ÇUKUROVA UNIVERSİTY FACULTY OF LAW

INTERNATIONAL CONFERENCE on "THE RULE of LAW in 21st CENTURY"

ABSTRACTS

November 10-11, 2022
ADANA

Prepared by
Assist. Prof. Zeynep ÖZKAN
Research Assist. Serhan YILDIRIM

HUKUK FAKÜLTESİ

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(https://rolconference.cu.edu.tr/)

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INTERNATIONAL CONFERENCE on

"THE RULE of LAW in 21st CENTURY"

PROGRAM

DAY 1. (10 November 2022)

13.30 – 14.00 Opening Speeches

- Prof. Dr. Mehmet DEMİR - Dean of Law Faculty
- Av. Semih GÖKAYAZ - President of Adana Bar Association
- Prof. Dr. Meryem TUNCEL - Rector of Çukurova University

14.00- 15.15 Panel 1

Chair Av. Semih GÖKAYAZ (Adana Bar Association)

- Prof. Dr. Rafael Bustos GİSBERT (Complutence University Madrid- SPAIN)

"The Independence of the Judiciary and the Legal Guarantees of Judges"

- Prof. Dr Selin ESEN (Ankara University)

"Essence of the Right' as a Criterion to Limit the Rights: A Comparative Analysis"

- Assist. Prof. Zeynep ÖZKAN (Çukurova University)

"A Contemporary Approach to the Rule of Law: "Environmental Rule of Law"

15.15- 15.30 Coffee Break

15.30- 16.45 Panel 2

Chair Prof. Dr. Selin ESEN (Ankara University)

- Prof. Dr. Javier Garcia ROCA (Complutence University Madrid- SPAIN)

"Democracy, fair elections and Rule of Law: the culture of constitutionalism, European Convention on Human Rights and the European Unión"

- Associate Prof. Sergei BELOV (St. Petersburg University – RUSSIAN FEDERATION)

"The Threats to the Rule of Law in Measures Taken Against Russians in 2022"

- Associate Prof. Demet ÇELİK ULUSOY (East Mediterranean University – NORTHERN CYPRUS)

"Long-standing Rules and New Era: Digitalizing in the Rule of Law"

DAY 2 (11 November 2022)

10.00- 11.15 Panel 3

Chair Associate Prof. Aslı BİLGİN (Çukurova University)

- Prof. Dr. Gülriz UYGUR (Ankara University)

"The Rule of Law, Epistemic Injustice and Vulnerable Legal Subject"

- Assist. Prof. Özge APİŞ (Çukurova University)

"Exploring The Meaning: The Aggravating Reason of "Committing The Crime By Multiple Perpetrator" In The Terms of Certain Crimes that Codified in Turkish Criminal Law"

- Dr. Hamit YELKEN (Republic of Turkey Court of Cassation)

"The Right of Appeal in Context of the Rule of Law"

11.15- 11.30 Coffee Break

11.30 – 12.45 Panel 4

Chair Dr. Hamit YELKEN (Court of Cassation)

- Prof. Dr. Luca MEZZETTİ (Bologna University- ITALY)

"Rule of law beyond the State: ius cogens as international rule of law?"

- Associate Prof. Aslı BİLGİN (Çukurova University)

"Protecting the Rule of Law in EU Legal Order"

- Prof. Dr. Miroslaw GRANAT (Cardinal Stanislaw Wyszyński University in Warsaw – POLAND)

"Rule of Law under Illiberal Constitutionalism (Polish case)"

12.45- 13.00 Closing of the Conference

ABSTRACTS

PANEL 1

The Independence of the Judiciary and the Legal Guarantees of Judges

Rafael BUSTOS GISBERT*

Professor of Constitutional Law ComplutenceUniversity of Madrid, Faculty of Law,

rafabust@ucm.es

Since 2010 a plethora of judicial decisions, both from the Court of Justice and the European Court of Human Rights, have sought to address the dangers that judicial independence has recently faced in the wake of rule of law backslidings in Europe. In addition, the Council of Europe has since 2010 adopted a large number of non-binding standards that have been taken into account at the EU level in the drafting of the criteria for the rule of law monitoring mechanism. A brief review of both case law and soft law concludes that a new dimension has been added to the principle of judicial independence. Conventionally, this principle encompassed a subjective side (the right to an independent court) and an objective side (the absence of political pressure on judges safeguarded by an independent organisation of the judiciary). In this context, both the Council of Europe and the EU have developed a third dimension of the principle which can be called the "statutory" component of judicial independence. This element can be summarised as the European version of the right of judges to their own independence, which has been fully developed in other human rights systems, such as the Inter-American system. A right that encompasses judicial review (by an independent court) of any decision on the constitutional role of judges and the enshrinement of a trend to include "judicial independence" in the definition of judges' rights such as freedom of expression, association or privacy. Ultimately, this dimension of judicial independence stands as the ultimate threshold that no regression in the standards of the rule of law can overcome.

