

Slide 1:

Dear Students,

I am pleased to be here at the College of Europe today. I know that this is a unique institution with a historical mission educating leaders for our (future) European society.

As you can see, my talk will discuss why the Rule of Law matters with regard to not only individual rights, but also the EU budget.

If you could give me your attention for the next 30 minutes, I would like to talk to you about the latest discussions on the Rule of Law in the EU.

As you may know, the European Commission published a proposal on the Rule of Law on 2 May 2018. The Court's opinion on the subject came out in July 2018.

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- Obviously, the Rule of Law presents a widely debated issue within the EU these days. You have surely been following the news on the continuing discussion between the European Commission and Polish and Hungarian governments on the one hand; the European Parliament, the European Court of Justice and the European Court of Auditors and their decisions pertaining to the dispute on the other hand.
- I will talk about the historical, political and financial perspectives as well as the proposal of the Commission and the related opinion of the Court.

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- I have no intention of going into detail about what the Rule of Law is.
- What I want to discuss with you is why we need the Rule of Law and why it is essential for the EU.
- While traditionally, economists had a rather narrow understanding of the Rule of Law and saw it as something that was limited to property rights and contract enforcement, the legal definition has always been broader. Lawyers also stress the importance of the Rule of Law to bind a community together.
- Furthermore, it is a continuum, and there are different schools of thoughts explaining and merging these concepts. The definitions are therefore ever evolving.
- The usefulness of the term "Rule of Law" also comes from its vagueness. It allows us to apply it to specific events and situations.
- That is why, if I ask you to explain the Rule of Law, you will probably all come up with an answer, in line with your experiences, from the books you read or some encounter at a state institution, a treatment you did not like.
- Most likely, each answer will give various definitions. While the Rule of Law is difficult to define, you all know for sure when it is being violated.

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- Besides the countless definitions, we also need to bear in mind that different countries have different traditions. The Rule of Law was developed in Britain. There is also the concept of the "Legal State" in Germany (Rechtsstaat) or (l'état de droit) in France. While you have the Magna Carta (1215) in Britain, the Joyous Entry in Belgium (1356) and Kant's theories paving the way for a German "Rechtsstaat", I propose to understand the Rule of Law in simple practical terms:
- In any case, it guarantees that you as a society and as an individual:
  - Will not be arrested arbitrarily
  - Your property rights will be respected no matter what your political opinions are

- You can reasonably plan your future and make your own choices about your life
- You can live in a flourishing environment for human creativity and initiative

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- As illustrated here, the Rule of Law plays a major role in the Treaty of Lisbon.
- There is a good reason why the Rule of Law is embedded in Article “2” and not in Article “300”. It is after all one of the main pillars upon which the European Union is founded.
- So, let us postpone the discussion about definitions for now and try to explore why we keep talking about the Rule of Law, why it is important, why it is essential for the EU Project and relevant to the EU budget.
- After a quick tour d’horizon, I believe we will have a better perspective to evaluate recent events and conclude our discussion with a Q&A session.

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- Why is the Rule of Law so important for the EU? Let us begin with the fundamentals.
- As you know from your political science classes on the general will and Rousseau (1712-1778), elections serve to determine the will of the majority. At the end of the day, democracy is all about revealing the will of the people.
- For the Rule of Law, you first need democracy and for democracy, you need free and fair elections. This means: the majority of the public opinion should be allowed to govern and make the decisions in society and for society.
- To form a majority, you need to reach 50% + 1. Nevertheless, democracy, as in the will of the majority, is not enough. In a liberal democracy where the Rule of Law is respected, this majority means only a license to govern and to make public policy decisions. A majority is by no means a blank check to do, as you like.

