

REVIEWS

REPORT ON THE INTERNATIONAL CONFERENCE ‘THE RULE OF LAW BETWEEN A LEGAL NOTION AND A POLITICAL TOOL’ ORGANIZED BY THE DANUBE INSTITUTE IN BUDAPEST ON JUNE 6, 2023

Enikő Krajnyák¹

ABSTRACT

The report concerns the international conference held on June 6, 2023, organised by the Danube Institute in Budapest with the participation of eminent Hungarian and foreign representatives from the academic and political world. The conference discussed the issue of the evolution and the politicisation of the concept of the rule of law and reflected on the ongoing debates between Hungary and the European Union (EU). The conference contributed to a better understanding of the current developments concerning the concept of the rule of law and its context at the international level. This report summarises the presentations at the conference and reflects on the conclusions drawn from the discussions.

KEYWORDS

*rule of law
constitutional identity
European Union
EU rule of law toolbox*

Introduction

The international conference titled ‘The Rule of Law: Between Legal Notion and a Political Tool’ was organised on June 6, 2023, in the Lónyay-Hatvany Villa located in the Castle District of Budapest. The aim of the conference was to give an insight into how distinguished legal minds from several countries review the evolution of the concept and the practical implementation of the rule of law in modern international political relations. The conference was divided into three sessions. The first section was opened by John O’Sullivan (President and founder of the Danube Institute), followed by the presentation delivered by Prof. Csaba Varga (Professor Emeritus at Pázmány Péter Catholic

1 | PhD Candidate, Ferenc Deák School of Law, University of Miskolc, Scientific Researcher, Central European Academy, Budapest, Hungary; eniko.krajnyak@centraleuropeanacademy.hu; ORCID: 0009-0003-2457-9491.



University); Gadi Taub, Ph.D. (Senior Lecturer at the Hebrew University of Jerusalem); Prof. István Stumpf (former Justice of the Constitutional Court and Minister in charge of the Prime Minister's Office); and Prof. James Allan (Garrick Professor of Law at the University of Queensland). The presentation of Ákos Bence Gát, Ph.D. (Head of Foreign Affairs at the Danube Institute and Researcher at the National University of Public Service) was followed by a panel discussion with the speakers of the first session, moderated by John O'Sullivan. The third session was dedicated to a dialogue with János Bóka (State Secretary for European Union Affairs of Hungary, Ministry of Justice) moderated by Ákos Bence Gát.

Session 1

The conference and the first session were opened by John O'Sullivan, who emphasised the topicality and importance of the theme of the conference, the rule of law in today's context. The first conference speech was delivered by Prof. Csaba Varga, titled 'On the Rule of Law: Contesting and Contested.'² The Professor first pointed out that the concept of the rule of law did not have a common understanding. For instance, the British approach to the 'rule of law' rests on the principle of all-covering justiciability, while the German concept of *Rechtsstaatlichkeit* strives to achieve its goals through comprehensive and across-the-board regulations issued by the force of state authority.³ The Professor contrasted the development of the Hungarian approach to the rule of law, in which the Hungarian Constitutional Court, established after the change of regime, had a strong role to play. In the jurisprudence of the Court, the rule of law has become a standard of constitutionality and the source of rights and constitutional principles.⁴ According to the Speaker, the role of the rule of law differs fundamentally from what it originally meant. Nowadays, in light of the ongoing discussions with the EU, one may observe that the rule of law has become extremely politicised and displaced from legal treatment to a political one; moreover, it is becoming a blackmail tool. The rule of law, however, is inherently contested and should serve as an ideal in ever-changing circumstances rather than being a normative prescription, as it seems to be interpreted recently by the EU. The Professor pointed out that the universalisation of the rule of law was an American view that certainly influenced European political and legal reality, in which the rule of law appeared as a manipulative tool. Instead of abusing and universalising the interpretation of the rule of law, the Speaker reminded the audience of the words of Václav Havel, former President of the Czech Republic:

There is no need at all for different peoples, religions and cultures to adapt or conform to one another. [...] I think we help one another best if we make no pretenses, remain ourselves, and simply respect and honor one another, just as we are.⁵

2 | The key arguments of the speech are based on the following work: Varga, 2021a.

3 | Varga, 2021a, p. 18; see also Varga, 2021b.

4 | Decision No. 31/1990 (15 December) of the Hungarian Constitutional Court.

