

# The Future of the Rule of Law in the EU

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2023-12-14T12:06:25

The [history of the rule of law in EU law](#) has been one of gradual process of formal Treaty enshrinement followed by the swift development of the EU's "[rule of law toolbox](#)" in response to unexpected [backsliding at EU Member State level](#).

With systemic threats to and violations of the rule of law not subsiding, notwithstanding the expected end of backsliding in the [case of Poland](#), the future of the rule of law in the EU is likely to be one of retrenchment accompanied by increased gaslighting to mask an increased gap between EU rhetoric and EU action. This means that the Commission's decision to unlock € 10 bn of EU funding previously frozen on rule of law grounds to "[sway Viktor Orbán on Ukraine](#)" should not be seen as a once-off aberration but as prefiguration of a new abnormal normal.

Before outlining the main features of this (bleak) future, a broad overview of what I have labelled the EU's "toolbox decade" will be provided.

## The Present: The (Ending) Toolbox Decade

The entry into force of the Lisbon Treaty was followed by a rapid expansion of the EU's rule of law toolbox in response to an unexpected "rule of law crisis" starting with [Hungary in 2010](#). Brand-new rule of law-focused mechanisms such as the [European Rule of Law mechanism](#) were adopted but primarily in an uncoordinated manner and on the basis of an overall diagnosis which one may view as flawed (i.e., the EU allegedly lacked the tools to address backsliding at Member State level).

Notwithstanding the swift development of the rule of law toolbox over a decade, backsliding has continued to gain in intensity in some EU Member States and spread to others.

It did not have to be that way.

At the risk of oversimplification, the EU has failed to tackle autocratisation at EU Member State level because it has prioritised toolbox navel gazing before wasting time (mis)using prevention tools and procrastinating when it comes to response tools.

Hungary, the first EU country to have ceased to be a democracy after a decade of backsliding, is the textbook example of the EU's unmitigated failure to stop autocratic rot. Notwithstanding repeated calls from the European Parliament to take Hungary's top-down autocratisation process more seriously [as early as 2013](#), the Commission and Council did virtually nothing for more than a decade. To this day, they continue to refuse to acknowledge that Hungary is no longer a democracy notwithstanding the [European Parliament's finding to the contrary](#).

The only meaningful but belated action to date has been the freezing of about € 28 bn in EU funding under [three different mechanisms last year](#). Recent developments however suggest this welcome but overdue resolve will be short-lived with the Council and Commission returning to their default setting position of [rewarding extortion tactics](#) by taking seriously cosmetic, [Potemkin-style changes](#) while Orbán is simultaneously introducing a new law making [“Moscow’s foreign agent law look mild and meek”](#).

Poland’s abrupt descent into authoritarianism did see the Commission reacting in a more assertive way but even in this situation, unprecedented in terms of the breadth and intense nature of the attacks on judicial independence, the Commission has done so in [a too little, too late fashion](#). In terms of legal actions, no more than 5 rule of law infringement actions have been lodged with the CJEU in about 8 years, with the Commission furthermore leaving unaddressed the [“main underlying problem”](#) at the heart of Poland’s [“rule of law breakdown”](#).

The Commission did suspend a significantly large amount of [EU funding in 2022](#) but it only did so following Poland’s *own admission* that it does not comply with the EU Charter of Fundamental Rights. The Commission has furthermore refused to activate the Conditionality Regulation on the [most dubious grounds](#) and made access to EU Recovery funding to rule of law milestones so manifestly deficient that 5 Commissioners dissented and several associations of judges [sued the Commission](#) for disregarding the rule of law case law of the CJEU.

In short, the Guardian of the Treaties has not exactly covered itself in rule of law glory notwithstanding the current President of the Commission asserting in 2022 that the [“Commission’s duty and most noble role”](#) is to protect the rule of law – ten years after the then President of the Commission, Mr. Barroso, warned against mounting [“threats to the legal and democratic fabric in some of our European states”](#).

