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POLICY BRIEF

TOWARDS A STRENGTHENED METHODOLOGY FOR THE ELABORATION OF THE RULE OF LAW REPORT

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EXECUTIVE SUMMARY

The Rule of Law Report, firstly introduced by the European Commission in 2020, monitors annually the rule of law situation in member states. This exercise helps to identify and to anticipate breaches and prevent further erosions. This Policy Brief proposes a series of methodological improvements for upcoming editions that might help to strength the robustness of the report. On the one hand, it focuses on two elements that the Report already considers: judicial independence and media freedom. For these elements, the Brief proposes strengthened assessment standards and data collection, and include new topics that are gaining relevance. On the other hand, the document suggests two additional areas for future editions - a comprehensive assessment of independent authorities in member states and a COVID-19 measures impact audit. Increasing methodological soundness will improve the transparency, validity and accountability of the Report.

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1. INTRODUCTION

The EU Commission's yearly revision of the state of the rule of law in EU member states (i.e. Rule of Law Report, henceforth "the Report") has meant a significant improvement in relation to previous absence of review. The Report has served at least to activate debates on the rule of law situation across the Union. Acknowledging these advances, we argue that the Report would increase its standing if embedded into a more robust methodological framework.

The Report already counts with a methodology for its preparation in which the scope of the assessment is defined, as well as the main sources consulted and the standards applied. However, as a newly developed tool, the methodology still has room for improvement. This could comprise an *a priori* determination of the issues up for the review (the current practice being that of agreeing with Member States on a questionnaire proposed by the Commission), a more exhaustive and detailed identification of the information and data collected and a refinement of the standards identified for review.

While the methodology identifies topics to be assessed in all member states, it does not include a comprehensive list of the indicators taken into account for evaluating each of the elements (e.g. which features are taken into account to consider that the appointment and promotion of judges system of a member state is independent?). Moreover, although every topic and element singled out in the methodology is equally evaluated in all member states, country chapters only mention the most relevant issues (i.e. mostly those which awake certain concerns). Improving these involve the development of a set of specific and detailed indicators, as well as an standardisation of the content of country chapters.

Improving the methodology will mean also further improving the clarity, impartiality and quality of the Report produced. Sound methodological foundations will further reinforce the legitimacy of the outcome and the ownership by relevant stakeholders.

This Brief focusses on four crucial issues and suggests the type of relevant information to be retrieved and some of the standards that can be applied. Available reports already address two of these issues – namely judicial power and media freedom. However, standardising data collection and their assessment against established standards will make the evaluation more robust. Two additional issues, mentioned in the 2021 report (i.e. the role of independent national authorities and bodies and the effects of the COVID-19 related measures on rule of law) have not been yet comprehensively analysed. At this stage, information and data to be collected and possible indicators to assess them may be fruitfully advanced.

2. AN IMPROVED APPROACH TO EVALUATE JUSTICE SYSTEMS AND MEDIA FREEDOM

2.1. Justice systems

Independence, both *external* and *internal*, and accountability of the judiciary are the key attributes for a working rule of law system. Three main features determine independence: the governance of the judiciary, the status of the judges themselves, and the situation of courts. Accountability refers to the ethics that guide judges´ actions, as well as to the disciplinary procedures.

Public perceptions on judicial independence are key in addressing whether the judiciary counts with public trust and its decisions are perceived as legitimate by the citizens. Nevertheless, only measuring judicial independence in terms of public perceptions might entail some risks (e.g. personal subjectivity). Reports could contrast public perceptions with objective indicators, such as some indexes developed by experts and independent organisations (e.g. V-Dem, WJP Rule of Law Index, among others).

So far, Reports have assessed the situation of judicial independence in member states but have only paid attention to those issues that constitute key weaknesses in each case. A more systematic revision of all features that constitute judicial independence according to

pre-defined parameters and using the same indicators for all member states would not only increase the quality of the report but may also anticipate possible micro-erosions of judicial independence at a very early stage.

