

THE RULE OF LAW MONITORING AND REPORTING IN THE EU

Author: Ivan Novosel,
Human Rights House
Zagreb

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Policy brief from the Rule of law dialogue:
Rule of law monitoring for EU countries and candidates: bridging the gap

The rule of law together with democracy, equality, human dignity, freedom and human rights is one of the fundamental values of the European Union (EU) enshrined in the provisions of the Treaty on EU.

Ever since the rise of “illiberal” regimes in Hungary and Poland, the political clashes over the respect for rule of law between Hungary and Poland, on the one hand, and the European Commission (EC), on the other, have been increasing. As an ever-growing number of illiberal policies were implemented, *curtailing the independence of the judiciary, pluralism and independence of the media, posing restrictions on civil society organisations and further shrinking the civic space*, the EC designated those actions as rule of law breaches or threats for which it only had one tool – Article 7, so-called the “nuclear” option of suspending the voting rights of Member States. As this was never a real option on the table, the EC designed a new tool: the **European Rule of Law Mechanism**, which “...provides a process for an annual dialogue between the EC, the Council and the European Parliament together with Member States, as well as, national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process.”¹

The European Rule of Law Mechanism and the **Rule of Law Report** are fairly new instruments – the first edition of the Rule of Law Report was published in the pandemic year 2020 and was covering developments from the beginning of the previous year. The creation of this mechanism was welcomed, primarily by civil society stakeholders which were advocating for the creation of effective rule of law instruments for a decade. Before dwelling on the analysis of the key lesson from the first three rule of law reports, it is important to make a very short contextual analysis of the rule of law monitoring done inside and outside the EU.

¹ European Commission: “Rule of law mechanism”, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en. Accessed on June 4, 2022.



The EU has a lot of experience in both monitoring and building the rule of law standards in the accession countries, and one could argue, that it has been quite good at this enterprise, with the notable exception of failing at achieving irreversibility in the case of Hungary and Poland. The EC's accumulated knowledge and experience from the pre-accession rule of law monitoring, however, did not transcend to the monitoring of the rule of law in the Member States of the EU. Instead of adopting a "holistic" assessment approach which would take into account the other EU values, e.g. human rights and democracy, the EC opted for a rather **"technical" rule of law monitoring** that without other values is devoid of catching the substance - deviancies of the democracy and deficiency of legal order to uphold and preserve the fundamental rights.

As for the Rule of Law Report, some of the main grievances, in part of the country analysis, are that the Report is too **descriptive and fails to catch the complexity of rule of law issues**. The report parcellates those complex issues and thus, fails to depict them rightfully and correctly. This is visible, especially in the case of Hungary and Poland, where the previous iterations did not catch that the rule of law breaches are the product of deliberate and planned policies that in their essence contradict the foundations of the liberal democratic regimes and associated values like human rights, equality, etc.

Directly linked to the problem of descriptiveness, is the style of writing of the report. The EC employed the strategy of **"no-name shaming"** and in the wording of the report is carefully balancing not to offend the many Member States, outside of the already problematic two – Poland and Hungary. This "diplomatic" approach is the main cause why the report is too "technical" and deemed without substance.

The main criticism of the previous reports is that they did not provide **recommendations** to the national governments. This substantially weakened the previous reports and the whole European Rule of Law Mechanism because no one is really interested in the follow-up. Without clear recommendations, it is illusory to expect national governments to pick the conclusion for the report and to some action on their own. At the same time, civil society cannot meaningfully engage with rule of law follow-up because it does not have anything solid and concrete to hold governments accountable for not making progress with the respect to the rule of law.

Lastly, the **timing of the publishing** of reports in July, in the middle of summer vacations, significantly limits the possibility of a public discussion on the EC's conclusions at a national level and makes the report politically less relevant. By the autumn, when the EC presents the report to national parliaments, the political focus has typically shifted on something completely different.

In conclusion, it is very important to have the European Rule of Law Mechanism in place. It is not the best instrument, but gradually, it has a chance to be an important tool that would, if not correct the existing rule of law breaches, at least **have the power to prevent the future ones**. The prospects of fighting to preserve the democratic standards would not be the same without it and efforts would be much more limited. There is a good chance to develop and strengthen the Rule of Law Report further in order to make it a better analytical tool that would be able to deliver – clearly and soundly – a diagnosis of what is wrong with our democracies and what is lacking in order to have a better system for protecting and promoting human rights in the Member States and the EU as a whole.

