

Oversight of the Rule of Law in the European Union: Opportunities and Challenges

Event Report

Date 16 January 2017

Venue The Bingham Centre for the Rule of Law,
The British Institute of International and Comparative Law

Speakers

- **Dr Petra Bárd** (Central European University, Budapest, Hungary)
- **Prof Ernst Hirsch Ballin** (Tilburg University; University of Amsterdam; and Former Minister of Justice and Interior Affairs, The Netherlands)
- **Prof Carlos Closa** (Institute for Public Goods and Policies (IPP) at the Spanish National Research Council, Madrid (Consejo Superior de Investigaciones Científicas (CSIC))
- **Natacha Kazatchkine** (Senior Policy Analyst, Open Society European Policy Institute)
- **Prof Dimitry Kochenov** (Chair in EU Constitutional Law, University of Groningen, The Netherlands)
- **Prof Tomasz Tadeusz Koncewicz** (Director of the Department of European and Comparative Law, University of Gdańsk, Poland)
- **Prof Kalypso Nicolaïdis** (Professor of International Relations and Director of the Centre for International Studies, University of Oxford)
- **Prof Laurent Pech** (Professor of European Law, Jean Monnet Chair of European Public Law (2014-17) and Head of the Law and Politics Department at Middlesex University London)

Organisers

This event was co-organised by the Bingham Centre for the Rule of Law and the University of Groningen, The Netherlands. It was convened by Prof Dimitry Kochenov (University of Groningen), and Lucy Moxham and Justine Stefanelli (Associate Senior Research Fellows at the Bingham Centre for the Rule of Law).

Background to the event

Article 2 of the Treaty on European Union provides that the EU is founded on fundamental values including the rule of law, democracy and human rights. In March 2014, in response to a number of "crisis events" in some member states that revealed "systemic threats to the rule of law" the EU Commission adopted a new [Framework to Strengthen the Rule of Law](#). In 2016, the Commission considered the situation in Poland under the Framework. In parallel, in December 2014, the Council of the EU established a new [Rule of Law Dialogue](#) to be held each year among member states to "promote and safeguard the rule of law in the framework of the Treaties".

The event provided an opportunity to hear leading experts consider the challenges and opportunities for rule of law oversight in the EU and the role of various EU institutions, including an analysis of the Commission's new Rule of Law Framework and the Council's new Rule of Law Dialogue. In addition, country experts assessed the situation in selected member states, with a particular focus on developments in Hungary and Poland. Speakers also considered what lies ahead, amid recent calls (see [here](#) and [here](#)) for a new binding EU mechanism to monitor the state of democracy, rule of law and fundamental rights in the member states, each year.

The event was held to launch a new book on the topic, '[Reinforcing Rule of Law Oversight in the European Union](#)' (Cambridge University Press, 2016) edited by Prof Carlos Closa and Prof Dimitry Kochenov.

The following is a summary of the speakers' comments during their presentations.

Panel One (chaired by Prof Dimitry Kochenov)

Prof Dimitry Kochenov gave some opening remarks. He commented that aside from Brexit there are other fundamental problems within the EU at present. These include, most notably in Hungary and Poland, a "tremendous backsliding" with regards to the rule of law and adherence to other values on which the EU is based. He noted that the Union is incapable of changing the course of history in those two member states, which is alarming because those two states could be joined by many more. So it is clear that for the EU to be successful, it needs to develop a means to deal with such challenges.

Prof Carlos Closa began by presenting the rationale of the book and introduced the mechanisms for rule of law oversight in the EU. Explaining why breaches of the rule of law are not purely a domestic matter for the "defective state", Prof Closa set out two key reasons why the EU should adopt a stronger role in scrutinising member states' compliance with the rule of law. First, the EU is considered to be a "community of law" which is based on having mutual trust among member states, so instances of the rule of law being undermined at member state level could impact this mutual trust and have a "systemic effect" on the EU as a whole. Second, an argument about consistency – the EU has developed a relatively robust mechanism for assessing compliance with rule of law and other fundamental values of the EU by those seeking accession, but no equivalent mechanism for assessing compliance by member states.

