

Respect for the rule of law in the EU on the example of Slovenia

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ABSTRACT

The rule of law is one of the fundamental principles of the EU, but in the last few years in some member states, including Slovenia, challenges have arisen regarding respect for the rule of law. An analysis of the recommendations given to member states in 2022 and 2023 by the European Commission shows that Slovenia is generally located approximately in the middle or leans slightly more towards the upper (better) half of the EU member states despite the identified challenges, where one-off violations and not systemic threats to the rule of law prevail. In connection to the question of the effectiveness of the measures that the EU envisages to ensure respect for the rule of law, the mechanism under Regulation (EU) 2020/2092 has currently been recognized as the most effective for ensuring progress in the protection of the rule of law in the EU.

Keywords: Rule of Law, Slovenia, European Union, European Commission, mechanisms

Spoštovanje vladavine prava v EU na primeru Slovenije

POVZETEK

Vladavina prava je eno temeljnih načel EU, vendar se v zadnjih nekaj letih v nekaterih državah članicah, med njimi tudi v Sloveniji, pojavljajo izzivi na področju zagotavljanja spoštovanja vladavine prava. Analiza priporočil, ki jih je državam članicam v 2022 in 2023 podala Evropska komisija, kaže, da je Slovenija na splošno

približno na sredini oz. se nekoliko bolj nagiba proti zgornji (bolj-ši) polovici držav članic EU kljub identificiranim izzivom, kjer prevladujejo enkratne kršitve, ne pa sistemske grožnje vladavini prava. V povezavi z vprašanji ali so ukrepi, ki jih EU predvideva za zagotavljanje spoštovanja vladavine prava učinkoviti, je kot najučinkovitejše sredstvo za zagotavljanje napredka v prizadevanjih za zaščito vladavine prava v EU zaenkrat prepoznan mehanizem pogojevanja koriščenja sredstev EU skladno z Uredbo (EU) 2020/2092.

Ključne besede: vladavina prava, Slovenija, Evropska unija, Evropska komisija, mehanizmi

1. The rule of law as a fundamental value of the EU

The rule of law is one of the fundamental values on which the European Union (hereinafter: EU) is based. In its most basic definition, the rule of law means that all members of society are equal before the law; therefore, strengthening the rule of law is the main goal of citizens, governments, civil society organizations, companies, and investors (Agrast et al., 2021, pp. 9, 13). Since one of the fundamental principles of the EU and its member states is that they are based on the rule of law, the promotion and preservation of the latter is of central importance to the work of the European Commission as the very legal, political and economic basis of the EU's functioning can be threatened by undermining the rule of law. Deficiencies related to the principle of the rule of law in one member state can affect other member states and the EU as a whole. Therefore, it is in the EU's common interest to resolve potential issues regarding the rule of law (Strengthening the rule of law within the Union: A blueprint for action, 2019, p. 1). Although all member states are, in principle, considered to respect the rule of law at all times, challenges have emerged in some member states over the past few years that make this no longer a self-evident claim. Among the examples of countries where threats to the rule of law are particularly prominent in the media and academia are Hungary and Poland, where the departure from EU values has been going on for a long time and political tensions are escalating.

In 2019, the European Commission highlighted cases of disrespect and threats to the principle of the rule of law, such as insuf-

ficient independence of the judicial process, weakened constitutional courts, the increasing use of executive decrees or repeated attacks by one branch of government on another, high-level corruption and abuse of official position in cases, when political power seeks to dominate the rule of law, attempts to limit media pluralism and the suppression of civil society and independent media (Strengthening the rule of law within the Union: A blueprint for action, 2019, p. 1). In its communication on strengthening the rule of law in the EU, the European Commission acknowledged that the aforementioned challenges also cause concern about the EU's ability to deal with such situations and that there is a need to strengthen it (Strengthening the rule of law within the Union: A blueprint for action, 2019, p. 1). The EU has a number of tools at its disposal to ensure and strengthen respect for the rule of law in all member states, which were developed and tested over the past decade (Rule of law: First Annual Report on the Rule of Law situation across the European Union, European Commission, 2020, e-source). These tools include the judicial mechanism pursuant to Articles 258–260 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) and the procedure pursuant to Article 7 of the Treaty on European Union (hereinafter: TEU). European Commission can also initiate the rule of law framework in the case of systemic threats to the rule of law in the EU member states. It includes the preparation of a report on the rule of law and the provision of specific recommendations to the member states. In 2020, when Europe and the rest of the world began to deal with the COVID-19 epidemic, in the financial framework for dealing with the epidemic, there was a proposal to condition the use of EU funds with respect for the rule of law. This entered into force in January 2021 with Regulation (EU) 2020/2092.

