Of Asymmetries, Aspirations and…Values, too

The European Transnational Legal Order Under Threat

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"Tread softly because you tread on my dreams"
William Butler Yeats, Aedh Wishes for the Cloths of Heaven

How are the transnational legal order ("TLO") and transnational governance affected by the democratic backsliding, authoritarianism and populism? As painfully evidenced by the Polish and Hungarian cases, the system of governance and constitutional design of the European TLO have been in error of "*normative asymmetry*": *transnational authority* to ensure that the states remain liberal democracies has not been effectively translated into the *transnational law* and *remedies*. In order to make the TLO more responsive to the democratic threats, however, it is crucial to take on the challenges that go beyond institutional and procedural tinkering.

Becoming different

In what follows TLO is understood as a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions. A TLO has gradually emerged in Europe with the ascent of the European Convention on Human Rights (ECHR) and the incremental growth and expansion of the EU. Today's European version of the cosmopolitan legal order is based on "a transnational legal system in which all public officials bear the obligation to fulfil the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship". Democratic backsliding comes with the constitutional narrative of *capturing* the *domestic* and rejecting the *international* and *transnational* normative framework. Crucially, it changes a constitutional profile of the component parts of the TLO. States not only fail to respect human rights and adhere to the essence of rule of law but become "*different states*" in terms of their constitutional fabric. The human rights become "*different human rights*" and the rule of law strays away from the common understanding that brought states together and that was thought of as defining their sense of belonging. The individual empowerment, being a staple of liberal constitutionalism, faces a challenge from a rival philosophy of human rights in which the collective wins over the individual. The separation of powers is rejected and ridiculed as a technical ploy to protect the despised elites. Liberal human rights are viewed with suspicion as diluting the communication processes between the sovereign ("the people") and the institutions. Importantly these anti-liberal, anti-institutional intermediary "outside bodies" are looked at as suspicious and seen as incompetent to intervene in domestic affairs. Law must be applied by national courts and judges because they are people's institutions.

TLO in flux?

With all this the TLO is being challenged and tested. However, it is argued here that the TLO is not only challenged, but also, and more dangerously, exposed to a paradox. *On the one hand*, the TLO is said to be thickening all the time, and nowhere more so than in Europe where it has achieved the thickest of thick transnational legal orders anchored in the liberal and democratic norms. This goes in parallel with the thickening of *jus cogens* to include the self-determination and democratic norms and the claim that the UN Charter is the constitution of an international legal order. And *on the other hand*, even in the heart of the very thickest of transnational public legal orders – the intersection of the Council of Europe and the EU – the

TLO seems to be on the defensive and unable to respond to the internal frictions.

The EU Founding Fathers thought that the memories of World War II would be surely enough to stave off any backsliding into authoritarianism. The error has been clearly on display when the TLO found itself incapable of responding to, and framing in transnational terms, the novel process of hollowing out the order from within. The *Council of Europe's* role was and is still painfully limited to a hopeless spectator, at best sending letters of outrage and empty threats. *OSCE* did not even try to play a role and kept silent throughout the capture of liberal democracies. The *Venice Commission's* expertise and advice have never been translated into tangible actions and integrated into systemic response. As for *the EU*, it has always been one step behind the events on the ground and in constant mode of dialoguing with the rogue governments. It has become clear that the system suffers from an existential drawback: the states which are the source of distrust and fear are called on to sit at trial over one of their fellow member states.

Still agreeing to live together?

One must be very clear, that not everything should be grouped under the high-handed (and often overused) tag of "value crisis" in the EU. When properly defined, this crisis is not about well-intentioned disagreements among reasonable democrats on how to best implement a technical piece of EU law or bring its domestic legislation into line with the requirements of EU law. There is a categorical difference between a lack of implementation of EU law and/or interference with citizens' EU rights, *on the one hand*, and the blatant rejection of the Court of Justice's authority, targeting national judges for sending preliminary rulings to the Court or masterminding a hate campaign against the judges that dare to say "no" to such practices of intimidation, *on the other*. The TLO must be based on the recognition that all actors embrace the TLO as their own and acknowledge their commitment to its shared democratic aspirations, core values of dignity, equality, rule of law and freedom.

What distinguishes the Polish and Hungarian cases from the past European crises is that the latter never questioned the "European overlapping consensus" that brought together states through agreed-upon essentials. J. Rawls has argued that "Citizens who affirm reasonable, but opposing comprehensive doctrines belong to an overlapping consensus: that is they generally endorse that conception of justice as giving the content of their political judgments on basic institutions; and second, unreasonable comprehensive doctrines . . . do not gain enough currency to undermine society's essential justice". It recognizes that there will never be a perfect agreement on all the essentials and that persistent differences between citizens living together in a constitutional regime will always create disagreement(s) over the final shape of these constitutional essentials. Denying the disagreement would be counterfactual, what matters, though, is that parties to the consensus agree that these disagreements will be ironed out and spelled out within the discursive framework.

