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ESSAY

The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "*Rule of Law*" in Illiberal Democracies

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Most things have dark side(s), at least in law.[1] However, and surprisingly for a noted "historian in the Marxist tradition", E.P. Thompson famously declared that the rule of law was an "unqualified human good."[2] Perhaps one needs to be a historian who deals with the horrors of the English legal system of the eighteenth century to produce such a bon mot.

Rule of law (hereinafter: RoL) is everywhere in law and even in politics (as a matter of the political evaluation of a country—as is the case under TEU Art. 7 in the EU, or a matter of international developmental aid—see the Washington conditionalities). Various bodies and political movements of and within the EU would like to use RoL as a standard that would serve to determine various sanctions against those countries which are in violation of some part thereof or another.

Looking at the use of RoL (even without the dark glasses of age) in the current transition to illiberal rule, one is tempted to ask: 'Is it not inherent in the rule of law that it has disastrous consequences?' This is a very practical question given the use of the law in "illiberal democracies". I will use the practical example of the use of the rule of law in emerging illiberal democracies to test the practical robustness of the concept.

Martin Krygier, who knows a thing or two about the rule of law, would not consider the current Hungarian legal system as one that satisfies any meaningful (even formal) definition of the RoL. But it is not easy to prove this intuition: after all, all the critical elements of the Hungarian system correspond to established solutions of respected democracies.

Martin's claim is that RoL is about tempering power by tempering arbitrariness (by the state or perhaps other powers too) i.e. "uncontrolled, unpredictable, and/or

[1] As far as I am concerned, the dark sides become more visible with aging, certainly due to visual deterioration. However, this essay is not about its author (to the extent possible) but about Martin Krygier, whose views were not obscured by age, if aging is of any relevance at all in his case.

[2] Thompson 1975, P. 266.

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disrespectful" power.[3] But in Hungary the use of power is formally controlled and it is hard to prove that the judiciary cannot exercise control (even if the control of the constitutional court is limited at best—but one can have a controlled system without a constitutional court!). Is this legal system arbitrary in the sense of unforeseen consequences? Not more so than other systems with a similar tradition. It is true that in matters that are important for political power certain legally established exceptions apply but *most* of the grounds for the exception formally fits into standard solutions of the RoL, at least *most* of the time. Such divergences are not necessarily fatal: After all, even if there are certain constant principles behind the RoL and certain rules like non-retroactivity, for example, apply in all RoL canons, RoL seems to be more of a cultural practice (a set of practices) than anything else. As to the third element, namely that the arbitrary regime is disrespectful of its citizens, this is certainly true in Hungary in a deeper sense as the regime and its law *cheats* them. For example, judges are sent into retirement as part of a pension reform and that measure is supposedly intended to serve equality. With sufficient transitory periods and advantageous early retirement packages the system will be "impeccable"; many of the judges concerned will endorse it. The cheating by the state makes the subjects of the illiberal realm complicit in this cheating: Most politically unconnected businessmen will lose most of the time in public procurement. The imperfectly integrated businessmen will continue to participate in public procurement tenders, deliberately presenting a losing offer only to become one of the subcontractors of the winner, the real trustworthy loyalist.

Recall Martin's admonition on how far RoL may go: "The very ideological use of law involved not cheating *all* of the people *all* of the time, for the ideology must be believed, and [here comes the quote from Whigs and Hunters:] 'the essential condition for the effectiveness of law, in its function as ideology, is that it should […] actually seem to be just.'"[4] In this quote I have omitted the fact that Thompson required one more thing: law "should display an independence from gross manipulation." It is this element that is the least satisfied in illiberal democracies, but the standard is a "*display*" and not the actual lack of manipulation, and a display there is most of the time. An illiberal democracy knows how to behave and, contrary to communism or even Russia today, it cheats only to the extent that is necessary. Formally, citizens' rights are visibly respected, at least to a sufficient extent. Of course, where the regulation moves towards a freedom of assembly where that right cannot be exercised on national holidays or in places of historical relevance (especially where a whole city centre is of such relevance) the cheat becomes a little more obvious. The citizens (and even more so the authorities) of an illiberal democracy are "living in lies" again—(see Vaclav Havel's hope that citizens will step out of living with the "lie" and communism will end),[5] and/or the same citizens are considered dupes to be manipulated. However, such a deeper lack of respect is not something that can be demonstrated in a court or even in a political institution.

[3] Krygier, 2016.

[4] Krygier 2019, p. 118.

[5] "Living within the lie can constitute the system only if it is universal…everyone who steps out of line denies it in principle and threatens it in its entirety…" Havel 1986, pp. 55-6.

