

January 2020

Democracy and the rule of law

Failing partnership?

By Ian Bond and Agata Gostyńska-Jakubowska



Democracy and the rule of law: Failing partnership?

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- ★ Democracy and the rule of law are often, wrongly, treated as synonymous. There are increasing tensions in Europe between what governments think their voters want them to do, and what the courts and EU institutions allow them to do. Commission President Ursula von der Leyen is right to say that threats to the rule of law challenge the functioning of the EU. Key EU policy areas such as the single market and law enforcement co-operation depend on respect for the rule of law throughout the Union.
- ★ Respect for the rule of law is declining in many EU member-states, not just those in Central Europe. One of the most comprehensive international indices, the World Bank's Worldwide Governance Indicators, shows that from 2009-2018 the rule of law deteriorated in 17 EU member-states.
- ★ The EU has a number of tools for monitoring and responding to non-compliance with the rule of law, but they are inadequate. Monitoring is too narrowly focused on judicial independence and relies on data submitted by member-states. Responses to democratic backsliding are inconsistent. The so-called Article 7 procedure, which can lead to suspension of a member-state's voting rights, has proved unusable. Attempts to make the disbursement of some EU funds conditional on respect for the rule of law have met legal and political obstacles.
- ★ There has been too much focus on punitive measures, and not enough on incentives to respect the rule of law, or steps to increase public understanding of and support for the rule of law.
- ★ In addressing rule of law problems, the European Union needs to treat all member-states equally. Von der Leyen has taken a positive step in proposing an annual report on the state of the rule of law across the EU, but she needs to ensure that it draws on information from a wide range of sources, including the EU's Fundamental Rights Agency. The report should lead to a proper annual debate on the rule of law in the Council of the EU.
- ★ The Commission should not hesitate to take member-states to the Court of Justice of the EU when they violate the rule of law, especially now that the Court has shown itself willing to intervene even when no specific EU legislation has been broken.
- ★ The EU's political 'families', such as the European People's Party, should take more responsibility for ensuring that their member parties respect the rule of law, rather than turning a blind eye to problems in their own groupings.
- ★ EU institutions should engage more with civil society organisations involved in raising public awareness of EU values and principles, and do more to promote respect for the rule of law throughout the Union.

- ★ In the negotiations on the proposed regulation to give the Commission the power to suspend the disbursement of certain EU funds to a member-state which undermines the EU's fundamental values, the Council and the Parliament should establish a stronger link between respect for those values and sound EU finances. A member-state's lack of respect for the rule of law may pose a threat to the proper use of EU finances, but democratic backsliding does not in itself guarantee corruption or the misapplication of EU funds.
- ★ The EU should look at what more it can do to help member-states tackle institutional weaknesses that damage the rule of law, allocating enough funds to do so. It should also be ready to help rebuild independent judiciaries in countries where these have already been seriously damaged.
- ★ Critics often accuse the EU of being an elite project, imposed on unwilling populations. But ordinary voters benefit from the EU's great achievements – the single market, and the borderless area of freedom, security and justice – which can only work if the rule of law prevails throughout the EU. The EU needs to try to win back voters' hearts and minds.

Democracy and the rule of law are often mentioned in the same breath, as though there were little difference between them. But the last decade in the EU has shown that not to be the case. Democratically-elected governments may want to act in ways that command the support of their voters, but find themselves blocked by courts or other independent institutions that act as guardians of the rule of law.

An increasing number of Western governments have shown their frustration with the constraints imposed on them by the rule of law. Such governments often argue that the 'will of the people' is supreme, regardless of domestic or international legal constraints. Moreover, they regularly treat the views of government supporters as representing the will of the people, even if their backers are not an absolute majority of the population.

In some cases, when courts attempt to defend principles such as the rights of minorities, or external obligations such as EU law, they and those who defend them are accused of obstructing the will of the people. In other cases, public security is used to justify infringing the rights of citizens. In a number of member-states, media and civil society organisations are finding it more and more difficult to investigate possible violations of the rule of law because of financial and political pressure on them.

The EU, which describes itself as a 'community of law', has put a lot of effort into promoting and defending democracy and the rule of law beyond its borders. But over the last decade the EU has been unable or unwilling

to prevent the erosion of the rule of the law within its own territory. Though EU institutions have mostly focused on trying to counter 'democratic backsliding' – as violations of the rule of law are often described – in Central and Eastern Europe (especially in Hungary and Poland), the problem is much worse and more widespread than that. Respect for the rule of law has declined in many EU member-states, including in Western Europe.

European Commission President Ursula von der Leyen wrote in her political guidelines for the new Commission: "Threats to the rule of law challenge the legal, political and economic basis of how our Union works"¹. She also wrote: "Lady Justice is blind – she will defend the rule of law wherever and by whomever it is attacked". This policy brief looks at what the rule of law means, and how it clashes with some concepts of democracy. It then examines the scope of the problems facing von der Leyen in promoting greater compliance with the rule of law, and the specific threats to the rule of law in a number of member-states. It suggests some steps that the EU institutions, member-states and civil society can take to ensure that the situation improves over the next five years.

Definitions and distinctions

Democracy, translated literally from the original ancient Greek *demokratia*, is 'the rule of the people'. But no modern state has the kind of direct democracy that characterised Athens in the 5th century BC, when

the votes of a majority of male citizens decided state policy. Many states retain some element of direct democracy, usually in the form of referendums (either on constitutional issues, or in response to petitions from

¹: Ursula von der Leyen, 'A Union that strives for more: My agenda for Europe – Political guidelines for the next European Commission, 2019-2024', European Commission, July 16th 2019.

voters). But states that call themselves democracies today are mostly representative democracies, in which voters elect legislators and trust them to take decisions in the national interest (and can vote them out if they are dissatisfied with their performance).

Western states, including EU members, are also liberal democracies – that is, the power of the people or their representatives is to some extent limited by rules and institutions. In such states the power of the majority is balanced by the separation of the executive, legislative and judicial functions of the state, and by the rule of law. The rule of law is designed to protect both the system itself (for instance, to prevent a legislature voting to abolish future elections and give itself permanent power) and the liberties of individuals (for instance, to protect private property against arbitrary confiscation).

According to the European Commission for Democracy through Law – the Council of Europe’s advisory body on constitutional matters, known as the Venice Commission – the rule of law has six elements:

“Some governments claim a popular mandate for breaking EU rules challenging the concept of the community of law.”

