



Five Lessons on International Rule of Law Support

Alina Mungiu-Pippidi
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Article

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The Russian invasion of Ukraine has made the rule of law more relevant than ever internationally. European and U.S. lawyers have documented war crimes in Ukraine, although the chances that Russia will be called to account before the International Criminal Court are anybody's guess. The rule of law is supposedly a paramount concern for all Western democracies, even if both their definitions and their priorities sometimes differ. For the EU, the key battle line is the supremacy of EU treaty law above member states' national constitutions, an existential matter for European integration. For the United States, the upholding of the rule of law and anticorruption efforts globally are important endeavors on national security grounds.

Practitioners have spent more than three decades promoting the rule of law across borders, enough time for them to draw valuable lessons from this experience. There are several indicators and indexes for measuring the rule of law. Many of these combine the views of experts and citizens, whose opinions are components of both the Rule of Law Index by the World Justice Project and the EU Justice Scoreboard.

A newly released analytical tool called the Corruption Risk Forecast (CRF) surveys 120 countries to gauge the causal determinants of public integrity and combines them with the latest political developments.¹ The findings of this tool are triangulated with those of older indicators like the World Bank's rule of law score, the Rule of Law Index, and the work of the popular V-Dem Project. While the European Parliament recently asked the European Commission for a new rule of law index, plentiful data already exists. This data offers five lessons on international support for the rule of law.

Risks of Overly Broad Definitions

As with many catchall concepts pushed onto the public agenda by political decisions (such as the notion of good governance), the concept of the rule of law is continuously stretched to fit the needs of those using it. The Harvard economist Dani Rodrik once wondered, "Am I the only [one] guilty of using the term [rule of law] abundantly without having a good fix on what it really means?" A term that encompasses everything from the unprovoked invasion of another country to decisions by some Polish municipal councils to deny marriage licenses to members of the LGBTQ community has a wide range of meanings indeed. Even more problematically, the rule of law clearly means different things to different people. As recent constitutional jurisprudence across EU member states and the EU itself bears witness, the rule of law can refer to both pandemic lockdowns and actions against such lockdowns. The concept was invoked by both supporters and opponents of Catalanian secession from Spain. Everybody can claim a corner of the wide mantle of the rule of law to cover their cause. In the international arena, initial thin versions of the rule of law have gradually given way to thick versions, shifting the focus from justice-related procedures to an ever-enlarging range of substance (including not only justice and fairness but other values as well). This has widened the gap between objectives and actual rule of law developments.²

There is no universally acknowledged definition of the rule of law. Consequently, it has turned into a multidimensional concept, although the number of dimensions varies across agencies and even within them. The World Justice Project's Rule of Law Index counts four principles and eight factors, while the Council of Europe's Venice Commission lists five components plus two challenges (like corruption). The

