



HR HELSINKI FOUNDATION
for HUMAN RIGHTS

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Opinion
on the Communication from the Commission to
the European Parliament, the European Council and the Council concerning
“Further strengthening the Rule of Law within the Union.
State of play and possible next steps” (COM(2019)163 final)¹

The Helsinki Foundation for Human Rights (“HFHR”) and the Hungarian Helsinki Committee (“HHC”), two leading national human rights organisations, based in Warsaw and Budapest, welcome the opportunity to contribute to the public consultation on the Communication from the European Commission to the European Parliament, the European Council and the Council concerning “Further strengthening the Rule of Law within the Union. State of play and possible next steps”² (“the Communication”).

Since their founding in 1989, thirty years ago, both HFHR and HHC have been monitoring threats to human rights protection and providing representation to victims of human rights abuses in legal proceedings before national and international courts. Since 2010, in the case of Hungary, and 2015, in the case of Poland, HFHR and HHC have been actively monitoring and reporting on the scale and consequences of the rule of law crises in their countries.

HFHR and HHC strongly believe that the rule of law is one of the fundamental values of the European Union as a community that protects democracy and human rights. Moreover, the duty to uphold and protect the rule of law is a shared responsibility of the European Union, Member State governments and civil society. Thus, in our remarks we will primarily focus on the perspective of civil society organisations and their challenges and obstacles in accessing European Union stakeholders in the processes of monitoring and upholding the rule of law.

¹ The opinion was prepared by Márta Pardavi, HHC co-chair and Małgorzata Szuleka, HFHR head of advocacy, in cooperation with Maciej Kalisz, HFHR lawyer. The authors would like to express their gratitude to Barbara Grabowska-Moroz, Ph.D. (University of Groningen) for her comments and input to the previous version of this text.

² Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps, COM/2019/163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN>

1. Scope of the opinion

As a part of the consultation process, HFHR and HHC wish to present their remarks on the Communication and their experience on the functioning of two already available rule of law tools in practice, namely, the Rule of Law Framework and the procedure provided by Article 7 of the Treaty on European Union.

2. General remarks

2.1. [Rule of law crisis] The undermining of the rule of law poses a serious threat to democracy in Hungary and Poland and increasingly to cooperation between EU member states.

In Hungary, the governing majority changed the Constitution in 2011 and then adopted numerous amendments to the legal system, which effectively dismantled checks and balances, undermined the independence of institutions meant to counterbalance the power of the executive branch and suppressed the freedom of media, academia and civil society³.

In Poland, for the last four years, the governing majority has attempted to change almost the entire governance system of the state, without, however, changing the Constitution. Similarly to the governing majority in Hungary, the Polish governing party carried out orchestrated attacks on independent institutions, especially the judicial system, by adopting almost twenty different pieces of legislation which were all aimed at the same goal: widening political control over courts and packing the courts with people hand-picked by the governing majority.

Despite a lot of criticism and certain measures taken by the European Union, such as infringement actions launched by the European Commission, in both Poland and Hungary these changes have resulted in the lack of systemic protection for the rule of law.

2.2. [Role of the civil society organizations in upholding the rule of law] While independent institutions (including courts, public media and the office of the Ombudsman) have been effectively weakened, civil society has developed into an essential actor in monitoring and analysing the scope of the democratic crisis. Civil society organisations have a unique expertise that combines both analysing systemic changes in legal system and assessing how such changes weaken the protection of victims of human rights violations before national courts or administrative authorities. Furthermore, civil society organisations play a crucial role in providing information to the monitoring mechanisms of international organisations, such as the Council of Europe or the United Nations.

2.3. [Shrinking civic space] The on-going constitutional crises in Hungary and Poland accelerate the process of shrinking of civic space. The access of civil society

³ Dimity Kochenov, Petra Bard, *Rule of Law Crisis in the New Member States of the EU. The pitfalls of overemphasizing enforcement*, available at: https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf

organisations to participate in any public consultation proceedings, especially concerning new laws and policies, has been greatly reduced in practice⁴. The extremely accelerated legislative process that often circumvents the legal requirements on public consultation relating to key pieces of national legislation pose often impossible obstacles for NGOs to present their opinions and concerns regarding the impact of laws on human rights protection. The limitations on access by civil society organisations to consultation proceedings at the national level should be counterbalanced by expanding their possibility to engage in the international monitoring mechanisms in a more meaningful manner.