- ★ legality, including a transparent, accountable and democratic process for enacting law;
- ★ legal certainty (people know what the law is and how the courts interpret it, and neither will change unpredictably);
- ★ prohibition of arbitrariness (the exercise of power cannot be unlimited);
- ★ access to justice before independent and impartial courts, including judicial review of administrative acts;
- ★ respect for human rights;
- ★ non-discrimination and equality before the law.²

The rule of law ensures that governments administer laws accurately and impartially, but it also prevents the majority, or their elected representatives, from imposing laws that violate natural justice, including those that affect minority groups disproportionately. Unless the executive and the legislature respect the independence of the courts and comply with their rulings, democracy is at risk: the government can muzzle critical voices in the media with repressive libel laws;

2: European Commission for Democracy through Law (Venice Commission), ‘The rule of law checklist’, March 18th 2016.

civil society organisations and whistle-blowers cannot hold governments or parliaments to account when they uncover corruption; voters cannot get redress if elections are rigged; and minorities cannot assert their rights in the face of discriminatory laws or government persecution.

Respect for the rule of law is also one of the founding values of the EU, set out in Article 2 of the Treaty on European Union, and one of the key requirements for countries seeking to join the Union. It ensures the consistent application and execution of EU law across the member-states, and contributes to the mutual trust that underpins European co-operation.

Governments criticised by the EU institutions or by other member-states for failing to respect the rule of law often complain that the critics are interfering in their internal affairs and acting undemocratically. But key Union policies (the single market, the area of freedom, security and justice, and the eurozone) rely on all member-states implementing and enforcing EU rules to similar standards in similar circumstances. An EU member-state that does not respect the rule of law, even if it does not overtly breach EU legislation, undermines that mutual trust and co-operation, and threatens the rights of its own and other EU citizens on its territory. Even if a member-state government can claim a popular mandate for breaking EU law, in doing so it is challenging the concept of the community of law.

The populist governments of Hungary and Poland have attracted more scrutiny than others because they have been the most overt in their efforts to undermine liberal democracy. Indeed, in a speech in 2014 Hungarian Prime Minister Viktor Orbán announced that he was building an “illiberal state” in Hungary.³ The actions of the authorities in Budapest and Warsaw, sometimes apparently designed to provoke a response from Brussels, have created or deepened rifts between Western and Central European member-states. They have contributed to a perception in Western Europe that violations of the rule of law are a ‘Central European problem’. But as this policy brief will show, other member-states also have their own issues with the rule of law.

Von der Leyen says that she wants to be a bridge-builder. She might therefore be more sensitive than her predecessor, Jean-Claude Juncker, to claims that the EU’s mechanisms for addressing alleged breaches of the rule of law stigmatise Central European countries. She has asked the Commission Vice President for Values and Transparency, Věra Jourová, a Czech who understands the complexities of Central Europe, to supervise the work of the Commissioner for Justice, Didier Reynders, on the rule of law. Jourová’s predecessor was Frans Timmermans

3: Website of the Hungarian government, ‘Prime Minister Viktor Orbán’s speech at the 25th Bálványos Summer Free University and Student Camp’, July 26th 2014.

of the Netherlands – now the Commission’s Executive Vice President with responsibility for the green deal. He was vilified by the Polish and Hungarian governments and media sympathetic to them for interfering in areas outside the Commission’s competence, and for trying to impose an alien way of life, at odds with ‘traditional’ values, on more conservative populations.

Jourová promised MEPs that she would be “a resolute defender of the European Union’s fundamental values, including the rule of law,” and that she would take “prompt and proportionate action when the rule of law is in danger”.⁴ Reynders told MEPs: “My first core task is to lead the Commission work to uphold the rule of law and to preserve it in each and every member-state”.⁵ The task facing the two Commissioners is daunting.

The state of the rule of law in the EU

The World Justice Project’s annual ‘Rule of law index’ evaluates the situation in 126 countries and territories, including 21 EU member-states, examining how the general public perceive the rule of law.⁶ The data behind the report shows a number of trends that should be of concern to EU citizens and institutions; it underlines that judicial independence, though vital, is not the only aspect of the rule of law that the EU should take an interest in.

“Judicial independence is not the only aspect of the rule of law that the EU should care about.”

The index shows that the rule of law in four of the 21 member-states covered (Bulgaria, France, Hungary and Poland) is worse overall in 2019 than in 2015 (see charts 1-4). Some countries have suffered big drops in performance in relation to specific indicators: Bulgaria has slipped from 56th place (out of 102) for constraints on

government powers to 91st place (out of 126); Hungary from 66th place to 103rd. France went from 30th place in 2015 to 56th place in 2019 in relation to order and security, presumably as a result of a number of terrorist attacks: the authorities have responded to these attacks with laws permitting extensive surveillance, not only of suspects but of all communications in specified areas, with little judicial oversight. France’s ranking for constraints on government power, protection of fundamental rights and the effectiveness of its criminal justice system also slipped, though by fewer than five places in each case.

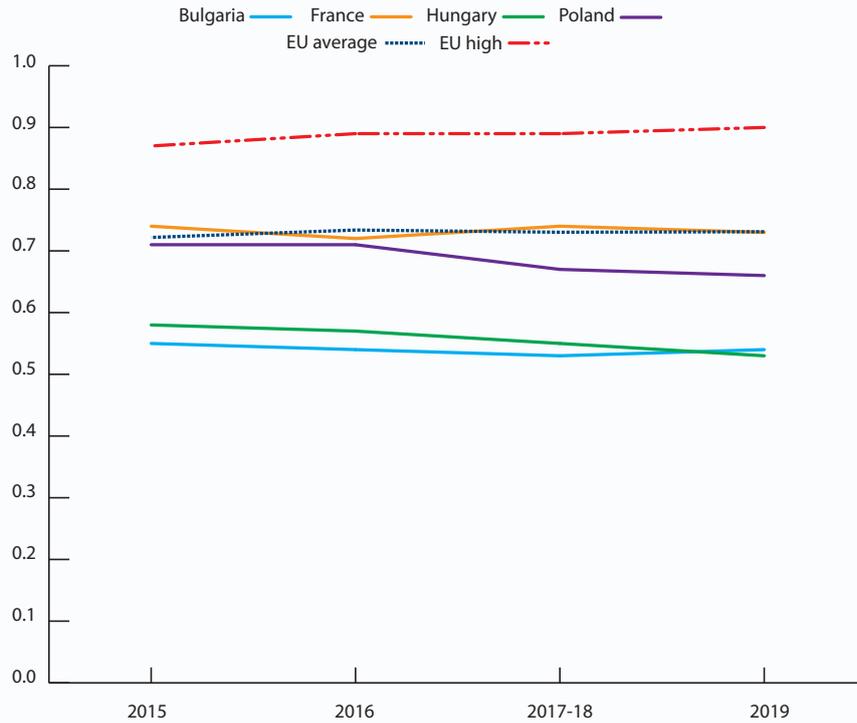
More broadly, the data shows that government powers in 10 EU member-states (including Austria, France, the Netherlands and Poland) were less constrained (by the judiciary, legislature, audit agencies or civil society) in 2019 than 2015; protection of fundamental rights worsened in 15 countries; and the administration of criminal justice (including speed, impartiality, effectiveness in reducing criminal behaviour, and due process including protection of the rights of the accused) deteriorated in 11 member-states.