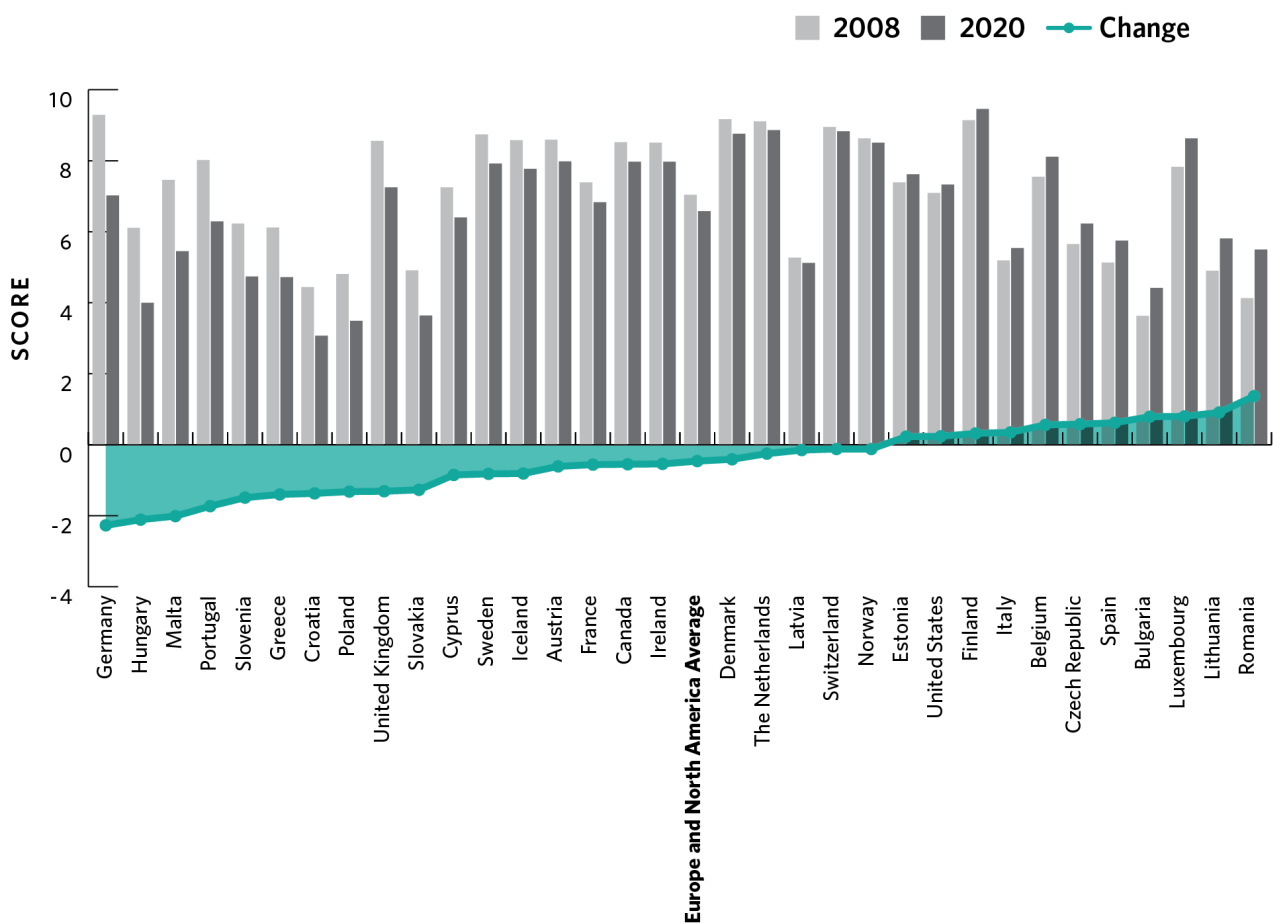
European Commission’s rule of law report includes freedom of the press alongside justice and anticorruption issues. Given that so many (and sometimes loosely connected) components can hardly result in a single metric, the practical solution for monitoring the rule of law therefore has been to use large baskets of indicators.³

This is problematic for international rule of law support. The broader and more imprecise the definition of the term is, the greater the risk of conflict between its loosely connected components. Tensions have arisen between the rule of law and electoral democracy (in cases like Hungary and Poland), between human rights and anticorruption (in Romania), and between EU policies and local votes in some EU member states (like Greece). The grounds on which sound monitoring and evaluation should be based become contested, as some components may go up when others go down. This contrasts with the control of corruption, which can be reflected in a single measurement. The simple solution would be for policy interventions to be rooted in one fact-based index for each major component of the rule of law instead of one general index.

Recognize Modest Impact

Most countries around the world have stagnated or even regressed on the rule of law for more than two decades, according to the World Bank’s rule of law metric (1998–2020). The situation is similar for the indicator on control of corruption: there has been a slight decline among the high-income members of the Organisation for Economic Co-operation and Development (OECD) and no catching up by lower-income groups. In the case of Europe and North America, no significant average change was recorded on judicial independence between 2008 and 2020 (see figure 1).⁴ In Europe, Romania was the only case with significant positive progress during this interval, but the country’s score on judicial independence (5.5 out of 10) remained below the regional average.

FIGURE 1
Judicial Independence in Europe and North America



Source: European Research Centre for Anticorruption and State-building and Center for International Private Enterprise, “Forecast Trend Indicators,” European Research Centre for Anticorruption and State-building and Center for International Private Enterprise, 2020, <https://www.corruptionrisk.org/forecast-trends>.

Soberingly, most of the countries worldwide that have stagnated on rule of law metrics have received considerable aid for rule of law promotion. Funding at most has managed to help some of these countries avoid further backsliding, like when Alice and the Red Queen run in place for several minutes just to remain where they were. According to the CRF, this may be the case for EU accession countries like Moldova, North Macedonia, and Serbia and for OECD accession countries like Peru—all of which have been recipients of considerable rule of law support. But even this cannot be said of OECD member Mexico, recent OECD recruit Colombia, and EU accession countries like Turkey and Bosnia and Herzegovina, which experienced backsliding on the rule of law despite years of reforms.

