



EDITORIAL

ENFORCING THE RULE OF LAW IN THE EU. IN THE NAME OF WHOM?

Astonishment seized Europe when, at the beginning of October 2016, Viktor Orban organised a referendum that explicitly aimed at violating EU law. On Thursday 27 October, the three-month deadline the Commission had imposed upon Poland to address what it saw as systemic threats against the rule of law in the country, expired.¹ Yet Poland's Prime Minister Beata Szydlo immediately retorted that Poland would not "introduce any change into Poland's legal system that would be incompatible with the interests of the Polish state and citizens and would lack substantive grounds". "Our impression", she added, is that "their recommendations are politically motivated". "Anything we do", the Prime Minister said, "is based on the law, adopted by a parliamentary majority and in line with the Polish constitution".² Beate Szydlo's resistance dramatically underlines Europe's weakness. Poland, like Hungary, overtly defies the EU and challenges its authority.

Confronted with this political crisis, legal academics ask themselves: what to do next? How can we improve the EU's capacity to tackle threats against the rule of law? Since the Haider episode,³ research has been conducted,⁴ which endeavours to develop the potential of EU law and the capacity of EU institutions to protect the EU from the rise of illiberal democracies. We are witnessing the burgeoning of ideas aimed at strengthening the rule of law despite the current limits of EU law.⁵ A first objective is to find out

¹ Commission Recommendation C(2016) 5703 final of 27 July 2016 regarding the rule of law in Poland.

² A. ERIKSSON, *Poland defies EU on rule of law*, in *EuObserver*, 27 October 2016, euobserver.com.

³ See W. SADURSKI, *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, in *Columbia Journal of European Law*, 2010, p. 385 *et seq.*

⁴ See C. CLOSA, D. KOCHENOV, J. WEILER, *Reinforcing Rule of Law Oversight in the European Union*, in *EU Working Papers*, 2014/25; A. VON BOGDANDY, M. IOANNIDIS, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, in *Common Market Law Review*, 2014, p. 59 *et seq.*; D. KOCHENOV, L. PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, 2015, p. 512 *et seq.*

⁵ The infringement procedure is ill-suited to systemic threats to the rule of law. Because of the conditions of Art. 7 TEU, there is little realistic chance of seeing the Council adopting sanctions against Poland following the determination by the European Council, acting unanimously, of the existence of a serious and persistent breach of EU values. In addition, the EU has to deal with the limited legal effects of Art. 2 TEU. Last, when the Commission acted on the basis of its 2014 Framework to strengthen the Rule of Law (*id est*, Communication COM(2014) 158 final of 11 March 2014 from the Commission to the

some possible legal base to the EU's competence to oversee the performance of Member States with respect to the rule of law. The ambition here is mostly to determine how action can be founded on a reading of Art. 2 TEU or a combination of it with other Treaty provisions (Arts 3, para. 1, 4, 13, para. 1, 19 TEU for instance). The purpose is, secondly, to design adequate procedures for such supervision, which could take the form of either a preventive or a corrective mechanism, or a combination of both, and such mechanism of democratic surveillance could be either specific or general. Last, researchers are striving to identify the best entities that should be entrusted with the supervising function: should it be democratic instances (mostly parliaments) or technocratic entities (a group of independent experts for instance), internal (intra-EU) or external monitoring (the Venice Commission for example)? The question is also whether and how to involve citizens (individually or through NGOs). Recent events would suggest a combination of procedures, instruments and actors to design the best possible framework so as to ensure that any threat against the rule of law be sanctioned. Accordingly, for the "existential crisis"⁶ of the EU to be solved, it is the depth of EU law that must be sounded: every classic concept or category (responsibility, citizenship, sincere cooperation, mutual trust, etc.) that could offer a ground or legitimacy to the EU's action seeking to tackle violations of the rule of law has to be revisited. Of course the reflection is not only *de lege lata*: though treaty amendments are currently very unlikely to be adopted, now is not the time to neglect possible options. Among many other suggestions, the possibility to amend Arts 2 or 7 TEU, and the possibility to increase the role that should be given to the Charter can be mentioned.

Despite their imaginative efforts to provide the EU with new tools to tackle violations of the rule of law,⁷ many legal academics feel disempowered. The problem is not (only) the EU's limited capacity to act. What is worse is that any action aimed at containing attacks against the rule of law seems to be fatally flawed: the EU's legal acts have become fuel for the anti-European discourse of populist governments and any expression of the EU's concern about illiberal policies is feeding the victimisation strategy of M. Orban and of the "Law and Justice" party. Accordingly, there are increasingly important resistance and criticisms against human rights – the acme of individualism? – which are said to be endangering nations and encroaching upon popular will. Therefore, one may legitimately wonder to what extent the law does remain a valuable instrument to resist

European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, this immediately triggered a debate about the legality of its actions.

