

Institution: Middlesex University		
Unit of Assessment: 18 LAW		
Title of case study: Challenging Rule of Law Backsliding in the European Union		
Period when the underpinning research was undertaken: Professor Laurent Pech: 1 January 2000 – Present Dr Joelle Grogan: 1 October 2012 – Present Research conducted collaboratively at Middlesex: 2016-2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Laurent Pech Joelle Grogan	Role(s) (e.g. job title): Professor Senior lecturer	Period(s) employed by submitting HEI: June 2013 – Present August 2016 – Present
Period when the claimed impact occurred: 1 August 2016- Present		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact		
<p>The EU has witnessed a startling breakdown in compliance with the rule of law, as some Member States' governments systematically dismantle checks and balances in order, incrementally, to establish one-party states. Pech and Grogan's research findings and recommendations have contributed to mitigating this urgent problem by being reflected, and even transposed directly, into legislative wording and judicial decision-making by European courts, as well as drawn on in the agenda-setting activity of policy-makers, judicial networks, research bodies, think tanks, and civil society organisations. Their research has also contributed to shaping public opinion both when extensively covered in broadcast media nationally and internationally and when adopted or contested by engaged online groups.</p>		
2. Underpinning research		
<p>As a legal concept and foundational value underlying the EU legal order, the rule of law has been the focus of Pech's publications since 2000 and of Grogan's since 2012. Their research examines systematic and coordinated efforts by some national authorities to undermine the rule of law. Pech's work is especially concerned with Hungary and Poland, while Grogan has mainly addressed the rule of law implications of Brexit and the COVID-19 pandemic. Both are members of "Reconnect": a H2020 consortium project awarded nearly €5-million in 2018 (www.reconnect-europe.eu), of which Pech is a member of the executive team as well as PI of the work package dedicated to rule of law (with an overall award of nearly €320K to Middlesex University).</p> <p>Through multiple publications and additional communications to professionals during consultancy or public engagement, Pech and Grogan's research has (i) developed ways to diagnose rule of law breakdown through precise definition and analysis; (ii) proposed instruments and other remedies to constrain and sanction systemic attacks on the rule of law where they occur. Pech's research findings include definition of the core and sub-components of the rule of law, a characterisation used subsequently by both the Venice Commission and the European Commission. Other findings include:</p>		

- (i) Demonstration that all core components of the “rule of law” need to be fully justiciable;
- (ii) Exposure of shortcomings in the EU’s available instruments for external promotion of the rule of law;
- (iii) Assertion that the “rule of law” deficit in the EU’s constitutional framework was largely remedied by the Lisbon Treaty;
- (iv) Evidence that the EU faces a “clear and present danger ” in an increasing number of EU countries, in what Pech defined as “rule of law backsliding” (4) (a 2017 article ranked as the most downloaded article from the *Cambridge Yearbook of European Legal Studies* site).

Grogan’s published research insights include:

- (i) Identification of commonality but also tension between national and EU conceptions of the rule of law;
- (ii) Assessment of strengths and deficiencies in responses to “rule of law backsliding”;
- (iii) Highlighting of rule of law issues associated with UK withdrawal from the EU, especially delegated legislative power, the separation of powers, and the impact of Brexit on the framework for UK rights protection (6);
- (iv) Diagnosis of rule of law issues in EU states’ responses to COVID-19 and their remedy.

By making their research widely accessible, through blogs and media interviews, Pech and Grogan have maintained a continuous public research presence. Pech’s Twitter has ~ 9,500 followers across Europe; Grogan contributes legal updates and commentary to the *Verfassungblog* and *LSE Brexit Blog*, among others, and has ~2,100 followers. Grogan has also distilled her “rule of law” analyses into an accessible public legal education project, “StickyTrickyLaw”, a format with a social media following of ~2,100. Together Pech and Grogan curate an open access Article 7 databank of materials related to measures tackling rule of law backsliding under DEM-DEC (<https://www.democratic-decay.org/article-7-eu>).

