International Journal of Arts Humanities and Social Sciences Studies
Volume 6 Issue 3 ǁ March 2021
ISSN: 2582-1601
www.ijahss.com

After Capitol Violence, J. Biden Vows To Restore « Rule Of Law » : But What Does It Mean ?

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Abstract: *This article, inspired by recent statements by the new administration of the United States in the violent context of the political transition, revolves around the questions of the rule of law, justice and democracy (and their mutual relationships) in modern and liberal political system. The brief analysis focuses on constitutional theories, concepts and principles well known to European legal scholars. This article has no other purpose than to stimulate a general and non-dogmatic reflection on the way in which political actors and academics (jurists and sociologists) understand democracy and liberalism in our time. Contrary to the prevailing positivism, we believe that politics, law and sociology are not separate fields, in the same way that a modern democracy cannot reasonably avoid a deep reflection on the rule of law (its meaning) and social justice.*

Keywords: *rule of law, democracy, constitutionalism, politics, law, justice, ethics, equity, equality, sociology, demagogy, populism, authority, liberalism, socialism, positivism.*

I. Introduction

Shortly after Washington suffered the assault on the Capitol by supporters of the outgoing President Donald Trump, the incoming President Joe Biden announced key nominations for the Department of Justice[1]. The Democratic President praised the nominees as highly qualified lawyers who will restore the integrity of the Department of Justice and renew Americans' faith in the « rule of law » in order to build a more equitable justice system. Joe Biden argued optimistically that they « will restore the independence of the Department so it serves the interests of the people not a presidency » and « rebuild public trust in the rule of law ». In addition to this, the Vice President Kamala Harris stated that « fidelity to the rule of law forms the bedrock of America's democracy. And in the face of both the damage that has been done to our Justice Department and our country's long-overdue reckoning on racial injustice, these are the right leaders to meet this moment ». It would be tempting, especially for a scholar in law, to see these political declarations as mere empty formulas and dismiss these assertions as hyperbolic. The author of this article considers, on the contrary, that these claims have a particular meaning for the jurist and should prompt him, regardless of his origin or cultural legal tradition, to take a close look at what the expression « restoring the rule of law in the United States » may well mean. In Anglo-American legal theory and in Anglo-Saxon juridical thinking, the notion of the rule of law does not necessarily seem to coincide with the very elaborate and sophisticated concept of « Rechtsstaat » (État de droit) that can be found in continental European doctrine. Whether or not « rule of law » and « Rechtsstaat » express the same idea, with regard to the semantic tradition of each side of the Atlantic, is an ongoing debate whose terms have already been partially clarified by others[2]. The fact remains that the external gaze of European scholar on this specific issue may be a contribution, however small it might be, to the legal-political analysis of what already looks like a paradigmatic change and a rupture in the policy practice of the new administration. The question seems all the more relevant since the outgoing President has often been accused by the international community of being a gravedigger of the « rule of law ». Yet this last notion is rarely well defined in everyday life or in the daily press. While it is not uncommon to confuse democracy and rule of law, it also happens to oppose the latter to the former. It goes without saying that the latter position is dangerous, precisely because it offers a theoretical framework for populism and demagogy (of which *Trumpism* may have been a symptom).

[1] Judge Merrick Garland, nominee for Attorney General; Lisa Monaco, nominee for Deputy Attorney General; Vanita Gupta, nominee for Associate Attorney General; and Kristen Clarke, nominee for Assistant Attorney General for the Civil Rights Division.

[2] LLANQUE Marcus, «Hermann Heller and the Republicanism of the Left in the Weimar Republic », Jus Politicum, n° 23.

The current political context of the United States can be considered from a somewhat original transatlantic perspective. We believe that Europe's constitutional experience provides America with food for thought, whether it be the recent debates on the alleged violations of the rule of law in Poland and Hungary, within the legal framework of the European Union, or the famous but more ancient legal controversies in the inter-war period having opposed the German constitutional lawyers of the Weimar Republic. Of course, the contexts are very different, culturally, politically, legally, historically, sociologically, etc. Nevertheless, some ideas seem to cross time and space. Moreover, periods of crisis all have in common the intense reflection that they must provoke among political actors and academics. This article has no other purpose than to provide some discursive ideas around the rule of law theme.

II. Rule of law and Democracy

There is currently in Europe a lot of discussion about democracy and the rule of law and their relationships. The recent debate was fed by the massive, and more or less systematic, infringements[3] on judicial and media independence by the so-called « illiberal democracies »[4]. But what exactly does the expression « rule of law » mean in our modern societies? And is it only possible to describe a democracy in terms of illiberalism without falling into a *contradictio in terminis* ? A brief overview is necessary here.

