European Liberal Forum
PAPERS

Policy Paper
No 9 | January 2022

A Europe of Values

Abstract

For many years, the EU has been struggling to respond adequately to rule of law violations in its own member states. With the Next Generation EU recovery funds now in the hands of governments who seem to be moving away from the democratic and liberal values of the EU, continued inaction is affecting the people's trust in the EU project. "A Europe of Values" learns from the examples of CVM, Article 7 proceedings and inconsistencies within the EU institutions themselves to show that it is now time to move beyond dialogue towards concrete actions.

Laurent Pech
PhD, Professor of European Law, Head of the Law and Politics Department at Middlesex University London

Nikolay Staykov
Investigative journalist and co-founder of the Anti-Corruption Fund

Núria González Campañá
PhD, Postdoctoral Research fellow in European Constitutional Law at the University of Barcelona

Pola Cebulak
PhD, Assistant Professor, University of Amsterdam

Introduction

By Laurent Pech

In a recent and unusually blunt speech, the President of the Court of Justice of the European Union (CJEU) gave a stark and unprecedented warning: 'I believe it is no exaggeration to say that its foundations as a Union based on the rule of law are under threat and that the very survival of the European project in its current form is at stake'.[1] President Lenaerts explicitly referred in this context to the increasing number of challenges directed at the authority of the Court of Justice and the primacy of EU law, in particular, EU requirements relating to judicial independence, originating not only from politicians and the press but also from some national courts, including 'certain constitutional courts'.[2] A few months prior to this speech, in a case concerning Polish rules relating to the secondment of judges, EU Advocate General Bobek warned about the potential emergence of legal back holes within the EU itself:

> In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe.[3]

These stark warnings are, unfortunately, entirely warranted. While the EU is formally founded on a number of foundational values such as the rule of law, the fundamental premise on which the EU legal order is based – that each Member State shares with all the other Member States, and recognises that those Member States share with it, the common values referred to in Article 2 TEU[4] – is becoming increasingly disconnected from the (autocratic) reality on the ground following many years of democratic and/or rule of law backsliding in particular in the two countries currently subject to the exceptional monitoring procedure laid down in Article 7(1) TEU.

1 K. Lenaerts, 'Constitutional relationships between legal orders and courts within the European Union', FIDE 2021, XXIX FIDE Congress, 4 November 2021, p. 2: https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony_-4-November-2021_Koen-Lenaerts.pdf

2 Ibid.

3 Opinion of AG Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim* et al, EU:C:2021:403, para. 138.
The Court subsequently found that EU law precludes these rules as they allow i.a. for the termination on judicial secondments by the Minister for Justice – who is also the Public Prosecutor – at any time without any statement of reasons.

4 See recently Case C-791/19, *Commission v Poland*, EU:C:2021:596, para. 50.

By democratic and/or rule of law backsliding, one must understand 'the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.'[5] This deliberate process of hollowing out democratic institutions (including independent counter-majoritarian institutions provided for by the national constitution, previously established by the parliament or mandated by EU law) is always engineered in a top-down manner by new parliamentary majorities. It follows initially free and fair elections, and is often a gradual process 'taking an average of nine years from the onset of backsliding until it ends in either a democratic breakdown or a return to democratic health.'[6]

This process, first identified by the European Commission in 2012-2013 as far as the situation in the EU is concerned,[7] has only accelerated and spread beyond what has become the EU's first non-democratic member state, that is, Orbán's Hungary which, in the space of a decade, has lost its status of liberal democracy to become the EU's first 'electoral authoritarian regime'.[8] Most recently, Poland has been identified as the world's top 'autocratising' country, that is, the country whose authorities have dismantled checks and balances the most in the world.[9] As if this was not bad enough, backsliding can also be identified in an additional number of EU countries with Lithuania and Slovakia having lost their status as liberal democracy to become electoral democracies.[10]

Most recently, Slovenia has been identified as another country subject to a recent but intense autocratisation process.[11] As for Romania and Bulgaria, whose rule of law deficiencies led the EU to make their EU accession conditional upon the unprecedented adoption of a new specific rule of law monitoring mechanism known as the Cooperation and Verification Mechanism (CVM), the situation has not improved in any meaningful way since 2007,[12] with

5 L. Pech & K.L. Scheppele, 'Illiberalism Within:Rule of Law Backsliding in the EU'(2017)19 CYELS 3, p. 10.
6 International IDEA, The Global State of Democracy 2021. *Building Resilience in a Pandemic Era*, 2021, p. 6.
7 See ibid, pp. 8-9.
8 V-Dem Institute, *Autocratization Surges–Resistance Grows. Democracy Report 2020*, March 2020, p. 13.
9 V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 19: 'While Hungary's ongoing autocratization is still conspicuous, Poland has taken over the dubious first position with a dramatic 34 percentage points decline on the [Liberal Democracy Index], most of which has occurred since 2015.'
10 V-Dem Institute, *Varieties of Democracy, Democracy of All? Annual Democracy Report 2018*, May 2018, p. 20.
11 International IDEA, *The Global State of Democracy 2021. Building Resilience in a Pandemic Era*, 2021, p. 8: 'Currently backsliding countries include some of the largest economies in the world: Brazil, India and the USA, in addition to countries such as Hungary, the Philippines and Poland. Slovenia, which holds the presidency of the EU in 2021, was added to the list of backsliders in 2020.'
12 See R Vassileva, 'Threats to the Rule of Law; The Pitfalls of the Cooperation and Verification Mechanism' (2020) 26(3) *European Public Law* 741. See also the democracy score history of both countries in Freedom House Nations in Transit 2021, p. 27 (Bulgaria and Romania's 2021 scores are their lowest since 2011).

