

THE EU ENLARGEMENTS BETWEEN CONDITIONALITIES AND INTEGRATION PRINCIPLES



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Abstract

After providing a short description of the different stages of European enlargement and of the conditionalities established at the Copenhagen European Council, this study will discuss the most important principles of European integration (the principle of mutual recognition, the principle of solidarity and the respect of the rule of law). Indeed, in the absence of a true political union, the enlargement conditionalities have to be interpreted and applied according to these fundamental principles of European integration.

Keywords: EU enlargement, enlargement conditionalities, mutual recognition, EU solidarity, EU rule of law

1. Foreword: Limits and Object of This Research

The history of the enlargements of the membership of the European Economic Communities (EEC), and then of the European Union (EU), has attracted little attention from the legal science in comparison to, on the one hand, the institutional

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developments and the study of the EU freedoms, and, on the other hand, the studies conducted by political scientists and historians.¹

This is likely due to the idea that the European Union is ‘a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals’.² Therefore, most of the attention has been paid to the institutional developments and to the strengthening of the internal market of the Union, rather than on its enlargement.

Furthermore, besides the possible transitional periods after the accession of a new Member State and the possible temporary exceptions provided in the specific accession treaty, the *acquis communautaire* (i.e. the legal corpus of the European Union) has to be fully accepted by the new entrants. Thus, the problem of the specific arrangements agreed with the new Member States has mostly a ‘historical’ value, as the system of European legislation has to be fully implemented in a relatively short period of time after the accession to the European Union (if not even before the accession).

The aim of this research is not to study the legal arrangements agreed upon for the accession of each new Member State, nor to provide an overview of the negotiations that took place or the political climate that accompanied each accession. This has already been the object of numerous studies by legal historians, political scientists and/or international relations experts.

Instead, after providing a short description of the different stages of European enlargement and of the basic principles on which such events have been based on, this research will attempt to identify the most pertinent conditionalities that the then ‘new’ Member States were required to meet and their coordination with the most relevant principles of European integration.

It should be stressed that this study explores only the previous (and accomplished) enlargements, without taking account of the current enlargement processes (concerning the Balkans, Turkey, Ukraine, Armenia, Moldova, etc.).

2. The History of EU Enlargement

The first enlargements of the European Economic Communities were based on a case-by-case approach. No general conditions were established at that time and, indeed, the main concern regarded the possible economic effects on the market

- 1 Although the enlargement process has been the object of many interesting books, often with a wide interdisciplinary approach, little room is devoted to the enlargement process in the textbook on European Union law.
- 2 European Court of Justice (ECJ), judgment of 5 February 1963, van Gend & Loos, case 26–62.

and on the integration process. The political debate focused mainly on the ‘deepening versus widening’ issue, as the widening of the Communities (through the enlargement) was thought to make the deepening of market integration more difficult (by making it harder to reach consensus in decision-making).³

Thus, the first enlargements were accompanied by certain European reforms.⁴ The first enlargement (1973: Denmark, Ireland and the United Kingdom), was agreed upon at the Hague Council of 1969, where it was linked with the creation of a European Political Cooperation (EPC) (i.e. the foreign policy cooperation among the Member States, that started in 1970) and the Economic and Monetary Union (EMU) (which, however, was created only much later).

Although the second enlargement (1981: Greece) did not provide for institutional reforms of the European Communities, the third enlargement (1986: Spain and Portugal) was accompanied by the signing of the Single European Act (SEA) which introduced the qualified majority voting for the approval of harmonisation legislation.

The fourth enlargement (1995: Austria, Finland, and Sweden) was based on the provisions of the Maastricht Treaty of 1992, which established the European Union as the successor of the European (Economic) Community and strengthened the integration process in many aspects (e.g. by providing the establishment of the European monetary union).

The fifth enlargement (2004: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) and the sixth (2007: Bulgaria and Romania) came after the intergovernmental conference of 1996 (which also produced the Amsterdam Treaty) and were based on conditions established in the Copenhagen summit of June 1993. The seventh enlargement (2013: Croatia) was also based on these established and consolidated conditions.

Besides the deepening vs. widening debate, other factors played a very important role in the political and legal debate concerning the enlargement.

For instance, the accession of the United Kingdom was vetoed twice by France (in 1963 and 1967) because of General de Gaulle’s concerns about the United Kingdom’s close ties with the United States and the Commonwealth (which could undermine the cohesion and purpose of the European Communities) and his doubts regarding Britain’s commitment to Europe and its willingness to embrace European economic and political integration.