In Europe, the concept of the rule of law was developed differently in continental countries — such as France (État de droit) and Germany (Rechtsstaat) — and in the United Kingdom (the English legal system). In this article we will focus on the continental experience, more precisely the German theory of the « Rechtsstaat ». The reason for such a choice is not totally arbitrary. Indeed, the crisis that American democracy has recently gone through, and the solutions that the newly elected political power is trying to provide, seem to echo an old European controversy, namely the tension that would exist between democracy and the rule of law. We will have the opportunity to come back to this point later, when we will mention the main protagonists of the legal-political debate of the inter-war period in Germany, passed on to posterity under the name « quarrel of methods ».

To begin with, democracy and the rule of law are two distinct concepts since the former relates to the question of the legitimization of political power and the latter concerns the limits (procedural and substantive) to the exercise of power. It is often said that under this principle, the state would be subject to the law. Thus, the rule of law would mean nothing more (literally) than the reign of the law. In a very kelsenian perspective, it is possible to argue that every state is a Rechtsstaat because of the reduction of state to law[5]. The positivist normativism implied the conclusion that any state could not but be a Rechtsstaat. But as it has been pointed out, such a claim could be a « dangerous weapon in the hand of the enemies of democracy »[6]. It seems more satisfactory to understand the rule of law as « a state of justice ». We subscribe to the opinion of Olivier Jouanjan in interpreting the rule of law as a state of justice not in the sense that justice would be an instance above politics, but a real power that must be brought within a constitutional system of balance of power (separation or division of powers)[7]. In this regard, the independence of the justice system, and especially constitutional justice, is the primary condition of any state governed by the rule of law[8]. But it is also, and above all, a condition of modern democracy.

[3] Let us recall in this respect that European Union is « based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty », Opinion of Advocate General Bobek delivered on 3 December 2020 Case C-650/18 Hungary v European Parliament, § 67.

[4] DRINOCZI Timea, BIEN-KACALA Agnieszka, 'Illiberal constitutionalism – the case of Hungary and Poland', 3 German Law Journal (2019) 171-208.

[5] KELSEN Hans, Vom Wesen und Wert der Demokratie [on the nature and value of democracy] 252-53 (1981).

[6] MENENDEZ Agustin José, « Hermann Heller NOW, European Law Journal 21, n° 3, 2015, p. 285-294.

[7] JOUANJAN Olivier, « L'État de droit démocratique », Jus Politicum, n° 22 [http://juspoliticum.com/article/L-Etat-de-droit-democratique-1284.html]

[8] *Ibid.*

III. The key role of constitutional justice in the modern legal state

If the illiberal turn has hit Europe very hard (from Budapest to Moscow via Warsaw), Donald Trump's America also seemed to give in to temptation. What the illiberal regimes have in common is the unpleasant tendency to mishandle the independence of the justice system. Other features may include populist politics, xenophobia, lawlessness, corruption and violations of human rights, which can lead to the undermining of democratic principles. Yet, precisely, constitutional justice must be able to ensure the protection of fundamental rights and provide certain guarantees because of its impartiality and independence, especially in times of crisis. It is the very essence of the rule of law. That is why, there is no coincidence that the illiberal rulers are trying to extend their control over judges.

As regards the former president of the United States, Donald Trump has often castigated courts and denigrated judges (the « so-called judges » or « Obama judges » as he called them) whose rulings he disagreed with, an attitude that began during the 2016 campaign and has continued during his presidency[9]. Trump also strongly criticized Supreme Court Justices S. Sotomayor and R. Bader Ginsburg, demanding that they should recuse themselves from any cases that he is involved in[10]. This circumstance did not prevent the defeated President from relying on the Supreme Court to hope to overturn the result of the 2020 presidential election that gave victory to the Democratic candidate[11]. This pattern is of particular concern given that the guarantees of fundamental freedoms must be ensured by a judge according to procedures that submit legislative, executive and administrative acts to the law. In the opposite case, there would be a failure of judiciary to provide equal justice for all. This point must be stressed : there can be no rule of law if the judiciary is dependent on the executive or the legislature. And there can be no democracy without respect for the rule of law.

Yet, strengthened by his election in 2016, Trump felt himself clothed in strong democratic legitimacy and all the required political authority. What Trump ignores or refuses to acknowledge is the very role of the judiciary in a modern democracy and liberal society : independent judges are the guardians of the Constitution and the guarantors of rights and freedoms, notwithstanding their political orientation and party affiliation (Democratic or Republican). But in Trump's eyes, the guardian of the constitution could not be a (depoliticized) judge, only a (charismatic) head of state. In this sense, the ex-president seemed to update and old constitutional theory that needs to be examined now.

