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IBA Reflection paper on the EU Commission Communication of April 3, 2019¹

Strengthening the Rule of Law within the European Union

The IBA and the rule of law

1. The International Bar Association, founded in 1947, is the world's leading organisation of international legal practitioners, bar associations, law firms and law societies. The Association now has over 80,000 members, 186 of the top legal firms in the world and corporate members from a diverse range of international companies. Bar membership presently spans over 170 countries with 195 individual associations (including representation in the 28 EU Member States). The work undertaken covers all areas of substantive law in addition to broader legal issues and ethics.
2. The rule of law underpins all of this work. Fairly defined and administered law provides the basis of trust and certainty to enable justice to be done and to provide the foundation for the achievement of social goals. If a state does not uphold law and justice, no other rights can be enforced or entitlements enjoyed.
3. The IBA supports the values upon which the European Union is founded which has the rule of law at its centre.² Adherence to the rule of law is a critical component for membership of the Union and essential to ensure the democratic functioning of both the Member State and Union as a whole. It requires a political acceptance – and political insistence – that it will shape the society in question. This calls for mutual respect and understanding between the three branches of the state – Legislature, Executive and Judiciary.
4. The simple existence of laws and their enforcement does not create the rule of law. The rule of law is not established by oppressive, discriminatory, or arbitrary laws that are complied with or enforced. Content matters. Under the rule of law, laws must, for example, protect fundamental individual rights. Courts that are fast and efficient but unfair will not come within the definition. Oppressive, autocratic regimes may have lower crime rates, but not the rule of law.
5. A cornerstone of the rule of law is that the powers of the government itself are limited and that neither the government nor its officials are above the law.

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6. **Judicial Independence.** We rightly focus on independence of courts and judges when we discuss the rule of law and the concept of judicial independence is a fundamental requirement of EU law³. Beyond independence, however, are competence, integrity, and fairness, all of which are more difficult to measure than how efficiently a court manages and processes cases. Justice is the ultimate objective of an independent judiciary, while maintaining respect for other branches of the state, to ensure respect for ‘comparative institutional competence’.⁴
7. **Threats to the Rule of Law.** Practices or attitudes that undercut the rule of law or foreshadow erosion of the rule of law are relevant to many of our countries. These may include political or partisan polarization, decreased civility both within government and beyond, disregard of integrity and honesty in public debate, an inability or unwillingness to compromise in legislating and in seeking to solve problems, a decline in public education and civic awareness with respect to government, political science, and the rule of law. Although “populism” is often tagged as a threat to the rule of law, we have seen in our lifetimes that populist movements may seek either to advance or to move away from the rule of law. It appears to depend on definition and perspective.
8. Turning to the European Commission Communication of 3 April 2019⁵, the IBA suggestions and thoughts are set out below with regard to each of the three proposed areas for rule of law enhancement. It has not been possible to provide answers to every question listed under the three headings, but some of our proposals cover more than one point and provide a coherent response to the overarching issue.

Better Promotion

- a. *How can the EU better promote the existing EU legal requirements and European standards relating to the rule of law, in particular at national level?*

Law-makers, judges and civil servants often lack basic, factual knowledge about EU law and its rule of law requirements. This lack of information opens up the door to misinterpretation of EU rules and values, and plays into the hands of groups with particular political agendas.

It might be worthwhile for the EC to think about developing specialist workshops on core EU rule of law issues for law-makers and offer them locally, perhaps in collaboration with national bar associations.⁶

Furthermore, EU rule of law standards should not be portrayed as ‘foreign norms’ imposed by the EU but rather as values inherent to every Member State’s constitutional order to increase the sense of ownership. This applies, in particular, to

the countries that have only introduced the concept of a 'rule of law' into their domestic legal systems recently (for example, post-Soviet countries that have introduced the concept only since the 1990s).⁷

The possibility of consolidating the rule of law and justice portfolios and lodging them with one single special Commissioner in the new Commission is a potential way to underline the importance of the concept and necessity for Member State and Union adherence to it. By raising the profile of this issue and entrusting it to a prominent, dedicated Commissioner, the EU will increase its capacity to promote, prevent and respond to potential threats in a consistent and more efficient way. The IBA notes that this is a proposal made by Le Conseil des Barreaux Europeens (CCBE) and is one it would support for the same reasons.