Greece’s accession was approved by the Member States as a recognition of the introduction of democracy after the dictatorial regime of the colonels. This was done despite the negative opinion expressed by the Commission, which found that Greece was not sufficiently prepared from an economic perspective.

Economic reasons also caused concerns regarding the accession of Spain, due to the impact it would have had on the distribution of structural funds in the field of

3 Cf. Wallace, 1989; De la Serre, 1991; Wessels, 1996, p. 141. Cf. also Kelemen, Menon and Slapin, 2014, p. 647; and Borchardt, 1995, p. 18.

4 See Preston, 1997, p. 23; Laursen, 2013, p. 19; Letta, 2003, p. 13.

agriculture and fisheries. However, also in the case of Spain, broad political considerations prevailed, taking into account the recent accomplishment of democracy.

The fall of the Berlin Wall in 1989 had serious consequences for European enlargement, although the integration of new Members followed different paths.

Regarding the former East Germany, the political position of Germany (that was accepted by the other Member States) was to immediately unify it (3 October 1990), although this required huge investments and transfers of economic resources.

The second path is represented by the accession of Austria, Finland, and Sweden (1995). This had previously not been possible due to their neutral status; however, following the fall of the Berlin Wall and the end of the East-West opposition, their ascension proceeded quite smoothly.

The third path was the accession of the Eastern European countries, which took a much longer time and was based on three phases. The first phase was the enactment of Association agreements; the second the application of the criteria established in Copenhagen; and the third was the negotiations.

The 2004 enlargement was, in many aspects, unprecedented.⁵ This was due, first, to the large number, and the geographical and cultural variety of the countries that joined; second, because it had the political significance of a 'reunification of Europe'; and third, because the European Union itself had profoundly changed since the earlier enlargements.⁶ For these reasons, the above-mentioned long and complex process was designed. Moreover, during the 2004 negotiations, the EU accession was presented as a 'package deal'. This allowed EU negotiators to include conditions that were unattractive to the candidates, which they eventually accepted because the overall attractiveness of joining the Union outweighed the disadvantages of parts of the deal. The background idea was that 'Ultimately, accession on any terms is better than no accession'.⁷

3. The Evolution of the Conditions for Accession to the EC/EU and the Copenhagen Criteria

The conditions for accession to the EC/EU have been defined and expanded throughout the years. Beginning as broad political and economic conditions, they have been gradually shaped and reshaped. As it has been said,

in practice, each enlargement has been an occasion for the Member States and the institutions to reflect and elaborate on the conditions of entry, not least because of

5 See Albi, 2005, p. 5.

6 Cf. Cremona, 2003, p. 2; Albi, 2005, p. 5; Jacobs, 2004.

7 Grabbe, 2006, p. 2.

the constant evolution of the Community/Union and of its legal order, but also as a reaction to the steady increase of membership applications.

Thus, the accession conditions have been converted, progressively into more objective 'benchmarks'.⁸

The accession conditions were finally defined by Art. O of the Maastricht Treaty of 1992 and by the European Council of Copenhagen of 1994.

According to Art. O of the Maastricht Treaty:

Any European State may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

This Art. has since been modified by the Lisbon Treaty of 2007, which added the condition that applicant States should respect 'the values referred to in Art. 2' and should be committed to their promotion.⁹

The specific criteria to be met were established by the Copenhagen European Council of 21–22 June 1993¹⁰ and strengthened by the Madrid European Council of 15–16 December 1995. These are known as the 'Copenhagen criteria'.

There are three sets of criteria. The first are the 'political criteria', which include the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities. The second are the 'economic criteria', which require countries to have a functioning market economy and the capacity to cope with competitive pressures and market forces within the Union. The third is adaptation to the *acquis communautaire*.

The political conditionality represents a consolidation of the principles *de facto* applied in the past (e.g. as concerns Greece, Portugal and Spain, which could join the European Communities only after the establishment of democracy) and anticipates

8 Hillion, 2004b, p. 3.

9 Art. 49 TEU.

10 Conclusions of the Presidency of the European Council in Copenhagen of 21–22 June 1993 (DOC/93/3, point 7.A.III): 'Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries'.

the criteria established by the Maastricht Treaty as revised by the Amsterdam Treaty, which ‘constitutionalised’ the Copenhagen criteria.¹¹

Even the economic criteria find their origin in the previous negotiations, such as when General De Gaulle vetoed the accession of UK in 1967 on the basis that it was not ready to join because of its economic situation. These conditions were implicitly considered in the case of Greece, Portugal, and Spain. They were then formally evaluated by the Commission in the case of the accession of the EFTA countries (Austria, Finland and Sweden).

