



Nip it in the bud!

The EU Commission Strengthens the Rule of Law

Franziska Rinke, Hartmut Rank

- › In the European Union, the “Instruments of the Rule of Law” will become even more important in the future.
- › There is a plan underway to publish an annual report on the Rule of Law to reflect the situation in all Member States.
- › The declared aim is to take action much earlier than in the past – meaning, that action should already be taken in the process of promoting an awareness of the Rule of Law.

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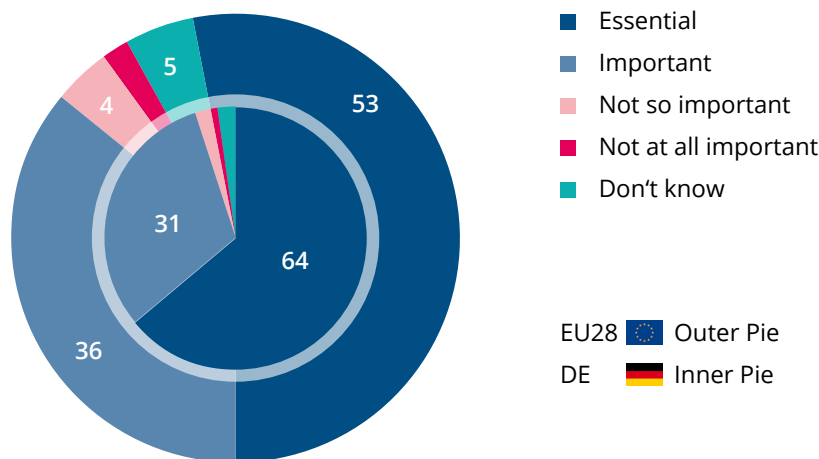
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Only ten years ago, it seemed far-fetched that the European Court of Justice (ECJ) would consider the Rule of Law of a Member State in a ruling. The fundamental values enshrined in Article 2 of the Treaty on European Union (TEU) were taken for granted and were thought to form the basis of our common set of values. The recent past has taught us the opposite.

The EU already has several instruments in place to uphold the Rule of Law. However, there are still shortcomings in the existing instruments.¹ This fact has led the Commission to present an approach to strengthening the Rule of Law in the Union.² The Commission thus also responds to a need expressed by the population. 95 per cent of respondents in Germany consider it to be important or essential that all EU Member States respect the fundamental values of the EU.³

How important for you personally are the following points?

All EU Member States respect the core values of the EU, including fundamental rights, the Rule of Law, and democracy (%)



95 per cent of respondents in Germany consider the consideration of the Rule of Law to be important or essential.

Source: Eurobarometer 91.3 Rule of Law, April 2019, p. 5.

The EU Commission's communication of 17 July 2019 was preceded by a consultative process. The Commission received 60 written contributions from institutional actors, civil society⁴ and science. The Commission's proposals are essentially based on three pillars:

1. Promoting a Rule of Law culture;
2. Preventing the emergence or aggravation of problems, and
3. Options for an effective joint reaction when a significant problem is identified.

The Communication contains 15 pages full of good ideas. Which of these will become reality depends on the political struggle in the coming months and probably years.

1. Promotion of Awareness of the Rule of Law

This pillar is primarily concerned with knowledge transfer, i.e. political education of the general public with regard to standards and the importance of the Rule of Law. "The Rule of Law that divides the powers [...] is based, to quite an essential extent, on a culture of the Rule of Law that cannot be established by law, but which must be present in the consciousness of all those involved and must be experienced daily," according to the recent words of the President of the Federal Administrative Court.⁵ This need has already been recognised in Germany. In March 2019, the Bundestag passed a law establishing the "Stiftung Forum Recht" (Foundation Forum Law), which sets up a documentation, information and discussion centre to make the Rule of Law come alive and palpable for everyone. The access to information and the transfer of knowledge must primarily take place in the Member States themselves. However, the Commission wants to support concrete projects financially and promote European networks. Apart from this, it wants to develop its communication strategies to raise awareness for the Rule of Law. The Commission is also considering an annual event on the Rule of Law to create a platform for dialogue.

