



Rule of law in the EU beyond political divisions. Budgetary sanctions and a new programme for citizens

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The Brits' decision to leave the European Union in June 2016 prompted questions about whether the EU might disintegrate. These questions are increasingly repeated, but not due to fear that others might leave. On the contrary, Brexit has been an effective vaccine for those with doubts about the point of being in the EU. 67% of EU citizens say their country has benefited from membership.¹ Few Eurosceptic politicians are calling to leave the EU. In Italy, even calls to leave the Eurozone have subsided.

The biggest challenge for united Europe today is not "leavers". Rather, it is populist and nationalist politicians who have reached the conclusion that – since they must continue "travelling on the EU train" – they can travel without a ticket, benefiting from the EU's bounty without the obligations

Summary

In January 2019, the European Parliament decided to make access to EU funds conditional on the rule of law in member states and to establish a Rights and Values Programme (RVP) to support democratic efforts by European citizens. These regulations are of strategic importance to the EU. The undermining of shared principles, especially regarding the rule of law, is one of the key threats to the EU today. The RVP's principles have already been accepted by the Council of the EU. It still needs to approve the size of the funds and the budgetary conditionality mechanism. This will probably become part of the bigger game relating to the EU's multiannual budget. Civic organisations and democratic forces should do everything to ensure that the subject does not disappear during the EU negotiations.

¹ <http://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/eurobarometer-2018-democracy-on-the-move>.

that result from applying shared rules. Travelling without a ticket is often not limited to “shirking” obligations; it also involves attacking the EU aggressively from within. Governments are increasingly undermining and disavowing EU law, with radical politicians making particularistic claims that clash with community principles. Sometimes, this involves an openly anti-EU campaign, like the Hungarian government’s. In other cases, these actions are more veiled, hidden behind slogans on the need to reform the EU and restore member states’ sovereignty.

EU regulations have been breached before, but never on this scale and in this form. Most worryingly, contesting the rules is starting to touch the EU’s very foundations. Principles at the “heart” of an open, law-based community – liberal democracy and the rule of law – are increasingly questioned. When these rules are undermined, the mechanism of making and enforcing EU law loses its credibility. If violation of the rule of law becomes widespread, it could paralyse the whole project of integration. The devastating consequences are not felt immediately; they become apparent later. The danger is that, once the effects become visible to everyone, it will be too late to treat the illness. Just imagine a situation in which some member states’ courts start refusing to respect the rulings of courts in other EU countries (such as Hungarian, Polish or Romanian ones). This “domino” could soon get out of EU and national decision-makers’ control.

Although the situation is serious, the rule of law is not a priority for most European politicians. Most avoid overt condemnation. Sometimes, they even hold up these countries as an example, as with Italian Deputy Prime Minister Matteo Salvini’s remarks about the Hungarian government’s policy. Still, the EU has not been completely idle. The European Commission, Parliament, European Council and the Court of Justice of the European Union (CJEU) have recently taken a series of unprecedented disciplinary actions. For the first time in EU history, the rule of law procedure set out in Article 7 of the Treaty on European Union (TEU) was triggered against Poland and then Hungary. The move was mainly symbolic, though. The lack of concrete means of pressure became a problem. Those in Article 7 turned out to be “out of reach”, as they require consensus among member states. The court route was much more effective. In its 2017 judgement, the CJEU de facto admitted that member

The new mechanisms fill gaps in the EU’s instruments for protecting the rule of law. Yet their effectiveness will depend on how they are implemented.

Above all, the financial restrictions must only be used for the strategic objective of restoring the rule of law. Officials should avoid the “temptation” to punish countries for other “offences”, such as lack of solidarity on refugees. It must also be clear that the budgetary sanctions are not only addressed to poorer countries; rather, they will be applied equally to all member states. In this context, it would be particularly harmful for richer countries to continue criticising violation of the rule of law in Central Europe from the position of “outraged donors”.

Implementing the RVP, the EU must think beyond technocratic procedures. The competitions’ priorities and how they are carried out should enable pro-EU circles, understood in the broadest sense, to consider the programme “their own”. The stereotype of the RVP as a “fund for the left and EU loyalists” needs to be counteracted. It must also be clear that this is not a programme for everyone; it should not support organisations that contest the foundations of the European legal and normative order.

In the long term, applying the new solutions requires building a real sense of a community of values among proponents of a united Europe. This requires discussion and recognising that ideological divisions in the EU are not limited to those between opponents and supporters of integration; they exist in pro-EU circles, too. Perhaps some of these differences – for example, on social justice or mores – simply need to be accepted. At the same time, we need to draw red lines that cannot be crossed concerning the system’s fundamental rules, such as the rule of law (including the separation of powers and judicial independence), which are non-negotiable and must be respected by everyone.

states' judiciaries are subject to its jurisdiction (this had not been obvious earlier). This opened the way to the Commission filing a complaint in 2018 on the violation of EU rules by Poland's law on the Supreme Court. In response, the Polish government withdrew the controversial provisions within a month. Despite this success, the problem of the undermining of the rule of law in the EU has not been solved. In Poland and Hungary, judicial independence is increasingly curtailed.² In certain other member states, challenges to the rule of law are growing, too.

