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BINDING THE GUARDIAN

On the European Commission's
failure to safeguard the rule of law

Albena Azmanova
Bethany Howard

Advisory Group: Kalypso Nicolaïdis, Evgenii Dainov, Adis Merdzanovic, Alina Mungiu-Pippidi, Laurent Pech

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A LOOK FROM THE TOP

FOREWORD

The rise of unaccountable, autocratic rule—more ostentatious in the East, more insidious in the West—is a trans-European pathology. It has spread in countries headed by Eurosceptic leaders (as Hungary’s Viktor Orbán) and European loyalists (Bulgaria’s Boyko Borissov), in old member states (Spain, France, Austria) and in new ones (Poland, Romania). Safeguarding the rule of law has become a matter of political emergency.

As guardian of the EU treaties, the European Commission has also assumed guardianship of the rule of law. But is the Commission complying with the rule of law while supervising member states’ compliance with this golden rule of our political existence? What does it mean for the ultimate guardian—a monolithic institution at the very top of the hierarchy of political responsibilities and unconstrained by the ropes of democratic accountability—to be itself bound by the rule of law?

Our investigation examines this question, on the example of the European Commission’s 2020 and 2021 Rule of law Reports—a new mechanism for annual rule of law monitoring in the EU’s 27 Member States. With the ambition to strengthen the rule of law in the Union, this mechanism pursues two tasks—an educational one (to develop rule of law culture) and a disciplinary one (to expose and condemn rule of law violations). We posit that in order to achieve effectively these goals while complying with the rule of law, the European Commission, whenever engaged in rule of law monitoring, needs to comply with four criteria: clarity, thoroughness, equal treatment and impartiality. We establish that, by deviating from these criteria, the Commission violates the rule of law norm it is meant to monitor and safeguard. We draw on three country chapters of the Report—on Bulgaria, Spain and France—as well as some examples from other country cases to illustrate these failures and highlight their consequences.

To dispel a likely misunderstanding: Our goal is not to provide a comprehensive critique of the Reports—a plethora of excellent commentaries has emerged since

its publication in September 2020 and in July 2021, arguing for the most part that the Report does not live up to expectations; some of these are included in the Bibliography.¹ Neither is it our goal to advance a diagnosis of the rule of law in the EU. Our investigation has quite a different target: we ask whether the Commission is effectively bound by the rule of law when it performs its supervisory mandate with regard to the rule of law. While existing analyses scrutinise the potency of the new instrument as a weapon for protecting the rule of law in the Union, we turn the magnifying glass around to focus it on the warrior waving the sword: is she bound by the principles she is protecting? The practical purpose of this study is to suggest guidelines for future editions of the yearly rule of law surveys.

We will proceed as follows: In Chapter one, we discuss the rule of law as a political social norm—that is, a norm guiding the behavior of public authority in its exercise of power. This will allow us to single out the prohibition of the arbitrary use of power as the essence of the rule of law. We will then articulate the criteria of political behavior that allow a public power to act in compliance with the rule of law and assess their application in the Rule of law Reports. Chapter one is self-standing: it articulates the logic of our investigation and summarizes our findings, namely, that by failing to monitor effectively the rule of law in member states, the Commission aggravates the problem it is meant to solve.

Chapters 2, 3 and 4 are a commentary on three of the Reports' country chapters—those of Bulgaria, Spain and France. Here we offer an account of some of the main omissions, misconceptions, and errors contained in the Commission's Reports in order to give empirical support to our conclusion that, be it inadvertently, the guardian of the rule of law fails to comply with the norm it is meant to monitor and safeguard.

In the Conclusion, we advance some ideas as to how to bind more firmly the guardian of the rule of law to the mast of responsible rule.

We have benefited from discussions with eminent rule of law specialists (within an Advisory Group headed by Kalyпсо Nicolaidis). We retain, however, full responsibility for the approach to the issue and its conceptualization, which emerged from the work one of us has previously done on the rule of law and accountability deficits in Europe.²

Albena Azmanova and Bethany Howard

1 See, for instance, EP 2021a; Pech 2020b; 2021b. Pardavi 2020. Poulas and Howarth 2020; Bard 2020.

2 See Azmanova 2004; 2005, 2013; 2017; Azmanova, Spinelli et al. 2017; Azmanova and Nicolaidis 2020.

There is no greater tyranny than
that which is perpetrated under the shield of
the law and in the name of justice

Montesquieu, *The Spirit of the Laws*

SAFEGUARDING EUROPE'S POLITICAL DNA



The rule of law is the foundation of European societies' legal order and political culture. Its core precept—prohibiting the arbitrary use of power—has provided the invaluable combination between freedom and security that has enabled our societies to thrive. The rise of autocratic rule across Europe since the turn of the century has triggered a crisis in the rule of law and an epidemic of abuse of power.³ This erodes the essential security that comes from power being held in check on which our personal and collective wellbeing depends. That is why the fate of the rule of law is no longer an academic issue or an elite preoccupation—ordinary citizens are engaging in the battles over its meaning, its implementation, and its future. Citizens are calling governments to account: from the widespread demonstrations in France against the global security law proposed in 2020, activism in multiple European countries against bans on civil assembly during the Coronavirus lockdowns, to the year-long anti-corruption protests in Bulgaria in 2020–2021.

The European Commission's annual "[Rule of law report – the rule of law situation in the European Union](#)" hereafter, Report) is the latest addition to a substantial EU rule of law toolbox' (EC 2019a; Pech 2020a). By adding a new element to the rule of law infrastructure, the European Commission has both exercised its mandate as a guardian of the rule of law in the Union and has further consolidated this competence: the 2020 Report initiated a new annual Rule of law Review Cycle led by the Commission, which starts with surveying the state of the rule of law in each member state in an annual report. This process involves an exchange of information between member states through a network of national authorities and civil society contacts, and a follow-up on the annual report with the Parliament and the Council. Such a comprehensive and consistent rule of law monitoring of all

3 When such developments result from the deliberate abuse of power, with the aim to "systematically weaken, annihilate or capture internal checks on power" in order to dismantle the liberal democratic state and thus ensure the long-term rule of the dominant party, they constitute a phenomenon Laurent Pech and Kim Lane Scheppele have called 'rule of law backsliding' (Pech and Scheppele 2017). See also Bárd, Grabowska-Moroz, and Zoltán 2020.

member-states (which had previously been confined to the enlargement process) is a very welcome development.⁴ However, as it expands its mandate as the ultimate guardian of the rule of law in the EU (together with the ECJ, the European Parliament and the European Council), it is important that the Commission itself be bound by it. Here is why this is important:

The rule of law is not violated when the law is broken, but when breaking the law is not punished, when the sanction is not uniform, and when there is no legal and institutional framework to enable that inequities be challenged and corrected. This whole process is enabled by a hierarchy of supervision that calls to account both the perpetrators of violations and those who sanction them. Up there at the peak of the hierarchy of accountability stands the ultimate authority: the Guardian.

This mandate of rule of law guardianship is highly exacting as it contains a double imperative: (1) supervising effectively the respect of the rule of law (2) doing so by conforming to rule of law principles (which we clarify below) in the course of exercising its supervisory function. Whilst examining whether the Commission complies with the rule of law in its deployment of the annual reports as a rule of law monitoring device, we will comment on the first objective only in light of the second objective.

Asking to what extent the Commission complies with the rule of law would be meaningless. Any public authority that has the duty of safeguarding the rule of law but fails to do so effectively, fails the rule of law entirely—it then becomes part of the problem it is meant to solve. This is because an inconsistent protection from arbitrary rule itself amounts to arbitrary rule, even if no apparent law is broken. The guardian of the rule of law can either safeguard the rule of law or betray it by allowing its violation—there is no third option.⁵

RULE OF LAW AS A SOCIAL NORM IN THE EXERCISE OF POWER

In order to articulate the factors that determine whether the Commission effectively acts as a guardian of the rule of law itself bound by the rule of law, let us consider some peculiarities of the rule of law as a norm guiding the exercise of power, as well as the way it has found its place in the EU legal framework.

For a long time, the EU treaties had neither mechanisms dedicated to rule of law enforcement, nor a single and comprehensive definition of the concept.⁶ Paradoxically, the EU was not designed to police rule of law infringements exactly

4 Nicolaidis and Kleinfeld (2012) have been advocating the launch of such a mechanism.

5 This binary logic applies only to rule of law monitoring – to the responsibilities of the central authority at EU and state level. In describing the state of the rule of law in a given country, one can distinguish between threats and infringements, between deliberate and non-deliberate violations, or systemic vs non-systemic threats to the norm, “serious and persistent” rather than minor and accidental breaches (as [TEU art. 7](#) does), but the judgment on whether something constitutes a violation or not is a binary one.

6 See Pech and Joelle 2020, pp. 48-57.

because the European Union came into existence as a union of societies that had endorsed the rule of law. Importantly, the rule of law is not only a treasured value (as stated in TEU Art 2) but a norm on a greater scale—it expresses what is considered normal behavior, what is seen as an appropriate conduct of public authorities in the exercise of their power. Often such notions of normality run so deep in the public mind, they are so ‘obvious’, that they do not need to be spelled out as values, codified in law, and enforced through penalties. The founding Treaties did not contain a direct reference to the rule of law because this norm is in Europe’s DNA⁷—that is, it has defined what is a normal, ‘natural’, behavior for both the holders of power and the subjects of rule. It was only the prospect of opening the EU to a considerable number of new members that had just emerged from autocratic rule (the ‘Eastern enlargement’) that transformed the rule of law from a self-evident truth and a social practice to a not-so-evident value in need of proper definition and institutionalised protection. This prompted efforts in the last decade of the 20th century to design specific rule of law monitoring and enforcement mechanisms, of which the annual rule of law reports are the latest addition.⁸

Even as European societies have long shared an intuitive understanding of what the rule of law is, the notion defies a simple definition. It is typically described, rather than defined, in terms of what it requires (e.g. legality, legal certainty) and how it is enforced (separation of powers, independent judiciary), as well as in reference to other fundamental values such as democracy and basic rights, and is thus hailed as a foundation of liberal democracy. Thus, the 2020 Rule of Law Report advances the following succinct definition: “Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts” (2020:1)⁹. Then it goes on to list the principles and procedures through which the rule of law is enacted. All this tells us what happens when the rule of law is enforced, but not what the rule of law is. Our task here, however, is not to offer an exhaustive definition of the rule of law but rather to assess the behavior of an actor (the European Commission) in its application of a specific tool (the Report) for rule of law monitoring. That is why, for the purposes of this analysis, it is necessary to identify the essence of the rule of law in reference to public authority’s behavior.

7 “The rule of law is part of Europe’s DNA, it’s part of where we come from and where we need to go. It makes us what we are” declared Frans Timmermans in a speech as first Vice-President of the Commission in charge of the rule of law (Timmermans 2015).

8 This process began with the provision introduced by the Treaty of Amsterdam in 1997 to empower the European Council to ascertain whether a significant infringement of the rule of law by a member-state has taken place and penalize this violation by suspending some of the membership rights of the state. For a comprehensive account of the evolution of the Treaty framework regarding the rule of law, as well as the evolution of the EU’s rule of law toolbox see Pech 2020a.

9 In reference to the central texts of this report, the European Commission’s 2020 and 2021 Rule of Law reports, we shall insert page numbers rather than the full embedded reference. Complete reference to be found in the bibliography as EC 2020 and EC 2021.

THE GENESIS OF THE RULE OF LAW: PROTECTION AGAINST TYRANNY

In seeking to discern the essence of the rule of law it might help to remember that the birth of the rule of law as a concept considerably predated the establishment of liberal democracy as a political system, which only fully consolidated in the early 20th century with the universal franchise. This process itself, however, was enabled by a particular attitude to power that germinated in the notions of due process of law and unconditional and universal basic rights that were first established with the English Magna Charta of 1215—itsself an outcome of the successful efforts of a group of rebel barons to fight the tyranny of King John of England. These developments were driven by an ambition to constrain public power and prevent its abuse by tying it down to certain norms that stand beyond the reach of any authority. Efforts to prevent the arbitrary use of power (and thus protect from tyranny) have been shaping the establishment of the rule of law as a social norm guiding the behavior of public authority in European societies now for over eight centuries. Thus, we posit that the substance of the rule of law is the prohibition of arbitrary use of power. In other words, power should be held in check through a number of institutional mechanisms and norms (from the separation of powers to unconditional and universal basic rights) in order to make sure it is deployed responsibly in the name of the common good and not in the interests of some.

It is because the rule of law has acquired its meaning in centuries-long struggles against arbitrary rule (that is, as a negation of autocracy) it is often mistakenly equated with other antonyms of autocracy (such as democracy). Alternatively, it is explained through what it is not (i.e., it is not just rule by laws, or through laws), as well as through the institutional devices that are used to hold power in check (legal certainty, separation of powers, equality before the law, due process, independent and impartial judiciary, etc.).

Much of the assault on the rule of law nowadays happens via laws enacted, or supported, by democratic majorities—the phenomenon of ‘illiberal democracy’ (Zakaria 1997). To comply with the rule of law principle, the very laws through which power is exercised, including laws that are democratically enacted, should not contribute to arbitrary rule and the abuse of power. The prohibition of arbitrariness makes the rule of law supervision an exacting political mandate: public authority can abuse its power both through active intervention and by failing to act; through what Hannah Arendt called the two sides of evil-doing—sins of commission and sins of omission (Arendt 1971: 418). Surely, governing necessitates the use of discretion—of passing judgment on a course of action. The rule of law stipulates that public power can use its discretion in the exercise of its mandate but in the course of doing so, it must not enlarge its mandate and the scope of its powers. Thus, when the Commission chose, rather hesitantly, to introduce the new mechanism, it exercised rightfully its discretion in deciding by what means

to monitor the rule of law. Once it has introduced this new tool, it must use it in a manner that is not arbitrary. In order to do so, it must comply with certain principles which we address next.

REPORTING ON THE RULE OF LAW IN COMPLIANCE WITH THE RULE OF LAW

The European Commission has effectively assumed its responsibility for safeguarding the rule of law; it has declared repeatedly its commitment to make full use of its powers in that regard.¹⁰ It has a solid ground to hold states to account for rule of law violations because (1) ensuring respect for the rule of law is a primary responsibility of each Member State and (2) the rule of law is integrated into the primary law of the EU (TEU Art 2) of which the Commission is guardian. Thus, both the states' responsibility and the Commission's mandate to hold states accountable are clearly established. This means that the Commission not only can, but must hold to account all member-states for rule of law violations and deficiencies within their national jurisdictions.

The European Commission has been designed as the non-political executive arm of the European Union. That is why it is well positioned to act with impartiality as a guardian of the rule of law, in cooperation with the other non-political institution—the European Court of Justice. (The Commission files complaints for rule of law violations to the ECJ and enforces its decisions.) Much criticized for their lack of democratic legitimacy, it is exactly the fact that these two institutions are (supposedly) neither in the service of partisan-political agendas nor swayed by short-term expediency under the pressure of democratic elections that enables them to deliver socially responsible (and not simply democratically responsive), rule—rule that is committed to the wider and long-term societal wellbeing.¹¹

The Commission argues that the methodology it has adopted for the annual reports assures a consistent, impartial and equal treatment in its monitoring of the rule of law across the 27 EU Member States.

We suggest that, in order to effectively comply with the rule of law while conducting its annual rule of law surveys, the Commission needs to be guided by (at least) four norms: clarity of communication, thoroughness in addressing rule of law violations (that is, in the full range and depth of detail), equal treatment of the subjects of power, and impartiality in the use of power (in the sense of not having a narrow partisan-political agenda). Whenever public authority violates

¹⁰ "The Commission will always be an independent guardian of the Treaties. Lady Justice is blind – she will defend the Rule of law wherever it is attacked," vowed Commission President von der Leyen in her first address to the European Parliament (von der Leyen, 2019).

¹¹ On the Commission's vocation to be a guardian of the long term see Begg, Bongardt, Nicolaidis and Torres 2015. For the difference between democratically responsive and socially responsible rule see Azmanova 2013.

these norms, that is, acts with a political agenda other than its defined mandate, with bias towards some subjects, by omitting to address relevant facts, or issues its communication in an unclear way it no longer complies with the rule of law. This is the case because such omissions create the conditions for the abuse of power: Obscurity is a fertile ground for arbitrariness, omissions tacitly condone what is omitted, favoritism disempowers some, and partisan-political considerations harm the common good. Such would be the case even when public authority does not violate any law, and even if its actions in question happen to have a de facto positive impact on the state of the rule of law it is supervising. Once an actor ventures to increase its sphere of legitimate power or fails to enact its stipulated mandate, the potential for abuse of power is tangible.

We have found that in deploying its methodological framework the Commission fails to give justification for the selectivity of information it has included, is prone to the use of obscure language that condones inherent threats to the rule of law and systemic institutional deficiencies, and is swayed by political bias.

The Rule of law Report is a '[communication](#)'—a non-legal instrument with no binding power. However, if the Report meets the criteria of clarity, impartiality, equal treatment, and thoroughness in addressing rule of law violations, it could serve effectively two objectives: to educate and to discipline. First, by exposing specific violations, their systematic occurrence, and their systemic roots, as well as by highlighting best practices, the annual rule of law review cycle could promote a rule of law culture: Indeed, without a public demand for banishing arbitrary power, no institutional mechanisms could ever fully secure the rule of law.

Second, the Report could help provide the necessary intelligence and authority to the European institutions so that they could issue well-supported warnings about specific threats and infringements of the rule of law, demand respective action from national governments, and impose penalties.¹²

However, as we will argue in what follows, the Report does not meet the requisite four criteria in surveying the rule of law in member-states. The Commission therefore fails to make a proper use of the new instrument it has introduced. Even if such failure is inadvertent, it means that nevertheless the Commission does not fulfill its duty as guardian of the rule of law.

¹² The mechanism of rule of law enforcement begins with the identification of a "clear risk of serious breach" of EU values either by the Commission, the Parliament or one-third of member states. (TEU, Article 7.1).

THE FOUR PARAMETERS OF THE RULE OF LAW COMPLIANCE IN MONITORING THE RULE OF LAW

CLARITY OF COMMUNICATION ————— 1

Clarity of conceptualization and phrasing creates a climate of certainty. Arbitrary power thrives on the uncertainty that obscurity generates. Clarity of definitions, as well as clarity in articulating the full causal chain of rule of law violations and their consequences are necessary so that responsibility for breaches of the rule of law can be attributed. The failings of the European Commission here regard two aspects of the Reports' narrative: **(i)** the conceptualisation of rule of law and **(ii)** the ambiguous language that is used in addressing rule of law violations.

A BLURRED CONCEPTUALISATION OF THE RULE OF LAW ————— (i)

The Report affirms that there is a shared understanding within the EU on the core meaning of the concept, and offers a detailed account of the rule of law: not only an extensive definition, but also clarifying its political, economic, and legal significance both in European societies and externally. This provides an excellent basis for obtaining the educational task the Commission has set for itself with this new mechanism. However, it has also missed a chance to eliminate misperceptions and ambiguities that are increasingly eroding the rule of law.

A central ambiguity in its conceptualisation regards the relation between the rule of law and other fundamental values of the EU as stipulated within its legislative framework. The EU Treaty places the rule of law on the same logical order of, and in distinction to, a number of values:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” (TEU, Art.2)

In the 2020 Report, the Commission draws connections between the fundamental values: it stipulates that all public powers should not only act within the constraints set by law but also in accordance with democracy and fundamental rights, and defines legality as implying a democratic process for enacting laws (2020: 1). While the claim that the legality of laws is always predicated on the democratic nature of law-making would be questioned by legal scholars, this is certainly the case in modern liberal democracies—such an update of the rule of law is therefore justified. However, in view of the educational objective of this Report, a more careful definition of the relationship between democracy and legality is needed in order to make it clear that the democratic origin of the law is not a sufficient condition for public power to act in line with the rule of law: democratically generated law still needs to respect the prohibition of arbitrariness.

The phrasing that is used in the Report could be interpreted to mean that the rule of law is conditional on democracy. This is a conceptual fallacy that misrepresents the rule of law. While it is indeed important to clarify the link between rule of law, democracy, and basic rights, the brief mention of interlinkages we find in the Report only aggravates the existing confusion about these values' mutual relations.

If the rule of law's primary concern is with the abuse of power, the prohibition of arbitrary use of power applies not only to ruling elites but to any political actor, including democratically elected bodies or the 'demos' in general. The rule of law cannot be made to depend on anyone's will, including the will of the people.¹³ Unless the prohibition of arbitrariness applies to all holders of power, the rule of law will be threatened. The fallacy of conditioning the rule of law on the will of the people is particularly dangerous in our times marked by the rise of 'illiberal democracies'. While undertaking breaches of the rule of law, current-day autocrats unflinchingly justify their actions with the democratic mandate they have. In their objections to EU criticism regarding alleged infringements of rule of law, the governments of Poland and Hungary typically point out that their policies enjoy public support expressed at the polls and that they have passed the reforms in question by legal means, using the tools of parliamentary democracy. Thus, Hungarian Prime Minister Viktor Orbán who had three land-sliding victories at national elections passed a new Constitution after coming to power, and amended the Constitution 7 times—each time with a super-majority. These reforms, executed with the mechanisms of democratic law-making, have increased the power of the state and reinforced the governing conservative Fidesz party's position in public institutions whilst curtailing civil liberties—a classic case of rule of law 'backsliding'.¹⁴

The fallacy of conditioning rule of law on democracy is present explicitly even in some of the constitutions of EU member-states – something the Commission as guardian of the rule of law should be criticizing rather than condoning. Thus, the preamble of the [Spanish Constitution](#) registers a commitment to “consolidate a State of Law which ensures the rule of law as the expression of the popular will” (emphasis added). Thus, the rule of law is reduced to legal provisions of democratic origin. This grave conceptual fallacy in the codification of the rule of law has already had nefarious political consequences. Thus, when trying to suspend the Catalan Independence referendum of 2017 with police violence (which was condemned by Human Rights Watch), Spanish Prime Minister Mariano Rajoy justified his actions as a matter of defending the law (namely, the Constitutional provision stipulating the “[indissoluble unity of the Spanish Nation](#)”) itself an expression of the will of the Spanish people. The European Commission at the time openly endorsed this

13 As Jean-Marc Sauvé, Vice-president of the Conseil d'Etat in France puts it, the rule of law's ultimate purpose “was to protect the individual against the risks of tyranny that are latent within all forms of sovereignty, including the sovereignty of the people” (Sauvé 2011). Thus, minority protection should be mandatory not because it is willed by the people, but by force of the ‘equal treatment’ proviso of the rule of law (that norm should be applied to all people equally).

