



**Overview Paper**  
**‘EU Policy Perspectives’ seminar series**  
**Clingendael European Studies programme (CESP)**

***Building Mutual Trust in a European Rule of Law***  
***A Bottom-up approach***

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Policy seminar organised by the Clingendael Institute  
in cooperation with the Netherlands Ministry of Foreign Affairs  
Huys Clingendael, Clingendael 7, The Hague  
7-8 April 2011

As a global ‘rule of law’ promoter,<sup>2</sup> the EU has engaged in an ambitious effort to sustain such a norm both abroad and within the EU. This quest for a European rule of law and mutual trust is supported by a comprehensive legal backbone developed within the Council of Europe and the EU. In spite of the inclusion of the Charter of Fundamental Rights<sup>3</sup> as a legal binding instrument and the ongoing negotiations for EU accession to the European Convention of Human Rights, rule of law is not self-evident. The possibilities for member states to call upon each other to ensure a balanced level playing field for citizens and businesses are limited and to a certain extent, unwelcomed. The recent row over the Roma ‘circulaire’ or the Hungarian media law illustrate those difficulties. Strong monitoring systems<sup>4</sup> and safeguards are in place. However, the current standardized approach to rule of law reform in member states to a certain extent limits the possibilities to effectively remedy state-specific shortcomings.

Departing from a traditional institutional approach, this seminar investigates the possibilities to foster a bottom-up approach ***to prevent breaches to the rule of law in Europe and foster a European rule of law culture***. Adhering to rule of law standards is a common challenge to various public, private and judicial actors. It is a dynamic acquis which requires continuous efforts, all the more because the EU needs to live up to the self-proclaimed standards it sets at home and abroad. Promoting the rule of law in Europe is not a mere organisational effort, but should be viewed a collective societal effort to protect crucial legal rights and benefits.

The objective of this seminar is to provide useful policy recommendations and practical tools to innovatively strengthen the rule of law amongst EU member states. To support this objective, this seminar will gather policy-makers, experts and academics to take stock of experiences, sharing best practices and identifying the most appropriate instruments and policy channels.

The seminar will take place under Chatham House rule, allowing for a free and open discussion.

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<sup>2</sup> Article 2 TEU

<sup>3</sup> The emphasis on rule of law standards is furthermore reflected in documents such as the Treaty of Lisbon amendments (2007), the Treaty establishing a Constitution for Europe (2004) and in multiple EU Accession Treaties.

<sup>4</sup> Several systems exist that monitor inter alia the functioning of judicial systems, press freedoms, implementation of EU legislation, corruption or money laundering in the context of the Council of Europe, via the role of national courts, the Luxembourg and Strasbourg Courts, OSCE structures, the Fundamental Rights Agency, the European Court of Human Rights, the European Court of Justice, The Committee for the Efficiency of Justice, the specialized monitoring mechanisms GRECO, OLAF and Moneyval, and via the role played by the Commissioner for Human Rights Thomas Hammarberg.

## INTRODUCTION- THE THEORY-IMPLEMENTATION GAP

Before delving into the heart of the matter, one must underline the variety of interpretations surrounding the concept of rule of law. Generally speaking rule of law refers to “*the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws*”.<sup>5</sup> In police states, on the contrary, authorities have no limitations to their powers. Rule of law is linked to democratic freedom and to the conclusion of a social contract since, for Rousseau “*obedience to a law one prescribes to oneself is freedom*”,<sup>6</sup> and as such, “*the people subject to laws, ought to be their author.*”<sup>7</sup> Such a principle is also guaranteed by checks and balances amongst the executive, the judiciary and the legislative powers.<sup>8</sup>

Today, the global consensus on the rule of law is unprecedented: “the fact remains that government officials worldwide advocate the rule of law, and equally significantly, that none make a point of defiantly rejecting the rule of law”.<sup>9</sup> This consensual understanding is shared by countries like Russia, China and other liberal authoritarian governments in the Middle East and North Africa that praise the virtues of rule of law reforms.<sup>10</sup> Considering the broad and complex nature of this concept, the international consensus on its significance is puzzling.

