

# How the European Parliament can protect the EU's fundamental values: An interparliamentary rights dialogue

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## Key recommendations:

- Using the powers available to it under Protocol 1 of the Treaty on the Functioning of the European Union and its own Rules of Procedure, the European Parliament (EP) should institute an interparliamentary rights dialogue as a mechanism to safeguard the EU's fundamental values.
- Under the dialogue, the EP's Committee on Civil Liberties, Justice and Home Affairs (LIBE) should meet with its counterpart committees from the 28 national parliaments individually over a two-year cycle. Discussion should be based on a synthesis of findings and recommendations made by existing monitoring mechanisms as well as pertinent supplementary information from civil society.
- During the dialogue, the LIBE Committee should address recommendations to its national counterpart committees. LIBE's counterpart committee in each Member State should undertake to place a proportion of recommendations on the agenda of its national parliament for discussion and report back to the LIBE Committee on progress made during the following cycle.
- When the LIBE Committee identifies challenges commonly shared by the Member States, it should address these through: a) own initiative reports; b) directing EU funding and technical assistance to addressing these issues; c) prioritising the development of fundamental rights indicators on these themes.

The European Parliament's (EP) use of the legislative initiative procedure to call for the establishment of an EU mechanism to protect the EU's fundamental values of democracy, the rule of law and fundamental rights is a welcome step.<sup>1</sup> The EU should establish a mechanism under which Member States are regularly reviewed to verify their observance of the EU's fundamental values. Such a system should be backed by sanctions to induce compliance as well as financial and technical

<sup>1</sup> Procedure reference: 2015/2254(INL), Committee dossier LIBE/8/04625.

assistance to support national authorities to make necessary reforms. Such a mechanism should also form part of a broader joined-up procedure involving the EP, Commission and Council, as well as the European Union Agency for Fundamental Rights (FRA) with an expanded mandate.<sup>2</sup>

In the current political climate, however, it is unlikely that the Commission will propose such legislation, or that such a proposal would meet with approval from the Council. This paper will therefore suggest how the EP could, within the scope of its existing powers, institute a procedure for the promotion and protection of the EU's fundamental values.

Following a review of the state of play, the paper will outline existing monitoring mechanisms, identify their weaknesses and explain how the EU could add value. The paper will then suggest how the EP could develop its own process to safeguard the EU's fundamental values through an interparliamentary rights dialogue between the LIBE Committee and its counterpart committees in national parliaments.

## I: State of play at EU level

The Union has no mechanism in place to monitor regularly all Member States for compliance with the EU's fundamental values and correct problematic behaviour through sanctions. Both the EP and the Council have recently called on the Commission to propose a mechanism to better safeguard the EU's fundamental values.<sup>3</sup> Progress by all three institutions has been modest.

In 2014, the Commission established a 'rule of law framework', allowing it to engage a Member State in dialogue if the Commission finds a systemic threat to the rule of law.<sup>4</sup> This dialogue may culminate in recommendations from the Commission to the Member State in question. While these recommendations are not legally enforceable, non-compliance by the country in question may lead the Commission to make a reasoned proposal to the Council under Article 7 of the Treaty

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2 On the Council see: Butler, I., 'The rule of law dialogue: five ideas for future EU presidencies', European Liberties Platform, December 2015, available on: <http://www.liberties.eu/en/news/five-ideas-for-eu-rule-of-law>.

3 Council Conclusions on fundamental rights and the rule of law, Doc. No. 10168/13, 29 May 2013; European Parliament resolution on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, P7\_TA- (2010)0483, 15 December 2010; European Parliament resolution on the situation of fundamental rights in the European Union (2010-2011), P7\_TA-(2012)0500, 12 December 2012; European Parliament resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), P7\_TA- (2013)0315, 3 July 2013; European Parliament resolution on the situation of fundamental rights in the European Union (2012), P7\_TA-PROV(2014)0173, 27 February 2014; European Parliament resolution on the situation of fundamental rights in the European Union (2013-2014), P8\_TA-PROV(2015)0286, 8 September 2015.

4 Commission Communication, A new EU framework to strengthen the Rule of Law, COM (2014) 158final/2, 19 March 2014.

on European Union. The framework was intended to allow the EU to protect the rule of law in situations where national problems had not yet reached the seriousness required to activate Article 7. Despite problems with the rule of law in Hungary and Spain, the framework has only been activated in relation to Poland, giving rise to complaints of double-standards. At the time of writing it is too early to tell how effective the framework will be in practice.<sup>5</sup>

At the close of 2014, the Member States agreed on the creation of an annual 'dialogue' on the rule of law to take place in the General Affairs Council.<sup>6</sup> The first dialogue took place under the EU presidency of Luxembourg in November 2015.<sup>7</sup> A second dialogue will take place under the Netherlands presidency of the EU in 2016, and the dialogue will be reviewed under the presidency of the Slovak Republic in the second half of 2016. The format of the dialogue is not yet fixed and each presidency has some discretion as to how the discussion is organised.<sup>8</sup> Nevertheless, indications from the first dialogue suggest that of itself this process is unlikely to guarantee the protection of the EU's fundamental values.

The first dialogue was largely open-ended. Governments were free to present an example of a challenge and a positive practice from their country on any aspect of the rule of law they chose. These presentations did not lead to any exchange of views, the issuing of recommendations or the announcement of undertakings by governments to address challenges identified. No effort was made to establish where Member States were failing to meet their international human rights obligations, nor are Member States expected to follow up in any particular way.<sup>9</sup>

Efforts have been made in the EP in recent years to alter the format of its annual report on fundamental rights so as to explicitly link rights violations with specific Member States. However, these initiatives have met with political resistance. As such, the EP's reports highlight rights violations thematically, without mention of particular countries. Although the EP has on occasion examined

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5 European Commission Fact Sheet, 'College orientation debate on recent developments in Poland and the rule of law framework: questions and answers', 13 January 2016, available on: [http://europa.eu/rapid/press-release\\_MEMO-16-62\\_fr.htm](http://europa.eu/rapid/press-release_MEMO-16-62_fr.htm); Butler, I., 'Commission refuses to uphold rule of law', EUObserver, 23 November 2015, available on: <https://euobserver.com/opinion/131100>.