This trend extends further afield as well. In the Middle East and North Africa, a particular area of focus for the EU's rule of law promotion efforts, Tunisia regressed while other countries did not change much and began at far worse starting points. Sub-Saharan Africa exhibited on average no progress, with countries like Burundi, Sierra Leone, and Zimbabwe recording some positive signs from very low starting levels. Longtime standout Botswana declined on budget transparency, press freedom, and judicial independence. The most positive case in Asia for judicial independence was Indonesia, whose score rose from 3.95 to 5.7 (out of 10) between 2008 and 2020, while India's score declined over that same period. Meanwhile, Uruguay, Costa Rica, and Chile performed well in Latin America. The Index of Public Integrity offers insights into what is missing in countries that need to achieve progress but have not managed to do so yet.

In Europe, there were no improvements on freedom of the press, another chief determinant (alongside transparency, judicial independence, and administrative simplicity) of how successfully countries mitigate corruption. Aside from Hungary and Poland, the list of backsliders included Greece, Bulgaria, and Latvia. Hungary's informal control of the media has received much publicity; in fact, media capture is widespread in some other EU member states as well, even if journalists are not arrested as they are in Turkey. The global situation on freedom of the press is even worse, according to Reporters Without Borders.

Accounts of how many countries are improving on the rule of law differ. The CRF's methodology identifies twenty-two countries that have been significantly improving (by at least one standard deviation from the global mean) on variables like judicial independence, freedom of the press, budget transparency, and digital civil society, compared to nine that have experienced significant backsliding. In contrast, the World Justice Project reports that in 2021, 74 percent of countries had declining scores on the Rule of Law Index. The negative trends are seen on the most political metrics like judicial independence and freedom of the press.

Given that previous direct international interventions on the rule of law in places like Kosovo (through the European Union Rule of Law Mission in Kosovo) and Guatemala have proven unsuccessful and unsustainable, assisting countries that are already on a positive trajectory and need assistance may be a more strategic choice for international donors. These countries are a mixed bag, but donors should hang on in places like Armenia, Indonesia, Kenya, Kyrgyzstan, Liberia, Moldova, Mongolia, Morocco, North Macedonia, Timor-Leste, Vietnam, and even Zimbabwe

Avoid Interventions That Would Destabilize Countries

The CRF's detailed map of change shows how politics tends to rule over the law. Between 2008 and 2020, several countries including Armenia, Brazil, Burkina Faso, and Ukraine made limited progress but managed not to regress on any essential rule of law indicators monitored by the CRF, until (in each case) a single political event ended up ruining their progress. Some positive political change accounted for countries that made progress, like Armenia, Bulgaria, North Macedonia, and Zimbabwe.⁵ Little discernable progress was seen in countries like Colombia, Peru, Tunisia, and Turkey that had full-blown, OECD-formulated five-year plans to achieve better governance, while countries in the Western Balkans have been priorities for the European Commission's justice and anticorruption strategies and roadmaps. There are a few exceptions to this general pessimistic trend, including Costa Rica and Uruguay, two Latin American standouts that have enjoyed no significant international rule of law promotion but nonetheless made progress due to a free press, the absence of violence, and broad consensus-driven reforms.

The lesson is that foreign assistance to promote the rule of law should start *after* basic domestic political conditions are met and supportive domestic constituencies exist. Unless this condition is met, such assistance runs the risk of being futile or perhaps worsening the situation.⁶ In the case of Moldova, for example, a self-styled oligarch leading a small party managed to capture a parliamentary majority and the state just by appointing loyalists to the country's new, donor-sponsored anticorruption structures and using them to eliminate rivals through blackmail or arrests. Benin and Senegal both regressed on democracy due to abuses of anticorruption structures against political opponents. The European Court of Auditors found that EU initiatives have not managed to unravel Ukraine's oligarchic structures in part due to the weakness of support for reforms from within local institutions. Moldova's former leader is now an

international fugitive, while the heroic resistance of Ukrainians to the Russian invasion allowed President Volodymyr Zelenskyy to redeem himself with his own civil society.

The case of Ukraine shows that rule of law promotion touches issues of sovereignty, which can be disputed. If the United States can intervene in an appointment of a general prosecutor in Ukraine, why not Russia? It is perhaps wiser for international supporters not to intervene in the appointment of prosecutors in other countries at all. Domestic agency comes first. Donors should simply support countries that manage to build some consensus over the broad reforms needed and that only require the resources or the know-how to enact those reforms. Mixing rule of law promotion with regime change has proved damaging. International donors may not be able to prevent wars (civil or otherwise) and coups, but they should certainly not provoke wars. Many things can be done in Western countries to prevent kleptocrats from laundering money without destabilizing the fragile countries they come from.

