18 Democracy and the Rule of Law: How can the EU Uphold its Common Values?

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18.1 Introduction

The nature of the EU has always been uncertain. Depending on the contexts, it has oscillated between a form of intergovernmental economic cooperation and a sui generis political supranational construction. While proponents of intergovernmentalism see the EU as an organisation that brings together nation states with the aim of increased economic cooperation, promoters of the EU as a polity conceive it as a union where the bonds between the peoples of Europe beyond the nation states are strengthened. These contrasting visions have shaped the integration process over time. This satisfied both federalists and intergovernmentalists as the outcomes of integration 'proved to be compatible with analyses from each of these perspectives' (Bellamy and Castiglione, 2000: 67). However, the issue of what the EU is and what can be expected from it remains a matter of heightened political debate and academic controversies. Today we know that the EU is more than an intergovernmental form of economic cooperation. However, despite the development of the political Union over time, the EU is not a state as it lacks a demos and a shared identity.

The nature of the EU matters. Indeed, the extent of how democratic it should be depends on how it is apprehended: for those who see it as a form of intergovernmental cooperation the EU is democratic enough (Moravcsik, 2002), while a wide majority of scholars consider that it suffers from an acute democratic deficit (Vauchez, 2016). Not only has the integration process challenged European democracies in many ways, but it has also given rise to questions about whether democracy can emerge beyond the nation state or whether a supranational construction without a demos such as the EU can be a democracy (Lacroix, 2008: 7).

The democratisation of the EU is ongoing. Its pace has increased since the 1990s as a reaction to mounting resistances to the integration process. For decades, EU integration has been driven by elites *for* the people but *without* the people (Schmidt, 2006). The signature of the Maastricht Treaty – meant to democratise the EU – revealed that 'the era in which relatively insulated elites bargained grand treaties in the shadow of an uninterested and generally approving public has come to an end' (Saurugger, 2016: 935). To legitimise its raison d'être, the EU draped itself 'in the rhetoric of democracy' (Bellamy and Castiglione, 2000: 65), seeking not only to democratise its internal decision-making structures but also to promote

democracy aboard in its relationship with the wider world. The perspective of the eastern enlargement strengthened the idea that the EU had an obligation to promote democracy and the rule of law on the continent (Whitman, 2011).

If democracy defines a form of government characterised by institutions, rights and practices designed to give people a say in the decision-making process, the treaties sought to strengthen the powers of the EP and to put it on an equal footing with the Council (see Chapter 3). If democracy refers to its underlying values, the treaties sought to legitimise the integration process by putting forward citizens' rights (Fossum, 2000: 112). Democracy and the rule of law were meant to guide the EU's action both internally and externally. By constitutionalising values common to all member states, political elites sought to unify the people of Europe, to generate a feeling of belonging and, ultimately, to legitimise the EU's raison d'être both internally and in its relationship with the wider world.

Paradoxically, in recent years, democracy and the rule of law have been increasingly politicised. The salience of these two values has spectacularly increased both at the EU and the domestic level, thus intensifying the polarisation of visions of Europe. This phenomenon is happening in a specific context: on the one hand, in Western Europe, traditional political parties face electoral defeat at the hands of Eurosceptic, nationalist, xenophobic parties who contest not only the integration process per se but also the very idea of democracy itself as well as the values enshrined in the treaties. On the other hand, in Central and Eastern Europe – where the democratisation process that followed the collapse of communism was supposed to be irreversible – new forms of authoritarian politics have emerged as nationalist and xenophobic parties win elections and large majorities in national parliaments with a discourse that rejects liberal democracy and its values. If democracy's main virtue is its tendency to promote pluralism, freedom and equality (Bellamy and Castiglione, 2000), recent developments within EU states reveal that these values are under considerable strain.

This chapter will show that values are increasingly politicised and that there is increased disagreement as to how to address instances of non-compliance. The finalité of the EU and its nature are under strain. Examining the cases of Austria in the 2000s as well as recent attempts to dismantle the rule of law in Hungary and Poland since 2010 onwards, this chapter will demonstrate how the EU seeks to uphold its values by creating new tools and mechanisms of compliance.

18.2 Historical Overview

Peace and liberty were the main aspirations of those who survived World War II. By creating the EC in the 1950s, the founding fathers sought to prevent the rise of new waves of nationalism through the reconciliation of the states and of the

peoples of Europe (see Chapters 2 and 13). References to democracy were relatively rare in the political declarations then (Weiler, 2012: 835). The aim of the six founding member states was to restore 'a sense of legitimate order and normalcy' (Conway and Depkat, 2010: 134), to find a 'shared destiny' by 'creating a genuine solidarity'. Democracy and human rights were not mentioned in the ECSC Treaty. The founding fathers sought to promote peace and economic cooperation, instead of relying on supranational guarantees of democracy and human rights which had been stipulated as strict criteria for membership by the Council of Europe in 1949 (Thomas, 2006: 1194).

