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Self-Defense Mechanisms of Democracy during the Crisis: The Baltic States in Comparative Perspective¹

Joanna Rak²

Abstract³

Theoretically embedded in studies on militant democracy, the study offers a comparative analysis of the use of self-defense mechanisms of democracy during the Coronavirus Crisis in Estonia, Lithuania, and Latvia. The research aims to identify what anti-democratic measures were adopted to influence the sovereignty of the political nations and which served to either strengthen, maintain or undermine that sovereignty. Although neo-militant democracy goals prevailed in the Baltic states' pre-pandemic political and legal structures, the pandemic-induced measures resulted in variation. In Estonia, the restrictions put the sovereignty of the political nation in jeopardy. Simultaneously, in Lithuania and Latvia, the sovereignty of the political nations remained unthreatened. In Estonia, the electoral successes and increase in support for the extreme-right political party Conservative People's Party of Estonia turned conducive to the movement from neo- towards quasi-militant democracy. In Lithuania and Latvia, the extreme groupings did not receive comparable support and could not initiate an anti-democratic turn.

Keywords: Estonia; Lithuania; Latvia; neo-militant democracy; crisis; coronavirus pandemic.

Introduction

A worldwide surge in right-wing populism and de-democratization, which followed the 2007–2008 financial crisis, has attracted significant scholarly attention to the self-defense mechanisms of democracy (Gökarıksel, 2020). Particularly intense clashes between democratic and anti-democratic forces took place in the post-communist countries of Central and Eastern Europe. On the one hand, by drawing upon World War II experiences, those democracies limited the freedom of activity of political parties and citizens, requiring them to respect the fundamental principles set out in constitutional provisions. On the other hand, there was growing social consent to breaking constitutional restrictions and changing the law in line with the political agendas of the right-wing ruling parties. This consent was gained as a result of the increase in the level of relative socio-economic deprivation after the great crisis and the inability to neutralize them on the part of the then left-wing ruling political parties. Studies on the effectiveness of self-defense mechanisms show that only in three post-communist countries, i.e., Estonia, Latvia, and Lithuania, democracies did not turn

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out to be vulnerable to anti-democratic threats (Skrzypek, 2020; Stanley, 2019). It resulted from the joint efforts of strong civil societies and ruling elites to defend, preserve, and expand the sovereignty of the political nations. In a democratic system, a political nation can be defined as a set of equals who are part of one society and can decide on the most important matters of the state independently. Domestic sovereignty is understood here as the ability to make final decisions. The sovereign is the supreme ruler, so one who is no longer under anyone else's authority, and everything depends on them (Bäcker, 2020).

After the accession of post-communist member states to the European Union, the second great crisis was a consequence of the pandemic. In the state structures, where political nations were challenged, undermined, and eliminated, following the outbreak of the Coronavirus Crisis, the ruling elites stepped up the anti-democratic measures taken during the previous crisis. By limiting the participation of political nations in making political decisions, the ruling elites increased the scope of their own power competencies. Nevertheless, in the Baltic states, self-defense mechanisms have not proved to be as effective as in the pre-pandemic period. At the same time, Estonian, Latvian, and Lithuanian democracies became vulnerable to anti-democratic threats to varying degrees. These observations motivate the research questions about the nature of and reasons behind the differences. The article aims to identify what anti-democratic measures were adopted to influence the sovereignty of the political nations and which served to either strengthen, maintain or undermine that sovereignty.

Theoretical and Methodological Assumptions

The analysis of anti-democratic measures imposed in the Baltic states is theoretically embedded in scholarship on militant democracy. In the 1930s, by drawing on the observation that the Weimar Republic became vulnerable to subversive movements and parties, Karl Loewenstein recommended that "democracy must become militant" (Loewenstein, 1937: 423). As the researcher argued, the regime was defenseless and unable to defend itself against the Nazi Party because of democratic fundamentalism prevailing in the political and legal structure. The enemy of democracy took advantage of democratic freedoms, rights, and institutions to destroy democracy from within. Therefore, only anti-democratic restrictions could protect this system and work as efficient self-defense mechanisms of democracy. According to Loewenstein, democracy is militant when it uses anti-democratic legislative measures against subversive propaganda coupled with restrictions placed on democratic liberties of free speech, the press, association, assembly, universal suffrage, and organization in political parties to protect democracy from its enemies (Loewenstein, 1937).

