

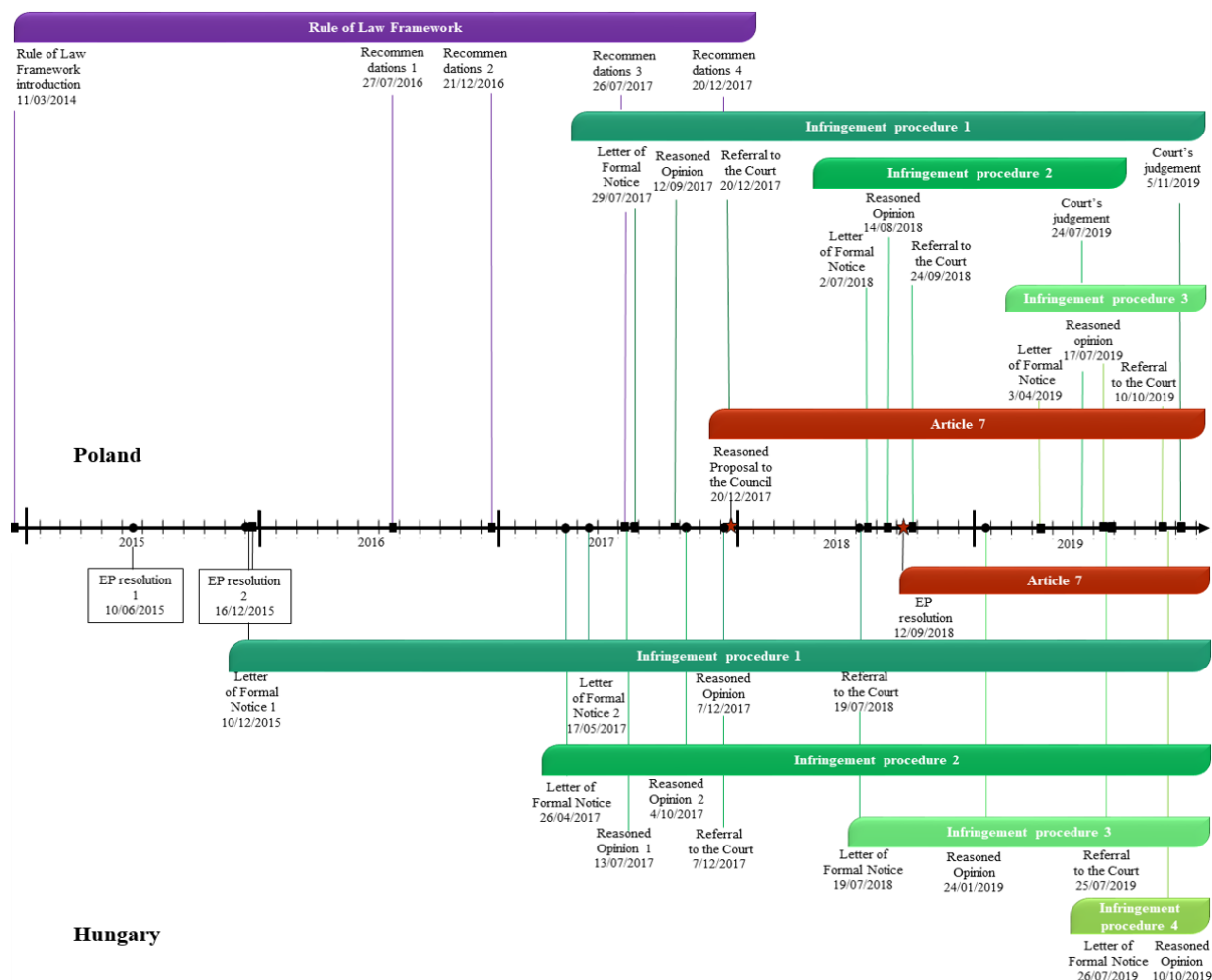
The European Commission's 2019 Initiatives on the Rule of Law

Aliya Abenova (ULB alumna, 2019-2020)

This analysis draws on my Master thesis dissertation conducted at the Université libre de Bruxelles under the supervision of prof. Ramona Coman, coordinator of the Jean Monnet module “Rule of law and mutual trust in global and European governance”.

