

## CONCEPT PAPER

# Measuring the rule of law, justice and fundamental rights

*Developed in consultation with the European Union Agency for Fundamental Rights (FRA)*

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## Background

**How to make the rule of law transparent** | In the pursuit of growth Europe 2020 has set five objectives to be achieved by this year: employment, innovation, education, social inclusion and climate/energy.<sup>1</sup> The current status and advancement towards concrete goals are closely monitored with a set of indicators which aim to show progress, compare Member States, identify trends and forecast developments. The rule of law, justice and fundamental rights are not less important values for the European Union (EU). However, what we know about the rule of law at both EU and Member States level is intermittent, hardly comparable and often based on less than robust data collection methods and data sources. There is a clear need for a consistent framework of EU indicators and data to make rule of law, justice and fundamental rights more transparent, comparable, predictable and manageable.

**Standards and innovation** | Measurement is not an end in itself. It is about achievement of high standards of rule of law. In order to maintain and further strengthen its leadership position, the EU need to constantly innovate measurement and monitoring. Innovation will be a key word in the field of justice. The past years witnessed a constantly growing fusion between digital communication and democratic and justice processes. Nowadays blogs, Twitter, Facebook, LinkedIn, Instagram and many other web services facilitate enormous data streams. Significant proportion of these data is about people's experiences with the rule of law, justice and fundamental rights.

**Challenges** | Measuring the rule of law, justice and fundamental rights is neither easy nor uncontroversial. All three concepts have as many interpretations as students. The rule of law, for instance, is a multifaceted phenomenon which covers a broad range of values: from recognition of human rights, including aspects such as access to justice to lack of corruption and aspects of democracy. Another measurement challenge is that the rule of law, justice and fundamental rights are not only about *black letter law*. They are about people's experiences with the law and how they use the law to improve own lives. Cultural, political and legal diversities add yet another layer of complication. Nevertheless, the rule of law, justice and fundamental rights are too important parts of the lives of those present in the EU to risk being left to intuition.

**Critical perspective** | This Concept Paper reviews critically the needs for measuring the rule of law in the EU and discusses approaches towards building a framework of indicators. Such a framework should position the rule of law, justice and fundamental rights into a logical structure. It should reflect an appropriate balance between what could be called 'bottom-up' and 'top-down' indicators. Various data sources should be used in the construction of a valid and reliable framework of indicators. At the same time the framework and its parts should not be overly complex. It has to be feasible and designed with a view to available data and what can reasonable be achieved in addition.

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<sup>1</sup> See [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)

**Investments are needed** | The Concept Paper strongly suggests that the EU invests more political will, knowledge, data and resources into the development of tools and mechanisms for rigorous monitoring and measurement of the rule of law, justice and fundamental rights. What precisely to measure, how, when and by whom as well as what should be the consequences of measurement are all matters for which an expert consensus is needed. In order to facilitate a consensus building process the Concept Paper raises eight concrete questions to be discussed during the FRA Symposium on 7 June 2013.

- 1** What to measure – the rule of law, justice, fundamental rights?
- 2** How to measure the rule of law, justice and fundamental rights?
- 3** Where from to source data?
- 4** Structure, input, process or outcome indicators?
- 5** *De jure* or *de facto* indicators?
- 6** Top-down or bottom-up indicators?
- 7** Indicators based on direct or indirect experiences?
- 8** Qualitative or quantitative indicators?

## Indicators: measuring performances and trends

**Indicators' properties** | The rule of law as well as the global notions of justice and human (or fundamental) rights cannot be directly observed. Therefore what is needed is indicators that can, as it were, indicate the state and dynamics of these concepts. Any rule of law assessment will be incomplete without knowledge about the equality of laws and their implementation, accessibility of justice and all other facets that constitute elements of the concept. At the end, the available knowledge will be a product of the quality of the indicators. It is beyond the scope of this Concept Paper to discuss the general notion of indicators.<sup>2</sup> What is needed at this stage is to summarise the basic requirements for indicators of the rule of law, justice and fundamental rights:

- Based on a sound framework, valid and reliable;
- Feasible and linked to data sources;
- Focused on the interests and justice needs of the people living in the EU and businesses;
- Neutral and administered by unbiased stakeholders;
- Non-judgemental;
- Capable to compare different Member States;
- Track data over time and identify trends;
- Not only external evaluation, but a tool for learning and improvement internally, based on the belief that no Member State has found a final and definitive answer to all challenges to the rule of law;
- Establish benchmarks in key areas;
- Actionable, ensuring that follow-up policies and actions are feasible;
- Deliver succinct feedback to policy makers;
- Contribute to improve implementation of the basic values of the EU, such as the rule of law, justice and fundamental rights.

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<sup>2</sup> See the FRA background paper developed in preparation for its 2011 Symposium on fundamental rights indicators.

## The EU: what role for the rule of law

**Values based on fundamental rights** | The EU is a community of values. “[R]espect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” are at the heart of the European integration (Article 2, Treaty on European Union). Support for the EU and further integration will erode if the people living in the EU and the Member States no longer believe that EU Member States uphold these values.

**Institutional trust** | Respect for and abidance by the rule of law creates trust amongst the EU Member States. In contrast, unfair laws, unequal application of the law, corruption and violation of fundamental rights nourish distrust. Distrust in institutions, policies and the EU itself. Many EU policies rely on the concept of mutual trust. The European Arrest Warrant, the Schengen Treaty, and more generally the principle of mutual recognition of judicial decisions are prominent examples. Trust in the institutions of EU Member States is clearly at stake. Since the accessions of new Member States in 2004 and 2007 it has become clear that the transition process in some states is not yet completed. Moreover, there are also serious concerns regarding old member states. These problems show how important it is to enhance mutual trust in each other’s justice systems. A general and proper monitoring mechanism could contribute importantly to that end.

