THE RULE OF LAW

SAFEGUARD FOR EUROPEAN CITIZENS

AND FOUNDATION FOR EUROPEAN COOPERATION

No. 87, January 2014

ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS
ADVIESRAAD INTERNATIONALE VRAAGSTUKKEN

AIV

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Foreword

On 19 April 2013 the government asked the Advisory Council on International Affairs (AIV) to produce an advisory report on the functioning of the rule of law in the member states of the European Union (EU). The government noted that the EU is a legal community and that it is therefore vital that the rule of law function effectively in all the member states. In the interests of the operation of, for example, the area of freedom, security and justice, the internal market and Economic and Monetary Union, it is essential for each member state to be able to trust the functioning of the rule of law in the others. Accordingly, the government's core question is whether more needs to be done to promote the rule of law in the EU, and if so, what. A number of specific questions arise out of this. The request for advice is enclosed as annexe I.

The AIV was faced with the task of analysing the extremely broad, wide-ranging issue raised in the request for advice – the proper functioning of the rule of law in the member states – with a focus on practical recommendations. Chapter I examines this issue from two perspectives: that of the citizen and that of the Union. The proper functioning of the rule of law in the member states is of great importance to EU citizens and for virtually all forms of cooperation within the EU. Chapter II discusses what is meant by the rule of law. Chapter III looks at a number of methods of monitoring and strengthening the proper functioning of the rule of law, while Chapter IV considers whether these instruments should be supplemented, with a particular emphasis on the potential contribution of peer review. The final chapter addresses the questions raised by the government.

To prepare this advisory report, the AIV established a joint committee chaired by Prof. E.M.H. Hirsch Ballin (Human Rights Committee). The members were Prof. M.G.W. den Boer (European Integration Committee), Ms K.M. Buitenweg (Human Rights Committee), Prof. R.A. Lawson (Human Rights Committee), Prof. L.A.J. Senden (European Integration Committee), Ms W.M.E. Thomassen (Human Rights Committee) and Ms H.M. Verrijn Stuart (AIV/Human Rights Committee). The civil service liaison officer was Ms M. de Jong and the executive secretary was J. Smallenbroek, assisted by O. de Roos and Ms J.G.M. van Laar (trainees).

The AIV adopted this advisory report at its meeting on 24 January 2014.

I The importance of strengthening the rule of law in the member states: two perspectives

I.1 Importance

This chapter explains that the proper functioning of the rule of law in the member states is of great importance from two perspectives: that of EU citizens and that of cooperation between the EU member states. The AIV would observe at the outset that the functioning and strengthening of the rule of law will always be influenced by the interaction between a state's institutional structure and its political and legal culture.

From the start, the EU and its predecessors, the European Communities, were intended to form a legal community, based on shared values and directed towards common interests. These values are summarised in article 2 of the Treaty on European Union (TEU), and reflect the fact that the EU draws its legitimacy from the rights and interests of its citizens. Article 2 states: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' Public trust in EU legislation and policy depends partly on citizens' conviction that decisions are made in a democratic manner and that the principles of the rule of law are observed when legislation is applied and enforced. It is important in this regard not only for people in authority to strictly adhere to the rules but also for respect for the principles of the rule of law to form part of a country's political culture.

Since the Treaty of Maastricht, nationals of EU member states have also been EU citizens, as stated in article 20 of the Treaty on the Functioning of the European Union (TFEU). Under the European Court of Justice's interpretation of this provision, EU citizens are not only free to travel, work and settle wherever they wish in the EU, but their EU citizenship also entitles them to make demands on member states of which they are not nationals. In other words, they have rights in other member states too.[1] Citizens are entitled to expect that everywhere in the EU, if they avail themselves of their freedoms, they can count on appropriate protection and certainties and their safety is guaranteed. This is essential if EU citizens are to have confidence in the rule of law. Empirical research shows that this confidence is not always present. Among EU citizens, trust in governments and parliaments is at a low ebb.[2] A majority of EU citizens do not agree that the law is applied and enforced effectively and equally for all, and that the state fights corruption effectively. Most have confidence in their national justice system but there are significant differences between the member states.[3]

1 See for example case C-85/96 *Martinez Sala*, European Court Reports 1998, I-2691, case C-184/99 *Grzelczyk*, European Court Reports 2001, I-6193 and case C-138/02, *Collins*, European Court Reports 2004, I-2703.

