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The Rule of Law, definition and meaning.

Lately the definition of the Rule of Law/ Rechtsstaat in "Die Zeit" has been described as follows: Green, pro-LGTB, Left-wing and agnostic.

That definition is far from complete.

In the article 67 the Treaty mentions, that the Union is an area of freedom, security and justice, in which fundamental rights and the different legal systems and traditions.

According to article 2 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" , but there is no specific definition of the Rule of Law.[1]

[1] "Was soll daran falsch sein"? Die Zeit dd October 14th, 2021 p. 5

First of all, the aim of the Rule of Law is to limit uncurbed, unlimited state power.

The Rule of Law contains the following elements:

- The Trias Politica Rule. That means the separation of powers, divided in the executive power, the legislative power and the judiciary. Each of these institutions has specific tasks within the state.

- The Nulla Poena Rule: no punishment without a preceding law;

- No retroactive law. A Government exceeds its authority when a person is held responsible for an act that was legally permissible at the outset, but was retroactively made illegal. That happened under the Nazi regime.

- The Ne Bis In Idem rule: people cannot be punished twice for the same crime.

- Protection of Human rights for everyone.

- The laws must be clear, publicized, and stable; while applied evenly, so that the individual can foresee with fair certainty, how this power will be used in special occasions; they protect fundamental rights, including the security of persons and contract, property, and human rights for everyone. The more prosecutorial decisions are based on the personal discretion of a government official, the less they are based on law.

- Freedom of the Press

- Independence of the Judiciary.

The Rule of Law has certainly no political colour nor political preference nor is it per se agnostic.

Human Rights are for everyone. We also can use the rule: "What you do not want to happen to you, do not do that to another"

Another definition has the following elements:

1. Accountability

2. The Rule of Law also means justice: Justitia Distributiva and Justitia Commutativa. The latter orders private law. The first is the terrain of the government.

3. Just laws, publicized and stable, so that the individual can foresee with fair certainty, how this power will be used in special occasions; Especially during the Corona epidemic the measures were (sometimes) chaotic and contradictory.

4. Safeguarding public order, that means maintenance of criminal law.

5. Open Government. It should indicate the line of action for human behavior.

6. Accessible Justice, delivered timely by competent, ethical and independent and neutral representatives.

The Rule of Law is an ambiguous term that can mean different things in different contexts.
In one context the term means rule according to law. No individual can be ordered by the government to pay civil damages or suffer criminal punish -ment except in strict accordance with well-established and clearly defined laws and procedures. In a second context the term means rule under law. No branch of government stands above the law, and no civil servant may act arbitrarily or unilaterally outside the law.

In a third context the term can mean a rule according to a higher law. No written law may be enforced by the government, unless it corresponds with certain unwritten, universal principles of fairness, morality and justice that transcend human legal systems.

This explication is important, because the criteria now used for the Rule of Law in some circles, nl. being Green, Left-wing, agnostic and homosexual is certainly not enough.

This whole issue is important in the context of the long-range budget of the EU, decided upon in July (17-21) 2020.

On July (17-21) 2020, the EU leaders reached an agreement on the multi-year budget from 2021 to 2027. But the EU parliament felt that it described very vaguely how the link between subsidies and the Rule of Law has been made. Later, the EU member states and parliament agreed on this after all. For the first time there will be a procedure to financially harm governments that violate EU fundamental rights.

One condition has been made: the money will only be available as soon as the countries Poland and Hungary will accept the principles the Rule of Law. [2]

The reaction of Hungary, was that it threatens to veto EU budget.

On November 9, 2020 the Hungarian Prime Minister Viktor Orban threatened to block the multi-year budget of the European Union (EU) with his right of veto, if European subsidies are linked to respecting the Rule of Law, as Hungarian media reported this. They quoted a letter from the Hungarian government to Ursula von der Leyen, President of the European Commission, and EU President Charles Michel.

But Hungary does not agree. Orban has been criticized in several EU member states for endangering the democratic constitutional state with certain decisions. Orban now threatens to use his veto and to hold back the multi-year budget for the time being.

Some considerations:

First of all: which elements of the Rule of Law are violated?:

How are these principles formulated? One of the criteria is: The Trias Politica Rule. The executive is not allowed to intrude the decisions made by the judiciary. That happened in Poland

No branch of government stands above the law, and no civil servant can act arbitrarily or unilaterally outside the law. Both happened in those two countries. Both these facts show that the Rule of Law has been harmed in both countries.

[2] Georg Blume “Das Geld lässt auf sich warten” in “Die Zeit” d 29-10-2020 p. 24

Second: If the EU is waiting until Poland and Hungary have changed their attitude towards the Rule of Law and have changed the situation accordingly, then it will be like the Palestinian question: it will be like putting the cart before the horse.

