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EU DEMOCRACY AND RULE OF LAW

**4th Jean Monnet NOVA-EU Workshop
Policy Brief**

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Policy brief

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Executive summary

Democracy and the rule of law continue to be under threat in several Member States of the European Union. While there have been positive steps in the EU's response in recent times, much more remains to be done to effectively address current challenges and realize a true 'Union of Values'.

This policy brief summarizes the debate in the NOVA workshop of June 2021 and is organized around three key pillars:

- a) Defining EU values;
- b) Protecting EU values;
- c) Strengthening EU values.

It also contains a series of recommendations addressed to EU institutions, policymakers, and the academic debate, including:

- 1) Reflect upon, and then develop clearer rule of law and democratic standards;
- 2) Within the limits of EU competences, include democratic and rule of law obligations in secondary legislation;
- 3) Develop a clear governance structure that allows for an effective use of existing and new tools;
- 4) Firmly protect judicial independence in all EU Member States;
- 5) Foster the role of national parliaments in EU democratic and rule of law protection;
- 6) Use conditionality to protect EU values;
- 7) Ensure a sufficient budget for EU values' promotion.

1.Introduction

Constitutional crises in a number of Member States of the European Union, including most crucially Hungary and Poland, and the EU's reaction to those crises, have put high on the agenda of the academic, policy, and political debate the question of how to best define, protect, and strengthen EU values. The June 2021 NOVA-MCEL workshop on 'EU Democracy and Rule of Law' brought together a number of academics and practitioners who reflected on these topics. This policy brief summarizes the debate that took place during the workshop and contains a series of recommendations for policy-makers as well as for the academic debate.

2.Defining EU values

A first theme explored by a number of contributions to the workshop was the question of the *content* and *meaning* of the EU values proclaimed by Article 2 TEU. Many speakers agreed that before looking at the concrete instruments and procedures that can be used to defend EU values, there is another question that should be asked first: what is there to protect? The participants, therefore, highlighted the need to better define what we mean by democracy and the rule of law in the EU.

On a general level, there seems to be a fairly robust level of consensus on the main elements that can and should be associated with, in particular, the value of the rule of law. In particular, the practice of European courts and institutions (with the key contribution of the Council of Europe's Venice Commission) has highlighted the key relevance of judicial independence – an indispensable element of any rule of law-abiding system – and its core components, both on an individual (the independence of judges) and on an institutional (the independence of courts) level.

At the same time, the job is not done, so to say. As the debate has made clear, there are still uncertainties both in identifying clear(er) rules, as well as in grasping on a more conceptual level what 'version' of the rule of law the EU exposes (and should expose). While many contributions have pointed towards a more substantive, or 'thicker',¹ version of the rule of law, inextricably

¹ On thin and thick, or formal and substantive, versions of the rule of law, see the debate in Craig P., "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", *Public Law*, Vol. 21, no. 3, 1997.

linked to democracy and fundamental rights, others have argued for a more formal, or 'thinner' version of the rule of law, conceptually independent from the other values mentioned in Article 2 TEU; and yet another conception – the 'procedural' version of the rule of law, which *inter alia* highlights the need to always justify judicial decisions – has also been endorsed, arguing that the Court of Justice should adopt it in its legal reasoning. Be as it may, speakers agreed on the call for further refining the relationship between the three key values of democracy, the rule of law, and human rights expressed by Article 2 TEU.

As will then be highlighted in section 4 of this policy paper, the debate has also shown the potential contribution of legislative initiatives to the definition of EU values. By introducing concrete democratic or rule of law norms in EU secondary law, it is possible to further clarify the content of those fairly general and abstract proclamations and transform them in tangible realities for EU citizens.

3. Protecting EU values

The central part of the workshop focused on actors, instruments and procedures for the protection of the EU values, in particular, in the context of the Hungarian and Polish constitutional crises. Contributors reflected on recently adopted tools – such as the Council peer review system, or the new Rule of Law Conditionality Regulation – as well on the innovative use of the old ones, addressing the still underexploited potential of some of the typical actors involved in promoting and protecting the rule of law. Most crucially, an in-depth analysis was dedicated to the role of judges and courts, in particular, as concerns the protection of their independence.