2 European Commission, Standard Eurobarometer 79, public opinion in the European Union, Brussels, July 2013, p. 55.

3 European Commission, Eurobarometer 385, Justice in the EU, Flash, Brussels, November 2013, p. 4.

In addition, cooperation in various areas, such as the free internal market and police and judicial matters, depends on the EU member states' truly functioning as democracies governed by the rule of law.

The importance of the proper functioning of the rule of law for a number of policy areas is discussed below, from the perspectives of both the citizen and the Union. It is also relevant that the credibility of the EU's external policy – which aims *inter alia* to promote the rule of law in third countries – partly depends on the proper functioning of the rule of law in the member states. This point is explained in the last paragraph of this section.

Police and judicial cooperation
Among the EU's objectives is the establishment of an area of freedom, security and justice within which the free movement of persons is possible and a balance exists everywhere between collective security and individual legal protection. Achieving this objective requires close cooperation between the member states in the field of criminal justice, for the free movement of persons enables citizens to move easily from one jurisdiction to another. Before the Treaty of Lisbon entered into force, the EU adopted 10 framework decisions relating to judicial cooperation in criminal matters, which were based on the principle of mutual recognition of judicial decisions.[4] With the entry into force of the framework decision on the European arrest warrant,[5] the system of extradition of suspects and convicted persons between states was abolished and replaced by a system of compulsory surrender between executing judicial authorities. When transposed into national legislation, the framework decisions considerably simplified cooperation between authorities. The AIV takes the view that this must not undermine the effective legal protection of the citizen. Provided the rule of law functions properly in all the member states, citizens can be confident that they will have access to the courts everywhere, will have the opportunity to appeal, will be able to have the assistance of counsel and that their case will be heard in public in a timely manner.

This type of cooperation also requires member states to have sufficient confidence in the functioning of the rule of law in other member states. The fact that this confidence does not exist in all cases and in all respects is acknowledged in EU documents. The Stockholm Action Plan, for instance, instructs the European Commission to put forward measures between 2010 and 2014 to strengthen mutual trust, including improving the protection of human rights, proposals for minimum standards in criminal procedural law, and the production of handbooks and the provision of training for public prosecutors, lawyers and judges.[6] The lack of mutual trust among the member states may also explain their slowness in transposing into national legislation framework decisions based on the principle of mutual recognition.[7]

4 M. Dane and F. Goudappel, 'European criminal law', in S. Wolff, F. Goudappel and J. de Zwaan (eds.), *Freedom, Security and Justice after Lisbon and Stockholm*, T.M.C. Asser Press, The Hague, 2011, p. 156.

5 See: <http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_nl.htm>, accessed 4 November 2013.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2010) 171, Brussels, 20 April 2010, pp. 8, 20-26.

7 M. Dane and F. Goudappel, 'European criminal law', p. 168.

The internal market
The essence of the single internal market is the achievement of the free movement of goods, services, persons and capital and the right of establishment. All businesses and EU citizens should have the same economic rights and obligations in all the member states. In other words, national authorities may not unjustifiably discriminate, directly or indirectly, between their own businesses and economically active citizens and those of other member states. The ban on discrimination on the grounds of nationality/origin – in other words the principle of equality – is thus fundamental to the internal market. The rules on the internal market are completed by rules on undistorted competition, protection of the environment and the consumer, public procurement, etc.