This constitutional chicanery differs in its consequences from the ideological oppression in authoritarian or totalitarian regimes: it is not that the innocent and alleged 'enemies' of the regime are convicted on trumped-up evidence in kangaroo courts or killed in the backstreets by hired rogues, but only that the corrupt beneficiaries of the institutionalized theft are protected from prosecution on rule of law grounds: the police or the prosecution authorities do not find sufficient evidence or, if the worst comes to the worst, amnesty and generous statute of limitations rules apply. The regime relies on the disapplication of the law (see the Berlusconi saga or the amnesty granted by outgoing President Klaus) and not on the application of the non-law. In addition, RoL in illiberal regimes remains within the culture of the RoL. Law and the RoL to a great extent remain *the* prevailing language of power (even if a *vulgata*) and the language of discourse about power (not to be confused with nationalism and identitarianism which are important for public mobilization and as a *source* of power).

Consider the paradigmatic case of public procurement in Hungary, probably the central element of creating economic power and dependency (the source of social power); these two forms of power are then converted into political power at elections. And yet, Hungarian public procurement law strictly follows EU law because of the single market and also for the needs of the disbursement of EU transfers, a vital element of the national economy.

What can be done against a system of such practices in the name of the RoL? Political issues and political injustice can hardly be solved in a court of justice.

The rules on the termination of a licence and of the new concession regime are clear, the processes are transparent: the Razian formal criteria of the RoL are satisfied. But perhaps Martin is right: if illiberals intend to render power more available for arbitrary use, then it violates the value that grounds the rule of law in a sense that Thompson has attributed to it: for him RoL meant "the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims."[6] Inhibitions are disappearing but the rulers in an illiberal democracy, at least in the formative years, do not impose all intrusive claims, they do allow one to live the way one likes as long as it does not represent a danger to the rulers.

To find the practices of chicanery contrary to a legal concept of the RoL requires a dangerously substantive concept of the RoL. But illiberal democracy's chicanery may escape even that very broad net of substantivity: Most fundamental human rights are observed most of the time, and if the use of a right becomes a political nuisance there will be another fundamental right or public interest to justify the restriction of that first right. This is unobjectionable from a substantive RoL perspective. Yes, all these restrictions occur in a growing number and point increasingly to a government friendly, nationalistic and antiliberal regime, but such preferences are not ruled out by the RoL, although their combination kills the RoL. Most of these illiberal systems are sloppy but not to the extent to frighten away foreign investment or domestic capital. The injustices occur beyond the reach of the formalities of the law, for example where people are dismissed from their employment due to their

[6] Thompson 1975, p. 266.

political views: the careful termination will use a valid justification. As always in a RoL system, the really vulnerable will hardly get to court to ask for justice. But in the eyes of the law they are all rights holders, and the very old common law idea of the RoL that people are accepted as rights holders is honoured.

To cut a long story short: while RoL may be a good ground of criticism on the political and theoretical level, it remains problematic when it comes to the evaluation of a legal system for practical purposes (investment, foreign aid, international sanctions) and as a legal concept in the application of the law. For the lawyer committed to neutrality, RoL is an uncertain ally—or even a constraint that would force the lawyer to do the morally wrong thing.

Once again, these practical shortcomings are of limited interest to legal philosophers but Martin, who with his background in the sociology of law, is also interested in the social reality of RoL-based legal systems. It is for this reason that he recently became interested in substantive RoL issues where substantive means an interest in the *content* of norms, but the content requirement is limited to limiting government's abusive accumulation of power. Nevertheless, this may trigger a more demanding RoL review which could (would?) exclude systematic abuses relied upon in illiberal regimes from the 'RoL family'.

While ready to acknowledge the pressing social needs expressed in the substantive attempts, Martin avoids the formal/substantive division by turning RoL into a matter of political philosophy, admitting at the same time that it is a practical matter. RoL is a teleological and not an anatomical concept. This is a legitimate escape route, but it does not answer the pedestrian practical problems of the nature of the concept with its inherent readiness to endorse its own abuse: the RoL can serve efficient, disciplined arbitrariness.

In his more recent writings Martin is inclined to consider a quasi-substantive folk knowledge of the RoL: this non-formal concept implies that it is people's understanding of [their?] guaranteed rights that gives *content* to RoL.

Indeed, historically, there was talk of natural reason and natural justice being part of common law. It ought to be *a* rule of law (this is how the term appears in the early texts) that resonates with what is in the heads of (reasonable) people and judges merely reflect what is in those heads. This was the justification of the common law being the reason of common men, against the arbitrariness of royal power in the seventeenth century.[7]

As Thompson wrote: "The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just."[8] The problem with illiberal democracies is that, as Martin has observed, RoL provides legitimacy and the "legitimacy of a government might lessen appreciation of injustices it commits [especially

[7] See, however, Hobbes: "Truly I never read weaker reasoning in any author of the law of England, than in Sir Edward Coke's Institutes, how well so ever he could plead." A Dialogue between a Philosopher and a Student of the Common Laws of England, Molesworth 1839, p. 144. For Hobbes only natural law is "a precept, or general rule, found out by reason".