Keywords: Rule of Law, European Court of Human Rights, the Court of Justice, The Independence of the Judiciary.

* Invited Speaker

‘Essence of the Right’ as a Criterion to Limit the Rights: A Comparative Analysis

Selin ESEN[†*]
Professor of Constitutional Law University of Ankara, Faculty of Law,
sesen@ankara.edu.tr

Abstract

The concept of ‘essence of the right’ is a criterion that is applied to define the content and utmost limit for restriction of a right. Historical reference of the notion of the ‘essence’ is Article 19.2 of the 1949 German Constitution. Also some other constitutions that were came into effect after the German Constitution, such as the 1961 Turkish, 1976 Portuguese, 1978 Spanish, 1991 Rumanian, 1992 Slovakian, and 1999 Swiss gave place this concept.

Likewise, some of the international human rights documents refer this notion. Essence of the right is a key criterion in the European Union (EU) law. Article 51.1 of the Charter of Fundamental Rights of the European Union stipulates that the limitations of the rights and freedoms recognized by the Charter must respect the essence of those rights and freedoms. This makes the protection of essence a general principle for the EU members, regardless of the existence the concept of essence in their constitutions. The European Convention on Human Rights (ECHR) does not explicitly indicate the ‘essence of the right’. However, similar to Article 5.1 of the ICCPR, Article 17 of the Convention prohibits ‘any state, group or person’ from engaging in an activity or performing an act aimed at limitation to a greater extent than is provided for in the Convention. Still, while reviewing restriction of the rights, the European Court of Human Rights (ECtHR) uses the notion of essence as a criterion in some of its judgement. The Court rules that the essence of the applicant’s right is infringed if the interference impairs the right’s very essence and deprives it of its effectiveness.

The 1961 Constitution of Turkey was one of the oldest constitutions that provided the concept of essence. Accordingly, as of its establishment, the TCC has applied this criterion in its rulings. Notwithstanding the original version of the 1982 Constitution of Turkey revoked the essence of the right and install the principle of the requirements of the societal order, the Court sustained to implement the criterion of essence together with the latter. The 2001 constitutional amendments reintroduced the concept of essence as an independent criterion together with the principles of proportionality and the requirements of the societal order. Even though essence of the right is an old concept for the Turkish Constitutional Court, it rarely has used it as a practical than a declaratory value. The Court infrequently benefited this criterion for definition of the concept of the rights. Since the 1982 Constitution came into force, the

[*] Invited Speaker

Court usually applies it related to the principle of proportionality. However, notion of essence should be implemented independently. If there is a potential justification for a breach of a fundamental right, it is possible to balance the values protected by a fundamental right with other competing values. The outcome of such balancing can be either a justified or an unjustified breach of a fundamental right, but not a breach of the essence of this right. This is because the essence lies beyond the proportionality exercise and there can be no possible justification for a breach of essence. Yet, the TCC`s approach on the notion of the essence is contradictory. The Court not always applies this concept in favor of the protection of the rights.

Keywords: Essence of the right, The Criterion to Limit the Rights, Charter of Fundamental Rights of the European Union, The European Convention on Human Rights.

A Contemporary Approach to the Rule of Law: "Environmental Rule of Law

Zeynep ÖZKAN
Asst. Professor of Constitutional Law University of Çukurova, Faculty of Law,
ozkan.zynp@gmail.com

Abstract

Generally, the rule of law is accepted as an indispensable element of a legal order. However, some global problems, such as technological developments and climate crisis, are causing the transformation of the rule of law principle. Environmental rule of law concept is one of them.

Since the 1972 Stockholm Declaration on the Human Environment, environmental laws and institutions have expanded across the globe. Although there is a high level of legalization, there is a poor implementation. So we can say there is a gap between the requirements of environmental laws and their implementation and enforcement. Although there are too many regulations in this field, the main question is why this is not reflected in environmental quality and sustainability. Why is it very difficult to achieve effective results with environmental law and what can be done to change this situation? Because, they exist mostly on paper since government implementation is irregular, incomplete and ineffective. Environmental rule of law is a very effective key to addressing this implementation gap. This is because, this concept describes how environmental laws can be widely understood, how these laws can be respected and enforced. And also this concept provides citizens with a clear ways to enjoy their rights and sets a fair framework for sustainability. That is why we need to reconsider the principle of rule of law.

First, environmental rule of law is a tool for addressing the gap between environmental laws on papers and in practice, second, a key to achieving the UN Sustainable Development Goals. It provides us to see this gap, and fix it. Namely, how can we access the laws on this matter, how can we understand them, and how can we ensure access to justice and thus sustainability.

This concept strengthens general rule of law principle by bringing a new, environmental dimension to it. It supports sustainable economic, social and cultural development. This term contributes to peace and security by lifting the destructive effect on the vulnerable groups and by proper managing the natural resources, and also by supporting the participation of the public and all stakeholders in decision-making processes. It protects the fundamental rights of people, such as right to life, right to adequate standards of living.

