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Acceptance and imposition of the EU values to reinforce democracy and rule of law in the Member States

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Abstract

This article reconstructs the meaning of the rule of law in the context of the European Union and observes the dynamics of the subjugation of European values by member states as a phenomenon of "soft" imposition of legal models. The mechanism of financial conditionality linked to the rule of law also appears as a case of the imposition of legal models.

Keywords

Rule of law, EU values, Democratic Backsliding, European Integration

Introduction

The so-called rule of law crisis currently affecting the European Union is mainly due to the constitutional and legislative reforms adopted by some member states, notably Hungary and Poland, which have gradually eroded the pillars of the democratic pluralist state. The legal changes that have reduced the space for the exercise of democracy and fundamental rights have taken place in a context that respects formal or procedural democracy, with free (though not fair) elections. As a result, the actions of the two governments are supported by large parliamentary majorities.

Overall, the measures adopted in Hungary (since 2010) and Poland (since 2015) have led to the centralisation and politicisation of executive power, the degradation of the public sphere, and the elimination of political competition and institutional counterweights (Huq and Ginsburg 2018: 117-118). In particular, the subordination of the judiciary to the executive has undermined the independence of ordinary and constitutional judges. The concept of the rule of law in a narrow sense encompasses the principle of separation of powers and the principle of judicial independence, two principles that are at the core of Western democracies. In a broader sense, accepted by the European Union, the concept of the rule of law also encompasses the guarantee of pluralism and freedom of the mass media, considered to be the guardians of democracy, and the apparatus of anti-corruption rules.

The numerous studies devoted to this subject highlight the constitutional decay or democratic backsliding that characterises the current political and institutional life of these two countries. This decline is exacerbated by the fact that these two systems were considered the most advanced among the countries emerging from socialism in terms of the democratic stability achieved in just a few years.

The reference to constitutional degradation is intended to highlight «a series of discrete reforms that singularly could be considered consistent within a democratic scope but summed up together prove to be pernicious for the whole constitutional system. This kind of erosion implies, indeed, a sophisticated and devious use of the legal and constitutional instruments to progressively undermine the substance of constitutional democracy, though maintaining intact its formal appearance» (La Placa 2022: 114).

Democratic backsliding or erosion, on the other hand, indicates «the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy» (Bermeo 2016: 5). This phenomenon can lead to authoritarian regimes, regardless of whether the backsliding involves rapid and radical changes across a wide range of institutions. Conversely, it can lead to ambiguously democratic or hybrid regimes, whether the democratic erosion is the result of gradual change across a more limited range of in-

stitutions (Bermeo 2016: 6). Hungary is emblematic of the latter case, and even the Council of Europe has defined it as a hybrid regime of electoral autocracy.[1]

Acceptance-imposition of the EU values and reconstruction of the meaning of the rule of law

The rule of law is one of the fundamental values of the European Union and the Council of Europe, regional organisations of which Hungary and Poland are members, following the formal acceptance of the values that are part of Europe's constitutional heritage and the principles and rules that give them concrete implementation.

According to some legal scholars, the adoption of the *acquis communautaire* by Central and Eastern European countries after 1989 is an example of the circulation of legal models for reasons of prestige. The reference to prestige implies that a country voluntarily adopts ideas, principles or legal rules established abroad because it believes that they may be useful or effective in its own legal system. Conversely, the phenomenon of the imposition of legal models may result from acts of violence, such as military conquest, or from the political, social, cultural and economic influence of a certain order on others. An example that falls into this category is the Soviet legal model, which was imposed on all socialist countries (Sacco 1988).

Sometimes voluntary transposition for reasons of prestige and transposition by imposition overlap (Graziadei 2006: 458). Indeed, the doctrine questions whether the constitutions of the post-socialist countries adopted in the 1990s were the result of autonomous choices or of pressure from European international organisations (Pegoraro and Rinella 2020: 20). For some scholars, it would be incorrect to speak of the imposition of constitutional doctrines alien to the traditional identity of post-socialist states, precisely because of their free choice to join the Council of Europe and the European Union (Bartole 2018: 297). However, one can argue about the degree of free will of these countries, as the economic and political incentives of being part of the European Union can act as a driver for reforms far beyond considerations of respect for democracy and fundamental rights. The point is that the introduction of a legal reform may be a relatively simple process, but this does not guarantee that the reform will actually be operational. This possible discrepancy is reflected in the expression "law in books" and "law in action".

[1] See European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE).

