

Rule of Law in Limbo

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Since 2010, the rule of law in the EU has weakened, most notably in Hungary and Poland. Political scientist Daniel Hegedüs analyses the state of play on rule of law in Europe, arguing that the effectiveness of steps taken to sharpen the EU's powers to countersteer this autocratic turn will ultimately depend on the political will behind them. With incoming Commission chief Ursula von der Leyen having already signalled that her commitment to protecting this fundamental EU value is not unconditional but tied to political ends, the future of rule of law in Europe, and with it the future of the EU itself, hangs in the balance. October elections in Hungary and Poland will be the first hurdles to determine the path forward.

The incoming European Commission, led by Ursula von der Leyen, inherits a difficult legacy in the rule of law field from its predecessors. While the second Barroso Commission and the Juncker Commission established new institutions in defense of rule of law in EU member states, they were not able to deploy anything that could reverse the ongoing autocratisation of Hungary and Poland. On the contrary, despite the Commission's efforts, the backsliding on rule of law and democratic standards appears to be spreading inexorably throughout the EU, especially in its eastern part.

Although the overall balance of the outgoing Commission on rule of law is hardly positive, 2019 was marked by significant institutional, legal, and political developments that promised a potential breakthrough regarding the enforcement of fundamental European values. The Court of Justice of the European Union (CJEU) delivered groundbreaking judgements in defense of judicial independence, while the Commission altered its former course and began relying more heavily on the CJEU in sensitive, rule of law related infringement procedures against autocratising member states. Last but not least, in July 2019 the Commission adopted its new Rule of Law Communication that envisaged the introduction of an annual rule of law monitoring exercise for all EU member states, perhaps the most significant rule of law related improvement in the EU's institutional framework since the introduction of the Article 7 procedure by the Treaty of Amsterdam.

Notwithstanding, in the assembly of the new von der Leyen Commission, dark shadows were cast over previous positive developments. President-elect von der Leyen's approach to rule of law and other EU fundamental values appears rather to be a delicate balancing act than the straightforward commitment she made in the European Parliament before her election. Although the team in charge of the rule of law portfolio (made up by Czech nominee Věra Jourová and Belgian candidate Didier Reynders) appears to be capable and committed, whether in difficult times they can count on the political support of the Commission President is not beyond any doubt. Furthermore, offering Poland and Hungary the important Commission portfolios they wanted gives the impression that von der Leyen seeks to please Europe's key autocrats in Warsaw and Budapest. Putting the Hungarian Commissioner – whoever he or she ultimately will be – in charge of enlargement and neighbourhood policy, and thus of accession conditionality and the EU's normative power, demonstrated her striking ignorance toward European values.

So, whether rule of law and democracy face a brighter or darker future under the next European Commission is

definitely not set in stone, as certain trends point in both directions. This article takes the most significant dynamics into account in order to identify the opportunities and challenges that in the coming years may determine the political conflicts around compliance with European values. Ultimately, it is up to the friends of rule of law and democracy in the European institutions, civil society and in EU member states, to determine whether the positive scenario can prevail.

Growing political commitment or short-lived lip service?

According to [Article 2 of the Treaty on European Union](#), “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Precisely these fundamental European values have come under significant pressure or have been completely hollowed out in certain EU member states.

This authoritarian development has gone furthest in [Hungary](#) and [Poland](#), where – in various forms and with largely different methods – the checks and balances of liberal constitutionalism have been neutralised, media pluralism has been significantly narrowed down, and the independence of ordinary justice has been seriously undermined by the incumbents. In Hungary, even the electoral rules were amended to benefit the party of Prime Minister Viktor Orbán, Fidesz. The Organization for Security and Co-operation in Europe’s (OSCE) electoral observation missions in charge of the [2014](#) and [2018](#) Hungarian parliamentary elections raised serious concerns regarding both elections’ compliance with democratic principles.

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While the European institutions have tried to countersteer anti-pluralist developments, they have only managed to slow them down and ultimately have been unable to turn the tide of authoritarianism. The reasons are manifold, but it is fair to say that since the emergence of the Hungarian and Polish autocratic challenges in 2010 and 2015, the proper enforcement of European values in these two member states has suffered mostly from [the lack of appropriate political will in the European institutions rather than from the shortcomings of the available institutional and legal tools](#).