6 Council Conclusions on ensuring respect for the rule of law, Doc. No. 17014/14, 16 December 2014.

7 See: Butler, I., 'Wary EU governments hold first rights talk', December 2015, available on: <http://esharp.eu/opinion/wary-eu-governments-hold-first-rights-talk>

8 For discussion as to the future format see Butler, I., 'The rule of law dialogue: five ideas for future EU presidencies', European Liberties Platform, December 2015, available on: <http://www.liberties.eu/en/news/five-ideas-for-eu-rule-of-law>

9 See also: 'Highlights and main results of the General Affairs Council', 17-18/11/2015, available on: <http://www.consilium.europa.eu/en/meetings/gac/2015/11/17/>

the rights situation in specific countries, most notably Hungary, it has not developed a practice of doing so systematically and periodically for all Member States.<sup>10</sup>

## II: Existing regional and global mechanisms

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All EU Member States are monitored for compliance with their international human rights obligations under a number of mechanisms, principally before the UN and the Council of Europe. The EU carries out some monitoring of Member States through the work of the FRA. However, the agency's mandate confines it to matters within EU competence, and its practice of thematic comparative reporting means that the FRA does not tend to publish recommendations addressed to individual Member States.<sup>11</sup> Neither is the agency empowered to deal with individual complaints.<sup>12</sup> Nevertheless, the data collected and recommendations made by the FRA should form part of the interparliamentary dialogue, outlined below.

Broadly speaking, there are three layers of monitoring at UN level. First, all EU Member States are party to a number of UN human rights treaties under which they are required to produce reports periodically on the state of implementation. The bodies responsible for monitoring implementation of these treaties are also often empowered to receive complaints from individuals concerning violations of their rights.<sup>13</sup> Second, all EU Member States are subject to monitoring by UN 'special procedures'. These are independent experts, or groups of experts, responsible for monitoring the implementation of particular rights or sets of rights. While 'special procedures' do not systematically monitor implementation across all countries, they may carry out country visits to investigate the state of implementation of the themes for which they are responsible. They also usually receive individual complaints, which they transmit to national governments, and to which states are expected to react.<sup>14</sup> Third, all EU Member States take part in a process of Universal Periodic Review

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10 For examples of where the EP has named specific Member States see: European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information, P5\_TA(2004)0373, 22 April 2004; European Parliament resolution on the situation of fundamental rights: standards and practices in Hungary, P7\_TA- (2013)0315, 3 July 2013; European Parliament resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA, P7\_TA(2013)0418, 10 October 2013.

11 Regulation 168/2007 establishing a European Union Agency for Fundamental Rights (the 'founding regulation'), OJ L 53, 22.2.2007, 1. It is highly desirable that the FRA's mandate be expanded to allow it to play a greater role in monitoring and the development of fundamental rights indicators, discussed below.

12 Preamble para. 15, FRA founding regulation.

13 The International Covenant on Civil and Political Rights (999 UNTS 171), the International Covenant on Economic Social and Cultural Rights (993 UNTS 3), the Convention on the Elimination of All Forms of Racial Discrimination (660 UNTS 195), the Convention on the Elimination of Discrimination Against Women (1249 UNTS 13), the Convention Against Torture (1465 UNTS 85) and the Convention on the Rights of the Child (1577 UNTS 3).

14 For an overview of 'special procedures' see OHCHR website: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

(UPR) carried out at the UN's Human Rights Council over a four and a half year cycle. Under the UPR all members of the UN are reviewed by their peers for compliance with international human rights standards.<sup>15</sup>

At the Council of Europe, all EU Member States are subject to a number of monitoring systems.<sup>16</sup> The European Court of Human Rights deals with complaints from individuals in relation to (mainly) civil and political rights,<sup>17</sup> while the European Committee of Social Rights deals with collective complaints from NGOs principally concerning violations of economic and social rights.<sup>18</sup> Other bodies monitor the broader situation of rights implementation in Member States, usually on a particular theme, such as the Committee for the Prevention of Torture,<sup>19</sup> the Commissioner for Human Rights,<sup>20</sup> the European Commission against Racism and Intolerance<sup>21</sup> and the European Commission for Democracy through Law (Venice Commission),<sup>22</sup> the Group of States against Corruption (GRECO),<sup>23</sup> and the European Commission for the Efficiency of Justice (CEPEJ).<sup>24</sup>

Almost all of these monitoring processes result in recommendations being made to states on how to bring their laws and practices into line with human rights standards. For the most part, even where members of a given monitoring mechanism are appointed by governments, the members of the monitoring body are selected on the basis of their expertise and expected to act independently.

