Aristotle in the Commission

Seven Steps to Enhance the Commission's Annual Rule of Law Report

Petra Bárd

24.07.2024 doi: 10.59704/7d7bda3ac75df636

Today, the European Commission issued its fifth Annual Rule of Law Report (ARoLR). While this monitoring exercise has come a long way and has been significantly improved, the rule of law backsliding remains one of the most pressing issues of the EU. Based on our report co-authored with Professor Pech in 2021, in the following I present seven recommendations how to improve the Commission's monitoring exercise. At the core lies a differentiation between a democracy and a hybrid regime. Once a Member State qualifies as the latter, it must be treated accordingly.

Monitoring should be based on the principle of equal treatment of the Member States. But once a methodologically correct and equal scrutiny leads to the conclusion that there are qualitative differences between Member States with regard to their regime types – something that has long been acknowledged by the European Parliament when declaring Hungary to be a hybrid regime of electoral autocracy – this must lead to differences in monitoring and enforcement. The proposed differentiation does not require anything extraordinary from the Commission, but to follow Aristotle's idea, that "equals should be treated equally and unequals unequally in proportion to their inequality." (Politics, Book III, Part IX) Aristotle's wisdom should have consequences for the ARoLR's use, methodology, and the actual enforcement of country specific recommendations.

A monitoring exercise

The ARoLR is a monitoring exercise and should not be oversold as a rule of law enforcement tool. It is important to highlight this to counter the narrative of politicians, such as Ursula von der Leyen, who infamously referred to the ARoLR when first introduced as a "starting point… to ensure there is no backsliding." This statement came after a decade of systemic dismantling of the rule of law in Hungary, five years in Poland, and similar actions by Bulgaria and other Member States.

I am not going to address the question, whether the ARoLR has been introduced to the detriment of the Commission's enforcement powers, disproportionately consuming its limited resources. This has been done elegantly and entertainingly by scholars, such as Professors Pech and Kelemen. All I say is that the ARoLR is a monitoring exercise, whereas monitoring is a precondition before any enforcement. Given the political realities, it seems that the ARoLR will continue to serve as the primary monitoring tool, despite alternative suggestions by the EP.

My recommendation is to harmonise the ARoLR with other monitoring tools in order to save resources and avoid potentially conflicting outcomes. Moreover, it should be acknowledged that the ARoLR is a dialogue-based exercise (Cf. Ursula von der Leyen on "dialogue always comes first"), which only works well with the Member States acting in good faith, but is entirely useless with regard to hybrid regimes.

Extending the scope of monitoring to the core values

The ARoLR features an introductory "umbrella" report and 27 country chapters focusing on justice systems, anti-corruption, media pluralism, and checks and balances. This year, for the first time, four chapters from enlargement countries, Albania, Montenegro, North Macedonia and Serbia have been added. Expanding this scope to include the three core values enshrined in Article 2 of the Treaty on European Union (TEU), democracy, the rule of law, and fundamental rights, would be beneficial. A judicial decline, a hard core rule of law issue for example impacts fundamental rights, as compromised courts cannot ensure fair

trial rights or protect minorities against majoritarian governments. Also, free and fair elections are a cornerstone of democracy, necessitating the protection of human rights such as freedom of expression, access to information, and a free, pluralistic media. Failure to meet basic election standards indicates a state's deficiency in even the most fundamental aspects of the rule of law.

In the short term, it is essential to acknowledge the vital role civil society organizations play in upholding the rule of law. One should include in the ARoLR a chapter on civil societies and their role and contributions in maintaining democratic standards and fostering accountability.

Involvement of experts

Appointing an expert panel for monitoring, similar to the Network of Experts on Fundamental Rights, would mitigate accusations of political bias and ensure objective assessments. The current ARoLR language often normalizes threats and violations due to its diplomatic tone. An expert panel would enhance credibility and thoroughness.

The ARoLR frequently uses excessively soft, diplomatic, toned-down language. This and the lack of alignment between the devastating findings and country-specific recommendations suggest significant editorial (political) influence, diminishing the impact of the findings during the multi-level editing process within the Commission.

The Commission's self-proclaimed status as a political and geopolitical entity invites criticism that omitting certain sensitive issues, as well as the negative findings may be politically motivated – in the latter case the Commission is blamed for punishing countries for differing political agendas. To mitigate accusations of political retaliation and ensure a more objective assessment of rule of law issues, it would be beneficial to involve an expert panel in the monitoring process.

In the short term, considering the political realities and the Commission's repeated rejection of outsourcing the task to experts, an expert panel could be set up to at least assist the Commission. This panel would enhance the credibility and objectivity of the monitoring process.

Different benchmarks for different regime types

Implementing qualitative and contextual assessments reflecting the varied rule of law conditions among the Member States is essential. Unequal situations should be treated unequally with tailored benchmarks differentiating between hybrid regimes and democracies. For instance, while the digitalization of judgments is beneficial and speeding up litigation is advantageous, these benchmarks do not address the fundamental issue of judicial capture. Without an independent judiciary, the mere digitalization of fast-track decisions cannot undo the deeper problem of court capture.

In the short term, the language of the reports should clearly differentiate between democracies and hybrid regimes. Currently, the language is often too diplomatic, imprecise, and euphemistic. The similar structure, including the bullet pointed recommendations with regard to each Member State, obscures the significant differences between them, inadvertently encouraging whataboutism. It is crucial to use more precise and direct language to accurately reflect the varied conditions and uphold the integrity of the evaluations.

Longitudinal approach

Reports should highlight trends over time, becoming more visible with each edition. By the fifth ARoLR, we can clearly identify resolved issues and those persistently neglected or worsening. Both the European Court of Auditors and the European Parliament insist that the report should highlight positive and negative trends and identify systemic vulnerabilities across the EU. Although the Commission has distinguished between new and ongoing issues, it has yet to present multiannual trends.