An essential precondition for effective economic cooperation is that the rule of law in the member states must be of a high standard. The EU is largely dependent on national legal orders for the implementation and enforcement of the substantive rules of EU law and for the legal protection they afford. Accordingly, the proper organisation and functioning of national legal systems are crucial to safeguarding the equal treatment to which EU businesses and citizens are entitled. Companies that wish to do business in several member states or EU citizens who wish to work in another member state must be able to have confidence that they will not suffer direct or indirect discrimination. And if they suspect that they are nonetheless being discriminated against they must have access to a well-functioning judicial system. In addition, if the rule of law functions well, it helps to ensure an attractive investment climate. If the rule of law functions below par in one or more member states, this can affect the operation of the internal market. Shortcomings in national legal systems are thus not only a problem for the member states in question but affect the operation of the internal market as a whole and the rights and obligations of citizens.

Asylum
The proper functioning of the rule of law in the member states is also relevant to EU cooperation in the field of asylum. Shortcomings in one member state can hinder the implementation of EU agreements. This was shown for example by the case of *M.S.S. v. Belgium and Greece* before the European Court of Human Rights (ECtHR).[8] M.S.S. was an asylum seeker residing in Belgium. Under the rules of EU asylum policy, Greece should have processed his asylum application and taken him back because he had entered the EU via Greece. Belgium therefore transferred the asylum seeker to Greece. On 21 January 2011 the ECtHR held that detention and living conditions for asylum seekers in Greece and the standard of the Greek asylum procedure did not meet minimum requirements and that under those circumstances a transfer to Greece was unacceptable. The implication was that no member state could transfer asylum seekers to Greece. This judgment was obviously very influential, for since then various national courts have forbidden the transfer of asylum seekers to Italy and Malta, among other countries, on similar grounds.[9] Decisions taken on the basis of European legislation can be reviewed in the light of rule-of-law and human rights norms. Judicial review can thus prevent European legislation from being applied. Member states have an interest in how other member states shape asylum policy and how they provide reception for asylum seekers.

8 *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECtHR, 21 January 2011).

9 M. den Heijer, 'Life after M.S.S.: unfinished business', *Netherlands Quarterly of Human Rights*, vol. 31/3, 2013, pp. 236-240.

EU member states must apply rule-of-law norms not only to nationals of member states (EU citizens) but to all those who are on their territory. In other words, these norms also apply to third-country nationals and stateless persons who are within the EU's borders. The rights of those who are not nationals of a member state are the focus of increasing attention in the development of European law, with debate being fuelled by the fate of asylum seekers from Africa who risk their lives to reach mainland Europe.

Decision-making in the European Union
Since the Treaty of Lisbon entered into force, the Council of the European Union has taken many decisions by qualified majority. This implies that individual member states can be bound against their will by a Council decision. In practice, every effort is made to reach consensus. Decision-making by qualified majority may mean that agreement is reached on a lower level of protection for civil and other rights than is deemed desirable in some countries. Given the interdependence of and interaction between decisions made at EU and national level, it is in the interests of each member state for the rule of law to be maintained at a high standard in all the others.

A credible external policy
The rights and interests of citizens and the closeness of cooperation within the EU are internal reasons for devoting attention to the functioning of the rule of law in the EU member states. In addition, promoting the rule of law in third countries is a significant element in EU external policy. Article 21 TEU states that the Union's action on the international scene must be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world, including the rule of law. It is important for the external credibility of the EU that the rule of law function at a high level within the Union. If the EU were to promote the rule of law in third countries – for example through the European Neighbourhood Policy, trade agreements and cooperation with developing countries – at the same time as member states were displaying serious shortcomings in that area, the EU would in fact be applying double standards.

In the framework of European Neighbourhood Policy, the EU strives for maximum political cooperation and economic integration with neighbouring countries in Eastern Europe and the southern Caucasus and on the southern shores of the Mediterranean. European Neighbourhood Policy takes concrete form through bilateral action plans, agreed between the EU and the individual neighbouring countries, aimed at political and economic reforms. The plans state, among other things, that the neighbouring countries will strive to strengthen democracy, human rights and the rule of law and that the EU will support them in this endeavour.[10]

The preamble to the Cotonou Agreement refers to the rule of law as 'part and parcel of long term development', and article 9 of the Agreement states that 'respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership,[11] shall underpin the domestic and international policies of the Parties'. The EU conducts political dialogue on a regular basis with other individual parties to the Agreement, during which the functioning of the rule of law may be on the agenda.

