The Rule of Law and the EU: Responsibility, Independence and Rights

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There is a very considerable literature on the rule of law and the EU, the principal focus of which is on rule of law backsliding by certain Member States, and the EU's response. This chapter does not seek to replicate this analysis, but to complement it in three different ways.

The discussion begins with responsibility, more specifically the conjunction of power and responsibility for the current situation. There are three levels at which the rule of law can be protected, statal, international and regional. The initial focus is on the state itself, which flows from an admixture of power and responsibility. Insofar as there are deficiencies we need to understand not only the immediate consequence, whether incursions into judicial independence or limits of free speech, but also the deeper malaise driving the negative policies. There is then analysis of the potential and limits of international and regional action to combat rule of law problems.

The second part of the chapter addresses judicial independence and its centrality to the rule of law. It explicates the ways in which such independence lies at the core of three prominent versions of the rule of law. The rationale for judicial independence is explored for the rule of law and lawful authority, the rule of law and guiding conduct, and the rule of law and rights. This is followed by discussion of why such considerations are especially pertinent in the EU.

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The final section of the chapter is concerned with the relationship between the rule of law and rights. It is acknowledged that there are different conceptions of the rule of law, and the principal fault line between formal and substantive conceptions of the rule of law relates to the issue of whether rights are regarded as part of the rule of law. The proximate rationale for this disagreement is explained, and so too is the deeper reason for the divide, which concerns the very theory of law and adjudication espoused by the protagonists in the debate. This theoretical discussion is followed by consideration of the relationship between the rule of law and rights within the EU, and the implications that this has for the current challenges facing the EU.

1. The Rule of Law, Power and Responsibility: Statal, International and Regional

The rule of law is a central constitutional precept. There are three levels at which the rule of law can be protected: statal, international and regional.

(a) Statal

It is axiomatic that the initial and primary focus for protection of the rule of law is the state itself. The state has the responsibility for securing the rule of law within its borders, and the duty falls on all organs, legislative, executive and judicial. The state may receive advice or admonition in equal measure from outside, but this does not alter the fact that we expect the state to keep its own rule of law house in good order and lament the fact when it does not do so. Reflect on the assumptions underlying this sentiment. They are grounded on an admixture of power and responsibility. It is the state that has plenary authority within its borders, which

carries the commensurate responsibility for ensuring that the rule of law is adhered to. This is foundational and too easily lost sight of in current discourse.

It is especially important when considering the rule of law and the EU. There may well be problems concerning the rule of law and its application to the EU's own institutional ordering. This does not alter the fact that the principal focus is on rule of law problems that emanate from Member States. Membership of an international or regional organization does not obviate the state of primary responsibility for compliance with the rule of law within its borders. Indeed, such membership increases this responsibility, since failure to comply with the rule of law can have negative spill-over effects on an organization to which the state has duties flowing from its membership.

(b) International

If there are failings in this respect then the traditional recourse has been to international law. The errant state may be condemned by international organizations such as the United Nations or the International Labour Organization for failure to comply with the rule of law. Such missives are important, but are bounded, both formally and substantively.

The formal powers of such organizations are circumscribed, and so too are their substantive powers. The bottom line is that while we might expect international condemnation we do not have high hopes for causal impact on the situation on the ground. We 'discount' in advance the extent to which such intervention can really change matters.

These considerations should, nonetheless, not mask the potential of international law. Consider in this respect the Vienna Convention on the Law of Treaties,[1] which contains several provisions pertinent to rule of law violations by contracting parties. Thus, Article 19 VCLT

1 Vienna Convention on the Law of Treaties 1969, No 18232.

stipulates that contracting parties have duties not to defeat the object of the Treaty prior to its entry into force. Article 26 VCLT, further amplified by Article 31 VCLT, embodies the principle of *pacta sunt servanda*, with the correlative obligation of good faith performance of the Treaty. This is complemented by Article 27 VCLT, which provides that a state cannot invoke its internal law as a reason for non-compliance with Treaty obligations.

Article 60 VCLT deals with the effect of material breach by one of the contracting parties. A material breach of a multilateral treaty by one party entitles the other parties by unanimous agreement to suspend the operation of the Treaty, or to terminate it, either in the relations between themselves and the defaulting State, or as between all the parties. Article 60(3) VCLT defines material breach in terms of a repudiation of the Treaty not sanctioned by the Vienna Convention; or violation of a provision essential to the accomplishment of the object or purpose of the Treaty. Not every breach of the rule of law would necessarily constitute a material breach as defined in Article 60(3), but serious violations would do so.