Over time, law shaped the integration process. The political elites of the founding member states designed an institutional framework (see Chapter 3) in which the Court of Justice of the EU was set up to prevent the misuse of powers by the newly created supranational institutions (in particular the High Authority) and to ensure that member states respect the obligations enshrined in the treaties (Saurugger and Terpan, 2017).

While initially democracy was not in the DNA of the Communities, it soon emerged as an important issue between member states and the newly created supranational institutions. In 1962, Spain under the rule of Franco requested to negotiate an association agreement aimed towards enlargement (Thomas, 2006: 1195). The executives of Germany, France and Belgium (although divided) were in favour, only conditioning Spain's accession to economic criteria such as the adjustment of the common external tariffs and the absence of internal tariffs (Thomas, 2006: 1196). However, the members of the Parliamentary Assembly were opposed to the association of a non-democratic member state. In the Assembly the social democrats argued that opening the market to an authoritarian political regime contradicted the objectives of the Communities and the principles enshrined in the preamble of the treaty (Thomas, 2006: 1200). Although the Assembly's powers were limited to deliberation, its members played an active role of oversight, questioning the actions of the Council and the High Authority. The Assembly upheld democracy and human rights as sine qua non conditions for the integration of new member states. In contrast, within the Council, member states were hard to convince of the need for any criteria for membership. According to Article 237 of the Treaty of Rome (see Table 18.1) accession was open to 'any European state' and the conditions of admission were to be determined by 'an agreement between the member states and the applicant State'. Nevertheless, the members of the Parliamentary Assembly kept on arguing that Europe 'was not only about oranges and tomatoes, coal and steel, cars and furniture [...] it is also and above all to strive to create a political community' (Thomas, 2006: 1200).

Overall, as Saurugger puts it, the integration process has in fact happened through law, not through a transfer of loyalty or the creation of a common identity (2016: 936). The integration through law has been seen as a form of constitutionalisation

Table 18.1 Chronology and legal basis

	Treaty	Preamble	Accession conditions	External action	Common values	Sanctions
Democracy and the rule of law in the EU treaties	Rome	_	Article 237	_	_	_
	SEA	Promote democracy and compliance with the law				
	Maastricht	Attachment to the principles of liberty, democracy and respect for the fundamental rights and freedoms, and the rule of law		Art. J.1 Objectives of the CFSP Develop democracy and consolidate the rule of law and respect for human rights and fundamental freedoms		
	Amsterdam		Article 0 Any European state which respects the principles set out in article F(1) may apply to become a member of the Union		Article F The Union is founded on the principles of liberty, democracy, respect for human rights and the rule of law, principles which are common to the member states.	Article F.1 The Council [...] may determine the existence of a serious and persistent breach of values
	Lisbon	Attachment to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and of the rule of law	Article 49: Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union	Article 21	Article F becomes **Article 2** Article 10 The functioning of the EU shall be founded on representative democracy.	Article F.1 becomes **Article 7**

of the EU (Saurugger, 2016: 936) in which economic considerations took precedence over political considerations.

In the 1970s, heads of state and government of the nine member states issued a Declaration on European Identity at the European Council meeting in Copenhagen (1973). The principles of representative democracy, rule of law, social justice and respect for human rights were put forward as 'the deepest aspiration of their people' and 'fundamental elements of the European identity'. In the 1980s, the accession of Spain, Portugal and Greece represented a new opportunity for the members of the EP to restate that the Community's duty was 'to welcome all European States which apply the principles of a pluralist democracy and observe human rights and civil liberties and support the ideal of a strong and united Europe' (Resolution on the enlargement of the Community to include Spain and Portugal, 17 November 1982).

The SEA – signed on 17 February 1986 and entering into force on 1 July 1987 – was the first major revision of the treaties. It aimed to speed up the establishment of the single market and to reform the Communities' institutions in preparation for the accession of new countries. In the Preamble, the signatories expressed their will to 'promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice' (see also Chapter 10). While this new step in the integration process was driven by the elites, the references to these values were presented as 'the wishes of the democratic people of Europe' (see Table 18.1).

From the 1990s, governing *for* the people but *without* the people of Europe was no longer possible. The democratic deficit of the Communities was a matter of concern both in political and academic circles. A new revision of the treaty was envisaged which was meant to allow the 'refoundation' of the communities (Magnette, 2000). The Maastricht Treaty – signed on 7 February 1992 and entering into force on 1 November 1993 – was an attempt to democratise the integration process and strengthen the identity of the EU's political regime (Magnette and Nicolaïdis, 2004). Seeking to establish an 'ever closer Union among the people of Europe', the signatories of the treaty confirmed their attachment to 'the principles of liberty, democracy and respects for human rights and fundamental freedoms and of the rule of law' (see Box 18.2). But the rejection of the Maastricht Treaty by referendum in France and Denmark marked the end of the 'permissive consensus'.

