

RULE OF LAW AND THE EUROPEAN UNION

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Abstract

In practice and in the theory of law, the concept of rule of law implies a system of political power based on the respect and implementation of the constitution, laws and other acts by citizens and other entities (legal entities), as well as by their own state organs, the various institutions and the bearers of public functions. It should also be emphasized that this term implies a crucial question that all procedures for adopting various legal acts that produce certain legal consequences in a state must be based on laws or other legal acts. So, in a broad sense, we can say that the rule of law also implies the rule of the principle of constitutionality and legality in a state or a similar community.

In the follows analysis, we will address a very important issue related to the principle of the rule of law in the EU and in the relations: member states - the EU and vice versa. So, we will especially focus on the question: what are the mechanisms for finding and resolving certain problems related to dissonant legal norms and their consequences in the relations between the EU - member state and vice versa, suggesting ways to overcome the obstacles.

Methodology

During the work of this material we were provided with - method of analysis, normative method, comparative method, historical method, generalization method and method of concretization.

Keywords: Rule of law, European Union, integration, ECJ

Introduction

In practice and theory, the concept of rule of law implies a system of political power based on respect for the constitution, laws and other acts, both by citizens and by state bodies, institutions and of public clerks. Also, according to this concept, all decision-making procedures should be based on laws or other legal acts. So, in a broad sense, we can say that the rule of law at the same time implies the realization of the principle of constitutionality and legality in a community.¹

Many authors believe that despite the general social, political and legal changes in many countries and other communities, however, the key functions of constitutional and democratic states remain: restraint of power; promotion and protection of human rights and fundamental freedoms; building and strengthening democratic institutions; the realization of the

¹In Fuller's catalogue of the basic features of the rule of law, it is said: the right is to be accessible to all; not to act retroactively; to be understandable; to be consistent; stable; and can be implemented.

constitutional principle of the rule of law, etc.¹ On such dimensions, the European Union is being built, which is increasingly considered a community of common values, and less of other interests. Therefore, in spite of the general social and economic development, the main goals of this state alliance are: human rights and freedoms, freedom of movement, democracy, security and many other segments directly related to the rule of law.²

The European Court of Justice in the "Les Verts" case, explicitly stated that the, then, European Economic Community was a community based on the rule of law.³ At the same time, the court demanded greater control over the compliance of legal acts and procedures adopted under the, then, European Economic Community Treaty. The court emphasized that judicial protection and control, from the point of view of the rule of law, means the possibility of controlling all legal acts of the member states and the EEC institutions in order to ensure greater compatibility with the EEC Treaty, which is a kind of "above - the law".

It should be noted that, as far as the EU is concerned, from the Treaty of Rome to the Treaty of Lisbon, there is a continuing search for the effective exercise of the rule of law in this democratic community of states, which now, it seems, is more sensitized in relation to the environment, too. On its way of more than 60 years of integration, the European Union is step by step moving from the rule of law as a symbolism to a level when the rule of law is treated as a general principle based on constitutionalism and appropriate institutions for implementation.⁴ But there are still many things to be done to talk about a functioning compatible legal system in relations - the member states and the European Union and vice versa.

Theoretical and normative aspects

Formally, of all the basic treaties of the European Union, it is considered that the Maastricht Treaty is the first to firmly constitutionalize the rule of law in the EU. The Treaty of Amsterdam, in Article 6, paragraph 1, reads as follows: "The Union is based on the principles of freedom, democracy, respect for fundamental human freedoms and rights and the rule of law, principles common to all member states." In fact, with this agreement, respect for the rule of law becomes a prerequisite for countries that aspire to full-fledged EU membership.

The Treaty of Lisbon (Article 2) states: "The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of ethnic minorities. These values are common to all Member States as a society dominated by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. "This agreement states that any discrimination within the European Union should have been banned by applying the principle of subsidiarity, proportionality, equality before the law, etc.⁵ Considering this, we can say that the EU has a formal and legal aspect based on universal and inseparable values in terms of human dignity, freedom, equality and solidarity, where the principles of democracy and the rule of law take a special place. It is a fact that such principles place the individual at the heart of the attention of the

¹Smerdel B, Ustavno uređenje europske Hrvatske, Narodne novine d. d., Zagreb, 2013., str. 8.