(c) Regional: Council of Europe

We now consider the regional level. In Europe the two principal regional organizations are the Council of Europe and the European Union. They are very different in terms of their powers, which affects our expectations of what they can achieve. The Council of Europe has made significant contributions to preservation of the rule of law, through the European Court of Human Rights, and the Venice Commission for Democracy through Law.[2] They have done broadly what is expected of them., but this expectation is framed by the nature of their powers.

The European Court of Human Rights is, by its very judicial nature, triggered when a case comes before it. The Strasbourg Court has made significant contributions to preservation

2 Venice Commission :: Council of Europe (coe.int)

of the rule of law, as exemplified by *Baka v Hungary*,[3] which concerned Articles 6 and 10 ECHR. The applicant alleged that he had been denied access to a tribunal to contest the premature termination of his mandate as President of the Supreme Court in Hungary, and that his mandate had been terminated because of views he had expressed publicly in his capacity as President of the Supreme Court, concerning legislative reforms affecting the judiciary.

The Strasbourg Court unanimously held that there had been a violation of Article 6(1). It acknowledged that there had to be a violation of a civil right for the purposes of Article 6(1),[4] but decided that the domestic legislative framework at the time of his election and during his mandate gave the applicant an entitlement under Hungarian law to protection against removal from his office as President of the Supreme Court during that period.[5] The new legislation could not take away the pre-existing right, since its legality was the very object of the dispute in the present case.[6] National legislation excluding access to court had to be compatible with the rule of law, which meant that it could not be ad hominen and had to be based on a law of general application.[7] The right of access to court fell within Article 6(1), and the claimant's premature termination was not reviewable by any domestic court. There had, therefore, been a violation of Article 6(1).[8] The ECtHR also found a violation of Article 10. It agreed with the claimant that his termination was due to the fact that he had criticised the government's judicial reforms. There was, therefore, prima facie a violation of Article 10.[9]

3 20261/12.

4 Ibid [100]-[101].

5 Ibid [109].

6 Ibid [109].

7 Ibid [117].

8 Ibid [120-121].

9 Ibid [151].

The Venice Commission is the other Council of Europe institution relevant for discussion of the rule of law. Its role is elaborated in Article 1.1 of the statute,[10] which mandates that it is to strengthen the understanding of the legal systems of the participating states, with a view to bringing them closer; promote the rule of law and democracy; and examine the problems raised by the working of democratic institutions and their reinforcement and development. Article 1.2 instructs the Venice Commission to give priority to work concerning the constitutional, legislative and administrative principles and techniques, which serve the efficiency of democratic institutions and their strengthening, as well as the rule of law; fundamental rights and freedoms; and the contribution of local and regional self-government to the enhancement of democracy. The reality is that the Venice Commission works in three broad areas:[11] democratic institutions and fundamental rights;[12] constitutional justice;[13] and elections,[14] including referendums and political parties.[15] The Venice Commission's work is an admixture of opinions concerning particular countries, and general studies that furnish more general guidance on particular fundamental rights or political parties.

This admixture of the general and the specific is apparent in the Venice Commission's important work on the rule of law. Thus, from a general perspective it published a 2011 Report on the Rule of Law,[16] which was complemented by a more detailed Rule of Law Checklist in

10 Resolution Res. (2002) 3 Adopting the Revised Statute of the European Commission for democracy through Law, CDL (2002) 27.

11 P Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law Democracy' (2017) 2 UC Irvine Journal of International, Transnational, and Comparative Law 57.

12 Venice Commission :: Council of Europe (coe.int)

13 http://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice&lang=EN.

14 http://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums&lang=EN.

15 http://www.venice.coe.int/WebForms/pages/?p=02_parties.

