

THE DIMENSIONS OF THE RULE OF LAW ACCORDING TO THE CONSTITUTIVE ACTS OF THE EU AND THE LISBON TREATY REGULATIONS OF THE RULE OF LAW IN EUROPEAN DOCUMENTS

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Abstract

In the construction of Europe, the rule of law is considered the foundation of all the values on which the European Union is based, and its observance is an indispensable condition for the observance of the other values of the Union, in other words, of its existence. In Article 2 of the Treaty on European Union, we find the provision that the rule of law is one of the fundamental values on which the Union is founded, which is joined in the text by respect for human dignity, freedom, democracy, equality and respect for human rights, including the rights of persons belonging to minorities. Given the importance attached to this principle, it is only natural to remain concerned and to ensure that all Member States comply with it at all times and that it is constantly monitored. In recent years, in various states, amid complex external situations and due to the economic crisis felt worldwide, there have been political actions considered to be "at the limit of the law", which were considered to affect the rule of law. All this has forced the Union to take concrete measures to strengthen the rule of law in order to prevent democratic slippages that could jeopardize the security of European construction. We will refer below to the regulations contained in the content of the Treaty of Lisbon applicable in situations of deviation from the rule of law.

Keywords: European law, European Union, administrative law, the rule of law.

JEL Classification: K23, K33

1. Introduction

Romania's accession to the European Union³ and, especially, the integration in the whole system that it implies, and here we refer especially to the normative and jurisprudential aspects, determine, among others, two immediate, complex and permanent consequences: on the one hand the harmonization national legislation in relation to European rules, privileged in application and, on the other hand, the major influence of the jurisprudence of the European Court of Justice on the justice of all Member States.

Due to the fact that at European level there are three distinct legal orders, generated by national norms, European norms and norms contained in the ECHR, in practice there are situations when all three categories of norms are incident in the same case, between which complex relationships are established and diversified.

These situations, imposed by the need to apply several categories of rules simultaneously, lead to conflicts, on the one hand natural if we consider the fact that the particularities of each national system make their mark on the relationship between domestic law and European law.

Moreover, the integration procedure is carried out both vertically between the regional and national levels and horizontally between the two European systems - European law and the ECHR⁴.

With regard to the ECHR, it should be noted that with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights⁵ has transformed values and principles into concrete and

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³ Done by the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania on the accession of Bulgaria and Romania to the EU on 25 April 2005 with effect from 1 January 2007, signed at that time by Romania by President Traian Basescu - Minister Călin Popescu Țăriceanu, Foreign Minister Mihai Răzvan Ungureanu and Chief Negotiator with the European Union Leonard Orban, published in the Official Journal of the European Union of June 21, 2005.

⁴ Mireille Delmas-Marty, *Critique de l'intégration normative; L'apport du droit comparé à l'harmonisation des droits*, Presses Universitaires de France, Paris, 2004, p.17.

opposable rights⁶, and this, having the same legal value as the Treaty, has become mandatory for the EU institutions, bodies, offices and agencies, as well as for the Member States, in the implementation of EU law.

European rules, by their very vocation, are broad rules, sometimes competing with those of the national law of the Member States, they acquire full concreteness and undoubted significance through the jurisprudence of the European court. Proper knowledge of these rules and their application when they are incidents in a given dispute, is subsumed by the obligation assumed by our country to respect European law.

We also share the doctrinal appreciation⁷ that the uniform and efficient implementation of European law in an enlarged Europe will be a huge challenge both for the European legal orders but, above all, we consider for the various national orders of each Member State.

A strong administration will be needed at all times, to meet the challenge of reforming the national administrative structures of the acceding states, in order to achieve, on the one hand, the hierarchy of rules adopted in the national legal system and, on the other hand, their harmonization, knowing that the diversity of Member States legal systems can be a source of uncertainty and destabilization of legal systems⁸.

2. Regulations of the rule of law in European documents

Thus, the Treaty of Lisbon includes, in the content of Article 2⁹, as values on which the European construction is based: human dignity, equality, the rule of law, human rights. In order to ensure compliance with these fundamental values, the European Union has at its disposal means regulated in the content of the Treaties, and we set out below some aspects of the regulation of the procedure for failure to fulfill obligations contained in Article 7 of the Treaty of Lisbon.