[8] Thompson 1975, p. 263.

among beneficiaries like investors to the concerned countries] and … sufficient injustice might well erode a claim of legitimacy."[9] Illiberal democracies, at least until they reach a point on their trajectory, and depending on their international dependency etc., are keen not to commit such "sufficient injustice", at least not to the detriment of too many people. It is in this context that some of the qualifications used by Thompson become relevant for illiberal RoL: the law and even its application is only *occasionally* unjust—and that will do the trick for legitimacy purposes. And the laws of the illiberal democracy may prefer what is in the (many but not most) heads and not what the law says. Consider the typical example of creditors and debtors: creditors would like to see a return on their investment in real terms even where there is inflation; and (to use a current East Central European example) private debtors who have to repay a foreign currency denominated debt after the exchange rate has dramatically changed to their detriment are convinced (contrary to the written law and complicated contractual language) that they are not supposed to bear the loss due to this (for them unforeseen) development. The CJEU and some national courts increasingly reinterpret the law in the name of consumer protection, favouring a kind of social justice (i.e. the consumer—debtor against the originally legally favoured creditor) to the detriment of formal RoL but to the advantage of what is in many heads: a kind of substantive law and material (redistributive) justice prevails to the detriment of the formal rule of law.

According to the logic of Martin's concept, a second content-related (but not social justice-related) requirement of the RoL would be that (in order to reduce arbitrariness) the actions of the authorities would need a legal basis (this is part of the formal RoL) and that people are entitled to fair justification when subjected to the law. In many respects this offers little extra mileage as the justification provided is that of legal legitimacy. But this has to be provided in a respectful and fair way: it requires an opportunity for the party concerned to voice her concern and to obtain a response thereto, even if only with the (incomprehensible and often unsatisfactory) words of the law. The legitimacy (justice) of the law comes from the fairness of the procedure. This is Tom Tyler's procedural justice argument: people are entitled to a hearing etc. This is nothing more than a procedural extension of the formal concept of the RoL and with adequate resources an illiberal regime will and does provide it. People will be gouged after having had the opportunity of a fair hearing and having received a detailed answer to their arguments in a proper judgment. If a country has sufficient resources, there will be enough trained judges who will write three pages of detailed but irrelevant yack–yack going through all the arguments of the parties and will send away the grieving party empty handed (if nothing works, then on the grounds of a technicality). Judicial review is only about the fact that a judge has spent enough time in order to determine that the administration or a lower court judge was smart enough to cover the traces of his crime of inhumanity.

Of course, it can be worse without the RoL. It does matter that people shall be taken officially as respected subjects and not objects. It is for this reason that it is becoming a RoL expectation that people have the right to give and receive an explanation (in law as well in politics). But once again this can be easily satisfied in the illiberal regime where the reason given is the reason required by the law which can be quite arbitrary or biased—see again the public procurement examples, above).

[9] Krygier 2019, p. 108.

The above-mentioned difficulties have practical consequences:

It will be difficult to find a systemic violation of the RoL in *smart* illiberal democracies because:

1. The EU is short of clear common benchmarks, and even if ex post such benchmarks with teeth are agreed upon (a highly unlikely event), to apply this retrospectively is highly problematic for the RoL (which abhors natural law);
2. The legal concept of the RoL is uncertain even if it has enough consistency to find specific violations on formal grounds (e.g. a violation of the prohibition of retroactivity, a lack of authorization etc.).

Unfortunately, these facts undermine the legal legitimacy of actions against violators of the rule of law; a sad conclusion that does not, however, rule out the legitimacy of treating illiberal democracy politically.

Is the legalistic and often futile concept of the RoL to be thrown away in practice and in theory? Was it purely a matter of ideological embellishment to refer to respect of the rule of law in TEU Article 2 and in so many national constitutions? After all, it offers little solid material to unmask what illiberal democracies are. Illiberal democracies cheat both on the RoL and democracy (and cheat their citizens, who are often complicit beneficiaries of the cheating).

Martin offers an encouraging answer. RoL is "insofar a social reality."[10] It is also a reality of a certain sense of ideology (as understood by Poggi): it does exist in so far as certain "maniéres d'agir et de penser" are shared within groups of people. It is an ideology with normative power as the shared modes of acting and thinking have a tempering effect on power. On most power, most of the time.

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[10] Krygier 2019, p. 106; Poggi 2001, pp 58-9.