Deepening and broadening the EU’s Rule of Law agenda

The major challenge the EU faces, is the availability of effective instruments to ensure the rule of law and stimulate improvement once a country is a member state. Most of the current discussion is focused on the (limited) role of the European Court of Justice, the European Commission’s Rule of Law Framework and Article 7. This policy brief maintains that instilling the rule of law in a sustainable manner can be found in a double approach: not merely through top-down, central control EU mechanisms, but also via active investment in national capacities that are strongly embedded in (subsidiarity-based) European networks.

1 Introduction

In October 2016, the European Parliament passed a resolution to ‘end the current “crisis-driven” approach to perceived breaches of democracy, the rule of law and fundamental rights in EU member states.’

The rule of law is particularly a pivotal issue, and a gap exists between the conditions for EU accession (“Copenhagen criteria”) and continued respect while being a member. The major challenge the EU faces, is the availability of effective instruments to ensure the rule of law and stimulate improvement once a country is a member state. Currently, in the search for instrumentation most attention is directed at top-down, central control EU mechanisms; high-level political and legal procedures and monitoring by European institutions. This policy paper explores the relevance of a different, complementary, long-term public management approach: active investment in national capacities via (subsidiarity-based) European networks. Hereby, the paper aims to fill the gaps in the current rule of law discussion by applying insights from developments in other major EU fields.

The outline of this policy brief is as follows: Section 2 briefly discusses the EU’s tendency towards management deficits and presents a diagnostic tool how management processes can emerge (successfully). Section 3 addresses the reality behind the rule of law and the current EU central control discussions. Section 4 critically reflects on the current policy discussions

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1 European Parliament, ‘MEPs call for EU democracy, rule of law and fundamental rights watchdog’.


Section 5 makes observations and reflections to deepen and broaden the rule of law agenda, followed by concluding remarks.

2 From central EU policies to EU management challenges

EU policies seem to go through a cycle. First, policies are agreed (the EU as legal system). Secondly, the policies run into different types of implementation problems (the EU as being prone to management deficits). Finally, and gradually, national, network and European management capacities are created (the EU as multilevel administrative system). The first case study – and popular wave of European integration – is the completion of the single market. At first a ‘management deficit’ had surfaced: although the EU had legal competences and regulations necessary to formulate single market policies, it had not paid similar attention to developing the administrative capacities within the EU to construct, manage and enforce complex cross-national undertakings underpinning the internal market. By analysing the many institutional capacities on the ground in member states, and with the aid of various (independent) national actors and European agencies, a network approach on further implementation and national enforcement developed. Particularly the creation of EU network-type arrangements and their subsidiarity-based networks of national actors proved successful in political sensitive areas such as environment policies, aviation safety and food safety. Arguably, a second example of EU integration, that ultimately has led to principles of reinforced national capacity building processes, is the Eurozone which seems to receive a ‘management deficit’ after primarily focusing on central control. Before the economic crisis, Europe’s economic governance was predominantly based on the Stability & Growth Pact rules and open coordination (the Lisbon Process). The crisis prompted new European control mechanisms such as the European Semester and the intergovernmental Fiscal Treaty, imposing new requirements on member states. Yet, difficulties to implement and enforce effective national reforms based on a top-down approach remain. Gradually, debates about the EU’s multilevel capacity building instruments seem to develop in this policy area too. Discussions progress about a better European Statistical network, the (not independent) position of DG Ecfin in the Commission, national fiscal authorities, etc. The setting-up of the European banking union has recently been confronted with national differences, deficiencies, and decentral supervision gaps in the member states as well. Although each policy field has its own peculiarities, the rule of law might be the third example of such a cycle from policy to effective ‘management’.

After the formulation of the ‘Copenhagen


7 European Commission, European System of Competitiveness Authorities.

8 European Court of Auditors, Ensuring fully auditable, accountable and effective banking supervision arrangements following the introduction of the Single Supervisory Mechanism. See also: 2016 EU-WIDE STRESS TEST, European Banking Authority, Financial Times (29 July 2016).
In addressing EU policy and related (multilevel) management challenges the following three dimensions can serve as a model of diagnosis:  

1) **national capacities**, implying an independent position of the national bodies.  