Romania also experiencing an episode of severe democratic backsliding in 2017-2019.[13]

In the face of this deliberate process of democratisation, reverse engineered by national authorities led by elected officials pursuing an authoritarian populist agenda, what have the EU institutions done?[14]

To put it briefly, they have primarily focused their energy on building and expanding the EU's rule of law toolbox rather than using it decisively, with most recently, a new annual Rule of Law cycle launched by the European Commission in 2020 and a new Rule of Law conditionality Regulation 2020/2092 adopted by the Council and the Parliament following an initial proposal made by the Commission in May 2018.[15] The process of developing and densifying the EU's rule of law toolbox may be understood in a positive and negative way: 'it may be positively understood as the sign of a broad consensus regarding the critical importance of the rule of law and an increasing awareness of the existential nature of the threat that rule of law backsliding poses to the EU. Conversely, this evolution may be understood as a failure to fully confront those who have deliberately undermined the rule of law in their countries by instead focusing on a quasi-permanent new instrument creation cycle at the EU level.'[16]

However, and arguably, the main issue has never been the EU's rule of law toolbox. Rather, the main problems have been the European Commission and the European Council/Council of the EU's denial of the autocratic reality and associated legal hooliganism coupled with a naïve faith in the virtues of dialogue with bad faith actors and concomitant recurrent failure to promptly and forcefully enforce respect for the rule of law in a coordinated manner.[17] In addition to this general reluctance to confront democratic and rule of law backsliding and those engaged in the deliberate hollowing out of democratic institutions, there has been a tendency to hide a persistent lack of meaningful legal/financial actions/sanctions behind a façade of action in the form of strong rhetoric, new tools and regular reports.

Following years of dialogue and reports, however, the situation in the EU, and in particular in Poland, is increasingly getting out of hand as autocrats, unsurprisingly, have been busy making the most of the time free of meaningful EU actions/sanctions to continue changing the facts on the ground and work on the consolidation of hybrid/authoritarian regimes. This is starting to result,

13 International IDEA, The Global State of Democracy 2019, p. 35 and p. 216.

14 For the Council of Europe's responses (or lack thereof), see the special issue of the *ECHR Law Review* put together by B. Çalı and E. Demir-Gürsel on 'The Responses of the Council of Europe to the Decay of the Rule of Law and Human Rights Protections' (2021) 2 ECHR Law Review 165.

15 L. Pech, 'The Rule of Law' in P. Craig and G. de Búrca, *The Evolution of EU Law* (2021, 3rd edition, OUP) 307, p. 337.

16 L. Pech, 'The Rule of Law' in P. Craig and G. de Búrca, *The Evolution of EU Law* (2021, 3rd edition, OUP) 307, p. 337.

17 L. Pech and D. Kochenov, *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, June 2019.

in turn, in the slow disintegration of the EU legal order, the authoritarian gangrenisation of the EU institutions and decision-making processes, not to mention the overloading of both the European Court of Justice and the European Court of Human Rights due to the ongoing process of 'nullification' of the EU/ECHR legal requirements relating to the right to an independent tribunal established by law organised by current Polish authorities via their kangaroo constitutional 'court'.

With the aim of better understanding the challenges faced by the EU on this front and identifying potential solutions, the European Liberal Forum organised three events in 2021 dedicated respectively to the CVM for Romania and Bulgaria; the European Commission's new Rule of Law cycle and its role as Guardian of the Treaties; and checks and balances in the European Institutions.

Chapter 1

Lessons Learned the Hard Way: A reflection and policy recommendations on CVM in Bulgaria and Romania[18]

Written by Nikolay Staykov, Investigative journalist and co-founder of the Anti-Corruption Fund (ACF)

Fourteen years of complicated and sometimes turbulent relations between the European Commission (EC) and Bulgaria and Romania have mostly revolved around the rule of law and the specially created Mechanism for Cooperation and Verification (CVM) for its monitoring. Established as a safety measure, it has become a recurrent point of focus and debate in these two countries, with pros and cons in need of a deeper evaluation and analysis. Below is the essence and the conclusions of the public panel of the ELF event, devoted to this subject.

Looking back to the CVM

One aspect about the CVM seems widely accepted: it did influence, visibly and meaningfully, the judicial systems and the general situation in terms of rule of law and the practical aspects of the fight against corruption in the two countries. Opinions may differ though on the extent of this influence and, more importantly, after fourteen years of hard work and pressure, do the positive features of the CVM outweigh its potential negative features?

