

To Live and to Learn: The EU Commission's Failure to Recognise Rule of Law Deficiencies in Lithuania

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Abstract

During the last decade, it has become apparent that the European Union (EU) Commission is failing to halt rule of law decline in Poland and Hungary. However, has the Commission learnt from its experience in handling rule of law decline in these countries? This article suggests that not only has the EU Commission failed to learn the importance of swift action in the face of burgeoning rule of law crises but has actively ignored similar systemic issues altogether in Lithuania, a country that has historically been an exemplary Member State. This article will analyse the status of the rule of law and judicial independence in Lithuania in light of the EU Commission's first two Rule of Law Reports published in September 2020 and July 2021. These reports were designed to act as a preventative measure to protect the rule of law in each Member State through documenting and raising awareness for rule of law developments in the Union. Lithuania has largely slipped under the radar of constitutional democracy scholars; however, in the past two years, Lithuania has endured a series of attacks on judicial independence and suffered an attempted siege of its national broadcaster. There has been an intense deadlock recently over the election of Constitutional Court justices, which has raised concerns over the executive's persistent attempts to politicise Lithuania's highest court. Worryingly the recent Rule of Law Reports, published by the EU Commission, fail to reflect the severity of these recent developments. The reports' silence on these issues leads this article to conclude that the EU Commission is turning a blind eye to Lithuania's precarious rule of law situation by failing to truthfully document significant negative developments around the rule of law. By doing so, the Commission not only exacerbates rule of law issues domestically but also undermines the fight against rule of law backsliding in the Union.

I. Introduction

The rule of law crisis poses an existential threat to the European Union (EU). There are now two competing views of what the future of the EU should look like. The prevailing view is that it should remain a union of states based on the values of democracy, the rule of law and human rights. However, this view is being successfully challenged by established Member States like Hungary and Poland, which have a more illiberal future in mind for the Union. The EU has been fighting a losing battle against illiberal governments for over a decade now, proving that this is an issue the EU cannot easily shake. The EU's losses in this fight have been widely documented and include the EU Commission failing to adequately carry out its duty to defend the Treaties due to indecision and delays.¹ Crucially, the Article 7 Treaty on European Union (TEU) procedure and infringement actions were once deemed the most potent weapons against the destruction of the rule of law in the Commission's arsenal. However, after they proved practically useless at halting rule of law backsliding on the ground in Poland and Hungary, the Commission has sought alternative routes. More specifically, the Commission has rightfully invested resources in establishing pre-emptive

¹ Kochenov 2019, p. 433-434; Scheppele et al. 2020, p. 3-10.

measures to protect the rule of law following the logic of ‘prevention is better than cure.’ The newest preventative tools are the Commission’s Rule of Law Mechanism and the annual Rule of Law Reports designed to stop rule of law issues before they reach the status of ‘serious and persistent breach’.² This is something that the EU Commission has so far failed to achieve in Poland and Hungary, two countries within the EU that are currently in the throes of authoritarian backsliding.³

The Rule of Law Reports were published for the first time in September 2020 and form the basis of the new annual rule of law cycle – the Rule of Law Mechanism.⁴ This new tool offers the Commission a unique opportunity to measure each Member States compliance with the rule of law on an annual basis and promote respect for the rule of law through raising awareness of recent national developments. Although the reports are not designed to have sanctioning power in themselves, this paper will demonstrate that they have great potential in aiding the implementation of sanctioning measures if required. Most notably these reports have already been deemed useful by the Commission for the purpose of assessing compliance to the rule of law in the context of the EU Recovery Fund.⁵ These annual reports will similarly help provide evidence regarding Member States’ rule of law compliance for the purposes of the widely anticipated Rule of Law Conditionality Mechanism as well as compiling evidence of rule of law developments which can prove useful in future litigation at the Court of Justice. Therefore, these new Rule of Law Reports have wide-ranging capacity to help manage and overcome the EU’s rule of law crisis by deterring individual states from undermining the rule of law domestically and also keeping a public record of existing breaches.⁶ However, there is worrying evidence suggesting that the Commission is repeating the same mistakes as it did at the beginning of Poland and Hungary's backsliding journey. The Commission's reports on Lithuania's rule of law compliance failed to condemn the Lithuanian government's systemic attempts to harass and politicise the judiciary.⁷

This paper will argue that the Commission's silence on these threats to judicial independence in Lithuania diminishes the purpose of the reports as a preventative tool, encourages further assaults on the rule of law and judicial independence and undermines the equality of Member States. More importantly, the Commission's characteristic inaction on rule of law breaches, while they are still emerging, has had a devastating impact on the rule of law in Poland and Hungary. Thus, the EU’s inability to “call a spade a spade” exacerbates the EU’s rule of law crisis further.⁸ If nothing is done to rectify the situation in Lithuania, the Commission risks allowing another Member State walk down a similar destructive path.

² Poula and Howarth 2020.

³ Kelemen 2020, p.481.

⁴ European Commission, ‘2020 Rule of Law Report - Questions and Answers’ (*European Commission*, 30 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757> accessed 7 May 2021.

⁵ Strupczewski, ‘EU lists rule of law concerns for Hungary, Poland, pivotal in releasing COVID funds’ (20 July 2021) <<https://www.reuters.com/world/europe/eu-lists-rule-of-law-concerns-hungary-poland-could-withhold-funds-2021-07-20/>> accessed 6 November 2021.

⁶ Scheppele et al. 2020, p. 87-88.

⁷ European Commission, ‘Country Chapter on the Rule of Law Situation in Lithuania’ (European Commission 2020) SWD (2020) 314; European Commission, ‘Country Chapter on the Rule of Law Situation in Lithuania’ (European Commission 2021) SWD (2021) 717.

⁸ Kochenov 2019, p. 426.

The purpose of this article is twofold: it aims to assess the efficacy of the Rule of Law Reports as a new preventative tool in the EU Commission's arsenal by describing how it fits into the existing rule of law toolbox and its potential in helping manage the EU's rule of law crisis. The article also seeks to present new empirical research on recent developments around judicial independence in Lithuania, a Member State from the 2004 EU enlargement that has so far been considered less problematic compared to its peers.

This article is divided into three parts: section II will give an overview of the EU Commission's rule of law toolbox including a description of the new Rule of Law Conditionality Mechanism which is expected to deliver promising results.⁹ This section will then explore the purpose of the new Rule of Law Reports and the Rule of Law Mechanism and how this new tool could be used to help overcome existing rule of law threats in the Union and thwart future ones. Section III will examine the current situation in Lithuania which is threatening judicial independence and the rule of law. In particular, this section will describe in detail the executive branch's deliberate manipulation of judicial appointments in both the Constitutional Court and Supreme Court which undermined judicial independence. It is important to acknowledge at this stage that this section does not seek to comprehensively assess Lithuania's judicial appointment procedure against international standards such as the Council of Europe's recommendations. Although topical, such analysis would require more space and thus is beyond the scope of this article. The last section will analyse the EU Commission's missed opportunity to recognise and acknowledge the threat to the rule of law in Lithuania and the far-reaching consequences of their inaction.