16 Report on the Rule of Law, CDL-AD(2011)003rev.

2016.[17] The Venice Commission has, in addition, published numerous specific Opinions[18] on rule of law problems in EU Member States, such as Hungary[19] and Poland.[20] The Venice Commission does not have a formal enforcement mechanism. This is not as problematic at it might seem, given that in many instances the state requests advice from the Commission. The issue is more problematic when the Venice Commission investigation is triggered in other ways, and/or where the state is resistant to suggestions for reform. The data on compliance is, moreover, incomplete and imperfect.[21]

(d) Regional: European Union

We turn then to the other leading regional player in Europe, which is the European Union. There is a very large literature on the rule of law and the EU, more especially as it concerns backsliding by certain EU Member States.[22] These problems relate principally, albeit not

17 Rule of Law Checklist, CDL-AD(2016)007rev.

18 Documents by opinions and studies (coe.int)

19 See, e.g., Opinion on the Law on Administrative Courts, CDL-AD(2019)004.

20 See, e.g., Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, CDL-AD(2020)017.

21 Craig (n 11) 81-83.

22 See, e.g., A von Bogdandy, M Kottmann, C Antpöhler, J Dickschen, S Hentrei, M Smrkolj, 'Reverse Solange–Protecting the essence of fundamental rights against EU Member States' (2012) 49 CMLRev 489; I Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"' (2013) 50 CMLRev 383; A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart, 2015); D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 EuConst 512; J-W Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' (2015) 21 ELJ 141; D

exclusively, to the independence of the judiciary in these countries. The present objective is not to repeat the measures taken by the EU to address rule of law backsliding. It is to reflect on what we expect from the EU, and how this affects commentary on what has or has not been achieved.

(i) The State: Objectives, Power and Responsibility

The EU is not a state, nor did it take the reprehensible action in relation to the judiciary. It is therefore important to consider, albeit briefly, the state's objectives, power and responsibility.

We begin with the state's objectives. Discourse about rule of law backsliding focuses heavily on attacks on judicial independence, and their implications for the EU. This is, however, but part of a broader political strategy to weaken constitutional constraints and arrogate power by the governing party. The constitutional meltdown thus precipitated has deeper roots in competitive authoritarianism and illiberal democracy.[23] Competitive

Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) YEL; C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); D Kochenov and L Pech, 'Better late than never: On the European Commission's Rule of Law Framework and its first activation' (2016) 54 JCMS 1062; A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member State Compliance* (Oxford University Press, 2017); L Pech, 'The Rule of Law', in P Craig and G de Burca, *The Evolution of EU Law* (Oxford University Press, 3rd edn, 2021) Ch 10.

23 S Levitsky and L Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge University Press 2010); N Bermeo, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5; D Adamski, 'The Social Contract of Democratic Backsliding in "the new" EU Countries' (2019) 56 CMLRev 62; K Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545; S Levitsky and L Way, 'The New Competitive Authoritarianism' (2020) 31(1) Journal of Democracy 51; P Craig, 'The Politics of Constitutional Meltdown', in M Tushnet and D Kochenov (eds), *The Politics of Constitutional Law* (Routledge, 2022, forthcoming).

authoritarianism connotes regimes where formal democratic institutions exist, but where incumbents' abuse of the state places them at a significant advantage in relation to their opponents.[24] Illiberal democracy has a proximate connection to populism, the latter term capturing the claim that populists alone represent the people, this being a moral, rather than an empirical claim, and that the people must be defended against a corrupt elite.[25] The salient point for present purposes is that the very existence of these deeper roots means that it is more difficult for any external actor to resolve the problem

We then consider power and responsibility. The state, as noted above, has plenary authority, subject to obligations that flow from EU or international law. The corollary is that it has the commensurate responsibility for ensuring that the precepts of the rule of law are adhered to within its borders. The unacceptable action was taken by the Polish and Hungarian governments. It was not causally dependent on their EU membership. The challenge to judicial independence was but part of a broader assault on foundational elements of their respective constitutions.

(ii) The EU: Objectives, Power and Responsibility

The EU's response to the rule of law problems must be seen against the preceding backdrop. That response is framed by the EU's objectives, and delimited by its powers, which has consequences for its responsibility.

The EU's objectives are encapsulated in Articles 2 and 3 TEU. Article 2 TEU sets out the values underlying the EU, which include, inter alia, human dignity, freedom, democracy,

24 Levitsky and Way, *Competitive Authoritarianism* (n 23) 5.

25 W Galston, 'The Enduring Vulnerability of Liberal Democracy' (2020) 31(3) Journal of Democracy 8, 8.

equality, the rule of law and respect for human right. Article 3 TEU then charts the EU's objectives, which include fulfilment of the values in Article 2.