5 | Cited in Howard, 2011.

Gadi Taub, Ph.D. conducted a presentation titled 'A Coup in the Name of 'The Rule of Law': How the Plan to Reform Israel's Judiciary Was Halted.' The Speaker introduced the Israeli government's judiciary reform plan for the first few months of 2023. The judicial reforms aimed to rebalance the power relations between lawmakers and the judiciary by changing the rules on the selection of Supreme Court judges, thereby introducing certain checks and balances to the Israeli judiciary. Given that Israel does not have a formal constitution, only a set of quasi-constitutional Basic Laws, the judiciary, particularly the Supreme Court, has become extremely powerful without any defined limits of authority. Despite several reform initiatives, the Supreme Court still has sufficient support among liberal members of the Knesset to hinder drastic measures that limit its power.⁶ According to the government, the Presenter pointed out that the Supreme Court had overstepped its role, which led to the replacement of the rule of law with the will of judges. The heavily contested legislative proposal was postponed in late March, after a coup d'état with the participation of military reservists in the name of the rule of law, raising the question of whether the power of democratic bodies could be taken through means that lack democratic legitimacy in the name of the rule of law.

Prof. István Stumpf, in his presentation 'The Increasing Importance of Constitutional Identity' addressed the role of the Hungarian Constitutional Court in developing constitutional identity and interpreting the rule of law. The Professor pointed out that the Hungarian Constitutional Court had been a protagonist of the constitutional transition in Hungary, as it had been the first rule-of-law institution during the regime change. The Constitutional Court ensured that the regime change could take place on the grounds of legality and established the rule-of-law standards on the basis of the new Constitution, which ensured that Hungary was 'an independent, democratic rule-of-law state.'⁷ The Professor emphasised that the debates on the adoption of the new constitution around 2010 were regarded as the second constitutional revolution.⁸ The 2/3 majority of the governing party intended to suppress the excessive power of the Constitutional Court. Entrusting significant powers to the Constitutional Court is more common in Western legal systems. This is in contrast to Hungary and other Central-Eastern European countries, which underwent a fundamental transition from communist regimes to democratic rule-of-law states. The 20-year period from 1990 onwards, as characterised by Prof. Csaba Varga, was accompanied by destructive liberal doctrinarism,⁹ a heritage of the communist regime. Conversely, the new Constitution, the Fundamental Law,¹⁰ brought about a fundamental change in Hungarian constitutional legal thinking: it did not accept any compromise from the previous period or the repeal of the historic Constitution. The historic constitution, connected to the symbol of the Holy Crown, embodies the constitutional continuity of Hungary's statehood and the unity of the nation.¹¹ The Professor also reflected on the relationship between EU identity and Hungarian constitutional identity,

6 | Carmi, 2005, pp. 67–68.

7 | Act XXXI of 1989 on the modification of the Constitution, Art. 2.

8 | See Stumpf, 2022.

9 | Varga, 2021a, p. 149.

10 | The Fundamental Law of Hungary was adopted on April 18, 2011, and entered into force on 1 January 2012.

11 | Raisz, 2012, p. 38.

highlighting that European identity is part of Hungarian constitutional identity,¹² which, as a national identity, should also be respected by the Union.¹³

Prof. James Allan discussed the issue of 'The Political Seduction of Law' from the perspective of a conservative legal scholar. The Professor clarified the difference between the procedural and the substantive aspect of the rule of law, namely, that there was a difference between formally (procedurally) conforming with the rule of law or not conforming with the content of the rule of law.¹⁴ While the former is less complicated to determine, the latter could lead to discussions on the moral content of the rule of law, which is less tangible and identifiable, and therefore, more subjective. The Presenter raised the question of whether it was morally acceptable to use the substantive components of the rule of law as a political tool, and drew attention to the dangers of increasing judicial power, which had been addressed earlier in Gadi Taub's speech in the Israeli context. The examples cited from the practice of the British and Australian courts and the US Supreme Court were particularly interesting, as they were introduced from the perspective of a Professor from the Anglo-American common law system.

