The Rule of Law Beyond the State

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I Semester: 2021/2022

Schedule:
10 November 2021, 15:00-17:00
17 November 2021, 15:00-17:00
24 November 2021, 15:00-17:00
9 December 2021, 13:30-15:00
15 December 2021, 15:00-17:00

Description
The course focuses on the logics, dynamics, and challenges of “Global administrative law” (GAL) from the viewpoint of the rule of law.

It can be helpful to say at the outset that GAL refers to a situation in which: (1) relationships between the interests of individuals and public authorities are influenced or governed by multiple normative systems (from informal social norms to law, from specific rules to the general principles of law), with the consequence that such systems co-exist and compete with one another within the same territory or domain of activity; (2) two or more systems of governance – such as the courts of different legal orders – claim authority over the same domain of activity.

In this context, the rule of law will be considered from three points of view. The meaning and significance of the rule of law is first examined. This is considered a complex enquiry for two reasons: on the one hand, diverse strands of thought have been placed under the label ‘rule of law’; on the other hand, while the rule of law is generally associated with the prohibition of arbitrariness, from a
global perspective it has observed that there are cases in which it degrades into an instrument of oppression. Second, the elaboration of both regional and global standards having, either directly or indirectly, the purpose of requiring national authorities to respect the rule of law is considered. Thirdly, a somewhat reverse perspective is adopted; that is, one focusing on how the respect of the rule of law is imposed upon regional and global institutions, such as the European Union and the United Nations.

Readings: Each of these viewpoints will be discussed in one or two seminar with participants, on the basis of reading materials previously circulated. There are few general readings required for the course and some special readings required for each lessons. General readings on GAL include:

- M. Bussani, Il diritto dell’Occidente (Einaudi, 2010)
- S. Cassese, Il diritto globale. Giustizia e democrazia oltre lo Stato (Einaudi, 2009)
- G. della Cananea, Due Process of Law Beyond the State (OUP, 2016)
- S. Mannoni, Da Vienna a Monaco. Ordine europeo e diritto internazionale (Giappichelli, 2019, II ed.)
- M. Shapiro, The Globalization of Law, 1 Indiana Journal of Global Legal Studies (2000);

Assessment: students will be required to prepare a paper that will be discussed at the end of the course. The papers must be submitted by 28 January 2022. The papers’ presentations will take place in two consecutive days of February 2022. Students will be assessed on the basis of their in-class participation (50%) and of their final essay (50%).
Lesson 1: The rule of law as an essentially contested concept – 10 November 2021

Although there is a rich literature, in law and political philosophy, concerning the virtues of the rule of law, this is an essentially contested concept in the sense that there is a widespread agreement about its importance, especially from a public law perspective, but not on the best realization thereof. In particular, whether the rule of law should be considered either from a purely procedural (or formal) viewpoint or from a substantive viewpoint is a matter on which opinion can, and does, differ. This is a consequence of the diversity of views as to what the rule of law entails. Certain predominant aspects can, however, be delineated, also on the basis of the standards defined and refined by international regimes, at regional and global level, such as the Venice Commission. There is yet another reason why the rule of law is a contested concept, at global level; that is, the critical remarks made by the discontents of legal globalization. While for most academic works it is axiomatic that the rule of law is an instrument of protection against arbitrariness and oppression, those critics argue that it is often the case that the rule of law is used in an instrumental manner by powerful states or firms, thus becoming an instrument of plunder. There is, obviously, no need to agree with this strand of thought, but it can be helpful to put things in perspective.

Readings
- P. Craig, Formal and substantive conceptions of the rule of law: an analytical framework (Public Law, 1997) (circulated)
- U. Mattei & L. Nader, Plunder. When the Rule of Law is Illegal (Wiley, 2008)
- Venice Commission, Rule of Law Checklist (2016) (circulated)

Lesson 2: The rule of law and national authorities – 17 and 24 November 2021

The literature on public law is predicated on the assumption that the principles and values of public law are established by the state, by each state, in what is regarded as the ‘Westphalian’ paradigm. However, those principles and values are increasingly influenced by a growing, rich and vast set of standards that are defined and refined by both ‘regional’ and global legal regimes, such as the European Union and the United Nations, respectively. These legal regimes are a prevalent feature of the global order. They perform different functions. Some merely provide a framework for state negotiation on several policy issues, while others generate standards – either variable or invariable – for domestic agencies, and still others also have their own enforcement mechanisms. It is both interesting and important to see the role that is played by the rule of law as a requisite for membership of these legal regimes, in a twofold sense; that is, to become a member and to be able to exercise all the rights that are associated with membership.

Readings
- G. Halmai, The fall of the rule of law in Hungary and the complicity of the EU (IJPL, 2020) (circulated)
- European Parliament, Proposal pursuant to Article 7 TEU (2019) (circulated)

Lesson 3: The rule of law within international and supranational authorities – 9 and 15 December 2021

Readings
There are several differences between international and supranational authorities. One concerns their potential membership, another the requisites for becoming members and still another one the remedies against their measures. Within traditional global organizations, such as the UN, those remedies are available to the founders, i.e. the states, which can thus control access to international courts, such as the International Court of Justice. Within the EU, instead, there is a sort of transnational dispute resolution, which is characterized by more open rules of access to courts by private parties, thus attenuating not only the gate-keeping capacity of governments, but also the ‘absolute’ nature of the powers which are exercised by common institutions. There is, therefore, a more complex interplay between collective and individual interests, including global security and the protection of property and reputation, as well as a different relevance of the rule of law. The “Kadi” saga, which involved national, EU and UN law, is a good example of this.

Readings
- Advocate-general Maduro, Opinion issued in case C-402/05 (circulated)