This brings us to the EU's powers. Article 3(6) TEU is a neat fulcrum point for this shift, insofar as it provides that the 'Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties'. It thereby constitutes a bridge between the EU's objectives dealt with in Article 3(1)-(5) TEU and its competence, specified in Article 4(1) and Article 5(1) TEU, and elaborated in more detail in Articles 2-6 TFEU. The injunction in Article 3(6) is reflective of the legal reality as specified in Article 4(1), which is that competences not conferred on the EU remain with the Member States. This is further reinforced by Article 5(1) TEU, which makes clear that the limits of Union competence are governed by the principle of conferral. The EU therefore has attributed power, it does not have plenary authority. It must work within the parameters of what the Lisbon Treaty allows. There is a legal and a political dimension to the idea of attributed power.

In legal terms, the EU has, truth to tell, been pretty good at using a plethora of techniques to try to address the rule of law problem. These include invocation of Article 7 TEU; the Commission Justice Scoreboard; the Commission Rule of Law Framework; the Council's Annual Rule of Law Dialogue; legal actions before the CJEU; the Rule of Law Cycle; and monetary incentives for compliance with the rule of law. It has deployed broad Treaty interpretation to good effect, as exemplified by judicial use of Article 19 TEU, and Article 258 TFEU. The Treaty nonetheless still limits EU's powers. Thus, Article 7 TEU was devised implicitly on the assumption that there would only be one 'bad' state at any one point in time. The decisional rules reflect this. If there are two or more such states then use of Article 7 TEU becomes a whole lot more difficult.

In political terms, the EU is bounded by rules for political decision-making grounded in Treaty provisions, which can be used by the defaulting states as shields to blunt the force of

EU initiatives to deal with rule of law backsliding. This is regrettable but predictable. A 'rational' defaulting state will draw on legal rules to shape the political terrain when it can do so. This is exemplified by the passage of legislation to impose rule of law conditionality through cuts to the contributions from the EU budget that go to defaulting states.[26] The political deal-making on this was conducted under the shadow of threats from Hungary and Poland to veto approval of the general EU budget.[27] This constrained what could be achieved, but the legislation is still important. We should be wary of the best being the enemy of the good.

The discussion of objectives and power casts into sharp relief consideration of the EU's responsibility. The EU clearly has a responsibility to tackle rule of law problems within a Member State, since they undermine the values in Article 2 TEU and impede fulfilment of the EU's objectives in Article 3 TEU. It can, however, only do so within the legal limits of powers conferred on it, and within the political limits that shape their exercise. The EU's responsibility to deal with rule of law backsliding must then be judged against a twin backdrop. The initial malaise, in terms of lack of judicial independence, is the fault of the Member State and is but part of a larger problem concerning assault on the constitution at national level. The EU's responsibility is bounded by the legal limits on its power, the exercise of which is perforce shaped by political considerations; its responsibility is also circumscribed by the fact that there are limits as to what it can do to redress the problems associated with illiberal democracy and competitive authoritarianism. This does not mean that we should accept the status quo with equanimity. To the contrary, we should be fully mindful of the dangers that this presents for the EU.

26 Regulation (EU/Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality to protect the Union budget [2020] OJ L433 I/1.

27 https://www.ft.com/content/6868477d-38a2-464e-b1c4-188fd0a62b1a; https://euobserver.com/opinion/150103?utm_source=euobs&utm_medium=email.

2. The Rule of Law and Judicial Independence: Conceptions, Importance and Application

Attacks on judicial independence lie at the heart of democratic backsliding by some EU Member States. The objective is not to analyse the CJEU's response to this malaise, which has been well documented in the literature. It is to consider why judicial independence is so central to any of the principal conceptions of the rule of law.

(a) Rule of Law: Lawful Authority

A core feature of the rule of law is that the legislature and government must be able to point to some basis for its action that is regarded as valid by the relevant legal system. Thus, the EU only has the powers conferred on it by the Lisbon Treaty. The EU institutions must, therefore, be able to point to a Treaty foundation for legislative acts made pursuant to Article 289 TFEU. This is equally true of other EU legal acts, which must fall within the legal parameters for the creation of delegated and implementing acts pursuant to Articles 290-291 TFEU.

