

Addressing systemic rule of law deficiencies in member states – necessity or tyranny of values?

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1. Introduction

The Council of Europe was founded upon the Rule of Law as one of its three core principles. This transpires from the preamble of the Council’s Statute and the requirements for membership, as enshrined in Article 3 where “every member of the Council of Europe must accept the principles of the *Rule of Law* [emphasis added] and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council.”²

This paper presents the Council of Europe’s various mechanisms designed to strengthen the Rule of Law before examining our cooperation with the European Union and in particular, the European Commission, who in light of the serious breaches of the Rule of Law has initiated several infringement proceedings against Poland³ in addition to asking the Council of the European Union to adopt a decision under Article 7 of the Treaty on European Union.⁴ The European Parliament has done so in respect of Hungary.

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² *Statute of the Council of Europe*, ETS No 001, London, 5 May 1949.

³ CJEU, Case C-619/18 *Commission v Poland*, ECLI:EU:C:2019:531. CJEU, Case C-192/18 *Commission v Poland* ECLI:EU:C:2019:529.

⁴ European Commission, *Rule of Law: European Commission acts to defend judicial independent in Poland*, 20 December 2017.

The paper then presents the new complementary procedure to deal with violations of statutory obligations, including Rule of Law principles, that is currently being prepared in the Council of Europe.

The paper ends with several questions regarding this new procedure, which will be discussed on Tuesday, 29 October.

2. The Venice Commission and its Rule of Law Checklist

The ‘European Commission for Democracy through Law’, otherwise known as the Venice Commission is an independent consultative body established through an enlarged Council agreement. The Commission has 62 members, the 47 Council of Europe member States and 15 other countries including Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the US. The Commission has in the past been publicly referred to as the “custodian of constitutional probity all over Europe.”⁵

For more than twenty years, the Venice Commission has supported and advised individual countries on the Rule of Law in order to strengthen democratic institutions and protect human rights. As one of its primary objectives, the Commission promotes the Rule of Law as a basic feature of the European constitutional order through recommendations and opinions on draft constitutions and legislation. The Venice Commission can be seized by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General or by a participating State, international organisation or body to provide an opinion.⁶ It may also carry out research on its own accord; prepare studies and draft guidelines, laws and international agreements.⁷ Its flexible and ad-hoc character allows the Venice Commission to react swiftly to threats posed to the Rule of Law and ensures the Commission’s relevance, in the midst of unfolding crises as the most recent events in Hungary, Poland, Romania, the Ukraine and Turkey, have illustrated.

In 2007, the Parliamentary Assembly called upon the Venice Commission to assist in the offering of further reflections on the Rule of Law in Europe. Following thorough deliberations, the Venice Commission published a ‘Report on the Rule of Law’ in 2011, in which it sought to identify a consensual definition of the Rule of Law in order to assist “international organisations and both domestic and international courts in interpreting and applying this fundamental value”⁸ and distinguish the Rule of Law from a rule *by* law. The report concluded that, despite a variety of opinions a consensus, regarding the core formal and substantive elements that compromise the Rule of Law could, nonetheless, be found.

During its plenary session in March 2016, the Venice Commission adopted its ‘Rule of Law Checklist’ a practical, accessible and user-friendly instrument intended to be used by a broad breadth of actors, including national authorities, international and non-governmental organisations, academics and ordinary citizens. Designed as a precise enough tool to allow for the application of

⁵ Gardner (6 April 2017), A breach between Turkey and the EU that suits both sides, Financial Times

⁶ Council of Ministers, Resolution (2002) 3, Article 3(2).

⁷ Ibid, Article 3 (1).

⁸ Venice Commission, *Venice Commission Report on the Rule of Law*, 4 April 2011, paragraph 3.

the Rule of Law principles in an objective, in-depth, and transparent manner, the Checklist is, when applied, meant to benefit from the broad involvement of interested stakeholders.⁹

The Checklist is neither exhaustive nor final; rather, it aims to cover a series of core elements of the Rule of Law whilst taking into account the diversity of Europe's legal systems and traditions.¹⁰ The Checklist translates five principles of the Rule of Law (legality; legal certainty; prevention of abuse of power; equality before the law and non-discrimination; and access to justice) into concrete questions with the intention of applying these to evaluate and assess the country-specific circumstances of its members. It also offers concrete examples of particular challenges with which the Rule of Law is, at times confronted with, such as claims of corruption and conflicts of interest¹¹ or the collection of personal data and surveillance.¹²

