



From Words to Deeds: Upholding the Rule of Law in the CEE Region

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With ongoing discussions on rule of law conditionality, and with the European Commission first Annual Rule of Law Report due soon, the focus on the rule of law is back at the top of the EU political agenda this autumn. As eyes turn to the latest political developments and threats to core EU principles and values in Central and Eastern Europe (CEE), this policy brief suggests switching from a top-to-top perspective to a societal approach to uphold the rule of law. This would go beyond recommendations to cleanse the rule of law toolbox from inefficient political instruments, and strengthen legal ones. In addition to introducing conditionality, this brief advocates for more active support of local civil societies in exercising their democratic prerogatives over electoral and representative democracy.

INTRODUCTION

All three European institutions kicked off this legislative year with the rule of law at the top of their agendas. Speaking in the European

Parliament hemicycle on 8 July, Chancellor Merkel put the rule of law on the German Presidency's list of priorities. Speaking on the same day in Karlsruhe, Commissioner Věra Jourová warned it "should be a precondition for the distribution of EU money."¹ Yet, the murky affair of EU conditionality on the rule of law continues after the summer recess. The July European Council meeting conclusions generated considerable commentary over the summer, pitting the Parliament against the Council. In a joint letter dated from 26 August, leaders of the main political groups in the Parliament warned of an institutional blockage on the MFF without strong guarantees on the rule of law and EU values.

These declarations follow a further side-lining of liberal democracy in Central and Eastern Europe (CEE) amid the COVID-19 pandemic. In Hungary, an emergency law adopted on 30 March allowed Prime Minister Viktor Orbán to rule by decree indefinitely. In Poland, the Law and Justice Party introduced hasty legislation playing fast and loose with the constitution and the fairness of Presidential elections. This backtracking in Budapest and Warsaw as the health situation evolved was compounded by further restrictions to press freedom in Hungary

and ideologically motivated repression of LGBT activism in Poland. These actions during the summer recess add to worrying trends.

In the CEE region, challenges to liberal democracy have been jeopardising the legal and normative grounds upon which European integration is built. The European Commission, as guardian of the treaties, has the legal basis to act when a Member State undermines the rule of law. Similarly, Member States, as contracting parties to EU treaties, have a shared responsibility to keep each-others in check and lead by example. However, acting to uphold the rule of law in the EU in recent years has amounted to stirring up a hornets' nest, with two significant difficulties to overcome. The first is of a legal and procedural nature: EU institutions lack effective means of action. The second is of a political and normative nature: they lack the democratic legitimacy bestowed by elections to act in national politics. As a result, previous attempts to uphold the rule of law in Poland and Hungary invariably have led to a political impasse and criticisms of partiality and anti-democratic meddling. How then to move from words to deeds?

Breaches to the rule of law in Poland and Hungary are amongst the most significant of the challenges posed to European integration. Consequently, this European Policy Brief starts with the challenges posed by an 'illiberal' form of democratic governance in former communist states. This brief advocates for comprehensive solutions to strengthen existing instruments, develop new ones, and renounce counter-productive measures. After a period of dormancy and amid current societal polarisation in Europe, this brief points to the increasing mobilisation of liberal forces in CEE in European post-communist civil societies. This (re)mobilisation should be encouraged by using all tools available to the EU and its Member States.

THE CHALLENGE OF SOCIETAL POLARISATION IN THE CEE

January 2019 marked the 15th anniversary of CEE countries' membership to the EU. This was a bittersweet anniversary as a "counter-revolution by law" follows much of CEE's transition to liberal democracy and Europeanisation successes.² In Hungary, the 2008 financial and economic crises fostered an ideological shift, whereby liberalism has replaced communism as the perceived primary threat to the nation. This idea had long been incubating in Poland too, but has escalated with the victory of the Law and Justice Party in 2015. This ideological shift was for the most part already foreseen by CEE specialists and is rooted in a broader post-communist political and intellectual context.³

While societal polarisation is by no means limited to the CEE, the context of post-communist transformations is often cast aside in discussions surrounding the rule of law in the EU. Initial democratisation successes in CEE countries largely glossed over the social costs of liberal economic reforms and on-going corruption struggles. From the mid-2000s, disappointment with liberal elites coupled with cultural disorientation has generated a delayed fatigue in the liberal democratic model⁴ and accelerated the development of neo-traditional subcultural trends.⁵ In Hungary, Poland, and to a lesser extent Romania and Slovakia, this has led to an authoritarian turn which has jeopardised the separation of powers, freedom of press, protection of minorities and neutrality of the civil service.

