ON THE DIFFICULTIES OF RULE OF LAW RESTORATION
ANDRÁS SAJÓ
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ABOUT THE AUTHOR

András Sajó is a former judge at the European Court of Human Rights, Strasbourg (2009-17). He is a University Professor at CEU. Professor Sajó was the founding dean of Legal Studies at CEU. In addition to his stature as a prominent constitutionalist, he is also a distinguished scholar in the human rights field, including media regulation. Professor Sajó has been extensively involved in legal drafting throughout Eastern Europe. In addition, he participated and/or advised in drafting the Ukrainian, Georgian, and South African constitutions. His latest publications include Ruling by Cheating (Cambridge University Press, 2021) and The Routledge Handbook of Illiberalism (ed. w. R. Uitz., St. Holmes) (Routledge, 2022).
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ABSTRACT

The democratic backlash in some EU countries is understood as a problem of the Rule of Law. This is misplaced but the inherent weaknesses and uncertainties of the Rule of Law contribute to illiberal regime building. This paper reviews the legalism and moral turpitude that enable the prevailing cheating. It is argued that the prevailing institutions of the Rule of Law do not provide sufficient self-defense for the Rule of law: in certain circumstances the Rule of Law is its own best enemy. The principal problem of its restoration is not just its incapacity for self-correction. It is a problem of the lack of a proper public and professional mentality in “backlash” countries.

KEYWORDS

rule of law, restoration, judicial independence, legalism
A NOTE ON TERMINOLOGY

Benjamin Constant wrote: “Despotism banishes all forms of liberty; usurpation needs these forms in order to justify the overturning of what it replaces; but in appropriating them it profanes them.”¹ Illiberal regimes, electoral autocracies, etc. are regimes of usurpation, profaning the Rule of Law (hereinafter: RoL).

INTRODUCTION

At the heart of the Rule of Law crisis lies nationalist, illiberal plebiscitarian leader democracy. As for corruption, this is an important but misleading tip of the iceberg and not the heart of the problem, contrary to the action plans that the EU is using (“conditionality”) or considering now. Embezzlement and cheating in the service of perpetuated illiberal imperium building are key techniques of the RoL usurpation. For building an imperium (perpetuated power based on usurpation) it is not crucial to bribe someone. The appropriation of public assets can be fully legalized. Here the laws are written and interpreted in a way that legalizes illicit assets redistribution. The rules of public procurement are written in such a way that the public procurement contract ends up in the hands of the government favorite, who is administered by loyal servants. The tailor-made-for-embezzlement law creates economic power that enables the perpetuation of political power in the seemingly democratic electoral process.

The RoL as an ideal and as a set of instruments is a defense against arbitrariness of the powers that be. But what can be an unqualified human good in abstracto becomes a conflicting matter in the social and legal practices carried out in the name of that good. Its necessary veneration among lawyers and the frequent lip service among politicians cannot obscure the fact that, like all human institutions, RoL has its imperfections, contradictions, and a dark side. To a great extent, the

current demise is simply a systematic display of the inherent negativity of the RoL. Arguably, in aggregate, this tends to empower more than constrain authoritarian agendas. Meanwhile, fidelity to RoL is reduced to what Balkin calls true faith in Constitutions, namely willingness “to see evil flourishing while still hoping for the eventual growth of the good”.

WHAT ARE THE IMPERFECTIONS OF THE ROL THAT ENABLE THE CURRENT DEMISE?

Among others:

1. The RoL sustains all kinds of status quo, including the unjust or unfair. It can be oppressive or at least heartless.

This undermines its legitimacy.

If a society has inherited a legally protected status quo that is based on past injustice, or where there are enclaves of injustice, the RoL will provide protection for such arrangements. The statute of limitations, nullum crimen and progeny are bastions of foreseeability and legal certainty, and ultimate defenses against arbitrariness, but they are also typical bulwarks of the status quo injustice. Rules of legal certainty will provide protection to ill-gained property and impunity to criminals of all sorts. Improperly appointed judges or other authorities will maintain their position in the name of irremovability, etc. The impunity of wrongdoers or the impossibility to return ill-acquired property generates social discontent because law is seen as the refuge of scoundrels. When it comes to its restoration, RoL operates as if it were its best enemy.