Furthermore, the third Copenhagen criteria relate to a long-standing accession condition – the ability of the applicant State to take on the ‘obligations of membership’ – which entails the acceptance and observance of the so-called ‘*acquis Communautaire*’, i.e., the broad corpus of EC/EU’s rules and objectives. This conditionality was established in the 1969 Hague Conference of the Head of States and Government (on the accession of Britain, Denmark, Ireland and Norway) and confirmed in the subsequent enlargements.

However, the conditions of accessions have been gradually made more severe and tough and have even been used to try to influence the domestic and foreign policies of applicant countries.¹² Controls of compliance to conditionalities have been institutionalised and their stricter applications envisaged.¹³

4. The European Enlargements Between Conditionalities and Fears

European integration is based on rules. After the failure of the agreement to create a European political union in the 50s of the last century, the main idea was to build the European integration through the enactment of market rules (i.e. by strengthening the market through legal rules).

In the background, however, was the idea of building a European integration through a basic political process based not only on market rules but also on other political values. As it was affirmed in the *Schumann Declaration* of 1950, ‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity’.

Furthermore, the enlargement process is based on rules (i.e. conditionalities) that are backed up by the idea of common values.

11 For an in-depth analysis see Hillion, 2004b, p. 3.

12 See Smith, 2003, p. 105; Grabbe, 2006, p. 25. As concerns the use of Accession Partnerships to influence applicant countries’ policy-making to an extent; this applies even to policies that have not been adopted by all Member States (such as Schengen and monetary union).

13 Hillion, 2004b, p. 13; Mattina, 2004, p. 50.

As stated in 1999 by the former President of the European Commission, Mr. Romano Prodi, regarding the Copenhagen conditionalities:

Now, as never before, and perhaps as never again, we have the chance to create a Europe in which all the peoples of this continent can live together in peace, security, freedom, justice and equality. A democratic Europe where human rights are respected and the rule of law prevails. An economically integrated Europe which offers growth and prosperity through a single market and a single currency. [...]

I believe this is a strong message of political solidarity with the applicant countries which underlines our sincere desire to open the doors of the Union is a meaningful time-frame.

But it is also a message that tells our fellow Europeans in these countries that their future lies very much in their own hands. We will be ready to receive them. Whether they are willing to join us will depend on their capacity to change and adapt their economic, social, environmental and legal systems. Like the need for our Member States to meet the Maastricht criteria, this effort of adaptation brings intrinsic benefits but is made easier by the constraints of aspiring to future membership.¹⁴

European integration includes strong political values, such as democracy, justice, and solidarity.

These values have been imposed, through the political conditionalities, on new Member States, in an even stronger way as compared to the existing Members.

However, rules and legal obligations are not enough to create a community. Becoming a member of any society or group is a long and complex process that cannot be based solely on the will of the governors as embodied in a formal legal text.

Gaining membership in any society (be it a rowing club, golf club, or an international community) is usually a process based on the acceptance of the vast majority of its members (often based on secret voting). Therefore, the accession to a community of States involving such strong economic and political ties also needs to have a strong involvement of the people.

From a formal point of view, the accession of the applicant countries is based on treaties that have to be signed by all of the current Member States and approved by national parliaments (and sometimes even by referenda).

However, if this process is not based on common feelings and values, the accession of new members may create huge problems, negative reactions, oppositions and widespread fears.

Two examples of such fears – caused by the 2004 enlargement – may be provided.

The first is the failure of the ratification of the Treaty establishing a Constitution for Europe. The Treaty, adopted by the European Council on 18 June 2004 and signed in Rome on 29 October 2004, was never ratified as it was rejected by two

14 Prodi, 1999, p. 1.

(founding) Member States following the failures of their national referenda. One referendum was held in France on 29 May 2005 (the negative votes prevailed with 54.68% of total votes) and the other took place in the Netherlands on 1 June 2005 (the negative votes accounted for 61.6% of total votes).