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- 15 UN General Assembly Resolution 60/251, Human Rights Council, UN Doc. A/RES/60/251, 3 April 2006; Human Rights Council Resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007. For further information and documentation see: <http://www.upr-info.org/en>
- 16 For a brief overview of Council of Europe mechanisms see: Bingham Centre for the Rule of Law, 'Safeguarding the rule of law, democracy and fundamental rights: A monitoring model for the European Union', 15 November 2013, chapter 1, available on: <http://binghamcentre.biiicl.org/binghamcentre/news/safeguarding>; and FRA, 'Fundamental rights: challenges and achievements in 2011', 2012, focus chapter, available on: [http://fra.europa.eu/sites/default/files/fra\\_uploads/2211-FRA-2012\\_Annual-Report-2011\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf)
- 17 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS 5, consolidated version available on: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)
- 18 European Social Charter (revised), 1996, CETS No. 163; Additional Protocol to the European Social Charter providing for a system of collective complaints, 1995, CETS 158.
- 19 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987, CETS 126.
- 20 Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, 7 May 1999.
- 21 Committee of Ministers Resolution Res(2002)8 on the Statute of the European Commission against Racism and Intolerance, 13 June 2002.
- 22 Committee of Ministers Resolution Res(2002)3 adopting the Revised Statute of the European Commission for Democracy through Law, 27 February 2002.
- 23 Committee of Ministers Resolution (99) 5 establishing the Group of States against Corruption, 1 May 1999.
- 24 Committee of Ministers Resolution Res(2001)12 establishing the European Commission for the Efficiency of Justice, 18 September 2002.

The principal exception to this is the UPR, where states monitor each other in a peer review exercise, and governments are free to voluntarily accept (or not) recommendations made by their peers.<sup>25</sup>

### III: Weaknesses of existing monitoring mechanisms

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The principal weakness of existing monitoring mechanisms is their inability to ensure that states implement their recommendations. There is no comprehensive data regarding the level of compliance with monitoring bodies' recommendations, but available research suggests that this is problematic.

It is thought that the body that achieves the best rate of compliance with its decisions is the European Court of Human Rights, the implementation of whose judgments is followed up and monitored by the Committee of Ministers of the Council of Europe.<sup>26</sup> However, no precise figure is available. Research concerning compliance with recommendations issued by the UN Human Rights Committee (the body responsible for monitoring implementation of the International Covenant on Civil and Political Rights), suggests that only around 12 per cent of its decisions on individual complaints are complied with.<sup>27</sup> There are no statistics showing what proportion of recommendations made by UN treaty monitoring bodies during the periodic reporting process is implemented by states. However, it is common for recommendations to be repeated in successive reporting cycles, suggesting that states frequently fail to comply.<sup>28</sup> Research relating to the UPR distinguishes between developed and developing countries, and finds that implementation of recommendations voluntarily accepted by governments of developed states sits at around 50 per cent.<sup>29</sup> In relation to the FRA, while its reports are transmitted to the EU institutions, the institutions do not systemat-

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25 For a useful overview see: Bingham Centre for the Rule of Law, 'Safeguarding the rule of law, democracy and fundamental rights: A monitoring model for the European Union', 15 November 2013, 7.

26 Baluarte, D., and De Vos, C., 'From judgment to justice: Implementing international and regional human rights decisions', 2010, 119, available on: <https://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf>

27 Baluarte, D., and De Vos, C., 'From judgment to justice: Implementing international and regional human rights decisions', 2010, 119, available on: <https://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf>

28 See: OHCHR, 'Concept paper on the High Commissioner's proposal for a unified standing treaty body', UN Doc. HRI/MC/2006/2, 22 March 2006, 10.

29 This is based on analysis of implementation of recommendations voluntarily accepted by nine governments as part of the UPR process. Two of the countries analysed are EU Member States (UK and the Netherlands). Frazier, D., 'Evaluating the implementation of UPR recommendations: A quantitative analysis of the implementation efforts of nine UN member states', 2011, 16, available on: [http://www.upr-info.org/sites/default/files/general-document/pdf/-david\\_frazier\\_paper\\_upr\\_implementation\\_2011-2.pdf](http://www.upr-info.org/sites/default/files/general-document/pdf/-david_frazier_paper_upr_implementation_2011-2.pdf)



ically discuss the agency's recommendations with the Member States or monitor whether national authorities implement these.

A second weakness of existing oversight processes is that monitoring bodies do not have a complete picture of human rights implementation on which to base their assessment of governments. So even though Member States frequently report on what measures they are taking to meet their rights obligations, monitoring bodies often lack accurate data as to the extent to which human rights standards are met in practice.<sup>30</sup> For example, while a government can show that it has created legislation to punish hate crime, it might not collect information on the number of hate crimes that are reported to law enforcement agencies or prosecuted in the courts.<sup>31</sup> This makes it difficult to tell whether the legislation is being implemented in practice. The lack of data on the extent to which rights obligations are being met in practice is particularly acute in relation to groups protected by equality legislation, such as racial and ethnic minorities, persons with disabilities or LGBTI persons.<sup>32</sup> It is, in part, this lack of accurate data on the state of rights implementation in the EU that inspired the mandate of the FRA, which has dedicated significant resources to collecting primary data on rights implementation through EU-wide data collection.<sup>33</sup>

## IV: Added value of an EU monitoring system

EU Member States are subject to a significant amount of monitoring. There is evidence to suggest that creating an entirely new EU reporting process may be counter-productive. For example, most

