

Status Quo Hegemony?

Bogdan Iancu

2020-10-06T09:00:15

Lady Bracknell: I do not approve of anything that tampers with natural ignorance. Ignorance is like a delicate exotic fruit; touch it and the bloom is gone. (Oscar Wilde, "The Importance of Being Earnest")

1. The "Rule of Law" vs. Populism

For over a decade now, the mainstream liberal discourse, also on the *Verfassungsblog*, has consisted in the incantation of one mantra: 'populists' are destroying 'the rule of law'.¹⁾ Populists (Orbán, PiS (Kaczyński), etc.) have been accused, not without reason, of manipulating Western models and ideas to aggrandize themselves. Kim Lane Scheppele, "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work," 26 *Governance* 559 (2013). What started as an attempt to describe the post-2011 situation in Hungary has gradually become a conceptual master key or, better yet, a jack-of-all-trades.

It is understandable why EU institutions should have clutched at the dichotomy. The rule of law is entrenched in the constitutive treaties (Art. 2 and, by reference, Arts. 7 and 49 TEU) and in the foundational enlargement instrument, the so-called Copenhagen Criteria. In a 'community based on law' but devoid of a normative constitution, the notion appears easier to conceptualize and formalize than more imponderable Art. 2 values such as freedom, democracy, equality or human dignity. Moreover, one can build on a broader trend of European and global rule of law standards, indicators, conditionalities.²⁾ e.g., in the Council of Europe system, the Venice Commission 'Checklist'. More generally, on international private and public RoL indicators, S. E. Merry, K. E. Davis, and B. Kingsbury (eds.), *The Quiet Power of Indicators – Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015). In what concerns progressive scholarship, hero-villain logic offers a streamlined narrative and holds policy recommendation appeal. It appears to imply a solution to current predicaments: EU institutions and the Western core of the EU must only support the enlightened elements (the "rule of law" camp) in lapsed jurisdictions against the evil "populists" and better angels of European togetherness will prevail.

Here is already the point at which our constitutional plot thickens. Historically, realities that can be accurately described by the use of the phrase "rule of law" have been exceptional and slow in the making, depending on a wealth of context and toil. Practices in a handful of jurisdictions fit to various degrees normatively loaded understandings of this phrase; even in those fortunate cases, the rule of law is a work in progress (process, not result). This does not mean that one can never achieve practical approximations of the rule of law-based state, only that one should not pretend to find "the rule of law" as such, overnight, where it does

not yet exist. Harvesting a complex meta-concept for short-term benefits devalues its epistemological currency and thus our capacity to converse intelligibly about practices and phenomena. By implication, sloganization impairs the possibility to ever create stable systems of law-ordered liberty.

More concretely, as I argue in my post contribution, there are two main problems with the mainstream rule of law narrative. First, it always builds upon the unstated premise that there was at some undetermined point in receding memory, presumably before a populist takeover, an Arcadian-Edenic moment, when something called “the rule of law” prevailed in *Zwischen-Europa*. This is factually false and thus the stance itself is disingenuous, since it embellishes the *status-quo ante* and counter-populist factions. Central and Eastern Europe, I argue, has always coursed a different modernization trajectory than that of the West, also before the onset of communism. The new Member States are now the latest avatars of what they had been in their pre-communist past, namely, “managed democracies.” Paying attention to such specificities and correspondingly shifting the focus from lamentations or indignation about effects to an inquiry into the causes of the phenomena (e.g., why do populists get popular support and what does that tell us about the current state of European democracy/democracies) is a much more sophisticated and useful exercise. Second and related, the counter-populist discourse obfuscates the instrumentalism with which rule of law-related EU policies, superficially designed and implemented, have reinforced preexisting rule of law deficits and sometimes even created new ones. To paraphrase Michal Bobek’s metaphor, the implementation of the Copenhagen conditionalities was an application of fresh paint, in a hurry, over half-corroded fences.³⁾ M. Bobek, Conclusions, in Michal Bobek (ed.) *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Oxford: Hart Publishing, 2015). At p. 418. Since the rust has begun to show, many European constitutional scholars are up in arms but this attitude lacks candor and introspection. Recurrent ‘backsliding’ episodes reveal shortcomings in the fiber of European constitutionalism as such. Such structural failures should be recognized, as a precondition for searching about possible ways to remedy them.

