



**FRIEDRICH NAUMANN
FOUNDATION** For Freedom.

Mediterranean Dialogue

CHALLENGES TO THE SECURITY AND THE RULE OF LAW IN THE EUROPEAN UNION¹

David Vincent Henneberger

Sebastian Vagt

Introduction

Today, Europe's security depends not only on the European Union (EU) and its Member States being able to defend their own territory with military means and protect their citizens from terrorist attacks. Europe's security is also defined by the question of the extent to which European societies will manage to uphold the principle of the rule of law as an essential element.

Fundamental democratic principles must be negotiated and interpreted continuously due to technological and social change. However, the symptoms of crises and conflicts in Europe's geographical neighbourhood constitute a particular challenge for the rule of law in Europe.

First, we will analyse the security policy situation of the EU and its Member States. What threats is Europe facing and what are the consequences? Then, we will discuss the importance of the liberal rule of law and its challenges. What characterizes the rule of law in Europe and to what extent is it able to cope with modern risks? Finally, recommendations will be presented on Europe's defensive capacity and the principle of the rule of law.

Europe's security in the 21st century

The world order that has existed since the end of the Second World War is being whittled away with no new order in sight. Contrary to the expectations of the American political scientist Francis Fukuyama (1992), the world is not heading towards the end of history and the universal adoption of Western liberal democracy. On the contrary, many places are seeing authoritarian and nationalist reactions in the opposite direction.

¹ This article was originally published in Spanish

These developments are having serious effects on Europe, whose security depends to a considerable extent on the stability of its neighbours and the promise of support by the USA. The EU's High Representative for Foreign Affairs and Security Policy Federica Mogherini even describes the resulting threats as existential: "The objectives, and even the very existence of our union, are in question" (Mogherini, 2016).

Unlike what was still the case during the Cold War with the Warsaw Pact, Europeans nowadays must face a complex and diffuse threat situation on their eastern and southern external borders, but also within their own societies. To understand this threat situation, the events of 2014 marked a significant turning point.

A New Cold War in the East, Disintegration of States in the South

The annexation of Crimea, a breach of international law, and the intentional destabilization of Ukraine by Russia, showed the EU and its Member States the geostrategic possibilities of the Kremlin and its revisionist intentions. The Baltic States and Poland in particular are concerned about Russia's military capabilities and its regular boasting in the framework of wide-ranging military exercises.

Moreover, the Kremlin, through its cyber and disinformation activities, has sought to exploit the vulnerabilities of open democracies and intentionally weaken the cohesion of European societies (Major, 2019). That is why nuclear weapon testing by Russia not only serve the purpose of demonstrating their own intervention capability, but also help Moscow fuel the sensitive debate about the need for nuclear deterrence in Western societies.

The conquest of large territories in Iraq and Syria by the radical Islamic terrorist militia Islamic State in 2014 also had a serious impact on Europe's security. Through the provisional control of its own territory, the organization gained both additional resources and a safe space for training and fighter support, as well as a high degree of media attention and appeal. The devastating attacks in Paris in November 2015 and Brussels in March 2016, in which more than 160 people were killed, were perpetrated with the support and on behalf of the Islamic State.

The war in Syria, as well as the disintegration of Libya and the crises in other countries bordering the Mediterranean led to an increase in the number of people fleeing those countries. While these people mainly fled to neighbouring states, in 2015 the EU also faced the challenge of hosting several million refugees seeking asylum. Often, this overwhelmed the host societies and even today is causing EU member states to have an important debate about a fair distribution of the burden. In many societies, xenophobic and nationalist political parties are taking advantage of this situation, such as the Lega, which was provisionally part of the Italian government, and during this period tried to prevent the rescue of refugees in distress at sea.

The increasing disintegration of states in North Africa and the Middle East is having repercussions in Europe, particularly in the form of two symptoms: an acute threat

from terrorist attacks and increasing immigration of asylum seekers. This is also reflected in public perception. What worries the citizens of Europe most is immigration and terrorism, way above from economic problems such as unemployment or public finances (Eurobarometer, 2018). Consequently, three quarters of respondents believe that a common foreign and security policy should be given high priority (Eurobarometer, 2018).

The renaissance of European security policy

With this in mind, both the EU and its Member States have significantly strengthened their security policy efforts over the past five years. The most recent strategic documents show that the defence of countries and alliances is once again becoming as important as the prevention of crises and conflicts at the EU's borders (White Paper on Security Policy, 2016).

This is also reflected in the military commitment of EU Member States and their transatlantic partners. Soldiers stationed on NATO's eastern flank are helping to re-secure Poland and the Baltic States within the framework of the Enhanced Forward Presence, while at the same time European armed forces are contributing to the stabilization of Mali as part of UN and EU missions.

Obviously, the stabilization of, for example, Afghanistan or countries in the Sahel region cannot be achieved by military means alone. There must be a close partnership approach with the civil society. However, military capabilities are key for Europe to defend itself and to be able to represent its own interests in a credible manner.