**Justice** | People, businesses and civil society organisations need protection when crises and disputes loom. Without access to justice all rights remain declarations. Fair dispute resolution processes and outcomes are needed when there are grievances. The Stockholm programme<sup>3</sup> (*Towards Citizens’ Europe in the Area of Freedom, Security and Justice*) sets the interests and needs of people as a political priority for the coming years. Gaps and inefficiencies in access to justice for citizens in their roles as consumers, employees, pensioners, users of government services and property owners should be identified, so that they can be remedied. This is also the perspective of many civil society organisations, which want to see justice done, human rights protected, access to justice safeguarded or basic justice care for everyone guaranteed.<sup>4</sup> Moreover, the interests of the businesses need enforcement of contracts, effective conflict resolution and protection of property rights in the real world, not only in the law as it is promulgated.

**Development** | Human, social and economic development necessitates environment of justice and fairness. The European citizens can bring the best of themselves only if their rights and interests are respected and protected. Business and innovation require certainty about the laws and their fair implementation.

**Enlargement** | Having a clear idea about the status of the rule of law, justice and fundamental rights in a given country is critically important in the context of EU enlargement. Moreover, the EU promotes values as the rule of law and justice in its policies vis-à-vis third countries,

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<sup>3</sup> [2010] The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens.

<sup>4</sup> Barendrecht, M., Gramatikov, M., Porter, R. B., & Verdonchot, J. H. 2012. Towards Basic Justice Care for Everyone. Challenges and Promising Approaches: 141. The Hague: Hague Institute for the Internationalisation of Law.

and this is only credible if those values are respected at a high level within the EU itself. EU has to lead by example. Not only in working towards the rule of law, but also in promoting accountability in this regard.

## The policy framework

**Monitoring the implementation of justice policies** | The rule of law is a keystone for the EU. Declaring respect for a given normative principle is an important first step, but adhering positively to this principle in the manifold realities of economic and social interactions within the EU is another matter. Recognising the gap between words and actions, between *black letter law* and real life, Article 70, Treaty on the Functioning of the European Union (TFEU) formulates the need for an objective and impartial evaluation of the implementation of EU's policies in the area of freedom, security and justice. The stated objective of evaluation and monitoring within the EU is to facilitate the full implementation of the principle of mutual recognition of criminal and civil judgements, judicial decisions and decisions in extrajudicial cases.

**Beyond policy assessment** | It should be noted that in Article 70 TFEU there is a call for a thematic or policy-level rule of law monitoring. This is something different than the need to gauge the rule of law and justice at horizontal level. Thus, two levels of evaluation can be discerned – 1) observation of justice and rule of law related phenomena and 2) assessment of policies and instruments that are deemed important for achieving greater compliance with the higher level principles. However, the two levels of evaluation serve different purposes, require different approaches and differ in terms of their policy value.

The need for monitoring and evaluating rule of law and justice within the EU has been pronounced at different policy levels. For instance, the European Commission's proposal *for a Regulation on the Establishment of an Evaluation and Monitoring Mechanism to Verify the Application of the Schengen acquis* calls for a coherent evaluation and monitoring mechanism covering all areas of the Schengen *acquis*.<sup>5</sup>

**Stockholm program** | Evaluation of the Member States' judicial systems is at the core of the Stockholm program.<sup>6</sup> The Tampere European Council Conclusions<sup>7</sup> as well as The Hague Program<sup>8</sup> also reiterate the importance of objective justice assessment as a priority. In one way or another all policy documents recognize that monitoring and evaluation of justice and rule of law is a major need, but by reiterating this principle they also suggest that it is difficult to make progress in the area.

**Focus on citizen perspective** | Overlooking the status quo, the Stockholm program argues that there is considerable fragmentation in the area of freedom, security and justice . This

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5 European Commission. 2011. Amended Proposal for a Regulation of the European Parliament and the Council on the Establishment of an Evaluation and Monitoring Mechanism to Verify the Application of the Schengen *acquis*. COM (2011) 559.

6 [2010]-a. The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens.

7 Tampere European Council. [1999]. Tampere European Council, 15 and 6 October 1999 : Conclusions of the Presidency, Bulletin of the European Union, Vol. 10/1999. Tampere: European Council.

8 [2005]. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, C 53/01.

fragmentation affects both policies and standards. Under the slogan *Towards Citizens' Europe in the Area of Freedom, Security and Justice*, the programme sets the interests and needs of people as a political priority for the coming years. Increased focus on evaluation is one of the tools which the Stockholm programme formulates. It should be noted, however, that the programme envisages mostly vertical monitoring – i.e. *ex ante* and *ex post* evaluation of particular legal instruments. An example of this approach is the European Council's urge for enlargement of the Schengen area when new countries have fulfilled “the requirements to apply the Schengen *acquis*”. In this way, conformity is measured not through benchmarks of justice and rule of law, but with tangible yet technical indicators of compliance.<sup>9</sup>

**Invitation to develop monitoring mechanisms** | Despite the challenges of conceptualising, monitoring and assessing rule of law and justice there is a constant mounting pressure for valid and reliable mechanisms for monitoring justice within the EU. The 2010 Stockholm Programme explicitly recognizes the need for an “objective and impartial evaluation of the implementation of the policies in the area of freedom, security and justice, in particular to promote the full application of the principle of mutual recognition.” The European Commission has been invited to submit “one or several proposals under Article 70 TFEU concerning the evaluation of the Union policies referred to in Title V (AFSJ) of TFEU.” Similarly, the European Council invites the institutions and the Member States “to ensure that legal initiatives are and remain consistent with fundamental rights and freedoms throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the European Convention and the rights and freedoms set out in the Charter of Fundamental Rights.”<sup>10</sup> Furthermore, monitoring and evaluation schemes are foreseen in the areas of free movement, mutual recognition, and corruption among others.<sup>11</sup>

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9 Ibid.

10 [2010]. The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens.

11 Ibid.

## Mechanisms: existing monitoring schemes and measurements

**What has already being done in the EU** | Several monitoring mechanisms have already been tried in the past; others are currently applied and developed:

- **Evaluation of the European judicial systems**

The Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) publishes biennial reports with key judicial statistics from the Council of Europe member states.<sup>12</sup> Aggregated data are gathered from national correspondents appointed by member states' institutions. Massive amounts of quantitative and qualitative data are collected and used to map the justice systems of the participating countries. In essence the reports cover the *inputs* in the judicial systems (budgets and resources of legal institutions), legal professionals (judges, prosecutors, lawyers etc.) and key characteristics of legal processes (court trials, ADR, enforcement procedures).