While the EU was seeking to democratise its structures by increasing the role of the EP in the decision-making process, in the eastern part of the continent citizens were celebrating and chanting the triumph of democracy and their 'return to Europe' after the collapse of communism in 1989. New states introduced requests to join the EU. In 1993, the European Council in Copenhagen noted progress in enlargement negotiations with Austria, Finland and Sweden and held a 'thorough

discussion on the relations between the Community and the countries of Central and Eastern Europe'. Two decades after the adoption of the Declaration on European Identity, the European Council laid down the conditions that every European state willing to join the EU should meet in terms of democracy, market economy and administrative capacity.

The Amsterdam Treaty marked a step forward with a new Article F stipulating that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the member states'. This treaty was also a move towards constitutionalisation as Article F enumerates the values common to all EU member states and Article F.1 details the action that EU institutions can take when one of the member states fails to uphold the values referred to in Article F (now Article 2) (see Box 18.1).

In the 2000s, the process of drafting a Constitution for Europe led to long debates on the EU's common principles and referred to them in terms of values. Despite the rejection of the Constitutional Treaty by referendums in the Netherlands and in France, the signatories of the Lisbon Treaty restated their commitment to 'the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law' and reiterated in Article 2 the values enshrined in the Amsterdam Treaty.

BOX 18.1 Key actors

Which institution(s) can trigger Article 7?	One-third of the member states The EP The European Commission
Which institution(s) may determine that there is a clear risk of a serious breach of the values referred to in Article 2?	The Council acting by a *majority of four-fifths of its members* The EP gives its consent
Which institution(s) may determine the existence of a serious and persistent breach by a member state of the values referred to in Article 2?	The European Council acting by *unanimity* on a proposal by one-third of the member states or by the Commission and after obtaining the consent of the EP
Which institution(s) may decide to suspend certain rights deriving from the application of the treaties to the member state in question?	The Council acting by a *qualified majority*, may decide to suspend certain of the rights, including the voting rights of the representative of the government of that member state in the Council
Which institution(s) may decide to modify or revoke these measures?	The Council acting by a qualified majority

18.3 Main Institutional Issues at Stake

The progressive constitutionalisation of values was meant to strengthen the EU's identity and normative power, that is its ability to define what is normal in its relationship with the wider world (Manners, 2002: 252). However, while the constitutionalisation of values received considerable support among the signatories of the treaties, it appears that within EU member states said consensus over values was more a myth than a reality. An illustration of this is the case of Austria in the early 2000s.

Four years after Austria's accession to the EU, in 1999, the Freedom Party of Austria (FPÖ), an openly racist and xenophobic party, won 26.9 per cent of the vote in the elections held on 3 October. It was the first time in the history of the integration process that several European leaders made alarming declarations on the political situation in another EU state (Coman, 2018: 148). The French President Jacques Chirac, the Spanish Prime Minister José-Maria Aznar and the Belgian Foreign Secretary Louis Michel were eager to take action at the EU level owing to the growth of national right-wing parties in their countries (Cramér and Wrange, 2000: 30; Merlingen et al., 2001). In contrast, the British Foreign Secretary Robin Cook favoured a 'wait-and-see approach' (Coman, 2018: 148). For their part, the governments of Sweden and Denmark expressed reservations on the idea of adopting sanctions at the EU level. In Germany, the main political parties were divided (Merlingen et al., 2001: 66).

The accession to power of the FPÖ raised a wide range of questions about the ability of the EU to uphold the values recently enshrined in the treaties. Though Article 7 clearly detailed the roles and attributions of EU institutions in suspending the rights of a member state that fails to observe the EU's common values (see Box 18.1), the following issues remained unclear:

- What does 'a clear risk of a serious breach by a member state' mean?
- Who has the authority to assess the existence of a serious breach?
- How should 'the existence of a serious and persistent breach by a member state of the values' be determined?
- When can Article 7 be triggered?

In other words, while the legitimacy of Article 7 was strong in terms of input (who can take decisions) and output (sanctions or not), the stages in between remained in a grey zone (Coman, 2018).

Under the Portuguese presidency of the Council ~~of Ministers~~, the fourteen EU member states issued a declaration stating that if the Austrian government was formed with the FPÖ, 'they would freeze bilateral relations, that is no longer conduct state visits or receive Austrian diplomats at the ministerial level'. At the end of January 2000, the Portuguese prime minister informed the president and the

chancellor of Austria that 'there would be no business as usual' in the bilateral relations with the Austrian government and that:

1. Governments of the fourteen member states would not promote or accept any bilateral official visit at political level with an Austrian government integrating the FPÖ.
2. There would be no support in favour of Austrian candidates seeking positions in international organisations.
3. Austrian Ambassadors in EU capitals would only be received at a technical level.

