



‘EU Policy Perspectives’ seminar series
Clingendael European Studies programme

A Policy Agenda for a European Rule of Law *Glass half-empty or half-full?*

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So far, the essence of the EU has been market integration. Since the end of the Berlin wall, EU citizens have lived in peace and security and tangible economic benefits have become the prime legitimizing aspect of European integration. More than originally understood, the internal market only functions when tightly linked to economic policy and the rule of law. Economic stability, stable financial sectors and trust are key ingredients for any society to function. Success in European integration with the internal market, the enlargement and progress in policies and instruments beyond traditional European policies make it necessary to now focus on the legal foundations of the EU.

The rule of law is intrinsically connected to the completion of an Area of Freedom, Security and Justice. The lifting of internal borders, following the Schengen agreement, as well as the efforts towards establishing a common EU migration and asylum policy and improved police and judicial cooperation, depend on a strong rule of law and respect for the principles of mutual recognition/trust. The recent row between France and Italy over the freedom of movement of Tunisian migrants within the Schengen space is another illustration that trust and the rule of law can easily be put under question, as also reflected by their joint proposal to reform the Schengen Treaty so as to allow more control over EU borders. Time has therefore come to evaluate whether the current state of rule of law in the EU is strong enough to sustain these achievements.

In cooperation with the Netherlands Ministry of Foreign Affairs, ‘Institute Clingendael’ organized the seminar “*Building Mutual Trust in a European Rule of Law: a bottom-up approach*” (8 April 2011), gathering policy-makers and academics to discuss the state of rule of law in the EU. The objective was twofold. First it offered a bottom-up perspective on the rule of law. Following earlier institutional approaches mainly addressing rule of law issues from a top-down perspective,¹ this seminar was the opportunity to discuss practical concerns that practitioners encounter in relation to the rule of law. Secondly, the seminar explored what policy agenda(s) could result for further steps in European integration, notably using this bottom-up approach.

A broad agenda-setting discussion on the rule of law in Europe includes the danger of having to

¹ Referring here to a variety of EU mechanisms, in particular, the Copenhagen criteria as used in the EU accession process. But also, the legal framework as set out in the various European Treaties and the normative legal structure as established through the case law of European courts.

conclude that ‘all is well’. But an overly complacent attitude in this regard should be heeded, as the conclusions of this seminar underline the need to put the theme of ‘the rule of law’ high on the European agenda. This is the time to frame the rule of law as an instrument for regional cooperation, as it offers a fresh look at the state of EU integration and forces us to approach the process as a glass half-empty or half-full.

The practical agenda(s) resulting from the discussions of the seminar in particular underlines:

- There is no reason for complacency. Although Member States are forced to cut back in financial programmes, further improvement in building capacities for rule of law projects are vital. Many frictions in the rule of law across the EU were discussed in the seminar. Analysis of threats to the rule of law are needed to elaborate the agenda. Yet, in any case the need for further training for judges and law enforcement organizations is beyond doubt.²
- The economics of rule of law should be considered. What are the costs involved, or perhaps more importantly, how much is the rule of law ‘worth’? The issues touched upon in the context of Eastern European enlargements are relevant here, as the link between stronger rule of law standards and an increase of foreign investment and economic performance is contested. Governments should take a more utilitarian approach, and harmonize legal standards so as to reduce the costs involved with a uncoordinated variety of national legal systems.
- Promoting mutual trust between national administrations, and in the pyramidal structure of European courts, was seen as a key component to any strategy and constitutes an important goal on the agenda. Problems exist on all levels of this pyramid and by clearly dividing judicial competences and promoting trust amongst the different stakeholders, a more comprehensive rule of law base can be established.
- A bottom-up approach that includes civil society and corporate actors could facilitate abovementioned trust. Policy measures or monitoring mechanisms involving non-state organizations and legal professional networks³ form a key element of this capacity-building instrument. In addition, enabling better access to courts, for citizens, companies and civil society organizations, should be a priority. National courts should play a crucial role as interpreters and enforcers of European rule of law standards. By emphasizing the responsibility of national courts in this manner, the workload of standard-setting European Courts (Strasbourg Court, Luxembourg Court) is reduced, and their area of judicial competence more clearly defined.
- Any agenda should focus on consolidating the current European acquis, before extending it. Effectively enforcing the framework we currently have is a challenge in itself. Through moderating the pace of the EU integration process in this manner, and

² A range of initiatives are applicable here, including anti-corruption training, training in EU law and policy developments, training on international legal cooperation between national administrations, etc.

