

Blog article

Overcoming naivety: the protection of the rule of law in a post-pandemic Union

Rose Hartwig-Peillon

As Ursula Von der Leyen underlined in her State of the Union address last September, the pandemic “showed us just how fragile our community of values really is”.¹ Indeed, the COVID-19 crisis has seen a rise in illiberal practices and disrespect of the rule of law, which has been a growing trend for several years now. As a result, it has been contended that the EU is a Union of values *de jure* but not *de facto*, insofar as the European treaties do assert the existence of European values, but in practice several EU Member States, notably Poland and Hungary,² disregard them.

Last year, the European Commission’s Vice-President Věra Jourová concluded that the EU had been “naive in the past” in overlooking rule of law breaches.³ As the noncompliance on European values intensify, the European institutions have taken on to establish new ways to protect them. They went beyond the naive assumption that the problem would resolve itself, and seized the opportunity to reaffirm the Union’s values. Indeed, since V. Jourová’s declaration, the European Commission (EC) and the Council of the European Union (CEU), hand in hand with the European Parliament (EP), have worked towards making European legislation more protective of the rule of law. The idea of “building back better” can also pertain to making political institutions more resilient to crises.⁴ These decisions are significant, especially those pertaining to the respect of the rule of law, whose existence is the *sine qua non* condition for the upholding of all the other European values: the respect for human dignity, freedom, democracy, equality as well as the respect for human rights, including the rights of persons belonging to minorities.⁵

In light of the fundamental importance of rule of law for sustaining the European values, this article aims at outlining how the European institutions are actively working to avoid further deterioration of fundamental European values. It also points at the main challenges ahead of the

¹ https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655

² See, for example: Martijn Mos (2020) Ambiguity and interpretive politics in the crisis of European values: evidence from Hungary, *East European Politics*, 36:2, 267-287.

³ <https://www.euronews.com/2020/09/30/watch-live-eu-releases-rule-of-law-report-on-democratic-backsliding>

⁴ This motto has been extensively used since the end of 2020. Here, it specifically refers to the objective set by the United Nations.

⁵ See the Article 2 of the Treaty on the European Union (TEU).

EU in terms of the protection of the rule of law in the context of an ideological fission in the Union.

Identifying what the respect of the European values entails

The first factor one can identify as leading to failures to respect the rule of law is the fact that the European treaties do not specify how the Union's values should be implemented. Indeed, whilst the Article 2 of the Treaty on the European Union (TEU) does clearly define which are the EU's common values, it does not specify how to uphold them. Hence, as the European treaties do not provide direct guidance on how to apply these European values, they leave room for interpretation of said values by the Member States.

The absence of specific guidance is surprising, knowing that maintaining a common set of European values is paramount in preserving the Member States "United in diversity". Moreover, the ambiguity found in the treaties makes it hard to identify what precisely represents a breach of the European values. It is especially true regarding the infringements on the rule of law, a value which has been interpreted differently across the Union.

Therefore, as to ensure that the rule of law is safeguarded across the EU, the European Commission took on to define more thoroughly what the rule of law is, and consequently what constitutes a failure to comply with this essential European value. The EC achieves this essential task by publishing every year its *Rule of Law Report*. Its first edition was published in September 2020, and the second was released in July 2020.⁶ The reports identify which political or institutional actions may have harmed the rule of law in every Member State, allowing for a continuous control over the respect of the most fundamental of European values. This constant supervision would allow for a more in-depth enforcement of the rule of law. However, the

⁶ https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en ; <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters>

Union has so far lacked the legal toolbox to properly enforce sanctions over the Member States that did not comply with the EU's values.

Enabling the institutions to sanction breaches on the rule of law

As emphasized by Clément Beaune, the French Minister for European Affairs,⁷ the Union did not originally think it would need to impose sanctions on the motive of non-compliance with its values. This circumstantial assumption has contributed to making the mechanisms for punishing the infringement on the rule of law unrealistically complicated, notably the procedure specified in the Article 7 of the TEU. This procedure allows for the suspension of a set of the Member State's rights if the Council concludes that there is a "clear risk of a serious breach by a Member State of the values referred to in Article 2". However, this sanction can only be made if the European Council decided, by unanimity, to approve of the sanction. This disposition of Article 7 makes the enforcement of the sanction difficult, as rule-of-law breachers may support each other in front of the Council – as was the case between Poland and Hungary, who have shielded each other from the sanction. Hence, the procedure was never completed, despite clear breaches of the rule of law in both countries.⁸