The democratic backsliding in Hungary and Poland is causing serious alarm in the international community, which sees an increasingly pronounced departure from the pillars of transnational constitutional law. The member state that violates the principle of the rule of law is departing from a value on which the EU is founded. Indeed, Article 2 of the Treaty on European Union (TEU) sets out the founding values of this organisation, referring to «human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities». This provision defines the "constitutional core" of the European Union as a set of values shared by the Member States and forming part of the common European heritage.

According to the European Commission, «The rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. […] The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law».[2]

Recently, the Court of Justice has had several opportunities to reconstruct this concept in detail. The Luxembourg judges have gradually identified the elements that characterise the rule of law, including both formal or procedural guarantees and guarantees of a substantive nature (including the independence and impartiality of the judiciary). A serious and persistent breach of the values enshrined in Article 2 TEU not only has repercussions within the system concerned, but also has negative consequences for the other Member States, for mutual trust between them and for the very nature of the Union. With regard to mutual trust, the concept has been presented by the Court of Justice as follows: «the principle of mutual trust between Member States is of fundamental importance in the law

[2] Communication from the Commission to the European Parliament and the Council 'A new EU Framework to strengthen the Rule of Law', COM/2014/0158 final.

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of the Union, since it enables the creation and maintenance of an area without internal borders» and that «that principle requires each of those States, in particular as regards the area of freedom, security and justice, to take the view, save in exceptional circumstances, that all the other Member States respect the law of the Union and, more particularly, the fundamental rights recognised by the latter» (Court of Justice of the EU, Opinion No. 2/13, 18 December 2014).

A reconstruction of the concept of the rule of law is also offered by the Venice Commission (European Commission for Democracy through Law) of the Council of Europe. In a 2011 report, the Venice Commission provided a common European definition of the rule of law, identifying the essential content common to the various legal systems in order to provide a useful guide for the application and promotion of this principle by national and supranational courts. It entails that «all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts». In this sense, the rule of law also includes accessibility of the law (i.e. intelligible, clear and predictable); questions of legal right decided by law and not discretion; equality before the law; power exercised lawfully, fairly and reasonably; human rights protection; means to resolve disputes without undue cost or delay; fair trials; compliance by the state with its obligations in international law as well as in national law (Venice Commission 2011: 9).

This conceptual convergence between the work of the European Union and that of the Council of Europe confirms the possibility, already suggested by the work of the European regional courts, of deriving a single "pan-European" concept of the rule of law as a synthesis of national experiences. Moreover, according to the Court of Justice of the European Union, the rule of law is conceived as a composite concept, in which the rule of law becomes a "principle of principles", respect for which runs through the promotion and protection of other general principles of the European Union order.

EU's actions to enforce respect for the rule of law

Over time, the EU has taken numerous measures to try to force Hungary and Poland to comply fully with EU law and to respect the values expressed in Article 2 of the EU Treaty. These measures are part of the monitoring, preventive and enforcement mechanisms available to the EU institutions (Diaz Crego, Mańko and van Ballegooij 2020).

The activation of Article 7 TEU, the innovative jurisprudence of the Court of Justice and financial conditionality are the profiles on which legal scholars have focused most attention.

With regard to Article 7 TEU, it should be recalled that at the end of the 1990s, when the accession of the Central and Eastern European states to the EU seemed a sure thing, some EU states raised the problem of what to do if one of the new accession states, once a member of the EU, did not respect the values of Article 2 TEU. The insertion of what was then Article 6 TEU – now Article 7 – responded precisely to the need to guard against the possibility that the new accession states, in view of their recent transition from a socialist to a liberal-democratic state, would subsequently fail to comply with the obligations they had assumed with regard to the principles of the rule of law and respect for human rights. This is why the so-called homogeneity clause was included in the Amsterdam Treaty in 1997 (Strazzari 2014).

The homogeneity clause in Article 7 TEU has a scope that also extends to areas within the competence of the Member States, over which the EU has no competence and in which EU law does not apply. Article 7 TEU contains two separate procedures. Article 7(1) is intended as a preventive mechanism. It allows the Council, acting by a four-fifths majority, to declare that «a clear risk of a serious breach» of Article 2 values by a Member State. Article 7(2) and (3) are designed as a sanction mechanism. Article 7(2) empowers the European Council, acting unanimously, to determine «the existence of a serious and persistent breach» by a Member State of the values referred to in Article 2. Once such a determination has been made, Article 7(3) concerns the sanction. It empowers the Council, acting by qualified majority, «to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council». It is worth noting that, unlike other international organisations, the EU Treaties do not provide for the possibility of expulsion of a Member State.

