Economic Interests and the Rule of Law Crisis in the EU

Viktor Z. Kazai 2020-05-02T17:32:36

In his response to Christophe Hillion's blogpost, Julian Scholtes rejected the suggestion that *"any balance of authority and legitimacy between the EU and the Member States is, in fact, a mere technicality of institutional configuration, and a mere doctrinal sleight of hand would suffice to tip the scale of authority one way or another"* and characterized such an idea as a manifestation of "*legal fetishism".* I do not wish to argue against those scholarly works which focus primarily on the legal technicalities of the EU enforcement mechanisms because I sincerely believe they are tremendously useful to detect the shortcomings of the institutional framework and to understand its operation. However, I do agree with the idea that legal scholarship needs to be more open to the political reality in order to effectively tackle the rule of law crisis. To go one step further, I argue that without considering the economic interests of all the relevant individual and institutional actors (corporations and governments) we will never fully understand the failures of the EU responses to the rule of law backsliding.

The rule of law as an economic concern

To state the obvious: the rule of law is a multi-faceted concept. Human rights NGOs, legal scholars, cabinet ministers, MEPs, EU bureaucrats, banks, investors and so on all support the rule of law principle. However, they all have different reasons for their enthusiasm, and they all adopt different meanings of the same concept. It is not only a matter of definition; it is also a matter of perspective. To say something equally evident: the EU is not only a sophisticated legal entity and a political community, but also – some may say primarily – an economic union. Therefore, it is only natural that the individual and institutional actors in the EU (corporations and governments) act on the basis of legal, political and economic considerations.

If we put together these two remarks we get the core argument of this article: as long as the EU is (partly) an economic union and the economic actors have an influence on its operation, nobody – not even constitutional lawyers – can ignore the economic aspect of the rule of law crisis.

We need to keep in mind that economic actors focus on a relatively narrow concept of the rule of law and mainly from the perspective of economic activities and profit. Haggard and Tiede distinguish four causal mechanisms through which the rule of law principle is usually associated with economic growth. Firstly, since civil conflict in a country can have devastating effect on the economy, the rule of law has to guarantee the security of persons. Secondly, individuals and companies may only be incentivized to invest and trade if the security of their property and the enforcement of contracts are ensured. Thirdly, institutional checks on executive discretion, including independent judiciary, are important to make credible a given state's commitment to the protection of property rights. Fourthly, corruption constitutes a challenge to the integrity of property and contracting, to the principle of equal treatment and procedural fairness.

There is a huge gap between these criteria and the long laundry list attached to the European Parliament's resolution launching the Article 7(1) procedure against Hungary which included various issues related to the functioning of the constitutional and electoral system, the independence of the judiciary and corruption, privacy and data protection, freedom of expression, academic freedom, freedom of religion, freedom of association, right to equal treatment, rights of minorities, rights of migrants, and economic and social rights. I do not highlight the contrast in order to argue against the EP resolution. I just would like to show that legal and political rule of law concerns, on the one hand, and the rule of law principles associated with economic growth, on the other hand, can be worlds apart from each other.

Economic incentives and the Hungarian Rule of Law crisis

In January 2018, the French economist, Thomas Piketty published a blogpost which immediately went viral. After having pointed out that Western investors (especially Germans) had gradually become the owners of a considerable proportion of the capital in Central and Easter European (CEE) countries, Piketty observed:

> "Between 2010 and 2016, the annual outflow of profits and incomes from property (net of the corresponding inflows) […] represented on average 4.7% of the [GDP] in Poland, 7.2% in Hungary, 7.6% in the Czech Republic and 4.2% in Slovakia, reducing commensurately the national income of these countries. By comparison, over the same period, the annual net transfers from the European Union […] were appreciably lower: 2.7% of the GDP in Poland, 4.0% in Hungary, 1.9% in the Czech Republic and 2.2% in Slovakia…."