The « schmittian spectre » behind the « trumpism »

Over the last few decades, European scholars, especially legal academics, have exhumed and meticulously dissected the constitutional writings of Carl Schmitt whose controversial ideas are still currently discussed by many political thinkers. Schmitt's theoretical work and political orientation (he was member of the Nazi Party) are often compared to other protagonists' view and attitude during the Weimar era in Germany, such as Hans Kelsen (who is very famous) and Hermann Heller (who is almost unknown). The recall of Schmitt's ideas about democracy could shed light on some recent aspects of American political life and also on the issue of the rule of law. Carl Schmitt is indeed the reference theorist for illiberalism.

As M. Jourdain talked prose all his life without knowing it, Donald Trump seemed to have apply, during his mandate, some of famous principles elaborated by the sulfurous political theorist. It should be emphasized that M. Trump probably did not read a single line of Schmitt's books[12] (even those that have been translated from German into English). But the way in which D. Trump recurrently attacked the rule of law, through his refusal to submit to the law and procedures, his open disdain for the judiciary, his cynical contempt for the universal

[9] As for example, when a judge of Federal District Court in Seattle reversed the president's executive order restricting immigration from seven predominantly Muslim countries. D.Trump described the judge's decision as « ridiculous ». When a Judge of the Northern District of California stayed new rules barring asylum applications from illegal migrants Trump considered « This was an Obama judge ».

[10] At her death, Ginsburg was quickly replaced by the conservative judge Amy Coney Barrett.

[11] D. Trump made claims of massive fraud in the use of mailed in ballots because of the coronavirus pandemic. Judges however found no evidence to substantiate those allegations.

[12] Politische Theologie. Vier Kapitel zur Lehre von der Souveränität, (Political Theology: Four Chapters on the Concept of Sovereignty. George D. Schwab, trans. (MIT Press, 1985 / University of Chicago Press; University of Chicago edition, 2004 with an Introduction by Tracy B. Strong. Original publication: 1922, 2nd edn. 1934; Constitutional Theory. Jeffrey Seitzer, trans. (Duke University Press, 2007). Original publication: 1928.

aspirations of liberalism and his emblematic conception of politics (which could be seen as a form of political « embodiment » or quasi-messianic « incarnationism ») are salient elements that characterize Schmitt's thinking. This « schmittian » spectre has made its effects felt both in internal politics (strengthening of the Executive and preservation of positions of power) and external politics (strategy of ideological confrontation and strong polarization).

We thus find in the trumpist practice of power the key elements of the Schmittian theory : the emphasis on « sovereign decisionism » by virtue of which decisions emanate from the sovereign leader who can stand above the legal order ; the well-known « friend-enemy » distinction which is the specific dichotomy of political action (American citizens vs illegal immigrants, muslims etc…) ; the (naive) claim that the (genuine) democracy has to be direct and immediate through plebiscites and a charismatic form of legitimacy (the use of tweets and their content illustrate this willingness to be « close » to the people and to short-circuit the intermediate forms, such as legal procedures and mechanisms, inherent in representative and liberal democracy). It is not certain however that this « schmittian » influence is exclusively peculiar to « trumpism » insofar as certain works had already noted the strong convergences between Schmitt's thought and the Republican right in the United States[13]. From this point of view, what would fundamentally distinguish Liberals from Conservatives is the circumstance that for the former, victory is less important than respect for procedures, historical precedents and consequences for future generations. The Conservatives, on the contrary, in their political confrontation, would seek only the conservation of power in a regime of moderation and consensus[14].

The monumental error of Carl Schmitt and his (unconscious) apostles was to oppose democracy and the rule of law, i.e. democracy and liberalism. Certainly, populism and demagogy can be opposed to the rule of law insofar as the former accuses the latter of elitism. But it must be emphasized that populism is only a highly degenerate (and particularly dangerous) form of democracy. This is a commonplace remark that was already known in Plato's time

IV. The return of ethics in politics : equity and social justice

To refer to the quotation by which we introduced our article, when Joe Biden stated that the new administration will restore the integrity and independence of the Justice and renew public faith in the « rule of law » in order to build a more equitable system, it is far to be a rhetorical formula. The independence of the judiciary is indeed the primary and necessary condition of the rule of law. As it was said by Professor O. Jouanjan « the key to any rule of law lies in the status of justice »[15]. In the same way, when Kamala Harris asserts that « fidelity to the rule of law forms the bedrock of America's democracy » it is (legally and politically) meaningful. Contrary to the Schmittian conception, democracy and the rule of law are not opposed: the second is necessary to the first (but the reverse is not necessarily true because one can envisage a state of law without democracy[16]).