- **European Commission for Democracy through Law (Venice Commission)**

The Venice Commission was established in 1990 as Council of Europe's advisory body on constitutional matters. Its main mission is to help the Member States of the Council of Europe (plus several non-Member States) in the process of adoption of new constitutional laws or the amendments of existing provisions. The Venice Commission produces opinions and studies on a variety of issues, including fundamental rights and judiciaries.

- **EU Justice Scoreboard**

EU Justice Scoreboard is a recent tool of the European Commission "designed to promote effective justice systems in Europe"<sup>13</sup>. The first edition of the Justice Scoreboard uses country level data mainly from CEPEJ but also Doing Business, the Rule of Law Index, and the World Global Competitiveness Report to construct several indicators – length of proceedings, clearance rate, number of pending cases, use of ICTs in courts, ADR, training of judges and resources.

- **Enlargement monitoring reports**

Any country seeking membership in the European Union must meet the three criteria established by the Copenhagen European Council in 1993. Of particular importance for this Concept Paper is the political criteria – "...stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities..." ([1993]). Comprehensive Monitoring reports acknowledge the extent to which the Copenhagen criteria have been met by the candidate countries. Information is gathered from various sources – most often interview with experts and key stakeholders, official reports, media monitoring – and compiled into process assessment of a particular field. Recent example is the 2012 report on Croatia's state of preparedness for EU membership:

"In the field of judiciary, efforts to strengthen the independence, accountability, impartiality and professionalism of the judiciary have continued." (European Commission 2012)

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<sup>12</sup> See the latest report with data from 2010 at [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf)

<sup>13</sup> See EU Justice Scoreboard 2013 at [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_communication\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf)

- **Peer reviews**  
The implementation of several EU criminal justice instruments in national legislation is subject to peer evaluation. An example is the implementation of the European Arrest Warrant.<sup>14</sup> The reports must be agreed upon unanimously, including by the member state under review.
- **Open Method of Coordination (OMC)**  
OMC was introduced by the 2000 Spring European Council held in Lisbon. It is an intergovernmental mechanism on voluntary basis, which rests on benchmarks, indicators, guidelines and sharing best practices. OMC is based on four steps – 1) the European Council agrees on general policy goals; 2) the Council of Ministers selects quantitative or qualitative indicators; 3) measures are being taken at national or regional level and 4) the achievement of the goals is measured through mutual evaluation and peer-review between member states. To the best of our knowledge OMC has not been applied to policies belonging to the Area of Freedom, Security and Justice.
- **Schengen evaluation mechanism**  
In 1998 a mechanism was set to verify the application of the Schengen *acquis*. The aim of the evaluation is to ensure that “all Schengen rules are applied effectively in accordance with the agreed common standards and with fundamental principles and norms” (See also European Commission 2011; 2012). It should be noted that fundamental rights are implicitly included in the scope of the evaluation. Compliance with the Schengen *acquis* is ensured through planned and unannounced on-site visits of experts. What is interesting about this mechanism is that the proposed Regulation foresees that the evaluation should result in a follow up action plan drafted by the member state where deficiencies have been identified. In case of serious problems it is foreseen that the Council and the European Parliament can set political pressure on the non-complying state.
- **Cooperation and Verification Mechanism (CVM)**  
CVM is a mechanism for biannual monitoring of the progress of Bulgaria and Romania in the fields of judicial reform, corruption and organised crime. Each CVM report evaluates specific targets (benchmarks) related to the monitored fields. CVM is a qualitative tool which pursues specific political goals. Due to their qualitative character the results cannot be compared across countries.
- **Justice Forum**  
Launched in 2008 the Justice Forum is a platform for consulting stakeholders on European Union justice policies, strengthening mutual trust among EU legal practitioners and promoting best practice in the justice systems of the Member states.<sup>15</sup> It is not clear yet whether the Justice Forum has produced any evaluations that can inform the rule of law, justice and fundamental rights in the Member states.

### Available data and data collection approaches

- **Eurostat**  
Eurostat regularly collects data in the EU on different topics relevant to rule of law, justice and fundamental rights. For instance, the Crime and Criminal Justice 2006-

<sup>14</sup> See Dane, M., & Klip, A. (Eds.). 2009. An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust. Tilburg, the Netherlands: Celsus legal publishers.

<sup>15</sup> See [https://e-justice.europa.eu/content\\_justice\\_forum-24-en.do](https://e-justice.europa.eu/content_justice_forum-24-en.do)

2009 studies the number of crimes recorded by national police authorities, number of police officers and prison population by Member State. Elements of perception based data can be found in the Eurobarometer – repeated cross-national social surveys.<sup>16</sup> Eurostat is also appointed as the implementation agency for an EU wide victimisation survey, the need of which has been stated and elaborated on in the The Hague Programme and the Stockholm Action Plan.

- **European Social Survey**

The European Social Survey takes place every two years since 2002 and covers more than 30 countries. In each of the previous rounds a question on trust in the criminal justice system has been asked. Overall confidence in the justice system has been measured as well as confidence in institutions such as “police” and “the justice system”.

- **FRA**

In 2010 FRA published a report on indicators regarding protection of the rights of a child (Fundamental Rights Agency 2010). Four areas of children’s rights are identified - (i) family environment and alternative care; (ii) protection from exploitation and violence; (iii) adequate standard of living; (iv) education, citizenship and participation in activities related to school and sport. The report also discussed the process of developing and consulting a set of valid and reliable indicators of the rights of a child. Other examples of FRA indicators related projects and publications are available in FRA’s recent report on indicators of fundamental rights.<sup>17</sup>

- **Annual Reports of the Court of Justice of the European Union (CJEU)**

Strictly speaking the data produced by the CJEU do not directly contain rule of law information. Numbers and type of proceedings, duration and outcomes of proceedings do not tell a lot about the state of the rule of law at EU or Member states level. Nevertheless, the institutional role of the CJEU requires keeping an eye on the developments of its practice. It is also important to constantly consider the place of the official justice statistics in an overall framework of indicators of the rule of law in the EU.

