The Inherent Limits of Law - the Case of Slovenia

Matej Avbelj

06.12.2013 doi: 10.17176/20170930-150933

Kim Lane Scheppele's proposal on establishing a systemic infringement action on the unamended legal basis of Art. 258 TFEU is another genuine and creative attempt of improving not the present functioning of the European Union, but the failures in the rule of law and democracy in the Member States. Like Jan Komárek I am sympathetic to her idea and unlike him I am relatively convinced that Art. 258, as it presently stands, could very likely be used in the proposed way. After all, the law does always leave some room for creative reconstructions and use of legal remedies whose meaning has been pretty much settled.

My concern, however, lies elsewhere. This time not in my pluralist bias, as you might have anticipated, that has led me in my previous post to insist on the institutional limits and respect for jurisdictional boundaries between EU law and national law. What I am rather concerned with is a more profound dilemma. Can the values and objectives of Art. 2 really (or even at all) be systematically protected and ensured, not just on books but in practice, by legal means, and in particular by courts, let alone the supranational ones?

I believe the answer is no. In fact, the answer is *in principle no* with respect to normal states, where the values of Art. 2 are systematically internalized in practice and deviations are but exceptions that confirm the rules of normality. And the answer is *never* in the countries, in which such values are systematically breached or where such values are respected purely formally, whereby reliance on the form disguises much messier hard facts on the ground. While the former cases are, of course, rare in the European Union, the latter are not that exceptional as I intend to show in the next few lines.

However, before revealing my particular case-study, let me explain why the law is, at a certain point, inherently limited in its capacity to remedy the failure of democracy and rule of law *lato sensu*. This is so since all the values of democracy and rule of law depend on the critical mass of institutional actors enforcing them with their own integrity. Hart and Dworkin meet at this point. To have the democracy and the rule of law proper the institutional actors (indeed everyone) have to integrate their underlying values as part of their internal point of view, constituting them into their rule of recognition. But they will only be able and willing to do so, if they are themselves men and women of integrity. As Joseph Weiler once wrote: democracy of vile persons will be vile. And so will be the law, we can add.

Now, this brings me to the aforementioned case study. Much on this blog has been written about the constitutional (and other) crises in Hungary, Greece, Romania and Bulgaria, but Slovenia, I believe, should be added to this club too. Long considered to be the best disciple among the new Member States, the country is now facing real prospects of an EU bailout with the troika and the other usual arsenal of measures. This economic crisis has eventually and decisively revealed the internal structural pathologies in the functioning of Slovenian democracy and of its rule of law. The very pathologies that have caused the same economic crisis to start with.

The Slovenian case has long escaped the attention of its European intellectual and political peers. And rightly so, states have to be able to solve their problems alone – a strong democracy and the rule of law can only emerge if they are self-made, autochtonous, rather than imported or even imposed from abroad. However, at a certain moment the threshold point is crossed and when the externalities, this time largely economical, are to be internalized by the wider European community, a European reaction is merited, perhaps even required in a pluralist polity too.

But what can be done? In a country like Slovenia, where all constitutional prerequisites are formally in

place, but practice deviates from them due to the people who have failed to actually internalize them, law has not been of much help. Certainly not national, as this is made and applied by the very same institutional actors who are part of the problem; but equally not supranational as this cannot enforce integrity in the institutional actors that would make them close the gap between the formal rules and their implementation in practice.

While Scheppele's proposal alone would thus make little difference if applied to the Slovenian case, what would be needed is an integral set of instruments which would, in a pluralist manner, force the country from the outside and therefore from the external point of view, to reflect on the merits of its own constitutional system and justify its practical conduct inside it. As I argued before, pluralism leaves no room for complacency, for self-sufficiency, for self-closure, but it requires the ethics of a dialectic open-self. In this process of justification, the Member State (actually its governing coalition and other institutional stakeholders) must genuinely consider the counter-arguments and be open to reconsider their own position and to amend it.

The external impetus for country's normalization can come under various guises, as a stick or as a carrot, but politicizing and publicizing the state of affairs in the affected country could be more effective than perhaps imagined. The, of course necessarily somewhat politically partial, resolution of the EPP on Slovenia, could be quoted as an example. While Jan-Werner Müller is right that this is, first of all and as against Hungary, party politics, he errs in his conclusion that it does not contribute to the impartial protection of European standards. There is no such thing as an impartial protection of European standards – we can only approximate it through the interface of as inclusive range of different politically partial approaches as possible. And, of course, the proposed Copenhagen Commission would be welcome to add its more expert input into this broad and encompassing debate. Finally, judicialization of the matter through Scheppele's systemic infringement action under Art. 258 could be attempted too.

Would this integral approach suffice or would we need a stick, even a baton? It at all depends on the existing social capital of democracy and rule of law in the country at stake. If the latter is present only in weak doses or even absent, then beating will certainly not help. In such a case the environment conducive to normalization of a country should be created and fostered from inside and outside. But this will take time.

ABOUT THE AUTHOR

Matej Avbelj

Matej Avbelj ist Professor für Europarecht an der Graduate School for Government and European Studies in Kranj, Slowenien.Matej Avbelj is a Professor of European Law at the Graduate School of Government and European Studies at Kranj, Slovenia.

SUGGESTED CITATION

Avbelj, Matej: The Inherent Limits of Law – the Case of Slovenia, Verfassungsblog, 06.12.2013, doi: 10.17176/20170930-150933.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20170930-150933.