

2023 Rule of Law Report stakeholder consultation submission by Democracy Reporting International, Berlin, Germany

Substantive recommendations

The four key areas covered in the rule of law report are the state of the judiciary, the issue of corruption, freedom of media and other items related to checks and balances, address the majority of the rule of law concerns in EU Member States. However, some horizontal themes and concerns apparent in all or majority of EU MS warrant particular attention due to their impact on the rule of law in the region as a whole.

1. Examining the impact of the war in Ukraine

The ripple effects of the full-scale Russian attack on Ukraine also affect the rule of law in the EU. Multiple items have been impacted, chief among them the situation of refugees from Ukraine in EU Member States, including the state of laws and policies enacted to facilitate their long-term stay, as well as court protection of their rights and freedoms. In addition, the refugees face challenges related to the legal systems of EU Member States operating exclusively in national languages and occasionally English, with a low number of available sworn translators of Ukrainian/Russian and the authorities tasked with the integration of refugees being unprepared for supporting such large numbers of incoming people from an area which had little prior regular migration.

Actions aimed at curtailing Russian influence in the European Union, including sanctions against individuals and attempts to curb Russian disinformation, must also be carried out with full respect to the rule of law. While diminishing undue Russian influence in the region and ensuring that criminal activities are persecuted are vital for the security of EU, care must be taken by all EU Member States and EU institutions to ensure that the principles of criminal law and the right to a fair trial are respected in the process.

Beyond the challenges of facilitating the refugees, multiple other areas of the rule of law in the European Union have been impacted by the war. The varied dynamic of supporting Ukraine's fight against Russia in some Member States where the rule of law has dramatically deteriorated in recent years, such as Hungary and Poland, has complicated EU's response and attempts to restore the rule of law. In our view, the issue of supporting Ukraine (or refraining to do so) should be considered separately from the situation of the rule of law in the country.

Recommendation:

The 2023 rule of law report should take a broader look at the rule of law impact of the war, in particular, the situation of refugees from Ukraine in EU and the effect the war has on the rule of law situation in EU Member States.

2. Assessing the non-implementation of CJEU and ECtHR rulings

Across the entire EU we observe a mounting issue of lack of implementation of orders and rulings from the Court of Justice of the European Union and the European Court of Human Rights. The reasons behind this lack of respect for decisions by top European courts range from insufficient resources to malicious disrespect triggered by political motivation. However, regardless of the cause, the effect of lack of implementation despite a clear legal obligation to do so remains a major and increasing rule of law problem in the EU.

With an increasing number of judgments from European courts being non-implemented by EU Member States and, in some cases, such courts being directly challenged by governments or constitutional courts in EU MS, there's a case for expanding the current assessment of non-implementation of rulings from ECtHR and look deeper into the systemic nature of the problem and examine the status of key CJEU judgments and interim orders which have been ignored or challenges by EU Member States. This pertains to judgments and decisions of either court that directly concern issues covered by the rule of law report, such as courts and judges, media freedom, corruption and checks and balances.

Monitoring this trend and tracking the fate of key ECtHR/CJEU judgments is critical, particularly concerning EU Member States, which have adopted a practice of sustained resistance against some rulings of European courts and have turned towards attacking these courts, using captured and politically compromised domestic courts and institutions. This, in particular, concerns Poland, where a not-independent Constitutional Tribunal has been used to challenge the authority of CJEU directly and partially reject the cornerstone principle of primacy of EU law.

Recommendation:

The 2023 rule of law report should include an assessment of the issue of surveillance of persons directly involved in work on the rule of law, such as judges, lawyers, journalists and civil society activists.

3. Highlighting the issue of widespread covert surveillance

The debate over legal aspects of secret surveillance of individuals carried out by law enforcement has a long history within EU. With Member States attempting to counter subsequent significant threats such as global terrorism, organised crime and now

Russian aggression, the question of protecting rights and freedoms while effectively countering crime remains constantly relevant. These measures ought to be used proportionately, under judicial oversight and with the ability of persons under surveillance to review and challenge the legal grounds for using such measures.