It integrates environmental needs with the elements of rule of law principle. It does this with combining three essential components of rule of law: fundamental rights, legal regulations

which inclusively developed, and accountability of government. In my opinion, a rights based – approach is essential when reconsidering the rule of law in the light of environmental needs.

Environmental Rule of Law relies on protection of environment- related rights both substantive and procedural rights. This way, humans become the main actor rather than being mere beneficiaries.

We have to understand that this concept is still emerging and still evolving. However, we can benefit from linkage between UN Sustainable Development Goals and Environmental Rule of Law. We can engage diverse actors such as; government, civil society, individuals, courts and companies to the process. We can develop new approaches to improve this concept, such as human rights – based approach as I have mentioned before.

Keywords: Environmental Law, Sustainable Development, Environmental Rule of Law.

PANEL 2

Democracy, fair elections and Rule of Law: the culture of constitutionalism, European Convention on Human Rights and the European Unión

Javier GARCÍA ROCA*
Director of the Constitutional Law Department, Complutense University of Madrid,
Vice-president of the International Association of Constitutional Law,
javiegar@ucm.es

Abstract

Democracy, free elections, and the Rule of Law must go hand in hand: "democracy embedded in the Rule of Law" insists the European Court of Human Rights (ECtHR). Three principles that cannot be separated, moreover division of powers and fundamental rights build a bridge among them. It is important to be cautious on strengthening the Rule of Law in Europe in these times of dangerous populism, nationalism and "illdemocracies" in countries such as Poland, Hungary and Romania, among others. Nothing can be more perverse to citizens' freedoms than unconstrained majority rule. It is not enough to hold elections, if the rest of the ingredients of a Rule of Law are violated. We are in front of a "framework toolbox" with several devices that creates a checklist: legality, legal certainty, prevention of misuse or abuse of power, equality before the law and non-discrimination, and access to justice. The effective guarantee of fundamental rights of individuals, independence of the judiciary, and control of government action can also be added. These tools of Rule of Law are also applied to fair elections as requirements, guaranteeing the principle of electoral legality, and access to judicial review -or by an independent authority- of any irregularities or alleged arbitrariness in electoral procedures. Representative democracy is the bedrock on which fundamental rights rest, and demands free elections, freedom of expression and right of association in political parties.

The ECtHR has created, year after year, in numerous sentences, many conventional standards in electoral matters; some of them are included in the Code of Good Electoral Practices of the Venice Commission of the Council of Europe. Indeed, there is not a single electoral model of constitutionalism or European law, there is a wide margin of national appreciation and freedom of the legislator under the system of the European Convention on Human Rights. But the ECtHR guarantees the exercise of the right to active and passive suffrage (article 3 of the Additional Protocol to the Convention) against any threats that interfere. In recent times, progress has even been made in guaranteeing, in a reinforced manner, the status of the

* Invited Speaker

political opposition throughout the moments prior to the election call as an essential condition for the holding of truly free elections. Freedom of expression and the rights of political participation of the opposition forces and their leaders cannot be silenced. The majority rule is not enough, it is not the only ingredient of a representative democracy based on the Rule of Law and respectful of political rights. Those who stand outside these values cannot claim any democratic legitimacy, even if they win elections.

Keywords: Democracy, Rule of Law, Fair elections, Political opposition, Constitutionalism, European Court of Human Rights.

The Threats to the Rule of Law in Measures Taken Against Russians in 2022

Sergei BELOV[*]
Assoc. Professor of Constitutional Law, University of St. Petersburg State,
Faculty of Law,
s.a.belov@spbu.ru

Abstract

Re-phrasing the famous German saying „At no time there is more lying than before the elections, during the war and after the hunt", one can say that *at no time there is more threats to the Rule of law than during the war*. The Ukraine conflict provoked a number of measures, labelled as "sanctions" from the US and the EU, as a reaction on the military actions of Russia. On the one hand, while we are still inside the situation, it is not the time to make legal assessments. On the other hand, this is the time to prevent more fatal ignorance of the basic ideas of the Rule of law.

Taking the theoretical starting point, the word "sanctions" refer to liability (punishment for the breach of law), which seems to be one of legal notions. Moreover, according to constitutional theory human rights could be limited by legal procedure only (within due process of law).

The Rule of law principle establishes basic ideas for liability, which are namely:

- a person is liable for her/his own actions
- there is no liability without law establishing to what a person is liable (*nulla crimen sine lege*), clearly described and demonstrated beforehand
- a guarantee of fair trial (including the right to defense) must be provided to any accused
- in a case of administrative measures the decisions are to be clearly and certainly demonstrated (at least to the liable person) with their legal and factual grounds, the judicial review of these decisions must be guaranteed
- sanctions (or punishments) in turn, must be clear and definite on their scope, to whom they are applied, time limits, etc.

