

EDITORIAL COMMENTS

The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems

In a European Union beset by troubles, one of the challenges which perhaps most closely engages the interest of legal scholars is the perceived crisis over respect for the “rule of law”. In fact, it is possible to identify at least three different “rule of law” problems facing the Union, none of them an entirely novel phenomenon, but each of which should indeed give cause for concern.

The first is the challenge of securing respect for *the rule of law within the Union*, in the face of certain national governments which appear half-hearted in their own commitment to some of the basic democratic principles that are meant to define the Member States’ shared constitutional values and provide the foundation for membership of the Union.¹ Readers will no doubt recall the controversies which surrounded (for example) the entry of the far right Freedom Party of Austria into a coalition government in 2000;² or how Prime Minister Berlusconi had accumulated such a degree of power over the national media as was alleged to endanger Italy’s proper democratic functioning.³ So the more recent developments gripping Hungary and Poland at least have their antecedents – even if many commentators feel these current “rule of law” disputes to be of a rather more sinister character. The European Parliament continues to lead the charge sheet against the Orbán regime in Budapest: complaints about the official treatment and portrayal of migrants have been added to an already long list of alleged abuses, such as restrictions on academic freedom of expression and the activities of civil society, discrimination against ethnic and sexual minorities and attacks on the independence of the judiciary.⁴ For its part, in January 2016, the Commission took the unprecedented step of formally implementing the *EU Framework to Strengthen the Rule of Law* against Poland – initiating a structured dialogue with the government of the ruling Law and Justice Party over the latter’s increasingly worrying approach to the independence and authority of the Constitutional Tribunal as well as its reforms to the regulation of public

1. On which, of course, see Art. 2 TEU.

2. Leading directly to the temporary imposition of diplomatic sanctions against Austria by the other Member States of the Union (14 at that time).

3. A situation indeed investigated, *inter alia*, by the European Commission for Democracy Through Law (Venice Commission): see, e.g. CDL-AD(2005)017 and CDL-AD(2013)038.

4. See, e.g. Resolution of 10 June 2015 on the situation in Hungary (P8_TA(2015)0227); Resolution of 16 Dec. 2015 on the situation in Hungary (2015/2935(RSP)).

service broadcasters.⁵ And let's not even mention the rapidly deteriorating state of the democratic order in Turkey, just as the Union promises to inject fresh impetus into Ankara's accession dreams, as part of the March 2016 deal to bring some semblance of control over the unrelenting migration crisis.⁶

The second problem is that of securing respect for *the rule of Union law*, in the face of the willingness of certain Member States – whether acting through their political or instead their judicial institutions – to qualify or even repudiate obligations which should be regarded as legally binding under the Treaties themselves. Of course, national judicial reservations over, and even challenges to, the supremacy of Union law, whether on paper or in practice, are hardly anything new: the journals are replete with such examples and discussion going back over a period of several decades almost to the time of *Van Gend en Loos* and *Costa v. ENEL* themselves.⁷ But over recent years, respect for the authority of binding obligations created under EU law has perhaps felt particularly fragile. In Germany, the Federal Constitutional Court has elaborated its jurisdiction to scrutinize the legality of Union acts – now available on human rights, *ultra vires* and constitutional identity grounds – culminating in the rather tense “judicial dialogue” with the ECJ during the *Gauweiler* dispute.⁸ But the German Government has hardly been setting any better example: Chancellor Merkel's unilateral decision to open the arms of the German nation to countless new migrants (whatever other views one might hold about it) effectively tore a massive hole right through the applicable EU asylum legislation – even if Germany was merely dealing the *coup de grace* to a system whose proper functioning had already fallen into disorder and disrepair elsewhere in Europe.⁹ Even the United Kingdom – a Member State which has long proved itself to be an awkward negotiator when it comes to making the rules, but a faithful servant of the law once those rules have been made – is showing its less clubbable side. The European Union Act 2011 has reaffirmed the sovereignty of Parliament to make and unmake

5. Commission, *A New EU Framework to Strengthen the Rule of Law*, COM(2014)158 Final/2. See the Commission MEMO/16/62 outlining the College of Commissioners' orientation debate on Poland (held in Brussels on 13 Jan. 2016).

