The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism

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The European Commission's strategy for the Rule of Law was published just a few weeks after the CJEU's seminal judgment in *Commission v. Poland*. Consequently, the time of its publication coincided with the judicial confirmation of the sad reality that the departure from the liberal democracy standards in both Hungary and Poland cannot be define as moderate anymore and that the judicial independence in both countries is at stake.

Is a soft law instrument the right object of assessment in a situation where most commentators on the ongoing rule of law crisis summarise previous EU actions with the statement: too late, too long, too mild? This piece offers a look at the July blueprint for action as a political declaration which provides important general statements regarding the concept of the rule of law within the EU legal system in times of democratic backsliding in Member States. Starting with a discussion about the scope of the rule of law principle in the EU and an argument against its enforcement, this blog post will analyse the potential of the current rule of law crisis to mark a unique historical change in the European constitutionalism, both on the EU and national level.

The Rule of Law as an Essentially Contested Concept? The European Commission in search for core elements.

In 2002 Jeremy Waldron published the essay with the provocative title: "Is the Rule of Law an Essentially Contested Concept (In Florida)?" (pp. 137-164) which loosely refers to another academic piece published in 1956 by the Scottish philosopher Walter Bryce Gallie.[1)]W. B. Gallie, Essentially Contested Concepts, *Proceedings of the Aristotelian Society*, New Series, Vol. 56 (1955 – 1956), pp. 167-198. For Waldron, the turmoil surrounding the counting and recounting of votes in the State of Florida in the 2000 U.S. presidential election served as an illustration of ambiguity and to some extent overuse of the Rule-of-Law card which has been played by the parties whenever it suited (138). The essay presents a splendid overview of various jurisprudential interpretations of the rule of law as a political ideal. The multiplicity of theoretical approaches to the rule of law, no matter how fascinating for legal philosophers is, nevertheless, a pitfall for any political body faced with the task of formulating an overall strategy for dealing with obvious and systemic rule of law violations.

The Commission's statement presented in the first paragraph of the July blueprint for action demonstrates awareness of this problem. The Commission holds that:

"*the rule of law is a well-established principle, well-defined in its core meaning. This core meaning, in spite of the different national identities and legal systems and traditions that the Union is bound to respect, is the same in all Member States.(…) Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts."*

Such an approach to the essence of the rule of law draws parallels between the Commission and the work of Philip Selznick and Martin Krygier who see the reduction of the arbitrary use of power as the central value and point to the importance of a contextual approach to realising that value: reducing arbitrariness may require very different specific measures from one society to another.[2)] Cf. E. Mak, S. Taekema, The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application, *Hague Journal on the Rule of Law* 2016, Vol. 8, p. 27. While recognising current challenges to the rule of law in Member States, the emphasis has been put on recent cases with a resonance at the EU level which have centred on the independence of the judicial process. Other examples mentioned in the blueprint for action have concerned weakened constitutional courts, an increasing use of executive ordinances, repeated attacks from one branch of the state on another, or more widely, high-level corruption, abuse of office and attempts to diminish pluralism and weaken essential watchdogs such as civil society and independent media.

The central place of judicial independence in the rule of law concept presented by the Commission is not surprising. The EU legal system works through national courts that directly apply EU law. The threat to the independence of national courts calls into question the effectiveness of the entire EU law system. However, the preliminary ruling procedure serves as an effective tool for referring systemic questions regarding rule of law to the CJEU. The recent rulings of the European Court of Justice in Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas,* case C# 216/18 *PPU, LM,* case C-619/18, *Commission v. Poland,* and case C#192/18, *Commission v. Poland* prove that effective judicial protection by independent courts (Art. 19 (1) TEU) is a specific expression of the rule of law principle and that the independence of national courts is essential to ensure such judicial protection (see also EU Comm, Strengthening the rule of law within the Union – A blueprint for action). Although the organisation of the national judicial system falls within the jurisdiction of the Member States, they must comply with EU law obligations when exercising that competence, and therefore this may be subject to review by the Court of Justice.

Nevertheless, the emphasis on the material elements of the rule of law – such as the independent judiciary – does not go hand in hand with indications of the root causes of rule of law violations often associated with non-compliance with formal standards of the rule of law, above others the eight desiderata of Lon Fuller's "internal morality of law". According to Fuller, laws should be (1) general, (2) publicly

promulgated, (3) prospective, (4) intelligible, (5) consistent, (6) practicable, (7) not too frequently changeable, and (8) actually congruent with the behaviour of the officials of a regime.[3)]L. L. Fuller, The Morality of Law, Revised Edition, New Haven: Yale University Press, 1969, p. 39. In particular, the case of Poland proves that the instrumental changes in the regulations of parliamentary chambers, express pace of the legislative procedure, the lack of adequate (and sometimes any) *vacatio legis* and statutory amendments following one after another enabled the PiS government to introduce reforms violating substantial elements of the rule of law. Therefore, the Commission's search for the core elements of the European rule of law concept should take into account to a greater extent the formal aspect of the rule of law which has been left in the background of the strategy. The infringement of the basic law-making principles is the underlying cause for the present challenges to the rule of law in EU.