Are there any so fatal crimes that deprive a person of all these guarantees? As a basic human right and legal principle – no. There were a case of Nuremberg Tribunal, when the Nazi officials of the German Third Reich were convicted for crimes against peace and humanity without clear statutory provisions *ex ante* prohibiting these actions, but anyway this was a public trial with the right to defense.

[*] Invited Speaker

The EU sanctions as they appeared in the **Council Regulation (EU) No 269/2014 of 17 March 2014** (as amended and implemented by other regulations) are: travel bans, assets freeze and prohibition to provide funds. Providing funds raise no questions, the travel bans do not obviously contradict the usual understanding the human right to travel (a country might bloc entering its territory and enjoy wide discretion in this regard - even might declare void visas issued before), while freezing assets is quite serious punishment, assaulting the individual right to property. The argument that "freezing" is not a confiscation does not look persuasive, because it is still a substantial encroaching on the right – without any time limits and blocking all owners' warrants. Today European politicians announce an intention to confiscate these assets.

The EU sanctions (according to the **official web-site of the EU** - https://eu-solidarity-ukraine.ec.europa.eu/) were "designed to (1) cripple the Kremlin's ability to finance the war and (2) impose clear economic and political costs on Russia's political elite responsible for invasion and diminish its economic base".

Leaving aside the sectoral economic sanctions (aiming to harm Russian economy in general), I focus on personal sanctions.

Among those sanctioned are "**top political representatives, oligarchs, military personnel and propagandists**" (according to the official web-site). Art. 3 of the Regulations No 269/2014 is more detailed, though the criteria are still vague – persons who are "responsible for, supporting or implementing actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine" and alike. They describe very wide range of activity. For instance, the Russian bar associations recently debated if it is acceptable for an advocate to work in the territories, annexed by Russia. If the need to provide criminal defense basing on Russian law – do they support policy which undermine territorial integrity of Ukraine and could be sanctioned? Or they just provide legal aid to the accused in criminal proceedings?

The interpretation shows up in practice. The Annex I to Council Regulation (EU) No 269/2014 contents the list of **persons under sanctions** with a brief **description of grounds** for each person. Being a wife or a child of a person supposed to be affiliated with President Putin, expressing publicly an opinion of support of the "special military operation", collaboration with "occupational authorities" are these grounds. How they look in terms of a criminal statute? To be a wife of person affiliated with a politician could be a criminal

offence? These grounds (many of them) are far from any statutory provisions, describing crimes. While the punishment is substantial limitations of rights.

However, the Annex I is not the exhausting circle of sanctioned. **Many Russians, who did not make anything related to the Ukraine conflict, faced freezing their assets** in the EU, not being listed in the Regulations. Two of my friends are among of them.

One of them **made personal investments in securities through a Russian depository**. The National Settlement Depository was the only one in Russia which had an access to the international financial system. This depository appeared in the sanctions list on 3 June 2022 because "it is recognised as a systemically important Russian financial institution by the Government and the Central Bank of Russia. It plays an essential role in the functioning of Russia's financial system and its connection to the international financial system, thus directly and indirectly enabling the Russian Government in its activities, policies and resources". As a result, all securities of the Russian investors (according to the Russian Central Bank 5 mln persons with €72 bln of investments) had their assets frozen.

Another friend of mine **made investment directly through a Belgian bank as a depository**. His securities were blocked because he is an employee of a Russian *oil* company. Later he got a notice of possibility to move his bonds, but could not find another depository within the EU – all financial institutions without any direct ban treat these assets as "toxic", being afraid of secondary sanctions for operations with Russians. This demonstrates the vague and uncertain manner of sanctions.

The professional community of **lawyers** discusses on the nature of them – are they preliminary measures taken to provide execution of judicial judgment on confiscation in the future? I believe not. Freezing assets were made outside any judicial procedure and without clear perspective of a trial. This is taking assets which could be used for financial support of activity threatening international peace and security – so they are preliminary measures, but not in the legal sense in the context of judicial trial. This is something lying beyond the law, making an obvious threat to the Rule of law.

Sanctions play the role of political pressure (forcing to change the state policy through making vexations for all people of the country), being outside the legal principles for limitation of human rights. This makes a big threat to the Rule of law within the EU and international legal order.

Keywords: The Rule of Law Principle, Russia, European Union, Human Rights.

Longstanding Rules and New Era: Digitalising in the Rule of Law

Demet ÇELİK ULUSOY*
Assoc. Professor of Constitutional Law, Eastern Mediterranean University,
Faculty of Law,
demet.celik@emu.edu.tr

Abstract

As humans, we live in the new developments that the digital age has added to our lives, especially law and human rights. These improvements are crucial part of real lives of human beings. Also, today the point we have reached a large part of real life has become dependent on digital services. The truth is that individuals need to accept what digital services offer to make their life easier, to catch up and keep up with real life. But on the other hand, these developments bring risks and negativities especially in the exercise of human rights. Consequently, efforts to restrict access to digital platforms or monitor digital activities interfere with fundamental rights such as privacy and freedom of expression, freedom of information, freedom of association and others. The digital era is not offering just interesting transformations but also challenging for fundamental rights especially privacy. The new digital era makes a new platform for illegitimate actions as well.