Whereas the particular dangers posed by populism in Hungary or Poland are not to be denied, the rule of law discourse suffers itself from limitations that render it easy to manipulate and confiscate by factions that do not mean to advance the common good. Furthermore, the rule of law as a juridical, normative meta-concept, on the one hand, and *rule of law ideologies*, on the other, are not a rose by any other name but very different things. Ideologies, with their insistence on conviction/belief, unfalsifiable dogmas, and leaps of faith, have hegemonic implications.

2. Managed Democracies, Confused Ideologies

Eastern European states were, before the onset of Communism, managed democracies, with façade constitutionalism playacted by and for the benefit of a thin veneer of urban gentry, deep social inequalities, and artificial urbanization and industrialization, usually enforced from above and at the expense of the countryside. Unlike in Western jurisdictions however, due to the traditional, prevalent agrarian

structure of the East, ideological and political dialectics structured along modern categories could not develop. The left for instance was in pre-communist Eastern Europe an idiosyncratic experiment. Eastern-style agrarian populism, not socialism, was the doctrine embraced by the peasant parties that appeared in the immediate aftermath of WWI, when land reform and extension of the franchise were instituted on a large scale.⁴⁾David Mitrany, *Marx Against the Peasant: A Study in Social Dogmatism*, Chapel Hill, University of North Carolina Press, 1951. Parliamentary democracy itself constituted a short-lived and artificial experiment, with ostensible forms (elections, parties, rights, institutions and the separation of powers) distorted beyond recognition in their operation by incomplete modernization and the ensuing authoritarian undertow.⁵⁾Hans Christian Manner, *Parlamentarismus in Rumänien (1930-1940): Demokratie im autoritären Umfeld*, De Gruyter, Oldenbourg, 1997. Kosa# D, Baroš J and Dufek P, "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism" (2019) 15 *European Constitutional Law Review* 427.

Communism destroyed what little rudiments of democracy existed and produced some elements of equality and social mobility, albeit at the prohibitive price of ruthless repression and imposition of conformity. After communism and against this foil, native urban intelligentsia would reinterpret with mnemonic selectivity a Belle Époque out of the regressive interwar period. Everyone in select society wanted to "return" to an imaginary Europe, to which embellished versions of one's national history had once allegedly belonged. Yet, rejection of communism more often than not meant all-out rejection of the social welfare state and of any form of social upward mobility (as "communistic"). In Romania, for instance, the battle for post-1989 reprivatisation *in natura* of properties nationalized or confiscated during Communism was intellectually carried under the banner of the constitutional meaning of property as "sacred and inviolable" in the Constitution of 1866. That definition, incidentally, had in its time justified a draconically restricted franchise and served as a legal padlock on land reform until 1917, when the constitution was amended.⁶⁾This revision made a break-up of the latifundia and their redistribution as smallholdings possible, on the basis of the land reform law of 1921. Before this reform, 0,46% of the landowners held large properties (over 100 hectares) covering 49% of the land. See Mitrany, *supra*, at p. 99. The electoral system mirrored the social and economic system. Before WWI (election of 1911), after the extension of the franchise in 1884, only 6,1% of the adult male population had the right to vote directly for the lower house, 1,5 for the Romanian Senate. Bizarre ideological misrepresentations and melancholy for the unexamined past are still a staple of the Romanian right. To wit, the presidential candidate of an upcoming, urban centre-right coalition, pledged his 2019 platform to the goal of establishing an educational system *just as in the interwar period*. In the interwar period, which did produce first-rate urban intellectuals, some of them of later international notoriety, most of these with topical 'Iron Guard' affinities, the rate of illiteracy was over 40%. After 1989, changed economic conditions made recourse to progressive pre-communist ideologies, i.e., agrarian populism, somewhat fanciful, whereas the Marxist left had been delegitimized by its dismal past performance. But social divisions and the regrowth of deep, entrenched inequalities are a real problem, compounded also

by a highly uneven distribution of incentives and benefits after EU accessions. In Romania, Bucharest and its environs are now [in terms of GDP per capita](#) well above the EU average, whereas the North-East development region ranks at around 40%, poorer almost four times over. Otherwise put, the kinds of social stratifications that used to be a staple of pre-communist underdevelopment have returned in adapted forms, such as smaller towns and countryside vs. bigger urban agglomerations, along with revived regional disparities. [Migration in its various manifestations](#), from brain-drain to sweatshop-style export of manual labour, and the sophisticated political exploitation of the 'diaspora', add to these complications.