When reviewing the key areas for ensuring the rule of law, i.e., judicial system, anti-corruption framework, freedom and plurality of the media, and system of checks and balances, it can be observed that even in Slovenia, in recent years, there were quite a few examples of events that do not comply with the definition of rule of law. The European Commission clearly highlighted some of them as shortcomings in its reports on the rule of law in the years 2020–2023 (2020 Rule of Law Report: Country Chapter on the rule of law situation in Slovenia, 2020, p. 1; 2021 Rule of Law Report: Country Chapter on the rule of law situation in Slo-

venia, 2021, p. 1; 2022 Rule of Law Report: Country Chapter on the rule of law situation in Slovenia, 2022, p. 1; 2023 Rule of Law Report: Country Chapter on the rule of law situation in Slovenia, 2023, p. 1). The alarming situation in Slovenia was clearly demonstrated and condemned by the Resolution of the European Parliament of 16 December 2021 on fundamental rights and the rule of law in Slovenia, in particular, the delayed nomination of EPPO prosecutors (Resolution of the European Parliament no. P9_TA (2021)0512, points 2–9). With this, Slovenia also found itself on the list of problematic member states that are sliding away from the values they undertook to respect by becoming EU members.

When looking at the situation in various EU member states, including Slovenia, questions arise as to whether the measures that the EU envisages to ensure respect for the rule of law in the member states are effective, why, despite the efforts of the European Commission and threats of sanctions there are still violations or deviations from EU values, and how the rule of law can be strengthened and the situation corrected so that all member states would respect the rule of law as much as possible. Time should not be wasted in solving these challenges. In its communication on strengthening the rule of law in the EU in 2019, the European Commission made an important observation that in solving a potential crisis of the rule of law, it is necessary to act as soon as possible because otherwise, there is the risk of bad practices taking root, which would make eliminating their adverse effects in the future even more difficult (Strengthening the rule of law within the Union: A blueprint for action, 2019, p. 12). Based on this, questions arise regarding the state of the rule of law in Slovenia compared to other EU member states and how convincingly and successfully the European Commission responded to the state of the rule of law in Slovenia compared to other EU member states.

2. The rule of law in Slovenia

Based on the analysis of the European Commission's recommendations for the judicial and anti-corruption framework, media plurality and freedom, and system of checks and balances, the situation regarding respect for the rule of law in Slovenia was

compared to the rest of the EU member states. It was assessed whether Slovenia is comparable to the majority or better or worse than most of the other EU member states. We investigated the mechanisms available to the European Commission per EU law to ensure respect for the rule of law in EU member states, as well as how the European Commission reacts in case of threats or violations of the rule of law in member states and uses available tools. If the European Commission acted on such cases, we analyzed whether it succeeded in effectively suppressing law violations, nullifying the effects of such violations, and sanctioning the offending member states within the framework allowed by the established EU legal system.

A key objective of the European Commission's first annual rule of law report from 2020, which is part of the European rule of law framework, was to raise awareness and encourage open debate among member states on rule of law issues. This report did not identify serious risks for respect of the rule of law in Slovenia. According to some stakeholders, it was also insufficiently critical of the actual situation in Slovenia (Sedej, 2020, e-source; Bruselj objavil prvo poročilo o vladavini prava v članicah EU, Lexpera, 2020, e-source). The European Commission's second annual report presented findings that the state of the rule of law in Slovenia has deteriorated significantly (2021 Rule of Law Report: Country Chapter on the rule of law situation in Slovenia, 2021, p. 1). Even the third annual report of the European Commission, despite mentioning the progress concerning some of the challenges from the previous report, highlighted in particular the deterioration of media freedom, challenges regarding the independence or autonomy of law enforcement authorities, deficiencies in rules governing parliamentary investigations and concerns about the independence of the National Bureau of Investigation and other institutions for the fight against corruption (2022 Rule of Law Report: Country Chapter on the rule of law situation in Slovenia, 2022, p. 1). European Commission's fourth annual report reported on the improvement of the situation in the judicial framework and civil society, freedom and pluralism of the media, and the provision of greater independence of the National Bureau of Investigation; however, it highlighted the challenges of ensuring adequate resources and the independence of judges and risks regarding the fight against corruption

(2023 Rule of Law Report: Country Chapter on the rule of law situation in Slovenia, 2023, p. 1).