14 “It's natural for the governing majority to make use of the authority it received in democratic elections,” stated Gergely Gulyas, the deputy leader of the Fidesz parliamentary group in response to international and domestic criticism of the reforms (reported in [BBC](#), 2013). A 2015 referendum on the European Commission's proposed mandatory quota for relocating migrants resulted in 98.36% of participants rejecting EU's migration policy.

autocratic interpretation of the rule of law, which led to the suppression of basic civil rights in Spain (we address this in Ch3).¹⁵

The conceptual confusion regarding the meaning of the rule of law starts already from the opening quotation, taken from Commission President von der Leyen's State of the Union Address 2020: "The rule of law helps protect people from the rule of the powerful". It might be that the statement is meant as a denouncement of arbitrary rule. However, the wording implies a populist juxtaposition between (the good) 'people' and (wicked) 'ruling elites'. Yet, unless it is empowered (and thus, given some discretionary power), public authority cannot rule—the point is to make the powerful rule responsibly, in the public interest—and the rule of law is one such weapon for forcing elites to rule responsibly. This is what the Commission's Report should be making clear if it is to pursue effectively its declared educational ambition.

VAGUE/DIPLOMATIC LANGUAGE _____ **(ii)**

While the authority of the Commission is based in its non-political nature and administrative professionalism, it tends to use diplomatic language in which criticism is delivered through euphemisms and understatements. Typically, it speaks about 'weaknesses' and 'needed improvements' to refer to grave problems. This vagueness diffuses both the responsibility of the perpetrators and that of the Commission. Thus, in its chapter on Bulgaria, the Commission writes that a "lack of transparency of media ownership is considered as a source of concern", and "Bulgaria's regulatory process is considered to be lacking predictability and stability due to frequent changes of the legislation." Who considers this to be of concern? Does the Commission judge that this is a rule of law breach? The wording leaves doubts about the Commission's stance.

To help address this, as a minimum, a clarification of the difference between violations of the law and violations of the rule of law should be offered. As we noted earlier, threats to the rule of law emerge not when the law is violated, but when breaking the law is not punished, when the sanction is not uniform, and when there is no legal and institutional framework to enable that inequities be challenged and corrected. As the Report fails to draw this distinction, it covers an indiscriminate selection of issues: from violations of the law to flawed accountability mechanisms. On the one hand, making this distinction explicit would help dispel a common misperception—that any violation of the law is a rule of law violation—especially if this monitoring mechanism is to play an educational role. This would direct the public's energies to requesting accountability for systematic abuses and their systemic sources. On the other hand, it would impose a discipline on the

¹⁵ An Open Letter to European Commission President Juncker and European Council President Tusk of November 2017, set out the ways in which Spain has violated the Rule of law in its dealings with Catalonia and charged that, by failing to sanction the Spanish government on this occasion, the European Commission has fallen short of its responsibilities regarding the respect of the rule of law in the EU (Azmanova, Spinelli et al. 2017). See also Azmanova, 2017.

Commission, preventing it from reporting on rule of law ‘non-issues’. Thus, the Bulgarian Chapter of the 2020 Report tells the success story of the Parliament’s refusing to adopt a measure in the State of Emergency Act of March 2020 which would have threatened the freedom of speech. Clearly, this is neither an infringement of the rule of law nor a threat to it. While there is no apparent need to include this ‘rule of law success story’ in the Chapter, its reporting creates the impression of real achievements when what the Bulgarian society needs and demands is the European Union’s detailed criticism of the chronic rule of law decay in the country.

Such omissions and understatements have a nefarious effect as the resulting obscurity allows perpetrators of rule of law violations to interpret the Commission’s commentary as an endorsement or at least toleration of their behavior. Thus, Bulgaria’s Justice Minister Desislava Akhladova and the ruling GERB party described the European Commission’s report as ‘positive and objective’, in the midst of massive anti-corruption protests in Bulgaria at which the civil society advanced serious allegations about government’s rule of law violations (Nikolov 2020).¹⁶

COMPREHENSIVENESS OF COVERAGE (THOROUGHNESS) — 2

UNJUSTIFIED DELIMITATION OF THE RANGE OF THE REPORT ————— (i)

The Report delimits its range to four areas: the justice system, the anti-corruption framework, media freedom, and ‘other institutional checks and balances’. Of course, the Commission is right to exercise its discretion in delimiting the range of the Report. However, to avoid arbitrariness in making such a decision, logical argumentation needs to be offered in justifying this choice—none is given. The Commission’s failure to offer either a thorough or well-justified selection of rule of law violations, is evidence in the following features of the Report.

The Commission has chosen, without explicit justification, not to address in a systematic way “accountability mechanisms for law enforcement, the role and independence of public service media, as well as measures taken to ensure that public authorities effectively implement the law and to prevent abuse of administrative powers.” (p.5, ft20). It also states that “the country chapters do not purport to give an exhaustive description of all relevant elements of the rule of law situation in Member States but to present significant developments” (p.5). This is already problematic, as no criterion is offered for how the significance of the chosen developments is established. The Commission thus grants itself an undefined (arbitrary) mandate that enables an arbitrary use of its power.

Of course, the country chapters cannot cover all inequities that occur in member states. But the distinction between violations of the law and infringements of the

¹⁶ The Bulgarian Premier Borissov, after his meeting with European Council President Donald Tusk on 2 Oct 2020 tweeted: “Tusk and I discussed the Commission’s comprehensive Rule of law Report. It is objective and reflects the efforts of our country to fight corruption” (OffNews 2020).

rule of law (as discussed above) could provide a reasonable basis for delimiting the range of the Report.

LACK OF SYSTEMIC ACCOUNT OF THE ISSUES ADDRESSED ————— (ii)

Although the Report appears to address a wealth of issues, this is not done in a structured way beyond the formal distinction of four sections. The various strands of otherwise valuable criticism would only make sense (and thus serve to educate and justify penalties) if the discussed failings could be traced back to a diagnosis of the rule of law situation in each country. Such a fact-based diagnosis should articulate the causes of each problem and trace its consequences. Moreover, such a diagnosis should explicate the general systemic roots of challenges to the rule of law within a context-specific discussion of the issues. Such diagnoses, however, are entirely missing in the Report. Instead, the Commission relies on generic statement of principles, surveys of perceptions, and enumeration of enacted or planned reforms. For example, in Austria's country chapter, the Commission acknowledges that high levels of state advertising "seem" to be distributed disproportionately among "high-circulation tabloid newspapers". It also cites concerns raised by stakeholders over "potential political influence in the allocation of state advertising" (EC 2020, Austria: p.11).¹⁷ However, the Report does not trace this anomaly to its systemic roots—the law allowing the state to take out advertisements in newspapers, which allows the government to use this budget to reward its friends in the media. The Report's allusion to perceptions of these issues avoids addressing the risks to media pluralism in Austria, and obscures the Commission's position on this matter.

Thus, the Report does effectively offer descriptions of the institutional landscape of member states; but this is done in detail whose relevance is unclear. At the same time, it fails to elucidate the systemic roots of rule of law violations and threats—that is, the way abuse of power is rooted in the institutionalised allocation of spheres of authority. The Commission's report has been criticised for not undertaking analysis of the systemic parameters of the rule of law institutional framework. For example, the Report reviews the basic structure of the French judiciary and its relation to the executive before addressing the planned [reforms](#) for strengthening the judiciary's independence. However, the need for such reforms remains obscure.

Thus, the systematic occurrence of conflict-of-interest cases in France is rooted in a systemic peculiarity of the French judicial system—its dependence, codified in the Constitution, on the executive—a phenomenon we address in Chapter 1.

Instead of such a comprehensive and coherent account of the rule of law institutional infrastructure, the Commission has offered snapshots of reforms (thus

¹⁷ Austria spends about 180€m on media advertisement – a huge amount for a small country (more than Germany whose population is 10 times the size of Austria's). Two thirds of this money in 2020 went to Austria's biggest tabloids: Österreich, Krone, Heute. These tabloids, regarded as more favourable to the former Chancellor Sebastian Kurz, received a hugely disproportionate amount as compared to the critical and standard daily medias, for example the tabloid Österreich received 5.15 euros per reader in 2018 and the daily Der Standard 0.89 euros (Vogt 2020).

giving the misleading impression of progress) but as Alina Mungiu-Pippidi notes, “the link between problems they were meant to address and these reforms is either missing or presumed” (Mungiu-Pippidi 2020).¹⁸ This points to another flaw in the Report’s design: the lack of context-specific diagnosis of the problems. Mungiu-Pippidi observes that the Report’s snapshot of judicial reforms fails to clarify how newly introduced reforms are meant to address entrenched problems rooted in the historically developed power balance in every given country (ibid.). This problem is aggravated by the failure to offer a lucid definition of key concepts such as ‘judicial independence’ and then clarify them in relation to the institutional framework of each Member State. Thus, the narrative in the Introductory and the country chapters mentions the need to reduce the influence of the legislative and executive powers on the justice system, but this is done ‘on the go’, without a focused definition. In treating judicial independence, the Reports also fail to address the need to shield the justice system from economic interests (a distinct problem in Bulgaria), or the risk of independent judiciary bodies, when left unchecked, to abuse their powers (as in the case of the Bulgarian prosecutor-general).

The inability to diagnose and therefore monitor these reforms in its situational context renders unclear to what extent the independence of the judiciary is really improving, or even if this celebrated independence might be a threat to the rule of law. Thus, the report correctly regards judicial independence as a precondition for an effective and efficient justice system. However, the formalistic emphasis on judicial independence obscures threats to the rule of law rooted in the unaccountable power of organs of the judiciary, which allows them to use their mandate selectively and instrumentally, in violation of the prohibition of arbitrariness that defines the rule of law. This is for instance the case in Bulgaria. The Commission appears to be praising the independence of the prosecution while it is exactly this purported independence that has allowed the Prosecutor-General to use selectively the powers of his office for personal and political ends. The 2020 Report’s commentary that Bulgaria still needs to “finalise legislative procedures to answer long-standing concerns about an effective accountability regime for the Prosecutor General” (EC 2020: 9) is far from sufficient to bring to light the gravity of the situation. Here the Commission fails the rule of law by failing its diagnosis of the systemic roots of systematic abuse of power in Bulgaria.

RESTRICTING THE REMIT OF THE RULE OF LAW TO PUBLIC AUTHORITIES — (ii)

The definition of the rule of law in the Report correctly places an emphasis on the abuse of power but unfortunately it unduly restricts this to public authority

¹⁸ As the author notes, “An anticorruption framework makes sense only in relation to a given country’s corruption problems [...] If a relation existed between the density of regulation on anticorruption and a reduction of corruption, this would be more understandable, but the reality is exactly the opposite: the most successful national integrity frameworks in the EU (and the world) are not the most regulated, but the other way around”.

“Under the rule of law, all public powers always act within the constraints set out by law” -p.1) While concerns with rule of law indeed originated in efforts to constrain the arbitrary power of central governments, threats to the rule of law nowadays come also from powerful economic actors. This is why the Venice Commission uses in its Rule of law checklist a more expansive language: “everyone has the right to be treated by all decision-makers with dignity” (#15), noting that “individual human rights are affected not only by the authorities of the State, but also by hybrid (state-private) actors and private entities” (#16). Thus, the Venice Commission updates the rule of law conception to the realities of the 21st century by stating that “all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of the rule of law” (#17) (Venice Commission 2016).

The Report correctly treats the judiciary’s independence in terms of independence from government and private interests. However, because the Commission has decided to limit its review to abuses by public powers, it has failed to address the social power (and not only the direct political influence) of the oligarchic mafia in Bulgaria. This is an important omission because the Bulgarian state’s capture by oligarchic economic networks is at the root of the incapacity of the state to uphold the rule of law in the country.

Finally, the Report makes no provision for assessing compliance and implementation, which is necessary in obtaining both its educational and its disciplinary goals.

By failing to provide a comprehensive and systematic coverage of rule of law threats and violations the Commission has put itself in a position of exercising its power in an arbitrary and therefore, irresponsible, way. This has an impact on the rule of law in European societies because the Commission’s choice not to address certain rule of law violations tends to be taken as a sign that it is condoning these violations.

EQUAL TREATMENT AND IMPARTIALITY ————— **3/4**

The principles of equal treatment and impartiality are closely related but they have each their own remit and significance. The first principle postulates that public authority should treat its subjects in a uniform manner. By not ‘playing favorites’ public authority maintains the legitimate distribution of power in society and exercises self-constraint by placing a limit on its own power, in line with the prohibition of arbitrariness that is fundamental for the rule of law. Impartiality, in the sense we use it here, refers to remaining politically/ideologically neutral—impartial to the multitude of ideological positions in society. This principle is particularly important

in the functioning of the executive and the judiciary branches of government in order to ensure that public authority rules in the interests of all citizens.

The very existence of the country reports is due to a great extent to the ‘double standard critique’ of the Commission’s treatment of member-states is well-known—it usually takes the shape of the claim that the EU is targeting Eastern European Member States that joined after 2004, while overlooking the misbehavior of the older member-states from western Europe. This narrative emerged in the course of preparing the Eastern European Member States to join the EU after the end of the Cold War. To that purpose, new accession criteria were formulated at the 1993 European Council in Copenhagen, including stability of institutions guaranteeing rule of law. Such an explicit criterion had not been applied in previous rounds of EU enlargement. A special rule of law monitoring arrangement (the Cooperation and Verification Mechanism) was even applied to Bulgarian and Romania. The launching, with the 2020 Rule of law report, of a comprehensive mechanism subjecting all member-states to such screening was meant to address the double standard critique.

It is important, indeed, that the Commission applies rule of law screening equally to all member-states in order to avoid giving grounds for claims that it is using the rule of law as a political instrument—in violation of the spirit of the rule of law. The ‘double standard charge’ also serves to downplay well-grounded concerns for rule of law backsliding in certain Member States—namely, the charge that such violations happen everywhere but the Commission selectively targets some countries in order to interfere in their domestic affairs (Pech and Grogan 2020).

The 2020 and 2021 Rule of law Reports vow to cover all Member States on “an objective and impartial basis” (2020: 3). However, it remarkably fails to deliver in this regard. For instance, significant infringements of the rule of law in the old democracies of Europe such as France and Spain are omitted from the Report—we review some of these in the next chapters. The Report has entirely omitted the Wirecard corruption scandal in Germany which brought to light pervasive rule of law violations.¹⁹

While such omissions could be imputed to the assumption that the old democracies of Europe have a well-established rule of law political culture and institutional mechanisms, the benevolent treatment of Bulgaria in the Report cannot be explained in those terms. The rule of law violations in this country are persistent and well-known. This positive treatment of Bulgaria precedes the 2020 & 2021 Reports; in its [last report](#) under the Cooperation and Verification Mechanism published in October 2019, the European Commission [announced](#) that

¹⁹ Reported in Chazan and Storbeck 2021.

it “consider[ed] that the progress made by Bulgaria under the CVM [was] sufficient to meet Bulgaria’s commitments made at the time of its accession to the EU”. In the 2019 CVM report, the Commission reaffirmed its conclusions from the previous year that the benchmarks judicial independence, legal framework, and organized crime had been closed because of satisfactory progress.

The Commission’s downplaying the problems of rule of law in Bulgaria has been detrimental to the efforts of part of Bulgarian society to press for essential reforms.²⁰ The Commission’s refusal to take a harder line with the Bulgarian authorities are giving the impression of its complicity with Bulgaria’s autocratic regime—which puts to question the political impartiality of the European Commission in the execution of its mandate.

The case of Bulgaria suggests that the Commission tends to overlook the transgressions of those among the rising autocrats in Europe who are otherwise loyal to the EU, or are important partners in the European People’s Party’s political family to which Commission Presidents have belonged since 2004. Such a blatant politicization of the body which is supposed to be the non-political executive arm of the Union and a guardian of the rule of law poses a grave danger to the rule of law in Europe.

We next turn to some country chapters in order to illustrate the way the Commission’s Report fails to comply with the four criteria of clarity, comprehensiveness, equal treatment and political impartiality and thus not only fails its mandate as a guardian of the rule of law but itself violates the fundamental prohibition of the arbitrary use of power that is the essence of the rule of law.

We have used two types of sources: First, we examined inputs the Commission received in the course of stakeholder consultation for its first 2020 Rule of law Report; the information from many of these contributions was not included into the original 2020 Report, which is in itself significant. We state when a particularly relevant contribution has been ignored, because this indicates a considered choice the European Commission has made to ignore these contributions. These are publicly available in the [Report’s database](#). Secondly, we draw on additional sources such as the opinions of legal scholars, civil society organisations and relevant institutions.

Our survey of the three countries follows the four-part structure of the Commission’s Report: (1) justice system, (2) anti-corruption framework, (3) media pluralism, and (4) other Institutional Issues related to checks and balances. However, we have adjusted the latter two components to also address fundamental rights.

²⁰ As we note in the Chapter on Bulgaria, former Justice Minister Hristo Ivanov commented that Prime Minister Borissov rejected his proposals for reforming the mandate of the omni-powerful Chief Prosecutor, saying that he will only do it if Angela Merkel demands it (Reported in Georgieva 2020).

The European Commission has not justified the exclusion of fundamental rights from the structure of country surveys; it has included a sporadic commentary only in the various sections. The safeguarding of unconditional and universal rights is the strongest protection there is against arbitrary use of power—infringements of rights need to be present prominently in any reporting on the rule of law's health.



FRANCE





ARBITRARY RULE AT THE HEART OF EUROPE

02

France has been one of the main laboratories of the rule of law. The triad Liberté, Égalité, Fraternité of the revolutionary 1789 has inspired revolt from state oppression worldwide—including in the struggles for the abolition of slavery, universal suffrage and colonial independence. Having been the poster child for liberal democracy, France has seen an increase of the arbitrary use of power by the executive, minority discrimination, as well as violation of fundamental freedoms.

There have been manifest signals that actions of the French Government are endangering the rule of law—the well-recorded criticism of the security laws introduced since the 2015 Paris terrorist attacks, the appeal to the European Commission by French judges on the “grave attacks to the independence to the judiciary” (Abboud 2020), and condemnation from various international human rights bodies on the use of violence by the French police against protesters.²¹ The Commission has chosen to remain silent or downplay these risks to the rule of law despite their apparent systematic occurrence. In what follows, we will review such grave omissions in the 2020 and 2021 rule of law Reports’ chapter on France.

I. THE JUSTICE SYSTEM

In May 2018 French President Emmanuel Macron introduced new wide-ranging constitutional reforms under the name of “[Projets de lois pour un renouveau de la vie démocratique](#)”. These reforms aim, among other things, at improving judicial independence.

21 Council of Europe Commissioner for Human Rights, Dunja Mijatović, expressed in 2019 her concerns at “the number of and seriousness of injuries inflicted on demonstrators” by law enforcement, and urged French authorities “to show more respect for human rights during operations aimed at maintaining public order and refrain from introducing excessive restrictions to freedom of peaceful assembly” (Commissioner for Human Rights 2019).

The Commission's 2020 Report observes that the increased role of the High Council for the Judiciary (Conseil Supérieur de la Magistrature CSM) foreseen by the reforms "would further strengthen judicial independence," (2020: 1) and notes that GRECO has endorsed the proposed constitutional changes. However, this account misrepresents the situation by omitting essential information and criticism of the reforms. The Report fails to mention, for example, GRECO's conclusion that the French executive's compliance with its recommendations remain "globally unsatisfactory" (GRECO 2018: 24), especially regarding the executive's power over the judiciary.

Similarly dependent on the executive is the prosecution. Ordinance n° 58-1270 of December 22 1958²² foresees that the magistrates of the Public Prosecutors' office are placed under the authority of the Minister of Justice. These systemic drivers of the political dependence of the prosecution in France have been a long-standing issue that has been addressed by the European Court of Human Rights which, in the case of [Moulin v. France, 23 November 2010, 37104/06](#), found that France violated article 5, section 4 of the European Convention of Human Rights, on the grounds that a public prosecutor cannot be regarded as a competent legal authority (due to it being under the authority of the executive).

The Commission's 2021 Report changes track on the subject of the 2018 Constitutional reforms, by declaring that they have not been "advanced" (2021: 3). In addition, it references proposals from an inquiry of obstacles to judicial independence issued by a National Parliamentary Commission of Inquiry on 2 September 2020. The inquiry advises to further strengthen the role of the High Council by aligning the disciplinary and appointment rules for prosecutors with that of judges (instead only giving an opinion on proposals from the Minister of Justice) and for the High Council to be able to act on its own initiative on any issue related to the independence of the judiciary. Art. 65 of the Constitution stipulating that the President can seize the plenum of the High Council as guarantor of the independence of the judiciary is cited in relation to the latter issue. This issue was highlighted in advance of the 2020 Report by one of the Commission's national stakeholders, the Syndicat de la Magistrature, who 'considers the current constitutional reforms as completely insufficient regarding the issues with nomination of public prosecutors' (Syndicat de la Magistrature 2020) and also by GRECO's 2018 recommendations mentioned above.

The European Commission's first 2020 Report failed to provide a broader diagnosis of the organisation of power in France to allow assessment of whether the proposed reforms are sufficient to solve the problem of the endemic influence of the executive over the judiciary in France.

²² [Article 5](#): "Prosecutors are placed under the direction and control of their superiors and under the authority of the Keeper of the Seals, Minister of Justice. At the hearing, their speech is free."