2.1.1. Governance

Models of judicial governance vary across member states according with the context of their socio-historical particularities. Each of these possess advantages and disadvantages.[1] The Report country chapters whilst assessing governance of justice systems, refers to them according to the relevance of the situation (e.g. the German chapter barely contains a succinct paragraph on the situation of judicial independence). A systematic assessment of judicial governance in all EU member states in every country chapter would anticipate possible issues affecting judicial independence. In cases where an independent authority is in charge of the governance of the justice, the assessment might consider the following issues.

First, a review of the **composition** of the judicial authority: whether it is composed fully of judges or not and, in the second case, the share of non-judges and their professional profile. In some cases, the legislative and the executive branch (e.g. MPs, Minister of Justice) seat at the judicial governance organs and, hence, assessment should ponder the powers those organs enjoy. The review may also address the specificities of the incompatibility regime; the duration of mandates and whether these are renewable or not. Furthermore, it is key to pay attention to the presidency, in terms of reviewing who can be elected, how, for how long, and which powers the president enjoys.

The **relation of the judicial governance body with the legislative and executive powers** is also a key matter to be assessed in the Report. In cases in which the Minister of Justice participates as a member in the governance body, its influence on the decisions of the Council should be scrutinized. Contrarywise, if the Minister is not a member of the Council, the relationship between the judicial authority and the Minister could be reviewed. Furthermore, the review of channels and quality of communication between both powers in order to integrate judicial power standpoint on those issues that directly affect the judiciary (e.g. new legislation) would provide additional indicators on the quality of governance.

The assessment of these issues needs to take into account the **powers of the judicial governance authority.** This concerns each of the specific competences but also the interaction between them. For instance, a determined system of appointments may negatively affect the independence of Judicial Council or not depending on its functions; a determined percentage of seats reserved for judges in the Judicial Council might not lead to a better functioning if the voting system limits their influence.

As for the **applicable standards,** the Venice Commission (VC) through several opinions (e.g. on judicial appointments, among others) and the European Network of Councils of the Judiciary (ENCJ) through its 2010-2011 report[2] have developed various principles regarding those issues. These could provide suitable comparative benchmarks. Nevertheless, setting EU standards on Judicial Councils would help the Report to assess whether or not they are independent in upcoming editions. In this respect, determining those standards in close collaboration with the VC and the ENCJ would enhance their legitimacy. Firstly, the VC has elaborated its opinions via consultations with national experts. Moreover, its methodology draws heavily on comparative law. Secondly, ENCJ standards will be developed with the participation of judges. Applying these standards secures that the actors who hold the most interest in safeguarding the external independence of the judiciary have been

1 Scholars have identified three models of judicial governance currently functioning in the EU. The Minister of Justice model implies that the executive plays a key role in the administration of the judiciary, and particularly in appointments and promotions of judges, and hence these tasks are not in hands of an independent authority. In the Courts Service model, there is an independent authority in charge of courts administration, although it does not play a substantial role in appointments of judges, neither in disciplinary procedures. Finally, the Judicial Council model implies the existence of an independent authority, often endowed with wide-ranging powers.

2 The ENCJ plans to transform these principles into a set of standards to be published at the end of 2021.

involved in the writing of the principles that secure the independence of the Councils. The design of EU standards for judicial governance is not aimed at homogenising the models but identifying mechanisms that guarantee effective judicial independence while respecting the diversity of member states.

2.1.2. Status of Judges

While the EU enjoys a system of civil servants that makes EU administration work, national judges play an essential role in enforcing EU law. The assessment of the situation of judges in member states might consider the following issues in all cases:

Firstly, the **system of appointment and promotion of judges,** both of High Courts judges (that normally receives the most attention) and judges to the first instance courts, is key to guarantee independence. Assessment may review the objectivity and margin for discretion in the appointments system by considering who is the authority in charge of the appointments, and whether it is independent or not. In cases in which there is not an independent authority but the Government, the Head of State or the Parliament which are directly implied in the appointment system, it is important to consider to what extent these authorities have a real margin of action, whether this margin of action is clearly specified and regulated in national legislations (e.g can the King/Queen/President reject the appointment of a candidate nominated by judges?), and whether - once appointed - judges can perform their duties with complete independence from such authorities. In addition, it is important to examine whether the system of appointments is based on objective criteria or not. The review could look at the existence of transparent (i.e. public) and well-defined and regulated criteria. This includes weighting factors to measure merit. Weighting factors help to avoid any type of manipulation in measuring both professional and personal requirements for judges and to ensure that the system is objective. The existence of publicly available reports that include all the steps of the appointment procedure of a judge, including the results, helps to ensure (and measure) transparency. Review of the promotion system of member states can equally consider whether it is competitive and merit-based.