In other words, even if CEE countries are net beneficiaries of EU funds, Western European economies benefit big time from their economic relationship with them – although these data evidently need to be analyzed more carefully and put into a broader context. One does not have to be a populist to realize that portraying CEE countries as beggars and Western European states as philanthropists is quite misleading.

Viktor Orbán and the various government mouthpieces are obviously more than happy to misinterpret these figures and use them as a weapon in their verbal combat waged against the EU and Western European "colonizers". But let us not confuse rhetoric with actions!

In their article published in 2019, Bohle and Greskovits argue that even though Hungary's illiberal turn after 2010 left its mark on the economy, *"to date none of [the] transformations appear to have gone far enough to fundamentally alter the* *institutional setup of embedded neoliberalism*". On one level, the Orbán government undoubtedly put in place measures in the name of militant economic nationalism in order to reestablish economic sovereignty and privilege national economic insiders (see e.g. sectoral taxes, nationalization of some companies etc.). However, foreign direct investment (FDI) has remained a major pillar of the Hungarian economy. Cash subsidies, low corporate tax and other tax incentives and a new policy instrument called "strategic partnership" were successfully applied to attract new and predominantly foreign investments. As a result, Hungary still attracts more FDI in relation to GDP than the other Visegrád countries. The authors conclude that the Fidesz government's economic nationalism was cautious and selective which allowed the regime *"to keep large manufacturing [transnational corporations] as its 'friends in court', namely with regard to EU institutions, or in negotiations with their home-country governments and parties*".

In a similar vein, Rech points out in his article discussing the EU's action on the erosion of the rule of law in Poland and Hungary that Orbán's economic policy has not made Hungary an "enemy of foreign business" as such. Instead, the government used a stick-and-carrot strategy with foreign investors to secure Hungary's position as a low-cost production site for major companies. Based on this observation Rech argues that *"[a]s economic forecasts for Hungary and Poland remain positive and labor relatively cheap compared with neighboring countries, major foreign investors will likely stay, which is one of the main factors allowing Fidesz and PiS to act boldly on the European stage*".

Of course, the issue of economic interests and the rule of law requirements can be and must be approached from the opposite perspective as well. Bohle and Greskovits note that EU structural and cohesion funds have become an increasingly important source of external finance in Hungary which have been used to nurture Orbán's domestic oligarchy. It is clear as day that the Hungarian government depends heavily on EU funds. This is the reason why Rech argues that *"[e]conomic pressure, not Art. 7, would thus seem to be the strongest card in the hands of the Union [and other Member States] to in#uence the policies of Fidesz and PiS*". This is basically the idea on which the rule of law conditionality is founded. However, when we ponder the pros and cons of whether respect for values enshrined in Article 2 can be and should be a condition for receiving EU funds, we must not forget to ask ourselves another question at the same time: who benefits from what exactly and who bears the consequences? (N.B. Rech is of the view that the rule of law conditionality comes with serious problems.)

Conclusion

When he speaks to his voters, Viktor Orbán likes to portray himself as a brave economic freedom fighter who has saved Hungary from the European "colonizers" and reestablished the country's economic sovereignty. At the same time, the brochure of the Hungarian Investment Promotion Agency proudly declares that "*Hungary has one of the most open economies of Europe, with an FDI stock of around EUR 80 billion*" and enumerates the various economic incentives offered to foreign investors, including non-refundable subsidies based on individual government decision. And European companies react positively. The companies from the following countries are the main investors in Hungary: Germany, the Netherlands, Luxembourg, Ireland, the US, France and South Korea.

Western European investors seem to be perfectly happy with the state of the rule of law in Hungary. So, the one-million-dollar question is: why would the Western European governments be motivated to step up against the Orbán regime? I think there are many good reasons. My argument is not to give up the fight. My point is simply that constitutional law scholars need to take into account the economic aspects of the rule of law crisis and pay attention to both sides of the issue: Hungary's dependence on EU funds and the benefits offered by the Hungarian market to Western European investors.
