



# THE CASE FOR A HUMAN RIGHTS APPROACH TO THE RULE OF LAW IN THE EUROPEAN UNION

UN HUMAN RIGHTS REGIONAL OFFICE FOR EUROPE (OHCHR)  
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## FOREWORD

Respect for the rule of law, which is intrinsically linked to human rights and democracy, is declining worldwide. The independence of the judiciary, transparent and accountable governance, media freedom and the separation of powers are being eroded, a situation compounded by some executive measures taken in response to the COVID-19 pandemic.

Against this background, the European Commission has set out to prepare its first annual assessment of the rule of law in EU member States. Expectations are high. Will the new EU initiative be able to prevent regression and restore the rule of law where it has been weakened? Will the new initiative spur a more joined-up approach between the European Parliament, the European Council and the European Commission? And will it lead to a better integration of the existing political and legal tools, proposals, and ideas about the rule of law that are being floated at EU level?

In this paper, the UN Human Rights Regional Office for Europe, guided by the universal mandate of the UN High Commissioner of Human Rights, recommends regarding the rule of law through the prism of human rights and its core principles of accountability, inclusion, participation and transparency. There are avenues for strengthening existing EU rule of law tools and for optimizing the new initiative in terms of substance, methodology, process and outcome. In a constructive spirit, this paper suggests drawing on the rich expertise, experience and lessons learned by the international human rights machinery over the past 75 years.

In February 2020, the UN Secretary-General, in his Call to Action, appealed to all stakeholders to make better use of the international human rights instruments to meet the challenges, opportunities and needs of the 21st century. The annual rule of law report to be prepared by the European Commission should align with the Universal Declaration of Human Rights and other sources of international human rights law. It should strive to be comprehensive in scope by using validated indicators and by seeking to complement existing international, regional and national mechanisms.

Participation and transparency are also critical for the credibility of the initiative. For decades, assessments by the Treaty Bodies, the Special Procedures of the UN Human Rights Council and the Universal Periodic Review have balanced States' perspectives with findings from regional organizations, national human rights institutions and civil society. This paper explores the inclusive methodology of the Universal Periodic Review as a possible model for the rule of law initiative and advocates for a greater role for the EU Fundamental Rights Agency and independent national human rights institutions. Meaningful participation also requires creating a system to protect those who contribute information from reprisals. Staff from national human rights institutions, equality bodies, journalists, activists and others must be able to speak out in safety. Protecting human rights defenders is a cornerstone of EU policy abroad; let us also make it one within its own borders.

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# INTRODUCTION

Respect for the rule of law is declining worldwide – a persistent trend evident even in established democracies. For the third year in a row, the World Justice Project Rule of Law Index<sup>1</sup> shows more countries with declining respect than countries with improving respect for the rule of law. Under international human rights law, the responsibility to ensure respect for the rule of law lies with each Member State of the United Nations (UN) as duty-bearer under international law.

The proposed Action Plan on Human Rights and Democracy 2020-2024 of the European Union (EU) identifies the rule of law as the cornerstone of societal cohesion, solidarity and trust, both between the State and citizens, and among citizens. Consequently, support for the rule of law in partner countries is prioritized.

Within the EU, challenges to the rule of law have centered on the independence of the judicial process, weakened courts, an increasing use of executive ordinances, or repeated attacks by one branch of the State on another.<sup>2</sup> Principles such as the separation of powers, cooperation amongst institutions, and respect for the opposition seem to have been undermined. The European Commission<sup>3</sup> has further pointed to high-level corruption, abuse of office, and attempts to diminish pluralism and to weaken essential watchdogs, such as civil society and independent media, as warning signs for threats to the rule of law.<sup>4</sup> Executive measures taken in response to the COVID-19 pandemic further risk endangering the rule of law and have, in some cases, already done so.<sup>5</sup>

The EU has several tools at its disposal to protect and promote the rule of law in its member States. Recently, various new proposals have been put

forward. In her political guidelines, Ursula von der Leyen, the new President of the European Commission, has committed to an additional comprehensive European rule of law mechanism with an EU-wide scope, as well as an objective annual reporting process by the European Commission.<sup>6</sup> As a result, the first annual Rule of Law Report has become one of the major initiatives of the Commission's Work Programme for 2020. It is intended to act as a preventive tool, deepening dialogue and joint awareness of rule of law issues.

In this paper, the UN Human Rights Regional Office for Europe analyzes how the mechanisms, procedures and findings of the international human rights system could meaningfully bolster existing and proposed EU efforts to safeguard the rule of law in its member States.

The paper then zooms in on the new EU Rule of Law Review initiative,<sup>7</sup> proposed in the European Commission's *Blueprint for Action*,<sup>8</sup> which entails the preparation of an annual Rule of Law Report by the European Commission summarizing the situation in all EU member States. The initiative's objective is to inform the dialogue with – and within – the European Parliament and the Council of the EU.

The paper articulates how international human rights law – and the mechanisms designed to monitor and assess State compliance and guide States towards continuous progress – can provide direction for the scope, content and methodology of the European Commission's annual report.

To situate the rule of law discussion in the broader international context, the next chapter addresses the international framework and the links between the rule of law, human rights and democracy.

