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Saving the EU from disintegration

Can Olaf Scholz's Zeitenwende become a momentum for change in protecting the rule of law in Europe?

Announced by German Chancellor Olaf Scholz in February 2022 in reaction to the Russian attack on Ukraine, the *Zeitenwende* – meaning a watershed moment – was quickly picked up in the international debate, becoming an appeal for a rules-based international order. Meanwhile, the war caught the European Union in a vulnerable position. For about a decade now, the EU has been struggling to contain anti-democratic developments in some of its member states. A broad portfolio of countermeasures has been applied, yet not with full force. As a result, the ongoing rule of law backsliding in Poland and Hungary is threatening the overall unity and integrity of the EU. Can the *Zeitenwende* become a momentum for change in protecting the rule of law in Europe?

A rule of law crisis

In recent years, we have witnessed how some member states intentionally undermine the rule of law at the national level and question the legal order of the EU. A systemic democratic backsliding started in 2010 with the electoral victory of Fidesz in Hungary and was followed by the Polish Law and Justice Party (PiS) government since 2015. In response, the EU has agreed on a range of instruments to safeguard the rule of law across the continent.

But the resistance of 'rule breakers' does not easily wear off. First, Article 7 – once nicknamed the 'nuclear option' because, in the worst-case scenario, it could strip a member state of voting rights – proved futile. Triggered against Poland and Hungary, the procedure remains inconclusive. Next, the infringement procedures launched by the European Commission before the European Court of Justice failed to solve fundamental problems with judicial independence in Poland. Now, the approach of using money as leverage to persuade non-abiding governments to change their ways seems promising though. The EU still holds cohesion funds from Hungary and money from the Covid-19 recovery fund from Poland.

A decade of destructive developments in Hungary and Poland has exposed the EU's inability to fully protect its constitutional identity. To combat rule of law breaches in the EU, there must be consequences severe enough to discourage governments from undermining the democratic order.

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From a technical and legal point of view, there is space for improvement. For example, procedural pathways should be created for member states to meet the recommendations listed in the Rule of Law Report and Justice Scoreboard. Conditionality mechanisms should also be attached to more EU programmes, grants and loans. Additionally, identifying synergies between single rule of law instruments within the legal order and competences of the EU could improve both their effectiveness and efficiency. Constant re-evaluation would allow for a more accurate application of rule of law tools in the future, including tracing favourable policy mixes. Nevertheless, technical improvements of the existing reporting and corrective measures are only half the battle.

Fixing rule of law erosion also requires tackling general democratic backsliding. It is crucial to proactively shape favourable conditions to defend the European community of law by strengthening democratic institutions and practices, both at the EU level as well as in individual member states. In countries experiencing acute rule of law backsliding, internal resistance is as important as external pressure. Smart capacity building of independent media and civil society organisations through improved access to EU funds via direct grant-making as well as safeguarding their functioning through European legislation are the right way forward.

To maintain a functioning democratic order, the rule of law must be sustained by both, robust institutional responses and political accountability. It is hence important to understand that the underlying problem of the EU's rule of law toolbox is not just a legal issue but above all a political vulnerability.

Power struggles

It was to be expected that targeting the interests of non-abiding member states directly would trigger their resistance. Still, the EU was not ready

for such a scenario. Blurring the debates and employing pseudo-legal arguments have become the usual tactics of the 'rule breakers'. When faced with legal sanctions, they also took advantage of lengthy procedures and the consensus-seeking nature of the European Union to advert immediate penalties.

EU institutions also have their share of responsibility in the decay of the rule of law. For example, Article 7 almost failed from the start due to the fear of the Council and the Commission that affected countries would still manage to obstruct important decision-making processes before their voting rights would be taken. The final shape of the 'Rule of Law Conditionality Regulation' was watered down in pursuit of a compromise between a more radical position of the European Parliament and a less invasive approach of the Commission and the Council.

The power struggle in Brussels is complex. Toxic solidarity and apathy too often replace a much-needed mobilisation for the rule of law standards. Reacting to rule of law deficiencies by member states falls into the cracks of different national interests and political alliances. Not getting involved is an insurance policy for reciprocity in case of getting into trouble in the future. In the European Parliament, party politics play a significant role, for example in tolerating political actors like Fidesz in the political mainstream or allowing corruption scandals.

A *Zeitenwende* for the rule of law

The ongoing polycrisis the EU is facing has aggravated rule of law disputes. The Covid-19 pandemic provided an opportunity to surpass laws by a state of emergency, allowing deregulation or executive orders. The soaring energy prices and inflation provide a fertile ground for political polarisation and radicalisation, likely resulting in Eurosceptic, illiberal forces gaining traction in other member states. Yet, it is the war in Ukraine that put the unity of the West to a test, exposing not only the conflict of two inconceivable world orders but also the ambiguity within the EU itself regarding further cooperation with authoritarian regimes and the commitment to the EU's founding principles.

The Zeitenwende initially referred to German foreign and security policy: abandoning outdated paradigms in favour of a proactive role in reshaping the defence architecture of Europe. But by now, it has earned a far broader meaning.

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international order. This also refers to the European Union: a peace project funded on the principles of freedom, democracy and the rule of law. Democratic order is a pillar of European stability. A new comprehensive European security architecture must embrace the defence of the legal Union and fundamental values.

The EU is not only facing external threats and strategic rivalry but also further enlargement. It must be fit to tackle these challenges. The European institutions, as well as the member states, must recognise the democratic order as a pillar of European stability. The rule of law is one of its fundamental principles. The attempts of some member states such as Poland and Hungary to emphasise national legal traditions as superior or to question the constitutional principles of the EU directly undermine European integration. Therefore, next to a comprehensive rule of law toolbox, a favourable political culture is needed to be proactively used – and with full force – to avoid the impunity of 'rule breakers' and save the EU from disintegration.

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