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REVIEW ARTICLE



The rule of law in the EU: many ways forward but only one way to stand still?

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ABSTRACT

The rule of law belongs to the values the EU proclaims it is founded upon. Leaving aside the legal-historical inaccuracy of this statement, it is indisputable that the concept is at least rhetorically of constitutional importance to both the EU and its Member States. As such, the very open assault on the rule of law and associated constitutional principles in Poland and Hungary in recent years has undermined both the EU's cohesion as a community of like-minded members and its legal system which in many respects depends on a shared commitment to common values. The present contribution reviews five recent publications which have grappled with the concept of the rule of law in the context of the EU and, in particular, the existing and potential role of the Union in addressing rule of law deficiencies in its Member States.

KEYWORDS

Rule of law; democracy;
EU values; backsliding;
constitutionalism

Introduction

It is a testament to the Hungarian Prime Minister's steadfastness in the pursuit of his constitutional project that 'Orbanisation' became a term of art for illiberal actions in EU commentary less than a decade after the dismantlement of liberal democracy in Hungary began. Joined on a nativist crusade by Poland, developments in both countries, as well as to a lesser extent in Romania, have contributed significantly to renewed interest in constitutional terminology fit to describe the illiberal trajectories pursued by Orbán's Fidesz and Kaczynski's PiS. Backsliding (Sedelmeier 2014), constitutional capture (Müller 2015), democratic decay (early warnings in Mungiu 2007), or populist constitutionalist theory (Corrias 2016) are just some of the notions recently popularized in academic discourse thanks largely to Hungary and Poland. Due to both the nature and process of the constitutional degeneration occurring in the two countries, much of the uptick in interest has revolved around the concept of the rule of law which has also swiftly found its way on the agenda of the EU, as it constitutes one of the values the Treaty on European Union (TEU) professes the Union is 'founded on' (Article 2).

The present article reviews five recently published books on the rule of law in the EU and its Member States (see also Bonelli 2017). They are not the only (von Bogdandy and

Sonnevend 2015), first (see, for example, Blokker 2013) or last (see, for example, Halmai 2018) contributions contending with the constitutional downturn in Central and Eastern Europe but they offer a representative snapshot of the state of the scholarship prior to 2018. Although the deterioration of the rule of law in some Member States certainly supplies an indispensable degree of relevance to the books under review, their actual scope is wider and covers in particular the status of the rule of law in the EU system proper. According to Claes and Bonelli (2016), the rule of law in the EU has three dimensions: (1) the 'rule of EU law', signifying the supremacy and effectiveness of EU law, which is distinct and sometimes distant from (2) the rule of law at EU level which requires, at minimum, that no action of EU institutions can in principle escape judicial review and (3) the rule of law in the Member States. The review article looks at contributions to both the understanding of the rule of law at EU level and the proposed EU's responses to rule of law crises in the Member States, although the two obviously overlap to some extent. The last part of the article contains a critical comment on the observed state of legal scholarship and research on the rule of law.

The rule of law and its interlocutors in the EU

Most authors – the overwhelming majority of whom have a legal background – agreed that the rule of law is a difficult concept to define and in general they made no theoretical attempt at overhauling prevailing definitions or typologies. The first instinct of the lawyers was to look for a definition in the case law of either the ECJ or the ECtHR, seeing that none is provided in the EU Treaties. The case law of the ECJ – most famously the *Les Verts* case of 1986 – emphasizes effective judicial protection, that is the availability of a judicial remedy against a decision of the public administration, as the key component of the rule of law without providing a single overarching definition (Schroeder 2016b). The ECtHR is similarly evasive when it comes to defining the rule of law but it has underlined the connection with the related concepts of democracy and human rights (Steiner 2016). A more operational avenue for obtaining a definition of the rule of law is found in the European Commission Rule of Law Framework, enacted in 2014 in response to demand from some Member States and challenges to the rule of law in others. Drawing on the case law of the two supranational courts and the work of the Venice Commission, the Commission (2014) identified (non-exhaustively) the following six principles as central to the rule of law: legality, which includes transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.