The "overlapping consensus" recognizes that the European polity is composed of distinct peoples and respects other peoples' ways of lives. Yet, for a consensus to work, "we" the European peoples should acknowledge certain fundamentals that bind and discipline us and that brought us together. Part of the deal behind the overlapping consensus has always been the acknowledgment that parties are ready to enter into a bargaining process in order to find similar grounds of unearthing and understanding of the fundamental commitments. This bargaining presupposes managing the disagreement over time in order to build a common understanding of the basic principles. However, and this is crucial for the proper understanding art. 2 TEU, the parties with unreasonable and irrational doctrines that question the liberal democracy as a form of government must be excluded from the consensus. This is so because the disagreement must not undermine all parties' commitment to support the liberal democratic principles under a democratic constitutional regime. When looking through this prism, it becomes much easier to debunk Poland's attempts to defend its actions with regard to the judi-

ciary. Poland is not debarred from expounding its own vision of the judiciary (structure, appointment etc.), quite to the contrary the organization of the judiciary remains within the competence of member states but while doing so every state must at all times remain within the broadly accepted and agreed upon essentials. Accepting skewed interpretations that undermine the consensus would betray the spirit of the original consensus based on the fidelity to certain constitutional essentials and fundamentally call it into question. This is where we find ourselves in November 2020.

From learning to sharing

For peoples of Europe to learn respect each other's way of life, an interdependence must be practised. Progressive opening will follow but it will be more about sharing and not unifying. The shared values have to be explained, taught and practiced. Either the States at drafting stage assumed that values are shared and taken the commonality element for a fact or they recognized that this is a desired state of things still to be attained, strived for and practised before being indeed shared. Should it be the *former*, they got in front of themselves and stated the counterfactual, all at the same time being unaware of the legal consequences of a situation on the ground where this counter-factuality would be corroborated. In the *latter* scenario, the states would simply be giving a nod to a process and work toward the goal. In this case sharing and commonality are not given but understood as aspirations to be achieved through learning and practice. Having said all that, word of conceptual caution is in order. The choice of words (*enforcing* credible commitments, *not imposing* uniform standards) is particularly important as it frames and orders our discourse about the (allegedly) shared values as we struggle to move along. At the same time the TLO should understand that the "value talk" while having a special role to play here, it is at the same time fraught with the dangers of overreach and conceptual pitfalls. *On the one hand*, it can (as argued above) act as a catalyst for reinforcing the commonality and strengthening the belonging, but *on the other* it can easily create a sentiment among some member states of being pushed out or subjected to the tyranny of values that are not at all shared (line of argument so often used and abused by Poland and Hungary).

Still living together after all ?

To deliver on the promise of the overarching aspiration of living together and respecting certain core constitutional essentials binding on all parties to the overlapping consensus, *four* interconnected pillars of the research on the TLO design and governance should be briefly identified and red-flagged:

(A) the TLO must rethink the EU membership and the lenses through which it looks at its member states: this requires a bold conceptual shift from the EU as market-driven entity to a democracy-enforcing supranational community of equal states invested in the TLO and committed to the common project and its systemic and organisational principles;

(B) the TLO must critically retool its own legal apparatus, mechanisms and approaches in response to the changing political and legal environment: that calls for the holistic approach that would straddle the political and the legal with each side knowing what and how the other is doing in pursuance of their own fidelities to the system;

(C) the TLO must rethink and refocus its own narrative which should concentrate on the catalogue of fundamental First Principles of transnational governance: The challenge that the EU is facing boils down to not so much the lack of common point of reference, but rather to the lack of understanding among peoples of Europe of why and how the quality of democracy and the rule of law in one of the member states should matter to all of them;

(D) the TLO must be better in tracking down and understanding the practice of TLO legality. The challenge lies in moving beyond the text and to reconstruct what is called here "the social life" or – using the transnational equivalent – the practice of the Treaties. As the EU transnational governance and law is not only about the (imperfect) text(s), but equally about the actors' actions on the basis of the text(s), the terms "social life" and practice would explain how the

document and the institutions serve the EU citizens. It brings together the normative (text), empirical (institutions) and sociological. The question how "the Treaty", understood here as an imaginary reference point for the European fidelity, expresses (or not) aspirations of the European citizens, and how it helps (or not) them change their lives for better, is still neglected. As things stand right now, domestic rule of law and politics in the (backsliding) member states are of no concern to the Dutch, French etc. people. Simply put: They are not seen as forming part of the TLO legality.

By belonging to the TLO, its actors agree to limit its choices by committing to the TLO's practice. The moment the TLO becomes anchored in the basic agreement to share and practice the essentials that define Us, the European peoples, it will be much easier to draw the lines of what is prohibited and ultimately counteract once the lines so drawn are overstepped. Otherwise the recognition of commonality loses much of its purpose. When all is said and done, the viable TLO must be based on certain ethos of membership. The ethos explains that Member States are bound to adopt a certain attitude toward other actors and is reflected, among others, in their duty to have due regard to the TLO and abide by its most fundamental rules. Unfortunately, today, this idealized notion of membership resembles more of a myth in search of the story-teller and of the public interested to listen.

As European societies evolve and advance, it must be asked whether "we the European peoples" are ready to continue living together within a constitutional framework, internally divergent, and one that is ready to respond to the exigencies and demands of new realities? James Tully's canoe metaphor eloquently summarizes the challenge, promise and a dream behind this question: "Perhaps the great constitutional struggles and failures around the world today are groping towards the third way of constitutional change, symbolised by the ability of the members of the canoe to discuss and reform their constitutional arrangements in response to the demands for recognition as they paddle. A constitution can be both the foundation of democracy and, at the same time, subject to democratic discussion and change in practice ".

In the end, this captures the ultimate aspiration of the European transnational legal order.

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