The modern day practice of the rule of law is indeed characterised by some confusion. Rule of law reform is often understood as a *means* and not an *objective* in itself. The “new orthodoxy” of the “Washington consensus” in the eighties claimed that political modernization, stability, democratization and economic growth were dependant on the implementation of the rule of law and other ‘good governance’ principles. Rule of law would be the cure to many of developing countries curses. Tamanaha noted that “at a training session of the World Bank staff members and consultants, ‘rule of law’ was probably the most repeated phrase of the week”.<sup>11</sup> The concept was nonetheless used in a narrow sectoral definition, ignoring many different social, legal and economical aspects. Reforms would focus on commercial law and judicial institutions while no attention was given to, for instance, law enforcement agencies as a basic flanking measure.<sup>12</sup>

Confronted with such criticism, international institutions and banks have turned to “bottom-up approaches” with concepts of “legal empowerment”, “access to justice” and “micro-justice”.<sup>13</sup> Similarly the World Justice Project has put together a rule of law index to examine

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<sup>5</sup> Oxford Dictionary

<sup>6</sup> J.J. Rousseau, (1762) *"Of the Social Contract or Principles of Political Right"*, p. 66

<sup>7</sup> Idem, p. 87

<sup>8</sup> C. De Montesquieu (1748). *The Spirit of Laws, Book XI(3), Of the Laws which Establish Political Liberty, with Regard to the Constitution.*

<sup>9</sup> Tamanaha, B.Z. (2004). Ibid. p. 3

<sup>10</sup> This confronts rule of law promoters like the EU with the inefficiency of its policies in supporting the independence of judiciaries. See S. Wolff (2009) *'Constraints on the Promotion of the Rule of Law in Egypt: Insights from the 2005 Judges' Revolt, Democratization*, Volume 16, No. 1.

<sup>11</sup> Tamanaha, Brian Z. (2004). *'On the Rule of Law'*. Cambridge University Press. p. 2

<sup>12</sup> G. Barron (2005). *'The World Bank and the Rule of Law Reforms'*. Working Paper Series, Development Studies Institute, London School of Economics. p. 32

Available at [www2.lse.ac.uk/internationalDevelopment/pdf/WP70.pdf](http://www2.lse.ac.uk/internationalDevelopment/pdf/WP70.pdf)

<sup>13</sup> These approaches target the marginalised and poor sections of the population in developing countries and are linked to the Millennium Development Goals and the eradication of poverty. See B. Van Rooij (2009). *"Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation."* Working Paper, March 25, 2009, Available at SSRN, <http://ssrn.com/paper=1368185> (2009)

practical situations where rule of law deficits impact the daily life of ordinary people.<sup>14</sup> This index looks at whether citizens have access to non-corrupt public service and whether mediation to solve disputes between neighbours or companies by an independent adjudicator is available. It takes a ‘human security’ perspective, looking also at the level of crime and the presence of police abuse. Such initiatives help to take into account citizens’ perspectives on the rule of law in their daily life, and can potentially complement more traditional institutional monitoring instruments.<sup>15</sup>

International theory and practice of the rule of law is therefore quite diverse and fragmented, leading to a so-called “theory-implementation gap”. Given that the EU has taken on a role of rule of law promoter, it is worth investigating whether what the EU is advocating abroad is a reality at home. This inquiry into rule of law at home is key when put into the perspective of an EU legitimacy deficit. Rule of law in Europe is indeed linked to issues of accountability and transparency.

The ambition of this seminar is to identify gaps, and to investigate how to address these gaps from a bottom-up perspective, by involving non-governmental actors. The aim is therefore to shed some new light on the European integration process and investigate whether a greater degree of coordination between different international and domestic rule of law reform strategies is needed.

To do so, **part one** shows that this ‘living acquis’ is at stake, in both old and new EU member states. The undermining of press freedom, fundamental rights infringements, the lack of mutual trust amongst EU judicial systems, are some of the structural problems that citizens, third country nationals and businesses are confronted to and are currently in the European media headlines. **Part two** opens up avenues of reflection and explores the different strategies available to individual citizens, non-governmental organisations and companies interested in addressing rule of law issues through a bottom-up approach

## 1. CHALLENGES TO FUNDAMENTAL RIGHTS AND THE RULE OF LAW IN EUROPE

The entering into force of the Lisbon Treaty constitutes an important step towards reinforcing the rule of law and the regime on fundamental rights. The Charter of Fundamental Rights acquired a legal binding value with the entering into force of the Lisbon Treaty (2009) and the EU has now the possibility to accede to the European Convention on Human Rights. This fundamental rights regime is nonetheless still fragmented since the UK, the Czech Republic and Poland have asked for derogations to the Charter of Fundamental Rights.<sup>16</sup> In addition, member states still continue to have different legacies and histories when it comes to the rule of law.