In order to understand the practical value of the Rule of Law Checklist, one should consider the following example: Access to Justice. Access to Justice is an essential requirement to ensure that we do not find ourselves living in a world dominated by *lex imperfecta* and yet, it remains a broad, perhaps even vague principle and should thus be divided into two sub-principles: a). independence and impartiality and b). fair trial. Both of these sub-principles are still quite general in their nature and thus require further elaboration. The principle of independence and impartiality for example, includes *inter alia* the independence of the judiciary and of individual judges, the impartiality of the judiciary, the autonomy of the prosecution service and the independence and impartiality of the Bar. Whilst the abovementioned components are, at their core still 'principles' they are nonetheless much more precise than the umbrella terms: independence and impartiality.

The Checklist includes a number of more detailed questions regarding the independence of the judiciary¹³: one general question and a number of specific follow-up questions regarding the independence of individual judges:¹⁴

*a) General: Are there sufficient constitutional and legal guarantees for the independence of individual judges?*¹⁵

b) Specific: Are judicial activities subject to the supervision of higher courts (outside the appeal framework), court presidents, the executive or other public bodies? Does the Constitution guarantee the right to a competent judge ("natural judge pre-established by law")? Does the law clearly determine which court is competent? Does it set rules to solve any conflicts of competence? Does the allocation of cases follow an objective and transparent criteria? Is the withdrawal of a judge from a case excluded (other than in cases where a recusal by one of the parties or by the judge him/herself has been declared)?

These questions aim to decipher the country-specific status of the Rule of Law, once they are answered, it becomes easier to identify possible shortcomings and subsequently, (hopefully!) remedy them.

⁹ Ibid, paragraph 24.

¹⁰ For more information on the Rule of Law Checklist, see also Drzemczewski (2018), page 179-184.

¹¹ Venice Commission Report on the Rule of Law, *supra* (note 16), paragraph 114.

¹² Ibid, paragraph 117.

¹³ Ibid, paragraph II. E.1.a.

¹⁴ Ibid, paragraph II. E.1.b.

¹⁵ Ibid, paragraph 85 b.

With the adoption of the Rule of Law Checklist in March 2016, the Venice Commission established “one of the few widely accepted conceptual frameworks for the Rule of Law in Europe.”¹⁶ The Checklist has been formally endorsed by the Committee of Ministers in September 2016 and a month later, by the Congress of Local and Regional Authorities. The Parliamentary Assembly of the Council of Europe also approved the Rule of Law Checklist during its plenary session in October 2017.¹⁷ The resolution foresees a systematic use of the Checklist by the Assembly, in particular in relation to the preparation of reports by the Committee on Legal Affairs and Human Rights and the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee).¹⁸ Furthermore, the Parliamentary Assembly invited national parliaments, governmental bodies and ministries, regional and international organisations, and civil actors to refer to the Checklist when contemplating legislative reform and carrying out their respective activities.¹⁹

3. European Convention on Human Rights

According to the European Convention on Human Rights, the Rule of Law famously forms part of “the common heritage”²⁰ of its members, it is a principle inherent to the very soul of the Convention.

The Court used the concept of “*prééminence du droit*” or “rule of law” for the first time in *Golder v. United Kingdom* in February 1975,²¹ basing its interpretation of Article 6 of the Convention (right to a fair trial) on the reference to the Rule of Law in the Convention’s Preamble. It emphasised that this principle should not merely be seen as a “more or less rhetorical reference”²², devoid of relevance for those interpreting the Convention. One of the reasons for why the signatory Governments decided to “take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”²³ was their profound belief in the Rule of Law. Since then, the Rule of Law has become a guiding principle for the Court which “inspires the whole Convention”²⁴ by being “inherent in all the Articles of the Convention.”²⁵ In this context, the Court has offered further clarification on a number of key themes which underpin the Rule of Law, including: i). the separation of powers, ii). the role of the judiciary, iii). impunity, iv). a tribunal established by law, v). sufficiently accessible and foreseeable law, vi). the scope of legal discretion, vii). *nullum crimen sine lege* and *nulla poena sine lege*, viii). legal certainty, ix). the execution of final domestic judgments, x). equality before the law, xi). the judicial control of the executive, xii). positive obligations of the state in the form of procedural requirements and safeguards, xiii). the right of access to a court, xiv). the right to an effective remedy, and finally xv). the right to a fair trial.