4: European Parliament, ‘Answers to the European Parliament questionnaire to the Commissioner-designate Věra Jourová, Vice-President-designate for Values and Transparency’, September 2019.

5: European Parliament, ‘Answers to the European Parliament questionnaire to the Commissioner-designate Didier Reynders, Commissioner-designate for Justice’, September 2019.

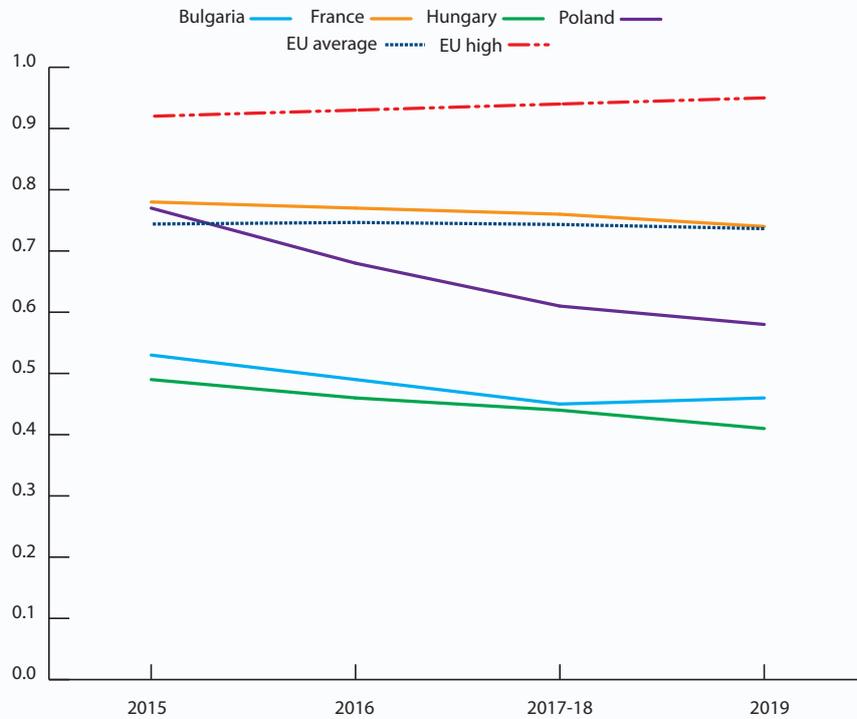
6: World Justice Project, ‘WJP rule of law index’ and accompanying data tables, 2015-2019.

Chart 1: World Justice Project rule of law index: Overall score



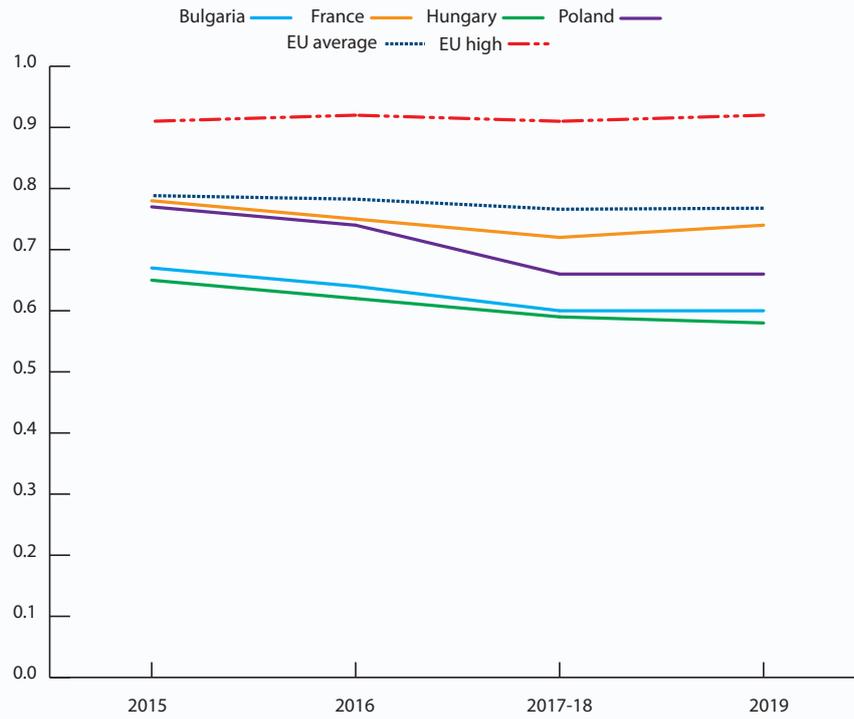
Source: Authors' calculations, based on data from the World Justice Project.
 Note on Charts 1-4: Scores range between 0 (weakest adherence to the rule of law) and 1 (strongest adherence to the rule of law).
 The 'EU high' may represent different countries in different years or for different indicators. The 'EU average' is the average score of the 21 member-states covered by the index.

Chart 2: World Justice Project rule of law index: Constraints on government powers



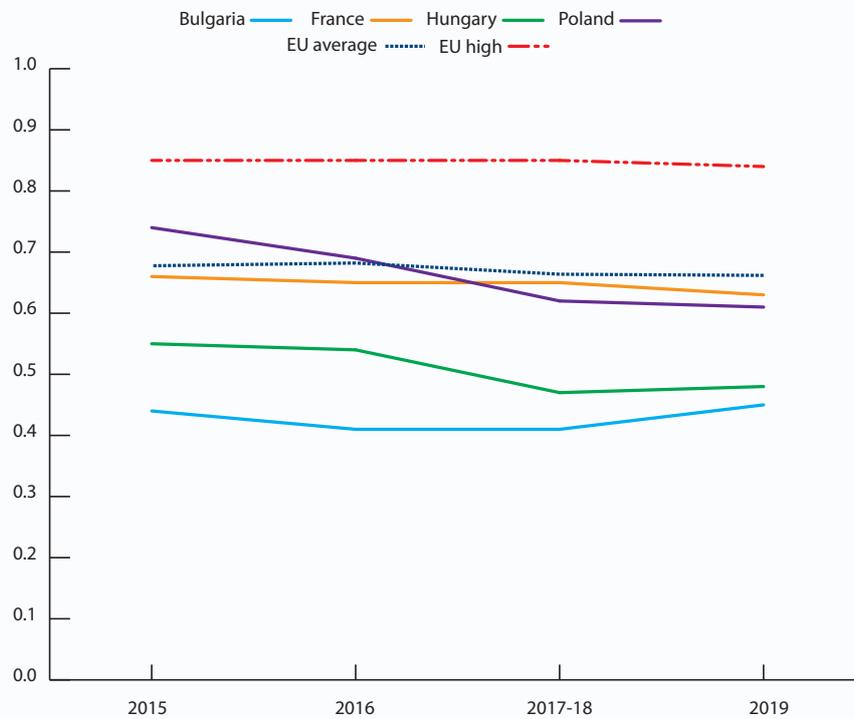
Source: Authors' calculations, based on data from the World Justice Project.