Prof Closa then presented a brief overview of key mechanisms for rule of law oversight in the EU including Article 7 of the Treaty on European Union, infringement procedures under Articles 259 and 260 of the Treaty on the Functioning of the EU, the EU Commission's Rule of Law Framework, the Council's Rule of Law Dialogue and the CVM (Cooperation and Verification Mechanism) applied specifically to Bulgaria and Romania. Prof Closa then outlined some of the principled objections raised about the present systems and also highlighted that institutional/political actors hesitate to use them. He emphasised that one of the main weaknesses that these instruments have in common (except for the Dialogue) is that they are incidental and as such are activated only once there is a breach of the rule of law. In contrast, permanent review systems would secure equal treatment between member states and would be reactive to early warnings of potential threats to the rule of law. Therefore, Prof Closa proposed the establishment of an ex ante permanent scrutiny mechanism that would complement the sanctioning mechanism. He suggested this assessment and supervision should be outsourced to an external body (his preference would be for the Council of Europe's European Commission for Democracy through Law – the "Venice Commission"). Permanent scrutiny would also allow for better peer review not only by other member states but also by civil society.

In conclusion, Prof Closa commented that the essential factor will always be political will, at the EU and member state levels. He also argued that Treaty revision is necessary to introduce, inter alia, stronger sanctions and the possibility of expulsion of a member state from the EU. Finally, he called for a holistic approach and emphasised that all instruments have an important role to play.

Prof Ernst Hirsch Ballin discussed the establishment of a peer review mechanism. He began by commenting that it is not easy to identify a reliable way forward with respect to rule of law oversight in the EU. To be more effective we need a varied approach, including revising the Treaties. He queried however, whether in practice the 'usual suspects' with respect to this topic (namely Hungary and Poland) would agree to Treaty revision, which would ultimately render them more susceptible to challenge. What then, he asked, do we need to do in order to create a situation in which it is possible to discuss for instance treaty revision and the other measures recommended by Prof Closa? He noted that we also have to take into account the real situation at present – see e.g., the "crisis of constitutional values" discussed in the book.

In 2007, Prof Ballin presented proposals for the establishment of a peer review mechanism for the rule of law in the EU, whereby the Council would invite peer review by various legal experts – including judges, lawyers, prosecutors and the police etc. – to promote and protect the "rule of law culture" within their own fields of activity. Although this would not be a "firm response" to the developments in Hungary and Poland, and to some extent in other countries, Prof Ballin questioned whether the 'big stick' of Article 7 is actually effective. The reason he advocated in 2007 in favour of peer review, a softer approach, he explained, was because without sufficient people who really care about the rule of law – in our judiciaries, in our police organisations, in our public prosecutors offices and in the public in general – all the efforts to create more forceful mechanisms with respect to rule of law oversight will be rejected.

From here Prof Ballin questioned how we can overcome this “crisis of constitutional values”. Does the problem stem from the member states or from their citizens as well? Does the importance of adherence to these constitutional values, including the rule of law, lack resonance with some audiences? This is not only an issue in Hungary and Poland, but we see it also with the EU referendum in Britain, for example. Are we facing a situation of “post constitutional citizenship” as well as “counter factual politics”? He concluded by arguing that we need to do more to help audiences understand the value of citizenship and the rule of law. It is never too late to educate and if we can create a situation in which human rights and citizenship education becomes the focus for future developments in the EU then maybe we can create a situation in which the broader proposals put forward by Prof Closa become feasible.

Prof Kalypso Nicolaidis addressed the rule of law dilemma. Giving her perspective on the book as a political scientist, she asked six key questions. (1) Is the rule of law under threat in the EU? The book makes clear that the rule of law is under threat, but Prof Nicolaidis suggested that in our analysis we need to be careful not to single out Hungary and Poland because every member state has its rule of law problems. (2) Why is this a bad thing? Prof Nicolaidis suggested that the book is grounded on the view that it is not only problematic for the Hungarians and Poles, but also for the EU as a whole; that the whole edifice falls apart, the “very fabric of European liberal constitutionalism” is at risk. She explained that the EU is founded on mutual recognition of law – however, explicit mutual recognition would not work without the presumed, implicit mutual recognition of legal structures and their soundness across member states. However, we are now questioning that implicitness. She describes this as “blind trust” versus “binding trust”. (3) What should we do about it? Is there any tension between “peer review” and “permanent review”? Is there a contradiction between expulsion from the EU and the rule of law itself, with its focus on inclusiveness? Why is there so little emphasis on starting with the basics? Why don’t we speak more about mechanisms to empower agents for change at a local level? Prof Nicolaidis noted that there is also an issue of the status of the democratic argument in this question. Is it counter-productive to develop a culture where we have coercive recourse to the supranational?