- b. *How can the EU best encourage key networks and civil society, as well as the private sector, to develop grassroots discussions on rule of law issues, including its economic dimension, and promote the standards underpinning the rule of law?*

The EU needs to promote and develop a sense of 'European constitutional patriotism' to increase ownership of EU rule of law requirements among civil society,⁸ in addition to investing in educating its future leadership cohort (including through academic curricula). Judges can also play a role in civic education as a means of encouraging an understanding of the Judiciary, their role and relationship with the Executive and Legislative. In England and Wales, the Lord Chief Justice has established a schools engagement programme, enabling individual judges to visit schools across the country. Similar engagement through press conferences, attending Parliamentary Committees to explain matters of relevance to the Judiciary and the operation of the justice system, are further ways in which judges can engage and educate.

Programs such as the IBA eight 'rule of law' educational videos for non-lawyers, launched in 2018⁹ are also important from this point of view. The IBA would welcome further opportunities to work with the EU institutions, Member States, bar associations and civil society to promote this material (and other relevant information/toolkits) and assist in programs to enhance grassroots awareness and understanding.¹⁰ Increased long-term investments on these priorities will be key.

In respect of the economic dimension, it is vital to engage with business associations to help them understand that a fully functioning rule of law, attested by the EU and other international actors, is critical to attract foreign investments and keep a country competitive. Who will invest in a country where assets are subject to capricious and arbitrary officialdom? Rule of law adherence and respect should be a fundamental component of future trade agreements between the EU and third parties; individual

Member State compliance and maintenance should be beyond reproach for the same reasons.

- c. *Can Member States do more to promote the discussions on the rule of law at national level, including for example through debates in national parliaments, professional fora and awareness raising activities addressed to the general public?*

National parliaments need to be better (and perhaps sooner) informed about outcomes of various reports on a country's compliance with human rights, rule of law and democracy standards, as well as being able to convert these reports into national rule of law and human rights compliance policies.¹¹ **National bar associations, which regularly consult with lawmakers, could play a role in bringing these reports to their attention and the IBA would be willing to encourage action and assist with dialogue in this regard.**

- d. *How should the EU and its Member States step up cooperation with the work of the Council of Europe and other international organisations that uphold the rule of law, including by supporting the work of the Council of Europe and with regard to evaluations and recommendations of the Council of Europe?*¹²
- e. *How can the EU build on the work of the Council of Europe and promote common EU approaches? Can peer review between Member States help in this process? What role for the EC? – see note below from EC – what are other valid views?*

It is often suggested that any new rule of law mechanism should build upon ECJ jurisprudence and insights of the European Agency for Fundamental Rights (FRA) but also the ECtHR and the Venice Commission.¹³ The 2007 Memorandum of Understanding between the EU and the Council of Europe identifies the rule of law as a shared priority of both institutions and a focal area for co-operation.¹⁴ A peer-review mechanism could, therefore, collect and analyse information provided by the ECJ, ECtHR, FRA, Venice Commission (and potentially recommendations already expressed during the UN Universal Periodic Review) in order to create a holistic summary of a Member State's rule of law situation. However, if a Member State's government steadfastly undermines the Rule of Law, such a review procedure will not be sufficient.¹⁵ [more on peer review mechanism below].

- f. *How can the existing steps taken by the European Parliament and the Council be improved and further developed? Can political groups and national parliaments be more engaged?*

Some form of tool to attract the EC's attention to potential threats to the rule of law should be given to domestic parliaments. So far, the only way (apart from the

subsidiarity complaint) for Ministers to bring a potential violation to the attention of the Commission is the regular ‘complaint form for breach of EU law’ on the Commissions website, which is available to any EU citizen.¹⁶ This procedure carries limited legal and political weight. Member State governments are reluctant to trigger EU oversight and are usually backed by majorities in parliament. A more formal tool to trigger Commission oversight could therefore be made available as a minority right to Ministers (e.g. by a 1/3 quorum) as it is very often the domestic political opposition that will first register and react to attempts to undermine the rule of law.

