Clingendael
Netherlands Institute of International Relations

MARCH 2017

Deepening and broadening the EU's Rule of Law agenda

Policy Brief

Michiel Luining & Adriaan Schout

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.'[1] 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.[2]

The outline of this policy brief is as follows: Section 2 briefly discusses the EU's tendency towards management deficits[3] 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

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

2 Jordan, A., J.A. Schout (2006) *The coordination of European Governance: exploring the capacities for networked governance*, Oxford: Oxford University Press.

3 Metcalfe, L.M., (1996) 'Building capacities for integration; the future role of the Commission', Eipascope, 1996/2, pp. 2-8.

(with reference to the diagnostic tool). 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 in to 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.[4] 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.[5] 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 perceive 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).[6] 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.[7] 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.[8] 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

4 Kassim, H. (2015) 'Revisiting the management deficit', in: E. Ongaro, Multi-Level Governance: The Missing Linkages, Bingley: Emerald.

5 Everson, M., G. Majone, L. Metcalfe and A. Schout (1999) *The Role of Specialised Agencies in Decentralising EU Governance, Commission of the European Commission*. Background document to the Commission White Paper on Governance, Brussels, March 2001. E. Vos (ed.) *European Risk Governance: its Science, its Inclusiveness and its Effectiveness*, Connex Book Series: Mannheim University Press.

6 Schout, A., A. Jordan, (2005) *Coordinated European Governance*, p. 202. Schout, A., A. Jordan (2011) 'The 'Old' and the 'New' Governance in the EU: Different Instruments, but the same administrative capacities?', in: P. Le Gales and H. Kassim (eds) Governing the EU: Policy Instruments in a Multi-Level Polity, Palgrave. Zito, A., A. Schout (2010) 'Learning theory reconsidered: EU integration theories and learning', in: Zito, T. (ed.) The European Union, Learning Theories and the Study of Integration, Routledge. Schout, A. (2009) 'Organisational learning in a multilevel governance system', in: Zito, T. (ed.) The European Union, Learning Theories and the Study of Integration, Routledge.

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).

criteria' in 1993 and the conditions for EU membership, intra-EU instruments concerning the rule of law as an European value are developing, particularly since 2006 (see Section 3). The general lesson is that EU policy challenges show that there seems to be a **distinction** between **setting-up European policies and central control mechanisms** on the one hand and ensuring **effective (independent) national capacity building** and functioning on the ground on the other hand.[9]

In addressing EU policy and related (multilevel) management challenges the following three dimensions can serve as a model of diagnosis:[10] **1) national capacities**, implying an independent position of the national bodies.[11]
2) an European network (with an independent secretariat or agency) that ensures effective exchange and mutual quality control,[12] with a learning-based visitation system (based on mutual-learning) with independent experts (from e.g. the network-agency).[13] **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.[14] The EU accession process has prioritised the rule of law particularly since 2012:[15] 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

9 Landau, M., R. Stout, 1979, 'To manage is not to control; or the folly of type II errors', Public Administration Review, pp. 148-56., Landau, M. (1969) 'Redundancy, rationality and the problem of duplication and overlap', Public Administration Review, July/August, pp. 346-358. Landau, M. (1973) 'Federalism, redundancy and system reliability', The Journal of Federalism, pp. 173-196. Landau, M. (1973) 'On the concept of a self-correcting organization', Public Administration Review, 33, pp. 533-542 and Schout, Jordan, *Coordinated European Governance*.

10 Based on Jordan, A., J.A. Schout (2006), *The coordination of European Governance: exploring the capacities for networked governance*, Oxford: Oxford University Press.

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).

14 'The EU and the Rule of Law – What next?' European Commission, Vice-President of the European Commission, EU Justice Commissioner Vivianne Reding (September 4, 2013).

