

## Background paper/ Press Memo

### The Rule of Law - When is it Threatened?

1. Introduction
2. Theses
3. Reasoning
4. Three preconditions for [a state based on] the rule of law
5. Criteria for investigation / Questions to be addressed to a real-case scenario
6. Conclusion

#### 1.) Introduction

It's currently a hot topic: "The rule of law". Many politicians and media commentators maintain that in view of current developments in such European states as Poland, Switzerland, France and Hungary, the rule of law is threatened and both it and democracy itself are being undermined.

But what exactly does "the rule of law/the constitutional state" mean, and what is the relationship between democracy and the rule of law? Is it possible to develop an abstract set of questions (not specific to any particular state but nonetheless practically applicable) on the basis of which - depending on the answers - it would be possible to assert that the rule of law, and thus also democracy itself, are endangered?

This paper seeks to shed light on these questions through a sequence of theses, arguments and core assumptions from which can be derived a series of questions which will allow the status of the rule of law in individual countries to be examined and evaluated.

The following theses and arguments are based on [the academic paper "Democracy and the Rule of Law - Two Sides of a Coin?"](#) (in German) by Democracy International, which details the political history of the idea of democracy and the rule of law and examines the fraught relationship between them.

## 2.) Theses

1. Democracy and the rule of law are equally primary, exist in an indissoluble relationship to each other, and are mutually supportive.
2. The rule of law is a necessary precondition for democracy.
3. If the core principles of the rule of law are compromised, an imbalance between democracy and the rule of law results. It can then be said that not only is the rule of law endangered, but also democracy itself.

## 3.) Reasoning

*In the context of Thesis 1:*

In every democracy the sovereign people must agree on a process which ultimately confers legitimacy on democratic decisions - and which simultaneously codifies the rule of law.

But who is to decide on the rules and the laws by which a people governs itself? And who ensures that these rules are observed?

In a democracy it is the sovereign people - the *demos*.

2

---

Reaching agreement on rules and laws requires a democratic decision-making process. Such a process or procedure is governed by principles deriving from the rule of law.

*In the context of Thesis 2:*

As in other political systems, democracy governs through legislation - through which the *demos* governs itself.

*In the context of Thesis 3:*

The democratic process thus created presupposes the following rights:

- recognition of fundamental human rights
- democratic civil rights
- the core principle of the separation of powers in democratic states

The rule of law is endangered if and when these rule-of-law prerequisites for a democracy are compromised.

The democratic process is threatened when, for example, there are no free media (the right to free media derives from the civil right to freedom of information and opinion), and the protection of minorities is endangered when the principles of judicial independence and proportionality are compromised.

#### **4.) Justification for the three preconditions for the rule of law**

Every person has inalienable **human rights**, which the democratic process guarantees and promotes. Mutual recognition of these rights is the basic precondition for enabling a sovereign *demos* to be constituted from all those who share the rights.

The **democratic civil rights** are necessary for a democratic decision-making process to be carried out. Among these civil rights are, for example, the principle of equality, freedom of the press and of information, both active and passive voting rights, freedom of assembly, the right to privacy etc.

The **separation of powers** (after Montesquieu and others) secures the procedures in a democracy and as far as possible prevents any abuse of power. It assumes that a democracy can only function if there is a clear separation between those who pass the laws (the Legislature), those who implement them (the Executive), and those who monitor and check them (the Judiciary).

In the different democracies this separation of powers has been empirically shaped in a variety of ways (e.g. in a presidential democracy by contrast with a representative democracy). Its primary function is to separate the making of laws (by the legislature - normally a parliament) from their implementation (normally the government), with the aim of preventing possible misuse of the state's monopoly on power.

The independent judiciary is responsible for ensuring that the democratic procedures are correctly followed (including the protection of human and civil rights) and that the laws and rules are observed.

The principle of proportionality must be observed in order to assess individual cases and treat them fairly.

#### **5. ) Questions to be put to a concrete example**

Using these parameters as a foundation, the following questions allow us to assess whether, and to what extent, the rule of law in a particular country is under threat:

### **The human rights premise:**

- are human rights codified in the constitution or integrated into the rule-of-law system of a country in the form of currently valid international law (UN Declaration of Human Rights, European Convention on Human Rights)?
- is everyone equal before the law or are the rights of certain groups restricted?
- are minority rights being flouted?
- does everyone enjoy a right to fair criminal proceedings?
- does everyone have a right to due process in law?
- is there a presumption of innocence?
- does everyone have effective recourse to justice?

### **The civil rights premise:**

- are democratic civil rights - such as an active and passive voting right, freedom of assembly, protection of privacy, and data protection - restricted?
- does electoral law enable the voters' decision to be adequately reflected?
- are the media independent? Is there an erosion of media diversity as a result of actions by the state or private entities?
- is the legislative process transparent and open? Is the right to information anchored in law?

### **The separation of powers premise:**

- have there been any developments through which, in particular, the executive has gained in power and checks on the executive (i.e. from the legislature and judiciary) have been weakened?
- is the independence of judges compromised?
- do courts have adequate possibilities to judge individual cases as per the principle of proportionality?
- is it possible for judges to assess laws on the basis of their compliance with the principles of the constitution ("judicial checks")?

## 6.) **Conclusion:**

As the interdependency of democracy and the rule of law makes clear, democracy depends on the proper functioning within a state of the rule of law: sound protection of human rights; enforceable civil rights; and an intact separation of powers. Together these confer legitimacy on the laws and rules enacted on behalf of the sovereign people.

The more the balance of these elements is disturbed, the greater is the threat, not only to democracy as an abstract value, but also to the rights of every individual citizen, on which rights the day-to-day life of everyone in a democratic community utterly depends.

Those who assert that in Poland, Switzerland, France and Hungary the rule of law is under threat and that democracy is being eroded should examine these countries through the lens of the questions listed above (a list which can be expanded) and base their arguments on the answers.

*Authors: Cora Pfafferott and Dr. Klaus Hofmann*

### **Contact:**

Cora Pfafferott  
Spokesperson  
Democracy International e.V.

++ 49 2203 102 1475 (office)  
++ 49 176 954 373 79 (mobile)

[pfafferott@democracy-international.org](mailto:pfafferott@democracy-international.org)