On the Role and Legitimacy of Supranational Courts in a Member State's Retransition

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The last decade has demonstrated what role the Union and in particular the Court of Justice, alongside other international bodies, can play in keeping a Member State "within the orbit" of the rule of law. Within that process, the case law of such bodies established numerous red lines as to what practices are not acceptable in a rule of law governed liberal democracy. The question for the immediate future becomes, at present perhaps rather for Hungary than for the stalled (or never properly launched) process in Poland: will the same red lines now be applicable also to the "good guys"? If yes/no, what will that mean for the legitimacy of those bodies, in particular the European Union?

In structural terms, the sad development of some of its Member States sliding into varieties of kleptocratic populism (or however the exact local variety of a hybrid regime is properly to be called) provided the Union with a new real-life legitimising source. The "democratic deficit" of the Union, long considered a major weakness and the object of critical treaties, suddenly turned into a strength. A supranational community that is not, certainly not immediately, responsive to the popular will of its citizens is no longer the structure found wanting, endlessly "democratising" itself to no avail for winning popular support and correlating legitimacy. Instead, it starts being presented as the effective construct for safeguarding the liberal, democratic, and rule of law governed statehood in its constituent units, the Member States.

In this way, the focus and the search for the legitimacy source for the Union itself moves, yet again, from the level of the Union to the level of its constituent parts, the Member States. The Union shall not be primarily judged on how far it itself lives up to the idea of liberal, democratic, rule of law governed statehood, but how far it is able to safeguard that ideal within its constituent units. Leaving aside the glaring paradox of Brechtian proportions of "we who fight for democracy cannot ourselves be democrats", the problem of output or regulatory legitimacy is that it does not, in contrast to its input varieties, tolerate failures. Or rather: failures in individual delivery immediately pose legitimacy problems for the entire structure, since the legitimacy source is not the process through which a certain outcome was reached, but the quality of that outcome.

By robustly entering into the rule of law battles and no doubt equally having (or rather already having) a say in a (re)transition in a Member State, the Court and the Union will equally (co-)own its results. The key legitimacy issue for the next stage, for "Transition 2.0", will boil down to a simple question: "Will all the red lines be equally applicable to the 'good guys'?" (With of course the preliminary caution of not believing that anybody coming after the "bad guys" must therefore by definition be a "good guy".)

Universally Applicable Red Lines?

In contrast to the judicial pronouncements delivered in Strasbourg, which concern a concrete case and the (non)violation of the Convention rights in that case, the decisions delivered in Luxembourg on preliminary rulings tend to be much more general, with their operative part decontextualized. That lies in the nature of the preliminary ruling procedure, the task of which is to provide general interpretation of applicable EU law, the concrete application of which is a matter for the Member State authorities. Stated at a higher level of abstraction, the common denominator for a number of those red lines set out would be that sudden, abrupt

changes to the judicial or legal systems are impermissible. Mandates must run to their end; the political power cannot interfere with ongoing judicial business.

But wishing to undo certain steps of the previous regime is likely to mean breaking or at least cracking some (or even the same) eggs. Some people will need to be fired, some mandates might need to be shortened, some decisions in some areas revisited. In terms of justifying such measures, it will matter whether some sort of "original sin" can be identified. Were those measures legal back in their time? Revisiting "tainted" decisions or appointments might be easier than undoing those that were (certainly formally) lawfully made, since mandates or terms of office run naturally to their ends.

Providing just one concrete example already discussed here: lowering/introducing the age limit for judges, even the one pursuing legitimate social policy objectives, is inacceptable if introduced for person who had the well-founded expectation that they would remain in office under the conditions applicable to them when appointed. National legislation that abruptly lowers the age limit for such persons, without providing for transitional measures protecting the legitimate expectations of those persons, violates EU law (see C-286/12, *Commission v Hungary*, or in another later modification in C-619/18, *Commission v Poland*). What about the (re)introduction of the 70-years age limit for constitutional judges in Hungary in order to "restore" true independence of that court by getting rid of certain judges?

What might be the reaction from the European level(s), once similar measures, this time around carried out by the "good guys", are put to the test before them? Extreme approaches might be theoretically imagined in this regard. On the one hand, full applicability of all the prohibitions previously announced as "generally applicable" red lines could amount to the effective impossibility of any (sudden) reforms. On the other hand, a full "switching off the lights" for the process of transition, with no rules or limitations being applicable in that process, and then restarting once all has been done, is difficult to contemplate either.

The reality is likely to lie somewhere in the middle, with the European oversight of the process of (re)transition becoming perhaps a sort of "control light". A greater leeway for the adoption of more intrusive measures is conceivable, in particular if those measures are directly and proportionately tied to the correction of a previous illegality under the rules in place already at the time when the decision was adopted or appointment made.

