

The European Commission's Missed Rule-of-Law Opportunity

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The European Commission's comprehensive rule-of-law report published on Wednesday is the first exercise of its kind in the EU's history. Its main goal is to provide fact-based analysis on the state of the rule of law in all EU member states, to allow an objective comparison among them, and to facilitate discussion on best practices for maintaining solid rule-of-law standards.

Comparing the performance of member states is particularly important since the two with the most controversial record—Poland or Hungary—have long complained about being singled out and demanded the extension of the monitoring to all members. From the European Commission's perspective, the comparative approach is also ideal to counter the strategy of “whataboutism” deployed by Warsaw and Budapest. In defense of what they have done, the Polish and Hungarian governments frequently selectively refer to legal provisions in other member states that either appear to be similar to their own controversial measures or that allegedly indicate even lower standards there.

The areas covered by the report—independence of the judiciary, anti-corruption frameworks, media pluralism and freedom, and checks and balances—were known in advance. This raised the hope that the European Commission would conduct a systemic assessment with a broad focus that might identify patterns of autocratization and state capture in member states. It was also hoped that the report could inform other important measures the EU has in progress with regard to democracy and the rule of law. This includes the European Council's Article 7 hearings on Hungary and the rule-of-law conditionality tool that will hopefully tie EU funds to the quality of the rule of law.

Unfortunately, these hopes remain unfulfilled as the European Commission has deliberately failed to exploit the opportunities in the reporting mechanism. Its report is undermined by soft language, the wrong time frame, and decisions not to address systemic deficiencies of the rule of law in certain member states. This makes the comparative approach useless and even harmful. Instead of underlining the existing differences among member states, the differences are rather relativized, and therefore so is the threat posed by the advancing autocratization in countries like Hungary or Poland.

The rule-of-law issue emerged on the EU's agenda due to the alarming and speedy collapse of constitutional checks and balances in those two member states. If the European Commission's report is unable to capture clearly the objective situation in those countries, the whole exercise is rather pointless.

The European Commission is the “guardian” of the EU treaties and in this capacity also that of the rule of law. This is not merely a competence—it is a responsibility. The commission is a stakeholder in the rule-of-law dialogue with the member states, not an external third party. Accordingly, its report should have established facts, at least from its perspective, instead of only reporting about well-known “existing concerns” and “controversies” in disturbingly soft language.

This peaks in euphemisms like the report’s statement about the independence of Hungary’s national media authority. According to the text, “The independence and effectiveness of the Media Council is at risk.” In fact, the Media Council was one of the first casualties of Hungary’s autocratization, having been captured and lost its independence following the country’s infamous media law in 2011.

Due to an incorrect application of the narrative of resilience, just as in President Ursula von der Leyen’s recent State of the Union address, the approach of the European Commission’s report is to defend fortresses that are in fact not besieged but already lost. The report presents the situation in Poland or Hungary as one where a largely intact system of constitutional checks and balances is being attacked. In fact, in both countries key ones were already removed a while ago and the authoritarian developments are already institutionally entrenched.

The report’s time frame is also often arbitrary. While it covers the whole period of Poland’s autocratization since 2015, it gives the impression that Hungary’s democratic demise only started recently. The first stages of the latter’s decade-long autocratization are not covered, although the early capture of constitutional institutions after 2010 had a more striking impact on the quality of the rule of law than later developments. The report does not even try to establish whether Hungary’s state institutions are already captured. The lack of any reference to the captured status of the Hungarian Constitutional Court is emblematic of this.

A reader not familiar with the situation in Poland or Hungary could hardly get the impression from the report that deliberate, well-organized, years-long systemic attacks have taken place in these member states against the melting remnants of liberal constitutionalism and democracy. Not the first time, the European Commission has failed to connect the dots and offer a clear picture about the autocratization in Poland and Hungary.

The report does not fulfil any of the commission’s goals. It is ill suited to serve as a go-to document about the rule of law in the EU, simply because it offers an incomplete and biased picture about those member states where the problem is most flagrant. Interestingly, the chapters on corruption and media pluralism are better than those on checks and balances and the independence of judiciary, which is not surprising since here the commission has heavily relied on external information. Perhaps a similar approach should be followed in the future when it comes to the legal chapters as well.

Furthermore, the European Commission’s claim that the new reporting mechanism will facilitate public and parliamentary debates on these issues in member states does not make much sense. Discussing the findings of the respective national reports in the Dutch, Danish, or Swedish parliaments, for example, will not contribute much to the overall situation in the EU, while in their current state the Hungarian and Polish parliaments hardly offer proper stages for such a national debate.

The threats to the integrity of the exercise were well known in advance, but the European Commission has managed to fall into every single trap that had been flagged to it in advance. Vice President for Values and Transparency Věra Jourová stated recently that Brussels has been “naive in the past” over rule-of-law breaches. Unfortunately, the present exercise is no proof that it has overcome this.

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