Secondly, **tenure periods** form an integral part of the status of judges. Review could therefore consider these tenure periods for judges and the existence of legislative guarantees for tenure until retirement for judges of first instance. Equally, review could deem whether tenure periods for High Courts judges guarantee independence in the renewal (e.g. does the timing of the renewal coincide with elections and the formation of a new government?).

Lastly, proper **remuneration of judges** is fundamental to prevent corruption. Review could consider whether fair remuneration of judges is guaranteed by law and based on objective criteria and not individual considerations. Moreover, it would be important to assess whether an authority exists that guarantees that remuneration of judges is transparent, information about it is public, and possible corruption cases are investigated (e.g. which authority investigates corruption among judges?).

The Council of Europe (CoE), the VC (through its rule of law checklist and more specifically its opinion on the appointment of judges), and the ENCJ have already identified core elements that permit assessment as to whether the systems of appointment and promotion of judges ensure the independence of the judiciary. Hence, these could serve as basis for EU standards when reviewing the system of appointment and promotion of judges.

2.1.3. The independence of Courts

The EU Commission 2020 and 2021 editions of the Report assess the efficiency and independence of courts. However, many of the elements that are reviewed in terms of efficiency fundamentally affect independence, hence it would be important to assess them also in this regard. A number of items could serve to extract evidence on independence.

Firstly, review could assess whether the **amount of resources** that the state allocates to the judiciary (as assigned by national budgets) is proportionate to its size and capacity, and whether it is transparent and public.
Secondly, **potential interferences of the legislative and executive branches** with judgements have a huge impact on independence (e.g. do they often give opinions regarding ongoing judicial processes that involve other politicians? Have politicians tried to exert pressure on judges on sensitive cases? Has any political party tried to withhold evidence in a case that implicates one of its members?, etc.). This also extends to the question on whether they (do not) respect decisions taken by courts. Perceptions could enrich factual data on the issue.

Thirdly, the **institutional design of courts** is an issue to be reviewed. Particularly, the existence of mechanisms to prevent repeated interventions of judges in successive instances with the same case is crucial, i.e. situations in which a judge has been previously involved in a case (e.g. they have been seated in the court that first examined the case, or has provided advisory help), and is later involved again in the judgement of the case if is appealed.

Finally, examination of the **relations between the courts** is recommended. Scrutiny could account for cases in which a court has refused to refer legal questions to High Courts (e.g. a court that refuses to refer a legal question to the Constitutional Court, or a court that refuses to refer a preliminary ruling to the ECJ). The Report could review the number of such situations that have occurred in member states.

The CoE, the VC (through its rule of law checklist and more specifically its report on the independence of judges), and the ECHR have developed a series of reports, opinions and compilation of cases in this regard that could be used by the Union in developing its own standards in order to better evaluate the situation of courts in member states.

2.1.4. Code of ethics

Controversies exist regarding the delicate balance between freedom of speech of judges and their expected behaviour as representatives of the independence and impartiality of the justice. So far, the Report does not include an assessment of whether and how member states deal with this issue. This type of assessment may consider the following issues in all cases:

Evaluation could look at the **existence of statutory obligations concerning the freedom of expression of judges**. When these provisions exist, focus should be on the guarantees of freedom of expression, the existing restrictions and the procedures implemented to scrutinise statements by judges that may jeopardise the independence and impartiality of their work.

Moreover, identifying the **authority in charge of elaborating statutory obligations** concerning the freedom of expression of judges (and taking into consideration the eventual involvement of judges themselves) helps to evaluate freedom of expression. The existence of ex ante consultation procedures regarding ethical issues and its functioning would improve the quality of judicial governance.

Review could also include an assessment of the **existence of principles or case-law that may serve as guidelines for judges when expressing themselves in social media** accordingly with the ethical standards demanded to their profession (e.g. the desirability or not of using pseudonyms, the recommendation of acting with moderation when expressing political opinions in publications, etc.).