Defence spending by European NATO members has risen again from an all-time low in 2014 (approximately \$220 billion) to the nominal level of 1991 (approximately \$280 billion [NATO, 2019]). At the same time, EU member states have increased their efforts for closer military collaboration, through the creation of a European defence fund and the establishment of Permanent Structured Cooperation (PSC), at a hitherto unknown pace (Macron, 2019).

Europe on the road to "strategic autonomy"?

The decisive impetus for a higher prioritization of a common foreign and security policy did not come from the change in the threat situation alone. Rather, the UK's planned exit from the EU and US President Donald Trump's unpredictable behaviour with the NATO are raising doubts among Europeans about the reliability of traditional alliances.

Therefore, the EU's declared aim is to achieve "strategic autonomy" (Mogherini, 2016) to be able to represent and impose its own interests and values, if necessary, even without US support. An important precondition for achieving this goal is a common perception of the threat: only if Spain takes the threat posed by a revisionist Russia seriously, Estonia will also want to intervene as a counterpart in the stabilization of Mali.

So far, the EU and its member states have fallen well short regarding their ambition to exert effective influence in their regional neighbourhood. This is why Europe is not yet in a position to dissuade its NATO ally Turkey from invading northern Syria in violation of international law, nor to keep the nuclear agreement with Iran alive even against US resistance. The EU must continue to strive for "global political capacity" (Juncker, 2018), if it is to guard against or even counteract the damaging symptoms of a fragile or authoritarian neighbourhood.

Although the EU member states take Russia's military potential seriously and must establish an effective deterrent against it, this is not the main threat to Europe. As elaborated below, the symptoms of a changing world order and its interactions are creating a risk to the foundation of liberal democratic society: The principle of the rule of law.

Threats to the principle of the rule of law in Europe

The evolution of the modern rule of law is inseparably linked to the enlightenment and the distancing from absolutist monarchies, and has been constantly evolving ever since. Whereas initially, the rule of law was the antithesis of despotism and the state's monopoly of power, and with it the promise of protection of citizens against internal and external enemies, today public freedoms vis-à-vis the state are at the heart of what is generally summed up by the term "liberal rule of law" (status positivus vs. status negativus). As a criterion distinguishing it from other forms of government, only these public freedoms are also adequate, since the state's claim to a monopoly of power increases even more as authoritarian ideology grows and, as it is well known, can be based on the rule of law (legality as opposed to the liberal rule of law). The fact that the liberal rule of law does not appear in any other region of the world to such an extent can be interpreted - despite periodic setbacks that are sometimes dramatic - as a result of the evolution of political philosophy that has its intellectual centre of gravity in Europe.

The spiritual father of liberalism John Locke was the first to consider the protection of individual freedom from the state as a condition for a lasting peaceful situation and the state (of law) thus understood as a real added value compared to the state of nature. Thus, the promise of state security and civil rights are left in a situation of enduring equilibrium that requires a continuous balancing of goods within constitutional limits.

For reasons of space, we cannot examine the interdependence of the European Union and the Council of Europe (Council of Europe / CoE) - geographically much more broadly conceived - because institutionally they are not linked to each other, nor the legal delimitation of human and fundamental rights. But we can state that Europe, with the adoption of the European Convention on Human Rights in 1950, only one year after the foundation of the Council of Europe in London in 1950, became - at least in theory - a pioneer of enforceable public freedoms. Meanwhile, the EU has advanced to become the most "rule of law" area in the world. In 1993, the constitutionality of the rule of law was decided as part of the "political" aspect of the

Copenhagen criteria to prepare for the eastward enlargement of the EU, and in 2009, with the Treaty of Lisbon, the EU Charter of Fundamental Rights entered into force at the same time, through which the now most integrated economic area in the world guarantees more than half a billion people rights to freedom that are among the most extensive in the history of mankind. That is why Europe ranks first in the "Rule of Law Index" of the World Justice Project (which is recommended reading if you want to go deeper into the subject) - despite a significant difference remaining between Western and Eastern Europe -. Here, it is worth pointing out that in particular, the EU's handling of the authoritarian setbacks of the past years in Poland and Hungary will show how effectively the alliance of states protects the rights of all its citizens and how fundamental democratic principles such as the division of powers can be upheld.

The achievements of the rule of law are continually under considerable pressure, both from the outside and within. In this sense, Europe's current challenges have both endogenous and exogenous roots, but are ultimately a consequence of the same fundamental meta-developments, which will be briefly described below.

Internet and social media (the open flank of free Europe)

The citizens' trust in the State is essential and a condition of the liberal rule of law. If this trust is lost, the state order as such is quickly endangered. Therefore, whoever sees the current order of a State or a supranational entity as a thorn in their side will seek to sabotage that trust (this is historically a key tool of secret services from the outside and of subversive groups from the inside). But whereas in the past it was necessary to stage costly acts of violence aimed at undermining confidence in the state's monopoly on power or to infiltrate agents into newspaper editorial offices, today the Internet and social networks offer hostile external and internal powers entirely new possibilities to reach their target groups without hindrance or filter. In the European context it is well proven that the greatest danger in terms of intentional disinformation and manipulation from abroad comes from Russia under Vladimir Putin (having at least the basic aim of extremist forces on the left and right critically confronting the EU, NATO and the "liberal world order"). Since economic dominance against the West organized as a state under the rule of law is unattainable, Russia can only weaken the enemy and skilfully exploit the strategic security policy mistakes of its Western allies in neighboring regions of the world, which for their part - intentionally - create new challenges to the rule of law in Europe; hence, among other motivations, the war in Syria and the migratory movements that boost right-wing anti-European forces in Europe; also Brexit, promoted in multiple ways by Russia because it is very convenient in the sense - supposedly - of European destabilization.

