

Introduction: The Great Rule of Law Debate in the EU

This symposium item belongs to a section headed: The Great Rule of Law Debate in the EU edited by Dimitry Kochenov, Amichai Magen and Laurent Pech.

DIMITRY KOCHENOV,¹ AMICHAH MAGEN² and LAURENT PECH³

¹University of Groningen. ²IDC, Herzliya. ³Middlesex University

Abstract

Faced with what has been labeled ‘rule of law backsliding’ in some EU countries, EU institutions have sought to address the rise of ‘illiberal regimes’ via existing mechanisms as well as new instruments. This introductory contribution offers an overview of the problem and a brief summary of the papers to follow and which were first presented at a workshop co-organized by the Bingham Centre for the Rule of Law and Middlesex University London.

On 13 January 2016, the European Commission activated, for the first time, its Rule of Law Framework adopted in March 2014 (European Commission, 2016). Most experts had expected, and in some cases called for, Hungary to be subject to this new instrument. Indeed, in its most recent resolution on the situation in Hungary, the European Parliament reiterated its call on the Commission to activate the first stage of its EU (European Union) framework in order to immediately initiate an in-depth monitoring of Hungary with the view of evaluating the emergence of a systemic threat to EU values in that Member State (European Parliament, 2015, § 8). In a rather prescient manner, the European Parliament warned that the persistent failure of the Commission and of the Council to react to threats and breaches of its own founding values by a Member State may contribute to the rule of law being undermined elsewhere in the EU (European Parliament, 2015, § 5).

Less than a month later, some highly controversial legislative developments in Poland led the Commission to decide to carry out a preliminary assessment of the situation of the Polish Constitutional Tribunal under the Rule of Law Framework (European Commission, 2016). Two primary reasons were given to justify this unprecedented step: (1) the dispute about the nomination of a number of judges at the Polish constitutional tribunal and (2) the dispute about the new media law, which raises issues relating to freedom and pluralism of the media. For the First Vice-President of the European Commission in charge *inter alia* of the rule of law, the Commission must act ‘when national rule of law safeguards seem to come under threat’, which allegedly would not yet be the case in Hungary but would be the case in Poland (Timmermans, 2016).

At the time of writing the Polish Constitutional Tribunal has just held that the controversial legislative changes regarding its composition and functioning are not compatible with the Polish Constitution (Constitutional Tribunal of Poland, 2016). Poland’s new conservative government’s initial reaction – a refusal to recognize and publish the Constitutional Tribunal’s judgment; and the content of the Venice Commission’s Opinion on the controversial Polish law, which concluded that ‘not only

is the rule of law in danger [in Poland], but so is democracy and human rights' (Venice Commission, 2016, § 135), should logically lead the Commission to rapidly move to phase 2 of its Rule of Law Framework. Doing so would lead the Commission to address one or several 'rule of law recommendations' to the Polish government with the view of resolving relevant problems within a prescribed deadline.

Considering the Polish government's uncompromising reaction to the ruling of the Polish Constitutional Tribunal, one cannot exclude an eventual recourse to Article 7 TEU (Treaty on European Union), often referred to – wrongly in our opinion – as the EU's 'nuclear option'. This Treaty provision, which was inserted into the European Treaties in 1997 and further amended in 2001, is meant to prevent and sanction serious and persistent violations by a Member State of the Union's foundational democratic values enshrined in Article 2 TEU. Should the Commission determine that a systemic threat to the rule of law has crystallized in Poland, and should a series of escalating warnings and opportunities for 'dialogue' fail to persuade Poland to remedy the defects identified, we might witness the first activation of the never previously used procedure laid down in Article 7 TEU.

Poland's subjection to the Commission's Rule of Law Framework, which has also been referred to as the EU's new 'pre-Article 7 procedure', is just an element in the moving and complex landscape of what has been branded as a 'crisis of the Rule of Law' within the EU (Reding, 2013). There are two facets to this crisis. The most pressing one, which is the key focus of this special issue, is the monitoring and enforcement of EU values and principles such as the rule of law in the 'backsliding' Member States. The increasingly obvious need to better monitor and enforce EU values at national level within the EU itself has produced quite a lot of commotion amongst the EU institutions, which we aim to document and analyse in the present issue. We do not aim, however, to touch upon the second facet, which concerns the EU's own adherence to the basic tenets of the rule of law both as a constitutional principle and as an ideal (on these two dimensions, see Pech, 2010 and Kochenov, 2015).

