

## **The rule of law in Europe – challenges in a multi-level and multi-systemic environment**

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This Sonderheft is the result of a conference organized in cooperation with the University of Luxembourg by SIPE on the very notion of the Rechtsstaatlichkeit in Europa / the rule of law in Europe / l'État de droit en Europe focusing therein on judicial independence and effective remedies. The contributions reflect various perspectives on the notions of the rule of law in Europe, especially its protection by the hands of courts and tribunals as independent bodies designed to review executive and, in most states, also legislative action for their compliance with constitutional principles and values. The contributions all display a broad understanding of notions contained in the rule of law obliging to ensure a separation of powers, an effective judicial protection, principles of a system of democratic government as well as the protection of individual human rights and fundamental freedoms. The rule of law in this understanding goes well beyond an adherence to the principle of legality and reaches also into substantive norms and institutional and structural principles of the organisation of the exercise of public powers. The existence and defense of this broad understanding of the rule of law is also deeply embedded in the very existence of the Council of Europe and its Convention on Human Rights.

Thus, the rule of law is one of the founding values of the European Union, central to the shared European constitutional identity and its common constitutional traditions as well as an essential element of the Union's constitutional identity.<sup>1</sup> The embedding of the rule of law into European legal regimes on the national, supranational, and international levels is also specifically European. Not only because the European legal construct is one of multiple layers. But also, because the very idea of a distribution of the exercise of public powers and control mechanisms over different levels holds the various actors to account in their compliance with the rule of law.

This common basis is challenged by a new authoritarianism in some parts of Europe. The principles covered by the rule of law have not in themselves protected against all or possibly not even the most egregious violations of the principles. But especially the vertical control mechanisms do increase visibility of violations, increases the cost of violations of rule of law principles and requires reasoning. A reaction to violations of the rule of law is nonetheless important since violations in one part of a multi-level system may develop corrosive effects within the whole of the legal system: They may impede mutual recognition of law, financial solidarity and the fight against corruption and associated organised crime. With this, the overall the legitimacy of the exercise of public powers in the EU is put into question. Various attempts have been made to address this set of problem on the level of the ECtHR case law, Council of Europe instruments, CJEU case law and European

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<sup>1</sup> See already Case 101/78 *Granaria v Hoofdproduktchap voor Akkerbouwprodukten* ECLI:EU:C:1979:38, para 5. See also, e.g. C-15/00 *Commission v EIB* ECLI:EU:C:2003:396, para 75.

Commission efforts to address matters in the Member States discussed in the contributions to this Sonderheft.

The focus of the contributions on judicial independence and effective remedies can be explained by the fact that in the EU, effective judicial protection by independent courts is required (Art 19(1) TEU) as a concrete expression of the value of the rule of law. EU law requires Member States to ensure that their courts remain independent and meet the requirements of effective judicial protection – these being elements essential to ensure such judicial protection of the rule of law. The CJEU also had to detail the requirements of the guarantees of independence and impartiality, however its interim measures to suspend national reforms that would affect judicial independence have not always been followed by the addressees.<sup>2</sup> In order to address the weaknesses in enforcement, the European Commission has – in the context of the current EU Multiannual Financial Framework – introduced a mechanism to protect the Union’s budget when generalized deficiencies regarding the rule of law in Member States affect or risk affecting that budget,<sup>3</sup> prominently used since 2022. Experiences with the diverse enforcement mechanisms have been mixed so far.

On the positive side, the fact that the rule of law in single Member States has become the focus of European attention - via the tool not only of the ECtHR but more specifically through the deeply integrated nature of the exercise of public powers within the EU - is itself an important novelty. There exists a need to improve rule of law standards to the benefit of citizens throughout Europe and the good functioning of the Union itself. The case law of the CJEU and of the ECtHR provide for the key EU requirements and standards to be respected by the EU and its Member States to safeguard the rule of law. The Council of Europe’s standards have been in a sense a ‘neutral’ guideline in the conflict between the EU and its Member States,<sup>4</sup> establishing the basic minimum standards within Europe.

In this context, this Sonderheft considers a series of perspectives discussed *inter alia* at the joint conference between SIPE and the University of Luxembourg’s Robert Schuman Initiative for European Studies and its Department of Law. The conference, which was held on 30 June and 1 July 2022, had been initially planned for 2020 but had to be postponed due to the Covid-19 pandemic. This Sonderheft also contains a remembrance of the development of SIPE – Societas Iuris Publici Europaei - since its creation two decades ago, the transcription of the speech held Julia Iliopoulos-Strangas, emeritus professor of Athens University, who served in the association’s executive committee since the beginning.

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<sup>2</sup> See e.g., the Polish reaction to C-619/18 R, *Commission v. Poland*, Order of 17 Dec. 2018.

<sup>3</sup> Regulation 2020/2092, of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, OJ 2020 L 433/1; for further discussion, e.g. Matteo Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, 23 *German Law Journal* (2022), 131–156.

<sup>4</sup> See especially the Recommendation CM/Rec(2010)12 on ‘judges: independence, efficiency, and responsibilities’; Venice Commission ‘Rule of Law Checklist’, CDL-AD(2016)007; Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality; as well as the Opinions of the Venice Commission and the Evaluations of the Group of States against Corruption (GRECO).

Contributions include an exploration of some of the more basic concerns in terms of the rule of law as developed by the Council of Europe such as by the case law of the ECtHR (see the contribution of Dean Spielmann, former president of the ECtHR and judge at the General Court of the CJEU in this volume) and of the role of the Venice Commission in the development and enforcement of standards (see the contribution of Angelika Nussberger, former judge at the ECtHR). The CJEU's role in the development of rule of law standards is then investigated by Advocate General at the CJEU Athanasios Rantos. The relation between CJEU case law and the role of national courts is further discussed by Elena Simina Tanasescu, judge at the Constitutional Court of Romania, taking the example of the relation between the CJEU and that Constitutional Court. The breadth of the notions of the Rule of Law are further explored by Irean Lipowicz former Ombudsman of Poland taking the example of the principles of good administration, principles derived from the umbrella principle of the rule of law as well as by Constance Grewe, former judge at the ECtHR in looking at the right of access to a judge (the 'droit au juge') and the discussion of the nature of the rule of law by the contribution of Maria Lúcia Amaral former vice-president of the Constitutional Court of Portugal and Portugal's 10th Ombudsman since 2017.

Ensuring the development and compliance with standards of the rule of law within Europe's multi-level and multi-dimensional legal system remains a dynamic task. We are hopeful that these contributions collected from this multi-lingual and multi-systemic conference are capable of furthering the debate, the awareness, and the search for solutions in view of a central premise of European constitutionalism. We wish many interesting moments in reading this edited volume.

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