II. The EU Rule of Law Toolbox

The EU's political institutions have a number of tools in their arsenal to monitor and address breaches of the rule of law in Member States. Article 7 TEU is a 'political' procedure which allows a Member State to be sanctioned by removal of some membership rights if a 'serious and persistent breach' of fundamental values under Article 2 TEU are established.¹⁰ Article 7(1) TEU contains an early warning system which can be triggered if there is a serious risk of a breach to EU values occurring. While, Article 7(2) and (3) TEU are the sanctioning arms of this measure and are initiated if a serious and persistent breach of EU values has already occurred.¹¹ Infringement proceedings under Article 258 TFEU are a 'legal' measure which can bring a Member State to the Court of Justice to ensure that EU law is being applied correctly.¹² If an infringement on EU law is established this may lead to sanctions being placed upon a Member State. Both of these reactive measures have been widely criticised for being ineffective and failing to acknowledge the gravity of many minor assaults on the rule of law adding up to a systemic breach.¹³ Moreover, Article 7 TEU has been considered a nuclear

⁹ Kirst 2021, p. 101-110; Blauburger and Hüllen 2021, p. 1-16.

¹⁰ Case C-619/18 *European Commission v Republic of Poland* [2019] ECR I-325, Opinion of AG Tanchev, para 50.

¹¹ Poptcheva, 'Understanding the EU Rule of Law Mechanisms' (European Parliamentary Research Service 2016) PE 573.922 4 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI%282016%29573922_EN.pdf> accessed 29 May 2021.

¹² As in Case C-192/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:924.

¹³ Śledzińska-Simon and Bárd, 'Rule of Law Infringement Procedures A Proposal to Extend the EU's Rule of Law Toolbox' (2019) CEPS Paper in Liberty and Security in Europe No 2019-09 5 <https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf> accessed 7 May 2021; Scheppele, et al. 2020, p. 20.

option which is exceptionally difficult to trigger.¹⁴ This is because of the high political thresholds for action with the preventive measure requiring four-fifths of Member States and the sanctioning measure requiring unanimity among EU heads of state.¹⁵ Also, Member States are reluctant to place sanctions on each other regarding rule of law breaches as leaders of Member States fear their own countries may be scrutinised for their compliance with EU values.¹⁶

Another tool to respond to Member States violating the rule of law is the new Rule of Law Conditionality Mechanism which makes EU funding contingent on respect for the rule of law.¹⁷ The idea for linking EU funding to rule of law compliance had begun to develop in 2017, with the then EU Commissioner for Justice, Vera Jourova, suggesting this in a speech.¹⁸ Following a series of negotiations and amendments to the first draft regulation proposed by the EU Commission in 2018,¹⁹ Regulation 2020/2092 was approved by the European Parliament on 16 December 2020 and became effective from the beginning of January 2021.²⁰ This new regulation establishes the rules necessary to protect the Union budget in the case of breaches of the rule of law in the Member States.²¹ For this regulation to apply, breaches of the rule of law in a Member State must affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.²² Therefore, Regulation 2020/2092 has the power to protect the rule of law in Member States and safeguard the integrity of the Union's finances. This will help the EU prevent the largest net recipients of EU funding, such as Poland and Hungary, from using EU funds to further their illiberal agendas.²³ This is also somewhat of a breakthrough for the EU in their battle to protect the rule of law as traditionally, post-accession conditionality has been considered a weak tool for incentivising compliance with the EU's normative initiatives.²⁴ While pre-accession conditionality has worked exceptionally well to persuade potential Member States to comply with EU rules,²⁵ once accession is complete, the EU loses its leverage as "accession advancement rewards" are no longer useful once a country already enjoys the benefits of EU membership.²⁶

¹⁴ Kochenov 2021, p. 132.

¹⁵ Poptcheva (n11) p. 4.

¹⁶ Poptcheva (n11) p. 5.

¹⁷ Article 1 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I.

¹⁸ Zalan, 'Justice commissioner links EU funds to rule of law' (31 October 2017) <<https://euobserver.com/political/139720>> accessed 29 October 2021.

¹⁹ Proposal for a Regulation of the European Parliament and the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States COM(2018) 324 final - 2018/0136(COD).

²⁰ For further details about the legislative process of Regulation 2020/2092 see Kirst 2021, p. 102-103.

²¹ Regulation 2020/2092.

²² Regulation 2020/2092 Article 4. The term 'sufficiently direct' was inserted at a later stage to limit the Regulation's scope due to objections from Poland and Hungary. For more details see Łacny 2021, p. 84-85.

²³ Łacny 2021, p. 80.

²⁴ Papakostas 2012, p. 216; Gateva 2013, p. 436.

²⁵ Papakostas 2012, p. 216

²⁶ Gateva 2013, p. 436.

Importantly, the rule of law conditionality regulation not only applies to the Union budget, but also to the EU Recovery Fund and other loans and instruments guaranteed by the Union budget.²⁷ Despite Hungary and Poland referring the rule of law conditionality regulation to the ECJ in an attempt to annul the new tool, it is likely that this challenge will only serve to delay its application.²⁸ The Commission has decided to refrain from using this tool against Poland and Hungary until the ECJ's approval.²⁹ However, this has not stopped the Commission from reprimanding the two states by using their position as gatekeepers to the EU Recovery Fund as leverage to compel compliance with EU standards.³⁰ Hungary and Poland's share of the Recovery Fund, which is designed to remedy the economic impact of the Covid-19 pandemic, has been withheld by the Commission due to their concerns over the rule of law in these Member States. The Commission states that findings of the annual Rule of Law Reports may be taken into consideration when assessing breaches of the principles of the rule of law that affect the financial interests of the Union.³¹ This proves that the EU is not afraid to utilise financial sanctions to demand compliance with EU values.

In the wake of the general rule of law crisis and the limited success of Article 7 TEU measures, the EU has also formulated more flexible preventative tools to protect the rule of law. These preventative measures include the EU Justice Scoreboard, the Rule of Law Framework and the Cooperation and Verification Mechanism for Bulgaria and Romania (CVM), amongst others. A brand new pre-emptive measure in the EU's toolbox is the Rule of Law Mechanism which aims to prevent rule of law issues from arising or deepening by creating a forum for dialogue between the EU institutions, Member States, civil society and other stakeholders on the rule of law.³² The new Rule of Law Reports form the basis of the Rule of Law Mechanism and are produced on an annual basis aiming to identify and highlight rule of law concerns through annual reporting and the input of the EU Commission, individual Member States and other stake-holders.³³ The reports are also in line with the Commission's aim of building a culture of respect for the rule of law in the Union.³⁴ The first cohort of Rule of Law Reports was published in September 2020 and established that the rule of law is facing a challenging period in some Member States with critical reports being issued for Poland, Hungary, Bulgaria and Romania amongst others.

The Rule of Law Reports offer an opportunity for the EU Commission to start measuring the status of the rule of law in all Member States on an equal basis. This is intended to bolster compliance with the rule of law under Article 2 TEU, a value that has suffered abuse in some Member States due to its

²⁷ Łacny 2021, p. 85.

²⁸ Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union*; Case C-156/21 *Hungary v European Parliament and Council of the European Union* (both cases pending judgement).

²⁹ Reuters, 'EU parliament sues EU Commission for inaction over rule-of-law concerns' (30 October 2021) <<https://www.reuters.com/world/europe/eu-parliament-sues-eu-commission-inaction-over-rule-of-law-concerns-2021-10-29/>> accessed 6 November 2021.

³⁰ Strupczewski, (n5).

³¹ Strupczewski, (n5).

³² European Commission, '2020 Rule of Law Report - Questions and Answers' (*European Commission*, 30 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757> accessed 7 May 2021.