The Court has emphasised that democracy is inseparably linked to the Rule of Law, the concept implying the existence of a separation of powers, institutional guarantees for an independent and

¹⁶ Carrera, Guild and Hernanz (2013), page 17.

¹⁷ Parliamentary Assembly, Venice Commission’s “Rule of Law Checklist”, 11 October 2017, Resolution 2187 (2017).

¹⁸ *Ibid*, paragraph 6.2.

¹⁹ *Ibid*, paragraph 6.3 – 6.5.

²⁰ Preamble of the European Convention on Human Rights, Rome 4 November 1950.

²¹ ECtHR, *Golder v. United Kingdom*, Judgment of 21 February 1975, Application no. 4451/70.

²² *Ibid*, paragraph 30.

²³ *Ibid*, paragraph 34.

²⁴ ECtHR, *Engel and Others v. the Netherlands*, Judgement of 8 June 1976, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, paragraph 69.

²⁵ ECtHR, *Amuur v. France*, Judgment of 25 June 1996, Application no. 19776/92, paragraph 50.

impartial judiciary, as well as the judicial oversight of the executive.²⁶ Already in 2002, the Court itself noted that “the notion of separation of powers between the executive and the judiciary has assumed growing importance in the case-law of the Court.”²⁷ This principle is also of relevance with regards to the appointment and selection of judges, whilst the executive and legislative branches may be involved in the appointment, the procedure must be free from undue pressure and interference.²⁸

In the case of *Baka v. Hungary*, the Court recognised the growing importance which international and more specifically, the Council of Europe’s legal instruments, case law and bodies attach to procedural fairness in cases concerning the removal and dismissal of judges.²⁹ Regarding legal certainty, the Court in *Brumărescu v. Romania* found that “one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have made a final determination of an issue, their ruling should not be called into question.”³⁰ More recently, the Court in *Guðmundur Andri Ástráðsson* addressed at length the principle of the separation of powers and judicial independence and impartiality, specifying that “the Court places emphasis on the importance in a democratic society governed by the rule of law of securing the compliance with the applicable rules of national law in the light of the principle of the separation of powers.”³¹

The right of access to a court, fair trial and an effective remedy were similarly further elaborated upon by the Court within its growing body of case law. The Court established the basis for the principle of the right of access to a court in the abovementioned case of *Golder*, when it held that in order to give effect to the procedural guarantees contained within Article 6 of the Convention, the right of access to a court must be provided for.³² In *Sunday Times* Strasbourg not only underlined the fundamentality of public confidence in the judiciary and the importance of the Court’s role as a guarantor of justice for the Rule of Law, but also emphasised that the principle implies the need for a fair trial.³³ In relation to the remedy required by Article 13, the Court perceived an effective remedy as “either [to] prevent the alleged violation or its continuation or prove adequate redress for any violation that had already occurred.”³⁴ The Court has also elaborated upon what it understands as the criteria for the phrase ‘prescribed by law’: “[f]irstly, the law must be adequately accessible... Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to

²⁶ Steiner (2016), page 154.

²⁷ ECtHR, *Stafford v. the United Kingdom*, Grand Chamber Judgment of 28 May 2002, Application no. 46295/99, paragraph 78.

²⁸ See the overview over relevant case-law in the Background Document to the 2018 Judicial Seminar at the Court entitled ‘The Authority of the Judiciary’, available at: <https://www.echr.coe.int/Documents/Seminar_background_paper_2018_ENG.pdf>.

²⁹ ECtHR, *Baka v. Hungary*, Grand Chamber Judgment of 23 June 2016 Application no. 20261/12, paragraph 172.

³⁰ ECtHR, *Brumărescu v. Romania*, Grand Chamber Judgment of 28 October 1999, Application no. 28342/95 Reports, paragraph 61.

³¹ ECtHR, *Guðmundur Andri Ástráðsson*, Judgment of 12 March 2019, Application no. 26374/18, paragraph 122.

³² ECtHR, *Amuur v. France*, *supra* (note 25) paragraph 72.

³³ ECtHR, *Sunday Times v. United Kingdom (No.1)*, Judgment of 26 April 1979, Application no. 6538/74, paragraph 55.