The recent report from the European Parliament on the use of Pegasus surveillance software by EU Member States, which is a massive right-to-privacy issue, highlights a significant problem of the apparent use of such means to spy on civil society activists, lawyers and journalists. Of particular concern is the use of such means by governments actively involved in undermining the rule of law towards their critics and opponents, paired with a lack of accountability and proper criminal investigations into abuse of surveillance. These issues all build upon earlier problems in EU Member States with overuse of cover spying on individuals and lacking proper oversight and judicial guarantees.

This issue speaks to a broader problem of governmental and private actors using a range of measures, including SLAPPs and harassment, to deter critics of their actions harmful to the rule of law. However, the use of surveillance is currently a particular challenge due to a tendency by governments to overreach with spying on citizens while handling a major threat, such as the current Russian posturing against EU and its Member States. Under such circumstances, it is far easier for governments to justify and carry out wide-scale surveillance with societal acceptance.

Recommendation:

The 2023 rule of law report should cover the systemic angle of the non-implementation issue, as well as look in detail into the situation of non-implementation of CJEU decisions.

Methodological recommendations

A. Factoring in informal/contextual issues in the qualitative assessment

The Commission's present approach to assessing the states' rule of law performance has two shortcomings, namely its excessive emphasis on legislative developments and disregard of informal factors that can significantly affect the actual mechanics of decision-making and its standardised approach to the legislative solutions proposed.

1. Challenges of one size fit all approach

It would be beneficial if, instead of advocating the same standard solutions for all states, the Commission adopted a country-specific approach. Because of the varied rule of law culture across the EU, legal arrangements that work well in certain countries will fail in others. For example, in some states, politicians may interfere with judicial independence notwithstanding formal safeguards, while in others, they may respect judicial independence even in the absence of such safeguards. Granted, solid formal guarantees can be helpful even in countries that have a well-developed rule of law culture. However, they do not constrain politicians where such culture is severely lacking.

While insulation of judiciaries from external pressures through the de-politicisation of governance makes sense in some countries, the complete exclusion of democratic oversight might not always be necessary or justified. It depends on how politicians behave and whether the process of political decision-making has built-in checks. At the same time, even where politicians' formal role gets reduced justifiably, the risks of indirect, informal politicisation remain. The rise of judicial self-governance has risks of its own which often remain unacknowledged and minimised. Hence, the Commission should be on the alert for judicial [accountability](#) deficits as well. In adopting such a context-sensitive approach, the Commission could consider relying on the input of independent national experts.

2. Looking beyond the legislative framework and at informal practices and institutions

It would be beneficial for the Commission to look beyond legislative achievements or flaws and factor informal acts, practices and institutions in its monitoring and assessments systematically and consistently. These could range from isolated incidents to established ways of thinking and doing - mindsets and behavioural patterns which have no foundation in law but are shared and practised by relevant stakeholders and shape institutional outcomes. As an example, in some countries (Spain, Portugal, etc), there is a *de facto* quota system, allowing for the allocation of seats in constitutional courts to core political parties. There can also be a quota system allowing the distribution of key positions in the judiciary (for example, those of court presidents or judicial council members) among various judicial associations. These types of practices could open the door for informal bargaining and minimise the role of merit-based selection.

Informal practices and institutions can have both negative and positive effects. Some behavioural patterns can render adequate formal changes useless and ineffective. Others could complement and reinforce existing formal safeguards or even help protect judges, journalists and other actors where formal guarantees are non-existent or incomplete. An example of the former is politicians attacking and seeking to discredit judges or calling them and inquiring about the results of ongoing politically

salient cases. Politicians may also adopt the practice of installing loyal judges in key positions and seek to control case outcomes through them. This makes the judiciary vulnerable to indirect politicisation, allowing politicians to exert influence even if they are not formally involved. An example of the latter (positive informal practices) would include judges' collective mobilisation (through judicial associations) to counter politicians' attacks or legislative drafts that, if adopted, could endanger judicial independence. Informal acts/practices/institutions instances should be flagged, where possible, and then discouraged or encouraged, depending on their effects on the rule of law.

