

re:constitution

WORKING PAPER

Anna Damaskou

**The COVID-19 Pandemic
and the Rule of Law:
Turning the Crisis into
Opportunity**

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe
c/o Forum Transregionale Studien e. V., Wallotstr. 14, 14193 Berlin

Anna Damaskou

The COVID-19 Pandemic and the Rule of Law: Turning the Crisis into Opportunity

Working Papers, Forum Transregionale Studien 5/2022

DOI: <https://doi.org/10.25360/01-2022-00053>

Design: Plural | Severin Wucher

© Forum Transregionale Studien under CC BY-SA 4.0

The Forum Transregionale Studien is an institutional platform for the international cooperation between scholars of different expertise and perspectives on global issues. It is funded by the Berlin Senate Department for Higher Education and Research, Health, Long-term Care and Gender Equality.

Working Papers are available in open access via *perspectivia.net*, the publication platform of the Max Weber Stiftung.

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe is a joint programme of the Forum Transregionale Studien and Democracy Reporting International, funded by Stiftung Mercator.

Abstract

The still ongoing COVID-19 pandemic has caused an extraordinary, unprecedented situation worldwide. Certain mechanisms and processes pertaining the regular democratic functioning of countries may be temporarily suspended or circumvented, in order to enable concentrated decision-making and effective crisis-management. Such suspension or circumvention could mean an abuse of the state of emergency, serving particular political interests, combined with reduced space for public scrutiny. In the EU, even well-established democracies seem to be susceptible towards backsliding of the rule of law. In September 2020, the European Commission published its first Rule of Law Report, as part of strengthening the EU's rule of law toolbox. The report aimed at monitoring significant developments between January 2019-September 2020, relating to the rule of law in the EU Member States. The report is expected to enhance the Commission's responses at the EU level. Does, however, the methodology followed for the drafting of the annual EU Rule of Law Report ensure uncompromised objectivity and independence, so that the conclusions drawn facilitate the proposal of the necessary reforms in each Member State? The present Working Paper aims to serve as a "shadow report" to the EU Rule of Law Report(s) focusing in particular on the repercussions of the Covid-19 pandemic.

Keywords: Covid-19 pandemic, rule of law, EU Rule of Law Mechanism, EU Rule of Law Framework, EU Rule of Law Report, shadow report

Suggested Citation:

Damaskou, Anna, "The COVID-19 Pandemic and the Rule of Law: Turning the Crisis into Opportunity" re:constitution Working Paper, Forum Transregionale Studien 5/2022, available at <https://reconstitution.eu/working-papers.html>

The COVID-19 Pandemic and the Rule of Law: Turning the Crisis into Opportunity

Anna Damaskou¹

Introduction

The still ongoing COVID-19 pandemic has caused an extraordinary, unprecedented situation worldwide. Political leaders had to face novel challenges and they have been called to take groundbreaking, extraordinary decisions, entailing extensive restrictions, in order to protect citizens' health and also counterbalance other damages brought about by the pandemic.

Certain mechanisms and processes pertaining the regular democratic functioning of countries may be temporarily suspended or circumvented, in order to enable concentrated decision-making and effective crisis-management. At the same time, the attention of the public and media focus almost solely on assessing epidemic risks, while citizens seem to be more open to accept radical steps and severe measures taken by their governments.

Nevertheless, such measures could show an abuse of the state of emergency, serving particular political interests, combined with reduced space for public scrutiny. Numerous restrictions and fast-track procedures mean suspension or abandonment of the checks-and-balances principle leaves major space for corruption. Although –no doubt– emergency situations require concentrated decision-making and prompt action, which often override some of the usual checks-and-balances procedures and democratic deliberation, the present emergency situation of the pandemic seems to legitimize authoritarian tendencies and the backsliding of the rule of law.

At the same time, the need for access to trusted, accurate and independent information has never been so vital. Yet one of most catastrophic fallouts of this crisis is a crackdown on press freedoms across the world. While, in the short term, this is extremely damaging, in the long-run, the consequences of suppressing independent journalism may significantly erode civil liberties in a wider sense. In countries where free press is already under attack, controlling information 'for the public good' may be exploited to seize political power.