Finally, it would be recommended to examine the **quality of training** of judges regarding judicial behaviour.

The VC, through its reports on the freedom of expression of judges and their use of social media, and the Global Judicial Integrity Network have developed a series of principles that may inspire the Union in the developing of standards in this regard.

2.1.5. Disciplinary proceedings

Disciplinary proceedings may be used as a key element to assess whether the judiciary is independent and accountable. In reviewing this issue in the Reports, several items could serve the assessment.

First of all, a ***review of regulation of disciplinary proceedings*** is fundamental. Existence of procedures known, transparent and with possible redress reduces the margin for arbitrariness. Questions such as the following may guide the assessment: Is there a comprehensive list of punishable conducts with corresponding sanctions? Where is the disciplinary regime of judges typified? Are judges well-trained and aware of their obligations? Who can present a complaint against a judge? Are anonymous complaints accepted? Can a non-directly affected person present a complaint? How are the rights of judges protected during disciplinary proceedings? Are there time limits for the solving of the disciplinary procedure?

Secondly, the **institution in charge of disciplinary proceedings** and its characteristics affects the quality of disciplinary proceedings. The number of successful appeals to those proceedings permits an assessment of the objectivity and fairness of the institution in charge (i.e. if most disciplinary proceedings are successfully appealed, the authority in charge of the discipline of the judges may not be acting properly).

Lastly, **assessing the number of disciplinary proceedings that prosper in a member state in relation to the number of judges, may serve to establish whether there might be a problem with the independence and impartiality of judges.** Moreover, looking at the number of complaints requesting the initiation of a disciplinary procedure can indicate the level of citizens' trust in the judiciary. However, it is important to investigate whether a low number of complaints signifies a healthy judicial system of that member state, or whether it is an indicator that citizens are not aware of their right to complain.

For the Union to set principles that could help guide member states actions in this regard, it would be helpful to consult the guidelines set by the ENCJ.

2.1. Media freedom

Reports already contain a specific section dedicated to analysing the status of media freedom in member states, focusing on media regulatory authorities, transparency of ownership and governments' interferences, and the protection of journalists from harassment. Improving this part of the Report would imply the inclusion of two phenomena that are becoming more and more relevant.

On the one hand, the Report may consider including an assessment of the **spread of disinformation and fake news through social media.** The shift from traditional media (press, radio, TV etc.) towards new ways of getting information poses fundamental challenges for democracy and the rule of law. Assessment of this phenomena might include the following points:

Firstly, **assessing the regulation of the activity of large social media platforms,** in those cases in which it exists. The Report could pay attention to whether member states have already regulated or are planning to regulate issues such as: transparency of the publications (obligation to be explicit regarding who has produced them and how they have been funded, if applicable), the possibilities of users to interact with platforms to denounce abuses, the attribution of responsibilities for dangerous behaviours online (e.g. whether social media platforms are imputable if they do not act against an account that is spreading disinformation), or whether platforms should warn users when a publication contains suspicious information, among other issues.

Secondly, focus could be put on the **regulation to combat disinformation by assessing whether member states count with effective regulatory frameworks** (i.e. identification of specific criminal offences and their typology),

which penalties are envisaged for each offense, their scope of application (e.g. are penalty measures only applicable when the disinformation has been produced in the member state, or also if it has been produced elsewhere but spread in that member state?), and whether special measures exist to act with haste (e.g. rapid legal proceedings so that the false information or the user producing it can be suspended or removed from the platform as soon as possible).

Thirdly, **examining the existence of fact-checker institutions in member states.** If so, information on who are the fact-checkers (e.g. journalists, judges, national security corps…) and their procedures would make their responsibilities more transparent.

Fourthly, an assessment of the **use of social media platforms for political campaigns** is also fundamental. It could be done by considering whether member states supervise online social behaviour in view of the elections. With this aim, the Report can review if member states specifically regulate this issue, or if on the contrary it is subject to the same measures as any other online publication.

Finally, it would be key to **identify whether programs of media literacy for citizens exist** in each member state, and if so, examine who are the authorities in charge of implement them, how this task is performed, and if the programs are designed for all citizens or designed for a specific group (e.g. young people).

