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Rechtsstaatlichkeit – Illusion oder Wirklichkeit?
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In 2012, the EU won the Nobel Peace Prize in part for advancing “democracy and human rights in Europe”.

In 2022, the EU is home to the two most rapidly autocratising countries in the world, with one of these two EU Member State no longer a democracy.

To make matters worse, what “rule of law backsliding” is spreading with the EU facing a wave of autocratisation both internally and externally.

Rule of law backsliding can be defined as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.

One of the key features of this process of weakening checks and balances is that it reflects a deliberate strategy of a ruling party whose (unadvertised) goal is to establish electoral autocracies (with elections possibly “free” but no longer “fair”) and the progressive solidification of de facto autocratic one-party states.

As of today, and following years of deliberate and sustained top-down undermining of their national system of checks and balances, the EU includes the world’s top two autocratising countries: Poland and Hungary, with the latter no longer recognised as a democracy but rather an electoral autocracy according to the classification done by the V-DEM Institute.

In 2012, the Norwegian Nobel Committee also highlighted “the granting of candidate status to Serbia” as a positive step which strengthens “the process of reconciliation in the Balkans”, and similarly praised “the possibility of EU membership for Turkey” which “also advanced democracy and human rights in that country.”

Ten years later, Serbia has backslided into an authoritarian regime with Turkey outdoing Serbia in this respect. And in the space of ten years following the awarding of the Nobel Peace Prize to the EU, Europe has become the continent which is home to 4 out of the 5 countries – which includes 2 EU Member States and 2 EU candidate countries – whose authorities have deliberately and systemically dismantled checks and balances the most in the world.

According to the latest report about the state of democracy in the world published by the V-DEM Institute, the situation may be about to get seriously worse with the EU seemingly facing an internal wave of autocratisation with 6 out of 27 EU members states – more than 20% of the EU – autocratising in 2021. These 6 EU countries are Slovenia (one of the top autocratisers in the world over the last three years), Croatia, Czech Republic, and Greece.

While not mentioned as recent examples of backsliding EU countries, Romania and Bulgaria have also faced severe backsliding episodes in the past and most recently, Romania’s Constitutional Court has started a process of systemic disregard of the EU’s rule of law

requirements following the Court of Justice's first judgment in 2021 regarding Romania's judicial "reforms" previously adopted during this 2017-2019 backsliding episode.

This is reminiscent of what has previously been happening and is continuing to happen in Poland since 2015 where Polish authorities have essentially reinstated what amounts to a "Soviet-style justice system" where, to quote from the European Commission's own analysis, the executive and legislative powers can now 'interfere throughout the entire structure and output of the justice system'. To do so, Polish authorities have repeatedly and deliberately violated the Polish Constitution, EU and ECHR requirements relating to the principle of effective judicial protection and refused to comply with multiple rulings and orders from Polish and European courts. This process culminated in the ruling party's unlawfully composed "Constitutional Court" holding both the rule of law related case law of the Court of Justice and the European Court of Human Rights "unconstitutional" in the past year.

Rule of law backsliding represents a critical challenge for the EU because it represents an existential threat to the EU as it structurally undermines the fundamental premise on which the EU's interconnected legal order is based.

In light of the continuing deterioration of the situation on this front – which was entirely predictable and was indeed anticipated by the European Parliament many years ago – the President of the European Court of Justice was forced to publicly warn last November about the "extremely serious situation" the EU finds itself in, which "leaves the Union at a constitutional crossroads" with the EU's "foundations as a Union based on the rule of law" now "under threat".

A few months prior to this speech, in a case concerning Polish rules relating to the secondment of judges, EU Advocate General Bobek warned about the potential emergence of legal back holes within the EU itself and the potential "collapse" of the EU legal order if this happens.

I would submit this is no longer a potentiality but a reality in at least one EU Member State as how else could one describe a Member State where hundreds and hundreds of "judges" are irregularly appointed via an unconstitutional body and where national and European rulings relating to the right to an independent tribunal established by law are routinely ignored by national authorities.

In the face of this clear and present danger for the continuing functioning if not very existence of the EU legal order, the Council and the European Council have repeatedly failed to fully acknowledge the severity of the problem or match their strong rule of law rhetoric with prompt and forceful actions and sanctions.

One must acknowledge that the resurgence of authoritarianism within the EU itself was unexpected. It is also no easy task to confront national authorities engaged in rule of law backsliding with a fanatical zeal as they have unfortunately multiple avenues to block and/or undermine the EU from within due to the extremely consensual nature/multi-level nature of the EU's institutional framework.

That said, both the Commission and Council deserve in my view strong criticism for seeking refuge in the creation of new tools to avoid having to enforce the tools they have. In this respect, we fully share the view recently expressed by Professor Kelemen:

The EU has always had in its possession the necessary tools to steer backsliding member states back towards democracy – or at least to strongly discourage any others from following their lead. Unfortunately, EU leaders have refused to apply these tools ... Instead, partisan politics, economic interests, norms of non-intervention, and failure to appreciate the seriousness of the disease have together led EU leaders to embrace a fatal mixture of passivity, fecklessness, and appeasement.

Strong rhetoric, reports – no matter how many and how regularly they are produced – and dialogue based processes will not help address the kind of legal hooliganism we have witnessed in some Member States. We need first and foremost prompt enforcement by the European Commission and prompt requests to the Court of Justice for dissuasive financial sanctions when orders and judgments of the Court of Justice are openly violated. The Commission and Council's failure to fulfil their legal and political responsibilities in respect of the situation in Poland is now leading to the overloading of the European Court of Human Rights with more than one hundred pending complaints relating to the destruction of judicial independence in Poland.

To conclude, the survival of the EU as a community of laws and a community based on the rule of law, is very much dependent on whether EU institutions are capable of enforcing EU law, including the provisions enshrining the foundational values the European project is based on.

As recently and forcefully stressed by the Court of Justice in its two judgments of 16 February 2022 regarding the EU's Rule of Law Conditionality Regulation adopted in December 2020, "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which ... are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".

As the Court, sitting as a full court forcefully held, the EU "must be able to defend" its foundational values and in particular the rule of law "which forms part of the very foundations of the European Union and its legal order".

Sadly if not infuriatingly, instead of prompt and meaningful legal action and financial sanctions to deal with the growing autocracy crisis the EU is facing, we have been served a façade of action in the form of toothless reports, regular dialogue and irregular hearings (under Article 7(1) TEU) not to forget inane milestones while EU funding continues to flow to those actively undermining the very foundations of the EU and its legal order.

The EU is failing to deal with its internal and growing autocracy crisis at its own perils.