

THE EU RULE OF LAW REPORT

MAKING THE BARK BITE

INTRODUCTION

In 2020, the European Commission published its first rule of law report, covering developments in all 27 EU Member States. Following on that report, this paper proposes that the 2021 version should better address three major issues related to the rule of law, namely: the impact of the covid-19 pandemic on the rule of law; the lack of implementation of judgements by the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR); and the situation of state-owned media in Member States.

COVID-19 AND THE LEGALITY AND CERTAINTY OF EMERGENCY MEASURES

The greatest new challenge to the shared values of the EU has emerged from the covid-19 pandemic. The pandemic is not only a public health crisis, but also poses a dramatic challenge to how human rights and the rule of law are respected in the course of governmental responses to an emergency. DRI has provided in-depth analyses of the state of the rule of law across the EU during the first wave of the pandemic – the first of these covering the period up to April 2020 and the second through June 2020 – and continues to work at analysing the situation during the second wave, from October 2020 onwards. Two core issues that have repeatedly emerged from our research are the questionable legality of many of the measures governments have implemented in response to the pandemic, and the lack of legal certainty amidst complex and rapidly changing rules.

1. THE LEGALITY OF EMERGENCY MEASURES

As one of the essential components of the rule of law, the concept of legality speaks to the requirement that all actions by public authorities be taken in accordance with the relevant laws introduced by the legislative or other bodies vested with the power to introduce them. This requirement is all the more

important with regards to actions that limit human rights and freedoms, as is frequently the case during emergencies.

While only a few EU Member States have introduced formal states of emergency in response to the second wave of the pandemic, all have introduced various emergency measures that amount to de facto states of emergency. Many of these measures raise concerns as to their legality. These concerns range from those about the prevalence of the use of secondary legislation (governmental decrees) as means of introducing emergency measures, through those about the relation between the severity of measures and their intended goal, to issues related to the constitutionality of the measures and their conformity with domestic and regional standards (such as the European Charter of Human Rights).

Courts in several EU Member States, including Germany, the Czech Republic and the Netherlands, have found some of the measures to be in violation of their country's constitution. In other Member States, courts have waived punishments handed out by authorities for the violation of covid-19 measures, citing the lack of appropriate legal basis.

2. LEGAL CERTAINTY

Legislation that conforms to rule of law standards should provide individuals and public authorities with clarity and certainty as to what exactly the law means in practice. Being able to establish whether a certain activity is allowed or prohibited is crucial for society, as is an individual's ability to predict the legal outcome of their actions. Legal certainty is even more critical during an emergency, under which people are likely to face limitations on their basic rights.

Across the EU, there has been a marked lack of legal certainty when it comes to covid-19 measures. Governments have frequently failed to provide clear instructions as to what elements of restrictions are legally binding and which amount

to non-enforceable suggestions. There have been a startling number of legislative U-turns, with the authorities announcing certain legal measures, only to rapidly backtrack following a backlash from experts or the public. In several instances, emergency measures were introduced with minimal to no *vacatio legis* – time before adopted measures come into force – leaving individuals with little or no opportunity to prepare and alter their daily routines or business activities so as to respect the restrictions.

EUROPEAN JUDICIAL ORDER UNDER THREAT

One of the greatest achievements of European legal culture has been the enduring respect for regional and international judicial bodies, namely the CJEU and the ECtHR. The respect for these courts and their decisions is a crucial element of the rule of law.

Recent years, however, have seen an increasing uptick in countries undermining this respect and refusing to implement the judgments of regional courts. While the CJEU has long been held in extremely high regard by EU Member States – even when they did not agree with its decisions – there is an increasing trend of those decisions being disregarded and left unimplemented. Recent examples, such as the Hungarian asylum case and the Polish Disciplinary Chamber case, show that some Member States have begun defying the CJEU.

Respect for the CJEU is critical for ensuring adherence to the rule of law in the EU. As such, bringing cases before the Court has been one of the most successful elements in the EU rule of law toolbox, leading Member States to counter negative developments or alter their policies to bring them in line with the standards of Article 2 of the Treaty on European Union, which states that the EU 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". While the Court cannot replace the European Commission as the primary enforcer of EU values, and proceedings before the Court take considerable time to reach legally binding conclusions, it is the CJEU that has the power to introduce interim measures aimed at halting worrying developments in Member States. The Court's key role rests in the assumption that the Member States will respect its rulings. Thus, the open flouting of the court by countries declining to implement its judgments threatens to critically weaken the entire EU, as it would lose its primary enforcement mechanism.