2. Early prevention

- a. *How can the EU enhance its capacity to build a deeper and comparative knowledge base on the rule of law situation in Member States, to make dialogue more productive, and to allow potential problems be acknowledged at an early stage?*

Prospective Member States have to comply with the Copenhagen Criteria to be admitted to the EU and their level of compliance is measured by annual reports. However, the treaties never adequately envisaged a weakening of the values enshrined in Article 2 TEU after a Member State has been admitted (apart from the ‘nuclear option’ of Article 7 TEU). A popular idea proposed is to establish a ‘Copenhagen Commission’ to review the continued compliance of Member States with the Copenhagen Criteria.¹⁷ This proposal seems to enjoy broad support but is seen as a mid to long-term option as it would require either a change in EU primary law or establishment by intergovernmental agreement outside the current treaty structure.¹⁸ In addition, it has been suggested that such Commission would ideally combine monitoring and sanctioning competencies.¹⁹

The IBA is willing and able to assist the EU and other EU organisations active in this area in the development of critical criteria and indicators used to assess rule of law adherence for accession candidate states and assessment of potential breach situations. Particular operational aspects may benefit from detailed attention, notably: respect for procedural safeguards; access to a lawyer of choice; access to legal aid and ultimately, adherence to the requirement of equality of arms throughout the process.

- b. *How can existing tools be further developed to assess the rule of law situation?*

A popular and relatively uncontroversial suggestion is to use infringement proceedings in a more systematic manner. Usually, infringement proceedings under Article 258 and 260 TFEU are launched by the EC to challenge a specific violation of EU law in an otherwise compliant Member State. Under current EC practice, only some violations – and not necessarily the most substantial ones - are raised in these proceedings. This

makes it difficult for the ECJ to notice underlying patterns of a deteriorating rule of law, especially because all complaints lodged against a certain Member State are heard by different panels.²⁰ To overcome this problem, the EC could request the Court to hear related cases in the Grand Chamber but this would still not allow the ECJ to make a finding on an overall pattern of non-compliance in and of itself.²¹ It has therefore been argued that the EC should focus on a set of violations that demonstrate a larger pattern and bundle them in a single case.²² That case should be tied together with an overarching legal theory that explains the systemic rule of law violation and points towards a respective remedy.²³ This could include a direct claim of an Article 2 TEU violation. However, it is still controversial whether Article 2 TEU can be legally enforced through the ECJ and not only through the political remedies of Article 7 TEU.²⁴

- c. *How could exchanges between the Commission and Member States on rule of law issues be most productively organised?*

The current rule of law dialogue introduced in response to the situations in Hungary and Poland may often benefit rule of law violators more than its defenders.²⁵ It allows uncompliant states to gain time for strategical manoeuvring and lukewarm commitments to hold off actual infringement proceedings.²⁶ Such formalized form of dialogue should therefore not be seen as an alternative to infringement actions, Article 7 proceedings or potential future financial sanctions. There could be clearer understanding of timeframes within which positive action to remedy breaches must be taken, to ensure greater compliance and transparency more broadly.

3. Tailored response

- a. *How can the relevant case law of the Court of Justice be effectively disseminated and its potential fully used?*

See above under 2(b) 'existing tools'. Another option that has been proposed is to interpret Union citizenship in a way that entails a guarantee of last resort for fundamental rights in cases of systemic failure in a Member State (the so-called *Reverse Solange* approach).²⁷ It would allow for the enforcement of rule of law guarantees through the domestic judiciary but requires the ECJ to creatively reinterpret Article 51(1) Charter of Fundamental Rights of the EU, making the Charter applicable in purely domestic cases. This approach is clearly somewhat controversial, but one that may merit further exploration.²⁸

- b. *How can the Commission, the European Parliament and the Council coordinate more effectively and ensure a timely and appropriate response in case of a rule of law crisis in a Member State?*

As we have seen in the Polish and Hungarian situation, it takes a significant amount of time to trigger Article 7 TEU even in cases of flagrant rule of law violations. In 2014, the Commission proposed a new rule of law mechanism that would gather and assess evidence and lead to an Article 7 TEU procedure.²⁹ Such a mechanism could help to put pressure on the EP and the European Council to approve Article 7 proceedings. However, the Council's Legal Service issued an opinion that such new mechanism could not be established under the current treaty framework and proposed a peer review mechanism instead, which we know the Commission is not enthusiastic to endorse (at least if there is not a substantial role for itself).³⁰

