

HRDN

Human Rights &
Democracy
Network

Submission to the European Commission in the framework of the 2nd Annual Rule of Law Review Cycle

**HRDN Working Group on EU Internal Human
Rights Policy**

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I. Introduction and key recommendations

The [Working Group on EU Internal Human Rights Policy](#) of the Human Rights and Democracy Network (HRDN) is comprised of a great variety of civil society organisations (CSOs) working on a wide range of issues related to the rule of law.

The Working Group submits this statement as the European Commission (EC) prepares to release, for the second time, their assessment of the state of the rule of law across the EU under a new mechanism (the EU ‘annual rule of law review cycle’) created in 2019 to improve monitoring of the rule of law in EU Member States, and as the European Parliament (EP) is set to vote on a resolution in response to the EC 2020 report. Our submission is intended as a contribution to the European Commission’s assessment and echoes many of the recommendations made by the Parliament with respect to this mechanism.

The Commission’s new Rule of Law Report (hereinafter ‘the report’) aims to identify the main rule of law challenges as well as good practices, with a view to **strengthening the Union’s capacity to protect and promote the rule of law within the European Union and preventing violations**. This annual review allows the Commission to evaluate the extent to which the rule of law is respected and upheld in the Member States. It also serves as an **authoritative EU source to identify gaps in compliance with EU standards in this area and can provide a solid basis for EU action when deficiencies are identified**. HRDN members recognise the potential value of this mechanism and chose to engage with the Commission in this process by contributing to the stakeholders’ consultation and encouraging our member and affiliate organisations in EU countries to do the same.

This submission is meant to complement individual cross-country and country-specific contributions submitted by HRDN members and partners in EU Member States. It aims to **provide an overview of key regional trends** that our organisations have observed in 2020 and that deserve attention in the 2021 report. Formal submissions have been made on all these issues and we hope to see these reflected in the upcoming report.

The submission further provides recommendations on **how this new mechanism can be strengthened** to use its potential fully and have a positive impact on the state of the rule of law across Europe.

Our 4 key recommendations

1) Genuinely and meaningfully engage with civil society and human rights defenders throughout the cycle

- Establish a policy framework on the protection of civic space to secure an enabling environment allowing civil society and human rights defenders to engage freely, meaningfully and in a sustainable manner with policymakers at both national and EU level
- Establish adequate protection mechanisms to prevent reprisals or censorship, including self-censorship, against civil society and human rights defenders engaging in the process
- Further invest, through dedicated funding, including core funding, in building capacity for CSOs to monitor and report about the rule of law situation in Member States
- Ensure extensive outreach to and participation of CSOs and human rights defenders in country visits in a timely and transparent manner and on an equal footing with state authorities

3) Adopt a more comprehensive approach to the rule of law

- Expand the scope of the scrutiny and analysis to better grasp the interconnection between democracy, the rule of law and fundamental rights
- Ensure a critical and contextualized analysis of country developments to expose any systematic, combined and deliberate

2) Secure a more inclusive, transparent and user-friendly approach

- Set clear deadlines with adequate notice to allow for sufficient time to contribute to the consultation in a meaningful and timely manner
- Revise the consultation's tools and questionnaires to make them more user-friendly and develop guidelines to assist stakeholders, including CSOs and human rights defenders, in contributing to the process
- Increase transparency of methodology, including as regards criteria for source selection and choice of focus areas, and ensure that the latter reflect stakeholders' priorities and needs, including those of civil society
- Set up an evaluation process to allow stakeholders to provide feedback on both process and substance for each cycle

4) Better link monitoring and enforcement of the rule of law in the EU

- Include clear, concrete and measurable recommendations to Member States, with set deadlines, to address problematic issues identified in each country report
- Establish a clear link between the rule of law monitoring and reporting process and enforcement mechanisms

II. Most striking developments regarding the rule of law in the EU during 2020

The research and monitoring work carried out by our organisations during the past year exposes a number of **worrying trends** affecting the rule of law, democracy and human rights across the EU during 2020. This overview does not intend to go into detail regarding the situation in specific Member States. However, the systemic and continued backsliding on the rule of law and human rights in both Hungary and Poland is particularly serious, which warrants a specific reference to them in this submission. While the Commission's report aims to look at the situation in all states with equal attention, we believe these two states require specific attention and scrutiny as the situation and attempts by their government to undermine EU values have reached such gravity that they cannot be examined on an equal footing with other states.

