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The Protection of the Rule of Law in the European Union: State of the Art and Prospects

Abstract

Recent concerns about the state of health of the rule of law in the EU required the intervention of the European institutions that monitor the correct application of EU law. It was therefore necessary to activate the specific procedure that the Treaties allocate to safeguard the founding values of the Union, listed in Article 2 TEU and which include the rule of law (i.e., the Article 7 TEU). However, at the time of its first and real application, this mechanism proved to be ineffective. To deal with the critical issues inherent in the system established by Article 7 TEU, various instruments have been proposed and/or prepared. This work the analysis of analysing the latter and checking whether there exist new, more effective solutions to protect the rule of law.

Key words: Rule of law, Art. 7 TEU, Art. 2 TEU, Founding values, EU.

JEL Classification: K33, K38.

Introduction

Since its inception, the Community, today the Union, has placed as a *leitmotiv* at the heart of the process of European integration the respect for those values without

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which its own *ratio existendi* is lacking. These values form its 'spiritual and moral heritage' and permeate its entire legal and institutional structure, including its policies (Preamble to the Charter of Fundamental Rights of the European Union).

Article 2 TEU, which contains the list of these values, begins with the expression that 'the Union is founded on the values [...]'. It is therefore clear from the outset that they do not constitute 'mere ideal and political statements' (Adam, Tizzano 2017: 375); but they are an essential condition for the survival of a 'Union [based on the rule] of law' as the European Union has sought to be since the *Les Verts* case law (Judgement of the Court of Justice of 23rd April 1986, case 294/83, para 23).

Moreover, the privileged position within the Treaties, which is second only to the affirmation of legal equality between the TEU and the TFEU, is enough to recall their fundamental importance.

In this regard, the Court of Justice has pointed out that '[…] each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded […]. That premise implies and justifies the existence of mutual trust between Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected' (Opinion of the Court of Justice of 18th December 2014, 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*).

It is therefore a necessary presence for a constitutional order of liberal-democratic inspiration such as the Union. This justifies why, as it will be seen, failures to comply with them have even more serious legal consequences than the violation of any other obligation laid down (Fumagalli 2014: 11).

In view of the above, one of the values on which the Union is founded is the proper 'rule of law'. The rule of law is in fact the 'backbone' of every modern constitutional democracy. It imposes the effective observance of (Union) law on all those subject to its shadow cone, namely institutions and bodies, Member States and individuals - natural and legal persons.

In addition to the principle of legality *stricto sensu*, the broader notion of the rule of law must also include the corollaries of fair trial, equality before the law, *ne bis in idem*, independence of the judiciary and effectiveness of its control, legal certainty, prohibition of arbitrariness of executive power, separation of powers, *etc.* (the principle of democracy is not included because it is an autonomous value. For the difference between this one and the rule of law, see Levits, Egils. 2018. *L'Union européenne en tant que communauté de valeurs partagées – les conséquences juridiques des articles 2 et 7 du traité sur l'Union européenne pour les États membres,* in *Liber*

Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne, Turin, 517: 'À la différence de la démocratie, qui dispose d'un concept central et visible, l'État de droit constitue une catégorie de structure complexe').

The Protection of the Rule of Law in the European Union: the Current System

Recent concerns about the state of health of the rule of law in the EU required the intervention of the European institutions that monitor the correct application of EU law (On this point, it is permitted to recall Circolo 2019: 35, 1, 19).

It was therefore necessary to activate the specific procedure that the Treaties allocate to safeguard the founding values of the Union, listed in Article 2 TEU and which includes the rule of law (*id est*, the Article 7 TEU).

The so called 'suspension clause' establishes that the Council may suspend certain rights (including voting rights within the Council itself) of the offending State, without this ceasing to be bound by the obligations deriving from the Treaties, after the violation of the values referred to in art. 2 TEU has been ascertained several times (and this is where the 'drama' begins – Casolari 2016: 135); for an overview of Article 7 TEU, Sanna 2014: 71).