Chart 3: World Justice Project rule of law index: Fundamental rights



Source: Authors' calculations, based on data from the World Justice Project.

Chart 4: World Justice Project rule of law index: Criminal justice



Source: Authors' calculations, based on data from the World Justice Project.

In many cases, the decline was slight and the situation might improve without any need for EU involvement: though Austria's score for 'constraints on government power' worsened between 2015 and 2019, the change was not statistically significant. But in some cases the decline was more worrying. On a scale from 1.0 (perfect rule of law) to zero (total absence of the rule of law), in relation to equal treatment and non-discrimination Bulgaria's score fell from 0.67 in 2015 to 0.58 in 2019; France's from 0.69 to 0.63; Greece's from 0.62 to 0.54; Hungary's from 0.61 to 0.44 (putting it on a par with China and Iran); and Slovenia's from 0.79 to 0.68. Countries including Croatia and Portugal saw noticeable deterioration in the performance of their criminal justice systems – from 0.58 to 0.51 and from 0.67 to 0.60 respectively.

“The Worldwide Governance Indicators assessed that the rule of law deteriorated in 17 member-states between 2009 and 2018.”

Other surveys show a similar picture. The Economist Intelligence Unit's (EIU) 'Democracy Index 2018' judged that 15 member-states in Western Europe were less democratic in 2018 than they were in 2008.⁷ The EIU categorised six EU member-states in Western Europe (Belgium, Cyprus, France, Greece, Italy and Portugal) as 'flawed' rather than 'full' democracies. Across the EU as a whole, the EIU identified 17 member-states as flawed democracies.⁸

The World Bank's Worldwide Governance Indicators (WGI) track six elements of governance, including the rule of law. The indicators combine the views of a large number of survey respondents in more than 200 countries and territories, based on data from a variety of survey institutes, think-tanks, non-governmental organisations, international organisations, and private sector firms. The rule of law indicator “reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.”⁹ The WGI assessed that the rule of law deteriorated in 17 EU member-states between 2009 and 2018. Among those suffering the steepest decline in perceived respect for the rule of law were Cyprus, Greece, Ireland (though it still remained

above the EU average score) and Malta; in absolute terms, the worst performers by 2018 were Italy, Greece and (the worst of all, by a significant margin) Bulgaria.

It is not always clear what particular factors influenced these perceptions, though in some cases it is possible to draw inferences from events taking place in the same time frame. In the case of Ireland, corruption scandals in *An Garda Síochána* (the Irish police force), revealed by whistle blowers in 2014, led to the resignation of two Irish justice ministers and one police commissioner, and the early retirement of another commissioner – events which may have had an impact on confidence in the rule of law in the country.¹⁰ In addition, the Council of Europe's 'Group of States against Corruption' (GRECO) has said of a proposed new system for appointing judges (currently held up by arguments in the Irish parliament) that it “appears questionable whether it is in line with European standards aimed at securing judicial independence”, and has criticised Ireland for “globally unsatisfactory” compliance with 2014 GRECO recommendations on preventing corruption – criticisms subsequently echoed by the European Commission.¹¹

In Greece, the main problem seems to be institutional weakness. Germany's Max Planck Institute for Comparative Public Law and International Law, which runs a project on the rule of law and state reform in Greece, says that in Greece “the administration and the judiciary necessary for an efficient modern state and a sustainable eurozone economy are not in place... The length of court proceedings, corruption, insufficient administrative expertise, and the lack of co-ordination are systemic problems. These institutional deficiencies are so grave that they amount to a rule of law problem.”¹² The independence and competence of the judicial system were also called into question by the politically motivated prosecution and ultimate conviction (in 2017) of the country's chief statistician, Andreas Georgiou – in essence, for putting out accurate statistics that contradicted the false ones used by successive Greek governments to deceive their international creditors.¹³

In Italy, the problems are broad in scope and deep-rooted: on every one of the eight indicators measured by the World Justice Project (WJP) (constraints on government powers; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; and criminal justice) Italy has

7: The Economist Intelligence Unit, 'Democracy Index 2018: Me too? Political participation, protest and democracy', January 2019.

8: The 17 were Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia and Slovenia.

9: Daniel Kaufmann and Aart Kraay, 'Worldwide Governance Indicators', World Bank, 1996-2018.

10: See, for example, Steven Carroll, 'Justice reform pledged following Guerin report', *The Irish Times*, May 9th 2014.

11: GRECO, 'Fourth evaluation round: Corruption prevention in respect of members of parliament, judges and prosecutors: Interim Compliance Report, Ireland', July 5th 2018; European Commission, 'Commission staff working document: Country report Ireland 2019, including an in-depth review on the prevention and correction of macroeconomic imbalances', February 27th 2019.

12: See Max Planck Institute for Comparative Public Law and International Law website, 'Rule of law and state reform in Greece'.

13: See, for example, Megan Greene, 'By convicting an honest statistician, Greece condemns itself', *Politico*, August 3rd 2017.

scored lower than the EU average in every year from 2015 onwards. Italy suffers both from institutional and political issues. For example, it has one of the lowest number of judges per capita in the EU.¹⁴ As a result, the time it takes to settle court cases is among the longest in Europe – according to the Council of Europe’s Commission for the Efficiency of Justice (CEPEJ), an average of 399 days to resolve civil, commercial, administrative and other cases in 2017, compared to 22 days in Denmark, the EU’s best performer. Large backlogs of criminal cases combine with a stringent statute of limitations to enable many accused to escape punishment. A Reuters investigation in 2016 suggested that attempts to reform the statute of limitations were doomed to failure: almost ten percent of Italian MPs had benefited from cases being closed because of the statute of limitations, or were involved in cases where they expected to benefit from it.¹⁵

Italy also exemplifies the tension between what voters want their elected leaders to do and what the law allows. The EU’s ‘Democracy Index 2018’ highlighted growing support for ‘strongmen’ who bypass political institutions, and noted that then-interior minister Matteo Salvini, from the right-wing populist Lega party, had supported the eviction of members of the Roma community from a camp in Rome, even after the European Court of Human Rights had ordered that the action be halted.

“In the 2019 World Press Freedom Index media freedom was judged ‘good’ in only nine member-states.”

