



Reconciling Theory and Practice of the Rule of Law in the European Union

Barbara Grabowska-Moroz¹ · Joelle Grogan^{1,2} · Dimitry V. Kochenov^{1,3} ·
Laurent Pech^{1,4}

Published online: 21 November 2022
© T.M.C. Asser Press 2022

The rule of law is one of the fundamental principles of Europe’s constitutional heritage which is said to be common to the forty-six Member States of the Council of Europe, twenty-seven of which are members of the EU. Beyond the boundaries of Europe, the rule of law has also been recognised as a foundational value, and a central tenet of both constitutional democracies and international organisations. As regards the EU specifically, the rule of law is explicitly mentioned in the EU Treaties as one of the values that is common to the EU and its Member States, values which “define the very identity of the European Union as a common legal order” according to the European Court of Justice.¹ In the family of Article 2 TEU values, the rule of law plays a crucial legal role as it “forms part of the very foundations of the European Union and its legal order”.² Yet, as unprecedentedly warned by the President of the CJEU in November 2021, the foundations of the EU “as a Union based on the rule of law are under threat” and “the very survival of the European project in its current form” at stake.³ This warning was subsequently echoed by the President of the European Court of Human Rights who spoke of “a worrying regression in the rule of law” in June 2022.⁴

¹ Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, para. 127 And Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98, para. 145.

² Case C-156/21, para. 128 and Case C-157/21, para. 146.

³ K. Lenaerts, ‘Constitutional relationships between legal orders and courts within the European Union’, FIDE 2021, XXIX FIDE Congress, 4 November 2021, p. 2: https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony_4-November-2021_Koen-Lenaerts.pdf

⁴ R. Spano, Solemn Hearing for the Opening of the Judicial Year, 24 June 2022, p. 5: https://www.echr.coe.int/Documents/Speech_20220624_Spano_JY_ENG.pdf

✉ Dimitry V. Kochenov
kochenovd@ceu.edu

¹ CEU Democracy Institute, Budapest, Hungary

² King’s College, London, UK

³ CEU Department of Legal Studies, Vienna, Austria

⁴ UCD Law School, Dublin, Ireland

Worsening and spreading rule of law backsliding means that the EU is now facing an autocracy crisis,⁵ with already one EU Member State no longer a democracy⁶ and another one arguably no longer with an independent judicial branch⁷ following years of sustained top-down implementation of autocratisation blueprints.⁸ While the EU institutions have not been doing enough to ensure that the EU meets the challenges outlined by the President Lenaerts⁹ and used every excuse, including the war in Ukraine, to do even less,¹⁰ the body of “Rule of Law law” has been growing steadily, especially, due to the efforts of the Court of Justice, which managed to give the whole field a foundational overhaul.¹¹ Against this background, this special issue, which draws on several years of scholarly cooperation in the auspices of the RECONNECT Horizon 2020 project,¹² aims to make an inter-disciplinary contribution engaging with the multi-faceted complexity of the EU’s Rule of Law landscape as it stands, outlining a selection of crucial challenges and also offering some solutions. The articles span conceptual arguments of the definition and scope of the rule of law within the EU legal space, as well as how it can be measured. It also presents case studies on, inter alia, the enlargement process, Hungary, Poland and Spain, judicial reasoning in intra-EU investment, and the impact of the COVID-19 pandemic on legal systems.

Laurent Pech opens the special issue with “The rule of law as a well-established and well-defined principle of EU Law” which aims to assess the extent to which the European Commission is correct in asserting that the rule of law is a well-established and well-defined principle of EU law whose core legal meaning is shared across the EU. It examines the meaning and scope of the rule of law within the EU legal space, and takes aim at criticisms originating from representatives of authorities engaged in the systemic violation of the principles at the core of the rule of law and according to whom the rule of law would neither be defined in EU law, nor could it be defined in EU law.

Julinda Beqiraj and Lucy Moxam, in “Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law” consider

⁵ R.D. Kelemen, “Europe’s Unused Tools” (2022) *Journal of European Integration* (forthcoming).