2) **an European network** (with an independent secretariat or agency) that ensures effective exchange and mutual quality control, with a learning-based visitation system (based on mutual-learning) with independent experts (from e.g. the network-agency).  

3) **the role of the European Commission** in managing the effectiveness of the administrative system/networks. When it is not the responsibility of an independent agency, the question is whether the Commission assumes solely a policy position (focusing on policies and formal implementation) or whether the Commission is actively engaged in network-building and the setting up of review and monitoring systems as well. The latter would prevent potential management deficits.

### 3 The rule of law and EU central control

The relevance of the rule of law is difficult to overestimate: it is a prerequisite for the fundamental values listed in Article 2 TEU, for upholding the obligations as laid down in the Treaties and it is vital for the functioning of and trust in economies and democracies (“Copenhagen criteria”) as well as the external credibility of the EU.

The EU accession process has prioritised the rule of law particularly since 2012: an acknowledgement that it is fundamental to transform societies of the candidate member states for the better. Supportive of this idea is that the rule of law is based on many concepts. It builds on – and manifests itself in – numerous national institutions and organisations, having deep impact on the institutional capabilities of a country and

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11 Such as independence in the appointment of the directors of the national bodies, sufficient resources and human resources, quality systems based on self-assessments and external expert reviews, transparency of policy and assessments, professional rules of procedures, independent complaint procedures, etc.

12 This would imply formalized meeting schedules, leadership and quality review systems and learning teams (including a ‘bite’ in the form of openness of quality reviews, exclusion of the network in case of lack of follow-up from recommendations, exclusion from EU programmes, fines).

13 Quality control in aviation could be used as an example (Icao/Easa - but food safety and other areas provide similar examples).


A functioning rule of law concerns the shape, sanctions, source and substance of rules, implying supremacy of the law that is general, prospective, clear, certain and consistently applied and in accordance to fundamental rights and constitutional democracy. The rule of law is a multidimensional concept, encompassing a variety of discrete components: e.g. economic scholars think of property rights when dealing with the rule of law, legal scholars of formal legality, political scientists of human rights and others mention public order. Thereby, various concepts and organisations are relevant. See e.g. Møller J. and S. Skaanin, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave Macmillan UK: 2014), pp. 17-20, Haggard S.M. and Tiede, L.D., ‘The Rule of Law and Economic Growth: Where are We?’ *World Development* Volume 39 (5) (2011), p. 673 and the World Justice project.

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17 Non-EU would ideally not be the case, as it is mentioned as a general value in Article 2 TEU. However, its legal scope has not been defined properly.

18 A prime-example is the infringement procedure of the EU over the earlier retirement of judges in Hungary which threatened the independency of the court. Hungary was brought before the Court and lost the case. The newly appointed judges could stay however as they were ‘independent officials’. The retired judges could be financially compensated within the legal context of the infringement procedure as it was launched on the grounds of (age)discrimination. Thereby, the real threat, the independency of the court, did not get properly addressed.

Council started annual rule of law dialogues to reflect upon possible improvements of the rule of law in the member states as well.20 A proposal of the European Parliament in October 2016, named an Union Pact for Democracy, the Rule of Law and Fundamental Rights (DRF), binds all existing instruments together. It seeks to streamline them into an annual ‘DFR Semester.’ Annual Reports on democracy, the rule of law and fundamental rights (European DRF Report) will be produced by an independent expert panel and adopted by the Commission with country-specific recommendations. These reports are based on various rule of law indicators and incorporate existing reporting done by the FRA, the Council of Europe, and other relevant authorities in the field. They will lead to EU Council and inter-parliamentary debates with arrangements that remedy possible risks and breaches of the rule of law – or ultimately lead to the activation of Article 7 TEU. The proposal also envisions a DFR policy cycle within the institutions of the Union and also takes into account possible innovative legal proceedings to achieve greater involvement of the European Court of Justice.21

4 Shortcomings of EU central control instruments

As above review shows, and with reference to section 2: the instrumentation of rule of law is developing. There is increasing acknowledgment that the rule of law depends on a broad range of national indicators and that European networks and agencies can play an important role. Considering the prevalent practice of the EU to attempt to step in correctively and punitively on rule of law breaches ad hoc, the Parliament’s proposal is especially a step forward: it seeks to establish a common structural environment in which the rule of law is monitored, debated and improved on a continuing basis by all member states and EU institutions.

