

ABSTRACTS

Andreas Voßkuhle

Constitutional Court: The Dilemma of Law and Politics

This article raises questions in the context of the tension between the activities of parliament and government on the one hand and constitutional courts on the other hand. As to this tension, it concludes that the manner and method of decision-making on the part of government or parliament differs fundamentally from the manner in which constitutional courts operate. The article further elaborates, in particular, on the acceptance of decisions rendered by the constitutional court, as well as on questions in the context of the election process of constitutional court justices.

Shimon Shetreet

The Challenge of Maintaining the Rule of Law: Ensuring Legitimacy of Courts at National and Cross-National Levels

In the context of the legitimacy of the justice system and respect for fundamental values, such as judicial independence and impartiality, accessibility to the justice system, efficiency, fairness, and public confidence in the courts, this article demonstrates that the application of certain values might contradict and conflict with the application of others. The central argument of this paper is that the legitimacy of the courts is desired not only at a national level, but required internationally as well. The article concludes that, in order to maintain the legitimacy of courts and of the justice system, efforts must be made by all branches of government to promote the fundamental values of democracy and justice, and in particular – the independence of the judiciary in the administration of courts, be it by adopting the shared model of responsibility, or by fully acknowledging the ability and the social desirability of a judiciary that administers itself.

András Sajó, Juha Tuovinen

The Rule of Law and Legitimacy in Emerging Illiberal Democracies

The current legal changes in Eastern and Central Europe leading to illiberal regimes are raising fundamental questions about the nature of the legitimacy of these regimes. While constitutional democracies rely on legitimacy originating from the observance of the rule of law, the rule of law is challenged in countries like Hungary, Poland and progeny. This article analyses, in particular, the lack of clear standards in illiberal regimes, especially where the cultural traits that underlie and animate the rule of law, in particular fairness, are not part of the “folklore”. It then thoroughly outlines the transformation of the judiciary in an illiberal state, followed by an analysis of the demise

of the rule of law beyond the attack on the judiciary, and the use of legality in an illiberal state. The article concludes that governments, while relying on certain aspects of the rule of law in protecting their own position and their own assets, nevertheless do not see value in following the rules of reason and fairness for the reasons that the rule of law is valued. They rather see it as a smoke screen for their activities that may justify them to some, and hide them from others.

Martin Kuijper

The Rule of Law in Crisis? – Some Observations from the Perspective of the Venice Commission

The European Commission for Democracy through Law – better known as the *Venice Commission* – is the Council of Europe's advisory body on constitutional matters.

In this article, the existence of serious threats to the rule of law will be elaborated on. There are various methods in order to conduct such an exercise. This contribution is limited to the overarching trend to use legislative amendments to repress those who disagree with government policies, those who could potentially disagree with the government line, or those who are otherwise considered to be an 'opponent' to the regime. When examining those threats, a distinction will be made between those measures which target the judiciary (including constitutional justice), the press, and civil society. Reference will be made to opinions adopted by the Venice Commission over the last five years (in a non-exhaustive manner). Because of this angle (opinions, statements and studies of the Venice Commission), this article does not provide an exhaustive picture of the 'Rule of Law' landscape, nor is that the intention of this article. Some thoughts as to the underlying explanations for such a 'Rule of Law crisis' will be discussed. In the concluding part, some more personal comments will be made how a body such as the Venice Commission can respond to the before-mentioned threats to the Rule of Law.

Marek Safjan

Domestic Infringements of the Rule of Law as a European Union Problem

In some countries of central Europe the rule of law is directly threatened by a new type of legislation based on the zeal of the political majority to establish a completely different political system than the one that was built after the collapse of the communist system. From that perspective, there is little place for the principle of separation of powers and the independence of the judiciary is threatened. This contribution discusses the multilevel dimension of the rule of law principle in the EU, issues in the context of the disrespect for the rule of law as a case of systemic deficiencies, followed by a brief discussion of the Copenhagen accession criteria. The article concludes that the rule of law principle as recognised under EU law is by no means of a merely symbolic nature, and that domestic legislation abolishing key safeguards of the rule of law can be scrutinized not only under the EU Charter of fundamental rights, where

applicable, but also under the TEU. Without the solidarity of all Europeans, however, the preservation of our basic values and the future of the EU are in serious danger.