10 AIV advisory report no. 44, 'The European Union's New Eastern Neighbours', The Hague, July 2005.

11 The ACP countries are the 79 countries in Africa, the Caribbean and the Pacific region with which the EU has a special relationship.

The promotion of the rule of law is also referred to in trade agreements which the EU has concluded with third countries, such as Mexico, Chile, South Africa and CARIFORUM.[12]

The AIV's advisory report 'The Human Rights Policy of the European Union: Between Ambition and Ambivalence' observed that while human rights form an important part of what the EU regards as its international identity and the EU endeavours to present itself as a normative force in this field, it plainly has difficulty demonstrating the same commitment internally.[13] The same difference in level of ambition can be seen between the EU's internal and external policy on promoting the rule of law.

Since promoting the rule of law is an objective of the EU's external policy, agreements between EU member states and third countries must respect the relevant principles. This is not always the case, however. Under a 2004 agreement between Italy and Libya, for example, Italy was permitted to return asylum seekers to Libya, which is not party to the UN Convention on Refugees. Hence the agreement did not respect the principles of the rule of law.

I.2 Subsidiarity, proportionality and the rule of law

Over recent decades the member states of the EU have become increasingly intermeshed and the question of whether new, more far-reaching forms of cooperation are necessary and desirable is constantly being asked. New proposals for EU legislation are therefore reviewed in the light of the principles of subsidiarity and proportionality. The AIV has a reservation in this regard. Not only should proposed EU legislation be assessed in the light of the principles of subsidiarity and proportionality, but the government should also take into consideration the influence such legislation could have on the functioning of the rule of law in the Union. On the basis of subsidiarity, the government holds that criminal procedural law is primarily a matter for the member states.[14] The AIV believes that harmonisation of the elements of criminal procedural law concerned with legal protection is in fact desirable, as an extension of earlier European agreements, because this is the only way to ensure that citizens do not encounter unpleasant surprises in other member states on important matters like understanding the charges against them or the availability of legal aid.

It is true that the European Commission already subjects proposed new legislation to an impact assessment, focusing on its potential economic, social and environmental impacts. This enables the legislator to determine whether tension exists between the proposed legislation and its consequences, on the one hand, and the fundamental principles of the Union, such as equality before the law, on the other. The Impact Assessment Guidelines date from 2009 and will be revised in 2014.[15]

12 The Caribbean Forum of African, Caribbean and Pacific States.

13 AIV advisory report no. 76, 'The Human Rights Policy of the European Union: Between Ambition and Ambivalence', The Hague, July 2011, p. 27.

14 Annexe to House of Representatives of the States General, 22112 no. 1650, 'Inventarisatie EU-regelgeving op subsidiariteit en proportionaliteit' ('Analysis of EU legislation in the light of subsidiarity and proportionality'), point 20.

15 European Commission, Impact Assessment Guidelines, 2009; see: <http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf>, accessed 4 November 2013.

I.3 The debate on the rule of law in the European Union

It has been clear for many years that the rule of law forms the constitutional basis for European integration.[16] The debate on the rule of law in the member states has also been under way for years. It is thus not the case that debate has arisen only recently, following events such as the conflicts in France about the expulsion of Roma, in Hungary because of the undermining of the independence of the judiciary or in Romania, where judgments given by the constitutional court have been disregarded. Such conflicts have certainly helped to move the issue of the rule of law higher up the political agenda. Some years ago, this debate was mainly conducted in the context of police and judicial cooperation, but it now extends to other policy areas. The development of the debate is outlined below.

