

# Rule of Law FAQs

Debunking Common Myths



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## Debunking Common Myths

A number of politicians in Europe, notably from government parties in Poland and Hungary, are challenging established conceptions around the rule of law – the framework guaranteeing accountable governments and equal citizens' rights. The challengers pretend that the rule of law is a mere buzzword and claim that it is a political tool used to target them and their political agendas without justification. These claims are packed with myths, lies and half-truths that hinder constructive debates around the rule of law in the EU.

Democracy Reporting International and Meijers Committee have paired up to help politicians, journalists, and other actors engaged in the rule of law debates navigate these muddy waters. These cards – our “Rule of Law FAQs” – help you get your facts straight and feel ready to bust the myths that some politicians have built around the rule of law.

## 1 Why is ensuring the rule of law so important for the EU?

**The rule of law** is essential for every aspect of the EU's functioning. It is a precondition for Member States in fulfilling their EU obligations and ensuring EU citizens and companies benefit from all of their rights. When citizens move to live or study elsewhere or when European businesses invest in other Member States, they must be sure they can rely on EU law being applied the same way. For this reason, ensuring the rule of law is an explicit entry requirement that all Member States have accepted.

It is one of the four political conditions (under the 1993 Copenhagen Criteria) for becoming an EU Member State, alongside **democracy, human rights and the protection of minorities**.

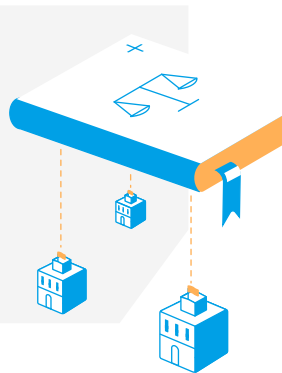
States can only apply for EU membership if they accept these conditions (Article 49 of the Treaty on European Union).



## 2 What is meant by “rule of law”?

The rule of law is a basic legal principle that has a clear and precise meaning. It is not a vague or solely political concept. It requires that **all public powers must act within the constraints set out by clearly defined laws**, in accordance with democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes:

- (a) Legality, meaning a transparent, accountable, democratic and pluralistic process for enacting laws;
- (b) Legal certainty, meaning laws need to have foreseeable effects;
- (c) The prohibition of the arbitrary exercise of executive power;
- (d) Effective judicial protection by independent and impartial courts and effective judicial review, including respect for fundamental rights;
- (e) The separation of powers;
- (f) Equality before the law.

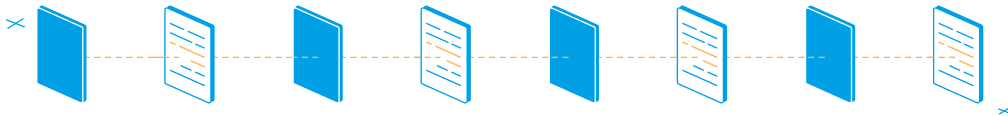


Each of these components of the rule of law is **indispensable**.

### 3 Where is the rule of law laid down?

The binding legal and political obligation for all Member States to comply with the rule of law is laid down in Articles 2 and 7 of the Treaty on European Union, which was ratified by all EU Member States. Article 7 allows other Member States to hold a non-compliant Member State to account.

The essential elements of the rule of law are specified in different legally binding EU rules and, most recently, in Regulation 2020/2092 (the rule of law conditionality regulation). This regulation was adopted by the EU Council of Ministers, composed of ministers of all Member States, and by the European Parliament, elected by citizens of all Member States. These elements are also laid down in the constitutions and laws of all Member States, in the European Convention on Human Rights and in UN human rights treaties ratified by all EU Member States.



## 4 Who defines the rule of law?

The rule of law is **not an externally imposed concept**. Member States themselves **have laid down its basic elements in their national laws, EU law and international treaties** they have negotiated and all accepted. The EU legislator – the European Parliament and Council of Ministers – sometimes also selects rule of law components particularly relevant to a specific policy area.

The EU Court of Justice and the European Court of Human Rights provide binding interpretations of elements of the rule of law in concrete cases. When applying or interpreting EU law on the rule of law, national courts are bound by the judgments of the EU Court of Justice. This Court, in turn, takes into account the judgments of the European Court of Human Rights on relevant rule of law elements.