Measures taken by governments across the EU to address the COVID-19 pandemic exacerbated existing challenges. People's human rights and freedoms, including the right to protest, to freedom of movement, and fundamental economic and social rights have been disproportionately impacted in a bid to stop the spread of the virus; law-making has often gone through fast-track procedures, which has limited democratic oversight of the executive and restricted the possibility for civil society to meaningfully participate in the political process; justice systems have been put under strain; governments have unduly silenced criticism over the handling of the pandemic. Laws and measures adopted during the pandemic point to a **further deliberate backsliding** on rule of law and human rights standards in EU countries with longer-standing problems with democracy. Indeed, the health crisis appears to have been used by some states as a pretext to further restrict human rights and crack down on dissenting voices. But such measures are regarded as having a **potentially long-term negative effect also in countries with strong democratic traditions.**

Civic space and human rights defenders under threat

The year 2020 marked a clear deterioration for the situation of civic space and human rights defenders across the whole EU. Government representatives and state media have been targeting CSOs and human rights defenders with **negative rhetoric, virulent smear campaigns, intimidation and threats, including death threats**, in several Member States, often depicting them as threatening the state's interests, society's 'traditional values', or public health in the context of COVID-19. Human rights defenders, especially those advocating for **rights for women, LGBTIQ+ people, refugees and migrants and for equality for ethnic and religious minorities**, are increasingly targeted and exposed to **threats and attacks**, including public and online hatred by both State and non-State actors, administrative and, in some instances, judicial harassment based on extremely serious charges such as espionage, smuggling, participation in criminal organisations, rebellion, or 'causing an epidemiologic threat' (e.g. when exercising their freedom of peaceful assembly in the context

of COVID-19). In some Member States, a worrying trend of violent physical attacks is on the rise. In some cases, family members of human rights defenders have been targeted as reprisals for the human rights defenders' human rights work. We must absolutely recognise the tremendous work achieved by many human rights defenders throughout the EU in spite of these difficulties. Many switched from their previous human rights work to humanitarian work, leading fundraising efforts for hospitals in need of medicine and equipment and providing care for particularly vulnerable segments of their community. We must also underline the killing of human rights defenders from non-EU countries on EU soil, without much progress on investigations to bring perpetrators to justice.

Abusive prosecutions and SLAPPs (strategic lawsuits against public participation) by corporations and politicians to harass human rights defenders (including journalists, lawyers, scholars and whistle-blowers) and silence criticism is also a practice that is reported to be on the rise. With a few exceptions, **restrictions on freedom of association** have not only persisted, but have worsened in 2020. Security-related concerns are relied on in an increasing number of Member States to tighten rules on CSOs' establishment and functioning, with some controversial decisions on the **dissolution of CSOs**. Other challenges include increasingly unfavourable regulatory frameworks in certain Member States, attempts to influence and control CSOs' work and the criminalisation of certain CSOs' activities, especially in sensitive areas such as asylum and migration. **Restrictions on access to and use of funding** also intensified in many Member States, in the context of a dire economic crisis and a shift in funders' priorities in response to the pandemic, which are hitting hard the civil society sector, particularly CSOs active on democracy, the rule of law and human rights. Discriminatory selection of projects for EU funds, excluding for example projects in relation to LGBTIQ+ or women's rights, was also noted in several Member States. **Restrictive measures unduly hindering the enjoyment of the right to peaceful assembly**, including blanket bans on assemblies, excessive security costs placed on organisers, surveillance, arbitrary arrests, detentions and unjustified charges pressed against protesters, lack of protection against 'gatecrashing' by violent groups, and the disproportionate use of force in policing protests were raised in many Member States, within and beyond the pandemic context.