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- Margret Thatcher’s quote underlines that without the Rule of Law, democracy is an empty ritual.
- What makes democracy a win-win for everyone, is that the will of the majority has to respect our rights and liberties.
- (1) A political party may win an election, but in a country that respects the Rule of Law, it is still a win for all citizens, because the party in power will have to govern not only according to the majority, but also according to the Rule of Law.
- (2) We only participate in elections, because we - as individuals - are guaranteed that we are not going to be punished if we are in minority.
- (3) Public power is there to implement public policy. The Rule of Law limits the use of political power for other purposes. Political power is therefore restricted to public objectives (to make the trains run on time, fix our roads, build schools, hospitals, improve infrastructure, etc.)
- (4) We know that cards will be reshuffled in 4 years and the majority is not a fixed, frozen majority. Instead, it is a temporary coalition between voters to choose certain policies over others. The majority can always change.
- This is what makes democracy unique, resilient and sustainable. If the Rule of Law is ensured, you do not have to worry about your basic human existential needs, such as your safety, well-being, etc.

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- I have chosen this slide to introduce the historical perspective, as it shows the immense wealth that can be found at the Groening Museum next-door.

- The museum is well worth visiting, and you will be able to see some of the best of what Flemish, Belgian and Dutch art has to offer there.
- But where did this flourishing art scene come from?
- History has shown that whenever and wherever human potential and creativity flourished, liberty was there first and led to prosperity.
- This confirms that basic civil and political rights and freedom are a pre-condition for democracy and progress.
- I will now talk about 2 very important moments in the history of my country which underline this:
  - First of all, in the 14<sup>th</sup> century, when free cities forced their rulers to pledge them to respect their rights and to hand over the keys of the City, they obtained autonomy and freedom (“Joyous Entry”, 1356).
  - Another key moment was in the 17<sup>th</sup> century, when the free cities of Belgium became independent from the Habsburg Monarchy and gained political civil freedom leading to the Dutch Golden Age.
- During that era, Antwerp, Amsterdam and Bruges became the main trade axes, and centers of learning and of art. Dutch trade signs, military and art were amongst the most acclaimed in the world. This was only possible thanks to the political freedom and liberty the citizens of these free cities enjoyed.

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- I can also give you a negative example, which makes it easier to illustrate my point as it is taken from history that is more recent.
- The Cold War ended the way it did because the Soviet Union lost its moral existence.
- It did not collapse because it went bankrupt economically. After all, it had unlimited natural and human resources. In fact, it collapsed because the system stopped working.
- Societies without the Rule of Law will always end up in a state of fear and distrust. In the long run, this is unsustainable and unstable.

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- We will now move on to the political perspective:
- Looking at Jean Monnet’s (1943) quote, we need to add that the EU is not only an economic union, but also a union of values. And the Rule of Law represents one of the key values.
- As the Commission states “The EU is a Community based on the Rule of Law. Independent Courts at national and EU level are entrusted with watching over the respect of our jointly agreed rules and regulations and of their implementation in all Member States”.
- This shows that the Rule of Law is extremely useful. Because it also a means separation of powers and duties among different government branches and institutions (Court of Justice, ECA, European Commission as counterbalances of the European Parliament).
- National governments also have to respect the competences of the EU Institutions. In other words, a system of checks and balances is in place.
- From this point of view, it makes perfect sense for EU Institutions, as they take their powers from the Treaties that are signed and authorized by Member States.
- Unlike what you read in the press, there should be no reason for a jealous competition between Brussels and national capitals because our competencies are divided.
- If everyone focused on his or her homework, Europe would be stronger.
- EU Institutions can only wish well for the Member States, because “our turfs are separate”.
- We are most of the time competing among the EU Institutions rather than against Member States.

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- In this context, I also want to contrast the European Union with the Soviet Union, because lately there have been several misguided references.
- Some people compared the regulations and directives enacted in Brussels, to the dictates of Moscow (Dictate of Brussels vs Dictate of Moscow).
- I think that this is completely wrong. After all,
  - The EU has grown by consent, and by consensus, not by force.
  - For all of our actions, there has to be a provision in the Treaties.
  - Consensus has its price. It works slowly. Nevertheless, the advantages outweigh the disadvantages.
  - Unlike the Soviet occupation, which became the Iron Curtain during the Cold War, the EU process is not irreversible. Any Member State can leave the club. This is clearly stated in the rulebook.