2. As applied in law-making and law enforcement, RoL is uncertain and to some extent contradictory. There can be a fundamental agreement at the highest level


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2 Lukina makes this argument in relation to the “evil regimes” of Nazi Germany and Stalin's Soviet Union, claiming these observations remain relevant to contemporary authoritarian legal orders such as Russia and China, and the emerging populist regimes of Hungary and Poland, A. Lukina, ‘The Paradox of Evil Law’ in M. Tushnet & D. Kochenov (eds.), In Research Handbook on the Politics of Constitutional Law, Edward Elgar Publishing, 2023.

regarding the value and principles of the RoL. It is easy to agree that limiting arbitrariness is a good thing, although even at this level there can be some disagreement, for example when it comes to the distinction between “necessary” discretionary power and “unacceptable” arbitrariness. The agreement can be sustained even at the level of foundational and structural components: legality, judicial independence, procedural fairness, etc., mean a firm belief in a specific principle (or bundle of principles) regarding the structure of law and its institutional pillars. In the hoped-for scenario, the shared belief becomes an effective action plan, and it enables the principle to have normative power. But what happens, and not only in the demise scenario, is that the agreement boils down to uncertainty in the operationalization of principles.

Is judicial review of all administrative decisions required by the RoL?

And what is the meaning of *vacatio legis* if it is an essential part of the RoL at all? What constitutes a sufficient transitory period? Decent and reasonable judges can consider various relevant factors to evaluate the adequacy of the time allowed. But this is not a guarantee in the sense of RoL certainty, although the judicial practice may crystallize points of reference for such matters.

3. The RoL consists of *inherent elements* – *components* which may undermine the very essence and efficacy of the RoL and the legal system.

4. The RoL is not sufficiently protected against its own demise, which is a demise by its own means.

Additionally, two non-legal, external elements merit particular attention in the study of the self-liquidation of the RoL. First, like constitutionalism in general, the existence and observance of the RoL is to a great extent a matter of *mentality*, tradition, and culture. There is a spirit of the RoL that must be shared by the actors of the law, and to some extent society, for the RoL to be meaningful and efficient. Without a shared commitment to legal decency judges will become mere technicians accepting a mechanical, politically imposed meaning of the law, partly because of existential conformism, partly because of professional dumbness.
Here even decent people become tired, and a mood of resignation prevails. The RoL ends where belief in it dies.

Secondly, where authoritarian predispositions prevail in society power can be used in an unconstrained manner, especially where public opinion is manipulated by government monopoly. For the authoritarian mind a constrained power is no power at all. By authoritarian disposition I mean a veneration of the authority of a person, a collective identity, with all of this bordering on religious fanaticism.

The regimes of usurpation in the EU claim that they respect the RoL. This claim is “corroborated” by showing that whatever they do is present in countries which are considered model states of the RoL. An equally important factor is that the regime of usurpation uses internationally recognized exceptions to general rules creating a regime of normalized exceptionalism and expediency. An important example is the disregard of competitive bids in public procurement in the interest of national economy (expediency) – a matter that is recognized in EU law. It is for the sovereign national authorities with local knowledge to determine where national economic interests are at stake, and this is a matter of national sovereignty. Local knowledge here means knowing who the cronies are. As to the remedy: a clear definition of what constitutes national economic interest is helpful but an EU advocated milestone that would limit single party calls to 10% of the total is a good start at best, and most likely only the beginning of a new cycle in the game of workarounds. Tom’s message to EU Jerry is clear: “Catch me if you can!”

Or consider the debate raging about the composition of judicial councils, judicial appointments, and irremovability. In the (changing) endorsement of one or another single model the imperative language cannot conceal the conflicting evidence.

**THE ROL AS ITS OWN BEST ENEMY**

The transition to democracy from dictatorial regimes and the restoration or reconstruction of a pre-existing constitutional order are discussed in transitional justice and transformative constitutionalism theory. Restoration of the RoL in regimes where the usurpation did not reach the level of dictatorship and naked
arbitrariness, and where at least the veneer of the RoL is maintained, represents a less studied phenomenon. The maxim of the transition to democracy is that “there can be no RoL created by its own violation” because it will only start an endless cycle of illegality. In certain restoration situations this maxim results in stalemate and status quo friendly paralysis. The uncertainties and contradictions become extremely challenging where the RoL and restorative social justice cannot be achieved without the violation of formal legality. This is the problem where the Midas touch of legality has served the usurper. The Midas touch means that most of the acts which have undermined democracy and keep people in intellectual serfdom and material dependence were fully legalized (though in Poland or Bulgaria, for lack of a constituent majority but primarily due to impatience, legalization is less successful than in Hungary).