The 2021 Report may have had to change its position from promoting these constitutional changes, to underlining existing criticism, in light of a much-publicised conflict-of-interest case involving France's current Justice Minister Eric Dupond-Moretti and the French Prosecutor's Office (also mentioned in the 2021 Report) which has brought to the forefront the issue of a lack of proper separation of powers between the two branches of government. Dupond-Morretti was a career defence lawyer before being appointed by President Emmanuel Macron as Justice Minister in July 2020. A month prior to the appointment, it was revealed that his phone had been tapped by the investigators of the National Financial Prosecutor (PNF) as part of its corruption investigation into former President Nicolas Sarkozy and his lawyer Thierry Herzog, who were Dupond-Morretti's associates. Dupond-Morretti demanded a judicial inquiry into three named investigators of the PNF who had conducted the phone tapping. According to Anticor, a national anti-corruption association that aims to promote ethics in politics in France, "This inquiry...sought to settle some personal accounts and send a message to the prosecutors who were bringing the accusation against Nicolas Sarkozy and Thierry Herzog. In doing this, the Minister used the inspection of those investigators who had inquired into him and his best friend, against a prosecutor who would be seeking a sentence against this friend in a couple of months' time." (Myant 2021). In response to Dupond-Morretti's call to investigate the three investigators of the PNF, a statement signed by many lawyers and academics in *Le Monde* denounced: 'everything is done to prevent the National Financial Prosecutor's Office from exercising its usual functions'. They accused the Executive of trying to destabilize "a judicial institution in which they never imagined could work independently and at times thwart their immediate interests" (Collectif avocats/universitaires 2020). The two biggest unions representing French judges appealed to the European Commission to intervene over what they consider the Justice Minister's "grave attacks on the independence of the judiciary" (Abboud 2020—the letter by trade unions is mentioned in the 2021 report, but is framed as a complaint over the conflict of interest case, without citing their concerns over judicial independence (2021: 3).

In light of these issues, Polish MEP Kosma Zlotoski from the European Conservatives and Reformists Group requested that the Commission explain its lack of attention to the deficient independence of the French judiciary in its 2020 Report:

1. Does the Commission intend to intervene in connection with what the French judges claim are grave attacks on the independence of the judiciary and on the rule of law in France? If so, what action will be taken?
2. Does the Commission consider that the letter from the judges' trade unions contradicts the conclusions of the chapter on France in the Rule of

law Report 2020, which does not raise concerns about the functioning of the French justice system?

3. Does the Commission believe that the French Government has the right to carry out the reform of the justice system and structure referred to in the letter sent by the unions representing French judges?' (Zlotoski 2020)

These questions hint at a disparity between the Commission's rigorous, well-supported criticism of the erosion of judicial independence in Poland, and near complete silence on the systemic dependence of the judiciary on the executive in France, in violation of the principle of equal treatment. European Commissioner for Justice Didier Reynders offered the following reply:

"The Commission recalls that, although the organisation of justice in the Member States falls within their competence, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EC law, including judicial independence. The Rule of law Report aims at encouraging all Member States to learn from each other's experiences and at showing how the rule of law can be further strengthened in full respect of EC law and European standards" (Reynders 2020).

This reply avoids addressing the substance of the problem—it is rather an attempt to decline responsibility for identifying rule of law deficiencies (unresolved systemic issues that endanger the rule of law) and for calling on member-states to act. The Commission's condoning of systemic flaws in France with the excuse that EU Member States are free to choose the particular institutional design of their political systems amounts to a deliberate refusal to fulfil its mandate as guardian of the rule of law.

Another area in which the Report fails to give a full account of systemic deficiencies in the French Judiciary is related to financial resources. The French justice system is drastically under-funded. Thus, *Le Monde* reported in October 2020, that France's judicial system budget was much less than the EU average (84,3€) with 69.5€ per inhabitant compared with Germany's 131,20€ and Italy's 83,2€. The average for the 47 European states which includes much poorer countries such as Armenia and Moldova which is 71,56€. The list of deficiencies in funding, staffing and remuneration indicates a chronic weakening of the judiciary, placing France behind its 47 counterparts in Europe.²³

²³ Thus, for the number of professional judges per 100,000 inhabitants in 2018, France has 10.9 whereas the medium is 17.7. For the number of prosecutors per 100,000 inhabitants in 2018, France has 3 whereas the medium is 11.25. For the number of lawyers per 100,000 inhabitants in 2018, France has 99.9 whereas the average in Europe is 123. In terms of legal aid, France provides two times less the amount than its European counterparts (7,16€ compared to 14,59€ average). In France, the remuneration of legal aid lawyers is one of the lowest in Europe (Jacquin 2020).

The Commission's 2020 Report noted rather euphemistically that the expenditure on the judiciary as a percentage of GDP "is rather low" in France, citing that "The Programming Law for Justice 2018-2022 provides for a significant increase in the funds allocated to the justice system, with a 24% increase between the 2017 budget of EUR 6.7 billion and the planned amount of EUR 8.3 billion in 2022" (2020: 4). The 2020 and 2021 Reports fail to convey the magnitude of the problem and the incapacity of the planned reforms to effectively address it. The Commission Nationale Consultative des Droits de l'Homme (CNCDH), the national human rights body in France, expressed its concerns on how the 2018-2020 programming law risks a limited access to judges and justice: "Under the pretext of simplification and streamlining procedures, the bill, instead of bringing justice closer to citizens, risks pushing them further away, in particular the most vulnerable and the most disadvantaged, even though access to justice is a fundamental right." (CNCDH 2018). The "simplification of procedures" refers to the plans to merge the tribunaux d'instance with the tribunaux de grande instance so that litigants have a single point of entry, undifferentiated according to the dispute, raising concerns of "a gradual devitalization of small jurisdictions." (Jacquin 2018)

Another significant flaw of the French justice system omitted from the Report is the reforms to the penal law which foresee submitting crimes punishable by fifteen or twenty years of imprisonment to a criminal court composed of five professional magistrates, without a popular jury to decongest the cours d'assises (trial courts)", which according to the *Le Monde*, "lawyers see as cheap justice"(Ibid.). This enhances the powers of the police and prosecution by extending to judicial police officers the possibility of issuing requisitions without the authorization of the prosecutor, extending police custody without appearing before the magistrate, extending the field of telephone tapping, geolocation and searches during an investigation by the prosecution, amongst others (Deléan 2019). The reforms introduced by the former Minister of Justice, Nicole Belloubet, was strongly opposed by the Union Syndicale des Magistrates (USM), the Syndicat de la magistrature (SM), the Syndicat des Avocats de France (SAF), the National Bar Council (CNB) and many other organizations and resulted in several thousands of lawyers and judges protesting in Paris in April 2018 (the 'justice morte' protests). Protestors' signs read: "Justice privée = privé de justice" (private justice = deprived of justice), "Nous marchons pour vos droits" (we are protesting for your rights), or "Sauvons nos territoires" (Save our territories) (ibid.).



Paris, France—11.15.2018, Protest against the Loi de Programmation. Birdog Vasile-Radu / Shutterstock.com

In the face of the well-publicised criticism of these reforms not only in terms of their ineffectiveness in solving the systemic problems of the French justice system but even the prospects of weakening it further, the Commission Report’s commendation of this reform is puzzling. The Report notes that this reform “aims to further foster the efficiency of the justice system” whilst acknowledging that stakeholders have expressed concerns (2020:4) without addressing the likely impact. Ernest Pardo, specialist in judicial dysfunction in Europe notes:

“Formal reforms which elude substantive reforms condemn any attempt at reform to ineffectiveness. Thus, the reforms only concern the administrative, structural or organizational aspect, without touching the jurisdictional aspect which is the root of the problem. Formal corrections envelop the basic problem and maintain a situation which has lasted, persisted and worsened for two centuries, without any of the alterations, measures or reforms undertaken and stopped by the State – this will not be effective in correcting the dystopia in which the justice system is plunged.” (Pardo 2021)²⁴

In a similar vein, Alina Mungui-Pippidi has noted that what such reforms achieve is rather to present an issue of power into a matter of judicial organisation. She

24 For an extensive analysis of the structural/systemic flaws of the French judiciary see Pardo 2018.

observes that the Report's failure to assess these reforms in their situational context renders unclear to what extent the independence of the judiciary in France is really improving, and what concrete action needs to be undertaken to effect a positive change (Mungiu-Pippidi 2020).

II. ANTI-CORRUPTION FRAMEWORK

France has a reputation for being lax on global corruption, for which it has been criticised by the OECD and Transparency International. To counter this problem, an anti-bribery law was introduced in 2016: The Law No. 2016-1691 on transparency, the fight against corruption and the modernisation of economic life, known as 'Sapin II'. This comprehensive law established the French Anticorruption Agency (AFA); introduced criminal penalties for large companies that failed to prevent corruption, a prevention program of corruption and influence peddling, and new Whistleblower protection regulations. France's first multiannual plan to fight corruption was adopted in January 2020.

In the second segment of the 2020 Report, The Anti-Corruption Framework, the Commission commends France for strengthening the institutional framework for fighting and preventing corruption in the public and private sector in the last years", notably in reference to the Sapin II laws and the multiannual plan—this is reiterated in the 2021 Report. However, both Reports omit that the national anti-corruption plan excludes the Private Office of the President which 'is not immune to corruption risks or of conflicts of interest' and 'should deserve a prevention programme and a risk assessment,' as observed in GRECO's "Evaluation report on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies." (GRECO 2020: 14). GRECO's evaluation report was used as a source for the 2020 and 2021 Rule of law reports regarding the transmission of information to the Executive of the National Financial Prosecutor (PNF). So why then was GRECO's position in that same paper regarding the Presidential Office ignored? This is particularly relevant given that this year (2021) former French President Nicolas Sarkozy was sentenced to three years in jail for corruption under the crimes of influence-peddling and violation of professional secrecy. Corruption in high office appears to be a running theme in French politics with former French President Jacques Chirac having been convicted of corruption, and five of the last six French centre-right prime ministers have faced criminal charges. In addition, the current leader of the far-right National Rally, Marine Le Pen, has been under formal investigation for the alleged embezzlement of €6.8 million in EU Funds, and former leader of far-left La France Insoumise is under investigation

for allegedly claiming money for 'fake jobs' in the European Parliament (Lichfield 2021). Given the history of corruption-related charges in the French executive and among the political class this omission in the Report is conspicuous and seems to be deliberate. What actions can be expected to be undertaken against rule of law infringements, if the Commission refrains from scrutinising the highest public office in EU Member States?

The Commission's potential lack of impartiality in its selectivity of GRECO's recommendations maybe be due to the constraints it has deliberately placed on itself: it has stipulated that it will not address "accountability mechanisms for law enforcement, the role and independence of public service media, as well as measures taken to ensure that public authorities effectively implement the law and to prevent abuse of administrative powers." (p.5, ft20). However, in circumventing issues related to the source and application of law enforcement, it fails to comprehensively examine the functionality of the existing safeguards in place to protect the rule of law. This is a foundational aspect of rule of law protection, which, left unexamined, will hinder the ability to clearly analyse related developments.

Again, the numerous concerns regarding laws have not been addressed by the European Commission, nor was criticism regarding their effectiveness. The reception of this law was criticised by Anticor, ATTAC, Bloom, CCFD-Terre Solidaire, Collectif Roosevelt, Justice et Paix, OCTFI, ONE, Oxfam France, Peuples Solidaires-Action Aid France, Réseau Faith et Justice Afrique Sherpa, Solidaires Finances Publiques and the Syndicat de la Magistrature. When the law was adopted, a group press release was published insisting that the Sapin II laws will "simply be ineffective in the fight against tax evasion" (Oxfam International 2016) and pointed to an inconsistency between the words and deeds of the mandate. This criticism centred on the provision which would oblige companies to publish tax information only in the countries where they have a minimum number of subsidiaries. This would exclude a large number of countries from being included in multinational's tax reporting, leaving gray areas where they can continue to hide their profits.

Several other aspects of the Sapin II regulations have been criticised by civil society. Anticor, alongside other civil society organisations, believe that AFA's position under the authority of the Minister of Justice and the Minister of the Economy does not guarantee its independence as stipulated under Article 6 of [the UN Convention against Corruption](#) (Collectif des organisations de la société civile 2016). A provision in the Sapin II law allows companies that confess to corruption to be allowed to amend their wrongdoings and pay a fine instead of a criminal conviction. This provision has been widely criticised for allowing companies to buy criminal immunity (Anticor 2016).

In the Anti-Corruption Framework section, the 2020 and 2021 Reports give the impression that the Commission has approached the issues superficially, ignoring well-recorded criticism by competent bodies, and without assessing the discussed reforms' capacity to reach their targeted outcomes. Notably, the discussion of anti-corruption policy is not situated within a systemic diagnosis of the problem to which the discussed reforms were meant to provide a solution. Before the 2016 anti-bribery legislation, France had never convicted a company of corruption, leading to what Transparency International called an "unacceptable state of near impunity in the last 15 years". It is therefore hard to situate the rule of law progression in France as told by the Commission's report, as reforms deemed progressive are not outlined against the backdrop of France's complex and ongoing history of corporate and political corruption.

III. MEDIA PLURALISM FREEDOM OF EXPRESSION AND INFORMATION

An environment in which rule of law risks have been allowed to fester provides fertile ground for the development of breaches. During the Macron Government, there have been a number of cases of state involvement in targeting journalists over the confidentiality of their sources—an act which threatens the rule of law in relation to the right to inform and journalist protection. Several examples cluster around the reporting of the 'Benalla Affair'. Alexander Benalla was a former security aid and deputy chief of staff to President Emmanuel Macron. He was dismissed in July 2018 over video footage of him attacking a young protester during the May Day demonstrations whilst impersonating a police officer. A string of scandals attached to Benalla were later revealed, including 'concealment of a violation of professional secrecy' and 'concealment of the misuse of images from a video surveillance system'. On the 4th of February 2019, two prosecutors and three police officers attempted to search the offices of the investigative news site Mediapart, after they had [published](#) audio recordings Alexander Benalla. Within them, Benalla is heard stating that he had the Presidency's support during his formal investigation over having committed violence against protestors. Mediapart also uncovered that Benalla was in contact with a Russian oligarch close to Vladimir Putin whilst working at the Élysée and kept strong ties with the French President during the investigation (Afri; Rouget; Turchi 2019). A number of journalist organisations from different media sites produced a statement expressing their "deep concern" over the prosecutor's attempt to breach the confidentiality of Mediapart's sources. The statement reinforced the need to strengthen the protection of journalists'

confidentiality of sources to maintain a free press and the right to inform (Le Monde Editors 2019). Mediapart journalist Fabrice Arfi warned that President Emmanuel Macron has himself stated that journalists are no longer telling the truth and that he is “developing a very worrying contempt for journalism” (Breedon 2019). He refers to Macron’s [allegation](#) that France has ‘a press that no longer seeks the truth’ (Chevalier 2018) in response to the first accusations against Mr. Benalla. Sowing mistrust towards the media erodes the rule of law as the media cannot perform its function to expose the abuse of power and to demand accountability from public authority.

This was not an isolated instance of political assault on the media: in May 2019, several journalists were summoned to the Direction Générale de la sécurité intérieure (DGSI), a French counterterrorism and cybercrime security agency, in relation to their reporting on the Benalla affair and on France’s arms sales to Yemen and Saudi Arabia. The journalists included a Le Monde journalist, Ariane Chemin, who reported on the Benalla Affair, as well as the President of the Executive board of Le Monde, Louis Dreyfus. Ariane Chemin was accused of having disclosed information on the profile and career of a non-commissioned officer of the Air Force, Chokri Wakrim, who was close to the former head of security at the French Prime Minister’s offices, Marie-Elodie Poitout. Within the same month, Michel Despratx, Geoffrey Livolsi and Mathias Destal, journalists for Disclose, an investigative journalism NGO and media outlet, was summoned by the DGSI in relation to an investigation on “the compromised secrecy of national defence”. Disclose had published a classified note by the French Military Intelligence Directorate (DRM) detailing how France sold weapons to Saudi Arabia and the United Arab Emirates that were then used in the deadly war in Yemen. Seventeen NGOs collectively warned that the threats towards the three Disclose journalists constituted an “unacceptable attack against the liberty of the press” and that they exercised their functions responsibly without revealing any French military operations or putting any of their personnel in danger (Oxfam France 2019). The National Union of Journalists (SNJ) responded by saying: “there is something very toxic going on in this country. We see this as an attempt to intimidate journalists and their sources, and that is totally outrageous.” News site Disclose denounced it as “a new attempt by the Paris prosecutor’s office to circumvent the 1881 law on press freedom and the protection of sources” (Le Monde avec AF 2019). In addition, a collective response by 40 news agencies was published by Le Monde: “We recall once again that the protection of sources has been consecrated by the European Court of Human Rights as “one of the cornerstones of freedom of the press” and that secrecy cannot be opposed to the law. To inform, essential to a public debate worthy of the name, nor to serve as the sword of Damocles to dissuade journalists from investigating and publishing.” (Par Collectif 2019).

The 2020 Report omitted referring to these well publicised instances of intimidation to journalistic confidentiality of sources and state intimidation. The 2021 Report goes a step further but provides a reductive account of this issue. It states that “worrying developments have been observed in relation to confidentiality of reporters’ sources” (12: 2021), and expands in its footnotes that the World Press Freedom Index noted at least two journalists were summoned for questioning by the IPGN in 2020.

The Report, in not thoroughly reporting these breaches to media freedom, cannot trace their accumulation into systematic infringements of the rule of law. Moreover, there is no attempt to address the possible systemic roots of these practices. The European Parliament has noted a lack of “differentiated reporting to distinguish between systemic and individual, disconnected breaches of rule of law” (European Parliament 2021) in the Commission’s report—rendering it incomplete and incoherent.

IV. OTHER ISSUES RELEVANT TO THE RULE OF LAW

Moving on to the fourth and final section of the Report, “Other Institutional Issues Related to Checks and Balances”, a potentially worrying development concerning the balance of powers during COVID-19 pandemic was omitted in the 2020 Rule of law Report. The 2020 Report originally addressed the emergency regime that was introduced in response to the public health crisis in a manner that created the impression that this has been done in full compliance with the rule of law. The Commission noted that the new emergency regime was both “specifically tailored to health emergencies” and “separate from the pre-existing emergency regimes” (2020: 11). This vaguely alludes to the widely condemned previous state of emergency regulation which was renewed six times and ended up largely mainstreamed into French law (discussed in detail below). The 2020 Report mentioned that the CNCDH criticised a number of the health emergency measures adopted by decree—obscurely referring to them as “contested in the context of legal proceedings”, in relation to the right to demonstrate and provisions relating to “the collection of data in the light of COVID-19” (ibid.). Neither of these phrases conveys serious criticism of the government’s pandemic response. In the 2021 Report, the Commission has largely changed its tune, notably warning that the accelerated procedure of pushing through laws “originally conceived as an exception, is becoming the norm” (2021: 14). The [CNCDH](#), in its opinion on the State of Sanitary Emergency and the State of Law from 28 April 2020, expressed its concerns that the French Parliament, “without its usual access to

fulfil its role in controlling the executive government in the context of the state of sanitary emergency [...] is functioning on a minimum basis and its role is reduced by the government to adopt orders in extremely vast areas.” (CNCDH 2020). The 2021 Report did not go so far as to explain that the concentration of power in the executive during the pandemic was due to the fact that “certain provisions remain imprecise” (Ibid.)—the vagueness of the adopted provisions opens the door to arbitrary rule

The growth of the discretionary power of the executive was aggravated when the Parliament adopted the Sanitary Emergency Act within five days by an overwhelming majority of MPs with only 38 out of 544 members of the National Assembly, and 2 out of 254 Senators voting against it. The Act stipulates that the Parliament is merely informed of the measures decided by the government and may request more information (article L 3131-13), which diminishes considerably the proper scrutiny by Parliament, which is indispensable in preventing arbitrariness in the use of power.²⁵

France has a history of contested State Emergency regulations. After the terrorist attacks in France in January 2015, France entered its first state of emergency under President François Hollande’s government. It was extended six times until President Emmanuel Macron ended it in 2017. During this period, approximately 500 professors and researchers warned of the risks to the rule of law: “the fight against terrorism is driving a profound change in our political system: against the terrorist threat, successive governments have gradually renounced essential principles protecting individuals against arbitrariness” (Collectif d’universitaires et d’artistes 2017). Human Rights Watch found evidence that France carried out abusive and discriminatory raids and house arrests under its state of emergency which also targeted human rights activists and lawyers working in affected areas: “Those targeted said the police burst into homes, restaurants, or mosques; broke people’s belongings; terrified children; and placed restrictions on people’s movements so severe that they lost income or suffered physically.” (HRW 2016). They also underlined that Jacques Toubon, France’s human rights ombudsperson, received about 40 complaints about the emergency measures that relate to these forms of abuses. These measures were equally condemned within the French government. French Senator Sophie Taillé-Polian, during a debate entitled ‘Are we witnessing the decline of the Rule of law in France?’, criticised how these security laws were disproportionate in nature and impacting civil liberty:

“The Government continually disseminates a discourse of fear. In doing so, it runs behind the illusion of total security and jeopardizes the balance between

25 In her assessment of the emergency regime in France, Catherine Haguenu-Moizard, concludes that “the conditions for proper control of the government are not met” (Haguenu-Moizard 2020)

public freedoms and security. The institutionalization of the security machine results in the progressive unravelling of our rights with the constant decline of the place of the judge compared to that of the prefect. Of the 4,600 searches that were carried out during the period of the state of emergency, only 20 were terrorism-related and only 16 were in advocacy of terrorism. The state of emergency resulted in the ban of 155 protests in eighteen months and served as a framework for ordering 639 individual protest bans” (Sénat 2019: 45).

Criticism of the disproportionate impact this temporary legislation had on ethnic minorities did not prevent Emmanuel Macron’s government from taking restrictive elements of the State of Emergency from 2015-2017, and solidifying them into permanent laws. The *Loi renforçant la sécurité intérieure et la lutte contre le terrorisme* of 30 October 2017, was globally criticised for its unconstitutionality and undemocratic nature. Human Rights Watch warned that “the legislature has effectively granted new, wide-ranging powers to police and prefects, treating these powers as the ‘new normal’, while at the same time weakening judicial scrutiny over how some of those powers are used.” (Raj 2017) For example, the implication of the “individualized administrative control and surveillance measures” which replaces a system of “assigned residence orders”. This allows a prefect, without any judicial authorisation, to “require a person deemed a threat to national security to limit their movements to a specified geographical area, to report daily at a fixed hour to a police station, to notify the police if they change residence, and to agree to wear an electronic surveillance tag.” (Ibid.) In addition, “The state isn’t required—as it would be in ‘normal’ criminal cases—to disclose the evidence of criminal activity to the accused so the person whose activities are restricted can mount a defence. These restrictions can last for up to a year, through a system of periodic quarterly renewals, with limited judicial oversight. Any violation of the specific measures carries a possible punishment of up to 3 years in prison and 45,000 euros.” (Ibid.). President Macron expressly declared that the Constitutional Council would not be referred to for prior constitutional revision on this law when setting out his five year-domestic security plan (Wojazer 2017)—under Article 61 of the French Constitution, prior constitutional review of ordinary legislation is optional.²⁶ This lack of constitutional review prior to enactment is alarming, given its wide criticism on its permanent impact on France’s governance, by for example French Senator Esther Benbassa: “this law does not put an end to the State of Emergency, it reproduces it permanently. Putting exceptional law into common law is not democratic” (Férus 2019).