3. CSO experience with the Rule of Law Framework

3.1. [General remarks] The European Commission set out the Rule of Law Framework in 2014 as a reaction to the legal and policy developments occurring in Hungary since 2010. The main aim of the Framework is “to ensure an effective and coherent protection of the rule of law in all Member States” and to tackle “systemic threat to the rule of law”. Designed as a “bridge between political persuasion and targeted infringement procedures on the one hand, and [...] the nuclear option of Article 7 of the Treaty”⁵, the Framework is perceived as a pre-Article 7 procedure -- in the case of Poland, however, this resulted in avoiding the triggering of the Article 7 procedure for as long as it was possible.

In January 2016, in response to the unprecedented attacks on the Polish Constitutional Tribunal and the public media, the European Commission decided to launch the Rule of Law Framework and start a dialogue with Poland. However, almost two years of systematic dialogue by the European Commission with the Polish government yielded no concrete solutions that would have convinced the Polish government to amend the changes in the judicial reform in accordance with international standards on the independence of judges and courts. The deficiencies in the design of the Rule of Law Framework were also among the reasons why the procedure failed in the case of Poland.

The Framework was designed as a procedure based on a “constructive dialogue” with the Member State concerned. It requires a high level of confidentiality in order to secure fruitful discussions between the Commission and Member State institutions (governmental representative). The Commission’s Communication underlined that “the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate quickly reaching a solution”. This is, however, difficult to combine with the public and fundamental nature of the issues being discussed under the Framework – the independence of judiciary, the separation of powers or the transparency of the legislative process.

The dialogue approach precludes the transparency of the whole process; in turn, limited transparency impedes the Commission’s ability to fully assess the situation in a Member State. Diplomatic dialogue seems also to be problematic when the discussed

⁴ Fundamental Rights Agency, *Country studies for the report 'Challenges facing civil society organisations working on human rights in the EU'*, available at: <https://fra.europa.eu/en/country-data/2018/country-studies-report-challenges-facing-civil-society-organisations-working-human>

⁵ Jose Manuel Barroso, *State of the Union address 2013*, available at: http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

topic is a purely legal one. The publication of judgments of the Constitutional Tribunal and their implementation do not leave much space for negotiation, whereas the notion of “discussion” assumes that the rule of law can be negotiable and that it is possible to destroy the constitutional safeguards of checks and balances and then simply discuss this with the Member State.

Hence the Rule of Law Framework should be strengthened in its “administrative” aspects to ensure its transparency and the Commission’s broad access to relevant information.

3.2. [Sincere cooperation in debate about the rule of law] The Rule of Law Framework – as provided in the Commission’s Communication – extensively relies on i) a will of a Member State to cooperate and discuss the issues undermining rule of law at national level and ii) an assumption that a Member State “refrains from adopting any irreversible measure in relation to the issues of concern raised by the Commission”.

Regrettably, both of these elements were absent in the Framework initiated against Poland. Ineffective attempts at conducting a constructive discussion delayed the triggering of Article 7 TEU while irreversible changes had already occurred. The Framework against Poland, introduced in January 2016, concluded in December 2017. However, basically no rule of law improvement was achieved. The lengthy process allowed the Government to implement numerous legislative changes weakening public media, the prosecutor’s office, common courts, the Supreme Court and the criminal justice system.

Taking action without delay is absolutely crucial for the Rule of Law Framework to be effective. The recommendations adopted by the Commission in December 2016 showed that the Commission can take action immediately and directly when crucial decisions have been made (e.g. when the new law on Constitutional Tribunal was adopted and the new acting-President of the Constitutional Tribunal was about to be appointed).

3.3. [Limited access for civil society organisations] One of main principles underpinning the Framework is to ensure an objective and thorough assessment of the situation at stake.

In order to achieve this goal, access to different sources of information is required, especially at the first stage of the procedure (assessment). The Commission recognised the possibility of seeking external expertise from the Fundamental Rights Agency, as well as from members of the “judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils”. However, the Commission did not recognise the role of non-governmental organisations, media or academia as sources of information relevant for a full and correct assessment of the situation in a Member State. Non-governmental actors are indispensable to verify the information provided by the government. That is why openness to non-governmental actors and independent institutions is absolutely crucial for data gathering and to ensure that as situations develop dynamically at the national level, up-to-date information is available for a variety of sources. We do regret to observe that also in this enhanced

model of monitoring of the rule of law, the Commission failed to fully recognise the role and potential of civil society organisations.

4. CSOs experience with the process of triggering Article 7 of the Treaty on European Union

4.1. [General remarks] Contrary to the case of Poland, for Hungary it was not the European Commission that triggered the process on Article 7(1) TEU but the European Parliament with its vote held on 12 September 2018⁶. Hence our experience as a Hungarian civil society organisation is limited to interactions and contributions to the work of the European Parliament and its members in the process leading up to the Resolution calling on the Council to determine the existence of a clear risk of a serious breach of the values in Article 2 TEU by Hungary.