Some historical retrospection is useful and on point here. As one observer noted 'it was useful as it allowed institutionally for the countries to join the EU' both of which faced criticism regarding their rule of law readiness in the pre-accession period. This aspect is not valuable from a historic point of view only, as Western Balkan countries face similar criticism.

Another achievement attributed at least partially to the CVM, is that it prevented extreme rule of law violations, unlike other countries (i.e. Hungary and Poland) which joined the EU without being subject to a similar mechanism. One of the examples given was the deterioration of the situation in Hungary in terms of media freedom - from the top tier of the world rankings in 2005[19] to the 92nd position in 2021. Preventing dramatic rule of law failures may be therefore

18 This report builds on the discussions during the European Liberal Forum event "The story of the CVM in Romania and Bulgaria" held on 16 June 2021.

19 Hungary was 12th in 2005 in media freedom rankings of Reporters Without Borders' "Worldwide Press Freedom Index 2005" at https://rsf.org/en/worldwide-press-freedom-index-2005

regarded as one of the crucial achievements of the CVM which has served as a safety valve in a period of rising populism and non-compliance with the EU's values.

Generally, the expert group seems to agree that the CVM experience – both in its positive and negative aspects – has shaped several key developments such as the annual rule of law report for all member states, the new regulation on conditionality of EU funds and, in institutional terms, the establishment of the European Public Prosecutor's Office (EPPO). Via the accumulated knowledge throughout the CVM, the EC has had an opportunity to collect comprehensive data on the shortcomings of the judicial systems in two key member states and the anti-corruption framework and especially the way it is applied. And maybe, most importantly, how to evaluate the progress reports.

Where did the CVM fail, if at all?

The CVM started as a very simple legal exercise and with a very naïve – as one of the speakers put it – presumption that once you have organised the independence of the judicial branch by following European best practices, the rule of law situation will resolve itself. Available statistics, however, show a very mixed picture without visible results.

Fourteen years seems like a long enough period to accumulate data and identify failures. One of the benchmarks for "progress" in the CVM at the beginning, for example, was the number of high-level prosecutions of corrupt politicians, which is easily defined methodologically. It is still a very important measure today, but most of our experts agree it does not tell the whole picture. Even when progress happens, as it did in Romania to a certain extent, it is still very difficult to measure accurately, as figures often tell nothing of the real story on the ground.

Another example of methodological failure concerns corruption-related metrics, named in some polls "level of informal influence". As one speaker noted, the relevant metrics were lower last year in Bulgaria and Romania than in France and Portugal, while we still say that the first two are far more corrupt. Maybe people bribe instead of using "informal influence", which is not the most convincing argument, as one of the speakers noted.

In brief, progress during the CVM period is hard to measure due to a serious methodological problem when it comes to measuring corruption. It is therefore difficult to assess the extent to which these two countries have actually transformed overall. It leaves out of the equation other important indicators with much more weight, one of those being the separation of powers, and most notably its practical implementation. And this is where the two CVM-monitored countries have a lot to tell us.

Country-specific: Bulgaria

Surprisingly or not, the CVM mechanism receives high approval rates among Bulgarian citizens and is therefore a core aspect of the overall high level of trust they have in EU institutions. However, Bulgaria's CVM story differs from the Romanian one, as the Bulgarian judiciary was not initially regarded as independent and efficient. And yet, experts note that the 2017 and 2018 CVM reports for example were more favourable towards Bulgaria than towards Romania, which can be attributed to being reactive not to the long-term effects of the CVM process "but to what is happening within a shorter timeframe".

As regards to Bulgaria, what is the situation at the end of the CVM as we know it? "After all these 14 years of monitoring the rule of law we ended up with a prosecutor who challenged the separation of powers", one Bulgarian analyst noted. Of course, we cannot put the blame on the EU but must look internally at what is happening. At the end of 2021, Bulgaria is still debating about the specialised court, created with the intention of fighting corruption and organised crime, and whether the authorities have turned it into a body enabling the opposite. On the positive side, this question and the more general one of judicial reform is at the centre of the current election campaign. This gives some hope that the issue could be solved soon, where the CVM alone simply could not do it.

Country-specific: Romania

As recalled by a Romanian speaker, the very first CVM report stressed the need for irreversible measures for establishing anti-corruption institutions and mechanisms, with the emphasis being on "irreversible". The logical question as of 2021 is whether there is such a thing as irreversible reforms in Romania. Very few arguments from the Romanian part of the discussion point at such, despite the fact that all agree progress was made and achievements did happen.

An objective historical overview of the last decade and a half of Romanian anti-corruption policy and its impact on general politics is yet to be made, but speakers agree that EU pressure has been crucial. The creation and restructuring of the famous DNA (Anti-corruption Agency), the political backlash against the so-called dictatorship of judges, the civic protests that anti-corruption laws and actions provoked – were all part of what has made up Romania's most recent history.