²⁶ The constitutionality of laws can be challenged after enactment through a procedure of preliminary rulings by the Conditional Council – but, there are several shortcomings to this: they can only be raised in the context of specific proceedings, they are only submitted if an affected party raises the issue which can lead to months or years before the unconstitutionality of a provision is recognised, and it is not retroactive – taking effect from the date of the decision (Boutin, 2018).



Etat d'urgence. Gyrostat (Wikimedia, CC-BY-SA 4.0)

The French Government's moves to increase the power of the police over that of the judiciary in affairs of security have become a running pattern—raising concerns about the arbitrariness of the new proposed security laws. The French Government, in response to the ongoing *Gilets Jaunes* protests, produced the 'law to strengthen and guarantee the maintenance of public order during demonstrations, well known as the 'loi anti-casseurs'. The Constitutional Council removed the highly contentious Article 3 of this bill which introduced the possibility for prefects to prohibit people from demonstrating throughout the national territory for one month, without any control by a judicial judge. However, Article 6 which punishes protestors for covering or partially concealing their faces with one year's imprisonment and a 15,000€ fine, Article 2 which allows judicial police to carry out searches of luggage and cars before a demonstration, and Article 8 which would allow a judge to prohibit someone under judicial supervision from participating in protests, were validated (Jacquin; Rescan 2019). Head of the Freedom Program at Amnesty International, Nicolas Krameyer, commented on Article 2 of this new law: "It is no longer the justice system that will state whether someone is dangerous during protests, it shall be transferred to the powers of the executive, who will decide to ban someone from protesting. This will clearly open the door to arbitrariness." He also criticised the vague wording of the law meaning that it can be applied "to a much larger number of people, depending

on the attitude that a particular government will have, now or in the future” (Vivent 2019). This legislation that restricts freedom of association and whose vague, blanket wording risks infringing citizen’s rights had a huge impact on the penalisation of the Yellow Vest protestors. According to Amnesty International, Between November 2018 and July 2019, 11,203 protestors of the Yellow Vest movement were taken into police custody and “arrested and prosecuted for activities which should not constitute criminal offenses”. In the same period more than 40,000 people were convicted on the basis of “vague laws”. These laws notably criminalize “insulting persons holding public authority”, “participation in a group with a view to preparing for violence” and “organizing a demonstration that has not been subjected to a prior declaration”. Amnesty International accused the French authorities of “misusing the laws to verbalize, arbitrarily arrest and prosecute people who had committed no violence” (Amnesty International 2019). The empowerment of the police services and prosecution to penalize demonstrators has also resulted in a proliferation of cases of severe injury of protestors by state actors. Human Rights Watch documented cases of wounds caused by Police onto protestors during the Yellow Vest demonstrations in Paris in November and December 2018. This includes head and neck injuries from direct hits by rubber ball-shaped projectiles, burns and physical injury to limbs from tear gas grenades which contain a small explosive charge. Senator Sophie Taillé-Polian recounted that since the start of the Gilet Jaunes movement, twenty-five people have lost an eye, and five people a hand (Sénat: 2019). MEPs condemned the disproportionate use of force by the police during protests in Europe in a resolution from 11 February 2019, entitled ‘resolution on the right to peaceful protest and the proportionate use of force’. It noted that the Council of Europe’s Commissioner for Human Rights expressed concerns about the large number of people injured during protests by “so-called intermediary defence weapons such as the defensive bullet launcher” and concerns over “the draft provision making it a criminal offence to intentionally conceal part or all of the face in or near a demonstration’ (Article 6 of the Anti-Casseur Law). These human rights violations as denounced by the Commissioner for Human Rights of the Council of Europe (CoE 2019) and The UN Office of the High Commissioner for Human Rights (OHCHR 2019) – were completely omitted by the European Commission’s 2020 Report. Reasons behind their exclusion may fall behind the fact that they do not fit neatly into the Commission IV Pillar system of categorising Rule of law issues in their Report – highlighting the need for a broader conceptualisation of the Rule of law and citizen rights. When the Commission was questioned on its silence in the face of “widespread use of violence by the police in France” (EP 2020) by GUE-NGL MEPs, Commissioner Ylva Johansson responded:

“Member States are responsible for maintaining law and order and safeguarding internal security. Consequently, any action by national authorities, including national police officers, remains the responsibility of the Member State concerned. The Commission does not comment on draft national legislative proposals, but will continue to monitor closely further developments in this respect (EP 2021b)”.

The Commission’s refusal to comment on the increasingly intrusive actions of national authorities—is explicative of the watered down and selective account of the rule of law in France in the 2020 Report. It is these elements that are overtly legal but are insidiously narrowing French citizen’s right of association and freedom of expression that need to be called out by the Commission if it is to safeguard the rule of law under Article 2 of the Treaty of the European Union. MEPs have already commented that the 2020 Report “fails to encompass fully Article 2 values” and have proposed that the next report contains ‘the identification of cross-cutting trends at Union level, when certain measures or practices may be replicated, or when their gravity and scope may affect the Union as a whole.’ (EP 2021a). The failure to thread the gaps between the four pillars and identify consequent trends in rule of law deterioration results only in the continual aggravation of these problems—as is evidenced in the final segment below.

FRANCE’S RULE OF LAW CULTURE & SECURITISATION

Since the publication of the Commission’s 2020 Rule of law Report, France has continued to issue new security laws which have been outrightly condemned as infringing the rule of law. On the 24th of November 2020 the French National Assembly passed the Global Security Bill ([Loi relative à la sécurité globale](#)). Article 22 of this bill extends the possibility for the police to film people using more “pedestrian” cameras; Article 24 foresees the use of drones and penalises the broadcasting of videos in which police officers or gendarmes are identifiable where the dissemination of the images has the aim of “threatening physical or psychological integrity”. The penalty is up to one year in prison and a fine of 45,000€. La Ligue des droits de l’Homme counted 60,000 people who protested against the new Security Law on Saturday 12 December, with more than 150 towns being involved since November 28 (Ligue des droits de l’Homme 2020). Amnesty International has warned that if this bill is passed, “it would establish mass surveillance, including via drones, and seriously violate rights to privacy, freedom of expression and peaceful assembly” and that ethnic minorities are most at risk of being misidentified by facial recognition systems (Amnesty International 2021b). La France Insoumise called for European Commission intervention on the Global Security Bill citing disproportionate police violence and

“repeated attacks against the rule of law in France” (La France Insoumise 2020). In December 2020, The Council of Europe Commissioner for Human Rights, Dunja Mijatovic, urged the French Senate to amend the General Security Bill, stating that the ban is an infringement of the freedom of expression and freedom to impart information (CoE 2020). On March 3, the Senate rewrote part of Article 24 of the Global Security Bill and the partly revised text was adopted by the National Assembly by a final vote (75 votes for and 33 against) on April 15 2021. Reporters Without Borders responded:

‘Despite its rewriting by the Senate Law Commission on March 3 (2021), article 24 of the ‘comprehensive security’ bill remains dangerous for press freedom. While it no longer sanctions the dissemination of images of members of the security forces with the intention of causing harm, it is targeting a new offense of “provocation of identification” with the aim of causing harm. In short, provocation to an act which is not an offense would become an offense, because of a particular intention...Its wording does not determine what constitutes the offense (dissemination of images, call for identification, etc.) and retains the vague notion of “attack on psychological integrity”’(RSF 2021).

The 2021 Report notes a critical reception to the law on Global Security by the community of journalists, various stakeholders and independent authorities, and cites its most controversial provisions. It details that the significant changes made to the contested article 24 provision, were afterwards declared incompatible by the Constitutional Council due to the “imprecise formulation of this provision”. It also notes that Government representatives have declared a “willingness to propose a revised version of the article” (2021: 13). However, in not mentioning the accelerated procedure used to initially pass through the text in Parliament, the mass civil protests to this bill, and the recent history of increased securitisation in France’s legislation—the European Commission refrains from criticising what is becoming a systematic narrowing of the civil society landscape through the means of securitisation. The euphemistic statement that recent legislation “raises concerns to its potential impact” (2021: 16) on civil society leaves the impression of a possible, rather than present, danger.

The impact of France’s security laws is pervasive; they are eroding the rule of law culture while fostering an atmosphere of hostility and cultural protectionism. As French legal scholar Catherine Haguenu-Moizard, has observed:

“There will always be terrorist attack whatever the government says. Every time you have terrorist attacks the government reacts by presenting a new deal, which states more power to the police, to the intelligence services, and then we have another one...The balance between security and freedom is always pulling more in the direction of security [...] actions may be brought before the courts, the courts

do control some of the measures taken by the administration but, in Marxist terms, it is more like a formal rule of law than a real rule of law because most of the measures are upheld and the control by independent judges is often superficial” (Haguenau-Moizard 2021).

Another source of the deteriorating state of the rule of law in France is legislation that targets France’s Muslim minority population, as such legislation violates the principle of equality of treatment. The draft Law Asserting the Republican Principles and the Struggle Against Separatism (Loi confortant les principes républicains et de lutte contre le séparatisme) is meant to fight against radical Islamism—a term left undefined in the bill which has raised concerns of “reinforcing negative and harmful stereotypes that conflate Muslims with terrorism” (Amnesty International 2021a: 3).

Article 6 of this bill states that any organisation that applies to the State or a local authority for financing must sign a contract of “republican commitment”. These grants can be denied if not compatible with these commitments such as the obligation to “respect the principles of liberty, equality, fraternity, human dignity, public order, the minimum requirements of life in society and the fundamental symbols of the Republic.” The Council of Europe has expressed concerns that this “might discourage the associations concerned from expressing views or carrying out actions which, although protected by the European Convention on Human Rights, might be perceived unfavourably by the administration.” (CoE 2021). Amnesty International specifies that this may impact “organisations espousing opinions that differ from those of the government and working to promote the rights of marginalised groups” (Amnesty International 2021a: 1). Al points out that awarding public grants in respect to “the symbols of the Republic” constitutes a threat to the freedom of the right of expression and is a vague and undefined notion (ibid. 2).

Prior to this bill, the government has issued orders that target the Muslim minority and limit its freedom of expression and association. On 2 December 2020, the Interior Minister Gérald Darmanin announced on social media that he had informed the NGO Collective Against Islamophobia in France (CCIF) that it was being dissolved by decree on the account of it being involved in Islamist propaganda. Human Rights Watch described the organisation as an anti-discrimination association who has been wrongly castigated by the Government for describing certain counter terrorism measures as Islamophobic (HRW 2020). The following day the Interior Minister [announced](#) that the government would take measures against 76 mosques “suspected of separatism,” (Darmanin 2020) closing them if necessary. Human Rights Watch responded: “Dissolving associations under international human rights law should be a measure of last resort taken because

an association advocates a clear, imminent threat of violence or has acted in grave violation of the law, and ideally made by a court.”(Ibid.)

This type of legislation restrictive of basic freedoms is on the rise. On October 28 2020 the Senate approved a fast-tracked research programming law which aligns “academic freedoms” with “respect for the values of the Republic” (Pietrandrea 2020). This provision has been criticized as “unconstitutional, dangerous and not capable of achieving its supposed goal” (Perroud 2020). More worryingly, the French Minister for Education stated in an Interview that some academics would even be guilty of “intellectual complicity with terrorism” in relation to “islamo-leftism” in universities. As Thomas Perroud has commented, this shows “that the attacks on academic freedoms are not restricted to [Hungary](#) or [Turkey](#). Even in a country that boasts itself of its vibrant intellectual atmosphere, a government that was elected on a liberal agenda is attacking academic freedom as never before.” (Ibid.)

Such manifestly discriminatory laws are being defended by the political class in the name of public safety. The Commission’s 2021 Report notes criticism of the Law on the Principles of the Republic, and in doing so cites various NGOs and the CoE. However, it does not comment on the way this legislation disproportionately impacts religious minorities nor how it is linked to the active repression of academic freedom and civil organisation by the state. The significant narrowing of the space of civil liberty has not been thoroughly addressed by the Commission’s Report, although this has everything to do with the protection from arbitrary rule that is at the heart of the rule of law.

CONCLUSION

In its approach to France, the European Commission has failed to address grave violations of the rule of law, which are not simply episodic instances, but systematic practices rooted in systemic peculiarities of the institutional and legal infrastructure of the country. The Rule of law Report, in its 2020 and 2021 editions, fails to assess how the wide-ranging anti-corruption and judicial reforms under President Macron’s Government are likely to affect the state of the rule of law. The survey of measures is superficial and uncritical. One is left disorientated and uncertain about the depth and gravity of issues made in passing reference, such as the impact of Covid-19 on the citizen rights or the lack of resources in the judiciary. This overly sanguine take on the state of the rule of law in one of the Union’s founding members creates the impression that the Commission has failed to treat all member-states equally and impartially, in violation of the core precepts of the rule of law.



SPAIN 03



THE RULE-OF-LAW AS RULE-BY-LAW



The 2020 and 2021 Rule of law Reports' chapter on Spain displays the Commission's tendency to limit the range of its mandate regarding rule of law monitoring in the EU, thereby allowing governments to wield arbitrary power, without risk of condemnation or retribution.

A peculiarity of the legal framing of the rule of law in Spain is that the Spanish Constitution engages the concept of the 'state of law' to enact the rule of law: "The Spanish Nation [...] proclaims its will to [...] consolidate a State of Law which ensures the rule of law as the expression of the popular will."²⁷ This contains a double conceptual fallacy: on the one hand, the rule of law is subordinated to popular sovereignty, on the other hand, its enactment is made dependent on the State acting through laws. To recall, the ultimate purpose of the rule of law is to protect individuals and their societies from the risks of tyranny—risks that are latent within all forms of sovereignty, including that of the people or the state. This statist and legalistic interpretation of the rule of law hampers the concept's anti-autocratic vocation. The Spanish government has effectively invoked the rule of law, thus interpreted, to suppress individual and collective freedoms, as we review below. The European Commission has endorsed this impaired modality of the rule of law concept, both in the omissions from the Reports' chapter on Spain we review below, as well as explicitly in statements regarding the conduct of the Spanish authorities.

²⁷ The reference to the rule of law in the Spanish Constitution is as follows: "Consolidar un Estado de Derecho que asegure el imperio de la ley como expresión de la voluntad popular" (Preamble). Two terms are used with regard to the rule of law: On the one hand, there is Estado de Derecho (State of Right), which is defined as "a form of state organization characterized by the equality of all citizens before the law, including those who hold power" (Marín García 2021). On the other hand, imperio de la ley (the dominance of law, the law's imperative) is indicative of "a legal regime that bounds rulers and their agents, so that their decisions are submitted to the observance of the norms of human rights as established by laws and regulations" (Enciclopedia Jurídica 2020).

I. THE JUSTICE SYSTEM

The Report's section on the Justice System in Spain contains two deficiencies: (1) its portrayal of issues related to the General Council of the Judiciary (CGPJ) and (2) its response to the Catalan Independence Referendum of 2017 within the broader issue of political freedom.

POLITICIZATION OF THE GENERAL COUNCIL OF THE JUDICIARY 1

Firstly, the Commission addresses the anomalous situation with the General Council of the Judiciary (the governing body of the justice system), which has functioned ad interim since December 2018. Whilst both the 2020 and 2021 Reports acknowledge the Council of Europe's warning that the CGPJ "might be perceived as vulnerable to politicization" (2020: 3; 2021: 2)²⁸, it fails to clarify the roots of the problem: that is, it neither elucidates the source of the CGPJ's vulnerability to politicisation nor it points out the political force responsible for the violation in question.

According to the Spanish Constitution, the Council is to be renewed every five years, by a qualified majority of three fifths of the members of Parliament (this opens the possibility for politicisation). As stipulated by article 568 of Organic Law 6/1985, the Congress and the Senate must adopt the necessary measures so that the renewal of the Council takes place on time.²⁹ The expired mandate of the Council was first established on 4 December 2013 and assigned by the Popular Party (PP) who at the time enjoyed absolute majority in Parliament. The PP lost this majority at the two general elections held in 2019, which meant it had to collaborate with the other political forces in Parliament to appoint new judicial members of the Council. However, the Party has been refusing to agree to the renewal of the Council for purely partisan reasons. Thus, the Council is functioning with members that have been appointed by a conservative political majority in Parliament (García de Blas 2021). In doing so, the parliamentary group of the PP is preventing both Chambers from complying with their constitutional obligation to renew the Council. The PP is thus attacking the independence of the judiciary as a fundamental principle of the rule of law and jeopardizing its independence and non-subordinated position vis-à-vis other public authorities. Whilst the 2021 report recognises a "stalemate" in negotiations between the political parties (2021: 2)—it connects this issue to the politicisation of the CGPJ. In addition, whilst acknowledging that the "parliament is responsible for the appointment for all its members"—it still refuses to recognise

²⁸ Page numbers inserted within the text refer to the Chapter on Spain in the 2020 and 2021 Rule of law Report.

²⁹ Official State Bulletin Organic Law 6/1985, 1 of July, of the Judicial Power.

that it is structurally politicised in nature. The Commission's avoidant response to this matter is pertinent, given that it reiterates a Court of Justice ruling in relation to Poland that "for the participation of a Council for the Judiciary in making the appointment process of judges by political organs more objective, such a body must itself be sufficiently independent of the legislative and executive" (2021: 8). This suggests an unequal treatment across Member States.

Many of the new appointments of judges that the Council has made have been questioned by legal associations for not satisfying the requirements of "merit, experience and ability" (Rodríguez 2019). On 14 September 2020, members of the European Parliament (MEPs) Eugenia Rodríguez Palop (GUE/NGL), Idoia Villanueva (GUE/NGL) and Ernest Urtasun (Verts/ALE) submitted two parliamentary questions addressing this issue:

"Does the Commission think that the blocking by the Partido Popular of the renewal of the CGPJ by Parliament, preventing the latter from fulfilling its constitutional mandate and jeopardizing the independence of the judiciary, may constitute a breach of the rule of law as a fundamental value of the EU?" and "Does the Commission intend to follow up the matter?" (EP 2020a).

To this Justice Commissioner Reynders, on behalf of the European Commission, replied:

"In the 2020 Rule of law Report, the Commission took note of the delay in the renewal of the General Council of the Judiciary to which the Honorable Members refer and underlined the importance of ensuring that the Council is not perceived as being vulnerable to politicization. [...] The Commission will continue to follow closely the developments in this respect." (EP 2020b)

In its response, the Commission has effectively refused to allocate responsibility to the PP and use its authority to apply pressure to resolve this urgent and anomalous situation. By refusing to use its power, the Commission is failing to fulfil its obligations regarding the rule of law in the EU, and allowing this issue at the core of Spain's judiciary to remain and fester.

CATALONIA'S INDEPENDENCE REFERENDUM OF 2017— 2

The Commission's 2020 and 2021 Reports are both completely silent on the numerous rule of law infringements the Spanish government has committed in response to the 2017 Independence Referendum in Catalonia. Although we address violations of basic rights in the last section of this report, we will address rule of law breaches in reference to the Catalan referendum here as the case displays the full range of rule of law breaches in Spain—from judicial independence to the politicization of the executive.

A referendum on the independence of Catalonia took place on 1st of October 2017. The Spanish Constitutional Tribunal declared this referendum to be an infringement of the rule of law as it violated “the indissoluble unity of the Spanish Nation”—enshrined in Article 2 of the Spanish Constitution. The government responded with violence both in the course of the popular ballot and during the voters’ peaceful protests to the Spanish authorities’ invalidation of the referendum outcome. The Prosecutor General charged several Catalan leaders with sedition and embezzlement; they were convicted in 2019 and received 9-to-13 year prison sentences (Rincón 2019).



Barcelona, Spain—October 3rd, 2017, Aftermath of the Catalan independence referendum, Sasha Popovic, Flickr.

The Spanish authorities’ violent reaction to the referendum (in which the Catalan people exercised their right to peaceful assembly and freedom of speech), violated Spanish law, EU law and international conventions.³⁰ Yet, Prime Minister Mariano Rajoy declared the Government as acting “with the law and only the law”, and affirmed, “Our rule of law maintains its strength and validity.” (Díez 2017) Notably, the European Union also judged the Spanish government to have acted

³⁰ These rights are protected by Articles 10 and 11 of the European Convention on Human Rights, by Articles 19 and 20 of the Universal Declaration of Human Rights, by Article 2 of the basic law of the EU, as well as the Charter of Fundamental Rights of the European Union and the Spanish Constitution. See Azmanova, Albena; Spinelli, Barbara; et al. 2017 and Azmanova 2017.

well within its prerogative and declared the matter as an internal affair to Spain.³¹ However, this was not the stance taken by Human Right's Watch (HRW 2017) nor the United Nations working group on arbitrary detentions. The working group considered the pre-trial detention of the Catalan leaders as arbitrary and in conflict with the Articles 2, 9-11, 18-21 of the Universal Declaration of Human Rights, and Articles 3,14,19,21,22 and 25 of the International Covenant on Civil and Political Rights. In a public statement, Amnesty International expressed concerns that the sentences handed down to members of civil society and public officials were based on the vaguely defined and broadly interpreted crime of sedition (Amnesty International 2019).

The Working Group demanded the leaders' immediate release and the right to compensation in accordance with international law (OHCHR 2019). However, the Spanish government did not hand over information on the specific (violent) actions of the accused, that if proven, would constitute crime under applicable law, including international law.