Systemic Resets and Individual Rights

However, when carrying out any such restorations, in particular in cases where individual decisions or individual judgements issued by illegitimate/incorrectly appointed servants of the previous "regime" are to be re-assessed, basic rules inferred from the previous transitions should be kept in mind.

First, the primary aim must remain the protection of "innocent bystanders", normal national parties and litigants, their rights and legitimate expectations. The mere systemic interest in "erasure" of past decisions adopted by "tainted" servants of the previous regime must be weighed against the protection of individual rights. As for instance aptly summarised in one of the (indeed too many) Czech property restitution cases before the European Court of Human Rights:

> *"The Court accepts that the general objective of the restitution laws, namely to attenuate the consequences of certain infringements of property rights caused by the communist regime, is a legitimate aim and a means of safeguarding the lawfulness of legal transactions and protecting the country's socio-economic development. However, it considers it necessary to ensure that the attenuation of those old injuries does not create disproportionate new wrongs. To that end, the legislation should make it possible to take into account the particular circumstances of each case, so that persons who acquired their possessions in good faith are not made to bear the burden of responsibility which is rightfully that of the State which once confiscated those possessions." (Pincová and Pinc v. the Czech Republic, § 58, repeated in*

numerous other cases, such as Zich and Others v. the Czech Republic, § 74).

Second, sanctions, exclusions and similar measures imposed ought to be based on individualised assessment of the persons in question. Overly broad measures implying or even outright assuming group-guilt are unlikely to survive external scrutiny, unless of course they are based on very solid and compelling evidence. Past wrongs can hardly be remedied by creating new ones. Incidentally, the European requirements for finding fair balance and protection of individual rights were not articulated only with regard to rehabilitation or property restitution cases, but were to be considered equally in other regimes of "dealing with the past", which did not include setting aside past judicial decisions, such as lustration laws (see e.g. points 16-22 of the Venice Commission Opinion No 788/2014).

Third, at the structural level and in the longer term, proportionate and thus milder solutions might be advisable rather than immediate and full retribution, with the system seeking to adapt and to move forward from its present predicament instead of just going back in time. For a successful retransition that can gather popular support and thereby generate the necessary legitimacy, that would not be perceived as just another turn of the wheel where it is now for the victors to enjoy their spoils, the ambition must amount to more than mere "undoing" of the steps done by the previous government. It ought to focus on adaptation, transformation and innovative solutions, increasing the future resilience of the system, while accepting that a retransition cannot limit itself to resetting the clock ten or sixteen years back, often at the expense of third parties.

The role and the added value of European oversight in such situations ought to lie in distance, both emotional as well as geographical. Somebody else, not directly and personally concerned by the injustices of the previous regime, can reflect on the tools and means chosen. That might, in individual cases, indeed lead to some frustration on the part of the "transformators", who wished for a more speedy and radical departure from the past (for one of the first "tasters", cf. e.g. *Opinion of the Venice Commission on the draft law concerning the status of judges appointed or promoted between 2018 and 2025 and other related matters*).

Asymmetric Standards?

There is one last onerous, structural question. Why should the Union or other international bodies act as "hesitant and gentle brake", not the "avid facilitator" of retransition back to the rule of law in the Member State? It could certainly be suggested that if a "wayward child" has finally found its way back "to the flock" of countries adhering to EU values, the EU itself must act as an accelerator of that process. All limits are off and, as happens occasionally in the Union, noble ends justify whatever means.

That naturally goes to the very heart of the question: is a supranational entity supposed to be more of an impartial guardian, policing the rules of the game at the national level, or a direct actor playing only on one team? In the past, the frequently invoked justification for the Court's pronouncements on the quality of national judiciaries was the rule of law and the imperative of impartiality and independence of the courts from the national political powers. But are courts that wholeheartedly embrace just one vision of policy and politics, and after their national victory speedily launch whatever next wave of new "transformative adjudication" that the political power (of course, this time the "right one") asks of them, genuinely impartial? What type of legitimacy can such institutions generate in the minds of the public?

Perhaps that heretical question might only come to the historically twisted Central European judicial mind, where "socially active (not to say activist) judging" is a tough sell. The same question nonetheless directly translates into the Union's long term legitimacy not just within the CEE region: is the European Union that fosters "asymmetric rule of law", with heavy limitations applicable to some, while none to others, a genuine "rule of law community"? Values translated into directly justiciable standards outside of a democratic process and participation have the unfortunate consequence of being exclusionary. Actors and

visions that do not feel accommodated within a given structure, with certain choices becoming supra-constitutionalised at a supranational level and therefore impossible to change, might have the tendency of heading for exit.

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