Run-of-the-mill rule of law discourses usually ignore the social dimension, namely, the extent to which "populists" are voted by marginalized strata in these peripheral societies. To put it differently, irrespective of nominal political labels, local forces supporting "the rule of law" usually turn out to have pronounced neoliberal inclinations and track records. One does not need to fully agree with Judith Shklar's corrosive description ("self-congratulatory device", "bit of ruling-class chatter"),⁷⁾ Judith N. Shklar, *Political Theory and The Rule of Law*, in Allan C. Hutchinson & Patrick Monahan eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), p. 1. in order to see that there is a problem when the rule of law walks always in anti-redistributive company. This essential part of the equation is obfuscated either by recourse to cutting narrative corners or by infantilizing obliquely the "populist" electorate through recourse to [various simplistic scripts](#). To be sure, callous verbiage can also have deferred practical implications: the reproduction of clichés aggravates the problems as such, once slogans are acted upon, thus creating the conditions for the possibility of future epic battles between populism and the rule of law.

The Eastern disconnect between fractured histories and changing realities translates also in a high degree of unreliability and fluidity of domestic ideological and political labels, with only limited streamlining via EP faction memberships. In Romania, for instance, the Social Democrats have been at the receiving end of both centre-right, EU-driven anticorruption policies and changing social dynamics and demographics. Paternalistic and rudimentary as they may be, the Social Democrats do have a redistributive agenda, similar mutatis mutandis to some *Law and Justice* programmes. The analogy with Poland is apposite since the Romanian PSD is, albeit nominally left, ideologically similar to the right-oriented Polish Law and Justice in both redistribution and electoral base selectivity. It also shares the conservative dimension, luckily in a much milder version. In the discourse of the Romanian right (the promoters of the "rule of law", as it were), redistribution is however always "bread and circus" or "handouts" and left-leaning voters are "captive electorates" and "uneducated masses" in "backward areas of the country." Since Romania, much like Poland or Hungary, is a nation state with a complicated and fragmented history, one may also embroider upon social and geographical divisions Huntingtonian "clash of civilizations" fables, such as: 'enlightened' Western Poland vs. Eastern bumpkins who vote PiS and Transylvania as '[Romanian Mitteleuropa](#)' or variations thereupon, such as 'sophisticated' Budapest vs. 'backward', 'brainwashed' provincials. Such local clichés, once pandered in fine society and thus legitimized, can be recirculated back home in even cruder forms.

In short, with [very few exceptions](#), the complex social, political and ideological implications of the 'populism' vs. 'the rule of law' struggle in the Eastern European context have been almost fully ignored. Yet, law and thus the rule of law do not exist in a vacuum.⁸⁾ Also in strictly legal terms: most Eastern European constitutions, including the current Polish (Art. 2) and Romanian (Art. 1 (3) fundamental laws qualify the *Rechtsstaat* definitionally, as 'social and democratic' (Romania) or "democratic state ruled by law and implementing the principles of social justice" (Poland). Whereas it is true that accounts of the rule of law predate generalized universal franchise, Eastern Europe now is not England in Albert Venn Dicey's times (nor should it be). As long as franchise is still universal and elections are more or less free, without a modicum of social and economic homogeneity there can be no genuine democracy, and thus no rule of law. Populists will be able to offer the lacking social safety net and perhaps a small measure of social mobility, with uglier, dangerous forms of homogeneity in tow (such as the current Polish anti-gay rhetoric).

3. The Stability of Backsliding Institutions

'Backsliding stories', a staple motif of European rule of law crusades, focus on unstable jurisdictions selectively, when instability at the periphery threatens the centre. This is a dangerous exercise and it will prove in the long run counterproductive on both ends. Stability after communism was constitutionally paid for on the domestic market, either through shaky compromise solutions ("roundtables") or with post-1989 perpetuation of second-rank nomenklatura (e.g., Romania). With EU accession came 'motorized constitutionalism' under the Copenhagen Criteria, purporting to reinforce "the stability of institutions guaranteeing democracy and the rule of law." Judicial independence meaning judicial self-government, autonomous institutions, and anticorruption were now all the rage and changes along such lines were prompted by the Commission, as "master of the conditionalities." Such reforms were superficial and instrumental, driven by an on-the-go, shallow understanding of what democratic stability requires. Derived by EU and CoE institutions primarily from Washington Consensus 'good governance' fads, the new rule of law agenda was also packed with neoliberal implications (preference for technocracy and mock-expertise solutions, the underlying anticorruption premise that politics is corrupt per se and thus no state equals no corruption, and the like).