## 5 What are the differences between the rule of law, democracy and human rights?

Democracy is a system where, in free and fair elections, citizens elect representatives who participate in the exercise of state and public power. Human rights are rights of individuals (citizens and non-citizens) limiting the exercise of state powers. Although these three concepts each have a distinct meaning, **they are mutually reinforcing and interdependent**. Human rights, like the right to vote and to be elected or the right to access to court, give concrete expression and substance to democracy and the rule of law.

Without the rule of law, which requires impartial and independent courts, human rights and the limits of political power in a democracy are empty promises.

The essential role of independent courts in the months before and after the 2020 United States presidential elections provided a clear example of this.



## 6 Is the EU interfering in national sovereignty by pursuing rule of law issues?

At its heart, the EU is an exercise in **pooling sovereignty**. EU Member States exercised their sovereignty when they defined the basic elements of the rule of law in national law, EU law and binding international treaties. Having done so, they cannot unilaterally pick and choose which EU rights and obligations they implement or not.

In setting up the EU, they deliberately chose to give its political institutions and its independent Court of Justice the power to **monitor compliance with the binding rule of law principles** covered by EU law. By granting legislative and judicial competences to EU institutions, all Member States have shared part of their sovereignty with the EU.





## 7 Can the EU criticise how the Member States organise their judiciaries, considering the variety of accepted systems?

How judges are appointed, promoted or disciplined varies considerably among the EU Member States. At the same time, Article 19 of the Treaty on European Union lays down a minimum standard by obliging Member States to provide effective legal protection to citizens, private organisations and companies through their national judiciary. This leaves a lot of leeway as to how to achieve this result.



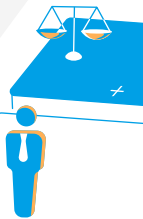
The EU Court of Justice has interpreted this requirement in connection with existing norms that oblige **judges to be independent of other state powers and impartial with regard to the parties in front of them**. For judges to be able to provide effective legal protection, they need to be guarded against dismissal or early retirement motivated by anything other than their professional conduct, as assessed by actors equally independent from the executive branch.

## 8 Isn't the executive branch regularly involved in the appointment of judges in EU Member States?

It is common for the executive branch to be involved in judicial appointments, but it does not decide alone. It typically shares powers with independent judicial councils or appointment boards involving judges, lawyers and university professors.

In Malta, for example, the Judicial Appointments Committee vets and evaluates candidates, and advises the prime minister on appointment decisions. In a recent judgment on Malta, the EU Court of Justice held that such a committee **can make the process more objective and less politicised, but only if institutional guarantees of its independence are in place.** It explained why the right to an effective judicial remedy sets limits on the prime minister's involvement in judicial appointments.

Other guarantees precluding politicians from unduly influencing judicial appointments include mandatory consultations with judges of specific courts, the engagement of a range of political parties, and transparency of decision-making processes.



## 9 Why should EU citizens care about the rule of law in all EU countries?

The EU is not only a common market, but also a community of values and source of rights for its citizens (Article 2 of the Treaty on European Union). To deliver on that promise, all EU Member States must remain functional liberal democracies, adhering to the principles of the rule of law. If the EU does not ensure this, EU citizens working, living or investing in another Member State cannot be certain that rights granted by EU law will be respected.

Rule of law issues can also erode the mutual trust needed for the legal cooperation between Member States.

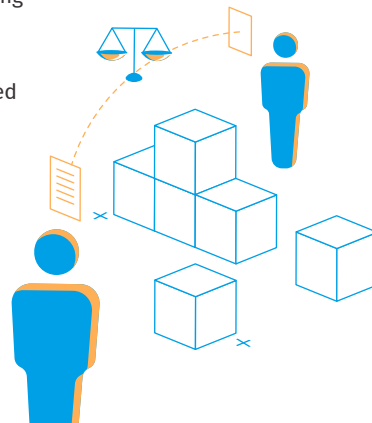
For example, if judicial independence in one Member State is **no longer guaranteed**, courts in other Member States **may no longer be able to arrest and transfer serious criminals** to that Member State or **recognise divorce decrees issued there**, directly affecting EU citizens' lives.



## 10 Why should EU businesses care about the rule of law in all EU countries?

The rule of law, and especially effective prosecution of misconduct by an independent judiciary, **is essential for doing business**. This provides a **secure, predictable** and **fair environment** for concluding contracts and handling potential disputes.

If there are severe rule of law deficits in an EU Member State, EU-based companies, shareholders and customers lose these important advantages. A competitive company will not enjoy the advantage of the EU's internal market if public procurement procedures are rigged and there is no investigation or meaningful prosecution of fraudulent practices. An exporter of goods may run into trouble when their contractual issue cannot be resolved by an independent court.