The typical fault line in rule of law definitions lies between 'thin' and 'thick' conceptions, with the former coming close to legality, while the latter in addition veers substantively towards fundamental rights and democracy (Tamanaha 2004). Whereas Konstadinides (2017) appears to have opted for a thinner interpretation ('rule of law in the EU essentially means a system where laws are applied and enforced'), in general the connection between the rule of law and fundamental rights – the respect for which is a condition of validity of EU law (*Kadi*) – is taken to mean that the rule of law concept in the EU as espoused both by the ECJ and the Commission qualifies as 'thick'. Palombella (2016) and Kochenov (2016a) take issue with the 'thick' reading of the EU approach to the rule of law; they argue instead that the EU does not possess a 'true' Rule of Law – not unlike natural law conceptions – which would

constrain and be beyond the reach of the sovereign. This view essentially equates the EU rule of law with the notion of legality (Merli 2016) which represents traditionally the ‘thin’ approach to the rule of law. Kochenov’s account especially can be seen as idealistic with a moral trajectory towards global cosmopolitanism, with little regard for the political, economic and social trade-offs making up the European transnational construct, leading the author to ultimately question whether such in his view impoverished (and co-responsible) EU vision of the rule of law should be engaged in a struggle to ameliorate the rule of law crises in the Member States (Kochenov 2016a).

Kochenov’s writings, though more critical than the rest, are far from alone in stemming from an ambitious understanding of European constitutionalism. Most contributions to the five books more or less accept the premise of the value-based and constitutionalized Union which should promote the rule of law, human rights and democracy, both strictly within its own legal-political structures and in the Member States, despite at the same time recognizing that the EU is finding it difficult to live up to its normative pledges. True to their legal orientation, the majority of authors satisfied themselves in this regard with pointing to the values of Article 2 TEU. More sceptical or restrained views of the EU and its constitutionalism, such as those of Peter Lindseth, were not represented in the books under review. This is a pity, as arguably the weakness and mythology (Smismans 2010) of EU constitutionalism – if that moniker is at all appropriate (Lindseth 2016) – including in relation to the Member States, can be better understood from less federalist and more grounded normative standpoints. Avbelj’s (2017) philosophically rooted chapter about the virtues of pluralism therefore represents a welcome exception.

Other authors have focused on other, more specific points. For example, Ștefan (2017) discusses the potential negative impact of soft law (widely used in EU competition enforcement) on rule of law principles. Van der Woude (2016) calls for a clearer separation of the ECJ’s judicial and self-administrative functions. Konstadinides (2017, 111) zooms in on the state of direct access to the ECJ by individuals through the procedure provided for in Article 263(4) TFEU. The author, as others have before him (for example Arnulf 2015), finds that little has changed since the days of the *Plaumann* judgment which was handed down in 1963: the interpretation of the conditions for obtaining standing before the Court remains notoriously restrictive. Direct challenges by individuals of EU legislation are simply not part of the EU’s DNA. Rather, the review, interpretation and application of EU laws and national implementing measures often hinges on national courts, albeit with guidance from the ECJ through the preliminary reference procedure of Article 267 TFEU (Broberg 2017), the historical importance of which for EU integration is well-established (Weiler 1991). The decentralized character of the enforcement of EU law in turn brings into play the diverse rule of law traditions in the Member States (Konstadinides 2017, 125; Jaremba 2016).

Rule of law crises in the Member States: a matter for the Union?

As pointed out in the introduction to Closa and Kochenov (2016a), all the contributing authors share the belief that the involvement of the EU in at least monitoring the rule of law in its Member States is desirable. This assumption holds for all the reviewed publications. Carlos Closa (2016) lists three normative arguments in its support: (1) the EU is a community of law based on mutual trust where a rule of law deficiency in one Member State affects other Member States and the EU legal system as a whole; (2) violations of the rule of law in

one Member State affect all EU citizens and Member States, as the offending Member State participates in joint EU decision-making; and (3) consistency between values and policies is in the interest of equal treatment of Member States which is currently undermined by the discrepancy between pre- and post-accession rule of law monitoring.

Even if accepted as desirable, the EU's intervention in Member States' rule of law crises has so far proven problematic on legal and political grounds. Claes and Matteo (2016) correctly point out that the EU's dilemma of intervening in domestic rule of law issues of the Member States has to do with the long-standing distinction in EU law between acting outside the (material) scope of EU rules, which signals that EU institutions should keep away, and acting within its scope, which triggers the entire machinery of the EU regime, from applicability of the Charter of Fundamental Rights (see Article 51(1) thereof which Jakab (2017) proposes to scrap in times of emergency) to the jurisdiction of the ECJ. It is generally accepted, including by the more sceptical Council Legal Service, that Article 2 and 7 TEU constitute an exception to this most foundational of EU legal principles in that the Member States are required to abide by the values of Article 2 TEU regardless of whether they are acting within the scope of EU law and they can be sanctioned for violating the values on the basis of Article 7 TEU. Thus far the legal effects of Article 2 and 7 TEU are relatively uncontroversial.

