



Rule of Law within the Union

Invitation to send your comments and answers

European **Political
Strategy** Centre

The European Commission published a **Communication**¹ on 3 April 2019, taking stock of the available tools to monitor, assess, and protect the Rule of Law within the Union, and looking back at experiences and challenges of the past years.

It outlines **three pillars** that could contribute to making the enforcement of the Rule of Law in the Union more effective – namely: better **promotion**, early **prevention** and tailored **responses**. The Commission invites the European Parliament, the European Council, the Council and Member States, as well as relevant stakeholders, including judicial networks and civil society, and the public at large, to reflect on a series of questions around each of these areas.

The EPSC has been tasked with reaching out to experts, academics, think tanks, and decision-makers to feed into this reflection, which will be crucial for the next policy cycle. In this context, we believe that you/your institution can make a highly valuable contribution to the debate and **we would like to invite you to send your comments and answers** to the questions raised in the Communication, in any of the EU languages, to the following two email addresses:

EU-RULE-OF-LAW-DEBATE@ec.europa.eu

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by Tuesday, 4 June 2019 (closure of business) at the latest.

This will enable us to incorporate feedback received in a **second Communication**, due in June 2019, containing conclusions and concrete proposals for strengthening of the Rule of Law in the Union, within the framework of the current Treaties.

Please, provide your comments and answers in the relevant boxes below (limit of 4000 characters per text box). **We would very much appreciate your contributions.**

Should you have any **questions or remarks**, please do not hesitate to contact the Head of the EPSC's Institutional Team:

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¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN>.

1. Promotion: Building knowledge and a common Rule of Law culture

Possible questions for further reflection

- How can the EU better promote the existing EU legal requirements and European standards relating to the rule of law, in particular at national level?
- How can the EU best encourage key networks and civil society, as well as the private sector, to develop grassroots discussions on rule of law issues, including its economic dimension, and promote the standards underpinning the rule of law?
- Can Member States do more to promote the discussions on the rule of law at national level, including for example through debates in national parliaments, professional fora and awareness raising activities addressed to the general public?
- How should the EU and its Member States step up cooperation with the work of the Council of Europe and other international organisations that uphold the rule of law, including by supporting the work of the Council of Europe and with regard to evaluations and recommendations of the Council of Europe?
- How can the EU build on the work of the Council of Europe and promote common EU approaches? Can peer review between Member States help in this process?
- How can the existing steps taken by the European Parliament and the Council be improved and further developed? Can political groups and national parliaments be more engaged?

Promotion: Building knowledge and a common Rule of Law culture

(limit of 4000 characters)

The Bingham Centre believes that to respond to the current Rule of Law (RoL) crisis in the EU there is an urgent need to **democratise** the RoL: to spread understanding of both its meaning and its importance to audiences beyond the legal sector, including parliaments and the wider public. To achieve this strategic aim, it is necessary to work proactively and imaginatively to engage national parliamentarians and the public in discussions about the RoL. For example, the Bingham Centre helped to establish, and now provides the Secretariat for, the [All-Party Parliamentary Group \(APPG\) on the Rule of Law](#), a cross-party group that exists to promote parliamentary and public discussion of the RoL as a practical concept. The APPG holds regular meetings in Parliament on topical issues with a RoL dimension and brings in experts from across the political spectrum to discuss the RoL aspects of those topics. It has recently held meetings on the RoL implications of data processing and Artificial Intelligence, counter-terrorism and border security, parliamentary accountability of the Security and Intelligence Services, and balancing freedom of speech in Parliament with respect for court orders.

How to get national parliaments more involved in discussing the Rule of Law was the subject of a COSAC conference as part of the parliamentary dimension of the Dutch Presidency in 2016, but there has been no follow up to that event. The Commission may wish to consider concrete ways of taking forward the conclusions of that conference, for example by offering Member States (MS) funding to help establish and run cross-party parliamentary groups on the RoL like the APPG in the UK, especially in MS whose governments may not be receptive to these kinds of proposals.

The Bingham Centre also believes that there is considerable scope for the EU to build on the pan-European consensus on the meaning of the RoL that has been developed by the Venice Commission. The 2014 RoL Framework states that CoE documents drawn up on the basis of the expertise of the Venice Commission form part of the “core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU” (p4). In 2011, with the Bingham Centre’s help, the Venice Commission published a [report](#) on the RoL in which it clearly defined the principle and gave itself the task of drafting a checklist for evaluating the state of the RoL in the Council of Europe states. The [RoL Checklist](#) was completed in 2016 and was formally endorsed by the Parliamentary Assembly of the CoE in 2017. The Checklist is structured around five RoL benchmarks: legality, legal certainty, prevention of abuse or misuse of powers, equality before the law and non-discrimination and access to justice. Each benchmark includes a number of self-assessment questions and illustrative examples. It is intended for use by national governments, national parliaments in their scrutiny of legislation, and national civil society organisations (CSOs) in their work holding states to account.