(4) Should we do more and, if so, where? It is not surprising that we would seek ideas in the enlargement context when we are now investing in the internal question. Of course, if we are going to do this we need to confront what she describes as “the rule of law dilemma” – we need to be both more ambitious (to also look at the institutions, the culture and power structure of a country) and more humble as the EU (including because we do not have one definition of the rule of law across member states). In this regard, Prof Nicolaidis proposed an amended version of the [Venice Commission’s rule of law report](#) and [checklist](#), as a living list of criteria, a citizen-centric notion of the rule of law. (5) Who should be afraid of non-compliance? Prof Nicolaidis suggested that the supranational level here has a narrow understanding of the rule of law and of course the rule of law is wider, the challenge is not enforcement, it is about the cultural ethos of the rule of law. She also argued that the ethos of mutual recognition should be the core that should inspire our understanding of the rule of law. (6) What is the real problem with the EU, of which the rule of law is an element? The deeper problem is the status of politics in the EU. The democratic responsiveness and rule of law responsibility

cannot be disentangled. The self-interest of the rule of law must coincide with the interests of the people. It is in the very nature of the EU and how it evolves in the next few years, that we shall find the keys to credible enforcement of the rule of law in the member states.

For more information, see Kalypso Nicolaïdis and Rachel Kleinfeld, [‘Rethinking Europe’s “Rule of Law” and Enlargement Agenda: The Fundamental Dilemma’](#) (Jean Monnet Working Paper 08/12).

Natacha Kazatchkine discussed the EU’s debate on the rule of law and perspectives from human rights NGOs. She started by commenting that the rule of law EU debate that we have seen in the last five years has created a new momentum for renewed and enriched discussions about the EU’s role and capacity to protect and promote human rights and the rule of law. However, at the same time, she expressed concern at the narrow interpretation of the concept of the rule of law and the weak enforcement mechanisms from the Council and Commission, which have created an increasing unease that there is a disconnect between the EU’s toolbox and the reality of the threat we are facing on the ground and that people are living today. She also noted that it has distracted discussions from some core human rights issues that EU has to deal with on a daily basis: the situation of migrants; the growing discrimination against Muslims and Roma; and extreme counter-terrorism measures.

The Commission’s failure to apply the Rule of Law Framework to address the situation in Hungary has affected its credibility and has tempered the reaction to its decision to act on Poland very much. The Commission’s procrastination with regards to activating Article 7 against Poland has also increased scepticism towards the Commission. This perceived weakness of the Commission’s action is reinforced by the Council and European Parliament pursuing their own rule of law mechanisms. This sends a confusing signal to citizens – where do the EU’s priorities lie? Ms Kazatchkine also noted the failure of the Commission and the Council to properly engage with civil society during these processes and emphasised that creating an enabling environment for civil society is a crucial pillar of any system based on the rule of law. So she emphasised that it is urgent that all three institutions join forces to press member states to respect their human rights obligations; and that the Commission no longer delays activating Article 7 against Poland. She also suggested that it should not be too late for the Commission to engage its Framework in relation to Hungary. She also considered the distinction between prevention and sanction – we are now facing an unfolding crisis in those two countries (see e.g., the recent [Statement by the President of the Venice Commission on Poland](#)). So it is about political will – we now have clear evidence which should lead the EU to act.

Panel Two (chaired by Prof Carlos Closa)

Prof Laurent Pech reflected on whether the Commission’s Rule of Law Framework was a new instrument which was bound to fail. He commented that a number of major shortcomings with the new Framework were identified soon after its adoption. These shortcomings included the lack of a clear definition of what the Commission understood

as systemic breaches of the rule of law, and as a result the possibility that the Framework would be used by the Commission rather subjectively. In addition, the Framework leaves the Commission entire discretion as to if and when to trigger the Framework; and if and when to progress to the next phase of the Framework once activated. A further shortcoming was the lack of the promised triggering benchmarks. Prof Pech emphasised that the most problematic shortcoming could however be the Commission's belief that a discursive approach ("structured dialogue") could convince 'rogue' member states to revise their policies, and stop systematically undermining checks and balances once the Framework had been activated. The non-legally binding nature of the 'rule of law recommendations' and the non-automatic recourse to Article 7 TEU should the recalcitrant member state fail to comply, was also bound to further increase the likelihood of protracted discussions and ineffective outcomes.