In this context, the objective of this study is to show the role of the old but unchanging rule of law principle, which is the backbone of constitutional democracy in the light of adjustments due to the evolution of technology. This new period reveals that both the ground legal principles and the policymaking means have changed, or states need to change their governing understandings and approaches. Since governments, as well as individuals, have become dependent on technology or digital platforms in their services. At the very least, they need the services offered by technology and digital platforms to provide fast, accessible, and effective public services to their citizens.

On the other hand, the principle of the rule of law, which is familiar, timeless and will probably not change for a long time in terms of its general requirements, is the key to the democratic constitutional state, good governance and the safeguarding of rights and freedoms. Today, recognitions to the advancing technology and what it brings, both the rule of law principle and the role of the state has deeply changed. Besides the power of the state, the private powers emerged, and these forces have risen with the fourth industrial revolution.

* Invited Speaker

Therefore, there is not only a state-individual dilemma in the digital field, private actors have been added to this also. In this area, just as we expect in terms of the principle of "rule of law" in the real field, freedoms should not be arbitrarily restricted, the existence of the phenomenon of authority bound by law and the rules related to the digital field should be clear, understandable and predictable as well.

Digital stages perform a progressively significant role in ensuring and balancing the rights of internet users specifically. Rising powers of the private actors bring with them risks on the basis of rights and freedoms in particular in the context of digitized personal data. While legal guarantee is required for people in the rule of law, private powers are not always successful in providing this assurance in the digital environment. This situation arises especially when they do not meet the legitimacy of such as artificial intelligence methods, algorithmic techniques and decisions, they apply with the different technological methods especially on private data. Nevertheless, these actors do not present the guarantees at least supported by public authorities. In order to prevent that applications and decisions on citizens' rights are shown in an arbitrary or ambiguous way, need to indicate on in what manner the principle of rule of law be able to endure and modify to the world of the web. Within these relations, the method of the government's participation is also important in terms of the digital rights. On one side, governments mostly depend on technology, private companies for digital services. Governments on the other hand may enter into a struggle with them over the governing of the digital platforms. For the reason that in most cases, these companies apply the rules they set themselves and even resolve digital disputes themselves. Individuals who are harmed by these conflicts and their rights and freedoms are restricted in the digital field mostly. As a result, the policy of the governments in the way of the digital sphere can be authoritarian or democratic. This also allows the concepts of digital authoritarian and digital constitutional state to be discussed. After all, the rule of law, initially thought as the contrary of arbitrary public power, is stress out because of the capability of private actors to develop and apply their own principles struggling with public standards in the digital era.

Keywords: The Rule of Law Principle, Russia, European Union, Human Rights.

PANEL 3

The Rule of Law, Epistemic Injustice and Vulnerable Legal Subject

Gülriz UYGUR*
Professor of Philosophy of Law, University of Ankara, Faculty of Law,
gulrizuygur@gmail.com

Abstract

The paper emphasizes the idea of rule of law and how it determines the construction of the legal subject in the context of epistemic injustice. The right to a fair hearing relates to the rule of law. If someone has not been treated fairly, it means that their dignity has been recognized by another. In that regard, I claim that it is necessary to state its connection with the concept of the vulnerability of an epistemic agent. Namely, when the judicial institutions do not recognize people as givers of knowledge, this means that they do not respect their dignity. The denial of some group of people as knowers causes epistemic injustice. This problem is connected with ignorance of the vulnerability of the legal subject. The paper points out the need for the recognition of human vulnerability as a condition of the legal subject, since ignorance of the vulnerability causes non-recognition of legal subjects as knowers. At this point, the problem is how the rule of law and its institutions respond to human vulnerability. This paper argues that the idea of rule of law only allows dominantly situated knowers and ignores others, and criticises this situation.

Keywords: Rule of law, Vulnerability, Epistemic injustice, Epistemic marginalization, Vulnerable legal subject.

* Invited Speaker

Exploring The Meaning: The Aggravating Reason of "Committing The Crime By Multiple Perpetrator" In The Terms of Certain Crimes Codified in Turkish Criminal Law

Özge APİŞ
Asst. Professor of Criminal Law, University of Çukurova, Faculty of Law,
ozge.apis@gmail.com

Abstract

In the 2nd Book of the Law No. 5237, in terms of some types of crime, "committing the crime together by more than one person" is regulated as a qualified form that increases the punishment. At first glance, the aforementioned regulation seems fair in terms of increasing the penalty fort he reasons of facilitating the commission of the crime in some types of crime and to ensure that the resistance of the victim is broken. However, Legality, which is an inseparable part of the Rule of Law Principle in terms of substantive criminal law, and the Principles of Certainty and Proportionality, which arose as a result of Lagality Principle, require an explanation in this regard. Because, it creates a debate in terms of the Principle of Legality whether the aggravating circumstances would be applied to all those who participated in the crime or only to those who have the title of co-perpetrator. In other words, is the "committing by more than one person" foreseen for some crimes also be applied to the instigator or aider or not?