³³ European Commission, '2020 Rule of Law Report - Questions and Answers' (*European Commission*, 30 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757> accessed 7 May 2021.

³⁴ Nato, 'A "Rule of Law Mechanism in Action" to Strengthen Legitimacy and Authority in the EU' (*Reconnect*, 9 February 2021) <<https://reconnect-europe.eu/blog/a-rule-of-law-mechanism-in-action-to-strengthen-legitimacy-and-authority-in-the-eu/>> accessed 6 May 2021.

limited enforceability in law.³⁵ Importantly, annual reporting of the rule of law demonstrates that the EU is paying attention to the domestic rule of law situation in all Member States and not just the usual ‘troublemakers’ of Poland and Hungary. This has the potential to mitigate any concerns within Poland and Hungary that they are being subjected to “double standards” or are being unfairly treated by the EU; something that both Member States have claimed in response to the EU’s accusations of rule of law breaches.³⁶

Importantly the Rule of Law Reports are a soft-law measure and not intended to be a sanctioning tool. Rather, the reports aim to identify possible problems in relation to the rule of law as early as possible by applying a “coherent and equivalent” approach and remaining “proportionate to the situation and developments”.³⁷ This system of reports builds upon the recent line of case law from the Court of Justice establishing the importance of the rule of law for the functioning of EU law, preservation of fundamental rights and judicial independence.³⁸ However, because the reports seek to preserve the rule of law in Member States through creating awareness rather than imposing sanctions, this preventative measure remains respectful of national constitutional systems and traditions.³⁹

Despite the seemingly ‘soft-touch’ nature of these annual reports, they present an importantly opportunity to create a record of developments around the rule of law in each Member State that can be useful further down the line. Precise and truthful documentation of rule of law breaches in individual Member States can be valuable in future litigation of rule of law breaches as made evident by the Court of Justice’s emphasis on reliable sources in *L.M.* as a way for a court to evaluate the extent of rule of law compliance in another Member State.⁴⁰ Furthermore, the Commission has already said the findings of the annual reports can be used as evidence to withhold the release of the EU Recovery Fund to Poland and Hungary for their rule of law deficiencies.⁴¹ Therefore, these reports have the potential to be a strong deterrent to rule of law breaches domestically. If Member States see that the annual reports have been used as evidence of rule of law breaches for the purpose of withholding EU funds then governments might think twice before compromising the rule of law domestically.

III. Recent Developments regarding the Rule of Law and Judicial Independence in Lithuania

Lithuania received a reasonably favourable rule of law evaluation in both the 2020 and 2021 reports. In particular, the sections on judicial independence were concise, identifying corruption within the judiciary and the controversy surrounding the demotion of the Chairperson of the Civil Division of the

³⁵ Mader 2019, p. 137–138.

³⁶ Gehrke, ‘Poland, Hungary to Set up Rule of Law Institute to Counter Brussels’ *POLITICO* (29 September 2020) <<https://www.politico.eu/article/poland-and-hungary-charge-brussels-with-double-standards-on-rule-of-law/>> accessed 7 May 2021.

³⁷ European Commission, ‘2020 Rule of Law Report - Questions and Answers’ (*European Commission*, 30 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757> accessed 7 May 2021.

³⁸ See Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117 and Case C-216/18 *PPU LM* [2018] ECLI:EU:C:2018:586.

³⁹ Nato (n34).

⁴⁰ Case C-216/18 *PPU LM* [2018] ECLI:EU:C:2018:586 para 61.

⁴¹ Strupczewski, (n5).

Supreme Court, Sigita Rudėnaitė, as a cause for concern.⁴² However, the reports failed to appreciate the scale of damage imposed on judicial independence that the demotion of a Supreme Court judge posed. The reports also neglected to link an escalating constitutional crisis caused by the government's persistent refusal to replace three Constitutional Court Judges with a politically motivated smear campaign against the President of that same court which was unravelling at the same time.⁴³ These are serious oversights on the EU Commission's part if the purpose of these annual reports are considered. Following the publication of the first Rule of Law Report on Lithuania, many experts, including the President of the Constitutional Court of Lithuania, criticised the reports for ignoring mounting political interference with judicial independence.⁴⁴ These guarded reports are particularly worrying considering the recent developments in Lithuania over the past five years. Although Lithuania is generally cited as a country that managed to achieve outstanding levels of democratisation in the short period of time between declaring independence from the Soviet Union in 1990 and acceding to the EU in 2004, it is not immune to the wave of democratic fatigue that is spreading across Central and Eastern Europe.⁴⁵ While there have always been features of populism in mainstream political rhetoric, a distinct shift can be identified during the 2016 general election.⁴⁶ A relatively unknown party, Lithuania's Peasants and Greens Union (LPGU) received 51 out of 141 seats in the Seimas (Parliament) by running on the basis of a populist message of nationalism, traditionalism and conservatism.⁴⁷ Despite struggling to reach the 5 percent threshold in previous years, now its message appealed to swaths of Lithuanians with conservative Christian values. They appealed to voters discontented with mainstream parties that had ruled by rotation for much of the previous decade.⁴⁸ This party has attempted to politicise the national broadcaster and judiciary, attacked freedom of speech and promoted traditional family values at the expense of minority rights.⁴⁹ This party exhibited many characteristics reminiscent of Poland and Hungary's illiberal governments. In fact, Saulius Skvernelis, who served as Lithuanian Prime Minister for LPGU between 2016 and 2020 has publicly expressed support for neighbouring Poland's controversial judicial reforms and even suggested that similar action to "de-sovietise" the national judiciary should be taken in

⁴² Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the rule of law situation in Lithuania' SWD (2020) 314 final, p. 3.

⁴³ European Commission, 'Country Chapter on the Rule of Law Situation in Lithuania' (European Commission 2021) SWD (2021) 717.

⁴⁴ Bakaite, 'EU's Praise of Lithuanian Justice System Ignored Political Pressure, Lawyers Say' *LRT* (23 October 2020) <<https://www.lrt.lt/en/news-in-english/19/1259914/eu-s-praise-of-lithuanian-justice-system-ignored-political-pressure-lawyers-say>> accessed 19 March 2021.

⁴⁵ Pettai 2020) p. 40–41, p. 57–58.

⁴⁶ Jegelevicius, 'How COVID-19 Could Save Lithuania's Populists from Electoral Oblivion' *Euronews* (9 October 2020) <<https://www.euronews.com/2020/10/09/in-lithuania-covid-19-is-a-key-election-issue-but-not-in-the-way-you-might-think>> accessed 22 May 2021.

⁴⁷ Jegelevicius (n46).

⁴⁸ Jegelevicius (n46).

⁴⁹ The Republic of Lithuania Draft Law Amending Article 2.24 of the Civil Code, State News, 2016, No. XIIP-3606(3); Draft law amending Articles 19, 31, 34 (1), 48 of Public Information Law No. I-1418, State News, 2019, No. XIIP-3118; Šuliokas, 'Planned Rally against "Genderist Propaganda" Electrifies Lithuania' *LRT* (12 May 2021) <<https://www.lrt.lt/en/news-in-english/19/1407354/planned-rally-against-genderist-propaganda-electrifies-lithuania>> accessed 31 May 2021.

Lithuania.⁵⁰ Therefore, it is no surprise that this government attempted an organised attack on judicial independence.

