

## RULE OF LAW IN THE 21<sup>ST</sup> CENTURY

*András Zs. Varga*

*Pázmány Péter Catholic University, Budapest*

**Abstract:** Rule of law is one of the core principles of constitutions and also the essential value of the European Union. Still, rule of law does not have a unanimous understanding either in the academic sphere or in the jurisprudence of the countries. The paper explains some theories on rule of law, then it considers how the doctrine prevails in the praxis of the Venice Commission and in the wording of the Treaty on the European Union. The paper concludes that interpretation of international fora involves the meaning of rule of law in a national level, even though the base of interpretation is unclear.

**Keywords:** rule of law, Venice Commission, constitutional interpretation, European Union

### 1 RULE OF LAW IN HUNGARY AFTER THE TRANSITION

A new constitution called *Basic Law of Hungary* (*Magyarország Alaptörvénye* in Hungarian) was adopted in 2011 and entered in force on 1<sup>st</sup> January 2012. It can be accepted as generally known event that the new constitution lead to tensions among Hungary and the Venice Commission or the institutions European Union (EU). The trivial explication of these tensions is that circumstances of adoption and some regulations of the Basic Law seemed to challenge the rule of law as fundamental value of the European Union (enacted in Article 2 of the Treaty on European Union (TEU)) and of the Council of Europe (CoE). Some accustomed aspects of the text (like the long and ceremonial preamble called National Avowal; the hermeneutical rule of Article R prescribing that the regulations of the Basic Law should be interpreted in accordance with their purposes, the National Avowal and the achievements of the Hungarian historical constitution; the limitation of powers of the Constitutional Court regarding economical cases) and the quick amendments of the Basic Law were and are under disputes also in Hungary. However, the degree of tension needs some more explanations, hence other regulations of the Basic Law reflect the former achievements of interpretation by the Constitutional Court that should have been welcomed. On the other hand, some amendments of the former Constitution (amended for more than 50 times in 20 years) had reshaped completely the division of powers between the Parliament and the Executive without any reaction of the EU or CoE institutions.

If we project the events on the background of nearest history it can be concluded, that preparation and adoption of the Basic Law met important moments of development of the concept of the rule of law. This special circumstance had sharpened the position of the interested institutions.

The first milestone of the actual constitutionalism in Hungary was the transition itself. On 23<sup>rd</sup> of October 1989 the Hungarian Parliament accepted an interim Constitution (formally as a comprehensive revision of the former Bolshevik constitution). It was consciously interim, as its preamble stated that it would be in force until the adoption of a new constitution. Article 2 of the interim Constitution declared that Hungary is an independent, democratic state under the rule of law. The

declaration had been unprecedented in Hungary. Also, on political considerations, it was an answer (a reaction) to the state establishment and the concept of law of the former period ruled by ideology.

No-one could be in doubt about the existence of implacable controversy between the Constitution and the inherited legal system. These were controversies for the solution of which the constitution institutionalized a strong Constitutional Court, in power to annul statutes. The actual situation and the constitutional empowerment both demanded that the Constitutional Court, by using their means, should speed up “clearing the law”.

In this process the rule of law clause was a legally relevant issue which the Constitutional Court needed to assess and to give certain interpretation to. But how to fill the content of rule of law, what is allowed to do and what shall be done; such information was not available by any live, domestic model. From the first decisions clause of rule of law was interpreted by the Constitutional Court broadly at their discretion. The Court took the decision that a loophole is impossible to exist in a state governed by rule of law; i.e. every single detail of state power shall be laid on constitutional norms. Beyond enshrining the abstract meaning of rule of law in a decision, the Constitutional Court likewise assessed the content of the concept in several of its decisions. They reached the conclusion that:

”Declaration of rule of law in Hungary (...) can be comprehended only as in a formal sense, and in substantive matters it has further references to other, specified constitutional rights. Principle of rule of law may be directly called up only if there is no other specific right regulated within the Constitution.“

In fact, the wording of the Constitutional Court is quite uncertain because, firstly, it elevated rule of law above other (substantive) provisions (‘formal’ rule of law). Secondly, rule of law was assumed to be a subsidiary rule (further reference to nominated rights). Thirdly, it is presumed as a mysterious (secret) substantive rule from which (in the absence of other provisions) individual constitutional rights can also be deduced. In a different decision, this multi-fold character is further enhanced (true for normative acts only).