The mere reading of the provision immediately makes it clear that we are faced with a procedure where the intergovernmental method prevails. The Council and the European Council are in fact the only bodies delegated to ascertain the existence of the violation and to decide on the suspension of the rights to the detriment of the non-complying State. While the European Parliament has a decidedly marginal role. Indeed, it intervenes: a) in the activation of the procedure (it is one of the subjects entitled to request the intervention of the Council through a motivated proposal); b) in taking the determination, but only through prior approval of the decision of the Council first, then of the European Council. On the other hand, it does not play a role in the definition of the rights of the Member State to be suspended.

The use of a procedure very different from the co-decision procedure, in terms of the relationship between Parliament and the Council, is justified in the light of what has been defined as the 'sensitivity to sovereignty' (Müller 2013).

Since condemning a Member State without delay is a very delicate operation, given its possible political repercussions, the use of the intergovernmental method is

more appropriate because of the considerable room to manoeuvre left to individual sovereignties.

However, at the time of its first and real application, this mechanism proved to be ineffective in substance. The procedural complexities and voting thresholds made its use impractical (compare with Mori 2016: 207).

In particular, the unanimity within the European Council required by Article 7 TEU to certify the actual existence of the infringement favours, in substance, the emergence of alliances between States. The substantial failures of the current mechanisms for protecting the rule of law have called for a redefinition of the framework of safeguards by all EU institutions involved in the supervision of the correct application of EU law.

New Recent Solutions to Preserve the Rule of Law

To deal with the critical issues inherent in the system established by Article 7 TEU, various instruments have been proposed and/or prepared.

First of all, the communication of the Commission of 2014 (Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law, COM (2014) 158, 11th April 2014) and the modification of the deliberative *quorum* of Article 7 TEU (e.g., moving from unanimity to qualified majority voting).

Then, there is the creation of the 'Copenhagen Commission' and of the 'Systemic Deficiency Committee'.

More in detail, the first would be an independent body responsible only for supervising respect for the values referred to in Article 2 TEU, a sort of a small Commission formed by eminent political figures, such as former Heads of State, former Presidents of Parliaments, *etc*., and endowed with various sanctioning powers.

The latter is conceived as a part of the Commission, but administratively and economically independent, in the wake of OLAF. It is true that it is based on a fascinating thesis, since it goes beyond the impediment of the revision procedure – needed for the Copenaghen Commission – through the use of the flexibility clause of Article 352 TFEU, considering that the protection of the values of Article 2 TEU falls within the scope of application of the competences of the Union. Nevertheless, it is not acceptable, since it would be a question of establishing not a simple committee, but a supervisory body with several powers over the *status* of a Member State,

a change that could only be made during the revision of the Treaties (see von Bogdandy, Antpöhler, Ioannidis 2016: 218).

Continuing the analysis, there are the expulsion from the Union and the outsourcing of protection (entrusted, for example, to the Venice Commission).

For the first hypothesis, there are many doubts about its possible contrast with the 'hard core' of the Treaties, which is considered unchangeable even with Art. 48 TEU.

For the second one, if it is clear that this scenario silences the risk of instrumental political persecution against certain Member States in alleged violations of the principle of the equality of States [Article 4(2) TEU], it is not how an authority outside the Union can impose its conclusions on the parties concerned in a binding manner.

Lastly, we find the most recent mechanisms, the DRF (democracy, rule of law, fundamental rights; European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 [2016/2009(INI)] and the regulation on EU's budget (European Commission, Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final 2018/0136 (COD), 2nd May 2018).

The DRF is a proposal to conclude an inter-institutional agreement, under Article 295 TFEU, between the Parliament, the Council and the Commission for the launch of monitoring procedures to defend these values, including the publication of an annual report on the state of the art of compliance with these rights. However, the inter-institutional dialogue it promotes does not seem to introduce new decisive tools, risking indeed to cause slipperiness and overlaps in the protection system.