Unfortunately, the gap between the rule of law rhetoric of the Commission but also the Council and the reality of their action has never been so wide. To focus on the sole Guardian of the Treaties due to space constraints, the current Commission is the only one in the history of the EU (this is a non-exhaustive list):

- to have been [sued by the European Parliament](#) for failing to act in a rule of law context and [sued by several associations of judges](#) before being [sued by an association of prosecutors](#) for disregarding systemic violations of the rule of law for political reasons;
- to have seen a [national parliament formally instructing its national government](#) to launch an infringement action in respect of Poland’s “muzzle law” as the Commission was failing to do so;
- to have claimed that no follow up enforcement action was required as regards a CJEU rule of law related order and judgment as they had been complied with only to see the ECtHR disagreeing with this assessment in two Polish cases decided in [2022](#) and [2023](#);
- to have failed to sanction a Commissioner known for his attempts to [doctor Commission reports](#) and [“circumvent and undermine the centrality of reforms in the EU accession countries in the areas of democracy and the rule of law”](#).

It is no wonder that Europe's senior judges have felt compelled to continue raising the alarm in increasingly blunt terms. In 2021, the CJEU President stated that the foundations of the EU as a Union "[based on the rule of law are under threat](#)". Most recently, the CJEU President felt compelled to caution against "[authoritarian drifts](#)" which could lead to the rule of law being replaced with "rule of lawlessness".

## The Future: The (Toothless) Reporting Decade?

The history of the rule of law in EU law began with a gradual but extensive process of constitutional entrenchment. Are we going to go full circle and enter a phase of retrenchment?

One should not expect formal but rather de facto retrenchment. This prognosis may seem counterintuitive as the EU's "toolbox decade" ended with some unexpectedly meaningful enforcement actions primarily in the form of EU funding not being disbursed on rule of law grounds to both Hungary and Poland. Yet, these actions are likely to be the first and last sparks of meaningful enforcement one may expect from the Commission and the Council which, one must stress, have simultaneously undermined the rule of law in other contexts.

This is why it is suggested that we may be entering a third phase in which the EU will no longer seek to project a sense of purpose by adopting new tools and undertaking minimal enforcement action when confronted with the most defiant instances of systemic violations of EU rule of law requirements. Instead, one may expect to see the Commission and the Council exclusively relying on existing but ineffective *permanent* dialogue-based and reporting procedures covering *all* Member States resulting in the *recurrent* adoption for *every* Member State of *non-binding* recommendations. This will be accompanied by assessments claiming compliance or progress even where there is [little or none on the ground](#), and denying or minimising systemic violations when necessary, so as to avoid having to follow up with enforcement action in respect of specific Member States.

In other words, instead of legal and financial action targeting the systemic violators of the rule of law, reports and recommendations in respect of all the Member States will continue to inexorably grow (108 reports and 283 recommendations have been produced within the sole framework of the Commission's annual rule of law report to date) and counterproductively mix minor issues with systemic threats/violations, a feature which only ends up normalising the abnormal and diverting limited resources.

This prognosis is informed by existing trends, the last two of which are more recent and arguably less noticed to date.

The first *tendance lourde* ever since the "failed" case of Austria in 1999 and the resulting urban myth that [EU rule of law interventions don't work](#) has been the lack of political will to meaningfully sanction specific Member States. Instead, the Commission and the Council have developed an infatuation with toothless-by-design [dialogue-based](#) and [report-producing](#) processes in a broader context where the EU's default setting seems to favour spending time on new legislation and tools than

addressing problems, including systemic non-compliance, on the basis of existing legislation and tools. When it comes to backsliding specifically, the different factors explaining the Commission and Council's default appeasement setting has been comprehensively outlined in the work of Professors [Scheppelle](#), [Kelemen](#) and [Closa](#). One may just add that with a European Parliament at serious risk of losing its current pro rule of law majority, there may be no impetus left within the EU's institutional framework to respond to rule of law backsliding with meaningful enforcement action whereas the CJEU can only step in if it receives infringement actions of the right scope at the right time and if national judges are not prevented (de jure or de facto) from submitting rule of law questions to it.

