

The Rule of Law Compromise: The EU's Gift to Autocrats

Article by Laurent Pech

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Following a budget blockade from Hungary and Poland lasting several weeks, EU leaders found a compromise to implement the EU's next seven-year budget, and provide financial assistance to the economies worst hit by the pandemic. While Germany, which currently holds the presidency of the Council of the EU, framed the deal as a success, many commentators see in it an unnecessary gesture towards the EU's two backsliding democracies. We asked legal scholar Laurent Pech for an opinion.

Green European Journal: In July, you forecasted that the German presidency would end in a possible Faustian pact on the rule of law. When looking at the latest developments, would you say that things unfolded in the way you feared they would?

Laurent Pech: I would say that the early prediction made in the summer of 2020 about a possible Faustian pact between the German government and the EU's two autocratic governments has materialised to a large extent. We can mention some concrete examples. First, the two Article 7 hearings, which were supposed to take place in December, were cancelled. Then, more crucially, the German presidency has proposed a so-called compromise, which was accepted on 10 December by the European Council. This "compromise" provides for the delayed implementation of the new rule of law conditionality mechanism. In my view, this has been done in obvious violation of the EU treaties.

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The European Council has seemingly convinced the European Commission not to apply the legally binding regulation until a judgment of the European Court of Justice (ECJ) is issued. We have never seen this in the history of the EU: the Commission, as the formally independent guardian of the treaties, has decided to do what it is told by the European Council, a body which the EU treaties forbid to exercise legislative functions. The German presidency has invented a new concept in EU law: legally binding regulations that do not have to be applied until a judgment of the ECJ has been issued. This concept has been created to appease the two autocratic governments which have been violating the EU's foundational values on an industrial scale for a while now. I never thought I would see this kind of legal sci-fi.

The EU often frames its deals as if everyone was a winner. In this case, are Poland and Hungary the beneficiaries?

EU institutions keep saying that EU values are non-negotiable, that they are not for sale, and there should be no

compromise whatsoever when it comes to the rule of law. But the reality is quite different. The content of the compromise, in the short-term, is a clear victory for the Hungarian and Polish governments, because they have been given time to do even more irreparable damage to the rule of law and the democratic fabric of their countries, and to misuse EU funds until the next national elections in their respective countries (which are expected to take place in 2022 and 2023). These autocratic governments now have ample time to finalise the consolidation of an authoritarian regime and make sure that the opposition will not be able to win the next elections via, for instance, the ongoing destruction of media pluralism in Poland and more rigged electoral rules in Hungary.

Strategically, wasn't it a bad idea to make the rule of law conditionality part of the discussion on the recovery funds? It provided Poland and Hungary an opportunity to blackmail the rest of the EU.

It was indeed a mistake to present it as part of the budget package when the regulation on this new conditionality mechanism could in fact be adopted simply with a qualified majority. My colleague, [R. Daniel Kelemen](#) from Rutgers University has repeatedly argued that the German presidency should have put this regulation to a vote to call Viktor Orbán and Jarosław Kaczyński's bluff. It would have passed and there would have been no incentive for the Hungarian and Polish governments to veto the EU's seven-year budget or the Covid-19 recovery plan.

Wasn't the rule of law conditionality watered down too much, anyway?

The proposal made by the European Commission in May 2018 was promising; it was a balanced, careful text. The European Parliament made a number of positive amendments, seeking to expand the scope, improving legal certainty, and making sure that beneficiaries of EU funding would not be negatively affected. But the German presidency presented a compromise text in September 2020 which was anything but a compromise; I would rather describe it as a deliberate sabotage of the Commission's draft regulation to appease Orbán and Kaczyński. Due to the repeated sabotage attempts made by the German presidency, the Commission must now satisfy a strict multipronged test before it can propose measures on the basis of this mechanism. And now, the very application of the mechanism has been delayed until God knows when.

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In its current form, how long would this procedure take after being triggered?

The ECJ can accept to review this case on an expedited measure, but the average duration of expedited proceedings is about 10 months. Even in a best-case-scenario, it is difficult to see how the Court would be able to issue a ruling before early 2022. Once this is done, the Commission has to finalise some "guidelines". Only then will the Commission be able to activate the mechanism and then you can expect more time before any eventual measures get to the Council. Essentially, by the time this mechanism has any impact there is unlikely to be any rule of law left. Not to mention that we do not know if it will ever actually be activated. The current Commission which has proved to be reluctant to act even when faced with ECJ judgments being openly ignored.