Session 2

The second session of the conference was opened by Ákos Bence Gát, Ph.D. with his presentation titled 'The Rule of Law Debate in the EU: A Glimpse behind the Scenes.' The Presenter gave an overview of the rule-of-law instruments of the European Union,¹⁵ including the rule of law framework of the Commission of 2014,¹⁶ the annual rule of law report,¹⁷ the conditionality mechanism,¹⁸ and the procedure based on Article 7 of the Treaty on European Union (TEU). The presentation paid particular attention to the recently enacted conditionality mechanism, which fundamentally differs from the infringement procedure, as in the case of the latter, the last instance is conducted before the Court of Justice of the European Union (CJEU), while there is no available appeal against the conditionality mechanism. The conditionality mechanism projects the suspension of EU funds to the Member States that threaten the financial interests of the EU by not respecting the rule of law. According to the Speaker, this measure had been introduced because the EU could not sanction a Member State for the functioning of the rule of law, but for

12 | See Art. E)(1) of Fundamental Law: 'In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.'

13 | See Art. 4(2) of the TEU: '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. [...]'

14 | See Allan, 2011.

15 | For an overview on development of the EU rule of law mechanisms, see Sulyok, 2021; and their impact on Central European States, see Gát, 2021.

16 | Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law /COM/2014/0158 final/ (11 March 2014).

17 | Rule of law mechanism, European Commission [Online]. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en (Accessed: 8 June 2023).

18 | Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

the protection of the EU budget. The question of whether the conditionality mechanism as a financial mechanism could be regarded as a rule of law mechanism and whether such measures could be applied based on alleged rule of law violations certainly arises, as was also addressed by Advocate General Sánchez-Bordona in his opinion¹⁹ connected to Case C-156/21.²⁰ Furthermore, the Presenter highlighted that the intention behind the adoption of the conditionality regulation could be connected to difficulties with the rule of law mechanism of Article 7 of the TEU, as determining the existence of a serious and persistent breach by a Member State of the rule of law requires unanimity from the European Council.

The second part of the session was dedicated to a panel discussion and a Q&A with the Speakers from the first and second sessions, moderated by John O'Sullivan. The Speakers reflected on the topics presented earlier at the conference, with a particular focus on how power relations influence the interpretation of the rule of law, allowing the EU to extend the rule of law clause,²¹ which could also be observed in the example of the Israeli judicial reform. The Presenters also discussed the shift from democracy and the rule of the people (demos) to juristocracy and the rule of judges, which may limit the role of Member States with electoral and democratic legitimacy.²² Such developments, however, should also be assessed from the internal perspective of the EU, namely, the ongoing power struggle among EU institutions, which also impacts rule of law debates. The CJEU's approach to the rule of law debate is also remarkable:²³ the Court originally distanced itself from the rule of law debate however, in the recent judgment in the *Minister for Justice and Equality (LM)* case, the Court ruled for the first time in an ongoing rule of law debate concerning Poland.²⁴ The Presenters agreed that all these development directions within or outside the EU underpin judicial activism, which is worth analysing from the perspective of respect for the rule of law.

Session 3

The final session of the conference was a dialogue with Dr. János Bóka, Ph.D., State Secretary for European Union Affairs of Hungary, about the rule of law debate, with a particular focus on the background and current status of the EU discussions with Hungary.

19 | Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021. Hungary v European Parliament and Council of the European Union, 136–137.

20 | The case referred to here is an action for annulment of Regulation 2020/2092 initiated by Hungary, which was dismissed by the Court. Poland, similarly, contested the legality of the Regulation. See: C-156/21 – Hungary v Parliament and Council, Judgment of the Court (Full Court) of 16 February 2022 (ECLI:EU:C:2022:97); C-157/21 – Poland v Parliament and Council, Judgment of the Court (Full Court) of 16 February 2022 (ECLI:EU:C:2022:98).

21 | On totalitarian approach to the rule of law by supranational entities, see Varga Zs., 2019. For the Hungarian version, see Varga Zs., 2015.

22 | Kis, 2021, p. 6.

23 | Metzinger, 2022, p. 14; Bóka, 2022, p. 81; see also Bóka, 2021.

24 | C-216/18 PPU – Minister for Justice and Equality, Judgment of the Court (Grand Chamber) of 25 July 2018 (ECLI:EU:C:2018:586).

25 | For an extensive analysis on the rule of law discussion and the actions taken by the EU against Poland, see the recent book published in the framework of the Polish-Hungarian Research Platform 2021: Pastuszko (ed.), 2023.