The second example is the strong opposition to the approval of the so-called Bolkenstein directive proposal which provided for an extension of the ‘mutual recognition’ or ‘country of origin’ principle.¹⁵

According to a widespread opinion, the application of this principle could have led to social dumping (by letting companies hire workers in other countries in order to pay lower social security costs), and even a race to the bottom of the national social security systems. The most well-known examples were the Polish plumber (*Plombier polonaise*) and Polish nurse (*l’infirmière polonaise*) cases, that, according to the aforementioned opinion, would have been able to offer their services at a lower price than that of the national plumbers or nurses.¹⁶

This led to the removal of the ‘country of origin principle’ from the directive, which, as it was then approved, simply provided for the ‘freedom to provide services’.¹⁷

5. In Search of the Fundamental Principles of European Integration

The rise in fear for a huge number of European citizens after the 2004 enlargement demonstrates the failure, at least from a political perspective, of the Copenhagen criteria.

- 15 Art. 16 (‘Country of origin principle’) of the proposal for a Directive of the European Parliament and of the Council on services in the internal market, doc. COM(2004)2, of 25 February 2004: ‘Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field. para. 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider’s liability’.
- 16 This opinion was clearly stated by the journalist P. de Villiers, *La grande triche du oui*, in *Le Figaro*, 15 March 2005: ‘*Cette affaire est très grave, car la directive Bolkestein permet à un plombier polonais ou à un architecte estonien de proposer ses services en France, au salaire et avec les règles de protection sociale de leur pays d’origine. Sur les 11 millions de personnes actives dans les services, un million d’emplois sont menacés par cette directive. Il s’agit d’un démantèlement de notre modèle économique et social*’. On this case, and more generally on the opportunities offered by the European integration, see Gnes, 2009, p. 37.
- 17 Art. 16 of the Directive n. 2006/123/EC of 12 December 2006, on services in the internal market.

Of course, these criteria cannot be exceeded or deleted. Their progressive establishment and consolidation demonstrate an important attempt to provide objective and fair conditions for candidate States to accede to the European Union.

However, especially in the absence of a true political union, these criteria have to be interpreted and applied according to the fundamental principles of European integration.

As concerns the ‘political criteria’ (stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities), the fundamental principles to be taken in account are the principles of solidarity and the rule of law.

As concerns the ‘economic criteria’ and the ‘adaptation to the *acquis Communautaire*’, the main principle of reference should be the mutual recognition (but the other two also play a relevant role).

Such principles are, indeed, not new, even in the practice of the European Commission in examining the integration dossiers of the candidate countries. However, it might be suggested that such principles should be applied under a different, more functional and comprehensive perspective.

5.1. The Principle of Mutual Recognition

Probably the most important principle of the European integration, under the perspective of the creation of the common market, is the principle of mutual recognition.

This principle, based on Art. 28 of the EC Treaty (now Art. 34 TFEU: ‘quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States’), was firstly stated by the Court of Justice in the judgment *Cassis de Dijon*. The Court held that:

the concept of measures having an effect equivalent to quantitative restrictions on imports, contained in Art. 30 of the EEC Treaty, is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a member state also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned.¹⁸

This judgment was later explained by the Commission in a specific communication, where it stated that:

the principles deduced by the Court imply that a Member State may not in principle prohibit the sale in its territory of a product lawfully produced and marketed

¹⁸ ECJ, judgment of 20 February 1979, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, case 120/78.

in another Member State even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products. Where a product 'suitably and satisfactorily' fulfils the legitimate objective of a Member State's own rules (public safety, protection of the consumer or the environment, etc.), the importing country cannot justify prohibiting its sale in its territory by claiming that the way it fulfils the objective is different from that imposed on domestic products.¹⁹

The principle of mutual recognition has been progressively applied by the Court of Justice to goods (in the 80s, especially for food and beverages), even concerning their manufacturing, characteristics, name, and packaging. This was then progressively applied to all the other EU freedoms. Thus, it was used to build the common market in areas where harmonisation had not been accomplished through EU secondary legislation.

The principle of mutual recognition, because of the integrative function attributed to it, is not easily distinguishable from other principles, with which it is generally identified or confused: the principle of functional parallelism, the principle of equivalence, the principle of non-discrimination, the principle of origin, the principle of control of the country of origin, the freedoms of movement, etc. These are distinct principles, but they seem to indicate specific aspects of the same general principle, which is sometimes identified as the principle of non-discrimination.²⁰

Indeed, the principle of mutual recognition, understood as functional parallelism, implies the obligation of the various Member States to allow the circulation within their territory of the goods produced in another Member State, provided that the standards followed in the second State correspond 'from a functional point of view' to those of the first.

