Handle with Care

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„*But if thoughts corrupt language, language can also corrupt thought*."

– George Orwell, *Politics and the English language* (*Horizon*, 1946)

Eastern Europe possesses enormous resources of bad faith. This surfeit, generated by patterns of underdevelopment, is problematic for the creation and even more for the 'restoration' of rule of law and constitutionalism. Both concepts shorthand evolutions and equilibriums that are mind-bendingly sophisticated. Without the internalization of the collective capacity to make the fine distinctions underlying the notions, the words as such are prone to oversimplification and ensuing ideological capture.[1)]See, generally, on the open-endedness of the abstract RoL concept, Martin Loughlin, The Rule of Law in European Jurisprudence, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DEM(2009)006-e The contextual odds are stacked against peripheral reform radicalism, even (perhaps particularly) under the banner of the noblest ideals.

I will, in what follows, seek to answer the overarching question of this symposium, starting from a cautionary Romanian rule of law (RoL) reform tale. Other things being equal, its lessons may be extrapolated to the specific case of hopefully post-Orbánite Hungary. Even though macroeconomic indicators are narrowing quickly (Bucharest has for instance surpassed Budapest in terms of GDP per capita),[2)]https://ec.europa.eu/eurostat/web/regions/statistics-illustrated Romania lagged traditionally behind in East-Central Europe. This was true in the interwar period, when the Romanian Kingdom exported unprocessed wheat, usually at a loss, whereas Hungary possessed the second-largest flour production mills in the world (after Minneapolis).[3)]Ivan Berend, *Decades of Crisis: Central and Eastern Europe Before World War II* (Berkeley: UC Press, 1998). At p. 19. It still remained true almost a century later, during the eastward enlargement, when Romania and Bulgaria were passed over for 'Big Bang' promotion; the two Balkan countries joined the EU in 2007 *with sui-generis post-accession strings attached*. Nonetheless, caveat aside, most of Central and Eastern Europe shares to various degrees resilient path-dependencies deriving from the pre-communist, agrarian nature of its societies. Additional commonalities were created by (post)communist determinations. More apposite to the current topic of discussion, my country has generated repeated backsliding events (in 2012 and again in 2016-2019); as a sizable crisis-prone new Member State, it was analogized first to Hungary and more recently to Poland.

‘Quick Fix’ Solutions and the Rule of Law: Anticorruption in Romania

In Romania, the rule of law has been used over the past 20 years to convey ideological representations about the virtues of repressive anticorruption. Anticorruption is an EU conditionality, whose local fulfilment was concretized in the constitutional entrenchment in 2003 of a highly autonomous judicial system and, in 2002/2005, in the creation and then strengthening of an autonomous anticorruption prosecutor’s office within it, the DNA (*Direc#ia Na#ional# Anticorup#ie*).[4)]Created in 2002 in a weak form, as *Parchetul Na#ional Anticorup#ie*, it was restructured as a self-contained anticorruption watchdog, under the name National Anticorruption *Department*, in 2005 (by EGO 134/2005) and renamed as *Directorate* in 2006. Formally a subdivision of the General Prosecutor’s Office, the DNA is in functional reality fully autonomous, operating as an *independent accountability agency*. See Elena-Simina T#n#sescu, “The Impact of National Accountability Agencies on the EU”, in B. Iancu and E.S. T#n#sescu eds., *Governance and Constitutionalism: Law, Politics and Institutional Neutrality* (London: Routledge, 2018), at pp. 85-96. The General Prosecutor of the General Prosecutor’s Office Attached to the High Court is formally the superior, in order to deflect a constitutionality limitation, namely, exclusive prosecutorial competence of this office over the indictment of deputies and senators, under Art. 72 (2) (Decision of the Constitutional Court No. 235/5 May 2005). In reality, the General Prosecutor has no leverage over the Chief Prosecutor of the DNA. For a while, there was universal enthusiasm for the institutional potential of the fight against graft to rid society of political evils. The DNA produced indictments with colourful nicknames, indictments resulted especially after 2012 in a string of resounding high-level convictions, prosecutors were lionized and immortalized in the high-brow press. Meanwhile, the perp-walks of disgraced notables generated syncopated catharses, while periodic leaks anticipated the trials in the court of public opinion. We were, as Commission CVM monitoring reports regularly noted, in the process of building the rule of law-based state by ‘robust’ anticorruption, on the basis of the ‘independence of the judicial system in its entirety.’