The preamble of the articles that regulate the "committing of the crime together by more than one person" as a case of aggravating the punishment stipulate that this provision would only be valid for co-perpetrators. In other words, the justifications of the aforementioned articles state that if the actions of the crime are commited by more than one person, aggravating circumstance would be applied. But instigator's or aider's punisment would not be increased for just this reason. The practice of the Turkish Supreme Court is also in this direction.

In that case, if all the participants in the crime are co-perpetrators, the aggravating circumtance of "committed by more than one person" requires an increase in the penalty of each perpetrator. However, in the concrete case, if the contribution of the person(s) who participated in the crime other than the perpetrator is at the level of aiding or instigating the crime, the punishment will be determined considering the basic form of the crime in terms of the perpetrator and the partners.

In my opinion, it is unfair to accept such a view of doctrine and practice. When we consider the reason for the acceptance of this provision as the commission of the crime and ensuring or facilitating the emergence of the unjust result, it does not seem reasonable to accept this only in terms of co-perpetrators. Here, at least, it is necessary to make a limited assessment of the

acts that facilitate the commission of the crime that include everyone who is a partner or perpetrator and reduces/removes the possibility of the victim's self-defense. In addition, in terms of article 40 of Law n. 5237, the criminal liability of the partners depends on whether the perpetrator has committed an intentional and unlawful act.

Therefore, it is undisputed that if the instigator instigates the "committing of the crime with more than one person", this aggravating circumtance would spread to him.

In terms of aiding, the application of this aggravating circumstance to the perpetrator should depend on knowing that he is being helped. If the perpetrator does not know that he is being helped, there is no intent to commit the crime with more than one person. If both the perpetrator and the aider are acting in accordance with an agreement to commit the crime, both should be punished accordingly. If there is a crime committed by more than one person as a co-perpetrator and the crime is assisted without the knowledge of the perpetrators, if the aider knows that the crime was committed by more than one person, he should be responsible for the qualified situation in question.

Keywords: Accomplice, Aider, Multiple Perpetrator, Principles of Clarity and Proportionality.

The Right of Appeal in Context of the Rule of Law

Hamit YELKEN
Dr, Republic of Turkey Court of Cassation
hamityelken@yargitay.gov.tr

Abstract

The rule of law means, in the most general sense, a State that acts in accordance with the law and is bound by the law in all its acts and actions. However, a state can be a state of law in the true sense of the word not only by committing and declaring that it will act in accordance with the law, but also by affording mechanisms to monitor whether it acts in accordance with the law.

According to the Constitution of the Republic of Türkiye, the Constitutional Court is vested with the authority to review the lawfulness of the legislature's acts and actions. The Constitutional Court and administrative judicial authorities fulfil the duty of reviewing the lawfulness of the executive branch's acts and actions. Then, who and which legal mechanisms will supervise whether the judiciary, namely the courts, act in accordance with the law in a state of law?

Considering the independence of the judiciary, it is clear that it is not possible for the judicial power to be subject to monitoring by another power. In this case, it becomes necessary for the judiciary to establish an internal control mechanism. Within this framework, everyone should be entitled to have the decision rendered against him/her reviewed by a higher court, which is generally referred to as the right of appeal.

Today, at the legal level, both in criminal and civil proceedings and in the administrative judiciary, it is regulated in principle that the court decisions shall be reviewed by a higher court. The international legal texts (Protocol No. 7 to the Convention and the International Covenant on Civil and Political Rights) also guarantee the right of appeal, limited to criminal matters. However, in order for these provisions in laws and conventions to afford effective protection, the relevant guarantee must also be laid down in the Constitution.

However, it appears that no article of the Constitution explicitly guarantees the right to request review of the decision or the right of appeal. It is also observed that the Constitutional Court did not display a consistent attitude in its judgements until the end of 2018. However, by a decision rendered at the end of 2018 (the Court’s judgment no. E.2018/71, K.2018/118, 27/12/2018), the Court put an end to this uncertainty and ruled that the right to request review

of the decision is a requisite inherent in the right to legal remedies safeguarded by Article 36 of the Constitution.

It should be noted immediately that while deriving this right from the Constitution, the Constitutional Court has taken an approach that goes beyond the scope of the European Convention on Human Rights and the case-law of the European Court of Human Rights on two issues.

1. Whereas in the Convention this right is limited only to criminal matters, the Constitutional Court did not adopt this limitation and ruled that this right shall apply to civil and administrative proceedings, as along with criminal proceedings.

2. Whereas Protocol No. 7 recognises the cases where it is the higher court that first orders conviction after acquittal as an exception to the right in question, the Constitutional Court did not adopt this approach either.

In conclusion, the case-law established by the Constitutional Court corresponds to an important step in the realisation of the rule of law not only for the legislative and executive powers but also for the judicial authorities.