The terms of two ordinary Constitutional Court judges and the Constitutional Court President ended on March 19th 2020 but for the first time in Lithuanian constitutional history their replacement has been disrupted by a political deadlock which forced the judges whose terms had expired to continue their duties indefinitely. This has stifled the Constitutional Court's work and has greatly damaged the institutions reputation as an independent court in the eyes of the public.⁵¹ The Lithuanian Constitution states that nine judges must be sitting on the Constitutional Court bench at all times. Judges serve for a single term of 9 years and every three years the judicial panel is replaced by one third by a vote of the Seimas.⁵² The candidates for these positions are proposed by the President of Lithuania, the Speaker of the Seimas and the President of the Supreme Court, each suggesting one candidate. The Constitution also establishes that the judges of the Constitutional Court must have an impeccable reputation and must be highly education in law and have at least ten years of legal or academic pedagogical work experience in law.⁵³

In early April 2020, the then ruling LPGU Seimas rejected all three nominated candidates for the vacant positions on the Constitutional Court bench. Their excuses were varied, they blamed the pandemic and said that the nominees were not up to the standard required to fill such positions.⁵⁴ However, these were just excuses to conceal why nominations had been rejected. As observed by notable Lithuanian constitutional experts such as former Constitutional Court judges and the current Judge of the European Court of Human Rights, the deliberate stalling and manipulation of Constitutional Court appointments points in the direction of attempted politicisation of the Constitutional Court.⁵⁵ It has been suggested that the LPGU-led Seimas refused to replace the Constitutional Court Judges simply because they can. In a display of their political dominance they refused to support the nominated judges because they were not aligned with the party's political agenda.⁵⁶ By rejecting the President's suggested candidate the ruling majority retaliated against the President in response to him refusing to support many of their previous political agendas. At the same time, the non-approval of the nominees selected by the President of the Supreme Court and the Speaker of the Seimas was to teach them a lesson, that while exercising their mandate to independently nominate a candidate for the Constitutional Court they must still seek the approval of the ruling majority.⁵⁷

⁵⁰ Brzozowski and Gerdžiūnas, 'Lithuania's PM Backs Warsaw in Rule of Law Dispute with Brussels' *Euractiv* (Vilnius/Warsaw, 18 September 2020) <https://www.euractiv.com/section/politics/short_news/vilnius-warsaw-lithuanias-pm-backs-warsaw-in-rule-of-law-dispute-with-brussels/> accessed 25 May 2021.

⁵¹ Sinkevičius, 'How to Paralise the work of the Constitutional Court?' *15 min* (Vilnius, 23 April 2020) <<https://www.15min.lt/naujiena/aktualu/komentarai/vytautas-sinkevicius-kaip-galima-paralyziuoti-konstitucinio-teismo-darba-500-1307694>> accessed 27 April 2021; Teisė Pro, 'Constitutional Court Update: Lawyers See Threats to the Rule of Law' (*Teisė Pro*, 13 January 2021) <<http://www.teise.pro/index.php/2021/01/13/konstitucinio-teismo-atnaujinimas-teisinkai-izvelgia-gresmes-teisinei-valstybei/>> accessed 19 March 2021.

⁵² Constitution of the Republic of Lithuania, Article 103.

⁵³ Constitution of the Republic of Lithuania, Article 103.

⁵⁴ Sinkevičius (n 51).

⁵⁵ Sinkevičius and Teisė Pro (n 51).

⁵⁶ Andrukaitytė, 'The Seimas Rejects all three Candidates for the Constitutional Court' *Diena.lt* (21 April 2020) <<https://www.diena.lt/naujienos/lietuva/salies-pulasas/seimas-balsuos-del-triju-konstitucinio-teismo-teiseju-lat-vadoves-skyrimo-963482>> accessed 27 April 2021.

⁵⁷ Sinkevičius (n 51).

In addition to the LPGU-led government stalling the timely rotation of the Constitutional Court they were also accused of attacking its independence and launching a baseless smear campaign on the Court's President, Dainius Žalimas, in an attempt to influence the Court's future decisions and to discredit the Court's previous judgement. This unfolded in response to a decision handed down by the Constitutional Court in June 2020 which declared that the Seimas' temporary commission of inquiry which had been led by LPGU member and minister for law and order, Agnė Širinskienė, was unconstitutional.⁵⁸ The Court held that this temporary commission was granted too wide a scope of investigation by allowing it to look into the possible impacts of illegal influences on decision makers and the political process over the last eight years. The Constitutional Court noted that to allow such a wide scope for this commission would be contrary to Articles 67 and Articles 76 of the Lithuanian Constitution, the constitutional principles of responsible government and the rule of law.⁵⁹

The denial by the Constitutional Court of this wide scope of power to investigate political decision-making was met with outrage and retaliation by the LPGU-led government. Ms. Širinskienė issued a public statement shortly after the Court's decision was handed down accusing the President of the Constitutional Court of collusion with members of the opposition.⁶⁰ She claimed to have a document which indicated that an informal meeting occurred between the Constitutional Court's president and members of the opposition where upcoming referrals to the Constitutional Court were discussed.⁶¹ These claims proved to be baseless as Ms. Širinskienė and LPGU have failed to provide any proof of these meetings.

The LPGU-led coalition continued to attack the position of the President of the Constitutional Court.⁶² Just days after the Constitutional Court held that the temporary commission was unconstitutional, LPGU circulated a report questioning whether the President of the Constitutional Court could legally still be President of the Court as his term had ended a few months prior. This report is damaging for many reasons but mostly because the issue of three judges on the Constitutional Court bench (including the President of the Court) still performing their duties even though their terms ended on the 19th March 2020 was a problem of the government's own making, as mentioned previously. LPGU contended that they received advice from lawyers which indicated that the position of the President of the Constitutional Court is held unconstitutionally by Dainius Žalimas. However, when

⁵⁸ *Constitutional Court of the Republic of Lithuania, Decision of 12 June 2020 "Regarding the decision of the Seimas of the Republic of 25th September 2018, Resolution no XIII-1495 "On the Establishment of the Temporary Commission of Inquiry of the Seimas of the Republic of Lithuania on the Possible Illegal Influence and (or) Influence on Lithuanian Politicians, Civil Servants and Political Processes in Lithuania" and Resolution no XIII-2937 of 14th May 2020 "On the Compliance with the Constitution of the Republic of Lithuania of the Conclusion of the Parliamentary Investigation Conducted by the Temporary Commission of Inquiry of the Seimas of the Republic of Lithuania into Possible Illegal Influence and (or) Influence on Lithuanian Politicians, Civil Servants and Political Processes in Lithuania" Registry of Legal Acts, 12/06/2020, No 12928.*

⁵⁹ *ibid* para 33.2.

⁶⁰ Tracevičiūtė, 'Coincidence or not? After the unfavorable decision of the CC - A.Širinskienė's stabs for D.Žalimas and conservatives' *15min* (Vilnius, 15 June 2020) <<https://www.15min.lt/naujiena/aktualu/lietuva/sutapimas-ar-ne-ponepalankaus-kt-sprendimo-a-sirinskienes-duriai-d-zalimui-ir-konservatoriams-56-1332958>> accessed 19 March 2021.

⁶¹ Tracevičiūtė (n60).