Constrain Executives

If the rule of law depends strongly on politics, then the political economy of the rule of law becomes essential. Many rule of law programs have backfired because they back executives' ostensibly reformist agendas in the absence of checks and balances on these governments.

For the rule of law to be more successfully promoted across borders, domestic stakeholders (such as Hungarian judges) must endorse it alongside broad constituencies (like Hungarian voters) and make demands of their political leaders. In the EU's neighborhood, the case of Albania's internationally endorsed judicial vetting (a process of checking and replacing the entire judiciary on the supposed grounds of integrity) is fast becoming a precedent. In Albania, the opposition stepped back from the process, which nevertheless went on with a government that had a monopoly on power at the central and local levels. This process led to accusations that only corrupt judges affiliated with the opposition were forced out. In an exercise for building the rule of law, the proper procedures may be even more important than the results, as the Venice Commission conveyed to the government of Moldova when it emulated the vetting process: "The Venice Commission recalls that meaningful consultation of the opposition and of the stakeholders [in this case, the Judicial Council] is a key element in democratic law-making."

However, reforms in both Albania and Moldova included the arrests of top reform opponents (like general prosecutors), without any guarantees that their successors would not be equally corrupt and politicized. An unaccountable and corrupt judiciary is a plague, but as long as it remains pluralist, democratic backsliding is less likely, as a textbook case like Peru shows. Each of the country's successive presidents has believed that their own political interventions are the solution to the problem of their predecessors' politicization of justice until they created an unsolvable problem. Indeed, it would be difficult to find any neutral parties to vet the Peruvian judiciary, which has been exhausted by so many political reforms. Neither Albania nor Peru, two highly informal economies that hold competitive elections, made significant gains on judicial independence from 2008 to 2020.

Successful examples look different. In Chile, South Korea, Taiwan, and Uruguay, research has documented evidence of virtuous circles in building the rule of law. International efforts to promote the rule of law may have few successes because they rely on contradictory approaches. Their standard approach is to rely on judicial councils as bodies of self-rule for judiciaries. Yet many countries start with corrupt and unaccountable magistrates. Donors then pressure the councils into making reforms, often via legislators and executive officials, which are more answerable to external pressure. This approach is self-defeating as it undermines the constraints on executive officials that are so central to the rule of law.

Avoid Tensions Between Anticorruption and the Rule of Law

External interventions to support the rule of law in other countries generally focus on judicial systems and anticorruption agencies, with the latter often seen as a panacea for governments' lack of will to fight corruption. Brazil and Romania have won the greatest praise as recent success stories of top-level judicial cleanups. Yet these cases may not be the unequivocal success stories they are sometimes presented as. After all, 54 percent of Brazilians (in 2019) and 45 percent of Romanians (in 2021) believed that corruption had in fact worsened recently in their countries, according to Transparency International's Global Corruption Barometer. These two cases offer many lessons.

Western observers celebrated Brazil's Operation Car Wash investigation, which sent shockwaves across Latin America and created the impression of a major shift away from impunity for corruption. However, Brazil's judicial independence score in the CRF did not once manage to rise above 5 between 2008 and 2020. The Supreme Court ended up releasing one of the key sentenced figures, Brazil's popular ex-president Luiz Inácio Lula da Silva, in a decision that overturned multiple earlier rulings. The Brazilian

public were split on the issue based on their partisan affiliations, with supporters of Lula claiming that the case was politically motivated and his critics viewing his eventual exoneration as a setback.

In the aftermath of this anticorruption campaign in Brazil, traditional political parties were discredited, and voters elected a populist general with authoritarian tendencies, whose behavior strained the rule of law even more. Brazil managed to avoid backsliding on any CRF indicators during this interval and even made gains on administrative transparency and slashing red tape, but its confidence in the rule of law was deeply shaken by this controversial anticorruption episode.

Meanwhile, in the EU, Brussels has promoted Romania as a champion of anticorruption efforts by, for instance, appointing a Romanian official in 2019 as head of the newly created European Public Prosecutor's Office. Romania jailed many ministers and virtually half the family of former president Traian Băsescu (after he left office), heavily relying on generalized wiretapping by the Romanian Intelligence Service. After a consistent string of convictions over several years, the Constitutional Court eventually banned the use of generalized wiretaps not approved by a judge on an anticorruption warrant.

As in Brazil, the weakness of Romania's main, largely corrupt political parties due to the country's long anticorruption campaign and political infiltration by the intelligence service led to a deterioration of civilian control over the military. Romania also ended up with a former general running the country when Nicolae Ciucă became prime minister in November 2021. When journalists accused him of plagiarism, they were harassed, and prosecutors confiscated the proof from the only government agency with official jurisdiction on the pretext of a legal investigation. In a similar move, the activist judge who sentenced oligarchs ended up being pushed out of the judicial ranks by the independent judicial council. Meanwhile, Romanian citizens still stand out in Eurobarometer polling for being among the most affected by corruption in their daily lives compared to residents of other EU member states.