The fourteen did not act under the procedure of Article 7 to adopt diplomatic sanctions against Austria. These measures emerged from their consensus rather than from any official EU action. The Commission, under the leadership of Romano Prodi, disapproved of coordinating decisions outside the treaties (Merlingen et al., 2001). The Commission's exclusion from the debates by member states weakened its role and reduced its visibility, although the treaties granted it powers of its own as a *gardienne des traités* (Coman, 2018: 150). Romano Prodi declared that the sanctions imposed on Austria were 'an error of judgment and should be swiftly lifted'. The president of the Commission contented that it was 'the duty of a strong supranational institution not to isolate one of its members' because 'when one of its members is in difficulty, the whole Union is in difficulty' (Merlingen et al., 2001: 66). In contrast, after a two-day debate in Strasbourg, MEPs demanded that EU member states withdraw Austria's voting rights if the coalition with the FPÖ was created.

The Austrian government contended that the EU's action itself violated 'fundamental legal principles and the spirit of the European Treaties', including 'the recognition of a democratic government committed to the rule of law' (Duxbury, 2000: 3). Jörg Haider, the FPÖ leader, lamented that it was 'unacceptable for other countries to determine what is happening in Austria' (see also Leconte, 2005). In a joint declaration with Wolfgang Schussel, he expressed Austria's attachment to the 'spiritual and moral values which are the common heritage of the peoples of Europe and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy' (Coman, 2018).

These debates revealed new lines of division between old and new member states, between Western Europe and the accession countries from Central and Eastern Europe. When sanctions against Austria were adopted, the Slovenian Prime Minister Jan Drnovsek argued that the EU action was 'exaggerated'. In Prague, the former Czech prime minister, Vaclav Klaus, said that 'Brussel's arrogance was far more dangerous than Haider's rhetoric' (Höbelt, 2003: 194). Only Bulgaria stood apart, with Nadezhda Mihailova saying the government 'would not support an Austrian government which would close Europe's door and would stand against EU eastward enlargement' (Coman, 2018: 150).

Thus, although political actors deplored the violation of the EU's common values in Austria, Article 7 was silent on how to determine the existence of a clear risk of a serious breach of the values referred to in Article 2. To sum up, the debates over the Austrian situation revealed the limitations of the existing legal framework to suspend the rights of member states that are found to be in 'serious and persistent breach' of these common values (Berit Freeman, 2002: 110; Coman, 2018: 152).

18.4 Main Policy Developments

The saga around democracy and common values did not end with the Austrian case. While EU institutions were discussing how to deal with Austria, the European Council in Copenhagen set the conditions for the enlargement towards the former communist countries. The Commission – mandated to conduct the accession process – was seeking to support the transition to democracy of the former communist countries by developing tools and instruments to strengthen their democratic institutions and the rule of law.

18.4.1 The Rule of Law as a Sine Qua Non Condition for Accession

Back in the 1990s, many argued that the conditions set by the European Council in Copenhagen were vague and did not define what a 'stable democracy' was (Grabbe, 2002: 253; Sadurski 2010). For instance, the rule of law (see Box 18.2) was a sine qua non condition for accession. However, its implementation remained an open question. The Commission played an important role in explaining why the rule of law was important for the EU's economic integration. The Commission did not promote a specific model of judicial organisation. Through its regular reports on the progress made by candidate countries, the Commission recommended consolidating the independence of the judiciary and reducing political interference in any field related to the appointment or promotion of magistrates, as well as in any disciplinary proceedings. After accession, national judges would become judges of EU law. The Commission therefore pointed out that the judiciary should be independent and well-staffed, and that judges must be well trained, well paid, efficient, respected and accessible to people (Coman, 2009).

Each candidate country sought to reform its judicial institutions to ensure their independence vis-à-vis political power (Coman, 2009). In 2004, the Commission was satisfied with the progress in ten candidate countries and postponed the accession of Romania and Bulgaria to 2007 because of their lack of progress in the fight against corruption and in the independence of the juiciary.

BOX 18.2 Key concept

The *rule of law* is about:

(1) Legality, including a transparent, accountable and democratic process for enacting laws.
(2) Legal certainty.
(3) Prohibition of arbitrariness.
(4) Access to justice before independent and impartial courts, including judicial review of administrative acts.
(5) Respect for human rights.
(6) Non-discrimination and equality before the law.

Source: Venice Commission – Rule of Law – Report – CDL – AD (2011)003 rev.

18.4.2 New Challenges to Democracy and the Rule of Law

After their accession, the governments of the new member states modified the provisions on the independence of the judiciary that had been adopted to meet the accession criteria.