6. See EU-Turkey statement of 18 March 2016.

7. Case 26/62, *Van Gend en Loos*, EU:C:1963:1; Case 6/64, *Costa v. Enel*, EU:C:1964:34.

8. See the Order of the German Federal Constitutional Court of 14 Jan. 2014 (2 BvR 2728/13); and the Judgment of the ECJ in Case C-62/14, *Gauweiler*, EU:C:2015:400.

9. And let's be fair: Council Decision 2015/1523 (O.J. 2015, L 239/146), intended to ensure a fairer distribution of migrants in need of international protection, has thus far hardly inspired devoted observance by the Member States. For a broad critique of the EU's legal framework on refugees, see further in this *Review* Den Heijer, Rijpma and Spijkerboer, “Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System”, 000-000.

any law regardless of the UK's obligations under the Treaties.¹⁰ The Supreme Court now openly discusses the degree to which national constitutional principles should inherently qualify the UK's respect for the supremacy of Union law and the jurisdiction of the ECJ.¹¹ And in a sense, the UK's membership referendum in June 2016 takes the challenge to the Union's authority to its extreme but logical conclusion: withdrawal would represent the ultimate act of repudiation against the rule of Union law;¹² even more so if (as feared) a potential UK departure triggers some sort of chain reaction in other Member States whose political discourse risks being similarly hijacked by ideological Europhobia.¹³

The third problem is that of securing respect for *the rule of law by the Union itself*, in the face of allegations that, in the quest to find effective or at least plausible responses to the various crises which have dominated European affairs over several truly difficult years, the Union institutions have been willing to bend the rules laid down in the Treaties and compromise the Union's observance of its own binding legal obligations. Yet again, such problems are hardly unprecedented in nature: one need only refer to the age-old debate about "competence creep" by the Union institutions, through an allegedly over-zealous recourse to legal bases such as Article 114 TFEU or Article 352 TFEU, in supposed contravention of the fundamental constitutional principle of attributed powers.¹⁴ But yet again, there is perhaps a contemporary sense that the problem has grown more acute – whether through its scale, its nature or simply its changed political context. Over and over, as the financial and credit crisis gave way to the sovereign debt and single currency crisis, the wide-ranging measures adopted by the Union institutions and the Member States have been savaged by scholarly and political criticism that the rule of law within the EU is (in various ways) being compromised in order to save the euro.¹⁵ Similar reactions now accompany the Union's various efforts to tackle the migration crisis – with both internal initiatives and external agreements regularly criticized for allegedly compromising binding

10. See further e.g. Craig, "The European Union Act 2011: Locks, limits and legality", 48 CML Rev. (2011), 1915.

11. See especially *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

12. Even though, of course, the actual right of withdrawal is expressly provided for under Art. 50 TEU.

13. One thinks here of the Dutch referendum in April 2016 rejecting national ratification of the EU's association agreement with Ukraine.

14. See further, e.g. Weatherill, "Competence creep and competence control", 23 YEL (2004), 1.

15. See further, e.g. Ruffert, "The European debt crisis and European Union law", 48 CML Rev. (2011), 1777; Chiti and Gustavo Teixeira, "The constitutional implications of the European responses to the financial and public debt crisis", 50 CML Rev. (2013), 683.

human rights commitments, often accompanied more or less explicitly by the insinuation that the Union's only real objective here is to safeguard the long-term functioning of the Schengen arrangements.¹⁶ Think also of the February 2016 deal to keep the UK within the Union on reformed terms of membership: the proposed changes to Union legislation governing the free movement and equal treatment of migrant workers, in particular, have been attacked as incompatible with the hierarchically superior rights laid down directly by the Treaties themselves.¹⁷ Small matter that some such criticisms appear to be based primarily on their author's own subjective preferences concerning the proper scope and interpretation of the Union's constitutional commitments and legal obligations: throw enough mud and some of it eventually sticks in the popular mind... is this a Union that sacrifices its own rule of law on the altar of political expediency?