## THE RULE OF LAW, HUMAN RIGHTS AND DEMOCRACY, AND UN MONITORING MECHANISMS

Although no international or regional legal definition exists of the rule of law, it is globally accepted that the rule of law, human rights and democracy intrinsically relate to each other. In the preamble to the Universal Declaration of Human Rights, UN Member States recognize that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”<sup>9</sup> The Declaration thus considers the rule of law a prerequisite for the enjoyment of human rights. In a resolution adopted by the UN Human Rights Council in 2015, States stressed that “human rights, democracy and the rule of law are interdependent and mutually reinforcing.”<sup>10</sup>

In his report to the Security Council, former Secretary-General Kofi Annan placed the rule of law at the very heart of the UN’s mission, referring to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. Additionally, he stated, the concept required measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.<sup>11</sup>

In his report “In Larger Freedom,” former UN Secretary-General Annan described the rule of law, human rights and democracy not only as ends in themselves, but as essential means to a world of justice, opportunity and stability.<sup>12</sup>

States have different national experiences in developing rule of law systems. Nevertheless, as affirmed by the UN General Assembly in resolution 67/1,<sup>13</sup> common features exist, based on international human rights norms and standards, including predictable legal frameworks, trust in justice and security institutions, good governance,

the independence of the judicial system, equal access to justice for all, equality before the law, and addressing and preventing corruption.

Annex 1 to this paper lists the most relevant international human rights norms and standards for a rule of law assessment. The international human rights protection system is comprised of the human rights treaty bodies, special procedures and the Universal Periodic Review (UPR) of the UN Human Rights Council. All these mechanisms monitor elements of the rule of law.

In the course of the UPR, which follows a periodic cycle of slightly more than five years, States “accept” or “note” recommendations they receive from other States on a range of human rights issues. These recommendations frequently draw on the findings and recommendations of the independent expert mechanisms, i.e. the treaty bodies and the special procedures of the UN Human Rights Council. They may also be inspired by findings from regional human rights organizations, national human rights institutions or civil society. The fact that States are given three months to reflect, hold internal consultations and reach a sovereign decision on the acceptance of specific recommendations, creates a legitimate expectation that, if a State accepts certain recommendations, it has the intention to act on them within the next five years. The buy-in from the Government thus makes UPR recommendations useful entry points for engagement. In February 2020, UN Secretary-General Guterres called on all stakeholders to make fuller and better use of UPR outcomes as a basis for meeting the challenges, opportunities and needs of the 21st century.<sup>14</sup>

Also of particular relevance is the Human Rights Committee, the treaty body that monitors State party compliance with the International Covenant on Civil and Political Rights (ICCPR), a treaty that is legally binding on all EU member States. State party reviews, decisions on individual complaints and general comments provide authoritative guidance on State obligations with respect to the rule of law. The Covenant’s protection of the right to a fair trial, equal protection before the law, and the freedoms

of speech, association and assembly give the Human Rights Committee a persuasive influence on States around the world to protect and uphold the rule of law. To ensure a coherent approach, country-specific observations and recommendations from the Human Rights Committee to EU member States should thus be taken into consideration in assessing the state of the rule of law as well as in formulating relevant EU recommendations.

In the rule of law context, the thematic annual reports and country visits by the UN Special Rapporteur on the Independence of Judges and Lawyers (the only international mechanism mentioned in the European Commission's *Blueprint for Action*) merit specific attention.<sup>15</sup> However, the work of other special procedures of the UN Human Rights Council also touches upon elements of the rule of law and generates findings and recommendations, which can contribute meaningfully to the enhanced monitoring and assessment of the rule of law in EU member States.<sup>16</sup>

By adopting the Sustainable Development Agenda, States further voluntarily committed themselves to promoting the rule of law.<sup>17</sup> Sustainable

Development Goal 16 is geared towards promoting peaceful and inclusive societies, providing access to justice for all, and building effective, accountable and inclusive institutions at all levels. Targets 16.3, 16.5, 16.6, 16.7, and 16.10 and means of implementation 16A and 16B – each with its respective indicator for measuring progress – provide useful guidance for the interpretation of the rule of law.

In 2015, the UN Human Rights Council decided to establish an annual Forum on human rights, democracy, and the rule of law<sup>18</sup> to promote dialogue and cooperation on issues pertaining to the relationship between these areas, and to identify and analyze best practices, challenges and opportunities for States. The reports of the annual thematic Forums, including the commitments made by States, can inform existing and proposed mechanisms at EU level. The 2018 Forum, for example, examined the role of national parliaments in the promotion of human rights, democracy, and the rule of law.<sup>19</sup> The European Commission, in its *Blueprint for Action*, equally highlighted the role of national parliaments – both in lawmaking and in holding the executive accountable – in ensuring respect for the rule of law in EU member States.<sup>20</sup>

## THE ROLE OF THE EU IN UPHOLDING THE RULE OF LAW

The legal order of the EU is premised on the presumption of respect for human rights and the rule of law within the EU. Article two of the Treaty on the European Union (TEU) explicitly recognizes respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights – including the rights of persons belonging to minorities – as values common to the member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.<sup>21</sup>

The EU Charter of Fundamental Rights further sets out rights, reflecting the values listed in Article 2 of the TEU,<sup>22</sup> which must be respected by both the EU and EU member States when implementing EU law. Its preamble stipulates that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, and is based on the principles of democracy and the rule of law.<sup>23</sup>

In the absence of a legal definition of the rule of law, the Court of Justice of the European Union (ECJ) has clarified the concept to include legality (implying a transparent, accountable, democratic and pluralistic process for enacting laws); legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts; effective judicial review,<sup>24</sup> including respect for fundamental rights; the separation of powers; and equality before the law.<sup>25</sup> This interpretation blends the rule of law with democracy and human rights.