In the case of Bulgaria, the Commission has hitherto been able to use the Co-operation and Verification Mechanism (CVM) – a transitional measure introduced when Bulgaria and Romania joined the EU in 2007 – to monitor progress on issues such as the effectiveness of the judiciary, and tackling corruption and organised crime. But the most recent CVM report says: “The Commission considers that the progress made by Bulgaria under the CVM is sufficient to meet Bulgaria’s commitments made at the time of its accession to the EU.”¹⁶ If the Council of the EU and the European Parliament agree, the rule of law in Bulgaria will no longer be under the Commission’s microscope – the CVM will be ended. But the Commission’s conclusions are

in sharp contrast with the evidence from other sources: on the WGI’s scale, which ranges from -2.5 (very bad) to 2.5 (very good), Bulgaria’s latest rule of law score, for 2018, was -0.03 – the only negative score in the EU, and barely changed from the -0.05 it scored in 2007.

Rule of law problems do not affect every member-state: Finland was the EU’s best performer in 2018, with a WGI score of 2.05, which put it in the 99th percentile of countries globally for the seventh time in ten years. But EU institutions should be concerned that almost two-thirds of the Union’s members had a lower WGI score in 2018 than in 2009; and that among them were 11 of the 15 Western and Southern European member-states that joined the EU before 2004. Even if in many cases the slippage is only slight, the trend is clearly in the wrong direction.

Free media play a vital role in protecting the rule of law, by uncovering wrong-doing and holding powerful political and economic actors to account. In the 2019 ‘World Press Freedom Index’ produced by the international NGO Reporters Without Borders, media freedom was judged ‘good’ in only nine EU member-states, ‘fairly good’ in 12, ‘problematic’ in six (in increasing order of concern: Romania, Poland, Croatia, Greece, Malta and Hungary) and ‘bad’ in Bulgaria. Croatian law, for example, does little to prevent political interference in the appointment and dismissal of editors-in-chief, while Maltese political parties own and control media enterprises.¹⁷

There have been a number of high-profile attacks on investigative journalists in EU member-states in recent years, including the murders of Ján Kuciak, a Slovak journalist who was looking into Slovak connections to Italian organised crime groups, and Daphne Caruana Galizia, a Maltese journalist who died in a car-bombing while investigating high-level political corruption. The Kuciak case triggered the resignation of the Slovak prime minister, Robert Fico, and the Maltese prime minister, Joseph Muscat, was eventually forced to resign following revelations of close connections between his office and suspects in the Caruana Galizia case. So far one person has pleaded guilty in the Kuciak case, though there have been a number of arrests, no-one has yet been tried for the murder of Caruana Galizia.

14: Freedom House, ‘Freedom in the world 2019’, February 2019.

15: Crispian Balmer and Gavin Jones, ‘Italy’s judicial shake up caught in political conflicts of interest’, Reuters, June 30th 2016.

16: European Commission, ‘Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism’, October 22nd 2019.

17: Iva Nenadic, ‘Monitoring media pluralism in Europe: Application of the media pluralism monitor 2017 in the European Union, FYROM, Serbia & Turkey, Country Report: Malta’, Centre for Media Pluralism and Media Freedom, European University Institute, 2018; Paško Bilić, Antonija Petričušić and Ružica Eterović, ‘Monitoring media pluralism in Europe: Application of the media pluralism monitor 2017 in the European Union, FYROM, Serbia & Turkey, Country Report: Croatia’, Centre for Media Pluralism and Media Freedom, European University Institute, 2018.

The EU's current instruments

The EU needs to take a broader view of the rule of law issue than it has so far – both in terms of the countries and the topics of concern; if it continues to focus on the state of the judiciary in two countries (however worrying that may be), the situation across the Union as a whole will continue to deteriorate. In theory, the EU has a wide range of tools to monitor respect for the rule of law in its member-states and respond to any backsliding.

“The EU's toolbox for assessing respect for the rule of law has many flaws.”

a) Monitoring

The Commission monitors public administration in all member-states as part of the so-called European semester, which provides a framework for co-ordination of national economic policies; meanwhile, the Commission's 'justice scoreboard' compares member-states' judicial systems, aiming to encourage a business- and investment-friendly environment. In addition, Bulgaria and Romania have both been subject to CVMs since their EU accession, to encourage their efforts to fight corruption and improve their judicial systems. The EU can also draw on reviews conducted by other organisations such as the Council of Europe or the United Nations. Efficient monitoring should in principle enable the Commission to nip any rule of law problems in the bud, before they reach the level of a “serious and persistent breach” of EU values, and put European co-operation at risk.¹⁸

b) Early intervention and problem-solving

When the EU concludes that a member-state is undermining the rule of law, it has a number of tools to respond. The Commission can investigate threats to the rule of law and recommend policy changes, using the so-called rule of law framework.¹⁹ If dialogue with a recalcitrant member-state does not resolve the issue, the Commission can recommend that the Council determine that “there is a clear risk of a serious breach of the EU values referred to in Article 2 of the Treaty on European Union” (TEU) and activate Article 7 TEU, potentially leading to a member-state's voting rights being suspended.

The Commission can also open an infringement procedure against a member-state when it believes that illiberal reforms violate EU law. But populist governments

have often undermined EU values without breaking EU law as such. The Polish government, for example, has attempted to use this flexibility to limit the independence of the country's Supreme Court (among other things), without violating any specific EU directive or regulation in the process.²⁰ The Polish government has claimed that it is up to member-states rather than the EU to decide how their judiciary should be organised.

The Court of Justice of the European Union (ECJ) has countered, however, by declaring itself competent to assess the judicial independence of national courts that apply and interpret EU law ('EU courts').²¹ And in the case against the Polish government, the court first suspended the controversial reforms while it decided on the matter, before eventually ruling in 2019 that the reform of the Supreme Court violated EU law, in particular the principles of judicial independence and the irremovability of judges.²² Thanks to such expansive judgements from the ECJ, the Commission might become more confident that the Court will be its ally in tackling breaches of EU values and fundamental principles, even if no specific EU legislation has been breached.

Despite this advance, however, the EU's toolbox for assessing respect for the rule of law and addressing any backsliding has many flaws. The EU's monitoring mechanisms do not give a full picture of the state of democracy across the Union. The justice scoreboard draws on information from a number of sources; but its quantitative data, for example on the length of court cases, relies mainly on data submitted by member-states via CEPEJ (which is contracted by the Commission to collect and tabulate national information). Since 2014 the UK has refused to submit any data, seeing it as an example of Commission overreach.²³ But a number of other member states, including Belgium, Germany and Ireland, have also failed to provide some data, whether for political reasons or because their national authorities do not collect some of information the Commission requests. The EU's own surveys are also often too narrow in scope. The rule of law is in danger not only when a government directly undermines judicial independence, but also when it makes it impossible for media and civil society organisations to scrutinise its actions – issues which EU surveys have so far neglected.²⁴ The EU co-funds the Media Pluralism Monitor, a tool designed by the Centre for Media Pluralism and Media Freedom (CMPF) to assess the risks to media pluralism in a given country, but has

18: Treaty on European Union, Article 7.

