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The European Union's Rule-of-Law Crisis and the Problem of Diagonality

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The EU's ongoing rule-of-law crisis, entailed by constitutional backsliding in some of its Member States, and the fierce debate as to whether and how European Union (EU) institutions should intervene have grown to one of the core issues of the European project. Nowadays, it is generally accepted that the rule-of-law predicament undermines the European integration and, sooner or later, a solution needs to be found. But how can there be a rule-of-law crisis in the EU? Rule of law and human rights (hereafter collectively: rule of law) are said to be the fundamental values of Europe (Article 2 TEU) and the EU has its own detailed bill of rights (EU Charter of Fundamental Rights).

The problem is that EU law has no doctrine of 'diagonality.' This term refers to the application of EU rule of law against Member States, as opposed to 'straight application', which refers to the application of EU law requirements against EU institutions, as well as the application of national constitutional requirements against Member States. EU law contains a comprehensive set of rule-of-law requirements, which have a full application against EU institutions ('straight application') but only a very limited one against Member States. EU rule of law applies to Member States when they implement EU law ('paradigm of scope'), however, notwithstanding its substantial spillover effects, this diagonality is false, as here Member States act as the agents of the European Union ('apparent diagonal application'), contrary to cases, where EU rule of law is applied to Member States acting in their own field of operation ('genuine diagonal application').

The Dead-End of the European Rule-of-Law Debate

The ongoing rule-of-law crisis in Europe brought to the fore a fundamental contradiction of the EU's legal and institutional architecture. One the one hand, rule of law and human rights are (at least, on the level of declaration) at the cornerstones of the European Union: they are clearly recognized by the founding treaties, serve as non-negotiable pre-conditions of accession, and they ensure that the various European mechanisms based on mutual trust and recognition are operational and effective. On the other hand, EU law has no doctrine of diagonality and appears to have very limited power when encountering recalcitrant Member States who are contemptuous of the EU's fundamental values. Unfortunately, if these values are outrageously defied in the Member States, that may demolish the European Union both as a community based on common values (principled reason) and as a mechanism based on mutual trust and recognition (practical reason).

The fierce scholarly and political debate as to whether and how EU institutions should intervene underscored the fact that EU law has failed to develop a solid doctrine of diagonality. While the ongoing rule-of-law crisis has stimulated various on how to enforce rule of law on Member States as well as within them, we still do not have an answer to fundamental questions about why such a doctrine is needed, if it is needed, what the justification for a diagonal application of EU law on the member states would be. Notably, the diagonal application of EU rule of law is not simply a vertical question of top-

down legal authority. While the straight application is based on the consideration that no public authority may exist without rule-of-law limits, this rationale is not valid in an EU-to-Member-State relation where Member States conferred sovereign powers on the EU and not the other way around. The answer to the question is deeply rooted in the EU's self-identity and conception of purpose. This leaves EU law in a very difficult situation where the EU is expected eat its cake (protect EU rule of law) and have it too (preserve national constitutional identities).

EU rule of law's application against Member States is, for the most part, linked to the scope of EU law ('paradigm of scope') and the debate on human rights in Member States has centered around how to define this scope. Nonetheless, the general perception is that the spill-over effects of this apparent diagonality are insufficient to address the problem that arises when Member States flout the EU's fundamental principles. The paradigm of scope seems to be flawed: on the one hand, it does not provide protection in genuine domestic matters; on the other hand, it tempts EU institutions to overreach by seeking to apply EU rule-of-law principles without taking into account national constitutional identities.

Multilevel Constitutional Architectures and Comparative Federalism

Fortunately, comparative federalism provides an array of experiences, solutions and techniques, which can assist the European legal community in addressing the diagonal rule-of-law problem. The most straightforward approach as to the diagonality of human rights is found in federal systems like those found in Austria, Belgium, Germany, and Switzerland. Some federations use various methods to give room to regional 'constitutional identities'. For example, the Canadian Charter of Rights and Freedoms does not distinguish between straight and diagonal application and applies equally to the federal government and the provinces. However, neither the de-politization, nor the uniformization of Canadian human rights is as determinate as it may appear at first glance. Federalism is factored into the Charter and its case-law at various points and the provinces (as well as the federal government) are given the right to unilaterally opt out from the Charter's central provisions.

Australian constitutional law relies on 'constitutional silence' to create more space for diversity. The Australian constitution does not list an explicit bill of rights but instead sets out a handful of fundamental rights, some of which limit only the federal government (or commonwealth), and some of which also apply to state governments. Nonetheless, the Australian constitution fails to build up a comprehensive system of human rights protection. In practice, Australia has normally given legislative (political) answers to the eventual human-rights-focused tensions between the federal and the territorial political communities. For instance, contrary to the United States (U.S.) and Europe, state sodomy laws were quashed through legislation and not by judicial intervention. In the Toonen case, after a successful complaint submitted to the United Nations Human Rights Committee against Tasmania's anti-gay laws, the Commonwealth of Australia passed the Human Rights (Sexual Conduct) Act 1994 (Cth), which was designed to override the pertinent provisions of Tasmania's criminal law.

The current EU architecture parallels the first century of U.S. constitutional history: although today, due to the incorporation doctrine, most fundamental rights held to be valid against the U.S. federal government can also be invoked against state governments, the first century of U.S. constitutional law was more similar to the current EU approach in terms of offering only loose controls on state

governments. Although the U.S. Supreme Court sporadically established constitutional limits on state governments that may be regarded as human rights in nature, the arsenal of human rights protection as enshrined in the federal Bill of Rights did not apply at the state level until the adoption of the XIVth Amendment after the Civil War. For a century, states were limited only by their own constitutions. The American Civil War proved that certain common core values have to be respected throughout the Union, if the Union is to hold together, and there are certain practices that violate the Union's 'most basic notions of morality and justice'.

A Doctrine of Diagonality

Against this background, the paradigm of 'scope' that prevails in EU law today should be replaced with the paradigm of 'core standards'. EU law needs a 'Copernican turn'. The paradigm of 'scope' holds the scope of EU law stationary at the center of the EU 'rule of law' universe. A paradigm of 'core standards' would instead place Member State action at the center of the analysis and would aim to ascertain whether that is reconcilable with the EU's core values. This way, instead of stretching (and at times overstretching) the scope of EU law, European jurisprudence could apply diagonally to the extent necessary to preserve the core values of the European Union.

This core standards paradigm would not imply that all EU rule-of-law requirements having a straight application are also applicable against Member States (e.g. not all rights listed in the EU Charter of Fundamental Rights have a warrant to be applied diagonally). On the contrary, the courts should give due deference to Member States and their constitutional identities wherever possible. A diagonal application of EU law is not meant to create an exhaustive rule-of-law protection scheme, but to protect the EU's rule-of-law identity, built up of the common core of European constitutionalism, and to make European mechanisms based on mutual trust, cooperation and recognition operational and effective.

The proposition is that the straight and the diagonal application have different rationales, which inform the way they should work. The choice between the two modes of application is determined by two considerations: the protection of the EU's rule-of-law identity as a cornerstone of the integration and the respect for national constitutional identities. EU law should set up a non-exhaustive but comprehensive diagonal system based on the 'core standards' paradigm, which, as a result, would be selective and respect Member States' margin of appreciation. While this approach may appear to be overly complicated in comparison to a more comprehensive application of EU protections on the Member States, it is far from unprecedented and it is capable of both preserving the core values underpinning the European Union and respecting the constitutional identities of the Member States.