This concern is not, however, limited to the CJEU. An even more worrying trend can already be seen with regards to the ECtHR. The implementation of leading ECtHR judgments is also at a worryingly low level, with several EU Member States failing to implement even 50 per cent of leading judgments from the last 10 years. Leading judgments are ones that identify new, recent human rights issues that are either significant on their own or are indications of systemic, country-wide problems. The Commission's rule of law report, however, focused heavily on the CJEU, without addressing the level of respect by EU Member States for the decisions of other regional and international courts. This should be changed.

Overlapping with this situation is the issue of increased mistrust between the judiciaries of the Member States, exemplified by the Netherlands' refusal to execute a European arrest warrant issued by Poland, citing the lack of independence of the Polish judiciary.

THE SITUATION OF STATE-OWNED MEDIA

The Commission's rule of law report also covers the issue of media plurality and the ability of journalists to exercise their profession freely. These are important considerations in relation to protecting the rule of law, as free and independent media are crucial to holding governments accountable and informing society. The next rule of law report should, however, also cover the specific situation of state-owned or de facto state-controlled media. While the majority of media outlets in EU Member States are in private hands and are frequently part of major international networks, all EU states feature some degree of state-owned public broadcasting, print media or other outlets. For the most part, these media are highly respected, quality institutions with long and distinguished histories of independent reporting and, often, being critical of the government despite being owned by the state.

In some Member States, however, there is growing concern over the state and role of public, state-owned de facto state-controlled media. In Poland, the government controls both the public television broadcasting service, TVP, and several radio channels. Since 2015, these outlets have increasingly become outright partisan in their pro-government and pro-ruling party support, while at the same time attacking the opposition and, at times, EU institutions. In December 2020, Orlen, a state-owned oil refiner and petrol retail enterprise, announced the purchase of several local newspapers and

news portals from the private media holding PolskaPresse. There is growing concern that Orlen will shift the editorial policies of these outlets towards supporting the government, and that it will continue to seek opportunities to buy other media outlets from private owners. While Poland maintains a robust and diverse private media market, there is growing concern that recent developments, including a proposed regulation of the freedom of speech (concerning governmental control over moderation by social media outlets), will have a further negative impact on the media landscape.

In Hungary, the situation of the state-owned media is similar, with the messaging of the public outlets being fully supportive of the government. The issue in Hungary is exacerbated, however, by the fact that the private media have been nationalised, shut down or taken over by individuals and businesses supportive of the government. This leads to a situation where practically the entire array of Hungary-based media outlets is controlled by the government or owned by those close to it and, as such, refrains from criticism and aligns itself with the line of the ruling party.

The abovementioned developments, coupled with a global trend of governments abusing their control of state-owned media, requires a look at media pluralism and the situation of journalists beyond just the private sector, particularly because publicly funded media have more stringent obligations with regards to impartiality. Such an assessment would provide a fuller view of the situation in Member States and help highlight the increasingly worrying situation of state-owned media in some countries.

CONCLUDING REMARKS

The European Commission's rule of law report is an important milestone in the further development of the EU's toolbox for the protection and promotion of the rule of law. While the Commission describes the report as a preventive tool, it primarily serves a descriptive purpose, showcasing the situation of the rule of law across the 27 EU Member States. Several further improvements could help the report realise its full potential:

- In its current form, the report focuses on providing an analysis of the situation in Member States, but it does not feature any recommendations or indications of changes or improvements that would be desirable from the Commission's point of view. Given that the

Commission does not generally shy away from indicating how Member States can fully respect their obligations under EU law, the inclusion of recommendations in future iterations of the report would be a natural way to add value;

- The Commission's ongoing dialogue with national parliaments on the report and the process of reviewing the situation in the Member States are laudable. Dialogue and review, however, will not replace enforcement and strong action aimed at ensuring that Member States who violate the principles of the rule of law are brought into compliance with core EU values. The political will necessary to move forward with hard measures that deliver concrete results needs to materialise at both the Council and Commission levels. Only then will the report serve its optimal purpose – that of helping the EU institutions tailor their responses to deficiencies in the rule of law and strengthening their action meant to ensure that the rule of law is respected by all 27 EU Member States;
- The 2022 iteration of the report should include an open and inclusive process for the review of the methodology used in the preparation of the review, as well as a review of the list of topics on which the report focuses; and
- The timeframe for stakeholder input for the 2022 report needs to be extended enough to allow civil society organizations, academia and other experts and expert bodies to provide their insight in a thorough manner.

ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions worldwide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. <http://www.democracy-reporting.org>

DRI's work on the rule of law in the European Union is being carried out under the re:constitution programme, implemented jointly with Forum Transregionale Studien and funded by Stiftung Mercator. In our work, we aim to provide timely analysis directed at policymakers, journalists and other stakeholders focusing on the rule of law and related values in the EU.