In 2005, the Law and Justice (PiS) Government in Poland had planned to change the attribution of the Constitutional Tribunal. In 2010, Hungary made the headlines with Fidesz's attempts to adopt a new Constitution and thus cement controversial institutional, cultural, religious, moral and socio-economic policies into law. Critics saw these measures as a dangerous deviation from democratic norms and EU treaties. The Hungarian ~~attempts to impose~~ governmental control over institutions whose independence is protected by the EU treaties have been considered a threat to democracy. Beside the revision of the Constitution, the Fidesz government also retired 274 judges. The mandate of the former president of the Supreme Court, elected for six years in June 2009, was prematurely terminated at the end of 2011. Applying the general retirement age to judges was questionable in light of the core principles and rules pertaining to the independence and immovability of judges (Council of Europe, Opinion no.621/2011, p. 10). The retirement of a large number of judges could affect the operational capacity of the judicial institutions (Council of Europe, Opinion no.621/2011, p. 10). Also controversial was the nomination by the government of the president of the National Judicial Office for a nine-year term, considered to be excessively long by the Council of Europe.

In January 2012, the president of the European Commission, José Manuel Barroso, initiated legal action against Hungary. Members of the EP called for a

triggering of Article 7. However, the EU's requirements regarding its values remain vague (Kochenov, 2008; Coman, 2009). Therefore, they did not provide sufficient basis for the legal action against Hungary (Blauberger and Kelemen, 2016: 5). Thus, when the Hungarian government decided to retire a large number of judges, the infringement procedure (see Box 18.3) of the Commission was based on a breach of the EU legislation on equal treatment and the Hungarian decision to lower the pension age, not on Article 2. The Commission won, and the Hungarian government complied with the ruling of the Court on the retirement age of judges (Batory, 2016). However, the case brought in front of the Court did not prevent Viktor Orbán from adopting new measures which threatened constitutional checks and balances (Batory, 2016), undermined the rule of law and weakened human rights protections (Halmai, 2018). Scholars have argued that infringement proceedings were ill-suited to such cases. Infringements seemed to be 'too narrow to address the structural problem which persistently non-compliant member states pose' (Halmai, 2018: 7).

BOX 18.3 Key concept

Infringement procedure. Article 258 (TFEU) grants the European Commission the right to initiate infringement proceedings against member states that have failed to fulfil a treaty or secondary legislation obligation.

In this context, the Commission and representatives of some member states indicated that new tools and mechanisms were needed to enhance the capacity for action in upholding the EU's values prior to triggering Article 7. The EP and the Council have proposed different solutions.

The EP and a series of academics suggested creating a Copenhagen Commission, inspired by the Venice Commission of the Council of Europe, to ensure the continuity of the Copenhagen criteria in all member states (Muller, 2013) and to monitor, assess and enforce the rule of law.

In contrast, the Council, wary of this EU Commission's power, favoured 'an increased cooperation with the Council of Europe (European Council, May 2013; June 2013; the JHA Council, June 2013) and its bodies, including the Venice Commission.

18.4.3 New Tools

Against this backdrop, the European Commission set up two new tools:The first was the EU Justice Scoreboard (see Box 18.4) created in 2013. This information tool aims at assisting the EU and its member states to reach a more effective justice system by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all member states.

BOX 18.4 Key concept

The *EU Justice Scoreboard* contributes to identifying potential shortcomings, improvements and good practices. It shows trends in the functioning of national justice systems over time.
Source: Commission.

The second was designed by the Commission in 2014 and is the Rule of Law Framework (Figure 18.1), a complementary tool to infringement procedures and to Article 7. This framework seeks to address 'threats to the Rule of Law which are of