The Rule of Law must
be experienced.

2. Prevention of Problems Related to the Rule of Law

It had already been demanded by many sides, but now it is decided: a Rule of Law Cycle. In this context, the factual basis is important to begin with. Concerning this point, the communication remains widely vague. On the one hand, existing sources of information should be used. However, the Commission also intends to make use of data from other organisations. Especially suitable for the "continuous information gathering" process is information held by the Council of Europe and its European Commission for Democracy through Law ("Venice Commission"), the OSCE, the OECD and the European Union Agency for Fundamental Rights. On the other hand, new procedures for gathering information are to be developed. In any case, the Commission intends to engage in dialogue and intensive exchange of information with the Member States. For this purpose, the Member States should set up contact points. There is a plan to publish the results in an Annual Rule of Law Report. The Commission envisions this report to reflect the situation in all Member States. Although the monitoring required for the review would cover all EU Member States, "it would need to be more intense in Member States where risks of regression, or particular weaknesses, have been identified."⁶

Annual Report on the
State of the Rule of
Law in all Member
States.

A special responsibility of the Commission also lies with European political foundations and political parties, which should follow up on the emphasis on the Rule of Law in their pan-European programmes. Following Regulation No 1141/2014 on the statute and funding of European political parties and European political foundations, infringements of the fundamental values of the Union may result in certain sanctions, up to a decision to de-register.

3. Enforcement

The EU Commission “is determined to bring to the Court of Justice Rule of Law problems affecting the application of EU law, when these problems could not be solved through the national checks and balances”.⁷ In the case of infringement proceedings which usually involve long delays, the Commission intends to request expedited proceedings and interim measures. The Commission considers that, overall, it is important that EU institutions act swiftly and have a more coherent and concerted approach. Specifically, the Commission wants to set clearer procedures and timelines for the Article 7 TEU proceeding. Concerning what this could mean in detail, the communication provides several suggestions. The Commission is considering entreating the Council of Europe and its bodies directly to assess specific problems in the Member States, in order to incorporate its expertise. In accordance with the area of “prevention”, the Commission always seeks to de-escalate. For this purpose, the Commission proposes a specific *follow-up monitoring* to ensure a swift exit perspective from the formal Rule of Law process as soon as changes are apparent in the Member State concerned. How this will be done and how it will relate to the general Rule of Law review cycle, remains to be seen.

The Commission requests better coordination and clearer procedures.

The EU Commission also insists on implementing the Regulation on the protection of the Union’s budget proposed in 2018. The proposal combines the identification of shortcomings in the Rule of Law with financial sanctions. The underlying idea is that the absence of the Rule of Law constitutes a lack of ability to control the economic and earmarked use of granted financial resources.⁸ The concrete design of such a protection instrument is not yet clear from the Commission communication. An intensive data for the protection of the financial interests of the EU is mentioned. However, when a measure in reaction to reports by the European Anti-Fraud Office (OLAF) is followed “only hesitantly and to a limited extent” or “only slowly” and not fully cooperating with the European Public Prosecutor’s Office (EPPO), is still very ambiguously formulated. It is also still unclear exactly which data should be collected and used as a basis for decision-making.

A lack in Rule of Law should be tied to financial sanctions.

4. Conclusion

Overall, the communication is still too vague to define concrete new instruments for measuring or protecting the Rule of Law standards. The communication remains an outline, but it is a renewed, clear reminder from the outgoing Commission that the complex of issues of “Rule of Law instruments” is to become even more important in the future. The concrete configuration will fall into the phase of the next EU Commission. It is to be expected that the desired process will be continued under the designated EU Commission President Ursula von der Leyen. During Finland’s current presidency of the Council of the EU, signals can be expected from the Council as to how the governments of the Member States envision the strengthening of the Rule of Law. It has set itself the goal of reviewing its dialogue on the Rule of Law.

Nevertheless, some concrete positive signals can be seen in the Commission’s communications of summer 2019.