The dialogue was moderated by Ákos Bence Gát. First, the politicisation of the rule of law was discussed, and the Distinguished Guest Speaker highlighted that the rule of law had originally been a political and not a legal concept that had served for the organisation to exercise power. Over the course of a few decades, this political concept has gone through judicialisation and has been applied as a rule by the judiciary. However, there are inherent limitations to how to translate the concept of the rule of law as a rule and how far this concept could be legalised for use in court practice. Namely, the rule of law has primarily been interpreted in a domestic context, as briefly mentioned previously, and is now being formed by EU institutions. For this reason, according to the Speaker, we may speak about the repoliticisation of the rule of law by the EU, and not by domestic institutions, thereby raising a primarily national issue to a supranational level.²⁶ The Speaker highlighted that despite the absence of any explicit transfer of competence by Member States in connection with the enforcement of the rule of law, there is no debate on the so-called stealthy transfer of powers. However, this process carries the potential of establishing a form of constitutional federalism in Europe that falls outside the direct control of Member States. In situations where Member States disagree with the integration progress, they may be portrayed as challenging the core essence of integration and breaching the principle of cooperative collaboration.²⁷

Dr. Bóka also provided an overview of rule of law procedures, which could be categorised according to the extent to which they are connected to the rule of law itself. First, the rule of law procedures, which are directly connected to the rule of law, encompass the Article 7 procedure and the rule of law review cycle. The prior procedure consists of two stages. In the first stage, the Council may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2,²⁸ including the rule of law.²⁹ In the second stage, the European Council may determine the existence of a serious

26 | The supranational interpretation of the rule of law is one of the research topics of the Central European Professors' Network 2023 at the Central European Academy. The research group, under the coordination of Dr. János Bóka, Ph.D., carries out research on the different notions of the rule of law, developed by various supranational institutions (including the Council of Europe, the OECD, the United Nations, the OSCE, and the EU). Additionally, they look at the legal basis for the interpretation of such notions, the control mechanisms through which it is examined, and the sanction systems related to such processes. The research gives special attention to the European Union and the issues of EU competencies in the context of national sovereignty and also examines the development of the hierarchy of the institutions controlling the rule of law and its current status. The results of the scientific research are expected to be summarised in a book published by the Central European Academic Publishing in the first half of 2024.

27 | Bóka, 2022, p. 80.

28 | Art. 7(1) TEU reads as follows: 'On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.'

29 | Art. 2 TEU reads as follows: '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.'

and persistent breach by a Member State of the mentioned values.³⁰ In case the existence of a serious and persistent breach is found under Article 7(2), the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council, while the obligations of the Member State under the Treaties shall continue to be binding. It is worth noting that the first stage of the procedure had been triggered against Hungary³¹ and Poland.³² Second, the rule of law review cycle concerns an informal dialogue between certain EU institutions and Member States and results in the publication of an annual rule of law report concerning four issues: judicial independence, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances, such as civil society.³³

The second category of rule of law procedures includes the conditionality mechanism,³⁴ which could indirectly be related to the rule of law as it primarily serves to protect the EU's financial interests by applying the condition to respect the rule of law, but does not aim to restore the rule of law itself. This conditionality mechanism was triggered in connection with Hungary in 2022.³⁵ Third, the European Semester, the EU's framework for the coordination and surveillance of economic and social policies, was mentioned as a procedure that is not even indirectly related to the concept of the rule of law, but is used to enforce it. The European Semester presents country-specific recommendations to Member States which provide guidance on tackling key economic and social challenges that are only partially addressed or not addressed in their recovery and resilience plans. In the case of Hungary, these recommendations also target judicial independence,³⁶ which does not seem to be connected to economic or social policies at all.

Dr. Bóka explained the relationship between the mentioned procedures by pointing out that the main idea behind the application of rule of law procedures had been to tackle the same issues from different perspectives to achieve more efficiency as a whole system. The use of certain procedures by different EU institutions or Member States may also be symbolic in showing that they are engaged in the topic regardless of the results of such procedures. According to the Speaker, the efficiency of these measures still needs to be evaluated, as debates were ongoing at the time of the conclusion of the conference and the present report. In addition, the mentioned repoliticisation of the rule of law enables the

30 | Art. 7(2) TEU reads as follows: 'The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2, after inviting the Member State in question to submit its observations.'

31 | European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

32 | European Parliament resolution of 1 March 2018 on the Commission's decision to activate Art. 7(1) TEU as regards the situation in Poland (2018/2541(RSP)).

