HUMAN RIGHTS PRACTICE: GENERAL ANALYSIS

The European Union and upholding the rule of law

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Wire that separates the border of Poland, at the Kuźnica pass, with Belarus, 21th December 2021. This is one of the entry points to the European Union | Photography: Alessio Mamo

In October 2021, Poland was ordered by the Court of Justice of the European Union (CJEU) to pay a penalty payment of 1 million euros per day to ensure implementation of the measures agreed in judicial proceedings in which certain legislative changes to Poland's judicial organisation were challenged as being contrary to European Union (EU) law, specifically to the judicial independence, which is a cornerstone of the rule of law. [1] In December 2022, Hungary was subject to a decision by the Council of the European Union which suspended the disbursement of 6.3 billion euros from the Cohesion Funds, as a measure to protect the EU's budget in the light of Hungary's breach of the principles of the rule of law with regard to public procurement, the effectiveness of judicial action and the fight against corruption.

These two measures show that the European Union has not looked away when member states have been found to breach the rule of law. However, it is by no means assured that the above-mentioned principles will be upheld. The situation that has arisen in Poland and Hungary since Andrzej Duda and Viktor Orban came to power is widely known, but it would be a mistake to believe that the problems are confined to these two countries. This is shown by the report on the situation of the rule of law in the European Union, published by the European Commission in July 2023, [2] which provides a diagnosis of the developments taking place in all member states in four areas that are fundamental for upholding the rule

of law: justice, anti-corruption, pluralism and media freedom, as well as broader issues related to the system of institutional checks and balances.

Reading the report reveals a mixed situation. It is true that it identifies positive reforms and progress in certain states. But the weaknesses detected are highly significant: a decrease in the perception of judicial independence in 13 member states, serious concerns regarding the Councils for the Judiciary and the procedures for the appointment and dismissal of judges, a lack of autonomy and independence of the prosecution service, the use of disciplinary procedures as a form of political control on the judiciary, weakness in the fight against corruption, absence of specific regulations on lobbying and “revolving doors”, deficiencies in the regulations on asset and interest declarations by public officials, or the risk situation regarding media pluralism, among others.

The war in Ukraine has exacerbated this trend. On June 1, 2023, a law came into force in Poland empowering an administrative committee to assess Russian influence on internal security. This committee will be able to decide whether people should be deprived of the right to hold public office for up to 10 years. Despite certain subsequent amendments, which attempt to address the main criticisms, both the Council of Europe’s Venice Committee and the European Commission itself have spoken out against the law and called for its repeal, fearing that it could have a negative impact on the elections in autumn 2023.

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The purpose of this article is not to analyse in detail the different infringements that occur in member states nor to enter into a discussion of their underlying reasons. Rather, it seeks to offer an overview of what the European Union can do and has done in the face of this challenge and assess the effectiveness and consistency of the EU’s commitment to the values proclaimed in its founding treaty.

Rule of law and judicial independence as core EU values

The rule of law is one of the core values of the EU, as proclaimed in Article 2 of the Treaty on European Union (TEU). This value – according to this Article 2 – is common to the EU and its member states. The European institutions have highlighted on many occasions the importance of this principle and its inseparable link with democracy and observance of human rights, forming a triad that lies at the heart of Europe’s constitutional identity.

Given the high degree of political and legal interdependence between the European Union and its member states, observance of the rule of law in the EU and the member states functions as a system of communicating vessels, so that any impact at either side affects the whole. For example, at the institutional level, elections to the European Parliament depend on an electoral system that, while complying with the requirements stipulated in EU

legislation, is regulated in the national legislation of each state. If freedom of expression or freedom of the press is not guaranteed in a particular state, the elections to the European Parliament cannot be conducted democratically and this institution's legitimacy will be compromised.

Likewise, the Council's democratic legitimacy depends on that of the states, since its membership is comprised precisely of representatives of these states. In the legal sphere, the principles of the European Union's legal system include mutual trust and mutual recognition. Their application means that a violation of the rule of law in one country affects the other countries: under European law, states are required to recognise and apply legal decisions taken in other states. If these decisions have been made without respect for fundamental rights or the rule of law, these principles are also violated in the implementing state. The European Arrest Warrant is a good example of this. If trust is lost in the states' political and legal institutions, there is a high risk of fragmentation of the EU's legal order.

On the other hand, one of the pillars of the rule of law, judicial independence, is key for the observance and effectiveness of European law, as it is national judges who apply it. Beyond these institutional and legal arguments, it is the very conception of what the European Union should be that is at stake. If, as the treaties proclaim, the EU is a political organisation based on common values, there must be a response to the risks and breaches of these values if it is to maintain its credibility. Otherwise, the legitimacy of the European project will be brought into question.