Against this backdrop, it was encouraging to see the growing commitment of European political parties to rule of law in the run-up to the 2019 European Parliament elections. Mainstream parties have been eager to introduce certain symbolic sanctions against the representatives of illiberal development in their own ranks. Most notably, in March the right-conservative European People’s Party (EPP) [suspended the membership of Orbán’s party, Fidesz](#). The Party of European Socialists (PES) declared in April that it [would freeze its relations with the Romanian Social Democratic Party](#) due to the planned Romanian legislative reforms undermining judicial independence and the persecution of corruption in the country. ALDE, the liberal predecessor of Renew Europe, also [excluded its Romanian member party, ALDE Romania](#), for supporting PSD’s legislative reform.

The pressure exerted by the European party families demonstrated how significant European political leverage can be over non-complying national governments and governing parties. The Hungarian government suspended the implementation of its highly criticised administrative court reform, while Romanian Prime Minister Viorica Dăncilă completely dropped PSD’s controversial judicial reforms.

Commitments to rule of law also played a significant role in the mainstream parties' European electoral campaigns and beyond, reaching their high water mark in von der Leyen's opening statement as Candidate to the Commission Presidency before the European Parliament, where she emphasised that "there can be no compromise when it comes to respecting the rule of law".

Unfortunately, a political ebb soon followed. The European Socialists reinstated the dialogue with the Romanian PSD in the aftermath of the European elections as soon as June 2019, and it will be less than surprising if the November 2019 congress of the European People's Party restores the status of Fidesz as an ordinary member of EPP. Following her nomination, von der Leyen launched a charm offensive – both at the level of political communication and substantial power decisions – towards the Polish government of the national-populist Law and Justice (PiS) party and her Hungarian fellow-EPP colleague Viktor Orbán.

After being supported in the European Council by the Polish and Hungarian governments and in the European Parliament by PiS and Fidesz MEPs, von der Leyen noted that "In central and eastern European countries, many feel that they're not fully accepted, and if we guide debates as sharply as we have done, it contributes to countries and peoples believing that they are being targeted as a whole". Concerning the rule of law track record of Poland and Hungary, she ultimately stated that "nobody's perfect".

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It is of course understandable that the new Commission President would like to give a chance to a constructive working relationship with rather challenging partners, to say the least about the illiberal governments in Warsaw and Budapest. The problem is that she repeats, confirms and enforces the discursive frames used by the illiberal governments themselves, claiming that the conflict around rule of law is embedded in a broader East-West conflict within the European Union, in which Eastern member states are 'persecuted' and 'witch hunted' simply because they are 'different'. Instead of sticking to the line of argumentation that the rule of law related criticism toward Hungary and Poland is fact based and rooted in a politically neutral process, as is demonstrated by the Commission's own infringement procedures and – in the case of Poland – by CJEU rulings, von der Leyen's discourse erodes the Commission's own institutional positions.

The Article 7 procedures against Poland and Hungary are by no measure 'witch hunts' initiated by allegedly pro-migration, liberal European elites due to the anti-migration positions of the Polish and Hungarian governments, as Judit Varga, the Hungarian minister of justice, commented. Von der Leyen should consciously separate the wheat from the chaff in her strategic communication and refrain from paying any lip service to the illiberal narrative. As Dutch social-liberal MEP Sophie in't Weld put it in her response to Varga, Hungary is "not put 'on pillory' for rejecting mass immigration, but for violating human rights, destroying the rule of law and non-compliance with EU law." Any alteration from this fact-based discourse, whatever political goals it may serve, is in conflict both with von der Leyen's position as President of the European Commission and with the Commission's role as the 'Guardian of the Treaties'.

The Commission's portfolio distribution – short sighted and ignorant, but redeemable

Adding injury to insult, von der Leyen's 'détente' policy towards Europe's autocrats has not been limited to the communication field. Proposing the agricultural portfolio for Poland and the enlargement and neighborhood portfolio for Hungary, the very commissioner posts these countries wished for, gave the sobering impression that the new Commission President is not concerned about the symbolic messages she sent and the practical challenges she created with her choice. More importantly, von der Leyen indicated that she had open political bills to be paid, offering attractive Commission positions in exchange for the support formerly provided by PiS and Fidesz to her election, something which says little in favor of her political autonomy.