⁶² Tracevičiūtė, 'A new démarche of the rulers? Why the guardians of the Constitution are being prosecuted' *15min* (Vilnius, 18 June 2020) <<https://www.15min.lt/naujiena/aktualu/lietuva/naujas-valdanciuju-demarsas-kodel-uzsimota-pries-konstitucijos-sergetojus-56-1334228>> accessed 19 March 2021.

asked who precisely advised the government in this way they did not have any names to hand.⁶³ In fact, Judge Žalimas' continued work as President of the Constitutional Court is in line with the Constitution and the Law on the Functioning of the Constitutional Court which allows judges to continue in their positions until they are replaced.⁶⁴ This ensures the Constitutional Court's work is disturbed as little as possible.

It is evident that the LPGU-led government was attacking the Constitutional Court and its president in an attempt to exert pressure on the Court and retaliate against the unfavourable decision regarding the temporary commission that the Court issued. Vytautas Sinkevičius, former Constitutional Court judge and one of the Lithuanian Constitution's drafters, maintains that this happened in part due to a number of politically sensitive referrals to the Constitutional Court that were coming up on the Court's list.⁶⁵ It seems that in this case, the government was attempting to harass and threaten the integrity of the Constitutional Court to warn them against issuing any more unfavourable decisions in the future.⁶⁶ This stands as a gross violation of judicial independence and the rule of law.⁶⁷

In late October 2020, a new Seimas emerged following a general election. Now a coalition of three parties, the Homeland Union-Lithuanian Christian Democrats (TS-LKD), Liberal Movement (LRLS) and the Freedom Party (LP), has formed a government. With a new ruling majority came renewed hope that the Constitutional Court deadlock would be resolved promptly. However, the new Seimas continued to deepen the constitutional crisis by delaying and rejecting further nominations. Although two ordinary Constitutional Court judges were replaced on January 14th, 2021 after much political back and forth, the Court's President, Dainius Žalimas' replacement proved to be a particularly sticky political issue. He was finally replaced on May 18th, 2021, after more than a year of working in 'over-time'.

The replacement of the President of the Constitutional Court was especially difficult because the current Speaker of the Seimas, Viktorija Čmilytė-Nielsen (LRLS), had the sole mandate to nominate a replacement for the current President of the Constitutional Court as he was also nominated by former Speaker of the Seimas, Irena Degutienė. However, Ms. Čmilytė-Nielsen's first candidate to replace the President of the Constitutional Court was refused by the Seimas Committee on Law and Order in January 2021.⁶⁸ During the same session, this committee endorsed the nominations of the ordinary Constitutional justices which were subsequently seated on the bench following a successful Seimas vote. Following the multiple unsubstantiated delays in replacing Constitutional Court justices that came before, the refusal to replace the Court's President in January 2021 has proven that the new parliamentary majority is once again politically manipulating the composition of the Constitutional Court. These fears are also not unfounded as Judge Žalimas can be considered an important ally of the Speaker's party, LRLS, not only because he is ideologically aligned with the Speaker's political views

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ See Council of Europe, 'Judges: Independence, Efficiency and Responsibilities' Recommendation CM/Rec(2010)12 (2010), para 17-18.

⁶⁸ BNS, 'The Seimas Committee on Law and Order did not approve Kabišaitis's candidacy for the CC' *Delfi* (13 January 2021) <<https://www.delfi.lt/news/daily/lithuania/seimo-ttk-nepritare-kabisaicio-kandidaturai-i-kt.d?id=86217553>> accessed 28 April 2021.

but also because he is a fervent critic of the LPGU party, who are now leaders of the opposition.⁶⁹ In light of this, it is not unreasonable to suggest that Ms. Čmilytė-Nielsen was in no hurry to replace Judge Žalimas and was certainly not going to suggest a candidate that would not fit her party's political goals. Therefore, it was no surprise that when she nominated respected academic, lawyer and advocate for LGBT+ rights, Vytautas Mizaras, in early February 2021, intense debates and controversy within government and the wider Seimas erupted.⁷⁰ During the routine questioning session of the new candidate by the Seimas many conservative parliamentarians heavily criticised the candidate's progressive and liberal world views and took issue with some of his past political engagements.⁷¹ However, despite the political divide, Vytautas Mizaras, managed to gain the support of 76 Seimas members out of 134 and was appointed as a Constitutional Court judge in June 2021.

Although the Constitutional Court vacancies have now been filled, much damage has been left in the wake of this political tug of war. The political manipulation of the Constitutional Court's composition has serious consequences for the rule of law and judicial independence in Lithuania. The political deadlock over the rotation of the Constitutional Court has revealed to the public that politicians can easily influence the work of the Constitutional Court which undermines the principle of judicial independence and sets a dangerous precedent for future politicisation of court appointments.⁷² Ultimately, the disregard for the Constitution by the Seimas damages the reputation of not only the judiciary but also the Seimas and democracy itself. The uncertainty around the timeline of rotation of Constitutional Court judges threatens to cause serious disruption to the efficiency of the Court and has created an important practical dilemma. Now that some judges have been seated abnormally late, it is evident that the Lithuanian Constitution has been violated. The judges whose nine year terms have concluded had been in office for over nine months longer than permitted by Article 103 of the Constitution.⁷³ This means that new judges may have to cut their tenure short in order to return the Constitutional Court to its correct timeline of being renewed by one third every nine years. The fact that some judges have served significantly longer terms than permitted while some terms are shortened violates Article 103 of the Lithuanian Constitution which states that tenure of Constitutional Court justices is for 9 years, no more and no less.⁷⁴ It is worth noting that the Lithuanian judicial appointment system could be considered partly to blame for the events that unfolded since March 2020 as it could be argued that the executive has excessive powers over the appointment of Constitutional Court Judges. As mentioned previously, candidates for the position of Constitutional Court judge are proposed by the President of Lithuania, the Speaker of the Seimas and the President of the Supreme Court and subsequently appointed by the Seimas. This system seems to contravene the

⁶⁹ Šileikis, 'New Manipulation to prevent the change of Judges and President of the Constitutional Court' (*Teisė Pro*, 13 January 2021) <<http://www.teise.pro/index.php/2021/01/13/egidijus-sileikis-naujos-prielaidos-manipuliacijoms-nekeisti-konstitucinio-teismo-teisejo-ir-pirmininko/>> accessed 28 April 2021.

⁷⁰ Venckūnas, 'Candidacy for Constitutional Court Judges - Another ticking bomb in the Coalition Relations?' *tv3.lt* (4 February 2021) <<https://www.tv3.lt/naujiena/lietuva/kandidatura-i-konstitucinio-teismo-teisejus-dar-viena-parako-statine-koalicijos-santykiuose-n1080287>> accessed 28 April 2021.

⁷¹ Plikūnė and others, 'The Seimas has decided: Mizaras will become a Judge of the Constitutional Court' *Delfi* (Vilnius, 18 May 2021) <<https://www.delfi.lt/news/daily/lithuania/seimas-nusprende-mizaras-taps-konstitucinio-teismo-teiseju.d?id=87217745>> accessed 19 May 2021.

⁷² *Teisė Pro* (n 51).

⁷³ Constitution of the Republic of Lithuania, Article 103.

⁷⁴ Vaičaitis, 'The Constitution turns 28' (*Teisė Pro*, 22 October 2020) <<http://www.teise.pro/index.php/2020/10/22/v-vaicaitis-konstitucijai-28-eri/>> accessed 19 March 2021; Vaičaitis, 'Who Will Defend The Constitution Or How To Appoint Judges To The Constitutional Court?' (7 January 2021) <<http://www.teise.pro/index.php/2021/01/07/v-a-vaicaitis-kas-apgins-konstitucija-arba-kaip-paskirti-konstitucinio-teismo-teisejus/>> accessed 28 April 2021.

