



Conference Report on “The Rule of Law Under Threat: Eroding Institutions in the Member States and European Remedies”

University of Erfurt, 20-21 October 2022

Aimee Sander/Dr. Robert Böttner

On 20-21 October, the Jean Monnet Chair of Public Law, Public International Law and European Integration at the Faculty of Law, Economics and Social Science at the University of Erfurt organised a hybrid conference on "The Rule of Law Under Threat: Eroding Institutions in the Member States and European Remedies" under the direction of Professor *Dr. Hermann-Josef Blanke*. Against the background of the progressive weakening of rule of law guarantees in individual EU Member States, the conference was dedicated to the principle of the rule of law as enshrined in Article 2 TEU. Representatives from academia and practice were invited to discuss in an interdisciplinary as well as international framework the challenges that arise in particular from the erosion of judicial independence in the course of illiberal constitutional policies that are contrary to the rule of law, for example in Hungary and Poland. The discussion also focused on the practical effectiveness of the Union's individual control and sanction instruments with regard to rule-of-law abuses in the Member States and concrete solutions to protect fundamental guarantees of the rule of law from further erosion.

In his introduction to the critical nature of the ongoing rule of law crisis, *Hermann-Josef Blanke* also pointed out that one should not only look at the serious problems in Eastern Europe, but also at the "old" Member States. For here, too, the failure to implement European secondary law and the disregard of the primacy of Union law could lead to a rule-of-law problem.

Professor *Dr. Theodore Konstadinides* (University of Essex) then spoke about the principle of the rule of law as a fundamental value common to the Council of Europe, the European Union and the constitutional traditions of the EU Member States. He pointed out the difficulties in finding a common definition of this principle, which is why its formulation and implementation often differ from one Member State to another. However, it is crucial that the rule of law, which is anchored in the national constitutions, is enforced and respected. The EU, as a community of values, is thus obliged to uphold the rule of law in its Member States.

Professor *Dr. Gábor Halmai* (EUI Florence) shed light on the phenomenon of illiberal constitutionalism, which leads to a successive dismantling of rule of law standards. The collapse of the rule of law and democracy in Hungary and Poland is representative of the rise of this illiberal constitutional model. The lack of checks and balances and the increasing influence of the executive and the legislature on the judiciary are characteristic of this. The "complicity of the EU", as he called it, is particularly evident in the insufficient demand for its fundamental values and in the inconsistent application of the existing EU instruments for the protection and safeguarding of the rule of law. So far, there is a lack of political will to actually use the instruments with which respect for common values can be demanded.

The debate took on a new dimension with the contribution of *Dr Raphael Bossong* (German Institute for International and Security Affairs), who outlined various political strategies that could be used to counteract the erosion of the international and European rule of law. For example, the rule of law as a primarily legal construct also requires embedding in the political context. Support for this constitutive principle of the EU could take place both indirectly, by keeping the issue on the political agenda and in public discourse, and directly, through politicisation, mobilisation and the exertion of public pressure. Special attention should be paid to strategies of containment and to overcoming the "culture of consensus" in the European Council.

Using the example of the nomination and appointment of judges of the supreme courts, Professor *Dr. Piotr Mikuli* (Jagiellonian University/University of Sheffield) showed the political factors of influence in these selection procedures and processes. Using a typology of different modalities, he differentiated between (1) the political nomination and appointment of judges, characteristic of the US model, for example, and (2) the nomination and appointment of judges with the participation of independent bodies such as the national judicial councils. Since the independence of the judiciary and judges is a core element of the rule of law, special attention must be paid to the appointment of judges. In particular, the aspects to which more pluralism and diversity in the selection and appointment procedures is required and how this criterion can be guaranteed among the members of the judicial councils require further discussion.

Dr. Ned Richardson-Little (University of Erfurt) added a theoretical approach to the discussion and reported on initial findings from his research project "The Rights of the Volk: Human Rights, the Basic Law and the Far-Right since Reunification" as part of the Volkswagen Foundation project "Towards Illiberal Constitutionalism in East Central Europe: Historical Analysis in Comparative and Transnational Perspectives". The emergence of illiberal democracies points to a possible failure of the democratic transformation process in post-communist societies. Especially with regard to Germany, right-wing populist parties tried to instrumentalise the events of 1989 and the peaceful revolution in the GDR for their illiberal agenda.

Professor *Dr. Aida Torres Pérez* (Pompeu Fabra University) took up the problem of undermining judicial independence. According to her, judicial independence primarily serves to enforce the rule of law and the legitimacy of the courts. A distinction must be made between external and internal independence and between a *de jure* and a *de facto* perspective. In this context, judicial protection of rights (Article 19 (1) TEU) is an essential prerequisite for the use of an effective legal remedy and a fair trial in the sense of Article 47 CFR. At the same time, the judicial containment of these sub-principles of the rule of law is of particular importance for mutual recognition and mutual trust between the EU and its Member States and in the context of preliminary ruling proceedings.

Against the background of the ruling of the Polish Constitutional Tribunal of 7 October 2021, *Dr. Udo Bux* (European Parliament/EP Liaison Office Munich) took up the principle of the primacy of Union law, which had increasingly been called into question by national constitutional courts in recent years. The primacy of Union law as developed by the ECJ forms an integral part of the legal order of the Union and has been taken up by the Treaty of Lisbon in the form of Declaration No. 17. On several occasions, however, national constitutional courts, for example in France, the Czech Republic, Hungary and Germany, had partially questioned the primacy of EU law and, like the German Federal Constitutional Court, had conducted *ultra vires* proceedings. The German Court's ruling of 5 May 2020 was cited as a prominent example. While this primarily concerned norms of secondary Union law, the ruling of the Polish Constitutional Tribunal represented a clear attack on central norms of European primary law.

The presentation by *Dr. Jonathan Bauerschmidt* (Legal Service of the Council of the EU) turned to the question of what instruments the EU has at its disposal to protect the value of the rule of law

and to enforce its observance. These included the procedure under Article 7 TEU, the rule of law dialogue and the conditionality regulation to protect the EU budget. While the mechanism of Article 7 (1) and (2) TEU is difficult to activate and only of limited legal effect, the rule of law dialogue, for its part, has no direct legal consequences. Thus, the conditionality regulation for the protection of the EU budget, which defines the rule of law principle in more detail in its Article 2, is the most powerful instrument so far. However, the EU instruments are complementary and must be further developed in the future.

The contribution by Professor *Dr. Michael Riegner* (University of Erfurt) on the concept of transformative constitutionalism explained that the crisis of the European rule of law must be located in the overall context of a worldwide weakening of liberal and democratic basic principles. He gave insights into the German-Brazilian research project "Varieties of constitutionalism: Contestations of liberalism in comparative constitutional law", for which he is co-responsible. The advance of autocratic and illiberal conceptions of law as well as the rise of populist and nationalist forces threatened not only the rule of law but also the central pillars of the liberal constitutional state. Against this background, it is not enough to concentrate solely on the European dimension. Rather, the EU should broaden its perspective and counter illiberal tendencies both within and in its external relations.

The intensive discussions made clear the complexity, but also the critical nature of the topic. At the same time, it became clear that it is both important and difficult to effectively counter the erosion of the rule of law. The results of the conference will be published in an English-language volume supplemented by further individual aspects.