Any legal historian or comparativist worth his or her salt could have predicted that the above-mentioned EU and CoE-backed institutional IKEA blueprints would 'go native' and/or develop pathologies. Moreover, peripheral instability is now hard to contain locally, and its price is rated on the common market. In tightly-knit juridical and political orders, the distinction between periphery and centre is volatile. Hence, slapdash reforms, as a form of normative garbage originally dumped on the periphery, are likely to overspill.⁹⁾ Marcelo Neves, „Die Staaten im Zentrum und die Staaten an der Peripherie: Einige Probleme mit Niklas Luhmanns Auffassung von den Staaten der Weltgesellschaft“, *Soziale Systeme* 12 (2006), Heft 2, S. 247-273, at p. 266: Die asymmetrischen Entwicklungen der modernen Weltgesellschaft in Zentrum und Peripherie lassen sich unter den gegenwärtigen Bedingungen

relativieren. Es ist aktuell die Frage zu stellen, ob die bevorstehenden Entwicklungen in der heutigen Weltgesellschaft nicht dazu führen werden, dass sich die bisher für die Staaten der peripheren Moderne typischen Probleme der Exklusion und der mangelhaften Ausdifferenzierung des Rechts und der Politik auch auf die Staaten der zentralen Moderne ausdehnen werden. Furthermore and related, Eastern European Member States were never really *stable democracies*; when a particular jurisdiction appears to be so from a distance, it behoves a constitutionalist to be honest and probe deeper into reality.

Romania is a very good example. The country has been repeatedly heaped on the backsliding basket, over Hungary in 2012, then more recently with both Hungary and Poland in 2016-2019. Together with Bulgaria, it is subject to a post-accession conditionality, the Cooperation and Verification Mechanism (CVM). This instrument is implemented by the Commission on the basis of reports to the Council and Parliament assessing biannually the success in achieving 'benchmarks' (judicial reform and anticorruption, essentially). Legally established in 2006,¹⁰⁾ [For Romania, on the basis of Commission Decision 2006/928/EC](#), The conditionalities/objectives (benchmarks) applicable to these two countries are almost identical; Bulgaria is additionally monitored in terms of progress in combatting organized crime. The CVM was meant to function as a stopgap and lapse by default three years after the accession of the two countries in January 2007. It has continued, extended indefinitely. This aside should not be understood as an accusation of neo-colonialism: the CVM was always a two-way street. Policy and institutional blueprints were pre-packaged but also negotiated and adjusted to suit local political interests. For instance, even though Romania and Bulgaria are subject to almost identically formulated CVM conditionalities, repressive anticorruption, as required by the CVM was a uniquely Romanian phenomenon. The mechanism has endured until now also because it was internally convenient to tap on EU legitimacy, by recirculating local predilections 'up' to be translated in Brussels bureaucratic jargon and then back down, affixed with 'European' imprimatur.

In Romania, over the past 15 years, the EU-driven need to produce anticorruption conviction quotas demonstrating success, in synergy with more 'strategic' domestic drives, has resulted in a version of "penal populism."¹¹⁾ John Pratt, *Penal Populism*, London, Routledge, 2007. Surveillance of all kinds spiked, [with quasi-unanimous judicial approval of wiretap warrants](#). Perp-walks have moved high-stakes trials into the "court of public opinion", with many wiretap transcripts leaked by anticorruption prosecutors, Brazilian-style, in the friendly press. More worrisome still, protocols between apex judicial institutions with the Romanian Intelligence Service (SRI) have surfaced, including references of close collaboration on files, between the SRI and anticorruption prosecutors. This happened through a *sub-rosa* interpretation of threats to national security, understood from 2005 onward to include high and medium-level corruption. Some features of this unhealthy collusion have been rolled back, starting in 2016, by the Constitutional Court (not by the Commission). Yet, the path-dependency, namely, a strong preference for security over either freedom or democracy, continues. The SRI budget (now, with budget adjustments, it is roughly 573 million Euros) has skyrocketed in perfect lockstep with the momentum of the EU-driven fight against corruption and exceeds now sensibly that of its closest

