

What Being Left Behind by the Rule of Law Feels Like, Part II

Renáta Uitz

2018-10-31T10:24:55

This is the second of two posts on the rule of law in Hungary. Part I is [here](#).

As this litany of procedures suggests so far European constitutional actors must have done their best: they made it clear to the Hungarian government that what it was doing, and especially how it was doing it, violates the rule of law. In doing so, they repeated each other's words and deeds without much variation. As every one of them chimed in, the list of contributions got longer, though not thicker. Now all eyes are on the CJEU. The case before it, as brought by the Commission is not about the rule of law as a founding value. Rather, it is presented as an issue about the freedom of services and the freedom of enterprise. While these claims are in the language of the four freedoms (i.e. the bread and butter of the Union), when put like this, the matter appears a tad bit removed from the rule of law as a bedrock principle.

Is this what the rule of law is meant to be about in the EU?

If one is to look at the record of the Commission and the CJEU on the subject more closely, there is surprisingly little there, apart from an emphasis on compliance with legal rules and a stubborn insistence on continued dialogue on the rule of law,

Consider the recent judgment of the CJEU in late July of 2018 in [L.M.](#), the case about a European Arrest Warrant where the Irish High Court asked the CJEU whether it was a good idea to extradite a Polish national to Polish courts for a drug trial after the Commission had triggered Article 7(1) TEU with regard to Poland due to its [recent judicial reforms](#). The Irish judge was concerned about the independence of the Polish judiciary and what that might entail for the fundamental rights of a Polish national, who also happens to be a European citizen. The case had the potential of halting Poland at that much-lamented [European red line](#). Instead, the CJEU told the Irish High Court to go and find it out for herself, in the course of a dialogue with the Polish court that requested the extradition, and if needed, with the Polish authorities.

This happened only a few weeks after the Commission [announced an infringement](#) action against Poland, on July 2, 2018, concerning the recently adopted amendment of the Polish Supreme Court that introduced a forced early retirement plan for the top Polish court. According to the plan 27 of the 72 judges of the Supreme Court would have to leave immediately, including the First President of the Supreme Court. Judges who wished to continue serving on [needed to seek individual exemptions](#) from the President of the Republic.

On August 2, 2018 the Polish Supreme Court turned to the CJEU with an [unprecedented preliminary ruling request](#) to halt the enforcement of the new law,

essentially to stop its own dismantling. On October 19, 2018 the CJEU did issue an injunction to do just that. It was done not upon the preliminary ruling request of the Polish Supreme Court, but upon the [Commission's infringement action](#) launched with the Court on October 2, 2018.

It is widely believed that the Polish government decided to comply with the injunction not because it changed its mind about its judicial reform plans, but to please its largely pro-EU citizens before the upcoming local elections of the weekend. By the time the CJEU rendered its injunction about the Supreme Court act, the Polish government expressed its views about the European legal order in a clear voice: it turned to the Polish Constitutional Tribunal [to ask](#) whether a preliminary ruling under Article 267 TFEU can reach beyond EU law, into the domain of national law. That the packed Constitutional Tribunal is expected to decide in favour of the government goes without saying. Rather, the question is [what should happen to the judgment of the Constitutional Tribunal](#), once rendered: should it become a conversation piece in the European constitutional dialogue in the same manner as a judgment from the German Constitutional Court would in a similar matter?

And what is this dialogue, fostered by the European Commission and the CJEU, about anyway?

For the time being, it does not amount to more than a (not too polite) conversation for the sake of a conversation. Apparently this is how the rule of law is used by the EU in its external relations: [it is a tool to foster cooperation and build trust](#), without awkward moments that a project with expectations and benchmarks would entail. The same approach, however, has radically different stakes and consequences inside the Union.

Even if European institutions are reluctant to give content to the rule of law (to make it an [institutional ideal](#)), due to the mutual trust and sincere cooperation (Article 4(3) TEU) expected from the member states, whatever is said by one of them in the course of this conversation affects all others. For now the internal dialogue on the rule of law is a back and forth between increasingly reluctant European institutions and national governments that are eager to boast about their own national constitutional identities to the detriment of values and ideals that are presumed to be shared within the EU. By now it must be clear to all that the Hungarian and Polish governments do have a plan that is built on staying within the Union, and changing it from the inside, (ab)using its institutions, resources and weaknesses to their own benefit. Every round and every step where European institutions falter in preventing moves to this effect is an opportunity for the offending member states to pursue their strategies even further.

The Hungarian government reacted to CEU's decision to leave in a predictable manner. Instead of addressing the issue of the international agreement that the government is meant to sign as per a legal requirement under Hungarian law, various voices of the inner circle took to the press to say that the government has not done a thing to push CEU out, there are no investigation targeting the University, nor is the government intending to enforce the new legal rules against CEU. Accordingly, as the Hungarian government see it: CEU is leaving Budapest, as a matter of its

free choice, and not due to government action. For flavour, they added that CEU's decision was just another shenanigan by George Soros, attacking the government by ulterior means. So was also the solidarity protest convened by a small opposition party, Momentum in the evening of October 26, 2018.

The fate of CEU was put in its broader European context by French President Macron at a press conference in Bratislava. When asked by a journalist about the fate of CEU he [vowed to contest](#) the those who want to roll back justice, undermine free journalism or question the place of universities as these are the things "that make us European" adding that "I do not believe in those who want to divide Europe."

Sounds like a campaign promise ahead of the European parliamentary elections of May 2019.

As the saga of CEU demonstrates, the European dialogue on the rule of law has consequences on the ground for ordinary subjects of the law who in and of themselves can do little to defend themselves from the whims of national governments. Until the rule of law is made to take over, such whims will continue to be turned into legal rules and formal legality – rule by law – will continue to reign. The rule of law, however, cannot take over of its own: it needs its guardians to act on its behalf. A piece of Sacher torte and a cup of mélange certainly make for a pleasant distraction while one is condemned to watching from the sidelines. Still, they cannot sooth the seeping fear that the rule of law may have been but a fool's errand in Europe after all.

This post has previously been published on the [IACL](#) blog and is republished here with kind permission.