Of course, each of those three phenomena is of significant importance in its own right. But the question is also worth considering: how far might these various "rule of law" challenges also add up to something greater than the sum of their individual parts? That is not to suggest for a moment that it is worth searching for or imagining some single, coherent phenomenon which might be at work here. It is obvious that our three "rule of law" challenges each have their own distinct causes and contexts. Indeed, even within each one of our three "rule of law" conundrums, meaningful explanations and identifiable experiences will differ considerably across both the affected Member States and the relevant policy fields. But that does not rule out the possibility that our three "rule of law" scenarios might indeed share certain direct or indirect points of contact, with the opportunity to exercise some degree of mutual influence.

After all, we know that perceived troubles over respect for the rule of law by the Union itself have led directly to specific problems with adherence to the rule of Union law within certain Member States. It is precisely the sense that the Union institutions have taken an excessively broad interpretation of their own competences – including the Court of Justice in the exercise of its judicial functions – which contributed to prompting the German Federal Constitutional Court and the UK Supreme Court each to articulate the limits laid down under domestic law to respect for the supremacy of Union rules and the jurisdiction of the ECJ.¹⁸ And in a perhaps less tangible sense, it can do

16. Particularly the compatibility with both EU law and international law of the agreement reached between the EU and Turkey on 18 March 2016.

17. In particular, the proposals to amend Regulation 492/2011 so as to introduce a "safeguard mechanism" limiting the equal treatment rights of migrant Union workers: see European Council Conclusions of 18–19 Feb. 2016.

18. In Germany, e.g. the rulings of the Federal Constitutional Court delivered on 6 July 2010 (2 BvR 2661/06) and 24 April 2013 (1 BvR 1215/07). In the UK, e.g. the rulings of the

little to help the Union's moral authority in persuading its own Member States to respect the binding force of Union law, when the Union institutions themselves are regularly accused of overreaching the limits of their own powers. A similar tension is surely at work when it comes to tackling alleged infringements of basic rule of law values by Member States such as Hungary or Poland: it becomes an easy matter for Orbán or the Law and Justice Party to dismiss as hypocritical the criticism of their European partners, simply by pointing to the latter's own shortcomings, whether in the Union's commitment to the rule of law under the Treaties or in the commitment by other Member States to the rule of Union law within their respective territories.

One might, however, argue that adverse influences can also flow in the opposite direction. Of course the Union needs to be seen to take a credible stance against systemic threats to the rule of law (not to mention the rule of Union law) within certain Member States. Failure to do so risks drawing the accusation that the EU is either unwilling or unable to enforce the fundamental values it is meant to embody and uphold. Indeed, the Union's prevarication in the face of domestic rule of law problems risks being portrayed as another example of the triumph of politics over principle within the Union's own constitutional experience.¹⁹ But even presupposing a genuine willingness to act, the Union institutions face a new dilemma: what powers actually lay at their disposal; and what are the implications of seeking to exercise those powers?

In certain situations, initiatives that threaten basic rule of law values within a particular Member State can also entail a clear and direct challenge to that country's respect for the supremacy of Union law itself. In particular, where primary Treaty rules or Union secondary law embody specific aspects of more general rule of law values, and translate them into concrete binding obligations, the Member State's actions might trigger a direct incompatibility with its Treaty obligations – actionable before the national courts (through the doctrine of direct effect) and the EU courts (via infringement proceedings under Art. 258 TFEU). The legal actions initiated against Hungary, albeit limited to particular aspects of the Orbán regime's wide-ranging reforms, illustrate the Union's capacity to show some hard edges in its response to

Supreme Court in *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport* [2014] UKSC 3 and *Pham v. Secretary of State for the Home Department* [2015] UKSC 19.

19. One thinks here of the controversies which surrounded France's demolition of Roma camps, and mass deportation of migrant Roma, particularly since 2010.

domestic measures which simultaneously challenge both rule of law values in general and the rule of Union law in particular.²⁰

Yet the Union's attempts to respond to rule of law problems within a particular Member State can also run the risk of aggravating national resistance to accepting and respecting the rule of Union law itself. That might be true precisely in those same situations where general rule of law values have been embodied in binding and actionable Union law obligations: after all, a Member State's persistent refusal to comply with the Treaties would represent a more serious challenge to the principle of supremacy for Union law within that domestic jurisdiction. But the problem might also arise in those situations where the Union cannot point to any specific legal duty incumbent upon the relevant Member State as a matter of directly effective Treaty rules or Union secondary law; and its concerns instead relate to rule of law problems which fall within the scope of the Treaties only by virtue of the general commitment by the Member States to respect basic democratic values, inherent in their shared membership of the Union and understood as essential for the mutual trust upon which its constitutional operation ultimately depends.