Each EU member State has the constitutional responsibility to ensure the proper functioning

of its State, but it also bears a responsibility with regard to the Union itself and to other EU member States. The principle of sincere cooperation in the TEU<sup>26</sup> emphasizes the duty of EU member States to facilitate the achievement of the Union's tasks and to refrain from measures that could jeopardize the Union's objectives. It also underlines the duty of the EU and its member States to assist each other, which means all EU institutions have a responsibility to provide proportionate assistance to member States in ensuring respect for the rule of law. Thus, when national rule of law safeguards do not seem capable of addressing threats to the rule of law in a member State, it is a common responsibility of the EU institutions and the member States to take action to remedy the situation.<sup>27</sup>

In its *Blueprint for Action*, the European Commission recalls the core principles underlying EU action on the rule of law. First, there is a legitimate interest from both the EU and other member States in the proper functioning of the rule of law at national level. Second, the primary responsibility to ensure the rule of law rests with each member State, and the first recourse should always be to national-level redress mechanisms. Third, the EU's role in this area must be objective and treat all member States alike; all its institutions must contribute in accordance with their respective institutional roles. Finally, the objective must not be to impose a sanction, but to find a solution – founded on cooperation and mutual support – that protects the rule of law, while not ruling out an effective, proportionate and dissuasive response as a last resort.<sup>28</sup>



## EXISTING EU TOOLS TO PROTECT AND PROMOTE THE RULE OF LAW IN EU MEMBER STATES

### THE EU JUSTICE SCOREBOARD

The EU Justice Scoreboard, prepared by the European Commission to provide national authorities of EU member States with information to help them improve their justice systems, includes comparative data on the independence, quality, and efficiency of national justice systems. It also supports the monitoring of national justice reforms in the context of the European Semester, the EU's annual cycle of economic policy coordination. The 2019 Scoreboard showed growing challenges with regard to the public perception of judicial independence. The European Commission has proposed to further develop the EU Justice Scoreboard and to use it to inform its Annual Rule of Law Report.<sup>29</sup>

### ANNUAL RULE OF LAW DIALOGUE

Since 2014, the European Council<sup>30</sup> has held a yearly rule of law dialogue on a particular theme in the General Affairs Council to support an exchange of good practices. Participants include representatives of EU member States and institutions, and the EU Fundamental Rights Agency.<sup>31</sup>

In September 2016, the Slovak EU presidency<sup>32</sup> sought member States' views on a proposal to transform the dialogues into a peer review process.<sup>33</sup> Absent an agreement on this proposal, it was decided that the dialogue should be stronger, more results-oriented and better structured. It was also decided that preparations for the dialogue should be more systematic and that proper follow-up should be ensured. A second evaluation took place under the Finnish EU Presidency of 2019. The Finnish Presidency concluded that the yearly stocktaking exercise should be comprehensive, genuine, and interactive, and that it should make use of the Commission's annual rule of law reports, all of which would create synergies between the institutions. It also called for more frequent use of interactive exchanges organized by the EU Presidency, such as seminars with relevant stakeholders and follow-up discussions.<sup>34</sup>

### INFRINGEMENT PROCEDURES

The European Commission can launch legal action, known as infringement proceedings,<sup>35</sup> in reaction to serious rule of law problems linked to a breach of EU law in an EU member State. The European Commission may refer the issue to the European Court of Justice (ECJ), which in certain cases can impose financial penalties. It is also possible for any EU member State that considers another Member State to have failed to fulfill an obligation under the Treaties, to bring the matter before the ECJ.<sup>36</sup> In practice, however, this procedure is rarely used.

The ECJ can also issue interim measures to suspend national reforms that would affect judicial independence. In June 2019, the ECJ overruled, for the first time, national legislation on the judiciary by invoking the rule of law, upon request of the European Commission.<sup>37</sup> In a ruling in April 2020, the European Court of Justice granted interim measures arguing serious damage to the EU legal order and thus to the rights which individuals derive from EU law and to the values set out in Article 2 of the TEU, on which the EU is founded, in particular the rule of law.<sup>38</sup>

### RULE OF LAW FRAMEWORK

The Rule of Law Framework provides a staged process of dialogue with an EU member State, structured with opinions and recommendations from the European Commission. The goal of the process is to prevent the emergence of a systemic threat to the rule of law, at which point an Article 7 TEU procedure would be required. To date, the rule of law framework has been activated only once, and the process is still ongoing.<sup>39</sup>

### ARTICLE 7 OF THE TREATY ON EUROPEAN UNION

Articles 7.1 and 7.2 of the TEU enable the European Council – acting by unanimity on a proposal by one third of the member States or by the European Commission and afterwards obtaining the consent

of the European Parliament – first to determine the existence of a risk of breach by a member State of the values referred to in Article 2, and then to determine the existence of a serious and persistent breach thereof. The Council may decide to suspend certain rights deriving from the application of the Treaties to the member State in question, including the Council voting rights of that member State's government representative. Article 7 remains the most emblematic if exceptional tool the EU has for taking action in the event of serious rule of law failings in a member State.<sup>40</sup> To date, article 7 has been triggered twice.<sup>41</sup>

## **THE COOPERATION AND VERIFICATION MECHANISM**

This mechanism was established specifically for Bulgaria and Romania when they joined the EU in 2007, to assist these two countries in addressing remaining shortcomings in the areas of judicial reform, the fight against corruption and, in the case of Bulgaria, organized crime. This mechanism is of a transitional nature and builds on the Copenhagen criteria, which are the standards any country must reach before qualifying for EU membership. They require stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.