The UN working group's report determines another infringement in the form of the incorrect allocation of the courts to the case. In accordance with the Statute of Autonomy of Catalonia, the competent court to judge criminal or civil responsibility of members of the Catalan Parliament or Government for actions occurring within Catalonia is the 'Superior Court of Justice of Catalonia'. However, Spain's Supreme Court, arguing that the actions of the Catalan leaders affected the whole of the Spanish territory, determined itself competent to judge the case. UN's working group observed that the criminal prosecution of individuals accused of crimes committed in a certain territory by courts located in another jurisdiction, constitutes a violation of the right to be tried by the competent judge when national legislation expressly attributes jurisdiction to the town where the alleged crime was committed (OHCHR 2019). There have been a series of well documented cases where politically motivated decisions by courts have removed matters from the legally predetermined court. The court proceedings against the Catalan leaders constitutes one such case of a systematically occurring phenomenon which is in the European Commission's mandate to address.

Further, in March 2020, the UN's Special Rapporteur on Minority Issues, Fernand de Varennes, remarked that in the aftermath of the referendum, there was a significant increase in hate speech, demonization, vandalism, physical threats and even aggressions against members of 'Catalan minority' and to a lesser degree, other national minorities (Basque, Galician, and Valencian). He noted

31 A plenary debate at the European Parliament on the events in Catalonia took place on 4 October 2017, at which the European Commission stated its position that "under the Spanish Constitution, Sunday's vote in Catalonia was not legal," that it "was not within the remit of the Rule of law". See speech by Commission vice-president Frans Timmermans, then in charge of matters of the rule of law and the Charter of Fundamental Rights (EP 2017).

that the Spanish authorities have not reacted sufficiently to these complaints, and depicted a considerable lack of trust towards the police and judicial power among the members of these minorities (UNGA 2019). Although the Commission draws heavily on surveys of perceptions in its Report, it has chosen to ignore this information, raising questions as to its impartiality when dealing with politically sensitive issues such as regional independence.

In a letter to Commission President Ursula von der Leyen, the current president of the Catalan National Assembly Elisenda Paluzie questioned why the imprisonment of the Catalan politicians was left unaddressed in the Commission's Report, given that the prison sentences of the Catalan leaders constitute a clear violation of Article 2 of the Treaty of the European Union TEU (ibid.). In doing so, she underlined the UN's working group recommendations on arbitrary detention and underscored the dangers of inaction: "every human right violation committed by an EU member state erodes the legitimacy of the European institutions to criticize these practices in countries outside the Union, and acts as a precedent for countries inside and outside of the Union to justify their own transgressions" (Paluzie 2020).

Justice Commissioner Didier Reynders replied on behalf of the Commission that the Report gives an assessment of "systemic" violations of the rule of law and that they do not comment on "individual cases". He reiterated that the developments regarding the Catalan referendum are "an internal matter of Spain and the Commission respects its constitutional order and judicial decisions" (El Punt Avui 2020).

Under the guise of protecting a democratic Constitution, the Spanish authorities have engaged in a systematic abuse of power. It is a travesty of justice to enforce a constitutional provision through the violation of fundamental rights. Moreover, the violation of basic rights and freedoms with impunity cannot be an internal affair of any government. The silence of the European Commission is unjustifiable—it constitutes an abrogation of its duty to safeguard the rule of law in the Union.

The Commission's failure to uphold the rule of law in its reaction to the actions of the Spanish government has been brought to light more recently by the Council of Europe's Resolution of 21 June 2021 on the on the prosecution of political leaders in Spain and Turkey (CoE 2021).³² The Resolution considers that the Catalan leaders involved in the organization of the 2017 referendum have been prosecuted for statements made in the exercise of our political mandates and for the organization of peaceful demonstrations. The Resolution notes that, since there is no question of their having called or caused any violence, the conviction

³² The report on which the resolution is based notes that "the mere expression of pro-independence opinions is not a reason for criminal prosecution" indicating that the prosecution and sentencing of the Catalan leaders constitutes a grave miscarriage of justice.

has required “novel interpretations such as the notion of ‘violence without violence’ [...], according to which the sheer number of demonstrators exercised psychological coercion on the police officers facing them, and a very wide meaning given to the term of ‘tumultuous uprising’ required for the crime of sedition.” In light of this, the Assembly has also called on to the Spanish authorities to reform the criminal provisions on rebellion and sedition so that they cannot be understood to criminalize the organisation of illegal referendums. Shortly after the Council of Europe published this resolution, Spain’s Court of Auditors, criticised as being strongly politicised, demanded €5.4m from 34 Catalans that they alleged used funds wrongly to promote independence (Canetti 2021).

Not only is the Rule of law report silent on these issues, but as we stated above, the European Commission has explicitly backed the Spanish government and endorsed its interpretation of the rule of law as a matter of a simple enforcement of existing law.

II. ANTI-CORRUPTION FRAMEWORK

CORRUPTION SCANDALS AND THEIR JUDICIAL HANDLING –1

While the Report addresses issues of transparency perceptions among the public,³³ it avoids providing empirical detail to clarify the reasons for these negative perceptions. In doing so, it fails to discern systematic violations and threats to the rule of law, and their origins in the systemic peculiarities of the institutional structures and power relations in the country.

The Commission omits a central issue of political influence in the selection of judges (vocals) in the CGPJ in relation to ongoing corruption trials. Two of these appointments by the CGPJ in 2018 were controversial as the appointees held political positions in the PP (Europa Press 2018). Similarly, there was controversy surrounding the appointment of the president of the Third Chamber of the Supreme Court in 2015 because the CGPJ chose a candidate with ties to the PP who had fewer qualifications and less experience than the former court president, whose tenure they decided not to renew (Águeda 2015). The CGPJ has made senior appointments to several other national and regional courts that have been characterized as attempts to influence the outcome of corruption trials against

33 Some of the prominent figures: 94% of respondents to the Special Eurobarometer survey on corruption perceive corruption as widespread in Spain (EU average 71%), and almost nine in ten Spanish companies (88%) consider that corruption is very or fairly widespread (2020: 6).

PP politicians (Vázquez and Martín 2017). This has effectively damaged the independence of the courts.

The National High Court (Audiencia Nacional), has been involved in the prosecution of several sensitive corruption cases involving different members of the PP that were in government at the time. Amongst other high-level members and ministers, they found Luis Bárcenas, treasurer of the party, guilty of receiving bribes, money laundering and tax evasion in 2018. The Party itself was also found liable under what is known as the Gürtel Case—one of the largest corruption scandals in recent Spanish history.³⁴ The judge allocated to the case—Judge De Prada—was in a second trial recused as a part of the PP and Luis Barcenás’ defense, on the grounds that, among other things, the judge had already issued a legal opinion in a previous trial on some aspects related to the new trial. In the National High Court, when an incident of recusal is presented against any given judge, the internal rule is to review the motives of disqualification by all the criminal judges composing the court, finalizing the process through a decision made by a simple majority. The decision for disqualifying the judge was attained by a very short margin and counting with the dissenting opinion of several judges. The decision established that the judge had to be disqualified for the second case as he had made statements that were “not absolutely necessary” regarding evidence that “were not the strict object of trial” and that affected the object of the case in his previous judgement, resulting in his impartiality being compromised (El Periódico 2019). This decision was highly controversial. The Association of Judges for Democracy responded that this decision of recusal may constitute an obstruction of their jurisdictional function. They have warned that if they normalize the ability to recuse a judge on behalf of the defendants for having already known one of the pieces of the same case, the configuration of the macro-trial courts may be affected (JJpD 2019; Gutiérrez 2019). Such developments threaten the rule of law in Spain and the country’s capacity to prosecute high-level corruption, and therefore fall within the supervisory role the Commission has assumed to exercise.

CORRUPTION IN THE CONTEXT OF COVID-19 ————— 2

During the Spanish Government’s handling of the Covid-19 pandemic, several instances of malpractice and corruption were recorded. Several political leaders have breached the vaccination protocols in Spain—using their privileged position to access vaccines before other citizens who, due to their health conditions or prioritization, should have received them before (Piña 2021).

³⁴ To note – the case came to public attention in early 2009, but the suspects were not put on trial until 2016.

There has been an increase in irregular contracts during the pandemic, particularly in the sanitary services where there has been a proliferation of handpicked adjudications (Grasso and Peinado 2018). Much of the financial management of the pandemic in Spain has involved billions of euros allocated in a discretionary manner by the government without public tender or following other valid procedures (Salvador 2021). Further, the Ministry of Finance stopped updating the data of the autonomous regions and the central government in June, when they already added 11,177 contracts throughout Spain. These so-called emergency contracts are processed by an express procedure that allows the government to order a service, a job or supplies directly from a company without the need for public tenders. This is the method through which public hospitals have obtained medical equipment, tests and cleaning services. Normalizing these practices within public contracting increases the risk of corruption as already warned by the OECD (2020), the UN (UN Secretary General 2020) and the Council of Europe's Group of States against Corruption (GRECO 2020) While the violation of the law itself is not an infringement of the rule of law, when such violations are not acknowledged or sanctioned (whenever preventable) by the public authority, this constitutes a rule of law infringement.

The Commission's 2021 Report, when discussing corruption in relation to the COVID-19 support measures, notes "an increased number of claims requesting access to information... including on corruption and fraud" to the Council of Transparency and Good Governance (2021: 13). It subsequently congratulates Spain for its "improved online systems for the prevention and reporting of fraud", which were implemented during the pandemic. The Commission positively references increased reporting of corruption without linking it to prior cases of Government financial mismanagement during the pandemic. It therefore provides an obscure, one-sided analysis of the Government's ability to handle financial corruption and refrains from commenting on cases where the increased emergency powers conferred onto the Government were at points abused and liable to corruption.

III. MEDIA, PLURALISM, FREEDOM OF EXPRESSION AND INFORMATION

This segment details recent legislation and prosecutions that have threatened the freedom of expression and access to information in Spain. In 2020 alone there have been at least three major international reports voicing the concern over the right to freedom of speech in Spain (UNGA 2020; UNESCO 2020) including criticism by

the European Commission in Spain's country chapter. However, by drawing on the contributions of several organizations (PDLI 2020; Liberties 2021), we point out several unrecognized or insufficiently recognized cases in the 2020 and 2021 Rule of Law Reports. They range from rule of law infringements in the form of attacks on journalists by the hands of state authorities to government legislation that acts to narrow and control civic freedom of expression.

DIGITAL CURTAILMENT OF THE FREEDOM OF SPEECH - 1

Much alarm has been raised by civil society over the Royal Decree 14/2019, which attributes to the State's wide-reaching, invasive powers to control the internet infrastructure. This includes "the direct management or intervention of the electronic communications networks and services in certain exceptional cases that may affect public order, public safety and national security"—thus affecting the freedom to organize protests on the internet (Castroverde 2020).

Further controversies arise from the government's expansion of its legal basis for discretionary intervention by decree, without the conditions of extraordinary and urgent need that would justify this type of regulation. The broad powers that the law grants to the Executive to undermine rights on civil organization, freedom of expression and digital privacy is based on confusing and ambiguous wording; and, importantly, is without judicial control.

Along with other organizations and legal experts, the Plataforma por la libertad información (PDLI) introduced a complaint before the Ombudsman on the grounds that it may be violating articles 18.3, 20.1, 20.2, 20.5 and 86.1 of the Spanish constitution. Although the Ombudsman has urged the government to incorporate judicial control mechanisms to this decree, the Ombudsman has decided not to appeal this law before the constitutional court on grounds of "the preservation of political neutrality that should characterize the actions of the Ombudsman" (Ibid.).

Additionally, the organizations ARTICLE 19 and Amnesty International have found that certain provisions of chapter IV of the Royal Decree violate Article 19 (3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights by which any restrictions on freedom of expression are required to meet the following circumstance (ARTICLE19 2020):

1. Be prescribed by law. That is, that the law must be formulated with sufficient precision as to enable individuals to regulate his or her conduct accordingly, making ambiguous, vague or overly broad restrictions unacceptable.
2. Pursue a legitimate aim.

3. Be necessary and proportionate, which requires a pressing social condition for the restriction and that the restriction is appropriate to achieve its protective function (Ibid.).

The cases reviewed above indicate that the current legal framework in Spain creates uncertainty regarding basic civil freedoms, which unduly increases the arbitrary power of the judiciary and the executive. These cases have been omitted in both the 2020 and 2021 Reports. The government's repeated use of decree laws, granted by the Constitution in cases of urgent and extraordinary need, is cited in the 2021 Report—but weakly aligned to stakeholder concerns that “it would limit the involvement of stakeholders in the legislative procedure” (2021: 17). It does not mention that there are cases where this process has already occurred and that risk damaging certain civil freedoms.

ORGANIC LAW FOR THE PROTECTION OF CITIZEN SECURITY AND ARTICLE 578 OF THE CRIMINAL CODE ('GAG LAWS') _____ **2**

The Commission, in discussion of the Organic Law 2/2015 and the Organic Law on the protection of public security, frames it as a series of “concerns” in relation to its negative impacts on journalists and civil society (2021: 15, 18). In doing so it has crudely understated how these laws are abused by authorities and specific violations in relation to the freedom of speech. Despite the several proposed attempts at reforming this law in 2020 and 2021 (Araque Conde 2021), the Organic Law 4/2015, infamously known as the ‘gag law’ remains fully in force. In fact, the ‘gag laws’ constitute a triad of judicial norms. The Law for the Protection of Citizen Security, the reform of the Spanish Criminal Code and the Anti-Yihadist Law were amended and enforced on the 1st of July of 2015. These norms seek to penalize such acts as carrying out unauthorized demonstrations or disturbing citizen security in public events, including disrespecting members of the Security Forces and Bodies in the exercise of their function (Chabaneix 2021).

The fundamental issue is that these laws have been used on several occasions to arbitrarily prosecute citizens. They have specifically targeted political speech and freedom of assembly, especially on social media and in the creative community (Amnesty International 2018). This year, in the context of the national state of emergency during the Covid pandemic, this law has been used against citizens without observing the criteria of necessity and proportionality as stipulated by the law (López Fonseca 2020; ECF 2021). These laws have been widely contested by civil society, including in a July 2020 Manifesto entitled ‘5 years of gags

Enough! For a new legislation that guarantees human rights', issued by Amnesty International Spain and backed by over 260 organizations (Amnesty International 2020). As noted by the Commission's 2021 report (2021: 18), in response to civil society pressure, the Constitutional court reviewed some of the contested articles of Organic Law 4/2015 in 2020 (such as the sanction provided by Article 36.23 of the Law which prohibited "the unauthorized use of images or data of authorities or members of the Security Forces of the State" (BOE 2020) which was in breach of article 20.2 of the Spanish Constitution (freedom of expression and information). However, according to the latest available annual statistics (Anuario Estadístico 2019), the articles most used to sanction citizens under this Law were not among those reviewed by the Constitutional court.³⁵



Madrid, Spain—November 1st, 2014, Gag laws. Adolfo Lujan, Flickr.

There has been a significant rise in the use of Article 578 to penalize legitimate societal forms of dissent which are being interpreted as criminal actions. Since the introduction of the 2015 amendment of the Law on the Protection of Public Security, the authorities have proceeded to impose tens of thousands of fines on

³⁵ Those were articles 37.4 on lack of respect for the Police, which was the third reason for sanction (only after consumption/possession of drugs on public roads and possession of weapons) with a total of 18,687 fines with a total amount 2,813,790 euros. This article was followed by article 36.6, on disobedience or resistance or refusal to identify oneself, which represented 12,645 sanctions in 2019 with an amount of 7,787,554 euros (615 euros average fine), while article 36.23, which has now been declared null, caused 'only' 38 penalties for 25,036 euros (660 euros is the amount of the average fine). (PDLI 2021).

protesters, human rights defenders and journalists for conduct that is protected by the rights to freedom of expression and peaceful assembly in breach of several binding treaties that guarantee the right to freedom of expression such as the ICCPR and the European Convention on Human Rights (OHCHR 1976; ECHR 1994). Further, in the context of the terrorist attacks in Paris in January 2015, the Spanish government introduced amendments to the criminal code, enlarging the scope of Article 578 to criminalize the “glorification of terrorism” and speech deemed to “humiliate the victims of terrorism” through the “distribution or public dissemination of messages or slogans” and “increasing the maximum penalty from two to three years’ imprisonment” (Amnesty International 2018).

The ‘gag laws’ are currently being used to normalize and make permanent the exceptional measures adopted during the COVID-19 public health emergency. As mentioned, sanctions have increased during the state of emergency in Spain to the extent of the de facto criminalization of the right to protest. In contrast with other countries, Spain did not develop any specific legal frameworks to enforce the measures during this state of emergency, since the amendments introduced into the Penal Code and the Citizen Security Law were already restrictive enough. On several instances, these laws have served to criminalize social movements providing support to vulnerable groups during the lockdown. Thus, on 2 April 2020, the Gag Law was applied to a mutual support network that delivers food to migrant collectives that help migrants in Barcelona (El Salto 2020). In another example, on 17 March, the Local Police of Valencia fined a restaurant and a neighbourhood mutual support network for handing out food to vulnerable families during the confinement period (El Mundo 2020). Alarming was also the case of La Nueva Elipa Neighbourhood Association on the 23rd of March, which received three fines from the Municipal Police relating to three volunteers of its Solidarity Food Pantry (Madrid Diario 2020). The seemingly arbitrary and therefore harmful manner in which this legislation is used to criminalize different swathes of civil society is left out in the Commission’s report.

Overall, while the European Commission’s 2020 report on the Rule of law has listed concerns raised by civil society on the gag laws’ threat to the protection to freedom of information, its reference remains vague and the severity of the harm upon the Rule of law remains unaddressed.

IV. OTHER ISSUES RELEVANT TO THE RULE OF LAW

We shall discuss here three types of issues. Firstly, we question the Commission's positive take on a criticized new Transparency law. Secondly, we cite evidence on how politicization of actions taken by the State infringe fundamental rights. Third, we address infringements of fundamental rights. As we note in the introduction, the universal and unconditional protection of fundamental rights is the strongest safeguard against tyrannical rule.

TRANSPARENCY AND ACCESS TO INFORMATION — 1

When discussing Spain's new transparency laws, the Commission's 2020 and 2021 Reports blanket its analysis in positivity leaving no space for the existing criticism on its utility in practice. The Law 19/2013 on Transparency, Access to Public Information and Good Governance deals with the communication of public information to ensure transparency in the activities of public bodies and regulates the right of access to public information (BOE 2013).

The law provoked significant criticism for falling short of standards of best practice in this field, such as the stipulation of the right of access to information as a fundamental right, the excess requirements for the exercise of the right, and the supervisory authority's lack of powers of inspection and sanction (OSCE 2013). As neither legislators nor courts have recognized access to information as a fundamental right and despite the fact that various experts in constitutional law have concluded that this is covered by article 20.1 of the Spanish Constitution, civil society has claimed that Spain is not complying with international standards (Access Info 2016). One of the more harmful deficiencies is its exclusion of scrutiny of the judicial and legislative powers, whilst maintaining regulations for the executive branch. The UN Human Rights Committee (OHCHR) has established that it should be possible to exercise the right of access to information before all the powers of the State (executive, legislative and judicial) and other public or government authorities, whatever their level (national, regional or local), that may give rise to responsibility of the State (PDLI, Access Info, FeSP, GEPC and Grupo de Investigación 2019).

Considering these deficiencies, the stakeholders who contributed inputs to the Report have actively recommended the Spanish government to recognize the Right of Access to Information as a fundamental right, simplify the process of requesting information, give sanctioning capacity to the Transparency Council and provide it with more resources, expand the Right of Access to Information so

that it also applies to the Legislative and Judicial Branches among other relevant recommendations (Access Info 2019).

Far from acknowledging the deficiencies and shortcomings of this law, and despite warnings from the above organizations, the Commission's Report instead acknowledges Spain's commitments to implement a transparency law, referring to their open government plans, which aim at simplifying procedures rather than addressing the futility of these efforts.

POLITICISATION OF THE EXECUTIVE ————— **2**

Considering that the primary function of the rule of law is the protection against tyranny and the assurance of responsible and fair governance, the full range of oppressive practices should be object of the Report's review. The omission of the following practices is significant as it highlights the systematic nature of the executive's politicization in Spain.

SURVEILLANCE ON THE CATALAN INDEPENDENCE MOVEMENT ————— **A**

The newspapers The Guardian and El País reported in July 2020 that the Catalanian Parliament's Chair Roger Torrent had been subjected to spying through the use of spyware, which according to Pegasus—the Israeli company selling the equipment—is only sold to governments to track criminals and terrorists (Kirchgaessner and Jones 2019). This spyware allows the user to control the victim's mobile phone and intercept all their communications. Further investigative journalism revealed that Anna Gabriel and Jordi Domingo, two members of the Catalan pro-independentist movement had their phones targeted illegally. According to the Spanish National Intelligence Center the use of this software is "in full accordance with the legal system, and with absolute respect for the applicable laws"; it stated that its work is overseen by Spain's supreme court, but refused to respond to specific questions on the use of the spyware. The prosecutor of the case, San Román deemed further investigation "unnecessary" (Bayo 2020). No information about political espionage was mentioned in the Commission's report.

LAWFARE AGAINST POLITICAL PARTIES ————— **B**

A petition signed by over 35.000 citizens and hundreds of intellectuals, politicians, and artists was launched in 2019 by civil society collective Stop Lawfare (Le Monde Commun 2019), with the aim of denouncing the political persecution of whistleblowers, unionists, ecologists, and demonstrators. Lawfare is the practice

of instrumentalizing justice in order to eliminate political opponents. This is usually followed by smear campaigns in the media, forcing targets into never-ending justification. In its worse consequences, lawfare practice leads to jail sentences, fines, and distortion of political processes such as elections, seriously undermining democratic principles.

In Spain, between the period of 2014 and 2017, the political party Podemos has been subjected to ten judicial complaints, all of which were stayed by the corresponding judicial process (Portillo 2020a). In 2021, another two open cases from 2019 and 2020 against the party were stayed (Estaire 2021). This illustrates the ongoing judicial and media pressure directed at concrete political parties, which poses a threat to the Rule of law.

FUNDAMENTAL RIGHTS AND MINORITY DISCRIMINATION ————— **3**

The rule of law principle stipulates equal treatment. Therefore, all forms of discrimination constitute a violation of the rule of law. The Report fails to address systematic discrimination, notably against the Roma community and people of African descent.