⁶ To use Juncker's expression in his State of the Union Address 2016, *Towards a better Europe – a Europe that protects, empowers and defends*, Strasbourg, 14 September 2016.

⁷ See for instance Kim Lane Scheppele's suggestion that the Commission could bundle together a set of infringing practices of an offending Member States into a systemic infringement action: K.L. SCHEPPELE, *EU Commission v. Hungary: The Case for the "Systemic Infringement Action"*, in *Verfassungsblog*, 22 November 2013, verfassungsblog.de.

the rise of illiberal democracies in the EU, notably when illiberal changes are legal. It is the authority of the law, together with the efficiency and legitimacy of protecting the rule of law by legal means that is now being questioned. For academics brought up in the belief that the EU is a *Union through Law* and a construction fuelled by lawyers,⁸ reality is cruel. Let me add to the irony with this provocation: as experts speaking from outside and in the name of rationality, can legal academics seriously claim they have the capacity and legitimacy to help solving a problem which originates, if we read the arguments used by populist governments, in the frustration of popular will by illegitimate technocrats and experts?

Given the intensity of the crisis, the challenge is to avoid being locked into a purely technical and legalistic approach. Addressing the EU's action from its underlying assumptions, its normative foundations, and its *modus operandi* is a matter of importance. One starting point is to consider the interlocutors of the EU, namely, populist governments. Populism, Jan-Werner Müller explains, rests on a triad: denial of complexity, anti-pluralism, and a crooked version of representation. Populists indeed speak and act, "as if the people could develop a singular judgment, (...) as if the people, if only they empowered the right representatives, could fully master their fates".⁹ Seen through the eyes of the Polish Government, the July recommendation of the Commission is a paradigmatic example of "them" (the technocratic Commission) "unfairly" imposing (why is Poland alone submitted to proceedings while Hungary escapes sanction despite the October referendum?) "illegitimate" rules (ignorant of national peculiarities and blind to national identities) to "us" (the national popular will as encapsulated in the representatives' political action).

I would contend that the efficiency and legitimacy of the EU's action can be improved by looking at how populist discourses are structured and founded and by adapting the EU's action to the arguments of its interlocutors. One would be right to argue that the protection of European values is a matter of principle, unlike the modulating of the European action depending on the perception of populist governments. Yet the crisis forces us to consider the possible effects (including side-effects) of the EU's action, and its possible reception (in certain cases the way it is instrumentalised). Any effort to reconfigure the EU's action depends upon taking into account how it echoes in the target society; it depends upon accepting some of the criticisms coming from Poland and Hungary.

A critical reading of the situation reveals two main flaws in the EU's action. The first one is the lack of clarity and predictability of the European action while the second one is the ignorance of the "us and them" divide. The insufficient predictability of the EU's

⁸ A. VAUCHEZ, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe*, Paris: Presses de Sciences Po, 2013.

⁹ J.W. MÜLLER, *What is Populism*, Philadelphia: University of Pennsylvania Press, 2016, p. 77.

requirements and action together with an alleged “double-standard” are the first cracks populist governments use to gain some leverage by using the argument that the EU lacks objectivity. Pursuant to Art. 7 TEU, proceedings may indeed be started, in case of a “clear risk of a serious breach” of values, and sanctions may be taken “in case of a serious and persistent breach by a Member State of the values referred to in Article 2”. Quite unsatisfactorily however, the provision does not provide any definition of a serious and persistent breach of values. Presumably we can relate it to the notion of “systemic threat” used in the CJEU’s and the European Court of Human Rights’ case law. But there remains to determine if, and to what extent, the difference between the unwillingness and the incapacity of a Member State to respect and uphold the rule of law matters. Is the intention to disrespect EU law and values, in particular when it is expressed in a political program, a significant and constitutive element of a serious breach of values? I would answer positively. Accordingly, the distinction between an isolated infringement and systemic or systematic infringements, is a cardinal divide. The difference does not lie only in repetition or duration: also the gravity and intensity of the infringements are at stake. There remains to determine the respective importance to be given to every criterion though.