The result will be that the poor Southern countries will have to wait forever to get their COVID money.

Poland and Hungary will not be solidary with the poor Southern countries.

It would be better to start to distribute the money to the countries who are most in need and then fight the battle on the Rule of Law with Hungary and Poland later;

Third: the history of both countries

Before judging this, just reconsider the history of both countries:

History of Poland: Poland was non-existent for almost 150 years due to the divisions of Poland by Prussia, Austria and Russia in 1772, 1792 and 1795. Yet they managed to keep their identity and became a free nation again, first after WW I and later after 1989.

The Catholic Church was an important instrument to beat Communism in Poland, but after the disappearance of Communism, the Catholic Church has still an enormous power in this country, behind the scenes (Radio Maria).

The Pope helped the pro- LGTB community already in 2015 by saying that the homosexuals are "Gods children", but that does not seem to work.

As we all know: power corrupts and absolute power corrupts absolutely.

Hungary had a different history: it lost pieces of its land after WWI and WW II because of their role in both wars. In 1222 a Hungarian king granted the right to resist to the Hungarians and that has been used ever since: foremost against the Habsburg Empire.

But both countries will not so easily give in and leaving the EU is not their aim: they prefer to stay member if only because of the threat the Russians exert.

On the other hand, the EU does not want to face another Brexit.

Fourth: the mentality of those same EU officials in matters concerning the Rule of Law.

Several examples.

2010

In 2010 we could see a perfect example of how the Trias Politica Rule was not taken into account.

That was the case of the trial of Microsoft: in this case the functions of the European Commission were exposed.

Because the European Commission did not have such an extensive power in the beginning of the EU, some functions could be linked together. That is now out of date. For example the policy of DG Competition in cases like the prosecution of enterprises like Microsoft.

The role of prosecutor, judge and jury were concentrated in one DG. That should not be possible. The situation should be the following.

The prosecutor should be DG Competition

The judge should be the European Court and

The Jury the European Parliament /the citizens

2012

In 2012 Christine Lagarde remarked in connection with the difficulties with the EU: "We should be able to breach the treaties in order to save the Euro"[3].

This remark shows how the predominance of the Law and the Rule of Law has become subordinate to the saving of the Euro (or any other item). This is only the beginning of a tendency, namely ignoring, even trying to

[3] Professor Joachim Starbatty, "Uber Macht und Rechtsmissbrauch-das Beispiel der Europäischen Währungsunion, June 29, 2012 p. 1.

abolish the Rule of Law in order to get things done in political matters. This remark is an outright infringement of the Rule of Law.

No period and country has characterized so much the importance of the Rule of Law and its implications since the outbreak of the Euro crisis. While the rest of the Euro zone countries were concerned about the saving of the Euro, Germany was concerned about the saving of their Rechtsstaat or Rule of Law.

Since the Euro-top (2012) at least 10 complaints have been filed at the federal constitutional court in Karlsruhe against this legislation concerning the EMU.

Germany in contrast to the rest of Europe sees things differently. The Federal Supreme Court in Germany decided otherwise. According to its judges the Bundesregierung (the German government) had the duty to inform the Bundestag and Bundesrat about the decisions made during the last Euro-top as soon as possible, but it did not.

Professor Sebastian Müller-Franken, remarked that "es kann nicht sein, dass der Bundestag Gesetze berät, ohne die notwendige Informationen zu haben"[4]

But since the decision has not been taken yet, the Bundesregierung can still inform the Bundestag and Bundesrat and all the deputies can and have to read and study the laws before taking a decision. As long as that has not happened yet, no decision can be taken yet according to the Professor.

The point is however "that Germany and other EU countries have, in the two years of the euro crisis, already ceded parts of their sovereignty to EU institutions and are asked to cede even more. Karlsruhe is worried that there will come a point when Germany has given up so much power that a parliament becomes irrelevant", according to Dieter Grimm, a former judge on the federal constitutional court[5].

This is an extremely important turning point in European history. If the "essential decisions are negotiated in the anonymous thicket of the

[4] Professor in Public Law at the Philipps Universität Marburg, Germany in "Die Süddeutsche Zeitung", no 148 dd June 29, 2012 p. 148.
[5] The Economist June 30-July 6, 2012, "Babies ad bathwater" p. 29.

Brussels bureaucracy" [6] instead of being made with all the care it needs by getting through a democratic process prescribed and contained in the national constitution, then there is the danger of losing our Rule of Law, which is the guarantee for our democracy.