More debatable are claims (notably Hillion 2016) which contend that Article 2 TEU, in conjunction with other provisions such as Article 3(1), 4(3) and 13(1) TEU (obligations to promote values and cooperate loyally), legitimize EU intervention in domestic rule of law situations, at least in exceptional circumstances. As the argument goes, Article 2 TEU provides the EU with a broader mandate to take various measures against Member States offending one or more of EU values, outside and in addition to the essentially political procedure in Article 7 TEU. This extensive reading of the TEU – rejected by the Council Legal Service in its negative opinion on the Commission Rule of Law Framework – forms the basis of a number of academic proposals to ameliorate EU oversight and sanctioning of violations of the rule of law by Member States.

Importantly, a recent judgment of the ECJ in a relatively low-key case (*Associação Sindical dos Juizes Portugueses*) concerning temporary reductions to Portuguese judges' salaries appears to have in part vindicated the expansive reading of Articles 2 and 19 TEU suggested notably by Hillion. The Court has exceptionally deviated from the material restriction inherent in the relationship between EU and national law to find that the scope of Article 19(1) TEU on effective judicial protection is wider than of normal EU law obligations. The ECJ moreover held that the Treaty provision entails that Member States ensure that all courts liable to rule on EU law – which is virtually all domestic courts – are independent. In this way, the Court has not only reconfigured the constitutional relationship between 'federal' and 'state' law but it has also laid ground for upcoming confrontation concerning the distortion of judicial independence in Poland (Ovádek 2018). A pending reference for a preliminary ruling will see the ECJ face up more specifically to the problem of mutual trust, as an Irish court has already refused to execute a European Arrest Warrant seeking extradition to Poland on the ground that the rule of law in the country has been structurally damaged.

It is not unprecedented that the ECJ would step forward with a legal solution at a time when the political response to a crisis has been meagre. Not only have Member States so far failed to agree on activating even the first limb of Article 7 TEU (see Bugarič 2016 arguing for reforming the provision), the 'governing' European People's Party (EPP) continues to rank

among its members Orbán's Fidesz party, despite increasingly illiberal discourse accompanying the undermining of democratic institutions and EU values. Moreover, infringement proceedings brought by the Commission against Hungary and Poland in a number of cases have failed to bring about meaningful domestic change. It should also be recognized, however, that the lack of justiciability of Article 2 TEU (which may change following the decision in *Associação Sindical dos Juizes Portugueses*) has severely constrained the effectiveness of the Commission's legal actions. Due to the necessity to connect a domestic assault on values and institutions with substantive EU law, one could witness a crackdown on judges, academic freedom and civil society in Hungary being addressed by the Commission through, respectively, age discrimination (Directive 2000/78), free movement of services (including WTO law) and free movement of capital.

The glaring insufficiency of trying to enforce EU values by means of the *acquis communautaire* is not, however, lost on any observers, a number of whom (for example Szente 2017) have also pointed out how little such infringement procedures achieved in practice: absent other sanctions, forcing Orbán into cosmetic compliance with EU law has not stymied his high total dismemberment of liberal democracy in Hungary (see also Kelemen and Blauburger 2017). A more long-term remedy proposed by Müller (2017), and in combination with a judicial approach by Von Bogdandy et al. (2017), is the creation of a new institution ('Copenhagen Commission') vested with powers to monitor and sanction recalcitrant Member States. Finally, some scholars have highlighted the connection between corruption and democratic and rule of law backsliding (Vachudova 2016), as well as (in one of the best chapters overall) between Member State capacity and ability to comply with EU law (Ioannides 2017). Indeed, cutting EU funding to recalcitrant Member States where governments have used it for enrichment and financing their popularity only to subvert EU values is currently at the forefront of scholarly thinking (Pech and Scheppele 2017).

Quo vadis, European legal scholarship?

The five books, four of which are edited volumes, are predominantly authored by legal scholars, many of them household names in EU law scholarship. As a direct consequence, the publications are typically devoid of theory and methodology. This may come as a surprise to social scientists but it represents mainstream practice in European legal scholarship (Van Gestel and Micklitz 2014). Unlike other, more narrowly legal, topics, however, the rule of law is a fuzzy, 'essentially contested' concept which is moreover closely connected to the notions of democracy and human rights. As such, it is suitable for interdisciplinary inquiry little of which is sadly on display in the reviewed works.