With the expansion and deepening of European integration, national challenges to the demand for regional legal compliance are likely to arise more frequently. In spite of a strong legal backbone, the situations presented below show that member states can be resilient to the

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<sup>14</sup> M.D. Agrast, J.C. Botero and A. Ponce (2010) *The World Justice Project: Rule of Law Index*. Available at WJP: <http://www.worldjusticeproject.org/>

<sup>15</sup> Regarding Europe, it is regarded as the region, together with North America, that performs the best in all rule of law categories: “*These countries are characterised by low levels of corruption, with open and accountable governments, and effective criminal justice systems.*” *The greatest problem identified in Europe is the lack of access to civil justice (legal council), especially by marginalised groups*” (*idem*, p. 18)

<sup>16</sup> See Protocol 30 TFEU

overall aim of strengthening of a supranational rule of law and the EU's fundamental rights. A few recent examples are selected below to provide food for thought.

**Press freedom** is a field where constant attention is needed. The debate over the Hungarian media law shows the lack of effective instruments to hold accountable another 'member of the club'. Following the introduction of amendments to the law that were considered to impair press freedom, the European Commission asked the Hungarian government to revise this law. Leading to an intense debate in the European Parliament, the requested changes were considered insufficient and the law still in breach of the Charter of Fundamental rights. This corroborates serious doubts raised by the OSCE regarding media supervision. Following a resolution voted by the European Parliament, the Hungarian government stated that it was victim of a "witch hunt".<sup>17</sup> This response is reflective of the political sensitivity involved when confronted with international pressure exerted by fellow states; in particular when coming from a supranational institutions like the Commission and the European Parliament. Public political pressure at the highest level is effective in such cases.

The Hungarian example is sadly symptomatic of other threats to press freedom in Europe. The 2010 Press Freedom Index showed that Europe is falling from its pedestal:

"It is disturbing to see several European Union member countries continuing to fall in the index. If it does not pull itself together, the European Union risks losing its position as world leader in respect for human rights. And if that were to happen, how could it be convincing when it asked authoritarian regimes to make improvements? There is an urgent need for the European countries to recover their exemplary status".<sup>18</sup>

Members of the European Parliament suggested possible initiatives to be taken such as a European directive on conflicts of interest, a directive on media pluralism or even launching a Citizen initiative, as is now made possible by the Treaty of Lisbon.<sup>19</sup> This leads to the question of what are the alternative means, other than new directives, to guarantee press freedom?

Turning to more vulnerable groups of European societies, fundamental rights are also at stake in the field of **asylum and migration**. On the road towards common EU policies in those fields, difficulties emerge as to the conditions of reception and treatment of asylum seekers. Recently, Greece has been at the focus of much international attention, as is shown by the jurisprudence of January 2011,<sup>20</sup> the repeated calls of the Council of Europe, its Secretary General but also the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Fundamental Rights Agency on the urgency to improve treatment and the conditions of detentions.<sup>21</sup> This begs the question whether

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<sup>17</sup> Agence Europe, EU/JHA: Media law, Budapest attacks "witch hunt" Brussels, 11/03/2011

<sup>18</sup> Europe without Borders (2010). Europe falls from its pedestal, no respite in the dictatorships. 2010 World Press Freedom Index, 20 October 2010.

Available at [http://www.ifex.org/international/2010/10/21/c\\_general\\_gb.pdf](http://www.ifex.org/international/2010/10/21/c_general_gb.pdf)

<sup>19</sup> (EU) EP/JHA: Media freedom, S&D wants European Tools Brussels, 03/03/2011 (Agence Europe) -

<sup>20</sup> European Court of Human Rights (2011). *M.S.S v Belgium & Greece* (application no. 30696/09). 21 January 2011

<sup>21</sup> For example, the "CPT public statement concerning Greece", available at <http://www.cpt.coe.int/documents/grc/2011-10-inf-eng.htm> and the FRA report: "coping with a fundamental Rights Emergency: The situation of persons crossing the greek land border in an irregular manner". Available at [http://fra.europa.eu/fraWebsite/attachments/Greek-border-situation-report2011\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/Greek-border-situation-report2011_EN.pdf)

jurisprudence and political statements are enough to trigger change and to ensure to asylum-seekers access to justice and the possibility to exercise their rights.