Dutch prime minister, Mark Rutte demanded that rule of law breaches be punishable retroactively as of January 1, even if the implementation of the mechanism is delayed. How can the Commission retroactively punish member states after a year or two, when in most cases the money is already spent by then?

It is not necessarily unlawful to do so as the conditionality regulation does explicitly provide that it shall apply from 1 January 2021. But what if we are faced with irreparable damage to the rule of law? The Commission can recoup the money from the funds which have not been used, or at least freeze those funds. But when judicial

independence is undermined, the damage is immediate, and in some cases irreparable. Recouping the money is not going to help much in the case of Polish judges who are being unlawfully suspended, litigants whose right to independent courts have been violated, or when critics are being legally or otherwise persecuted by their own government.

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There is, however, an immediate solution available: the conditionality mechanism is not supposed to supersede all existing tools. In the case of Polish judges, for example, the Commission could do its job more promptly and effectively by making more proactive use of the infringement procedure and systematically applying for interim measures in the face of obvious irreparable damage being done to the EU legal order. We have to use these more often and more effectively if we want to avoid situations similar to what happened with the Central European University in Budapest. In that case, the Commission won in Luxembourg, but this win came too late. By the time of the judgement, the university had been de facto kicked out of the country in breach of the EU law.

Another problem with the conditionality is that it cannot be applied to issues that are not directly linked to the mismanagement of the spending of these funds...

There has to be a direct link with the sound financial management of the EU budget or the protection of the EU financial interests. A member state could decide to attack civil society groups or discriminate against LGBT people or persecute individual independent judges and yet its actions would fall completely outside the scope of this new mechanism because it would be difficult or impossible for the Commission to establish a sufficiently direct link with the use of EU funds. Thus, the scope of this new mechanism is very, if not excessively, limited. This is why it is important to reiterate that this new mechanism is only complementary.

Will undermining the Commission set a problematic precedent for the future?

In this instance, the Commission was willing to agree to stop being the guardian of the treaties and take instructions from the European Council. This is in complete contradiction with the role of the Commission as defined in the EU treaties. I guess this would not have been possible if it weren't for the fact that the President of the Commission, Ursula von der Leyen, is a former minister of the Head of government currently in charge of the rotating council presidency. So maybe she has failed to adjust to her new role and failed to fully appreciate that the Commission is not supposed to be the personal assistant of the European Council. This constellation is bad and has led to a toxic precedent. Why should the Commission have independent regulatory powers if it is not going to act independently?

The lower house of the Dutch parliament adopted a resolution in early December obliging the government to file a claim against Poland at the European Court of Justice for not respecting the rule of law. Is this a sign that the Commission's duty to act as guardian of the treaties will fall on the member states?

The expression "guardian of the treaties" is in the singular and not in the plural. So, the assumption is that we have only one guardian whose main job is to guard the treaties. However, the treaties also provide for national governments to launch infringement actions. So, this is nothing new: infringement actions can be initiated by national governments against a fellow neighbouring government. This time, the Dutch parliament asked the Dutch government to consider launching an infringement action against the Polish government regarding the violation of EU rule of law requirements. It is not yet clear whether the Dutch government is going to go ahead with this. They have agreed to report back to the Dutch parliament by 1 February 2021. Even if they do go ahead,

the Commission has to be consulted. If the Commission does not want to take the case forward itself, the Dutch government might lodge a complaint before the Court. So, this again can lead to another very long process.

Symbolically, this is indeed an important step. The fact that the Dutch parliament felt the need to put forward the motion and to adopt it is a damning indictment of the current Commission's failure to act promptly regarding the severely deteriorating rule of law situation in Poland.

Hungary and Poland claim that the rule of law is badly defined, Hungarian foreign minister Péter Szijjártó called them “ideological and political criteria”, and Hungarian justice minister Judit Varga argued that there is no clear definition of the rule of law. Is it really as arbitrary as they claim?

