

A PROPOSAL FOR POLITICALLY-WILLING COUNTRIES TO RESOLVE EUROPE'S RULE OF LAW CRISIS

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A Proposal for Politically Willing Countries to Resolve Europe's Rule of Law Crisis

In March, the European Parliament decided to sue the European Commission over a quid pro quo exchange of European Union funds with Hungary for support of Ukraine EU accession. This lawsuit marks a striking culmination of a years-long failure on the part of the Commission to protect the rule of law despite the marked atrophying of Article 2 TEU principles in numerous EU Member States. While it would be most prudent and well advised for the “Guardian of the Treaties” to pursue the currently available institutional mechanisms in the EU Rule of Law Toolbox, one ought to entertain novel ideas for reinforcing liberal democratic values in European states. Further inaction risks irreparable damage to the European Union polity.

Given frustrating delays from Brussels, this blog post proposes a non-EU accountability mechanism—a so-called Rule of Law Commission—to bolster and reinforce commitments to rule of law issues among European states. Given a demonstrable lack of remedial action in formalized EU institutions, politically willing European capitals acutely aware of regionally proximate rule of law infringements should come together to establish and fund a values-specific Rule of Law Commission.

Presenting the Innovative Capabilities of an Extra-EU Rule of Law Commission

Across the EU, the “state of play” for rule of law principles in 2024 does not present much encouraging news. The Liberties’ Rule of Law Report recently assessed civil liberties and the rule of law across EU Member States; a mere six of the analyzed EU Member States were found to not be regressing in either justice, anti-corruption metrics, media environment, checks and balances, civil society frameworks, or human rights. Additionally, the prospect of a far right and illiberal swell in the European elections this year prompts a particularly acute need for innovative methodologies for preserving the rule of law in Europe.

The proposed Rule of Law Commission would be established and funded via a multilateral treaty among politically willing national governments that seek to “do business” with democratically-sound foreign partners. The Commission would operate independently of the whims of electoral cycles or executive administrations; it would be composed of nonpartisan, self-contained,

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and ideologically diverse legal experts and diplomats who would craft policy proposals for democratic values assertion. Any relevant state or individual actor could petition the Commission with actio popularis petitions to review perceived breaches of rule of law norms. This Rule of Law Commission would encompass the capabilities of both soft power “naming-and-shaming” tactics and material sanctioning methodologies variously attempted by the EU institutions. Like the European Commission’s Rule of Law Framework—but impervious to the complicating factors of a body partially comprised of illiberal members—this Rule of Law Commission would first define and analyze the synergies, or lack thereof, between rule of law aims and values in each petitioned case. It would

subsequently demarcate economic and diplomatic state-specific responses regarding rule of law non-compliance for each treaty member. This Rule of Law Commission would stand as a visible, independent, and extra-EU body—similar to, say, the Council of Europe—that (1) identifies persistent derogations from democratic values in identified countries and (2) recommends diplomatic and economic responses to such non-compliance on a national level. The treaty members that commit to implementing the recommendations of the Rule of Law Commission would proceed to effect said accountability measures.

This schema builds off of Professor Jan-Werner Müller’s once suggested EU “Copenhagen Commission.” Müller offered a new EU institution that would serve as a democracy and rule of law watchdog to judge on a Member State’s derogation from the EU’s “normative acquis,” measuring compliance on both EU aims and values. Müller cited the challenge in locating an “agent of credible legal-political judgment” for the assertion of “militant democracy” in the federative EU structure. Müller’s Copenhagen Commission would be analogous to the Venice Commission, yet would go beyond advisory functions and carry substantive sanctioning capacities by being able to cut EU funds over rule of law violations.¹ While Müller’s proposal serves as a savvy suggestion for addressing persistent breaches of EU values, it has become clear that EU institutions will unhesitatingly deprioritize rule of law considerations for political expediency—as if the European Commission functions on some “either-or” horse trading agenda.

¹ Müller proposed the Copenhagen Commission before the establishment of the Rule of Law Conditionality mechanism.

This blog's proposed Rule of Law Commission would improve upon Müller's approach by specifically mitigating rhetorically weaponized perceptions of supranational impositions into spheres of constitutional individuality and alleged "Europeanization" efforts by EU technocratic umbrella organizations. This independent Rule of Law Commission would not be codified as an EU institution; it would be established and funded between committed national governments and driven by independent, nonpartisan, and credentialed experts. As such, the Rule of Law Commission could be established far sooner than Müller's Copenhagen Commission which would require EU treaty change. Additionally, considering the Rule of Law Conditionality mechanism currently exists in the EU Rule of Law Toolbox, economic and diplomatic responses recommended by the Rule of Law Commission would occur on a nation-to-nation basis—a tactic similarly pursued in the Haider affair. The clout of a Rule of Law Commission which operates beyond the confines of the EU treaties carries Magnitsky-level

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implications for sanctioning rule of law backsliding and illiberal regimes around the world. Upon identification of major rule of law breaches in a nation, the Rule of Law Commission can substantively expose violations, warn of the osmotic impact of these breaches, and recommend country-specific material sanctions in response—effectively establishing a cordon sanitaire around rule of law

contraventions. By diffusing punitive sanctioning responses to the state level, populist bona fides of principled non-compliance with Brussels loses its validity. And with the measurable rise

of far-right parties in advance of the European Parliament elections, a sans-Bruxelles approach in the long-term could be advised.