## RECENT PROPOSALS TO STRENGTHEN THE RULE OF LAW IN THE EU

### EUROPEAN PARLIAMENT'S 'PACT FOR DEMOCRACY'

In June 2015, the European Parliament requested that the European Commission launch an "impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all member States, indiscriminately and on an equal basis, involving an evaluation by the EU Fundamental Rights Agency, together with appropriate binding and corrective mechanisms, in order to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level."<sup>42</sup> In October 2016, the European Parliament adopted a second resolution, calling on the European Commission to set up comprehensive monitoring of democracy, the rule of law and fundamental rights in all EU member States, with a yearly cycle of reporting and recommendations.<sup>43</sup> That call for monitoring was reiterated in 2018.<sup>44</sup>

### THE PERIODIC PEER REVIEW AMONG EU MEMBER STATES

In March 2019, the Belgian and German Foreign Ministers<sup>45</sup> called for a new periodic peer review as a substantive exchange of views on the rule of law in all EU member States. The scope of the proposed mechanism would include judicial independence, effective judicial protection and legal certainty. There would be input from international, regional and national organizations, followed by interactive discussions at the expert level, and on the political level in the margins of the General Affairs Council. Then Belgian Foreign Minister Didier Reynders, now European Commissioner for Justice, made reference to the Universal Periodic Review (UPR) of the UN Human Rights Council as a model for this new EU mechanism. While a majority of EU member States was in favor of this new initiative, no consensus was reached at the time.

Finland, during its Presidency of the EU Council, noted in its Council Conclusions that discussions were ongoing and that there was agreement that this work should continue, while avoiding

duplication and undue administrative burdens and ensuring the necessary coherence with the rule of law dialogue in the Council.<sup>46</sup>

### RULE OF LAW CONDITIONALITY OF EU FUNDING

The EU offers financial support to EU member States for developing justice and security policies and toward member States' efforts to strengthen public administration and the judiciary. This funding comes primarily from the European Structural and Investment Funds. The European Commission has proposed that receipt of any EU funds by the member States be made conditional upon respect for the rule of law. This proposal was endorsed by European Commission President von der Leyen in her Political Guidelines.<sup>47</sup> With the European Parliament in favor of conditionality,<sup>48</sup> at the time of publication, the proposal was still under discussion, contingent on discussions surrounding the EU Multi-Annual Financial Framework 2021-2027.

### A RULE OF LAW REVIEW CYCLE, SUPPORTED BY AN ANNUAL RULE OF LAW REPORT

On 3 April 2019, in light of the rule of law challenges in EU member States, the European Commission presented an overview of the existing toolbox for addressing challenges to the rule of law, and it invited contributions on how to strengthen it.<sup>49</sup> In its *Blueprint for Action*, the Commission outlined proposals for concrete action in the short and medium term in three areas:<sup>50</sup>

- **Promotion:** Building knowledge and a common rule of law culture
- **Prevention:** Cooperation and support to strengthen the rule of law at national level
- **Response:** Enforcement at EU level when national mechanisms falter

Whereas in some areas the European Commission can act alone, others require inter-institutional cooperation with the European Council and the European Parliament, the only directly elected institution of the EU.

One of the proposals put forward aimed to deepen

and enhance monitoring of the rule of law in EU member States through a rule of law review cycle. The initiative would be supported by an annually published rule of law report from the European Commission, summarizing the situation in EU member States. It would provide a synopsis of significant developments in EU member States and at EU level, based on a variety of sources, including

case law of the ECJ, elements of the EU Justice Scoreboard and European Semester country reports. According to the *Blueprint for Action*, the assessment and dialogue should draw on all available sources of relevant expertise, with the European Commission retaining its autonomy and capacity for independent assessment, in line with its role as guardian of the EU Treaties.

## A HUMAN RIGHTS BASED APPROACH TO THE RULE OF LAW INITIATIVE

Under its new leadership and with a new College of Commissioners in place, the European Commission has signaled its intention to move ahead on preparing an annual report to be issued in 2020, on the rule of law in EU member States. This section focuses on the annual review initiative proposed in the European Commission's *Blueprint for Action* and provides guidance on a human rights based approach.

### WHAT TO ASSESS: THE SCOPE OF THE ANNUAL REPORT

While the *Blueprint for Action* proposed that the review cycle cover all the different components of the rule of law, the European Commission has since defined the following chapters: (1) justice system, (2) anti-corruption framework, (3) media pluralism and (4) other institutional issues related to checks and balances.<sup>51</sup>

International human rights norms, standards and recommendations, however, suggest a broader scope for the rule of law concept, to include at a minimum:

- The right to equality before the law<sup>52</sup>
- The right to a fair trial<sup>53</sup>
- The right to liberty and security of person<sup>54</sup>
- The right to freedom of expression and opinion<sup>55</sup> -- of which media pluralism is one element
- The right to peaceful assembly and association<sup>56</sup> -- a prerequisite for transparent and accountable government
- The right to participate in public affairs<sup>57</sup>

### SOURCES OF INFORMATION

The European Commission has indicated that, in preparing the report, it will rely on a diversity of existing sources, including input from EU member States and information gathered through country visits. While the *Blueprint for Action* mentions the Council of Europe, the Organization for Security and Cooperation in Europe, and the EU Fundamental Rights Agency, it does not explicitly

mention information from the UN human rights mechanisms.

Yet, the findings and recommendations on the rule of law from the UPR, the UN treaty bodies and special procedures of the UN Human Rights Council should also be considered, in light of States' legal obligations under international human rights law and in order to draw on the broadest available information on the respect for the rule of law in EU member States. International human rights recommendations, including country-specific ones, are searchable via the Universal International Human Rights Index.<sup>58</sup>

Key concerns are taken up in the letter sent by the UN High Commissioner for Human Rights following the UPR to each State reviewed, detailing in its Annex areas that require particular attention over the next five years. In addition, a matrix of thematically clustered recommendations is made publicly available along with the High Commissioner's letter for each State, thus facilitating the identification of accepted and noted recommendations and their link to relevant Sustainable Development Goals. The letters, matrixes and an infographic are available on the UN Human Rights website.<sup>59</sup> UPR mid-term reports by States after the review are expected to provide information on follow-up action undertaken, especially with respect to accepted recommendations.<sup>60</sup>

Recently, findings, recommendations and jurisprudence of international and regional organizations have become searchable through the EU Fundamental Rights Information System (EFRIS),<sup>61</sup> the human rights gateway of the EU Fundamental Rights Agency mentioned in the *Blueprint for Action*. This database should be a key reference point for compiling the Annual Report.