In recent years, the European Commission has made the most of specific recommendations to member states in connection to the successful fight against corruption and the efficient operation of judicial systems. These two fields are among the most essential for ensuring respect for the rule of law in the EU and, at the same time, the most under threat. In 2022 and 2023, Slovenia also had the most challenges identified regarding the judicial system, where it received four and two additional recommendations. Regarding anti-corruption framework and media freedom, it received three recommendations for each of these fields, while it earned one recommendation for the system of checks and balances. Among the challenges of the justice system, which have been most exposed in recent years, are ensuring the impartiality and independence of the judiciary, the prosecution, and the police, providing adequate resources, lack of adequate safeguards, and lengthy legal proceedings, especially in the corruption prosecution, while the internationally more resounding event was the delay in the appointment of European delegated prosecutors. Slovenia has not adopted a current valid national anti-corruption strategy, and the challenge is also the implementation of provisions for preventing and managing conflicts of interest in public administration. In connection with this, systemic corruption risks have been identified, which may be even greater due to obstacles to effective investigation and prosecution of corruption at the highest levels. Repeated reports by Slovenia's Commission for the Prevention of Corruption that its recommendations regarding identified challenges are not being heeded cause concerns. There are also concerns about the independence, organization, and effectiveness of the Commission for the Prevention of Corruption due to the lack of resources and adequate safeguards in the legislation. In addition, there have been reports of political pressure on independent and investigative institutions such as the Information Commissioner, the Commission for the Prevention of Corruption, the Audit Court, the Ombudsman, the police, and the National Bureau of Investigation. Moreover, political interference poses a risk to the independence of the media, in connection to which Slovenia is characterized by the non-transparency of media ownership and actual owners, verbal harassment of journalists,

lawsuits with an intimidating effect, while more internationally resounding were the complications with state financing of the national press agency STA, and the obstruction of its work. The noticeable trend of deterioration of media freedom from previous years started to improve in 2023. Challenges in connection to the system of checks and balances are represented by non-compliance with the recommendations of the Ombudsman, the overloading of the Constitutional Court and the resulting delays in adjudicating cases, the lack of opportunities for the participation of the public, independent bodies, and civil society in the legislative process, insufficient protective measures for the financial independence of independent bodies and financial restrictions for civil society organizations. In the crisis of the COVID-19 pandemic, challenges were identified regarding the insufficient respect for the rule of law by ruling with unconstitutional decrees (Teršar, 2023, pp. 118-119).

We can assess that in the case of all the described deviations from the principle of the rule of law, these are primarily isolated cases. At the same time, the risk of systemic threats is present in the judicial system regarding court backlogs, where there is a risk that the situation would gradually worsen in the future. Additionally, there is risk in the anti-corruption framework regarding the implementation of provisions on the prevention and management of conflicts of interest in public administration, in connection to which the Commission for the Prevention of Corruption detected systemic corruption risks (Ocena stanja Komisije za preprečevanje korupcije 2021, 2022, pp. 5-6). As they represent threats to respect for the rule of law, all identified challenges must be given additional attention and effective solutions must be prepared and implemented.

3. Comparison of the state of the rule of law between EU member states

What is the state of the rule of law in Slovenia compared to other EU member states? Based on the analysis of the total number of recommendations member states received from the European Commission in 2022 and 2023, this research classified member states into five groups. Despite all the identified challenges, Slovenia generally belongs to the third-best group of member states

(out of five groups), located roughly in the middle of all member states. In general, Slovenia leans slightly more towards the upper (better) half of the EU member states. At the top of the list, where the fewest challenges of respect for the rule of law are identified, are Estonia, Denmark, Finland, the Netherlands, Sweden, Latvia, and Belgium. Countries with the most issues regarding respect for the rule of law are Hungary, Poland, Romania, Bulgaria, and Malta, followed by Cyprus, the Czech Republic, Slovakia, Spain, Italy, Croatia, Greece, and Slovenia.