The EU and United States promoted the Romanian model in Ukraine, Moldova, and the Western Balkans with poor results. To thrive, anticorruption campaigns need the support of nonpartisan, middle-of-the-road constituencies; the more such efforts get tied up in top-level politics, the greater the likelihood of partisan conflict and lost sustainability. Rule of law reforms need to stress procedures, not the removal of particular individuals. In places where the rule of law is weak, rulers use anticorruption agencies against political opponents. What good does the anticorruption agency do in a country like Senegal, other than clearing the field of other presidential contenders, while the president's brother can manage official funds with practical impunity? The solution is to depoliticize both the bureaucracy and the judiciary—or at the very least, to strive to avoid situations where a single party captures control of both these levers of power—and to gradually eliminate legal rents and privileges through comprehensive reforms. When the greatest power asymmetries are addressed, other reforms will gradually take hold without endangering the rule of law.

Conclusion

The fundamental question that scholars like Thomas Carothers and Francis Fukuyama asked after 1989—whether the rule of law can actually be promoted from abroad—has largely been answered in the negative, especially if the rule of law is defined so broadly as to include public integrity or gender equality. Even in the EU, where a majority strives to impose a liberal European order on defecting countries, a narrow definition closer to procedures (rather than values) might help achieve more effective promotion. Helpful international support is still possible, however, if the rule of law is defined more thinly and procedurally as a rule-based system, sanctioning those who break the rules and assisting those who build and preserve such a system. This endeavor needs to be detached from overly ambitious state-building designs and implemented based on clear, objective, and unitary standards.

Notes

¹ Unless otherwise noted, the data cited in this article are from the author's work with the European Research Centre for Anticorruption and State-building, including the Index of Public Integrity and other similar datasets.

² World Bank, *World Development Report 2017: Governance and the Law* (Washington DC: World Bank, 2017), <https://www.worldbank.org/en/publication/wdr2017>.

³ The Venice Commission offers a comprehensive list of benchmarks. See Venice Commission and Council of Europe, "European Commission for Democracy Through Law (Venice Commission) Rule of Law Checklist," Venice Commission and Council of Europe, Study No. 711/2013, March 18, 2016, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e). The European Commission DG Justice focuses on four features for its much criticized rule of law reports. See European Commission, "2021 Rule of Law Report: Communication and Country Chapters," European Commission,

2021, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report_en;

and Laurent Pech, "Doing More Harm Than Good? A Critical Assessment of the European Commission's First Rule of Law Report," Heinrich Böll Stiftung, December 4, 2020, <https://eu.boell.org/en/2020/12/04/doing-more-harm-good-critical-assessment-european-commissions-first-rule-law-report>. The EU Justice Scoreboard homes in more narrowly on the efficiency, quality, and independence of justice. See European Commission, "2021 EU Justice Scoreboard," European Commission, 2021, https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf.

⁴ The Index of Public Integrity's judicial independence component uses a ten-point score (with ten being the best) based on data from the World Economic Forum's Global Competitiveness Report. See World Economic Forum, "Global Competitiveness Report Special Edition 2020: How Countries Are Performing on the Road to Recovery," World Economic Forum, December 16, 2020, <https://www.weforum.org/reports/the-global-competitiveness-report-2020/>.

⁵ For more information, see the CRF's individual country profiles. See European Research Centre for Anticorruption and State-building and Center for International Private Enterprise, "Corruption Risk Forecast 2021," European Research Centre for Anticorruption and State-building and Center for International Private Enterprise, 2021, www.corruptionrisk.org/forecast.

⁶ A study by Ronald J. Daniels and Michael Trebilcock divides countries into three categories: those where politicians, legal professionals, and the public all support reform, so progress can be made (as occurred in Central Europe after the fall of communism or South Africa after apartheid); those where politicians support reform, but lawyers and the police do not (in countries like Chile and Guatemala); and those where lawyers want change, but politicians do not (in places like Pakistan). See Ronald J. Daniels and Michael Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries," *Michigan Journal of International Law* 26, no. 1 (2004):<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1217&context=mjil>.

Alina Mungiu-Pippidi is a professor of democracy studies at the Hertie School in Berlin and the United Nations Office on Drugs and Crime expert in charge of developing a system of objective corruption indicators.

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