## 11 Haven't Hungary and Poland always complied with the judgments of the EU Court of Justice?

The current governments of Hungary and Poland **have refused** to comply with various decisions of the EU Court of Justice.

For example, Poland keeps operating the Disciplinary Chamber of its Supreme Court and carrying out disciplinary actions against judges over their decisions – in clear violation of the 15 July 2021 judgment of the EU Court of Justice in case C-791/19 and its interim order in case C-204/21.

President Andrzej Duda's February 2022 proposal to dismantle the Chamber did not properly address the roots of the problem as identified by the Court, including **the politicisation of the National Council of the Judiciary**. Hence, even if this were made into law, it would not amount to compliance.

Hungary, too, has failed to respect multiple rulings by the court, such as in cases C-78/18, concerning a transparency law, and C-808/18, regarding the protection of asylum seekers.



## 12 Didn't the judicial reforms in Poland help root out communist-era judges?

While the Law and Justice (PiS)-led government claimed that the Polish judiciary was dominated by communist judges, only a small percentage of then-sitting judges began their careers before 1989. All Polish judges born before 1972 underwent the process of **lustration** – a **determination of whether they collaborated with the secret services of the communist-era government**. The PiS government has not been able to identify a single case of professionally active judges **who compromised the principles of judicial ethics** in communist times.

In contrast to this, in 2019, the PiS-affiliated President Duda swore in the Constitutional Tribunal judge Stanisław Piotrowicz (a former PiS MP), who worked as a state prosecutor during the communist times and was involved in cases **against opposition dissidents**. Piotrowicz was among the judges who declared the rulings of the EU Court of Justice **incompatible** with the Polish Constitution.



## 13 Didn't the Polish judicial reforms improve the quality and efficiency of the judicial system?

The judicial reforms implemented since 2015 **have not improved** judicial efficiency, digitalisation, the flexibility of procedures or the user-friendliness of courts in Poland.

The excessive length of proceedings is widely acknowledged as a systemic problem.

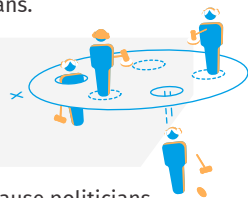
Poland remains under “enhanced supervision” of the Committee of Ministers of the Council of Europe for the length of civil and criminal proceedings. According to the Polish Ministry of Justice, the average length of proceedings at ordinary courts increased from 4.2 to 7 months between 2015 and 2020. The World Justice Project Rule of Law Index has shown deterioration in terms of the speed of civil justice, as well as in the timeliness and efficiency of the criminal justice system since 2015, with the lowest scores recorded in 2021. **Poland is firmly placed in the bottom half of the regional rankings.**



## 14 Aren't political appointees in judicial councils an accepted way of making these councils more democratically accountable? If so, why criticise Poland?

While some presence of political appointees in judicial councils is defensible, the Polish government moved to an almost entirely political body: 23 of the 25 members of the National Council of the Judiciary are either politicians themselves or elected by politicians.

As the two European Courts highlighted, this undermines the Council's independence from political authorities, as well as its ability to prevent politicised appointments or dismissals of judges.



The risk of political meddling is higher in Poland than elsewhere in the EU because politicians, rather than judges, hand-pick the Council's judge members. The lack of party pluralism among non-judge members (who are politicians, not lawyers or university professors, as is in Italy and France) further aggravates this risk. The expulsion of the Polish Council from the European Network of Councils for the Judiciary attests to the **widespread consensus on its lack of independence**.

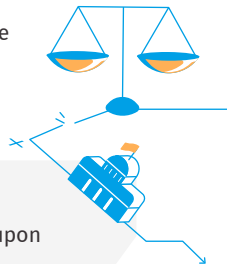


## 15 Poland is not the only country in which judge-members of judicial councils are elected by the parliament. Why is it singled out by EU bodies?

In EU Member States that have established judicial councils, judges typically propose and elect judge members. This is the case, for example, in Italy, France and Portugal. **This method of election is widely regarded as a means of reducing the risks of politicisation** and is recommended by the Council of Europe to all states.

The Spanish Judicial Council is an exception, since its judge members are only proposed by judges, and then elected by the parliament. Spain has been called upon to implement changes to make its Council less vulnerable to politicisation.

