Respecting rule of law beyond EU Enlargement: Does the EU have what it takes?

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Introduction

The rule of law is enshrined in Article 2 of the Treaty on European Union (TEU) along with respect for human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities, as a shared value on which the Union is rooted. Since the Treaty of Lisbon these are recognized as constitutive EU values. As such, rule of law defines the collective identity of the whole organization and thus essentially determines the EU’s action in the domestic and international realms (Articles 21, 3 (5) and 8 TEU), as well as conditions for EU membership (Article 49 (1) EU).

However, not only EU aspirants, but also several EU Member States are confronted with grave threats to the functioning system of rule of law. In some cases, for example in Italy or Greece, these challenges have never disappeared, while in Hungary and Poland they re-emerged after the countries had joined the EU. Acknowledging the danger of observed rule of law backsliding across the EU and beyond, the European Commission President Ursula von der Leyen acknowledged in her political guidelines for the Commission that “threats to the rule of law challenge the legal, political and economic basis of how our Union works” (2019). As a result, the EU is currently confronted with the double challenge of promoting the rule of law within the Union and in regard to future members.
Common challenges to the functioning rule of law —

European integration has made a significant and lasting contribution to a rule-based order in Europe. Yet, over the past decade problems with democratic pluralism and governance based on rule of law are increasingly observed throughout EU Member States. The systematic and deliberate erosion of the rule of law in Hungary under Viktor Orbán’s government is already well-known (Uitz, 2020), and has been emulated by other EU member states, particularly Poland (Pech, 2020). In September 2018, the Commission actually had to refer Poland to the ECJ for the adoption of a new law on the Supreme Court, which was one year later assessed in breach of the principle of judicial independence.¹ Despite the far-reaching reforms enacted in preparation for EU membership, Bulgaria and Romania are still subject to a specific post-accession monitoring system in the sphere of rule law. Moreover, not only ‘new’ Member States, but also more experienced EU countries, such as Italy with problems in the sphere of media pluralism, or Greece with poor governance as revealed by the euro crisis, are struggling with rule of law implementation.

On the other hand, despite being exposed to EU rule of law promotion mechanisms within the Stabilisation and Association Process (SAP) for more than two decades, the respect for the rule of law in Western Balkan candidate countries - Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia - has been steadily declining for over a decade. The enduring problems regarding the rule of law in the Western Balkans are not new and have been noted over the years, including by the latest Freedom House Freedom in the World report (2020) that observes an absence of the rule of law and an increase in patronage networks and clientelism, which threaten democratic institutions in the region. Similarly, the European Commission in its 2018 Communication
on a credible enlargement perspective for the Western Balkans departed from its usual technocratic account of the state of the rule of law and straightforwardly declared that the countries show “clear elements of state capture, including links with organised crime and corruption at all levels of government and administration, as well as a strong entanglement of public and private interests.” (European Commission, 2018).

The apparent absence of the rule of law across Europe is mainly observed through the creation of regime-centred legal settings allowing for utter arbitrariness and violence of the ruling elites. This has led to a wide-ranging erosion of independent institutions and control over the judiciary and independent media, a feature that the Western Balkans share with a critical number of EU members. Thus, the erosion of rule of law requires a response both within the EU and towards future member states.

Does the EU have what it takes?

In an answer to the rising rule of law problems across the Union, the European Commission announced a new toolbox of measures in 2019 that would build upon the 2014 Rule of Law Framework and rulings by the ECJ. Correspondingly, the respect for the rule of law has been spelled out as one of EU’s ‘fundamental’ conditions for Western Balkans EU enlargement.

However, both strategies suffer from major shortcomings that put into question their overall effectiveness. This can be seen in all three pillars of the Union's rule of law enforcement, namely 1) the EU’s ability to effectively answer in situations when a problem of sufficient significance is detected, 2) the EU’s capacity to monitor and intervene at an early stage of rule of law deterioration, and 3) the lack of effective mechanisms for spreading of rule of law in Europe.
First, Member States are vetted for their compliance with the rule of law before they accede to the Union. However, to this date effective mechanisms to supervise and regularly monitor adherence to the rule of law and other foundational values after accession remain in infancy. The combination of supervision instruments - actions before the ECJ and the infringement proceedings brought by the Commission - could prove effective in exerting pressure on breaching Member States. Still, the procedure to invoke a clear risk of a serious breach under Article 7(1) TEU remains unattainable due to high decision-making thresholds. Alternatively, the suspension of membership negotiations and any financial assistance from the EU could be imposed on a prospective member for breaching the rule of law. Yet, this procedure suffers from a different set of problems, as a single Member State can raise the overall balance clause to prevent further opening of negotiating chapters until satisfactory progress on the rule is achieved. Such a setup risks repeating the apparent mistake of 2019 French veto on opening of North Macedonian and Albanian EU accession talks. Hence, in the event of Treaty change, reviewing Article 7 TEU to lower the thresholds for decisions would be preferable and should take the form of reversed qualified majority, while gatekeeping in steps leading up to the – and not including – EU membership, requires a higher threshold.