Amidst the ongoing rule of law backsliding in certain European states, the response to this issue of the European Commission (the Commission) as the guardian of the EU treaties is under particular scrutiny. In 2019, the Commission conducted a rule of law consultation that attracted around 60 contributors and was marked by the Commission's two communications, issued in April and July, introducing the three pillars for upholding the rule of law: promotion, prevention and response (European Commission 2019a, 2019b; for the analysis of the 2013 consultation, see Coman [2015](#)).

This initiative is of interest to understanding how the Commission pursued upholding the rule of law, taking into account the limited effect of previously applied tools. As a reminder, since 2010 onwards, the Commission has been active in proposing a new rule of law toolbox to confront the erosion of the EU essential value in Poland and Hungary. Among them are infringement procedures, Article 7 mechanism, and the Rule of Law Framework (see graph 1).

Graph 1. The European Commission's efforts against the Rule of Law backsliding in Poland and Hungary

In this regard, a view through the legitimacy prism can shed light on this issue. According to Ramona Coman (2018, p.151), the European institutional actors, while proposing new tools to address the threats to the rule of law, have been seeking to reinforce EU's three-fold legitimacy, conceptualised by V.A. Schmidt as follows: **input** (the EU's ability to respond to challenges and safeguard its values), **output** (what is reflected in policy outcomes) and **throughput** (what occurs between input and output, disclosing the process in 'the black box of governance'). While the Commission seeks to strengthen its capacity to act, what are the preferences of other EU institutions and stakeholders?

An examination of the stakeholders' proposals for each pillar (see charts 1, 2, 3) and the Commission's communications related to the 2019 rule of law consultation, adhering to the aforementioned framework, reveals the following findings.

Main proposals of the contributors to the 2019 Rule of Law consultation¹

¹ Figures in frames ☐ stand for number of contributors supported the proposal.
Source: author's own calculations from the stakeholders' contributions

Chart 1. Promotion

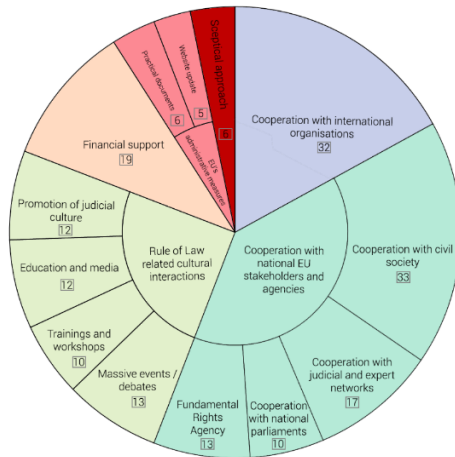


Chart 2. Prevention

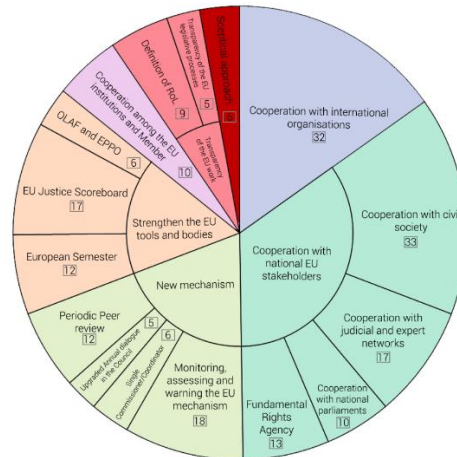
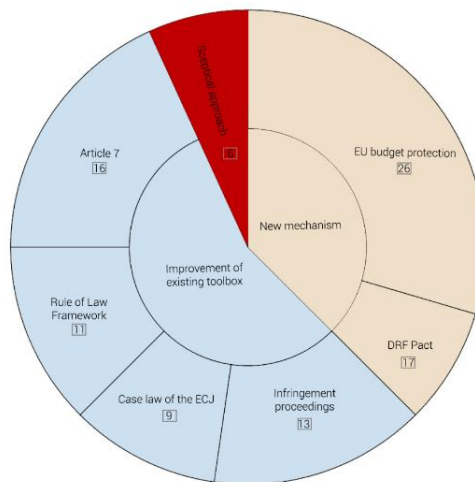