The above examples show how, from the principle of rule of law, the Constitutional Court emphasized the relevance of legal certainty, elevating that to be the source of the most various constitutional requirements under various qualifiers. Thus, it was legal certainty the key element to open any legal dogmatic lock: the Constitutional Court could deduce almost anything from this principle and its individual decisions enlarging the concept enhanced more and more this discretion. From here on, the Constitutional Court has been entitled to do anything.

The new constitution called Basic Law of Hungary was ready-made and accepted by the Easter of 2011. Its structure was strongly different from the interim Constitution. Some regulations remained unchanged, others got new formulation, and very new regulations appeared within the text. But one regulation remained the same. Article B) declared that Hungary is an independent, democratic state under the rule of law.

## **2 GROWING INTERNATIONAL INTEREST REGARDING RULE OF LAW**

### **2.1 The Venice Commission and the Report on Rule of Law**

The first knight with rule of law on its shield was the Venice Commission, officially known as the European Commission for Democracy through Law, was established at 10<sup>th</sup> of May 1990 by the Committee

of Ministers of the CoE for a period of two years. The Commission, composed of individual members appointed by the governments of the member states, has designed the cooperation between the member states of the CoE and other Central and Eastern European states (not members at that moment) including first and foremost mutual knowledge and approximation of the legal systems of the states concerned, understanding of differing legal cultures and resolving and improving the functioning of the democratic institutions. In its work, the Commission was to give priority to constitutional, legislative and administrative principles and methods for the effectiveness and the rule of law of democratic institutions, the protection of fundamental rights, public participation of citizens and the protection of self-governments. The founding document was revised by the Committee of Ministers in 1992, as a result of which the activities of the Venice Commission continued for an indefinite period.

In the first years of its activity the Venice Commission published one opinion regarding Hungary, and the situation is the same for Central Europe and the Baltic States.

The opinions of the Commission, which had become increasingly prestigious symbolised by the number of its members, are unavoidable, even if the opinions are formally non-binding. The “soft” opinions cannot be ignored due to the prestige of the institution, its criticism is unpleasant for the member state in case. Thus, the Commission appears as a quasi-court to the applicant, there is no other body to supervise the opinion once published.

The consistency of “case-law” of the Commission was facilitated by the opportunity granted the Commission to act even in lack of request. Without infringing the powers of other bodies of the CoE, the Commission may on its own initiative, carry out research and, if it is justified, draw up studies, drafting directives, legislative and international agreements that the legislative bodies of the CoE may discuss and accept. This activity is very effective.

The turning point of the activity of the Venice Commission was 2011, when its Report on the Rule of Law was adopted and published. The report states that the rule of law is an essential component of democratic societies, it concerns the relationship between the state and the individuals, but it also concerns the effects of globalization and state deregulation, as well as the private, international and supranational public actors on individuals. The central finding of the Report is the definition of the rule of law derived from Tom Bingham:

“Every private or public person and authority within a State must be subordinated to, and should be, as a beneficiary of the law, which is publicly accepted with a view to the future and which is used by the courts in public proceedings” (Article 36).

Based on the definition of Bingham, the Report observes as conceptual components of the rule of law: certainty of law, which includes its perception, clarity and predictability, the assurance of subjective rights based on law (rules) and non-discretionary decisions, equality before law, the lawful, fair and rational exercise of state power, the protection of human rights, the resolution of disputes by fair trial and the respect of States’ obligations under international and domestic law. By the Report the Venice Commission created its strong instrument appropriate to push any member state in the direction conceived by the Commission to be right and correct. The instrumentalisation was completed by a technical questionnaire that made it even more effective, the Rule of Law Checklist.