Academic freedom has also been under strain. Some Member States are increasing government control over higher education institutions and threatening to erode the academic freedom and critical debate necessary to hold governments to account.

Mounting pressure on free speech and media freedom

While some governments are genuinely trying to counter hate speech and disinformation, in a number of Member States' provisions restricting or criminalising speech, including those adopted within the framework of the fight against terrorism, hate speech and online illegal content, have a severe **chilling effect on the exercise of freedom of expression, freedom of association, and academic freedom.** During the COVID-19 crisis,

governments took **insufficient measures to protect journalists and whistle-blowers**, including health workers. On the contrary, **political pressure on public and independent media** greatly increased in some Member States over the past year. Cooptation of formerly independent media outlets by government-controlled groups and corporations, especially in Hungary and Poland, raises concerns about protection of media freedom. These government-controlled media outlets have been used to conduct smear campaigns against - for instance - women's rights defenders and marginalised groups, such as LGBTIQ+ people, and disseminate State propaganda. In Hungary, state media regulators are even censoring programmes and books which include diverse characters, such as LGBTIQ+ characters. In Poland, in the context of the reform of education, the authorities have removed from schoolbooks content promoting diversity and non-discrimination, and replaced them with materials promoting heteronormative views of society and reinforcing traditional gender roles in Polish society, while teachers and CSOs carrying out human rights education and anti-discrimination activities have been targeted and, in some cases, disciplined by school authorities. **Harassment, intimidation and attacks on journalists, scholars, bloggers and citizen journalists**, especially those reporting on sensitive topics such as the management of the pandemic, have become more commonplace across the EU. Increasing legal threats (such as SLAPPs) and new repressive legislation are putting freedom of speech under pressure, not only for the media but also other watchdogs such as NGOs, scholars and human rights defenders.

Sharp cuts to public funding schemes are putting non-profit media in a particularly difficult position. In some Member States, **artistic and academic freedom** are also under increasing pressure. The right to free speech of the judiciary is under severe pressure in Poland: disciplinary procedures, harassment, sudden relocations, demotions, and the lifting of immunity are used to silence judges and prosecutors who speak out against the judicial 'reforms' of recent years and who attempt to implement EU law in the Polish legal system, including by referring cases for preliminary ruling to the Court of Justice of the European Union (CJEU).

Increasing challenges to fair and effective justice

Despite some progress expected in a few countries where **reforms** are underway, or under discussion, and a positive push for the **digitalisation** of the justice systems, barriers continue to hamper people getting fair and effective access to justice across the EU, exacerbated in a number of Member States by the impact of the measures taken to address the consequences of the pandemic on justice systems. Heavy case backlogs still seriously affect the **length of proceedings** in many countries, hindering courts from delivering justice within a reasonable time. This is often due to the fact that governments do not provide the judiciary with enough **resources**. Practices in **violation of fair trial rights in criminal proceedings**, in particular for persons in pre-trial detention, continue to be reported in many Member States, and have become more commonplace in the context of remote justice. Access to courts is often impacted by **high court fees** and the **inadequacy of the legal aid systems**. The **independence of the judicial system** has further weakened in countries

where serious deficiencies already existed, with governments systematically overriding and publicly challenging recommendations and decisions issued by domestic courts as well as regional rule of law and human rights protection mechanisms. This, coupled with growing attacks directed at members of the judiciary, including for voicing legitimate criticism of judicial reforms and applying EU law, have seriously affected judicial independence as well as people's access to an independent justice. Other countries also saw concerns emerging about the **integrity of the judiciary** and the transparency of judicial appointments, dismissals and transfers, especially when these have been taken away from independent organs of self-government and vested in the executive.

The lack of legal assistance, information, and safeguards for refugees and migrants across the EU, at the EU's borders and in detention is of serious concern. Without adequate legal and procedural oversight, rights violations continue to flourish in a climate of impunity.