In contrast to the overall assessment based on the recommendations of the European Commission, in the assessment of the World Justice Project, Slovenia ranked 13th (out of 20) among EU member states in 2022 and 2023, which places it in the bottom half of the member states. In the ranking of all world countries, Slovenia reached 31st place in 2022, while in 2023 it climbed to 27th place with a slight improvement in the result (Agrast et al., 2022, p. 12; Agrast et al., 2023, p. 11). Slovenia seems to be slowly changing the direction and turning the respect for the rule of law into a positive trend. The findings from the analysis of the latest European Commission report on the rule of law from 2023 show an improvement after a notable decline, which was particularly evident in the annual reports from 2021 and 2022. The alarming state of respect for the rule of law in Slovenia was additionally recognized with the European Parliament's Resolution on fundamental rights and rule of law in Slovenia from December 2021, which theoretically ranked Slovenia even a little lower in respect of the rule of law, or into the group of the most problematic member states. However, in fulfilling the recommendations of the European Commission from 2022, Slovenia made the most significant progress of all the states, having fully fulfilled half of the recommendations, followed by Lithuania, Estonia, and Italy. On the other hand, the least progress was made by Poland. Among other states with the most challenges in terms of respecting the rule of law, slightly more progress was made in Romania, Bulgaria, Malta, and Hungary, where the latter made the most considerable progress (Annex to the 2022 Rule of Law Report: The Rule of Law Situation in the European Union, 2023, pp. 2, 6, 12, 15, 17-18, 21, 23-24).

When comparing the state of respect for the rule of law between member states, it is necessary to take into account the con-

cerns that the European Commission, in its annual reports on the rule of law and the recommendations, did not adequately cover all the challenges of respect for the rule of law in individual member states, but rather presented them in a deficient or non-objective way. As a result, the European Commission's reports do not necessarily reflect the real situation of the rule of law in the member states. Particularly problematic is the fact that the European Commission generally obtains information directly from the national stakeholders involved, which leaves no room for a broader sociological approach, based on which the respect for the rule of law in individual countries could be analyzed more comprehensively. Avbelj singled out Slovenia as an example of the flawed approach of the European Commission, as the entire situation regarding the decision-making on the matter of the new Radiotelevizija Slovenija Act was not presented. In relation to this, there is an indication of a risk that the political bias of the European Commission in the case of certain countries could be divisive for the actual state of the European rule of law and thus the existence of the EU as such, as it could present an argument against the directions of the EU and the European Commission on the part of the member states, where the challenges of the rule of law are the most serious (Avbelj, 2023, e-source).

4. The response of the EU and the European Commission to the challenges of the rule of law in the member states

Upon analysis of the reaction of the EU or the European Commission in cases of threats or disrespect for the rule of law in Slovenia and other EU member states, it was found that the only formal response of the European Commission in the case of Slovenia was the highlighting of identified challenges in the annual report on the state of the rule of law from 2020 onwards. In 2022 and 2023, specific recommendations for judicial and anti-corruption systems, pluralism and freedom of the media, and the system of checks and balances were also provided. The European Parliament was somewhat stricter with its resolution on fundamental freedoms and the rule of law in Slovenia, prepared in December 2021. All of the above responses highlighted problematic situ-

ations represented by one-off violations or potential emerging risks for systemic violations of the rule of law that resulted in generic recommendations to resolve these situations as soon as possible. Within the framework of ensuring the rule of law, the European Commission made specific recommendations to all member states, where Estonia received the fewest recommendations and Hungary the most. Additionally, the European Parliament issued resolutions for Bulgaria, Malta, Slovakia, Hungary, Poland and Slovenia. However, such recommendations and resolutions are not binding and have no concrete legal consequences for Slovenia or the other member states.

A stricter response from the European Commission occurred in the case of Hungary (2018) and Poland (2017), against which a procedure was initiated in accordance with Article 7 of the TEU due to controversial reforms of the Polish judicial system and concerns about the state of democracy, the rule of law and the protection of fundamental rights in Hungary. Against Germany (2021), a procedure was initiated in accordance with Article 258 of the TFEU regarding the issue of respecting the primacy of EU law. These cases required a more serious response because the rule of law violations were more systematic and not so much one-off in nature. At the same time, they also represented a dangerous precedent that the rest of the member states could follow their example.

Sanctions for non-respect for the rule of law can be primarily financial, or they can cause a possible loss of voting rights, which is supposed to be a temporary measure until the sanctioned member state stops its violations and thus returns to respecting the rule of law. Non-fulfillment of obligations in accordance with the TFEU and TEU can only be dealt with on the basis of Articles 258-260 TFEU or Article 7 TEU. From a legal point of view, there is no procedure in EU law that could force a member state to leave the EU due to non-fulfillment of obligations from the treaties. A member state can decide to leave the EU in accordance with the procedure under Article 50 of the TEU, as happened in 2020 in the case of the United Kingdom of Great Britain and Northern Ireland. Violation of the rule of law cannot, therefore, be a legal basis for sanctions in the form of exclusion from the EU, even if the member state strongly or persistently violates the principle of the rule of law. When assessing whether the introduction of such

a sanction in the EU treaties might be sensible, it must be taken into consideration that the exclusion of any member state is not in the interest of the EU. Still, the goal is that all member states follow the set rules, including respect for the rule of law.