Nevertheless, there are still some unresolved deficiencies22 of which two are fundamental. First, the latest initiatives of the Commission and Parliament ultimately boil down to the question and limitation of conferral. Extending top-down control in the area of European values, including the rule of law, in the current EU’s design and functioning is not only problematic in practice but as a principle (democratically and legally).23 The mandate of enforcing the rule of law ultimately lies with the member states in Article 7 TEU; they are to decide collectively, and politically (with risk of a veto). Equally so, attempts

20 Council of the European Union, ‘Presidency non-paper for the Council (General Affairs) on 24 May 2016 - Rule of law dialogue’.
21 One example is to present a bundling of infringement procedures under Article 258 TFEU (to demonstrate that the sum is more than just the sum of its parts), to allow the Court to judge on Article 2 TEU values and show that there is a systemic breach of the rule of law. A possible legal innovation to by-pass a passive Commission and politically reluctant European Council is the idea that a member state could use ‘direct action’ via Article 259 TFEU. See Kochenov, D., Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool, The Hague Journal of the Rule of Law, Vol. 7, 2015, pp. 153-174.
22 European Parliament Research Service, European Added Value Assessment accompanying the legislative initiative report, An EU mechanism on democracy, the rule of law and fundamental rights (October 2016).
23 The rule of law is shared between the EU and its member states and is not entirely rooted in the supranational legal order, Chalmers, Davies, Monti, European Union Law, p. 190-197. Article 4(2) TEU also stipulates the EU will respect the member states ‘national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’
for greater involvement by the Court of Justice are uncertain: the Court may not be responsive due to the existing legal rationale of mutual respect and recognition between member states and the EU, particularly on this issue.  

Secondly, despite the Parliament’s proposal to ‘manage’ the rule of law collectively on a broad range of indicators, in essence the process entails central control and top-level (political) debates in parliaments, the Commission and Council. The myriad of institutions and organisations that constitute the rule of law are thus approached top-down via EU institutions and national governments. As a result, the EU makes use of networks for its central assessments but is less active in terms of stimulating national capacity building and of managing an active (bottom-up) network. In addition, while there is evidence, for example, that central bankers after investment in their epistemic communities that links them across countries can withstand political pressure to a degree and independently take up important cross-national policy coordination, the enforcement of rule of law institutions across the EU through investment in (subsidiarity-based) networks seems insufficiently addressed in the current policy debates.

Indeed, when looking briefly at some rule of law related networks such as EPAC, EUPAN, EJPA, ENCJ and ENIP, it seems that several European networks of national institutions that could together contribute to managing the rule of law in member states are insufficiently or poorly developed. Existing networks are incomplete, have limited agenda’s and miss the necessary vigour. Officials involved in the networks state that ‘our membership does not entail much more than be present once a year’ or that the network ‘has not much clout and merely best practices exchanges.’ Other statements point to the fact that the network has no real agenda or follow-ups, that some national institutional actors are either absent, uncommitted or that the wrong one is present. The EU’s Fundamental Rights Agency, which centrally reports on only a few rule of law related topics, also needs greater involvement than its current role.

5 Managing the rule of law: observations and recommendations

Based on the short review above, one can acknowledge the following in order to potentially deepen and broaden the EU’s rule of law agenda. 1) The rule of law is a multidimensional concept and its resilience is shaped by many national institutions and organisations. 2) The rule of law as a principle cannot be predominantly maintained top-down by, within and via

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24 See Article 4 TEU. Moreover, neither Article 2 TEU nor the Charter of Fundamental Rights have figured among legal proceedings of Article 258 TFEU for example, no matter what kind of violations the Commission was trying to prevent, Kochenov, Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool, p. 13. In addition, the Court has even rejected the accession to the ECHR that could have provided stronger legal basis. The suggestion that individual member states legally have better possibilities than the Commission to address rule of law breaches of another member states may seem plausible but distracts from the unlikelihood of member states bringing each other for the Court on a high political level that puts strains on general cooperation.