The internal and external defence capabilities of European democracies will be decisive for public confidence in the coming years. The EU has reacted and in 2018 established the Stratcom East strike force, which aims to practice counter-intelligence especially in the new member countries with the highest risk of infiltration by pro-Russian forces. This is certainly a step in the right direction, but it may not be enough. In addition to technical defence measures, the most important thing is to strengthen dramatically the confidence in the ability of EU policy to solve problems and in the Member States themselves if authoritarian propaganda from

abroad and at home is not to continue to fall on fertile ground. In addition, the legislator should not have to force the large US internet conglomerates to do their part to preserve the rule of law, but they should proactively participate, in their own interest, in the defence of "Western values". Censorship attempts by authoritarian states around the world make it abundantly clear that in the long term, the only commercial basis for internet platforms can only be the liberal rule of law.

Terrorism, secret services and the endurance test for the rule of law

Since Western metropolises have suffered terrible terrorist attacks in the first decade of the new millennium (New York 2001, Madrid 2004, London 2005), the debate on the compatibility of tightening up security legislation and the protection of constitutional rights has continued. For the first time, new phenomena such as the whistle-blower have provided citizens with in-depth insights into the activities of the secret services of democratic states, sparking wider debate, but also decoupling it from the realities of intelligence work. Ever new terrorist acts such as in Paris (2015), Brussels or Berlin (both in 2016) put politics continually under pressure to sharpen security measures so that citizens' trust in the rule of law is not undermined.

Here, the dividing line between legitimate political goals and leviathanic arrogance is not always so clear-cut, as in the case of former German Interior Minister Hans-Peter Friedrich of the Bavarian CSU party, who in 2013 spoke of security as a "fundamental super right", i.e. a right of citizens vis-à-vis the state that stands out in comparison to other constitutional rights.

In the wake of the revelations by US whistle-blower Edward Snowden, who exposed US eavesdropping practices in the Federal Republic of Germany, including those of Chancellor Angela Merkel, a debate had previously been sparked about the fundamental relationship between data protection and the powers of security officials. But in *dubio pro securitate* can never be a general maxim of action in a liberal system, since the contradiction between security and freedom rights is insoluble and precisely what makes necessary a weighing of the good in each concrete case. The importance of this weighting is demonstrated by the long list of stricter laws in recent years in Europe: by way of example, we might mention the French anti-terrorism law of 2017 (in principle limited to three years), which transfers large parts of the powers of the state in a state of emergency to normal law, and the second amendment of the Bavarian police law of 2018, which in the specific case allows suspects to be detained without charge for up to three months. In coming years, this and other types of "preventive policing", together with the ever-improving technical possibilities of data monitoring, collection and evaluation, will keep civic and constitutional lawyers continually busy. Experience has shown for example in Germany, that the reasons for shortcomings in the supervision of dangerous persons are often not due to a lack of competence on the part of the security authorities, but to insufficient funding and the demarcation of competences between the different levels of government.

Europe on the way to a common conception of law?

The permanent task, which sounds banal, in liberal democracies such as those in Europe is to secure the rule of law with the means of the rule of law ("balancing the good within constitutional limits"). To achieve a strengthening of the common internal and legal policy within the EU, the historical differences in the assessment of "freedom versus security rights" also have to be taken into account. Thus, for example, the fundamental right of freedom of expression is comparatively less sacrosanct in Germany than in the Anglo-Saxon area and is periodically subject to strong limitations in case law, for example, for the protection of the personal rights of third parties. In contrast, protection against state access to private telecommunications is particularly strong here because of the Nazi and Stasi past. The prognosis for a common, deeper and democratically legitimized internal and legal policy of the EU and the "defensive capacity" of the Union as a constitutional state will therefore not only depend on the willingness of the European states to cede sovereignty at supranational level, but also to a large extent on creating a European public opinion and establishing an intensive dialogue of civil society on the considerations generated historically in order to be able to negotiate the weighting of common good and the rule of law.

Facts: what is to be done?

Europe is increasingly surrounded by authoritarian and disintegrated states in times of changing world order. The resulting risks are not only of a military nature, but above all affect the rule of law, the central achievement of European liberal societies.

In uncertain times with an eye on proven alliances, EU member states must try to find a common perception of the threat. They should also meet their own claim to greater independence in their foreign, security and defence policy to combat population flight due to combat, prevent the emergence of safe havens for terrorist organizations and neutralize military aggression against individual members.

Within the societies themselves, it is a matter of strengthening the capacity to defend the rule of law, for example by promoting a European public opinion. This would certainly be a confidence-building measure in the European institutions, as well as a condition for a supranational debate on weighing up the importance of security and freedom.