³⁴ ECtHR, *Kudla v. Poland*, Judgment of 26 October 2000, Application no. 30210/96, paragraph 158.

foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”³⁵

The ECtHR thus has, and continues to hold, a crucial function in safeguarding the Rule of Law by fleshing out this principle through relevant case-law.

Furthermore the Committee of Ministers’ supervision of the execution of ECtHR judgments constitutes as an invaluable source of information as to the efforts made by member States to remedy both individual and systemic ECHR violations, including those related to the Rule of Law.

4. Other Council of Europe bodies

Apart from the Council of Europe’s statutory organs and the Venice Commission, there are various other technical bodies dealing with, in one way or another Rule of Law related issues. In particular, one must mention the Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of European Judges (CCJE), the Consultative Council of European Prosecutors (CCPE) as well as the Group of States against Corruption (GRECO).

The CEPEJ was established to improve the efficiency and functionality of justice in the member States. Through its work, the CEPEJ strengthens the mutual confidence between judicial professionals and promotes the public service of justice. Furthermore, the CEPEJ’s evaluation of judicial systems, through the analysis and collection of quantitative and qualitative data offers a reference point for the execution of judicial reforms across Europe.

The work undertaken by the CCJE and CCPE incorporates the perspectives of serving judges and prosecutors throughout Europe. In 2016, the two bureaus drew a comprehensive review of the challenges for judicial independence and impartiality, in which they jointly recognised the public perception of corruption within the justice system to be one of the most serious challenges for the maintenance of public trust and confidence in the independence and impartiality of judges and prosecutors.³⁶

The GRECO consistently emphasises the close link between the rule of law and the fight against corruption. Corruption leads to arbitrariness and abuse of powers; it undermines the very foundations of the rule of law. More recently, the GRECO adopted a series of critical assessments of the rule of law situation in Poland and Romania.

As regards Romania, the GRECO’s recommendations focused on proposed amendments to judicial laws as well as the criminal and criminal procedure codes.

The relevant opinions and recommendations by GRECO and the Venice Commission³⁷ recall in this context core concepts of the rule of law such as

³⁵ Ibid, paragraph 49.

³⁶ *Challenges for judicial independence and impartiality in the member States of the Council of Europe* SG/Inf(2016)3, 15 January 2016, paragraphs 310 and 313.

³⁷ All opinions and recommendations can be found at the Venice Commission’s <<https://www.venice.coe.int/webforms/events/>> and GRECO’s <<https://www.coe.int/en/web/greco>> websites.

- the legislative process should be inclusive and transparent involving effective consultations of all stakeholders and meaningful discussions (which are impossible if the process is excessively fast and non-transparent);
- emergency ordinances and expedited procedures should be the exception, not the rule;
- the principles of legal clarity and certainty and in particular the principle of *res judicata* must be respected;
- not only judges, also the prosecution service and individual prosecutors should enjoy some independence from interference by the government;
- judges and prosecutors are entitled to freedom of expression; a reasonable balance needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of the duties;
- judges and prosecutors must not be prevented from engaging in debates about the adequate functioning of the justice system; fear of sanctions may have a chilling effect which is detrimental to society as a whole;
- effectively preventing and sanctioning corruption-related acts are vital anticorruption measures and obligations under Council of Europe conventions.

While our experts acknowledged the need to reform the judiciary and prosecution services, adapting it where necessary to new challenges and realities, such important reforms should not be rushed through Parliament, they should be based on an inclusive process. Both the Venice Commission and GRECO emphasised that some of the foreseen measures seen alone, but especially in view of their cumulative effects, were likely to undermine the independence of judges and prosecutors, public confidence in the judiciary, the effectiveness of criminal justice as well as the country's fight against corruption.

In a state governed by the rule of law, it is important to play by the rules, not with the rules.

5. Cooperation with the European Union

The 2007 Memorandum of Understanding between the Council of Europe and the European Union recognises the Rule of Law as a priority for matters of common interest and encourages both institutions to commit to the development of common standards to promote “a Europe without dividing lines.”³⁸ In particular, it provides that:

“[t]he Council of Europe and the European Union will endeavour to establish common standards thus promoting a Europe without dividing lines, without prejudice to the autonomy of decision. Bearing this in mind, legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules.”³⁹

The three pillars of our “strategic partnership” namely political dialogue, cooperation projects and legal cooperation have led to collaborations “of unprecedented intensity.”⁴⁰

³⁸ Council of Europe and the European Union, *Memorandum of Understanding between the Council of Europe and the European Union*, paragraph 23.