⁶ European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P9_TA(2022)0324, para. 2 (Hungary has turned ‘into a hybrid regime of electoral autocracy’).

⁷ L. Pech, P. Wachowiec, D. Mazur, “Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action” (2021) 13 *Hague Journal on the Rule of Law* 1.

⁸ L. Pech, K.L. Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

⁹ D. Kochenov, A. Magen, and L. Pech (eds) ‘The Great Rule of Law Debate in the EU’, 54 *Journal of Common Market Studies*, 2016, pp. 1045–1104.

¹⁰ P. Bárd and D. Kochenov, ‘War as a Pretext to Wave the Rule of Law Goodbye? The Case for EU’s Constitutional Awakening’, 27 *European Law Journal*, 2021, pp. 39–49.

¹¹ L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice* (SIEPS, 2021).

¹² *Reconciling Europe with its Citizens through Democracy and Rule of Law*. RECONNECT received funding from the European Union’s Horizon 2020 Research & Innovation programme under Grant Agreement no. 770142.

the main and common elements of the rule of law across the institutions of the EU, Council of Europe and the United Nations, underlining the broad consensus of its core meaning. They evaluate the tools with which rule of law compliance is measured across these institutions, and on this analysis, consider the current trends in rule of law across a range of data sets including Varieties of Democracy (V-Dem) indices, the Democracy Barometer, the Bertelsmann Stiftung's Transformation Index (BTI), and the World Justice Project's Rule of Law Index.

Petra Bárd and Viktor Zoltán Kazai in "Enforcement of a formal conception of the rule of law as a potential way forward to address backsliding: Hungary as a case study" examine how the Court of Justice and other EU institutions charged with ensuring a high level of adherence to the rule of law have not yet exploited the potential of an emphasis on the formal elements of the rule of law, rather than a focus on the substantive elements so far seen in the case law of the Court. They argue that EU institutions have tools available to them which could be effectively used to address Hungary's lack of compliance with formal rule of law elements. By using Hungary as a case study, they argue that a focus on formal elements of the rule of law would be beneficial in terms of both speed and desired effect in countering the process of autocratisation.

Dimitry Kochenov and Nikos Lavranos examine a specific judgment of the Court of Justice of the European Union in "*Achmea* versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union". They argue that *Achmea* presents the threat of tangible future harm for investors by disempowering them, and lowering standards of judicial protection. They underscore how, in a time of increasing and systemic undermining of judicial independence at EU Member State level, the Court of Justice's aim to reinforce its monopoly on adjudication results in investors being deprived of effective judicial protection in the Member States where the Rule of Law is fading away. Fighting for supremacy of EU law has thus resulted in weakening the Rule of Law and the protection of human rights, as the two Hungarian case-studies from the paper demonstrate.

Elena Basheska, in "EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia", underlines the importance of the rule of law as an aspect of the EU's enlargement policy and shows that the over-politicisation of the process can render relevant enlargement provisions futile and undermine the transformative effect of EU values. Through the case study of so far unsuccessful dispute settlement between Croatia and Slovenia, she argues for a reconsideration of the principle of conditionality.

Gisela Hernández and Carlos Closa provide an in-depth analysis of the Catalan crisis from a rule of law perspective. They argue that interpreting the Catalan secessionist challenge merely as a conflict between the Spanish state and constitution vis-à-vis pro-secessionist actors while ignoring its European dimension and consequences can be misleading. The article evaluates how secessionism may disregard the rule of law. Furthermore, the authors argue that much of the secessionist strategies were similar to the ones used by the political authorities that

have engaged in democratic and rule of law backsliding blueprints in some EU member states, particularly in Poland and Hungary.

Edit Zgut takes a close examination of the erosion of standards of democracy and the rule of law in Hungary and Poland following their “authoritarian remaking” over the last decade in “Informal Exercise of Power: Undermining Democracy Under the EU’s Radar in Hungary and Poland”. The author highlights how, despite the introduction of various frameworks and other instruments, the EU has been unable to effectively enforce compliance with fundamental values. The article explores the under-theorized area of the link between informal power and the limited constraining role of the EU and argues that the exercise of informal power to further democratic deconsolidation and rule of law backsliding is as severe a threat as active legislative actions.