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- 30 UN treaty monitoring bodies frequently complain about a lack of data on the de facto state of implementation, as opposed to the de jure situation, across the entire range of human rights. See: OHCHR, 'Concept paper on the High Commissioner's proposal for a unified standing treaty body', UN Doc. HRI/MC/2006/2, 22 March 2006, 10.
- 31 FRA, 'Making hate crime visible in the European Union: acknowledging victims' rights', 2012, available on: [http://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf)
- 32 FRA, 'The right to political participation for persons with disabilities: human rights indicators', 2014, available on: [http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities_en.pdf); FRA, 'Synthesis report - The Racial Equality Directive: application and challenges', 2012, [http://fra.europa.eu/sites/default/files/fra\\_uploads/1916-FRA-RED-synthesis-report\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf); FRA, 'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, 2010 update', 2010, available on: [http://fra.europa.eu/sites/default/files/fra\\_uploads/1759-FRA-2011-Homophobia-Update-Report\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1759-FRA-2011-Homophobia-Update-Report_EN.pdf); FRA, 'Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation', 2009, available on: [http://fra.europa.eu/sites/default/files/fra\\_uploads/397-FRA\\_hdgso\\_report\\_part2\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf). Open Society Foundations, 'Ethnic origin and disability data collection in Europe: Measuring inequality - combating discrimination', November 2014, available on: <https://www.opensocietyfoundations.org/sites/default/files/ethnic-origin-and-disability-data-collection-europe-20141126.pdf>
- 33 For example: FRA, 'Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism', 2013, available on: [http://fra.europa.eu/sites/default/files/fra-2013-discrimination-hate-crime-against-jews-eu-member-states-0\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2013-discrimination-hate-crime-against-jews-eu-member-states-0_en.pdf); FRA, 'EU-MIDIS, European Union minorities and discrimination survey, Main results report', 2009, available on: [http://fra.europa.eu/sites/default/files/fra\\_uploads/663-FRA-2011\\_EU\\_MIDIS\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/663-FRA-2011_EU_MIDIS_EN.pdf); FRA, 'EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey, Main results', 2014, available on: [http://fra.europa.eu/sites/default/files/fra-cu-lgbt-survey-main-results\\_tk3113640enc\\_1.pdf](http://fra.europa.eu/sites/default/files/fra-cu-lgbt-survey-main-results_tk3113640enc_1.pdf). FRA, 'The situation of Roma in 11 EU Member States, Survey results at a glance', 2012, available on: [http://fra.europa.eu/sites/default/files/fra\\_uploads/2099-FRA-2012-Roma-at-a-glance\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2099-FRA-2012-Roma-at-a-glance_EN.pdf)

countries, including EU Member States, are late (sometimes by a number of years) in sending their periodic reports to UN human rights treaty monitoring bodies. This can be due to several factors, including the burden placed on national administrations, which report to UN bodies on a number of human rights treaties. Because of this, the Office of the High Commissioner for Human Rights (OHCHR) of the UN is making efforts to rationalise and consolidate reporting.<sup>34</sup> A new EU reporting process might tempt Member States to shift their resources away from UN and Council of Europe monitoring mechanisms, which could weaken the legitimacy of these bodies in the eyes of non-EU countries and prove detrimental to rights protection outside the Union. However, the EU could complement and add value to existing mechanisms without duplicating their functions, in two ways.

#### A. Improving implementation of monitoring bodies' recommendations

First, by becoming a forum to facilitate implementation of existing monitoring bodies' recommendations. Because the EU wields greater political influence over its Member States than Council of Europe or UN mechanisms, governments are more likely to take measures to improve fundamental rights implementation when these are called for by the Union.<sup>35</sup> While governments are willing to participate in monitoring processes under the UN and Council of Europe, they tend to be unenthusiastic about the EU exercising this role.<sup>36</sup> This is probably due to two reasons. First, criticism by the EU tends to attract far more media attention than criticism by the UN or Council of Europe, which in turn generates public and political pressure. Second, although there are no sanctions under EU law for Member States breaching fundamental rights standards (unless they happen to be in violation of a piece of EU legislation in the area of fundamental rights), there can be indirect consequences. For example, poor records on corruption in Romania and Bulgaria have led some governments to block their entry into the Schengen system, despite this not being a formal require-

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34 Pillay, N., 'Strengthening the United Nations human rights treaty body system', OHCHR, 2012, available on: <http://www2.ohchr.org/english/bodies/HRTD/docs/HCRReportTBStrengthening.pdf>

35 It seems unlikely that Hungary would have stepped back (albeit superficially) from some of its reforms on the basis of the Council of Europe's Venice Commission assessments alone, had the European Commission not made clear that it expected Hungary to cooperate. See: Hungarian Helsinki Committee – AEDH joint statement, 'Rule of law under attack', 10 December 2013, available on: <http://helsinki.hu/en/rule-of-law-under-attack-joint-statement-with-the-aedh>; European Commission Memo, 'Statement from the President of the European Commission and the Secretary General of the Council of Europe on the vote by the Hungarian Parliament of the Fourth Amendment to the Hungarian Fundamental Law', 11 March 2013, available on: [http://europa.eu/rapid/press-release\\_MEMO-13-201\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-201_en.htm); European Commission press release, 'The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary', 12 April 2013, available on: [http://europa.eu/rapid/press-release\\_IP-13-327\\_en.htm](http://europa.eu/rapid/press-release_IP-13-327_en.htm); Speech of Viviane Reding, 'Hungary and the rule of law – statement of the European Commission in the Plenary Debate of the European Parliament', 17 April 2013, available on: [http://europa.eu/rapid/press-release\\_SPEECH-13-324\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-324_en.htm)

36 This, along with the fact that the FRA rarely addresses specific Member States, probably explains why the EU institutions do not routinely follow up with governments on what action they are taking to implement the agency's recommendations.



ment for joining the area of free movement.<sup>37</sup> Similarly, it has been thought that suspension by the Commission of EU cohesion funds for Hungary in 2012 was linked to concerns over its sweeping constitutional reforms.<sup>38</sup>

## B. Improving the quality and availability of information for monitoring bodies

The second means through which the EU could add value is by contributing to the development of fundamental rights indicators and improving the collection of data on fundamental rights by the Member States. Currently, monitoring mechanisms measure a country's performance against rights as listed in international agreements, which can be phrased in abstract terms. Over the years these rights have been given greater precision as to their content by bodies responsible for interpreting their meaning – through the development of case law and interpretative guidance. However, these more precise interpretations have evolved organically, in a piecemeal manner and are contained in diffuse documents.