Moreover, defining and publicising the criteria founding the decision to sanction a Member State for threatening the rule of law would, arguably, provide an answer to the recurrent criticism of the EU’s partiality. This cannot be sufficient to counter the unfairness argument though. Interestingly enough, an alternative is suggested by the European Parliament resolution of 25 October 2016, which recommends the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.¹⁰ The European Parliament aims to create a Union Pact on Democracy, the Rule of Law and Fundamental Rights (so-called *EU Pact for DRF*), which provides for the elaboration, monitoring and enforcement of values and principles. The Pact for DRF is intended to apply, without distinction, to every Member State and EU Institution. Instead of prior control of specific countries, it promotes a horizontal and general approach, which would result in the whole EU being under democratic surveillance. From the Polish or Hungarian perspective, this system of monitoring may be yet another example of the EU placing popular sovereignty under supervision. Given its legitimacy and political deficit, Joseph Weiler argues, the EU is badly equipped to impose any legal rule that tends to empower individual rights against national law and democracy.¹¹ For him, the solution for the EU is to consider its own democratisation. We can only agree that the European Union will lose

¹⁰ European Parliament resolution P8_TA(2016)0409 of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.

¹¹ In C. CLOSA, D. KOCHENOV, J. WEILER, *Reinforcing Rule of Law Oversight in the European Union*, cit., pp. 25-29.

credibility if it does not act in an exemplary manner. Yet if its action is indexed upon its current democratisation, all its actions will remain illegitimate in the short term.

Therefore, one has to address the second, and surely the most delicate issue: how to cope with the argument of the “us and them” divide? Until now, it has been in the name of democracy, of the rule of law, of EU values, that the rule of law has been monitored. This is fundamental but far too abstract. There is yet another path to explore: the challenge here is to re-empower the EU with the capacity to act “in our names”. In order for the “supranational-technocratic-rationalistic” criticisms to be fended off, there needs to be clarified that it is in the name of European citizens, and of their way of life, in the name of European (not just Hungarian or Polish) democracy, and justice, that an EU action is being pushed for. It is not only the popular sovereignty of Polish and Hungarian peoples that is at stake: the other European peoples are directly affected by their actions.

The difficulty is to find out where this “us” comes from. I would contend that it comes from interdependence and EU citizenship. Interdependence is a matter of facts: it is the consequence of the institutional and legal framework of the EU. A Polish violation of the rule of law may have side effects on non-Polish citizens. It is the case when the Council adopts, with the Polish Government voting for it, an EU legal norm that is mandatory for every EU citizen. Accordingly, the area of Freedom, Security and Justice cannot operate on the basis of the principle of mutual trust if the presumption that every Member State fulfils the democratic condition is fictional. In other words, what we need to elaborate is a system where nationalist governments would run up against the EU citizens’ refusal to accept side effects stemming from their politics. We could even imagine the possibility of EU citizens claiming they are in a situation of self-defence when the rule of law is being violated in Poland or Hungary.

“Us” also derives from EU citizenship. Read AG Szpunar’s opinion in the *Rendon Marín* judgment:¹² EU citizenship is a legal status that binds citizens “together as peoples of a Europe that, on the basis of a civil and political allegiance still being built, but also necessary in the context of political, economic and social globalisation”. Since the *Rottman* and *Ruiz Zambrano* judgments,¹³ we know how central the protection of “genuine enjoyment of the substance of the rights attaching to the status of European Union citizen” is. Not only is the European judge attentive to the right to have EU rights but also protects EU citizens from their own State of nationality: the citizens’ rights and duties may not be restricted by national authorities without proper justification. As AG M. Szpunar explains, to declare to nationals of the Member States that they are citizens of the Union “is not merely a matter of defining rights and duties; it also creates expecta-

¹² Opinion of AG Szpunar delivered on 4 February 2016, case C-165/14, *Alfredo Rendón Marín*, para. 117.

¹³ Court of Justice, judgment of 2 March 2010, case C-135/08, *Janko Rottman v Freistaat Bayern* [GC]; Court of Justice, judgment of 8 March 2011, case C-34/09, *Gerardo Ruiz Zambrano* [GC].

tions".¹⁴ EU citizens can legitimately expect EU institutions to protect them, including against their own State. The very idea of a Europe that protects is not entirely new: already in the *Odigitria* case, the Court of First Instance decided that the Commission had not acted in breach "of its duty to provide diplomatic protection".¹⁵ In his 2016 State of the Union Speech, Jean-Claude Juncker explicitly referred to "a Europe that protects and defends" its citizens.¹⁶ That idea still remains to be explored and translated into concrete procedures, rights and duties. Yet EU citizenship has become a normative foundation for the EU's action to enforce the rule of law "in our names".

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¹⁴ Opinion of AG Szpunar, *Alfredo Rendón Marín*, cit., para. 117.

¹⁵ General Court, judgment of 6 July 1995, case T-572/93, *Odigitria AAE*.

¹⁶ Jean-Claude Juncker in State of the Union Address 2016, *Towards a better Europe – a Europe that protects, empowers and defends*, cit.