The procedure can be initiated by any of the European institutions, but under different majority conditions. They may submit a reasoned proposal to the Council, one third of the Member States, the European Parliament or the European Commission with the prior consent of Parliament. The Council will analyze the situation, hear the Member State concerned, at which point it can make recommendations to it, and only then can it find, by a four-fifths majority of its members, that there is a clear risk of a serious breach of the Union's values.

The proposal may be submitted by the same subjects to the European Council, which, however, will be able to decide on the existence of infringements by unanimous vote, of course after inviting the Member State to present its position. If the proposal and the finding were made under the conditions set out above, the Council may, acting by a qualified majority, decide to suspend certain rights of that Member State, including the right to vote in the Council of the representative of the government of that State. in whole or in part the measures taken, depending on the concrete evolution of the situation.

The member of the European Council or of the Council of the State concerned shall not take part in the vote and the Member State shall not be taken into account in calculating the third part of the procedure¹⁰.

The rule of law will always be a major challenge of any modern society, because it is the corollary of the most advanced achievements of human society: human dignity, democracy,

⁵ A document that brings together, in a single text, rights that were previously found in a variety of legislative instruments – national legislation, international conventions of the Council of Europe, the United Nations and the International Labor Organization. First proclaimed in Nice in December 2000, and later in December 2007, with the entry into force of the Treaty of Lisbon.

⁶ Paragraph D of the European Parliament resolution of 27 February 2014.

⁷ Jurgen Schwartze, *European administrative law*, Office for Official Publications of the European Communities, Sweet and Maxwell, 2006 p.206.

⁸ Flavia Ghencea, *Autorizația administrativă. Teorie. Practică. Jurisprudență*, Editura Universul juridic, București, 2013, p.185.

⁹ Article 2 of the Treaty of Lisbon provides: “The Union shall be founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and the observance of human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men”.

¹⁰ Art.354 of the Lisbon Treaty, available on the website: http://www.presidenti.ro/static/Versiunea_consolidata.pdf.

freedom, equality, tolerance, all being elements of resistance of a construction made to be permanently functional for the citizen.

Everything will depend on its importance, so that effective intervention and correction mechanisms will have to be built at the same time for possible skidding moments, which is why all participants are aware of the need for very close cooperation: Member States, European Parliament, Commission and the Council, by which, by mutual agreement, the guarantees of the functioning of the rule of law shall be permanently strengthened.

3. The crisis of the rule of law in the current period. EU perspective

Within the European Union, it sometimes happens in the territory of several Member States that these values and principles are not respected, or not put into practice, and fundamental rights are not equally protected.

In these circumstances, the Union has understood that it needs a more efficient and legally binding instrument, which can do more than Article 7 TEU, in order to respond to situations where Member States do not comply with Article 2 TEU. The same reason was given by several institutions in the European structure, which, aware of the special importance of the state principle and, implicitly, of the dangers that threaten the European construction of non-compliance, took a position on several occasions, of which, we present below the most important.

The European Parliament has called for a mechanism to monitor and verify compliance with the rule of law on several occasions, and we are referring here, in particular, to the resolution of 27 February 2014¹¹ on the situation of fundamental rights in the EU.

Parliament also appreciates on this occasion that the main aim of the European project has been and continues to be to anchor European states in democracy and the rule of law, in order to respect and promote fundamental human rights, which can only be achieved by promoting a substantial role and asset of the rule of law.

Furthermore, the aim is to launch special and objective investigations and, if necessary, to initiate infringement proceedings, even going so far as to develop a "*new Copenhagen mechanism*"¹² to ensure compliance, defense and promoting the values of the Union.

According to this Resolution, the future mechanism will "*need to integrate a system of early warning, political and technical dialogue, letters of notification and a freezing procedure as already requested by Parliament, to ensure that Member States, at the request of the EU institutions, suspends the adoption of legislation that could neglect or violate fundamental rights or the rule of law of the EU*".

Following the above-mentioned resolution, on 11 March 2014, the Commission presented a communication proposing a framework for strengthening the rule of law, and on 16 December 2014, the Council decided to launch an annual dialogue on the rule of law, which we appreciate as insufficient to meet the need for an effective mechanism for regular assessment of Member States compliance with EU core values, as Parliament has repeatedly called for.