Horizontally, there was consensus on the need to develop new strategies to protect EU values. The debate highlighted three possible (and complementary) pillars of such strategies: (1) a renewed emphasis on ensuring judicial independence; (2) the emergence of new roles for traditional actors; and (3) the creation of new mechanisms aimed at tackling the rule of law backsliding.

3.1. The centrality of judicial independence

Having highlighted current threats to judicial independence in several Member States of the EU,² many contributors stressed the need to act to counter those threats. As noted in section 2 above, thanks to the work of international organizations, clear judicial independence standards and benchmarks have been identified, with the most notable example being the Venice Commission Rule of Law Checklist,³ which crucially has set standards applicable not only to individual judges, but to the legal framework within which judges operate. Indeed, as correctly highlighted by several contributors, judicial independence cannot and should not be understood only by reference to the single and individual judge or body adjudicating in a particular case. A continuous monitoring of the general legal framework is necessary, in order to ensure that the required forms of protection, transparency and accountability are in place.

It is now time to enforce those standards in the Member States. In order to do that, and in general for ensuring judicial independence, a number of actors need to get involved, from international courts to self-governance bodies, including most crucially Councils of the Judiciary, but ultimately also the judges themselves. There was indeed discussion on the question of the judges' freedom of expression (and its limits) and their role in publicly upholding democratic values. There might indeed be a tension between the judges' 'public' role and their obligation to maintain an appearance of impartiality and neutrality.⁴ The speakers mostly agreed that especially in the context of the rule of law backsliding, and attacks on judicial independence, judges cannot and should not remain silent, but it is much more difficult to precisely determine the extent to which they can (and should) intervene in the political debate.

The workshop also underlined a fairly new aspect of the judicial independence debate, which may bring added value to the fight against rule of law backsliding: the requirement of a tribunal established by law, established by Article 6 of the European Convention on Human Rights

² See, among others, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [2021 Rule of Law Report – The rule of law situation in the European Union](#), COM(2021) 700 final, attached to the 2021 Rule of Law Report, and the Council of Europe Consultative Council of European Judges' Opinion n°23 (2020) [on the role of associations of judges in supporting judicial independence](#).

³ European Commission for Democracy Through Law (Venice Commission), *Rule of Law Checklist*, Venice, 11-12 March 2016, full text available [here](#).

⁴ See, among others, the story behind Judge Igor Tuleya, under continuous threats of disciplinary sanctions and victim of a politically-motivated suspension in Poland: American Bar Association, "[The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland](#)", November 2020.

(ECHR) and 47 of the Charter of Fundamental Rights of the EU (EUCFR).⁵ This may prove crucial, on the one hand, to ensure the respect of the right to a fair trial, as it ensures equality before the law, by preventing the establishment of *ad hoc* tribunals; and on the other, it can protect the quality of the appointment process, by imposing strict criteria to appoint judges.

3.2. The emergence of new roles for traditional actors

The debate focused also on the possibility to further exploit the potential of traditional actors involved in democratic and rule of law protection, such as courts and parliaments, and imagine new roles for them.

When it comes to judicial actors, a first horizontal challenge, as already noted above, is finding the right balance between judges' political activism, freedom of speech and judicial independence and impartiality. There was general agreement that judges are playing - and should be playing - an increasing role at the national level in protecting EU values, also through innovative forms of cooperation with civil society actors, but again, finding that right balance is a complex task. When it comes to the CJEU in particular, a key challenge it is facing is how to deal with populist narratives in its decisions, and the manipulative use by illiberal governments of its own decisions.⁶ The Court has a wide range of techniques available to deal with this challenge, from more constitutionally-oriented decisions to deference to national courts and a more administrative-based reasoning, and reflection is needed on how to combine these responses and understand when each of them should be deployed.