Weaker checks and balances

While **corruption scandals** continued to emerge in a number of Member States, including in connection with the management of the pandemic, checks to balance executive powers were weakened in several countries. Commonly reported issues include **poor quality law-making**, the **widespread use of fast-track and emergency legislative procedures**, which allow governments to bypass ordinary channels of democratic decision-making, in some cases beyond the limits set by their countries' constitutions, and **lack of consultations and transparency** and **serious limitations to access to information** for citizens, CSOs, scholars and journalists, which in turn limits accountability for public action.

In certain cases, governments took advantage of the emergency law-making mode **to pass controversial laws with little or nothing to do with the fight against the pandemic**, in areas such as family life, gender and sexual orientation, sexual and reproductive rights, counter-terrorism or the environment. In some Member States, **serious deficiencies affect the constitutional review of laws**. In Poland, in particular, the **unlawful appointment of constitutional judges** affects their independence and exposes them to political interference. **Polish authorities have been using the politically compromised Constitutional Tribunal to bypass proper parliamentary procedures and rubber-stamp reforms that violate human rights, particularly women's rights, and could further weaken independent democratic institutions and undermine the rule of law**. The targeting of judges and prosecutors as mentioned above, and the chilling effect this has on other members of the judiciary, also weaken human rights protection. The **accumulation of judicial and prosecutorial functions and their dependency on political power** in some Member States raise further concerns regarding the independence of the justice system. In some EU countries, there is also increasing concern over **public human rights watchdog bodies not being sufficiently independent, effective and/or resourced, or exposed to increasing pressure, threats and forced**

dismissal/non-renewal, again particularly, though not exclusively, in Hungary and Poland.

Systematic violations of international human rights standards

Systematic human rights violations and the lack of accountability are a clear sign of deterioration of the rule of law. The EU saw some worrying developments in this respect during 2020.

In many countries, people of colour and ethnic minority origin had disproportionately high rates of infection and death, as a consequence of longstanding systemic racism and discrimination faced by these populations, including poverty and barriers to adequate health care determining a higher incidence of underlying risk conditions. Several governments in the EU are **failing to adequately respond to the needs of these marginalised groups**. Some authorities even engaged in **overtly discriminatory practices**, through discriminatory checks, forced quarantines, arbitrary fines and disproportionate surveillance – as reported for example in a number of Roma settlements across the EU.

The pandemic is also being instrumentalised by certain governments to counter progressive and inclusive visions of society and exacerbate divisions based on nationalist, heteronormative and patriarchal rhetoric and conventions. In some EU countries, religious and political figures have engaged in campaigns of **hatred against the LGBTIQ+ community**. Hungary took regressive steps on the protection of LGBTIQ+ people's rights in areas such as family life, legal gender recognition, and health, and recently adopted legislation banning discussions on sexual orientation and gender identity and further discriminating against the LGBTIQ+ community. LGBTIQ+ rights and women's rights groups also reported increased domestic violence against LGBTIQ+ people and women, due to forced quarantine with abusive and discriminatory families/households and funding cuts to organisations providing support to victims. COVID-related spikes in public attacks and abuse against LGBTIQ+ people were also reported. **Women's rights** have also undergone a major retrogression in some Member States. In Poland, in particular, the unlawfully constituted Constitutional Tribunal imposed a near-total ban on access to abortion care, drastically reducing women's access to sexual and reproductive health and rights and exposing them to serious risks to their health and life. Plans to withdraw from the Istanbul Convention, a regional instrument intended to prevent and protect against domestic and gender-based violence, could put women's lives at risk and fall short of European standards in this area. Public narratives that relegate women to traditional gender roles in society are prevalent, while women's rights defenders and groups are increasingly stigmatised and targeted.

The pandemic worsened the already precarious situation of **refugees, asylum-seekers and migrants**. Several EU countries **delayed or suspended asylum requests**, and many refugees and migrants were forced to live in **overcrowded and unhealthy conditions**, exposing them to serious risks to their health and life. In some countries, **violent push-backs done with quasi-**

total impunity have become the norm, as Member States keep systematically outsourcing responsibility for migration management to non-EU countries with poor human rights records, with little or no consideration for the impact this could have on the rights and life of people on the move.