Instruments for guaranteeing the values

In line with the affirmation of these values, European legislation establishes instruments for guaranteeing them, in particular, the procedures set forth in Article 7 of the TEU to address possible risks or breaches of the values proclaimed in Article 2. There are a number of reasons for having recourse first to these procedures. First, prior to 2014, they were the only ones that existed. Second, because of their "constitutional" status, as they are regulated in the Treaty. And, third, because so far they have failed to provide an effective response to a situation that has been creating problems within the European Union for more than a decade.

The aforementioned mechanisms enable European institutions to respond to situations with a "clear risk of a serious breach" and to "serious and persistent breach" of any one of the values set forth in Article 2. In either case, this is a political procedure, not a jurisdictional one: responsibility for performing the value judgement to determine whether a given situation is serious enough to warrant putting in motion the response established in the Treaty corresponds to the EU's political institutions and not to the CJEU.

These mechanisms are clearly designed for systemic threats or breaches in which it is a state's political and legal system that has failed, not for specific or individual violations. In the event of a risk situation, the mechanism is preventive and, therefore, does not include the imposition of penalties, but a mere declaration by the Council, which must be adopted

by four-fifths of its members with the prior approval of the European Parliament. If it is not a threat but an actual breach of any of the values of Article 2, the procedure is divided into two stages: first, the European Council must decide unanimously that there is a clear and persistent breach, with the prior approval of the European Parliament and, subsequently, the Council, acting on a special qualified majority, may suspend certain rights of the member state concerned.

> In a clear challenge to the basic principles of legal integration, countries such as Hungary have questioned the primacy of European law. This threatens the authority of European legislation and the equality of member states

It is therefore a punitive procedure, although hypothetically the case may arise that it is decided that there has been a non-compliance but without imposing any penalty. What is clear is that these penalties consist of a temporary suspension of rights, but never lead to expulsion. These procedures entail many difficulties: for example, the high majorities required, the indeterminateness of the concepts of seriousness and persistence of the breach, or the risk and the discretional nature of the penalties that may be applied, among others. However, it is also true that they are a powerful tool for putting pressure on a state if the necessary unity is achieved to apply them. However, in practice, so far the political will to do this has been lacking.

The cases of Poland and Hungary

In December 2017, the European Commission submitted a reasoned proposal to the Council to the effect that there was a clear risk of serious violations of the rule of law in Poland. In September 2018, the European Parliament did the same referring to Hungary. In the six years that have passed since then, the Council has discussed these proposals on several occasions and has given the countries concerned the opportunity to explain their side of the story, but has been unable to make any decision on the matter. Despite the fact that no sanctions were on the table, the member states have not agreed on the appropriateness of using this mechanism, viewed by some as the “nuclear button” to be reserved for extremely serious cases. So, in the end, it has been completely ineffective and it has shown that the states, represented on the Council, have failed and given no answer to the requests received from the Commission and the European Parliament.

In a complementary manner, the European Commission has put in place two approaches for defending the rule of law, based on dialogue and cooperation. The first, adopted in 2014 and called Framework to strengthen the rule of law, aims to respond to threatening situations without having to trigger Article 7. It was used with Poland, to no effect, as the Polish authorities turned a deaf ear to the Commission’s recommendations. As a result, as explained earlier, the Commission ended up asking the Council to adopt a decision based on

Article 7. It is a preventive but weak instrument, since its success depends entirely on the good will of the offending state.

The second approach is the so-called “rule of law mechanism”. Implemented since 2020, it consists of a monitoring procedure aimed at preventing the emergence of problems and fostering a culture of respect for the rule of law in the European Union. It is articulated through an annual report in which the Commission analyses the situation of the rule of law in each state. This report, which we have mentioned at the beginning of this article, generates a debate between states, European institutions and civil society; a dialogue aimed at identifying the main problems and also the best practices. Although the Commission includes concrete recommendations in this report, it is not intended as a response mechanism but as a monitoring mechanism, which is why it does not include penalties. However, it is an interesting document, as it gathers a lot of information and enables a sound diagnosis to be made.

Legal options: the role of the CJEU

In parallel to these soft law mechanisms, the institutions have also resorted to instruments and legal means that entail legal obligations and sanctions. Particularly important here is the role played by the CJEU. Whether in response to the appeals filed by the European Commission or answering questions raised by national judges, the CJEU has made a firm commitment to upholding the rule of law insofar as the breaches in this area constitute a breach of European law, particularly of judicial independence. Its judgements have condemned a number of states, including Poland and Hungary, on the grounds that their regulations on the organisation of the judiciary violated the independence of judges and, therefore, European Union law. The CJEU has even imposed economic sanctions on Poland to ensure compliance with its decisions. This jurisprudence has been strongly contested by the Polish Constitutional Court, which has considered it to be an unacceptable breach of national sovereignty.