Another proposal advanced during the debate was to (re)imagine and strengthen the role of national parliaments in the EU's rule of law crisis, also by making use of the still relatively unexploited venues for collaboration between national parliaments and the European Parliament. It was pointed out that in the current context, national parliaments are turning inwards their willingness to have an impact on rule of law backsliding, through non-institutionalized forms of activism. The discussion showed the recent peculiar use of motions, resolutions and informal letters aimed at pressuring national governments to provide support to EU institutions and other

⁵ See, among others, CJEU, Judgment of the General Court (Appeal Chamber) of 19 July 2018, *Erik Simpson v Council of the European Union*, T-646/16 P, ECLI:EU:T:2018:493; Judgment of the General Court (Appeal Chamber) of 19 July 2018, *HG v European Commission*, T-693/16 P, ECLI:EU:T:2018:492, and ECtHR (GC), *Guðmundur Andri Ástráðsson v. Island*, 1 December 2020, app. n°26374/18 and *Xero Flor w Polsce sp. z o.o. c. Pologne*, 7 May 2021, app. n°4907/18.

⁶ Scheppele K.L., "Autocratic Legalism", *University of Chicago Law Review*, Vol. 82, no. 2, 2018, p. 548.

governments in upholding EU values. While this new form of parliamentary activism may face constitutional limits in many Member States, it may still represent a new form of activism and an attempt to influence future EU developments that deserves further attention.

3.3. Innovative use of existing tools

While several contributors focused on the renewed role of existing actors and the enter into the scene of new actors, others presented their reflections on the potentiality presented by new instruments, particularly the new Rule of Law Peer Review Mechanism and the increasing reliance on conditionality clauses in the EU funding instruments.

During the workshop, several contributors focused on the need to address rule of law backsliding in a multidisciplinary way, combining different fields of study to cover financial, sociological and political aspects of the rule of law crisis. In this regard, the debate focused on the potentiality of the use of peer-review mechanisms, transposed from the international experience, into the EU political system.

As already underlined, many contributors pointed out that the lack of effectiveness of the traditional mechanisms provided for in the EU Treaties is pushing the actors involved on the EU scene to develop new tools to address the rule of law crisis. In the light of such considerations, the debate provided insights as to the new Rule of Law Peer Review Mechanism, based on country-specific discussions held in the context of the General Affairs Council and addressing groups of five Member States every six months. The discussion focused on the peculiarities of this instrument compared with other international peer review settings, while also addressing its limits, notably the lack of publicity, recommendations and follow-up. In the light of the above, it was concluded that the new Rule of Law Peer Review Mechanism can play a role in complementing the efforts of the Commission's Rule of Law Report, thus contributing to the establishment of a structured dialogue, proving particularly useful for those Member States that have not yet receded on the rule of law.

Furthermore, and in addition to the traditional tools available to EU institutions, many contributors focused on the need to develop new tools, specifically designed to leverage the Member States to stop their illiberal practices. The debate focused, in particular, on the tactical use of funds allocation to push for political change in selected Member States. The strategy of leveraging on a State's desired benefits to push for democratic change, and the adoption and pursuit of a reform plan is not new in the EU's history. Indeed, it represents a defining element of the EU enlargement process, embodied in the so-called Copenhagen criteria. However, as repeatedly underlined in

the literature, the power of EU's conditionality rapidly decreases once the candidate country becomes a member of the EU.⁷

Over the last years, following the democratic backsliding that took place in Hungary and Poland, EU institutions found themselves in difficulty. In an attempt to provide a response to this trend, contributors focused on four different forms of power that EU institutions can use to force Member States to comply with the values they agreed to share. Contributors addressed and examined in particular (1) the Rule of Law Conditionality Regulation, with its limits posed by the political agreement attached to it by the December 2020 European Council,⁸ (2) the European Structural and Investment Funds,⁹ supported by their enabling conditions, which require Member States to strengthen the enforcement and respect of fundamental rights to have the relative funds allocated; (3) the newly established Citizens, Equality, Rights and Values funding program,¹⁰ with its Rights and Values strand aimed at supporting civil society organizations active in EU Member States in the field of the defense of EU values; and (4) the Recovery and Resilience Facility,¹¹ which sees at its heart the Commission's power in verifying Member States' adherence and respect of the governance-related recommendations issued in the context of the 2019 and 2020 European Semesters.

The contributors agreed that the EU's spending powers represent a promising tool to tackle rule of law and democratic backsliding in some Member States. However, they also admitted that the current institutional context could diminish the effectiveness and impact of such tools, given the reliance on EU institutions' political willingness to achieve full implementation and enforcement of the different mechanisms.