³ Participants particularly pointed at the rather uncoordinated group of professional networks involved with rule of law issues. There is room for more interaction between these networks, in line with our idea of a more comprehensive bottom-up strategy. Examples include, the European Judicial Training Network (EJTN), The International Network to Promote the Rule of Law (INPROL) and the Hague Rule of Law Network (HRoLN).

by aiming to improve the quality of our current legal system, a more effective economic and political Union is made possible.

- The role of current and future rule of law monitoring mechanisms was examined. There are already many mechanisms that exist within the Council of Europe and the Fundamental Rights Agency. In that context, the discussion revolved around the need to use the already existing mechanisms fully.
- Given the current negotiations of the EU budget (the Multi-annual Financial Framework), an increase in Chapter 3 budget on Freedom, Justice and Security could enable policymakers to secure rule of law in the EU and implement some of the initiatives described in this report.

Summary of the seminar

Session 1: Rule of Law Challenges: identifying structural problem areas

The first session discussed the structural barriers that actors engaged with rule of law reform are facing in the EU today. Preliminary remarks were made on the nature of the rule of law as an *ideal* which guides modern states and its citizens in their quest for an optimal social contract. Challenges to this ideal include the *political plurality* and attachment to notions of *sovereignty* present in our Union. Such obstacles can impede mutual trust and legal harmonization in the EU. The *economic crisis* and subsequent budgetary cutbacks in both Member States and the Union constitute another challenge for the rule of law in Europe. The question of how much rule of law is worth was raised by the participants, as well as the high costs of preserving it, particularly when considering the issue of access to justice for citizens and small and medium-sized companies.

Another issue identified was *the double-standard discourse of the EU* pointing at a dilemma between rule of law promotion abroad and a perceived rise in rule of law breaches within its own jurisdiction, including in ‘older’ Member States such as Italy (press freedom) and Greece (asylum policy, human rights infringements in the detention sector). This development challenges EU credibility and diminishes the image of the *EU as a rule of law guardian* in the eyes of the public.

Challenge No. 1 - Lessons from the rule of law promotion during the Eastern Enlargement

Results to promote the rule of law during the 2004 and 2007 enlargements have been mixed, contrasting the often shared vision that the enlargement was a success. Participants pointed out that there is little data to suggest that the 2007 enlargement processes of Bulgaria and Romania, have solidified rule of law principles to a great extent. On the contrary, *public trust in the Judiciary* in Poland, Bulgaria and Romania has been consistently low over the period between 2004-2009. The percentage of the population trusting the judiciary actually diminished over time in the latter two states.⁴

One problem identified during the discussions was that during the accession negotiation process, the emphasis on rule of law standards by the European Commission was placed only in the latest stages of the negotiations.⁵ Consequently, the acceding state’s response became a *‘tick the legal box exercise’*, presuming an automatic link between adoption of the *acquis* and an adherence to rule of law principles. Little effort was made to raise awareness on the public advantages of a well functioning rule of law and as a result, candidate states tended to perceive reform efforts merely as a formal criteria to obtain membership. In order to further motivate states, the boon of economic gain via an increase of *foreign investment* is often stressed in relation to the rule of

⁴ As reflected by various European Commission Standard Barometer reports issued between 2004 and 2010, “Eurobarometer: Public Opinion in the European Union. All available at http://ec.europa.eu/public_opinion/archives/eb_arch_en.htm

⁵ It should be acknowledged that the European Commission has recognised the need for an earlier focus on rule of law reform, as stated in their policy document: Commission of the European Communities (2008) “*Enlargement Strategy and the Main Challenges 2008-2009*” COM(2008) 674 Final, p. 14

law. However, the link between economic performance and high rule of law standards is far from absolute and corrupt practices can offer an alternative sort of predictability and stability, particularly for corporate actors. Such considerations should push policymakers to rethink the use of current conditionality mechanisms as instruments for rule of law reform and to more clearly explore additional (economic/social) incentives for ‘new’ Member States to truly enforce high rule of law standards.

Challenge No. 2 - The need for mutual trust and institutional efforts

For a rule of law to develop within a political union of 27 Member States, **trust** is a crucial component, irrespective of whether it pertains to the functioning of public procurement procedures or Justice and Home Affairs cooperation.⁶ To truly create trust, European *legal systems must be sufficiently harmonized⁷ and mutually recognized*.

In the EU legislative system, as a pyramidal structure of courts, *national courts* have the initial responsibility to provide access to court and transpose EU legal guidelines. Legal norms are to be translated and enforced by the different national systems of the Union. Towards this purpose, the European Court of Justice ought to be acknowledged as a key actor in the strengthening of the rule of law in Europe.

