

A political analysis of EU's uncertain legitimacy to protect the rule of law at the national level

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Abstract

The rule of law crisis has prompted the need for clarification of the EU's legitimacy to ensure the effective compliance with the rule of law in all Member States. This question is addressed through a multidisciplinary perspective, following the multifaceted character of the rule of law. Special emphasis is made onto the political dimension, dividing it into three layers. To do so, legitimacy is analysed throughout its legal and political aspects, but also taking into consideration elements deriving from the integration process to provide a transversal answer to the legitimacy dilemma. While on the one side, the legal base for the protection of the rule of law at the national level has evolved continuously, including the creation of new instruments, the current legal framework does not yet provide clear, concise and effective mechanisms for creating supranational competences. On the other side, the integration process has increasingly accentuated interdependence in the EU's regulatory and judicial arenas, creating functional needs for further integration of the rule of law protection. Democratic backlash in one Member State can negatively affect the others, diminishing mutual trust, a fundamental principle for EU's integration. The final reflection on political legitimacy concludes that the rule of law crisis represents a political crisis, affecting not only institutions, but also European citizens. Eroding this principle leads to legal uncertainty, individual rights violations and constrains on the enjoyment of already acquired rights. Since the EU is an independent political entity, a supranational community based on common values, it would then be entitled to give itself the instruments to defend these values, given that a systemic breach of the shared values in any Member State represents a threat to the EU as a whole and not only to the Member State in question.

Introduction

The question of legitimacy has been touched upon the European Union (EU) since its very foundation. Whilst the effectiveness of economic integration has long provided for a sense of passive legitimacy based on the permissive consensus (Hooghe and Marks, 2009; Coman, 2018),

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increasing demands for the political legitimization of the European Project soon led to the evolution of the European Parliament from a merely consultative assembly to a real embodiment of European democracy.

Nowadays, the constraining dissensus political behaviour shown by many citizens all around the EU poses the question of whether this previous results-based legitimacy is still up to date (Hooghe and Marks, 2009). This increasing politicization has led to a democratic crisis at the heart of the EU, questioning its institutions, its policies and its very nature (Collignon, 2006). In addition, the constitutional and judicial reforms carried out in Hungary as well as the judicial system modifications and the potential constitutional reform to be implemented in Poland, the so-called “rule of law crises”, have prompted the need of a clarification regarding the EU’s capacities and mechanisms to ensure effective compliance with the rule of law in all Member States (Dawson & Muir, 2013; Coman, 2015; Kochenov & Pech, 2015; Coman, 2018; Mader, 2019). The rule of law crises refers to the complex combination of legal and political phenomenon taking place in Poland and Hungary over the last decades.

From this framework arises the question of the legitimacy of the EU to protect the rule of law at the national level, a question entangled in three different types of legitimization sources: the existence of a clear legal base to do so, the integration process itself and the legitimacy conferred to the EU as a supranational polity. This structure is followed in this article to answer its question by adopting a transversal perspective that relies on both, the political and legal aspects of the rule of law and the supranational mechanisms for its protection. Finally, while a differentiation between thin and thick conceptualizations of the rule of law serves as a way to separate the political and legal dimensions it comprises (Mader, 2019), the definition adopted for this article corresponds to the substantive dimension, as it allows for the inclusion of a wide set of ideals (Chesterman, 2008).

The three dimensions of EU’s legitimacy as protector of the rule of law

1. Legally constructed legitimacy

Coman (2015) purposed the existence of a regulatory gap when it comes to rule of law monitoring, implementing and enforcing at the supranational level. During the enlargement process, Member States agreed to delegate the power of monitoring the achievements of the Copenhagen criteria, including the rule of law, to the European Commission. Notwithstanding, the Commission lacks formal power to implement and enforce the rule of law within the EU (Dawson & Muir, 2013; Coman, 2015: 3).

The Treaties’ revisions carried out during the 1990s brought new mechanisms to protect the rule of law, notably the Article 7 procedure and the inclusion of the fundamental values in the body of the Treaty on EU (TEU) (Coman, 2018; Van Elsuwege & Gremmelprez, 2020). Notwithstanding, Müller (2015:146) showed that these values do not confer material competence, as they rather represent general orientations to policy and law implementation. Correspondingly, Mader (2019) asserts that the lack of precision in Article 2 (TEU) also has negative consequences for its enforcement. Kochenov and Pech (2015: 516-517) insisted on the political nature of Article 7

TEU, arguing that the Council is not legally compelled to impose sanctions when there has been a breach of the fundamental values of the EU. Furthermore, Coman (2018: 144) noted that the Article 7 mechanism is conceived as a nuclear option whose application is impractical in actual legal practice.

The Commission, in order to deal with the previously described situation, recommended the adoption of new instruments. In 2013, the EU Justice Scoreboards, and in 2014, a new framework to strengthen the rule of law at the EU level (Coman, 2018). The need for the creation of this new framework – which functions as an early warning tool, preceding the triggering of the Article 7 procedure – indicates that available tools were not sufficient, neither efficient, to prevent violations of EU values (Kochenov & Pech, 2015: 516). The principle of the rule of law, although used by the Court of Justice of the EU, “is not a rule of law actionable before a Court” (Ibid, p. 519). Therefore, Article 2 does not provide a legal basis, as its content can only be operationalized in the frame of Article 7.

2. Legitimacy deriving from the EU integration process

Firstly, Coman (2015) argues that, while the enlargement process created a frame for the development of new policy areas regarding the rule of law in an institutionalized manner, they have not yet emerged as such. During the enlargement, the EU saw its input legitimacy increased as a result of the diverse consultations. Nevertheless, the spill-over effect in the area of the rule of law implementation and enforcement has been limited once candidates became Member States. In spite of the fact that the rule of law has been included as part of different internal policies at the EU level, Coman (2015) points that “the political and administrative autonomy of the Commission has remained precarious” (p. 7).