Second, the ‘new’ EU approach on Chapters 23 and 24, ‘Judiciary and fundamental rights’ and ‘Justice, freedom and security,’ introduced for the first time in the Croatian negotiating process, relies on an interim benchmarking system that would assess the country’s preparedness to open and close a negotiating chapter, and introduces safeguard measures, most notably the overall balance clause intended to stop negotiations on all other chapters if progress on the rule of law begins to lag behind. However, in practice interim benchmarks are very broad and represent a long-term goal, which makes their assessment rather superficial. In addition, the benchmarks are not tailored to the specific circumstances of the countries they target, as seen in the example of
identical benchmarks developed for the two Western Balkan accession frontrunners – Serbia and Montenegro. Similarly, the case law of the European Court of Justice and the European Court of Human Rights that provide for the key EU rule of law requirements to be respected by the EU and its Member States, are not always sufficiently known. To fill up these gaps, it would be useful that the EU develops fundamental set of rule of law benchmarks that would be applied on candidate and members states alike, notwithstanding the need for acknowledging their specific contexts and legal tradition.

Next, the likelihood of the effectiveness of EU rule of law efforts decreases with the number of domestic veto players incurring net effective power losses stemming from reforms. Recent convictions of the former Croatian Prime Minister Ivo Sanader on corruption and of former Macedonian Prime Minister Nikola Gruevski on embezzlement charges, serve as a striking example of the harmful effect which EU reforms can have for established elites. Ongoing EU rule of law efforts are state-centered with strong emphasis on law reform and government institutions, particularly judiciaries, whereas civil society is at best adjunct to the institution building process. There is, however, a strong need for a more inclusive bottom-up approach to EU rule of law promotion, in which civil society actors, including constructive grassroots and local initiatives, are empowered to play a rights-holder’s role vis-à-vis public authority. This would help to push for compliance of key laws, monitor their implementation and influence norm internalization, before, during, and after EU membership negotiations.

Finally, while the EU has put a considerable effort into promoting the rule of law, at the same time it has been rather unsuccessful with preventing concurrent democratic backsliding. The EU is wrong to believe that the rule of law can be protected on its own, as it continues to disregard other principles and values enshrined in Art 2 TEU. From a doctrinal and practical point of view, at least democracy should be equally included under EU scrutiny.
The way ahead for our shared European future

As this study has shown, EU leverage in the past decade has not been sufficient to promote rule of law in countries seeking to join the Union, nor has membership provided a sufficient safeguard by itself. EU rule of law policies thus require providing tools for both members and future members. While the accession process can provide leverage, if successful, it cannot prevent backsliding after accession, as no democracy and rule of law-based system is ever completely immune to setbacks. This requires developing joint strategies for current and future member states.

These include the identification of rule of law setbacks, such as rolling out the EU justice scoreboard for all countries of the Western Balkans and also developing coherent methodology to focus beyond the judiciary to other aspects of rule law and democracy, i.e. free and fair elections, media freedom, checks and balances, informalities, anti-corruption, etc. Ideally, existing monitoring tools should be integrated under one authority that would regularly observe compliance with the Union's values. The European Fundamental Rights Agency (FRA), assisted by local expertise, could expand its scope of work to cover current and prospective EU Member States by means of regular assessment on specific legal and political measures concerning rule of law and democracy. In addition, rule of law expert missions like the 2016 Priebe group established in North Macedonia and since identified as a common tool for the Western Balkans, could also be used within the EU.

Of course, the identification of problems is not sufficient by itself, as in most cases governments deliberately undermine the rule of law and thus are only susceptible to change their approach due to domestic or international pressure. The strong and hostile reaction of the Polish government and president to the recommendation of the Venice Commission of the Council of Europe in January 2020 highlights
the need for effective enforcement mechanisms. In order to be effective, the sanctions have to be possible during the accession and post-accession period, i.e. not exempting EU members to discourage backsliding or strategic and incomplete reforms. These could include accelerated infringement procedures and the development of the equivalent for countries negotiating accession. In particular, the post-accession rule of law conditionality that could block financial support should be used. As part of proposals for the 2021-2027 Multiannual Financial Framework, the Commission has established a connection between the respect for the rule of law and the Union’s budget. A constructive step forward should enable the Council to decide by a reverse qualified majority on reduction of EU funding for Member States in systemic breach of rule of law and democracy.

So, how can the implementation of democratic laws be ensured, and how can the independence of state institutions be secured in order to substantively reinforce democracy? The EU must find new allies in this endeavour. Success rests upon the precondition of eradicating the root causes of illiberal elite-centred political systems. The key remains to unlock new political dynamics that would enable to break away from the established patterns of clientelism, informal networks and strong party control over media and state institutions. In other words, liberal structures must be strengthened in order to persistently challenge illiberal power structures and norms. Therefore, it is necessary to include additional – non-political as well as expert actors in the process of EU rule of law promotion who would complement EU’s efforts by means of convincing national elites of the need to internalize EU values. Basically, it is essential to achieve the transformation of traditional top-down power structures in which governments are at liberty to influence both legislative and judiciary branch through clientilistic networks and/or methods of more or less open pressure into a horizontally structured civil society based on the rule of law. In concrete terms, civil society empowerment should strengthen their expertise, capacities, and technical know-how; provide for regional and international networking.
possibilities with the aim of establishing support mechanism for their systemic resilience; help local fund raising; and, better connect civil society to politics. The EU should commit to *diverting financial aid* from governments to civil society in countries whose administrations breach core democratic norms. In addition, more funding must be provided to *protect civil society activists* from state repression in countries with shrinking democratic space. Specific efforts should be made to *support constructive grassroots and local initiatives*. If this does not happen, the prevalence of these patterns will cement the democratic smokescreens behind which business as usual shall continue in decades to come.
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IDSCS is a think-tank organisation researching the development of good governance, rule of law and North Macedonia’s European integration. IDSCS has the mission to support citizens’ involvement in the decision-making process and strengthen the participatory political culture. By strengthening liberal values, IDSCS contributes towards coexistence of diversities.

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