In the short term, the Commission should incorporate an Article 7 TEU state of play report on the worst rule of law violators, extending its scope to include compliance with milestones and expectations under various conditionality procedures, as well as adherence to European apex court judgments. While

the reports currently mention non-enforcement of European Court of Human Rights judgments, they should also cover CJEU judgments – especially since the Commission has the power and obligation to follow up on Luxembourg decisions and can request penalties for non-compliance.

Fitting the ARoLR into the broader rule of law toolbox

Acknowledging the differences between hybrid regimes and democracies is crucial in the use and consequences of the reports. The ARoLR is effective as a dialogue-based exercise with Member States committed to constitutional democracy. In the past, raising certain questions about legislative drafts in the ARoLR has deterred Member States from introducing laws that would potentially have conflicted with the rule of law. In other countries, the national report has sparked public debate.

Engaging in dialogue with bad faith actors who deliberately undermine Article 2 TEU values is, however, futile. The ARoLR, on its own, cannot halt rule of law backsliding. To be truly effective, it must be integrated into the broader EU rule of law toolbox, including robust enforcement mechanisms such as Article 7 procedures, infringements, and conditionality mechanisms. Relevant pieces of EU law, such as the proposal for a Directive on combating corruption is inspired by the findings of the ARoLR, and the ARoLR already references Article 7 and conditionality procedures. The Commission President promised to include a single market dimension. These are certainly positive developments. But legislative and enforcement procedures should channel the ARoLR in a more structured way.

In relation to this point, it may be worth emphasizing that the EU already possesses enough tools to tackle rule of law backsliding. Hence, the problem is rather the insufficient application of the available mechanisms in a scattered, inconsistent and unprincipled manner, or subjecting them to political bargaining and giving in to blackmailing, as it happened with the unfreezing of funds upon Hungarian pressure in December 2023 (shown by Dora Hegedus), despite not having satisfied the respective milestones (proven by Ágnes Kovács, Erika Farkas and András Kádár on this platform). Accordingly, the Commission should be required to explain why it does not trigger the respective rule of law enforcement mechanisms within a reasonable (preferably pre-specified) time) after a devastating finding occurs.

While addressing the issue of sacrificing rule of law scrutiny for political advantages, one may note in passing that the publication of the 2024 ARoLR, initially scheduled for 3 July 2024, was significantly delayed. This delay was attributed to Ursula von der Leyen's efforts to secure Italian Prime Minister Giorgia Meloni's support for her second term as Commission President, as the ARoLR's devastating findings on the state of Italian media freedom would have jeopardized her mission. (For dubious deals made before her first term, see my VerfBlog post.)

In addition to sanctions, other legal consequences could also be attached to the ARoLR's negative findings. For example, in the mutual trust domain, mutual recognition-based laws could be suspended until the Commission finds in the next cycle that trust has been restored regarding Article 2 TEU values. This would have the advantage of being a regular exercise instead of the current practice of suspending mutual trust-based laws on a case-by-case basis. The EU would not be so dependent on external players, such as the Council of Europe, in determining systemic problems in the mutual trust domain. Finally, the EU should take the lead in rule of law and human rights matters by setting higher standards than the Council of Europe.

In the short term, the country-specific recommendations introduced in 2022 should be regularly followed up by an external entity to ensure impartiality. The Commission contends in the 2023 report that almost 65% of the country-specific recommendations of 2022 have been followed up, which Laurent Pech, Anna Wójcik, and Patryk Wachowiec warn us, "must be taken with a large pinch of salt as it is not backed up by any evidence, nor is it accompanied by any methodological explanations", nor do we know what "some progress" means. A neutral expert panel would be better suited to assess the impact of the Commission's exercise than the Commission itself.

Introducing an EU chapter

To enhance the ARoLR, I recommend that the EU itself should be monitored as to its commitment to the rule of law. Accordingly, the ARoLR should have an additional chapter dedicated to the practices of the EU's institutions itself. The introduction of this new EU chapter could be drafted by the EU Fundamental Rights Agency or a network of academic experts. The EU faces challenges such as corruption scandals within its institutions, inconsistent interpretations of judicial independence, mass and severe human rights abuses, including deaths at external borders, and the failure to accede to the European Convention on Human Rights. Given the Hungarian Presidency's track record, it may be counterproductive that they have taken up this proposal we have long been advocating in the Presidency Program. However one may view Hungary holding the Council Presidency, following this recommendation and addressing EU-level deficiencies head-on will bolster the ARoLR's legitimacy and effectiveness. Scholars at the CEU Democracy Institute in Budapest are already putting together an alternative report on the EU's commitment to its own rights and principles. The Commission should only follow their lead.[1]

ABOUT THE AUTHOR

Petra Bárd

Petra Bárd is Professor of Sustainable Rule of Law at Radboud University, Research Centre for State and Law (SteR), Nijmegen; Associate Professor at Eötvös Loránd University (ELTE) Faculty of Law, Budapest; and Research Affiliate at CEU Democracy Institute, Budapest.

SUGGESTED CITATION

Bárd, Petra: Aristotle in the Commission: Seven Steps to Enhance the Commission's Annual Rule of Law Report, Verfassungsblog, 24.07.2024, doi: 10.59704/7d7bda3ac75df636.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240724-152054-0.

[1] This blog post is based on a talk delivered at an Interparliamentary Committee Meeting in the European Parliament on the situation of the Rule of Law in the EU on the 4 December 2023 in Brussels, and a presentation at the ICON·S 2024 annual conference on the 10 July 2024 in Madrid. The author is thankful for all the feedback.