Secondly, the integration process has increasingly accentuated interdependence. As functional theories reveal, progressive integration has led to spill-over effects (Haas, 2004: 199). This continuous inclusion of policy areas under the EU umbrella has not only resulted in the high interdependence of economic and monetary policies, but also created political interdependence (Müller, 2015). Furthermore, Kochenov and Pech (2015: 521) show that interdependence in the EU’s regulatory and judicial arenas is based on the principle of mutual trust, which can no longer function if one Member State does not respect the rule of law at the national level (Rizcallah, 2019; Van Elsuwege & Gremmelpré, 2020). Furthermore, Müller (2015) has exposed how democratic backlash in one Member State can negatively affect the others, further synthesizing the cross-border output into the following idea: “if national institutions of democracy and the rule of law fail, mutual recognition will end” (Ibid, p. 145). For instance, mutual trust is the fundamental base of the Single Market since all actors trust the system based on common regulations. The same applies to intergovernmental policy areas, notably foreign and defence policies are two fields whose development at the EU level has been possible due to interdependence between the Union members, resulting from the implementation of a common broad international relations strategy. If the doubt of implementation in one Member State starts to crumble the cost-benefit analysis of intergovernmental cooperation, incentives to work together will be eroded.

Since its inception, the EU has been committed to shared values, but the integration of these values into the legal scheme has taken place in a progressive manner, strongly encouraged by the need for legitimization of the European project (Coman, 2018). According to Smith (2019), the EU integration process relies on the rule of law as a requirement to ensure the effective implementation of EU policies, given that the EU is essentially a system of law whose functioning depends on the law application at the national level (Rizcallah, 2019). Likewise, as expressed by Van Elsuwege and Gremmelprez (2020: 13), the respect of the rule of law is linked to the principle of sincere cooperation, which implies that Member States shall not implement measures that could endanger the shared goals and values of the EU.

EU integration has progressively become more politically oriented, augmenting the importance of values and rights. Examples of this trend can be found in the positioning of most EU's leaders regarding Hungary's new educational law which touches upon the respect for fundamental rights enshrined in Article 2 (TEU). Besides, the list of competences in which the institutional system of the EU is involved continues to increase with each crisis period: the economic and monetary union was deeply reinforced after the 2008 financial crisis and the EU is developing currently. Since the 2000s, shared values have been inserted as fundamental parts of EU action, both domestically and in the area of external relations (Coman, 2018). The conceptual change from principles to values is consistent with this evolution, considering that the term "values" is more related to political ideals, pointing to the recent development of the EU's political dimension (Smith, 2019).

3. Political legitimacy

The rule of law crisis is also a political crisis. For the first time in the history of the EU, democratically elected governments have systematically pursued illiberal, anti-democratic policies, threatening the values of the European project. Mader (2019) argued that the solution to this situation can only be thought of as one of political nature. In accordance with these ideas, Müller (2015) exposed that, while the democratic principle of all-affected interests is not commonly used in the EU sphere, it is not in the objective interest of any of the Member States, nor of the European citizens, to have a non-liberal government participating at the EU institutions. Since decisions taken at the Council and the European Council have a direct impact on citizens' lives, the fact that the offending Member State enjoys the same voting rights as the rest of them represents a threat to all Europeans (Kochenov & Pech, 2015: 521).

The EU is not a democracy in itself, but it rather takes part in democratic processes. The *sui generis* character of the EU, which is not a State, nor a Federation, together with the complex institutional structure depending simultaneously on supranational, intergovernmental and national processes, creates an unique system of governance. As a result, it is subjected to a double legitimacy when described as a democratically fully legitimate polity: national parliaments' legitimacy and the European Parliament legitimacy (Müller, 2015). Hence, the EU as a political community based on common values would be entitled to give itself the instruments to defend these values (Coman, 2018: 147). A systemic breach of the shared values in any Member State represents a threat to the EU as a whole and not only to the Member State in question (Mader, 2019: 139).

Conclusion

The current legal framework does not provide clear, concise and effective mechanisms for the creation of supranational competences that allow the Commission to protect the rule of law at the national level. Despite subsequent treaty reforms, the rule of law is still codified as a fundamental value, preventing its operationalization as a judicially enforceable prescription outside the framework of Article 7.

Even though the Commission has monitored and evaluated the fulfilment of the Copenhagen criteria during the enlargement process, spill-over effects were limited once candidates had acceded to the EU. However, increasing interdependence between Member States has turned into functional needs for more political integration. The EU, as a system based on laws, relies on national actors for the enforcement of supranational legislation. Therefore, the rule of law crises have brought into the debate the need for new mechanisms in order to strengthen and safeguard the rule of law within the EU. One of the main arguments to do so relies on the effects that breaches on the rule of law in one Member State can have in other Member States, as well as its direct consequences for European citizens. A good example of such consequences is the lack of certitude of legal protection, the blurring of the fundamental right to be equal before the law and the possibility of seeing individuals' rights violated.

The concepts of the EU are embedded in multiple democratic processes, both at the national and the European levels, that create a complex, supranational, political legitimacy derived from national and European processes of participation and election. Given that the breaches of rule of law affect these processes that European citizens partake in, it would be politically legitimate for the EU to protect the rule of law on the national level, as well as on the European level.

Overall, the EU's legal legitimacy to enforce the rule of law at the national level is evolving, with the constant development of new tools and mechanisms. There are functional needs for further integration of rule of law enforcement, which are sustained on a clear political legitimacy built around democratically reinforced values.

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