- **European Court of Human Rights (ECtHR)**

Similar to the CJEU the ECtHR produces monthly, annual and multiannual statistics about different aspects of its work. These reports provide different data splits by type of application, parties involved, outcome etc. It should be noted that the workload of the ECtHR is significantly higher as compared to the CJEU. For instance, in 2012 the ECtHR received 65,150 applications of which 16,800 were identified as Chamber or Committee cases. Again, these data do not lend easy to interpretation and their relevance to indicators of the rule of law, justice and fundamental rights has to be carefully considered.

- **Other data sets**

Various data sets collect, process and visualise data about phenomena related to rule of law, justice or fundamental rights. In an appendix a non-exhaustive list of 23 such data sets is provided, that contain data about different years at country level. There are many other datasets that contain data about the rule of law. Also, there are numerous methodologies and frameworks that are developed with the intention to facilitate collection of relevant data.

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<sup>16</sup> See for example [http://ec.europa.eu/public\\_opinion/archives/eb/eb74/eb74\\_publ\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb74/eb74_publ_en.pdf)

<sup>17</sup> European Union Agency for Fundamental Rights (2011). Fundamental Rights Indicators in the EU.

## What to measure?

**A coherent framework of concepts, indicators and data** | A robust measurement of rule of law, justice and fundamental rights must start from a clear idea about what is being measured. “The rule of law” is not equivalent to “justice”; “fundamental rights” is not the same as trust in justice institutions. Accordingly, the first question is:

### What to measure – rule of law, justice, fundamental rights?

This is an open ended question. One possible way to frame it is to think about the relationships between the three concepts. The rule of law is the upper-level concept which contains multiple dimensions including justice and fundamental rights. Highly abstract notions are difficult to observe and therefore have to be assessed through their parts. A good example is the World Justice Project’s Rule of Law Index which assesses the rule of law through eight distinct dimensions. Whether to compute an overall index or to report the values of the components is a matter of choice that has to be made in light of the advantages and disadvantages of the alternatives.

### How to measure the rule of law?

**Various interpretations** | There is little agreement about what defines the rule of law. In the words of Professor Brian Tamanaha “the rule of law is strikingly like the notion of the “good,” in the sense that everyone is for it, but there is no agreement on precisely what it is”.<sup>18</sup> In general, there are two approaches to outline the scope, structure and content of the rule of law, although the two are often merged and confused.<sup>19</sup> The *thick* or substantive conception emphasizes the ends that the rule of law is supposed to serve within a society. The *thin* or instrumental definition outlines the institutional elements that are believed to sustain the rule of law in a particular society.<sup>20</sup> Both notions are difficult to observe and interpret, but there is an agreement that the *thin* conception is more amenable to translation into observable indicators.

**Multiple dimensions** | It is evident that the rule of law is a complex multidimensional concept. There is no agreement however on exactly how many dimensions the rule of law has, or what precisely they are. For instance, Cooney & Ó Briain<sup>21</sup> identify nine requirements for the rule of law.<sup>22</sup> Similarly, the World Justice Project’s Rule of Law Index specifies eight

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18 Tamanaha, B. Z. 2002. The Rule of Law for Everyone? The Rule of Law for Everyone?(1): 97-122.

19 Botero, J. C., & Ponce, A. 2011. Measuring the Rule of Law. SSRN eLibrary. Carothers, T. 1998. The Rule of Law Revival. Foreign Affairs: 95–107. Radin, M. J. 1989. Reconsidering the Rule of Law. Boston University Law Review.

20 Belton, R. K. 2005. Competing Definitions of the Rule of Law: Implications for Practitioners. In C. E. f. I. Peace (Ed.): Carnegie Endowment for International Peace.

<sup>21</sup> Cooney, T. and D. Ó Briain (2013). Elements of the Rule of Law in the European Union, Department of Justice and Equality, Ireland.

<sup>22</sup> Questions about rights, duties or liabilities are solved by application of law; laws are accessible, intelligible, clear and predictable; laws apply equally to all; fundamental human rights are protected; institutions and

components of the aggregated notion of the rule of law.<sup>23</sup> Benton proposes three facets – 1) laws which are publicly known and relatively settled; 2) a judiciary “schooled in legal reasoning, knowledgeable about the law, reasonably efficient and independent from political manipulation and corruption” and 3) force able to enforce laws, execute judgments, and maintain public peace and safety.<sup>24</sup> An even more aggregated approach is used by Tamanaha who argues that the rule of law consists of two general facets: 1) protection against government tyranny and 2) qualities of legality.<sup>25</sup>

### **How to measure justice?**

**Justice as fairness** | Justice is maybe an overused term, showing its tremendous appeal as a value to citizens, but its meaning and dimensions are rarely explored in depth. Various EU policy documents proclaim the importance of justice but stop short from defining what it means. Depending on the particular context or perspective, justice signifies different things for different people. Aware that one cannot measure justice if it has not been sufficiently defined a conception which can be operationalised and observed will be delineated. This conception refers to perceiving ‘justice’ as ‘fairness’ from the perspective of the individual users of justice. It epitomises the bottom-up approach towards justice.

**Costs, process, outcome** | People regularly need protection from the law to solve legal problems in a fair manner. Effective and efficient legal systems have to provide rules, procedures and institutions to make sure that people receive justice. One way to assess the degree to which justice is delivered is to ask the people about their experiences with situations when they needed justice. In this perspective, justice is assessed through the fairness perceptions of people who have had to deal with various types of disputes and grievances. It should be clarified that this proposal goes further than suggesting to focus on procedural justice. The bottom-up concept of justice-as-fairness, proposed herein, has three major dimensions: 1) the quality of the procedures; 2) the quality of the outcomes and 3) the costs of justice. The first dimension thus relates to procedural justice, while the other two add the practical considerations of costs (are they seen to be affordable and reasonable?) as well as of the outcome of the process (the extent to which people consider the outcome to be fair, even if it was not the result they desired). For each of these dimensions, concrete indicators have been identified.<sup>26</sup>

### **How to measure fundamental rights?**

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procedures resolve disputes without prohibitive costs or excessive delay; official power is not exercised arbitrarily; adjudicative procedures are fair; EU complies with its international obligations; commitment to some form of democracy.

