

Promoting the rule of law in the European Union

FRA SYMPOSIUM REPORT

4th Annual FRA Symposium
Vienna, 7 June 2013

Contents

The 4th annual symposium – an introduction	3
Summary of discussions	4
Working groups	5
1. The EU: what role for the rule of law?	5
2. Indicators: measuring performances and trends	6
3. Mechanisms: synergies among existing monitoring schemes and further developments	8
Conclusions	9

The 4th annual symposium – an introduction

The FRA Symposium is an annual meeting held at FRA. It allows experts and practitioners to discuss topics of particular relevance to the European Union (EU) policy agenda in the field of fundamental rights. The 2013 event took place on 7 June in Vienna, and aimed at providing a platform to discuss and exchange ideas on the promotion of the rule of law in the EU.

The need to reflect on the promotion of the rule of law in the EU was already put forward in 2009 by Prof. Hirsh Balin, the Dutch Minister of Justice in a speech entitled “Towards reinforcing mutual trust”. He stressed that the Treaty on European Union (TEU) identifies the rule of law as a common principle - a principle that forms the very basis of cooperation in the European Union. Indeed, the common EU area of Freedom, Security is built on the ‘presumption of confidence’. At the same time, the minister stressed that we have to recognise that this presumed confidence in the quality and integrity of each other’s legal systems is not something we should take for granted.

The crucial role of the rule of law has since been reinforced by other Member States, by the European Commission (President Barroso "State of the Union 2012 Address"), by the European Parliament and by the Irish Presidency of the Council of the EU. In this context, it was often underlined that a more structured political dialogue on the rule of law would allow eventual deficits in a given country to be addressed at an early stage and hence avoid discussions on sanctions according to Article 7 of the TEU. This article addresses exceptional violations of the EU’s founding values - also in areas that do not fall within the EU’s legislative competencies.

In addition, strong arguments have been made for enhancing the focus on the rule of law for the protection of the rights of people living in the EU; for economic growth (rule of law as an incentive for investment and trade); for freedom of movement (to create a common area of justice which works in a similar way); for internal-external cohesion (ensuring what is promoted in third countries also happens ‘at home’); and for identifying and promoting best practices.

The 2013 Symposium also aimed at contributing to the ongoing discussions on the Copenhagen criteria. While there are strict requirements for future EU Member States, there is less leverage on members to make improvements once they have joined the EU.

The Symposium discussions were preceded by a seminar organised under the auspices of the Irish Presidency on 9-10 May 2013, entitled “A Europe of equal citizens: equality, fundamental rights, and the rule of law”.

The Symposium gathered around 80 experts from across Europe, including representatives from the European Commission (DG Justice, DG Enlargement), the Irish Presidency, the FREMP Working Group of the Council of the EU, the European Parliament (LIBE Committee), EU Member States, the Council of Europe (including from the Venice Commission and the Directorate General of Human Rights and the Rule of Law), the OSCE (ODIHR), academia and civil society organisations. The event programme included plenary sessions as well as focused discussions

in three working groups. During the day, participants had the opportunity to discuss challenges to the rule of law and fundamental rights, the best use of existing instruments, and the possibility to establish indicators and coordinate the assessment of data and information in order to safeguard and enhance the rule of law throughout the EU.

More information about the 2013 FRA Symposium is available on its website:

<http://fra.europa.eu/en/event/2013/fra-symposium-promoting-rule-law-eu>

Summary of discussions

The FRA Director **Morten Kjaerum**, in his opening speech, drew attention to the importance of defining the scope of the rule of law in the EU: "We would miss the point if we settled for a narrow reading limited to traditional aspects like judicial independence and the quality of law-making. The rule of law should be understood to include broader fundamental rights issues." In addition, the Director stressed the need to regularly assess the rule of law including fundamental rights, and to identify appropriate indicators for this purpose. This assessment needs to be carried out in close cooperation with all relevant institutions, including civil society organisations and national bodies with a human rights remit. He also pointed to the particular challenge of bringing together the relevant data and analysis from all levels. He signalled FRA's availability to substantially contribute to this process of consolidation that could enhance the visibility and accessibility of already existing data and analysis.