As in Bulgaria, however, signs of political interventions are clear, with the 2012 and 2013 appointments of a new prosecutor general and of the DNA chief prosecutor. This clearly contradicts all of the key points referring to the separation of powers. Positively, as one speaker reminded, the 2014 CVM report heavily criticised this deal, which is one reason why the CVM continued to be important.

Both Romanian and Bulgarian speakers agree that Romania's case has much more to tell with regards to evaluating the CVM. In Romania, the

anti-corruption campaign started partially as a result of the fact that the CVM was in place and due to consensus among some politicians and civil society. However, the way it proceeded and developed, was rather unexpected, in terms of political and institutional friction against it, and this is useful to analyse as it could easily be expected in other countries. "The revolution of the judges, or the dictatorship of the judges, as some called it, was followed by a series of decisions by the Romanian Constitutional Court, which curbed the anti-corruption campaign by suspending the use of evidence collected by the Romanian intelligence agency, altering definitions of abuse of office and visible attempts to make the judiciary accountable for judicial errors", a Romanian analyst concluded.

What is important for the Western Balkans as, hopefully, future EU member states?

One easy forecast is that as an impact of anti-corruption campaigns of similar scale to Romania's under Ms Kövesi (and unlike the government-friendly lighter versions in Bulgaria), political resilience is highly likely. "We have seen the same in Italy and Brazil", one speaker said and noted that such political contestation of the judicial issues could be very successful. The political aspect is inevitable – it is not possible to have a lot of people indicted without getting involved in politics.

An interesting question raised during the discussions concerned the effectiveness of the US Magnitsky Act sanctions in relation to Bulgaria, where a former MP and head of intelligence services and a gambling tycoon are among the most notable in the country's sanctions list. However, opinions differed as to whether this represents an intervention in the EU's affairs or not. The open legal questions, however, do not eclipse the symbolic value. It sends a clear message, one speaker said. Nevertheless, there are no clear recipes, and when it comes to European values, it is high time we look at the methods we are applying and start practicing what we preach.

Policy recommendations

All institutions involved in future country reports on the rule of law must share the knowledge they have accumulated in the context of the CVM with other EU countries, as well as EU candidate and potential candidate countries.

To prevent CVM, or more generally, Rule of Law Report assessments seeming disconnected from the rule of law reality on the ground in the relevant country, more transparency regarding what information is received, how the accuracy of the information received is checked, and which stakeholders/experts are consulted should be organised.

As regards to the possible termination of the CVM on account of the adoption of the annual Rule of Law Report, it is submitted that the CVM should be

maintained in light of its specific legal nature, content and effects as established by the European Court of Justice in its judgment of 18 May 2021 in Case C-83/19 et al.

Future rule of law reports should contain clear and specific recommendations as well as deadlines, and should outline how the implementation of these recommendations will be checked.

EU institutions need to watch out for rule of law "KPI tweaks", as the mere increase in the number of investigations, forfeitures or other "desirable" proceedings does not necessarily amount to evidence of a rule of law system in good shape.

More generally speaking, in a situation where rule of law backsliding is deliberately organised by national authorities acting in breach *inter alia* of the principle of sincere cooperation, dialogue should not take precedence over prompt enforcement in particular in the form of infringement actions, with financial sanctions to be considered – or requested from the Court of Justice when its own infringement rulings are not complied with.

Chapter 2

Navigating the Rule of Law[20]

Written by Núria González Campañá, PhD, Postdoctoral Research fellow in European Constitutional Law at the University of Barcelona

EU rule of law toolbox

Annual reports

The rule of law is one of the EU's core values, probably the most crucial one as respect for the rule of law conditions respect for other values. One of the newest tools established by the European Commission to promote it is the rule of law reports. In July 2021, the second edition of the Annual Rule of Law Report was published. This new tool primarily aims to prevent problems via a regular dialogue with Member States (MS). The European Commission (EC) collects input from MS and stakeholders, and there are also country visits. This is key, says one of the speakers during our discussion: when it comes to data collection, although governments provide information, there is a need to rely on other sources (NGOs, academia and international organisations like the Council of Europe).

The rule of law report is composed of two parts: first, the main transversal findings and second, the 27 country chapters. The situation is analysed with the same criteria for all Member States. For one speaker, it is key to apply the same standards to everyone, but there is some disagreement regarding how this may be done. For instance, in some MS there are systemic threats, while this is not the case for others. If you look at different indexes and reports, some MS are classified as full democracies, but others are listed as partially-free states. That is why equal treatment might be problematic as you may end up treating different situations equally.

Following the publication of the Annual Rule of Law Report, next come discussions at the EU level, and in particular within the Council. National discussions are also organised, with the EC having presented the Report to 20 national Parliaments to date. This dialogue has produced results with some MS having initiated reforms (e.g. Malta). The idea is to avoid an infringement procedure. In the follow up, the EC also has contact with civil society organisations.