Systematic consolidation and categorisation of the detailed interpretation given to human rights standards could allow monitoring to be carried out against more precise benchmarks, or 'indicators'. The OHCHR has developed a conceptual framework for human rights indicators including a methodology for their development and application.<sup>39</sup> The FRA has built on the OHCHR's groundwork to begin developing fundamental rights indicators that can be applied in the Member States on specific issues: child-friendly justice, Roma inclusion and political participation for

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37 Brady, H., 'Saving Schengen: How to protect passport-free travel in Europe', 2012, 22-24, available on: [http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/rp\\_041\\_km-6422.pdf](http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/rp_041_km-6422.pdf)

38 EurActiv.com, 'EU to cut Hungary's regional funds over deficit', 23 February 2012, available on: <http://www.euractiv.com/regional-policy/eu-cut-hungary-regional-funds-de-news-511049>

39 OHCHR, 'Human Rights indicators: A guide to measurement and implementation', 2012, available on: [http://www.ohchr.org/Documents/Issues/HRIIndicators/AGuideMeasurementImplementationCompleteGuide\\_en.pdf.pdf](http://www.ohchr.org/Documents/Issues/HRIIndicators/AGuideMeasurementImplementationCompleteGuide_en.pdf.pdf)

persons with disabilities.<sup>40</sup> The Commission has also developed indicators to monitor progress on social protection and social inclusion, and on media pluralism.<sup>41</sup>

Fundamental rights indicators, as conceptualised by the OHCHR and the FRA, break down the content of each right into 'structure', 'process' and 'outcome' indicators. Simply put, 'structure' indicators relate to whether Member States have ratified international human rights agreements, introduced legislation, formal policies and procedures or created infrastructure for human rights implementation. 'Process' indicators relate to measures that implement law and policy, such as the resources allocated, scope of beneficiaries and measures implemented, such as awareness raising activities. 'Outcome' indicators cover the actual experience of individuals as to whether their rights are being realised in practice.

By breaking down the substantive content of rights in this manner it is possible to identify with greater accuracy which aspects of particular rights are not being implemented by a Member State. Thus, for example, the FRA has broken down the right to political participation for persons with disabilities, guaranteed by Article 29 of the UN Convention on the Rights of Persons with Disabilities into 28 discrete indicators.<sup>42</sup>

As well as providing more accurate data on fundamental rights implementation, using indicators would also help to address concerns that particular countries are being unfairly singled out by EU institutions for their rights records. The EP, Commission and Council have all stressed that any process established to safeguard the EU's fundamental values should ensure objectivity and non-discrimination towards Member States.<sup>43</sup> Assessments based on indicators can be made comparable by using the same methodology to collect the data that populates the indicators for each Member State. If data is collected using the same method for all countries, it then becomes possible

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40 FRA, 'Fundamental Rights: challenges and achievements in 2014', 2015, focus chapter, available on: [http://fra.europa.eu/sites/default/files/fra-annual-report-2014\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-annual-report-2014_en.pdf); FRA, 'Child friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States', 2015, available on: [http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf); FRA, 'The right to political participation for persons with disabilities: human rights indicators', 2014, available on: [http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities_en.pdf); the FRA's Roma integration indicators are not yet publicly available, see: <http://fra.europa.eu/en/event/2014/ad-hoc-working-party-integration-indicators-meets-fra-0>

41 Though these do not follow the 'structure-process-outcome' format adopted by the OHCHR and the FRA. See: KU Leuven, 'Independent study on indicators for media pluralism in the Member States – Towards a risk-based approach', July 2009, available on: [https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/final\\_report\\_09.pdf](https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/final_report_09.pdf); Eurostat webpage on employment and social inclusion indicators, available on: <http://ec.europa.eu/eurostat/web/employment-and-social-inclusion-indicators/social-protection-and-inclusion>

42 FRA, 'The right to political participation for persons with disabilities: human rights indicators', 2014, available on: [http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities_en.pdf)

43 See: Commission Communication, A new EU framework to strengthen the Rule of Law, COM(2014) 158final/2, 19 March 2014; Council Conclusions on ensuring respect for the rule of law, Doc. No. 17014/14, 16 December 2014; European Parliament resolution on the situation of fundamental rights in the European Union (2013-2014), P8\_TA-PROV(2015)0286, 8 September 2015.

to make direct comparisons between Member States more accurately and thereby avoid allegations of bias.

It should be noted that although the EU could add value by helping to develop EU-wide indicators and populate them with data, this would be difficult to achieve without the cooperation of Member States. First, it is generally agreed that national authorities and other relevant stakeholders must participate in the process of developing indicators.<sup>44</sup> If indicators are to be accepted by governments, monitoring bodies, civil society and other stakeholders as authoritative and legitimate, all relevant parties need to agree on how they are formulated and populated with data.<sup>45</sup> Second, while some of the data needed to populate indicators can be collected directly at EU level (though this can be costly), some indicators are likely to rely on information that is available only to national authorities. Such cooperation cannot be taken for granted: as noted above, national authorities have often been unwilling to collect data on the state of implementation of human rights.<sup>46</sup>

‘Structure’ and ‘process’ indicators can generally be populated using desk-based research. This is because this type of information, such as the existence of legislation, policies, budgets or action plans, has often already been collected by UN and Council of Europe monitoring bodies. ‘Outcome’ indicators, however, often rely on data that is hard to obtain without the participation of national authorities, for example, the number of complaints registered with law enforcement bodies or the numbers of judges undergoing professional development training. Populating ‘outcome’ indicators

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44 FRA, ‘Fundamental Rights: challenges and achievements in 2014’, 2015, focus chapter, available on: [http://fra.europa.eu/sites/default/files/fra-annual-report-2014\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-annual-report-2014_en.pdf)