In the 21st century, Loewensteinian anti-democratic restrictions are used and misused (Rezmer-Płotka, 2020; Skrzypek 2020). Democrats whose politics fall into the Loewensteinian tradition establish and maintain modern or neo-militant democracies. In those political and legal structures, anti-democratic measures serve to defend, preserve, or expand the sovereignty of political nations understood as an ability and freedom to make informed political decisions. At the same time, anti-democrats, which are enemies of democracy, establish quasi-militant democracies by misusing anti-democratic measures to challenge, undermine, and eliminate the sovereignty of political nations. Therefore, the same measures may have different political and legal consequences depending on the purposes of their implementation. Accordingly, it is necessary to identify what anti-democratic measures were adopted to influence the sovereignty of the political nations in the Baltic states. In addition, it is crucial to determine the measures' actual impact on the sovereignty of the political nations and thereby the intentions of the state authorities implementing those measures.

To address the research questions, the study draws upon a method of source analysis. The corpus of sources includes reports published on Verfassungsblog, a blog giving voice to international experts. It is a journalistic and academic forum of debate about topical events and developments in constitutional law and politics. The corpus contains the reports that included the searching phrases Estonia or Lithuania or Latvia and pandemic or/and epidemic or/and coronavirus or/and virus or/and COVID-19, published from the pandemic outbreak of coronavirus disease in March 2020 to the mass vaccination in April 2021. It covers the first year of imposing COVID-19-induced political and legal restrictions and consolidating the regimes that emerged from those measures. The reports concerning Estonia are as follows: State of Emergency in Estonia by Rait Maruste (17/05/2020), States of Emergency by Joelle Grogan (26/05/2020), COVID-19 in Estonia: A Year in Review by Merilin Kiviorg and Päivi Margna (12/03/2021); Lithuania: Travel Bans in Europe: A Legal Appraisal by Daniel Thym (19/03/2020), Lithuania's Response to COVID-19: Quarantine Through the Prism of Human Rights and the Rule of Law by Eglė Dagilytė, Aušra Padskočimaitė, and Aušra Vainorienė (14/05/2020), Lifting Travel Restrictions in the Era of COVID-19: In Search of a European Approach by Peter van Elsuwege (05/06/2020); and Latvia: COVID-19 in Latvia: Precaution Above All by Aleksejs Dimitrovs (02/05/2020). The qualitative report analysis serves to list Loewensteinian anti-democratic measures (restrictions placed on democratic liberties of free speech, the press, association, assembly, universal suffrage, and organization in political parties) and differentiate between those implemented to defend, preserve, or expand the sovereignty of a political nation (neo-militant democracy) or challenge, undermine, and eliminate it (quasi-militant democracy).

Anti-democratic Measures Influencing the Sovereignty of the Political Nations

Although neo-militant democracy goals prevailed in the Baltic states' pre-pandemic political and legal structures, the pandemic-induced measures resulted in variation. In Estonia, the restrictions put the sovereignty of the political nation in jeopardy. At the same time, in Lithuania and Latvia, the sovereignty of the political nations was not under threat. Only in Estonia, the electoral successes and increase in support for the extreme-right political party Conservative People's Party of Estonia (EKRE) turned conducive to the movement from neo- towards quasi-militant democracy. The government made attempts to meet the expectations of a radical part of the electorate. In Lithuania and Latvia, the extreme groupings did not receive comparable support and could not initiate an anti-democratic turn.

In Estonia, without consulting the parliament, the government declared a state of emergency by the Order Nr. 76 on 12 March 2020 (Grogan, 2020). The declaration drew on the definition of the epidemic as an "emergency situation" (Maruste, 2020). As Maruste underlined, the government ruled the state and dealt with the pandemic utilizing executive orders based on the Emergency Act. The orders of the government and its crisis committee, led by the prime minister, violated constitutionally guaranteed rights and freedoms, e.g., freedoms of movement, assembly, property, entrepreneurship, private life, self-determination, and rights to education. The repertoire of restrictions went beyond the Loewensteinian set of measures. Furthermore, the government had supervision competence on the execution of the orders and compliance with the Act. Although the government was not obliged to report to the parliament, its orders could be challenged in administrative courts if they transgressed constitutional freedoms or rights of a concrete person (Maruste, 2020). Citizens raised complaints concerning, among others, surveillance issues, data handling and protection, treatment of pupils with special educational needs, and right to education (Kiviorg and Margna, 2021). Nevertheless, Estonia had no specific or accelerated procedures for challenging orders. Therefore, administrative courts would process complaints after the state of emergency ends, in ordinary procedures. Estonians were deprived of adequate judicial control of the executive during the pandemic (Maruste, 2020; Kiviorg and Margna, 2021).