⁷ See, among others, Schimmelfennig F., "EU political accession conditionality after the 2004 enlargement: consistency and effectiveness", *Journal of European Public Policy*, Vol. 15, no. 6, 2008, pp. 918-937 and Cirtautas A.M. & Schimmelfennig F., "Europeanisation Before and After Accession: Conditionality, Legacies and Compliance", *Europe-Asia Studies*, Vol. 62, no. 3, 2010, pp. 421-441.

⁸ [Regulation \(EU, Euratom\) 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 and European Council Conclusions, 11 December 2020, Brussels, EUCO 22/20.](#)

⁹ [Regulation \(EU\) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation \(EC\) No 1083/2006.](#)

¹⁰ [Regulation \(EU\) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation \(EU\) No 1381/2013 of the European Parliament and of the Council and Council Regulation \(EU\) No 390/2014.](#)

¹¹ [Regulation \(EU\) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.](#)

4. Strengthening EU values

A series of contributions looked also beyond the current 'crises' and reflected more broadly on how to strengthen and promote EU values also, and perhaps most crucially, via EU legislative and policy action. They underlined how democracy, the rule of law and human rights need to be mainstreamed in all fields of EU's action, concentrating, in particular, on the digital and environmental policy.

As for the digital policy, the speakers stressed how the emergence of new technologies and the rise of powerful private operators in the digital world put under stress democracy, the rule of law and human rights. These players are indeed not embedded in existing constitutional structures, and democratic as well as judicial actors continue to struggle in holding them accountable. As many contributors agreed, it is essential that the EU and European actors (re)assert their control over the dominant players in the digital world. The EU is taking steps in recent times with a series of legislative initiatives,¹² within the framework of the Digital Single Market Strategy¹³ and the European Democracy Action Plan,¹⁴ yet it finding effective solutions remains very complex. The EU is called to exercise a delicate balancing act between contrasting interests and priorities, such as the protection of users' personal data, pluralism and reliability of information, and the fight against disinformation. While contributors agreed that public actors need to play a more active role, the question of how far they should go remains open.

¹² See Directive on Copyright in the Digital Single Market – [Directive \(EU\) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC](#), amendments to the Audiovisual Media Service Directive - [Directive \(EU\) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services \(Audiovisual Media Services Directive\) in view of changing market realities](#); the Regulation on Terrorist Content - [Regulation \(EU\) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online](#); proposal for a Digital Services Act, currently under discussion in the European Parliament, [Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services \(Digital Services Act\) and amending Directive 2000/31/EC COM/2020/825 final](#).

¹³ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [A Digital Single Market Strategy For Europe](#), COM(2015)192 final and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [Online Platforms and the Digital Single Market Opportunities and Challenges for Europe](#), COM(2016) 288 final.

¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions [On the European democracy action plan](#), COM/2020/790 final.

Another topic discussed in the workshop was the green transition, which as well comes with democratic and rule of law challenges and asks the institutions to reflect on how to shape an 'environmental democracy'. Furthermore, the connection between the values and the green discourse appears when looking at the practice of conditionality in EU funding. Conditionality has indeed been used as a technique both to safeguard the rule of law, most notably in the 2020 Regulation, but also to promote environmental objectives. This calls for reflecting on the interplay between the two policy areas, ensure coordination and avoid conflicting decisions.

5. Policy recommendations

5.1. Defining EU values

As the debate at the NOVA workshop made clear, the efforts to develop new mechanisms and strategies to protect EU values must be complemented by further institutional and academic reflection on the very content of these values. While progress has been made in recent times, with the Commission, but also the CJEU and the ECtHR contributing to clarifying some key rule of law elements, the process of identifying and developing standards remain crucial, and must also be accompanied by more theoretical reflections on the notion of the rule of law (and of democracy) that the EU wants to adopt, implement and promote.

FROM VALUES TO STANDARDS

EU institutions, supported by the academic debate, should, therefore, continue to provide further clarifications on the meaning of the rule of law as a EU value, building, in dialogue with national actors, clearer and more precise standards. That process, however, should also be respectful of (legitimate) national diversities and experiences, and should not lead to full harmonization of national rule of law systems. Institutions should then initiate the same 'clarification' process for the value of democracy. Where possible, i.e. where the EU has the competence to act, EU legislation can also contribute to the clarification of standards, by including concrete democratic and rule of law obligations.