45 The integrity of the data collected and its method of collection are particularly important to ensure that indicators are not used as a smoke screen to conceal rights violations. See, for instance, disagreements between the Bar Association and the Judicial Council of Spain over the correctness of statistics that went on to form the basis of justice-related reforms: Abogacía Española, Consejo General, ‘Datos reales de la Justicia: el número de procesos tramitados ante los órganos jurisdiccionales es de 1.833.608’, 11 July 2013, available on: <http://www.abogacia.es/2013/07/11/datos-reales-de-la-justicia-el-numero-de-procesos-tramitados-ante-los-organos-jurisdiccionales-es-de-1-833-608/>

46 For a stark example of a Member State refusing to cooperate with the EU see the UK’s failure to provide data to populate the European Commission’s Justice Scoreboard. UK House of Commons European Scrutiny Committee, Item 14, 2015 EU Justice Scoreboard, 11th Report, 2 December 2015, available on: <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-xi/34218.htm>

is also likely to require the use of surveys,<sup>47</sup> which become more costly if conducted at EU level because of the need to cover all 28 Member States.<sup>48</sup>

## V: The interparliamentary rights dialogue

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In light of the above, it is recommended that the EP's mechanism focus more on implementation of Member States' human rights obligations rather than monitoring. This would avoid duplication of existing monitoring mechanisms at the UN and Council of Europe, and be complementary to these processes by strengthening implementation of the recommendations issued by these monitoring bodies, which is their principal weakness. Given that the LIBE Committee is 'responsible for the protection within the territory of the Union of citizens' rights, human rights and fundamental rights', this committee should act as the forum for review of Member States.<sup>49</sup> Although lacking the possibility of taking hard sanctions against a Member State, the process of interparliamentary dialogue could generate political pressure for progress at national level. The EP could also link the dialogue to incentives for Member States such as financial and technical support, or provide direct support to bodies at national level responsible for rights protection, such as civil society organisations.

Past EP resolutions have called on the Commission to establish an EU monitoring mechanism based on fundamental rights indicators to guarantee that assessments of Member States are objective.<sup>50</sup> Given the amount of resources and time required to develop fundamental rights indicators, not to mention the need for national authorities to cooperate, the EP should not make the proposed interparliamentary rights dialogue contingent on the existence and population of indicators. It is desirable for fundamental rights indicators to be developed in the long term (discussed below), but

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47 For example, the degree of discrimination experienced by a given minority may well not be reflected by the number of registered complaints of discrimination because in some Member States individuals do not tend to report acts of discrimination. In these cases the only way to make an accurate measure of discrimination would be to gather data on the experience of discrimination directly from the minority group in question. FRA, 'Fundamental rights: challenges and achievements in 2014', 2015, 50-51. See also, FRA, 'EU-MIDIS, European Union minorities and discrimination survey: Main results report', 2009, available on: [http://fra.europa.eu/sites/default/files/fra\\_uploads/663-FRA-2011\\_EU\\_MIDIS\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/663-FRA-2011_EU_MIDIS_EN.pdf)

48 To get an idea of the cost of collection of quantitative and qualitative data through surveys, see successive Annual Work Programmes of the FRA, which note budget allocation for individual projects. The cost of a survey covering all EU countries typically runs into the hundreds of thousands, and sometimes millions, of Euros, depending on the number of participants, scope of the subject matter, and the method of data collection (for example, face to face interviews are more expensive than online surveys). FRA Annual Work Programmes available on: <http://fra.europa.eu/en/about-fra/what-we-do/annual-work-programme>

49 European Parliament Rules of Procedure, 8th parliamentary term, July 2014, Annex VI, available on: <http://www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8.EN.pdf>

50 See: European Parliament resolution on the situation of fundamental rights in the European Union (2012), P7\_TA-PROV(2014)0173, 27 February 2014; European Parliament resolution on the situation of fundamental rights in the European Union (2013 - 2014), P8\_TA-PROV(2015)0286, 8 September 2015.

there is sufficient information on rights implementation available to allow the EP to move ahead and establish an interparliamentary rights dialogue without delay.

## A. General format of the dialogue

The EP should institute a process whereby it reviews the implementation of the EU's fundamental values in the 28 Member States. The EP should examine each Member State individually over a two-year cycle, with 14 Member States reviewed each year. This would allow for adequate time to review each country, while also allowing each country to take follow up measures between reviews. The review would take the form of an interparliamentary dialogue,<sup>51</sup> according to which the LIBE Committee would invite its counterpart committee from the parliament of the Member State into a discussion.<sup>52</sup>

To institute a process based on mutual respect between the EP and national parliaments and to help improve rights compliance by the EU itself, the dialogue should not be confined to a one-way process where the EP only addresses recommendations to Member States. National parliaments should also be given the opportunity to make recommendations to the LIBE Committee to be placed on the LIBE Committee's agenda for debate and follow up. Introducing a two-way process could make national parliaments more willing to participate by strengthening their stake in EU governance and reinforcing the principle of subsidiarity.

## B. Informational basis for the dialogue

The dialogue would be based on a country fiche and civil society summary paper. The country fiche should be based on information taken from a rights database, along the lines of the European Fundamental Rights Information System (EFRIS) suggested by the FRA.<sup>53</sup>

The rights database would serve as a one-stop-shop allowing for an overview of the situation of human rights in any Member State. It would be populated by the reports of existing monitoring

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51 Article 9 of Protocol 1 to the Treaty on the Function of the European Union, on the role of National Parliaments in the European Union. Rule 142(2) of the EP's Rules of Procedure states that: 'The organisation and promotion of effective and regular interparliamentary cooperation within the Union, pursuant to Article 9 of the Protocol on the role of national parliaments in the European Union, shall be negotiated on the basis of a mandate given by the Conference of Presidents, after consultation of the Conference of Committee Chairs. Parliament shall approve any agreements on such matters in accordance with the procedure set out in Rule 140.'

