



THE EU'S RULE OF LAW REPORT 2020 AND ITS DISCONTENTS

MAIN FINDINGS AND FUTURE PROSPECTS

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Themis, the Titan Goddess of Law and Justice, as featured on the digital cover of the Rule of Law Report 2020

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SUMMARY

At the end of September 2020, the European Commission published its first country-by-country assessment on the rule of law in all 27 Member States of the European Union. The comprehensive document covers four pillars – the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances – and is part of a new rule of law mechanism. The dedicated country chapters are based upon contributions from the Member States and a variety of already available sources, using a qualitative, albeit flawed methodology.

While pointing to a host of positive aspects, the report also highlights “concerns” and “serious concerns” regarding worrying developments or democratic backsliding in various Member States, including in the context of the COVID-19 pandemic. However, it refrains from issuing concrete policy recommendations and has no binding power. This paper aims to briefly present the main findings of the report, some of its inherent shortcomings and future prospects.

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STATE OF THE UNION

In her first ever [State of the Union Speech](#), President of the European Commission (EC) Ursula von der Leyen proclaimed that “European values are not for sale”, reminding the Commission’s duty “to care and nurture for the rule of law”. In order to forge a genuine ‘Community of Law’ and a prospective political union at home, and to fuel the normative vocation and aspiration of the European Union (EU) as an international actor abroad, a strict adherence to and respect for the fundamental European values enshrined in [Article 2](#) of the Treaty on European Union (TEU) remains quintessential. According to the EC’s [working definition](#), the rule of law helps protect people from the rule of the powerful, guarantees the respect of basic everyday rights and freedoms, and allows access to a free press.

Shortly after Von Der Leyen’s both motivational and cautionary address, the European Union’s first [report on the state of the rule of law](#), which is the product of several months of work in the challenging times of the COVID19 pandemic that put all of the bloc’s countries under scrutiny, was published on 30 September 2020. The snapshot document reflects concerns that the European Union is failing to counter democratic backsliding among some of its members, though, on paper, it has long prided itself as a champion of mutually reinforcing values such as human dignity, freedom, democracy, equality, rule of law and human rights. The report also explores the way in which the COVID-19 pandemic has confirmed the relevance of the rule of law system and its impact on the daily lives of citizens under extraordinary circumstances. While pointing to a host of positive aspects, the report nonetheless highlights “concerns” and “serious concerns” regarding worrying developments in various Member States. It stresses that strengthening the rule of law remains a priority for a well-functioning European Union, but it refrains from issuing concrete prescriptions and policy recommendations and has no binding power. Essentially, the report is a self-explanatory ‘preventive mechanism’. Still, it did cause a significant turmoil in countries like Hungary and Poland, which have only accepted a [rule of law conditionality tied to the EU budget and the recovery fund after a strong political fight where they secured extra time in case procedures were to be brought against them](#).

DECONSTRUCTING THE RULE OF LAW ‘ECOSYSTEM’

Through the report, covering four pillars – the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances – the European Commission aims to ensure the consolidation of an ‘enabling ecosystem’ for the rule of law. As such, it considers that respect for judicial independence, an effective anti-corruption framework, a free and pluralistic press, a transparent and high-quality administration guided by institutional checks and balances, and an empowered and active civil society are key ingredients for achieving that fertile ecosystem. A 2019 [Eurobarometer](#) dedicated to the rule of law showed that more than 8 in 10 citizens thought that the rule of law needed to be respected in all other Member States, while over 80% of citizens in the EU supported improvements regarding key rule of law principles. On the one hand, that poll indicated that most European citizens were aware of existing rule of law deficiencies and, on the other hand, instilled the EC’s effort with a sense of legitimacy.

As the Court of Justice of the EU stated in its rulings, the EU is based on the rule of law, and every action taken by the polity is founded on the treaties, voluntarily and democratically agreed upon by the Member States. Among others, the Court has played a considerable role in pursuing integration through law, in particular since the 1950s when the role of judges and liberal constitutionalism has been reaffirmed. Various [strategic documents](#) of the EU clearly affirm its attachment to multilateralism and a rules-based international order.



To a great extent, the European Union is both a product and a main proponent of the so-called '[liberal world order](#)', a "[conceptual jelly](#)". On the inside, the EU used to pride itself as a select club of liberal democracies – a political system marked not only by free and fair elections, but also by [constitutional liberalism](#). In a controversial [speech](#) in 2014, Hungarian Prime Minister Viktor Orban, outlined his position on liberalism: "A democracy is not necessarily liberal. Just because something is not liberal, it still can be a democracy." And he began his incremental attack on institutional restraints, which are only as strong as the norms that underwrite them.