¹ Dr Anna Damaskou holds Bachelor [Democritus University of Thrace] and Master [London School of Economics and Political Science] degrees in law, as well as a PhD in European economic criminal law [Queen Mary University of London]. She is currently (June 2021) the Chair of the Transparency International Greece (pro bono), while she has served also as its researcher in the past. She has 17 years of work experience in the areas of banking regulatory compliance and regulation/supervision of the banking and financial sectors. She is teaching and publishing extensively on issues of good governance, anti-corruption and regulation/supervision of the banking and financial sectors. She is a member of the Athens Bar Association. She is certified as Fraud Examiner (CFE), Anti-Money Laundering Specialist (CAMS), General Sanctions Specialist (CGSS) and Data Protection Officer (CIPP/E, CIPM). She speaks English, French, German and Serbian. In the framework of the re:constitution Fellowship (academic year 2020-2021), she paid study visits to the Transparency International Secretariat (Berlin, Germany) and to the Institute for European, Russian and Eurasian Studies (IERES) of the George Washington University (Washington DC, USA), institutions to which she is grateful for substantially assisting her research.

As the COVID-19 pandemic ravages the world, of particular concern with regard to the protection of human rights, is the crackdown of the right to privacy, in order to limit the spread of the virus and to allow healthcare providers and researchers to exchange data. The EU's legal framework of privacy and data protection is robust, up to date and designed to the needs of the modern world. However, the pandemic has seriously challenged it, as governments placed legislative restrictions to diminish the right to privacy in sake of the alleged protection of public interests.

In the EU, even well-established democracies seem also to be susceptible towards negative developments. However, despite the ongoing epidemic crisis being unprecedented in its character and seriousness, the attention should not be taken away from adhering to the principles of democracy and rule of law. In September 2020, the European Commission published its first Rule of Law Report², as part of strengthening the EU's rule of law toolbox. This report aimed at monitoring significant developments between January 2019-September 2020, relating to the rule of law in the EU Member States, in particular with regard to their judicial system, their anti-corruption framework, media pluralism and other institutional issues related to checks and balances. The report is expected to enhance the Commissions' responses at the EU level, with regard to the aforementioned issues, including introducing legislation, where it is necessary.

Does, however, the methodology followed for the drafting of the annual EU Rule of Law Report ensure uncompromised objectivity and independence, so that the conclusions drawn facilitate the proposal of the necessary reforms in each Member State? The research conducted by the present author in the framework of the re:constitution Fellowship during the academic year 2020-2021 aims to serve as a 'shadow report' to the EU Rule of Law Report(s) focusing in particular of the repercussions of the Covid-19 pandemic.³

The present Working Paper is based on two premises:

(a) given the persistence of the Covid-19 pandemic, it goes without saying that also the upcoming EU Rule of Law Reports shall be relevant for assessing the state of the rule of law in the EU Member States;

(b) detailed findings of the shadow report referring to specific EU Member States remain outside the scope of the present Working Paper.

² European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - 2020 Rule of Law Report: The rule of law situation in the European Union, COM(2020) 580 final, available at: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en, last accessed on: 30.06.2021.

³ The present Working Paper was concluded in June 2021. The second EU Rule of Law Report is expected to be published later this year.

1. The Predecessor of the EU Rule of Law Report: The Abandoned EU Anti-Corruption Report

1.1. The need for the EU Anti-Corruption Report

The EU Anti-Corruption Report was introduced by the European Commission's short-lived anti-corruption reporting mechanism, established in 2011.⁴ Originally, the report was planned to be published on a bi-annual basis, so as to monitor and assess the efforts of EU Member States on fighting corruption. However, in 2017, it was discontinued, having only ever published one report in 2014.⁵

The report aimed at providing a clear picture on the situation regarding corruption in each Member State, including inter alia: implemented anti-corruption measures and outstanding issues of particular concern. The ultimate aim is to set up a framework for the facilitation of the exchange of best practices, identify EU trends, collect comparable data on the EU Member States, stimulate peer learning and further compliance with EU and international commitments, as well as prepare the ground for future EU policy initiatives in the area of anti-corruption. During its short lifetime, the EU Anti-Corruption Report served as the basis for dialogue with national authorities, as well as for broader European debates.

