

Civil society recommendations: how the Commission can improve the credibility, inclusiveness and impact of the Rule of Law Report

The EU rule of law report is an important step towards strengthening the foundational values of the Union – respect for human dignity, freedom, democracy, equality, the rule of law and human rights. To this end, many civil society and media organisations, as well as journalists and human rights defenders, have put significant resources into quality submissions to the public consultation and coordination regarding input and follow-up. All of them recognised the great importance of the Commission’s work and have made these submissions with a view to assisting the Commission in its critical missions. Yet among them, there is a widespread sense that some of these efforts are fruitless and in vain. We have therefore come together to issue a set of recommendations ahead of the next reporting cycle, to improve the credibility, inclusiveness and impact of the report.¹

A. Adopt a clear, more inclusive and transparent methodology for the meaningful participation of non-governmental stakeholders throughout the process.

We greatly welcome the Commission’s involvement of civil society actors, both through the online public consultation and the country visits and interviews. Yet the involvement of civil society, human rights defenders, legal professionals, journalists and other media actors in the process was scattered in scope and geographical coverage, and inconsistent, suffering from a number of shortcomings that inhibited civil society engagement and thereby undermined the inclusiveness and credibility of the process:

- **Short deadline:** The deadline for the public consultation was very short, with only five weeks to feed into the extensive consultation.² Such a deadline makes it exceedingly challenging for CSOs to consult their own constituencies and coordinate joint submissions, thereby closing many doors for meaningful participation.
- **Lack of transparent methodology & outreach:** While many non-governmental actors spent significant time and energy on the consultation, there is no clarity on whether and how their submissions are being used to feed into the report. There is a lack of transparency into the methodology used to design the consultation and draw up the country and general reports, which in turn harms the legitimacy and credibility of the process.
- **Lack of transparency on civil society involvement:** While we welcome civil society involvement in the country visits and interviews, the manner in which civil society and professional organisations were involved lacked clear criteria and transparency on who was and was not invited to participate, and why. Many of those who submitted to the consultation

¹ Find here some reaction statements from individual signatories, which have fed into this joint statement: [European Civic Forum](#), [Human Rights and Democracy Network](#), [European Centre for Press & Media Freedom](#), [Democracy Reporting International](#), [Liberties](#).

² Find the details of the stakeholder consultation [here](#).

were not invited to meetings and lists of contacts sent by civil society networks were not used. The timing of country visits was not effectively communicated to civil society around Europe. Civil society are treated as an information source rather than a partner in the process.

- **Lack of transparency and involvement in follow-up discussions:** Discussions on the follow-up to the reports' findings currently happen behind closed doors, excluding both the public and civil society.

RECOMMENDATIONS:

- 1. Clear and timely communication:** The Commission should communicate in a transparent manner core information about all main aspects of the process well ahead of time. This includes announcing a clear timeline of the consultation process at least one month in advance of its commencement, with detail on the public consultation period, country visits and contact information for all thematic and country focal points on the rule of law. The public consultation should be open for at least twelve weeks to allow for meaningful participation by all non-governmental stakeholders. The Commission should proactively reach out to civil society - including relevant umbrella organisations identified in the Transparency Register - and journalists in Member States, including through the Commission's national representations. Finally, detailed country pages should be made easily accessible on the Commission's website: they should provide all relevant information on the consultation process in the respective Member State, including contact details of the country focal point, as well as important updates relating to the Rule of Law report. They should be translated into national languages.
- 2. Transparent process:** Clear criteria should be established for the selection of stakeholders to be consulted in country visits and interviews. Such protocols should be established jointly with non-governmental stakeholders. The Commission should communicate publicly on the stakeholders they consult and the criteria for this, with due regard to the need to protect confidentiality in certain cases.
- 3. Methodology:** The Commission should publicly adopt a methodology for the processing of consultation submissions and input, including clear selection criteria for the inclusion and exclusion of input in the final reports.
- 4. More inclusive involvement:** Non-governmental stakeholders should be more closely and proactively involved throughout the process to strengthen the credibility of the reports and avoid blatant omissions of violations in the reports, including as a result of any undue influence that may be exerted by Member State pressure in the revision process.

B. Review the methodology of the current Rule of Law report to consider all rule of law issues, including civic space, media independence and systemic human rights violations in EU Member States.