3. References to the research

Key outputs:

- 1) Pech and Grogan, ‘Upholding the Rule of Law in the EU: What Role for the EUFRA’, in R. Byrne and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy. The Role of the EU Fundamental Rights Agency* (Routledge, 2020).
- 2) Pech and Grogan et al, *Meaning and Scope of the EU Rule of Law*, RECONNECT Deliverable 7.2, 30 April 2020: <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf>.
- 3) Pech, ‘Judicial independence under threat: The Court of Justice to the rescue’ (2018) 55 *Common Market Law Review* 1827-1854.
- 4) Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3-47.
- 5) Pech and D Kochenov, ‘Better late than never: On the European Commission’s Rule of Law Framework and its first activation (2016) 54(5) *Journal of Common Market Studies* 1062-1074.
- 6) Grogan, ‘Rights and Remedies at Risk: The Future Post-Brexit’ [2020] *Public Law* 683.

4. Details of impact

Users and beneficiaries of the research include policy-makers at national and European levels; national judiciaries; professional bodies; civil society groups and the broader public. Evidence of impact can be demonstrated as specific changes and citation as authority in cases; in other instances, it is also evidenced by testimonial because of the confidential nature of some legal consultations (Sources 1-5).

Conceptual impact

From the RECONNECT project, research recommendations made by Pech and Grogan (Sources 7 and 8) have been cited as part of the European Parliament's research agenda and efforts to combat false narratives within rule of law backsliding. Sources (2) and (8) were cited in Source 10. Pech's work in (3) was cited by courts including the European Court of Justice in A-G Tanchev's Opinion in Case C-619/18. Two articles published before the current period (in 2009 and 2010) continue to be extensively cited, including by the Dutch Council of State and the Supreme Administrative Court in the Netherlands in their 2011 report on the legal meaning of the rule of law in Dutch and European Law (p141). The EU Commission's (2014: 158) definition of the rule of law tracks Pech's published formulation precisely in its wording, though the Commission Communication does not, as a matter of procedure, refer to sources. Conceptual influence is also evident in how Pech's concept of "rule of law backsliding" gained public traction following the publication of (2): altmetric data available via the CYELS website show how a sharply rising trend for the article correlated with increased public discussion of failures referred to using Pech's "backsliding" concept.

Grogan's contribution to public opinion and debate on important legal issues is evidenced by the reception of her analysis of rule of law questions raised by the Supreme Court prorogation hearings: during one week alone her summaries and critique were heard by an audience of over 70 million people worldwide, then taken up in widespread quotation and comment in national and international media following >110 TV and radio interviews for national (BBC, Sky) and international (CNN, Associated Press Agency, EuroNews) media between January 2019-July 2020 (Source 9).

Impact on case law

According to the CJEU President, who recently included the case in the EU's *Marbury v Madison* category of key cases, the importance cannot be overstated of the ruling in the "Portuguese judges" case: that national authorities can be sued when they undermine judicial independence of their courts. The interpretation reached was prefigured in precise detail but controversially in articles by Pech including (4). Testimony from several ECJ judges/staff is available to confirm the influence of Pech's scholarship on the reasoning in question (Source 5).

Pech's RECONNECT Working Paper no. 8 (Source 8) was quoted several times in the decision of the Labour Chamber of Poland's Supreme Court in its decision to submit a reference for a preliminary ruling issued on 15 July 2020, as reported in:

<http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20po%203-19-5.docx.html>

Further, indirect impacts on legal proceedings have also occurred, including that the law relating to access to EU documents has begun to be reshaped as a result of Pech's initiation of proceedings against the European Council, in Case T-252/19 Pech v Council <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019TN0252&from=EN>

Policy-making impact

In 2018 and 2019, the European Parliament adopted proposals on an EU mechanism on Democracy, the Rule of Law and Fundamental Rights (PE 579.328, April 2016), based on a report commissioned by the European Parliamentary Research Service with Pech as lead author. Pech's recommendations have been adopted by the European Commission (July 2019; <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A343%3AFIN>).