A few years ago, only a few could have foreseen Article 7 procedures against Poland and Hungary. Today, backsliding on liberal democracy has grown to constitute one of the greatest challenges to the legitimacy of the EU. This challenge is twofold. Behind the rule of law principle is a shared legal culture that allows for mutual trust

between Member States in a multi-level governance system. Hence, it is the responsibility of all Member States to keep their co-signatories accountable. Enshrined in the Preamble to the Laeken Declaration and in Article 2 TEU, the rule of law has become the normative cornerstone of the integration process. Thus, the responsibility for upholding the rule of law falls not only on Member States but also on the Commission and Parliament. Failure to uphold the rule of law in recent years has jeopardised cooperation and consensus-building between national governments. It also weakened the EU normative appeal, especially in its Eastern neighbourhood. This is rightly causing alarm among both observers of, and actors in, European affairs.

WHICH INSTRUMENTS TO UPHOLD THE RULE OF LAW?

In July 2019, the Juncker Commission released its blueprint for action to strengthen the rule of law within the Union.⁶ This came more than two years after the European Parliament passed a resolution calling for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (so-called DRF pact).⁷ Last December, the von der Leyen Commission committed to advancing this work by strengthening the toolbox of instruments. This also aimed to develop a more systematic approach to bringing anti-infringement cases to the European Court of Justice and to create a proposal for introducing rule of law conditionality to EU funding.

Cleansing the rule of law toolbox – The EU is not defenceless to attacks on the rule of law in its Member States. Instead, the EU toolbox is fragmented into a multitude of instruments. They include the Rule of Law Framework, the EU Justice Scoreboard, the European Semester, the Council Annual Rule of Law Dialogue, the Cooperation and Verification Mechanism, Infringement Actions (Articles 258 and 259 TFEU), Interim Measures

(Article 279 TFEU), Article 7 TEU and the work of agencies (*inter alia* the Fundamental Rights Agency, the European Anti-Fraud Office and the soon to be operative European Public Prosecutor's Office). In recent years, some of these instruments have proven effective, yet could be used more systematically. Other instruments have untapped potential, while a few are mostly smokescreens. This leaves room for improvement.

First, the first Annual Monitoring Report on rule of law performance in all Member States is to be published this month and is a welcomed development. It should hopefully cut short criticisms of partiality and anti-democratic meddling, while expanding the Commission's expertise. Designed to be more 'comprehensive' than the European Semester process, it remains to be seen whether it successfully reaches out to a plurality of stakeholders.

Second, clarifications on the role of EU agencies, EU institutions and Council of Europe bodies could facilitate procedures and ease the co-existence of two fundamental human rights frameworks and case laws on the rule of law in Europe. Lengthy procedures, a multitude of actors, and dense legal jargon make it arduous for relevant stakeholders to follow 'who does what' and 'what is going on' in the rule of law framework.

Third, the Council's Annual Rule of Law Dialogue has so far demonstrated few results. In the absence of explicit political engagement from the Member States, a transparent peer-review system would be more constructive in defusing rule of law conflicts before they escalate and become entrenched regional positions blocking EU-decision making.

Strengthening legal instruments – The European Court of Justice (CJEU) rulings spelt out the substantive dimension of Article 2 TEU which now imposes clear legal obligations on Member States. This includes effective judicial protection by independent and impartial courts, equality before the law, and effective judicial review, all enforceable by the CJEU (Article 19 TEU).⁸ On this basis, infringement

procedures launched by the Commission against Poland and Hungary have met some success, notably in safeguarding some independence for the Polish Supreme Court. What was achieved in the European Commission v. Republic of Poland (Case C-619/19) should serve as an example to follow.

A strategic approach to bringing anti-infringement cases to the CJEU can ensure stronger enforceability of the toolbox. Yet more efforts are required to reduce the period of dialogue, and launch more systemic and accelerated infringement procedures. This would give further leverage-power to the new enhanced European Rule of Law Mechanism. The stigma of a CJEU ruling against a Member State in a rule of law infringement can act as a powerful disincentive.

Introducing conditionality, between coercion and incentives – The proposal for a new budgetary conditionality mechanism linking EU funds to the respect of the rule of law regained prominence amid discussions on the next MFF, also linked to Next Generation EU, and the latest misdemeanours in the CEE. It is an opportunity to seize. It is evident that this can have a significant impact on those Member States which rely heavily on EU funding, and that monitoring and legal proceedings alone cannot suffice.

In another Egmont policy brief, Alexander Mattelaer (ed.) outlined the risks of political coercion-based forms of conditionality. The logic of sanctioning some policy behaviours comes with collateral damage for EU cohesion, EU publicity in the Member States, and the voluntary spirit of the integration process. Article 7 TEU procedures in relation to Poland and Hungary make good examples. They have so far brought few results and instead added to societal polarisation and the radicalisation of governmental positions, which have subsequently spilled over to other policy areas of the Council's activity.⁹

As of today, political blockage at the EU level poses a greater threat than political backlash. The gridlock of Article 7(2), which calls for the Council to act

based on unanimity minus the Member State under examination, is to continue unless reverse qualified majority is agreed upon. This is rendered complex by discussions on rule of law conditionality, now indexed to MFF negotiations, for which unanimity in the Council and consent of the Parliament are required. Divergent reactions from national governments, Commissioners and MEPs following the July EUCO conclusions have only increased confusion.¹⁰ Ultimately, conditionally on the rule of law seems inevitable. Yet, it is dependent on the German Presidency's success in depoliticising the debate.