On the other hand, the Report could **account the existence (and number of) media attacks on institutions in member states** (e.g. unfounded campaigns of discredit towards a determined institution or public figure (a politician, a judge etc…). The Report could then **review how member states legislative frameworks deal with these attacks without eroding the independence of the media.**

3. NEW FOCUSES: INDEPENDENT AUTHORITIES AND COVID-19 MEASURES

3.1. Independent authorities

Independent authorities are a key element for ensuring the protection of the rule of law and member states have created a significant web of these authorities in recent years. However, previous Reports have paid little attention to them. Indeed, they do not contain a specific category in which independent authorities are analysed, but they are included at the end of the report in the category of "other institutional issues related to checks and balances". A more in-depth assessment of independent authorities could be included in upcoming Reports. In order to do so, it would be useful **to map the independent authorities that exist in each member state.** This mapping might contain: the denomination of the independent authority, the purpose of its creation, its activities, who will work on it and how they are appointed, how it is funded and whether it receives proper funding to carry out its work with independence. Mapping would assist in identifying whether all of them have well-defined aims. An excessive number of independent institutions without clear tasks and objectives might lead to delegitimization and distrust among citizens: citizens may have difficulties in identifying these independent institutions and perceiving their action as important for protecting their rights. The review of independent authorities may contain the following elements:

Firstly, **an assessment of the mechanisms in place for the protection of independent authorities.** Independent authorities often do not enjoy as many protection mechanisms as they should to avoid political capture. In order to assess their protection instruments, items as the following ones provide a useful guide: the system of appointment of its members, and particularly its president, in order to guarantee that the turn of mandate did not constitute an opportunity for the political power to capture the institution; states' guarantees to ensure that the institution counts with sufficient funding

(e.g. Constitution, legislation etc…); and its relation with the executive and legislative powers, in terms of whether the institution is allowed to control them (e.g. anti-fraud supervision) and whether it is consulted in the drafting of laws that affect them or their area of work.

Next to independence, **accountability is a second unalienable principle in the functioning of these agencies.** Citizens´ trust requires forms of accountability of independent authorities. This involve assessing inter alia the accountability mechanisms in place to supervise the action of independent authorities and the identification of the authority in charge of this supervision task (e.g. does the independent authority often have to report its activities to Parliament ? How frequently is the independent authority monitored? Do their members count with functional immunity? Is there a specific code of ethics that members must follow in order to ensure that they are perceived as independent? Are their annual accounts public and transparent?). Additionally, the Report could also evaluate how independent authorities deal with the issues of conflicts of interest and revolving doors (and whether they pay a role in supervising these problems in public authorities).

Scrutiny could also focus on whether there are proper **channels of communication between independent authorities and citizens** in order to assess whether the later are really aware of their existence and know how to call on them in case of need (e.g. does the independent authority have a user-friendly website that allows citizens to file complaints? Does the representative of the independent authority meet frequently with citizens or citizens' organisations so that they can bring their concerns to them?). Furthermore, the extent that extent member states guarantee the right of citizens to access to these authorities in a free manner might be also reviewed.

The development of a series of principles and standards on independent authorities would help to better evaluate the situation of these authorities in member states. Indeed, the development of these standards would be a novel issue, as there is currently nothing similar developed by other bodies such as the CoE (with the exception of the Venice Principles on the protection of the Ombudsman institution). An alternative is to consider the possibility of adopting VC principles in this regard if they were developed in a near future, or to use them as a source of inspiration.
Independent institutions that provide information to elaborate the Report could be consulted on the draft in order to enhance cooperation and increase mutual trust.

Moreover, it would be recommended to increase engagement with these institutions and organisations in order to promote the Report after its publication. This would result in a greater reach and impact of the report, and subsequently lead to more possibilities for the recommendations to be implemented by member states.

3.2. COVID-19

The COVID-19 pandemic has posed a fundamental challenge for democracy and the rule of law. The 2021 Report has partly addressed this problem. Considering the relevance of COVID-19, the 2022 edition could contain a specific category for assessing member states' emergency measures and their impact on the rule of law. By clustering the different areas impacted by COVID-19 for evaluation, the report would gain clarity. Furthermore, it would be easier to observe interactions between the elements. To assess the performance of COVID-19 measures, the Report could look at the following elements:

Firstly, the level of **coherence between the legal framework and the measures taken.** Did all the measures taken have a legal basis? Which measures were adopted in adherence to the existent legislation, and which ones went beyond it (and hence compromised the principle of legality)?