First of all, it is important to remember that the Hungarian and Polish governments were the ones who applied for EU membership, and part of the obligations for membership is to comply with the rule of law. The Commission gave the green light to their accession on the basis that they would comply with all EU law requirements. So, now these countries are conveniently forgetting their own legal commitments to the EU.

Their arguments also betray a lack of knowledge of their own legal systems when they criticise the EU for lacking a single provision which would offer a comprehensive definition of the rule of law. If you look at the Polish or Hungarian constitutions, you are not going to find a very detailed definition, because national constitutions are not supposed to be long lists of definitions. This is also why, in the EU treaties, most concepts are not extensively defined. Think of the concepts of European citizen, worker, or the concept of customs duties. In the EU, the rule of law is made concrete in several provisions of the EU Treaties as well as in the EU Charter of Fundamental Rights. The Charter has several provisions describing what the rule of law means, for instance: a right to an independent tribunal, the right to a fair trial, presumption of innocence, effective judicial protection, and so on. It is all there. The EU rule of law has been further defined through the case law of the ECJ, which is exactly the same situation as in Hungary and Poland where the core requirements of the rule of law have been defined in the case law of the Hungarian Constitutional Court and the Polish Constitutional Tribunal (when these countries still had proper independent constitutional courts). The bottom line is the Hungarian and Polish governments are misrepresenting the situation to undermine the legitimacy of EU action on the rule of law front.

Following the compromise on the rule of law mechanism, has another opportunity been wasted after the Article 7 mechanism? What should be the next step? Containment? A two-speed Europe? Should we expect Hungary and Poland to leave at some point?

Legally speaking, no member state of the EU can be forced out. The best you can do if you value the rule of law is to quarantine the governments concerned using the Article 7 procedure to stop the authoritarian gangrene, which would suspend that country's voting rights. The problem with this “quarantine” is that you need unanimity, and therefore, when you have not just one problematic government, but two, they can protect each other. It is possible to find a way around this by suspending them at the same time. But this is not politically realistic considering the likely opposition of governments, for instance the Bulgarian government, whose own rule of law record is quite abysmal. Let us also not forget Slovenian Prime Minister Janez Janša, who seems very keen to defend his “big brother” Orbán.

Nevertheless, Article 7 could still be used more effectively. In the two ongoing proceedings, the Council could adopt concrete recommendations which the Polish and Hungarian governments would have to consider. But nothing is done. We do not even have formal hearings. We also have the infringement procedure but it tends to be used in a too little too late fashion. The main European political parties could also play

their part by expelling their pet autocrats.

Since the EU cannot expel autocratic governments, if the situation gets really bad, it may have no choice but to take seriously the scenario discussed by the Dutch prime minister a few weeks ago in the Dutch parliament. He said if things really get out of hand, there is always the option to reconstitute the EU without Hungary and Poland. So, it would not be Hungary and Poland leaving the EU, it would be the other EU member states that exit the EU (on the basis of the infamous Article 50 as the UK did) and create a new union. But this would be a legal and logistical nightmare. Not to mention that it would not be fair to leave the Polish and Hungarian citizens behind. To avoid this scenario, it would help a lot if the national governments and parliaments of other EU member states would recurrently and strongly denounce the authoritarian developments in Hungary and Poland, and make sure that Hungarian and Polish citizens can again have elections that are not only free but also structurally fair.

Hungary and Poland are not the only countries causing concern. In France, the recent terrorist attacks have led to proposed security legislation that severely curtails press freedom and free expression – fundamental pillars of a society that respects the rule of law. How worried should we be about these developments?

The context and the patterns matter a lot. Some of the measures which have been recently adopted in France can certainly be described as potential violations of the rule of law. No country is immune to its government of the day adopting measures which do not comply with democratic requirements.

But Hungary and Poland are qualitatively different, because there is a pattern leading to autocracy, a blueprint which aims to deliberately and structurally undermine all checks and balances. Such a process cannot be identified in France. It is important not to compare oranges with apples. Hungary is not even considered a democracy anymore by many democracy annual reports and indexes: violations of the rule of law in a non-democratic regime cannot be compared to restrictive measures in democracies.

We can and should criticise what happens in France or elsewhere, but it is important not to use the problems in other countries to engage in whataboutery and normalise an abnormal situation. Poland and Hungary are to date the only two straightforward, obvious examples of severe and deliberate autocratisation.



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