Conditionality regulation

Beyond the annual reports, there are other EU tools, like the rule of law conditionality regulation, which is a powerful instrument and whose activation

20 This report builds on the discussions during the European Liberal Forum event "Navigating the Rule of Law" held on 17 September 2021.

is expected soon. In fact, as emphasised by one speaker, this tool might be a turning point once stakeholders realise that dialogue is not enough. As for concerns about the use of financial instruments to ensure the rule of law (and the attached risk of being perceived as blackmail), in fact the ethical imperative requires us to prevent EU money being used to pursue a political agenda that runs contrary to EU values. However, another speaker points out that there is a need to evaluate accurately the impact of aid reductions: will these measures work? This will of course depend on the impact they have on internal stakeholders, something that should be carefully analysed.

Article 7 TEU

Article 7 TEU, another relevant tool, has been activated twice which has led to the organisation of some hearings in the Council. However, the Article 7(1) procedure has not thus far met expectations. Amending this Treaty provision would be desirable, but very difficult in practice to secure due to the unanimity requirement. One has to note, though, that today, at least, and despite its flaws, it does maintain political pressure.

Rule of law crisis as an existential threat to the EU

Despite the frustration of seeing the rule of law become simply another point on the agenda or branded as another ordinary EU crisis, the EC is nowadays doing more and is acting faster. This is essential, because otherwise the EU will end up as a motley club of liberal democracies and hybrid regimes. If mutual trust is lacking, the single market and other cooperation mechanisms will not work properly. This is an existential crisis, even in practical terms. Several speakers stressed this point.

In effect, a rule of law crisis in a given Member State amounts to an existential threat to the EU, since a crisis of this nature has the potential to jeopardise the whole European project: the EU decision-making process is affected if some MS are no longer full democracies. What happens if, for instance, a national election within a MS is rigged? There is then an illegitimate co-legislator within the Council. Besides, the legal instruments are based on the presumption that all MS have independent courts and enjoy free media. Can courts be sure that whenever they authorise an extradition the person affected will have a fair, impartial trial in the country that person is being surrendered to?

In any case, it seems that the EU has the tools – both hard and soft tools – to prevent democratic backsliding. Or at least, it can stop funding illiberal regimes. What is clear is that rule of law violations must not be left without consequences, particularly if they lead to a broader dismantlement of the rule of law in the country. One cannot leave this job to just one institution, like the CJEU, although the CJEU's intervention has proved crucial. Political institutions must play their part. While dialogue needs a platform, once it is

clear that the national authorities of a MS are not sharing the same concept of constitutional or liberal democracy, it is pointless to invest too much time in further discussions.

The need of a comprehensive approach when dealing with a rule of law crisis

The persisting problem when dealing with the rule of law crisis is that we only address pieces of the problem, especially in Poland and Hungary. Context matters, values are interconnected, the violation of one value harms the others, and there is a risk of forgetting the broad picture if fundamental rights and democracy are not taken into consideration when discussing the rule of law crisis. It is tricky to deal with this crisis, because even in those MS where there are systemic threats, violations of the rule of law may have been "legalised". In fact, illiberal regimes use legal means to achieve their aims. Some speakers underline the importance of keeping in mind the big picture and relevant context and argue that qualitative analysis is very much needed.

Policy recommendations

- In order to promote rule of law more effectively, respect for rule of law should be one of the top priorities of all European Commissioners. They should increase their communication in this regard.
- Rule of law reports, which are primarily addressed to national authorities, should be made more citizen-centred and civil society should be more involved.
- The EC has to create different communication channels to promote EU values in order to reach those who adhere to these values, but also those who may support alternative narratives when it comes to the rule of law.
- Rule of law convergence criteria similar to the ones in the economic field must be developed.
- Because of the interconnectedness of EU values, the EC should go beyond the current four themes addressed in the rule of law reports.
- The country chapters in the annual Commission's Rule of Law Report must include more information and data regarding any instance of non-compliance with relevant judgments of the European Court of Justice and the European Court of Human Rights, as well as any national judgments relating to the themes addressed in the annual Rule of Law Report.
- The European Commission must stop considering enforcement as a last resort option but rather as a parallel option, particularly so, when identified violations of EU law raise issues of deliberate undermining of the EU's common values.
- The European Commission must also *publicly*, *promptly* and *unambiguously* condemn flagrant threats and/or violations of EU requirements relating to the rule of law instead of expressing euphemistic "concerns" on a regular basis.

- As for the use of the conditionality regulation, the European Commission should consider using its annual Rule of Law Report to identify potential violations of the principle of the rule of law which affect or seriously risk affecting the sound financial management of the EU budget or the protection of the EU financial interests while also making sure that EU funds continue to be available to final beneficiaries.
- In order to continue the fight against democratic and rule of law backsliding, it is vital to build up local democratic capacity and that must be done alongside the use of rule of law mechanisms and conditionality.
- The EU should do internally what it has been doing externally when it comes to supporting civic democratic voices.

Chapter 3

Checks and balances in the European Institutions[21]

Written by Pola Cebulak, PhD, Assistant Professor, University of Amsterdam

Why is it important for EU institutions to lead by example when it comes to the EU's common values?