²Gráinne de Búrca, „Europe’s raison d’être,“ in Dimitry Kochenov and Fabian Amtenbrink (eds.), European Union’s Shaping of the International Legal Order, Cambridge: Cambridge University Press, 2013, 21.

³See: Case 294/83 Les Verts v. Parliament [1986] ECR 1339, para. 23

⁴Wennerström E.O, "The Rule of Law and the European Union", Uppsala, 2007, 61–76.

⁵See, Founding Agreements; Charter on EU Fundamental Rights; various documents of the Commission, Council and Parliament regarding the decisions of the European Court of Justice.

legal system by clearly defining the status of a citizen of the European Union and by creating a zone of freedom, security and justice throughout the EU.

Namely, we can say that European "common principles" are now being promoted in common values. But it should be noted that while legal principles have their own structure since they derive from individual practices, this does not apply to common values. Therefore, some scientists believe that this could weaken the principle of the rule of law, which should remain the basic principle of modeling the law, the functioning of EU institutions and the functioning of the Union as a whole. However, it can generally be concluded that the concept of the rule of law, either as a principle or value, is a system that is primarily intended to protect the rights of citizens from arbitrariness and abuse that may come from public authorities.¹

In some member states of the European Union there are numerous shortcomings that undermine the principle of effective rule of law at the national level, primarily due to distortions of balance and relations in the division of powers (legislative, executive, judicial, but also local self-government). There are also certain restrictions on the rights that belong to the opposition as a political force. There are certain restrictions on the independence of institutions that guarantee the protection of justice and legality in public institutions, as well as restrictions on the independence of central banks and numerous situations in violation of ethnic and religious freedoms. All of this presents some systemic threat to the realization and enforcement of the rule of law throughout the entire territory of the European Union.

It is therefore natural that the EU must act to protect the principle of the rule of law as a shared value of the Union and its Member States. To date, most authors who treat the principle of the rule of law within the European Union have demonstrated obvious weaknesses in the functioning of the existing EU instruments and mechanisms in resolving systematic violations of the principle of the rule of law in different EU Member States. In fact, it can be said that there are still no effective mechanisms and procedures that can be taken against Member States that ignore the values of the rule of law.² For this reason, on March 11, 2014, The European Commission, in coordination with the European Parliament and the Council, adopted the so-called "*The new European Union framework for strengthening the rule of law*".

The purpose of this document was to eliminate existing dissonances in the exercise and functioning of the rule of law by member states before creating the conditions foreseen for the activation of the mechanisms provided for in Article 7 of the Treaty on European Union, which have to initiate the procedure in cases of clear risk from a serious breach of Article 2 of the Treaty to the EU, which may be done by a Member State of the European Union. According to the European Union Rule of Law Framework for the Strengthening Rule of Law, the European Commission, as the patron of the treaty, gained central place here when it comes to the protection of the rule of law. In fact, the measures taken by the Commission under Article 258 of the Treaty on the Functioning of the European Union (TFEU)³ were shown to be a relatively good instrument for solving certain problems related to the rule of law. However, it should be noted that the Commission may initiate such a procedure for a violation of European law only if the alleged violation relates only to the violation of certain provisions of the legislative acts of the European Union.

¹ Roos R. S. "The Rule of Law as a Requirement for Accession to the European Union", f. 3. (ně: <http://www.kas.de/rspsoe/en/publications/12154/>), 1 shtator 2015.

²See, COM(2014) 158 final/2, Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law.

³TFEU –Treaty on the Functioning of the European Union).