These reforms, backed by the premise of collective punitive transfiguration *as rule of law*, happened however in a context which was from the onset highly receptive to the notions of retribution, jails, handcuffs, and prosecutors and not so much to other elective affinities (*rule of law*, parliaments, constitutions, procedures, and judges). The centre-right president who spearheaded anticorruption, Traian B#sescu (2004-2014), famously campaigned and won in 2004 by promising ‘wooden spikes (*#epe*) in Victoria Square’, embossing on the EU-driven anticorruption conditionalities the celebrated effigy of Vlad the Impaler (1428-31, 1476-77). This arguably backward domestic ethos doubles back on specific social and economic cleavages. Neat urban-rural divides, a mark of past agrarian underdevelopment, have been retrenched by the EU accession, whose benefits are severely skewed against the rural and small-urban areas and strongly in favour of the bigger cities. In Bucharest, the poverty rate is now, according to the National Statistics Institute, 15 times lower than in the North East region (the percentages are 2,4%

and 35,6%, respectively).[5] https://insse.ro/cms/sites/default/files/field/publicatii/dimensiuni_ale_incluziunii_sociale_in_romania_2020.pdf Patterns of uneven development between the late neo-feudal, Balkan Old Kingdom and the differently stratified former Austro-Hungarian provinces hearken back to the nineteenth century and the interwar. Bigger cities vote disproportionally centre-right throughout the country, as do, overall, the former Austro-Hungarian provinces. The sizable Romanian diaspora votes overwhelmingly right.

Anticorruption ('the rule of law') steadily developed into a centre-right discourse, fused with all manner of anti-redistributive narratives and embellished by mock-civilizational glosses. Eventually, all political problems were translated in anticorruption terms, driving pre-existing cleavages to extremes and leaving no legitimate space for classical ideologies, negotiation, and compromise (in short, for recognizable party politics). The social democrats were at the receiving end of anticorruption prosecutions and retaliated in kind by adopting, in 2017, an emergency ordinance (EGO 13/2017), published well towards the break of dawn, that would have redefined the crime of abuse of office and rescued the party president from a pending indictment. The latter was accused, and eventually convicted, for colluding with the head of the Child Protection Agency of Teleorman County, to fictitiously hire two women who worked in reality for the local party branch. Midnight emergency ordinances that inure to the benefit of party bosses have little to do with a thicker, traditionally Western account of the rule of law. But many episodes of high-profile Romanian anticorruption leave much to be desired as well, from the indictment of a former Prosecutor General accused in essence of commuting to Bucharest with an escort to that of an attorney convicted for having lawfully promoted the interests of his clients 'with methods specific to juridical argumentation.' These two DNA indictments (and many similar others) resulted eventually in acquittals. In the specific recent case of the attorney, Mr. Ro#u, he was first acquitted of all charges of organized crime and complicity to abuse of office by the Bra#ov Court of Appeals, then convicted on appeal by a panel of the High Court, and lastly –November 2021– acquitted of all charges by another High Court panel, in the solution of an extraordinary cassation appeal, after having spent 11 months in jail.

Acquittals have multiplied recently and have something to do with the last episode of the Romanian anticorruption saga, which revolves around the deferred abolition of a special prosecutorial body created by the PSD-dominated majority in 2018, the Section for the Investigation of Offences Committed within the Judiciary (SIOJ). All files concerning magistrates were transferred to this section. The main argument behind the creation of the entity was that the DNA had in the past kept files on judges and prosecutors open for years on end, in order to intimidate them — particularly higher-ranking judges and Council members — and thus secure favourable solutions in high-profile cases. According to a 2018 Judicial Inspection report, there are quite a few statistical indicators which, at least *prima facie*, substantiate the fear.[6] Approved by Superior Council of Magistracy, Plenum Decision 225/15 October 2019, at http://old.csm1909.ro/csm/linkuri/08_01_2020__97031_ro.pdf