15 European Commission, Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2013-2014.

its society.[16] This implies not only lower and supreme courts and their proceedings, but also for example the well-functioning of police, prosecutors, lawyers, audit chambers and anti-corruption and integrity bureaus. In addition, it implies public bodies and procedures safeguarding fundamental rights, democracy and transparency under the rule of law such as open governance formats, impact assessments, independent statistics, ombudsman, independent media, transparency boards, advisory councils, whistle-blower protection, social-economic councils and so forth. Together they make up a whole institutional, political and legal 'rule of law culture' that *inter alia* ensures a separation of powers, checks and balances, legal compliance and adherence to fundamental rights and democratic standards.

The **existing European political and legal practice** of primarily maintaining the rule of law, focuses on **breaches** of rule of law while relying on **central European control mechanisms**. The quality of rule of law under the Acquis is maintained through the infringement procedure (Article 258-260 TFEU) and when it concerns the principle (Article 2 TEU) through Article 7 TEU. Both procedures have their shortcomings. The Commission may only initiate an infringement for a specific violation of EU law, thereby allowing a member state of the hook for systemic (and 'non-EU'[17]) rule of law breaches (as the Hungarian case since 2011 has demonstrated).[18] Article 7 TEU is at the same time a never activated procedure due to the 'nuclear' nature and nearly impossible threshold; unanimity must be established in the European Council to consider a breach of the values laid down in Article 2 TEU. Various instruments (without the need for Treaty change) have been tabled to strengthen the rule of law in the EU.

After the launch of the Cooperation and Verification Mechanism for Romania and Bulgaria in 2006, an European Union Agency for Fundamental Rights (FRA) in 2007, an annual Media Pluralism Monitor and EU Justice Scoreboard in 2013 and the EU Anti-corruption Report in 2014, the European Commission has introduced a Rule of Law Framework to bridge the gap between the infringement procedure and Article 7 TEU.[19] It provides the Commission the authority to enter into a structured dialogue with a member state and to assess the rule of law deficiencies with the help of various (judicial) bodies and networks, such as the Venice Commission of the Council of Europe, FRA and the Presidents of the Supreme Judicial Courts of the EU. Hereby, a stronger case is build up that could potentially lead to triggering Article 7 TEU, pressuring the member state to resolve the outstanding issues. The EU's General Affairs

16 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.

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.

19 European Commission, European Commission presents a framework to safeguard the rule of law in the European Union, 11 March 2014.

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 DRF 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 deficiencies**[22] 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.[24]

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,[25] the enforcement of rule of law institutions across the EU through investment in (subsidiarity-based) networks seems insufficiently addressed in the current policy debates.[26]

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.[27]

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

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.

25 Johnson, J. *Priests of Prosperity: How Central Bankers Transformed the Postcommunist World*, Ithaca: Cornell University Press, 2016.

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.

27 Toggenburg, G.N. and J. Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?' In JCMS 2016 Volume 54. Number 5. pp. 1093–1104.

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-function[31] 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.

28 Provan, K.G., P. Kenis (2007) 'Modes of Network Governance: Structure, Management, and Effectiveness', Journal of Public Administration Research and Theory, Vol. 18; Groenleer, M. (2009) *The autonomy of European Union agencies*, Delft: Eburon.

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.

About the Clingendael Institute

The Clingendael Institute is an independent think tank and diplomatic academy which enhances knowledge and opinion shaping on issues related to international affairs. As part of a vast global network, the Institute realises this objective through its research, training and consultancy for governments, civil society and the private sector. Its work focuses on Strategic Foresight, Security, Conflict and Fragility, European Affairs, Migration and Sustainability. Clingendael publishes reports and policy briefs, holds numerous conferences and offers a wide spectrum of training programmes for professionals from all over the world. It also publishes the digital magazine *Internationale Spectator*. For further information, please view: **www.clingendael.nl**

Follow us on social media

About the authors

Michiel Luining is Research Assistant at the Europe cluster of Clingendael Institute. His research is particularly focused on the rule of law and the social dimension of the EU.

Adriaan Schout is Senior Research Fellow and Coordinator Europe. He combines research and consultancy on European governance questions for national and European institutions. He has worked on projects addressing issues of the EU presidency, EU integration and Improving EU regulation, amongst others.