The new legal and political structures created opportunities to misuse anti-democratic measures and abuse power competencies. Due to the lack of parliamentary control and discussion, the government could take advantage of new power competencies achieved under the state of emergency for its own benefit and, thereby, challenge, undermine, and eliminate the sovereignty of the Estonian political nation. According to Maruste, the package of emergency legislation contained new, unrelated

provisions and legislation that loosely referred to the pressing needs of crisis management. Instead, it fell into the government's political agenda, such as changing the present pension system and stricter controls on migration (Maruste, 2020). The political nation could not participate in that decision-making process due to the COVID-19-induced legal changes.

In contrast to Estonia, Lithuania and Latvia did not introduce restrictions that would limit the sovereignty of the political nation (Dagilytė, Padskočimaitė, and Vainorienė, 2020; Thym, 2020; van Elsuwege, 2020; Dimitrovs, 2020). As Dagilytė, Padskočimaitė, and Vainorienė indicated, under Lithuanian constitutional law, health was considered one of the most significant values, and this rule established a legally legitimate objective for restricting several rights, e.g., freedoms of peaceful assembly and movement. The restrictions imposed under the Quarantine Resolution encompassed the ban of public events and assemblies of more than two people who were not members of the same family (Dagilytė, Padskočimaitė, and Vainorienė, 2020). Notably, the limitations did not exclude any part of the political nation from political decision-making processes in Lithuania.

It is worth highlighting that Article 30 of the Lithuanian Constitution and Article 38(1) of the Law on Contagious Diseases introduced the right to appeal to court when human rights were breached. Additionally, members of the Seimas, the courts, the President, and individuals could petition the Constitutional Court to conform to the government's acts with the Constitution and laws (Article 106). Unlike Estonians, Lithuanian citizens had timely access to justice during the pandemic (Dagilytė, Padskočimaitė, and Vainorienė, 2020).

As Aleksejs Dimitrovs showed, in Latvia, The Law on Emergency Situations and the State of Exception authorized the government to impose some restrictions regarding, e.g., freedoms of peaceful assembly and movement. At the beginning of the pandemic, the government banned public gatherings of over 200 people. Nevertheless, on 29 March 2020, the ban was extended to all such events, including religious and private gatherings, except for funerals outdoors, respecting two-meter distance rules. Later on, "baptism ceremonies in urgent cases" were considered another exception (Dimitrovs, 2020). However, like in Lithuania, the restrictions did not exclude any part of the Latvian political nation from political decision-making processes. Furthermore, Latvians also had timely access to justice.

The comparison of the Baltic states uncovered that in Estonia, the anti-democratic measures were adopted to undermine the sovereignty of the political nation. The government abused the extended power competencies to perform its own political agenda. In Lithuania and Latvia, anti-democratic measures were not misused and served to maintain the sovereignty of the political nations. In those

two neo-militant democracies, the restrictions worked as precautions intended to prevent the spread of coronavirus and protect human lives and health.

Conclusions and Recommendations

The analysis exposes the role of social consent to implement anti-democratic solutions. In Lithuania and Latvia, unconditional opposition to the inclusion of anti-democratic forces in the government, erected a barrier to abuses even during the crisis that encouraged malpractices. In contrast, in Estonia, crisis management became a tool in the hands of anti-democratic forces to extending their power competencies. As the Estonian case reveals, the lack of adequate procedures to resolve a crisis along with the social support for anti-democratic forces and their electoral success may trigger a movement from neo- to quasi-militant democracy.

By drawing upon Estonia's experience, Kiviorg and Margna stressed out that the laws regulating emergency situations should be revised to avoid future infringements of the principle of the rule of law. Since the state of emergency generates a field for power competencies misuse, the laws have to guarantee that constitutional rights and freedoms will not be violated arbitrarily by unconstitutional orders and restrictions that have no basis in the law. Moreover, the supervisory mechanisms should be developed and amended so as to provide citizens with the possibility to control the protection of their own rights and freedoms on an ongoing basis. Hasty, reactive, and haphazard changes during a crisis are not recommended (Kiviorg and Margna, 2021). Instead, it is recommended that in the early post-COVID-19 world, the state legislators face the challenge of reviewing the existing crisis management procedures and laws. The pandemic-derived experience in regulating political, legal, and social structure should be widely discussed and consulted with civil society. The existing and constantly modified regulations should be controlled not only in terms of compliance with the applicable law, the level of effectiveness in combating the threat, the level of social acceptance, but also the influence on the sovereignty of political nations.

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