19: European Commission, 'A new EU framework to strengthen the rule of law', Communication to the European Parliament and the Council, March 11th 2014.

20: Agata Gostyńska-Jakubowska, 'Time to let the rule of law have its day in court', CER insight, July 19th 2018.

21: Court of Justice of the European Union, 'Judgement of the Court of Justice in the case Associação Sindical dos Juizes Portugueses v. Tribunal de Contas (case C-64/16)', February 27th 2018.

22: Court of Justice of the European Union, 'Judgement of the Court of Justice in the case European Commission v. Republic of Poland (case C-619/18)', June 24th 2019.

23: Nikolaj Nielsen, 'EU justice scoreboard upsets some member states', *EU Observer*, March 17th 2014.

24: Israel Butler, 'A response to the Commission communication on further strengthening the rule of law within the Union', Civil Liberties Union for Europe, June 2019.

yet to make much use of it.²⁵ Von der Leyen has asked Jourová to use the Monitor to identify threats to media plurality in the EU.²⁶

The EU's inconsistent response to alleged rule of law violations in Hungary and Poland has also opened it up to accusations of bias. Although the Hungarian government started undermining the country's democratic checks and balances to a significant extent in 2010, the Commission refused for several years to invoke Article 7. Instead, it launched infringement procedures against specific Hungarian government actions, relying on the ECJ to keep Orbán in check. It was only in September 2018 that the European Parliament (rather than the Commission) finally launched the Article 7 procedure against Hungary. By contrast, when the Polish government started following Hungary's playbook just months after it took power in 2015, the Commission was quick to take action under the rule of law framework. When negotiations between the Polish government and the Commission eventually broke down two years later, the latter recommended in December 2017 that the Council trigger Article 7. The Commission's different approaches to similar violations in the two countries has made it easier for PiS, Poland's governing party, to claim that it is being singled out unfairly.

“The EU's inconsistent response to rule of law violations in Hungary and Poland has opened it up to accusations of bias.”

One significant difference between the Polish and Hungarian governing parties (which may explain the difference in how they have been treated) is that PiS does not belong to any of the mainstream European political families. Orbán's Fidesz party belongs to the European People's Party (EPP), made up primarily of Christian Democrat parties including German Chancellor Angela Merkel's CDU. PiS, by contrast, is a member of the European Conservatives and Reformists with a number of other parties, most of them with limited political influence. Although the EPP has formally suspended Fidesz's membership, at the time of writing it has not expelled Hungarian MEPs from its ranks or excluded them from high profile positions in the European Parliament. Tamás Deutsch and Kinga Gál have been elected vice-chairs of the Parliament's budgetary control committee and security and defence sub-committee respectively.

25: Elda Brogi, Iva Nenadic, Pier Luigi Parcu and Mario Viola de Azevedo Cunha, 'Monitoring media pluralism in Europe: Application of the Media Pluralism Monitor 2017 in the European Union, FYROM, Serbia & Turkey', European University Institute, 2018.

26: Ursula von der Leyen, 'Mission statement to Věra Jourová, Vice-president-designate for values and transparency', September 10th 2019.

27: Lorena Bachmaier, 'Compliance with the Rule of Law in the EU and the Protection of the Union's Budget', *eu crim: The European Criminal Law Associations' Forum*, issue 2, 2019.

Questions of alleged bias aside, Article 7 TEU has also proved an ineffective way to exert pressure. It is a multi-stage process that relies ultimately on member-states' willingness to vote unanimously (minus the state in question) to determine the existence of a serious and persistent breach of EU values, resulting in punishment for one of their own – something the EU member-states have been reluctant to do. They have struggled even to muster the votes of four-fifths of the member-states to launch the first stage of the Article 7 procedure, namely to determine that there “is a clear risk of a serious breach (...) of the values referred to in Article 2 TEU”. Instead, the Article 7 procedure has contributed to tensions among the member-states and sometimes led to stormy meetings of the General Affairs Council (GAC), which discusses rule of law violations. The GAC on December 10th 2019 hit the headlines when Hungarian officials sent offensive tweets from a supposedly closed-door meeting on respect for the rule of law in Hungary.

Another problem with the EU's response to democratic backsliding is that so far it has focused on deploying punitive measures – either via the Article 7 mechanism, infringement procedures or financial pressure. In May 2018 the Commission put forward a proposal to enable it to reduce or suspend EU funding if a member-state did not respect the rule of law. But there are concerns among independent experts (backed by the Council Legal Service) that the draft regulation fails to make a solid connection between the objective of protecting the EU's financial interests and deficiencies in the rule of law in a member-state.²⁷ There is no evidence so far that the Polish government's judicial reforms have led to mismanagement of EU funds. Despite the politicisation of its judiciary, Poland is in 36th place in Transparency International's Corruption Perception Index (CPI), far above Bulgaria (77th), Greece (67th) and Hungary (64th).²⁸

In addition, some member-states, including Hungary and Poland, are uneasy about the fact that the proposal is drafted in a way that would allow the Commission to suspend the disbursement of funds unless the Council decided otherwise by a qualified majority voting (the so-called 'reverse qualified majority vote').²⁹ They think that the current wording of the proposal aims to bypass the Article 7 procedure by giving the Commission (rather than the member-states) unprecedented powers in determining whether EU values have been violated and whether funds should be suspended.

28: Transparency International, 'Corruption perceptions index 2018', 2019.

29: This is a method already used by the Commission in the economic sphere to impose penalties under the Excessive Deficit Procedure – it takes a qualified majority vote in the Council of the EU to overturn fines imposed by the Commission on member-states whose budget deficits and/or national debt are too high. It is worth noting, however, that because Hungary and Poland have not adopted the euro as their currency the procedure does not apply to them.

Even if legal and political objections to rule of law conditionality can be overcome, the Commission will need to ensure that only those responsible for violations of the rule of law are deprived of funding, and not worthy recipients in deprived regions of the EU. The Commission's proposal stipulates that if the flow of EU funds to a country is suspended, the government of that member-state would still have a legal obligation to fulfil their contractual obligations to the beneficiaries of financial assistance – that is, not to cut them off without payment. The member-states should ensure that this provision is maintained in the final text of the regulation.

“Sadly, the EU has not given enough support to civil society organisations that try to increase public awareness of the rule of law.”

Central European states claim that in its efforts to discipline defiant member-states, the Commission is bending EU law and/or applying double standards. They argue that the Commission has not established a clear link between the independence of the judiciary and sound management of EU funding; and they challenge the legality of the proposal to take decisions by reverse qualified majority voting. The counter-argument to the first point is that if the national courts are under government influence, they may find it more difficult to reach independent judgements on the conduct of any government officials suspected of embezzling EU funds. That would obstruct the work of the EU's anti-fraud office, which relies on national authorities to prosecute cases where it uncovers criminal behaviour.