52 Rule 142(3) of the EP's Rules of Procedure states that a 'committee may directly engage in a dialogue with national parliaments at committee level'.

53 FRA, 'Fundamental rights in the future of the European Union's Justice and Home Affairs', 31 December 2013, 8, available on: [http://fra.europa.eu/sites/default/files/fra\\_submission\\_on\\_the\\_future\\_of\\_eu\\_justice.pdf](http://fra.europa.eu/sites/default/files/fra_submission_on_the_future_of_eu_justice.pdf)

mechanisms at UN and Council of Europe level, as well as data from the FRA. The database should be searchable country-by-country or right-by-right. Such a collection of information does not yet exist but the EP could formally request the FRA to create it.<sup>54</sup> Although the FRA's mandate does not allow it to collect data on matters outside EU competence, the agency's founding regulation does not preclude it from simply compiling existing information in an accessible database.<sup>55</sup>

Using the information in this database, the European Parliamentary Research Service (EPRS), together with the secretariat of the LIBE Committee, could synthesise the findings and recommendations addressed to each Member State in a country fiche.<sup>56</sup> The EPRS and/or the LIBE Committee secretariat should also draw up a separate civil society summary paper on each country. This civil society summary paper should be based on submissions made by civil society organisations for the purposes of the dialogue.<sup>57</sup> The country fiche and the civil society summary paper would together form the basis for the dialogue.

## C. Outcomes

### I. Recommendations for follow up at national level

The agreement between the EP and national parliaments to institute the dialogue could provide for the LIBE Committee to make a certain number of recommendations to their national counterparts. LIBE's national counterpart committees could agree to accept a certain proportion of these recommendations and to place discussion of these recommendations on the agendas of their national parliaments with a view to their implementation. LIBE's national counterpart committees could then report on the outcome of these debates and any action taken at the next dialogue in the following cycle. In addition to accepting a proportion of the recommendations made by the

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54 Article 4(c), FRA founding regulation.

55 See, for example, the collection of information hosted on the FRA's website relating to the international obligations of Member States, available on: <http://fra.europa.eu/en/publications-and-resources/data-and-maps/int-obligations>

56 Inspiration for this can be drawn from the compilations of findings from UN human rights mechanisms produced by the UN Office of the High Commissioner for Human Rights as part of the Universal Periodic Review process. See, e.g. Compilation prepared by the OHCHR in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Human Rights Council resolution 16/12: Austria (UN Doc. A/HRC/WG.6/23/AUT/2, 28 August 2015). Similar documents for all EU Member States are available via: <http://www.upr-info.org/en>

57 In theory, one might expect the findings of monitoring bodies to include concerns raised by NGOs. However, the difficulty of participating in the work of monitoring bodies for NGOs, for example, due to travel costs, means that they do not always have the opportunity to provide information to monitoring mechanisms, and consequently, the latter do not always pick up on the full range of challenges at national level. Inspiration for the civil society summary paper can be drawn from the UPR. See, e.g., Summary prepared by the OHCHR in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Austria (UN Doc A/HRC/WG.6.23/AUT/3, 14 August 2015).



LIBE Committee, LIBE's national counterpart should state how it intends to urge relevant national bodies to make use of available EU funds in the area of fundamental rights, as well as technical assistance from the FRA, Council of Europe and/or UN. The outcome of each dialogue should be recorded in a country note.

## II. Follow up at EU level

### *a) Linking to Commission and Council rule of law mechanisms*

Ideally, the EU should develop an overarching coherent rights protection mechanism that involves the EP, Commission and Council in complementary roles. As the Commission and Council have each developed their own processes to safeguard the EU's fundamental values, the EP could help to introduce cooperation between the institutions by forwarding the country notes, which record the outcome of interparliamentary dialogues, to the Commission and Council. Where a dialogue has revealed systemic threats to the EU's fundamental values, the EP could include a recommendation that the Commission activate the rule of law framework.<sup>58</sup> Country notes should also be forwarded to the Council with a view to informing the choice of thematic focus and the content of discussions for the Council's annual rule of law dialogue.<sup>59</sup>

### *b) Own-initiative reports*

It is likely that the dialogue will highlight rights challenges commonly held among the Member States. Similarly, national parliaments may share certain concerns about the EU's respect for fundamental rights. For example, national parliaments might consider that EU legislation conflicts with human rights standards (as was the case, for example, with the Data Retention Directive),<sup>60</sup> or that EU rules are being interpreted in such a way as to conflict with the Charter of Fundamental Rights and need clarification.<sup>61</sup>

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58 Butler, I., 'European Commission refuses to uphold rule of law', EUObserver, 23 November 2015, available on: <https://euobserver.com/opinion/131100>

59 Butler, I., 'The rule of law dialogue: five ideas for future EU presidencies', European Liberties Platform, December 2015, available on: <http://www.liberties.eu/en/news/five-ideas-for-eu-rule-of-law>

60 Joined Cases C 293/12 and C 594/12 *Digital Rights Ireland*, 8 April 2014.

61 For example, the Commission has announced its intention to issue guidance to Member States on how to interpret EU rules governing the European Structural and Investment Funds consistently with the EU Charter of Fundamental Rights. See announcement by Corina Cretu, 'We won't compromise with the respect of fundamental rights in Cohesion Policy', 20 May 2015, available on: [https://ec.europa.eu/commission/2014-2019/cretu/announcements/we-wont-compromise-respect-fundamental-rights-cohesion-policy\\_en](https://ec.europa.eu/commission/2014-2019/cretu/announcements/we-wont-compromise-respect-fundamental-rights-cohesion-policy_en)

Where the dialogue identifies rights challenges shared by a number of Member States, or where a number of national parliaments share similar concerns about EU rules, these could become the basis for own initiative reports by the LIBE Committee, setting out proposals for action by the Commission and Council to address these problems at EU level.