In her keynote speech, the Irish Minister of State, **Kathleen Lynch**, representing the Irish Presidency of the Council of the EU, underlined the importance of the quality and observing the rule of law in all EU Member States. She stressed the absence of a common understanding of the rule of law in the EU, an issue which the Irish presidency has made its key priority. She reminded participants that "despite robust EU legislation we still see worrying incidents of discrimination based on ethnic origin, as well as racism and related intolerance." Minister Lynch also provided an overview of the discussions at the Presidency Conference of 9-10 May 2013 highlighting that the EU was not only an "economic project" but a project built on fundamental rights and common European values – values including the rule of law. She concluded that the challenge for the EU is to develop a rule of law tool that provides objective measurements, that gives Member States an opportunity to verify and respond such measurements, and that builds on and creates synergies with – but does not duplicate – the work of other relevant international institutions such as the Council of Europe.

Rui Tavares, Member of the European Parliament's LIBE Committee underlined in his keynote remarks that the economic crisis can lead to a human rights crisis, which might further lead to a crisis in the rule of law. He defined rule of law as a common culture, which if respected, ultimately prevents totalitarian regimes from being established. He further stressed that there is a need for constant monitoring of the rule of law in the EU. This monitoring should avoid arbitrariness and double standards. It should not only use quantitative indicators, as those can be easily manipulated; a context for the indicators is also needed. Moreover, the European

Parliament, Council and Commission should act together while working on the rule of law, with the assistance of independent expert institutions, such as FRA, in order to avoid politicization. In his final words the keynote speaker reminded the audience of the fact that the rule of law and human rights are responsibilities of the EU. As such should be protected and promoted by its institutions and by all EU Member States.

From the European Commission's perspective, **Emmanuel Crabit** (Head of the general justice policies and judicial systems unit, DG Justice) welcomed the Irish Presidency's efforts and its impressive results in relation to the adoption of the Council conclusions on fundamental rights and the rule of law. He explained that the Commission is determined to take the process forward, as requested by the Council. He underlined the importance of a thorough reflection on a number of issues when exploring ways to better safeguard the rule of law in the EU. This particularly relates to the need to well define the problems for which an initiative is necessary at EU level, to take into account the experience of existing tools and to ensure that any initiative would itself observe the rule of law (the "rule of law of the rule of law"). The objective should be to bring real added value and to go beyond the soft power of political persuasion.

A question and answer session explored several aspects highlighted by the keynote speakers, including references to vast institutional experience in assessing candidate countries that could be used as a basis. The data visualisation from FRA's EU LGBT survey was referred to as a good practice that should be considered when gathering a large amount of data, as envisaged for the rule of law indicators.

- **Rule of law, justice and fundamental rights requirements within the EU**
- **Rationale for monitoring the rule of law in the European Union**

Working groups

1. The EU: what role for the rule of law?

Moderator: Jonas Grimheden, FRA Head of Sector 'Access to Justice'

Rapporteur: Constance Grewe, Professor emeritus of Public law, University of Strasbourg and Judge of the Constitutional Court of Bosnia-Herzegovina

The working group discussed the rationale for assessing the rule of law, as well as different options and platforms for arranging for such an evaluation. Existing procedures and more innovative avenues were explored.

Some in the working group underlined that the current legal basis offered by the EU founding treaties might not be enough for setting up an appropriate mechanism or it might limit its scope. Others suggested focusing on more voluntary schemes without the need for a formal legal basis. Participants drew attention to the monitoring mechanism carried out by the United Nations and the Council of Europe. They stressed that the possible EU mechanism could complement existing monitoring systems and make it EU-specific. This would bring it closer and make it more relevant to the EU Member States than what the UN and Council of Europe with almost 200 and 50 states respectively could offer.