Liberal values such as the rule of law seem to currently be under attack in the EU and beyond. In Europe, we see the risks of disintegration, and the idea of European integration is undermined by the logic of cherry-picking EU obligations. EU institutions have to send a message that there cannot be any viable EU without strict adherence to EU values and the rule of law. In this context, the credibility of EU institutions is of particular relevance, in order to ensure effectiveness of its actions vis-à-vis Member States as well in its neighbourhood and the wider world.

In addition to the EU's interest in maintaining its internal and external credibility, there are two other reasons why it is important to scrutinize the observance of rule of law standards by the EU institutions themselves. First, it helps solidify a common understanding of what those rule of law standards are. Second, it fosters the system of checks and balances within the EU governance structure. As a result, there seems to be a need for symmetry – applying the same standards and methods – to assess rule of law protection at EU Member State level as well as at the level of the EU institutions themselves.

Procedural vs Substantive Rule-of-Law Guarantees

A distinction between procedural and substantive rule of law guarantees has been proposed. The procedural ones relate to the functioning of EU institutions, while the substantive ones concern the compatibility of their actions and the contents of the measures they adopt with the core components of the rule of law. The procedural guarantees include, requirements relating to the independence of members of EU institutions. Those guarantees relate not only to ethics standards, but also to their political independence from Member State

21 This report builds on the discussions during the European Liberal Forum event "Checks and balances in the European Institutions" held on 28 October 2021

governments. The rules governing the appointment of members of the Court of Justice of the EU (CJEU), including their reappointments, has been criticized in this respect. Further procedural guarantees relate to transparency within the EU institutions.

In contrast, substantive guarantees relate to the compatibility of EU actions and their contents with the core principles of the rule of law. Challenges to substantive rule of law guarantees for EU institutions include, for example, the responsibility of the EU for human rights violations. Those can arise in the context of actions of EU agencies in migration policy or Common Security and Defence Policy missions abroad. The Frontex fundamental rights complaints mechanism does not seem satisfactory so far.

A second example of substantive issues revolves around the enforcement of judgments of the CJEU. EU institutions need to promptly comply with CJEU rulings and commit to assist with their enforcement, even if they are in tension with political majorities of the day. Those tensions may emerge in situation of "legislative overruling," when EU institutions adopt new legislation or enter into international agreements which *de facto* override CJEU rulings. It is important to focus not only on rule of law guarantees of a procedural nature, but also highlight the substantive ones when scrutinising actions of the EU institutions themselves.

The Watchdog Role of the European Ombudsman

The role of the European Ombudsman in the system of European checks and balances also warrants discussion. The Ombudsman, as an independent watchdog, opens the EU institutional system up towards the citizens. The Ombudsman has a broad mandate on the basis of which the office holder can launch investigations and issue recommendations. It cannot, however, issue binding decisions. Its non-judicial character makes it more accessible to individual citizens and civil society organisations than for instance the CJEU, considering applicable legal standing rules for non-privileged applicants and the matter of legal costs. The Ombudsman can also look into more systemic issues as it can open inquiries on its own initiative.

Based on the recent work of the Ombudsman, the main rule-of-law concerns relate to issues such as institutional transparency, 'revolving-doors' and the observance of rule-of-law in actions of EU institutions. First, major institutional transparency concerns relate to the Council's legislative process, which remains rather opaque. This opens the possibility for national politicians to 'blame Brussels' for the result of EU negotiations, without having to disclose their own position in those negotiations (as they were not recorded). Second, the 'revolving-doors' problem of top EU officials moving between related public and private sector posts has been recorded, both during their mandate (e.g. Mario Draghi) and after the end of their mandate (e.g. José Manuel Barroso,

officials from DG Competition and DG Grow). This highlights the ambiguity of institutional standards in this regard. Another example of ethically controversial practice within the EU institutional landscape is the practice of recruiting private sponsors for European Council presidencies. Third, the actions of the European Commission have raised concerns when it failed, for instance, to perform a sustainability impact assessment before reaching a political agreement with its Latin American partners.

Political Integrity in the EU Institutions

Finally, anti-corruption measures in EU institutions must be reviewed. Lobbying rules, as regards the Commission and the Parliament, largely exceed the standards observed at the national level in many Member States. Nonetheless, concerns regarding political integrity remain. First, whistleblowing protection raises issues with regard to double standards and substantive rule of law guarantees. While the EU has adopted a new Whistleblower Directive, which applies to EU Member States, it does not apply to the EU institutions themselves. Moreover, if it were to apply, the EU internal regulations would not live up to the standards of this Directive.

Second, strengthening the supervision of the ways in which EU funds are spent is an important consideration. With regard to the Member States, this can be fostered by strengthening the European Public Prosecutor's Office. As regards EU institutions, this can be addressed by tightening the allowance regime for Members of European Parliament by demanding receipts for all spending.

A third issue of concern is the lack of sanctions. A proposal for an independent ethics body covering the EU institutions has been mentioned in this regard. In particular, with respect to the European Parliament, no sanctions have been applied by its President to any of the dozens of ethical breaches which have been reported.