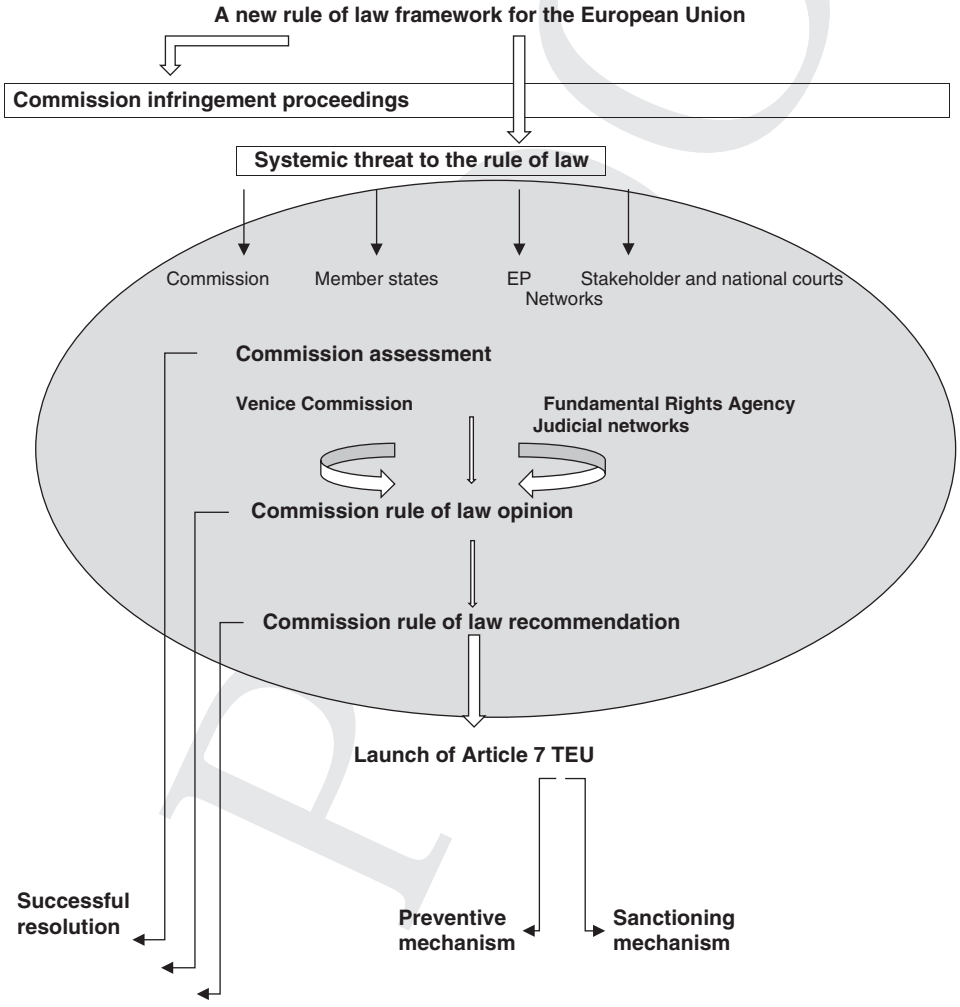

Figure 18.1 The Rule of Law Framework

a systemic nature' (COM 2014). Its purpose is a dialogue that helps the Commission find a solution with the member state in question in order to prevent a systemic threat to the rule of law that could develop into a 'clear risk of a serious breach' which would then potentially trigger the use of the 'Article 7 TEU Procedure'.

However, neither the EU Justice Scoreboard nor the Rule of Law Framework prevented changes in the organisation of the judiciary in some EU member states. Since 2015, the Polish executive led by the PiS has followed a similar path to the Hungarian government, seeking to reduce the independence of the Constitutional Tribunal and of the Judicial Council (see Table 18.2). The Commission initiated the Rule of Law Framework. Over twenty-five letters were exchanged with the Law and Justice members of the government. Since November 2015, the Commission has issued one rule of law opinion and four rule of law recommendations. The vice president of the European Commission, Frans Timmermans, stated that the Polish authorities did not provide reasons for optimism. 'The situation is getting worse', he declared at the end of the dialogue (*EUObserver*, 23 March 2017). 'More than one year of bilateral dialogue has so far not been sufficient to convince the Polish government to address the situation', he said (*EUObserver*, 23 March 2017). As a result, in December 2017, the Commission called for triggering Article 7.

Table 18.2 Chronology: legal changes in Poland and EU action

Legislation adopted by the Polish government (2015–17)	The *law on the Supreme Court* approved by the Senate on 15 December 2017 The *law amending the law on the Ordinary Courts' Organization* in force since 12 August 2017 The *law amending the law on the National Council for the Judiciary* approved by the Senate on 15 December 2017 The *law amending the law on the National School of Judiciary and Public Prosecution* in force since 20 June 2017
January 2016 Rule of Law Framework	The EU launched an inquiry into whether Poland's government had breached the EU's democratic standards by taking greater control of the judiciary
2017 and 2018 Infringement proceedings	*July 2017*. The Commission launched an infringement procedure on the Polish Law on Ordinary Courts, on the grounds of its retirement provisions for male and female judges and their impact on the independence of the judiciary • This was contrary to Article 157 (TFEU) and Directive 2006/54 on gender equality in employment • The Commission referred this case to the Court of Justice on 20 December 2017

Table 18.2 (cont.)

	September 2018. The Commission decided to refer Poland to the Court of Justice due to the violations of the principle of judicial independence created by the new Polish Law on the Supreme Court, and to ask the Court of Justice to order interim measures until it issued a judgement on the case
2018 Article 7	The Commission adopted a *reasoned proposal in accordance with Article 7.1 TUE* for a Council decision on the determination of a clear risk of a serious breach of the rule of law by the Republic of Poland

The Commission did not activate the Rule of Law Framework in the case for Hungary. Many have argued that this was a political decision by the Juncker Commission, strongly influenced by members of the European People's Party, the political group to which the Fidesz is affiliated (Blauberger and Kelemen, 2016). In Hungary, the government continued to make decisions that have led the EP to adopt resolutions and reports expressing its belief that the situation in the country represents 'a clear risk of a serious breach of the values referred to in Article 2' and warrants the launch of the Article 7(1) (Resolution adopted on 17 May 2017). In 2018, the EP adopted a report drafted by MEP Judith Sargentini with 448 votes in favour, 197 against and 48 abstentions calling on the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the EU is founded (2017/2131(INL)).