Chart 3. Response



The most popular proposals among the contributions expressed the need for the EU's enhanced **throughput**, which is related to 'efficacy, accountability, openness, inclusiveness of the governance processes' (Schmidt 2013, p.3). The contributors favoured increased cooperation with different stakeholders in the first two pillars; the rule of law-related cultural interactions and the EU administrative measures in promotion; collaboration among the EU institutions and its members, transparency of the EU's work in prevention. The expectation of the efficient **output** against the crisis resulted in common proposals in prevention and response pillars on the strengthening of the existing toolbox and the establishment of new mechanisms with both intergovernmental and supranational **input**, although the latter was more broadly encouraged.

A cross-section of the major preferences divided by the groups of contributors revealed that almost all groups endorsed the idea of cooperation with international and national stakeholders. International organisations advocated for the relevance of their expertise, judicial networks

favoured transparency of the EU processes and the dissemination of judicial culture across the Union, while civil society was inclined to propose strict sanctioning measures against the Member States concerned, many non-governmental contributors embraced the idea of the rule of law promotion through various events, debates, educational programmes (contributors 2019).

It is noteworthy that the Member States supported not only intergovernmental (such as Periodic Peer Review mechanism, an upgraded Annual Dialogue on the Rule of Law in the Council) but also supranational tools (protection of the EU's budget). Their most popular solutions for the rule of law reinforcement can be divided into three categories: 1) consolidation of cooperation with other stakeholders related to the EU's throughput legitimacy; 2) establishing new mechanisms with supranational and intergovernmental approaches to input and output legitimacy; 3) improvement of existing tools connected to increasing both the throughput and output legitimacy of the EU. Meanwhile, both Member States concerned — Hungary and Poland — adopted a confrontational stance, condemning the Commission's political motives and remained critical about the legality of the consultation itself (Member States 2019).

The contributions provided the Commission with a necessary avenue for further legitimacy strengthening, expressed in the communications (European Commission 2019a, 2019b).

The Commission, in its turn, used the consultation process for the purpose of overcoming the traditional democratic deficit of the EU, increasing its input legitimacy in a broad sense, as well as overcoming the lack of treaty-based input anchors for the establishment of the new rule of law instruments. An analogy could be drawn here with the Commission's 2014 Rule of Law Framework, which was strongly criticised by the Council's Legal Service due to the absence of a precise provision in the Treaties that entitled the Commission to create this new rule of law supervision mechanism (Kochenov et al. 2016, p.1047; Coman 2018, p.155). Nonetheless, having envisaged this, the Commission opted to introduce its tools after the previous rule of law broad consultation in 2013, which is referred to as a part of the basis for the creation of a new instrument (European Commission 2014, p.3). In 2019, the Commission applied a similar tactic regarding the new instruments for the prevention of the EU value breach.

By outlining the promotion pillar serving as a new area, devoted entirely to the throughput, the Commission intended to improve the transparency, accessibility, openness, and multi-actor inclusion in the EU's deliberation process. Such emphasis on the throughput legitimacy can be explained by its crucial role. As Schmidt (2013, p.8) stated, the EU's input and output

legitimacies can often be compensated for by the high quality of the other, whereas throughput legitimacy cannot, its deterioration can undermine both other types of legitimacy.