We welcome that this year's report has been somewhat more explicit in describing how attacks on the judiciary, the media and civil society can create fertile grounds for impunity and corruption and affect the rule of law infrastructure. However, it has continued to overlook some key rule of law issues, as a result of the Commission's narrow interpretation of the rule of law, such as the situation of public service media, the implementation of decisions by regional and international judicial bodies, civic

space and the situation of human rights defenders, and widespread and systematic violations of fundamental rights. Three problematic shortcomings resulting from the limited scope of the report are particularly worrying and these areas should, as a result, feature in the next rule of law reports:

I. Systemic human rights violations: The Commission's very narrow interpretation of the rule of law has as a consequence that the report fails to adequately take on board the human rights dimensions of the rule of law. "The rule of law is inextricably linked to and interdependent with the protection of human rights, as guaranteed in international law and there can be no full realisation of human rights without the operation of the rule of law, just as there can be no fully operational rule of law that does not accord with international human rights law and standards."³ The reports, however, fail to map the scale of systemic human rights violations that directly affect respect for the rule of law in the EU. Without considering these systemic human rights violations, it is impossible to assess the principles of accountability, effective remedy and access to justice.

As a result, the Commission ignored submissions on core rule of law issues related to human rights, which became even more pronounced during the pandemic. This includes numerous cases of racial and other discrimination, undue limitations to freedom of expression and assembly, attacks on academic freedom, discriminatory laws and measures against women and LGBTIQ persons, and violations of the rights of migrants. We would recall that non-discrimination is itself a core rule of law principle. As Liberties phrased it well: "*While some of these developments are, albeit timidly, reflected in certain country reports, the EU Commission has overlooked many of these human rights abuses by public authorities and had missed the opportunity to reflect how governments' failure to prevent, investigate and sanctions such violations affect the rule of law.*"⁴ While we do not suggest that the Commission evaluate all human rights concerns in the rule of law report, certain human rights and in particular certain systemic violations of human rights have a particularly close link with the rule of law, and these should be prioritized in the work of the Commission.⁵

II. Media freedoms: In addition, the reports have overlooked some serious media freedom issues, particularly related to the capture and state control over public service media. Public service media are under increasing pressure or constraints in some member states, lacking sufficient independence from state or public authorities, as detailed in the Media Pluralism Monitor and numerous other reports.⁶ Yet public service media are often able to swing public opinion decisively in favour of incumbent parties in government, adversely affecting the results of elections to the European Parliament and national and regional voting. State influence over Public Service Media is wielded through funding, state advertising and politically dependent management. In addition, the reports only pay scant attention to other media freedom issues such as strategic lawsuits against public participation (SLAPPs), increased smear campaigns against journalists and the abuse of provisions regulating free speech.

³ ICJ, 2019: The Tunis Declaration on Reinforcing the Rule of Law and Human Rights (para 4). Available [here](#).

⁴ See the full statement [here](#).

⁵ Rights with particularly close links to the rule of law include, among others, the right to a fair trial by a competent, independent and impartial court established by law; the right to political participation including through free and fair elections; non-discrimination, equality and equal protection of the law; the right to freedom of expression and information, particularly as concerns the functioning of a free and independent media; the principle of accountability and intolerance of impunity, particularly for gross human rights violations; and the right to an ineffective remedy and reparation for human rights violations. (see e.g. 2012 Human Rights Council, Resolution 19/36 on Human Rights, Democracy and Rule of Law, A/HRC/RES/19/36, 19 April 2012).

⁶ The Media Pluralism Monitor 2021 report identifies twelve EU member states where Public Service Media (PSM) independence is at 'high risk'. See also the Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, available [here](#).

III. Civic space: Finally, we welcome that more country reports have this time touched, even if timidly, upon civic space, including the mentioning of SLAPPs as a threat to civil society, freedom of expression and academic freedom. As recognised by the Commission in the report, the enabling space for civil society is vital to the functioning of the rule of law. Political and civic participation are essential for the safeguarding of the rule of law. Civil society contributes to increasing effective access to human rights for many. However, the reports' limited scope largely excludes many substantial issues regarding civil society and civic space that affect the strength and ability to enjoy the rule of law. There is no systematic assessment of civic space and when it is considered, the issue is treated superficially and very marginally, without any mention of human rights defenders. The impact of the COVID-19 pandemic on the right to assembly is, for instance, only sporadically considered and very vaguely, and certain blatant attacks on freedom of association were not even mentioned.⁷ The overly legalistic approach fails to assess the implementation or impact of laws in practice, and as a result the reports do not capture other barriers beyond the laws themselves that restrict civic space. Moreover, the role of certain governments in restricting civic space is significantly downplayed or not made explicit, particularly with regard to Poland.