III. Lessons learnt from the 1st European Commission's Annual Rule of Law Review Cycle: positive aspects and suggestions for improvement

Support the engagement of civil society and human rights defenders throughout the process

We welcome the Commission's efforts to create an inclusive process, reaching out to a wide range of stakeholders, including civil society and human rights defenders, but more needs to be done. CSOs and other non-governmental actors play **a critical role in providing evidence-based information and ensuring independent oversight and accountability for public action**. CSOs and human rights defenders' response to the Commission's call for contributions has been overwhelmingly positive taking into account the limited resources they dispose of in a context of increasingly narrowing civic space. This work demands an investment in terms of resources, both human and financial, that many civil society actors across the EU are simply unable to make at the moment. The next EU budget cycle foresees dedicated funding for CSOs working on the rule of law at national level, but its scope and size are limited, which risks excluding many valuable civil society actors from EU support. The EU should **invest in building capacity for civil society to monitor the rule of law in Member States** and collect information and data. **Country-visits** foreseen in the context of the consultation should ensure **extensive outreach and meaningful engagement with civil society actors, including human rights defenders**, to ensure that stakeholders' views are duly heard and taken into account in the review, on an equal footing with views provided by other stakeholders, especially by State authorities. The Commission should further engage with civil society around **follow-up actions** to promote the report and hold Member States to account for the deficiencies identified therein. **Adequate mechanisms should also be put in place to ensure the protection of sources**, to prevent reprisals and/or censorship, including self-censorship, against civil society actors, including human rights defenders, willing to engage in this exercise.

The ability of civil society to engage free from pressure and in a meaningful and sustainable manner on monitoring, reporting and following-up on rule of law challenges can only rest on **broader efforts to secure an enabling environment for CSOs and rights defenders**. A specific mandate to pay special attention to freedom of association in the EU was for the first time included in First Vice-President Jourova's mission letter in December 2019. While this is a welcome step, it has so far remained a mere formality which has not been followed by any concrete policy action. It is high time for the EU to propose a comprehensive **policy framework on civic space and defense of EU**

values, which, as already proposed by this Group, should include, as a minimum:

- the commitment to developing EU standards to address challenges faced by CSOs across the EU;
- a regular monitoring of restrictive national laws and practices, to be comprehensively reflected in the annual rule of law reports and followed-up by prompt and effective enforcement action as appropriate;
- the design of a 'Rapid Response System' to detect and act on the first signs of attacks against CSOs and human rights defenders, including a helpline, legal assistance and temporary relocation.

The EU policy framework should take stock of the EU's experience in protecting civic space and human rights defenders within EU external action and build on a thorough evaluation of the worrying developments across the EU that civil society has highlighted in their contributions to the 2020 and 2021 rule of law review cycles. It should also take into account the up-to-date data collected by the EU Agency for Fundamental Rights (FRA) in its upcoming report on challenges faced by CSOs working on human rights in the EU. The framework should be drafted in close consultation with civil society and anticipated by a comprehensive thematic report by the European Commission to be adopted under its revised Strategy on the implementation of the EU Charter of Fundamental Rights.

A more inclusive, transparent and user-friendly approach: procedural aspects

Experience of the first two reports has shown that the **procedures must be improved** to facilitate participation of civil society actors and other stakeholders. The Commission should provide stakeholders **sufficient time to contribute to the consultation**, including by setting clear deadlines and giving them advanced notice to contribute. **The tools and questionnaires should be made more user-friendly** and complemented by **clear guidelines** to help stakeholders navigate the process. **The methodology should be more transparent**, including on how the contributions and data are analysed and how their accuracy and quality are assessed, comparing them across states and time. This includes **sharing the criteria applied for source selection** and for the inclusion of/balance between stakeholders' contributions, **as well as for the choice of the focus areas for the assessment. Regular feedback should be sought from stakeholders both on the process and on substance**, to ensure that their experience and views are taken into account and inform the process going forward, and that the Commission's assessment accurately reflects the reality and challenges faced by civil society and human rights defenders in EU Member States.