Technically, there is no need for the regulation to be adopted unanimously. Because of the contentious character of the proposal, however, member-states agreed to decide on some of aspects of it, including the possible use of reverse qualified majority voting, alongside the EU's long-term budget – the multiannual financial framework (MFF) for 2021-2027 – which has to be agreed unanimously. That increases the risk that rule of law conditionality will become a bargaining chip in the negotiating end-game, traded away for other concessions rather than being treated on its merits.

While the Commission has various sticks to punish those that flout the rule of law, it has yet to develop any carrots to help encourage public support, and to increase understanding of why it cannot turn a blind eye on the rule of law violations. Sadly, the EU has not given enough

support to civil society organisations (CSOs) that try to increase public awareness of the implications for citizens' rights and for the European project of breaching the rule of law. According to Israel Butler of LibertiesEU, an organisation which promotes civil liberties throughout the EU, current EU programmes do not focus on capacity building or public education, and are not available to local or national organisations that promote EU values.³⁰ This is because the Commission has long argued that education policy is in the hands of member-states, and the EU has only a supporting role in efforts to increase awareness of the EU and its values.

The good news is that the Commission is aware that it has not yet found an effective response to democratic backsliding, and it is willing to listen to the views of outside experts on how to improve. In April 2019 the Commission encouraged various stakeholders to come up with ideas for preventing and responding to breaches of the rule of law, and for promoting EU values. CSOs responded with proposals to make the public more resilient to governments' illiberal actions and to restore society's appreciation of the importance of the rule of law. The Commission promised in July that it would consider organising an annual rule of law dialogue between civil society and EU policy-makers.³¹

The Commission has also pledged to “make full use of funding possibilities for civil society and academia supporting the strengthening of a rule of law culture, in particular among the general public”. In May 2018 the Commission put forward a proposal to establish a Justice Programme with around €305 million and a Rights and Values Programme with almost €642 million for the next seven years. The first initiative aims for example to support judicial co-operation and judicial training and the second is designed to promote equality, rights and democracy, and to combat violence.

The European Parliament, however, amended the proposals to increase the funding of the justice programme to €316 million in 2018 prices, and of the Rights and Values programme to over €1.6 billion in 2018 prices (over €750 million to a strand dedicated to promoting respect for EU values).³² MEPs also amended the rights and values programme to make it easier for local and national civil society organisations working on the rule of law to apply for funding. But the European Parliament does not have the final word on the size of this programme. The proposal still needs to be approved by member-states, which are generally reluctant to spend more money on promoting democracy than is absolutely necessary, whether for financial or political reasons.

30: Israel Butler, 'Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs', March 7th 2018

31: European Commission, 'Strengthening the rule of law within the Union: A blueprint for action', July 17th 2019.

32: European Parliament Legislative Observatory, Procedure file on the Justice programme 2021–2027 and European Parliament Legislative Observatory, Procedure file on the Rights and values programme 2021–2027.

In December 2019 the Finnish presidency proposed some cuts to the overall Multiannual Financial Framework. Although the Finnish proposal does not specify the allocation for the Rights and Values programme, the European Parliament's own estimate suggests that if the Finnish proposal were adopted the programme would be significantly smaller than MEPs had proposed.³³

“The Commission should treat member-states equally strictly rather than focusing exclusively on Central Europe.”

At his confirmation hearing in the European Parliament Reynders promised that the Commission would examine the rule of law situation in all member-states and draft an annual report. He also pledged that the Commission would widen the scope of its analysis and take into account issues of media pluralism. In its analysis, the Commission wants to draw on the expertise of the other international organisations, the Fundamental Rights Agency and the EU's own monitoring mechanisms. It also wants member-states to set up national contact points to facilitate the exchange of information about the rule of law. But despite calls from various civil society organisations for the Commission to delegate the assessment of the situation in member-states to experts or a new agency, the Commission wants to control the content of its own annual rule of law report. The risk is that the Commission's analysis is seen as being politically motivated in some member-states. Proponents of

keeping the review in the Commission's hands will say, however, that since the assessment could form the basis for legal action, the Commission, as the guardian of the treaties, should conduct it; that way it would certainly be admissible evidence at the ECJ. The Commission could also offset such criticism with a public information campaign explaining the factual basis for its assessment.

The Commission itself also hopes that such a report will create a basis for greater co-operation with the Council and the European Parliament on democratic backsliding. Since 2014 the Council has discussed rule of law-related themes such as disinformation or trust in public institutions (the so-called Council rule of law dialogue), but it has shied away from debating democratic backsliding at the member-state level, or putting forward any country-specific recommendations. As a result, the exercise has been an “unhelpful” waste of the Council's time.³⁴ Finland, which held the Council's rotating presidency in the second half of 2019, was keen to reform the rule of law dialogue in the Council, so that the Council could use the Commission's proposed report in its discussions on the rule of law. Poland and Hungary opposed the Finnish ideas when they were discussed at the GAC in November 2019. As a result, it was impossible to reach agreement, and Finland was forced to set out its proposal in the form of Presidency conclusions, “supported or not objected to by 26 delegations”.³⁵ But Germany (which will hold the rotating presidency in the second half of 2020, when the next rule of law dialogue should take place) may, like Finland, be willing to push for a more co-ordinated approach to declining respect for the rule of law.

Recommendations and conclusion

The European Commission needs to address deteriorating respect for the rule of law wherever it occurs in the EU. It should not be selective in its approach. The Commission should not turn a blind eye to negative developments in Central Europe; rather it should treat all member-states equally strictly. Such an approach might defuse East/West tensions around the issue of the rule of law which, in the longer term, could undermine the EU's integrity.

Von der Leyen has made a small step in the right direction by promising an assessment of the rule of law in all member-states. It is, however, not entirely clear how the Commission intends to collect data for such an annual report. If it wants a balanced picture, it cannot rely exclusively on data provided by member-states' governments. It should make better use of the Fundamental Rights Agency (FRA) in collecting information about the rule of law. There is nothing to

stop the EU institutions asking the agency to collect data about the rule of law in individual member-states. The FRA draws on the expertise of local contact points that could help it gather useful insights, for instance about judicial independence, and thereby contribute to the Commission's annual rule of law report. The Commission should also seek information from international organisations such as the Council of Europe (as it already does for the Justice Scoreboard) and from civil society organisations.

If the Commission's report shows serious democratic deficiencies in a member-state, the Commission should offer the government concerned the opportunity to comment on the findings. In some cases, as the analysis above of problems in Greece and elsewhere has shown, the problem may be institutional weakness rather than any deliberate effort to breach the EU's fundamental

33: European Parliament, Committee on Budgets, 'Note to the MFF negotiating team. Decoding the Finnish presidency number: A preliminary analysis of the MFF negotiating box', December 9th 2019.

