

“More Europe” to strengthen the Rule of Law

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The rule of law and democracy are coming under pressure in several EU Member States. These developments, but also the allegation of double standards and the activation of the Article 7 procedure against Poland and Hungary indicate: “more EU” is necessary to strengthen the rule of law.

The EU’s existing instruments

The EU already has instruments for safeguarding the rule of law and democracy at its disposal; it is not a toothless tiger:

The state of rule of law is playing an increasingly important role when assessing EU candidate countries.

The so-called **Co-operation and Verification Mechanism (CVM)** vis-à-vis Romania and Bulgaria, serves to handle deficits in the rule of law.

Infringement proceedings can be brought forward against member states before the European Court of Justice (ECJ). By using this instrument, the ECJ has effectively contributed towards protecting the values enshrined in Article 2 TEU. For instance, in November 2018 the Polish government revoked their controversial reform of the Supreme Court as a reaction to a judgement passed by the ECJ.

The **Article 7** applies if there is a serious breach of the rule of law: *“the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.”* Following such a procedure, the member state may be stripped of its right to vote – insofar as a *“Serious and persistent breach”* of the values established in Article 2 is unanimously agreed.

In 2014, a **“new EU Framework to strengthen the Rule of Law”** was initiated in order to enter into

dialogue before an Article 7 procedure becomes necessary. To date, the framework has only been applied vis-à-vis Poland.

During negotiations on the EU’s next Multiannual Financial Framework, discussions will also focus on a **stronger relationship between granting EU funds** and compliance with rule of law standards.

Gaps and Deficiencies

There are gaps in the apparatus.

1. Infringement procedures can only be directed against individual actions of a member state, not against a problematic development over the longer-term.
2. There is no regular or public inventory of the state of democracy and the rule of law in **all** EU Member States. The Commission’s little-known justice scoreboard is useful, but only covers limited areas.
3. There is a lack of more moderate sanctioning options besides the “nuclear” option that is Article 7. The unanimity principle is an (excessively) high hurdle.
4. The allegation of arbitrariness: a number of EPP parliamentarians had not voted in favour of initiating the Article 7 procedure against Hungary since they believed that the underlying report by the Green MEP, Judith Sargentini, dealt with issues that did not constitute violations

against the rule of law. Representatives of the affected governments claimed that the Article 7 procedure is an attempt to impose a particular progressive/secularist vision of society on them or to punish them for their attitude towards migration policy.

Problematic: meanwhile, rule of law deficits of other EU Member States (including Romania), have for a long time received only relatively limited attention.

That is why many actors (also member states such as Belgium), support extending the existing apparatus.

A New Mechanism

One element would be the introduction of an **annual report** on the state of rule of law and democracy in the EU. This could be carried out as part of a procedure similar to the European Semester: a report drawn up by the European Commission (or jointly with the Council of Europe's Venice Commission), would provide an annual analysis of the state of rule of law and democracy in **all EU Member States**. The report would particularly (but not exclusively) examine the situation in countries where problematic

developments have been identified, and in turn formulate recommendations for action. The Council of the European Union would advise upon the report and provide guidelines. The European Parliament would issue an opinion. The Commission would make **recommendations** to the member states concerned about how identified deficits can be addressed. The European Council would commit to discussing this rule of law report once a year.

A continuing disregard for the recommendations could then result in the (more transparent) application of harsher instruments (rule of law framework, Article 7 procedure, reduction of EU funds). This more accountable process would refute the allegation of arbitrariness.

Important: the report should focus on the core areas referred to in Article 2 TEU (basic values, separation of powers etc.) and avoid socio-politically controversial topics towards which the EU Member States have completely different attitudes. This would also ensure a wider acceptance within **all** EU countries.

Such a **"European Semester of rule of law"** could lead to a more consistent and public dialogue about issues pertaining to the rule of law and democracy in the EU.

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