That is the broader domain rightly occupied by the system of prevention and sanctioning as provided for under Article 7 TEU; as well as the more informal frameworks based on degrees of monitoring, assessment and dialogue as organized by both the Commission and the Council.²¹ Here, the risk is that the Union's efforts to negotiate with but also ultimately penalize a country which endangers basic rule of law values, even in the absence of any concrete infringement of specific obligations imposed by Union legislation, might provoke the relevant Member State into challenging the Union's very authority and legitimacy. It is an easy retort even for a government bent on fostering authoritarianism, to accuse the distant Union of meddling in the internal affairs of a sovereign State. And EU criticism may well risk setting off a popular backlash in support of the elected national administration, thus

20. E.g. Case C-286/12, *Commission v. Hungary*, EU:C:2012:687. Consider also e.g. the infringement proceedings commenced by the Commission on 10 Dec. 2015 against Hungary in respect of the latter's asylum legislation (Press Release IP/15/6228). Cf. our Editorial Comments, "Hungary's new constitutional order and 'European unity'", 49 *CML Rev.* (2012), 871.

21. See Commission, *A New EU Framework to Strengthen the Rule of Law*, COM(2014)158 Final/2. And Conclusions of the Council of the European Union and the Member States meeting within the Council on ensuring respect for the rule of law (16 Dec. 2014).

bolstering rather than undermining the latter's ability to pursue repressive domestic policies.²²

Furthermore, the Union's attempts to tackle general rule of law problems arising at the national level can also raise (or at least provoke) some difficult questions (justified or otherwise) about respect by the Union institutions for the scope and limits of their own competences as defined under the Treaties.²³ For example, it has been suggested that the general commitment to upholding democratic constitutional principles, as undertaken by the Member States and imposed upon the Union institutions through the Treaties, in itself amounts to a directly binding obligation capable of justifying infringement proceedings under Article 258 TFEU against regimes which fail to respect basic rule of law standards – even in those situations which might otherwise have been assumed to fall outside the strict scope of Union law – perhaps through the medium of the Member State's duty of loyal cooperation under Article 4(3) TEU.²⁴ That might well offer a valuable weapon in the fight against a growing trend towards authoritarianism in certain parts of Europe – but for many, it would also stretch accepted understandings about the nature and limits of both the Member States' binding obligations and the EU institutions' rightful enforcement powers under the current Treaties.

Similarly, both past and present Commission initiatives to strengthen the framework for monitoring, assessing and responding to alleged rule of law problems within a particular Member State have been criticized for lacking any clear legal basis under the Treaties and thereby overstepping the powers properly attributed to the Union institutions.²⁵ One might protest that such criticisms are lacking in any convincing basis: after all, what could possibly be the objection, under the principle of conferred powers, to the Commission offering the opportunity for political dialogue with a Member State as an essentially preventive measure aimed at avoiding formal recourse to a power

22. A point noted in the Ahtisaari, Frohwein, Oreja Report into the EU's sanctions against Austria (adopted in Paris on 8 Sept. 2000, especially para 116). See also Eurobarometer Report Number 53 (October 2000).

23. See further on the constitutional context of the potential EU and Member State responses to rule of law problems within particular countries, e.g. von Bogdandy and Ioannidis, "Systemic Deficiency in the Rule of Law: What is it, what has been done, what can be done", 51 CML Rev. (2014), 59. Also, e.g. von Bogdandy et al, "Reverse *Solange*: Protecting the essence of fundamental rights against EU Member States", 49 CML Rev. (2012), 489; Canor, "My Brother's Keeper? Horizontal *Solange*: 'An ever closer distrust among the peoples of Europe'", 50 CML Rev. (2013), 383.

24. See the discussion in our previous Editorial Comments, "Safeguarding EU Values in the Member States: Is Something Finally Happening?", 52 CML Rev. (2015), 619.