Venice Commission's recommendations on judicial appointments where it states that in semi-presidential systems such as the one adopted by Lithuania, the majority of the judicial appointment power should rest with an independent judicial council.⁷⁵ Furthermore, the Venice Commissions notes that extra care is needed to prevent abuse of judicial appointments by the executive in young democracies as they lack constitutional traditions that prevent exploitation.⁷⁶ Nevertheless, Lithuanian constitutional law scholars have pointed out that nothing of this scale has happened to disrupt judicial appointments before,⁷⁷ so it is reasonable to conclude that the existing flaws in judicial appointment rules were used to achieve disingenuous political motives in this instance.

Another weakness in the independence of the Lithuanian judiciary was also highlighted in 2020, only this time it concerned the Supreme Court of Lithuania. In spring 2020 the Lithuanian President, Gitanas Nausėda, sought to promote Chairperson of the Supreme Court's Civil Division and acting President of that court, Sigita Rudėnaitė, to the position of President of the Supreme Court in a single presidential decree.⁷⁸ According to the Constitution, the president of Lithuania can suggest candidates for election to positions within the Supreme Court for the Seimas to vote on.⁷⁹ However, in this particular situation an unprecedented issue arose when the Seimas' legal committee presented the President's proposal to two different votes: one on the dismissal of Judge Rudėnaitė from her existing role as Chairperson of the Supreme Court's Civil Division and acting President and a separate vote on her appointment as official President of the Supreme Court. The Seimas agreed to dismiss Judge Rudėnaitė from her position as Chairperson of the Supreme Court's Civil Division and acting President in the first vote but they refused to appoint her as President of the Supreme Court in the subsequent secret vote.⁸⁰ This resulted in Judge Rudėnaitė being effectively dismissed from her existing position as head of the Civil Division and being denied the role of President of the Court, rendering her an ordinary justice of the Supreme Court, with lower pay and lower status. This situation was contested by a group of Seimas members who sought clarification on the constitutionality of the demotion of Judge Rudėnaitė in the Constitutional Court.⁸¹ The Constitutional Court issued a ruling in September 2020 declaring that the situation that resulted from the presidential decree and the subsequent vote in the Seimas was contrary to the Constitution and the Law on Courts.⁸² The Constitutional Court held that the actions of President Nausėda and the Seimas

⁷⁵ Venice Commission, 'Judicial Appointments: Report adopted by the Venice Commission at its 70th Plenary Session' Opinion No. 403 / 2006 (2007), p. 4.

⁷⁶ *ibid* p. 3.

⁷⁷ Šileikis (n69); Vaičaitis (n74).

⁷⁸ Decree of President of the Republic of Lithuania, 16 December 2019, no. 1K-164 "Regarding the submission to the Seimas of the Republic of Lithuania to dismiss Judge Sigita Rudėnaitė of the Supreme Court of Lithuania from the position of the President of the Civil Cases Division of this Court and appoint her President of the Supreme Court of Lithuania" Registry of Legal Acts, 216/12/019, No. 20242.

⁷⁹ Constitution of the Republic of Lithuania, Article 84.11.

⁸⁰ Skėrytė, 'Constitutional Court: The decision on Rudėnaitė's dismissal is illegal, she is to be reinstated' *LRT* (Vilnius, 2 September 2020) <<https://www.lrt.lt/naujienos/lietuvoje/2/1224477/konstitucinis-teismas-sprendimas-del-rudenaites-atleidimo-neteisetas-ji-grazinama-i-pareigas>> accessed 19 March 2021.

⁸¹ *Constitutional Court of the Republic of Lithuania, Decision of 2 September 2020 "On decree no 1K-164 of the President of the Republic of Lithuania of 16 December 2019 'For the provision of the Seimas to dismiss Supreme Court judges Sigita Rudėnaite from the Supreme Court's civil case division and appoint her as President of the Supreme Court' Article 1 and resolution no XIII-2848 of the Seimas of 21st April 2020 regarding 'the dismissal of Supreme Court judges Sigita Rudėnaite from the Supreme Court's civil case division' compliance with the constitution and the Law on Court"* Registry of Legal Acts, 03/09/2020, No. 18611.

⁸² *ibid*.

breached, inter alia, the constitutional principles of independence of the judiciary and courts, separation of powers, the rule of law and responsible government.⁸³

Article 90 of the Law on Courts establishes that a judge may be removed from their position for the purposes of reappointment to another position only if they have already secured that new position.⁸⁴ The President, by trying to both remove Judge Rudėnaitė from her old position and appoint her to her new position in one decree, breached the Law on Courts by allowing a judge to be removed from her position before her new position was guaranteed. The Constitutional Court in its decision also highlighted that what had occurred flew in the face of the rule of law, separation of powers principle and violated judicial independence. The Constitutional Court nullified the decision of the Seimas and reinstated Judge Rudėnaitė in her original position as head of the civil division of the Supreme Court.

Although the unconstitutional situation that occurred with the appointment of Judge Rudėnaitė was resolved eventually by the Constitutional Court, it nevertheless highlighted how fragile judicial independence is in Lithuania.⁸⁵ The Constitutional Court in this instance was criticised for delaying a declaration of unconstitutionality by over four months.⁸⁶ If the expedient nature by which the Constitutional Tribunal of Poland was packed with partisan justices in 2015 is considered, then there is no reason to think that this situation could not arise in Lithuania too. In the Lithuanian example that unfolded in early 2020, if we generously assume that Judge Rudėnaitė was dismissed and then not promoted as planned by the Seimas through a miscommunication or missight, this still reveals a significant weakness in the integrity of judicial independence. Overall this mishap in judicial appointment sends a message to all judges in Lithuania that their position can be easily jeopardised.

IV. Analysing the Rule of Law Reports' Purpose in Light of their Silence on Rule of Law issues in Lithuania

Given the significant issues described in the previous section, the Rule of Law Reports evidently fail to live up to their purpose by ignoring threats to judicial independence in Lithuania. Unfortunately, this silence on the threats to judicial independence in a Member State is not surprising given the Commission's track record on this issue. The Commission has been criticised by many for its incoherent response to a systemic rule of law crisis.⁸⁷ In one of the first interviews Ursula von der Leyen gave after becoming the Commission President, she infamously downplayed the severity of the rule of law crisis facing the EU and seemingly reassured backsliding countries that "nobody is perfect".⁸⁸ Furthermore, the Commission is no stranger to being accused of failing to treat like cases alike or to recognise coordinated attacks on the rule of law for what they are. The Commission has

⁸³ *ibid* p. 47-48.

⁸⁴ Article 90, The Law on Courts, State News, 1994, No. 46-851.

⁸⁵ Šileikis, 'Judges' Quasi-Promotion Suspension: "Errors" in Restoring a Past Situation' (*Teise Pro*, 20 May 2020) <<http://www.teise.pro/index.php/2020/05/20/e-sileikis-teisejos-kvazi-paaukstsinimo-suspendavimas-ankstesnes-padeties-atsikurimo-klaidos-aspektai/>> accessed 19 March 2021.

⁸⁶ Navickytė, 'Why Everyone is Silent, or how the Constitutional Court betrayed the Constitution' *Defli* (Vilnius, 1 June 2020) <[s://www.delfi.lt/news/ringas/lit/lina-navickyte-kodel-visi-tyli-arba-kaip-konstitucinis-teismas-pervaziavo-konstitucija.d?id=84419683](https://www.delfi.lt/news/ringas/lit/lina-navickyte-kodel-visi-tyli-arba-kaip-konstitucinis-teismas-pervaziavo-konstitucija.d?id=84419683)> accessed 11 December 2020.