In extreme cases, the use of Article 7 of the TEU is foreseen, where the threshold for activating response mechanisms is very high. At the same time, events in some member states have shown that these mechanisms are not always adequately effective or suitable for swift response to threats to the rule of law (Communication from the Commission to the European parliament and the Council: A new EU Framework to strengthen the Rule of Law, 2014, pp. 5–6). In the procedure under Article 7 of the TEU against Poland and Hungary, significant development of the cases has not yet been achieved, and the measures implemented solely based on these procedures have not led to improvements in any of these countries. The EU's efforts to ensure respect for the rule of law have been relatively unsuccessful, as the available legal tools have not been used forcefully enough. Although the dismantling of the rule of law in some countries is the result of deliberate political decisions (Strengthening the rule of law within the Union: A blueprint for action, 2019, p. 5), the EU has not responded to such deviations with mechanisms that would include sanctions but mainly relies on preventing violations and dialogue with member states (Priebus, 2022).

Which of the existing tools or the European Commission's responses is, therefore, the most effective or encouraging for member states to prevent deviations from respect for the rule of law? Member states' response depends primarily on the existence and severity of potential sanctions, which is why mere recommendations to achieve the desired standards of the rule of law are not effective enough, as member states are not sufficiently encouraged to strive for compliance. At the end of April 2022, the European Commission used, for the first time in the case of Hungary, the conditionality mechanism for the use of EU funds in accordance with Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget, thus directly sanctioning Hungary's rule of law non-respect (Bruselj proti Madžarski uradno sprožil mehanizem pogojevanja sredstev z vladavino prava (dopolnjeno), Tax-Fin-Lex, 2022, e-source). A

good indicator of the effectiveness of this type of mechanism for conditioning financial resources, even in the most problematic countries, is the undoubted fact that Hungary began to actively fulfill the recommendations given by the European Commission in 2022. From this point of view, it seems reasonable to establish a solution at the EU level, as was proposed by the European Parliament in a resolution from March 2023. Namely, the European Commission should more clearly define threats and violations of the rule of law in its annual cycle and report on the rule of law while also giving binding recommendations to member states and, thus, providing a direct basis for the automatic activation of the mechanism for conditioning the rule of law in accordance with Regulation (EU) 2020/2092 in case of violations of the rule of law (European Parliament's Resolution no. P9_TA(2023)0094, 30. 3. 2023, pp. 9-10; Rule of law: the Commission's reporting has improved, but EU values are still deteriorating, European Parliament, 2023, e-source).

5. Conclusion

Based on this research, possible solutions can be defined and potentially applied to the plan for ensuring respect for the rule of law in Slovenia's future or in key areas where the threats to the rule of law are the greatest. A comparison of Slovenia with other EU member states can provide examples of bad and good practices in ensuring respect for the rule of law in the judicial framework, the anti-corruption framework, media plurality and freedom, and the system of checks and balances. Based on this, solutions for the challenges faced by Slovenia regarding respect for the rule of law can be adapted accordingly. The present research can also represent a starting point for further research into the topic and related issues.

The EU is based on the common values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. All EU member states must respect them since joining the EU and later as full EU members and democratic countries, where the rule of law and fundamental rights are mutually reinforcing values. Their threat could pose a risk to the rights and freedoms of EU citizens. Therefore, respect for the rule of law is binding on all levels of governance in EU member states

(European Parliament's Resolution no. P9_TA(2023)0094, 30. 3. 2023, p. 4).

Although the rule of law is, in principle, ubiquitous, its broad definition makes it very likely that its meaning is not sufficiently understood by the citizens of the member states, which also creates a high risk of its misuse or ideological abuse (Bingham, 2011, p. 5). For this reason, it is essential to increase awareness of the importance of the rule of law among people in Slovenia and the EU, which should start with educating the younger generations. The holders of public functions, especially the executive and legislative branches of government, also have their role in this, as they can raise the level of political culture and contribute by their own example so that the rule of law, democracy, and integrity will become a standard in our society. Conscious and critical civil society and the media can encourage this type of behavior and, at the same time, reveal those who, with their actions, insist on the opposite and contribute to the disintegration of the rule of law. Therefore, continuous proactive action is required by every EU citizen to protect European society from existing and potentially developing challenges of the rule of law.

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