

# Three misconceptions about the EU rule of law crisis

---

András Jakab

2022-10-17T11:03:51

There are three major academic and political misconceptions concerning the EU rule of law crisis. The first mistake is already in the denomination, as the name 'rule of law crisis' is actually misleading, the second is to believe that 'the EU does not have the necessary legal tools', and the third is to conceive it as a 'crisis only in the Member States affected'. These misconceptions make the crisis look narrower and less threatening than what it actually is, while also offering excuses for inaction.

First, it is far too simplistic to talk about the EU's 'rule of law crisis'; it is more fitting to call it a 'hybrid regime crisis'. What has been happening in the EU's hybrid regimes is more of a twin crisis, namely, a slow decline of *both* democracy and the rule of law. In the last decade, two EU Member States have degraded from liberal democracies to hybrid regimes (Hungary and Poland). These are not full-blown dictatorships, at least not yet, even though the situation is getting worse year by year in both countries, with no end in sight. They are currently in-between in the grey zone. Not only key elements of the rule of law, like judicial independence, but also mechanisms of democratic accountability have been eroded (i.e. 'elections are free, but not fair', both private and public media are centralized and used as a propaganda machine). By focusing exclusively on the rule of law, we are missing the point of how democracy and the rule of law [mutually support](#) each other. It has been commonly known for some time that the rule of law, and especially certain political fundamental rights, are preconditions for a democratic process. However, one should not forget the reverse causality either: namely, that [the rule of law is itself a product of democratic rotation](#); if governing parties have no fear of being outvoted and finding themselves in opposition, they will inevitably be less and less inclined to respect the separation of powers, particularly judicial independence, and fundamental rights. Moreover, if we understand the rule of law as the negation of unlimited government power, then democratic accountability contributes to it itself by being a limitation on government power.

Second, it is outright false to say that the 'EU does not have the necessary enforcement tools'. As a matter of fact, it does. [It always has](#). The problem has rather been that the application of these [enforcement mechanisms](#) depends at one point or another on political discretion. Just to provide a few examples: Firstly, in the infamous Article 7 procedure the Council (of foreign ministers) and the European Council decide at key points of the procedure. Secondly, releasing the recovery funds, which was considered to be the possibly most effective leverage in the hybrid regime crisis, also depended on the discretion of the Commission. It has established 'milestones' for the actual payments in the case of Poland, which milestones, however, [do not tackle the substance](#) of the Polish hybrid regime crisis. In a strictly legal sense, the Commission has acted within its discretion. (The Polish government seems to be reluctant to implement even these unhelpful milestone steps, thus

the actual payments to Poland are now [delayed until further notice](#).) Thirdly, also in the case of infringement procedures, the Commission has political discretion whether to launch them or not – and what we have seen in the last two decades is a stark decline in the number of new infringement procedures. Member States have not become more law-abiding, but the willingness of the Commission to launch infringement procedures [has declined](#). This has been a deliberate strategy from the Commission in order to avoid antagonizing national governments, as they believed that infringement procedures would jeopardize the support for the Commission's planned legislative proposals. The now situation increasingly resembles horse trading: if a Member State is in violation of EU law in, for example, four matters, then the Commission is often willing to look the other way in two cases, if at least the remaining two will be solved quickly. Political expediency rules over law enforcement.

Third, it is wrong to conceive all this 'purely as a crisis of the Member States affected'. It is not only that hybrid regimes are poisoning other Member States (by investing into various foreign media assets or by ruining judicial cooperation through fake judges) and the European Union (by [electing MEPs in unfair elections](#) or by delegating Trojan horse officials in EU institutions). The hybrid regime crisis is actually a *symptom* of the EU's own constitutional malaise. The legal tools are there, but the Commission has so far been unwilling to apply them.

So the real question is how to make the Commission use their already existing powers. There are two pathways:

1. The European Parliament (or any Member State) could challenge acts of the Commission (or acts of the Council that were proposed by the Commission). Four organizations of judges already [challenged](#) the adoption of the Council's decision (proposed by the Commission) to unblock Recovery and Resilience funds for Poland. This Council decision basically softens down the ECJ's independence requirements concerning the Polish judicial system and is therefore substantively illegal – it is unclear though whether the four organizations of judges have *locus standi*. The European Parliament or Member States, however, automatically have *locus standi* (Art 263(2) TFEU), therefore, they could go after such illegal acts. For illegal inactions Art 265 TFEU could be applied similarly.
2. A large part of the problem is, however, that the Commission is not acting illegally: it is their legal discretion whether to use their powers to tackle the hybrid regime crisis. A number of MEPs are frustrated over this phenomenon and would like the de facto behavior of the Commission to be nearer to the [wishes](#) of the European Parliament. The institutional method to achieve that is the *Spitzenkandidatensystem*. This system would therefore not only be an improvement of the EU's own democratic accountability, but this is also the method to rescue the EU from its own hybrid regime. It is time to return to it.