We Are Not Helpless

How Poland can restore the Rule of Law by referring to its constitutional foundations

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The current debate on how to restore the standards of a democratic state under the rule of law in Poland reminds me of the dilemma faced by King Rex, as described by Lon L. Fuller. Like the king constantly falling into a trap we equally seem to be trapped. We know what should be done and what compliance with the rule of law means, yet we try to convince each other that every conceivable way out is bad. So do we need to refrain from taking any action and look in frustration at the systematic deformation of mechanisms that have worked quite well in Poland for a quarter century and protected us from pathology and the abuse of law?

To consider that nothing can be done until the end of President Duda's term of office would be tantamount to admitting full-scale failure. All our thoughts, ideas and laborious institution building after 1989, the development of effective fundamental rights protection, the independence of the judiciary and the balance of powers would prove to be a house of cards that can be brought down easily by a new political arrangement adhering to a different legal axiology. We would also tell all those who, over the past few years, have not given up in their heroic efforts to uphold the ethos of the rule of law, often paying a high price (I think above all of many judges and prosecutors) that their fight was useless because we cannot do anything today.

I do not share the view that restoration of the rule of law is impossible. The legal system – its general principles and values – makes sense when it can fulfil its function as a guarantee: It is not just a beautiful idealist story of individuals having fundamental rights and freedoms, but both the foundation and an instrument for a healthy democratic life.

We spent decades in the traps of the communist system, which used decorative, not to say bombastic, language to create an illusion of equality, participation in democratic elections, freedom of expression and assembly, freedom of conscience and religion. These rights were enshrined in the People's Republic's Constitution of 1952. Of course, nothing derived from this since, in respect of guarantees for the individual, the Constitution did not work and the recourse to it was ineffective and risky. Many young people were even imprisoned in March 1968 because they demanded respect for the Constitution.

The Remedy is in the Constitution

After 1989, we entered a new phase of thinking about the constitution, fundamental rights and legally enshrined principles. Constitutional norms have shown great potential if only they are taken seriously – with reference to Dworkin's work 'Taking Rights Seriously' – and if they are thought of as a binding norm that give rise to certain responsibilities for public power, and guaranteed rights for individuals.

May I recall how many 'discoveries' the Constitutional Tribunal has made after 1989 on the basis of the principle of a democratic state governed by the rule of law. From that principle, hitherto unincorporated constitutional rights were derived such as, for example, the protection of private life and private property, effective judicial protection, and the protection of citizens' trust in the rule of law and legitimately acquired rights, as well as the prohibition of retroactivity etc. This shows how much an open, democratic legal reasoning referring to the historical achievements of old democracies has been able to infer from the content of constitutional principles!

Today we have a constitution with a modern approach to the concept of a democratic state governed by the rule of law, based on generally recognized principles such as that of checks and balances, with a chapter on fundamental rights, including the right to an effective remedy before an independent court. I thus fail to see why, with such an extensive instrument at our disposal, we should feel helpless and tolerate that our State functions in profound violation of the rule of law, just because the Constitution does not explicitly provide remedies to combat such systemic deformation.

We Have Done it Once Before

Our situation is easier today than it was in 1989, when everything had to be remade from scratch. Today, in addition to the Constitution itself and its guarantees, we have an extensive legal infrastructure with a developed case-law of the courts applying our principles and values and defining the limits of constitutional guarantees. We are part of the European Union's legal space with its own guarantees for the principles and values that make up the axiology of a democratic state governed by the rule of law, the Charter of Fundamental Rights and the generally applicable case-law of the European Courts. Maintaining in this situation a state of deep unconstitutionality, that is to say, a State that does not ensure the independence of courts, a judiciary of genuine, rather than sham-judges, the functioning of fundamental institutions (such as, in particular, the National Council of the Judiciary, the shape of which is in direct breach of the Constitution), appears to be absurd by law.

I am not a legal nihilist nor would I profess a revolutionary upheaval theory as a way to change the legal system. Fortunately, we do not need to resort to such instruments. On the other hand, I am a judge with long-standing constitutional practice and I know how much depends on a rational, reasonable and well-substantiated interpretation of the law if we want to use the latter in accordance with its function and purpose. Only such an approach to the application of the law at a constitutional level – which refers to the fundamental principles of the system as its real foundation and essence – can nowadays serve as a generally recognised method. At the level of European law, this method is a lever for the development of this right, ensuring that it is systematically developed and adapted to changing external conditions without the need for a continuous revision of the Treaties.

Today, in Poland, much depends on the legal community, on its imagination and on a correct definition of values and their hierarchy. We have a plethora of arguments, starting with the text of the Constitution itself, the interpretation given by the Polish Constitutional Tribunal before 2016, the Supreme Court, the Supreme Administrative Court, as well as the European Courts. This makes it possible to think constructively about the repair of the rule of law in Poland through various instruments which are not just of a legislative nature. It would be a tremendous mistake and a blow to civil society and our constitutional and legal culture if we chose omission and passivity over our Constitution's potential.

I often hear that the current feeling of helplessness is fueled by caution and respect for the Constitution and the laws in force. This implies that any solution allowing Poland to emerge from its structural crisis should be criticized as violating the law. We are indeed walking on a thin line over the abyss where the anti-law demons are hiding and risking the very existence of the rule of law in the future. But the alternative to such risky migration is to wait and do nothing. This, however, would lead to permanent unconstitutionality, violations of fundamental rights and of the axiology of a democratic state governed by the rule of law. That is why we do not have a choice.

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