### PARTICIPATION AND TRANSPARENCY

In a targeted consultation, the European Commission invited relevant stakeholders to provide written contributions to the 2020 Report between 24 March and 4 May 2020. The objective was to feed the European Commission's assessment

with factual information on developments on the ground in the member States.<sup>62</sup>

The UPR and treaty bodies' State party review processes both provide an opportunity for national human rights institutions, equality bodies, civil society, regional organizations and the UN system to submit information. This allows the monitoring body to develop a comprehensive and broad understanding of the progress made in human rights as well as the challenges that remain, and to receive recent and updated information. The perspective of States is thus supplemented and balanced against the analysis from other stakeholders and interested observers. This holistic approach not only honors the human rights principles of participation and transparency, it has proven useful in elaborating concrete and action-oriented recommendations for implementing human rights treaties in a specific national contexts.

In the *Blueprint for Action*, the European Commission has pointed out that the rule of law includes having a transparent, accountable, democratic, and pluralistic process for enacting laws. At the request of the Human Rights Council and following a global consultation, the UN Human Rights Office issued Guidelines on the right to participate in public affairs,<sup>63</sup> outlining the right's basic principles. Realising the right to participate requires promoting transparency in all aspects of decision-making and holding public authorities accountable. The guidelines could therefore meaningfully inform the process of preparing the annual rule of law report.

The stated objective of the targeted consultation process is to feed the European Commission's assessment. Nevertheless, it is unclear if, when, and how submissions by stakeholders will be shared with the public. In light of the large number of potential submissions and the significant information already available from international, regional and national monitoring mechanisms, the UPR process model could be replicated to summarize and compile the information and make it available through a transparent and public process.

The UPR process includes the preparation of three documents in advance of the peer review:

- A national report, prepared by the State under review

- A compilation of information from the UN system on the State under review, prepared by the UN Human Rights Office<sup>64</sup>
- A summary of information submitted by other stakeholders (regional organizations, national human rights institutions, equality bodies and civil society), also prepared by the UN Human Rights Office; stakeholder submissions are also made publicly available in their entirety.

As an independent agency with already-structured platforms, in accordance with its mandate to engage with national human rights institutions, equality bodies and civil society, the EU Fundamental Rights Agency would be well placed to compile and summarize the information and submissions from international human rights mechanisms, the UN system, regional organizations, national human rights institutions, equality bodies and civil society on the rule of law in every EU member State. Along with input from the State under review, such a compilation could inform the European Commission's assessment, while at the same time being accessible to the public as a user-friendly document.

## PROTECTION AGAINST REPRISALS

The European Commission, in its *Blueprint for Action*, acknowledged the importance of a free and vibrant civil society to the rule of law, and described civil society as an essential player in the promotion of a rule of law culture. In 2019, the UN Secretary General listed three EU member States in a report on intimidation and reprisals for cooperation with the UN in the field of human rights.<sup>65</sup>

When encouraging national human rights institutions, equality bodies, and civil society to promote the rule of law and contribute to the annual report, adequate attention should be paid to the risk of reprisals against organizations and individuals that contribute information. The open and transparent participation of all stakeholders, free from reprisals, will prove an important criterion for the effectiveness of the rule of law cycle or mechanism, whatever its form.

The EU is therefore encouraged to develop and implement a mechanism to prevent, monitor and address intimidation and reprisals in EU member States. This mechanism should also ensure swift action and provide protection in the

event of emergencies. The EU's Protect Defender programme for human rights defenders in partner countries could be a source of inspiration.

## HOW TO ASSESS: MEASURABLE RESULTS

The human rights indicators developed by the UN Human Rights Office at the request of the treaty bodies<sup>66</sup> and the UN Rule of Law indicator framework<sup>67</sup> both provide an existing framework that can be used as a methodology for the European Commission's assessment to be made for its annual rule of law report. In addition, relevant indicators under Sustainable Development Goal 16,<sup>68</sup> listed in Annex 2, should be used to measure progress in EU member States.

Indicators should be fact-based and should use objective methods of data collection and presentation. In this regard, a combination of various sources and data-generating mechanisms will yield the most comprehensive and credible assessment of the rule of law.

The UN Human Rights Office has developed guidance on a Human Rights Based Approach to Data<sup>69</sup> to improve the quality, inclusiveness, relevance, and use of data and statistics, which are consistent with international human rights standards, norms and principles. This guidance tool specifies four categories of data-generating mechanisms that could be useful in developing indicators or metrics for the rule of law assessment.<sup>70</sup>

- Expert judgments (data generated through combined assessments of the rule of law with the help of a number of informed experts)<sup>71</sup>
- Quantitative data
- Socio-economic and administrative statistics
- Perception and opinion surveys polling a representative sample of individuals for their personal views

Using only one or two of the data-generating mechanisms listed, for example a survey, would fall short of meeting the standard called for by a human rights based approach to data.

## CONCLUSION AND RECOMMENDATIONS

The human rights based approach requires that EU action on the rule of law adhere to the fundamental principles of transparency, inclusion, participation, accountability and non-discrimination. The comprehensiveness and perceived fairness of the European Commission's annual report will prove critical for the credibility of the entire rule of law initiative.