The report came to the conclusion that all EU Member States, like many countries around the world, suffered from corruption. However, it varied in nature and extent from one country to another. Corruption, as for the report, impinged on good governance, sound management of public money, competitive markets and the EU's competitiveness in the global economy, economic development, democracy, social justice and the rule of law. Thus, it ultimately undermined the trust of citizens in democratic institutions and processes. EU Member States, in principle, did have in place the necessary legal instruments and institutions to prevent and fight corruption. However, the Commission assessed that their effectiveness was not satisfactory, since the declared goals of the instruments were often too distant from concrete results and a genuine political will to eradicate corruption was often missing as well.

1.2. The methodology implemented for the drafting of the EU Anti-Corruption Report

The EU Anti-Corruption Report covered all –at the time– 28 EU Member States with country-specific reports. It also contained a horizontal chapter on corruption-related trends across the EU and it summarized the main findings as well. A thematic chapter, focusing on a cross-cutting issue of particular relevance at EU level would also have been included in each periodic

⁴ European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE Fighting Corruption in the EU, COM(2011) 308 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0308:FIN:EN:PDF>, last accessed on: 30.06.2021.

⁵ European Commission, REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT EU Anti-Corruption Report, COM(2014) 38 final, available at: https://ec.europa.eu/home-affairs/system/files/2020-09/acr_2014_en.pdf, last accessed on: 30.06.2021.

report. The topic of the 2014 report was public procurement, due to its importance for the internal market, with special attention to the fact that, at the time of the drafting of the 2014 EU Anti-Corruption Report, the global economic and financial crises had put additional pressure on EU Member States. In times of such crises and budgetary austerity, organized crime, financial and tax fraud, money laundering and corruption challenged the integrity and transparency of public expenditure. While in line with international legal instruments, the report defined corruption in a broad sense as any “abuse of power for private gain”⁶, it also focused on selected key issues that were of particular relevance to each Member State. It described good practices and weaknesses and, moreover, identified steps which would allow the Member State to address corruption more effectively.

Having said that, the 28 country chapters did not provide a detailed description of the corruption-related issues and of the anti-corruption measures. Instead, the chapters highlighted selected key issues that had been identified through the individual country assessments with due regard to the national context. The report, where it was relevant, referred to and supported the recommendations of other corruption reporting mechanisms – notably Council of Europe’s Group of States against Corruption (GRECO) and OECD– some of which were not yet followed by the Member States. The Commission also tried to avoid duplicating existing reporting mechanisms and added to the administrative burden on the Member States subjected to various peer review evaluations (GRECO, OECD, UNCAC, FATF, Moneyval).

The report was, therefore, not based on detailed questionnaires or on country visits. It relied on the abundance of information available from existing monitoring mechanisms and also on data from other sources including national public authorities, academic researches, independent experts, think-tanks, civil society organizations etc. Furthermore, the report drew on corruption-related information concerning a wide range of policy areas (e.g. public procurement, regional policy etc.), coming from various Commission departments and from the competent EU agencies (Europol and Eurojust).

Studies and surveys were specifically commissioned for the purpose of further elaboration of relevant areas. An extensive study was also published on corruption in public procurement involving EU funds, initiated by the European Parliament and commissioned by OLAF⁷. The Commission also used information that had been collected by research projects having been co-funded by the EU, such as the National Integrity System reports carried out by Transparency International. The EU Anti-Corruption Report also built on the Cooperation and Verification Mechanism (CVM), a post-accession follow-up mechanism for Romania and Bulgaria. In relation to Croatia, which at the time of the publication of the report was to be considered as a new EU Member State, extensive information had been collected as part of the pre-accession process and related monitoring activities.

⁶ European Commission, REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT EU Anti-Corruption Report, COM(2014) 38 final, available at: https://ec.europa.eu/home-affairs/system/files/2020-09/acr_2014_en.pdf, last accessed on: 30.06.2021, 2.

⁷ *Ibid.*, 37.