## 2.2 Rule of law in the TEU

The EU and the CoE are different entities with different institutions. However, the concept of rule of law served as a promoter of coordinated procedures. The key moment was the adoption and entering

into force of the TEU. Rule of law, this paradigmatic principle of multi-source and multi-component has become normative rule not only in Hungary but also in other countries and finally in the European Union. The basic document of the European Union provides for the values of the Union:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

TEU has become binding since 1 December 2009. We can say that the rule of law has become a normative concept for the European Union. Due to the differences in terms of use, it seems appropriate to mention that the different terms (all of them official): e. g. rule of law, *Rechtsstaatlichkeit*, *État de droit* (and *jogállam* in Hungarian) are more than a linguistic feature. The instability of terms opens up space for arbitrary interpretations (now we can generously not consider that the European Union is certainly not a state at this moment, but in many languages it is based on the value of *Rechtsstaat*). The TEU, therefore, stipulates without any conceptualization that one of the basic values is the rule of law or *Rechtsstaatlichkeit* or *État de droit* or *jogállam*. As a result of Article 2, the raising of the principle of rule of law to normative rank opens a gate that would probably never be closed: a tool for the EU bodies that can be used without restrictions.

### 2.3 The new framework for strengthening the rule of law as link between EU and the Venice Commission

There was no need to wait much for a soft (looking) and therefore easy to use tool. The European Commission, at the invitation of the Council and Parliament, developed a tool for the new EU framework for strengthening the rule of law by 2014, which in fact is partly political and partly legal. One of the key features of the “framework” is that it excepts the rule of law from other values of Article 2 and gives priority to its protection whenever “threats to the rule of law” occur which are of systemic nature (point 4.1). This wording undoubtedly demonstrates how easy is to formulate an accusation of the violation of the uncertain content of the rule of law, yet it is worth taking a look at the examples of offensive situations:

“The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national “rule of law safeguards” do not seem capable of effectively addressing those threats.”

The Communication on the “framework” for the rule of law contains another surprise:

“The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.”

In other words, the question of whether a Member State violates the rule of law is not necessarily answered by the European Commission but it may take over the findings of the CoE constitutional advisory body based on an informal procedure. With this non-legislative Communication the European Commission, body of the supranational EU that holds some characteristics of a state linked

its rule-of-law-protection-mechanism to the interpretation of the pan-European international organization based on a much wider membership (47 CoE Member States), the constitutional advisory body of the CoE, to the soft case-law of the Venice Commission.

As a result, we are witnessing the emergence of an unprecedented institutional linkage, which makes applicable the normative formulation of the rule of law paradigm, extracted from fundamental values in a free interpretation against any member state. Member states that are involved in suspected “systemic” threat are thus faced with a multi-faceted defense, in which the “accusers” are coordinated. The “systemic” concept, as we recall, was published in the European Commission’s “Framework” Communication. It is necessary to emphasize it because it allows arbitrary “accusations”: it is not necessary a large number of serious individual injuries committed by authorities of a member state and considered by national or international courts. It is enough if the soft opinion of the Venice Commission based on its informal inquiry on a political request suggests such a systematic threat.

The free interpretation opens space to bypass the declaration of Section 2 Article 4 of the TEU stating that “The Union shall respect the equality of Member States before the Treaties”, hence the Venice Commission has no similar limitation.