In the field of judicial cooperation, rule of law and fundamental rights are at the heart of the principle of mutual trust in each other judicial systems. *The European Arrest Warrant*, established in 2002 to replace extradition processes amongst EU member states initially met with a lot of resistance.<sup>22</sup> According to Human Rights Commissioner Thomas Hammarberg, it is currently being misused by member states and seen as a threat to human rights. With around 1000 EAW issued every year, concerns have been voiced regarding “the imprisonment of innocent persons, disproportionate arrests, violations of procedural rights and the impossibility in some countries for an innocent person to appeal against a decision to be surrendered”.<sup>23</sup> Some cases are pending in front of the Strasbourg Court. While this instrument should have enhanced mutual trust amongst EU member states and encouraged criminal cooperation, one can easily perceive its potential for undermining it instead. The problems identified include “the absence of an effective remedy against a decision to extradite an individual subject to an EAW; the considerable lapse of time between the date of the alleged offence and the issuance of an EAW; and the impossibility for individuals in some countries to have an EAW against them cancelled– even when their innocence has been established or a member state has decided not to surrender them”.<sup>24</sup>

Rule of law is also an important field to ensure a level-playing field for *businesses*. Corruption and non-transparent public procurement procedures can easily push entrepreneurs to be more risk-avoiding. Those issues can cause serious impediment to entrepreneurship in some countries. For example, in the case of Bulgaria, Ivanova reports that “starting a business in Bulgaria is more difficult than in other countries. Onerous license and registration systems, slow and incompetent administration and centralisation create obstacles for private business. The procedure for securing building permission takes an average of 136 days and obtaining energy supplies for new industrial construction sites takes 85 days, compared to an average of 17 days for Central Europe. Poor and cumbersome business regulations create conditions for corruption.”<sup>25</sup>

Likewise, the practice of *public procurement* or public contracting is a frequently recurring issue-area when considering adherence to the rule of law in the private sector. It is a field where risks of uncompetitive corporate behaviour, corrupt (legal administrative) practices and fraud are multiplied. Considering that about 70% of a government’s expenditure is allocated via contracts,<sup>26</sup> the impact of such illegal practices is likely to be significant, especially in

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<sup>22</sup> Some obstacles have been encountered following a case raised by the German constitutional court concerning this EAW. In a judgment on 18 July 2005, the Bundesverfassungsgericht declared that the German implementing law was against German Basic Law and argued that “extradition of a German would run counter to the principles of legality enshrined in the constitution, as citizens cannot be handed over against their will to, a legal system which they ignore and in which they do not have confidence”(Fichera, M. 2009: 82) . A new implementing law had to be drafted. The EAW, which was also legally challenged in Poland, Cyprus and the Czech Republic, clearly reflects the discrepancy between a unanimous adopted Framework Decision by the Member states and the problems of trust between European judicial systems in practice. See Fichera, M. (2009). “*The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*” European Law Journal, 15(1), January 2009: 70–97.

<sup>23</sup> T. Hammarberg (2011). *Overuse of the European Arrest Warrant – a threat to human rights*. Blog, posted 15 March 2011.

<sup>24</sup> Ibid. T. Hammarberg (2011).

<sup>25</sup> S. Alegre et al (2009) p. 42

<sup>26</sup> United Nations Public Administration Network (UNPAN) (2010) Data center. Accessible via <http://www2.unpan.org/egovkb/datacenter/CountryView.aspx>

large sectors (oil, construction, pharmacy). The multi-faceted and quick paced interaction between governments and companies in this area moreover causes it to be challenging to combat corrupt practices. “Corruption is rarely a one-sector phenomenon, occurring only in one institution of the state, or at one level of the bureaucratic hierarchy, it tends to pervade large parts of the state administration (...) Try to curb corruption by implementing anti-corruptions measures into the procurement procedures can therefore appear optimistic in such a setting”.<sup>27</sup>

Non-governmental strategies aimed at decreasing the risks involved are arguably viable, as for instance reflected by the development of Integrity Pacts by Transparency International developed in the nineties. Such pacts constitute a written agreement between all government departments and corporate bidders involved to refrain from bribery and collusion. While currently often applied outside of Europe, EU governments have participated in such pacts<sup>28</sup> and the model may provide a good basis for more European oriented initiatives.

### *Questions for discussion*

- What have we learned from the experience of an expanded European acquis (in terms of scope and depth), as a result of the European integration process?
- Where have existing (monitor and compliance) instruments in these fields been ineffective and why?
- Which additional grey areas of European integration can be identified? Are there any friction areas which also contributed to the EU ‘legitimacy deficit’, both at EU and national level?

## **2. PROSPECTS FOR A BOTTOM-UP APPROACH**

This paper provides some reflection on the extent to which the practice of the rule of law suffers from a ‘theory-implementation gap’. While Europe certainly performs very well when compared to other regions globally, it is crucial to realise that the rule of law is a ‘dynamic acquis’. As such, it is not set in stone, and evolves alongside European societies. Press freedom, asylum-seekers, trust amongst European judicial systems, the correct implementation of EU legislation, are only some of the problematic areas identified in this paper. They demonstrate the extent to which they impact on the daily lives of citizens, third country nationals and businesses.