A new mechanism, in an objective manner, with clear indicators, will help to avoid the double-standard analysis of problematic legal situations that have arisen in the future.

We also appreciate that, in situations of breach of obligations, it is possible to go as far as applying sanctions aimed at accessing European funds. In fact, the first steps in this direction have already been taken, the parliamentarians have asked for the creation of a commission to include experts specialized in fundamental rights.

Recently, there has been too much flexibility of legal institutions in different states.

¹¹ European Parliament resolution on the situation of fundamental rights in the European Union adopted on 27.02.2014.

¹² A summum of criteria adopted in Copenhagen, which aims to establish a state as a full member of the European Union. These relate to a system of democratic governance, freedoms and appropriate institutions and respect for the rule of law.

This phenomenon became worrying when the laxity of legal institutions determined the weakening of the European construction by affecting the rule of law, a defining element of this edifice.

We are still trying to identify situations of this kind that have occurred in several European countries and have finally come to the attention of European bodies.

We start from the idea that the rule of law means that both its citizens and those who govern must and respect the law. Furthermore, in young societies from a democratic point of view, there is a difference of opinion of its members on the extent to which regulation must penetrate society. In other words, during the democratic “*search*” the differences between the followers of the welfare state – followers of the extensive regulation by the Government, and those of the liberal state – who see a more attenuated role of the Government, are much brighter, the emotion is greater, which leads to the forcing of the limits of the law as close as possible to each other in an attempt to prove the veracity of their opinions.

Corroborating these situations with the youth of the institutions in the respective states, it is invisible to highlight the imperfections in the construction that, until then, worked seemingly conveniently.

In fact, the test on the functioning of the rule of law “*does not come in normal times but in times of crisis*”¹³, in which any institutional construction tests its limits.

Whether we like it or not, we must be aware that these periods can bring significant increases in social and community life, giving us the opportunity to identify the “*flaws*” that, after a proper process of analysis lead to the strengthening of the previous mechanism. According to an old Romanian saying: “*What does not bring you down, strengthens you!*”.

It is expected that European institutional structures and mechanisms, especially those relating to the rule of law, will operate within the appropriate parameters for as long as possible; some small “*exaggerations*” are also assumed.

It happens, however, that they become more frequent and then they begin to become alarm signals, all the more dangerous as there is already a fund of economic and financial crisis, which will make it more difficult to solve problems.

Recently, there have been no small or isolated incidents in some Member States, considered real crises that have tested and are testing the rule of law, events analyzed, in fact, in European forums. We recall below, briefly some of these situations appreciated at the level of the European Union as “*issues that revealed systemic problems of the rule of law*”¹⁴:

1. The Roma crisis in France, which occurred in 2010 – the rights of persons belonging to a minority were considered to be endangered, with concrete reference to the right to free movement of European citizens¹⁵;

2. The Hungarian crisis of 2011¹⁶ - the findings of European officials concerned the independence of the judiciary and were due to regulations that restricted the rights of minorities, affected the right to a fair trial, or noticed major shortcomings in the way of regulation at law or even the Constitution;

3. The crisis of the rule of law in Romania – it was appreciated¹⁷ that the events that took place in July 2012 on the occasion of the suspension of the President of Romania led to a series of

¹³ This has been repeatedly said by several European leaders, such as Manuel Barosso and Viviane Reding, who, along with other MEPs, have argued on several occasions that concrete measures must be taken to prevent situations in which various political events in the Member States endanger institutions of the rule of law.

¹⁴ Viviane Reding, European Commissioner for Justice.

¹⁵ In this case, the Commission initiated the infringement procedure against the French state on 29.09.2010, even sending an ultimatum on 13.10.2010; Following this position, France decides to amend the migration law, thus meeting European requirements, which is why the shortcomings are considered to be remedied and the procedure is withdrawn.