In 2005, the European Commission stated that strengthening trust between member states was essential for the acceptance of mutual recognition of judicial decisions. Assessment of the credibility and effectiveness of national legal systems in their entirety was necessary to increase mutual confidence that national legal systems meet high standards of quality.[17]

Mutual trust is also a prominent feature of the Stockholm programme for delivering the area of freedom, security and justice for the period 2010-2014, which summarises a number of ways of increasing trust between member states, such as providing training for judges and public prosecutors, extending networks, and evaluating instruments on the basis of the principle of mutual recognition.[18]

Partly in response to this, Germany, France and the Netherlands decided to set up a project aimed at devising a methodology for evaluating cooperation in criminal matters and strengthening mutual trust. The research was funded by the European Commission and the final report was published recently.[19]

The fact that nowadays the functioning of the rule of law in the EU member states is seen in a far wider context than that of police and judicial cooperation is also shown by the reluctance to admit Romania and Bulgaria to the Schengen area. By 2011 both countries had fulfilled all the technical requirements for acceding to the Schengen acquis, but the Netherlands, Germany and other member states took the position that they were not yet ready to do so because of the continuing corruption in both countries, which made it impossible to guarantee the rule of law.[20]

16 See for example María Luisa Fernández Esteban, *The Rule of Law in the European Constitution*, Kluwer, 1999.

17 Ibid., p. 9.

18 Ibid., pp. 13-14.

19 P. Albers et al., Towards a Common Evaluation Framework to Assess Mutual Trust in the Field of EU Judicial Cooperation in Criminal Matters, final report, 2013.

20 See: <http://www.minbuza.nl/ecer/nieuws/2013/03/bulgarije-en-roemenie-voorlopig-nog-geen-volwaardig-lid-schengen.html>.

Past experience prompted the European Commission to tighten up the accession procedure in 2011,[21] putting the rule of law at its heart; negotiating chapters 23 (the judiciary and fundamental rights) and 24 (justice, freedom and security) are at the forefront of the new procedure. The new approach is being applied in the accession negotiations that began in June 2012 with Montenegro, a candidate country.[22]

In his State of the Union address in 2012, the President of the European Commission, José Manuel Barroso, said that the EU needed a better developed set of instruments – not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of article 7 of the Treaty. He repeated this argument in his 2013 State of the Union address.

The European Parliament (EP) has repeatedly drawn attention to the desirability of a new mechanism for monitoring compliance with the Union's fundamental values. In its Fundamental Rights reports for 2010 and 2012 and the 'Report on the situation of fundamental rights: standards and practices in Hungary' by rapporteur Rui Tavares, the EP calls on the Commission to put forward proposals to this end. Indeed the EP made the first move by suggesting that the EU set up an 'Article 2 TEU Alarm Agenda', a new values-monitoring mechanism. In addition a group of independent experts should be empowered to make recommendations on how the EU could best respond to breaches of the Union's fundamental values by the member states. The EP recently published a study containing proposals for a new mechanism.[23]

The issue is also on the agenda of the Dutch parliament, as shown for example by the motion introduced by MPs Henk Jan Ormel and Klaas Dijkhoff,[24] which was passed with a large majority in February 2012. A year later the House of Representatives passed a motion submitted by MP Mark Verheijen, likewise with a big majority.[25] Both called on the government to work towards periodic monitoring of developments relating to the rule of law in the member states.

The Justice Scoreboard presented by European Commissioner Viviane Reding in March 2013 refers to the relevance of the functioning of the rule of law to the internal market. Chapter III discusses the Justice Scoreboard in more detail. This too is evidence that the focus of attention now extends to policy fields other than police and judicial cooperation.

In March 2013, the foreign ministers of Denmark, Finland, Germany and the Netherlands sent a letter to the President of the European Commission, José Manuel Barroso, arguing that the fundamental values of the EU – democracy, the rule of law and human rights – must be vigorously protected. They expressed the view that a new mechanism

21 See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0666:EN:NOT>.

22 See: <http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf>.

23 European Parliament, Directorate General for Internal Policies, The Triangular Relationship Between Fundamental Rights, Democracy and Rule of Law in the EU, October 2013, pp. 45-46.