As Nietzsche aptly observed: domination means the power to name. Through the performative act the usurper (in control of the monopoly to generate language and ideas) takes possession.

The status quo protecting nature of the RoL is central in matters of judicial irremovability. Removing judges in case of systemic improper judicial appointments seems to be a natural response in attempts at restorative justice, but it is a real challenge as the post-war legal history of Germany indicates. The ECtHR, after many years of trepidation, recognized in Guðmundur Andri Ástráðsson v. Iceland that exceptional circumstances may justify judicial removal and the CJEU too has accepted that certain judicial formations are contrary to the RoL and some appointments and dismissals are void, but the there was no restoration to judicial managerial positions in the Hungarian cases. The unconstitutional appointments of the Polish Constitutional Tribunal have so far not resulted in judgments invalidating the appointments. The fruits of the poisonous tree are hanging too high: the longer the despotic regime rules the more legalized the

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4 “…the origin of language itself [is] an expression of power on the part of the rulers: they say ‘this is this and this,’ they seal every thing and event with a sound and, as it were, take possession of it.” F. Nietzsche, On the Genealogy of Morals, trans. Walter Kaufmann and R. J. Hollingdale, ed. Walter Arnold Kaufmann, New York, Random House/Vintage Books, 1989, 26.

5 Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020
appointments will be and the RoL, contrary to quasi-revolutionary regime changes, does not offer a solution where the problem with the administration of justice is that the judges and in particular those who have managerial positions were appointed in view of assumed political loyalty or lack of spine, but within the legal forms that apply in RoL countries.

Given the centrality of the judiciary for the RoL, the scholarly, professional, and political interest focuses on the administration of justice. However, while the sources of the illiberal usurpation lie in economic and cultural quasi-monopolies, they are created by law and entrenched by the RoL. The positions of domination were created by tailor-made law and were not deemed violations by the EU. How can the decisive ownership structures be changed in a way that conforms with the RoL where the press is owned by the cronies of the usurper? Would Nationalization in the name of public interest with full compensation be the RoL compliant answer? And what should be done with the management of the public television or national bank and many other public institutions which are also protected by rules of irremovability, even at the level of EU law, and which are quite often constitutionally entrenched?

Criminal law is also bound by legality. How can past illegalities which are beyond the wall of the statute of limitations be prosecuted, and if they are not yet expired who will prosecute when the prosecutorial office is populated by accomplices of the past regime? Recall the Italian “solution” after the collapse of fascism. The author of the race law became the second president of the Constitutional Court. Fascists continued to work for democracy. It is for the specialist to determine to what extent Italian Christian Democracy in the post-war, cold war period operated a RoL system, except that it was destroyed by its own corruption. Italy was no exception. Not even the European Court of Justice was free from accomplices of the Nazi regime in the first 20 years of its existence.6 The power of the usurper

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6 The Italian judge and the first president of the Court, Massimo Pilotti, had advised Mussolini on how to avoid condemnation by the League of Nations for Italy’s actions in Ethiopia. During the Second World War, after Italy’s annexation of Slovenia, he also headed the high court of occupied Ljubljana. The German judge Otto Riese had retained his membership of the National Socialist German Worker’s Party (NSDAP) until 1945 despite residing in Switzerland. Maurice Lagrange joined the Court as an Advocate General having previously overseen the first wave of persecution of French Jews in the civil service of the Vichy government. Another Advocate
will continue because its material basis, the formerly public assets in the hand of regime loyalists, are protected by the constitution and the RoL. The only hope is that there are enough corrective mechanisms in the RoL which allow at least for a modest correction. Many biased contracts can be voided for being contra bonus mores (unconsciable) and rescinded if the judiciary is ready to accept a radical but reasonable interpretation of classic private law concepts. After all, as the Hungarian Civil Code states: “Contracts violating the law or concluded by circumventing the law shall be null and void” (6:95 §). But are these concepts applicable to an administrative decision allocating a government subsidy?

Some of the more recent victims of laws written to the benefit of government cronies can be compensated if the laws of usurpation are contrary to European law. Let us assume that the domesticated judiciary will be ready to review its earlier positions. Even so, it will be hard or even impossible to frame most of the abuse in terms of EU law infringement, and the successful infringement process does not reach the wrongdoers who act in accordance with the national law that they had written for themselves.