Already in 2011, the Commission set up a group of seventeen experts on corruption in order to support the work on the EU Anti-Corruption Report⁸. The expert group advised the Commission on the overall methodology and the final assessments of the report. The experts acted in their personal capacity and did not represent any institutions. In 2012, the Commission had also set up a network of local research correspondents⁹. This network of experts complemented the work of the above-mentioned group, by collecting and processing relevant information from each Member State. It consisted of experts on corruption coming from research institutions and civil society organizations. To sum up, the report was based primarily on qualitative rather than quantitative assessment. The focus was on the functional and not on the dysfunctional anti-corruption national procedures. In the report, the Commission underlined that it met with difficulties to collect credible, comparable data of high quality across the Member States, as well as to demonstrate convincingly the link between those factors and corruption. It was also challenging to draw clear, policy-oriented conclusions from these correlations.

1.3. The ‘swan song’ of the EU Anti-Corruption Report

In February 2017, the reporting process ceased to operate. In a letter to the then Chair of the EU Parliament's Civil Liberty Committee (LIBE), MEP Claude Moraes, the then Commission Vice-President, Frans Timmermans, reasoned the discontinuation by inter alia the following arguments:

“The fruits of our anti-corruption work can be seen in concrete examples of Member States taking legislative or other action to prevent and counter corruption. The Commission has also been providing financing for projects in the area of anti-corruption as an important element in administrative capacity building.

During this period the wider policy framework at EU level has evolved in a number of ways. Most importantly, fighting corruption has become a key element of the European semester process of economic governance, where a number of the country reports now include specific analysis of corruption risks and associated challenges. [...]

At the same time, this raises the question of whether the format adopted in 2014 is still necessary today. While the first report was useful in providing an analytical overview and creating a basis for further work, this does not necessarily mean that a continued succession of similar reports in the future would be the best way to proceed.”¹⁰

⁸ Ibid., 38.

⁹ Ibid.

¹⁰ Frans Timmermans, ARES (2017) 455202, 25.01.2017, available at: <http://transparency.eu/wp-content/uploads/2017/02/20170130-Letter-FVP-LIBE-Chair.pdf>, last accessed on: 30.06.2021.

2. The Descendant of the EU Anti-Corruption Report: The EU Rule of Law Report

2.1. The EU Rule of Law Framework¹¹ and the EU Rule of Law Report

Six years after the publication of the –first and only– EU Anti-Corruption Report, in September 2020, the EU published its first Rule of Law Report¹². The European Commission emphasized that a number of crisis events in some EU Member States revealed systemic threats to the rule of law and led to the adoption of the rule of law framework, in order to address such threats, given that strengthening the rule of law in the Union is and must remain a key objective. In more detail, the EU is based on the rule of law. This means that every action taken by the EU is founded on its Treaties, which have been approved democratically by its Member States. EU legal instruments help to achieve the objectives of the EU Treaties and put EU policies into practice. Rule of law guarantees fundamental rights and values, allows the implementation of EU law and supports an investment-friendly business environment.

The 2020 report had been preceded by the Commission’s Communication from April, 2019 on “Further Strengthening the Rule of Law within the Union”¹³ and the July, 2019 follow-up¹⁴, which had set out three pillars for future action – promotion, prevention and response – and invited all stakeholders to contribute to the next steps to be taken to uphold the rule of law within the EU. In response to the Communication, the Commission received over 60 contributions, including from the Member States, EU institutions and bodies, international organizations, political actors, judicial bodies and networks, civil society organizations, academia and also from business associations.

Both the 2020 Report and the 2019 Communication contain elements of the 2014 EU Rule of Law Framework¹⁵, which provided for a staged dialogue with each Member State, so as to prevent the emergence of a systemic threat to the rule of law and the triggering of an Article

¹¹ European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en, last accessed on: 30.06.2021.

¹² European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2020 Rule of Law Report - The rule of law situation in the European Union, COM(2020) 580 final, available at: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en, last accessed on: 30.06.2021.

¹³ European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Further Strengthening the Rule of Law within the Union - State of Play and Possible Next Steps, COM(2019) 163 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, last accessed on: 30.06.2021.