Hence, Poland is not the only EU Member State being criticised on this account. Notably, the role of judges in electing judge members **is even more limited in Poland** than it is in Spain. Their voice is only heard at the stage of the pre-selection of candidates.



## 16 Have Poland and Hungary not been victims of double standards when it comes to the assessments of their judicial reforms?

The current Polish and Hungarian governments claim the EU applies double standards on the rule of law, arguing that the other Member States also opt out from certain EU policies or defend the sovereignty of their national laws, but are not subject to the same criticism. **This comparison is flawed.**

While Member States may opt out of EU cooperation in fields such as defence, immigration and asylum, or criminal justice, **it is impossible for any Member State to opt out** from the core obligations of states under EU law, which **include the independence of courts.**



Hungary and Poland **were not singled out** in this regard. The two European Courts have handed down similar rulings against other states. The rulings against Poland and Hungary have been numerous and repeated, however, due to the systemic nature of defects in laws and practices undermining judicial independence.

## 17 Hungary has a Council of the Judiciary, which consists of judges elected by judges. Is that not enough to guarantee judicial independence?

In Hungary, **extensive powers regarding court administration lie with the President of the National Office of the Judiciary (NoJ)**, a political appointee with a nine-year mandate. It has competencies in areas typically in the hands of judicial councils, such as appointments, promotions, secondments and transfers of judges.

The Hungarian National Council of the Judiciary (NCJ) **cannot counterbalance these rather excessive powers**. It only has a limited role in appointing judges and court presidents, and no right to propose or be consulted on legislation.



The political branches ignore the NCJ's concerns and appeals, rendering it **unable to exercise proper oversight over the President of the NoJ**. Hence, the NCJ differs from its counterparts in other EU Member States, which can effectively check on and act as counterweights to political actors. The existing institutional arrangements **leave Hungarian judges vulnerable to political pressure, endangering their independence**.

## 18 What are the major similarities and differences between Polish and Hungarian approaches to judicial reforms?

Polish and Hungarian politicians invoked judicial corporatism and corruption, as well as the lack of democratic legitimacy of the judiciary, **to justify the increased role of political authorities**. They chose slightly different reform paths.

In Hungary, Prime Minister Viktor Orbán's government sidelined the National Judicial Council by severely reducing its powers, while giving overly broad powers to the President of the National Office of the Judiciary, a political appointee.

In Poland, the PiS-led government captured the National Judicial Council by packing it with political appointees.

Ultimately, both approaches **endanger judicial independence**. In both systems, politicians or political appointees (the Minister of Justice in Poland and the President of the National Office of the Judiciary in Hungary) handpick court presidents, who may then be inclined **to use their broad powers to pressure or sanction disobedient judges** out of loyalty to politicians.



## 19 France is facing multiple rule-of-law issues, including political influence on the judiciary. Why isn't France being criticised the same way as Poland?

The French and Polish systems of judicial governance have some similarities, with the formal powers divided between judicial councils and ministries of justice. A closer look into their respective institutional arrangements shows, however, that **the French judiciary is better insulated from political pressure and/or capture than Poland's.**

In France, judge members of the Judicial Council are elected by judges themselves, while in Poland, the parliament elects them. **While the French Judicial Council picks court presidents, in Poland this power is in the hands of the Minister of Justice.**

In France, the coexistence of the council and ministry helps secure balance and prevents abuse by either. In Poland, the system lacks balance, due to the political subordination of the council to the ruling party. These differences make the different assessments by the European Commission understandable and justified.

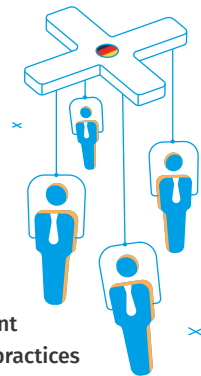


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## The EU Court of Justice found that Germany's prosecutors aren't independent either. So why criticise only Poland and Hungary?

In 2019, the power of the Minister of Justice to issue instructions to prosecutors in individual cases prompted the EU Court of Justice to conclude that **German prosecutors are not sufficiently independent** to issue European Arrest Warrants. Consequently, the power to issue arrest warrants in Germany was shifted to judges.

The EU Court of Justice's pronouncements did, however, trigger broader reform discussions under a centre-right coalition. The November 2021 agreement of the new centre-left coalition explicitly mentions the intention to reform this system. These discussions and actions **illustrate the recognition by the German government of the authority of the EU Court of Justice and a commitment to change laws and practices in line with its conclusions**, irrespective of the political composition of the government at the time.