Participants thought that it is important to identify key indicators. Based on these, various potential follow-up actions were identified. These included: bringing together all existing data and analysis in a one-stop-shop; identifying the gaps in available information and analysis; starting to closing these gaps; discussing identified data and analysis at the political level; and establishing a regular forum where conclusions can be drawn, based on these discussions.

- **Links between the rule of law, justice and fundamental rights**
- **What indicators could best measure the rule of law?**

Working group participants also drew attention to the importance of developing a clear comparative tool to monitor the situation in Member States. The rule of law's impact on everyday lives of people in the EU was underlined. The discussion included calls to use the internet to make data and information available, thereby providing additional transparency and leverage.

A structured political dialogue was suggested as an appropriate element for a rule of law evaluation. For this purpose, robust data and evidence is needed to underpin the political discussions: "The objectiveness and reliability of the data collected would encourage politicians to take the necessary decisions."

Possible next steps identified by the working group:

- **To determine what is needed specifically for the EU;**
- **To bring together objective, comparable, reliable data and information;**
- **To establish a regular and structured political dialogue.**

2. Indicators: measuring performances and trends

Moderator: Joanna Goodey, FRA Head of Freedoms and Justice Department

Rapporteur: Deaglán Ó Briain, Irish Presidency, Chair of the Working Party of the Council of the EU on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)

When discussing links between the rule of law, justice and fundamental rights, the working group first had to examine the different dimensions of the rule of law. Participants agreed that the rule of law has a formal and a substantial dimension. They highlighted that it should not be considered as a narrower concept since the existence of law in itself is never sufficient and law cannot be abstracted from its implementation. In this context, participants agreed that a comprehensive and broader rule of law definition needs to be applied.

- **How can existing mechanisms be used?**
- **How to develop synergy and refinement between existing mechanisms?**

Participants further underlined that the rule of law is not a value-free concept. People's perceptions (i.e. value judgements), as well as their involvement, are crucial to determine the scope of the rule of law. In this regard, the working group discussed possible ways to capture and understand the dynamics of society, the values present in different cultures, as well as ways to assess the performance of institutions involved in the rule of law. The working group also underlined the importance of citizens' trust and confidence in the processes and discussed, in this context, the standards of elections, law enforcement procedures, and the capacity of judicial systems to provide effective justice.

As to data collection, the working group highlighted the difficulties in getting credible and comparable data. Participants also stressed the great challenge of giving meaning to data that is collected and how to draw conclusions on the basis of 'numbers'. Some participants underlined the need for transparency regarding data collection and analysis, and advocated for an agreed standard in this regard. In addition, an important step would be to ensure high impartiality and credibility for the body that compiles, and analyses the data and other information.

Possible next steps identified by the working group:

- **To measure the capacity of the judicial systems in terms of their functionality and the ability to produce results;**
- **To elaborate a comprehensive definition of the rule of law;**
- **To define indicators which provide verifiable, credible, and comparable data.**

3. Mechanisms: synergies among existing monitoring schemes and further developments

Moderator: Martin Gramatikov, Senior Justice Sector Advisor at Hiil The Hague Institute for the Internationalisation of Law

Rapporteur: Tatiana Termacic, Head of Support to Human Rights National Implementation Unit, Directorate General of Human Rights and Rule of Law, Council of Europe

The working group examined four specific areas when looking for already existing mechanisms: the quality of law, implementation of the law, independence of the judiciary and access to justice. In each area, it focused on three dimensions: structure, process and outcome.

As a cross-cutting aspect, the working group flagged the importance of having a good law-making process which is linked to democratic and participatory processes. In this context, participants highlighted that the law should always be understandable, clear and simple. They attributed particular importance to ask people about their perception of law and discussed the objective of better law making.