POLICE BRUTALITY & RACIAL DISCRIMINATION ————— **A**

In 2020, several organizations reported a number of incidents where discriminatory practices targeted people of African descent as well as other minorities. In their report “Covid-19: Racism and xenophobia during the state of alarm in Spain” (IDPAD and RIS 2020), the implementation team of International Decade for People of African Descent (IDPAD) and Rights International Spain (RIS) document an alarming number of racial profiling, police brutality and institutional, discriminatory practices. The report gathers over 70 incidents that took place during the confinement under the state of emergency, highlighting the ways in which people of African descent and other minorities have been subjected to discrimination. The use of racial-ethnic profiling on behalf of law enforcement in Spain is a practice condemned by the UN Working Group of Experts on People of African Descent (WGEPAD) in 2018 and also documented by the 2019 report “Under suspicion, the impact of discriminatory policing in Spain” from Rights International and Open Society Initiative (OSI and RIS 2019).

The report also highlighted police brutality as a form of discriminatory practice during confinement. On the 29th of March 2020, Amnesty International reported a

video of an aggression on a young man of North African descent, who was stopped by two law enforcement officials. After an altercation, the man was violently pushed and hit with a baton. His mother, who appeared moments later warned the police officers that her son was suffering from poor mental health and repeatedly attempted to approach them. In response, the police officers, who had pinned down the young man also hit her and tackled her to the ground (Amnesty International 2020b).

In March 2021, one hundred organizations from all over the Spanish territory signed a letter to the Ministry of Interior soliciting the implementation of effective measures to eradicate racism within law-enforcement agencies (the Civil Guard, the National Police, the regional police forces- Ertzaintza, in Basque Country and Mossos d'Esquadra in Catalonia as well as the local police forces all over the country (IDPAD and RIS 2021).

Further, grassroots organizations that mobilized under the platform 'Defender a Quien Defiende' issued a statement on the 25th of March reporting four cases of police violence during the state of emergency (Defender a Quién Defiende 2020). The report was sent to the Spanish Ministry of Interior and to the Spanish Ombudsperson. Three weeks later, Defender a Quien Defiende issued a second statement and reported seven new cases of institutional violence by National Police officers in different areas of the Spanish territory who allegedly used excessive force during the state of emergency (Ibid.). This platform requested the Ministry of Interior carry out investigations, identify those responsible and refer to the judicial authorities with any facts amounting to criminal offence. Several organizations have denounced increasing imposition of fines, detentions for alleged crimes of resistance and serious disobedience to authority with the use of the law for the protection of citizens security (gag law). As illustrated in the sections above, this law has helped law enforcement agencies to arbitrarily impose sanctions. From an expansive interpretation of the law during confinement, actions such as breaking curfew, or any restriction on the freedom of movement has in many instances lead to the use of excessive force by the police (Portillo 2020b). While the use of arbitrary force during the lockdown has impacted many, the UN WGEPAD has underlined that the Citizens' Security law on the rights of people of African descent has additionally "pushed people into self-censorship, resulting in underreporting of discriminatory acts, failure to investigate and prosecute perpetrators and provide redress to victims" (UN WGEPAD 2020).

DISCRIMINATION AGAINST ETHNIC MINORITIES _____ **B**

The Special Rapporteur noted that minorities such as Roma, people of African Descent, migrants, and religious minorities such as Muslims report to be targeted

by hate speech and subject to intolerance (Ibid.). The Rapporteur has linked this to and criticized a rise in xenophobic nationalism in Spain (Ibid.).

The contribution of Fundación Secretariado Gitano (Romani Secretariat Foundation) was neglected in the Commission's 2020 Report as well as any mention to discrimination of minorities. In its 2020 annual report (FSG 2020), the foundation signals specific cases as well as the multidimensional discrimination the Roma community faces in Spain. It has pointed out the absence of an appropriate regulatory framework, which severely hampers any effective legal response to discriminatory practices. In the circumstances in which the discrimination is not a criminal offence (which often is the case) the organization must resort to channels that are not really designed for the reporting of discrimination, and which are rarely effective. The organization has highlighted that in Spain, the Equality body—The Spanish Council for the elimination of racial or ethnic discrimination (pursuant to Directive 2000/43/EC) is not independent, which means that the European Council Directive 43/2000 on ethnic discrimination has not been properly transposed in Spain. Several human rights associations request that this equality body be truly independent and have more resources (EQUINET 2019).

Sadly, even when the requisite channels for redress are available, Roma people do not report the incidents to the authorities because of fear of retaliation, negative experiences with the police or discouragement with lengthy and costly proceedings that may cause them to feel victimized and discriminated against once again. We must note here, discrimination has a strong gender bias. In a recent report on the situation of the Roma community and its relation to employment and poverty (FSG 2019), the foundation established that Roma women are more strongly affected by early school leave, academic failure, systemic unemployment and poverty. Bad reporting practices and discrimination against Roma in the media reinforces negative stereotypes and consolidates already prevalent preconceptions surrounding the community and crime. In defence of the rule of law and of fundamental rights, the foundation brought to attention the reality of school segregation. There are many schools where majorities of the students are Roma or immigrant children, which affects their access to education and the quality of their education. Further, apart from the evident underreporting of discrimination cases or hate crimes, there is an overrepresentation of Roma people in prisons, which illustrates an ethnic bias in the judicial system. Several of these issues were also highlighted by the Statement of the UN Special Rapporteur on minority issues in his official visit to Spain in January 2019 (UN 2019).

Ultimately, what is highlighted by the IDPAD and RIS is that there is widespread evidence of the increase of cases of racial discrimination as reported by many organizations, and that the measures implemented since the beginning of the

Covid-19 pandemic lack sensitivity to both a gender and racial perspectives. Further, as called out by the Special Rapporteur on minority issues (UN 2019) and the WGEPAD report (UN WGEPAD 2018), the lack of disaggregated data by race and ethnicity obstructs the identification of specific needs and the subsequent design of strategies to reduce situations of exclusion and discrimination against Muslim Arab, Roma, Afro-descendant, Latin-American and Asian groups. There is no explicit account of systemic minority discrimination in the 2020 and 2021 Rule of law Reports.

CONCLUSION

In its chapter on the rule of law in Spain, the Commission has omitted both systematic threats and repeat infringements of the rule of law. The Commission has taken the position that many of these issues are an internal affair of the Spanish state. Under the guise of protecting a democratic Constitution and safeguarding public order, the public authority in Spain has engaged in oppressive practices. The violation of basic rights and freedoms protected by international and EU law cannot be an internal affair of any government.

The deliberate silence of the Commission is likely to have a far-reaching, negative effect on the rule of law in the European Union. The Commission's reductive, legalistic analysis of the rule of law in Spain opens the door to its utilisation as an instrument of oppression.

A large crowd of people is shown from a high angle, many holding Bulgarian flags. The image has a halftone or dot-matrix texture. Overlaid on the center is the word 'BULGARIA' in a bold, white, sans-serif font. A large red '04' is superimposed over the text, with the '0' partially covering the 'A' and the '4' extending to the right. A solid red horizontal line is positioned below the text.

BULGARIA

04



MHP!

MILITARY POLICE

MILITARY POLICE

PLANT

EU'S COMPLICITY WITH STATE CAPTURE

04

When Voltaire mused that the world consists of deceivers and deceived, he coined a phrase that is an apt description of post-communist Bulgaria. Whatever the motivation of Bulgarian political and intellectual elites for joining the EU might have been (from access to financial resources to re-joining Western civilization), for the population at large it was the hope that the EU will protect the Bulgarian people from their rulers, will save the deceived from the deceivers. Quite the opposite has happened. The government of Prime Minister Boyko Borissov—which ruled for over a decade between 2009 and 2021 with the support of an oligarchic mafia it helped consolidate³⁶—has quoted from the 2020 Rule of Law Report's chapter on Bulgaria as evidence of the EU's patronage and approval: "We are making big efforts and are doing an excellent job, no wonder Europe considers us an exemplary case of success ... our country has never been in a better condition", boasted Borissov at an electoral rally on 19 May 2019 (INFOMREJA.BG 2019).

The Bulgarian people have been let down at a moment when they were mobilising themselves, in the summer and autumn of 2020, for what might well be their last attempt to end the state capture by the mafia. The chapters on Bulgaria of the 2020 and 2021 Rule of Law Reports are the best illustration of our claims that, by failing on its function as a guardian of the rule of law, the Commission has become complicit in the erosion of the rule of law in Europe.

³⁶ Today's network of political and economic magnates has its origins in the communist-era spy service. After the fall of the regime, they got hold of prize national industries with the help of ruling elites across the ideological spectrum. What was intended to be a privatization of state-owned assets in the transition towards a capitalist economy (as required by the EU accession criteria), proceeded as a personalization of state assets by the powerful of the day. Boyko Borissov, who served as chief secretary of the Ministry of Interior from 2001 to 2004, mayor of Sofia from 2004 to 2009 and Prime Minister from 2009 to 2021, had been a bodyguard to former Communist dictator Todor Zhivkov and was closely connected to the Soviet-era spy service. He is believed to be the main enabler of the mafia in Bulgaria, even as he styled himself as an anti-corruption champion (Oliver 2020). The U.S. Congressional Quarterly noted in 2007 that Borisov "is a close associate of known mobsters and linked to almost 30 unsolved murders in the Black Sea republic" (reported in Stein, 2007). For a detailed account of the process, see (Antonov 2013).



Sofia, Bulgaria—Sept 22 2021 Sofia central area. Yulian Staykov / Shutterstock.com.

Below, we survey some of the omissions and misrepresentations in the Reports' chapters on Bulgaria. Much of the content from the input submitted by anonymous and public stakeholders in the course of the consultation for the first 2020 Report has been ignored by the Commission—we have chosen to stay very close to these primary contributions, due to their value as material which the Commission has decided to leave out upon considered judgment. The European Parliament adopted a [Resolution](#) on the Rule of law and Fundamental Rights in Bulgaria on 8 October 2020, several days after the Commission's first Report was published, in which it condemned the systemic violations of the rule of law in the country. We also reference this report in relation to various issues throughout this chapter (EP 2020a).

I. THE JUSTICE SYSTEM

Our commentary on the justice system below overlaps with commentary on anti-corruption because the two issues are closely related in Bulgaria. The overarching problem is that political forces are using the justice system, including reforms purportedly aiming at fighting corruption, to complete the state capture by the

oligarchic mafia.³⁷ The judicial oversight that Brussels imposed on Bulgaria upon its accession to the Union in 2007 has failed. The legal infrastructure the Commission requested has been largely put in place, but it has remained inefficient: Bulgaria never convicted any top politicians or mafia godfathers, while EU funding, without effective accountability, is fuelling the mafia-government nexus, thereby facilitating the process of 'state capture' in an EU member state formally bound by Article 2 of the EU Treaty.

In the opinion of Lozan Panov, President of the Supreme Court of Cassation, "the rule of law and the division of powers are highly compromised and key state institutions have been captured by private interests [...] At the same time real corruption remains unchecked and pervasive. Those who are independent from power are under constant attack. Lists of 'enemies' and 'traitors' are published in newspapers. Xenophobia and hatred have become a government policy" (Ivanov 2019).

The Commission's review of the rule of law in Bulgaria correctly identifies the main challenges: a lack of effective accountability and criminal liability of the Prosecutor General, the authorities' failure to react to attacks against the judiciary, failure to regulate lobbying, lack of final convictions in high-level corruption cases, and lack of transparency of media ownership. However, the 2020 and 2021 Reports proceed to state that the latest Cooperation and Verification Mechanism (CVM), through which the Commission had monitored Bulgaria's reforms of its judiciary and anti-corruption framework, affirms that Bulgaria has made sufficient progress to meet its commitments³⁸ made at the time of its accession to the EU (2020: 1; 2021: 2).³⁹ Even as it notes that "Bulgaria will need to continue working consistently on translating the commitments specified in its report into concrete legislation and on continued implementation", the judgment on progress ("meeting commitments"), combined with a list of outstanding issues and praise of planned reforms creates the distinct impression of a positive assessment on the health of the rule of law in Bulgaria, especially at the backdrop of the highly critical chapters on Hungary and Poland.

DUE PROCESS 1

In parallel to ordinary courts, a system of specialised judicial bodies has been established to deal with high-level corruption and organised crime: a Specialised

³⁷ The term 'state capture' (i.e., the capture of state institutions by private interests) is used to describe a condition of systematic political corruption which leads to private interests having a considerable influence over the state's functions and using that influence to their benefit.

³⁸ As per the accession criteria (the so called '[Copenhagen criteria](#)'), Bulgaria was meant to ensure the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.

³⁹ In reference to the central texts of this report, the European Commission's 2020 and 2021 Rule of law reports, we shall insert page numbers rather than the full embedded reference. Complete reference to be found in the bibliography as EC 2020 and EC 2021.

Criminal Court, Specialised Prosecution, a Specialised Appeals Court, and the Anticorruption Commission with an attendant 'specialised' committee dealing with a pre-trial confiscation of property in cases of suspected corruption (the Counter-Corruption and Unlawfully Acquired Assets Forfeiture Commission). These have been set up via 'extraordinary' legislation by Parliament. In their area of competence, these courts have enhanced powers that lie outside of the normal legal system. As Evgenii Dainov noted in a 2018 letter to Justice Commissioner Věra Jourová, those implicated within the system of specialised courts do not have recourse to the normal institutions of law and order and thus do not profit from due process (Dainov 2018). Civil society actors have condemned this parallel court system as a tool used for harassing opponents of the government. They have also raised concerns about the manner in which the judges of this court were selected—many being former prosecutors and less sensitive to fundamental rights (Vassileva 2019b). The Specialized Confiscation Commission has powers to seize property and block bank accounts without reference to any due process or court decisions. As of December 2018, new legislation specifically allows the Confiscation Commission to hold on to confiscated property even after a court declares the person innocent. The justification that was offered of this measure is symptomatic of the absence of any notion of rule of law in the mindset of the political class. Bulgaria's then Justice Minister stated: "Even if the court declares some criminal innocent, society has the right for redress. The Confiscation Commission, by not returning property seized from this criminal, provides this redress" (Dainov 2019a). It is a presumption of guilt, not of innocence that governs relations within the anti-corruption network of specialised institutions.

None of these systemic sources of abuse of power have been mentioned in the Reports. In fact, the European Commission has praised Bulgaria for setting up this specialized court system in its CVM reports as well as in the 2020 Rule of Law Report, giving this as an example of progress.⁴⁰ We will give texture to the problem with a few examples:

Former municipal mayor Dessislava Ivancheva was arrested on trumped up charges of corruption, handcuffed publicly for six hours (as a way for the government to showcase its fight against corruption), and refused bail by the Specialised Appeal Court for "demonstrative behaviour". The Specialised Court sentenced Dessislava Ivancheva to 20 years in prison for allegedly asking for a bribe from a real estate developer. Her former deputy Bilyana Petrova was sentenced to 15 years. This occurred amongst a collapse of

40 Evgenii Dainov has repeatedly pointed out this contradiction in communications addressed to Justice Commissioner Jourová (Dainov 2018) (Dainov 2019b) and successive Justice Commissioner Didier Reynders of the European Commission (Dainov 2019a) – Copies of these letters are available on the website of MEP Clare Daly: <https://claredaly.ie/rule-of-law-bulgaria-letters/>

witness testimonies and evidence (Rafaoilovich 2019b). The ECHR is looking into rights violations in regard to the nature of the arrest and the treatment of Ms Ivancheva in jail.

Businessman Anton Prodanov was detained in 2019 by the Special Prosecutor's Office and charged with leading an organized group for tax crimes. His business premises were shut down and bank accounts were blocked putting his company out of business. Notably, Mr Prodanov was the main witness in the case of the so-called Sausage-gate, for which the former MP Zhivko Martinov is accused of having extorted 4 tons of flat sausage from Mr Prodanov claiming they were for the Prime Minister Borissov (Yaneva 2020). Mr. Martinov received a 2-year suspended sentence; the prosecution terminated the investigation in January 2021 and the decision was confirmed by the specialized court of appeal. This case brings to light the logic at work in fighting graft and corruption in Bulgaria: the victims of corruption are punished while the perpetrators, usually well-connected political figures, run free.

The 2020 Report, in its commentary on the anti-corruption framework, mentions “the complex and formalistic Bulgarian system of criminal procedural law has been highlighted by different reports and analyses over the years as an obstacle to the effective investigation and prosecution of high-level corruption” (11)—but refrains from addressing the arbitrary power of the specialized prosecution system.

The Report also notes the creation of the new Commission for Counteracting Corruption and Illegal Assets Forfeiture (the specialised committee of the Anti-Corruption Commission) and acknowledges that “[s]takeholders have raised concerns about its staffing, noting risks for the political independence of the Anti-corruption Commission’s work” (ibid.)—whilst merely citing that this body had “further streamlined its organisational structure” in the 2021 Report (2021: 13). The European Commission acknowledged in 2020 that “[s]takeholders have raised serious concerns that the civil confiscation cases are not conducted in an independent and impartial manner.” (2020: 13). Bizarrely, concerns over the civil confiscation regime were not touched on in the 2021 Report. These superficial acknowledgments of imperfections do not question the systemic issue with the structure of this parallel system of courts and its unconstitutional nature.

JUDICIAL INDEPENDENCE ————— 2

The politicisation of the judiciary in Bulgaria is endemic and pervasive. Appointments are commonly based on personal relationships and deals rather than professional merit and application of established procedures. As per the testimony of Judge Metodi Lalov: “without knowing personally the key [political] figures and without

their approval, nothing essential in the judicial system can happen. I was not chosen to be the court chairman [of the Sofia Regional Court] after a competition and wide public discussion. I was elected thanks to the blessing of the networks around Yaneva and Kolev [two high-ranking judges” (EU Elections Bulgaria, Editors 2019). We will survey some of the systemic roots of this phenomenon below.

POLITICALLY INFLUENCED SUPREME JUDICIAL COUNCIL (SJC) ————— A

The Supreme Judicial Council (SJC) is responsible for the appointment and promotion of all magistrates (investigators, prosecutors and judges) as well as for monitoring their ethics. A Constitutional reform in 2015 introduced a system of appointments to this body that invites political influence over the judiciary. Thus, eleven of the SJC’s twenty-five members are directly elected by Bulgaria’s Parliament—appointments conducive to political influence. Moreover, the four prosecutors and one investigator who are elected to the SJC are direct subordinates of the Prosecutor General, who is an automatic member of the SJC. This is problematic because all prosecutors are under the direct control of the Prosecutor General, while the Prosecution is strongly influenced by the executive—as we discuss in more detail below.⁴¹

The 2020 Rule of law Report notes that “the overall structure of the SJC could limit its ability to safeguard judicial independence against pressure by the executive, the legislature, the judiciary, including the office of the Prosecutor General and the SJC itself. The 2021 Report maintains this position and adds that the voting practice in the SJC “demonstrates the limited influence in decision-making of the peer-elected judges...and the potential influence of the PG over the SJC” (2021: 6). “The risk to judicial independence is evidenced by the number of judges subject to attacks, targeted criticism based on the content of their rulings or the recent rhetoric used by public figures” (2020: 6). Specifically, the Commission comments on the deficient independence of the SJC by noting that 1) The overall number of judges elected by their peers does not amount to a majority; 2) the Prosecutor General plays a decisive role in the Prosecutor’s chamber as well as an influence on the plenary and potentially the Judges’ chamber; 3) the “overall structure of the SJC would limit its ability to safeguard judicial independence against pressure by the executive, the legislative, the judiciary, including the office of the PG”; 4) The lack of judicial independence is evidenced by the number of judges subject to attacks and criticism on their rulings (2020: 6-7). However,

41 The willing subordination of the SJC to the executive became visible, for instance, when its members asked instructions from the government on how to vote on the suspension of the Polish National Judicial Council in the European Network of Councils for the Judiciary. (See Vassileva 2018).

deprived of proper diagnosis, and at the backdrop of the congratulatory reference to the Constitutional reform of 2015 which in fact deepened the SJC's dependence on political forces, the Report treats the issue only superficially, as a matter of incidents, rather than as a systemic problem.

We will illustrate the gravity of SJC's abuse of power with some examples: In 2018, the President of the Supreme Court of Cassation Lozan Panov launched an inquiry into administrative malpractice by the Specialized Criminal Court of Appeal. Bulgaria's prosecution publicly instructed the latter court not to cooperate with the Supreme Court of Cassation, which is a violation of the hierarchy of the justice system enshrined in the Constitution. Moreover, the Supreme Judicial Council (SJC) initiated proceedings against Panov claiming he had threatened judicial independence, in view of impeaching him. This was the culmination of years of harassment against Panov, who has been a vocal critic of the interference of the executive into the judiciary. The European Commission has been informed of this systematic harassment against the President of the Supreme Court of Cassation, as parts of the larger problem of the politicisation of the judiciary.⁴² And yet, the Commission [provisionally closed](#) the 'judicial independence' benchmark under the Cooperation and Verification Mechanism in 2018, "thus demonstrating not only denial of reality, but also complicity with Bulgaria's executive" (Vassileva 2019c).

During the 2020 stakeholder consultation, the Commission was informed of the faulty software used by the SJC for the allocation of cases. An outside audit of the software conducted in the period 17/02/2020–09/03/2020 stated that the system for random case allocation fails to adhere with good security practices. By the time the Report was published, the issue with the software vulnerabilities has not been addressed. "Instead, the Prosecutor General Geshev has expressed certainty about the culprits for the above-identified deficiencies. He publicly pointed at Judge Kalin Kalpakchiev, the current chairman of Bulgaria's Union of Judges and a former member of the Supreme Judicial Council, Hristo Ivanov, the former minister of Justice. Lozan Panov, the chairman of the Supreme Court of Cassation. In blatant disregard of the presumption of innocence, the Prosecutor General has publicly declared someone responsible for a crime before any conclusion of an on-going investigation. The three men that the Prosecutor General Geshev has singled out have previously frequently voiced public criticism of Mr. Geshev and his methods. And as a result, have been the subject of previous smear campaigns by him" (Anonymous Contribution 9: 7)⁴³ This issue was omitted from the Report.

42 For instance, on 14 December 2018, Magistrats Européens pour la Démocratie et les Libertés (MEDEL 2018) addressed such a [letter](#) to the European Commission.