2020

In May 2020 another remarkable verdict has been pronounced by the Bundesverfassungsgericht: . On May 5 the court criticized, that the Central Bank has not sufficiently justified the appropriateness of a program for the purchase of government bonds decided on 5 years ago. In short, its decision was the following:

To summarize: the ruling by the German Constitutional Court means, that "the flood of money-printing (QE) of the European Central Bank (ECB) has exceeded its legitimate mandate. It finds, in particular, that the ECB did not respect the "principle of proportionality", while at the same time criticizing the German government for failing to challenge those abuses, as it should have done.

The Court's ruling highlighted the economic side-effects of the ECB's ultra-loose monetary policy, notably penalizing savers and pensioners– and (here's the Covid-19 parallel) "***the ECB fails to conduct the necessary balancing of its monetary policy objective against the economic policy effects arising from its program."*[7].**

He concludes: Same old question: is the cure worse than the disease?

The consequences of this decision could be the following:

The verdict does involve several European Institutions:

- The ECB
- The Constitutional Court (Bundesverfassungsgericht)
- The European Commission
- The German Parliament (der Bundestag)

[6] Idem.

[7] WOOLF Emile, "BALANCING DISEASE AND CURE – IT'S NOT JUST THE VIRUS" in *Economic Perspectives,* Issue 80, June 1st, 2020. Italics by Emile Woolf

- The national German Bank [8]

If the ECB has to produce a proof of proportionality, that will also give difficulties.

The legal consequences:

"The Court then issued an ultimatum, directly instructing the Bundesbank (Germany's central bank) to agree by August 2020 to comply with its ruling and to cease its buying of government bonds under the ECB's QE program"[9].

As you might expect, EU authorities have not taken this blow to their authority without protest. There were predictable squawks from Christine Lagarde, (ECB President), Ursula von der Leyen (EC President) and the European Court of Justice (ECJ) – all claiming to be undeterred by, and contemptuously dismissive of the Constitutional Court's ruling. Indeed the ECJ reiterated defensively, that the ECJ is the judicial authority of the entire bloc, and that it alone possesses the jurisdiction to decide whether EU institutions are breaking EU law. Von der Leyen echoed this unequivocally in her official statement that *"EU law has primacy over national law.* [10]

The outcome

One possible outcome could be that the ECB -in order to be accountable- could give a proof of proportionality and sum up the pros and cons of the purchase of bonds.

"That means no weakness, but conversely, a strengthening of their independence with regard to the diverse political interests and influence on their actions. That is the independence, about which we all care "[11]. The other possible scenario is, that other national courts will also take

[8] "Wer gibt hier nach?" Mark Schieritz in "Die Zeit", dd 14-5-2020, p.25
[9] WOOLF Emile, "BALANCING DISEASE AND CURE – IT'S NOT JUST THE VIRUS" in *Economic Perspectives,* Issue 80, June 1st, 2020.
[10] *Ibidem.*
[11] "Unabhängigkeit: Ja. Die Kompetenz der EZB ist limitiert. Die Einhaltung ihrer Grenzen unterliegt gerichtlicher Kontrolle" in die F.A.Z dd 3-6-2020, pag 16

independent decisions which will not always be convenient on European level[12].

It is also possible that courts in southern countries would rule for *more* purchases of bonds.

Most probably, the above-mentioned institutions will try to arrange and avoid a confrontation.

One point is clear : the Bundesverfassungsgericht has far more authority than any other equivalent institute.

The Bundesverfassungsgericht also stated that "The Court of Justice of the European Union exceeds its judicial mandate, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective".

Conclusion

Also the rules for "Better Regulation" should be studied. After all, it is absolutely inefficient and contradictory when civil servants have to make rules and then have to judge them on their efficiency themselves instead of leaving this judgement to an independent authority.

In that case the whole idea of fighting red tape has failed.

There should be a sharp and clear separation of legislation, jurisdiction and executive power.

The legislative power should be in the hands of the European Parliament, the jurisdiction in the hands of the European Court and the executive power in the hands of the European Commission.

One MEP, criticized the policy of the European Commission. "First decisions are made and after that the strategy will be defined. That is wrong. It should be the opposite strategy".

[12] Heinrich WEFING "Die Rechthaber" in "Die Zeit" dd 7-5-2020, p. 1

Not only the EU, also the whole European society is in a period of transition and that means developments that are not comfortable for Eurocrats. But after all, the aim of the concept of "Europe" should be one that appeals to its citizens and makes it possible to treat them as mature individuals who can judge and decide about the situation in Europe themselves.

If the decisionmakers in Brussels want to create a federal state and turn the EU into one, let them at least create a solid constitution with a clear separation of powers leaving a substantial part of the power to the national governments.

The essential basis of the EU, namely a proper constitution, is lacking. Therefore it is not working properly.

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