However, national political support for internationally set (legal standards) remains a crucial element. The breach of the Growth and Stability Pact by Germany and France in 2003, and the subsequent lack of repercussions exerted through the European Commission, was mentioned as an example of a scenario where considerations of political power overruled reliability on the rule of law. The **rule of power** overtook **the rule of law**.⁸

Session 2: Experiences in the Field: the bottom-up approach

Traditionally rule of law reform is often considered from a top-down perspective, whereby EU institutions, the Council of Europe and various International Courts play a key role. This session looked into bottom-up initiatives potential to supplement such institutional efforts and remedy the general detachment of European citizens to the European integration project. The discussions gathered views from civil society and business actors.

Although often less financially powerful than governmental or corporate actors, *civil society actors* are well positioned to address rule of law issues from a *bottom-up perspective*. They can act as a bridge for citizens to voice concerns and respond to treatment perceived not to be in accordance with the rule of law. However, civil society actors face several constraints to sustain the rule of law in Europe, notably in terms of resources, staff and (active) public support.

⁶ The implementation of the European Arrest Warrant (EAW) would be a prime example

⁷ The application of the European Arrest Warrant (EAW) appropriately reflects the imbalance created by the practice of mutual recognition. States make abundant use of it, but national standards and practices regarding its use are not harmonized, rendering its intended purpose ineffective.

⁸ For an in-depth analysis of the issue, Caballero, A. et al. (2006) *Credibility, Rules and Power in the European Union Institutions: a Transactional Analysis of the Stability and Growth Pact*. Brazilian Journal of Political Economy, Vol. 26, No 3 (103), pp. 445-458

Companies tend to favor pragmatic responses that allow them to navigate within the ‘governing law’ of a particular state territory. Participants stressed the need for a more collective response, both in terms of cooperation between different companies operating abroad and cooperation between companies and their domestic government.

The growing attention for *Corporate Social Responsibility* (CSR) was mentioned as a possible useful tool. While criticized by some to be mere public relations schemes, CSR should not be discounted as a (financially) powerful practice to affect change. It was pointed out that in terms of financial weight businesses are not equal when rule of law breaches occur. Small and medium-sized enterprises in particular, have much less leverage and financial means when it comes to taking legal action.

Further Policy Recommendations

- The potential for a European version of the American Civil Liberties Union should be explored⁹.
- Provide a bigger budget for the Council of Europe.
- The ‘integrity pacts’ by Transparency International are mentioned as a good example of a civil society initiative acting as a crossover between NGO and state actors in addressing corruption.¹⁰
- Draw on the expertise and experience of private law firms in mediating conflicts when addressing rule of law breaches.

Session 3 and 4: The Rule of Law in Europe: devising strategies

During the afternoon workshops, strategies, best practices and policy instruments were formulated and are summarized below. These recommendations provide a tool box for policy initiatives to foster civil society ‘ownership’ as a complementary strategy towards rule of law reform.

Commonalities across policy sectors

As a preliminary remark, it is important to mention that regardless of the issue-area, there is a need for complementary strategies utilizing both:

- ***Bottom-up instruments*** (NGO, watchdog organizations, public awareness initiatives, CSR initiatives, etc)

⁹ The American Civil Liberties Union is a US nongovernmental organization established in 1920 and is concerned with the protection of freedoms and rights of US Citizens. Their legal activity in the area of US constitutional rights has been particularly influential. For more information, see the website of the American Civil Liberties Union: <http://www.aclu.org/about-aclu-0>

¹⁰ For example, in Italy a number of large local municipalities were collectively bound by an integrity pact, binding the whole administration to mutually agreed 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*. For further information on the Transparency International Integrity Pact instrument see: http://www.transparency.org/global_priorities/public_contracting/integrity_pacts

- ***Top-down instruments*** (legislative/executive institutional reform, legal enforcement)

Strategies need to be ***country specific***, taking into account the particular problems encountered and addressing them in a ***cross-sectoral/departmental manner***, as rule of law issues generally do not restrict itself to one particular body or organization. Moreover, an emphasis should be placed on ***promoting trust*** between all actors. Strategies should be ***consistent and sustainable***, as upholding the rule of law is a continuous challenge. It should ***include all stakeholders***, and in particular include civil society so as to facilitate a sense of ***ownership***.

