



Rule of Law within the Union

Invitation to send your comments and answers

European **Political**
Strategy Centre

The European Commission published a **Communication**¹ on 3 April 2019, taking stock of the available tools to monitor, assess, and protect the Rule of Law within the Union, and looking back at experiences and challenges of the past years.

It outlines **three pillars** that could contribute to making the enforcement of the Rule of Law in the Union more effective – namely: better **promotion**, early **prevention** and tailored **responses**. The Commission invites the European Parliament, the European Council, the Council and Member States, as well as relevant stakeholders, including judicial networks and civil society, and the public at large, to reflect on a series of questions around each of these areas.

The EPSC has been tasked with reaching out to experts, academics, think tanks, and decision-makers to feed into this reflection, which will be crucial for the next policy cycle. In this context, we believe that you/your institution can make a highly valuable contribution to the debate and **we would like to invite you to send your comments and answers** to the questions raised in the Communication, in any of the EU languages, to the following two email addresses:

EU-RULE-OF-LAW-DEBATE@ec.europa.eu

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by Tuesday, 4 June 2019 (closure of business) at the latest.

This will enable us to incorporate feedback received in a **second Communication**, due in June 2019, containing conclusions and concrete proposals for strengthening of the Rule of Law in the Union, within the framework of the current Treaties.

Please, provide your comments and answers in the relevant boxes below (limit of 4000 characters per text box). **We would very much appreciate your contributions.**

Should you have any **questions or remarks**, please do not hesitate to contact the Head of the EPSC's Institutional Team:

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¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN>.

1. Promotion: Building knowledge and a common Rule of Law culture

Possible questions for further reflection

- How can the EU better promote the existing EU legal requirements and European standards relating to the rule of law, in particular at national level?
- How can the EU best encourage key networks and civil society, as well as the private sector, to develop grassroots discussions on rule of law issues, including its economic dimension, and promote the standards underpinning the rule of law?
- Can Member States do more to promote the discussions on the rule of law at national level, including for example through debates in national parliaments, professional fora and awareness raising activities addressed to the general public?
- How should the EU and its Member States step up cooperation with the work of the Council of Europe and other international organisations that uphold the rule of law, including by supporting the work of the Council of Europe and with regard to evaluations and recommendations of the Council of Europe?
- How can the EU build on the work of the Council of Europe and promote common EU approaches? Can peer review between Member States help in this process?
- How can the existing steps taken by the European Parliament and the Council be improved and further developed? Can political groups and national parliaments be more engaged?

Promotion: Building knowledge and a common Rule of Law culture
(limit of 4000 characters)

Current proposals to contrast the erosion of the rule of law in EU member states predominantly focus on persuading and correcting governments by means of *formal-legal* instruments and procedures (as appears also evident in the general EU approach). It is, however, crucial that the *societal dimension* – not least in terms of civic debates on, appreciation of, engagement with, and empowerment by human rights and the rule of law - is equally addressed. Citizens and civil society may play a significant ‘counter-democratic’ role (Rosanvallon 2008), in which institutions and their behaviour are monitored (e.g. as in recent years manifested in the Romanian anti-corruption movement).

Key attention needs to be paid to the awareness of the *practical functions and benefits of human rights* and the *rule of law*, that is, how the law and constitutional norms matter in distinctive cases, in what specific ways, and for whom. The civic awareness of legality, constitutionality, and rights is crucial for a functioning constitutional democracy. Without important civic engagement, it is difficult to see how enduring social and political attachment to the law and ‘constitutional patriotism’ might emerge, and how the erosion of the rule of law might be halted. In the medium- to longer term, citizen awareness of the critical nature of citizens’ direct participation in judicial practices, legal/legislative debates and constitutional reforms (not least as a democratic right) ought to be raised (practical inspiration can be derived from recent innovative practices and reforms in various European countries, including citizen deliberation in the *Irish Constitutional Convention*, public debates in prominent cities in the *Romanian Forumul Constituțional*, while also the transnational mobilization of citizens by *European Alternatives* ought to be mentioned). In sum, important attention should be paid to the promotion of distinctive instruments that allow citizens to participate in public debate and even in policy-making, and which may enhance a unique ‘learning effect’ by active engagement politico-legal matters such as human rights, constitutional norms, and the role of the rule of law. Specific instruments include deliberative fora/mini-publics; forms of citizens’ initiatives (not least the European Citizens’ Initiative), as well as more spontaneous, bottom-up forms of civic mobilization. It is crucial that such processes include a variety of actors: policy-makers, politicians, administrators, scholars/experts, civil society, citizens.

In addition, it is of great importance that citizens perceive human rights as protective instruments for *all* citizens, not merely for marginalized or minority groups, and understand civil society organizations as pivotal parts of democratic society in their quality of counter-democratic or civic-democratic institutions. Civil society organizations and NGOs themselves can play a significant role, using distinctive techniques and narratives to explain constitutional norms and human rights in terms that are closer to citizens (for instance, by means of the usage of social media and personalized stories of ordinary citizens). One significant instrument to enhance awareness is civic education, which is best not limited to school curricula (often controlled by adverse governments), and may need to include a bottom-up dimension, initiated by civil society organizations themselves.

More attention ought also to be paid to the public discussion of the deleterious effects on - in particular - education due to the erosion of the rule of law, in particular for younger generations (e.g. the lowering of the quality of (higher) education with effects for future employment opportunities, the effects of censorship and the reduction of educational choice due to the narrowing of curricula).