Equally important will be the initiative's complementarity to existing international, regional and national mechanisms. Therefore, a stated objective of the initiative should be to foster EU member States' compliance with and accountability for the rule of law recommendations of existing monitoring bodies. As with the rule of law, democracy and human rights cannot be dissociated from one another. Neither can the EU's initiative make abstraction of the obligations, standards, commitments and recommendations that bind member States, legally or politically, by virtue of their membership in the UN and the Council of Europe. In this way, the rule of law initiative also provides a renewed opportunity to support a rights-based approach to implementing the Sustainable Development Agenda at national level.

A joined-up approach between the various rule of law initiatives existing in the EU, and among the EU institutions – the European Commission, the European Parliament and the Council of the EU – is equally important. Improving the integration of various rule of law tools and mechanisms in the EU is likely to benefit right-holders and duty-bearers alike.

An annual report that clearly reflects the existing findings of international, regional and national human rights mechanisms, as well as equality bodies and ombuds institutions – one that provides a separate and dedicated space for input from civil society – could ensure the report's status as the bedrock of the EU's broader inter-institutional discussion. A report in line with the criteria outlined above could further provide a reliable basis for discussions under Article 7 TEU proceedings and the rule of law framework. It could usefully inform other political dialogues on the rule of law, including a possible periodic peer review and the annual rule of law review dialogues by the Council of the European Union. A report drafted in this manner would reinforce the European Commission's infringement procedures, as they would be more systematically linked to enforcing the rule of law in the EU. Including references to international human rights law and findings in the report would also provide a stronger legal basis for the rule of law conditionality linked to providing EU funding as foreseen in the European Commission President's political guidelines.

The UN Human Rights Regional Office for Europe therefore encourages the EU in general and the European Commission in particular to:

- Acknowledge that the rule of law is a prerequisite for democracy and the implementation of all human rights, and thus to broaden the scope of the forthcoming annual report by the European Commission on the rule of law to include the right to equality before the law, the right to a fair trial, the right to liberty and security of person, the right to freedom of expression and opinion, the right to peaceful assembly and association, and the right to participate in public affairs.
- Avoid duplication and ensure complementarity by reflecting, in a non-selective manner, all findings from international, regional and national human rights mechanisms related to the rule of law in EU member States, through the use of the Universal Human Rights Index, HC letters/annex and Matrixes and the EU Fundamental Rights Information System (EFRIS), which also incorporates the findings of the Council of Europe mechanisms. As regards the Universal Periodic Review, no distinction should be made between recommendations from EU member States and those from non-EU countries.
- Draw inspiration from the international human rights mechanisms, and the Universal Periodic review in particular, to ensure that the process leading up to the report is transparent, and that submissions from national human rights institutions, equality bodies, ombuds institutions and civil society are compiled separately, ideally by the EU Fundamental Rights Agency as an independent monitoring body in



accordance with its founding mandate, in addition to being made publicly available in their entirety.

- Develop and implement a mechanism to prevent, monitor and address intimidation and reprisals against human rights defenders and organizations who submit information to the process.
- Use human rights indicators to analyze the state of the rule of law in EU member States, including:
  - » UN Human Rights indicator guidance, with relevant illustrative tables
  - » UN Rule of Law Indicators, Implementation Guide and Project Tools
  - » Indicators linked to Sustainable Development targets 16.3, 16.5 to 16.7, 16.10, as well as means of implementation 16A and 16B
- Combine various sources and data-generating mechanisms, including expert judgments, quantitative data, administrative statistics, as well as perception and opinion surveys.
- Integrate the findings, recommendations and commitments that national parliaments made in the context of the 2018 UN Forum on Human Rights, Democracy and the Rule of Law.
- Explicitly encourage independent national human rights institutions to monitor the rule of law in EU member States, in cooperation with the European Network of National Human Rights Institutions (ENNHRI).

# ANNEX 1

## RELEVANT UN SOURCES FOR A RULE OF LAW ASSESSMENT

### INTERNATIONAL TREATIES

#### Universal Declaration of Human Rights (UDHR), 1948

- **Article 3** Right to life, liberty and security of person
- **Article 7** Equality before the law
- **Article 10** Right to a fair trial
- **Article 11** Presumption of innocence
- **Article 19** Freedom of expression
- **Article 20** Freedom of assembly
- **Article 21** Right to partake in public affairs

#### International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965

- **Article 5** Prohibition of discrimination and equality before the law
- **Article 6** Effective protection and remedies

#### International Covenant on Civil and Political Rights (ICCPR), 1966

- **Article 9** Liberty and security of person
- **Article 14** Due process
- **Article 19** Freedom of expression
- **Article 21** Freedom of assembly
- **Article 25** Right to partake in political and public affairs
- **Article 26** Non-discrimination and equality before the law

#### Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979

- **Article 7** Participation in public and political life
- **Article 15** Equality before the law

#### Convention on the Rights of the Child (CRC), 1989

- **Article 12** The right to be heard, including in judicial and administrative proceedings
- **Article 13** Freedom of expression
- **Article 15** Freedom of association
- **Article 37(b)(d)** Prohibition of arbitrary deprivation of liberty; right to legal assistance
- **Article 40** Administration of juvenile justice

#### Convention on the Rights of Persons with Disabilities (CRPD), 2006

- **Article 12** Equal recognition before the law
- **Article 14** Liberty and security of the person
- **Article 21** Freedom of expression and opinion, and access to information
- **Article 29** Participation in political and public life