German equivalent, the *Bundesamt für Verfassungsschutz*. In the last episode of what is slowly becoming routine theatrics, the centre-right President Klaus Iohannis campaigned for a second term riding on an anticorruption referendum and on the slogan 'Educated Romania'. The consultative referendum was a success, almost a foregone conclusion, and helped boost participation in the European Parliament elections, serving then as springboard to a presidential landslide. "Tough on crime" advocacy is an easy sell even in advanced democracies; in more backward settings, even anti-democratic advocacy as such yields handsome returns.¹²⁾ An initiative to abolish the upper house of the bicameral parliament and reduce the number of MPs to 300, promoted to similar effect by ex-anticorruption champion, former President Băsescu, was a blockbuster during the first round of the 2009 presidential elections. The education *renvoi* was a silent shorthand and a rough compliment to the centre-right electorate. But once the Social Democrats could be replaced by a minority centre-right government of the President's colour, the budgetary allocation for education and research was promptly reduced to the lowest GDP percentage (2,7%) in twenty years. Contrariwise, budgets for defence, the interior ministry, and the entire security apparatus grew correlatively (in the case of the SRI, the usual 10% increase). Interwar-style, entrenched inequalities and chronically underfunded public education, combined with 90s market fetishism and an obsession with militarized security: this mix is arguably not a rule of law recipe. None of the problematic features of the fight against corruption have ever registered in CVM reports. For instance, the last, 2019 report for Romania dismissed the protocols issue with short ceremony. The Commission, as the reasoning runs, is interested only in how 'politicians' (evil word, formerly known as representative democracy) affect (the Commission's understanding of) judicial independence. But secret documents, bartered under the table, between an extremely powerful internal security agency and apex judicial institutions are apparently irrelevant and beyond ken, adverse effects on said judicial independence notwithstanding: "[The operation of intelligence services is not a matter for the EU and falls outside the CVM benchmarks.](#)"

In contrast, the [last \(2019\) Commission report for Bulgaria](#) recommended the expedited lifting of the CVM for this country, which ranks very poorly (worse than Romania) in global anticorruption rankings, has never created any effective anticorruption institutions, and is repeatedly shaken by corruption scandals. Recent mass demonstrations in Sofia, fuelled by abnormalities that were swept under the rug by the EU for many years, might have come as an after the fact embarrassment. The demonstrations address corruption and abuses carried out by the incumbent prime minister and his sidekick, General Prosecutor Geshev. Hardly a Fullerian, Geshev described himself as "[an instrument in the hands of God.](#)" But as long as the local system could be kept on an even keel by the centre-right parliamentary coalition supporting prime minister Borissov, the Commission dutifully adjusted its CVM interpretations of the rule of law. One should also note that, even if successful in removing Borissov, it is not necessarily the "rule of law" that will take hold but, most likely, contending visions thereof (perhaps those of the Socialist president, perhaps those of urban elites which may prefer lobbying and special-interest legislation to the rougher, early 90s forms of corruption apparently perpetrated by Prime Minister Borissov, etc.).

4. German Hegemony? Status Quo Hegemony? Discursive Hegemony?

In the Gramscian paradigm that patented the concept, cultural hegemony means defence of an oppressive state of play by the 'traditional' (as opposed to the 'organic') intelligentsia. In this vein, the rule of law discourse, as institutionally practiced and as proffered by mainstream elite accounts, has reductive tendencies which, due to unreflective support of status quos ridden with partiality and inconsistency, are problematic. Ironically, the rule of law discourse, just as the populist one, lends itself to instrumentalism and hijacking by various factions which do not necessarily pursue the common good. In fact, the Manichean, rudimentary nature of the discourse reinforces instrumentalism, by implicitly and selectively whitewashing the factions opposing populism (real and constructed). In Romania, under EU tutorship, the phrase "rule of law" has for instance become a self-serving shibboleth of the right and a running diatribe. In Bulgaria, [mindful of the recent CVM episodes](#), anti-GERB demonstrators ask the question openly: "EU, are you blind?"

When a rudimentary understanding of the rule of law, tailored and adjusted bespoke, is promoted, this is also an agenda with dominant effects. Hegemony, however, commonly presupposes a hegemon. This leads us to the question as to who/what/which is the dominating force in Europe? Opinions differ but they are invariably drawn in the straitjacket of the rule of law vs. populism antinomy. When the Second Senate of the *Bundesverfassungsgericht* rendered its PSPP *ultra vires* ruling, rule of law defenders immediately charged the court, a [main line of attack](#) being that, by second-guessing supranational institutions, the German Constitutional Tribunal would aid and abet the "erosion of the rule of law" in Poland, Hungary and their ilk. According to Professor Cassese, this was even an example of hegemonic Germanization (*il guinzaglio tedesco*). [The accusation appears justified](#), inasmuch as Polish officials, among them Prime Minister Morawiecki himself, hastened to hail the judgment as one of the most important in the history of the EU. This also is a perplexing statement, considering the routine reformulation by the two governments in Budapest and Warsaw of their opposition to the EU as resistance to a supposedly overhanging German hegemony. The stances are logically at loggerheads: The Tribunal cannot be at the same time an exponent and an opponent of German hegemony.