This conception of the rule of law is narrow, but it is nonetheless central; any vision of the rule of law must embrace the requirement of lawful authority even if it goes beyond it. However, this conception tells one nothing as to the nature of the challenged governmental action. The government might be seeking to achieve some benign objective, or it might be attempting to do something that most would regard as undesirable. This is irrelevant for the purposes of the present inquiry. The measure would be equally contrary to the rule of law if the government could not point to some basis for its action that would be regarded as valid by that legal system.

Judicial independence is central to this conception of the rule of law. If the government or legislature exceeds the boundaries of its lawful authority, then its action will be null or invalid. There must be independent courts to assess whether the limits on lawful authority have been exceeded. If the courts lack such independence then there is a real danger that limits on the scope of political power will be ignored, or will be interpreted in a manner that is not objective and is too favourable to the government.

(b) Rule of Law: Guiding Conduct

The preceding conception of the rule of law is important, but limited. Any law properly passed by the legislature would meet this precept. Thus, the fact that laws are enacted in the correct legal manner is a necessary facet of the rule of law, but it is not regarded as sufficient. A further important aspect of the rule of law is that laws should be capable of guiding one's conduct, in order that one can plan one's life, thereby facilitating legal certainty. It is from this general precept that Joseph Raz deduced a number of more specific attributes that laws should have to comply with the rule of law:[28] laws should be prospective, not retrospective; they should be relatively stable; particular laws should be guided by open, general and clear rules; there should be an independent judiciary; there should be access to the courts; and the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.

This conception of the rule of law is not concerned with the substantive content of the law, in the sense of whether the law is just or unjust, provided that the formal precepts of the rule of law are met. It is necessary to consider the content of the law to decide whether it complies with the preceding precepts of the rule of law. However, if it does so comply then

28 J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195.

that is the end of the inquiry. The corollary is that this conception of the rule of law could be met by regimes whose laws are morally objectionable, provided they comply with the formal precepts of the rule of law. It also follows that not all laws passed by a democratic regime will necessarily comply with the rule of law. However, the rule of law thus conceived minimises the danger created by law itself, by ensuring that whatever the content of the law, it should be open, clear, stable, general and applied by an impartial judiciary.

Judicial independence is central to this component of the rule of law, hence its inclusion on the preceding list. If the judiciary is not independent people will not be able to plan their lives secure in the knowledge of the legal consequences of their action. They will not be sure that the courts will faithfully apply the letter and spirit of the law to their situation. Judicial independence is also necessary to give effect to other facets of the rule of law. Thus, consider by way of example, the rule of law precept to the effect that laws should not be retrospective. Independent courts have a number of juridical techniques at their disposal to deal with retrospective legislation. It might be annulled, because it offends the constitution. It might be invalidated pursuant to a statute that protects human rights. The retrospective legislation might be interpreted very narrowly. If, however, the courts are not independent then they may well not make use of these doctrinal precepts to control retrospective legislation.

(c) Rule of Law: Rights, Justice and Accountable Government

There is a third conception of the rule of law that embraces the previous two, but goes beyond them, with the consequence that the rule of law is not purely formal, but substantive. On this view there is a rights-based component to the rule of law, such that certain rights are based on, or protected by the rule of law, with the consequence that violation of these rights constitutes infringement of the rule of law. On this view the rule of law also provides the foundation for the controls exercised by courts over governmental action through judicial review, which

commonly include principles such as legality, procedural propriety, participation, fundamental rights, openness, rationality, relevancy, propriety of purpose, reasonableness, equality, legitimate expectations, legal certainty and proportionality.

This vision has been espoused by a range of writers. It underpins the work of Ronald Dworkin,[29] who accepts the conception of the rule of law in the previous section, labelling this the 'rule book' conception, since it would feature in any serious theory of justice. However, as Dworkin notes, this says little if anything about the content of the laws within a legal system. He argues for a rights-based understanding of the rule of law. Citizens have moral rights and duties with respect to one another, and political rights against the state. These moral and political rights should be recognised in positive law, and citizens should be able to enforce them through the courts. The rule of law in this sense is the ideal of rule by an accurate public conception of individual rights.[30] In a similar vein, Lord Bingham argued that the rule of law should include, but extend beyond, the formal precepts articulated by Raz. It should include adequate protection for fundamental rights.[31]

Judicial independence is central to fulfilment of this conception of the rule of law. Courts that lack independence cannot be trusted to enforce rights, and they cannot be trusted to apply the precepts of judicial review. Independent courts will enforce the rights-based component of the rule of law through the powers invested in the judiciary in that legal system. Independent courts will also develop and enforce the principles of judicial review. If courts lack independence the principles of judicial review will not be objectively enforced against the executive and its discretionary power will not be properly controlled.