34: Laurent Pech and Dimitry Kochenov, 'Strengthening the rule of law within the European Union: Diagnoses, recommendations, and what to avoid', policy brief, RECONNECT project, June 2019.

35: Finnish Presidency, 'Presidency conclusions - Evaluation of the annual rule of law dialogue', November 19th 2019.

values. But if the explanation provided by the member-state is not satisfactory and the prospects for addressing the problems identified in the report are not promising, the Commission should not hesitate to ask the ECJ to weigh in. As in the Polish case, the Commission should ask the ECJ to order the suspension of controversial reforms until it issues a final verdict.

The Commission should prepare its report in time for the Council to use it in its own deliberations on the rule of law. The Commission should convince Poland and Hungary (opponents of this idea) that a report that looked objectively at the situation in all member-states could spark a more honest debate in the Council about the state of democracy and the rule of law in the EU and improve the atmosphere among the member-states. The conflict over rule of law issues has led some Western European states to view the Central Europeans as more generally obstructive and unco-operative in policy areas unrelated to the rule of law.

“European political families have a responsibility to assist in upholding the rule of law throughout the EU.”

There are likely to be occasions when a member-state decides to violate the rule of law before the Commission finalises its report, or when the Commission cannot legally open an infringement case because the law it objects to has not yet entered into force. In such cases other EU leaders and EU political ‘families’ like the centre-right EPP and the centre-left S&D have a responsibility to assist in upholding the rule of law throughout the EU. Article 3 of the Regulation on the statute and funding of European political parties and European political foundations provides that a political alliance must observe fundamental values listed in Article 2 TEU in order to be registered as a European political party.³⁶ The leadership of the European parties should therefore try to dissuade their fellow politicians from pursuing actions that would constitute a clear violation of the rule of law.

It would be in the interest of the EU and all the member-states if serious violations of the rule of law by a member of a European political party led to its political isolation. In March 2019 the EPP established an evaluation committee to help it decide Orbán’s fate. At the time of writing, the committee has apparently finalised its report but not made it public. Donald Tusk, the new president of the EPP, should act decisively, publish the report and expel Fidesz from the EPP’s family.

The EU institutions should revise the regulation on European political parties. They should make it easier to

36: Regulation (EU, EURATOM) on the Statute and Funding of European Political Parties and European Political Foundations as amended by Regulation 2018/673, May 3rd 2018.

expel or deregister whole political groupings in the event that they do not take action against national member parties that violate the rule of law or other fundamental EU values. At present, a European political party can be deregistered only when the whole party family (not just one member party) ceases to fulfil the registration criteria, including respect for the rule of law. Moreover, it takes the Commission, the Council, or one quarter of MEPs representing at least three political groups to initiate a case for deregistration – a step which none has yet seemed willing to take.

The EU institutions should make greater use of civil society organisations. The EU should empower them to act as reliable sources of information; and it should be willing to support them with financial and other resources in their efforts to increase popular understanding of the rule of law. Civil society organisations can also offer the EU useful recommendations on how to make the public more resilient to populists and their authoritarian actions.³⁷ At the same time, in order to avoid being accused of political bias by hostile governments, the Commission should engage in a dialogue with civil society organisations from across the ideological spectrum, including those advocating the return of some powers from the EU to the member-states.

The member-states should accept the European Parliament’s proposal to increase EU funding for rule of law promotion. This will be a hard sell for parliaments and publics who do not want to contribute more to the EU’s budget than they currently do. But they should understand that when a member-state gets away with violating the rule of law, the cost to others may be more than the extra funding for rule of law promotion. In the end, any attempt to undermine judicial independence, infringe the rights of criminal suspects or restrict media freedom constitutes a major threat to the integrity of the single market, a project which has contributed to member-states’ prosperity, and to the common legal space, based on mutual trust, which contributes to the security of the EU’s citizens.

The member-states should establish a stronger link between respect for fundamental values and sound management of EU funds, regardless of pressure to compromise in order to reach a deal on the budget for the next seven years. Making the instrument legally watertight would help to see off accusations that the EU is prepared to bend its own laws to punish defiant member-states. This strategy is not without risks: member-states who oppose conditionality might threaten to veto the entire MFF over this issue. But reassurance from other leaders that conditionality is intended as an objective, legally-grounded instrument and not an attempt to bypass the cumbersome Article 7 procedure could help sway them.

37: Agata Gostyńska-Jakubowska, ‘New approaches to upholding democratic values in Poland’, Carnegie Europe, October 5th 2018.

The EU should also look at what more it can do to help member-states tackle institutional weaknesses that damage the rule of law – some of which have persisted for decades. Where shortcomings in the administration of justice in a member-state potentially affect the interests of citizens or firms in other member-states – for example, where there are inordinate delays in court cases, or judges are inadequately trained – the EU should be able to offer support as well as criticism. The EU already allocates some European Structural and Investment Funds to pay for judicial reform, training for judges and the like (a total of more than €900 million in the budgetary cycles 2007-2013 and 2014-2020); 16 member-states, including Bulgaria, Greece and Italy, have benefited from this funding.³⁸ The next MFF should make it a high priority to help member-states tackle rule of law problems identified in the Justice Scoreboard and in reports from international bodies like GRECO and CEPEJ. The proposed Justice Programme is likely to prove inadequate, particularly if it is also required in due course to help rebuild the independent judiciary in member-states where populist governments have seriously damaged it.

Critics often accuse the EU of being an elite project, imposed on unwilling populations. But those populations benefit from the EU's great achievements – the single market, and the borderless area of freedom, security and justice – which can only work if the rule of law prevails throughout the EU. Democratically-elected governments in individual member-states have to be prevented from taking decisions that suit them and boost their ratings, but undermine the rule of law throughout the EU. There is a difficult balance to be struck between the absolute 'will

of the people' and the paternalistic 'we know best' rule by judges and other unelected institutions. But a 'pure' democracy always runs the risk of turning into what the former British Lord Chancellor, Lord Hailsham described in 1976 as an "elective dictatorship", in which the government of the day, by virtue of its majority, can take any policy decision it chooses, without any check on its power. Modern European democracies need the rule of law to limit their ability to make terrible mistakes; and the EU as a whole has a legitimate common interest in the application of the rule of law throughout the member-states.

The authors are grateful to Khrystyna Parandii, 2019-2020 Clara Marina O'Donnell Fellow at the Centre for European Reform, for her assistance with the research for this policy brief.

A version of this paper will also appear as a chapter in 'Deliberative democracy in the EU', to be published by Rowman & Littlefield International later in 2020 as part of the project 'Towards a Citizens' Union' (2CU), of the European Policy Institutes' Network (EPIN), co-funded by the Erasmus+ Jean Monnet Programme of the European Commission.

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January 2020

38: European Commission, 'The 2019 EU justice scoreboard', May 2019.