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The rule of law in Europe is not negotiable

We don't need compromises and unfulfilled promises but political courage to stop rule of law backsliding in Europe

'There can be no compromise when it comes to defending our core values,' promised Ursula von der Leyen as candidate for President of the European Commission, and assured her Commission would make use of all its tools to protect the rule of law. This promise has yet to be delivered and the window of opportunity is closing.

The rule of law is an essential foundational value of the EU. Without it, neither citizens nor private sector actors can feel secure that their rights will be duly protected. In this sense, our security as European citizens and businesses is what is at stake when the rule of law is threatened. The EU has been letting this security threat go unanswered for far too long.

Alongside dealing with the Covid-19 pandemic's health and economic impact, EU governments and institutions are now discussing conditioning EU funds in the recovery fund and the next long-term EU budget on upholding the rule of law. This is the right thing to do. Just as with the health pandemic, the EU has a duty to prevent and respond to the spread of illness to its democracies and threats to the rule of law within the Union itself.

At the same time, some member state governments, notably that of Hungary and Poland, relativise the notion of the rule of law as part of their gaslighting European campaign aimed at deterring responses to increasing autocratisation and corruption at home.

However, with the exception of the funding conditionality tool, the EU is already well equipped to take action towards fixing its rule of law problem. What is needed is more political will to start using these tools.

The Commission's current toolbox

The European Commission's toolbox allows for a differentiated approach to both prevent and respond to threats and attacks on the rule of law and it should make use of them all without hesitation.

The rule of law mechanism that the Commission launched this spring consists of an annual report covering all 27 member states and focuses on the themes of independent courts, anti-corruption, free media and other constitutional checks and balances. The Commission calls this EU-wide objective assessment a preventive tool as it allows for early identification of emerging threats to the rule of law in any member state as such are unfolding in an increasing number of countries well beyond the outlier countries of Poland and Hungary.

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The Commission emphasised that this mechanism is meant to complement the other tools it has to respond to rule of law challenges, among which legal action and suspending EU funds would be the strongest. The rule of law report raised high expectations as many hoped it would be an encouraging signal of change in the Commission's readiness to call out anti-democratic tendencies in member states.

The disappointing reports

Ambition and high expectations led to strong reactions and even disappointment when the rule of law report was published on 30 September.

It was no surprise that the Hungarian government came out to forcefully criticise the report, saying it is the 'wrong report, in the wrong place, at the wrong time' and repeating its nasty smear attacks against Commission Vice President Vera Jourova and Hungarian human rights NGOs that documented the dire rule of law crisis in a 50-page report. The Polish government joined its rule-of-law dismantling ally.

Academics, think tanks and NGOs had a mixed review of the Commission's synthesis and 27 country reports at best. On the positive side, many welcome that all member states are assessed on an equal and annual basis. They agree that as far as the most conspicuous rule of law offenders are concerned, the Polish and Hungarian country chapters are factually correct, though the Hungarian chapter did not include any new elements compared to those discussed in the Council in the Article 7

procedure.

Still, the Commission failed to clearly spell out the stark reality of systemic and deliberate rule of law backsliding in Hungary and Poland. The report's limited scope of topics and time as well as euphemistic and cosmetic language do not reflect how public service media have become awful propaganda tools, or how smear campaigns have instilled a chilling effect on public expression of dissent. Certainly, the reporting project has distracted resources from urgent legal action that the Commission should have been taking to put out fires that are inflaming the house right now (i.e. requesting interim measures in the case of Polish judges facing harassment and intimidation under the guise of disciplinary proceedings).

Now that the diagnosis is complete, the question is what are its consequences and who will take action.

Going after the money

The Commission, as guardian of the Treaties, certainly has a duty to act now to respond to glaring rule of law violations identified in the reports. It should switch from its soft tool of dialogue to its fast precision tools that have strong potential to stop or even reverse otherwise irreparable harm. As several governments seized the Covid-19 crisis to boost the import of methods from autocracies outside the EU and weaken checks and balances on government powers, the Commission could have already taken legal action in Spring 2020 to help contain rule of law backsliding.

Instead of having a dialogue with uncooperative governments, it should use its legal powers to launch infringement action and request interim measures and accelerated procedures at the CJEU. It should have done so to defend academic freedom in 2018 when the Central European University had no choice but to leave Hungary. Now, despite the CJEU ruling in the university's favour, the harm can no longer be undone.

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Lately, the Hungarian government appears to be dragging its feet to fully and properly comply with CJEU judgments. In June 2020, the CJEU found the Hungarian anti-NGO law to be against EU law. Yet not only has the law not been repealed since, but Hungarian authorities have started to enforce it against NGOs seeking Erasmus+ funds after the judgment. The Commission should immediately take steps so that the CJEU can impose financial penalties

for non-compliance.

Going after the money is key, after all. Most Europeans citizens are at least disappointed if not outright angry that the EU is funding the dismantling of democracy and the fueling of hate and division.

We don't need unfulfilled promises

Beyond fines, the Commission could stop funding rule of law offenders and move to suspend EU structural funds already today.

As negotiations about the rule of law conditionality on funding are accelerating and the German EU Council Presidency does not follow through on its promise to protect the rule of law in its proposal on conditionality, it is heartening the see that the largest political groups in the European Parliament are sticking to their stance that European values are not for sale.

Finally, in the fight against rule of law erosion in the EU, we must turn disappointment with the first annual rule of law report into a renewed call for EU institutions to stand up to autocratisation and corruption. It is still the EU Court of Justice and the European Commission that are the strongest institutional supporters of the rule of law at EU level we have today.

We don't need compromises and unfulfilled promises on the rule of law, what we need are sharp tools and the political courage to use them to stop the attacks on it.



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