A second and more recent trend is what one may label nonchalant disregard for the rule of law *in* the EU Member States. This trend is visible in countries regarded as consolidated democracies at EU Member State level and whose governments tend to adopt – ironically – a strong pro rule of law stance in the Council. While non-systemic in nature, nonchalant disregard is not only unhealthy if not dangerous in terms of societal support for the rule of law and the country's democratic fabric, it also provides cover for those engaged in systemic violations of the rule of law. This trend furthermore reinforces the *tendance lourde* highlighted above as the Commission has shown an increasing tendency not to act without strong support in the Council, and strong support is unlikely to materialise when even the core EU rule of law countries evidence this trend or are captured by authoritarian populists.

To give a recent example of nonchalant disregard for the rule of law, last month, the French government casually [violated an interim order of the ECtHR for the very first time](#) in an extradition context. One may also mention the French government's prior [reliance on \(specious\) constitutional identity](#) arguments to convince France's top French administrative court of disregarding the CJEU's case law in the area of date retention. Unfortunately, multiple examples from many EU Member States could be easily listed. To borrow from a recent (draft) report by MEP Sophie In'tVeld, we are witnessing the erosion of democracy, the rule of law and fundamental rights across the EU with several Member States engaged in open non-compliance “with EU law in various fields, such as asylum, implementation of sanctions, and human rights law”, a new trend which [“risks making the EU a lawless zone”](#).

In parallel to the trend above, there is increasing evidence of unconcerned disregard for the rule of law *at* EU level where national executives (acting within the Council or the [European Council](#)), with usually the complicity (tacit or explicit) of the European Commission, are willing to disregard their legal obligations and [“treat judgments of the Court of Justice as bargaining chips and adjustment variables for reasons of political convenience.”](#) A [recent example](#) is the nonchalant acceptance by influential EU actors that it is fine to unlock EU money suspended on rule of law grounds regardless of whether the EU's rule of law demands have been meaningfully met in response to a government's extortion tactics. A specific problem in this context has been the CJEU's reluctance to hold EU institutions to account when they themselves violate the rule of law, creating in turn a serious risk that the CJEU itself [“may be perceived as not fully consistent in enforcing the rule of law at the national and EU levels”](#).

Even more problematical and arguably more systemic in nature is the emergence of Professors Kochenov and Gantzy have described as “[EU Lawlessness Law](#)”. One may mention here the example of the EU-Tunisia “memorandum of understanding”. This MoU not only makes the EU complicit “[in abuses against asylum seekers, refugees and migrants](#)”, it was agreed by “Team Europe”, a new and unaccountable negotiation “team” which [has no legal basis in the Treaties](#).

The tendencies outlined above are surfacing in a broader context in which “[the law’s regulating and restraining role appears to be viewed increasingly as an obstacle to good government, not a necessary and indispensable ingredient thereof](#)”. This trend is noticeable in the EU but also beyond the EU with, for instance, the UK currently in [full backsliding mode](#) with its current government willing to legislate a “[dangerous legal falsehood designed to undermine the rule of law](#)” to project a flawed sense of purpose.

As far as the EU is concerned, the tendencies outlined above are bound to further reinforce each other with the EU subject to increasing autocratic contamination and rule of law erosion both from below and from within. And with the EU’s enforcement duo unwilling to seriously defend the values which “[define the very identity of the \[EU\] as a common legal order](#)” but all too willing to treat compliance with the rule of law as a bargaining chip, it is for the rest of us and especially “[constitutional scholars](#)” to tirelessly explain what is at stake; to remind political actors of their “[ecological responsibility](#)” for the constitutional framework based on the rule of law in which they operate; and increase the costs of inaction or complicity in the face of systemic threats to or violations of the rule of law.

*This post is based on a [presentation](#) given at Yale University last week.*

