

1. Assessment of recommendations from the 2023 Rule of Law Report consultations

Last year, Democracy Reporting International made several recommendations regarding the substantive scope and methodology of the annual rule of law report. We reiterate key points here as much as they have not been implemented.

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

- **Status of Implementation: partial** – The Commission has recognised the increasing significance of the rule of law in view of the Russian aggression, including when engaging with candidate and potential candidate countries. However, the effects of war inside the EU have been addressed sporadically and peripherally rather than systematically.

Recommendation: The 2023 rule of law report should cover the systemic angle of the non-implementation issue and look in detail into the situation of non-implementation of CJEU decisions.

- **Status of Implementation: partial** - ECtHR data has been incorporated, but non-implementation of the CJEU rulings is getting much less attention. The issue is not highlighted in the recommendations in the case of the ECtHR and CJEU regarding particularly alarming situations of non-implementation, either in the case of ECtHR or CJEU.

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

- **Status of Implementation: partial** - While DRI welcomes the coverage of the issue, we believe the [scale](#) of the [problem](#) is far [greater](#) than what the Commission has shown. The report also did not assess the effectiveness of checks meant to prevent the abuse of surveillance/spyware or address concerns about the inadequacy of parliamentary inquiries, the lack of adequate judicial or prosecutorial scrutiny or allegations that authorities hinder various independent monitoring bodies.

Recommendation: The 2023 rule of law report should: (a) Factor local context-specificities 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.

- **Status of Implementation: unimplemented** – greater scrutiny is needed to trace the sufficiency of reforms and informal factors that might hinder adequate implementation in practice.

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 the soft power of its reports

- **Status of Implementation: partial** – the quality of recommendations still varies - selection of problems seems arbitrary, the expected level of effort is either minimal or unclear; while the Commission has developed an elaborate assessment scheme, highlighting various levels of implementation. However, several issues remain – for example, where the state efforts have fallen short, the Commission does not clarify what additional action should be undertaken.

Follow-up recommendations on Substantive Issues

Recommendation: The European Commission should systematically address the impact of the Russian full-scale invasion of Ukraine on the rule of law in Europe.

Recommendation: In addition to incorporating data on the overall record of implementation of the ECtHR judgments, the European Commission should focus on implementing key ECtHR and CJEU rulings falling under the four areas covered by the report. The Commission should address non-implementation in the analysis and through the issuance of recommendations to the states with particularly alarming overall records of implementation and those with unimplemented rulings on judicial independence and impartiality.

Recommendation: The Commission should engage a more sober and critical analysis of these practices in its report, focusing on checks on relevant authorities and assessing the effectiveness of monitoring and investigation meant to prevent the abuse of power.

Follow-up recommendations on Methodological Issues

The Commission should:

- Prioritise central issues over peripheral ones when formulating the recommendations.
- Provide more precise recommendations so that states and other actors know what is expected. The Commission should involve independent experts in the preparation of recommendations and the assessment of state progress.
- Enhance its scheme for assessing state performance. The Commission should clarify additional actions required when the state fails to implement the recommendation fully.
- Exercise caution in prematurely and readily accepting "reforms" as positive and instead monitor their implementation in practice.

2. Overarching concern: Arbitrariness and Overreach by the Executive

1.1. Introduction

We want to draw the Commission's attention in this year's stakeholder consultation to the issue of overreach and arbitrary action by the executive in EU Member States. The strengthening of the executive seen across the board in Europe during the height of the COVID-19 pandemic has persisted, and governments in multiple EU Member States have continued to employ emergency measures to react to this and other crises, frequently in a way that raises questions as to the reasoning behind such approach and its goals. Coupled with the erosion of judicial oversight and the increasing tendency for governments to disregard both domestic and international courts, this leads to the unchecked overreach of the executive with a detrimental effect on the rule of law, in particular in situations of open resistance against the judiciary and challenging the authority of CJEU and ECtHR.

1.2. Select issues

1.2.1. Judiciary

There are four types of problematic scenarios in which the governments seek to weaken judicial checks: first, governments introduce/maintain institutional arrangements undermining judicial or prosecutorial independence; second, governments delay reforms reinforcing formal guarantees of judicial or prosecutorial independence; third, inadequacy or insufficiency of such reforms can still leave room for political meddling with judicial governance and/or judicial decision-making; fourth, even where reforms are adequate on paper, judicial independence can still be endangered through informal practices, mainly where the political culture is not based on respect for this value. This means that the Commission should keep an eye on reform efforts to identify the ones that are sham or incomplete/partial and look at the actual dynamics of implementation of even seemingly adequate reforms before making any conclusive assessments about their adequacy.

In Slovakia, Prime Minister Fico's government sought to fast-track changes in criminal law to scrap a special prosecutor's office investigating [corruption](#). France and Germany, on the other hand, represent examples of delays in the reinforcement of formal guarantees of prosecutorial independence, even though the lack of such guarantees does not necessarily lead to politicised prosecutions or shielding from prosecution.

Hungarian situation exemplifies the risks of maintaining the system of judicial governance in which a political appointee (President of the National Office of the Judiciary) decides on judicial careers and the National Judicial Council (NJC) – the body composed of judges elected by judges - was sidelined. [Politicised](#) appointment of the Supreme Court president also created threats to judicial independence. Recent reforms seemingly address some of these concerns, but the remaining gaps endanger their effectiveness. While new [Hungarian](#) legislation precludes the re-election of the Supreme Court (Kúria) president, the current rules allow for keeping the president in office indefinitely because a parliamentary minority can easily block the successor's election. While the reform strengthened the NJC, there are still barriers to effectively exercising its powers. While there was no incentive to capture an otherwise weak NJC, reinforcing its position increases the risk of capture. In October 2023, the Hungarian Helsinki Committee [reported](#) external and internal pressures exerted on electing NJC members for the next six-year term. Examples include public statements by the minister aimed at discrediting current members of the NJC and dissuading them from running for the elections. There have also been reports about the violation of the secrecy of the voting process.