43 'Anonymous contribution' refers to the anonymous stakeholder input submitted to the Commission in the lead up to the 2020 Rule of law report. For more information, please see the Commission's website: https://ec.europa.eu/info/publications/2020-rule-law-report-targeted-stakeholder-consultation_en

Some of the structural issues within the SJC are acknowledged in the Report, but they are framed in a way to convey the government's commitment to reforms and create the impression of progress amidst a reality of 'backsliding'—that is, of deliberate and systematic assault on the rule of law by the dominant political forces in Bulgaria. The incidents we reviewed above, however, and which had been communicated to the Commission by external stakeholders are not referenced; neither is criticism included on the amendments to the Constitution of Bulgaria in 2015 which have been contested as having effectively decreased the independence of the SJC (Venice Commission 2015).

UNACCOUNTABLE PROSECUTOR'S OFFICE ————— **B**

Bulgaria's Prosecutor's Office is afflicted not by lack of independence, but rather by unaccountable, unconstrained powers. The prosecution has a monopoly and complete procedural control of the investigation process and pre-trial phase, and disproportionate powers at the trial stage. At the same time, there is no judicial review of prosecutorial refusals to open investigations; neither is there a viable procedure for effectively investigating the Prosecutor General. The omni-powerful prosecution system endangers the independence of the judges.

The 2020 and 2021 Rule of Law Reports poorly reflect the gravity of the abuse of power by the unaccountable Prosecution. They mention that the prosecution service has been subjected to a series of reforms that aimed to restructure it (2020: 3). The 2021 Report puts greater emphasis on the lack of possibility for an effective criminal investigation of the Prosecutor General. It notes that the Committee of Ministers of the Council of Europe have stressed the importance of reducing the influence of the Prosecutor General and to do so by an "effective investigation mechanism" and "by extending the judicial review to any prosecutorial refusals to open investigations" (2021: 5). They also cite the European Court of Justice's (CJEU) ruling on this matter, which considers the ineffectiveness of criminal investigations a "systemic problem" (Ibid.)

Thus, while the Report effectively addresses some of the problems and refers to Council of Europe recommendations, the criticism is framed in terms of incomplete reforms and lack of sufficient resources, not as a lack of political will to undertake the requested reforms.⁴⁴

Legal expert Radosveta Vassileva also points out that the Reports omit several spending scandals that have occurred within the office. For example, the

44 Former Justice Minister Hristo Ivanov, one of the leaders of the anti-corruption movement in Bulgaria commented that Prime Minister Borissov rejected his proposals for reforming the mandate of the omni-powerful Chief Prosecutor by saying "I will do this only if Merkel asks me to" (Reported in Georgieva 2020).

investment of “extremely expensive, luxurious cars” and “millions poured into the development of a police force associated with the Prosecutor’s Office”—a force that does not have a constitutional basis and whereby there is little knowledge of its objectives and work. According to Vassileva, it was this police force which raided Bulgaria’s Presidency, triggering mass civil protests during the summer of 2020—a fact omitted from the Commission’s 2020 Report (Vassileva 2020). Bulgaria has a long troublesome track record of losing cases before the ECHR because of severe violations by the Prosecutor’s Office and this has also been omitted in the Report (Ibid.). The privatisation of public power, the personalisation of public office and the synergy this allows between the judiciary and the executive is well brought to light by the fact that the Prosecutor General Geshev lives in a villa inside the compound of the executive in Boyana; at Geshev’s request, this villa was renovated with public money. Such infringements of the most basic norms pertaining to the rule of law have become so common that they are not even hidden by their perpetrators.

Examples of politically motivated actions of the Prosecution abound, making it a systemic phenomenon. The most conspicuous case was the illegal raiding of the Presidency by the police force of the Prosecutor’s Office on 9 July, 2020, carrying out searches of offices in relation to two pre-trial procedures. The legal affairs secretary of the President was arrested on charges of leaking of classified information and power abuse. This broke Art. 103 (4) of the Constitution stipulating that no one shall initiate criminal prosecution against the president and the vice-president.

Civil society has been also object of arbitrary use of power by organs of the judiciary and the executive, ranging from active harassment to refusals to investigate crime.⁴⁵

Individuals are suffering miscarriage of justice, as basic mechanisms of due process are suspended. Thus, in September 2019 a Bulgarian court ordered the early release of an Australian citizen, Mr Jock Palfreeman, who had served 12 years in jail for manslaughter. The police refused to accept the ruling, immediately re-arrested Mr Palfreeman and held him in a detention centre for illegal migrants, citing orders from the Prosecution (HRW 2019). As the Bulgarian Judges Association writes in its input for the 2020 Rule of law Report, “the case was used for propaganda purposes in the course of the ongoing procedure for selecting a Prosecutor General. On the one hand, it diverted attention from critical voices against the only candidate, and

45 Thus, Georgi Georgiev, leader of the BOEC civic movement which has been active in anti-government protests was subjected to harassment by the authorities. In the first 40 weeks of 2019, he had already received 60 written summons to appear at either the local police station or the Prosecution’s office. Another example of the prosecution’s arbitrary execution of its mandate is in the case of Bulgarian businessman Emelivan Gebrev, who was poisoned with a Novichok-like substance in 2015. The poisoning preceded a sustained effort of Bulgarian state institutions to take over his business (the “Emco case”). Chief Prosecutor Sotir Tsatsarov refused to investigate the poisoning. The entire security apparatus of the state has persistently refused to investigate the presence of dangerous GRU agents on Bulgarian (and EU) soil (Dainov 2019b).

on the other, it demonized judges who took a critical stance against the coarse intervention of the executive in the election of high-ranking representatives of the judiciary” (Bulgarian Judges Association 2020).

In its input to the Report, the Bulgarian Prisoners’ Association notes, “When the Sofia City Prosecutor was requested to review some missed evidence in the Jock Palfreeman criminal trial, the Sofia City Prosecutors office categorically refused to even look at the newly presented evidence that contradicts the indictment and final court decision.... the Prosecutor’s department very suspiciously chooses when to review evidence or cases and when not to, without a defined criteria or constant explanation. To summarise the official refusal of the Prosecutor’s office, the Prosecutor claimed that the reason there was no need to review newly found evidence contradicting the final court verdict was because there was a final court verdict.” (Bulgarian Prisoners’ Association 2020a: 7).⁴⁶

On this occasion, the Union of Judges in Bulgaria issued on 25 September 2019 an Open Letter to Bulgarian Citizens, signed by 292 judges, noting that “the government system has made no effort to guarantee the independence of the court as a fundamental pillar of the rule of law”, and that lack of such independence transforms “the court into a decorative facade for imposing the will of those who are politically powerful today, of those who have economic and power resources to manipulate the public opinion for their own benefit.” (Bulgarian Prisoners Association 2020a)

II. ANTI-CORRUPTION FRAMEWORK

Bulgaria is marked by a high degree of fusion between the economic and the political spheres through mafia-type oligarchic networks and practices of influence peddling. Apart from its nefarious impact on society, this presents a distinct danger of abusing the EU funds Bulgaria receives. The defrauding of EU funds is of the scale of the largest markets for organized crime (CSD 2020). Although this phenomenon has been well reported by specialised bodies and the mass media, it is not addressed in the Rule of law Reports.⁴⁷

⁴⁶ We note that Jock Palfreeman is the head of this association and wrote this input.

⁴⁷ See, for instance, “Corruption and ‘State Capture’ in Bulgaria”, EU Reporter, 8/10/2020 (<https://www.eureporter.co/politics/2020/10/08/corruption-and-state-capture-in-bulgaria/>); Christian Oliver, “How Bulgaria became the EU’s mafia state, Politico, 9/09/2020 (<https://www.politico.eu/article/bulgaria-how-it-became-mafia-state-of-eu/>); “Dogan, Peevski, Borisov, Bulgartabak, counterfeit and financing of terrorism”, Bivol, 20/04/2021 (<https://bivol.bg/bulgartabac-and-illicit-trade.html>); Genka Shikerova, “Who is the businessman Ilchovski, what did he accuse Borisov of, and how this story evolves”, Svobodna Evropa, 6/05/2021 (<https://www.svobodnaevropa.bg/a/31240938.html>).

LEGAL FRAMEWORK AND POLICY PRACTICE ——— 1

The European Commission's 2020 and 2021 Reports commend the comprehensive reform of the legal and institutional anti-corruption frameworks that was carried out in 2017 and 2018, through which the specialised judicial system discussed above was established. It is exactly this apparatus of specialised judicial bodies that the government weaponised to persecute its political opponents, often engaging a rhetoric about fighting corruption and protecting the political independence of the judiciary. Instead, the Commission notes that "The legal framework to fight corruption is largely in place, but challenges remain", among which are mentioned understaffing of the respective agencies; it also comments that "a solid track record of final convictions in high-level corruption cases remains to be established" (2020: 10, 12; 2021: 13)

The Commission has been informed by stakeholders and members of civil society that this framework is not only completely ineffective, but is also being actively used for political persecution by incumbants, in rampant violation of due process norms. Thus, in their input to the Commission's 2020 Report, the Bulgarian Institute for Legal initiatives notes, on the basis of a series of examples, that the decisional bodies have adopted these measures "not to build a comprehensive toolbox for prevention of corruption, but rather to arm themselves with respective munitions for the inter-institutional power-play" (BILI 2020, c.17).

There are at least two sets of issues related to the failure to contain corruption: (a) the consolidation of state capture, and (b) the endangering of citizens' lives and wellbeing through nefarious economic practices. To highlight the gravity of the abuse of power in regard to both these sets of issues, we will mention a few examples.

CONSOLIDATION OF STATE CAPTURE ——— A

The systematic lack of investigation into high-level corruption cases has become a trademark of the Bulgarian judicial practice, and is indeed referred to by the Commission with the remark, "A solid track-record of final convictions in high-level corruption cases remains to be established" (2020:1). It also notes in its 2021 Report in relation to the conduct of civil servants and senior officials that there is—a "limited evidence as to the effectiveness of measures related to the integrity of the public administration" (2021: 14). However, as this practice is the enabling mechanism of the state's capture by the oligarchic mafia, it merits more detailed scrutiny. We will illustrate the problem with two examples:

The so called 'apartment-gate scandal' was leaked in January 2019 through an investigation by the Sofia-based NGO Anti-Corruption Fund (ACF). It revealed that

senior members of the ruling GERB party in Bulgaria were acquiring properties at a fraction of market prices. They were sold these properties by a construction company which members of parliament of the then ruling GERB party helped through changing legislation in its favour, (its license for building a controversial skyscraper had run out and the legislative change extended it). This resulted in Tsetska Tsacheva, the Justice Minister, stepping down, and the GERB's Deputy Chairman Tsvetan Tsvetanov resigning his parliamentary seat. Two deputy ministers also stepped down—all of whom had bought luxury apartments at low prices. The former head of the Anti-Corruption Commission, Plamen Georgiev, was also under investigation. Bulgaria's Prosecutor General launched an official investigation into the purchases in March 2019. All those involved have denied wrongdoing (Dimitrov 20219b; Dimitrov and Hope 2019). The Specialised Prosecutor's Office on 28 May 2020 declared that it will not investigate Tsvetan Tsvetanov and the Apartment-Gate scandal. The inquiry by the prosecutors concluded that no evidence was found of "Tsvetan Tsvetanov taking part in corruption or other crimes." (Rafailovich 2019a).

The Corporate Commercial Bank (CCB) Bankruptcy case (starting 2014 and in courts since 2018) is also indicative of the imbrication between political forces and economic elites and the arbitrary use of power by the prosecution (Tchobanov 2020). CCB collapsed in late 2014, causing the largest financial crisis in Bulgaria since the 1990s—the Bulgarian National Bank then took it over. The Government filed a lawsuit against the bank's largest shareholder, Tsvetan Vassilev, on embezzlement charges. Vassilev blamed the failure to a plot by the government and his competitors, and fled the country. The controversy around the investigation surrounds, amongst other things the connection between well-known politician and media magnate Delian Peevski (owner of numerous national newspapers, websites, radio and TV stations) and his credit dealings with the Bank. Forbes journalist Frances Coppola cites media reports at the time connecting the bank's failure to a spat between Tsvetan Vassilev and Delian Peevski (Coppola 2015) which were left uninvestigated by the Prosecutor General, despite substantial documentation trail and testimonials on the relationship between the Bank and Mr. Peevski (Anonymous Contribution 9: 13).

A series of reviews conducted by the interim government in 2021 revealed a systematic and widely spread practice of contracting without public tenders or with only one participant, a concentration of commissioned projects to a handful of companies, as well as multiple abuse of public funds.⁴⁸

48 "Minister Petkov: Mismanagement and abuses for million in the management of dams"bulletin of the Ministry of Economy, 5/08/2021; "Minister Assen Vassilev: Ministry of Finance goal is to put an end to the inefficient use of public resources", bulletin of the Ministry of Finance, 15.06.2021; "Minister Vassilev: Road Infrastructure Agency has used over 2,5 billion leva above its budget without contracts", bulletin of the Ministry of Finance 8/07/2021; Eleonora Taneva, "Kiril Petkov: Insane salaries of 60 000 lv in the Bulgarian Bank of Development", Bulgaria on Air, 7/07/2021 (<https://www.bgonair.bg/a/2-bulgaria/232116-kiril-petkov-y-bbr-sa-si-razdavali-zaplati-po-60-000-lv>)

These are not isolated cases of failures of an otherwise sound system—these practices display features of deliberate and systematic abuse of public office. The current head of Bulgaria’s Anti-Corruption Commission is former General Prosecutor Sotir Tsatsarov who has been implicated in a number of corruption scandals that have never been investigated. The European Commission failed to address this, although it has been well reported in the input submitted during the public consultation by several of the stakeholders for the 2020 Report.

The European Parliament has taken a stance on this matter, pointing out “the necessity of conducting serious, independent and active investigations and achieving results in the areas of anti-corruption, organised crime and money laundering, and of thoroughly looking into the allegations of high-level corruption... all of which—taken together—suggest deep and systemic weaknesses in rule of law and anti-corruption measures in Bulgaria.”(EP 2020: 7)

DAMAGES TO PEOPLE’S WELLBEING ————— **B**

Public procurement rules, including for EU projects, are systematically violated—this has become one of the greatest sources of economic mismanagement in the country, which has reached such proportions that it is endangering not only the long-term economic welfare of the population, but citizen’s lives. As Evgenii Dainov writes in his letter to Commissioner Reynders of 9 December 2019, “Corruption is now the universal regulator of social and political relations [...] This situation has severely undermined the market economy, governance and politics; and has now reached the stage of taking human life. Because of corruption, trains routinely derail from newly laid rails, while new roads kill” (Dainov 2019a). To illustrate the problem, we will relate a few cases.

The Struma motorway case involves the starting of illegal preparatory works before the official tenders opened, with no due environmental assessment and precautionary measures for protected species (Stefanova 2019). In January 2020, the Bulgarian government decided to forego EU funding in order to break EU environmental legislation by constructing (and paying from its own budget) the motorway along a route different from the one approved by the Commission (Petrova 2019).

Between 2007 and 2013, the EU has granted Bulgaria 101 million euros to build hotels in the country’s poorest regions and boost tourism. But most of the money was used to build private homes, often by eminent political figures (Nikolov 2019; Bivol 2019). Other subsidy fraud staples include projects that do not really exist or projects that end up being so badly constructed that more European money is needed to repair them.

The Bulgarian democratic opposition has been accusing the EU of insufficient oversight, as the Union is still sending money to Bulgaria, even though some of it just funds the mafia.

In late 2018, environmentalists caught the builders of the Northern motorway illegally dredging riverbeds for free gravel. This kind of gravel contains a mass of organic material that cannot be used for foundations for a motorway; but that is what it is being illegally used for, making the future motorway a risk for its passengers. Such practices are well-reported but are unopposed by the government, and therefore condoned. A road constructed in transgression of all possible standards (because the bulk of the money was stolen) near the town of Svoge in 2018 resulted in the death of 20 people (Dainov 2019a). Recently, it came to light that the GERB government had paid upfront, to avoid a public tender, for the future construction of at least four bridges along that motorway—bridges which have neither construction license nor valid technical paperwork (Boncheva 2021).

WHISTLE-BLOWER PROTECTION ————— 2

The Report registers well the flaws of the existing regime: the submission of anonymous alerts is not allowed (2020:14), nor does there exist a specific law on whistle-blower protection (2021: 15). However, the practices of persecution of critics persists due to the arbitrary and highly politicised use of public office by organs of the executive and the judiciary we discussed above. To illustrate with an example:

On April 10, 2020, Asena Stoimenova, chairman of the Bulgarian Pharmaceutical Union, received an indictment from the Bulgarian Prosecutor's Office under Art. 326# 1 of the Penal Code, which deals with violations against public peace and order and are punishable by imprisonment for a term not exceeding two years. The indictment is in connection with interviews Stoimenova gave to the Bulgarian National Radio and Bulgarian National Television regarding the supply of medication in the context of COVID-19 pandemic. In these media appearances, Stoimenova talks about stockpiling of medicines, the need for flexibility of legislation and the likelihood of a shortage of certain medicines. The Bulgarian Pharmaceutical Union has notified the European Commission as well as the European Parliament about this institutional attack against the freedom of speech. The Prosecutor's Office however has requested 20 000 BGN/10 000 euro bail for the release of Stoimenova (Anonymous Contribution 9: 12). The Association of European Journalists—Bulgaria condemned these acts of the Prosecutor's Office, pointing out that anybody who discloses information about any problem may face accusations on the same ground (AEJB 2020). The prosecution of experts and other people disclosing information has been reported by the Association of European Journalists (ibid.).

III. MEDIA, PLURALISM, FREEDOM OF EXPRESSION AND INFORMATION

The section on Media Pluralism in the Reports correctly discerns some of the critical flaws of the existing system: from the lack of transparency of media ownership (“source of concern”), the missing regulatory safeguards for fair and transparent distribution of state advertising, and the fact that the legal framework against political interference in the media does not explicitly forbid politicians from owning outlets (2020: 15-16).

The persecution of journalists is also mentioned, but worded in a cursory or euphemistic manner: “Media freedom associations claim that journalists and media owners face politically motivated charges with a view to silencing critical reporting. The Media Pluralism Monitor (MPM) 2020 reports cases where the State is allegedly threatening media independence by way of political, administrative and judicial pressure” (2020: 18, emphasis added). The 2021 Report mentions a single case of a journalist being beaten by the police and detained for 24 hours, which the Prosecutor’s Office refused to investigate (2021:17). This statement does not reveal the systemic lack of accountability for the abuse against journalists: in Bulgaria, the public authorities do not undertake investigations into these practices, and the Commission neither request nor recommends it. The rule of law relies on mechanisms of accountability and the Report’s role should be above all to note where such mechanisms are missing, as well as seek responsibility for these omissions.

The elimination of the mass media as a check on the arbitrary use of power in Bulgaria takes place through a number of channels—from intimidation of journalists to the acquisition of key media outlets by oligarchic entities with partisan-political agendas. We review some of these pathways below.

Over 2018-2020, all reputable investigative journalists in mainstream television, as well as independent-minded TV anchors, were purged from the three major national TV channels (Dainov 2020). In September 2019, Bulgarian National Radio’s main news and discussion channel Horizont was taken off the air. The official explanation was technical maintenance—ruled out by an investigation later on. The host, Silvia Velikova, was removed from the on-air rota the previous day, as four people whom the director general couldn’t name considered that she was covering the election of the new chief prosecutor too critically (Anonymous Contribution 7: 10).

Moreover, the media scrutiny over the government is also reduced through the existing system of funding. News site Club Z discovered through a freedom of information request, that since Bulgaria joined the EU in 2007, 29.62€ millions of EU funds has been given to broadcasters through a ‘direct negotiation’—where the government hands out funds without an open selection process (Twigg 2019).

As one of the Report's anonymous stakeholders comments, "The government continues to allocate EU and public funding to media outlets with a complete lack of transparency, with the effect of encouraging recipients to go easy on the government in their reporting, or to refrain from covering certain problematic stories altogether. At the same time judicial harassment of independent media, such as the Economedia group and Bivol continued to increase" (Anonymous Contribution 7: 10). This issue is briefly mentioned in the 2020 Report: "EU Funds are allegedly used by local authorities to strengthen their control of local newspapers and TV channels" (2020: 16), with the 2021 report stating that the allocation of this funding "remains problematic" (2021: 16). This however, does not convey the scale of political control through funding and its impact on media pluralism.

The centralisation of power in the media facilitates the influence of oligarchic interests such as the dominance of the media mogul and MP Delyan Peevski. Reporters without Borders note: "Corruption and collusion between media, politicians and oligarchs is widespread in Bulgaria. The most notorious embodiment of this aberrant state of affairs is Delyan Peevski, who ostensibly owns two newspapers (Telegraph and Monitor) but also controls a TV channel (Kanal 3), news websites and a large portion of print media distribution (Reporters Without Borders 2018, also mentioned in Anonymous Contribution 7)."

When Nova TV was acquired by the oligarch Kiril Domuschiev in 2019, "his arrival marked the layoff of a number of critical investigative journalists, such as well-known Mirolyuba Benatova. The position of independent reporters is further complicated by an unwritten agreement among pro-government news media not to hire journalists fired by another one in their circle. Newspapers openly opposing the government exist, but they have denounced their extremely unfavourable working conditions, as well as their lack of access to politicians from the governing coalition, who are impossible to interview outside of state-organised press conferences. In addition, several opposition journalists accused the police of verbal and physical violence—especially while covering the current protests against Borissov's cabinet"(Bevacqua 2021).

In early March 2020, investigative journalist Valia Ahchieva was condemned by the Supreme Judicial Council for her "aggressive" approach and the "violation of the judge's private sphere" in reference to her questioning of the president of Sofia's City Court, Alexey Trifonov. Her weekly investigative program with the Bulgarian National Television was suspended without any legal grounds, in what appeared to be another attempt to silence journalism that disturbs those in power (Gotev 2019).

In 2015, the owners of two independent media groups—Ivo Prokopiev (Economedia) and Ognyan Donev (ClubZ) were indicted by the prosecution a number of times. Another independent publisher—Sasho Donchev (SEGA) was the subject of several investigations. For many years prior to those indictments the

editorial policy of these publications systematically sought accountability from the prosecution (Anonymous Contribution 2).

Surviving independent journalists and publicists are routinely victimized by the authorities and targeted by gangs in the service of the regime (tire-slashing and car-burning are favoured modes of attack, as in the case of Mr Velislav Minekov, a famous sculptor) (Dainov 2019b).

