

The role of EU institutions in protecting the rule of law in Europe

Thank you for inviting me to address the participants of this webconference. In my capacity as the European Parliament's rapporteur for establishing an EU mechanism on democracy, the rule of law and fundamental rights, I follow the work of the European Network of the Council of the Judiciaries with great interest. Professional associations such as yours possess a unique legitimacy to uphold standards and I hope that your work will continue to promote the rule of law in Europe.

In my intervention I will try to reflect on the role of EU institutions in protecting the rule of law in Europe. I will talk about what I think went in my opinion wrong, what went right and what we need next.

First, what went wrong. How is it possible that more than 10 years since the entry into force of the Lisbon Treaty and 16 years since the 2004 enlargement, there are at minimum two Member States that are seriously undermining rule of law principles? Before things began to unravel around 2011, there was a general feeling of security about the state of liberal democracy in EU Member States. Sure, there were problems with corruption and other issues, but few expected the EU to harbour quasi-autocratic regimes just ten years later. After all, the promise of the 2004 enlargement was to consolidate the democratic direction of Central and Eastern Europe and achieve not only higher material standards but also fairness and justice. The lawless era was meant to be the 1990s, not the 2010s.

The domestic determinants of rule of law backsliding are numerous and I will not go into them. But why hasn't the EU done something about state capture in Hungary and Poland? The short answer is that it wasn't prepared, and in fact it was intentionally set up not to be prepared. What I mean by this is that the Member States have envisaged only an extremely limited role for the EU in counteracting democratic and rule of law backsliding (which as we see are linked) in the form of Article 7 TEU. The history of this decision stretches all the way back to the 1950s when the project for a European Political Community, with its explicit roots in respect for democracy, the rule of law and human rights was abandoned in favour of a pure market integration regime. The EU has been playing catch-up with its constitutional roots ever since, but this has become especially acute in the past decade which revealed that the EU was ill-equipped to stem the illiberal tide in Hungary and Poland.

The extremely high threshold for using Article 7 TEU has so far largely prevented it from effectively staring down governments destroying the rule of law. Despite its ineffectiveness, great efforts were made on the parts of the two governments concerned to delegitimize the process, which goes on to

show that facing the reality of backsliding and having an open debate has been largely taboo at the EU institutional level. In my view, the sometimes undignified scenes that accompanied some of the hearings, as well as the fact that the Parliament as an initiator of the procedure against Hungary was left outside the meeting room, only confirm the need for us to push harder for an honest and regular debate on the state of the rule of law in the EU. If we are not honest with ourselves about the grave problems in some Member States, we cannot expect to ever tackle them.

And the constitutional problems created by interference with the judiciary and other independent institutions are not just academic and domestic. Most of us are aware of a growing number of cases in which judges from other Member States refuse to extradite suspects to Poland, citing doubts about whether they can get a fair trial after the assault on independent judiciary. We should be wary of this creeping decentralized disintegration and gradual erosion of trust affecting all European cooperation. National judiciaries are essential in guaranteeing citizens' right derived from EU law. They ensure that the law operates in practice rather than just remains on paper. Without judicial independence, citizens and businesses may rightly fear for their EU rights. Access to the Court of Justice through the preliminary ruling procedure would be conditional on the referring court's independence. And it is obvious from the Polish case that safeguarding judicial independence falls to a large extent to National Councils of the Judiciary, which themselves need to be protected from undue influence.

In my view, the one EU institution that really stood up and was counted in this ongoing rule of law crisis is the Court of Justice. The Court realized earlier than the Commission that the situation in Poland in particular is grave, and its implications for the way EU integration currently operates equally so. As a result, court actions have emerged as the leading EU contribution to the fight against rule of law deconsolidation.

Nonetheless, we cannot rely on the ECJ like this forever. We need a positive agenda and political will to protect the rule of law in Europe. What was for a long-time implicit—a shared commitment to democracy, the rule of law and fundamental rights—needs to nowadays be made explicit for the EU to survive. In the long run, the EU needs to revise its Treaties to robustly condition membership on respect for its basic values, including by a range of credible sanctions if necessary. In the short run, we need a regular mechanism for assessing the rule of law situation in each Member State with political follow-up at both the EU and national level.

I therefore welcome the fact that the Commission has begun this year with an annual rule of law monitoring cycle. The Parliament has called for such a mechanism already in 2016. I am personally responsible for a report that will try to envisage how this monitoring cycle can be made stronger, among others by covering democracy and fundamental rights. This monitoring will help break the

institutional taboo that Member States are somehow unrepachable. It will help foster reflection on the state of the Union and the role of our common values. It will help put values on the agenda of the EP and in particular the Council which has proven itself so reluctant to discuss the problems. Finally, we should strive to link the outcome of this monitoring with a sanctioning mechanism if Member States continue to undermine the rule of law. It is therefore of utmost importance that the Commission proposal concerning budgetary conditionality is passed as part of the MFF package, with reverse qualified majority. It is unacceptable that EU tax-payers' money is used to buttress dubious autocratic projects. Now is the time to face these challenges head on.

Thank you for your attention.