### **3 COINCIDENCE OF CHANGES IN INTERPRETATION OF RULE OF LAW**

If the developments of the EU, the Venice Commission and the Hungarian constitutionalism are examined in their projection to each other, it can be seen immediately that the new Basic Law was prepared and adopted in a period of time (2010 – 2011) when the concept of rule of law and its international (or supranational) context got into the focus of interest. The TEU added the rule of law to the fundamental values of the EU – firstly in the history of the Union. Due to this legal phenomenon an inevitable need have been risen for interpretation of rule of law as normative principle – interpretation that could serve as universal principle in cooperation among the EU and its member states. One of the answers to this need for interpretation was given by the Venice Commission, the advisory body of the CoE in constitutional matters which had a two-decade long expertise in endeavour of harmonising different legislations. The Report on Rule of Law filled perfectly the temporary hermeneutical vacuity around the Article 2 of the TEU. Hungary’s Basic Law was dropped into this international euphoria of constitutional interpretation. The moment was neither the time for constitutional specialties nor for national identities, for constitutional unorthodoxy. CoE and the EU decided to use the principle of rule of law and their mechanisms to guarantee a kind of orthodox interpretation of rule of law and orthodox state practice.

### **4 CONCLUSION: COMMON AND NATIONAL VALUES IN EUROPE**

However, the situation is disturbing not only for Hungary or Poland, but for any European State. The dispute between universalist and local (or sovereigntist) approaches of constitutions or of the principle of rule of law did not come to an end. The experience of the last years shows that international cooperation in protection of the universal concept of rule of law is more and more emphasised, and

the role of international institutions, constitutional and supranational courts have strong positions even against legislations of the member states. These effects were facilitated by TEU, by the Venice Commission and by linkage between the European Commission and the Venice Commission.

But in the same time constitutional specialties were not left unreflected. The ECJ in *Internationale Handelsgesellschaft* used the new term of “constitutional traditions common to the Member States” with focus on the common and homogenous protection of human rights. As the danger of overcoming the constitutional judicature of the member states was quite clear and present, the answer did not delay. The German *Bundesverfassungsgericht* reacted in 1974 with *Solange I* based on the Grundgesetz, namely on its eternity clauses stated that community law, consequently the common constitutional traditions protected by the ECJ does not have priority over the protection granted by the Grundgesetz and protected by the German courts. In this way *Solange I* tried to go against the international common traditions by highlighting the role of national constitutions. The quiet battle was going on for decades. *Solange II*, *Solange III* and many other cases were the nodes of this tug of war. Finally, The Treaty on European Union tried to give a peaceful equilibrium.

Articles 2 and 6 of TEU identifies common values of the member states, but in the same time Article 4 rules that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It means that common traditions as international or supranational values will be protected later on by the ECJ which perhaps will maintain the primacy of the EU law against national constitutions. But on the other hand, just the TEU gives a strong background for the standpoint that the common European constitutional heritage must not be opposed to national constitutional identity and vice versa. The two set of values should be equilibrated.

It means that constitutional identity of the different nations cannot be dissolved in an artificially constructed common formula. The common values contain what is common, the national values cover what is not common. But values that are not common are also values and these values also need legal protection. If constitutional identity disappears, the common part also loses its importance, it will be reduced to a mere formal order. From institutional aspect this means that if the common European heritage is developed and protected by international and supranational courts, the ECJ and the ECtHR, the equilibrium needs a similar court protection. This protection is vested in the constitutional courts of the member states of the EU. Thus the constitutional courts may have different tasks but their primary mission is protection of their own constitutional identity. This is not only national but – if we accept the regulation of the TEU – it is also a European mission.

The path was shown by the German *Bundesverfassungsgericht* in the *Solange* decisions, and many of the constitutional courts made their contribution to fulfil this mission. The Hungarian Constitutional Court tread on this path by its decision 22/2016. (XII. 5.) AB. The Court stated that it “interprets the concept of constitutional identity as Hungary’s self-identity”. “The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today (...) These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon. (...) The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the

protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State”.

It is beyond any doubt that there will be long debates regarding the co-interpretation of the universal principle of rule of law and national constitutional identities. Among the EU institutions and member states there is a common ground of interpretation, the TEU. Among member states and the Venice Commission the common ground is less clear.

**Contact information:**

prof. Dr. András Zs. Varga  
varga.zs.andras@jak.ppke.hu  
Pázmány Péter Catholic University  
Faculty of Law and Political Sciences  
Szentkirályi u. 28-30  
1088 Budapest  
Hungary