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- We say that we are together because we believe in each other, in this enterprise. Nonetheless, any country, who thinks otherwise, has the right to leave the Union as stated in Article 50. You can see this with Brexit, now.
- It is a true test of our values. We do not want the UK to leave. However, we respect their decision.
- There may be one silver lining about Brexit: It serves as a reminder that we are better and stronger together and that we take many things for granted.

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- Finally, from a financial point of view:
- The Rule of Law is not only a European value, as referred to in Article 2 of the TFEU.
- It is also very much an operating principle, as only an independent judiciary that upholds the Rule of Law and legal certainty in all Member States can ultimately guarantee that money from the EU budget is sufficiently protected.
- Therefore, wherever EU funds go, we need to ensure that the rules regulating the use of EU funds are observed and respected. Moreover, we need to make sure that the funds handled with a sound financial management in mind, as well.
- This is why we are an interested party if the independence of courts and public institutions is called into question and checks on the governmental power are being reduced.
- Because of the unique case with the EU funds (Shared Management – EU does not manage and control these funds on its own but has to rely on the Member States); the EU budget is more at risk.
- So, we have to be absolutely sure about the integrity and competence of the judicial systems in the Member States and independence of public institutions (for example other Supreme Audit Institutions)
- History has taught us that power corrupts but absolute power corrupts absolutely.
- A government without checks is prone to corruption. Countries run by authoritarian governments are known for their high fraud and corruption rates.
- As stated in the Treaties, the European Court of Auditors - as guardian of the EU tax payer's money - has to report to the European Parliament and to the Council if the financial management of the EU was sound (Article 287/2).

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- At this point, we are not accusing anyone of anything.
- First, let me clarify the fundamental disagreement between the two national governments and the Commission:
- Hungarian or Polish Governments do not challenge that the Rule of Law is a European Value as stated in Article 2.
- However; recent developments, such as
  - the increasing control of the media (e.g. Hungary and Poland)
  - the limitations they have been imposing on academic freedom (e.g. Central European University in Budapest)
  - the constitutional changes (or "reforms") they introduced, regarding the appointment of judges and Supreme Court judges (e.g. Polish Constitutional Court and forced retirement of the Court's President)
  - the pace in which they pass these "reforms" (without allowing public discussion) have set alarm bells ringing at the Commission.

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- Proposal of the European Commission:
- To tackle these kinds of situations, the Commission can take two different actions:
- 1) It can start an infringement procedure:
- In line with Article 258: [Article 258 of the Treaty on the Functioning of the European Union (TFEU): "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the EU."]
- It starts with a formal notice to the MS and then a communication phase. Finally, the Commission brings the matter before the Court of Justice, if the MS does not comply with the EU Law.
- 2) The second option is anchored in Article 7 (the so-called nuclear option):
  - Against any MS, if there is a clear risk of a serious breach of the values referred to in Article 2
  - It is mainly about suspending certain rights of MS (ranging from financial to limiting their voting rights in the Council)
  - There is a higher threshold to decide. [Identifying the breach requires unanimity (excluding the state concerned), but sanctions require only a qualified majority.]
  - This option is very serious and has not been applied, yet.
- Both of those procedures are inflexible mechanisms.
- They are not entirely related to EU Budget but foreseen for general or for very fundamental disputes of competence between the EU and National Governments.
- Therefore, the consequences are also very serious and there is no middle-way.