⁸⁷ Pech and Scheppele 2017, p. 27–28; Kochenov 2019, p. 426–427.

⁸⁸ Rettman, 'Von Der Leyen Signals Soft Touch on Migrants, Rule of Law' (*EUobserver*, 19 July 2019) <<https://euobserver.com/news/145504>> accessed 7 May 2021.

been criticised for “sugar-coating” Bulgaria’s rule of law compliance in their CVM reports even though Bulgaria had been experiencing pervasive attacks on their judicial independence by the Borissov government.⁸⁹ Also, the EU Commission infamously brought an infringement action against Hungary for their removal of 10 per cent of the judiciary's senior members.⁹⁰ This move allowed the Fidesz government to pack important positions within the judiciary with loyal judges, which constituted a significant threat to judicial independence.⁹¹ However, instead of arguing at the Court of Justice on the basis of breaches of the rule of law and judicial independence, the Commission focused on the narrow argument of age based discrimination against the dismissed judges. Even though the Commission won this case, it missed an opportunity to protect the rule of law.⁹² The Commission’s approach so far has ultimately missed the point that many individual assaults on the rule of law creates a crisis greater than the sum of its parts.

In many ways, we can see the Commission repeating its same mistakes only this time by ignoring systemic threats to the rule of law in the very reports designed to flag them. The Commission seems too preoccupied with describing levels of digitalisation within Lithuania’s judicial systems to notice the deliberate and systemic nature of the attacks on judicial independence there.⁹³ Although the reports mention vast delays in judicial appointments and the unlawful removal of the a Supreme Court Judge from her post, they fail to connect the dots and put these events into context. That is, the described events in section III came about due to a deliberate attempt to put pressure on the judiciary to give favourable judgments and undermine judicial independence. These were acts that seem legal or allowable on the surface but when analysed more carefully prove to be disingenuous acts of aggression by the executive seeking to exert pressure on judges. A situation such as this should be setting off alarm bells for the Commission as it has been in this situation before. A number of individual legalistic assaults on the rule of law combining to create a rule of crisis is how both Hungary and Poland became the first Member States to be subjected to the Article 7 TEU procedure.⁹⁴

It is also surprising that the Rule of Law Reports failed to pick up on attacks on the Lithuanian judiciary as EU institutions place significant importance on judicial independence as the cornerstone of the rule of law. This is made evident from both the Commission’s communications where it describes judicial independence as a key principle of the rule of law and essential for democracy to thrive.⁹⁵ The centrality of judicial independence to the Commission’s conception of the rule of law is logical given that national courts apply EU law, so a breach to the rule of law at national level

⁸⁹ Vassileva, ‘Sweet Like Sugar, Bitter Like a Lemon: Bulgaria’s CVM Report’ (*Verfassungsblog*, 16 November 2018) <<https://verfassungsblog.de/sweet-like-sugar-bitter-like-a-lemon-bulgarias-cvm-report/>> accessed 7 May 2021.

⁹⁰ Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687.

⁹¹ Armin von Bogdandy et al. 2021, p. 42.

⁹² *ibid*, p. 42.

⁹³ European Commission, ‘Country Chapter on the Rule of Law Situation in Lithuania’ (European Commission 2020) SWD (2020) 314, p. 5; European Commission, ‘Country Chapter on the Rule of Law Situation in Lithuania’ (European Commission 2021) SWD (2021) 717, p. 5-6.

⁹⁴ Article 7(1) TEU was triggered on 20 December 2017 as a result of rule of law breaches in Poland and on 12 September 2018 in Hungary.

⁹⁵ European Commission, ‘Strengthening the rule of law within the Union’ (European Commission 2019) COM(2019) 343 final; European Commission, ‘2021 Rule of Law Report: The rule of law situation in the European Union’ (European Commission 2021) COM(2021) 700 final.

threatens the integrity of the whole EU legal order.⁹⁶ Also, the Court of Justice has developed a line of case law specifically designed to bolster the value of the rule of law under Art. 2 TEU through coupling it with the principle of effective judicial protection under Art.19(1) TEU.⁹⁷ Not to mention, that an executive tampering with judicial independence, especially that of higher courts such as a Constitutional Court or Supreme Court, can be considered a ‘canary in the coalmine’ moment - a warning that all is not well with the rule of law in a country.⁹⁸ Indeed, PiS packed the Polish Constitutional Tribunal just a few weeks after their electoral victory of 2015, a shocking event that foreshadowed a multitude of attacks on the wider Polish judiciary still ongoing to this day.⁹⁹ Therefore, it would seem reasonable for the Rule of Law Reports to flag the multiple attack on judicial authority, independence and reputation in Lithuania that occurred in a short space of time as a concern.

The Commission’s inability to identify and highlight possible threats to the rule of law in Lithuania undermines the Rule of Law Mechanism’s aim of preventing breaches before they evolve into a full-blown rule of law crises. The first two Rule of Law Reports should have identified the attacks on judicial independence described in section III of this article as a systemic attempt to undermine the independence of the Constitutional Court and the Supreme Court. Instead, what the reports produced was a description of isolated events, absent of context or analysis. It is important to note here that this article is not calling on the Commission to impose sanctions or initiate official dialogue with Member States over minor national rule of law setbacks. This would, of course, be impractical and illegitimate – Member States have the prerogative to deal with internal affairs on a national level, without intervention from the EU at the earliest sign of trouble. However, the Rule of Law Reports are a soft-law measure which are minimally invasive in sovereign matters.¹⁰⁰ It is a tool designed to observe and flag developments that might possibly lead to a rule of law crises in the future and not a sanctioning tool in itself. Any initial worrisome developments might very well fizzle-out and resolve themselves. However, as explained earlier, if these developments evolve into a bigger rule of law problem, then the Commission has a record of the issues it has described in its yearly reports which can be used as evidence for invoking EU funding conditionality, litigation or the Art. 7 TEU procedure. Therefore, the reports simply need to truthfully account for domestic rule of law issues, and this does not necessarily equate to an accusation of rule of law backsliding, but rather would put a Member State on notice that the EU (and wider civil society and international community) are aware of a threat to the rule of law domestically. This in itself has significant deterrent value against rule of law breaches.

In summary, the first two Rule of Law Reports have failed to honestly address the emerging rule of law issues in Lithuania and this has three broad consequences. First, the Commission turning a blind eye to ongoing threats to judicial independence in Lithuania sets a dangerous precedent for the future of the rule of law in the country. Politicians who are seeking to undermine the rule of law and other fundamental values may take the Commission’s inaction as permission to continue undermining the rule of law and judicial independence in the future. Politicians learning from each other how to

⁹⁶ Kustra-Rogatka, ‘The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism’ (Verfassungsblog, 14 November 2019) <<https://verfassungsblog.de/the-rule-of-law-crisis-as-the-watershed-moment-for-the-european-constitutionalism/>> accessed 7 November 2021.

⁹⁷ For example see Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117 and Case C-216/18 *PPU LM* [2018] ECLI:EU:C:2018:586.

⁹⁸ Pech and Scheppele 2017, p. 9-10.

⁹⁹ For more details of Poland’s ongoing breaches of judicial independence see Pech et al. 2021.