When examining the different levels of data available, the working group found that although there are numerous sources and mechanisms on all levels, the amount of data is uneven between Member States, as well as between different aspects of the rule of law. As regards national data, the working group highlighted the importance of independent national data sources and the problem of comparability as certain data are not collected in all Member States. Furthermore, the lack of data availability was also mentioned (for instance, not all judicial decisions are made accessible). When it comes to the European level, the working group highlighted the monitoring structures of the Council of Europe and the EU Justice Scoreboard as good examples. On an international level, the working group noted the inspiring methodology of the UN. This particularly related to the Universal Periodic Review with its peer-review mechanisms based on predefined indicators, and the Millennium Development Goals with very limited and thus high profile areas with clear indicators and benchmarks. The working group agreed that a significant amount of data is already available and what is missing is making the link between them.

In conclusion, it was underscored that a hundred years ago no one could imagine how it would be possible to measure the economic performance of countries but today we have GDP. In line with this logic, we have to believe that indicators for fundamental rights can be developed.

Possible next steps identified by the working group:

- **To map existing data sources on all levels;**
- **To analyse the synergies and links between existing sources by cross referencing their data, and to identify and fill the eventual data gaps;**
- **To identify understandable, commonly agreed upon, measurable and actionable indicators.**

Conclusions

- From the Symposium discussions it emerged that there is a window of opportunity at present to make headway on improving the rule of law in the EU.
- It was also viewed that, despite all the difficulties of capturing the meaning of the rule of law, a comprehensive definition or at least its core constituting elements need to be elaborated and agreed upon in the EU. To wait for a fully-fledged agreed definition before developing an assessment, is not feasible.
- It became also clear that in order to objectively and effectively measure the rule of law in the EU, understandable, commonly agreed upon, measurable, and actionable indicators have to be identified. The means of assessing these indicators should also be agreed upon.
- It was mentioned that any potential rule of law assessment should not only look at available laws and institutions (structures) or policies (procedures) but also, and especially, the situation on the ground (outcome).
- Participants stated that reliable, independent and comparable data is needed. It was also stressed that a rich variety of data sources already exists at national, European and international levels: This data has to be interlinked and analysed in order to provide information from the situation in the Member States. Areas should be identified where data and analysis is still lacking.
- In addition, a robust methodology for collecting and analysing data is needed.
- It was also noted that the rule of law should not only be measured in EU Member States but also in the EU itself – and its institutions.

In his concluding remarks FRA Director **Morten Kjaerum** first recalled the diversity within the EU, highlighting that Member States come with different cultural-legal backgrounds. These backgrounds and national identities should be recognised. He underlined that it is less relevant to measure the absolute status of a countries' situation (snapshot approach). What is crucial is to understand the direction in which a country is moving (trend assessment). To safeguard that actual progress is made, trends have to be measured regularly. To do so, relevant data and appropriate tools for assessment are needed.

Furthermore, the narrow interpretation of the rule of law does not seem to be enough to protect the core values of the EU. It is time to put in place an assessment which would prevent back-sliding. Independently, from the discussion on a potential future "mechanism" in the area of the rule of law, he underlined the possibility to get data from existing sources and to use it in a more focused way. He referred to the past and ongoing work of FRA on indicators and offered FRA's help, within the remit of its mandate, to a focused collection of relevant "real-time" data and information.

Specifically, he suggested that in FRA's next annual report, central areas for the rule of law, including fundamental rights could be looked into with the help of indicators as a first step that can stimulate debate: commitment and compliance with international human rights standards; independence of bodies with a human rights remit, including procedures; status of victims of crime, including their access to justice and the reporting and prosecution of hate crime.

Finally, Director Kjaerum expressed his hope that the discussion on the rule of law will be taken further. He also stressed the importance to engage organisations such as independent institutions with a human rights remit and national civil society organisations, by opening the floor for national discussions. He concluded by saying that "The possible consequences of doing nothing are much more harmful than the pain of finding a path for the future".