In particular, the fact that the Court has accepted the scope of the right in a broader perspective than that of the European Convention on Human Rights law while making this decision has provided a separate guaranteefor the protection of individual rights against the arbitrariness of the courts. This approach should be considered as a highly positive development.

However, in the last instance, this approach is based on the case-law. Courts may change their case-law. Considering that the right to request review of the decision is not explicitly set forth in the Constitution, the explicit formulation of this right in Article 36 of the Constitution through a constitutional amendment will make a significant contribution to the effective realisation of the rule of law in terms of the judiciary.

Keywords: Rule of Law, Right of Appeal, Constitutional Court.

PANEL 4

Rule of law beyond the State: ius cogens as international rule of law?

Luca MEZZETTI*
Professor of Constitutional Law, University of Bologna, Faculty of Law,
luca.mezzetti@unibo.it

Abstract

The idea of the rule of law implies the limitation of the normative power that is visible, in its Anglo-Saxon roots, in the description of Albert Venn Dicey: the principles that form a common denominator of the line of continuity that unites Henry de Bracton (the couple *gubernaculum / iurisdictio*) and Edward Coke (Bonham's case) to the Federalist Papers and the US judicial review correspond to a unitary logic.

The rule of law requires that the State (in the sense of the productive apparatus of law guided by the political will of the sovereign - *gubernaculum*) does not monopolize the production of law.

From the beginning, the rule of law depended on the distinction between judicial decisions, common law and constitutional conventions, on the one hand, and the will of the sovereign (*gubernaculum*) and his government policies on the other. The ultimate power over a social collectivity was and is authorized to make use of the law only in part.

The ideal of the rule of law therefore rests on an internal relationship and does not depend on a single and exclusive source → principle of non-domination of law. The rule of law is therefore a normative ideal, like human rights and democracy: freed from the notion of jurisdiction-dependent, it can be referred to the supra-state level. The duality of the rule of law also emerges in the international order → a corpus of general rules of international law is taking the force of *ius cogens*, a law of the international community that has enriched the contents of traditional international law as *super* partes law and consolidated the principle according to which there can be norms that do not presuppose the consent of each one.

It is therefore not possible to draw a clear distinction between the rule of law "*in this jurisdiction*" and the rule of law in the international order.

The international community is no longer (only) a community of states, but it can be qualified as a universal community of men: according to the constitutional theorization of international law [KELSEN, ZICCARDI, GUGGENHEIM, SCELLE, VERDROSS, SIMMA], this law

* Invited Speaker

tends to assume within the universal community of men the same function performed by constitutional law within the state systems: in other words, this is a sort of constitutional law of the human race aimed at establishing the rules that delimit the competence of national legal systems, decentralized organs of the universal community as well as partial communities within a wider universal community.

The Universal Declaration of Human Rights is configured in this perspective as the essential core of the constitutionality block of international constitutional law, formed by the United Nations Charter, the International Bill of Rights, as well as by the core treaties of international human rights law, and thus rises as a parameter of commensuration of the legitimacy-lawfulness of the behavior of States and individuals and, at the same time, marks the placement of the human being at the center of the legal scenario as such.

The attribution of rights to individuals under international law entails significant consequences and implications on the side of the concept of States' sovereignty.

If the individual is recognized by international law as the holder of the power to assert his rights vis-à-vis the State responsible for their violation, this means the definitive placing of the international order in a position hierarchically superior to national legal systems and endowed with precedence and primacy towards them.

In the fourth phase of the globalization of human rights, the latter become cosmopolitan as the fundamental nucleus of the imperative norms of international law (*ius cogens*), which thus acquire a hierarchically superior rank to treaty law and the "ordinary" norms of customary international law.

The rule of law disappears if the tension between law-justice and sovereign-law, between *gubernculum* and *jurisdictio* is abolished within State or international sphere.

The current crisis of the State does not necessarily correspond to a crisis of constitutionalism: the re-foundation of the rule of law in the age of globalization passes through the extension of the constitutional paradigm to any legal system (hence also supranational) and can limit the natural absolutist vocations of any power, in accordance with a multilevel structure that allows higher-level standards to impose limits and constraints on lower-level standards.

Keywords: International Rule of Law, The Universal Declaration of Human Rights, United Nations Charter, the International Bill of Rights.