RECOMMENDATIONS:

5. **Human rights concerns:** Human rights and democracy are closely interconnected with the rule of law, but this connection is not sufficiently reflected in the reports. In order to accurately reflect rule of law issues, the reports will need to take a broader approach to defining the rule of law and reporting on interconnections between the rule of law and human rights, where these linkages are most salient. This requires special attention to the systemic violation of certain human rights in EU Member States. When breaches of the rule of law enable human rights violations, these human rights violations need to be considered in the reports. Finally, the implementation of decisions from the CJEU and the ECtHR is another crucial element that needs to be more deeply reflected.⁸
6. **State of public service media:** The reports should discuss core rule of law issues such as the situation of public service media in EU Member States.
7. **Civic space:** Add civic space as a separate pillar of the rule of law reports, with an additional chapter systematically analysing the state of civic space in EU Member States and its connections to the rule of law context. The methodology for assessing civic space should be clear, transparent, co-created with civil society and building on benchmarking mechanisms already used by the Commission (e.g. in the accession countries or in the Eastern Partnership) and the work of the European Union Agency for Fundamental Rights. The chapter should also investigate the misuse of European legislation provisions for closing down civic space.

C. Strengthen the potential for impact of the reports with concrete recommendations, clear linkages with other EU frameworks and policy instruments, an alert mechanism, and transparent dialogue on follow-up.

⁷ Most notable is the case of the administrative dissolution of the Collectif contre l'islamophobie en France (CCIF) and BarakaCity in 2020 in France.

⁸ Find more detailed recommendations from Democracy Reporting International on this [here](#).

Among the most fundamental shortcomings of the rule of law report is its overly descriptive - rather than analytical - approach, and its apparent lack of power to provide measures that would hold Member States to account in the future. The reports are unable to show how they are meaningfully improving the lives and work of the individuals affected by the reported concerns. While the comparative approach of the Commission – looking at all EU Member States equally – has value in revealing some common trends, it also inhibits the Commission from doing justice to rule of law violations of a systemic and deliberate nature, as currently committed by many governments (Hungary and Poland being notable examples), in its analysis.⁹ The **descriptive approach decontextualises the analysis** to the extent that the reports do not adequately reflect the reality of threats to the rule of law in some EU Member States. This is a disservice to the purported aims of the Commission, as it trivialises the most blatant rule of law violations in some Member States and puts them on equal footing with minor violations in other EU Member States.

This shortcoming is compounded by the apparent **lack of any follow up** to the reports. The reports do not issue any concrete, country-specific recommendations or any follow-up questions, giving very little guidance to governments on the actions needed to address the identified shortcomings and preventing watchdogs including civil society from monitoring follow-up action and seeking accountability. The report does not propose any concrete actions needed to strengthen the rule of law, and simply describes existing tools to strengthen the rule of law without tying any of the findings to them. Finally, reports are not linked to any follow-up and monitoring mechanism in between reports, nor to existing fundamental rights monitoring processes such as the one conducted by the Fundamental Rights Agency.

RECOMMENDATIONS:

- 8. Concrete, country-specific recommendations:** We welcome the commitment of Commission President Ursula Von der Leyen to include country-specific recommendations in the Rule of Law reports in 2022, as mentioned in the State of the Union address.¹⁰ Indeed, the reports should include clear and concrete, country-specific recommendations for strengthening the rule of law, with a clear timeline for implementation and reporting on their implementation. This will empower governmental actors to remedy at the national level existing shortcomings in the implementation of the rule of law, and establish positive practical, legislative and policy measures, while emboldening non-governmental actors' ability to monitor and support these efforts. This could serve as an effective basis for discussion on the rule of law between governmental and non-governmental actors. Recommendations should be framed with a view to preventing future violations and providing full remedy to individuals affected by the concerns in the report, and a duty of care to follow up.
- 9. Explicit language to identify systemic violations of the rule of law:** For the reports to reflect the reality of the rule of law and retain their credibility, the reports need to be more explicit in their language on exceptionally poor and regressive situations in Member States, particularly in cases such as Hungary and Poland.
- 10. Integrate the report with other EU frameworks & policy instruments:** The rule of law report needs to be better integrated with other policy areas and mechanisms. In particular, the reports' findings should be articulated in such a way as to enable the Commission to rely on

⁹ For a more in-depth analysis, find [here](#) an opinion piece by Natacha Kazatchkine, from the Open Society European Policy Institute.

