DOI: 10.12737/jflcl.2021.002

Creating a Democratic and Rule of Law Based Country*

Herdis Kjerulf Thorgeirsdottir, member of the European Commission for Democracy through Law (Venice Commission), doctor of law

Your excellencies, distinguished guests, ladies and gentlemen, dear Talia Khabrieva,

I am greatly honoured to speak at the 10th Congress of Comparative law of the Government of Russia to discuss constitutional evolution.

Constitutional government means that we put our trust in the idea that political power should be constrained by law — the expression of the English legal writer Henri de Bracton who died in 1268 was: *Not under man, but under God and law*¹.

Power must be exercised subject to the law. The legitimacy of government actions derives from their conforming to the Constitution. Then, where does the legitimacy of the Constitution itself come from? The constituent power (*pouvoir constituant*) — the will that predates the constitution and is superior to it must come from the dimension of natural law — where the ultimate source of political authority derives from the people.

The constitution is an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed.

With the founding of the Council of Europe more than 70 years ago and the adoption of the European Convention on Human Rights — in the wake of the atrocities of the Second World War — the commitment to human dignity and individual freedoms in a state ruled by law — became the paradigm of the human rights protection of the international community — in line with Immanuel Kant's 18th century vision of the cosmopolitan right which stems from an understanding — of all human beings as equal members of a supra regional, international community — where citizens are much more than subjects of the domestic legal order — they are entitled to civilized behaviour of their authorities. The revolutionary thought deriving from John Locke reflected in the 1776 American Declaration of Independence states that “whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government”².

The notion of human dignity and of freedom of expression and information — a touchstone right — signifies the empowerment of citizens to be active

participants in the shaping of their constitutions and thus their destiny — as well as holding authorities accountable on the premises that authorities are serving their subjects rather than being their masters.

The words of Abraham Lincoln in one of the most famous speeches in the English language: government of the people, by the people and for the people — says it all.

The Constitution is the fundamental law. Upon its provisions rests the entire fabric of the state's institutions and if based on the principle of justice and human rights it must stand the test of time and endure the shifting winds of politics. Although amendments to the Constitution are initiated by the authorities (the constituted power) — they must be mindful that their authority derives from the consent of their subjects (the constituent power).

The Venice Commission in recent opinions regarding constitutional amendments has underscored the importance of involving the citizenry in an active dialogue — it encourages authorities to elaborate on the reasons behind each proposal and ensure meaningful participation of the citizenry, experts, media, all political forces in this process — so that people will be aware of the pros and cons of each change and its purpose.

The European Convention on Human Rights rests on a shared constitutional conception of a democratic government, the rule of law and civil and political rights. The High Contracting Parties to the ECHR confirm that these principles and freedoms must be translated into the basic laws of the Member States.

Thirty years ago — following the revolutionary wave in Central and Eastern Europe, a belief in an open democratic society and a sense of reasserted national and indeed European identity seemed to go hand-in-hand. This was the deep meaning of the fall of the iron curtain in 1989. The Venice Commission — the European Commission for democracy through Law — was created in 1990 to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. This work was not least aimed at states in transition.

A few years later the Russian Federation³ made the political decision backed by broad national consensus to join the Council of Europe. This was a major step and

* Report of Ms Herdis Kjerulf Thorgeirsdottir at X Congress of Comparative Law “Constitutional evolution in Russia and in the modern world: dialectics of the universal and national” (Moscow, 4 December 2020).

¹ Non sub homine sed sub deo ad legis.

² American Declaration of Independence, July 4, 1776 (emphasis supplied). Compare John Locke, *Two Treatises of Government* vol. 2 (ed. P. Laslett) (Cambridge, 1998), § 222.

³ Russia and the U. S. S. R. went through seven constitutions in the 20th century, with changes to the basic law made under Soviet leaders Vladimir Lenin, Josef Stalin, and Leonid Brezhnev, and again under Boris Yeltsin, the first president of Russia that emerged from the Soviet collapse of 1991.

a sign of a fundamentally new time. The ratification of the ECHR in 1998 was part of Russia's reinvention as a post-communist, liberal-democratic state joining a pan-European human rights regime that provided the citizens of its member states with effective judicial tools to defend their rights.

The VC in its 1994 comments regarding Russia held that the Constitution, adopted by popular referendum on 12 December 1993, did not give rise to any serious question as to its conformity with the principles of a democratic State governed by the rule of law and respectful of human rights⁴.

A quarter of a century later the open society, the European identity is in some countries in Europe called into question. Hungary and Poland have in the course of the last several years explicitly raised doubts about the liberal model adopted after 1989 — receiving harsh criticism from the international community for dismantling the rule of law.

Even Russia appears to be having misgivings about its obligations under the ECHR — with its latest amendments to the Federal Constitutional law — dealt with in an opinion by the VC in June 2020⁵.

⁴ CDL(1994)016.

⁵ CDL-AD(2020)009. The amendments to the Federal Constitutional law no. 1-FKZ of 21 July 1994 on the Constitutional Court corresponding largely to the amendments which entered into force in 2015 — empower the Constitutional Court to declare an international decision “non executable” if the ruling is deemed to be incompatible with the “foundations of the constitutional system of the Russian Federation”. The Venice Commission has previously found that the power of the Constitutional Court of the Russian Federation to declare a judgment non executable as such, thus putting an end to the process of execution, contradicts the obligations of the Russian Federation under the European

This step is lamented despite the growing trend of scepticism towards pan European co-operation — as it is important to be able to count on Russia as a strong and enthusiastic ally in our co-operation to promote democracy, human rights and the rule of law — widely under threat. Such co-operation results in mutual reinforcement.

We are now in the worst economic crisis since the 1930s where millions have lost their jobs as measures due to the pandemic COVID-19 has brought the world to a grinding halt. Full respect of civil and political rights is crucial to our survival. It is vital during the times we now live — despite current emergency measures — to respect the essential role of freedom of expression, an active information flow and open, public dialogue to enable people to have a check on the increased executive powers⁶.

Neither the public health emergency we are faced with now nor any economic or political situation gives license to governments to cast aside their human rights obligations and suppress political opposition.

We cannot prevent external disasters — like the current pandemic but our basic laws protecting civil and political rights provide a bulwark against manipulation by political or other powerful actors and regression into authoritarianism.

The sacred commitment the High Contracting Parties to the ECHR have undertaken — to secure to everyone within their jurisdiction the rights protected under the Convention — sacred I say — referring to the old notion that political power must be constrained by law — not the other way around. Our future depends on it.

Thank you again and best wishes to you all.

Convention on Human Rights. The Commission is alarmed by the constitutional entrenchment of such a power.

⁶ CDL-AD(2020)014, Report on respect for democracy, human rights and the rule of law during state of emergency reflections.

For citation. Thorgeirsdottir H. Creating a Democratic and Rule of Law Based Country. *Journal of Foreign Legislation and Comparative Law*, 2021, vol. 17, no. 1, pp. 13—14. DOI: 10.12737/jflcl.2021.002

Для цитирования. Торгейшдоттир Х. Creating a Democratic and Rule of Law Based Country // Журнал зарубежного законодательства и сравнительного правоведения. 2021. Т. 17. № 1. С. 13—14. DOI: 10.12737/jflcl.2021.002