Here, the European institutions have proved great agility. As the Article 7 procedure proved almost impossible to be used, the European Commission (EC) helped enacting the "rule of law conditionality", approved by the European Parliament and European Council in December 2020. This regulation allows the EC to sanction the infringements of the rule of law committed by Member States through financial means. Indeed, the EC can freeze its payments to any Member of the Union that would critically jeopardize the upholding of the rule of law. Hence, the sanctioned EU Member could lose its secured funds from the European budget and the European Recovery Fund. This tool is certainly coercive, as in several Member States economic growth heavily relies on European funds. It is, for instance, the case of Hungary: in 2018, EU

⁷ <https://www.vie-publique.fr/discours/280530-entretien-clement-beaune-23062021-union-europeenne>

⁸ <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened>

spending amounted to 5% of the country's economy.⁹ The freezing of European funds could have a crippling effect on the Hungarian economy, already weakened by the pandemic. Hungary would therefore find itself very strongly incentivized to respect the rule of law. One may therefore conclude that the European institutions found a way to compel the most recalcitrant Member States to scrupulously respect the rule of law.

At the time of writing, it seems that the Hungarian case should be further detailed, as it appears likely that the Commission will sanction the state for its repetitive breaches of the rule of law. A report mandated by Members of the European Parliament, published at the beginning of July 2021, found that there were “interconnected breaches of rule of law principles” in Hungary.¹⁰ This report offers a compelling case for the European Commission to use the rule of law conditionality and freeze Hungary's recovery funds. Moreover, the Commission itself expressed reservations about granting funds to Hungary because of the country's excessive levels of corruption and its insufficiently independent judiciary power.¹¹

In theory, the Commission has the means to punish Hungary's excesses. The institutions and Member States most committed to the rule of law have demonstrated the agility needed to adapt the European regulations to the Union's unforeseen need to protect its values. However, it has also been argued that rather than being based on respect for the rule of law, the sanctions that Brussels has attempted to impose on Poland and especially Hungary are based on ideological rather than objective reasoning. Both countries would be treated unfairly due to the growing opposition between liberals and conservatives. Since it seems that Hungary is the most likely to be sanctioned by Brussels, the legitimacy of such a sanction must be assessed.

Reminding that the upholding of the rule of law is not ideological

The sanctions that Brussels has tried to impose on Hungary in the last few years have been countered with accusations of ideological hostility from the European institutions. Judit Varga, the Hungarian Minister of Justice, outlines this theory as follows:¹² “*Ideological pressure is*

⁹ https://europa.eu/european-union/about-eu/countries/member-countries/hungary_en

¹⁰ https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf

¹¹ <https://www.politico.eu/article/brussels-turns-down-hungarys-recovery-plan/>

¹² <https://www.ft.com/content/7f57551c-837b-459e-9c10-c6037392600d>

used under the guise of the rule of law against certain countries just because we say no to migration, no to multiculturalism, and because we have a different view on the role of family in society.”

Orbán’s government developed the theory that the accusations on rule of law in the country are ideologically biased. The line of argumentation is the following: there would be a clash of cultures between liberals and conservatives, and the liberal Brussels would therefore oppose Budapest’s conception of the rule of law because of this ideological feud. As an example, the Judit Varga ventured the idea to create a new rule of law institute, in Poland and Hungary, which would be more respectful of the two countries’ conservative ideology and take it into account into its analysis of the state of rule law.¹³

Here, care must be taken not to fall into the semantic trap set by the Hungarian government. Although there may be strong ideological differences between some European leaders, there should be nothing conservative or liberal about the enforcement of the rule of law. The question of respect of the rule of law must be separated from the question of the ideological harmony of the Union. The basis of the rule of law, i.e. an independent judiciary system and an uncorrupted administration, are the very basis of a functional democracy. Hence, disrespecting the rule of law is not a conservative but an illiberal choice. The Hungarian Prime Minister has been glossing over his illiberal practices with a thick layer of conservatism for years now, it is time for the Union to curb these abuses.

¹³ <https://www.ft.com/content/7f57551c-837b-459e-9c10-c6037392600d>