33 | See supra 16.

34 | See supra 17.

35 | European Commission Proposal for an implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022) 458 final, 18 September 2022.

36 | 2023 European Semester: Country Specific Recommendation/Commission Recommendation – Hungary, COM(2023) 617 final, 24 May 2023.

application of such procedures as a result of political conflicts between the EU and certain Member States, in the present case Hungary and Poland.

The last part of the dialogue was opened to the audience in the form of a Q&A with Dr. Bóka, who reflected on questions concerning the conditionality mechanism and the suspension of Erasmus funds, rule of law procedures and their compatibility with the principles of the rule of law, and the role of the CJEU in the debate. First, in connection with the planned suspension of the Erasmus programme in Hungary within the framework of the conditionality mechanism, Dr. Bóka highlighted that it was not clear how this measure would contribute to the protection of the financial interests of the EU, particularly in light of the fact that the suspension of the programme would only impact Hungarian exchange students and not incoming foreign students.³⁷ Furthermore, the question of whether and how these rule of law procedures comply with the rule of law itself arose. As the Speaker pointed out, the values contained in Article 2 of the TEU were primarily applicable to EU institutions and not national institutions. The starting point was that these values had been developed in Member States at the domestic level, and had later become binding for EU institutions by the TEU. Moreover, control over such processes may fall beyond the control of Member States, which justifies the prior statements of the Speakers of the first sessions who pointed out that the rule of law had been used as a political tool by the politically more powerful party to enforce their point of view on other actors. Last, Dr. Bóka, in accordance with the prior Speakers of the conference, emphasised the increasing role of the CJEU in the rule of law debate, highlighting that the Court was no longer a neutral party, but rather became another player in the game that had pushed the stalled machinery of European integration beyond political indecision,³⁸ which could be controversial in light of the principle of subsidiarity and the absence of any clear transfer of power from Member States. The discussion with Dr. Bóka was particularly interesting not only because of his practical engagement with EU negotiations, but also because he could analyse and explain the ongoing processes as a scholar, thanks to his prior scientific background.

Summary

The international conference titled ‘The Rule of Law: Between Legal Notion and a Political Tool’ addressed the topical issue of the politicisation of the rule of law at the supranational level, especially at the EU level. The conference was divided into three sessions. The first session granted space for the introduction of the concept of the rule of law from a theoretical perspective presented by Prof. Csaba Varga; the presentation and discussion of a practical example of how the rule of law was used as a political tool in Israel by Gadi Taub, Ph.D.; the presentation of the constitutional transition of Hungary and the

37 | It is also worth noting in this regard that the preparatory document of the conditionality regulation particularly referred to that fact that ‘[...] the individual beneficiaries of EU funding, such as Erasmus students, researchers or civil society organisations, cannot be considered responsible for such [rule of law] breaches.’ See: Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union’s Budget in case of Generalised Deficiencies as regards the Rule of Law in the Member States, COM/2018/324 final – 2018/0136 (COD), Explanatory Memorandum. (Noted by the author.)

38 | Bóka, 2022, p. 81.

development of the interpretation of the rule of law in the practice of the Hungarian Constitutional Court by Prof. István Stumpf; and the analysis of how the substantive content of the rule of law was interpreted by the judiciary in common law states by Prof. James Allan. The second session was dedicated to the evaluation of the development of the rule of law instruments of the EU by Ákos Bence Gát, Ph.D.; and a panel discussion with the involvement of the Speakers. Third, Dr. János Bóka, State Secretary of EU Affairs, provided insights into the current stage of the rule of law debates in the EU and their understanding from the Hungarian point of view.

The conference provided a scholarly platform for discussing the evolution of the interpretation of the rule of law and its application in states where the interpretation and practice of the rule of law do not necessarily correspond with its supranational perception. One may conclude that the concept of the rule of law is not exact and may lead to severe power struggles between individual states and supranational entities. The essence of the rule of law, however, shall be respected by both parties throughout politicised processes. The supranational interpretation of the rule of law is subject to further research in the Central European Professors' Network 2023, in which the interpretation of the notion of the rule of law, related control mechanisms, and sanction systems are examined in the practice of various supranational entities, with a particular focus on the European Union. The results of the scientific research are expected to be summarised in a book edited by Dr. János Bóka, Ph.D., and published by the Central European Academic Publishing in the first half of 2024.

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