23 Limited government powers; absence of corruption; order and security; fundamental rights; open government; effective regulatory enforcement; access to civil justice; effective criminal justice

24 Belton, R. K. 2005. Competing Definitions of the Rule of Law: Implications for Practitioners. In C. E. f. I. Peace (Ed.): Carnegie Endowment for International Peace.

25 Tamanaha, B. Z. 2002. The Rule of Law for Everyone? The Rule of Law for Everyone?(1): 97-122.

26 Gramatikov, M., M. Barendrecht, et al. (2010). A Handbook for Measuring the Costs and Quality of Access to Justice. Apeldoorn, Antwerpen, Portland, Maklu.

**Long list of rights** | Indicators of fundamental rights have to “show what the fundamental right situation is like on the ground for different people in areas ranging from equality and non-discrimination through to the right to redress in cases of misuse of personal data”.<sup>27</sup> Efforts to develop indicators for fundamental rights have been invested among others the Cingranelli-Richards Data Project,<sup>28</sup> FRA,<sup>29</sup> and the United Nations Office of the High Commissioner for Human Rights (UN OHCHR).<sup>30</sup>

**Scope** | A substantial part of FRA’s mission is to develop quantitative and qualitative indicators of fundamental rights in the EU. Therefore any EU system of indicators of fundamental rights should build on what has been already achieved by FRA on the Charter of Fundamental Rights of the EU. Research has already been undertaken by the FRA in areas of the rights of the child,<sup>31</sup> integration of the Roma<sup>32</sup>, racism<sup>33</sup>, and violence against women<sup>34</sup>. A symposium organised by FRA in 2011 discussed five topics with regard to development of indicators of fundamental rights:

- Disability
- Roma
- Access to justice
- Rights of the child
- Data protection

When it comes to measurement of fundamental rights it is recommendable to adopt a ‘Start small, think big approach’. Selecting a couple of rights to start with and learn from the lessons before expanding and scaling up to others – would seem to be the most feasible strategy.

## Where to find data?

**Triangulation and innovation** | Indicators without data are just a theoretical exercise. Various data sources have to be explored when considering each individual indicator, including the following and possibly more:

- Statistics, public registries and census data from the EU, its Member States, and national and international organisations;
- Cross-sectional and longitudinal survey research;
- Peer review monitoring and expert assessments;
- Country level indicators relevant to the rule of law, justice and fundamental rights;
- Results from research and monitoring;
- Media content analysis.

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<sup>27</sup> European Union Agency for Fundamental Rights (2011). Fundamental Rights Indicators in the EU.

<sup>28</sup> Cingranelli, D. L. and D. L. Richards (2008) The Cingranelli-Richards (CIRI) Human Rights Data Project Coding Manual Version 2008.3.13.

<sup>29</sup> European Union Agency for Fundamental Rights (2011). Fundamental Rights Indicators in the EU.

<sup>30</sup> UN Office of the High Commissioner for Human Rights (2012). Human Rights Indicators. A Guide and Measurement and Implementation. U. O. o. t. H. C. f. H. Rights, UN Office of the High Commissioner for Human Rights.

<sup>31</sup> Fundamental Rights Agency (2010). Developing indicators for the protection, respect and promotion of the rights of the child in the European Union. Vienna.

<sup>32</sup> See [http://fra.europa.eu/fraWebsite/eu-midis/eumidis\\_roma\\_en.htm](http://fra.europa.eu/fraWebsite/eu-midis/eumidis_roma_en.htm)

<sup>33</sup> See [http://fra.europa.eu/fraWebsite/research/publications/publications\\_per\\_year/2009/pub\\_eumidis\\_en.htm](http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/pub_eumidis_en.htm)

<sup>34</sup> See [http://fra.europa.eu/fraWebsite/research/projects/proj\\_eu\\_survey\\_vaw\\_en.htm](http://fra.europa.eu/fraWebsite/research/projects/proj_eu_survey_vaw_en.htm)

Internet and particularly social networks and blogs can be the source of highly relevant data. This is an area where innovation is needed and has to be supported. Large amounts of unstructured data are generated literally every minute and hour on services such as Twitter, Facebook, LinkedIn, Instagram and many others. Not all of this information is public and amenable to analysis. With appropriate and respectful methods and tools, however, these information sources can be sifted for the rule of law, justice and fundamental rights knowledge and trends. Social media cannot be the primary source of information about the topics of interest but the EU should be cognizant about its growing importance as medium of the rule of law information, complementing the more traditional sources of data.

## What sort of indicators?

### Structure, input, process or outcome indicators?

Various aspects of the identified concepts can be measured. Different indicators will be appropriate depending on whether the intention is to measure input, process or outcome. UN OHCHR and FRA define *structure* indicators – reflecting commitment to legal norms and instruments. Most of the current indicators in the rule of law area belong to the categories of structure, input and process. Clearly, more emphasis is needed towards the outcome indicators which tell us how the legal institutions, rules and processes affect people's lives. Here, the surveys of the FRA as well as those of others can prove very useful.

### *De jure* or *de facto* indicators?

*De jure* indicators are similar to the structure indicators. What they do is to gauge the law as it is in the books. *De jure* indicators are relatively easy to compile and populate with data. On the other hand, the *de facto* indicators are the ones that ought to show how the rule of law, justice and fundamental rights actually take place. Accordingly, the informative value of the *de jure* indicators is limited and should not be overestimated. The focus should be on the more challenging but also more useful *de facto* indicators.