In devising new strategies to strengthen the rule of law in Europe, and the problem of naming and shaming Alegre et al. point to the importance of *EU capacity-building* programmes to “raise awareness of the issues, offer technical assistance and push for change on a national and European level”.<sup>29</sup> Improving professionalism of key actors such as judges, policemen, prosecutors, is another long-term effort that should help diffusing a rule of law culture in Europe.

<sup>27</sup> T. Soreide (2002) ‘*Corruption in public procurement: Causes, Consequences and cures.*’ Chr. Michelsen Institute (CMI Report R 2002:1) p. 39

<sup>28</sup> For example, in Italy a number of large municipalities were collectively bound by an integrity pact, binding the whole administration to standards that stimulated more transparent, competitive and fair legal conduct. Transparency International (2002) *The Integrity Pact : The concept, the model and present applications. A status report.* Available at [http://www.transparency.org/global\\_priorities/public\\_contracting/integrity\\_pacts](http://www.transparency.org/global_priorities/public_contracting/integrity_pacts)

<sup>29</sup> S. Alegre et al. (2009). p. 15

Looking at the case of Bulgaria, Ivanova points out that, inter alia, *the improvement of qualifications and professionalism of judges* constituted a crucial aspect of rule of law reforms. Improving access to case law and jurisprudence, internet access for judges as well as the furthering of international legal cooperation are equally important. This should be coupled with investments *in supporting education at university level*: “The teaching positions in law schools are not attractive for young and motivated lawyers. Bulgarian academics have been underpaid for years; most law school professors also have a legal practice or a political career on the side, which leaves them with little time or incentive to acquire new knowledge. Deterioration in university level education will inevitably have a negative impact on the professional qualification of the members of the judiciary.”<sup>30</sup>

From a citizens perspective, *transparency* is arguably the best means to challenge rule of law abuses with. However as rightly pointed out by Skrzypiec, in Poland for instance, only few citizens are aware of the possibilities offered by the law regarding the activities of local authorities, etc. Pointing out the “severe lack of *civil society watchdogs*”, the few hundred active NGOs are actually more concerned with “soft human rights and environmental issues” as opposed to tougher questions such as corruption. Most of the operating watchdogs are actually lacking proper human resources and know-how. Other external obstacles include the lack of financial and institutional support. “It is, indeed, extremely difficult to find appropriate sources of funding because, as a rule, the governments and businesses who could provide funding are themselves the main object of scrutiny of the watchdogs, thus creating a “conflict of interest”.<sup>31</sup> Further support, financial and training expertise, with exchange of best practices and know-how are therefore still central to the sustained efforts to support the rule of law in Europe.

Furthermore, the *lack of knowledge* amongst EU citizens, concerning their own basic rights is worrying. A recent survey by the European Ombudsman reveals that EU citizens are not fully aware of their rights. 72 percent of the respondents declared they felt not well informed about the entering into force of Charter of fundamental rights. They also showed signs of dissatisfaction as to the lack of transparency of EU institutions.<sup>32</sup>

Those are only some of the aspects that this paper can suggest as possible areas of discussion. The workshop will undoubtedly identify many more. The discussion will focus on civil society and businesses experiences and an exchange of best practices when it comes to responding to weak rule of law environments and infringements to fundamental rights in Europe.

Common problems, but also how to devise strategies from a bottom-up, as well as ways to promote a level-playing field for businesses and citizens will be discussed.

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<sup>30</sup> S. Alegre et al. (2009) p. 35

<sup>31</sup> R. Skrzypiec (2004). ‘*The Enlarged European Home Needs Enhanced Networks of Watchdogs.*’ Open Society Institute. Available at [http://www.soros.org/resources/articles\\_publications/articles/european-watchdogs-20040501/european-watchdogs-20040501.pdf](http://www.soros.org/resources/articles_publications/articles/european-watchdogs-20040501/european-watchdogs-20040501.pdf)

<sup>32</sup> European Ombudsman (2011). 72% of European citizens do not feel well informed about the Charter of Fundamental Rights. Press release No. 6/2011, 18 March 2011.

### *Questions for discussion*

- What are best practices where stakeholders have successfully stimulated sustainable changes in the field of rule of law ?
- Which options are available to non-governmental actors when confronted with an infringement of legal rights?
- Can we establish initial guidelines on how to cope on a practical level with national challenges to EU rule of law principles?