¹⁴ European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Further Strengthening the Rule of Law within the Union – A Blueprint for Action, COM(2019) 343 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0343&from=EN>, last accessed on: 30.06.2021.

¹⁵ European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0158>, last accessed on: 30.06.2021.

7 TEU procedure. The three-stage process of the framework comprises the Commission's assessment, the Commission's recommendation and its monitoring on the Member State's follow up. If no solution is found within the Rule of Law Framework, Article 7 of the TEU is the last resort to resolve a crisis and to ensure the Member State complies with EU values, providing for special mechanisms with far-reaching sanctions in case a Member State does not respect the fundamental values enshrined in Article 2 TEU, including the rule of law.

The European Rule of Law Mechanism, furthermore, constitutes a process for an annual dialogue between the Commission, the Council and the European Parliament, together with Member States, as well as their national parliaments, civil society and other stakeholders on the rule of law, so as to stimulate inter-institutional cooperation and encourage all EU institutions to contribute in accordance with their respective institutional roles. The Rule of Law Report is the foundation of this new process, since it serves as a basis for discussions in the EU, monitoring significant developments, both positive and negative, relating to the rule of law in Member States. It covers four pillars: (a) the justice system, (b) the anti-corruption framework, (c) media pluralism and (d) other institutional issues related to checks and balances.¹⁶

Apart from the EU Rule of Law Framework, a number of other mechanisms and frameworks help address rule of law issues in Member States, as early warning and preventive tools, before it becomes necessary to have recourse to Article 7. These are: (a) the European Semester cycle of economic, fiscal and social policy coordination, whereby the Council can adopt targeted country-specific recommendations; (b) the annual EU Justice Scoreboard; (c) the Cooperation and Verification Mechanism established as a specific mechanism for Bulgaria and Romania when they joined the Union in 2007, to assist the two Member States to address remaining shortcomings in the areas of judicial reform, the fight against corruption and, for Bulgaria, organized crime, which is relevant when addressing rule of law challenges in all Member States; (d) the Commission's Structural Reform Support Service providing tailor-made technical support for structural reform in the Member States, on the request of Member States and is to address needs reflecting defined reform priorities; (e) the European Structural and Investment Funds and funds supporting Justice and Security policies; (f) the European Anti-Fraud Office (OLAF); (g) the European Public Prosecutor's Office (EPPO).

2.2 The methodology implemented for the drafting of the EU Rule of Law Report

The first report, published in September 2020, rather presented a summary of the overall current situation in each Member State with regard to the aforementioned four pillars, taking into account particular developments since January 2019. As per the report, the monitoring approach relies on comparable information and relevant sources, such as inter alia global indices and scorecards issued by international institutions and bodies, as well as country-

¹⁶ European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, 30.09.2020, available at: https://ec.europa.eu/info/sites/default/files/2020_rule_of_law_report_methodology_en.pdf, last accessed on: 30.06.2021, 1.

specific researches published by those entities. In more detail, the assessment in the European Rule of Law Mechanism is carried out by the Commission based on:

(i) relevant obligations under EU law, elaborated by the CJEU [e.g. Art. 2 TEU, 19 (1) TEU, 47 Charter of Fundamental Rights of the European Union, 325 TFEU and rule of law-relevant EU secondary legislation such as EU criminal law, Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive)];

(ii) European Court of Human Rights case law;

(iii) Council of Europe standards such as:

- the Recommendation of the Committee of Minister on judges: independence, efficiency and responsibilities¹⁷,
- the Recommendation of the Committee of Ministers on the role of public prosecution in the criminal justice system¹⁸,
- Criminal Law Convention on Corruption¹⁹,
- Civil Law Convention on Corruption²⁰,
- Resolution of the Committee of Minister on the twenty guiding principles for the fight against corruption²¹,
- the Recommendation of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors²²,

¹⁷ Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, available at: <https://www.icj.org/wp-content/uploads/2014/06/CMRec201012E.pdf>, last accessed on: 30.06.2021.

