EDITORIAL

THE RULE OF LAW IN EUROPE: A CONTESTED, BUT ESSENTIAL CONCEPT

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This special issue of the IJPL is about the rule of law. This topic has always been characterized by differing approaches, theoretically and pragmatically, but in the last three decades or so the difference has become more profound.

From a theoretical point of view, Paul Craig has encapsulated the essence of two strands in public law thought, as well as in legal theory, in the distinction between formal and substantive conceptions of the rule of law (*Formal and substantive conceptions of the rule of law: an analytical framework*, in *Public Law*, 1997, p. 467). Formal conceptions of the rule of law, he argued, address – *à la* Fuller - the manner in which the law is enacted and promulgated, the legal basis for the exercise of authoritative powers by public authorities, and their accountability through the courts or other mechanisms, such as external audit. They are essentially concerned with the existence of the law, not with the question whether it is good or bad. Substantive conceptions of the rule of law, he continued, seek to go beyond this, by devoting attention – *à la* Dworkin - mainly to the rights that individuals possess against the State. Whether this conception implies the priority of negative rights with respect to positive rights, is an important issue within this theoretical debate. But this is not of immediate concern for us here. What must instead be added is that in the continental tradition, which differs from the English variant of the common law tradition more that it does with regard to that of the United States, there has been a debate along similar lines, if not the same, especially with regard to the various ways to conceive the *Rechtsstaat* or *Stato di diritto*. The articles written by Jean-Bernard Auby and Gordon Anthony for this special issue show this similarity, whilst keeping an eye on national cultural specifities.

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With the increasing globalization of the law, especially after 1989, another dividing line has emerged. On the one hand, prominent lawyers from different Western countries have discussed reported violations of human rights in various regions of the world and have sought to mobilize the legal profession, the courts and other institutions for the protection of those rights and the fulfilment of the rule of law. Several studies and reports produced by respectable institutions, such as the Venice Commission, have affirmed that the States are subject to the rule of law, that governmental authorities should respect the rights of the individual and provide effective means for their enforcement. While traditional critics of this approach held that there are circumstances in which developing countries may legitimately decide that the pursuit of other goals, such as help for particular social groups or the fulfilment of a certain political agenda, may justify the sacrifice of at least some elements of the rule of law, others have gone much beyond this. They have criticized the use of the rule of law that has been made by some international institutions. In their opinion, the rule of law is not simply an ideology – as those of who are nostalgic of Marxism would put it – that masks substantive inequalities in power, but is even an instrument of exploitation of the weaker countries and social groups of the world. There is an important sub-text in this formulation, which suggests that individual rights, judicial review and its necessary condition, that is to say judicial independence, may not simply be the target of critical scrutiny, as is in typical in the Western legal tradition (and is confirmed by Mauro Bussani's contribution to this special issue, as well as, in another respect, by that of Stefano Dorigo), but could and should be contested more radically. Alternative constructions justify not simply temporary deviations, in the logic of the substantive conceptions of the rule of law mentioned earlier, but even, in their extreme forms, substitution of the idea of government not under the law with that of government but under the will of men, a will that is (allegedly) legitimated by the support of the majority of the people.

The contributions published in this special issue concerning Venezuela and Hungary (witten by Flavia Pesci Feltri and Gàbor Hamai, respectively) are particularly helpful for a better understanding of these developments. First, they show that such developments have a common, and negative, trait; that is, the

destructive – not only, to borrow Aristotle's famous distinction, in potentiailty, but also in actuality – impact of these alternative constructions for the civil, political, and social rights of many individuals, who are exposed to the arbitrariness of those who govern them. Second, they show the differences related to the broader institutional and legal framework, for the simple reason that in Europe there are, not without ambiguities and gaps, external limits to the will of those who govern. Thirdly, and consequently, they allow us to widen the discussion by considering the relationship of European public law scholarship to the domestic theoretical debate.

It is true, as Armin von Bogdandy warned during the workshop in which all these contributions were discussed, that those who contest the meaning that are given to the rule of law by the States who either founded the European Community or joined in the last century evocate the danger of a "tyranny of values". But although differences will inevitably remain over matters as fundamental as the individuation of the "values upon which the Union is founded" (Article 2 TEU), there is arguably an incoherence in the will (whether or not it is majoritarian within such relatively more recent member States) to remain in a 'club of nations' that was founded on liberal and democratic values and not so much the unilateral adhesion to the alleged virtues of "illiberal democracy", but the exercise of legislative and administrative powers in clear contrast with the fundamental tenets of the rule of law, such as judicial independence. Clearly separation of powers, of which judicial independence is a key corollary, is not the same in all political societies, and even an Asian dictator – as Montesquieu would have put it – may assert that its will is supreme because the law of the land so provides. But this was certainly not the sense in which the Copenhagen criteria were defined and refined, with regard to the enlargement of the EU. In this sense, the rules of the 'club' do not permit certain legal relations, between the political branches and the judiciary as well as between the former and universities, to be replaced by relations of force. It is not so much in 'official discourses', but in some particular events, such as the anticipated dismissal of a senior judge or the withdrawal of the authorization to issue diplomas, in sum in what happens in the streets and squares of an ideal public sphere that the real threats to liberty and justice can

be better perceived. Whether the impairment of judicial independence is compatible with the supranational constitution of the EU, as it was reshaped by European and national courts, is still another important question.

The following pages, considered as a whole, are thus not simply another attempt to distil the precise meaning of the phrase "the rule of law". The main purpose is rather to provide materials that describe and explain what is happening in Europe and elsewhere from our chosen viewpoint, and thus contribute to a debate that runs across national and disciplinary borders, as is the mission of the IJPL. We will continue to call for heightened attention and critical discussion on issues involving liberty and democracy, the respect for the rule of law and fundamental rights, our common core values.