1. It is evident that the Commission’s aim is to take action much earlier than has hitherto been the case. It is precisely the shift towards promotion and prevention that seems to be an appropriate way of countering the worrying developments within the EU. However, we should not deceive ourselves in this respect. In the end, the implementation of concrete measures is the responsibility of the individual Member States. In the case of a

A shift to promotion and prevention.

government that is already intervening massively in the foundations of the Rule of Law, it probably has little interest in informing its citizens about this in detail. The proposed measures nevertheless make sense, as the entire EU must be kept in mind and not just the “problem cases”.

2. The new set of instruments for a regular Rule of Law review should affect all Member States. This can help to refute the accusation of double standards within the Union, which could be heard repeatedly in recent times, and to make the debates on Rule of Law issues more objective. Particularly in Bulgaria and Romania, which have been EU members since 2007 and have been subject of the “Cooperation and Verification Mechanism” for the same amount of time, the displeasure about the ongoing procedure had grown recently. Nevertheless, it is still unclear how the vague terms (“danger of regression”, “special shortcomings”, “with increased intensity”) can be defined without provoking renewed accusations of arbitrary or politically-motivated action on the part of the states concerned.
3. The Commission’s proposed approach, particularly in the third area, is supported by the current case law of the ECJ. The enacted judgments will play an important role in solving similar conflicts.

The mills of Brussels grind slowly, as shown by the fact that the European Parliament had already proposed an annual report on democracy, the Rule of Law and fundamental rights in 2016. However, the EU Commission’s proposals are a further contribution on the way to a continuous dialogue. Finally, new Rule of Law instruments that are clearly defined, and allow direct comparison, could in future also help to point the way out of the recent impasse in the discussions on the EU expansion process: If the standards applicable in the Union, in the area of the Rule of Law, were formulated as standards to be fulfilled by EU candidates, both the EU and the candidate countries would have measurable criteria. This would contribute to strengthening the credibility of the Union, which has recently suffered in the Western Balkans.

An important
contribution for con-
tinuous dialogue.

Measures to strengthen the Rule of Law in the European Union should be implemented through:

- › Promotion: Building knowledge and a common Rule of Law culture
- › Prevention: Cooperation and support to strengthen the Rule of Law at national level
- › Response: Enforcement at EU level when national mechanisms falter

[Communication of the EU Commission of July 2019]

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- 1 In detail: Wientzek, Olaf: in short no. 31/January 2019, "More Europe" to strengthen the Rule of Law <https://www.kas.de/en/kurzum/detail/-/content/mehr-europa-zur-staerkung-der-rechtsstaatlichkeit> [12.11.2019]; Krichbaum, Gunther: Wahrung der Rechtsstaatlichkeit, Die Politische Meinung No. 554, January/February 2019, p. 83ff.
 - 2 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic, and Social Committee and the Committee of the Regions of 17.7.2019 COM(2019) 343 final.
 - 3 Eurobarometer on the Rule of Law (April 2019), available at <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2235> [23.7.2019].
 - 4 The contribution of the KAS is available at https://ec.europa.eu/info/files/stakeholder-contribution-rule-law-konrad-adenauer-stiftung_en [23.7.2019].
 - 5 Rennert, Klaus: Kann die Justiz den Staat zwingen?, FAZ of 18.7.2019.
 - 6 Communication of the Commission, p. 10.
 - 7 Communication of the Commission, p. 13.
 - 8 Krichbaum, Gunther: Wahrung der Rechtsstaatlichkeit, Die Politische Meinung No. 554, January/February 2019, p. 85.

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The Author

Dr Franziska Rinke is the International Rule of Law Programmes coordinator. She is working from the headquarters in Berlin.

Hartmut Rank is Head of the Rule of Law Programme South East Europe, based in Bucharest/Romania.

Konrad-Adenauer-Stiftung e. V.

Dr. Franziska Rinke

International Rule of Law programmes coordinator

T: +49 30 26996 3507

franziska.rinke@kas.de

Hartmut Rank, LL.M., MBA

Head of the Rule of Law Programme South East Europe

European and International Cooperation

T: +40 21 – 3020263

hartmut.rank@kas.de

Postal address: Konrad-Adenauer-Stiftung e. V., 10907 Berlin

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