### Top-down or bottom-up?

Top-down indicators measure the scope, breadth and quality of the available legal institutions. Examples of top-down indicators are commitments to legal principles, resources invested in courts, police services or prisons, number of cases and duration of legal procedures. Bottom-up indicators are looking at people's needs for justice, what they do when such needs arise as well as how much justice they perceive to receive. An example is Hiil Innovating Justice methodology for measuring the costs and quality of justice.<sup>35</sup>

A growing body of research explores how the law influences the ways in which people deal with the problems of everyday life.<sup>36</sup> Such situations largely affect people's confidence in justice and fairness. Everyone needs justice to protect important interests. Well-functioning legal and justice systems should provide basic justice care in the form of rules, processes and

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<sup>35</sup> Gramatikov, M., M. Barendrecht, et al. (2010). A Handbook for Measuring the Costs and Quality of Access to Justice. Apeldoorn, Antwerpen, Portland, Maklu.

<sup>36</sup> Genn, H. G., & Beinart, S. 1999. Paths to justice : what people do and think about going to law. Oxford, England ; Portland, Or.: Hart Pub, Gramatikov, M. 2010. Justiciable Events in Bulgaria. Sofia: Open Society Institute, Pleasence, P., Balmer, N., Tam, T., Buck, A., Smith, M., & Patel, A. 2008. Civil Justice in England and Wales. London: Legal Services Research Centre, van Velthoven, B. C. J., & Klein Haarhuis, C. M. 2010. Geschilbeslechtingdelta 2009. Over verloop en afloop van (potentieel) juridische problemen van burgers. Den Haag: Boom Juridische Uitgevers.

fair outcomes.<sup>37</sup> What this means is that when there is a dispute or grievance, there must be accessible mechanisms which result in some sort of fair resolutions.

### **Based on direct or indirect experiences?**

Bottom-up rule of law indicators can be based on general perceptions or specific experiences. For instance, questions regarding trust or confidence in the legal system are most often based on respondents' general perceptions of the system, rather than direct experiences. Most people have infrequent contacts with the legal system. Their perceptions and attitudes regarding justice come from the experiences of others – vicarious experiences. On the other hand, encounters with specific parts of the legal system beget perceptions and attitudes based on this specific event. For instance, experiences with crime or civil justice problems makes people think about aspects of rule of law, justice and rights from their specific experiences. Both direct and indirect-experience indicators might be of significant interest. It is important to note that they require different types of data and methodological approaches.

### **Qualitative or quantitative?**

The rule of law cannot be separated from its context. Purely quantitative indicators are often criticised for missing the broader environment. On the other hand, indicators based on qualitative data are less rigorous as it comes to reliability and comparability. The brief overview of the existing EU methods and mechanisms shows an overemphasis on qualitative approaches. The challenge is how to bring the two together.

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<sup>37</sup> Barendrecht, M., M. Gramatikov, et al. (2012). Towards Basic Justice Care for Everyone. Challenges and Promising Approaches. The Hague, Hague Institute for the Internationalisation of Law: 141.

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## Appendix 1: Sources for rule of law data

1. The bi-annual report of the European Commission for the Effectiveness of Justice (CEPEJ, 45 countries) describes and compares the judicial systems of the Council of Europe Member states. In essence, the evaluation scheme provides national statistics which reflect various parts of the assessed judicial systems. As such, the statistics do not evaluate but describe national systems. The national reports also contain qualitative parts which add supplementary information. CEPEJ prepares the general methodology and distributes questionnaires to national contact points. The aggregated reports are organised by subject matter: judicial budget, access to justice, courts, alternative dispute resolution, judges, trials, prosecutors and lawyers.
2. The World Justice Project (66 countries) is a multinational and multidisciplinary initiative which aims to monitor the rule of law throughout the world. The Rule of Law Index (ROLI) aims to respond to a long-time demand for a reliable and valid cross-country measure of the rule of law concept. It recognizes the complexity of the rule of law concept and uses a four facet model to observe it in real life. The model is based on four universal principles of rule of law which are defined as: 1) accountable government; 2) publicized and stable laws that protect fundamental rights; 3) an accessible, fair and efficient process and 4) access to justice. Each of the indicators is further operationalised into sub-indicators and questionnaire items.
3. The Cingranelli-Richards Human Rights Dataset (CIRI) contains longitudinal quantitative information (195 countries) about the level of respect that national governments provide for 15 human rights, as recognized internationally. Annually updated country level datasets are available since 1981. These include information on measures of government human rights practices, describing a variety of rights such as worker's rights, women's rights and torture. The current data set consists of information that makes it one of the most comprehensive sources of quantitative comparative knowledge in the field of human rights. Due to its focus on human rights, the index covers the concept of **respect for fundamental rights**. These rights include both physical integrity rights such as the right not to be tortured in addition to civil liberties such as freedom of speech and freedom of religion.
4. The Bertelsmann Transformation Index (BTI) assesses and evaluates the progress, development and transformation of 128 countries in transition. Specifically, BTI focuses on progress in democracy, market economy and governance. Higher rankings indicate transformation of the democratic order through "terms of acceptance, interest representation and political culture" (Bertelsmann Stiftung, 2010, p. 6). The index consists of two ranking tables – Status Index on political and economic transformation and a Management index assessing the quality of governance. Under the Status Index, rule of law more generally is considered as a part of political transformation, including a measure for **independent judiciary** having the ability to interpret and review existing laws, pursue own reasoning free from corruption and develop a differentiated organization. There is also an indicator for **absence of corruption** within the rule of law measure, examining the extent to which those officials engaging in corrupt activities face prosecution and punishment. **Protection of fundamental rights** is also included, focusing on the guarantee and protection of civil rights more specifically.
5. Transparency International defines corruption as "the abuse of entrusted power for private gain". The Corruption Perceptions Index (CPI) "ranks countries according to the degree to which corruption is perceived to exist among public officials and politicians" (Transparency International, 2010, p. 1). Perception-based data (178 countries) is collected from different sources "produced by reputable organisations and data gathering organisations". For instance, the last edition of CPI from 2010 uses 13 different surveys conducted by 10 organizations of the likes of: regional development banks, Bertelsmann Foundation, Freedom House, World Bank etc. The data sources can be further classified into two streams – business people opinion surveys and secondary assessments of country performance, conducted by experts. Interestingly, despite its title, CPI does not draw on actual perceptions of ordinary people from the assessed countries. With regard to concepts measured that are related to the rule of law indicators, dealing with the absence of corruption is the primary goal of the CPI.