Exploring Soft Power Tactics and Material Sanctions through a State-to-State Approach

With the establishment of a Rule of Law Commission as a central and independent body for singularly analyzing rule of law violations, motivated European capitals can demonstrate their commitment to resolving the rule of law crisis sweeping liberal democratic states outside of the lingering limitations of the EU structure. Such an initiative to strengthen democratic principles comes at a particularly pivotal time for Europe; the pall of revanchist authoritarianism emanating from Moscow requires an urgent, clear, and decisive rebuttal. Furthermore, a Rule of Law Commission beyond the EU treaty structure would evade the failures of the EU's current approach to social pressure tactics and material sanctioning processes.

The nonpartisan and dispersive composition of the Rule of Law Commission would mitigate national populist notions of supranational, Brussels-derived “meddling” when confronted by EU leadership. Treaty members would individually sign onto the Rule of Law Commission and respectively implement its tailored policy suggestions. Political gamesmanship with allies or ideological blocs in the full 27-Member State EU institutions would not translate into a Rule of Law Commission given its siloed composition of legal experts and diplomats. With this Rule of Law Commission in effect, liberal democratic offenders in Europe will struggle to replicate their electorally salient caricature of the EU as some centralizing and homogenizing behemoth. With numerous capitals enacting bespoke and disparate policies, illiberal governments will no longer be able to play their Brussels blame game. The soft power capabilities of this anatomically novel

organization will sidestep the historically stymied and at times blasé efforts of the EU.

The Rule of Law Commission would improve upon current EU material sanctioning methods in three ways. Firstly, it would adeptly avoid the rather rigid and technical applicability of EU material sanctioning in infringement procedures and the Rule of Law Conditionality mechanism. Instead, it would base sanction responses off reasoned, peer-reviewed legal opinions and holistic, values-based examination. Illiberal governmental constructs rely on intricately designed laws that retain the veneer of democratic standards; unlike the narrow focus of Rule of Law Conditionality and infringement procedures, a Rule of Law Commission could assess illiberalism in its entirety and not just in its specificity. Secondly, diplomatic and economic sanctions suggested by the Rule of Law Commission would serve as a more potent censure than the mostly toothless Article 7.1 “preemptive” measures but also as a far more feasible instrument than the Article 7.2 “nuclear” option. With the near impossible task of achieving unanimous approval from the Council on Article 7.2, extra-EU and independently determined national sanctioning is the next best response. Thirdly, with economic or diplomatic sanctions occurring on a nation-to-nation basis, tiered levels of responses can be accommodated depending on Member State capabilities—unlike the requisite wholesale approach of the EU.

Pinpointing the Potential Pitfalls and Shortcomings of a Rule of Law Commission

The major potential pitfall inherent to a Rule of Law Commission comes from the lessons of the Haider affair. Opponents might argue that pitting neighboring nations against each other would only lead to the deterioration of relations. Some might claim that tying general values governance to economic or diplomatic exchange in such a Commission would simply amount to the bullying of smaller

economies or abuse and overuse of this mechanism for unrelated purposes. Since the fallout of the Haider affair, European states have admittedly been reluctant to pursue a similar course of action. But, with punitive sanctions devised by nonpartisan and independent legal experts and exclusively targeted to rule of law issues, such a concern might be resolved. This Commission could even begin as an avenue for addressing authoritarian regimes elsewhere in the world—a certain formalized embodiment of the Magnitsky Act. To further quell the Haider naysayers, politically willing treaty members would only play a role in establishing the Rule of Law Commission; they would not dictate its policies. It must be noted that the major problem with the Haider sanctions came from the fact that fellow European countries and political leaders leveraged sanctions against Austria before any tangible violation of EU values had occurred. Current illiberal actors present a completely different case with clear and consistent violations stretching back more than a decade. As such, coordinated sanction regimes are far more justifiable and empirically supported concerning these enduring rule of law violations. Opponents of this idea might lastly argue that this diffusive Rule of Law Commission would undermine the authority of EU institutions on values governance; however, the Rule of Law Commission would not serve as a replacement to the EC’s Rule of Law Toolbox already in place. Punitive measures would instead complement the Rule of Law Toolbox in a strictly non-supranational capacity. Perhaps such a body will finally spur the European Commission into fulfilling its role as “Guardian of the Treaties.” It is high time for politically willing European states to take decisive action on more than a decade of democratic backsliding sweeping the region and the world.

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