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- 3) As a third option the European Commission proposed a draft regulation to the Parliament on 2 May 2018, on the protection of the Union's budget in case of generalized deficiencies concerning the Rule of Law in the Member States.
  - In line with Article 322 of the TFEU, the draft proposal was also sent to the ECA and the Court duly published its opinion on August 17. I happened to be the reporting Member for this opinion.
  - The Commission requests a new mechanism to freeze EU funding for example, to prevent a spillover.

- It is a reasonable approach to prevent mismanagement of EU funds, addressing the shortcomings in the Member States.
- However to apply this mechanism, we have to agree on what the Rule of Law is and what constitutes a Rule of Law deficiency, a breach of Rule of Law and what does not.

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- ECA Opinion 1/2018
- This is an extract of ECAs opinion on the draft proposal of the Commission
- ECA concluded that the commission's request for a new mechanism addressing these kinds of contingencies was reasonable.
- At the same time, it put forward some recommendations to improve the proposal:
- 1) Particularly, the article about how to define a "generalized deficiency" - the technical term used by the Commission - raised some major concerns.
- We need to ensure that it is implemented as impartial and objective as possible, and cannot risk for it to turn into a political tool.
- Consequently, our opinion requested clear criteria to determine what exactly constitutes a deficiency.
- There are actually certain applications/expertise that can be consulted for guidance:
- Cooperation and Verification Mechanisms used vis-a-vis Bulgaria and Romania to track the progress of these Member States after the accession in the areas of judicial reform and so on.
- The Rule of Law Checklist prepared by the Council of Europe and Venice Commission

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- 2) Another important aspect that was missing in the proposal is that this mechanism should by no means turn into a punishment of the final beneficiaries.
- As this is a dispute between Brussels and these national governments, not the citizens of these countries, we recommended certain provisions to be foreseen to protect the legitimate interests of the beneficiaries.
- 3) ECA furthermore recommended setting time limits by which the MS has to provide the required information as well as introducing similar deadlines for the Commission whenever appropriate, for example, when it comes to lifting the measures once the generalised deficiencies have been removed.
- 4) We also recommended assessing the possible budgetary implications of a reduction in the EU funding for the national budget of the concerned Member State bearing in mind the principles of proportionality and non-discrimination. As EU contributions or disbursement of these funds make up a significant portion of the annual budget for some countries. We recommended that deciding on appropriate measures; this should be taken into account.
- The Proposal is still a draft. It needs to be adopted by the Council. Recently the European Parliament formed its opinion on it with a report. This was adopted at the Joint Committee of BUDG and CONT.

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Future of the EU and Young Generation:

- To study here is certainly an honor, which you have earned, but it is also a responsibility.

- Just as you have high expectations of us, EU policy-makers/decision-makers, we also have high expectations of you for the future.
- Since we are definitely not as good as you would like us to be, we will be leaving you several serious challenges that need to be tackled with determination, intelligence and hard work.
- International order: the EU does not exist in a vacuum. It is part of the international order, which is competitive. Compared to other trading blocks, we are at a disadvantage because the EU is not one centralized nation-state like the US or China sharing one language.
- We have diversity, which we cherish, but in certain respects, we need to work harder to be able to afford this diversity. As with tech companies and innovation, there is an economy of scale that American and Chinese companies have but European ones are lacking.
- We also need to work on the Western Europe/Eastern Europe divide and create a unified Europe.

Slide 20:

- While the Rule of Law is very important, I have also come here to talk to you about something else:
- Memorandum of Understanding - European Court of Auditors Audit Thesis Award
- Conditions:
  - open to all students of the College (nationals of an EU Member State)
  - best thesis (marked 15/20 or higher) on a topic related to the work of the European Court of Auditors will be awarded
  - deadline will be in early May (to be confirmed)
  - Award: a 5-month remunerated traineeship at the European Court of Auditors

About us:

- As the external auditor of the EU, the European Court of Auditors (ECA) has a three-part mission:
- to contribute to improving EU financial management
- to promote accountability and transparency
- to act as the independent guardian of the financial interests of EU citizens