The principle of mutual recognition is not merely a particular expression of the broader principle of non-discrimination (and equality), nor only one of the possible instruments for the creation of the single market, nor exclusively a means of evaluating the application of the controls set up by the Member State of destination (or establishment). Instead, it is the strongest application of the principle of non-discrimination, which constitutes a fundamental principle of the EU legal system. From this latter principle follows the prohibition of discriminatory treatment (understood as an application of the principle of equality) and, consequently, not only the obligation to treat goods produced in other countries in a non-discriminatory manner, but also that of recognising the regulations of other countries as equivalent. This, in

19 Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*), published in the OJ of 3 October 1980, C256, p. 2.

20 On the mutual recognition principle see esp.: Weiler, 1999, p. 349; Majone, 1993; Armstrong, 2002, p. 225; Gnes, 2006 and 2010.

turn, prevents the possibility for States to set quality standards that could introduce obstacles to the freedom of movement.

This is the most important and most delicate aspect of the mechanism that allowed the creation of the single market, as it establishes acceptance, by the various legal systems of the countries adhering to the Union, of both the rules and the acts enacted by other national authorities.

The application of the principle of mutual recognition, as an alternative to that of (total) harmonisation, as well as the determination of the level of (minimum) harmonisation and the methods for establishing the mix of harmonisation and mutual recognition, vary not only according to the technical characteristics of the sector concerned, but also on the basis of political choices, which are often the result of compromises between the various EU institutions and the Member States.

In order to make this principle work, it is necessary that there is, on the one hand, a sort of mutual trust or mutual respect ('comity') on the part of the national legal systems involved (and especially on the part of national administrations); and, on the other hand, that there is a great credibility and reliability of the activity of the EU institutions.

According to this perspective, the mutual recognition principle plays a fundamental role in the construction of European integration. It has the role of keeping together the different elements of the European complex system, with a federative and integrative function, similar to that played by the *Full faith and credit clause*²¹ and the *Commerce clause*²² in the United States legal system.²³

The mutual recognition principle (as well as its sister principles, like the country-of-origin principle) constitutes a bridge that allows the circulation of national rules (e.g. the rules according to which a product has been manufactured, or a person has acquired his qualifications). The possibility for national rules to be applied in another country may give rise to the phenomenon of 'choosing the law' (i.e. to the possibility to 'import' the rule of another country).

For example, in a case concerning the freedom of establishment, two Danish nationals, residing in Denmark, incorporated a company named 'Centros' in the United Kingdom (at the time member of the EC), for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up. However, the Danish administration refused to register a branch of that company in Denmark, on

21 Art. IV, I of the US Constitution: 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof'.

22 Art. I, X, n. (2) US Const.: 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress'.

23 For a comparison of the integrative processes in the EU and in the US, see Kommers and Waelbroeck, 1986, p. 165.

the grounds, *inter alia*, that the company, which did not trade in the United Kingdom, was in fact seeking to circumvent the national rules. The refusal was appealed to a Danish tribunal and the question referred to the Court of Justice. The Court of Justice established that ‘the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty’. The Court also held that Member States may

case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely.²⁴

5.2. *The Principle of Solidarity*

The principle of solidarity plays an increasingly important role in the European integration process as an emerging principle that may be part of the constitutional principles that underline the European integration (as the non-discriminatory rule, the rule of law, etc.) or may even constitute a part of the ‘European rule of law’.

The term ‘solidarity’ appeared in the above-mentioned Schumann Declaration of 1950. It was later mentioned in both the preamble of the Treaty establishing the European Coal and Steel Community of 1951 and in the preamble of the Single European Act of 1986.

The phrase ‘European solidarity’ is one of the most frequently used in public discourse and media, especially in relation to the different crises (financial crises, refugee crisis, etc.) that have affected Europe.

However, it has been applied by the European Court of Justice in a limited number of cases and areas. For example, in a case in the field of social security, the Court held that ‘a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary’²⁵ should be accepted.

Although the meaning of (European) solidarity has never been defined in EU law, nor in the case law of the Court of Justice, this term has been used in the framework of European integration with different purposes, with different perspectives, and to respond to the different crises Europe is facing.

European solidarity has, thus, a multilayered character.²⁶ Different perspectives on this principle have been envisaged: as a constitutional principle, as it may provide

24 Court of Justice, judgment of 9 March 1999, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, case C-212/97, §§ 27 and 25.