Policy Recommendations

- Discussions around checks and balances within the European institutions revealed a key difference between the procedural and transparency-related shortcomings, on the one hand, and the substantive and ethics-related ones, on the other hand. The former lend themselves to quicker solutions, if the political will is present. Transparency rules with regard to access to documents or recording of Member States positions in the Council could be adopted in the short run. The latter will probably require longer-term solutions, including EU accession to the ECHR or a cultural change within the institutions.
- EU institutions should streamline their regulatory frameworks to improve compliance with procedural rule of law guarantees.
- A new independent EU Ethics Body covering all EU institutions should be established as a matter of priority.

- EU institutions should improve their system of recording institutional documents. Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents must be revamped and updated to take on board the changes brought about by the Lisbon Treaty and relevant case law of the CJEU.
- EU institutions should take better account of international rule of law standards and seek alignment with them when they go beyond EU rule of law standards.
- Completion of EU accession to the ECHR should be prioritised and viewed as an opportunity to close any potential gaps in terms of accountability of EU actions for human rights violations.
- EU political institutions should better cooperate with other EU institutions fulfilling a watchdog function.
- EU rules regarding European political parties should be revised with the view of making it possibly for the Authority of European Political Parties to more effectively and promptly act, either on its own motion or based on a reasoned request received from any EU citizen, in a situation where a European political party does not comply with Article 2 TEU values or does not react to the violation of Article 2 TEU values by one of its national members.
- The mandate of the EU Fundamental Rights Agency should be revised in order to enable it to play a more meaningful role regarding all Article 2 TEU values.
- An EU network of independent experts should be re-established and be empowered to look at matters connected to the whole set of Article 2 TEU values, not only at the level of all EU Member States but also at the level of the EU institutions.
- EU institutions should cooperate more openly with civil society in particular when it comes to assessing the achievements and shortcomings of EU action (or inaction) in relation to matters connected to Article 2 TEU.

Conclusion

After more than a decade of democratic and rule of law backsliding which started in Orbán's Hungary, key EU actors still seem unable or rather unwilling to confront the harsh reality that the EU is no longer a community of democracies and accept that they are faced with disloyal legal hooligans. To put it differently, there is still a reluctance to accept that the EU is faced with national authorities *proactively* seeking to undermine the rule of law and *deliberately* violating the red lines recently mentioned by the President of the CJEU.[22] As a number of rule of law experts, including the present author (Prof. Laurent Pech), wrote in 2019:

> Calling for more dialogue while simultaneously normalising the systemic, deliberate and deceitful annihilation of checks and balances we are witnessing in both Poland and Hungary on the ground that "nobody's perfect" constitute an approach which will only lead to more time being wasted even while rule of law backsliding is spreading to more EU countries and endangering the very survival of the EU legal order.[23]

It has always beggared belief to hear or read that dialogue must always be preferred to enforcement actions, including sanctions. The suggestion not to seek "to impose a sanction but to find a solution that protects the rule of law, with cooperation and mutual support at the core – without ruling out an effective, proportionate and dissuasive response *as a last resort* (our emphasis)"[24] has always been as naïve as it has been counterproductive as it has merely encouraged autocratic escalation.

It was good in this respect to see an adjustment, albeit still insufficient, of this approach recently with the current President of the European Commission, having previously noted some 'worrying developments in certain Member States', stating that while '**dialogue always comes first. But dialogue is not an end in itself, it should lead to results**. This is why we take a dual approach ofdialogue *and* decisive action.'[25]

22 Koen Lenaerts, 'Constitutional relationships…', op. cit., p. 11: 'while the EU does not impose any particular model on the judicial systems of the Member States, it does lay down red lines. Respect for those red lines and for the rule of law in general is the foundation for mutual trust. The European project – and the solidarity among Member States that this project entails – depends on that trust.'

23 L. Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, 'The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism', RECONNECT blog, 4 September 2019: https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/

24 European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final, 17 July 2019, 5.

25 2021 State of the Union Address by President von der Leyen, 15 September 2021, Speech/21/4701.

This dual approach is welcomed but one may still argue that dialogue should not come first but rather accompany immediate enforcement, especially in a situation where for instance orders and judgments of the Court of Justice of the EU and/or orders and judgments of national courts applying EU law are openly violated and national judges persecuted and punished for applying EU requirements relating to the rule of law. To put it more informally, one does not dialogue with arsonists with matches in their hands.

Reality should also match the rhetoric and currently the gap between the two is particularly wide with for instance less than one infringement action per year launched by the Commission to protect judicial independence in Poland ever since this country's deliberately manufactured rule of law breakdown began.[26] Should EU institutions prove unable to contain this breakdown and sanction the state-sponsored persecution of the independence of Polish judges, it is only a matter of time before the EU's interconnected legal ecosystem begins to collapse.

