We Still Haven’t Found What We’re Looking For

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A lot, indeed too much, hope has been laid in the impatiently anticipated CJEU’s ruling in the LM case. On the one hand, this is understandable. The state of constitutional democracy in several EU member states has been on a notable decline. Since the EU has failed, either deliberately or due to a genuine lack of competences or simply due to its proverbial inertia, to address the process of decay early on, the still insular cases of constitutional exceptionalism possess a capacity of developing into a new normal. First Hungary, then Poland, since forever Bulgaria and Romania, and many other pseudo-constitutional democracies inside the EU which even failed to get on a politically very selective map.

The diagnosis is grim. So, the CJEU should have done something! If the political class is reluctant, the law in the hands of the CJEU must be put to play. The conventional narrative has it that this has always been the case. Therefore, the EU was first the *Rechtsgemeinschaft*, and all the rest has followed, or still will. This was the gist of the hope laid in the anticipated LM case. The CJEU has not lived up to those high expectations. This is not a landmark ruling and neither will its impact be of seismic constitutional proportions. The reason for that is, as we shall see, not the reluctance of the CJEU to address the problem seriously, but a plain fact that the expectations have been simply too high. While this is, most likely, as good as it can judicially get, the LM decision has still not brought us what we have been looking for. Nevertheless, we might be at least an inch closer toward that goal.

The systemic dimensions of the LM ruling

Many, if not most observers, have looked at the LM case from a systemic perspective. According to this approach, the referring Irish court enabled the CJEU to step in and to make its own, perhaps decisive contribution in the Polish backsliding saga. The Court has been cognizant of that opportunity and has indeed seized it in several paragraphs and dicta spread across its ruling. The Court reiterates its understanding of judicial independence, its inherent, primordial constitutive relationship with the rule of law and sets it in EU constitutional stone. In laying out the elements of judicial independence, the Court’s narrative is rich. It clearly plays an educator’s role, teaching from the bench and, indirectly at least, sends many signals to the Polish authorities where they have gone wrong with their ‘reformist’ attempts.

Also, still within the systemic dimension, the Court here – very differently from its previous Hungary-related jurisprudence where the attacks on constitutional democracy were assessed trough the market rationality – is not blind to the overall context of the case, in particular to the Commission's reasoned proposal on the basis of Art. 7(1) TEU. While the mechanism envisaged by this article has been, by many, regarded as mainly, perhaps even exclusively, political, the Court has now made it, again at least indirectly, a standard of judicial review of the circumstances engendering (or not) mutual trust in the EU. This, on a first sight, innocent step, has a potential of constitutionalizing Art. 7 in liaison with Art. 2 TEU further, turning it from a politically unappealing nuclear bomb, into an irreducible epistemic core of the EU legal order that simply, lest the very identity of EU law is destroyed, cannot be encroached upon.

Importantly, the CJEU has not followed AG Tanchev's very restrictive proposal, according to which an individual should be subject to a real risk of flagrant denial of justice for the execution of his arrest warrant to be postponed. The Court clearly opts for a higher standard of human rights protection, which requires demonstrating 'only' a real risk of breach of the fundamental right to a fair trial. In so doing, it also departs from the ECtHR standard according to which the individual, in a situation such as claimant's in this case, would need to prove that his right to a fair trial would be nullified or indeed destroyed entirely. Had the CJEU pushed the bar so high, as suggested by the AG or as practiced by the ECtHR, the Polish and other authorities, which might become sympathetic to authoritarianism in the future, could get away basically with any systemic tempering with their judiciary.

So, in systemic terms the CJEU indirectly constitutionalizes the Art. 7 TEU procedure; opts for a higher standard of human rights protection; thereby confirming that the EU is substantively a denser value-based community than the Council of Europe. All this is convincing and normatively 'useful' for addressing the challenges posed by the constitutionally backsliding regimes, including from a policy perspective. The same, albeit less in terms of usefulness for devising policy mechanisms to address the Polish *problematique*, can be claimed for the Court's persuasive insistence that the cases of non-implementation of EAW must be exceptional. After all, this is a court that has cared deeply about the uniformity and effectiveness of application of EU law. Neither primary nor secondary EU law, let alone the Court's judicial philosophy, permit for a laxer standard, for loosening the principle of mutual trust and making the EAW basically conditional on national courts' preferences that could, in case of alleged systemic deficiencies, put EAW to an automatic halt. Nevertheless, even against this uniformist background, the Court has been willing to draw a new exception to implementation of the EAW, adding the Art. 47 of the Charter on the list next to the pre-existing Art. 4 (inhuman or degrading treatment).

As it goods as it gets

It is for the above stipulated reasons, that this is as judicially good as a court can get it. Taking into account the separation of powers inside the EU system of governance, the relationship between law and politics, as well as the pluralist relationship between EU law and the Member States, it would be simply not just unrealistic, but even extra-constitutional, to demand more from the Court. A decision permitting systemic, general and

automatic non-implementation of the EAW with regard to a specific state is left in the political hands. The judiciary can draw red lines on a case by case basis, following a double-pronged test. The latter, convincingly, binds the national court, which has been seized by the EAW, to exercise both a systemic and therefore abstract review of the nature of the requesting state's judiciary; as well as a specific and therefore concrete review of the aggrieved individual's own perspective within an alleged systemically deficient judiciary. Finally, it is for the national courts to draw the red line in an actual case, following the still relatively loose CJEU's criteria.

And, it is here that it might get (even) better, or at least more interesting. Perhaps, depending on the courageous stance of the national judges, the EU will be turned in the federal judicial laboratory in which the rule of law could be built (also) bottom up through the system of a horizontal national judicial (non-)cooperation. Of course, this can come with its own risk as well. Suspending the EAW in Ireland on the grounds of systemic deficiencies in Poland, will be detrimental to the uniform and effective use of this mechanism, but it will also cause a political outcry in Poland. The crisis would accentuate, but perhaps for the better, as all the sides involved: legal and political, on the national and supranational plane, would come under a mounting pressure to justify their (in)actions. And it is in this process of transnational legal and political justification, which has a potential of smoking out the illegitimate interests, that I lay my hopes for holistically improving the state of constitutional democracy in the EU.

More legal arms, but what about the individual?

The LM decision could be hence understood as a legal arms-making factory of sorts. Systemically, both legally and politically, the room for autocratic manoeuvre has shrunk. At least a bit. The high politics of log-rolling between Brussels and Warsaw has already been 'formalized' by the initiation of Art. 7 procedure. This mechanism has now been deepened and indirectly constitutionalized. The national courts have now been, on the initiative of the Irish court, formally drawn in the review of systemic compatibility of the Polish judicial system with the well-established EU standards. More cases, with potentially conflicting outcomes, can be expected in the future, which will, on the one hand, require the CJEU to say more, as well the EU legislature and the EU political crown: the European Council to act more determinedly when the EU irreducible epistemic core is under attack.

Hence, there is room for some optimism. Especially, if our expectations from the courts are not too high. The expectations that cannot be met, the unfulfilled expectations, are just another word for crisis. Scholars should not, by asking too much from the courts, create one, where it currently does not exist. Nevertheless, EU law and its scholars alike, maybe, should start caring about those that these cases are really important for. It should not be just about systems, and the rule of law in *abstracto*. The LM case has been triggered by an individual risking his surrender to an increasingly legally arbitrary environment. Historically, it has, of course, been part and parcel of EU law to abstract away the individuals, despite nominally relying on them. This case, probably, will not be any different from others. But that should change.

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