³⁹ *Ibid*, paragraph 23-24.

⁴⁰ Committee of Ministers, ‘Report on co-operation between the Council of Europe and the European Union’ 12 May 2017, CM(2017)28-final.

It was against this background that the the ‘Council of the European Union’s Conclusions on Fundamental Rights and the Rule of Law’ emphasised the importance of “mak[ing] full use of existing mechanisms and cooperate with other relevant EU and international bodies, particularly with the Council of Europe, in view of its key role in relation to promotion and protection of human rights, democracy and the Rule of Law, in order to avoid overlaps.”⁴¹

Referring specifically, to proposals which called for a EU Framework on the Rule of Law to be established, the Committee of Ministers stressed in February 2014 that it “fully supports the efforts deployed by the Secretary General, who has intensified his political consultations with the EU institutions, emphasising in particular the message that a possible future EU framework should take into account the instruments and expertise of the Council of Europe and co-operate closely with it.”⁴²

The Council of Europe welcomed the European Commission’s understanding of the Framework as a complementary component to “all the existing mechanisms already in place at the level of the Council of Europe to protect the Rule of Law.”⁴³ During the assessment phase of the Rule of Law Framework, the Commission may refer to the expertise of different parties where necessary, including the Council of Europe’s Venice Commission. The Communication from the Commission on the Rule of Law Framework noted that the European Commission “will as a rule and in appropriate cases seek the advice of the Council of Europe and/or its Venice Commission.”⁴⁴ The Commission reiterated and developed these ideas in two further communications issued in April⁴⁵ and July 2019.⁴⁶ It notably committed to the “strengthen[ing] cooperation with the Council of Europe, including the Venice Commission and GRECO, and explore further support to it in relation to EU priorities on the rule of law.”⁴⁷

One might be tempted to argue that the more instruments and institutions there are to protect and promote the Rule of Law, the better for the purpose of ensuring that governments act in conformity with the Rule of Law. In October 2016, the European Parliament endorsed the Committee on Civil Liberties, Justice and Home Affairs’ legislative initiative report calling for the establishment of a new binding mechanism to monitor the Rule of Law, democracy and the fundamental rights’ situation in Europe. The mechanism aims to ensure compliance with EU values through preventative, corrective and sanctioning measures. It is composed of four core elements: an annual European report to identify possible breaches (the European DRF report) which includes country-specific and general recommendations, an annual inter-parliamentary debate on the abovementioned report, proposals to remedy possible risks and violations as provided for by the relevant treaties, and lastly a monitoring cycle (DRF policy cycle) within the main EU institutions. Whilst the Commission expressed its support for the Parliament’s objective, particularly the fostering of an

⁴¹ Council of the European Union, *Conclusions on Fundamental Rights and the Rule of Law*, June 2013.

⁴² In its reply to Parliamentary Assembly Recommendation 2027 (2013).

⁴³ Communication from the Commission to the European Parliament and the Council a New EU Framework to Strengthen the Rule of Law, COM/2014/0158 final of 11 March 2014, page 6.

⁴⁴ *Ibid*, page 9.

⁴⁵ ‘Further Strengthening the Rule of Law within the Union - State of play and possible next steps’ COM(2019)163 final of 3 April 2019.

⁴⁶ ‘Strengthening the rule of law within the Union - A blueprint for action’ COM(2019) 343 final of 17 July 2019.

⁴⁷ *Ibid*, page 8.

inter-parliamentary dialogue on democracy, the Rule of Law and fundamental rights, it was more sceptical of the need and feasibility of an annual independent expert report on the Rule of Law.⁴⁸

In addition to the Commission's hesitant appraisal of the EP's initiative, one must not ignore the genuine risk of a duplication of standards and actors, which may lead to serious inconsistencies and forum-shopping practices, an outcome that cannot be seen to be in the interest of either citizens or governments. As a means of avoiding such overlaps, the Council and the relevant European institutions abide by a general policy of cooperation such as exemplified by the European Commission and the CEPEJ, where the EU justice scoreboard relies upon the information provided by the CEPEJ, thereby avoiding any potential duplication and confirming the CEPEJ's status as a common reference point for justice evaluations. The DRF report similarly refers to "cooperation envisaged with the Council of Europe and other bodies."⁴⁹ In April 2019, the Parliamentary Assembly examined 'the establishment of a European Union mechanism on democracy, the rule of law and fundamental rights'. The Assembly voiced concern "that, in the long run, the variety of the rule of law related initiatives involving different European Union institutions may jeopardise both the Memorandum of Understanding's declared objective of ensuring the coherence of the standard-setting system in Europe, and the complementarity and efficiency of mechanisms in upholding the shared values of human rights, democracy and the rule of law which exist within the two institutions with regard to States which are members of both the Council of Europe and the European Union."⁵⁰ The Assembly invited the European Union, in the framework of its existing procedures and its initiatives to ensure compliance with the values guaranteed in Article 2 of the Treaty on European Union, to:

- "support the effective application of benchmarks at European level, using the Council of Europe's 'rule of law standards', including the case law of the European Court of Human Rights, relevant recommendations of the Committee of Ministers, standards and opinions of the Venice Commission (including the 'Rule of Law Checklist') and recommendations, opinions and/or conclusions of other relevant Council of Europe bodies;
- use the available reports, opinions or recommendations of the Council of Europe's advisory or monitoring bodies, not only citing them as references in the documents produced by the European Union bodies, but taking into account the conclusions of these bodies in the assessment by the institutions of the European Union to determine whether a rule of law issue has arisen, as well as to guide proposals for any action to be taken;
- when assessing whether a rule of law deficiency has been remedied or has ceased to exist, liaise with the relevant Council of Europe bodies which issued the opinion or the recommendation to ensure consistency of views and conclusions. The initiative for political action in the event of alleged non-compliance with the European Union legal framework would remain with the European Union, with the Council of Europe offering legal and technical assessment in accordance with its monitoring or advisory bodies' competences;
- provide for safeguards in all mechanisms of the European Union to ensure that the assessment or action of the European Union will not affect existing procedures arising from Council of Europe

⁴⁸ Communication from the Commission to the European Parliament and the Council a New EU Framework to Strengthen the Rule of Law *supra* (note 43) page 6.

⁴⁹ *Ibid*, page 7.

⁵⁰ Parliamentary Assembly, *Establishment of a European Union Mechanism on Democracy, the Rule of Law and Fundamental Rights*, Recommendation 2151 (2019), paragraph 7.

advisory or monitoring mechanisms, along similar lines to Article 53 of the Charter of Fundamental Rights of the European Union.”⁵¹

With the next Commission, headed by Ursula von der Leyen due to take office at the end of 2019, Brussels has indicated that it intends to remain tough on the Rule of Law. In turn, the joint Belgian-German proposal, to subject all EU countries to an annual Rule of Law monitoring procedure has been favourably received by the Commission⁵² and presents an excellent opportunity to establish new modes of collaboration and mutual-reinforcement between the Council of Europe and the European Union.

6. The new complementary procedure

Respect for the Rule of Law is a precondition for the accession of states to the Organisation. The Rule of Law is of the utmost importance for the Council, so much that if a member state were to consistently fail to uphold this principle, it may trigger the application of article 8 which would not only provide for the suspension of a State’s right to representation, but also its eventual expulsion if the systematic violations continued to persist. The relevant Committee of Minister’s decisions require a mere two-thirds majority (as defined by Article 20 (d) of the Statute).⁵³

The Parliamentary Assembly disposes of a range of measures in the context of its own monitoring procedure. Based on the procedure to challenge the credentials of national delegations, it may choose to suspend the voting and participatory rights of a delegation.⁵⁴ These powers have been subject to criticism on both political and legal grounds.⁵⁵ Following the adoption of the decision by the Committee of Ministers at its 129th Session (Helsinki, 17 May 2019) on “A shared responsibility for democratic security in Europe – Ensuring respect for rights and obligations, principles, standards and values”, the Assembly modified its sanctions regime. Henceforth, the members’ right to vote, to speak and to be represented in the Assembly and its bodies shall not be suspended or withdrawn in the context of a challenge to or reconsideration of the credentials of these members.⁵⁶ Should a member State continue to persistently disrespect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take action in accordance with the provisions of Articles 7 and 8 of the Statute.