## HUMAN RIGHTS STANDARDS

UN Human Rights Committee

- [General Comment No. 25](#) on **Article 25**: The right to participate in public affairs, voting rights and the right of equal access to public service, 1996
- [General Comment No. 32](#) on **Article 14**: Right to equality before courts and tribunals and to a fair trial, 2007
- [General comment No. 34](#) on **Article 19**: Freedoms of opinion and expression, 2011
- [General comment No. 35](#) on **Article 9**: Liberty and security of person, 2014

UN Committee on the Rights of Persons with Disabilities, [General comment No. 1](#) on Article 12: Equal recognition before the law, 2014

UN Committee on the Elimination of Discrimination against Women, [General recommendation No. 33](#) on women's access to justice, 2015

UN Committee on the Rights of the Child, [General comment No. 24](#) on children's rights in the child justice system, 2019

UN Human Rights Council, Resolution 23/6, [Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers](#), 2013

UN Human Rights Council Resolution 25/4, [Integrity of the judicial system](#), 2014

UN Human Rights Council Resolution 28/14, [Human rights, democracy and the rule of law](#), 2015

[UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels](#), 2012

[UN Basic Principles on the Independence of the Judiciary](#) (endorsed by General Assembly resolutions 40/32 and 40/146), 1985

[UN Draft Universal Declaration on the Independence of Justice](#) ("Singhvi Declaration") (referenced by UN Commission on Human Rights, resolution 1989/32)

[UN Basic Principles on the Role of Lawyers](#) (welcomed by General Assembly resolution 45/166), 1990

[UN Guidelines on the Role of Prosecutors](#) (welcomed by General Assembly resolution 45/166), 1990

[United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#) (endorsed by General Assembly resolution 67/187, 2012)

UN Human Rights (OHCHR), [Principles relating to the Status of National Institutions](#) (The Paris Principles), 1993

UN Office on Drugs and Crime Judicial Group on Strengthening Judicial Integrity, [The Bangalore Principles of Judicial Conduct](#), 2002

United Nations Department of Peacekeeping Operations (DPKO) and UN Human Rights (OHCHR), [The United Nations Rule of Law Indicators](#), 2011

## ANNEX 2

### RELEVANT INDICATORS FROM THE SUSTAINABLE DEVELOPMENT AGENDA

Target 16.3. Promote the rule of law at the national and international levels and ensure equal access to justice for all

- **16.3.1:** Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms
- **16.3.2:** Unsentenced detainees as a proportion of overall prison population

Target 16.5. Substantially reduce corruption and bribery in all their forms

- **16.5.1:** Proportion of persons who had at least one contact with a public official and who paid a bribe to a public official, or were asked for a bribe by those public officials, during the previous 12 months
- **16.5.2:** Proportion of businesses that had at least one contact with a public official and that paid a bribe to a public official, or were asked for a bribe by those public officials during the previous 12 months

Target 16.6. Develop effective, accountable and transparent institutions at all levels

- **16.6.1:** Primary government expenditures as a proportion of original approved budget, by sector (or by budget codes or similar)
- **16.6.2:** Proportion of the population satisfied with their last experience of public services

Target 16.7. Ensure responsive, inclusive, participatory and representative decision-making at all levels

- **16.7.1:** Proportions of positions (by sex, age, persons with disabilities and population groups) in public institutions (national and local legislatures, public service, and judiciary) compared to national distributions
- **16.7.2:** Proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group

Target 16.10. Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

- **16.10.1:** Number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months

Means of implementation 16.A. Strengthen relevant national institutions (...) for building capacity at all levels (...) to prevent violence and combat terrorism and crime

- **16.A.1:** Existence of independent national human rights institutions in compliance with the Paris Principles

Mean of implementation 16.B. Promote and enforce non-discriminatory laws and policies for sustainable development

- **16.B.1:** Proportion of population reporting having personally felt discriminated against or harassed in the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law

## ENDNOTES

1. The Index measures eight factors of the rule of law: constraints on Government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice. See <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>.
2. See **'The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism'**, Aleksandra Kustra-Rogatka, 2019.
3. The European Commission is the executive branch of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU.
4. European Commission Communication [COM \(2019\) 343](#), 2019, pp. 1-2.
5. UN Human Rights, [Press briefing note on Hungary](#), 27 March 2020.
6. See Ursula von der Leyen, candidate for President of the European Commission, "A Union that strives for more. My Agenda for Europe: Political guidelines for the next European Commission 2019 – 2024", July 2019.
7. Referred to by the European Commission as "cycle" or as "mechanism", this paper uses the term "initiative".
8. European Commission Communication [COM \(2019\) 343](#), 2019.
9. UN General Assembly resolution [217 A](#), 1948.
10. UN Human Rights Council resolution ([HRC/RES/28/14](#)), 2015.
11. Report of the Secretary-General to the Security Council ([S/2004/616](#)).
12. Report of the Secretary-General [A/59/2005](#), para. 128.
13. UN General Assembly resolution [67/1](#), 2012.
14. See "The Highest Aspiration, A Call to Action for Human Rights" António Guterres, UN Secretary-General.
15. European Commission Communication [COM \(2019\) 343](#), 2019, p.8.
16. For further reference see the [Special Rapporteur on freedom of expression](#), [Special Rapporteur on freedom of assembly and association](#), [Working Group on arbitrary detention](#), [Working Group on discrimination against women and girls](#), [Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), [Independent Expert on the promotion of a democratic and equitable international order](#), [Special Rapporteur on the situation of human rights defenders](#), [Special Rapporteur on the independence of judges and lawyers](#), and the [Special Rapporteur on the promotion and protection of human rights while countering terrorism](#).
17. UN General Assembly resolution [70/1](#), 2015.
18. [A/HRC/RES/28/14](#), 2015.
19. Reports of the Forums can be consulted at the [UN Human Rights \(OHCHR\) website](#).
20. European Commission Communication [COM \(2019\) 343](#), 2019, p. 7.
21. Article 2 Treaty of the European Union (TEU).
22. See opinion by the EU Fundamental Rights Agency on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU, based on existing sources of information, [2/2016](#), 2016.
23. Charter of Fundamental Rights of the European Union, [2012/C 326/02](#).