Lack of interdisciplinarity aside, the crucial problem of a one-dimensional legal approach and policy commentary unconcerned with theoretical propositions and empirical testing is the resulting absence of scientific rigour. With some exceptions (for example Blokker 2016; Müller 2017; Vachudova 2016; Avbelj 2017; Closa 2017), the primary basis for most claims made in the books resides in the EU Treaties and the case law of the European Court of Justice (ECJ) or the European Court of Human Rights (ECtHR). Even without straying outside the legal discipline, more rigorous findings could have been attained through recourse to by now established methods of empirical legal research (Dyevre, Wessel, and Lampach 2017). At the very least, empirical studies should have complemented the traditional doctrinal

method but, alas, not a single chapter of the 80 in total was devoted to methodologically informed empirical research.

In addition, the prevailing format of the books – the edited volume – poses editorial problems. If overall coherence and a discernible research objective were taken as appropriate standards to evaluate an edited volume as a whole, Closa and Kochenov (2016a) would be the winner among the four reviewed volumes by some distance, despite the fact that this volume, too, lacks falsifiable hypotheses, methods and empirics. The other three volumes would fare considerably worse, featuring often disjointed contributions on a variety of topics and of wide-ranging quality, the familiar pitfalls recently scathingly criticized by the guru of European legal scholarship, Joseph Weiler (2016a) (himself one of the authors in Closa and Kochenov 2016a).

None of the above is to say that there is no place for traditional (doctrinal) legal research (Van Gestel and Micklitz 2014). Indeed, understanding and explicating legal provisions from an internal point of view and logic of the legal system, as well as assessing the consistency of legal pronouncements, remains a legitimate and often indispensable endeavour, not least for social scientists who rely on such analyses for their own research. Besselink's (2017) dissection of the procedure and legal arguments relating to Article 7 TEU is an excellent example of properly delimited and shrewd doctrinal research – the chapter is insightful in itself but can also serve as a legal foundation for other types of work on the EU's and Member States' commitment to the values listed in Article 2 TEU. More problematic is the abovementioned absence of theory and methodology: without theory, it is difficult to measure whether and how knowledge advances as a consequence of scholarly writing; without methodology, it is difficult to assess the validity of scholarly claims. Both omissions compound and are compounded by a lack of academic rigour which in other fields might be seen as *sine qua non*. A typical issue in this regard is the frequent absence of literature review in legal research, which applies also to the books under review (with some exceptions, for example Ștefan 2017). Doctrinal legal research is therefore not well-placed overall to set research agendas in broad-ranging topics such as enforcement and the rule of law in the EU. Such themes are eminently amenable to a multidisciplinary, multi-method inquiry of which the doctrinal analysis of the law should form but one part.

Conclusion

The desire to adapt the rule of law mechanisms reflects a fundamental shift in the EU's political environment. Take this, as of 2018 very topical, anecdotal example: when the populist and anti-immigrant FPÖ under the helm of Jörg Haider entered an Austrian coalition government with the centre-left SPÖ in 2000, the other then 14 Member States introduced diplomatic sanctions against Austria in collective horror at the *potential risk* the move posed to EU values. Today, as FPÖ has entered another coalition – this time with hardened right-wingers from ÖVP and with a leader deemed more radical than Haider – any sort of action against Austria is inconceivable in light of the overall rise of the far-right in Europe and the ongoing constitutional capture in Poland and Hungary, despite the fact that the EU added a preventive procedure to Article 7 TEU partly in response to the original Austrian episode (but also due to the impending eastern enlargement; see Sadurski 2010). In other words, the goalposts have shifted immensely since Haider's presence in the Austrian

government outraged Member States to the point of swiftly instituting pre-emptive (pre-mature, according to some, but not Lachmayer 2017) sanctions.

What has come to be expected of the EU when the rule of law is under threat is, as the reviewed collections thoroughly demonstrate, an institutional response intended to signal and sanction unacceptable transgressions of purportedly common European perceptions of what the rule of law requires. For all its conceptual fuzziness and proximity to fundamental rights and democracy, it has been fairly clear to most observers that the developments in Hungary and Poland are not consonant with all but the most circumscribed interpretations of the rule of law and that they quite obviously – even explicitly – undermine the liberal democratic model propping up the modern (Western) European condition. The celerity and majoritarian mandate with which the deconstruction has been taking place should raise, as Blokker (2013, 2016) observes, deeper questions about the extent to which EU values have been internalized during (Kochenov 2008) and after the enlargement process in the contested countries. Rather than looking at formal institutions and legal solutions to deep constitutional crises, future research could focus on specifying the political and socio-economic factors which enable rule of law crises to take root and empirically locate the concept of the rule of law in European societies.

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