THE RELATIONSHIP BETWEEN DEMOCRACY, THE RULE OF LAW AND HUMAN RIGHTS

There is a need to further reflect upon, and clarify, the relationship between the ‘trinity’ of democracy, rule of law and human rights. That is a more conceptual exercise compared to the previous one, yet it remains necessary also to avoid that national actors exploit this uncertainty by opposing the value of ‘national democracy’ to the ‘EU rule of law’ in the attempt to justify controversial national reforms.

5.2. Protecting EU values

Contributors and participants to the workshop unanimously agreed that the EU’s response to the democratic and rule of law challenges that have emerged in the last decade has been so far insufficient, and they called for strengthening the protection of EU values. The current tools at the disposal of EU institutions have proved to be only partially effective, and the discussion in the workshop led to the following recommendations.

DEVELOP A COMPREHENSIVE APPROACH AND A GOVERNANCE STRUCTURE

Rather than looking for a silver bullet, i.e., a single mechanism that could solve the ongoing crises, it is essential to put in place a comprehensive approach and a true governance structure, where EU institutions, national and civil society actors interact and together contribute to the protection of EU values in a coherent manner. This structure should involve judicial bodies, both at the European level (the CJEU, the ECtHR) and at the national one, as well as political actors, again both at the EU and at the national level. Furthermore, EU institutions and national governments should develop new ways to proactively engage with civil society actors, in order to complement the classic top-down approach with a bottom-up one.

RETHINK JUDICIAL INDEPENDENCE AND ACTIVISM

Judicial representative bodies, EU institutions and academia should further reflect on the role of judges as active players in the protection and consolidation of democracy and the rule of law, both when they act in court and outside of them. It is necessary to rethink the relationship between judicial independence and judges’ activism, in order to allow the latter to play an active role in pushing back against authoritarian and populist practices, while maintaining or even strengthening people’s trust in the judiciary.

FOSTER THE ROLE OF NATIONAL PARLIAMENTS

EU institutions should engage in a more structured manner, both at the political and diplomatic level, with national parliaments and MPs, building on the increasing activism of some of such national actors. The EU's effort to uphold democracy and the rule of law should be perceived as a common goal, shared by the EU and the national level. EU institutions should launch consultations on the possibility to institutionalize national parliaments' intervention, through both dialogue and enforcement mechanisms.

ENFORCE THE EU'S SPENDING POWERS

The adoption of the new Rule of Law Conditionality Regulation and of the Next Generation EU Recovery Plan give further opportunities to the EU institutions to put the growing 'spending powers' of the EU at the service of the defense of democracy and the rule of law. Together with giving full implementation to the Regulation in the next months, the Commission could also consider making the approval of national Recovery and Resilience Plans for both first and subsequent disbursements conditional upon concrete steps are taken by all Member States to implement country-specific recommendations concerning rule of law issues (especially anti-corruption, good governance and judicial independence).

Furthermore, the Commission should build upon the possibilities offered in other funding mechanisms (e.g., European Structural and Investment Funds' enabling clauses) to leverage reluctant Member States to guarantee the respect of EU standards as to rule of law and fundamental rights.

5.3 Strengthening EU values

Another series of recommendations related to the third pillar of the discussion: the medium and long-term strengthening of EU values via policy and legislative action. The main recommendation here is that EU action can and should not be only reactive (protecting democracy and the rule of law when they are under attack in *specific* Member States) but also proactive (promoting democracy and the rule of law in *all* Member States).

MAINSTREAM VALUES IN SECONDARY LEGISLATION

As already noted above, legislative action is needed to define the content of EU values but also to continue strengthening democracy and rule of law in the Member States. The European

Democracy Action plan presented in December 2020 is a step in the right direction and the Commission should soon develop those plans into concrete legislative action.

ENSURE A SUFFICIENT BUDGET FOR VALUES PROMOTION

Strengthening EU values also requires that EU institutions, and in particular the Commission, are endowed with a sufficient budget for supporting projects, at both the EU and the national level, that may contribute to promoting democracy and the rule of law. While the new Multiannual Financial Framework contained some progress in that respect, the overall system is still unsatisfactory and is ultimately a missed opportunity.