In this respect, in a clear challenge to the basic principles of legal integration, the primacy of European law has been questioned. This not only puts at risk the authority of European law but also the equality of member states, as the primacy guarantees that European laws are a shared legislation that applies equally to all states and all citizens. Despite this challenge, the Polish government has begun timid reforms to get the sanction lifted.

The Rule of Law Conditionality Regulation

Lastly, we will mention the most recent binding instrument to be adopted: the so-called “Rule of Law Conditionality Regulation”. [3] Although the first proposal by the Commission dates from 2018, its approval was prompted by the economic effort that the EU decided to undertake in response to the economic crisis caused by the pandemic. In this context, the need was put forward to establish a suitable mechanism to protect the approved budget and the NextGenerationEU funding plan from certain threats. The idea behind this Regulation is that it is only possible to guarantee sound management of European funds if

the authorities of the states that manage them abide by the rule of law. Accordingly, this instrument is not intended to address all the breaches of the rule of law but only those that have a clear link to the budget and pose a sufficiently direct threat to the financial interests of the European Union.

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If one of these situations arises in a member state, the Commission will initiate a procedure which, after gathering information and listening to the state concerned, will culminate in a decision by the Council adopting the measures deemed appropriate by qualified majority. These measures may lead to freezing European funds. Although this regulation's scope is limited to budgets, as we have said, its impact may be significant. First, because the procedure envisaged is subject to fixed time limits and because the Council decides by the general qualified majority rule, which should enhance its effectiveness and feasibility. Second, because the sanctions that may result from its application may have significant economic consequences for states.

So it is not surprising that it was so difficult to adopt this Regulation in 2020 and that Poland and Hungary filed an appeal with the CJEU challenging its legality. In an important ruling in February 2022, the Court upheld the Regulation's legality, highlighting the importance of defending the rule of law as an essential value of the Union and its states. A few months after this ruling, in April 2022, the Commission initiated the envisaged procedure against Hungary. Following an exchange of information, in July 2022, the Hungarian government undertook to implement a series of corrective measures to address the shortcomings identified by the European Commission. However, the Commission considered that they were insufficient and proposed to the Council to freeze 65% of the funds of three cohesion policy programmes. Finally, the Council decided to suspend 55%, the equivalent of 6.3 billion euros, to which must be added the 5.8 billion euros frozen through the terms required to receive NextGenerationEU funds. Releasing these 12.1 billion euros will depend on fulfilment of the measures required by the European Commission. Jointly with the Hungarian authorities, a team of Commission negotiators is studying the plan to progressively unfreeze the suspended funds once implementation of the measures has started. It is the first time in all these years that Hungary has agreed to carry out the reforms suggested by the Commission.

It remains to be seen whether these reforms will be effective and will represent a genuine change or whether they are mere stopgap measures to avoid the sanctions in a context of severe economic crisis, which does not leave the Hungarian authorities much room for

manoeuvre. The effectiveness of this conditionality mechanism in other cases will depend on the economic situation of the state concerned (the more it depends on EU funds, the more clout the Regulation will have) and also on the European Commission's ability to find a link between the breaches of the rule of law and the harm to the EU budget. The decision on Hungary, as we said at the beginning, is grounded, among other reasons, on corruption in the award of public contracts, so the budgetary link is clear. However, in other cases, it may not be so easy to establish. This may be the reason why action has not been taken against other states that are also in the Commission's sights, such as Poland, although this country's status after the outbreak of the war in Ukraine may have played a role. Were this the case, it would send a very negative message, based on the idea that upholding the rule of law is negotiable, depending on economic or political circumstances.

In any case, neither the appeals to the CJEU nor the Rule of Law Conditionality Regulation can solve all the cases of serious violations of the rule of law as, in both cases, there are jurisdictional limitations on their use. That is why a comprehensive approach is needed, allowing the use of all the instruments available to the European institutions to bring greater pressure to bear on the offending states. Although one cannot speak of total passivity, the practice of recent years has shown that states have lacked the will to take courageous political action. Without this genuine will, the European Union's response will always be limited and its commitment to the values proclaimed in the treaties will be questioned.

REFERENCES AND FOOTNOTES

1 — In April 2023, this amount was reduced to 500,000 euros per day as it was considered that Poland had taken a series of positive, albeit insufficient measures.
2 — European Commission (2023). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2023 Rule of Law Report. The rule of law situation in the European Union. Brussels, 5 July 2023.
3 — Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, DO L 433I of 22 December 2020.



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