In December 2017, the Commission initiated the procedure under Article 7(1) TEU against Poland, in order to have the Council find that there is a clear risk of a serious breach of the values set out in Article 2 TEU.[3] In relation to Hungary, the activation of the Article 7(1) procedure was made by the European Parliament in September 2018.[4] However, the monitoring process did not have a positive impact (Aranci 2018; Uitz 2020).

And with regard to Article 7(2), the unanimity requirement means that it cannot be activated as long as Hungary and Poland support each other.

[3] European Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland', COM(2017) 835 final.

[4] European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340).

As for the role of the Court of Justice, it has inaugurated a new jurisprudential strand related to respect for the rule of law, so much so that the Court's jurisprudence is considered in terms of transformative constitutionalism (von Bogdandy and Spieker 2023).

In some cases, the Court of Justice has used Article 19 TEU («Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law») as a parameter for innovative case law, paving the way for a judicial review of Member States' respect for the rule of law. According to the Court, Article 19 TEU gives concrete expression to the value of the rule of law reaffirmed in Article 2 TEU. Consequently, it allows the compatibility of national rules with EU law to be examined in cases where national rules are potentially prejudicial to the independence of national courts. This is because national courts are responsible for applying and interpreting EU law. The organisation of the judiciary must therefore be carried out in accordance with the obligations imposed by EU law. It follows that state reforms affecting the guarantees of national courts may be examined in the light of Article 19 TEU (see Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16 rendered by the Court of Justice on 27 February 2018; and, with specific reference to Poland, see Commission v. Poland, Case C-619/18, dated 24 June 2019).

In addition, if a national court considers that a measure taken within the system is contrary to the rule of law as laid down in Article 2 TEU and concretised by Article 19 TEU, it may make a preliminary reference to the Court of Justice. In this way, the Court of Justice has actively involved national judges in the protection of the rule of law, who will be able to take action against national measures that are likely to infringe their judicial function (Parodi 2018: 991; Pech and Platon 2018).

Another turning point in the search for solutions to enforce compliance with the values of Article 2 TEU is provided by the case Republika v Il-Prim Ministru decided in 2021 (C-896/19). In this case, the Court of Justice introduces the principle of non-regression into the system of EU law, stating that Member States cannot fall below the minimum standard of compliance with Article 2 values that they achieved in the course of the pre-accession process and which qualify them for membership of the Union. In its reasoning, the Court emphasises that «the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them» (point 61). Consequently, compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State. Therefore, a Member State cannot «amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU» (point 63). In other words, the Union's legal order prohibits the regression of values. Article 2 and the principles it em-

bodies are opposed to those who want to stay in power at all costs, with the consequence that authoritarian tendencies cannot be tolerated under any circumstances. The importance of the decision therefore lies in the new way of interpreting Article 49 TEU, linking it with Article 2 TEU to create a principle of non-regression for the Union's values, which could be useful in future decisions (Leloup, Kochenov and Dimitrovs 2021).

Finally, further action by the European institutions to prevent democratic degradation in Member States falls within the scope of financial conditionality, of which Regulation 2020/2092 on the protection of the EU budget is an emblem. In the European Parliament resolution of 17 April 2020 on coordinated EU action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)), paragraphs 46-55 are entitled 'Protection of democracy, the rule of law and fundamental rights', in which the cases of Hungary and Poland are mentioned. The resolution makes respect for the rule of law a condition for the disbursement of funds. This has become a legal requirement with the adoption of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2000 on a general system of conditionality for the protection of the Union's budget. It is aimed at infringements of the principles of the rule of law which affect or seriously risk affecting the sound financial management of the budget or the protection of the Union's financial interests. It is therefore not a sanctions mechanism covering all rule of law issues. The actions brought by Hungary and Poland to annul the regulation were rejected by the EU Court of Justice in two "twin" judgments delivered on 16 February (Gallinaro 2021; Baraggia 2022).

On 18 September 2022, the Commission adopted a proposal for measures to protect the Union budget against breaches of the principles of the rule of law in Hungary, citing concerns about corruption and public procurement. Finally, on 15 December 2022, the Council of the EU adopted a decision suspending €6.3 billion,[5] representing 55% of the budget commitments under the three cohesion policy programmes that are implemented through public procurement (Maurice 2023).

As Scheppele and Morijn point out, in addition to the conditionality regulation, there are other legal instruments to which rule of law conditionality has been attached. They are inserted in other regulations and sometimes emerge in new interpretations of existing EU law. Whether the Commission uses the Conditionality Regulation, the Common Provisions Regulation or the suspension of funds under the EU's Next Generation Recovery Plan, it has a powerful tool at its disposal to curb the illiberal backsliding of EU Member States. All these tools have enabled the European Commission and the Council of the EU to act together to freeze a large amount of EU

[5] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

funds, totalling more than €28.7 billion for Hungary and more than €110 billion for Poland (Scheppele and Morijn 2023: 29 ff.).