6. Worldwide Governance Indicators (WGI) (212 countries) is a project of the World Bank mostly known from the popular Governance Matters series of papers authored by Daniel Kauffman and his co-authors (see for example and references Kaufmann, Kraay, & Mastruzzi, 2009). Similar to CPI but at a larger scale, WGI is a secondary and even tertiary index of data obtained from vast number of sources that provide data on various aspects of governance. RoL is envisioned as one of the six dimensions of governance; the others being: voice and accountability; political stability and absence of violence; government effectiveness; regulatory quality; and control of corruption.
7. The Global Peace Index (153 countries) is composed of 23 indicators, ranging from a nation's level of military expenditure to its relations with neighbouring countries and the level of respect for human rights. Included in the index are indicators such as violent crime, access to weapons, jailed population, displaced people, homicides, security officers and terrorist acts. The rankings range from more peaceful to less peaceful.
8. The Human Rights Index (195 countries) measures the degree of lack of protection or noncompliance of the obligations of States in regard to human rights and the International humanitarian law. Similar to the CIRI and the GPI, the main focus is on respect for human rights. Therefore, the dimension of **respect for fundamental rights** is measured using HRI indicators that measure the failure to ratify international instruments of human rights, violation of international law on human rights, and violation of international humanitarian law. The three indicators, based on 22 items, are then weighted and information appears to come from sources such as the Office of the High Commissioner for Human Rights, Amnesty International and Human Rights Watch.
9. The Failed States Index (177 countries), prepared by the Fund for Peace and published by Foreign Policy, is based on their levels of stability and the pressures they face. It includes 12 indicators including human rights, delegitimization of the state, demographic pressure, group grievance, human flight, uneven development, factionalized elites, external intervention, poverty, refugee flows, public services and security threats.
10. The Ibrahim Index of African Governance is a composite index (48 countries), constructed by combining underlying indicators in a standardised way to provide a statistical measure of governance performance in all African countries. The Index is an aggregation of third party data. The rule of law dimension then looks at **independent judiciary**. Furthermore, the effective judicial system is linked to the indicator of the Ibrahim Index measuring the judicial process. **Absence of corruption** is also included to a large extent, within the subcategory of accountability (accountability, transparency and corruption in the public sector and in rural areas; corruption and bureaucracy; accountability of public officials; prosecution of abuse of office). Finally, **respect for fundamental rights** is included in the indicator of participation and human rights, examining human rights, political rights, worker's rights, women's rights, civil liberties and freedom of expression.
11. The Political Terror Scale (PTS, 190 countries) measures levels of political violence and terror, using a 5 point indicator. The scale classifies countries into one of five levels and therefore can be interpreted as an indicator of state violations of citizens' physical integrity. It includes abuses such as extrajudicial killing, torture or similar physical abuse, disappearances, and political imprisonment. Focus is on violence carried out by political actors, including the state and its agents. Data comes from two sources: (1) yearly country reports of Amnesty International and (2) the U.S. State Department Country Reports on Human Rights Practices. In essence, PTS is based on the same data sources as CIRI, but uses different coding scheme to process the raw data. Focus here is given to the rule of law indicator of respect for fundamental rights.
12. The Human Security Index (HSI) (232 countries) is intended to represent the recent-to-current situation. It includes the Economic Fabric Index, the Environmental Fabric Index and the Social Fabric Index (most important to justice related issues). Though presented in the spirit of the Human Development Index (HDI) it is not currently intended to become an annual publication. After all, societies rarely change so quickly (unless blasted by natural disaster, war or other major impact, in which case good indicators are unlikely to quickly characterize such change) for annual updates to be meaningful. Includes indicators of freedom from corruption, environmental protection, peace, protection of diversity and information empowerment. The indicator of corruption control falls under the rule of law dimension of **absence of corruption**.

13. The Social Institutions and Gender Index (102 countries) draws on 12 social institutions variables from the OECD Gender, Institutions and Development (GID) Database that have been grouped into five categories or sub-indexes: Family Code, Physical Integrity, Son Preference, Civil Liberties, and Ownership Rights. The SIGI looks at discriminatory social institutions. Physical integrity examines violence against women, including female genital mutilation, and the laws that exist combating such behaviors. Generally, these indicators look at the **accountability of the law**, examining the existence of women's legal protection under the indicator of restricted physical integrity. Furthermore, **respect for fundamental rights** is addressed in terms of civil liberties defining women's rights (forced marriage, minimum age for marriage among men and women, custody, inheritance). Also included under this dimension are freedom of movement and access to public space.
14. The Global Integrity Index (GII, 38 countries) annually assesses more than 300 indicators of the existence, effectiveness, and citizen access to key national-level anti-corruption mechanisms. More specifically, it looks at the mechanisms against corruption - government accountability, transparency, and citizen oversight. GII quantitatively assesses the opposite of corruption, that is, the access that citizens and businesses have to a country's government, their ability to monitor its behaviour, and their ability to seek redress and advocate for improved governance and the mechanisms in place to prevent abuses of power and promote public integrity. First, the existence of public integrity mechanisms, which promote public accountability examines government (executive, legislative, judicial) accountability, falling under **accountability of the law**. Similarly, **access to information** is covered, for example through the items measuring their access to legislative documents and asset disclosure records, and more generally through the indicator of public access to information. **Absence of corruption** also has its own indicator, measuring anti-corruption law and anti-corruption agency. The more general concept of rule of law exists within an indicator, that when broken down, examines **independent judiciary, effective judicial system** (enforcement, appeals, following written law), and finally **access to justice** (through equal access to the justice system for citizens).
15. The International Crime Victim Survey (ICVS) (37 nationwide, 78 cities) is a programme of standardised sample surveys to look at householders' experience with crime, policing, crime prevention and feelings of unsafety in a large number of countries. The survey was set up to produce estimates of victimisation that can be used for international comparison. Data is included on fear of crime and perceptions of the police and corruption, in addition to providing victimization rates of all types of crimes. The **effective judicial system (criminal) dimension** is measured using a few items from the questionnaires. Victims are asked the extent to which they are satisfied with the police, in addition to reasons for their satisfaction or dissatisfaction. There are also items examining the performance of the police, including if they are doing a good job and if they are helpful. Furthermore, victims are asked if they were subjected to corruption by government officials, measuring the rule of law dimension of **absence of corruption**. This measure includes who was involved in the corrupt behaviour. All respondents, victims or non-victims, were asked to report the likelihood they believed corruption would exist in transaction with different public officials.
16. The United Nations Surveys on Crime Trends and the Operations of Criminal Justice Systems (100 countries) collect data on the incidence of reported crime and the operations of criminal justice systems with a view to improving the analysis and dissemination of that information globally. The survey results provide an overview of trends and interrelationships between various parts of the criminal justice system to promote informed decision-making in administration, nationally and internationally. The rule of law dimension of **respect for fundamental rights** may be reflected in the measure of time in prison awaiting trial, which is linked to a speedy process and unfair imprisonment.
17. Doing Business (183 countries) is a World Bank associated project which assesses annually the impact of legal regulations and administrative practices on the business environment. Two types of indicators are operationalised and monitored in order to evaluate the legal and administrative burdens that small