¹⁸ Council of Europe, Recommendation CM/Rec(2012)11 of the Committee of Ministers to Member States on the Role of Public Prosecutors outside the Criminal Justice System, adopted by the Committee of Ministers on 19 September 2012), available at: <https://www.icj.org/wp-content/uploads/2014/10/CMRec201211E-role-public-prosecution-outside-criminal.pdf>, last accessed on: 30.06.2021.

¹⁹ Council of Europe, Criminal Law Convention on Corruption, ETS No. 173, signed on: 27.01.1999, ratified by 48 states on 30.06.2022, entered into force: 01.07.2002, 2216 U.N.T.S. 225, available at: <https://rm.coe.int/168007f3f5>, last accessed on: 30.06.2021.

²⁰ Council of Europe, Civil Law Convention on Corruption, ETS No. 174, signed on: 04.11.1999, ratified by 35 states on 30.06.2022, entered into force: 01.11.2003, 2246 U.N.T.S. 3, available at: <https://rm.coe.int/168007f3f6>, last accessed on: 30.06.2021.

²¹ Council of Europe, Resolution 97(24) of the Committee of Ministers on the Twenty Guiding Principles on the Fight Against Corruption, adopted by the Committee of Ministers on 6 November 1997, available at: <https://rm.coe.int/16806cc17c>, last accessed on: 30.06.2021.

²² Council of Europe, Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the Protection of Journalism and Safety of Journalists and Other Media Actors, adopted by the Committee of Ministers on 13 April 2016, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1, last accessed on: 30.06.2021.

- the Recommendation of the Committee of Ministers on media pluralism and transparency of media ownership²³.

Overall, the report provides a qualitative assessment carried out by the Commission, the main characteristics of which are a brief factual description of the legal and institutional framework relevant to the four areas of the report, including positive and negative aspects.

Throughout the process, the Commission ensured the close involvement of Member States in the preparation, follow-up (e.g. discussion on possible operational support from the Commission to address a specific issue identified in the Report) and monitoring. The latter may include country visits, meetings with and contributions by the national contact persons (of also the national justice systems and national anti-corruption authorities) and other relevant national stakeholders in bilateral format at political and technical level.²⁴

Most importantly, prior to the publication of the EU Rule of Law Report, Member States are given the opportunity to comment on the content of the country-specific assessment. The Commission keeps the General Affairs Council informed about the preparation of the Report and also maintains coordination with the Presidency and the European Parliament.²⁵

Unavoidably, in the first Rule of Law Report, the four dimensions of the rule of law regimes in the 27 EU Member States have been analyzed also through the lens of the COVID-19 pandemic, which has proved a challenging stress test for the resilience of the rule of law worldwide.

The report recognizes that, beyond the immediate health and economic impact, the COVID-19 crisis created a wide variety of challenges for society, and more specifically for public administrations, legal and constitutional systems. All Member States have taken exceptional measures, in order to protect public health. A number of Member States declared some form of state of emergency, while others granted special emergency powers for the executive under constitutional provisions or public health protection laws. Changing or suspending the general regime of checks and balances can pose particular challenges for the rule of law.

Key tests of the Commission regarding the compatibility of the emergency measures with the rule of law standards include whether measures were limited in time, whether safeguards were in place to ensure that measures were strictly necessary and proportionate and whether parliamentary and/or judiciary oversight, as well as media and civil society scrutiny, could be maintained. Another key issue has been the way in which these powers have been scaled down or phased out. As per the report, reactions to the crisis showed overall strong resilience

²³ Council of Europe, Recommendation CM/Rec(2018)1 of the Committee of Ministers to Member States on Media Pluralism and Transparency of Media Ownership, adopted by the Committee of Ministers on 7 March 2018, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13, last accessed on: 30.06.2021.

²⁴ European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, 30.09.2020, available at: https://ec.europa.eu/info/sites/default/files/2020_rule_of_law_report_methodology_en.pdf, last accessed on: 30.06.2021, 1-3.

²⁵ Ibid., 4-5.

of the national systems, not without loopholes and issues of serious concern in some EU Member States.