The EU needs new instruments for enforcing compliance with the law. This is why the European Parliament's decisions in January 2019 to link payments from the EU budget to the rule of law in member states and establish a Rights and Values Programme (RVP) supporting grassroots democratic efforts are so important. The RVP's rules have already been approved by the Council of the EU. It still needs to approve the size of the funds and the budget conditionality mechanism. This will be part of the EU multiannual budget negotiations. Member states must not be tempted to trade this strategic issue for other, more immediate gains.

A programme for citizens

The Parliament's decisions showed that EU institutions have matured enough to be more decisive and innovative when it comes to the rule of law. Until recently, many of the solutions adopted as part of the RVP were considered totally unrealistic; too "revolutionary" for the EU bureaucracy's conservative standards.

The funds' scale is significant: EUR 1.83 billion for 2021–2027, three times more than the European Commission initially planned. If the RVP were allocated based on country's populations, Polish organisations would get around EUR 19 million a year on average. The largest amount, EUR 850 million, will go towards the "Values" strand (activities supporting democracy). The other two strands, "Equality, Rights and Gender Equality" (anti-discrimination measures, especially regarding women) and "Active Citizenship", will receive around EUR 500 million each.

The RVP is innovative for three reasons.

Firstly, it is the only financial instrument in the EU's history protecting and promoting democratic rules within the EU, rather than in third countries. Its priorities are formulated very clearly; they include supporting NGOs that defend judicial independence, media freedom, freedom of assembly and academic freedom, along with whistle-blowers who report violations.

Secondly, a large part of the funds will go to NGOs operating at the national, or even local, level (in the "Values" strand, it is supposed to be at least 65%). As democratic forces have been saying for months: democracy cannot be defended or built solely at the level of big supranational consortia. Local NGOs, rooted in a country or region's political and cultural reality, are key.

Thirdly, the programme introduces an emergency response mechanism, which can be used if there is a "dramatic and sudden deterioration" in the rule of law in a member state. The Commission can then open a special, simplified funding route for pro-democratic civic activity. This is a clear departure from

² The state of the rule of law in Poland. Actions taken by EU institutions and unaddressed European Commission recommendations: <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Stan%20praworzadnosci.pdf>.

the EU's approach so far – involving long-term, stable funding – towards reacting flexibly to a changing and unpredictable reality.

Financial conditionality

In the second regulation adopted, the European Parliament decided that the Commission will be able to suspend access to or withdraw funds in the EU budget from countries in which problems with the rule of law threaten the reliable spending of EU funds.

Serious departure from the rule of law includes threats to judicial independence (especially that of judges), when state institutions are unable to prevent illegal actions by governments, enforce judgments and investigate violations of the law.

The Commission has been authorised to take restrictive steps if problems with the rule of law endanger the functioning of the free market, the rules of competition, the transparency of financial management and with the general obligations resulting from EU and monetary union membership. The new mechanism's scope could therefore be very broad. It goes beyond countries that have adopted laws openly undermining judicial independence (like Hungary and Poland) and could encompass countries struggling to combat corruption and fraud due to ineffective institutions.

The decision to suspend funds will be made by the Commission. Its motion can be vetoed within a month by a parliamentary majority or a qualified majority in the European Council (55% of countries, representing 65% of the EU's population). The procedure has been designed to make it very difficult for a coalition of "free riders" to block the Commission's actions.

The regulation places considerable emphasis on obtaining comprehensive and objective information on the rule of law in member states. This includes appointing a special expert panel that will play a consultative role for the Commission. It will have one expert from each member state, plus five chosen by the Parliament. Every year, the panel will prepare an assessment of the rule of law in EU countries (decisions would be based on a majority of votes), resulting in a comprehensive, regularly updated "map" of the rule of law in all member states.

The Parliament also plans to create a whistle-blower mechanism. Recipients of funds in member states will be able to report abuses that affect them. A special website where people can report them safely, without being exposed to "retaliation" by the perpetrators, will be established.

The mechanism linking payments from the budget to the rule of law will involve far-reaching protection of the final recipients. A reduction in funds from the EU budget will increase the amount that a member state's government will have to contribute to a given project. The sanctioned country's authorities will have to meet their obligations towards the subsidy's recipients, such as researchers, students or farmers.

How can order be restored?