Strengthening EU founding values: a more comprehensive approach to the rule of law

As it stands, the review's scope is limited to an assessment of the state of the rule of law across four main subject areas: the functioning of the justice

systems; the anti-corruption framework; media pluralism; and institutional checks and balances. While these four areas are crucial, a more comprehensive approach is needed. As presented above, our organisations and their members and affiliates in EU countries point to **a wider set of concerns that affect or reflect respect for the rule of law in EU countries**. Our organisations also point to the connections between attacks on the rule of law, such as the independence of the judiciary, and violations of human rights, including but not limited to regression in women's, LGBTIQ+ people and migrants, refugees and minorities, including religious minorities, rights, a shrinking civil society space, and to the impact that restrictions to media freedom have had, for instance on elections. In order for the review cycle to grasp the interconnection between democracy, the rule of law and fundamental rights, and assist the EU institutions in their action to enforce respect for EU founding values in the Member States, it is crucial that the Commission **expands and deepens its scrutiny and analysis**.

Alongside expanding its scope, it is equally important that the assessment of country developments results in a **critical analysis of the overall framework for the protection of democracy, fundamental rights and rule of law in each state**, also taking into account the evolution of trends over time. While it is important to ensure equal treatment of all Member States when carrying out the monitoring, it is equally crucial that the assessment of the data and information gathered for each focus area is **carefully contextualised**. When developments clearly point to **systematic, combined and deliberate attacks aimed at weakening the rule of law, democracy and fundamental rights infrastructure**, thus questioning a state's genuine attachment to the EU founding values, this should be clearly reflected in the country reports. This would allow the report to **better inform follow-up action by EU institutions, including in terms of enforcement and future policy-making**. It would also ensure that it more adequately responds to the European Parliament's call to conclude an **EU inter-institutional agreement on democracy, fundamental rights and the rule of law** that paves the way to the development of a robust and positive agenda in this field.

From words to action: linking monitoring and enforcement of the rule of law in the EU

Inter-institutional cooperation, cooperation with other national, regional and international mechanisms, and with civil society actors, is instrumental to the success of this strategy. The Commission needs to build on the extensive work of the Council of Europe (CoE), the Organization for Security and Co-operation in Europe (OSCE), the United Nations (UN), to amplify their voice and play a constructive role in promoting adherence to and strengthening of rule of law standards globally. This includes looking at the implementation of judgments delivered by the Court of Justice of the European Union and the European Court of Human Rights, whose authority is currently challenged in some Member States and adherence to which is a key to respect for the rule of law. It should also seek to leverage the expertise of other EU institutions and agencies, such as FRA. **Tying the process strongly to other existing (and future)**

mechanisms is paramount to achieve results and ensure accountability for rule of law violations. This applies in particular to enforcement mechanisms, such as infringement proceedings, the rule of law framework, the procedure laid down under Article 7 TEU and the new Regulation on EU funding conditionality. Failing to establish such a link equals a failure by the EU to use its unique enforcement power to its full potential.

The report should further include **clear, concrete and measurable recommendations**, complementary to those issued by other international and regional mechanisms, that Member States should be requested to implement by a set deadline. Such recommendations would guide Member States in ensuring compliance with EU standards and strengthens accountability for their violations.

If not strengthened, the report faces the fate of other periodic reviews, whose value in terms of documentation and raising awareness about the situation in the countries under review is beyond dispute, but whose capacity to effect real change remains minimal. For this rule of law mechanism to reach its full potential for the effective promotion, protection and implementation of the rule of law across the EU, it must be **firmly grounded on a solid international and regional rule of law and human rights protection framework**. It must further be aligned with the overarching policy and legal framework it belongs to and geared towards the actual enforcement of rule of law and human rights standards. The serious challenges the EU is facing in recent years demand and deserve a mechanism that can truly and efficiently effect change.

IV. Resources

Disclaimer

This paper is based on work done by all of our organisations. As it is a group product, none of the information can necessarily be assigned to any particular organisation. Evidence for the statements made in this paper is available and can be requested. Below we have included a compilation of main references for further reading.

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