At the level of practices, rule of law standards do not pertain to any particular juridical tradition or ethos. The only country whose legal system and history presents remote similarities to specific "best practices" mentioned above (judicial council and anticorruption, pushed through as conditionalities in the CEE region) is Italy, hardly a hegemon. If anything, the policies, with their insistence on autonomous institutions, run counter to most European national traditions. They are particularly in tension with, if not antithetical to, German constitutionalism, which emphasizes structurally hierarchical, responsible executive organization, in line with the democratic principle (*Demokratieprinzip*). The insistence on accountability was after all the very reason why it was difficult to justify constitutionally the existence of autonomous German administrative authorities even [in the few instances where a clear, hard EU law](#)

[mandate for institutional independence exists](#). Germany is a particularly interesting case, being the only European country that has invested heavily in legal reform and rule of law promotion, through programs such as the IRZ and through the intermediary of its party foundations' local branches. Of the latter, the CDU-affiliated Konrad Adenauer Stiftung (KAS) is by far the most active. What KAS, also within its Rule of Law Program (*Rechtsstaatsprogramm Südosteuropa*), has promoted *in situ*, however, are the general reform biases indicated above, not a particularly Germanic program. Otherwise put, the Foundation piggybacked on the Commission line with EPP flair and/or reinforced the policy-ideological predilections of centre-right local political partners: latter-day anticommunism as *Vergangenheitsbewältigung*, radical anticorruption, judicial independence as complete corporate insulation from clear lines of social and democratic accountability, a certain vision of property relations and the market, etc. But joining an ideological bandwagon, even when the country's high standing and economic weight (undeniably, both are considerable) have been thrown around to promote it, is hardly a form of German hegemony, legal or otherwise.¹³⁾ I fully agree with Armin von Bogdandy's argument that there is no German hegemony in the European marketplace of juridical ideas (no imposition or aggressive advocacy of a *specifically German legal agenda*). See The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text, MPIL Legal Paper Series 2020-08. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933406.

The hegemonic effects result in reality from the extreme ideological polarization of the storylines as such. In response to and in synergy with a rudimentary nativist discourse (populism, meaning democracy as majority rule unconstrained by law), a pliable understanding of law stripped bare of its democratic underpinnings has crystallized as the mainstream rule of law narrative. In this light, one may begin to look at the German Constitutional Court and its PSPP ruling more benevolently, as trying to chart a middle ground between extremes: Even though this is *German* constitutional doctrine, it projects a coherent conceptual vocabulary, which lends itself to emulation by other judiciatures engaged in the task of negotiating the interface between national constitutions and the fledgling EU constitutionalism. The reason why the German Constitutional Court is followed closely by other constitutional tribunals lies solely in the strength of its arguments and their amenability to migration as a form of *ius constitutionale europaeum* (otherwise, the Tribunal as such has been hardly interested in much judicial networking or dialogue with its national peers). The PSPP ruling is a restatement of essential liberal-democratic juridical principles: that words (such as, for instance, "monetary" and "economic") must have limited, non-contradictory constructions, that even special treaties have their outer bounds, that all legitimate exercises of public power must be traced back to the original grant of authority, that all public action furthers a purpose, that the purpose must be legitimate, and the means by which it is carried out must be graduated in correlation to that end, in short, that legal concepts and institutions do not free-float well and must be grounded in practices. This is a juristic vocabulary that seeks to reconcile democracy and the rule of law, in the process of a deferential and thoughtful engagement with the EU project. As Carl Schmitt himself, momentarily repentant, pointed out in 1950, without stable and logically consistent

concepts and institutions, there can be no law and by implication no possibility of freedom through law (see [here, p.30](#)).