Granted, informal practices and institutions are hard to discern due to not being codified in formal documents. However, there is common knowledge about them among stakeholders in the relevant interaction contexts. They are often visible and talked out as well as reported by media, CSOs and academics. While even isolated informal incidents could be consequential in a positive or negative sense, particular attention needs to be given to informal practices (behavioural patterns), especially the ones that get institutionalised and hence, inform expectations and behaviour of relevant actors (judges, politicians, etc.), including any newcomers to the system.

Informal rules of the game are as important as formal rules. Hence, if the Commission wants to genuinely understand the state of the rule of law in EU member states, it will also need to understand informal practices operating therein. Otherwise, it will lose sight of the negative tendencies behind the formal façade as well as the positive ones that should be replicated.

Extending the scope of its analysis this way would enable the Commission to contribute to improving the rule of law culture, possibly instigating changes in the mentality and behaviour of relevant stakeholders.

Recommendations:

The 2023 rule of law report should:

- (a) Factor specificities of the local context in its proposals and recommendations instead of taking a 'one size fits all' approach.*
- (b) Flag not only legislative flaws or gaps but also informal practices undermining otherwise adequate legal changes, where possible. In seeking to accomplish that, the Commission could benefit from the involvement of independent national experts.*

B. Developing the Assessment scheme

- 1. Overarching scheme of assessing state performance comprehensively and systematically**

According to its [own description](#), in preparing its annual rule of law report, the Commission conducts a *qualitative* assessment, focusing on significant developments, highlighting both challenges and positive aspects for each EU member state. However, the Commission's analysis remains largely descriptive and fragmented in that it fails to acknowledge the inter-connectedness and systemic nature of challenges. Moreover, the Commission does not give a clear conclusion as to whether the state has declined or improved as regards the areas covered by the report (separately and [in combination](#)). While the Commission identifies trends across the EU, its analysis does not show systemically how each state's performance evolves or how it compares to other states. This is a missed opportunity in terms of exploiting the soft power of the report.

The Commission could [go beyond](#) qualitative assessments and grade the states in specific areas covered by the report. This would allow for a) meaningful cross-country comparison and b) tracing the evolution of the state's performance over time. At least some states are [concerned](#) about how they are viewed by other states as well as how they compare to other states. Grades and ratings could stimulate reputational concerns and lead to improvements. The Commission's conclusions would be picked up by the media and CSOs, maximising exposure and pressure and creating favourable conditions for change.

2. Follow up on the recommendations

The Commission included country-specific recommendations in its 2022 report for the first time. It was a major improvement compared to previous editions of the report. However, the credibility and effectiveness of this feature depend on (a) the quality of recommendations (b) an effective follow-up to assess state compliance. It is not immediately clear how the Commission chooses the issues to focus on and whether those issues are central or peripheral to the rule of law crisis or decline in each country; while some recommendations are sufficiently specific, others are vague. For example, the Commission sometimes requires "continuing efforts" without specifying the level of effort it would consider sufficient or appropriate and any result to be achieved. In terms of follow-up, the Commission could take inspiration from the [UN Human Rights Treaty Bodies](#) and build on their experience in developing the methodology for assessing states' progress. At the most basic level, for each recommendation, the Commission should at least differentiate between the performance that is fully satisfactory, partly satisfactory or entirely unsatisfactory. It should set thresholds as to what would amount to full or partial compliance. In case of partial compliance, it would have to clarify what additional action needs to be undertaken.

Without adequately following up on recommendations and giving clear assessments, the Commission could create [false expectations](#) and continue to fail at both

preventing or reversing backsliding, thereby undermining the effectiveness of its reports and its own reputation.

Recommendation:

The 2023 rule of law report should develop an approach for assessing the rule of law performance of Member States (including but not limited to compliance with recommendations) capitalising on states' reputational concerns and thereby enhancing soft power of its reports.