Pech has also been widely consulted by European legal bodies. Examples include:

(i) by the LIBE Committee in preparing its report on a proposal calling on the Council to activate Article 7(1) TEU (see Report A8/0250/2018, 4 July 2018). Based on his published findings, Pech advocated activation of Article 7(1), a course of action followed in September 2018;

(ii) by rapporteurs of a proposal for a European resolution regarding respect for the rule of law within the EU (see Proposal No 1300 and Information Report No 1299, 2018). Pech's view and recommendations were endorsed by the two MPs in their report;

(iii) by drafters of a Flemish Parliamentary resolution regarding the rule of law situation in Poland. The resulting resolution urged by Pech was the first time a parliamentary body denounced the rule of law situation in a different EU country (Vlaams Parlement, 1423 (2017-2018) Nr. 1).

Alongside such direct consultation, Pech has also contributed to policy-making discussion regarding rule of law initiatives in a range of "closed" meetings whose content remains confidential (e.g. the session organised by Commission officials on 26 April 2019).

Grogan has similarly been involved with confidential policy discussions related to Brexit and COVID-19. Her rule of law recommendations were subsequently cited by the European Parliament in the resolution on the impact of COVID-19 measures (Source 7.2) 2020/2790(RSP)).

5. Sources to corroborate the impact

Source 1: Testimonial, Adam Bodnar, Commissioner for Human Rights, Warsaw, Poland.

Source 2: Testimonial, José Igreja Matos, President of the European Association of Judges, First Vice President of the International Association of Judges, Member of the Advisory Board of the Judicial Integrity Network of United Nations.

Source 3: Testimonial, Judith Sargentini, Deputy Director Medecins sans Frontieres Netherlands, Previously Member of the European Parliament for the Dutch Green Party.

Source 4: Testimonial, Sophie In 't Veld, MEP, Chairperson European Parliament Democracy, Rule of Law, Fundamental Rights Monitoring Group, Rapporteur for the European Parliament legislative initiative report for the Establishment of a European Mechanism for democracy, the rule of law and fundamental rights (adopted 2016).

Source 5: Testimonial, Eleanor Sharpston QC, Advocate General of the Court of Justice of the European Union 2006-2020.

Source 6: Statement: We, the Board of the European Association of Judges, publicly support the open letter “Before it’s too late” (<https://verfassungsblog.de/before-its-too-late/>) addressed to the President of the European Commission regarding the Rule of Law Breakdown in Poland. The letter was published today by 37 prominent worldwide academics in the field of International and Comparative Law. Signed: José Igreja Matos President of the European Association of Judges (EAJ), Duro Sessa, Member of the Board of the European Association of Judges (EAJ), Mikael Sjöberg, Member of the Board of the European Association of Judges (EAJ).

Source 7 (1 and 2) Reconnect Policy brief J Grogan and N Weinberg, ‘Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies’ August 2020; Cited in: 7.2 European Parliament, The impact of COVID-19 measures on democracy, the rule of law and fundamental rights European Parliament, Resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights (2020/2790(RSP)), footnote 11.

Source 8: Reconnect Policy Brief, Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid, June 2019, Professor Laurent Pech, Middlesex University London, Leader of WP7 “Rule of Law – Principles”; Professor Dimitry Kochenov, University of Groningen, Leader of WP8 “Rule of Law – Practices”.

Source 9: Media report listing relevant media appearances by Laurent Pech and Joelle Grogan.

Source 10: European Parliament Research Service, Protecting EU common values within the Member States. An overview of monitoring, preventing and enforcement mechanisms at EU level, PE 652.088, September 2020. Numerous citations from the work by Pech and Grogan, including reference to source 8.