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## The German Federal Constitutional Court in Karlsruhe constantly challenges the EU Court of Justice. Why is only Poland criticised?

The 2020 ruling of the German Constitutional Court (FCC) on the partial unconstitutionality of the PSP (Public Sector Asset Purchase) Programme of the European Central Bank (ECB) is not comparable to the October 2021 decision by the Polish Constitutional Tribunal (PCT) on the primacy of EU law. There are three key differences:

- First, the FCC acted on its own; the PTC acted at the request of the government.
- Second, the FCC case concerned an isolated issue of a bond-buying scheme of the ECB; the PCT questioned the primacy of EU law in general.
- Finally, following explanations from the ECB and the German government, the FCC has found that the issue has been resolved.

The Polish government continues **to escalate the attack on EU law**, with new cases lodged with the PCT aimed at other elements of the EU Court's case law.



## People in Poland are in favour of the reforms of the judiciary. Isn't opposing them anti-democratic?

Poles had been keen for judicial reforms long before the current ruling party came to power. It promised to make courts work better for ordinary people, but **largely failed to fulfil this promise.**

With an ever-increasing caseload, understaffed and under-resourced courts take months to carry out tasks as simple as writing a person's ownership and mortgage in the land registry. Due to the slow pace of digitalisation, the Polish judiciary has not moved away from a paper-based system. The length of proceedings has even increased in some areas.

**Issues with the efficiency and effectiveness of courts negatively affect public trust in the judiciary.** Opinion polls show that Poles overwhelmingly view the reforms implemented since 2015 as unsatisfactory. They are in favour of real judicial reforms, not a dismantling of checks and balances **that make judges vulnerable to pressure and intimidation.**

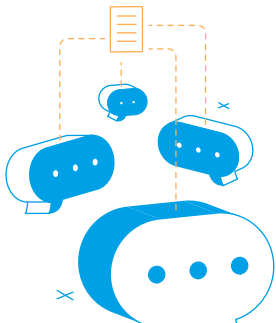




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## Isn't EU opposition to reforms in Poland and Hungary political, tied to party politics and based on a Euro-federalist agenda to weaken nation states?

The 27 EU Member States and the political parties in those states have widely different views on EU integration and its future. Some want to return certain competencies from the EU to the Member States, others want greater economic cooperation. Some want more integration on taxation and social security, others advocate for stronger defence capabilities of the bloc.



**Reforms of the EU have always followed fierce debate, with eventual agreement among the Member States.** The decision-making process within the EU **makes it practically impossible** for one person, political party or country **to impose its agenda**. The EU is frequently criticised for the exact opposite – its inability to push through a strong agenda due to a lack of unanimous agreement among the Member States. The claim that the EU opposition is based on an agenda to weaken the Member States is groundless.

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**What about the Polish and Hungarian governments' argument that the EU imposes an ultra-liberal ideology, demanding equality for LGBTIQ people at the expense of a cultural and national identity that has never accepted them?**

The EU Member States are legitimately different in many respects, as is reflected in the EU's motto "united in diversity". The Treaty on European Union, in Article 4(2), also clarifies that **the EU shall respect the national identity of Member States**. Member States have wide leeway in regulating "moral politics" (for example, allowing same-sex marriage or not).

Yet, EU law lays down a limited number of binding minimum norms Member States have agreed to apply. **The rights to equality and non-discrimination for LGBTIQ people, laid down in Article 21 of the EU Charter of Fundamental Rights, is one such norm.** This is why the law banning LGBTIQ content in schools prompted the European Commission to launch infringement proceedings against Hungary. It is also why the European Commission decided to halt EU funding for Polish cities where so-called "LGBTIQ-free zones" were introduced.



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## Do Polish and Hungarian governments not have a point when they claim the EU has no competence to deal with “reforms” in their national media landscapes?

Financing and regulation of national media are subject to various rules of EU internal market law, such as state aid rules and the Audiovisual Media Services Directive.

Moreover, without access to independent media, citizens cannot meaningfully exercise their freedom of speech or their right to cast an informed vote in elections, including those covered by EU law, such as elections for the European Parliament.

Hence, the national media landscape is already covered by EU law in different respects. This is why the European Commission decided to sue Hungary after **Klubradio, an independent radio station**, lost its appeal to extend its broadcasting license. This is also why the Commission could decide on a similar course of action if the Polish government decided once again to try and curb the activities of the independent **Polish television channel TVN24**.