About Constitutional Identity, Common Constitutional Values and the Fetishisation of Political Constitutionalism

Martin Krygier pointed out that "rulers do many bad things, often parading them under the mantle of the rule of law". This apt observation acquires unique relevance in the context of the Commission's blueprint for action aimed at preventing rule of law violations. Recent academic insights point to the construction of an argument around constitutional identity as one of the jeopardies to effectively counteract the further erosion of the rule of law in Member States. According to this position, with the emergence and ongoing consolidation of competitive authoritarian regimes especially in Hungary and Poland, these governments have started to use the idea of a constitutional identity to justify their dismantlement of checks on their power and to shield themselves against potential EU interventions. In my opinion, this observation is only accurate regarding the abuse of constitutional identity as an argument against the rule of law and not about constitutional identity itself. Until the illiberal government violating the rule of law does not obtain a constitutional majority (as happened in Hungary), it is bound by binding constitutional norms. This means that constitutional identity can also be used as an important argument in the debate on the essence of the European concept of the rule of law. The constitutional identity of Member States, in addition to the individualising elements characteristic for this idea, turns out to contain elements of a more universal dimension. One of them is the rule of law. Therefore, the constitutional identity of a Member State has the salient potential for the pluralistic legitimisation of the enforcement of the strong union of values. This, however, requires noticing and emphasising the similarities between the universal elements of Member States' constitutional identities (Art. 4 (2) TEU), common constitutional traditions (Art. 6 (3) TEU) and six foundational values of the EU (Art. 2 TEU).

The real threat to the rule of law in the EU is fetishisation and instrumentalisation of political constitutionalism. While the current theoretical trend to emphasise the dual nature of the constitution (both legal and political) enables constitutional scholars

to pay attention to the long forgotten (or purposely hidden) political foundations of constitutionalism, it becomes a dangerous tool in the hands of politicians striving for authoritarian power. The contemporary populism, neo-authoritarianism, democratic backsliding and retrogression of liberal constitutionalism has emerged in reprisal of the domination of the legal and judicial elites. The pendulum which had leaned too much towards legal constitutionalism, bounced back to the side of political constitutionalism. Illiberal governments instrumentally use this swing effect, transforming the idea of political constitutionalism into *de facto* abusive constitutionalism or statutory anti-constitutionalism.

Democratic backsliding as the new constitutional momentum for the EU

According to Miguel Poiares Maduro, European constitutionalism promotes inclusiveness in national democracies by requiring national political processes to take into account out-of-state interests that may be affected by the deliberations of those political processes. European constitutionalism can constitute a form of self-imposed external constitutional discipline on national democracies. There are many instances were domestic political malfunctions can be better corrected by external constraints. These may force national political processes to rationalise national policies that have, for example, become path-dependent or captured by certain interests. In many such instances, EU law's imposed discipline rationalises and, often, reignites a more informed and genuinely open deliberation in the national political process. Therefore, the current rule of law crisis has the potential to be a watershed moment for European constitutionalism on both an EU and national level. The analysis of the limits of the national constituent power in the context of participation in the pluralist European constitutional order can help define European constitutionalism and its constitutional essentials within a pluralist, overlapping consensus. Unfortunately, the Commission does not seem to recognise this potential. The July blueprint for action is just another piece of (very) soft law which lacks a broader political vision and ignores the primary causes of the rule of law violations.

The progressive erosion of the constitutional democracy in several EU Member States sets ambitious tasks for the new Commission. It should go beyond the previous strategy and propose solutions which will take into account the importance of the current rule of law crisis for the future of European constitutionalism. Hopefully the Commission will rise to the momentousness of this period.

References

- 1. W. B. Gallie, Essentially Contested Concepts, Proceedings of the Aristotelian Society, New Series, Vol. 56 (1955 – 1956), pp. 167-198.
- 2. Cf. E. Mak, S. Taekema, The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application, Hague Journal on the Rule of Law 2016, Vol. 8, p. 27.

- 3. L. L. Fuller, The Morality of Law, Revised Edition, New Haven: Yale University Press, 1969, p. 39.