In 2020, a centre-right coalition came to power, on an anticorruption agenda which had defined the EP and presidential elections of 2019 and the subsequent national parliamentary elections of 2020. The minor member of this coalition, the *Union Save Romania* (USR), was created explicitly on an anticorruption platform. Its electoral base draws primarily on the support of big-urban middle classes. This faction insisted on scrapping the special section, as an impediment to reviving the 'European rule of law' (meaning, the return to full-steam anticorruption). Meanwhile however, senior judges and most mainstream parties favour a compromise alternative solution, by which some guarantee of DNA impartiality would be guaranteed in a similar format. So do now most mainstream politicians, including former rule of law champion, President Iohannis. In the end, the USR minister of justice, who insisted on pushing forward with the removal of the new body, was sacked with short ceremony and presidential imprimatur, the anticorruption coalition was dismantled, and a new 'grand coalition' government was formed including the mainstream left, the PSD (successfully labelled by the right for many years as the epitome of corrupt politics), the mainstream centre-right, the National Liberal Party (PNL, a longstanding bastion of rhetorical anticorruption), and the Hungarian minority party, UDMR/RMDSZ (pragmatic kingmaker of many coalitions).

The *volte-face* was perceived by the finer anti-corruption society and by the last remaining bastion of 'robust' fight against graft, the USR, as a betrayal of the common cause by centre-right President Iohannis and his National Liberal Party and, in a way, it was. But the dominant RoL discourse had to be rolled back or at least toned down, since there is only so much "European rule of law" extravaganza the poor periphery can take. One cannot project indefinitely upon a country of 19 million, in which almost one third of the households lack indoor plumbing,[7)]https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20191119-1 a vision of the rule of law which encapsulates ideological proclivities (affluent-urban latter-day Thatcherism, ornamented with handcuff fantasies and disjointed mock-progressive fads) shared at most by 10-11% of the electorate. The newest realignment, to be sure, does not signify a return to "rule of law" either, simply a return to old-style patrimonial politics.

Peripheral RoL Instrumentalism and EU Vulnerabilities

Since the predicate policy solution for the consolidation of a peculiar understanding of the rule of law was an EU conditionality, giving effect to more general trends towards anticorruption as modernization/stabilization panacea in peripheral jurisdictions, the above is obviously not only a Romanian story. Indeed, the only reason why the anticorruption discourse and associated practices did not peter out sooner (as in Brazil recently, as in Italy in the 90s) has been the geopolitical lack of vision and alternative solutions at the level of the EU and Council of Europe bodies. Too much was invested in the anticorruption discourse as a reform panacea (for the Western Balkans, for Ukraine, for Moldova) and Romanian complexity/ambivalence could not be allowed to simply stand in the way. In practical effect, the EU Commission has ignored for a decade and a half the nebulous sides

of Romanian anticorruption. The Union executive kept the CVM, a mechanism initially scheduled to be closed a decade ago, open until now. More recently, it did not however issue reports for years on end, in spite of its express legal mandate to do so.[8)]According to Art 2 of Decision 2006/928/EC, after June 2007 „the Commission will report again thereafter as and when required and at least every six months." In some years two reports were issued, in some years one and between October 2019 and June 2021 none. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en#year2018 Yet the Commission bears only part of the blame for this failure, which is merely a reflection of the structural overtaxing of its capabilities. Bureaucracies, no matter how superbly adequate to certain tasks (high-end statistics, cross-border competition law enforcement, and the like), cannot constitutionalize-civilize-modernize a quarter of a continent overnight. For their part, Eastern European elites of various kinds have perhaps not internalized the normative nuts and bolts of Western rule of law dialectics but adjusted remarkably well to the superficial jargon of rule of law ideologies, utilizing EU structural vulnerabilities and general Western needs to reduce peripheral complexities,[9)]https://www.nzz.ch/international/rumaeniens-praesident-iohannis-ist-kein-reformer-ld.1656683 usually by recourse to expedited heuristics. For instance, the anticorruption camp in Romania deftly exploited the geopolitical stakes, namely, the false analogy between the Romanian SIOJ (a poorly thought solution to a genuine problem) and the (truly objectionable) Polish Special Chamber. The Court of Justice, thus prodded and trapped at any rate in its own Poland-centred proxy hermeneutics, held that the CVM has superordinate status over the national constitution, implying that such effect accrues also to the –often inexistent– soft law monitoring reports.[10)]Judgment of the Court (Grand Chamber) In Joined Cases C#83/19, C#127/19, C#195/19, C#291/19, C#355/19 and C#397/19 (18 May 2021), https://curia.europa.eu/juris/document/document.jsf?docid=241381&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=442119