Instead, the proposal for a new regulation, which was recently adopted at first reading in the EP (P8_TA(2019)0349, 4th April 2019), would allow the Commission, assisted by a group of independent experts, to identify 'generalised deficiencies regarding the rule of law' and to decide on the most appropriate financial measures to be implemented (i.e. suspension of payments for EU programmes). These sanctions can only be applied after approval by the Council. If it is true that this mechanism seems to be effective from the point of view of safeguards, it also raises more than a few doubts as to its compatibility with the Treaties. The connection to the legal basis is indeed indirect and forced. Even from a mere reading of the rule it emerges that Article 322 TFEU only allows to establish financial rules on the modalities of implementation of the budget; certainly not, on the contrary, to protect the expenditure of the Union against the generalized deficiencies of the rule of law. Bending the legal basis in this direction would lead to the violation of another fundamental principle of EU law, namely the prohibition of abuse of rights, which

prevents the exploitation of a benefit resulting from formal compliance with a rule, since its use goes beyond the objectives of the rule itself. This regulation would in fact censure: the same violations (systemic violations and not one-off); of the same principle (the rule of law); in the same way (the suspension of payments is nothing more than a suspension of a right deriving from the Treaties, the same rights that the Council may suspend according to Article 7 TEU). It is therefore not clear how and when one mechanism should be preferred to the other. In the end, it seems to be an *escamotage* to circumvent the revision of the Treaties and the unanimity needed to reform the existing protection mechanism.

To sum up, these solutions can be divided into three major macro-categories:

– instruments that require revision of the Treaties in order to be implemented (the lowering of the *quorum*, the Copenaghen Commission, the outsourcing of the protection, the expulsion);
– valid instruments that are, in substance, ineffective (the Commission's 2014 communication; the DRF mechanism);
– instruments that 'circumvent' the letter of the Treaties in order to offer alternative protection (Systemic Deficiency Committee, regulation on EU's budget).

Conclusions: Future Prospects

Nonetheless, none of these mechanisms proved to be the decisive for the above-mentioned critical issues. It seems that it is no longer justifiable for Member States to be unwilling to refer such breaches to the Court of Justice. However, this must always be done in accordance with the 'rules of the game' that the Member States have set themselves. The 'Copenhagen dilemma', that is the paradox whereby the candidate countries for accession are required to respect the founding values of the Union, the violation of which is not effectively censurable after accession, is an actual problem; but it cannot legitimize the forcing of the procedures that the Treaties allocate for the modification of the letter of the same.

All that remains, therefore, is to continue to promote a constructive dialogue between the Union and 'rogue' States and to wait until, and if, there is a moment of community of purposes within the Union that can enable the players on the European scene to seize the ideas drawn from practice, such modifying the Treaties.

It is true that the possible jurisdiction of the Court of Justice over respect for the founding values, values which are common to the constitutional traditions of the

Member States, risks creating further conflicts of jurisdiction between the Union's courts and the national courts, '*traditionellement jalouses de leur rôle de gardien des valeurs fondamentales dans les systèmes internes*' (Porchia 2018: 785–786).

However, often, it is precisely the internal courts that are the addressees of the measures in breach of Article 2 TEU, thus they are incapable of protecting those values. The institutional role of the Court, on the contrary, remains undisputed. From the outset of the Community that role constitutes the added value for its consecration to a community based on the rule of law and for the achievement of increasingly advanced legal, economic, social and political integration.

Waiting for this, the supervision on the respect for the rule of law can and must still be left to the Commission and the Court, but through the mechanism that the Treaties already reserve, as far as we can see, for the defence of Union law and its values, that is to say, the infringement procedure.

Contrary to what was assumed in the proposal for a regulation, Article 7 TEU and Articles 258 *et seq*. TFEU, both of which are in the primary legislation, do not explicitly conflict with each other. The interpretation of those provisions as cumulative and non-alternative means of protection does not appear to be subject to express legal obstacles. It is not possible to find in the Treaties the postulate on which one of their assumed ontological differences is based, that is the circumstance that the former only takes into account the systemic violations of these rights and that the latter is limited to 'one-off' non-compliance.