In addition to an analysis of the Commission's development, and eventual deployment, of a new pre-Article 7 mechanism, this special issue also addresses how other EU institutions, and in particular, the Council of the EU and the European Parliament, have sought (or not) to address the problem of democracy and rule of law backsliding in EU Member States. Arguably, in this context, the Council has disappointed the most by focusing its energy on a technical and narrow issue: the question of whether the Commission had the legal power to adopt its Rule of Law Framework, which, in our view, was somewhat of a red herring as the Commission does clearly have such a power. To make things worse, the Council decided not to support the Commission's new instrument and instead came up with its own even softer mechanism in December 2014, when it announced the establishment of a 'dialogue among all Member States within the Council to promote and safeguard the rule of law' (Council of the EU, 2014). At the risk of further complicating an already complex framework, the European Parliament has also been exploring the adoption of new instruments. Most recently, the European Parliament has mandated the LIBE (Committee on Civil Liberties, Justice and Home Affairs) Committee to look into the development of a new EU mechanism on democracy, the rule of law and fundamental rights, which could possibly include a scoreboard (European Parliament, 2016).

All of the issues and mechanisms highlighted above were the subject of a scholar-practitioner workshop co-organized by the Bingham Centre for the Rule of Law

and the School of Law at Middlesex University in June 2015, and which benefited from the financial support of the EU's Jean Monnet programme. Following the workshop, we invited the contributors to this symposium – current and past EU policy-makers as well as academic experts – to help decipher the emerging 'Great Rule of Law Debate' in the EU and critically explore the new mechanisms adopted or proposed separately by the Commission, Council, Parliament and the EU Agency for Fundamental Rights (FRA) to better anchor and defend rule of law conditions within EU Member States.

Each individual contribution represents a piece in the mosaic of the debate. Amichai Magen's opening article provides a succinct conceptual and analytical framework for approaching the emerging debate and understanding the contending positions of the various EU institutions embroiled in it. After addressing the challenges of conceptualization and politicization inherent in the idea and ideal of the rule of law, Magen demonstrates that over the past several decades the rule of law emerged as a central dimension in four distinct core areas of EC/EU identity and activity. He also asks why the democratic crisis has been framed exclusively in terms of the rule of law, rather than the other foundational values listed in Article 2 TEU, and contends that the current debate marks a distinct 'rule of law turn' in the thinking of EU policy-elites; a turn that is also identifiable in other like-minded international organizations.

The contribution by Kochenov and Pech focuses on the Commission's Rule of Law Framework and discusses both its potential effectiveness and the Commission's reasoning to justify its activation against Poland. It is argued that while the Commission should be commended for seeking to address increasing rule of law backsliding at Member State level, it may also be criticized on five main grounds: its procrastination with respect to Hungary; its lack of consistency in the light of the reasoning used in the case of Poland; its misrepresentation of Article 7 TEU as a 'nuclear option'; its continuing failure to trigger Article 7(1) TEU against Hungary; and finally, its failure to more forcefully apply the infringement procedure in a situation where a pattern of systemic breaches of EU values has clearly come to light. More fundamentally, Kochenov and Pech make the argument that reliance on the Rule of Law Framework alone, if only because of its 'soft' and discursive nature, is unlikely to remedy a situation where systemic violations of EU values form part of a governmental plan to entrench an 'illiberal' regime.

In May 2014, the Legal Service of the Council delivered an opinion on the European Commission's Framework to Strengthen the Rule of Law, stating that it would be unlawful for the Commission to pursue the mechanisms envisaged in the new Framework. Six months later, the Council announced the launch of its own initiative, an annual Rule of Law Dialogue. In their contribution, Oliver and Stefanelli critically analyse both developments. Focusing on the handling of the Hungarian crisis in particular, Oliver and Stefanelli argue that the Council's obstruction and passivity amount to an abject failure in the face of grave and systemic abuses of the foundational principles of the EU.

Sargentini and Dimitrovs, respectively a Member of the European Parliament and legal advisor for the Greens/EFA Group in the European Parliament, explain why the Parliament, which has dedicated time and efforts to raising rule of law problems in countries such as Hungary, has not had much impact on the developments on the ground in what may be called the backsliding Member States. They submit that this is primarily due to the positions of other institutions and the Parliament's own internal political divisions. The latest developments, which their contribution documents, relate to the change of

tactics on the part of the Parliament, as it is now seeking to propose the adoption of a new and permanent rule of law monitoring mechanism by means of an own-initiative report, rooted in the 'Copenhagen criteria' thinking. The new mechanism, yet to be finalized, aims at overcoming both the (non)application of existing tools and the lack of political will on the part of the Commission and Council to reform the existing tools in a way that would make them significantly more effective.