Offering the enlargement and neighborhood portfolio to Hungary appears to be an especially backwards step away from European values. The commissioner in charge of that portfolio should promote exactly the same values towards candidate countries and partners in the neighbourhood – the geopolitically most important segment of EU external affairs – that are mostly flouted by autocratising countries within and outside of the EU. Of course, if someone actively advances the undermining of rule of law at home, as Hungary's first appointed commissioner candidate László Trócsányi has done as Hungarian minister of justice, then their nomination to any post related to the safeguarding or promotion of European values is especially controversial. But representing and protecting such illiberal policies in the Council – the everyday job of Olivér Várhelyi, Hungary's permanent representative to the EU and the country's new commissioner candidate following the rejection of Trócsányi by the European Parliament – is no better either.

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It must be underlined that this contentious issue cannot be resolved by simple swaps of one candidate for another. No person in any way associated with the Orbán government can qualify for the post of the enlargement and neighbourhood commissioner, due to the track record of the Hungarian government in hollowing out exactly those values that the commissioner should promote and represent. Hence a portfolio swap should be urgently considered by von der Leyen, even in the worst case between the Hungarian and Romanian commissioner candidates.

However, there is some light at the end of the tunnel. Considering the speed and straightforwardness of how the European Parliament's JURY committee put an end to the candidacies of Trócsányi and Romanian nominee Rovana Plumb, and presuming that MEPs might have appetite for more, it is fair to say that the new, politically more balanced European Parliament can assume a role of increased political control over compliance with European values. That happens just in time to counterbalance any potential weakening of the Commission's commitments to safeguarding rule of law and other key European values.

For this development, it might be an important prerequisite that, if necessary, the mainstream political groups – or at least the progressive ones – make closed-door deals in order to maintain European values, and not to protect national member parties at any costs. It is better to make sacrifices in a coordinated, bi- or even tri-partisan way, as happened in the case of Trócsányi and Plumb, than to have a party-political consent of sweeping everything under the carpet. The European elections, especially through the increased electoral support for Green and Liberal parties, demonstrated that the rule of law and democracy discourse resonates well in the electorate. Hence, the mainstream European political parties must reflect on their own role as 'Guardians of European Values' and act accordingly in the future.

Will the new mechanisms remain empty shells?

In July 2019 the Commission adopted a new communication on the strengthening of rule of law in the European Union. While it has its weaknesses, the Commission's initiative does indeed have the capacity to be a game changer in enhancing rule of law compliance in the EU. The promised strategic approach of the Commission's infringement procedures that capitalises on the benefits of a conscious interplay between the Commission and the CJEU, together with the planned annual rule of law monitoring exercise covering all EU member states and the previously announced rule of law conditionality in the EU's new Multiannual Financial Framework (MFF) may significantly upgrade the Commission's toolkit.

Having said that, the real question remains whether the new Commission will be ready to use and further develop these tools in the spirit of von der Leyen's statement before the European Parliament that "there can be no compromise when it comes to the rule of law". The commitment of justice commissioner candidate Didier Reynders to maintain rule of law compliance in the EU is indeed beyond any doubt. As Belgian foreign minister, he has been the real political motor behind the 'friends of rule of law' initiative that sought for a more intensive rule of law dialogue among member states in the Council.

However, will the designated Jourová-Reynders tandem be able to work proactively and independently, or will the rule of law scrutinisers be placed under the political control of the Commission President? The latter would resemble the operational patterns of the Timmermans-Juncker team and recall the suspicion that blocking by Jean-Claude Juncker (and the EPP) might have played a significant role in First Vice-President Frans Timmermans' (and the Commission's) rather unbalanced approach toward Poland and Hungary. A repetition of that party-political game in the new Commission may just break the back of European integration as a liberal, law-based project.

To avoid the potential hollowing-out of the outgoing Commission's very promising initiative, the European Parliament shall stick to the promised competence of legislative initiative and force von der Leyen to a solid commitment to guarantee this right. Furthermore, the European Parliament should use this new legislative power to establish the required monitoring mechanism if the Commission fails to do so. The Parliament should also be ready to use the blockade of certain ordinary legislative procedures as leverage over the Commission and the Council if the other two institutions are too reluctant in enforcing the rule of law compliance of EU member states, including the implementation of rule of law conditionality in the new MFF.

Democracy, human rights, and the rule of law are among the values upon which the European Union was founded. Maintaining compliance with these values is crucial for the functioning of European integration and for the European Union's future. If the Commission is ready to act in concert with the CJEU and the European Parliament as the true Guardian of the Treaties, the given institutional and political conditions can significantly empower European institutions to counter authoritarian developments in member states and to contain further infection. However, if the European Commission is reluctant to fulfill its role as Guardian of the Treaties in a committed and straightforward way, it will be the European Parliament's responsibility to correct the course of the von der Leyen Commission.

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