In addition, when the Vice President insists on the damage done to « country's long-overdue reckoning on racial injustice », it is no longer a formal (« kelsenian ») but a « material » (more social) conception of the rule of law. As it was already said, the rule of law concerns merely procedural aspects in Anglo-Saxon conception, but in German thinking, the rule of law (Rechtsstaat) has two sides : « a formal one and a material one, with the latter including claims for social security and main public goods »[17]. The arrival in office of the new President should thus coincide with the return of ethics, equity and social justice in politics. The question of ethics concerns internal politics as much as the international sphere, as illustrated by the welcome return of the United States in the Paris agreement (shortly after Trump's decision to leave the treaty on climate change signed in 2016). On the domestic policy front, Joe Biden and Kamala Harris intend to focus on gender and racial equity. In this sens, Biden's administration's announced massive efforts to tackle the issue of inequality and dismantle systemic racism in order to advance equity for all, particularly for marginalized communities who have been overlooked. The *quaestio diabolica* concerns, more deeply, the alleged promotion of socialism imputed to the Democratic President. It is well known that Republicans, especially Trump's supporters, use the term « socialist » to attack

[13] VERGNIOLLE DE CHANTAL François, « Carl Schmitt et la « révolution conservatrice » américaine », Raisons politiques, vol. no 19, no. 3, 2005, pp. 211-229.
[14] *Ibid.*
[15] JOUANJAN Olivier, « L'État de droit démocratique », précité. « La clé de tout État de droit tient dans le statut de la justice ».
[16] Constitutional monarchies, simply limited, could have been states governed by the rule of law.
[17] LLANQUE Marcus, «Hermann Heller and the Republicanism of the Left in the Weimar Republic », Jus Politicum, n° 23.

Democrats (in this case Joe Biden) and their policies as if they fear that liberals want to turn United States into Cuba…

Towards a « social rule of law » ?

Joe Biden is definitely not a promoter of socialism, whether anti-communist witch-hunters like it or not. This does not prevent him from being sensitive to the sociological question in his country, to the chagrin of Trump's followers, including in its conception of the « rule of law » : what neither Kelsen (because of his formal normativism-positivism) nor Schmitt (for reasons we know) could tolerate, or even conceive of. This remark leads us to introduce, and we will finish on this point, the little-known and tragic figure of a third jurist (and philosopher) active under the Weimar Republic : Hermann Heller.

Heller was a German legal scholar who joined the Social Democratic Party in 1920 but expressly rejected the « marxist » internationalist elements of the party's program. Despite his short life, he was involved in a number of political debates, most notably with Kelsen and Schmitt. He calls for a reconciliation of socialism and the state in order to integrate the working class in the cultural and political structures of the nation (this notion being defined in terms of culture, not race or ethnicity). He invented the expression « Sozialer Rechtsstaat » to indicate a « platform on which socialists as well as liberals could work together »[18].

Heller sharply criticized the liberal conception of law in a society marked by socio-economic disparities because, formally conceived, freedom and equality inevitably lead to the domination of those who hold economic power. The result is a « materially unequal » law for the working class which is an economically weak class. Thus, in the absence of social homogeneity, formal equality is transformed into inequality, materially speaking[19]. And formal democracy turns into a « dictatorship » of the hegemonic ruling class. There is therefore a paradox, a radical contradiction, between legal form and social reality. The originality of Heller's socialist thought lies in the observation that freedoms were originally focused on a material legal idea with emancipatory aims. But from the middle of the XIXth century, the « bourgeoisie », frightened by the struggles of the proletariat, abandoned this generous ideal. This is why the rule of law has progressively been emptied of its substance and reduced to the formal legality, « disconnected from the content of law and the idea of justice »[20]. Since the essence of socialism lies in the idea of social justice (the ultimate aim is to create a just and equitable community and to guarantee a decent existence for all), law is of fundamental importance in his thinking. The difficulty with the ethical idea of socialism lies however in the transition from formal to material law/justice.

It is clear that the old Weimar Republic has little to do with the modern republic of the United States. However, (positivist) jurists should not neglect today's social-justice concerns such as police and domestic violence, exploitation of workers, sexual assault, public corruption, bias crimes, environmental/climate concerns and, in general, issues about discrimination and minorities. For a jurist like Heller, the theory of the state must be a sociology and sociology must be conceived as a science of reality[21]. The state must thus remain in the tumult of history, i.e., caught in the conflicts and tensions of society. The modern democratic state must therefore be a state governed by the rule of law in order to guarantee individual and social freedoms. It must also be a social state, in order to prevent discriminations from destroying democracy from within[22].

[18] LLanque Marcus, « Hermann Heller and the republicanism », précité.
[19] LE BOUEDEC Nathalie, De l'État de droit libéral à l'État de droit social. Critique et transformation de l'État de droit chez Hermann Heller. Jus politicum. Revue de droit politique, Dalloz, 2019, Trois juristes de gauche sous Weimar : Heller, Neumann, Kirchheimer.
[20] *Ibid.*
[21] JOUANJAN Olivier, «Enjeux de la théorie hellérienne de l'État », Jus Politicum, n° 23 [http://juspoliticum.com/article/Enjeux-de-la-theorie-hellerienne-de-l-Etat-1295.html].
[22] *Ibid.*