Pavel Rychetský

Post-Revolutionary Europe?

The crisis of the rule of law is a threat rather than a real and present danger. The rule of law has many facets and it is firmly rooted in European thought. The current situation in Central and East European countries is, rather, an erosion of their system of values. Constitutional courts, which are the safeguards of basic values of each state, must therefore face pressure from inside their respective nations, which weakens their independence, along with pressure from outside their countries, which narrows the scope of their power.

Emmanuel Cartier

Judicial Independence – French and European Perspectives

Judicial independence within the framework of the rule of law is a broad, complex and controversial subject, which is especially true of France, because of the country's particular attitude to justice since the French Revolution, and even before this critical and fundamental period. The first part of this article deals, on a broad constitutional scale, with the configuration of judicial independence, its guarantees (material and organic) and its interaction with the rule of law in the constitutions of the member states of the EU. The main purpose is to draw an objective map of the situation from a pure formal and textual (and therefore a slightly partial and narrow) view point. The second part of this contribution considers the specificity of the independence of the French judiciary in relation to the French constitutional principle of the rule of law, which is called the "Etat de Droite" in the French legal tradition.

Zoltán Fleck

Changes of the Judicial Structure in Hungary – Understanding the New Authoritarianism

In 2018 the populist right-wing authoritarian *Fidesz*, after eight years of dismantling the rule of law and democracy, won the parliamentary election by two-thirds, in a greatly unfair election. The release from authoritarianism through elections organized by the authoritarian forces is unlikely. Due to the lack of an effective counterbalance for the government, this political situation undoubtedly affects the judiciary, as well as the entire construction of the rule of law from several perspectives. This contribution thoroughly analyses the mechanisms that were instrumental in making the non-rule of law situation, as well as the reasons for this perplexing situation, with particular emphasis on the general peculiarities of the new Hungarian authoritarianism. In its concluding chapter, the article discusses the changes of the judicial structure in Hun-

gary, in particular. In this respect, the development in Hungary has been characterized by continuous failure, and periodic setbacks.

Peter Oliver Loew

A Tale about Poland – Introduction to the Situation in Poland

This article provides an in-depth insight into the “Polish peculiarities” that substantially continue to affect the current situation in the country – a country where the rule of law is in danger, where politics and society are dramatically divided, and where images of existent or invented enemies seem to dominate the political and cultural discourse. The article concludes that many questions remain open regarding the respect for the rule of law. The “tale of Poland” is not yet finished: there are several possible scenarios for Poland, ranging from progressing radicalization, to maneuvering of the government in order to satisfy the EU as well as the domestic national-Catholics, to the destruction of the government camp and the return of a majority of the electorate towards pro-European, liberal politics.

Ewa Łętowska

Convulsions in the Rule of Law

This contribution discusses the reasons for the ongoing deconstruction of the judiciary in Poland by a parliamentary majority – elected by a minority – changing the entire system. How could that have happened in a nation governed by the rule of law that met all the requirements of the rule of law when joining the European Union? The article analyses the transformation processes in Poland, discussing the specific difficulties caused by more recent as well as the country’s distant history, with a broad analysis of the numerous fateful factors and events that are crucial for an in-depth understanding of the ongoing convulsions in the rule of law in Poland, which eventually caused a breakdown of the democratic order in Poland.

Wojciech Sadurski

Anti-Constitutional Transformation in Poland: Dimensions, Sources, and Prospects

The dramatic changes in Poland after the 2015 presidential and parliamentary elections took many by surprise, both because of the speed and the depth of the changes, paralysing the Constitutional Tribunal and transforming it into a “positive enabler” of the government. This article discusses the structural characteristics of this revolutionary transformation, focusing first on the structural characteristics of the change and the anti-constitutional dimensions of the transformation. It continues with some hypotheses about the causes of this worrying phenomenon and concludes with a concise discussion of the resources that liberal democracy still has in Poland, thus supporting some optimism about the future.