Moreover, a clearer consensus on the conceptualization of the rule of law is needed. Finally, ***consolidating the current European acquis*** before extending it and ensuring actual enforcement and transposition of EU legal guidelines into national jurisdiction should be a priority in any strategy.

General outcomes of the discussions on good practices

The legislative

Anti-corruption and EU ***training*** for judicial staff and junior level public officials is a crucial area of attention. With regards to the international courts it can be said they demonstrate good practice in furthering human and fundamental rights principles. However, the issues of ***access to courts***, particularly the European Court of Justice, needs attention. In addition it should be aimed to keep the EU legal system ***transparent, organized and understandable*** to all, as well as making sure that new European legislation is swiftly and effectively transposed and enforced by national administrations.

The executive

With regards to the political executive branch of the government it was deemed important to ***stimulate political dialogue*** on the rule of law and to facilitate the ***disclosure of public information*** on rule of law issues, thereby empowering citizens with knowledge. ***Effective legal recourses***, such as the option for parties to appeal to the European Commission or the European Parliament when challenged by breaches of the rule of law, should be promoted more actively by governments and support should be provided for civil society actors actively engaged in rule of law promotion.

Civil society

Civil society should aim to increasingly act as a watchdog and form the basis for a more well-developed system of ***international and independent monitoring mechanisms***. Use of the media in promoting awareness on fundamental and human rights issues is advised as well as utilizing the various professional networks, such as ***the European Judicial Training Network (EJTN)***.. Finally, the expertise of many civil society organizations could contribute to ***raising awareness*** within national administrations of the latest legal and political developments originating in Brussels, thereby facilitating the top-down pyramidal legal harmonization within the Union.

Business

To facilitate the fast pace typical of the private sector, overregulation should be avoided and the potential of ***self-regulation*** amongst corporate actors should be developed. An appreciation for ***corporate social responsibility***, particularly when conducting business in an international context, is to be stimulated, as well as the capacity of companies to lobby governments.

Tool-Box on Rule of Law in Europe

- Establishment of civil society-based *independent rule of law oversight bodies*.
- Draw from the experience of the National monitoring mechanisms created by the Organization for the Prohibition of Chemical weapons¹¹.
- Stimulate research on finding the terms *European social contract where rule of law takes a prominent place*
- Explore the option of a *European Citizens charter*.
- Promote effective use of the new *European Citizens Initiative (ECI)* as introduced by the Lisbon Treaty.
- Promote use of the *E-justice portal*, as a publicly accessible database on legal issues.
- Integrate *the utilitarian principle* into rule of law reform strategy, letting self-interest provide an incentive to stimulate reform and harmonize different legal systems.
- *Pay grades of public officials* should be adjusted such as to lessen risks of corruption.
- Explore the use of *class actions*, or collective legal action, in a cross-national setting to address fundamental rights or human rights breaches and facilitate civil society opportunities for legal action¹².
- Exploring the use of interventionism through art. 7 Treaty on the European Union (TEU), allowing international intervention on the basis of a Member States' breach of the European values listed in art. 2 of the aforementioned treaty.
- Create a *European media organization* tasked with protecting press rights
- Develop legal and political *protection instruments for witnesses and whistleblowers* involved with rule of law breaches.
- Adopt more far-reaching European legislation, resembling US federal laws and in so doing effectively criminalizing corrupt practices, particularly bribery.
- Set-up a high level *annual European platform* or forum focusing purely on the facilitation of a European rule of law.
- Designate a specific EU budget on the rule of law to fund additional international initiatives.
- The capacity of the existing *EU legal aid fund* to further fund rule of law promotion and oversight mechanisms should be explored
- Consider the *development of I-phone apps* detailing fundamental,- and human rights to inform European Citizens of their legal rights.

¹¹ A specific reference was made the exemplary performance of national legislative enforcement measures following agreements made during the *Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction* (1993) Organisation for the Prohibition of Chemical Weapons, The Hague. If a state needs assistance to draft regulations and train staff for national enforcement of the international obligations, the OPCW visits and helps. The success score of the dedicated action programme for national implementation of the CWC is impressive.

¹² A class action is a form of legal action in which a large group of persons collectively bring a claim before court. This legal mechanism originated in the United States and is still predominantly a U.S. practice. However, in several European countries, legal changes have been made that allow consumer organizations to bring legal class,- or 'group actions' on the behalf of citizens. For an in-depth study on the potential use of class actions in Europe see: Cappalli, R.B. and Consolo, C. (1992) *Class Actions for a Continental Europe? A Preliminary Enquiry*. Temple University School of Law Journal, No. 217.