In Poland, the issues with the government taking advantage of a politically captured National Council of Judiciary, Constitutional Tribunal and elements of the Supreme Court persisted as in prior years. Of note, in particular, was the December 2023 [judgment](#) of the Constitutional Tribunal finding, entirely in line with the request from the Prosecutor General (who also is the Minister of Justice) that the financial penalties for non-compliance with CJEU interim orders, such as the ones imposed on Poland in cases C-204/21 Commission v Poland (concerning Disciplinary Chamber and so-called "muzzle law") and C-121/21 Czech Republic v Poland (concerning the Turów coal mine) are not compatible with the Polish Constitution.

The reforms implemented in Romania also appear mostly partial and ineffective in protecting judges from being targeted for being outspoken. A few [judicial](#) and [expert](#) bodies criticised taking the power to investigate judges and prosecutors away from the National Anti-Corruption Directorate and vesting it into the Special Section within the Prosecutor's Office (SIIJ). While the dismantling of the SIIJ in 2022 can be seen as a positive development, the [Venice](#) Commission indicated that non-specialised prosecutors replacing the SIIJ would not have the independence and expertise necessary to investigate allegations of corruption against judges and prosecutors, especially compared to the National Anti-corruption Directorate. The CJEU is expected to address the issue of the new system of investigation in

response to the [reference](#) by the Pitești Court of Appeal. The reform also sought to remedy the [concentration](#) of powers in the hands of the chief Inspector, an actor in charge of initiating disciplinary proceedings, and reduce the risks of abuse of power by the latter. However, national judges still claim that while some of the reforms might look good on paper, new legislation has not prevented the Judicial Inspectorate from [harassing](#) them in practice and getting them dismissed for objecting to legislative amendments related to the justice system.

Further attention is needed where the de-politicisation of judiciaries is in order, but reforms have been delayed considerably. Spain is known for political negotiations and clashes over the composition of the General Council of the Judiciary, with the two main parties seeking some level of control over the body. The politicisation of appointments to the Council has similarly been an issue in Poland, and hence, with the change in government, the reform of the politically captured Council and resolving the situation with the judges appointed with the recommendation of that Council remains on the agenda.

1.2.2. Corruption

In multiple EU Member States, action against corruption arbitrarily targets only specific sectors of the authorities, leaving some without proper oversight. This most frequently manifests in formulating policy and implementing measures that target low to mid-tier officials while leaving out the top of the country's administration. Such a situation persists i.e. in [Hungary](#) and [Malta](#) where highest ranking officials evade proper examination as to possible corruption affecting them or their family members. In some cases, the governments are seen as pressuring the courts to influence proceedings in cases concerning corruption (Hungary) or have been taking advantage of politically capturing elements of the judiciary to ensure that cases concerning instances of corruption are handled by judges friendly to the government (Poland).

1.2.3. Media pluralism

Arbitrariness and overreach of the government in media pluralism manifested itself in 2022 in several ways. One common practice used by governments in i.a. [Hungary and Poland](#) was the arbitrary denial of journalist accreditation or refusing to allow media critical of the government to cover press briefings and events organised by authorities. [Slovakia](#) saw the new Prime Minister refuse to be interviewed by four significant media outlets, while in [Czechia](#), a Russian journalist in exile was denied accreditation during the meeting between the Czech and Ukrainian presidents. In the case of countries where public state-owned media have been dominated by messaging friendly to the government, state media regulators have targeted private media outlets with fines over the content of their programming while ignoring complaints over similar content being aired by state-owned outlets.

1.2.4. Other issues

The Commission should be highly alert to the constitutional reform proposals by the Italian government in November 2023. The cabinet proposed the direct election of the Prime Minister (a constitutional curiosity) and a guaranteed majority for the Prime Minister, who would get a seat bonus of 55% of the seats in both houses. Thus, a relative majority in votes would be turned into a significant majority of seats. A party with only 20% of the votes could end up in a commanding constitutional position because no other party garnered more votes. While now parliamentary elections determine the composition of the government, with this reform, the "prime minister's elections" would decide on the composition of the parliament. The reform will create a massive concentration of power in the Prime Minister, endangering constitutional checks and balances and, thus, the rule of law. It will weaken the role of parliament. The system has no precedent or parallel in constitutional practice. The Prime Minister would enjoy the legitimacy of direct elections that the Presidents have in presidential systems, without the checks and balances that characterise the Presidential system (a directly elected parliament as a counterweight). This significant challenge should be addressed in the report (and through other means).

Another alarming development is the effective rule through a decree following the introduction of a state of emergency. The [Hungarian government](#) has been governing through decrees since 2020 thanks to declaring a state of danger, most recently in connection with the war in Ukraine. On 26 November 2023, the government extended the state of danger for another six months. This way, the government can avoid parliamentary debates and rule without parliamentary control. The outcome of the parliamentary process may have been the same, as the government can rely on a two-thirds majority. However, rule by decrees means the absence of any accountability by providing reasoning or otherwise. It is hard to connect many of the decrees to the war in Ukraine.

Recommendation: The Commission should look at the risks of executive overreach and any initiative meant to weaken the checks systematically and consistently across the areas covered by the report and tackle such initiatives through recommendations.