The Venice Commission RoL Checklist is an important and useful tool for safeguarding and promoting the RoL at national level. It has great potential as the foundation on which to build a deeper and wider European consensus about what a shared commitment to the RoL means in practice. However, it is currently not widely used or referred to. Article 7 of the European Parliament’s (EP) [draft Interinstitutional agreement](#) on the Pact for Democracy, the RoL and Fundamental Rights in the Union (DRF Pact) implicitly adopts these benchmarks. The Commission may wish to consider how the EU can play a role in ensuring more widespread awareness and use of the Checklist, e.g. by explicitly adopting it for use under of the Rule of Law Framework, Article 7 and any future monitoring mechanisms the EU may adopt.

2. Prevention: Cooperation and support to strengthen the Rule of Law at national level

Possible questions for further reflection

- How can the EU enhance its capacity to build a deeper and comparative knowledge base on the rule of law situation in Member States, to make dialogue more productive, and to allow potential problems be acknowledged at an early stage?
- How can existing tools be further developed to assess the rule of law situation?
- How could exchanges between the Commission and Member States on rule of law issues be most productively organised?
- How can EU expertise and support be most effectively channelled to Member States?
- Can preventive steps be given weight through a more inter-institutional approach?

Prevention: Cooperation and support to strengthen the Rule of Law at national level
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The Bingham Centre believes that it would be feasible under existing Treaty powers for the EU to engage in country monitoring: see our [report](#) on Monitoring Mechanisms. We note a similar suggestion by the EP concerning the DRF Pact, which we endorse. We propose that any review body should build on existing monitoring work by the CoE and the UN so that much of the EU body's work would be in synthesising regional and international reports on RoL and human rights. Article 6 of the EP DRF Pact acknowledges the importance of using existing sources. In addition, the review body would of course assess each MS's compliance with EU law. We also propose setting up a network of independent experts on the Rule of Law modelled on the predecessor to the Fundamental Rights Agency (FRA): the Network of Independent Experts on Fundamental Rights. The Network was created by the Commission in September 2002 on the recommendation of the EP. It issued reports and opinions on fundamental rights practice in the MS and the EU in light of a number of objectives, including:

- Making recommendations regarding how to exercise EU competences to strengthen the protection of fundamental rights;
- Monitoring MS respect for Article 2 TEU values and the Charter;
- Promoting the exchange of information and the sharing of best practice between MS concerning implementation of the Charter.

The Network also played a role in relation to the Article 7 sanction mechanism by informally monitoring MS compliance with the Charter for the purposes of Article 7 in order to supply information to those EU institutions responsible for having recourse to the procedure.

The EP suggests the creation of an independent DRF Expert Panel composed of one independent expert designated by each MS' parliaments and ten further experts appointed by the EP. While we support in principle the idea of an independent expert panel, its relationship with existing sources of independent expertise such as the Venice Commission will need careful consideration and it may be difficult to achieve true independence through a MS-led nomination process, especially in MS suspected of breaching the RoL. The national nomination processes would need to be closely overseen by the EU institutions to ensure that the body is non-politicised and objective.

Should the EU decide that it wishes to engage in RoL monitoring, the following additional points should be taken into consideration:

- To ensure coordination and collaboration with existing mechanisms, representatives from the CoE, UN and existing EU bodies should be consulted.
- The mechanism should engage in automatic and periodic monitoring (as, for example, in many of the UN and CoE mechanisms) to enable the body to gather expertise and obtain an accurate picture of the situation regarding fundamental rights, democracy and the RoL in every MS. This will ensure that the Commission's goal of treating all MS alike is achieved (p. 7, pt. IV of the Communication).
- It is important that the mechanism be able to respond to requests for assistance and receive information from individuals, MS and credible third parties (e.g. as is the case in the UN Special

Procedures and the UN Treaty Bodies System, to differing degrees—both of which perform a monitoring function of relevant UN instruments). This would enable the mechanism to alert the Commission to systemic or structural violations as well as to those situations which require urgent action. In addition, requests for assistance or expert opinions can serve a preventive function, for example, by allowing the monitoring body to comment on proposed legislation or policy in advance of its implementation.

- It should be open to the new mechanism to take into consideration additional sources of information. This might include staff engaging in ‘on-the-ground’ analysis through country visits (as is done by, for example, the Venice Commission, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, European Commission against Racism and Intolerance, and UN Special Procedures).
- The MS under review should be responsible for implementing the recommendations set out in the final outcome document. External stakeholders, in particular civil society and NGOs, could have a role to play in this regard by raising public awareness, conducting campaigns and advocacy initiatives around particular issues, and maintaining pressure on the government to comply with the recommendations.