A new restrictive system for press access inside the new Bulgarian Parliament building was imposed in September 2020 when the Bulgarian National Assembly was moved to another location. This came on the tails of increased violence towards, and intimidation of, journalists during the anti-government protests in the summer of 2020 (EURACTIV Bulgaria 2020; International Press Institute 2020). The European Parliament has rebuked these practices, declaring that it ‘regrets the recent restrictions imposed on journalists on the premises of the National Assembly, which limit their access to parliamentarians and thus the possibilities for media scrutiny over the work of the legislature’ (EP 2020a: 7).

As it is left unchecked by the Bulgarian and EU authorities whose job is to safeguard the rule of law, the stronghold of the oligarchic mafia on the mass media in Bulgaria is consolidating.

IV. OTHER ISSUES RELEVANT TO THE RULE OF LAW

USE OF THE LAW TO INCREASE ARBITRARY POWER — 1

While in power, the political party GERB has been abusing its dominant position in Parliament to pass legislation in breach of rule of law norms. On the 7th December 2018, Bulgaria’s Supreme Court of Cassation concluded, after reviewing case law by the ECHR and the EU Charter of Fundamental Rights, that unless there is a guilty verdict, a person’s property cannot be confiscated. In response, on the 10th of December 2018, the ruling party GERB introduced bills for amending the Law on Confiscation and other reforms which increased the powers of the Confiscation Commission, reduced the scope of the anti-corruption law to exclude some civil servants, as well as to authorise secret arrests (under 48 hours for adults and 24 hours for children).⁴⁹ Radosveta Vassileva comments:

49 The Police now has the right to arrest and keep incommunicado (no right to contact the outside world) any adult for up to 48 hours; and any child for up to 24 hours. During that time, the authorities are not obliged to inform next of kin, parents etc. In the case of arrested children, the deputy-minister of Justice has defended (on TV) the action thus: “If a child has been arrested, that child has not been a good and obedient child” (reported in Dainov 2019b).

“On the 12th of December 2018, the [bill](#) was approved by Parliament without any discussion or consultation with civil society. It entered into force retroactively on 23 January 2018. This arbitrariness shocked not only Bulgaria’s civil society, but also the legal profession. In December 2018, prominent attorneys sent [a letter of protest](#) to the GERB member (Danail Kirilov) who introduced this bill as well as other controversial bills” (Vassileva 2019b). The Commission’s 2021 Report notes an increased number of draft laws proposed by Members of Parliament “without compulsory stakeholder consultation, impact assessment and compatibility check with EU legislation” (2021: 18)—however, there is no reprimand of the political actors who have breached basic rule of law norms, nor commentary on questionable legislation.

INDEPENDENT FUNCTIONING OF HUMAN RIGHTS / REGULATORY BODIES _____ **2**

The Report notes that the new draft law on foreign funding for NGOs endangers civil society” (2020: 1, 20) and that “in some occasions, members of the civil society appear to be under pressure, through smear campaigns, intimidation and negative narrative” (2021: 20). However, it fails to address the scope of the systemic affront on civil society organisations and other infringements of fundamental freedoms that are directly relevant to the rule of law.

As the Bulgarian Institute for Legal Initiatives comments in its input to the Report: ‘the independence of human rights and other regulatory bodies in Bulgaria is relative. The very election and appointment procedure of their leadership is highly politicized, lacks transparency, competitiveness and merits. Thus, institutions function not as a corrective, but rather as a rubber stamp for actions of the political status quo in the country. This leads to conclusions made by civil society actors and opposition that we have a state capture situation in Bulgaria.’ (Bulgarian Institute for Legal Initiatives 2020: 25).

POLICE BRUTALITY _____ **3**

In its commentary to the [Velikova V. Bulgaria group of cases](#), the Council of Europe comments: ‘The Committee noted however reports indicating the persistence of risks of ill-treatment by the police and of impunity in law enforcement. Given that this group of cases has remained under its supervision for 19 years, it insisted firmly on the need to rapidly adopt comprehensive additional measures to combat the risk of ill-treatment in police detention and to ensure the effectiveness of criminal investigations into allegations of ill-treatment by law-enforcement officers....The

Committee equally insisted on the need to strengthen existing safeguards against ill-treatment in detention, such as the legal assistance arrangements, the quality and confidentiality of medical examinations and the mechanisms of reporting to the Prosecutor's Office of medical findings of signs of ill-treatment and complaints received by the police' (CoE 2019b).

Concerning the civil protests in Bulgaria in the summer of 2020, the European Parliament "expresses particular dismay at the allegations of the use of [police] force against women and children, including children with disabilities; is concerned by the unlawful and excessive audits conducted into private businesses that have publicly expressed their support for the protests; condemns the violent and disproportionate intervention by the police during the protests in July, August and September 2020." (EP 2020a: 7)

As the government condones (through inaction) police brutality, tolerates and even rhetorically encourages groups of hooligans to clash with protesters at anti-government rallies, the Bulgarian political system begins to display some typical features of fascistic regimes.⁵⁰

The Commission's 2021 report discusses the police force briefly in relation to the integrity of the public administration. It cites new measures adopted by the Ministry of the Interior, e.g. a system of video recordings of actions by security officers and road patrols which have been used to "discipline, sanction or convict police officers from different departments" (2021: 14). However, the issue of police brutality is left unmentioned.

PRISON SYSTEM / DETENTION _____ **4**

While commentary on this is missing in the Commission's Reports, the European Parliament has condemned "the inhumane conditions in Bulgarian prisons found by the European Court of Human Rights, including the existence of overcrowding, poor sanitary and material conditions, limited possibilities for out-of-cell activities, inadequate medical care and the prolonged application of restrictive penitentiary regimes"(EP 2020a: 7-8).

MINORITY DISCRIMINATION AND ABUSE _____ **5**

The Romani community has suffered long-lasting and systematic abuse in Bulgaria.

50 Football hooligans were giving Nazi salutes during a football game between Bulgaria and England in October 2019 (Wright 2019). "The Prosecution charged only one hooligan – for baring his backside. The case was dropped when the accused claimed that it was not him baring his backside, but his identical twin brother. The reason that these Nazis were not sanctioned is that they form the hardcore of a group of storm-troopers, routinely hired by the authorities to disturb and break up protests demanding rule of law and critical of the Prosecution" (Dainov, 2019a)

While the European Commission is silent on this, the European Parliament has condemned these practices, writing that it:

“deplores the climate of hostility against people of Romani origin in some populated communities, particularly against those who had to leave their homes following rallies targeting their communities in several localities; deplores the mobbing and violent evictions of Roma people in the Voyvodinovo area...believes that it is necessary to fully eradicate the educational segregation of children of Romani origin; calls on the authorities to put a stop to hate speech and racial discrimination against people from the Romani minority in the response to Covid-19, and to halt police operations targeting Romani neighbourhoods during the pandemic” (Ibid. 9-10).

VIOLATION OF INTERNATIONAL ASSYLUM LAW ——— 6

There is no mention in the Report of this well-recorded issue. The European Parliament has voiced its concerns “that persons who may be in need of international protection have been prevented from entering Bulgarian territory or expelled, at times with force, without the opportunity to apply for asylum or an individualised assessment; is particularly concerned about the troubling deportation of members of the Turkish opposition, in violation of international treaties and despite valid court orders issued by competent Bulgarian courts.” (Ibid. 10-11)

LACK OF INVESTIGATION INTO HUMAN RIGHTS ABUSE AND ECHR JUDGEMENTS ————— 7

The Report mentions Council of Europe recommendations that are still to be implemented. However, the relevant issue, in view of rule of law supervision, is the systematic failure of the Bulgarian authorities to comply with the judgments of the European Court of Human Rights. The European Implementation Network, which tracks the implementation of ECHR judgements across Europe, found that as of October 2021, 58percent of the ECHR’s leading judgments against Bulgaria of the last ten years [have not been](#) implemented (EIN/B). This finding is also supported by the 2019 annual report of the ombudsman of the Republic of Bulgaria. (Anonymous contribution 9: 15).

The European Parliament has sounded its “deep concern at the fact that following over 45 judgments against Bulgaria by the European Court of Human Rights, the Bulgarian authorities have failed to comply with their obligation to carry out effective investigations; considers that these recurrent shortcomings have revealed the existence of a systemic problem” (EP 2020a: 9).

This matter has been communicated to the Commission in the course of public consultations, therefore its omission is deliberate (Vassileva 2019a).

CONCLUSION

There is no rule of law backsliding in Bulgaria. It is rather a landslide into lawlessness, state capture and authoritarianism, to borrow from Evgenii Dainov's letter to Justice Commissioner Didier Reynders of 2019 (Dainov 2019a). With its 2020 and 2021 Rule of law Reports the Commission failed to clearly present ongoing grave, systemic rule of law violations, and thus support the efforts of Bulgaria's democratic forces to regain control of its politics.

By claiming progress despite the well-recorded evidence of assaults on the rule of law in Bulgaria—evidence regularly and thoroughly communicated to it—the European Commission has become complicit to the demise of the rule of law in this country. As Georgi Gotev, Senior Editor at Euractiv wrote: “The most serious problem with the Rule of Law Report is the attempt to create the impression that there is some movement in the right direction in Bulgaria, even as some problems are acknowledged. The facts indicate just the opposite” (Gotev 2021).

To the detriment of Bulgarian society, the Bulgarian incumbent has received a lenient treatment in these reports, in contrast to the distinctly harsher treatment of Romania, Poland and Hungary. This is an unequivocal endorsement of the Bulgarian establishment and its corrupt practices, at a time of massive protests against state-sponsored corruption. The glaring omissions and mischaracterisations culminate in a striking presentation of the anti-government protests of 2020 in a more favourable light for the government. The 2020 Report stated that the “lack of results in the fight against corruption is one of the key aspects raised throughout the summer 2020 protests” (EC 2020 [Bulgaria]: 1). However, these protests did not simply express frustrations with ineffective policy, they were explicitly directed against the corrupt practices of the ruling party, its leader Prime Minister Borissov, and the oligarchic groups with whose help they stayed in power (Vassileva 2020).



Sofia, Bulgaria—Jul 14 2020, People protesting on the main streets in the capital and demanding PM's resignation. Circlephoto / Shutterstock.com.

This misconception was reinforced by Justice Commissioner Reynders during the debates held at the [European Parliament on 5 October 2020](#), when he stated: “The necessary structures are essentially in place, but Bulgaria has to make them deliver results more efficiently” (EP 2020b). This is a dangerously wrong diagnosis: as stakeholders and scholars have persistently explained, including in direct communication to Commissioner Reynders, the structures themselves are part of the problem.⁵¹ These specialised bodies stand outside the ordinary legal framework, circumventing due process, and are being deployed by the powerful of the day to consolidate their power and deepen the symbiosis between mafia and state. This enables the arbitrary use of power and is hence a direct assault on the rule of law, whose *raison d’être* is the prevention of tyranny.

The nefarious effects of systemic corruption and mismanagement in Bulgaria extend beyond the Bulgarian society: they extend to the EU at large. The lack of transparent management of funds and the lack of an accountable and effective National Prosecution Service to investigate and prosecute fraud directly threaten the financial interests of the EU.

It is not the European Union institutions, but the Bulgarian people who decide how their country is ruled; they need to reign in their political class and tie it to

51 For instance, in Professor Evgenii Dainov’s letter to Commissioner Reynders of 9 December 2019 (Dainov 2019a)

the demands of decent politics. However, the EU's support is crucially needed to empower the Bulgarian people in their fight for the rule of law. Responsibility without power is as futile as power without responsibility is deadly.

A WEAPON AGAINST PRECARITY

CONCLUSION

Advocates of social justice tend to undervalue the rule of law, exposing it as a shrewd confidence trick—the smoke and mirrors elites use it to mask the oppression of the masses. Marx’s misgivings are well known: the formal legal, moral or political equality of rights enables the oppression of labor by capital. To this we can object, together with the Marxist historian E.P. Thompson that, even as the content of bourgeois law might be oppressive, the rule of law is emancipatory and therefore of service to humanity: “the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims [is] an unqualified human good” (Thompson 1975:266).

Rule of law’s added value for social justice has become sharply salient in the current historical juncture. It is not by chance that the upsurge of autocracy in the early 21st century has been gathering speed in parallel to another trend—the rise of social and economic insecurity. Increased competition for profits in the globally integrated capitalist economy has made governments abandon societies to market forces. The ensuing precarity has spared no one—rich and poor, young and old, skilled and unskilled have all been affected. Precarity is breeding anxiety and fostering public demands for security and safety. To this, political elites across the Left-Right divide have responded by increasing their stronghold on society through law-and-order policies, rather than providing the economic safety for which people yearn. Autocracy is the most natural corollary to economic precarity.⁵²

Precarity and autocracy reinforce each other: economic insecurity breeds autocratic attitudes that propel dictators to power, whose assaults on the rule of law further disempower citizens, leaving them to the mercy of despots. Therefore,

52 On the generalization of precarity and its link to autocracy see Azmanova 2020.

the return of political decency and socially responsible rule depends on a struggle on two battlefronts—against economic precarity and for the rule of law.

The deepening collusion between autocracy and capitalism in European democracies has borne out this truth: the rule of law, as a weapon against political tyranny, might not be sufficient in the struggle for a more just social order, but without it we are completely disempowered. The great political challenge of our day is therefore this: to make political elites not only responsive to democratic demands, but to make them also socially responsible—that is, to use their power for the larger and longer-term wellbeing of our societies. The rule of law is one of the most powerful tools at our disposal for reigning in the powerful and making their power a force for good, for transforming their power over people into service to the people. By stipulating norms that no one, including democratic publics, can violate, the rule of law also protects societies from the tyranny of the majority.⁵³

We posited, in the Introduction to this study, that the essence of the rule of law, its *raison d'être*, is the protection from tyranny by preventing the arbitrary use of power. This protection from tyranny is enacted through intricate institutional logistics: the separation of powers, checks and balances, legality (including a transparent and independent process for enacting law), due process (including non-discrimination and equality before the law), and safeguarding fundamental rights. The health of the rule of law is then monitored by an institutional hierarchy of accountability through which decisions can be scrutinised and challenged. The European Commission, being the (purportedly) non-political executive arm of the Union and a guardian of the EU treaties, has the duty to enforce compliance with the rule of law, which is enshrined in EU law (TEU Art.2) that is binding on all members.

In this study, we ventured to inquire what it means for the European Commission to enact its mandate as guardian of the rule of law who is also bound by the rule of law. We based our reflections on an analysis of its latest tool—the yearly country Rule of law reports, the first of which was issued in September 2020. Even as this particular mechanism is not binding, and many have argued that it is inefficient and even redundant because there are stronger instruments for rule of law monitoring, our analysis established that when mishandled, this seemingly innocuous policy tool can do serious damage. We examined in detail three such country cases. In France, the Commission has condoned a semi-permanent state of emergency rooted in a systemic weakness of the French judiciary, thereby allowing arbitrary rule to take hold in one of EU's founding members. In the case of Spain, the Commission has explicitly and repeatedly endorsed the Spanish

53 On the difference between 'democratically responsive' and 'socially responsible' rule see Azmanova 2013.

governments' systematic violations of core values such as the right to peaceful assembly, freedom of speech and even the right to liberty. By stating that the Spanish government's reaction to the 2017 independence Referendum in Catalonia is a matter of Spain's internal affairs, the European Commission has abdicated its duty to safeguard the rule of law in the EU. Further, by adopting the position (in conflict with the judgment of other international bodies) that the Spanish government has acted well in line with the rule of law in protecting Spain's territorial unity, it has reduced the remit of the rule of law to a simple matter of legality—an approach that has invariably armed autocrats with the power of binding law. The case of Bulgaria has disclosed the dangerous politicization of the Commission which, for reasons of political expediency (and by all evidence, under the influence of the European People's Party of which Bulgaria's Prime Minister at the time was a loyal member), has given an extremely lenient account of the rule of law situation in this country. It has thus become complicit in the capture of the Bulgarian state by the oligarchic mafia.

If the weakest policy tool in the hands of the Commission can wield such a significant impact, both via its actions and its inactions, we must demand that the guardian comply with the rule of law while fulfilling its guardianship mandate. This simply means that it should not exercise this power in an arbitrary manner. If the Commission is to continue deploying the annual rule of law reports as a monitoring device—which we welcome, indeed—it needs to execute the country surveys differently.

We articulated four criteria these surveys need to satisfy: clarity of communication (because obscurity is a fertile ground for arbitrariness), thoroughness (because omissions tacitly condone what is omitted), equal treatment (because favoritism disempowers some), and impartiality (because partisan-political considerations harm the common good). We established that on all four criteria the European Commission has failed the rule of law. It should do better next time—as per the list of recommendations issued by Civil Liberties Committee of the European Parliament (EP 2021). To these, our analysis adds another six:

CLARIFY THE LINK BETWEEN DEMOCRACY AND RULE OF LAW _____ **1**

The close link the Report draws between rule of law and democracy, in deviation from the approach in the Treaty (where these are treated as distinct and independent values), without offering a clarification of the relationship between the two concepts (the rule of law does enhance democracy, but the democratic origin of the law does not guarantee that it aligns with the rule of law) is regrettable. This

deepens the confusion among citizens about the meaning of the rule of law and gives ammunition to autocrats to argue that they can use their power as they see fit with the blessing of the people. It would be important, in future iterations of the Report, to clarify carefully this relationship, namely: First, the rule of law lays the foundation for a viable democracy (i.e., it is a precondition for democracy) because it postulates the general and equal application of the law. Second, the democratic nature of law-making in liberal democracies is a necessary, but insufficient condition for obtaining the rule of law: the rule of law principle is respected only so far as democratically enacted laws do not serve the arbitrary use of power. A democratically issued law that contributes to the arbitrary use of power violates the rule of law.

EXPLICITLY DISTINGUISH BETWEEN VIOLATIONS OF THE LAW AND VIOLATIONS OF THE RULE OF LAW — 2

The country surveys should distinguish explicitly and systematically between violations of the law and violations of the rule of law: the rule of law is not violated when the law is broken, but when breaking the law is not punished, when the sanction is not consistently applied or proportionate, and when there is no legal and institutional framework to enable that inequities be challenged and corrected. Reporting on existing and well-functioning mechanisms of the rule of law, especially when violations are omitted, creates a dangerously positive portrayal of the situation.

CONTEXT-SENSITIVE ACCOUNTS ————— 3

A formalistic approach to the mechanisms of rule of law enforcement, such as judicial independence and specialized anti-corruption bodies should be avoided. As the case of Bulgaria made it clear, economic and political elites have deployed the independence of the Prosecutor General's office and the existence of specialized anti-graft mechanisms in the abuse of power.

SYSTEMATIC ACCOUNTS OF SYSTEMIC VIOLATIONS — 4

The European Parliament has proposed that future editions of the Report contain “a more integrated analysis on the interlinkages between the four pillars of the report, and of how combined deficiencies may amount to systemic (risks of) breaches” (EP 2021). To this, we add that it would be helpful to distinguish further between systematic rule of law problems and their systemic roots. Further, an account of

the systemic roots of violations must be invariably rooted in a fact-based diagnosis of the rule of law situation and informed of the context-specific problems in each country—that is, how reported violations origination in the institutional structure, legal framework, and political culture of a country. As we pointed out in the case of Spain, the Constitution hosts a wording of the rule of law principle that makes it liable to be reduced to rule by law—the government’s rule of law violations (some of which the European Commission has explicitly backed) are based on such a reductionist view on the rule of law.

ENLARGE THE SCOPE OF RESPONSIBILITY TO ECONOMIC ACTORS _____ **5**

The definition of the rule of law should not be constrained in a way to place responsibility only on public authorities; it should be expanded to include economic actors, as per the approach of the Venice Commission in its Rule of law Checklist: “all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of the rule of law” (#17). The case of Bulgaria illustrates that the state’s capture by oligarchic economic networks is at the root of its incapacity to uphold the rule of law in the country.

CLEAR ATTRIBUTION OF RESPONSIBILITY _____ **6**

Accounts of rule of law breaches and threats need to be presented in a way that political responsibility for these breaches and threats is clearly attributed.

Finally, and most importantly, the structure of accountability in the EU needs to expand not only upwards towards the four-tier Guardian, but also downwards—to the people whose wellbeing it is meant to serve. As Kalypto Nicolaidis and Adis Merdzanovic put it in their *Citizen’s Guide To The Rule of law* (2021), “if the rule of law depends on each and every one of us, shouldn’t we, the citizens, be empowered as its guardians”. What we need, therefore, is that citizens can actively demand that those powerful institutions and actors ‘render an account’ for their actions and inactions through reasoned argumentation, with a proper follow-up by those who are requesting the account.⁵⁴ To that purpose, Nicolaidis and Merdzanovic have advanced the idea of a citizen-centred rule of law platform, catered by the European Parliament, on which citizens share publicly their lived examples of rule of law breaches. Importantly, the authorities to which accountability requests would be directed, would need to give reasoned account publicly and with clarity, a point

⁵⁴ For the difference between formal accountability and actively demanding and rendering account through reasoned argumentation see Azmanova, Albena 2012: 24-25; 220-221, 225, 236.

we highlight in this report. In sum, the platform will both educate citizens in the fine art of really existing liberalism and democracy, and hold the Guardians firmly bound to the mast of the rule of law, with the two functions reinforcing each other.

“Quand la vérité n’est pas libre, la liberté n’est pas vraie”, sings Europe’s beloved bard Jacques Prévert: When truth is unfree, freedom is not real. It is high time we get real about the rule of law. Without that, even prosperity and equality might be of service to tyranny.

Brussels,
10 September 2021

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This analysis judges the compliance with the rule of law of the European Commission's annual rule of law monitoring. The Report pursues two tasks—an educational one (to develop rule of law culture) and a disciplinary one (to expose and condemn rule of law violations). We posit that in order to achieve effectively these goals while complying with the rule of law, the Report needs to meet four criteria: clarity, thoroughness, equal treatment and impartiality. We establish that by deviating from these criteria, the Commission fails to comply with the rule of law norm it is meant to monitor and safeguard. We draw on three country chapters of the Report—on Bulgaria, Spain and France—as well as some examples from other country cases to illustrate these failures and highlight their consequences.