Poland and Hungary are not the only cases raising concerns at the EU level. In 2017, the Social Democratic government in Romania sought to change the legislation related to the organisation of the judiciary, the criminal code and the provisions concerning the fight against corruption. These actions disregarded the recommendations the European Commission had formulated in the CVM. This tool was created in 2007 to address the shortcomings in judicial reforms and the fight against corruption, and to ensure that Romania and Bulgaria would continue to improve their judiciaries after accession. On 3 October 2018, in the EP, Prime Minister Viorica Dăncilă questioned the CVM's raison d'être and the methodology of the Commission. It is a fact that the leverage of the tools that were set up prior to accession is decreasing.

18.5 Current Political and Academic Controversies

The changes in their legal systems introduced by the Hungarian, Polish and Romanian governments have raised a wide range of questions both in academic and political circles. These controversies can be summarised around the following points.

Liberal democracy vs. authoritarian politics. At a very general level, there is a debate around the electoral success of political parties who challenge the EU's liberal democratic foundations and put forward an alternative model of so-called 'illiberal democracy' (which is an oxymoron). Within academia, this has been analysed as the rise of authoritarian politics and autocratic legalism (Scheppele, 2018; Sadurski 2018). Scholars have argued that from 2010s onwards, in Central and Eastern Europe, political parties such as the Fidesz and PiS have undermined the rule of law, steering politics in 'a dangerous authoritarian direction' (Bugaric and Kuhelj, 2018: 21). This phenomenon is not limited to the new democracies that emerged after the collapse of communism. In Austria, the FPÖ presents itself as an alternative to the mainstream political parties which are criticised for their inability to deal with complex economic and global problems such as immigration (Bugaric and Kuhelj, 2018: 29). What scholars have shown is that leaders like Orbán or Kaczynski seek to alter the nature of their political regime, reducing political pluralism and the independence of judicial institutions. In other words, they introduce reforms that remove the checks on executive power by dismantling constitutional constraints (Scheppele, 2018). These are not isolated examples of democratic regression. They reveal a deep tension between democracy and constitutionalism in Europe. Said tensions occur when elected politicians seek to 'give what the people want' by overriding constitutional principles and by putting liberalism on the line (Scheppele, 2018).

A multicultural Europe vs. a Christian Europe? The rule of law is not the only value enshrined in the EU treaties that has been challenged by the governments of Poland and Hungary, as well as the Czech Republic, Slovakia and Romania. These countries' refusal to welcome Muslim refugees (see Chapter 12) is a case in point. In Hungary and Poland, the Fidesz and PiS portray multiculturalism as a threat to their values. They promote conservative political agendas founded on 'moral values' as a reaction to the decadence of Western Europe. Moreover, they reject not only refugee protection but also Roma and LGBT rights (Bugaric and Kuhelj, 2018: 26), adopting measures which are incompatible with EU law. The Hungarian and Polish governments are seeking a profound political and social transformation which is in stark contradiction with EU law and principles.

A polity based on values or an intergovernmental cooperation between member states? Supranational sovereignty vs. parliamentary sovereignty. These countries' governments oppose national sovereignty and supranational sovereignty, criticising any Commission attempt to uphold the values enshrined in Article 2. The legitimacy of the Commission is called into question as well as that of the EP. In 2016, Jaroslaw Kaczynski proposed reducing the powers of the Commission after Brexit (*Politico*, 15 March 2017). When the EP in 2017 decided by 438 votes to 152 with 71 abstentions to prepare a formal request that the Council activate the preventive mechanism provided for in Article 7.1, the Polish prime minister declared that the discussions in the EP were 'scandalous'.

The existing tools upholding the rule of law have significant shortcomings and therefore the EU is facing problems of compliance. Ultimately, part of the academic and political debates focus on the tools recently adopted at the EU level to prevent systemic threats to the rule of law and to combat democratic backsliding. Despite the activation of the Rule of Law Framework in the case of Poland in January 2016, scholars have concluded that the EU responses to the measures taken by the Hungarian and the Polish governments have been 'ineffective' (Sedelmeier, 2016; Kochenov and Pech, 2016; Pech and Scheppele, 2018; Kochenov and Bard 2018; Van Bogdandy and Ioannidis, 2014). They argue that preventing the consolidation of an autocratic regime within the EU requires a quick reaction. The Rule of Law Framework is however conceived to encourage dialogue. It is designed for 'normal times' and therefore it gives domestic leaders sufficient time to pursue their plans. Scholars have maintained that the Commission should use the instruments at its disposal, in particular infringement proceedings, arguing also that judicial safeguards alone will not be sufficient 'to stop democratic backsliding by a determined national government: if the Union is to rein in such attacks on its core values, heads of government and other EU leaders will have to intervene politically as well' (Blauberger and Kelemen, 2016: 2). Ultimately, academics have pointed out that the EU is confronted with a problem of compliance, as member states 'engage in symbolic/and or creative compliance, designed to create the appearance of norm-conforming behaviour without giving up their original objectives' (Batory, 2016: 685). Such instances of non-compliance put the credibility of the EU at risk.