29 R Dworkin, *Law's Empire* (Fontana, 1986).

30 R Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 11–12.

31 Lord Bingham, *The Rule of Law* (Penguin 2011).

(d) Rule of Law: Judicial Independence and Interlocking Legal Orders

The preceding discussion has considered the centrality of judicial independence to different conceptions of the rule of law. Judicial independence is of particular significance in interlocking legal orders such as the EU, which are reliant on EU courts and national courts to attain the objectives of the Lisbon Treaty.

This is in part for horizontal reasons, in the sense that cooperation between national courts lies at the heart of the European Arrest Warrant regime that constitutes the core of the Area of Freedom, Security and Justice. This cooperation is predicated on mutual trust between national courts, which will no longer be forthcoming if the courts of the country to which a person is sent for trial are not trusted by other courts because they lack independence. It is in part for vertical reasons, since national courts are central to the regime of EU adjudication. They have the obligation to conform to, and apply, EU law within their jurisdiction and are therefore courts with general jurisdiction over EU law. They are also central to the flow of cases upwards to the CJEU, via the regime of preliminary references in Article 267 TFEU that lies at the core of the EU legal order. If national courts lack independence then the regime of EU adjudication will suffer in both respects. National courts that lack independence may not apply EU law correctly, and they may restrict the flow of preliminary references where there are challenges to national legislative or executive action that is contrary to EU law.

It is for these reasons that attacks on judicial independence in Hungary and Poland have assumed centre stage in discourse about rule of law backsliding. The tensions were cast into sharp relief by the decision of the Polish Constitutional Tribunal that challenged central tenets of the primacy of EU law.[32] This is not the place for detailed exegesis as to the consequences

[32] K3/21, 7 October 2021.

that should flow from this decision. My views can be found elsewhere.[33] Suffice it to say for the present that the decision by the Constitutional Tribunal reveals the importance of judicial independence and the consequences that follow when it is undermined. If you strip a court of its independence and pack it with government appointees with the intent that it will do the government's bidding, then sooner or later it will make a decision of this nature.

3. The Rule of Law and Fundamental Rights: Conceptions, Importance and Application

The difference of view as to whether the rule of law should encompass rights has been noted in the previous discussion. The present section considers how far this makes a legal difference. The discussion begins by clarifying the theoretical positions and then addressing the issue in the context of the EU.

(a) Rule of Law and Rights: Theoretical Terrain

It is important to understand at the outset why there is a difference of view concerning inclusion of rights within the rule of law; the way in which this is dependent on divergent theories of adjudication that underpin the respective theories; and the reasons why the gap between the two principal theories is less marked than might be thought at first sight.

The formal theory of the rule of law was espoused by Raz, who is also a leading exponent of legal positivism. He argued that the rule of law should not include consideration of rights for the following reason.[34] We may all agree that laws should be just, that their content

[33] P Craig, 'The Rule of Law, Breach and Consequence', eulawlive

34 Raz (n 28) 196.

should be morally sound and that rights should be protected within society. The problem is that if the rule of law is taken to encompass the necessity for 'good laws' then the concept ceases to have an independent function. There is a wealth of literature devoted to the meaning of a just society, the nature of the rights which should subsist therein, and the appropriate boundaries of governmental action. Political theory has tackled such questions from time immemorial. To bring these issues within the rubric of the rule of law would, therefore, rob the concept of an independent function. Laws would be condemned or upheld as being in conformity with, or contrary to, the rule of law when the condemnation or praise would simply be reflective of attachment to a particular conception of rights, democracy or the just society.

The message is, therefore, that if you wish to argue about the justness of society, do so by all means. If you wish to defend a particular type of individual right then present your argument. Draw upon the wealth of literature that addresses these matters directly. It is, however, not necessary or desirable to cloak this in the mantle of the rule of law, since it will merely reflect the conclusion that has already been arrived at through reliance on a particular theory of rights or the just society.

