

The rule of law: A totem with a thousand facets

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The book *Le Totem de l'Etat de droit, Concept flou, conséquences claires* (The totem of the rule of law, a vague concept with clear consequences), by Ghislain Benhessa, a French scholar of public law, lawyer, philosopher and lecturer at the University of Strasbourg, is here to convince us otherwise.

Although the rule of law has become a political argument, often used against Hungary and Poland, it is a philosophical and legal concept that is difficult to define.

It is this task of definition that Benhessa undertakes in his work. He deplores the fact that the current proponents of the concept lack any intellectual rigour when they have turned it into "the ultimate talisman of Western democracies, which means everything at once, in a gigantic maelstrom: separation of powers, independence of the judiciary, equality before the law, transparency of public action, freedom of the press and broadcasting, pluralism of political parties, and of course the defence of fundamental rights and the fight against discrimination [...] A talisman whose power grows as more rights are implemented according to the context and social demands."

The rule of law has become an instrument that allows us to put the general interest second. It is an edifice whose contours change according to the "protean values" defended tooth and nail by the judge, the central figure in a system that favours legality over legitimacy; in short, "the rule of law has become the exercise of the right against the state", "the instrument for privatising the world to the detriment of the collective, the Trojan horse of the most diverse and colourful grievances", a "maze of freedoms and fundamental rights under the authority of judges".

In the pages devoted to what he calls the "battle of the leaders" between the "white knight" Kelsen and the "black knight" Schmitt, Benhessa beautifully summarizes the conflict in which Hans Kelsen's model prevailed over Carl Schmitt's concept. The former constructed a "system of understanding the world based entirely on law", a "scientific model of the rule of law", while the

latter hunted down the "aporias and blind spots" and drew on "theology and the history of ideas to oppose him with the concept of the state of exception".

Benhessa's work is also a valuable contribution for understanding the changes in Gaullist ideas that took place in the aftermath of the decision of the French Constitutional Council, in 1971, on freedom of association, by which it became the guardian of fundamental freedoms. This was the beginning of a drift that would lead to a situation in which "the judges arrogated to themselves the function of exclusive interpreters of the Constitution", something that General de Gaulle would never have accepted.

We are now a long way from the original concepts of the rule of law, which were designed to "contain the public power of the government vis-à-vis the individual", and even from the pyramid of norms conceived by Hans Kelsen. The rule of law has become a concept that serves as a breeding ground for - the "dream of unlimited emancipation", a phenomenon that Alexis de Tocqueville and John Locke had already warned against, referring respectively to the notions of "a corrupt nature which is effected both by men and beasts to do what they list" and "positive liberties, [i.e.] the desire to be one's own master".

According to Benhessa, it is Jürgen Habermas who brought about the fusion between "European identity" and this "bastard notion of the rule of law". The work of Habermas, a true "spiritual mentor" of the European Union, "sheds light on the ideology that runs through the European Union, on the question of nations, borders, freedoms and fundamental rights. It is a kind of window on the epicentre of the great federalist project. "

As a "civil religion", the rule of law has its "sworn enemies", Hungary and Poland, and it does not accept criticism of its "final power grab": apart from promoting the progressive values it claims to defend - equality, non-discrimination, tolerance, minority rights - the rule of law enables the European Union "to establish once and for all the hegemony of its standards in their entirety".

It all comes down to being for or against the rule of law. There is no room for nuance or criticism. The rule of law seems to be the conceptual weapon of choice used by Brussels to subjugate those who resist. A political blackmail aimed at those who raise their voices against the

'values' and ideologies in vogue, the government of judges, and the infringements of national sovereignty not provided for in the Treaties.

Ghislain Benhessa's book, written in a style that is both forceful and confident in its grasp of the concepts involved, deserves to be in the hands of all those dealing with a concept the implications of which they often fail to grasp.