Article 258, para 1 TFEU just states: 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties […]'. How can compliance with the founding values not be considered as failure to fulfil an obligation under the Treaties? Furthermore, the thesis of the alleged generic nature of the obligation to respect the founding values cannot be considered acceptable (compare with the judgement of the Court of Justice of 16th December 2004, case C-293/03, *Gregorio My/ Office national des pensions*, para 29; Gormley, Lawrence 2017: 76–77).

Indeed, as initially envisaged, they are not programmatic rules, but the essential premise of the existence of the EU, whose specific violations must be irreparably censored.

The Court has not yet expressly ruled on the possibility that the fundamental values may serve as a parameter between the infringement and the opening of an infringement procedure (Miglio 2018: 421–431, spec. 428); however, as part of the doctrine has already shown, such an intervention is highly desirable (Hillion 2016: 59).

However, problems may arise with regard to the application of the *ne bis in idem* principle. First of all, the breadth of these principles has to be marked, borrowed from national legal systems, they have been incorporated in the Union's legal order. Once these legal categories are acquired, they take on a new meaning in relation to the specific features of the European legal system, even if they continue to maintain the same label. In this sense, the application of *ne bis in idem* must always be balanced with the effectiveness of these other principles on which the entire Union is based. The exceptional nature of the case could well justify the joint application of the intergovernmental procedure and the action for failure to fulfil obligations. Moreover, by failing to recognise the cumulative effect of remedies, the infringement could well be brought whenever the Member States are unable to activate the Art. 7 TEU procedure, or, conversely, the latter could no longer be used if the non-compliant State has already been punished under Articles 258 TFEU and 260 TFEU.

However, if such an interpretation seems to, at least potentially, be able to go beyond the 'quantitative' argument, it is not equally capable of extending to the 'qualitative' argument, that is to say, to the hypothesis that the infringement cannot be traced back to the cone of shadow of EU law but that it refers to purely internal situations. In this sense, however, some recent landings of the Court's case law seem to show openings. The reference is first to the judgment of the Court *Associação Sindical dos Juízes Portugueses* (for a comment, see Krajewski 2018: 395: 'The Court took advantage of this case to emphasise the potential of EU law to consolidate and defend the rule of law structures in the Member States. The Court discovered a justiciable rule of law clause in Art. 19, para. 1, TEU, which enshrines the principle of effective judicial protection before national courts. This provision makes the enforcement of rule of law standards vis-à-vis the Member States more straightforward as compared to the enforcement of Art. 47 of the Charter of Fundamental Rights of the EU. In the future, Art. 19, para. 1, TEU could be enforced by means of infringement proceedings under Art. 258 TFEU to counteract the undermining of judicial independence at the national level').

The expansion of the value of Article 19(1) TEU, operated by the Court in conjunction with Article 2 TEU, allows to activate infringement procedures that could tackle violations of the principle of effective judicial protection, and so of the rule of law too (like this, see Coli 2018).

In *ASJP*, the CJEU affirmed that Article 19(1) TEU 'gives concrete expression to the value of the rule of law stated in Article 2 TEU' (para 32). Therefore, in providing effective judicial protection of the rights deriving from EU law to individuals within

their respective jurisdictional systems, national courts also ensure respect for the rule of law (compare with Parodi 2018: 987–990).

The Court of justice has confirmed and definitively formalized this case-law with the ruling *Commission v Poland* (judgement of the Court of Justice of 24th June 2019, case 619/18, spec. paras 47–59. See Rasi 2019: 1–14).

For the moment, entrusting the protection of the values referred to in Article 2 TEU to the exclusive jurisdiction of the Court of Justice probably constitutes a Copernican revolution. One the Member States are not yet ready for, as they have shown. But it would achieve 'the most perfect design of contemporary constitutionalism, which gives the Supreme Court the power to arbitrate, on the basis of law, political conflicts between the constitutional actors of the legal order' (Cannizzaro 2018: 168–169).

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