Under Art 5 TEU, 'the limits of Union competencies are governed by the principle of conferral'. Respect for the rule of law by Member States cannot be the subject of action by EU institutions without the existence of any specific material competence to frame this action. There is no legal basis in the Treaties that would allow the creation of a supervision mechanism, and Article 7 only empowers European Council, Council and European Parliament to follow a single, clearly laid down procedure. It does not confer any material competence to the EU to monitor the rule of law situation in Member States. The necessary amendment, would, in all likelihood, be quite small. However, the problem lies rather in the general fact that every amendment of the current EU treaties may be difficult to achieve politically.

One suggestion may be that such a mechanism could first be established as an inter-governmental body (as we have seen for example with the European Stability Mechanism - ESM) outside the current Treaty framework and then, if Member States later agree on an update to the post-Lisbon TEU and TFEU, be incorporated into the new primary law framework.

Peer-review, however, would be possible as it does not require the establishment of a new body and the material action (the review) would remain in the competency of the Member States. If a credible peer review mechanism were to be established, it could probably draw on the experience of the Universal Periodic Review (UPR), where everyone reviews everyone in order to avoid a Poland reviews Hungary type of situation. However, this would probably require a significantly higher amount of commitment and domestic resources.

- c. *In what ways could the Rule of Law Framework be further strengthened? Should this include more engagement with other institutions and international partners (e.g.*

Council of Europe/Venice Commission, Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights)?

Although external institutions such as the Venice Commission or Office for Democratic Institutions and Human Rights (ODIHR), and internal EU agencies such as FRA, can be helpful in monitoring Article 2 TEU compliance, the actual sanctioning would still have to be done by the EU.³¹ The Venice Commission might be useful in providing technical assistance to fix existing deficits but it cannot enforce or impose its advice onto the Member States. The Role of external institutions will, therefore, be limited to the promotion and prevention phase.

- d. *Are there other areas, in addition to the EU's financial interests, where the EU should develop specific mechanisms (including rule of law-related conditionalities) to avoid or remedy specific risks to the implementation of EU law or policies?*

One area could be judicial cooperation. As we have seen in the *LM* case regarding judicial independence in Poland, domestic courts may stay extradition proceedings and other forms of judicial cooperation with Member States in cases where the accused may be denied a fair trial due to government interference with the judiciary.³² The implementation of the European Arrest Warrant mechanism can be suspended in the event of a serious and persistent breach of Article 2 TEU.³³ Ultimately, however, it is for domestic courts to decide whether a threat to the rule of law amounts to a serious breach of Article 2 and justifies the suspension of judicial cooperation obligations. Courts in different Member States may reach different conclusions and consistency is hard to maintain when monitored in a subjective context. These courts may benefit from either an EU-wide mechanism or at least guidelines to harmonize responses against an uncompliant Member State. The suspension of judicial cooperation would qualify as both a preventive measure (by not subjecting individuals to a compromised legal system) and a sanction (by denying the uncompliant Member States the benefits of judicial cooperation).

Conclusion

If the focus is upon what is achievable using the current legal framework, a combination of peer review (UPR style), the creation of a dedicated single Commissioner, strategic infringement proceedings and financial sanctions within clearly defined timeframes, could significantly strengthen the existing rule of law mechanisms.

The IBA is willing and keen to assist in awareness raising activity in a range of ways, notably the dissemination of the eight rule of law educational videos for non-lawyers,

launched in 2018. We reiterate that the IBA would welcome further opportunities to work with the EU institutions, Member States, bar associations and civil society to promote this material (and other relevant information/toolkits) and assist in programs to enhance grassroots awareness and understanding.

¹ The IBA would like to thank Federica D'Alessandra and Hannes Jöbstl from the Oxford Program on International Peace and Security, Institute for Ethics, Law, and Armed Conflict (ELAC) in the Blavatnik School of Government for their significant contribution to this paper.