Mariam Begadze examines growing tensions between autocrats and opposition-led local authorities in Hungary, Poland and Turkey. With these countries as case-studies, the article identifies the emerging categories of abuse of law within the illiberal playbook. It carries a hopeful optimism that still antecedent and robust guarantees (paired with popular support) can still serve as a bulwark against illiberals in national executives, but cautions that this is not always the case. Reflecting on the phenomenon of incremental undermining of opposition in subnational contexts, the article concludes on the question of whether such instrumentalization of law can itself be judicially manageable, at least in situations when clear political opponents are targeted.

Barbara Grabowska-Moroz identifies and discusses the main systemic challenges related to the rule of law protection in the European Union. The article refers to results of the survey conducted as a part of the RECONNECT project,¹³ which asked the respondents how important EU values are to them. The rule of law was not assigned the highest importance compared to other values. Furthermore, despite the continuing expansion and densification of the EU’s rule of law toolbox, rule of law backsliding still has not been eradicated, which raises questions about whether the EU is even able—or willing—to guarantee and enforce compliance with the foundational values which define the very identity of the EU as a common legal order. The article offers some key suggestions on how to tackle existing systemic deficiencies in the field of the rule of law in the EU.

Finally, Joelle Grogan examines the impact of the COVID-19 health crisis on the practice of democracy and the rule of law in the EU in “COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis”. She underlines how emergency situations can incentivise rapid action without scrutiny and the use of power without restraint. She argues that this can be a potent and dangerous mix in the context of pre-existing trends towards authoritarianism and rule of law backsliding. The demands of emergency can provide a convenient guise and means of justification for the use of power which only serves to consolidate power

¹³ C. Plescia, J. Wilhelm, S. Kritzinger, T. Schüberl, J. Partheymüller, ‘RECONNECT 2019 European Parliament Election Panel Survey (SUF edition)’ (2020) <<https://doi.org/10.11587/MOV0EZ>> AUSD, VI.

within the executive to the detriment of the separation of powers and weakening of the institutions of liberal democracy. The article draws from the experiences of the EU and comparators beyond to offer an outlook on how to prepare for future emergencies by building on the lessons of the COVID-19 pandemic.

Let us make no mistake: the significant recent case-law and the multi-faceted developments this special issue engages with did not come as a panacea. Although enriching the level of EU's legal engagement with the Rule of Law as a fundamental principle of law,¹⁴ recent developments this special issue analyses have not resulted in solving the challenges on the ground in the troubled Member States.¹⁵ If anything, the on-going upgrade and elaboration of the Rule of Law as a principle of crucial significance in the European legal space has resulted in new cleavages. The first of these appeared between the practice of the Rule of Law as applied by the supranational institutions to their own level of governance, as opposed to what is applied to the Member State level.¹⁶ The second of such cleavages consists in the growing discord between the key approaches to the Rule of Law by the Court of Justice as opposed to the standards articulated and applied by the European Court of Human Rights.¹⁷ The two are mutually reinforcing, as the growing departure of the Court of Justice from the ECtHR standards contributes also to the growing rift between the EU and its Member States.¹⁸ The attempts to solve the most outstanding Rule of Law problems has thus created new challenges, and new research, building on what this special issue offers, will be indispensable for the fuller understanding of the on-going Rule of Law processes in Europe.

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

¹⁴ L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice* (SIEPS, 2021).

¹⁵ D. Kochenov, 'De Facto Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times', *XL Polish Yearbook of International Law* 2021, pp. 197–208.

¹⁶ D. Kochenov and Graham Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair', *27 European Law Journal*, 2021, pp. 262–296.

¹⁷ B. Grabowska-Moroz, Annotation of the *Noble Bank* Case, CMLRev. 2022 (forthcoming).

¹⁸ D. Kochenov and P. Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe', *60 Journal of Common Market Studies*, 2022.