A number of additional shortcomings only became clear after the Framework was activated against Poland. In the case of Poland, he explained, this period of structured dialogue has been used by the Polish government to play for time while it consolidates power as quickly as possible before EU institutions start discussing the possible triggering of Article 7. Paradoxically, the Framework appears to have made Article 7 even less persuasive and effective than it was before the adoption of the Rule of Law Framework. Even though the aim of the new Framework to prevent rule of law backsliding was a good one and the Framework itself has many positive features, such a clear definition of the core elements of the rule of law, Prof Pech suggested that we have created "a new window of opportunity for illiberal governments to consolidate power" quickly and present the EU with a *fait accompli*. So, by the time we discuss moving to Article 7, it is already too late to save the rule of law in the relevant country as key checks and balances have either been dismantled or been captured. In conclusion, Prof Pech suggested that perhaps the new, permanent and more comprehensive proposal devised by the European Parliament may offer a more effective solution in the long term.

For more information, see Dimitry Kochenov and Laurent Pech, ['Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality'](#), *European Constitutional Law Review*, 11(3) (2015), pp. 512–540.

See also, Laurent Pech and Kim Lane Scheppele, ['Poland and the European Commission, Part I: A Dialogue of the Deaf?'](#) (3 January 2017); and Laurent Pech and Kim Lane Scheppele, ['Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law'](#) (6 January 2017).

Dr Petra Bárd asked "Hungarian unorthodoxies or a schoolbook case of rule of law backsliding"? She began with a governance index illustrating that while the EU average shows fairly constant rule of law status, there has been dramatic backsliding in Hungary. She commented that the Hungarian case of "constitutional capture" raises a number of questions about the foundations of European integration and European values, which we have taken for granted. Dr Bárd explained that after the 2010 elections, one of the first tasks of the new Fidesz government was to create a new constitution despite this not being on the agenda before the election. According to the new government, the 1949 constitution was reminiscent of the Communist past (despite its significant amendment since 1949 which meant that overall, Hungary had a constitution which satisfied the requirements of rule of law, democracy and fundamental rights).

She then discussed some shortcomings with regard to the constitution-making procedure. For example, she noted that the previous requirement of a four fifths majority for a new constitution to be drafted was abolished by a two thirds majority of the Parliament. In addition, she noted that the government initiated an inadequate “national consultation” instead of a referendum (and even though only 11% returned these questionnaires, this was a legitimising factor in the eyes of the government for the adoption of the new constitution, later called the Fundamental Law), and that the constitution-making process was exempted from the ordinary legislative rules. The Hungarian Fundamental Law was neither adopted on the basis of broad consensus by the political parties nor did it gain support or ex post confirmation directly by the electorate.

Dr Bárd concluded by suggesting some lessons for a European supervisory mechanism. First, she commented that this is a matter for the EU as EU citizens are harmed and because the legitimacy of the whole legislative process of the EU is undermined by Hungary’s participation. Second, she noted the importance of distinguishing “genuine claims of constitutional identity” because more recently “Hungarian unorthodoxies” have been framed in this way. Third, constitutional claims should be evaluated in the EU’s corresponding rule of law framework. Fourth, one needs a contextual, qualitative assessment – for example, the Hungarian state is always seeking international examples to try to justify its approach. Finally, Dr Bárd suggested not engaging in a “sunshine policy” with states that are in a constitutional capture.

For more information, see Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov (with thematic contribution by Wim Marneffe), [‘An EU mechanism on Democracy, the Rule of Law and Fundamental Rights’](#) (CEPS Paper in Liberty and Security in Europe No. 91 / April 2016).

See also, Petra Bárd, ‘Hungary’s Fundamental Law and Related Constitutional Changes 2010-2013’, *Revue des Affaires Européennes: Law and European Affairs* 2013/3 pp. 457-472 (http://en.bruylant.larciergroup.com/titres/131763_2/revue-des-affaires-europeennes-2013-3.html).