It is not fortuitous that Raz is a leading exponent of legal positivism, which is predicated, inter alia, on the twin assumptions that courts apply recognized sources of law, and that there is no necessary connection between the content of the existing law and moral precepts. Legal positivists who subscribe to a formal conception of the rule of law do not believe that the existing law is value neutral. They do maintain that there is a distinction between the existing rules and their normative justification. The formal conception of the rule of law follows, for exclusive legal positivists, from their belief that in determining what the law is, there is no necessary link between law and moral precepts.[35] Inclusive legal positivists

[35] J Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, 1979) 49-50; J Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (Oxford University Press, 1994) Chaps 10, 13;

maintain, by way of contrast, that there can be some instances where the determination of what the law is will entail moral considerations.[36]

Legal positivism does not, however, entail the exclusion of all moral considerations from public law discourse. Such considerations may, as inclusive legal positivists argue, be incorporated into the validity criteria of certain legal systems. There will, moreover, be many source-based norms, whether derived from statute, precedent or the constitution, which the courts must, on the positivist thesis, faithfully apply. These norms will, in liberal polities, commonly enshrine substantive rights to equality, speech and a plethora of other rights. There is, moreover, nothing in the positivist thesis to prevent the courts interpreting such norms to require substantive constraints on the way that power is exercised. It is also accepted by positivists that courts can have recourse to moral considerations in determining what the law ought to be, when the existing sources of law, whether based on statute, or precedent, run out.[37]

Dworkin's substantive conception of the rule of law is grounded in his non-positivist theory of law and adjudication. He argued that subject to questions of 'fit', courts should decide legal questions according to the best theory of justice, which is central to the resolution of what rights people currently possess.[38] On this view, 'propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the

A Marmor, 'Exclusive Legal Positivism', in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press, 2002) Chap 3.

[36] J Coleman, 'Negative and Positive Positivism' (1982) 11 Jnl of Legal Studies 139; P Soper, 'Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute' (1977) 75 Mich L Rev 511; Marmor (n 35); K Himma, 'Inclusive Legal Positivism', in Coleman and Shapiro (n 35) Chap 4.

[37] Raz, *The Authority of Law* (n 35) 49-50, 181, 193-4; Raz *Ethics in the Public Domain* (n 35) Chaps 10, 13; Marmor (n 35).

38 R Dworkin, *Law's Empire* (Fontana, 1986).

best constructive interpretation of the community's legal practice'.[39] Subject to questions of fit, the court should choose between 'eligible interpretations by asking which shows the community's structure of institutions as a whole in a better light from the stand-point of political morality'.[40] An individual has a right to the legal answer that is forthcoming from the above test. These moral and political rights should be recognized in positive law, so that they can be enforced by citizens through the courts. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights.

It was then natural for Dworkin to advocate a rights-based conception of the rule of law, given his argument that citizens have moral rights and duties with respect to one another, and political rights against the state. This view of the rule of law 'does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights'.[41] It does not mean that this conception of the rule of law is consistent with only one theory of justice or freedom. It does mean that it is not independent of the particular theory of justice, or vision of freedom, which constitutes its content at any point in time.

The positivist and non-positivist accounts of law and adjudication are different, and this is reflected in the divergent interpretations of the rule of law. This can be acknowledged, while also accepting that the degree of difference may be less marked than initially thought. This is in part because, from the positivist perspective, courts will apply recognized sources that commonly include rights; the criteria of validity in a particular order may include moral considerations; and courts can have recourse to such matters when the law 'runs out'. It is in

39 Ibid 225.

40 Ibid 256.

41 Dworkin (n 30) 11-12.

part because from a non-positivist perspective, the rights-based conception of law is framed by questions of fit that can circumscribe the options open to a court.

(b) Rule of Law and Rights: Legal Terrain

The focus now shifts to consideration of the rule of law and rights viewed from the perspective of EU law, when read in the light of the preceding discussion.[42]

We begin at the beginning, which for this purpose is Article 2 TEU. It is framed in terms that distinguish between the rule of law and human rights, and this textual disjunction is further emphasized by the remainder of Article 2 TEU, insofar as it elaborates separately the desiderata of, inter alia, justice, non-discrimination and gender equality. This textual disjunction should not be pressed too far. The opening Articles of the TEU should not be read in a manner akin to a biblical exegesis, more especially because they were almost certainly not drafted with a mind to the theoretical distinction concerning different conceptions of the rule of law adumbrated in the previous section. However, disaggregation between the rule of law and rights also characterized earlier versions of the Treaty, as exemplified by the Maastricht Treaty, the Preamble of which distinguished between respect for human rights and the rule of law. This distinction was reinforced by the language of Article F, with its focus on fundamental rights, and it was carried forward to Article J.1, which defined the objectives of the CFSP, and separated the rule of law and rights. This approach was retained in the revisions to Article F in the Amsterdam Treaty, wherein the EU's foundational values were said to include, inter alia, respect for fundamental rights and the rule of law, with the text edging closer to that in the current Article 2 TEU.