26 L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *HJRoL* 1.

List of abbreviations

CJEU - Court of Justice of the EU
CVM – Mechanism for Cooperation and Verification
DG – Directorate General (of the European Commission)
DNA – Romanian anti-corruption agency
EC – European Commission
ECHR – European Convention on Human Rights
EPPO – European Public Prosecutor's Office
MS – Member States
TEU – Treaty on European Union

References

Çalı B. and Demir-Gürsel E., on 'The Responses of the Council of Europe to the Decay of the Rule of Law and Human Rights Protections' (2021) 2 ECHR Law Review 165.

European Commission, 2021 *State of the Union* Address by President von der Leyen, 15 September 2021, Speech/21/4701

European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final, 17 July 2019

Freedom House, *Nations in Transit. The Antidemocratic Turn*, 2021.

International IDEA, *The Global State of Democracy 2019. Addressing the Ills, Reviving the Promise*, November 2019

International IDEA, *The Global State of Democracy 2021. Building Resilience in a Pandemic Era*, 2021

Lenaerts, K., 'Constitutional relationships between legal orders and courts within the European Union', FIDE 2021, XXIX FIDE Congress, 4 November 2021: https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony_-4-November-2021_Koen-Lenaerts.pdf

Pech, L., 'The Rule of Law' in P. Craig and G. de Búrca, *The Evolution of EU Law* (2021, 3rd edition, OUP) 307

Pech, L., Kochenov, D., Grabowska-Moroz, B. and Grogan, J., 'The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism', RECONNECT blog, 4 September 2019: https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/

Pech, L., and Kochenov, D., *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, June 2019.

Pech, L., and Scheppele, K. L., 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3

Pech, L., Wachowiec, P. and Mazur, D., 'Poland's Rule of Law Breakdown: A

Five-Year Assessment of EU's (In)Action' (2021) 13 *HJRoL* 1.

Reporters Without Borders, *Worldwide Press Freedom Index 2005*, 2005 at https://rsf.org/en/worldwide-press-freedom-index-2005

Vassileva, R., 'Threats to the Rule of Law; The Pitfalls of the Cooperation and Verification Mechanism' (2020) 26(3) *European Public Law 741*.

V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, March 2020

V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021

V-Dem Institute, *Varieties of Democracy, Democracy of All? Annual Democracy Report 2018*, May 2018

Editor's bio

Laurent Pech, PhD, is Professor of European Law, Jean Monnet Chair of European Public Law (2014-17) and Head of the Law and Politics Department at Middlesex University London. Laurent is also a Visiting Professor of Law at Bordeaux University, an expert for eLabEurope, and a member of the editorial board of the *Hague Journal on the Rule of Law* as well as a member of the scientific board of the *Montesquieu Law Review*. Professor Pech specialises in EU Public Law and has lectured in a variety of subjects including EU Constitutional Law, EU Internal Market Law, EU Competition Law and EU Fundamental Rights Law. His current primary area of research is rule of law backsliding in Europe.

Authors' bios

Nikolay Staykov has a degree in business administration and is an experienced business journalist and editor. Formerly deputy editor-in-chief of capital weekly, he specialised in economic analyses, investigations, and business rankings. He now works as an investigative journalist and co-founder of the Bulgarian Anti-Corruption Fund (ACF). Staykov has attended a number of international seminars and forums, dedicated to countering corruption. His positions have been published in a number of foreign and national media outlets, including The New York Times, The Economist, Financial Times, Reuters, ARTE TV, Deutsche Welle, and many others.

Núria González Campañá, PhD, is a Postdoctoral Research Fellow in European Constitutionalism at the University of Barcelona. In 2019, she obtained her DPhil in Law at the University of Oxford. She is also an Associate Post-doc Researcher at the Jean Monnet Chair in European Policies at the Autonomous University of Barcelona. Her research focuses on different cases of populism in Europe and the tools the EU has available to deal with such tendencies.

Pola Cebulak, PhD, is a tenured Assistant Professor in European Law at the European Studies Department of the University of Amsterdam. She worked as Lecturer and Postdoctoral Researcher at iCourts – the Centre of Excellence for International Courts at the Faculty of Law, University of Copenhagen, and at the Global Studies Institute at the University of Geneva. Her research focuses on the external dimension of judicial authority and legitimacy, notably the role of Court of Justice in the EU's external relations.

About ELF

The European Liberal Forum (ELF) is the official political foundation of the European Liberal Party, the ALDE Party. Together with 47 member organisations, we work all over Europe to bring new ideas into the political debate, to provide a platform for discussion, and to empower citizens to make their voices heard. Our work is guided by liberal ideals and a belief in the principle of freedom. We stand for a future-oriented Europe that offers opportunities for every citizen. ELF is engaged on all political levels, from the local to the European. We bring together a diverse network of national foundations, think tanks and other experts. In this role, our forum serves as a space for an open and informed exchange of views between a wide range of different EU stakeholders.

A liberal future in a united Europe

ISSN
2736-5816
DOI
10.53121/ELFPP9

/europeanliberalforum
@eurliberalforum
#ELFevent

liberalforum.eu

This publication was co-financed by the European Parliament. The European Parliament is not responsible for the content of this publication, or for any use that may be made of it.