² Article 2 of the Treaty of the European Union (TEU): The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

³ Article 19 (1) TEU

⁴ Alan Paterson, *Final Judgment* (2013) at p.276.

⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Further strengthening the Rule of Law within the Union State of play and possible next steps COM/2019/163 final

⁶ Similar projects exist with regard to domestic rule of law requirements, for example in the UK: 'Law for lawmakers: A JUSTICE guide to the law' available at https://www.law.ox.ac.uk/sites/files/oxlaw/justice_-_law_for_lawmakers.pdf (last visited 28 May 2019).

⁷ Venice Commission, Report on the Rule of Law, Strasbourg, CDL-AD (2011)003rev., 4 April 2011, paras 32-33, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e) (last visited 28 May 2019).

⁸ See e.g. Jan-Werner Müller, 'A 'Thick' Constitutional Patriotism for the EU? On Morality, Memory and Militancy' in Erik O. Eriksen et al. (eds), *Law, Democracy and Solidarity in a Post-national Union* (Routledge 2008).

⁹ The Brussels launch of the IBA videos took place in November 2018 at the European Parliament with a range of key stakeholders including Chair of the EP LIBE committee MEP Claude Moraes and First Vice President, Commissioner Frans Timmermans in attendance.

¹⁰ <https://www.ibanet.org/rule-of-law-videos-en.aspx> - hyperlink to the IBA website and rule of law videos.

¹¹ See e.g. COE, Parliamentary Assembly, 'Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights' (19 March 2019) available at <http://website-pace.net/documents/10643/5636795/20190309-European-Union-mechanism-democracy-EN.pdf/bc99f3e7-a239-4a5c-a171-d0da5367fcb6> (last visited 28 May 2019) para 85.

¹² Matjaz GRUDEN, Director of the CoE Directorate on Democratic Participation addressed this point as a panellist in the IBA's November 2018 event in the EP. The CoE's [Venice Commission](#) and [GRECO](#) as part of the Directorate on human rights and rule of law would be useful collaborators with the EU to bring in wider Europe the global perspective. The IBA, with its global reach including activities and work in conflict areas on this could be a useful coordinator with these EU/global institutions and the IBA's global members.

¹³ See Ernst Hirsch Ballin, 'The Virtue of Reciprocity – Strengthening the Acceptance of the Rule of Law through Peer Review' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 141.

¹⁴ Memorandum of Understanding between the Council of Europe and the European Union (23 May 2007) <https://rm.coe.int/16804e437b> (last visited 28 May 2019) para 14.

¹⁵ Ballin (n 5) 145.

¹⁶ See EU Commission, 'complaint form for breach of EU law' available at https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/ (last visited 28 May 2019).

¹⁷ See Jan Werner Müller, 'Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 206-224.

¹⁸ *ibid*, 209.

¹⁹ *ibid*, 213.

²⁰ Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Closa and Kochenov (n 9) 109-11.

²¹ ECJ Statute, Chapter II, Article 16.

²² Scheppele (n 12) 112.

²³ *ibid*.

²⁴ *ibid* 114-15.

²⁵ See e.g. Renata Uitz, 'Europe's Rule of Law Dialogues: Process With No End in Sight' (*Verfassungsblog*, 22 November 2018) available at <https://verfassungsblog.de/europes-rule-of-law-dialogues-process-with-no-end-in-sight/> (last visited 28 May 2019).

²⁶ See Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)' *Verfassungsblog*, 13 January 2019) <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/> (last visited 28 May 2019).

²⁷ A. von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) *Common Market Law Review* 489.

²⁸ See also Andras Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in Closa and Kochenov (n 9) 187-205.

²⁹ European Commission, Communication from the Commission on 'A new EU Framework to strengthen the Rule of Law, A new EU Framework to strengthen the Rule of Law', COM(2014)158, 19 March 2014.

³⁰ Opinion of the [Council's] Legal Service on the Commission's Communication on a new EU Framework to strengthen the Rule of Law, 10296/14, 27 May 2014.

³¹ Carlos Closa and Dimitry Kochenov, 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options' in Werner Schröder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart 2016) 192-93.

³² ECJ, *Minister for Justice v LM* (25 July 2018) C-216/18.

³³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ((2002/584/JHA) recital 10.