[42] For discussion of the relationship between democracy and the rule of law, see Allan Rosas in Ch ? of this volume.

There is, however, another aspect of EU law that is suggestive of a more proximate relationship between the rule of law and rights. This relates to EU general principles of law, the history of which is imperfectly understood.[43] The salient point for present purposes is that the ECJ read them into the Treaty to ensure that the EEC had principles of judicial review that were fit for purpose. Fundamental rights were incorporated into the Treaty in the same manner, and in conceptual terms they were regarded no differently from the other general principles. Viewed from this perspective, the reasoning could be thus summarized: the rule of law demanded that the EU should have precepts of judicial review to control decision-making by the Commission and other EU bodies; these precepts were conceptualized as general principles of law; and fundamental rights were regarded as but one such principle, in line with the other principles that comprised the rule of law. Article 6(3) TEU is the enduring legacy of this pattern of thought, specifying as it does that fundamental rights shall constitute general principles of law.

This proximate connection between the rule of law and rights is also evident in Commission initiatives, as exemplified by its 2014 paper, which set out a new framework to strengthen the rule of law.[44] It acknowledged that the precise content of the rule of law could vary, depending on each Member State's constitutional system. The Commission nonetheless formulated a broad, substantive conception of the rule of law, drawing on case law from the CJEU, the Strasbourg Court, and documentation from the Venice Commission. For the EU Commission, the principles that comprised the rule of law included legality, which implied a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty;

[43] P Craig, 'General Principles of Law: Treaty, Historical and Normative Foundations', forthcoming.

[44] A new EU Framework to strengthen the Rule of Law, COM(2014) 158/2 final. See also, Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final.

prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; and equality before the law. Respect for the rule of law was, therefore, intrinsically linked to respect for democracy and for fundamental rights: there could be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights were effective only if they were justiciable; democracy was protected only if the judiciary could ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.[45] Compliance with the rule of law was, therefore, a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It was also a prerequisite more generally for upholding all rights and obligations derived from the Treaties and from international law.[46]

The final point to make concerning the legal relationship between the rule of law and rights within the EU takes us back to the theoretical discussion. It was noted that the difference between the formal and substantive conception of the rule of law was less significant if a legal order protected fundamental rights as a recognized source of law. Fundamental rights would not be regarded as part of the rule of law if a legal system adhered to a formal conception of the rule of law, and the positivist theory of law and adjudication that underpinned it. However, insofar as such rights were enshrined in a recognized source of law, then positivism would dictate that they should be faithfully enforced in the same manner as any other source-based legal norm. This condition was met prior to the Lisbon Treaty, insofar as fundamental rights were regarded as general principles of law. It is further reinforced by the fact that the Charter of Rights is, in accord with Article 6(1) TEU, treated as equivalent to the constituent Treaties.

[45] Ibid 4.

[46] Ibid 4-5.

4. Conclusion

There will be no attempt to summarize the entirety of the preceding argument. Suffice it to say the following. We craft argument with the hope that it will shed light on a particular issue, whatsoever it might be. In doing so we might reason deductively, inductively or use an admixture of the two. We also have recourse to a combination of more abstract or theoretical arguments, and those that are more particular or grounded in positive law. The real world then generates facts against which to test such reasoning, as exemplified by the decision of the Polish Constitutional Tribunal.[47] This regrettable decision reveals the centrality of the issues discussed in this chapter.

It speaks directly to the concerns about power and responsibility and the statal, international and regional levels at which they can be addressed, revealing the way in which challenge to the independence of the courts is but part of the broader strategy of illiberal democracy that pertains in such countries. It reveals in the most powerful manner the corrosive impact of lack of judicial independence and the way in which this undermines legal orders to which the country belongs. It demonstrates the proximate connection between the rule of law, democracy and the protection of rights, such that if independence is compromised and the courts are beholden to the executive, then rights, whether enshrined in the constitution or statute, will be but paper promises without substance.

[47] K3/21 (n 32).