¹⁶ See the Report of the European Commission for Democracy through Law (Venice Commission) of 19.03.2012, available on the website: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dt/923/923929/923929ro.pdf

¹⁷ See the Report of the European Commission for Democracy through Law (Venice Commission) of 17.12.2012, available on the website: http://www.ccr.ro/uploads/aviz_ro.pdf

measures taken in rapid succession which, taken both individually and as a whole, been problematic in terms of constitutionality and the rule of law

4. Conclusions about the current approaches of the European Union regarding the rule of law

Confident that the European Union is a single construction whose members are not held together by a common army but by the rule of law, European officials follow with interest the institutional developments in the Member States, taking a stand and intervening when they find that the values union supports are affected.

As we mentioned earlier in our paper, the Union institutions did not remain mere spectators once they found threats to the rule of law but, after discussions, debates and trials, adopted a new regulatory framework for "*addressing systemic threats to the rule of law in any of the Member States*"¹⁸.

The new rule of law framework is intended to complement the infringement proceedings – when EU law has been infringed – the so-called "*Article 7 procedure*" of the Lisbon Treaty, which, including the strictest sanction, allows suspension of voting rights in the event of a "*serious and persistent breach*" of EU values by a Member State.

The new conditions aim to identify possible threats to the rule of law as early as possible by establishing an early warning tool that allows the Commission to initiate a dialogue with the Member State concerned to prevent the existence of systemic threats to the rule of law, and if the new proposals are not satisfactory, the legal mechanisms provided for in Article 7 will ultimately be used.

The Commission begins by adopting a broad definition of the rule of law as "*a system in which laws are enforced and enforced*". The application and observance of laws are revealed by the principles established in the jurisprudence of the European courts which, moreover, are common to the constitutional regulations of the Member States, including: the principle of legality, legal certainty, independent and effective judicial control, the right to a fair trial or separation of powers¹⁹.

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In order to achieve the objectives of preventing threats to the rule of law, a three-step process is proposed:

- the first step will be to assess the Commission, which, after gathering all relevant information, determines whether there are any threats to the rule of law and, in this case, initiates a dialogue with the Member State concerned - considered to be a warning;
- in the second stage, the Commission issues a Recommendation (which it makes public) for the Member State, including the problems identified and a deadline for their remediation, as well as the obligation to inform about the measures taken throughout the period;
- in the third stage, the Commission shall monitor the measures taken by the Member State and, in the event that no action is taken or those taken are unsatisfactory, the Commission may have recourse to one of the mechanisms provided for in Article 7.

¹⁸ See the Framework for the Protection of the Rule of Law in the EU, presented by the European Commission on 11.03.2014, available at: http://ec.europa.eu/romania/news/11032014_protejarea_statului_de_drept_ro.htm.

¹⁹ Article 7 of the Treaty of Lisbon.

We believe that the proposed new framework at the level of EU structures does not target new powers for the Commission, but we can see an increase in transparency about how the Commission plays its role under the Treaties.

We share the European legislator's proposal to seek opportunities to identify and remedy situations considered dangerous to the rule of law, democracy and the existence of the Union.

In concluding this analysis, we mention a current of opinion²⁰, so far viewed with skepticism regarding the revision of the Treaty and the repeal of art.51²¹ of the Charter of Fundamental Rights of the European Union, "*so that all fundamental rights are directly applicable in the Member States*", which would give the Commission the opportunity to intervene in the event of a violation of fundamental rights by Member States by launching infringement proceedings, even if the Member State does not act in cases of implementation of European legislation.

All this leads us to the statement that the European Union is the most ambitious political and social project of the community in this part of the globe, creator of ambitions, which will have to be dynamic and versatile, constantly adjusting with the evolution of each nation that compose.

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²⁰ Opinion of European Commissioner Viviane Reding presented, inter alia, at the Center for European Policy Studies available at: <http://www.zeit.de/2013/44/interview-viviane-reding>.

²¹ The text of Article 51 of the Charter of Fundamental Rights of the European Union is as follows: "*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union, in accordance with the principle of subsidiarity, and to the Member States only if they implement the law. Union. They shall therefore respect the rights and principles and promote their application in accordance with their respective functions and with regard to the limits of the powers conferred on the Union of the Treaties. (2) This Charter does not extend the scope of Union law beyond its competences, it does not create any new competence or task for the Union and does not alter the powers and tasks established by the Treaties.*"