3. Does the Methodology of the EU Rule of Law Report Create a Need for the Drafting of a Shadow Report?

In his letter of February 2017 to the then Chair of the EU Parliament's Civil Liberty Committee (LIBE), MEP Claude Moraes, the then Commission Vice-President, Frans Timmermans, reasoned the discontinuation of the Anti-Corruption Report on the basis of the achievements noted at national level in the fight against corruption. This –rather non-convincing argument– was coupled by an additional one, namely that the Anti-Corruption Report needed to be replaced by a more efficient mechanism. Can the Rule of Law Report be regarded as such?

Firstly, for the purpose of drafting the Anti-Corruption Report, studies and surveys were specifically commissioned, while information was generated also by independent research projects co-funded by the EU. Moreover, a group of seventeen experts on corruption – selected following an open call– to support the work on the EU Anti-Corruption Report was formed, providing advice on the overall methodology and on the assessments²⁶. The experts acted in their personal capacity and did not represent their home institutions. They were also assisted by a network of local research correspondents coming with a high degree of independence. In addition, 28 external reviewers oversaw the main deliverables of the correspondents and issued an opinion on the fairness of the correspondents' input to ensure objectivity²⁷. On the contrary, none of the aforementioned methodological safeguards were implemented in the first Rule of Law Report, which relied to a larger extent on the contributions of the Member States' national authorities.

Alina Mungiu Pippidi, a prominent anti-corruption expert, argues,²⁸ that the Rule of Law Report took into consideration only selected items of publicly available information, without digging deeper to reveal possible new findings²⁹, that may also need to be taken into account. Often, even important publicly available information is not being taken into account. For example, serious scandals took place in some Member States while they went through the Commission's assessment, like the Airbus scandal in France³⁰ and the Wirecard scandal in

²⁶ European Commission, REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT EU Anti-Corruption Report, COM(2014) 38 final, available at: https://ec.europa.eu/home-affairs/system/files/2020-09/acr_2014_en.pdf, last accessed on: 30.06.2021, 38.

²⁷ Ibid.

²⁸ Alina Mungiu Pippidi, "Unresolved Questions on the EU Rule of Law Report", 20.10.2020, available at: <https://carnegieeurope.eu/2020/10/20/unresolved-questions-on-eu-rule-of-law-report-pub-82999>, last accessed on: 30.06.2021.

²⁹ Author's note: Such new findings could have been submitted by e.g. investigative journalists, NGOs and/or whistleblowers.

³⁰ See indicatively: The New York Times, "Airbus to Pay \$4 Billion to Settle Corruption Inquiry", 31.01.2020, available at: <https://www.nytimes.com/2020/01/31/business/airbus-corruption-settlement.html>, last accessed on: 30.06.2021.

Germany³¹ – just to name a few. No consistent methodology is implemented, which results to the national reports constituting mere collections of snapshots. The 2020 Report did not even include conclusions pointing to the reforms required.³² Subjective data based on the perceptions of the everyday citizen –not of experts–, such as e.g. the Eurobarometer survey on corruption³³, has not been taken into consideration. Finally, while the Rule of Law mechanism specifically aims to protect EU funds, procurement, via which EU funds are allocated, does not comprise a distinct chapter of the national reports, along with justice, anti-corruption, media and checks and balances.

The report “EU 2020: Demanding on Democracy Country & Trend Reports on Democratic Records by Civil Liberties Organisations Across the European Union”³⁴, published by the Civil Liberties of Europe organization, illustrated the challenges affecting the rule of law in 14 EU countries during 2020. In this context, the report attests that the Commission’s scope of audit remains too restrictive, as it does not even look into human rights abuses by public authorities and the latter’s failure to prevent such violations, given that the rule of law, democracy and human rights are interlinked and that excessive surveillance, data breaches, police abuse, racial segregation and ill-treatment of migrants at the EU’s external borders are some of the most striking examples of human rights breaches happening across the EU. Moreover, also this report notes that it is imperative for the European Commission to integrate in its reports clear recommendations to EU governments on how to address identified shortcomings, or, where dialogue is clearly not an option any longer, to include clear indications on actions that the Commission intends to take. NGOs raise their voices for a more transparent and inclusive process in the preparation of the reports, because, while the European Commission encourages stakeholders to feed into its reports, the public consultations are very short and too limited in scope. Civil society, moreover, lacks the necessary financial resources for adequately responding to the consultations. Discussions on the Commission’s Rule of Law Reports with EU institutions should also be transparent, in particular since national governments are usually keen to make a good impression in these talks.