26 The execution or administration of EU law is overwhelmingly a matter for domestic authorities and national governments within member states. Administrative actors are central to securing not just enforcement but also popular awareness and acceptance of the authority of EU law, Chalmers, Davies, Monti, European Union Law, p. 187.

EU institutions and national governments, but (should) function(s) alongside national governments as an independent principle. 3) In fields where the EU has had made good progress, it was precisely through the enforcement of capacity building of various national (supervisory) organisations that were stimulated to work together in European networks in the context of (independent) European agencies. 28

4) Given the EU’s legal and political complications for centrally controlling the rule of law in particular, a (decentralised) network approach could especially be a potential complementary instrument. 29

5) Current European networks are not optimally utilised and the EU’s Fundamental Rights Agency plays only a limited role.

This demands from the EU, particularly the European Commission, a distinct complementary approach. Instead of focusing predominantly on short-term central control and taking a policy position, it should actively engage more in long-term network-building and the setting up of review, learning and monitoring systems among national capacities as well. National capacities should directly be strengthened and not solely hold passively accountable top-down but instead become actively responsible in their member state and in the EU via their respective European network as well (according to a type of model described in section 2).

Like the current EU’s central control, this approach would not be free from set-backs either and political hurdles need to be overtaken in what is ultimately also a political process, including the setting-up of this approach. While the rule of law is a different field than, e.g. the internal market, and less ‘technocratic’, it does not prevent the EU to look at the necessary administrative and national capacities and acknowledge basic principles. In addition, the rule of law as a principle of checks and balances is to an extent ‘technocratic’, in the sense that it should be depoliticised to a certain extent once agreement is established. Current central EU action risks a legitimation deficit and is taken, strictly defined, politically (via Article 7 TEU). Instilling the rule of law in a sustainable manner can be found in a double approach: not merely through ultimate top-down and sanction based control but also via long-term investment in national capacities that are strongly embedded in European networks.

The EU should initiate (independent agency-driven) networks that consist of officials of the national institutions and independent experts to cultivate capacity building, mutual learning and common resilience to withstand political pressures. 30 A network that also includes decentralised peer reviews with different levels of ‘bite’ (e.g. in the form of openness of quality reviews, exclusion of the network in case of lack of follow-up from recommendations, exclusion/inclusion from EU programmes, fines/funds). A step-function31 of sanctions/benefits in a network is potentially more ‘technocratic’ and more or less automatic – compared to the high-level Article 7 procedure or infringement procedure – and could present clear signals for building (or preventing) a case for ultimate central sanctions.


29 From a legal perspective the management approach could potentially both overcome the problem of mutual respect as well as activate the principle of positive duty of the fidelity principle (Article 4(3) TEU), which implies that the EU legal system confer responsibilities on national public bodies with organisations on the grounds giving effective consequence to article 2 and 3 TEU.

30 E.g. legal basis can be sought in the combination of Article 2, 3(1), 4(3), 6, 7 and 13(1) TEU, the EU Charter of Fundamental Rights and the basis of the FRA, including article 352 TFEU.

31 If necessary, options for enhanced cooperation should be explored that entails a carrot to join (reputational benefit that e.g. facilitates business investments, or concrete benefits by connecting it to the attainment of funds and the participation in programs).
6 Conclusions

The EU currently struggles with ensuring the rule of law and runs into political and legal difficulties. While the European Parliament’s proposal of October 2016 is a step forward, the EU – in the search for improvement – might overlook the practical implications of effective implementation and institutionalisation of EU policies and values in the long term. Numerous national actors are central to securing not just enforcement but also popular awareness and acceptance of the authority of EU law. This policy brief has aimed to fill the gaps in the current rule of law discussion by addressing the rule of law as a public management challenge. This would require a distinct complementary role by the EU: greater long-term investment in (subsidiarity-based) European networks and independent national capacity building processes (instead of primarily focusing on central control and top-down adjustments). Despite difficulties in this approach as well, given the problematic nature (legally and politically) with regards to EU central control of the rule of law and the preferable independent nature of the rule of law, there are good arguments to focus on such a complementary approach.
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