In the EU, this configuration was to a certain extent a foregone conclusion, and will remain thus for the foreseeable future, until either a full step ahead towards federal unity or a half-step back from the 'tyranny of values' is taken. The Union capacity to spread prosperity, albeit unevenly distributed, is nothing short of wondrous. Romania itself was *macroeconomically* lifted from its 90s third-world status to the cusp of a high-income economy. But common market dynamics are matched only to a superficial degree by the civilizational capabilities of the Union, which remain market-driven ('functionalist')[11)]See Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford: OUP, 2016). On post-Lisbon emphasis on and implementation of values, Stephen Weatherill, *Law and Values in the European Union* (NY: OUP, 2016). and inchoate. The story above shows how an inadequate reform solution was embraced domestically and deflected from its purpose. What started as a (simplistic EU-driven) solution became part of the perennial Romanian problem whereby, in the longer run, Union institutions served merely as echo chambers.

Rule of Law Restoration in Hungary: Handle with Care for Context

The specific context of Hungary presents, at least apparently, the Romanian problem in reverse, namely, the transition from an authoritarian nationalist regime to a pluralist, European, rule of law order. The Orbán government has over the years done much that is reprehensible, from the public discourses, saturated with Europhobe undertones and aggressive nativist rhetoric to specific actions, among which the persecution of the Central European University stands out in obscenity. Even so, the *Stunde Null* implications of the questions framing this fascinating invitation to debate are somewhat unwarranted (intendedly/provocatively, given the pre-eminence of the two conveners). Continuities of instrumentalism pre-existed, albeit more low-key, the FIDESZ *Machtergreifung*[12)]Cf. Attila Vincze, “Talking Past Each Other: On Common Misperceptions in the Rule of Law Debate”, in Astrid Lorenz, Lisa H. Anders, eds., *Illiberal Trends and Anti-EU Politics in East Central Europe,* Palgrave Macmillan (Springer Online), London/Heidelberg, 2020, pp. 209-233, at https://link.springer.com/chapter/10.1007/978-3-030-54674-8_9 and some normative continuities were identified even in the reviled 2011 Fundamental Law.[13)]Andra#s Jakab, Pa#l Sonnevend, Kontinuita#t mit Ma#ngeln: Das neue ungarische Grundgesetz, Zao#RV 72 (2012), 79-102, at https://www.zaoerv.de/72_2012/72_2012_1_a_79_102.pdf More relevant still (also in practical terms), the current majority, if it is to lose power, will be unseated by a motley coalition counting a metamorphosed Jobbik among its heavyweights. At the helm of this unseemly alliance sits a professedly conservative Catholic from the Hungarian heartland. Should the transition from current constitutional politics to a more pluralistic, open, liberal regime be able to take place, the questions that should precede the pragmatics as to how the rule of law can be restored is what the restoration could mean in the specific context of Hungary now and how its preconditions could be ensured. In this latter respect, it would be helpful to separate the illegitimate (xenophobic, Europhobic, perhaps anti-Semitic) reasons why the current majority was so popular for such a long time from the more legitimate claims or frustrations, which can be accommodated by a thicker notion of the (*sozialer?*) *Rechtsstaat* in a civil, liberal-constitutional manner. In rule of law-creation or restoration, starting from contextual preconditions is always more helpful than upping the abstract conceptual-discursive ante.

References

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National Anticorruption Department, in 2005 (by EGO 134/2005) and renamed as Directorate in 2006. Formally a subdivision of the General Prosecutor's Office, the DNA is in functional reality fully autonomous, operating as an independent accountability agency. See Elena-Simina T#n#sescu, "The Impact of National Accountability Agencies on the EU", in B. Iancu and E.S. T#n#sescu eds., Governance and Constitutionalism: Law, Politics and Institutional Neutrality (London: Routledge, 2018), at pp. 85-96. The General Prosecutor of the General Prosecutor's Office Attached to the High Court is formally the superior, in order to deflect a constitutionality limitation, namely, exclusive prosecutorial competence of this office over the indictment of deputies and senators, under Art. 72 (2) (Decision of the Constitutional Court No. 235/5 May 2005). In reality, the General Prosecutor has no leverage over the Chief Prosecutor of the DNA.

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- See Turkuler Isiksel, Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State (Oxford: OUP, 2016). On post-Lisbon emphasis on and implementation of values, Stephen Weatherill, Law and Values in the European Union (NY: OUP, 2016).
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