³¹ See indicatively: Reuters, “Timeline: The rise and fall of Wirecard, a German tech champion”, 16.03.2021, available at: <https://www.reuters.com/article/us-germany-wirecard-inquiry-timeline-idUSKBN2B811J>, last accessed on: 30.06.2021.

³² European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - 2020 Rule of Law Report: The rule of law situation in the European Union, COM(2020) 580 final, available at: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en, last accessed on: 30.06.2021.

³³ See indicatively: European Commission, Special Eurobarometer 502 – Report Corruption, Fieldwork December 2019, Publication June 2020, available at: <https://europa.eu/eurobarometer/surveys/detail/2247>, last accessed on: 30.06.2021.

³⁴ Civil Liberties of Europe, “EU 2020: Demanding on Democracy Country & Trend Reports on Democratic Records by Civil Liberties Organisations Across the European Union”, March 2021, available at: https://dq4n3btxmr8c9.cloudfront.net/files/AuYJXv/Report_Liberties_EU2020.pdf, last accessed on: 30.06.2021.

Conclusion

In anticipation of the publication of the 2021 EU Rule of Law Report, which shall be drafted with the afore-described methodology with which the 2020 EU Rule of Law Report was also drafted, it goes without saying that the EU Commission should examine the re-design of the scope and methodology of the report, given the above credible remarks by field experts.³⁵

In this context, a shift to more openness, transparency and objectivity in the drafting of the EU Rule of Law Reports requires the allocation of EU funds to civil society for the production of independent contributions – the so-called ‘shadow reports’, ‘spotlight reports’ or ‘parallel reports’, along the lines of other international initiatives. Civil society plays an important role in international monitoring processes through, such as, for example, in providing independent contributions for the evaluation of states’ progress in the implementation of the 2030 UN Sustainable Development Goal Agenda³⁶ and the OECD Anti-Bribery Convention³⁷. Such contributions are particularly important where civil society has little or no opportunities to engage in official processes at the national level. The involvement of civil society is even more important, since there are some limitations in the official monitoring mechanisms, such as the inadequacy of the officially selected indicators, the unavailability of data for official indicators in many countries and questions around the credibility of data generated by government agencies. In general, civil society reports serve as a valuable mechanism for holding national governments accountable regarding the progress they make of their membership.

The research conducted by the present author in the framework of the re:constitution Fellowship during the academic year 2020-2021 aims to serve as a ‘shadow report’ to the EU Rule of Law Report(s) focusing in particular on the repercussions of the Covid-19 pandemic. Sources of the present Working Paper include relevant independent reports, replies to a questionnaire sent to Transparency International national chapters, as well academic and media publications.

Input from the above sources provides a wide overview of rule of law circumventions in light of the Covid-19 pandemic in EU Member States. This allows for the drawing of proposals regarding the reforms that need to be enacted, at the national level and also at that of EU policy and legislation. Despite the different contexts Member States may be facing from time to time, the EU democratic standards need to be upheld under any circumstances. Those

³⁵ Democracy Reporting International, “The EU Rule of Law Report: Making the Bark Bite”, March 2021, available at: <https://democracy-reporting.org/uploads/publication/3/document/bp114-the-rule-of-law-report-ma-6102a9027b547.pdf>, last accessed on: 30.06.2021.

³⁶ United Nations General Assembly, Resolution adopted by the General Assembly on 25 September 2015 70/1 Transforming our World: the 2030 Agenda for Sustainable Development, A/RES/70/1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement>, last accessed on: 30.06.2021.

³⁷ Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on: 17.12.1997, ratified by 44 states on 30.06.2022, entered into force: 15.02.1999, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293>, last accessed on: 30.06.2021.

detailed findings referring to specific EU Member States have been reserved for publication in the context of a wider research project.

Forum Transregionale Studien e.V.
Wallotstraße 14
14193 Berlin
T: +49 (0) 30 89001-430
office@trafo-berlin.de
www.forum-transregionale-studien.de