Secondly, **review the proper functioning of the institutions that are fundamental to guarantee democracy and the rule of**

law during the pandemic, and particularly whether they were able to perform tasks of scrutinising governments' actions. These institutions include Parliaments, judicial authorities, the media, and independent authorities. Key questions to assess their situation during the States of Emergency could include: were these institutions closed during the States of Emergency, and if so for how long? Were restrictions to their activities introduced? Did they function with normality? Were there facilitated instruments and measures in order to ensure that parliamentary/judicial/media and independent authorities' activities could be performed (e.g. online participation if a MP was in quarantine; remote trials)?

A more specific assessment of the situation of each of these institutions could also be done. Regarding Parliaments, it would be important to examine whether they often held control sessions to monitor government's action.

With respect to the judiciary, possible questions for assessing their scrutiny capacity to governments might be: has the legality of states of emergency and the measures taken during them been subject to judicial review by the country's High Courts (i.e. Constitutional Court, Supreme Court)? If so, have the rulings confirmed the legality of the measures taken?

Media played a crucial role in informing on the pandemic. Hence, government information (e.g. frequency of press conferences, journalists questions, access for all media to the press conferences, and availability of online facilities so journalists could participate remotely if needed) will provide good evidence on public scrutiny of governmental action.

Regarding independent authorities, examination may take into account whether they were often consulted regarding the design and implementation of the emergency measures, and especially those that work in the field of human rights. This issue could be measured by taking into account the number of consultations of public authorities with independent authorities. In this regard, direct questions to these institutions would also be valuable for the assessment.

Thirdly, it would be important to **scrutinise citizens trust in authorities' decisions** by taking into account the level of compliance, which can be evaluated by looking at the number of sanctions for disobedience to COVID-19 measures, the number of protests against them, and the number of citizens complaints to public authorities. The percentage of vaccinated people can be also taken as an indicator of citizens' trust in governments' vaccination campaigns.

Finally, in order to **assess which social groups were the most affected by governments' measures,** and hence evaluate whether these measures effectively protected or not all citizens, it would be helpful to review the data regarding unemployment, poverty and inequality rates in member states before and after the pandemic in relation with characteristics of the population such as gender, race, ethnicity, religion or sexuality, among others, as well as in relation with economic status. In order to better assess the impact of the pandemic in children regarding the latter, school performance rates could be reviewed (e.g. the pandemic could negatively affect those children with lower economic resources as they may have had difficulties to follow online classes if their family did not have access to a computer).

4. CONCLUSIONS

Rule of law reports are an innovative instrument to assess rule of law status in member states, and hence help to correct deficiencies and to prevent further erosions. Providing a comprehensive assessment of the same elements in all country chapters (whether they perform well or have weaknesses) makes the methodology of the report robust and any improvements in this direction (for instance, by making a more exhaustive assessment of judicial independence, and by including new topics -such as the impact of social networks in media and information, the mapping and evaluation of independent authorities, and the

impact of COVID-19 measures in the rule of law-) will even make it more unquestionable.

Increasing interdisciplinary cooperation and expertise in elaborating the Report to take into account the knowledge of professional practitioners in different areas would help to reinforce its soundness. It would be also interesting to incorporate the opinions and expertise of those who are being attacked in member states, e.g. judges dealing with unjustified disciplinary procedures, independent authorities struggling to perform their activities due to insufficient state funding, professional journalists encountering difficulties to publish and disseminate their work due to the increasing spread of disinformation, etc.

Overall, the Report is a powerful instrument to prevent rule of law flaws to become a systemic problem. Methodological developments would improve the robustness and consistency of the Report, thereby providing it with enhanced legitimacy and validity.

The School of Transnational Governance (STG) delivers teaching and high-level training in the methods, knowledge, skills and practice of governance beyond the State. Based within the European University Institute (EUI) in Florence, the School brings the worlds of academia and policy-making together in an effort to navigate a context, both inside and outside Europe, where policy-making increasingly transcends national borders.

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