3. Response: Enforcement at Union level when national mechanisms falter

Possible questions for further reflection

- How can the relevant case law of the Court of Justice be effectively disseminated and its potential fully used?
- How can the Commission, the European Parliament and the Council coordinate more effectively and ensure a timely and appropriate response in case of a rule of law crisis in a Member State?
- In what ways could the Rule of Law Framework be further strengthened? Should this include more engagement with other institutions and international partners (e.g. Council of Europe/Venice Commission, Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights)?
- Are there other areas, in addition to the EU’s financial interests, where the EU should develop specific mechanisms (including rule of law-related conditionalities) to avoid or remedy specific risks to the implementation of EU law or policies?

Response: Enforcement at Union level when national mechanisms falter
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The Bingham Centre strongly supports more effective enforcement at EU level when national mechanisms fail to secure the RoL. We support the DRF Pact's specific acknowledgment in Article 3 that the Framework and the Dialogue must be brought within one instrument to enhance coordination and effectiveness of response. We also welcome as long overdue the Commission's proposal for a regulation linking EU subsidies with systemic breaches of the RoL and the EP's amendments to the proposal (COM(2018) 324 final). The proposal could be made more clear regarding what constitutes a systemic breach of the RoL by reference to the RoL factors in the Venice Commission RoL Checklist and the factors listed in Article 7 of the EP's DRF Pact. If this proposal is adopted, it should be rigorously enforced, including, if necessary, by the allocation of additional resources to the Commission departments concerned.

The Bingham Centre also strongly supports more proactive engagement with other international institutions with relevant RoL expertise, particularly the VC and OSCE/ODIHR, going beyond mere dialogue, involving more substantive co-operation and working together. The Commission should also engage in dialogue with national CSOs in addition to its intergovernmental dialogue, during the assessment phase of the RoL Framework, to obtain additional evidence of RoL problems that may not be readily provided by the MS under examination. Civil society can also inform reports and recommendations in the context of MS visits, should an EU monitoring body with such powers be established. The Commission may wish to consider earmarking funds for CSOs in MS where the RoL is under threat. The Rule of Law Framework would also benefit greatly from the imposition of time limits at each stage of the process that would apply to both the Commission and the MS under investigation. For example, once the Framework is triggered, the Commission should be required to make its determination about the existence of a systemic threat to the RoL and issue its opinion to the MS at issue within a certain number of weeks. The MS should then be required to respond within a given number of weeks, and so on. Time limits will safeguard against further damage being done and ensure that the processes move along in a timely manner so that a resolution can occur more quickly. Equally, should the DRF Pact be adopted, it should also include clear time limits at each stage.

Finally, while the most pressing RoL issues in the context of Hungary and Poland concern the independence of the judiciary, the EU should take care to give attention to other measures which undermine the RoL, such as attacks on media and press freedom, academic freedom and civil society. Article 11(2) of the Charter of Fundamental Rights protects the freedom and pluralism of the media and the proposed DRF Pact includes this within its list of issues to monitor. Media freedom is central to the RoL because the press serves as the eyes and ears of the people, as well as a watchdog on the state, ensuring its accountability. The Commission should therefore give specific attention to this issue in the context of the RoL Framework. It may, for example, choose to adopt a Protocol or an Annex to the Framework which articulates in a practical way the commitments of the EU in the Treaty and the Charter. Article 7 of the DRF Pact serves as a useful example of a general list of RoL commitments and gives more legal certainty to the operation of the Framework itself. MS breaches of these specific commitments could possibly trigger the Framework.

About the Bingham Centre for the Rule of Law

The Bingham Centre for the Rule of Law exists to advance the Rule of Law worldwide. Its strategic aims are to democratise the Rule of Law, to embed the Rule of Law, to build Rule of Law leadership, and to broaden agreement globally about the core meaning of the Rule of Law as a practical concept. The Centre carries out independent, rigorous and high-quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally. The Bingham Centre is part of the British Institute of International and Comparative Law, which provides informed, independent and practical legal ideas for a global community. (Registered Charity No. 209425. Company Registration 615025). For more information visit www.biicl.org.

The Bingham Centre was a drafting partner for the Council of Europe's Commission on Democracy through Law (Venice Commission) in its May 2016 publication, a [Rule of Law Checklist for its member States](#). Many of the principles in the Checklist were drawn from Lord Bingham's definition of 'Rule of Law', which forms the basis for the Centre's work. The Bingham Centre's Director, Murray Hunt, was recently appointed the UK's alternate representative on the Venice Commission.

In 2013, the Bingham Centre conducted a [study](#) titled 'Safeguarding the Rule of Law, Democracy and Fundamental Rights: A Monitoring Model for the European Union', prior to the Commission's adoption of the Rule of Law Framework. The aim of that study was to contribute to the Commission's debate on the future of EU justice policy ahead of the 'Assises de la Justice' forum. Some of the conclusions made in that report regarding rule of law monitoring are discussed in this submission.

The Bingham Centre is part of an 18-partner consortium in a project funded under the Horizon 2020 framework, called 'Reconciling Europe with its Citizens through Democracy and Rule of Law', or '[RECONNECT](#)'. In addition to co-leading the communication, dissemination and exploitation work package, we are part of substantive work packages on principles and practices of rule of law in the Member States and EU institutions.