24. See European Court of Justice Case (C-72/15), which noted that article 19 of the Treaty on European Union establishes an obligation for member States to ensure effective judicial protection, and that the very existence of effective judicial protection “is of the essence of the rule of law”.
25. European Commission Communication [COM\(2014\)158](#), 2014.
26. Article 4(3) TEU.
27. See European Parliamentary Research Service on “[Protecting the rule of law in the EU: Existing mechanisms and possible improvements](#)”, 2019.
28. European Commission Communication COM (2019) 343, 2019, p.5.
29. European Commission Communication COM (2019) 343.
30. The members of the European Council are the heads of state or government of the 27 EU member states, the European Council President and the President of the European Commission. The European Council defines the EU’s overall political direction and priorities.
31. Civil society organizations were invited to some of the dialogues, but their participation was not systematic.
32. The presidency of the Council rotates among the EU member States every six months. During this six-month period, the presidency chairs meetings at every level in the Council.
33. European Union Presidency conclusions, [14173/19](#), 2019.
34. European Union Presidency Conclusions, [14173/19](#), 2019.
35. Article 258, Treaty on the Functioning of the European Union.
36. Article 259, Treaty on the Functioning of the European Union.
37. European Court of Justice Case (C-619/18 R), *Commission v. Poland*, 2018.
38. The Court ordered the suspension of the application of national provisions in Poland on the powers of the Disciplinary Chamber of the Supreme Court, with regard to disciplinary cases concerning judges, arguing that the independence of the Supreme Court could not be guaranteed. See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf>.
39. The Rule of Law Framework has been used once with the start of a dialogue with Poland in January 2016.
40. See European Commission Communication [COM \(2003\) 606](#).
41. See Reasoned Proposal [COM \(2017\) 835](#), and European Parliament resolution [2017/2131 INL](#).
42. European Parliament resolution [2015/2254 INL](#), 2016.
43. European Parliament resolution [2015/2254 INL](#), 2016.
44. European Parliament resolution [2018/2886RSP](#), 2018.
45. See Euractiv article: <https://www.euractiv.com/section/justice-home-affairs/news/belgium-germany-make-joint-proposal-for-eu-rule-of-law-monitoring-mechanism/>.
46. European Presidency Conclusions, [14173/19](#), 2019.
47. President of the European Commission’s political guidelines for the next European Commission, “A Union that strives for more”, 2019 [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf).
48. European Parliament legislative resolution [P8\\_TA\(2019\)0349](#), 2019.
49. European Commission Communication [COM \(2019\) 343](#), 2019.
50. European Commission Communication [COM \(2019\) 343](#), 2019.
51. The list of areas to be included thus differs from the Rule of Law Checklist of the Venice Commission.

See European Commission for Democracy through law, Venice Commission, "[Rule of Law Checklist](#)", 2016.

52. UDHR, art.7; ICCPR, art 26.

53. UDHR, arts. 10-11; ICCPR, art. 14.

54. UDHR, art. 3; ICCPR, art. 9.

55. UDHR, art. 19; ICCPR, art. 19.

56. UDHR, art. 20; ICCPR, art. 21.

57. UDHR, art. 21; ICCPR, art. 25. See also, UN Human Rights prepared [Guidelines](#) on the right to participate in public affairs as requested by resolution [33/22](#) of the Human Rights Council. The Council, in resolution [39/11](#) adopted by consensus, took note with interest of the Guidelines and presented them as a set of orientations for States and others.

58. See <https://uhri.ohchr.org/en>.

59. See <https://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>.

60. See <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx>.

61. See EU Fundamental Rights Agency's [Fundamental Rights Information System](#). For more background and info see M. O'Flaherty, J. Grimheden, G.N. Toggenburg, The multiplicity of human rights information: seeing the forest for the trees in the EU, in P. Hladschick and F. Steinert, Making Human Rights Work, NWV Wien Graz, 2019.

62. See [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report\\_en#2020-rule-of-law-report-targeted-stakeholder-consultation](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report_en#2020-rule-of-law-report-targeted-stakeholder-consultation).

63. Ibid 60.

64. Including from UN Treaty Bodies, Special Procedures of the Human Rights Council, UN Human Rights field presences and the UN system.

65. Report of the Secretary General [A/HRC/42/30](#), 2019. EU member States listed are Hungary, Malta and Poland.

66. See UN Human Rights (OHCHR), [illustrative tables of human rights indicators](#).

67. United Nations Department of Peacekeeping Operations (DPKO) and UN Human Rights (OHCHR), "[UN Rule of Law Indicators, Implementation Guide and Project Tools](#)" 2011.

68. UN General Assembly resolution [71/313](#).

69. See Praia City Group, "[Handbook on Governance Statistics](#)", 2019.

70. See UN Human Rights (OHCHR), "[Human rights indicators, A guide to measurement and implementation](#)", 2012.

71. Findings, views, and decisions in the rule of law area by the international human rights mechanisms, regional mechanisms of the Council of Europe, and the European Network of National Human Rights Institutions (ENNHRI) would qualify as expert judgments. Examples from the Council of Europe include European Court of Human Rights (ECtHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judges of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights and the Venice Commission.