But, within the European Union, the problems in most cases arise when situations occur outside the European Union's legislative, which cannot be considered as violations of treaty obligations, but they really represent a systematic risk-taking for the rule of law. In this situation, without dilemma the mechanism provided in Article 7 of Treaty of European Union would be activated, according to which European Commission is authorized to give an explanation and clarification regarding the proposal for activating those mechanisms. Indeed, the purpose here is to influence the strengthening of the rule of law even in those areas in which the member states of the Union operate independently.¹

Undoubtedly, in order to have an effective and efficient rule of law in the EU and its institutions, it is necessary to have the same at the level of the Member States of the Union. Of course, this significantly strengthens the trust of all EU citizens for the functioning of the common legal system, which is extremely important for the sustainability of the integration processes, within the internal borders of the Union. But, some actions that have taken place in some member states over the past few years are evidence of not so slight concessions in respecting the rule of law, and hence in the fundamental values on which the European Union was founded. In this connection, there are known cases of brutal deportation of the Roma minority from France in the summer of 2010, followed by constitutional and legal reforms in Hungary and, of course, cases of corruption in Romania and Bulgaria.² Here, we can also mention the dominant anti-immigration policy in France, envisaged in the Law on the Ban on Niches and the Law on Deprivation of Muslims by Citizenship if they refuse to accept the principles of secularism. Also in 2011, Hungary was accused by the European Commission of controversial reforms that actually weaken the rule of law rule in this country, giving a nationalistic and religious character to the new Hungarian constitution, for which, even the European Parliament adopted a special resolution.³

When it comes to issues related to Romania and Bulgaria, primarily due to slow judicial reforms that were not effective in combating high-level corruption, the EU created the so-called Co-operation and Verification Mechanism. This is interpreted by various authors as a deviation from the Copenhagen criteria, which signifies the priority of the political circumstances in the European integration process.⁴ Also, the European Court of Justice has voiced alterations in Hungarian legislation that is contrary to several EU legal acts concerning the existence of equal retirement conditions for persons performing public works. This was followed by legal changes that were discriminatory for early retirement of judges, which clearly violated - Directive 2000/78 / EC.

Existing institutional mechanisms

The existing institutional mechanisms for securing the rule of law on the territory of the EU are: 1) judicial control; 2) Article 7 of the EU Treaty; 3) ad-hoc mechanisms; 4) other provisions.

¹Ibid.

²Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 OJ L157/77.

³European Parliament Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))

⁴Decision (EC) 2006/928/EC establishing a Mechanism for Co-operation and Verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption [2006]OJ L 354/56 and Commission Decision (EC) 2006/929/EC establishing a Mechanism for Co-operation and Verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime [2006] OJ L354.

1. Judicial control

The European Court of Justice has the authority to control and ensure the application of the law of the founding treaties of the European Union, as well as to interpret and enforce the legal norms provided for in these agreements. Its task is to ensure that EU law is interpreted and applied equally in all Member States. Except for acting within the legal system of the EU, in some cases those courts can act as an internal court of the Member States. It can also decide on disputes over lawsuits by member states and citizens who believe that a right has been violated by a decision by the authorities and bodies of the European Union.

In fact, the European Court of Justice, within its jurisdiction, promotes an autonomous European understanding of the concept of the rule of law. Such an approach is logical when we know that various EU member states have long time developed into different constitutional traditions. In fact, the term "rule of law" cannot be translated adequately in all the official languages of the Union. The term "Rule of law" coexists with the terms "Rechtsstaat", "Etat de droit", "Stato do diritto", "Estado de derecho", which are close to the standard meaning of this term, but are not completely identical. Therefore, there is a need for an autonomous European understanding of the rule of law.¹

Namely, there is no dilemma that the rule of law in the EU is manifested as an important principle that reflects the fundamental meaning within the framework of the basic principles for achieving stability and coherence of the legal order. However, the rule of law cannot be imagined without institutional judicial protection.

Under the Treaty on the Functioning of the European Union, the European Court of Justice also decides to assess the legality of the legislative acts of the Council, the acts of the Commission, of the European Central Bank and the European Council, as well as various bodies and agencies that produce legal consequences for third parties (Article 263, TFEU). Also, the European Court of Justice is competent to decide on an arbitration clause from any agreement concluded by the EU or on its behalf, whether public or private (Article 272, TFEU).