25 Court of Justice, judgment of 20 September 2001, *Rudy Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, case C-184/99.

26 Borgmann-Prebil and Ross, 2010.

different answers as compared to the analyses based exclusively on the concepts of citizenship and fundamental rights;²⁷ as a key element of the concept of social justice as a counterweight to the predominant market orientation; and as a guiding principle not only for cohesion policies but also for legislation in general.²⁸ However, this concept has never been expressly affirmed as a constitutional legal principle, likely because of its intrinsically political origin and the opposition of Member States to affirm a general obligation of mutual assistance.

Although the concept of solidarity, also in the European integration, has primarily a strong rhetoric and political meaning, it acquired (especially after the Lisbon Treaty) an increasingly stronger legal significance. Solidarity is used in Art. 3 TEU according to three different meanings: ‘solidarity between generations’, ‘solidarity among Member States’ and ‘solidarity and mutual respect among peoples’ in respect of the Union’s relations with the outside world.²⁹

The Lisbon Treaty expressly mentions the concept of solidarity in many different areas: in the field of financial solidarity,³⁰ in the field of migration,³¹ in that of social solidarity,³² and in other fields.³³

The Court of Justice has invoked or elaborated the concept of solidarity in different areas: generally, to define the principle of loyal cooperation³⁴ where solidarity was used as a foundation for key constitutional principles securing the effectiveness of EU law and the protection of individual rights; social rights (where solidarity played the role as a ‘value signifier’ especially regarding access to social justice, as in the fields of healthcare and public services); market freedoms (where the concept of national solidarity was used as a justification in favour of obstacles to the single market), EU citizenship (especially concerning the development of the equal-treatment principle in core citizenship rights and the request to Member States to demonstrate financial solidarity toward those EU citizens sufficiently integrated into the host Member State); and competition rules (in order to exclude solidarity systems from the notion of ‘undertaking’, and so from the application of competition rules).³⁵

A legal principle gets its strength from its constitutional position and from its judicial application (and by the reconstruction provided by the legal science). In the case of solidarity, the role of the Court of Justice as promoter of European integration was not backed up by the development of legislation. Especially in the field of social

27 Ross, 2010, p. 41.

28 Barnard, 2010, p. 75.

29 Ibid., p. 74.

30 Art. 122 TFEU, European Stability Mechanism, etc.

31 Art. 80 TFEU.

32 Arts. 2, 3 TEU and Art. 27 of the European Charter of fundamental rights.

33 Arts. 21, 24, 31, 32 TEU; Art. 222 TFEU on terrorism; Protocol 28 on social cohesion, etc.

34 Art. 10, now Art. 4, TEU.

35 Ross, 2010, p. 41; and Ross, 2007, p. 1057.

solidarity, it encountered the opposition of the Member States, who were worried about the financial solidarity obligation that would be imposed upon them.³⁶

The principle of solidarity is still far from living up to its strong potential in the interpretation and application of EU law.

5.3. The Respect of the Rule of Law

The rule of law is not only a political condition to become a Member State but also a fundamental principle of the European Union, expressly provided for by Art. 2 TEU:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

Art. 2 TEU does not simply provide a list of principles and values. It defines the political background and programme of the European Union integration. Therefore, although the TEU does not define what the ‘rule of law’ is, it may be defined according to the other values mentioned.

There is not a commonly recognised definition of ‘rule of law’: not only because the legal literature on the topic is almost infinite, but also because the term has been used by politicians and exporters of democracy with many different meanings.

As a starting point, using a legal dictionary definition, it might be defined simply as the ‘supremacy of regular as opposed to arbitrary power’ (i.e. the ‘supremacy of law’), or ‘the doctrine that every person is subject to the ordinary law within the jurisdiction’.³⁷

In the EU legal system, the principle of the rule of law has been defined and applied by the European Court of Justice in different fields, but especially in the area of judicial independence.³⁸ Indeed, since the origins of the European Communities, a strong relationship was built between the European and the national judges, through the preliminary ruling procedure established by the EEC (precursor to the EC and then the EU) Treaty. This instrument has been used not only as a means to achieve the ‘final’ and definitive interpretation of EU law from the European Court of Justice but also as a strategical tool to re-interpret national law; or even to modify national law through the application of EU law, according to its status as a superior law.³⁹

³⁶ Gnes, 2018, 238.