Within the two other pillars, the Commission exposed the intention of reinforcing its input and output legitimacy by promoting new supranational preventive and sanctioning instruments, namely the Rule of Law Cycle with an Annual Report and the mechanism for the EU budget protection. This was important in the context of the constant tensions between proponents of supranational tools leading to the EU empowerment and those who supported intergovernmental tools, striving to preserve Member States' control over the rule of law, leaving no place for interference in their sovereignty (Coman 2018, p.145). Struggling against the tools undermining its capability to confront the issues, the Commission aimed not only to increase its legitimacy but also to establish priority over the intergovernmental tools with the support of the contributors. Along with attempts to enhance throughput legitimacy with various stakeholders' active engagement in the information gathering process, the Commission also sought to uphold its special status of the guardian of the treaties by establishing the primacy of its instruments for the rule of law monitoring and assessment.

Moreover, the Commission endorsed the improvement of the existing rule of law toolbox through the method of division of responsibilities among the EU institutions within their legitimate capacities and without undermining the Commission's efforts in this field.

Thus, the examination of the Commission's latest effort to safeguard the EU's core value by means of the 2019 rule of law consultation reveals the Commission's evident aspirations for the input, output, and throughput legitimacy enhancement.

References:

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Kochenov D., Magen A. and Pech L. (2016), 'Introduction: The Great Rule of Law Debate in the EU', *JCMS: Journal of Common Market Studies*, 54(5), pp. 1045–1049.

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European Commission (2019b), 'Strengthening the rule of law within the Union. A blueprint for action', *Communication from the Commission to the European Parliament and the Council*, COM(2019) 343 final, 17 July 2019.

The list of contributions to the Rule of Law Consultation 2019

All available at https://ec.europa.eu/info/publications/stakeholder-contributions_en, accessed on January 18

Member States Governments:

Belgium
Finland
France
Germany
Hungary
Poland
Portugal
Slovakia
Slovenia
Spain
Sweden
The Netherlands

EU institutions and bodies:

European Central Bank (ECB)
European Economic and Social Committee (EESC)
European Ombudsman

EU Political Groups and Members of the European Parliament:

The Greens/European Free Alliance (Greens/EFA)
Sophie in 't Veld, Member of the European Parliament (MEP)

International Organisations:

Organisation for Economic Cooperation and Development, Public Governance Directorate (OECD)

Council of Europe (CoE)

Judicial networks and associations:

Association of European Administrative Judges (AEAJ)

Association of European Administrative Judges (AEAJ) & European Association of Judges (EAJ) & Magistrats Européens pour la Démocratie et les Libertés (MEDEL)

European Association of Judges (EAJ)

European Network of Councils for the Judiciary (ENCJ)

European Network of Legal Experts (TEE) and the Centre for Research on Conflicts, Liberty, and Security (CCLS)

European Network of National Human Rights Institutions (ENNHRI)

International Bar Association (IBA)

International Commission of Jurists (ICJ)

Magistrats Européens pour la Démocratie et les Libertés (MEDEL)

Network of the Presidents of the Supreme Judicial Courts of the European Union (NPSC)

The Council of Bars and Law Societies of Europe (CCBE)

The German Association of Judges (Deutscher Richterbund) (GAJ)

Others (NGOs, unions, academia, etc.):

‘Nézőpont’ Institute, Research and Analysis, Nonprofit Kft (Hungary)

Bingham Centre for the Rule of Law

Bruegel

Center for Fundamental Rights (Hungary)

Civil Liberties Union for Europe

Civil Society Europe

Civil Unity Forum (CÖF) - Civil Unity Public Benefit Foundation (CÖKA) from Hungary

European Humanist Federation

European Liberal Forum

European Social Partners

European Trade Union Confederation (ETUC)

Helsinki Foundation for Human Rights (Warsaw) and the Hungarian Helsinki Committee (Budapest)

Konrad Adenauer Stiftung (Germany)

Marlene Wind (University of Copenhagen)

Open Society European Policy Institute

Paul Blokker (University of Bologna)

Philanthropy Advocacy – a joint DAFNE & EFC project

Prof. Dr. András Jakab (University of Salzburg)

Prof. Dr. José María Porras-Ramírez (University of Granada)

Radu Magdin (TheSmartlink.org)

RECONNECT project

The Democratic Society

Transparency International EU

Union of civil servants (Germany)