*c) Agenda-setting for funding*

While sanctions might not be available, the EP could use other measures to improve implementation, in particular EU funding. The Commission might be willing to cooperate with the EP in adapting the allocation of its resources according to the commonly shared challenges identified by the EP during the dialogues. For instance, the Commission might be willing to establish relevant pilot projects or introduce relevant calls for proposals in its annual work programme under existing rights-relevant funding programmes.<sup>62</sup> Funds could be used to support, for example, monitoring by civil society organisations or,<sup>63</sup> more broadly, operational costs of NGOs working on the promotion and protection of fundamental rights.<sup>64</sup>

The EP should also pay attention to whether EU funding is being used by the Member State in question to violate human rights standards. For example, it is well documented that some governments have used EU cohesion funds to perpetuate segregation of Roma communities (through the construction of camps) or persons with disabilities (by funding long term residential facilities instead of community-based care), in breach of the Charter of Fundamental Rights.<sup>65</sup> In such cases, the EP should recommend that the Commission interrupt or suspend EU funding as appropriate.

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62 In particular, the Justice Programme (Regulation 1382/2013 establishing a Justice Programme 2014–2020, OJ L 354, 28.12.2013, 73) and the Rights, Equality and Citizenship Programme (Regulation 1381/2013 establishing a Rights, Equality and Citizenship Programme 2014–2020, OJ L 354, 28.12.2013, 62).

63 For example, Commission Financing Decision, 10 September 2014, C(2014) 6309 provides funding for civil society organisations to monitor implementation of the National Roma Integration Strategies via a pilot project.

64 While operational costs or costs for litigation are not currently covered by the Justice Programme or the Rights, Equality and Citizenship Programme, these programmes could be amended to allow this. In this respect inspiration could be drawn from the field of environmental policy where the EU may make operating grants to support NGOs 'which pursue an aim of general Union interest... and are involved in the development, implementation and enforcement of Union policy and legislation'. Article 21 of Regulation 1293/2013 on the establishment of a Programme for the Environment and Climate Action (LIFE), OJ L 347, 20.12.2013, 185.

65 See the own-initiative inquiry by the European Ombudsman investigating whether cohesion funds are spent consistently with the Charter of Fundamental Rights: <http://www.ombudsman.europa.eu/cases/decision.faces/en/59836/html.bookmark>

*d) Agenda-setting for indicators*

As discussed, the development of a comprehensive set of fundamental rights indicators is likely to take a number of years and require the cooperation of national authorities. The collection of data to populate indicators is also likely to be a gradual process, either because of the budget required (if primary data is to be collected directly at EU level) or because national authorities (assuming they are willing to participate) would be likely to adjust data collection practices gradually.

The EP could use the commonly shared challenges identified by the dialogue to prioritise which indicators should be developed and populated with data. Over time, this could lead to the gradual development of a comprehensive set of fundamental rights indicators allowing for a progressively more accurate pan-EU overview of rights implementation. This would not only benefit the EU by providing objective and comparable evidence, but also strengthen monitoring mechanisms at the UN and Council of Europe, which would be able to base their assessments of Member States on better quality information.<sup>66</sup>

The EP has various options when it comes to funding the development and population of indicators. First, the EP could explicitly request the development and population of indicators by the FRA to the extent that these fall within its mandate and resources.

Second, and for matters falling outside the FRA's mandate, the EP could request the Commission to support the development and the population of indicators through its European statistical programme. The European statistical programme provides financial support and guidance to national statistical authorities for the collection of harmonised and comparable European statistics 'for the purpose of carrying out the activities of the' EU.<sup>67</sup> The priorities of the multiannual statistical programme need to be agreed upon by the EP and the Council, which could allow reluctant Member States to block the use of this instrument. If the European statistical programme proves to be an unworkable vehicle, the EP could approach other Commission departments to explore their inter-

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66 Thus, when indicators are developed and populated, this data would become available to existing monitoring bodies to help with their assessments of Member States. The data could also be used by the LIBE Committee in its interparliamentary rights dialogues to supplement information compiled from UN, Council of Europe and FRA reports.

67 Article 13(2) of Regulation 223/2009 on European statistics, OJ L 87, 31.2.2009, 164. The current multiannual programme on European statistics is set out in Regulation 99/2013 on the European statistical programme 2013-2017, OJ L 39, 9.2.2013, 12.

est in dedicating funds to the development and population of indicators, as has been the case on the issue of media pluralism.<sup>68</sup>

Third, the EP could request the EPRS to develop and populate indicators. However, it should be kept in mind that the cost of collecting primary data direct at EU-level for the whole of the EU is unlikely to prove sustainable in the long term. Ultimately, the EP will require the collaboration of national authorities - which have not shown abundant enthusiasm to collect data on rights implementation in the past - in helping to elaborate and populate fundamental rights indicators.

## VI: Conclusions

EU Member States can no longer be presumed to uphold the EU's fundamental values. Existing protection regimes at the UN and Council of Europe play a vital role by monitoring Member States. However, they lack tools to ensure states comply with their recommendations, and their work is hampered by gaps in data. The EU can help to safeguard fundamental rights, democracy and the rule of law and complement existing monitoring mechanisms by improving compliance by Member States with these mechanisms' recommendations, and by improving the availability and quality of information on rights implementation. Given current political limitations, an interparliamentary rights dialogue constitutes the most effective means available to the EP to safeguard the EU's fundamental values.

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68 There is a precedent for this: the Media Pluralism Indicators developed by the Commission and applied by the European Centre for Media Pluralism. See documentation available via European Commission Digital Agenda for Europe website: <https://ec.europa.eu/digital-agenda/en/media-pluralism-monitor-mpm>

This paper has been endorsed by the following partners of the European Liberties Platform:

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