In the case of Greece, the Committee of Ministers came close to applying article 8 of the Statute. A military coup occurred in Greece in 1967, as a result of which an inter-state application against the Greek Government was brought by Denmark, Norway, Sweden, and the Netherlands pursuant to Article 33 of the ECHR. The now defunct European Commission on Human Rights found that the derogations from the ECHR declared by Greece were not justified under Article 15 and that the Greek government was therefore in a systemic breach of the provisions of the Convention. Greece

⁵¹ Parliamentary Assembly, *Establishment of a European Union Mechanism on Democracy, the Rule of Law and Fundamental Rights*, Resolution 2273 (2019), paragraph 16.1 - 16.4 .

⁵² European Commission Press Release, “Strengthening the Rule of Law through increased awareness, an annual monitoring cycle and more effective enforcement” (17 July 2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4169.

⁵³ Ibid.

⁵⁴ See Evans and Silk (2013).

⁵⁵ See ‘Role and responsibilities of the Council of Europe's statutory organs with special emphasis on the limitation of membership rights’ DLAPIL 18/2018 of 25 September 2018.

⁵⁶ Parliamentary Assembly Resolution 2287 (2019) of 25 June 2019.

eventually denounced the Convention and withdrew from the Council of Europe before the Committee of Ministers could adopt a draft decision to suspend the country from membership.

So far, no member State has ever been sanctioned for showing a blatant disregard for the Rule of Law. Attempts by the Assembly to open ‘monitoring procedures’ in respect to Hungary⁵⁷ and Malta⁵⁸ failed in April 2013 and June 2019. Yet, on 24 April 2017, the Assembly chose to reopen a monitoring procedure regarding Turkey citing “serious concerns”⁵⁹ over a number of human rights, democracy and Rule of Law related issues.

Following up on the decisions adopted at the ministerial session in Helsinki, the Committee of Ministers and the Parliamentary Assembly are currently in the process of setting up, in addition to the existing procedures, a joint reactionary procedure to serious violations of the Organisation’s fundamental principles and values, including the Rule of Law, which could be triggered by the Parliamentary Assembly, the Committee of Ministers or the Secretary General.

While the details of the new procedure are still being negotiated, there appears to be broad agreement on the following characteristics of the new procedure. It should be

- credible: it must be a useful tool, that can be implemented in practice, and that is seen as a relevant and credible response to the crisis situation that we are trying to resolve;
- predictable: the various steps of the procedure need to be sufficiently predictable and clear to allow the Committee of Ministers, the Parliamentary Assembly and the Secretary General to follow *concrete and well-defined steps*, as stipulated by the Helsinki Ministerial Decision. This is also of particular importance for the member State concerned and will help make the procedure more efficient;
- reactive: the procedure needs to provide enough time for dialogue with the member State concerned on all necessary issues, but one also needs to react quickly to events, and one must avoid being entangled in inconclusive or endless discussions;
- reversible: it will be important to develop a well-defined exit-strategy, that also foresees how the procedure can be halted at each step of the procedure, if the member State concerned takes appropriate steps to rectify the situation.

As the example of the Venice Commission’s ‘Rule of Law Checklist’ shows, it is perfectly possible to identify certain core principles which are commonly accepted all over Europe. It is also feasible to use such principles to assess state conduct.

The danger however in charging the rule of law concept check-list with even more detailed and substantial requirements is that the conception constructed may be so strong that it is regarded as purely political, or conversely, the conception becomes so vague that it cannot be used for an intelligent analysis; in a nutshell, the analysis may be reduced simply to whether or not we consider a legal system to be good.

⁵⁷ Parliamentary Assembly, *PACE Committee Recommends Monitoring of Hungary*, 25 April 2013.

⁵⁸ A motion presented in the context of ‘Daphne Caruana Galizia’s assassination and the rule of law in Malta and beyond: ensuring that the whole truth emerges’ (Report by P Omtzigt, doc. 14906) failed, but Resolution 2293 (2019) was adopted and states *inter alia* that “the rule of law in Malta is seriously undermined by the extreme weakness of its system of checks and balances.”

⁵⁹ Parliamentary Assembly, *PACE reopens monitoring procedure in respect of Turkey*, 25 April 2017.

Moreover, measuring the ‘fairness’ of a procedure or a system, requires the making of complex judgments. As Wennerström warned already in 2007, attaching legal consequences and especially negative ones to a term, the meaning of which is unclear, runs counter to several if not most interpretations of the rule of law.⁶⁰ In other words, by expanding the notion of the rule of law too widely, and charging it too heavily with substantial requirements, there is a risk that the notion itself becomes so uncertain and unpredictable that it could fail its proper tests on clarity and foreseeability.