Assume, for example, that the rules of public procurement will be rewritten and the new legislation is not struck down by a Constitutional Court filled with appointees of the usurper. Imagine that in the new rules enacted as part of the restoration, clear and transparent (objective) tender conditions, etc., will prevail. Assume also that past overpricing, exclusion of competitors (on formal grounds or informally), and exclusion of better offers are documented. The evidence indicates improper advantage, even systemic corruption, in the previous regime of public procurement but no smoking gun of bribery or illegality (as the system is legally rigged by sovereign decision). Would it conform with the RoL to exclude the beneficiaries of past procurement calls from new public procurement if the excluded company were not found so far to be involved in price fixing, etc., and

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the managers were never convicted and not even charged? It is easy to exclude on grounds of past behavior companies like Odebrecht\(^7\) with a clear judicial record of illegality, but not in our case where the qualified bidder has never been charged.

Of course, it is possible that legal responsibility can be established but this takes many years in a RoL-based system, because due process is time-consuming. The domesticated national administration of justice will object to the restoration of the RoL in the very name of the RoL.

As for the EU bodies and civil servants, these have not been able so far to respond flexibly and expediently. In the EU, where “Qatargate” is only the consequence of the refusal of proper transparency and conflict of interest rules and where horse trading is called stakeholders’ democracy, it is telling that as part of the conditionality milestones the Hungarian parliamentary asset declaration rules had to be changed, because the Hungarian Parliament applied the European Parliament rules.

Consider the case of the EU Fifth Anti-Money Laundering Directive (AMLD5, 2018). The Directive exempts access to beneficial owner information where there is a disproportionate risk of fraud, etc. This is a reasonable exception if national authorities act properly and transparently. It becomes a shield to knaves where the authorities are programmed to see such disproportionate risk every time the information would expose government cronies. The CJEU in C-37/20, by striking a proportionate balance in the spirit of human rights and RoL, went even further and voided the unconditional access of the public to information about the beneficial owner. Apparently, the earlier, pre-2018 rule is restored and legitimate interest must be shown. This is again within the RoL, except that another gap is created in the service of the usurper as there is no presumption in favor of the press and specific civil society organizations. The authorities of usurpation will not

\(^7\) The judicial findings are dubious in the eyes of left-wing commentators in the Ecuadorian case related to the Odebrecht bribery where the convictions allegedly aimed to facilitate the barring of ex-President Correa from standing in elections and were in violation of the RoL. D. Rogatyuk ‘Ecuador’s Neoliberal Government Is Trying to Ban Rafael Correa from the 2021 Elections’, *Jacobin*, 8 March, 2020, https://jacobin.com/2020/08/ecuador-moreno-correa-elections (accessed February 6, 2023)
find legitimate interest. They will maintain the façade of legality, for example arguing that the press has no legitimate interest in the specific case. For example, they may claim that the requesting journalist did not explain convincingly that the person concerned is involved in money laundering. Of course, the information will be granted to the friendly press when it comes to “enemies”, in the spirit of “to my friends everything, to my enemies the law”.

The recent EU measures are doomed because they continue with the assumptions that the RoL and human rights enforcement will operate as in other democracies. Where the form of state is kleptocracy, the RoL assumptions are naïve at best. However, and this speaks for the RoL and even for regimes of usurpation, the abuse of the RoL is a shield for the knaves, and not the sword of the usurper, i.e., in most cases law is not used to silence or at least to prosecute those unwilling to become accomplices, and in individual litigation a veneer of decency is still present. But the ordinary considerations of the RoL and human rights backfire in usurpation.

The legalistic limits of EU law and the non-confrontational muddling through tactics of the EU contribute to the systemic substantive violation of the RoL in a growing number of Member States. The careless EU subsidies empowered the beneficiaries of the usurpation in their regime building. After all, the EU has “more important matters on its agenda” than issues affecting less than 1% of the budget and development in semi-civilized peripheral countries. As to the Member States: what is wrong with nationalism when we are also nationalists, albeit of a superior and civilized kind?