We can say that the European Court of Justice acts: a) as a constitutional court in cases of disputes between the institutions of the European Union and in cases of reviewing the legality of legislative acts; b) as an administrative court when deciding on administrative acts; c) as a court that resolves labor disputes when dealing with issues of social equality; d) as a fiscal court when dealing with issues of interpretation of the directives in the field of taxes and customs; e) as a criminal court in reviewing the decisions of the Commission on the imposition of fines; f) as a civil court when dealing with disputes in the sphere of civil, commercial and intellectual property (Article 262, TFEU).

2) Article 7 of the EU Treaty

Article 7 of the EU Treaty provides the initiation of proceedings in cases of serious breach of Article 2 of the Treaty on European Union by any Member State of the Union. In the event of

¹L. Pech, „The Rule of Law as a Constitutional Principle of the European Union,“ Jean Monnet Working Paper04/09, 2009, 11

a violation of the values on which the Union is founded, a Member State may be subject to certain sanctions, including the suspension of certain rights arising from the Treaty, including the right to vote.

Here we have two mechanisms. The first mechanism is of a preventive nature and is activated when defining the "obvious danger of serious violation of the values of Article 2 of the DEU". The second mechanism contains penalties in the event of a "serious and persistent breach" of Article 2 of the Treaty on European Union. In both cases, the offense must be serious. Criteria for assessing the "seriousness" of the breach are - the purpose of the violation, the cause of the violation and its consequences. But the procedure is not so simple, given that the determination of the "severity" of the offense requires a proposal from one third of the Member States or a proposal from the European Parliament or the European Commission, while a final decision of the Council requires the European Parliament's consent. But here we have a lack of jurisdiction of the European Court of Justice, so problems are resolved more politically rather than legally.

3) Ad-hoc mechanism

For newly-admitted states in the EU, there is the so-called. Mechanism for Verification and Cooperation, as an ad-hoc mechanism for the new EU member states to strengthen the rule of law. This mechanism was implemented in two member states: Romania and Bulgaria.¹No doubt, its importance comes from the efforts and readiness of the EU to strengthen the rule of law, in particular EU law. Such a mechanism for the protection of the rule of law has also been applied in the candidate countries for full-fledged EU membership.

4) Other provisions

With the entry into force of the Treaty of Lisbon, Article 269 TFEU is applied, which provides for the jurisdiction of the European Court of Justice to decide on the legality of an act adopted by the European Council or Council under Article 7 of the Treaty on European Union. This is done only at the request of a Member State concerned by that act of the European Council or of the Council, and only on procedural matters contained in Article 7 of the Treaty on European Union. The request should be made by the State party within one month from the date of the enactment of the act. The European Court of Justice will decide within a month from the day of submitting the request.

¹Commission Decision 2006/928/EC, 2006 O.J. (L 354) (establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption); Commission Decision 2006/929/EC, 2006 O.J. (L 354) (establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime).

Conclusion

The rule of law has fundamental importance in building the political identity of the European Union, since it strongly contributes to building a European value system. With consistent application, a good ambience is created to strengthen the legitimacy of the whole legal system of the Union.

There is still no universal definition of what constitutes a rule of law, which in the practice of some member states manifests in dissonant ways, even causing a crisis in the functioning of the EU. The full definition of this notion should not only remain on the doctrine and theoretical level, but also on the part of the normative and institutional framework of the Union and its member states.

The highest legal acts of the EU must contain clearer legal norms with regard to the obligation of the Member States to include effective mechanisms in their legal systems for full exercise of the rule of law. This will obviously reduce the likelihood of contrary action by Member States. Such safeguards in Member States, through automation, mean the autonomous building of governance and law at EU level.

Rule of law is not only an EU value, but also a fundamental political principle of the Union. Hence, it is necessary to further extend the competencies of the EU institutions, which in itself means strengthening the rule of law throughout the Union. It is a fact that if the European Parliament receives more powers, it means a stronger influence on the rule of law in all member states.

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