The new solutions fill the gap in existing mechanisms for protecting the rule of law in the EU. Actions taken as part of Article 7 (warning, recommendations) will become more than innocuous complaining; if needed, they can be backed up with concrete financial sanctions. The Commission will not only

be able to cite problems in a single country; it will have regular assessments of the rule of law in all member states. Moreover, the civic dimension has been added to the EU's instruments for supporting the rule of law. This is a response to the idea that the rule of law and democracy in the EU cannot be maintained by top-down methods alone; ordinary people should be involved in the process. Finally, countries that break common rules undoubtedly need disciplining, but constructive long-term action – such as educating people and promoting certain values – is also needed. Until now, this dimension was only visible in EU policies to a very limited degree. If the new solutions enter force, they will significantly increase the EU's ability to restore and maintain the rule of law and liberal democracy.

For the legislative process to be completed, the financial conditionality mechanism and size of allocations for the RVP still need to be approved by the Council of the European Union. This approval will depend on the negotiations concerning the EU's next multiannual budget. A few member states will probably want to neutralise the solutions adopted by the Parliament; above all, the potential targets of these mechanisms – eurosceptic governments that undermine the rule of law. The other players must not succumb to the temptation to trade this issue for other, seemingly more important and more profitable gains. This requires that civil society pay attention, but also that all pro-European forces relentlessly draw attention to threats to the rule of law.

How the new instruments are implemented will be key to restoring order.

Firstly, the financial restrictions must only be used for restoring the rule of law. Disciplinary actions will inevitably result in countries claiming that they are being “persecuted” due to conflicts of interest with stronger players. It must be clear that withdrawing funds is not linked to any other political objectives, however legitimate they might seem. For example, during backstage discussions on limiting access to the EU budget, there were suggestions that restrictions could also apply to countries that show a lack of solidarity and refuse to take in refugees. Fortunately, there is no trace of this thinking in the regulation. Similar ideas must not creep into the EU's actions as it implements the new mechanism.

Secondly, it should be clear from the start that financial restrictions are not “whipping the poor”, but can be applied equally to all member states. Politicians in richer member states should avoid the narrative of “indignant donors” and “insubordinate recipients”, which is dangerous for EU unity. The asymmetry inscribed in the mechanism makes this even more important. Countries that receive more from the budget than they contribute have more to lose from financial restrictions. The regulation's provisions on obtaining reliable knowledge, including appointing the expert panel, guarantee that the Commission will have objective and in-depth information on the situation in individual member states. The risk is therefore not that innocent countries could face restrictions, but rather than not all guilty ones will be treated equally. The Commission must not use double standards, ignoring the violation of the rule of law in stronger and more influential countries. Here, grassroots civic actions can help.

Thirdly, when implementing the RVP, a key question needs to be answered: what can be done to make pro-EU circles, understood in the widest possible sense, consider the programme “their own”, without supporting entities that contest the foundations of the European legal and normative order? In other words, how can “free riders” be excluded, while remaining inclusive towards proponents of a range of views, whether the progressive left or the conservative right? The inclusion of all pro-EU circles should be treated more seriously. If this is neglected, the RVP could deepen divisions between supporters of a united Europe, rather than integrating and mobilising them. The alleged favouring of certain

ideological forces is likely to be exploited by those who feel threatened by citizens' pro-democratic efforts.

The answer to these questions is not obvious and significantly beyond the scope of the RVP. It touches on one of the key challenges for the EU today as a project based on shared rules and values. It is essentially a question about the limits of the pluralism when it comes to values and fundamental norms, beyond which systemic tolerance ceases. The RVP and other instruments for protecting the rule of law cannot be applied effectively without open discussion on this topic. The deep ideological divisions not only between supporters of European integration and its opponents, but also within the former camp, need to be acknowledged. It may be time to admit that some of these differences (such as attitudes to civil partnerships or abortion) should simply be accepted. At the same time, pluralism and tolerance must have clear limits that cannot be crossed. Some fundamental norms, such as support for the rule of law and judicial independence, should be recognised by everyone and are non-negotiable. The EU sorely needs this kind of debate now; its conclusions should be considered when preparing the guidelines for the new programme. The RVP's "Equality, Rights and Gender Equality" strand demands special attention here, as it includes areas that are sensitive due to deep differences between supporters of the EU.

Finally (and crucially), decisions on how the RVP and mechanism linking payments to the rule of law are implemented must be apolitical and based on objective grounds.

This does not mean that leaders in Brussels and member states should withdraw from the process completely. Today, EU institutions need strong political legitimisation to defend the rule of law. Politicians must speak unambiguously on the rule of law, both in national debates and at the EU level. It should be clearly stated that the rule of law cannot be deemed the domain of national interests. It is a fundamental issue, without which the project of integration will not survive. For the new solutions to work, the pro-European majority (leaders and ordinary citizens) cannot stand aside passively, hoping that others solve the problem. Rather, it must actively defend shared European principles.



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