Prof Tomasz Tadeusz Koncewicz offered an insight into the current rule of law situation in Poland, asking “Of constitutional capture, alienating constitutionalism and constitutional fidelity. Quo vadis Poland... and Europe?” Professor Koncewicz began by observing that Poland, Hungary (or any other country) will not be saved by the EU, nor by the best possible enforcement mechanism in Article 7, but rather by the citizens of each member state defending the rule of law. The problem is that there are many, many definitions of the rule of law, and the rule of law has never been internalised in Poland. His presentation is in three parts. Part (1) Background circumstances – He noted that the Constitutional Court in Poland has been captured. Why did this happen? Constitutional capture of institutions, disabling the checks and balances, calls into question key paradigms that we have been taking for granted post 1989. First, faith in law. He noted the problem is that we have a top down approach to constitutionalism and have been building democracy without asking how these institutions and procedures translate into the daily lives of citizens and what the rule of law does for them. He suggested that the Constitutional Court has never become part of the daily lives of average citizens. The citizens of Poland are those who should be the ultimate

beneficiaries of the rule of law. So, the culture has never followed the legal reforms. Second, why is Kaczyński's party so ruthless in opposition to the Court? He commented that post 1989 he has been very steadfast in denying the very existence of the Roundtable Compromise and has derided the 1997 constitution and necessarily the Court which served that constitution. Third, why does it matter for Europe? Prof Koncewicz referred to John Rawls and the term "overlapping consensus" which requires agreement on some fundamental principles, on constitutional essentials, despite other differences. He commented that the constitutional capture that is happening in Poland has been undermining this "overlapping consensus".

Part (2) Constitutional capture – Prof Koncewicz commented that constitutional capture is not an end point; it is a process with its own dynamics, tools, enemies and rationales. This is why the EU has failed so dramatically when faced with constitutional capture because it has undermined key paradigms. For example, supranationality has always been about the commonality of values and the imposition of limits from above. However, the Article 7 procedure has failed because constitutional capture took it by surprise. Prof Koncewicz also noted that the politics and the poison, the captured institutions and public media, the captured state, will stay with us for a number of years.

Part (3) Constitutional fidelity – Prof Koncewicz concluded by suggesting that we need to recognise that the rule of law is not about fidelity to the text but to the values and principles that underlie the Polish constitutional document.

For more information, see Tomasz Tadeusz Koncewicz, [‘Living under the unconstitutional capture and hoping for the constitutional recapture’](#) (3 January 2017); and Tomasz Tadeusz Koncewicz, [‘Constitutional Capture in Poland 2016 and Beyond: What is Next?’](#) (19 December 2016).

Prof Dimitry Kochenov concluded with some reflections on this difficult time for the rule of law in the EU. Prof Kochenov asked whether the founders of the EU were naïve then not to give us the tools that we need. He answered that they were not as naïve as we might think (because they envisaged two ways of ensuring that the rule of law and other values stay with us at the supranational and at the national levels) but that they probably looked in the wrong direction. The first way was to limit economically the member states' choices, with the single market; the second was to limit political choices and to limit the possibility of leaving this construct of the internal market (which is now reversed with Article 50 and with Brexit). If we look at the archival documentation on the history of enlargement of the EU, the focus was on how to discipline those who were outside; protecting the "cathedral of limitations" from outsiders "polluting the cathedral". That said, he noted, there were also concerns that some member states (for example, the UK) would not only "pollute the cathedral" but would try to derail and undermine the very foundations of these two limitations. In addition, backsliding at the national institutional level was not really considered. (However, he suggested that this possibility did appear on the horizon with the fall of the Berlin wall).

From this, Prof Kochenov said that if we look at the array of instruments, mechanisms, special benchmarks etc., deployed by the EU institutions together with the member states, these have not worked. The EU has not developed any capacity to radically change those who are about to accede. He suggested that we should draw an important lesson from this as regards future enlargement – to continue with enlargements under the current structures of constitutional guarantees that the EU is imposing on those states, would be very inadvisable because it provides no guarantee against backsliding from those new states. The second lesson we are learning is that the founders were not actually naïve about the sacredness of the two limitations (economic and political) – that sacredness is simply not there, and that is why we need Article 7 and the other enforcement procedures. However, since we have seen that all the experience gained by the EU during the organisation of enlargements does not actually produce lasting change at the core of the constitutional culture, what we are dealing with is a wakeup call. Unfortunately, the EU is absolutely incapable of guaranteeing the self-preservation of its own constitutionalism, at least at the national level. Prof Kochenov concluded that the book is ultimately a lament and a call to do more thinking because it demonstrates beyond any doubt that the EU is incapable of putting its own house in order.

Each panel was followed by Q&A with the audience.

This report was prepared by Lucy Moxham, Associate Senior Research Fellow at the Bingham Centre for the Rule of Law and Rosie Slowe, Bingham Centre