¹⁰ Find the full State of the Union Address for 2021 [here](#).

them in order to promptly initiate strategic infringement proceedings and, where relevant, activate the rule of law conditionality mechanism. In addition, the reports should be integrated with the justice scoreboard, the European Democracy Action Plan (EDAP) and the reporting on the new strategy on the EU Charter on Fundamental Rights. The reports would also be the ideal mechanism for assessing the implementation of existing standards for the rule of law, including the upcoming EU recommendation on journalists' safety and relevant strategies under the equality framework. The Commission should also explicitly and transparently link the report findings with funding priorities for programmatic support to civil society and media.

- 11. Alert and rapid response mechanism:** An alert and rapid response mechanism should be set up to empower non-governmental actors to easily and promptly signal regressions and urgent threats to the rule of law to the Commission, obtaining a rapid response and follow-up action from the Commission in a timely and transparent manner.
- 12. Follow-up dialogue:** Concretely promote the organisation of an open, transparent and participatory dialogue between governmental, civic and media actors at national level, to inform and monitor the recommendations from the report. Pro-actively and clearly communicate the timing and details of such dialogues.
- 13. Evaluation:** Following the third rule of law reporting cycle, the Commission should conduct a robust evaluation of the effectiveness of the reports, involving local actors such as civil society, human rights defenders, legal professionals and journalists in the process. The evaluation should entail a publicly available written report, with recommendations for improvement.

Civil society, human rights defenders, journalists' organisations, other media actors and other non-government stakeholders have clearly demonstrated their engagement and commitment to the Rule of Law consultation, including through the allocation of staffing and resources. But reform is needed to make the mechanism credible and effective, and indeed make it a preventive tool, with the real power to strengthen the rule of law and prevent challenges from emerging or deteriorating. We call on the Commission to swiftly and fully implement the recommendations in this statement, and be robust and vocal. We share a vision of a Europe where democracy, human rights and the rule of law are effectively defended, and we cannot compromise this vision now.

Signatories

Association of European Journalists
Association of European Journalists - Belgium
Center for Reproductive Rights
Civil Liberties Union for Europe (Liberties)
Committee to Protect Journalists (CPJ)
European Center for Not-For-Profit Law Stichting (ECNL)
European Centre for Press and Media Freedom (ECPMF)
European Civic Forum
European Federation of Journalists
European Partnership for Democracy (EPD) ¹¹

¹¹ The European Partnership for Democracy signs the statement on behalf of its 18 members: Agence Française de Développement Médias (CFI) | Article19 | Danish Institute for Parties and Democracy (DIPD) | Demo Finland | elbarlament

European Youth Forum
FIDH (International Federation for Human Rights)
Free Press Unlimited
Global Forum for Media Development (GFMD)
Human Rights and Democracy Network (HRDN), EU Internal Human Rights Policy Working Group ¹²
Human Rights House Foundation
IFEX
ILGA-Europe (the European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)
International Commission of Jurists
International Federation of Actions by Christians for the Abolition of Torture
International Press Institute (IPI)
Osservatorio Balcani Caucaso Transeuropa (OBCT)
Ossigeno per l'Informazione (Ossigeno.info)
Scholars at Risk Europe
Society of Journalists, Warsaw
SOLIDAR Foundation
South East Europe Media Organisation (SEEMO)
The Coalition for Women in Journalism (CFWIJ)
The Daphne Caruana Galizia Foundation
Young European Federalists (JEF Europe)

| European Association for Local Democracy (ALDA) | ePanstwo Foundation | European Exchange | Netherlands Helsinki Committee (NHC) | Netherlands Institute for Multiparty Democracy (NIMD) | The Oslo Center | People in Need (PIN) | The Universidade Católica Portuguesa | Westminster Foundation for Democracy (WFD) | Club de Madrid | Election Watch EU | Democracy Reporting International (DRI) | EDGE (Experts in Democracy, Governance and Elections).

¹² This working group has 23 members, which can be found [here](#).