Finally, the article by Toggenburg and Grimheden, who both work at the EU FRA, focuses on the past, present and potential roles for the EU FRA in a rule of law context. They explain that while neither the Treaties nor the Regulation establishing the FRA envisage an explicit role for the Agency with respect to situations where EU Member States may seriously breach EU values, its assistance may be sought in this context even though the contours of any such assistance remain relatively unclear. By contrast, the European Commission's Rule of Law Framework explicitly refers to the FRA and it can be therefore assumed that the Commission may approach the FRA on an ad hoc basis should the Commission require its assistance when it comes to assessing the situation in a particular Member State. The Council and the Parliament could similarly require the FRA to assist them. Their main submission is that a more regular provision of data and analysis via the FRA would make the EU system of monitoring respect for EU values within the EU itself more operational and help prevent double standards.

A number of key findings may be drawn from a transversal reading of the contributions summarized above: several and perhaps arguably, too many mechanisms and processes now exist at EU level to promote, protect and safeguard the values laid down in Article 2 TEU and in particular, democracy, the rule of law and fundamental rights. Rather than seeking to use them proactively and where required, forcefully, EU institutions have had a tendency to procrastinate and focus their energy on elaborating new instruments of limited effectiveness when action is required, with the alleged limitations of available instruments used as an excuse for inaction while new ones are being elaborated. The exception to this rule is the Commission's activation of its Rule of Law Framework against Poland, which may however be understood as having avoided the Commission triggering the so-called nuclear option in a situation where contrary to the Commission's diagnosis, there is not simply a systemic threat to the rule of law but a serious, deliberate and concrete breach of EU values, which is the scenario foreseen in Article 7(2) TEU. The lack of joined-up thinking and effective inter-institutional collaboration has furthermore led to the adoption of legal instruments that are not properly interconnected whereas the EU Fundamental Rights Agency has not been granted the authorization to monitor EU Member States on the basis of a permanent and comprehensive mechanism. With some limited exceptions, the EU institutions have also failed to significantly articulate the substance of the values laid down in Article 2 TEU such as the rule of law, which has allowed 'rogue states' to argue that democracy or the rule of law remain principles which are too open ended to be used as benchmarks to assess their actions and policies.

In addition to these primarily legal issues, the Commission, Council and Parliament have also initially failed to fully grasp the nature of the problem they were facing. While persistent rule of law shortcomings in some EU Member States such as Romania and Bulgaria are nothing new (Sedelmeier, 2014; Iusmen, 2015), the deliberate implementation of an 'illiberal regime blueprint', first in Orbán's Hungary and more recently, in Kaczyński's Poland, took the EU institutions by surprise. Conditions in Hungary and

now Poland finally pushed the Parliament and the Commission into action, yet the Council has remained largely paralysed and when it has acted, the Council has mostly sought to undermine the Commission's efforts as it remains divided over the extent to which the EU should play a substantial role with pushing for Member State compliance with rule of law principles prescribed 'from above'.

Any failure to both understand the reality and counter the emergence of illiberal regimes within the EU itself threaten the very existence of the EU legal framework, which, as 'a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other ... is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded' (Court of Justice, 2014, §§ 167–8).

Correspondence:

Amichai Magen
Lauder School of Government, Diplomacy and Strategy
IDC, Herzliya
PO Box 167
Herzliya 4610101
Israel
email: amichai.magen@gmail.com

References

- Constitutional Tribunal of Poland (2016) Act of 22 December 2015 Amending the Constitutional Tribunal Act, Case K47/15, judgment issued on 9 March 2016. Available at <<http://trybunal.gov.pl/en/news/press/releases/after-the-hearing/>>.
- Council of the EU (2014) 'Conclusions of the Council of the European Union and the Member States Meeting within the Council on Ensuring Respect for the Rule of Law'. General Affairs Council Meeting, 16 December.
- Court of Justice (2014) *Opinion 2/13 on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2054.
- European Commission (2016) Press Release: College Orientation Debate on Recent Developments in Poland and the Rule of Law Framework, Memo/16/62, 13 January.
- European Parliament (2016) Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, File number: LIBE/8/04625.
- Iusmen, I. (2015) 'EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania'. *JCMS: Journal of Common Market Studies*, Vol. 53, No. 3, pp. 593–608.
- Kochenov, D. (2015) 'EU Law without the Rule of Law'. *Yearbook of European Law*, Vol. 34, p. 79.
- Pech, L. (2010) '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law'. *European Constitutional Law Review*, Vol. 6, pp. 359–96.
- Reding, V. (2013) 'The EU and the Rule of Law – What Next?'. Speech/13/677.
- Sedelmeier, U. (2014) 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession'. *JCMS: Journal of Common Market Studies*, Vol. 52, No. 1, pp. 105–21.
- Timmermans, F. (2016) 'Opening Remarks at the European Parliament's Plenary Session on the Situation in Poland'. Speech/16/114, 19 January.
- Venice Commission (2016) Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Opinion No. 833/2015, 11–12 March.