In comparison to the Rule of Law Framework launched in the case of Poland, the European Parliament's procedure related to Article 7 with regard to Hungary afforded a relatively transparent and accessible platform for contributions from civil society, the public or other interested organisations.

4.2. [Pre-Article 7 procedure] The European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) held two hearings in the course of its deliberations on Hungary, on 27 February 2017 and 7 December 2017. On both occasions, experts from Hungarian civil society organisations, who had been previously agreed on in LIBE to receive invitations (including the Hungarian Helsinki Committee's co-chair), had the opportunity to address members of the European Parliament. The hearings were open to the public and were also live-streamed on the Internet. Hungarian media covered the hearings and the entire process in the EP in great detail (and the Hungarian state television also broadcasted the hearings live). Civil society organisations, based in Hungary or elsewhere in the EU, had the opportunity to express their concerns about threats to core European values to any or all members of Parliament, and many did make use of these opportunities by publicly disseminating information materials and meeting members of the EP, the rapporteur or the shadow rapporteurs.

4.3. [Threats to the civil society] Given the increased transparency of the parliamentary process and the highly charged political atmosphere in Hungary over the looming triggering of the process on Article 7(1) by the EP, those civil society organisations or individuals who had conveyed their views to the EP, either in writing, in person meetings or by attending the hearings in LIBE, were frequently subjected to harassment as a result of their participation. Individuals and human rights organisations had to endure smear campaigns in the propaganda media and verbal threats from individuals in social media or on the telephone. The Hungarian Helsinki Committee experienced a flood of harassing mail, social media messages and telephone calls already when the December 2017 hearing in LIBE was still in session, due to the live television broadcast on state media and the overall contexts of restrictions and harassing narratives that human rights NGOs operate under in Hungary. Now that the Council has triggered the process relating to Article 7(1) TEU, the process fully lacks transparency or accessibility for civil society organisations and

⁶ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))

the general public. Civil society does not have any access to the Council when discussions about the rule of law and fundamental rights in Hungary are taking place.

5. Recommendations

The Helsinki Foundation for Human Rights and the Hungarian Helsinki Committee make the following recommendations to the European Commission:

5.1. Promoting the rule of law by building knowledge and a common Rule of Law culture

- 5.1.1. The EU should consider the rule of law as part of its critical infrastructure and make significant investments to enhance its resilience. It should significantly increase the funding allocated for this purpose within and beyond the EU institutions⁷.
- 5.1.2. With threats to the rule of law emerging and deepening in an increasing number of Member States, the Commission should have expanded capacity to address and investigate these phenomena.
- 5.1.3. The EU should significantly increase support for national independent institutions (National Human Rights Institutions, where appropriate) and civil society in promoting a rule of law culture locally.

5.2. Ensuring transparent and broad access for civil society to contribute to the prevention of and responses to threats to the rule of law

- 5.2.1. Broader inclusion of EU citizens into debates about the rule of law in Member States can strengthen the legitimacy of the European Commission when addressing systemic rule of law deficiencies. Without including civil society, discussions about the rule of law cannot be fully constructive, objective and well informed.
- 5.2.2. Designating a Rule of Law Coordinator in the European institutions, at least in the European Commission, would improve transparency and access for civil society and external actors wishing to contribute and receive information about promotion, prevention and response on rule of law issues.
- 5.2.3. Setting up structured means of input from civil society would greatly enhance transparency of the process. The methods developed and used by the monitoring mechanisms of the United Nations human rights treaty bodies could serve as a model to build on in this respect, where there are clear rules about how those wishing to contribute information may do so, and such information is made publicly available. Furthermore, the European Commission Transparency Register could serve as a model for, or be used as a tool for ensuring that civil society organisations that contribute information to preventing or responding to threats to the rule of law are transparent themselves about their work.

⁷ See further: *Liberties, European Parliament Votes to Better Protect Freedoms, But Council Yet to Agree*, available at: <https://www.liberties.eu/en/news/ep-vote-values-program-freedoms-democracy-civil-society-human-rights/16805>

5.2.4. The broader and structured inclusion of civil society, however, presupposes that organisations and individuals who submit information to the EU institutions on developments and threats to the rule of law in Member States are themselves protected against reprisals or other risks for taking action. Establishing structured access would also contribute to protecting against possible negative consequences, such as reprisals, smear campaigns, harassment of civil society organisations or individual human rights defenders, by sending a clear message that the role of civil society is recognised and their contributions are valued by the European institutions.