and medium enterprises face when doing business.<sup>38</sup> First, experts evaluate the number of steps required to perform the activity. Second, again experts assess how many days and other resources are needed to accomplish the task. Two of the Doing business indicators might be used as proxies for observing the **effectiveness of the judicial system**. Duration, and number of procedures required for enforcing contracts reflect the ability of the national justice system to cope efficiently with disagreements based in contractual relationships. Similarly, the duration and number of procedures required for resolving bankruptcies indicates the effectiveness of the judicial systems. The costs of enforcing contracts and bankruptcy procedures can be viewed as proxy of **access to justice**.

18. The Freedom of the World Index (194 countries) provides annual evaluation of the state of global freedom. Freedom has been understood as “the opportunity to act spontaneously in a variety of fields outside the control of the government and other centres of potential domination—according to two broad categories: political rights and civil liberties.” Experts assess the extent to which a set of 10 political rights and 15 civil liberties are implemented in real life. The indicator Functioning of the government corresponds with the dimension **accountability to the law**. Three of the Freedom of the World indicators inform the dimension **respect for fundamental rights** - Freedom of expression and belief, Associational and organizational rights and Personal autonomy and individual rights. The Rule of Law indicator is more challenging because it reports a single number composed of four facets.<sup>39</sup> Each of these sub-indicators refer to different dimensions of our conception of the rule of law but Freedom of the World does not publish their individual scores.
19. The Index of Economic Freedom of the Heritage Foundation (183 countries) analyses ten components of economic freedom which are grouped into four domains: Rule of law, Limited Government, Regulatory efficiency, Open Markets. Data is collected through meta-analysis of available indexes, reports, news, and magazine articles. The rule of law component consists of two sub-factors - Property rights and Freedom from corruption. Property rights assesses the extent to which laws protect and enforce the right of individuals to accumulate private property. Thus the Property rights indicator is linked to the **effective implementation of laws** dimension.
20. The Global Competitiveness Report of the World Economic Forum (GCR, 42 countries) studies various factors underpinning national competitiveness. Twelve pillars of competitiveness are identified and studied mostly with data from the World Economic Forum’s annual Executive Opinion Survey. In the first pillar, Institutions, GCR evaluates among other things the extent of protection of property rights and intellectual property rights.
21. The Civicus Civil Society Index (56 countries) assesses the state of civil society at national level. Civil society has been conceptualised as “the arena, outside of the family, the state, and the market where people associate to advance common interests”. Recognising the complex nature of civil society the identifies a four dimensional structure to observe it in real life: structure, values, environment and impact. The last dimension is about the impact that civil society’s actors have on people’s lives and on the society as a whole. Impact itself is a composite indicator consisting of four sub-indicators.
22. The Sustainable Governance Indicators (SGI, 31 countries) evaluate aspects of governance in the members states of the Organisation for Economic Co-operation and Development. Data are collected from official statistical sources and expert opinions. The indicators are organized into two groups - Status Index and Management Index. The former evaluates the institutional framework of governance, whereas the latter is concerned with the processes of policy implementation. Three of the indicators of the Status index merit special attention. Access to information, civil rights and rule of law are constructed as dimensions of the quality of democracy. Access to information has been operationalised

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38 The discrete activities studied by Doing Business are: starting a business, dealing with construction permits, employing workers, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business

39 Freedom of the World methodology evaluates rule of law through four batteries of questions: 1) Is there an independent judiciary?; 2) Does the rule of law prevail in civil and criminal matters? Are police under direct civilian control?; 3) Is there protection from political terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system? Is there freedom from war and insurgencies?; 4) Is there protection from political terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system? Is there freedom from war and insurgencies?

as media freedom and thus it deviates from our understanding that it is the ability of citizens and organisations to request, receive and process public information. Civil rights, on the other hand, is the extent to which “the state respect and protect civil rights, with courts protecting against rights violations”.

23. The Democracy Index (167 countries) is compiled annually by the Economist Intelligence Unit. According to the assigned scores the countries are categorised into full democracies, flawed democracies, hybrid regimes and authoritarian regimes. Most of the indicators and sub-indicators of the Democracy index are derived from expert evaluations. s. Five categories are monitored and evaluated by the index.<sup>40</sup> Of particular interest are a couple of variables which bear significant relevance for different dimension of the rule of law.<sup>41</sup>

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40 Electoral process and pluralism, functioning of government, political participation, political culture and civil liberties.

41 Effective system of checks and balances, accountability of government to the electorate between elections, access to information, corruption, civil service which is willing and capable of implementing government policy, freedom of expression and protest, respect for minority views, use of torture by the state, independence of the judiciary, religious tolerance and freedom of religious expression, the degree to which citizens are treated equally under the law, extent to which citizens enjoy personal freedoms, extent to which citizens enjoy basic security, popular perceptions on human rights protection, absence of discrimination.