In the meantime, Orban has arguably become Europe's most influential right-wing populist, and, according to democracy scholar [Larry Diamond](#), "a decade after joining the European Union in 2004, Hungary became the first EU country to leave democracy". At the moment of publishing the EC report, both Hungary and Poland were fighting an Article 7 procedure. Article 7 of the TEU is the last resort to resolve a crisis in the rule of law framework and to ensure an EU Member State complies with EU values. However, unanimity requirements in the consolidated treaties basically mean that the disciplinary measures initiated against Hungary and Poland will hit a dead end, as both countries [vowed to protect each other](#). In context, it is worth mentioning that the two 'black sheep' are some of the biggest beneficiaries of EU funds, which actually helped their illiberal leaders to consolidate their grip on power and pursue their authoritarian temptation.

Overall and unsurprisingly, although there is no ranking present on any of the four evaluated dimensions, Poland and Hungary came in for the harshest criticism in the EC's report on the state of the rule of law. But the document also voiced concerns about corruption and the independence of the judiciary in Bulgaria, Croatia, the Czech Republic, Hungary, Malta, Romania and Slovakia. With the notable exception of Malta, the problematic grouping was part of the former Communist bloc gravitating around the Soviet Union. And this may point to the fact that the rule of law is intertwined with the historical, institutional and ideological compact in which it has developed. Of course, there are still those who will argue that the rule of law is still a highly flexible and contested concept that can be defined in various ways and which is usually the subject of qualitative rather than quantitative evaluation. And, to be fully honest, in spite of the Commission's best and laudable efforts, the report does have some methodological gaps and biases, accurately detailed in an [article](#) by Alina Mungiu-Pippidi. Arguably, the text's biggest lapse is its complete lack of concrete recommendations to scrutinized Member States to address outlined issues.

At best, what we are witnessing in countries like Hungary or Poland, the report's main discontents, may be temporary and incremental retreats from the rule of law, but there is no guarantee that these 'illiberal democratic' developments will not have a contagion and spill-over effect, especially in the context of the looming post-COVID-19 socio-economic crisis. Although there is certainly an alarming degree of power concentration in Hungary and Poland, these two Member States may still be perceived in theory as functional liberal democracies because there still exist constitutional ways in which the government could be overthrown if it overreaches beyond socially acceptable limits. [Others](#) would strongly disagree. However, as things stand, countries like Russia, China or Turkey are far more pernicious threats to Western liberal values and democracy itself than Hungary or Poland. But the fact that Budapest and Warsaw actively threatened to blackmail the EU over the recovery package designed to help Europe overcome the economic crisis caused by the coronavirus only confirms why it is important not to water down in any way the rule of law mechanism. This type of zero-sum 'bullying' among political allies is obviously a sign that all is not well inside the European community.

An interesting and useful section explores the effects of the COVID-19 pandemic over the state of the rule of law in Member States. Without a doubt, the lockdowns and the other restrictions imposed by national governments in order to contain the spread of the deadly virus have put to great stress



the rule of law system and fuelled intense political and legal debates. Nevertheless, as the [report](#) shows, “national Parliaments, Constitutional courts and Supreme Courts have played a key role in the scrutiny of measures taken to respond to the COVID-19 pandemic”. The outbreak boosted the digitalisation of the judiciary and further confirmed the crucial role that a free and pluralistic media can play in constantly delivering fact-based information, countering disinformation and building democratic resilience and accountability. By contrast, the crisis revealed that measures designed to tackle the ‘infodemic’ can be used to curtail and undermine fundamental rights and freedoms. The monitoring in this area will continue and will undoubtedly feature in next year’s report as well, especially with regards to the necessity, proportionality, time frame and scope of the extraordinary measures.

QUO VADIS EUROPA?

One of the founding fathers of the American Constitution, [James Madison](#), remarkably noted that “if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary”. He envisioned a system of robust checks and balances, powered by the rule of law, aiming to make “ambition counteract ambition” in each of the three branches of government. It goes without saying that, given the main findings of the EU’s first rule of law report, Member States are not governed by post-modern angels and that unchecked ambition can be highly consequential for a nation and its citizens’ well-being. Throughout the world, we are witnessing a resurgence of authoritarianism, which poses an existential threat to the world’s democracies. Against this background, a strong culture of the rule of law remains the backbone of an effective functioning of the Union, with liberal democracies ingrained in its metabolism.

In sum, the first rule of law report of the European Union is a first step in the right direction, in the greater context of the rule of law mechanism. On the one hand, the report showed that many European citizens enjoy high standards of the rule of law, which benefits their quality of life. Nevertheless, the same document did highlight some important new and old challenges, mostly pertaining to problematic judicial independence and insufficient resilience to systemic corruption. As intended by its authors, the report is but the cornerstone for a new and dynamic process, structured upon a continued (and hopefully constructive) dialogue with the Member States. The lessons learned from this first exercise may well provide us next year with a better, less biased and more comprehensive report. But the Union will literally have to put its money where its mouth is in order to curb the backsliding on rule of law and democracy and uphold its normative power vocation. And, starting next year, it may regain its traditional American ally on this front.

FIND OUT MORE

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