What about a European change of heart that would encourage more radical forms of RoL restoration? Consider the cautionary tale provided in December 2022 by Slovenia. A new parliamentary majority wanted to get rid of the members of the Broadcasting Council that had been elected by the previous parliamentary majority. The Council has turned public broadcasting into a propaganda tool of the previous populist government which simply followed the Polish, Hungarian, Venezuelan, Greek etc., model. The new Slovenian Government enacted a law that enabled the replacement of the former appointees under the guise of
reorganization. The former governing party successfully called for a referendum but the Slovenian people (more precisely about one-quarter of the electorate) endorsed the law, which delegated to civil society organizations the power to appoint board members. The old management was to be dismissed, in disregard of the members’ term of mandate. There is no judicial finding that the Council, in disregard of the duty of impartiality, acted illegally. The case is now pending in the Constitutional Court. Is such populist/popular dismissal compatible with the RoL? If not, how can the RoL be restored? Are we going to say that a politically biased public broadcasting body, if lawfully elected, is not a RoL problem and not even a problem for democracy? If it is not a problem because the RoL is about the structure of the law and not democracy, the biased public propaganda will continue.

*Acquiescence* is the name of the game. Social peace and efficiency are decisive considerations influencing the RoL (and practical human reasoning). Legal certainty and its institutional entrenchment hamper the correction of past injustice even if that irregularity continues to pester the democratic future. The statute of limitations is all about that. The ECtHR ruled that, even where a judicial appointment was inappropriate, “the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant’s right to a “tribunal established by law” in the balancing exercise that must be carried out”.8

**THE MENTALITY OF IMMORALITY**

There are a few limited possibilities for RoL restoration which rely on the rather limited or neglected capacity of RoL self-correction. The RoL does not contain a mechanism of self-defense, a kind of militant RoL, that is apt to prevent and combat systemic abuse and it does not provide a system of its self-restoration that would not endanger, perhaps perpetually, its own normal functioning. It is perhaps possible to envision a restorative, militant RoL but given the social realities of adjudication and compromise-based interest politics the chances of an effective restorative system are not good.

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8 *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 252, 1 December 2020
The principal problem of restoration is not just insufficient self-correction. It is a problem of public and professional mentality. The RoL is not just a principle, or a set of principles, generating standards and ultimately rules. It is also about the spirit, the morality, that motivated and generated the principle, which is anchored in shared social experience. Those who suffered injustice at the hands of torturers, or communities experiencing lack of equality before the law on a daily basis, will understand what arbitrariness means and have an intuitive understanding and respect for the RoL and what derives from it, as well as a motive to undo arbitrariness. This spirit (or consciousness, culture, *habitus*, etc., depending on one's train of thought) of this shared social experience was to a great extent socialized as a set of general social expectations, and institutionally in the construction of the *Rechtsstaat*. In this culture, the other party has to be listened to as a matter of respect and a precondition for rational deliberation. Decency as truth telling is the norm and a realistic, or at least affordable, basic assumption of life. These expectations operate as social norms in the sense of collective expectations that are socially and institutionally sanctioned. These social assumptions were also built into the professional ethics of lawyers, scholars, journalists and even in partisan politics. It is in the spirit of legal decency and integrity that legal interpretation must follow established canons, and it should be reasonable, at least.

This system of implied beliefs fails if ordinary social decency and fairness cease to be valid expectations because, for example, a higher cause like restoring the nation's imaginary greatness dictates otherwise. Expectations of fairness fade away thanks not only to conformism or simple personal survival needs: it becomes unrealistic and counterproductive as a life strategy. He who continues to expect decent behavior in social relations outside family is fatally mistaken and will be punished where unprincipled action rules and integrity is not rewarded.

Judges are socialized to follow a professional ethics of decency. In their case decency means professional rationality. They are not socialized to be moral heroes on the bench (although some Polish judges did show heroism). Once decency and integrity are gone there is no moral obstacle to one or another
absurd interpretation of the law (especially if this is the precedent coming from higher instances).

The citizen of a democracy expects respect from the authorities that can be provided by adherence to the RoL. However, the same citizen is often ready to endorse a sentiment that is fundamentally contrary to the RoL. After all, to quote Sandy Levinson, “the ‘rule of law’, defined as adherence to procedural norms, works in systematic ways to frustrate democratic wishes and goals.” It is increasingly believed that the will of the nation or of the sovereign, represented in a majority, is the ultimate decider. The majority represents the genuine (true) nation and/or the people and rules are unnecessary obstacles only. To quote the President of the Hungarian Supreme Court (Kuria): “the rule of law is excessive.”

Alexandre Koyré said this before Hannah Arendt: “The totalitarian regime is founded on the primacy of the lie”. The contemporary regimes of usurpation are founded on the toleration of known lies. How is that possible? *Mundus vult decipi, ergo decipiatur.* If the world will be gullied, let it be gullied.

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