³⁷ Garner, 2009, p. 1448.

³⁸ Bóka, 2024, p. 173.

³⁹ On the ‘strategic use’ of the preliminary ruling procedure, see, inter alia, Gnes, 1999, p. 331; de Witte, 2016, p. 15; Classe, 2021, p. 177.

It is important to note that decades ago, an Italian judge attempted to obtain an interpretation against the national legislation concerning the liability of judges (which would have undermined their independency also in their role of judges applying European law). However, the request for a preliminary ruling was rejected on the grounds of not bearing any relation to the actual nature of the case or to the subject-matter of the main action.⁴⁰

More recently, the rule of law has been invoked in cases that involved the independence of the judiciary in certain East European Member States (Poland, Hungary, and Romania) and the power of lower courts to propose preliminary rulings to the European Court of Justice.⁴¹ Another recent case concerned the conditionality for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States, which was upheld as legitimate by the European Court of Justice.⁴²

This is not the place to discuss the function and meaning of the rule of law or of its application in the European Union, nor to discuss its application in the field of conditionality regulation⁴³ or judicial independence,⁴⁴ as much has already been written.

It should be highlighted that this principle has assumed an extremely relevant role in the development of the European union legal system. Suffice it to say, it has contributed to the move from the traditional position of European non-interference on procedural issues to a stricter control on the national judiciaries (although formally only to assure the correct functioning of the European integrated judicial system).

6. Perspectives

Formally setting the conditionalities through the Copenhagen criteria undoubtedly contributed to the transparency of the accession procedure and clarified what candidate countries can expect once they become full members of this special community of States.

40 Court of Justice, order of 26 January 1990, *Falciola Angelo SpA v. Comune di Pavia*, case C-286/88.

41 See e.g. the Judgments of the Court of Justice (Grand Chamber) of 23 November 2021, *Criminal proceedings against IS*, case C-564/19 (concerning the Hungarian judiciary) and of 22 February 2022, *Proceedings brought by RS*, Case C-430/21 (concerning the Romanian judiciary).

42 European Court of Justice (Full Court), judgment of 16 February 2022, *Hungary v. European Parliament and Council of the European Union*, case C-156/21.

43 Cf. Bóka, 2024, p. 224.

44 Cf. von Bogdandy et al., 2021.

However, it must be noted that the European Union is not (yet) a federal State, as it not only lacks some of the most important features of federal States but also a common political basis.

The step-by-step process of building European integration has been based on the construction of a common market, through legal and economic instruments so that Europe is seen as ‘Europe of rules’. The process has also relied on the work of the only real supranational institutions: the European Commission, the European Court of Justice and the European Central Bank. However, these are considered ‘technical’ institutions, without a specific political mandate.

For decades, Western countries and international institutions and organisations have tried to ‘export’ democracy to the less developed countries, providing economic subsidies in exchange for adherence to democratic principles. The respect for the rule of law and of human rights has been used as a conditionality to provide financial benefits: from the EU to candidate countries under special agreements; or, from international financial institutions (esp. International Monetary Fund and World Bank) to finance development projects.

The rule-of-law principle has been defined according to the Western countries’ lenses, and the EU rule of law has been developed according to even more specific lenses.⁴⁵

In particular, the first enlargements saw the accession of new countries as a prize for their recently acquired democratic status. Indeed, the EC/EU has been an ‘expanding club of democratic European states’. Alongside this geographical expansion, the process of European integration gradually expanded the functional scope of integration, from the construction of the common market to the fiscal and monetary union and the inclusion of limited political elements.⁴⁶ However, the most recent enlargements show the self-conceit of the oldest Member States as consolidated democracies, as opposed to the new and fragile democracies.

Of the three fundamental legal principles that have been described, two (mutual recognition and rule of law) are ‘technical’ instruments in the hands of administrations and judges, necessary to promote the creation and strengthening of a common market based on common democratic values.

The third principle, solidarity, has both legal and political value, and should be used, together with the other principles, to achieve a less legal and more political union.

The European Union is more than just a common market, which may be based only on the principle of mutual recognition and some economic conditions. It entails a complex and difficult mix of law and politics, enshrined by principles that have a double face, like solidarity and rule of law.

The challenge is to be able to use (both the EU legislator and the European judges) these principles in a prudent, consistent, and visionary manner.

45 Cf. Varga, 2021, p. 301.

46 Laursen, 2013, p. 22.

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