What is clear is that there is little use for an enhanced Rule of Law Mechanism without some form of conditionality to provide it with political leverage. Nevertheless, there is little doubt that, in the longer-term, betting on the carrot rather than the stick would prove more successful in grounding the rule of law in CEE. Political and economic incentives rewarding transparent and accountable management of EU funds alongside positive track records in fighting corruption could be a more encouraging form of conditionality. Inspiration can be drawn from the many EU financing instruments dedicated to the external promotion of the rule of law and EU values. Overall, this points to the need for a more comprehensive and societal approach to ensure the rule of law principle and safeguard EU values.

TOWARDS A MORE SOCIETAL APPROACH TO THE RULE OF LAW

The Commission's July blueprint, with its focus on promoting a "rule of law culture", makes a timid first step in that direction. On paper, a societal approach to upholding the rule of law in the EU meets the requirement of a uniform standard for judicial independence and defence of EU values across the EU. This would increase the likelihood of curbing criticisms of discrimination and accusations of a lack of objectivity. In practice, this will need to be bold and do more than symbolic sponsorship and annual stakeholders' conference to be successful.

The Commission's first annual report on the rule of law is expected to be published in September 2020. Covering all 27 Member States, this should ideally allow the Commission to pre-empt threats to the rule of law. This should also equip the Commission with the necessary knowledge to fully grasp distinctive local and contextual issues in different European regions. As mentioned previously, this is of particular relevance in the case of CEE Member States.

The COVID-19 context during which consultations with stakeholders were held was not ideal. The health crisis only allowed for 'virtual' visits from the Commission's legal experts. Additionally, extraordinary situations of lockdowns and their emergency laws are likely to have kept civil society stakeholders focused on COVID-19 context violations. Unfortunately, this might weaken the legitimacy of the conclusions in the Commission's report making it more difficult to defend rule of law conditionality on the basis of this.

Regardless of this year's unique context, associating stakeholders in a monitoring mechanism cannot make up for the lack of civic awareness of legality, constitutionality, and rights, which only Member States' education systems can easily address. Still, the new mechanism can encourage civic engagement if transparent and beyond top-to-top exchanges of views. While article 7 TEU demonstrated clear limitations in Brussels, moving from Article 7(1) to 7(2) has been successful in politicising issues of non-compliance with core EU principles and EU values at the level of citizens.

In Poland most notably, this has encouraged the organisation and mobilisation of grassroots liberal forces. Here, civic energy is mobilising in defense of democratic values, women's rights and LGBT rights, after previously being dormant or apolitical in the modern context.¹¹ A similar process is under way within Romania' and Bulgarian's civil societies. The close results from the 2020 Polish presidential elections, which turned into a referendum in favour or against the neo-traditional model of society developed by Jarosław Kaczyński, proved that liberal

values are still widespread and well-grounded in CEE societies. Growing kaleidoscope of civic engagement in the region, with notably the mobilisation of younger generations, offer grounds for optimism.

In this regard, inspiration can be drawn from the civic society community created around the European Citizens' Initiative. Despite shortcomings, it has succeeded in creating an active transnational community of activists and experts as well as growing civic awareness around the ECI. A centralised platform with a stakeholders' forum is an initiative to be implemented sooner rather than later to help the rule of law become more visible to citizens and assist local stakeholders in promoting it. All observations, publications, and documents, including the Commission's Annual Report on the Rule of Law and formal reports on Article 7 hearings, should be made public on such platform.

Finally, strengthening re-energised civil societies in their democratic prerogatives also calls for direct financial support. In Hungary and Poland, governmental supervision and stricter regulations on NGOs' and media funding have opened the door to severe risks of ideological biases. It is therefore crucial that a regime of rule of law conditionality does not simply cut off all transfers of EU funds, but rather bypasses national governments to channel funds directly to their final recipients. Ultimately, it rests on civil societies to keep these values alive, on European Institutions to help them do so beyond words and on all Member States to lead by example.

One of the characteristics of EU approaches to upholding the rule of law has been its focus on political and legal top-down instruments. This brief suggests cleansing the rule of law toolbox from inefficient political instruments, strengthening legal instruments, and introducing conditionality. This brief also suggests switching perspective to put more trust in local liberal democratic forces. In the current context of political remobilisation of civil societies and discussions on rule of law conditionality in Brussels, securing direct financial channels to

beneficiaries is crucial. Similarly, transnational activist networks and full transparency on all rule of law matters is necessary for civil societies to keep their governments accountable. Finally, launching infringement procedures, by the Commission or a Member State, should become systematic. Where a systematic violation of EU principles and values is identified, there is no time to lose. This becomes urgent as societal polarisation and disappointment in the capitalistic and liberal form of democracy is widespread across the EU, and is unlikely to be resolved soon, even less so by itself.

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Endnotes

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