Protecting Rule of Law in EU Legal Order

A. Aslı BİLGİN
Assoc. Professor of International Law, University of Çukurova, Faculty of Law,
a.aslibilgin@gmail.com

Abstract

The European Union is struggling with the rule of law crisis due to the change of governmental policy occurred in Poland and Hungary since 2010. Although these two Member States threaten the survival of the European Union via rule of law breaches, they do not have an intention to withdraw from the European Union since they still enjoy the advantages of European Union Treaties without fulfilling their obligations. While the sanction mechanism enavisaged in Article 7 TEU could not even be invoked due to its political nature, infringement proceedings set out under Articles 258, 259 and 260 TFEU are also ineffective unless violating State implements the orders and judgements of the Court of Justice of the European Union. In addition to these mechanisms, Rule of Law Conditionality Regulation which protects the EU budget and financial interest of the EU from breaches of the rule of law has entered into force in January 2021. The regulation enables the Commission to propose measures such as suspending funds to the Council in order to tackle with rule of law violations that threaten the financial interest of the EU in a given Member State. While the implementation of the Regulation depended on the decision that would be given on its legality brought by Poland and Hungary before the CJEU, in line with Advocate General's opinion the Court decided that the link between the rule of law and budget is sufficiently direct in cases when violations of rule of law threaten the management of EU funds.

In a supranational organization like EU whose functioning is based on law, sincere cooperation and mutual trust, rule of law backsliding in any of its members will hinder and jeopardize the achievement of its aims and objectives, which are legally binding. Therefore, as Schroeder mentions 'the rule of law itself is of legally binding nature' and the respect for and promotion of rule of law, which is a prerequisite for signing an accession treaty for candidate countries, also continues after becoming a Member State at least for the operation of the EU Treaties.

The main purpose of this study is to examine if the procedures envisaged in order to protect rule of law in eu legal order is effective. In this context while the importance and the legal status of the rule of law in the EU will be discussed in the light of ECJ's case law, the recent developments regarding the rule of law conditionality mechanism will be analyzed.

Keywords: Rule of Law, Rule of Law Conditionality Regulation, European Union.

PROGRAM

1. GÜN 10 Kasım 2022

1330 – 1400 Açılış Konuşmaları

- Prof. Dr. Meryem TUNCEL - Çukurova Üniversitesi Rektörü
- Prof. Dr. Mehmet DEMİR - Çukurova Üniversitesi Hukuk Fakültesi Dekanı
- Av. Semih GÖKAYAZ - Adana Barosu Başkanı

1400-1515 1. Oturum

Oturum Başkanı Av. Semih GÖKAYAZ (Adana Barosu)

- Prof. Dr. Rafael Bustos GISBERT (Madrid Complutence Üniversitesi – İSPANYA)
  "The independence of the Judiciary and the Legal Guarantees of Judges"
- Prof. Dr Selin ESEN (Ankara Üniversitesi)
  "Essence of the Right' as a Criterion to Limit the Rights: A Comparative Analysis"
- Dr. Öğr. Üyesi Zeynep ÖZKAN (Çukurova Üniversitesi)
  "A Contemporary Approach to the Rule of Law: "Environmental Rule of Law"

1515-1530 Kahve arası

1530-1645 2. Oturum

Oturum Başkanı Prof. Dr. Selin ESEN (Ankara Üniversitesi)

- Prof. Dr. Javier García ROCA (Madrid Complutence Üniversitesi – İSPANYA)
  "Democracy, fair elections and Rule of Law: the culture of constitutionalism, European Convention on Human Rights and the European Union"
- Prof. Dr. Sergei BELOV (St. Petersburg Üniversitesi – RUSYA FEDERASYONU)
  "The Threats to the Rule of Law in Measures Taken Against Russians in 2022"
- Doç. Dr. Demet ÇELİK ULUSOY (Doğu Akdeniz Üniversitesi – KKTC)
  "Long-standing Rules and New Era: Digitalizing in the Rule of Law"

2. GÜN 11 Kasım 2022

1000-1115 3. Oturum

Oturum Başkanı Doç. Dr. Aslı BİLGİN (Çukurova Üniversitesi)

- Prof. Dr. Gülriz UYGUR (Ankara Üniversitesi)
  "The Rule of Law, Epistemic Injustice and Vulnerable Legal Subject"
- Dr. Öğr. Üyesi Özge APİŞ (Çukurova Üniversitesi)
  "TCK'nda Yer Alan Bazı Suç Tipleri Bakımından "Suçun Birden Fazla Kişi Tarafından Birlikte İşlenmesi" Nitelikli Halinin Anlamı"
- Dr. Hamit YELKEN (Yargıtay 1. Hukuk Dairesi)
  "Hukuk Devleti Bağlamında Hükmün Denetlenmesini Talep Hakkı"

1115-1130 Kahve Arası

1130 – 1245 4. Oturum

Oturum Başkanı Dr. Hamit YELKEN (Yargıtay 1. Hukuk Dairesi Üyesi)

- Prof. Dr. Luca MEZZETTI (Bologna Üniversitesi- İTALYA)
  "Rule of law beyond the State: ius cogens as international rule of law?"
- Doç. Dr. Aslı BİLGİN (Çukurova Üniversitesi)
  "Protecting the Rule of Law in EU Legal Order"
- Prof. Dr. Mirosław GRANAT (Kardinal Stefan Üniversitesi – POLONYA)
  "Rule of Law under Illiberal Constitutionalism (Polish Case)"

1245-1300 Kapanış

21. YÜZYILDA HUKUK DEVLETİ

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