Maybe even more than human rights standards, rule of law principles are context-specific. They are always applied within a specific national context. A good example is the ‘measuring’ of the ‘fairness’ of a procedure or system, a task which can only be accomplished with reference to a particular legal system and through the weighing of different factors which feed into this complex assessment. A good example is selection procedure for judges. Whilst the election of judges by citizens is a well-established practice in Switzerland, the same approach would be unimaginable in a country with a relatively recent history of interethnic war like Bosnia and Herzegovina.

The diversity of Europe’s legal systems and cultures must however not be used as a pretext to justify violations of core principles. But it is equally true that rule of law standards cannot be harmonised in the same way as air or road traffic security standards.

Many questions remain to be resolved. Here are just a few that I would like to discuss with you on Tuesday, 29 October:

1. What should be the exact scope of the new procedure? Article 3 of the Statute refers to respect for human rights and rule of law and, indirectly, via the reference to Chapter I of the Statute, to ‘collaboration in the realisation of the aim of the Council of Europe’. ‘Democracy’ is only mentioned in the Statute’s preamble. What about respect for international law and in particular the peaceful settlement of conflicts?
2. Is it possible to define a threshold to trigger the new procedure, in particular as regards the Rule of Law? There is no doubt about situations of a military coup like in Greece in 1967. But this is probably not sufficient if the new procedure should also have a preventive function. On the other hand, it must be taken into account that action to be taken ultimately by the Committee of Ministers will require the existence of a “serious violation” of “the principles of the rule of law” within the meaning of article 3 of the Statute of the Council of Europe. To envisage exclusion from the Organisation, we shall have to be confronted with systemic or structural deficiencies of a certain magnitude, a series of actions and measures which in their entirety reach a critical threshold. Is it possible to define this threshold further? In particular in cases of member states accused of backsliding as regards Rule of Law principles?
3. Which role can the Parliamentary Assembly and the Secretary General play in the procedure? The Helsinki decisions put all three at the same level. All three should be entitled to trigger the procedure. However under the Statute the CM is the only decision-making body when it comes to decisions under article 8 of the Statute. The PACE is an organ with however mainly consultative functions and the SG (Secretariat) is not even an organ (unlike in the UN Charter).
4. How would the new procedure relate to existing procedures and mechanisms (e.g. PACE monitoring, ECHR, monitoring mechanisms such as GRECO or the Venice Commission and the HR Commissioner)?

⁶⁰ EO Wennerström *The Rule of Law and the European Union* (Uppsala, Iustus Förlag, 2007) 87 and 81.

5. What would be the relations between new procedure and EU mechanisms, in particular under article 7 TEU? From a purely legal point of view, Council of Europe and EU are distinct organisations and each one determines its procedures autonomously. In practice, however...?

7. References

Barentine C J (2015) *The Lost Constellations: A History of Obsolete, Extinct, or Forgotten Star Lore*. Springer International Publishing

Carrera S, Guild E and Hernanz N (2013) *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU*. Available via <https://www.ceps.eu/ceps-publications/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu/>. Accessed 21 August 2019

Drzemczewski A (2018) *European Commission for Democracy through Law (Venice Commission)*, HRLJ 37:184-198

Evans P and Silk P (2013) *The Parliamentary Assembly – Practice and Procedure*, 11th edn. Council of Europe

Gardner D (6 April 2017) *A breach between Turkey and the EU that suits both sides*, Financial Times p 6

Grimm D (2016) *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie*. Verlag C.H. Beck.

Huber P (2016) *The Principle of Proportionality*. In: Schroeder W (ed) *Strengthening the Rule of Law in Europe*, 1st edn. Hart Publishing p 111

Lübbe-Wolff G (2019) *‘Richterwahlen in der Schweiz: Wo liegt das Problem?’* VerfBlog, Available via <https://verfassungsblog.de/richterwahlen-in-der-schweiz-wo-liegt-das-problem/>. Accessed 26 August 2019

Polakiewicz J and Sandvig J (2016) *The Council of Europe and the Rule of Law*. In: Schroeder W (ed) *Strengthening The Rule of Law in Europe*, 1st edn. Hart Publishing p 115-134

Steiner E (2016) *The Rule of Law in the Jurisprudence of the European Court of Human Rights*. In: Schroeder W (ed) *Strengthening the Rule of Law in Europe*, 1st edn. Hart Publishing p 154