18.6 Analysis of a Paradigmatic Case Study: Towards a New Rule of Law Conditionality?

Against this backdrop, when the Commission presented a broad overview of its budget proposal for the post-Brexit era (2021–7) on 2 May 2018, it included a proposal for a rule of law conditionality for EU funding. This came about as a consequence of the fruitless years-long political dialogue that it had been engaged in with the Polish government. It is designed to complement the series of tools developed as preliminary or complementary stages prior to triggering Article 7. This proposed rule of law conditionality stipulates that payments and EU-funded programmes would be suspended when breaches to the rule of law are observed in member states. If adopted, the Commission would be allowed 'to suspend, reduce and restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the rule of law deficiencies' (Halmai, 2018: 14).

Conditionality is not a new principle of governance. Several international organisations have used it to foster compliance, to encourage reforms, and to implement policies. It is often associated with the idea of sanctions or rewards for the implementation of specific measures.

The Commission wishes to integrate within the 2021–7 Multiannual Financial Framework rules that would be applied in cases of generalised breaches in the rule of law in member states (COM(2018) 324 final 2018/0136 (COD)). The rule of law ~~is~~ therefore linked to EU spending policies (see Chapter 6).

In 2018, the Commission's proposal enjoyed significant political support from the governments of Germany, Italy, France and the Netherlands. Unsurprisingly, the proposal was disapproved by the parties in power in the Czech Republic, Hungary, Poland and Romania.

The idea of new forms of conditionality has given rise to contrasting views in both the academic and political fields. How can a misuse of the EU budget where the rule of law is under strain be avoided? How can member states be convinced to contribute more to the EU budget when the number of irregularities in the use of EU money increases? How can mutual trust and financial solidarity be ensured when corruption relates to EU funds and when domestic institutions are reluctant or unable to investigate corruption cases or to cooperate with the European Anti-Fraud Office? Stories about corruption and the misuse of EU funds undermine solidarity among member states and pushes the EU to govern by conditionality.

Arguments in favour of conditionality abounded. Several think tanks published detailed reports weighting the pros and cons and concluded that, at least from a political standpoint, putting funds under political conditionality was justifiable. EU funds are important leverage for the Commission and effective spending cannot be guaranteed without the rule of law. The expected effect of this new form of conditionality is to provide incentives to the governments in question to enter into a constructive dialogue with the Commission and to seriously take into account its recommendations. The measure, it has been argued, is not meant to target specific member states, but to prevent the erosion of democratic values in any EU member state. A member state that does not meet the requirements related to the respect of the rule of law 'does not fulfil the legal conditions of the funds and consequently cannot get them' (Halmai, 2018: 15).

On the one other hand, scholars and experts alike argued that such conditionality would be counterproductive for three reasons. Sanctions have the hypothetical potential of increasing nationalist and anti-EU sentiments, with the risk of increased polarisation between east and west. They would also be a penalty for citizens in poorer regions, not for the governments undermining the check and balances of their political regimes. Last but not least, sanctions would damage the process of economic convergence as well (Heinemann, 2018: 300). In this context, some scholars have argued that social pressure is also a way to exert influence without material leverage. Sedelmeier contends that the Romanian case demonstrates the possibility for the EU to induce member states' governments to reverse breaches of liberal democracy without threatening material sanctions (2016: 8). Recent events, however, show that social pressure alone – meaning

massive protests in Bucharest against the attempts of the government to change legislation related to the fight against corruption – is not sufficient (Coman, 2018), as governments can act against the pressure of the street and even repress said protests with violence. Ultimately, to sort out the current impasses it has been argued that a reform of the EU as such is needed so that 'the EU law embraces the rule of law as an institutional ideal'. 'The result would be an emergence of a supranational constitutional system at the EU level [...] which would play a significantly more productive role in solving the backsliding challenges' (Kochenov and Bard, 2018: 26).

How to deal with violations of the rule of law in member states depends on the political identity of the Union which requires political, legal and social support.

GROUP DISCUSSION

What are the reasons of the increased politicisation of values in the EU?

Does the EU need new tools to uphold its values? Is the rule of law conditionality a suitable tool? In your opinion, what are the weaknesses of the tools presented in this chapter? Provide arguments for your position.

TOPICS FOR INDIVIDUAL RESEARCH

Is supranational sovereignty in tension with national sovereignty when democracy is challenged by authoritarian politics at the domestic level?

Analyse the politicisation of the rule of law in a case study (EU member state) or in several contexts (in a comparative design). Examine the arguments of national governments seeking to legitimise the limitation of power of judicial institutions.

FURTHER READINGS

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