2. Prevention: Cooperation and support to strengthen the Rule of Law at national level

Possible questions for further reflection

- How can the EU enhance its capacity to build a deeper and comparative knowledge base on the rule of law situation in Member States, to make dialogue more productive, and to allow potential problems be acknowledged at an early stage?
- How can existing tools be further developed to assess the rule of law situation?
- How could exchanges between the Commission and Member States on rule of law issues be most productively organised?
- How can EU expertise and support be most effectively channelled to Member States?
- Can preventive steps be given weight through a more inter-institutional approach?

Prevention: Cooperation and support to strengthen the Rule of Law at national level
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It is crucial to identify, map, and assess distinctive local, contextual issues and problems concerning the rule of law and democracy. These may include problematic or incomplete forms of social and political integration and value conflicts around constitutions, problematic legal-constitutional legacies, and/or the local 'translation' of legal transplants. In the case of the new EU member states, such problems should at least be partially understood as part of complex processes of post-communist Communist transformation. Crucial issues are distinctive political problems, such as deeply embedded forms of corruption, the status of minority groups, problematic judicial legacies related to Communism, or acute social problems, such as poverty, inequality, and exclusion. A highly salient issue is the incomplete *Vergangenheitsbewältigung* or confrontation with the past in various societies (in particular with regard to transitional justice and lustration). Constitutional norms and practices ought to strike member of society as relevant for their own situation, and as useful instruments in dealing with such specific and complex societal problems. Political and constitutional institutions would gain significantly in legitimacy, if people perceive political and legal institutions and practices as offering decisive practical implications solutions for the most pressing problems in their societies.

The enhancement of EU capacity to build a deeper and comparative knowledge base on the rule of law situation in Member States, to make dialogue more productive, and to allow potential problems be acknowledged at an early stage ought to start from the insight that different member states struggle with distinctive problems regarding the rule of law, judicial institutions, and the institutionalization of democracy. The EU – in framing a potential response – should be cautious regarding putting too much weight on abstract, sweeping, top-down, and universalistically formulated solutions and rather endorse a multi-partner process (a multi-logue), including scholars/experts (including historians, political scientists, and sociologists) and citizens in identifying the main issues and urgencies. In the case of the new EU member states, part of the problems have to do with the absence of the emergence of a widely carried narrative on democratic and human rights, not least due to an overly formalistic form of (legal) education and a lack of attention to 'democratic citizenship' in educational curricula. Such a contextually sensitive approach ought to equally pay due attention to what is currently one of the main problems in both old and new member states, that is, an increasingly negative public assesment of supranational legal norms and institutions (including both the EU/ECJ and the ECtHR).

3. Response: Enforcement at Union level when national mechanisms falter

Possible questions for further reflection

- How can the relevant case law of the Court of Justice be effectively disseminated and its potential fully used?
- How can the Commission, the European Parliament and the Council coordinate more effectively and ensure a timely and appropriate response in case of a rule of law crisis in a Member State?
- In what ways could the Rule of Law Framework be further strengthened? Should this include more engagement with other institutions and international partners (e.g. Council of Europe/Venice Commission, Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights)?
- Are there other areas, in addition to the EU's financial interests, where the EU should develop specific mechanisms (including rule of law-related conditionalities) to avoid or remedy specific risks to the implementation of EU law or policies?

Response: Enforcement at Union level when national mechanisms falter
(limit of 4000 characters)

A unilateral, top-down approach of the European Union, grounded in the logics of conditionality, involves a number of important risks, which may ultimately compromise the objectives of strengthening the rule of law and democracy. This has, first of all, to do with the substance and logic of conditionality itself. The teleologic view behind the idea of conditionality is in clear need of revision, not least in the light of developments within both old and new EU member states. Conditionality is informed by the idea of what sociologists call 'modernization', which separates solid and long-standing modern democratic states from 'less modern', 'traditional', or 'developing' societies. The logic and template of modernization presupposes that the associated states need to follow the same logic and trajectory in democratization and institutionalization of the rule of law as those of so-called established democracies. There is much in this approach that is open to doubt and critique, not least the a-historical and context-insensitive nature of these presuppositions. With regard to the rule of law, this means that a thorough, contextual assessment of the effects and implications of formal rule of law mechanisms is preferable over a general, European-wide 'check list'.

Secondly, conditionality - such as the one that was part of the Eastern Enlargement process - is unlikely to produce the beneficial outcomes that are expected, and hence to realize the 'modernization' agenda in practice. The one-sided legalistic or rule-based approach, informed by the modernist view that was already evident in the enlargement conditionality regarding East-Central Europe, has led to important failures, as not least shown by the contemporary developments in Hungary and Poland. EU policy has been one-sided in the sense that a formalistic rule transfer was preferred over deeper engagement with local realities and path dependencies. In addition, the effects of EU-driven constitutional and rule of law reforms are 'context-dependent' and the realities of both old and new member states frequently display highly problematic features, not least related to the type of 'agents' that are supposed to undertake structural reforms. In this, a top-down rule of law approach, in concomitance with a conditionality process, is prone to stimulate an instrumental, rather than a normatively driven, value-based engagement with reforms.

In sum, one needs to be wary of too optimistic expectations regarding the international transfer of constitutional-legal norms and designs, without structurally supporting (the learning processes of) societal and political forces that are to uphold institutions and without taking distinctive contexts and historical trajectories into due account. The (implicit) legal-constitutionalist template that has been prominent in the East-Central European transformation processes suffers from potential defects that might produce perverse effects with regard to the institutionalization of constitutional democracy and the rule of law (as arguably has become visible in Poland, and Hungary in particular).