¹⁰⁰ European Commission, ‘2020 Rule of Law Report - Questions and Answers’ (*European Commission*, 30 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757> accessed 7 May 2021.

systemically push the EU's boundaries is nothing new. PiS officials in Poland have been learning from Prime Minister Orbán's illiberal revolution in Hungary and eagerly taking notes on the Commission's indecision and inaction.¹⁰¹ Furthermore, the prospect of a Lithuanian government attempting to undermine democracy or the rule of law in a systemic manner is not a remote idea. Throughout its time in power LPGU was criticised for its attempts to push through legislation sanctioning any criticism of politician's and government¹⁰² and attempting to capture free media and the national broadcaster.¹⁰³ This proves that a rule of law crisis of the type seen in Poland and Hungary can strike at anytime and anywhere.

Second, the problem with ignoring an emerging rule of law issue within one Member State can impact the whole Union. The rule of law is essential to maintaining the healthy functioning of the EU internal market, the execution of the EAW and the maintenance of EU citizens' fundamental rights. One Member State being allowed to violate the rule of law can disrupt the EU's equilibrium as a whole and may encourage other Member States to also deviate from the rule of law.¹⁰⁴

Third, the EU Commission by failing to take the earliest opportunity to highlight the threats to judicial independence in their Rule of Law Reports undermines the purpose of these reports and the Rule of Law Mechanism. The Rule of Law Reports form the foundation of the Rule of Law Mechanism which is designed "to prevent problems from emerging or deepening further".¹⁰⁵ The Commission states that the aim of the annual reports is to "identify possible problems in relation to the rule of law as early as possible... by applying the same methodology and examining the same topics in all Member States" to ensure "a coherent and equivalent approach".¹⁰⁶ This means that the aim of the reports along with the broader aim of the Rule of Law Mechanism is twofold: First, it aims to prevent rule of law breaches from emerging or from escalating and second, it aims to scrutinise the rule of law status in all Member States on an equal basis. These are admirable aims as Polish and Hungarian politicians have criticised the EU for applying high rule of law standards unevenly amongst Member States.¹⁰⁷ In fact, these two countries have already publicly discredited the Rule of Law Reports' evaluation on this basis.¹⁰⁸ It is important to note that the ECtHR has recently condemned the Polish government for improper appointments to their Constitutional Tribunal, a very similar situation to the one resulting from the Lithuanian Constitutional Court deadlock.¹⁰⁹ This judgment will be likely used by the EU Commission as further evidence of violations to Polish judicial independence so it is equally important for the Commission to condemn the situation in Lithuania. By failing to identify the extent

¹⁰¹ Pech and Scheppele 2017, p. 27–28.

¹⁰² Draft law amending Articles 19, 31, 34 (1), 48 of Public Information Law No. I-1418.

¹⁰³ Mapping Media Freedom, 'Violation of Media Freedom - Lithuania: Ruling Party's Proposals Raise Fears over Independence of Public Broadcaster' (2019) <<https://mappingmediafreedom.usahidi.io/posts/22734>> accessed 19 March 2021.

¹⁰⁴ Bárd, 'Diagnostic Autopsy: The Commission's 2020 Annual Rule of Law Report' (*Reconnect*, 28 October 2020) <<https://reconnect-europe.eu/blog/diagnostic-autopsy-the-commissions-2020-annual-rule-of-law-report/>> accessed 6 May 2021.

¹⁰⁵ European Commission, '2020 Rule of Law Report - Questions and Answers' (*European Commission*, 30 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757> accessed 7 May 2021.

¹⁰⁶ *ibid.*

¹⁰⁷ Ariès and Birnbaum, 'E.U. Issues Its First Rule-of-Law Report, Angering Leaders of Hungary and Poland' *Washington Post* (30 September 2020) <https://www.washingtonpost.com/world/europe/eu-rule-of-law-report/2020/09/30/20a93e42-026c-11eb-b92e-029676f9ebec_story.html> accessed 7 May 2021.

¹⁰⁸ *ibid.*

¹⁰⁹ *Xero Flor w Polsce sp z o.o v Poland* App No 4907/18 (ECHR, 7 May 2021).

of rule of law issues in some Member States but not others, the Commission undermines the aims of the Rule of Law Mechanism and their annual reports. They at once fail to identify and stop rule of law breaches at their inception and also create fertile ground for countries like Poland and Hungary to discredit the EU as biased and unfair.

V. Conclusion

The EU Commission has failed to prove that it has the rule of law crisis under control. It continues to emphasise the importance of maintaining rule of law standards and promoting rule of law culture, which completely ignores the fact that, in some parts of the Union, there is not much rule of law left to maintain.¹¹⁰ What seems to be lost on the Commission is that dialogue will only work if a Member State genuinely intends to operate within the parameters of the fundamental values.¹¹¹ What has happened in Poland and Hungary over the past decade has proven that dialogue only exacerbates rule of law backsliding in countries that no longer want to play by the rules.¹¹²

The Commission's response continues to be fragmented and incoherent, as made evident by its inadequate reporting of the rule of law situation in Lithuania. In order to fulfil the purpose of the Rule of Law Mechanism the 2022 reports, which are still in production at the time of this writing, need to reflect upon the failings of the first two reports in order to serve any practical benefit in the fight against rule of law backsliding in the Union. Specifically, the overly positive tone and failure to report rule of law violations truthfully render the reports ineffective.¹¹³ Indeed, this article has pointed out that despite the shortcomings of the Rule of Law Reports so far, they remain a very promising tool which has the potential to help turn the tide in favour of the EU in the fight to protect the rule of law. However, in order for reporting to work, the Commission must reconsider their approach so far and engage in finding ways to strengthen the current blueprint of this tool. Even small adjustments such as the inclusion of specific recommendations to each Member State or larger reforms such as the introduction of a scoring system to numerically measure compliance with various aspects of the rule of law could provide more reliable reports and should be considered.¹¹⁴ Overall, the Commission needs to learn from the mistakes it has made in dealing with Poland and Hungary and use the rule of law tools it has created effectively. It must heed the advice of experts and refrain from viewing individual breaches of the rule of law in isolation.¹¹⁵ This means that the next Rule of Law Report on Lithuania must recognise that an executive's persistent tampering with the nomination of Constitutional Court Judges, illegal dismissal of an apex court judge, and attempts to curb free media over a short period are not accidental. These breaches represent a systemic attack on the rule of law, and turning a blind eye to this fact undermines the whole endeavour of protecting the EU's fundamental values. Furthermore, these superficial reports enable what Bárd terms 'whataboutery' – the ability of countries which consciously exploit the weaknesses of the rule of law to feed a conspiracy theory that the EU is treating them inequitably.¹¹⁶ Unless these reports join the dots

¹¹⁰ Bárd (n 104).

¹¹¹ Pech and Scheppele 2017, p. 27.

¹¹² *ibid.*, p. 27–28.

¹¹³ Priebus, 'Too Little, Too Late' (*Verfassungsblog*, 2 October 2020) <<https://verfassungsblog.de/too-little-too-late/>> accessed 8 May 2021; Bárd (n 104).

¹¹⁴ For more on this please see Bárd (n 104).

¹¹⁵ Jakab and Kirchmair (2020), p. 947-949; Bárd (n 104).

¹¹⁶ *ibid.*

between individual breaches of the rule of law in a Member State to unveil its systemic nature, the future of the EU is unthinkable.

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