25. Consider, e.g. the views of the Council Legal Service (Doc No 10296/14) discussed in the Note from the Presidency to the Council, "Ensuring respect for the rule of law in the European Union" (Doc No 15206/14).

of sanction explicitly provided for under the Treaties? Yet even such manufactured uncertainty over the precise content of the Union's competence to tackle national rule of law problems still risks fuelling fresh concerns about the Union's own commitment to respecting the rule of law as laid down in the Treaties – in effect, a vicious circle of tit-for-tat accusations and counter-accusations across our three “rule of law” domains which can only further sap the individual and collective moral authority of Europe's political institutions.

So: there are indeed some important mutual influences that serve to link up the otherwise distinct challenges facing the rule of law in the Union, the rule of Union law and the rule of law by the Union. But it is worth concluding with a few observations on some further connections that undoubtedly weave together our various “rule of law” issues. In particular, it is striking just how far the twin krakens of the eurozone crisis and the migration crisis together provide the backdrop and indeed the raw material for many of the worst problems we have just described: from some of the most serious allegations levelled against Hungary's respect for fundamental democratic values; through much of the German judicial and political disquiet with the smooth reception and operation of Union law within the national legal system; to many of the most damaging criticisms made of the extent of the Union's own willingness to play by the rules laid down in the Treaties. Indeed, one might argue that the sad predicament of long-suffering Greece is the very embodiment of how the debt and migration crises can each and together fuel a complex mixture of overlapping rule of law challenges – most obviously when it comes to a Member State's failing capacity to ensure compliance with its Union obligations, but also evident in the constitutional concerns raised (often from very different perspectives) by the Union's own engagement with Greece.

On the one hand, it might be argued that, were it not for the aggravations brought about through the eurozone and migration crises, we would not perceive the Union's various rule of law problems to be nearly so acute as they currently appear. Indeed, one might reasonably expect that some easing in the serious problems continuing to affect the long term stability of the single currency, and / or those posed by the gigantic movement of third country nationals across European borders, should help reduce the chief drivers that lie behind many of the Union's recent “rule of law” troubles – and perhaps even make it easier to tackle the remainder. On the other hand, it might equally well be argued that the eurozone and migration crises have merely brought to the fore certain inherent weaknesses in the Union's constitutional order: we are witnesses to the limits of centralized legal competence and political authority when it comes to securing the cooperation and marshalling the activities of a

now large and highly diverse group of countries as regards a growing range of deeply controversial socio-economic policy challenges. If so, it suggests that the persistence, intensification and multiplication of “rule of law” problems are not simply the by-product of any particular crisis or even constellation of crises, but are somehow endemic to the Union in its existing configuration.

Either way, we would do well to keep all these problems in some proper perspective. Europe is not just about crises: the internal market, environmental protection, employment rights, consumer protection, education and research policy... such historic achievements form a stable core to the Union’s activities and deliver concrete benefits to the Member States and their peoples on a daily basis. It may well be that the Union has also found itself – partly through choices of its own making, partly by dint of external pressures – charged with certain near-impossible responsibilities, i.e. of responding to problems for which there simply are no meaningful solutions within the realistic grasp of our public institutions acting within the constraints of our existing constitutional orders. In such circumstances, the Union’s task is effectively one of endless and thankless crisis management – and the real challenge for political as well as legal discourse is to adjust our expectations of what the Union should reasonably be considered capable of delivering *in such troubled contexts* (judged not least against what the Member States could possibly have achieved in the absence of a Union contribution).²⁶ But in that case, we need to work consciously and work hard to limit the emergence of an unjustified negative feedback loop: the sorts of problems we might have to accept as all but inevitable in and around the unstable realm of crisis management – even when it comes to certain “rule of law” contestations – should not seep noxiously back into the concepts, structures and practices that have made such a success of the Union’s activities under more stable conditions; nor be allowed to rewrite the popular discourse about European integration into an unfair and inaccurate narrative of institutional paralysis, policy failure and cynical realpolitik.

26. Cf. our Editorial Comments, “From eurocrisis to asylum and migration crisis: Some legal and institutional considerations about the EU’s current struggles”, 52 CML Rev. (2015), 1437.