German constitutional identity doctrine can, it is true, be utilized by populists but instrumentalism is now generalized in all directions and cannot be controlled anyhow, least of all by more instrumentalism. As exemplified above, the rule of law discourse is equally amenable to manipulation. How one can escape sloganisation and its oppressiveness is difficult to say at the level of practices, even though starting points for a discussion about procedural changes do exist. For instance, the Commission's reformist misadventures across Eastern Europe and the Western Balkans indicate a need for caution about the structure of future CVM-type 'mechanisms' (regarding their feasibility, the need to strike a better balance between democratic politics and law, and more generally concerning the wisdom of forcing change and putting constitutional processes on bureaucratic speed dial). At the level of scholarship, one may start by seeking to escape the reactive friend/foe trap of simplistic generalizations. Less conviction (more restraint) and paying closer attention to contextual nuance go a long way towards better understanding.

References

- 1. Populists (Orbán, PiS (Kaczyński), etc.) have been accused, not without reason, of manipulating Western models and ideas to aggrandize themselves. Kim Lane Scheppele, "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work," 26 *Governance* 559 (2013).
- 2. e.g., in the Council of Europe system, the Venice Commission 'Checklist'. More generally, on international private and public RoL indicators, S. E. Merry, K. E. Davis, and B. Kingsbury (eds.), *The Quiet Power of Indicators – Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015).
- 3. M. Bobek, Conclusions, in Michal Bobek (ed.) *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Oxford: Hart Publishing, 2015). At p. 418.
- 4. David Mitrany, *Marx Against the Peasant: A Study in Social Dogmatism*, Chapel Hill, University of North Carolina Press, 1951.
- 5. Hans Christian Manner, *Parlamentarismus in Rumänien (1930-1940): Demokratie im autoritären Umfeld*, De Gruyter, Oldenbourg, 1997. Kosa# D, Baroš J and Dufek P, "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism" (2019) 15 *European Constitutional Law Review* 427.
- 6. This revision made a break-up of the latifundia and their redistribution as smallholdings possible, on the basis of the land reform law of 1921. Before this reform, 0,46% of the landowners held large properties (over 100 hectares) covering 49% of the land. See Mitrany, *supra*, at p. 99. The electoral system mirrored the social and economic system. Before WWI (election of 1911), after the extension of the franchise in 1884, only 6,1% of the adult male population had the right to vote directly for the lower house, 1,5 for the Romanian Senate.

- 7. Judith N. Shklar, *Political Theory and The Rule of Law*, in Allan C. Hutchinson & Patrick Monahan eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), p. 1.
- 8. Also in strictly legal terms: most Eastern European constitutions, including the current Polish (Art. 2) and Romanian (Art. 1 (3) fundamental laws qualify the Rechtsstaat definitionally, as 'social and democratic' (Romania) or "democratic state ruled by law and implementing the principles of social justice" (Poland).
- 9. Marcelo Neves, „Die Staaten im Zentrum und die Staaten an der Peripherie: Einige Probleme mit Niklas Luhmanns Auffassung von den Staaten der Weltgesellschaft“, *Soziale Systeme* 12 (2006), Heft 2, S. 247-273, at p. 266: Die asymmetrischen Entwicklungen der modernen Weltgesellschaft in Zentrum und Peripherie lassen sich unter den gegenwärtigen Bedingungen relativieren. Es ist aktuell die Frage zu stellen, ob die bevorstehenden Entwicklungen in der heutigen Weltgesellschaft nicht dazu führen werden, dass sich die bisher für die Staaten der peripheren Moderne typischen Probleme der Exklusion und der mangelhaften Ausdifferenzierung des Rechts und der Politik auch auf die Staaten der zentralen Moderne ausdehnen werden.
- 10. For Romania, on the basis of Commission Decision 2006/928/EC, The conditionalities/objectives (benchmarks) applicable to these two countries are almost identical; Bulgaria is additionally monitored in terms of progress in combatting organized crime.
- 11. John Pratt, *Penal Populism*, London, Routledge, 2007.
- 12. An initiative to abolish the upper house of the bicameral parliament and reduce the number of MPs to 300, promoted to similar effect by ex-anticorruption champion, former President Băsescu, was a blockbuster during the first round of the 2009 presidential elections.
- 13. I fully agree with Armin von Bogdandy's argument that there is no German hegemony in the European marketplace of juridical ideas (no imposition or aggressive advocacy of a specifically German legal agenda). See *The Current Situation of European Jurisprudence in the Light of Carl Schmitt's Homonymous Text*, MPIL Legal Paper Series 2020-08. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933406.