Conclusions

The crisis of the rule of law in Poland and Hungary, two countries that have not yet reached the stage of democratic consolidation after the fall of the Berlin Wall, has clearly demonstrated both the weakness of the Copenhagen criteria and the problems inherent in the political mechanisms for enforcing respect for the fundamental values enshrined in Article 2 TEU.

With regard to Article 7 TEU, some scholars point out that the ineffectiveness of the instruments it regulates does not detract from its symbolic character. This is because Article 7, together with Article 2, has the function of recognising the elements of political-institutional affinity that unite the Member States and justify their common experience in the EU (Strazzari 2014: 5). Other scholars, on the other hand, advocate the deletion of Article 7(1) TEU on the grounds that this preventive mechanism lacks concrete effectiveness. At the same time, a procedure for the expulsion of a Member State should be included in the Treaties, although this idea could be even more problematic, as it could clash with the core of the Treaties, i.e. the aspiration for an ever closer union among the peoples of Europe (Circolo 2019: 36 ff.).

One path that has yielded more productive results is the procedural one, thanks to the activism of the Court of Justice. However, this can only resolve individual cases and is not enough to halt democratic regression. As Pitruzzella, Advocate General at the Court of Justice, recently observed, for decades the language used by the European institutions to pursue the goal of integration has been that of law. This is because the identity of the European Union (and before that the European Economic Community) has been defined primarily in legal terms. As a result, major problems have been analysed and resolved as if they were legal problems. With the deepening crisis of the rule of law, however, a phase has begun in which the language of values dominates. The values referred to in Article 2 TEU and applied by the Court of Justice form part of the common constitutional traditions and have been accepted by the States which have joined the Union. Sharing the fundamental values of the national constitutional orders and committing to defend and promote them means creating bonds of solidarity between peoples and Member States that are even stronger than those resulting from the creation of a single market, a single currency, an area of freedom and security and a common judicial system; it means achieving political union (Pitruzzella 2023).

Finally, with the adoption of the conditionality regulation, the EU institutions have shifted the focus from values to economic efficiency, arguing that a more efficient and predictable justice system, namely an independent judiciary, or a stronger fight against corruption is more favourable to the business climate and growth. By calling for legislative reforms aimed at strengthening the anti-corruption framework and ensuring greater transparency in public spending, the EU demonstrates its ability to impose legal models through forms of economic imposition. This imposition comes in the form of conditionality, which seems to have had some positive effects, although the overall framework is still unsatisfactory.

Some fundamental questions remain: what meaning can legislative reforms have if they are not effectively supported by institutions and civil society? Will there be a separation between the law on the books and the law in action, or will the reforms really be useful in making the transition from an autocratic system to a democratic one? Furthermore, it is important to understand whether and to what extent countries with a liberal-democratic tradition can coexist in the EU with countries that do not seem to be able to approach this form of state. Given that expulsion from the EU is not provided for in the Treaties, it is clear that we must continue to act in this direction, using all the preventive mechanisms at our disposal, first and foremost the monitoring procedure in defence of democracy, the rule of law and fundamental rights. This procedure provides for the publication of an annual report on the rule of law, so that the level of democratic standards achieved by each Member State is always kept under review.[6]

If we then look at the phenomenon from the perspective of the internal dimension of states, we need to pay attention to the constitutional path in order to search for possible antidotes against the democratic regression that Poland and Hungary are experiencing and that could also affect other countries. In fact, a leading legal scholar wonders whether the authoritarian drift is the effect of a failed democratic transition or whether there is a kind of contributory negligence on the part of the European institutions, which did not take due account of the historical specificities and cultural traditions of the post-socialist countries in the stages of accession to the EU, nor of the negative impact on the welfare state of the economic requirements of European conditionality. It is therefore necessary to take a critical look at the recent past and to examine the modalities and protagonists of the transition, as well as the subsequent developments, in order to be able to think about how to intervene now in order to stop the authoritarian wave. From a constitutional point of view, the elements for strengthening internal state antidotes revolve around measures to protect democracy,

[6] See at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en.

the requirements for the technical-professional competence of judges, the limits of constitutional revision and participatory institutions (Di Gregorio 2019). These are areas that need attention in the near future and in which the Union can intervene with financial conditionality, directing funds to NGOs, cultural associations, universities and schools aimed at promoting the values of Europe's constitutional heritage from below, from civil society, in order to reinforce democracy and rule of law in the EU legal space.

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