24 House of Representatives of the States General, 33001 no. 10.

25 House of Representatives of the States General, 33551 no. 2.

was called for to protect the rule of law in the member states.[26]

The European Commission announced that at the beginning of 2014 it would publish a Communication on the form to be taken by an initiative on the functioning of the rule of law in the EU.

Another point is that in recent months it has become clear how much pressure can be put on the rule of law by technological advances. The confidentiality of online communications is not always respected. Public authorities and businesses can gather privacy-sensitive information on other public authorities, politicians and private citizens without the latter being aware of it. This constitutes a new threat to the rule of law which the AIV will not touch on in this advisory report.

Thus far the AIV has focused on the functioning of the rule of law in the member states, but the Union itself must also meet rule-of-law standards. This advisory report will not discuss that issue because the request for advice did not refer to it and because it has many more dimensions than the functioning of the rule of law in the member states. If required, the AIV could prepare a separate advisory report on the functioning of the EU as an entity governed by the rule of law.

26 House of Representatives of the States General, 33551 no. 17.

II The rule of law

As stated above, the rule of law is one of the values on which the EU is based (article 2 TEU). It is also central to the Council of Europe (CoE). The treaties governing the EU and the CoE do not define the rule of law; the concept is deemed to be self-evident. However, 'rule of law' does not always mean the same thing in political circles: for some, the primary concern is the independent dispensation of justice, while for others it is law enforcement, to ensure that the law of the jungle does not prevail. But there is no complete picture of what the rule of law is – or should be. For that reason this chapter will begin by examining what meanings are attached to the rule of law, showing that consensus exists as to its standards but that they are defined and interpreted in different ways in the legal traditions of the various member states.

II.1 Standards for the rule of law

In its request for advice, the government refers to the Report on the Rule of Law by the Council of Europe's European Commission for Democracy through Law (the Venice Commission).[27] This report explains that the British concept 'rule of law', the German concept *Rechtsstaat* and the French concept *État de droit* have different origins. Although the underlying standards are the same, the rule of law has taken different forms in these countries. The Venice Commission observes that the notion of the rule of law was difficult to find in communist countries, where the idea of socialist legality prevailed. Here there was no general concept of the rule of law; the notion of strict execution of the laws was central. Law was conceived as an instrument of the state ('rule by law'), rather than as a value to be respected.[28]

On the basis of an analysis of national and international legal instruments, and the writings of scholars and judges, the Venice Commission concludes that consensus exists nevertheless on the standards of the rule of law. They include the following:

1. Legality (supremacy of the law): both individuals and authorities, public and private, must act in accordance with the law. Officials must act only on the basis of authorisation and within the powers conferred upon them. Legality also implies that no one may be punished unless they have broken the law. Violations of the law should be punished.

2. Legal certainty: the text of the law must be easily accessible and the state must respect its laws and apply them in a foreseeable and consistent manner. The wording of laws must be sufficiently precise so that individuals are able to act in accordance with them. Legal certainty does not rule out discretionary powers but the extent of such powers must be defined in the law. Rules must be clear and precise. Criminal-law statutes may not have retroactive effect and nor may civil and administrative law statutes if that would affect citizens' interests, because this is incompatible with legal certainty. Final court judgments should not be called into question.

27 European Commission for Democracy through Law, Report on the Rule of Law, Strasbourg, CDL-AD (2011)003rev., 4 April 2011.

28 European Commission for Democracy through Law, Report on the Rule of Law, Strasbourg, CDL-AD (2011)003rev., 4 April 2011, para. 32-33, pp. 8 and 9.

3. Prohibition of arbitrariness: to be arbitrary is to act according to the whim of the moment. Arbitrariness should be distinguished from discretionary powers, which allow the decision-maker latitude to take a reasonable decision in the light of the aim of a regulation. Discretionary power should be conferred by primary legislation on the decision-making government authority or official, and the said legislation should also lay down the criteria that should be observed when making a decision. An arbitrary decision is never taken in accordance with criteria stipulated in a statutory regulation.

4. Access to independent and impartial courts: independence and impartiality on the part of the courts are elements of the democratic principle of the separation of powers. Judicial proceedings must be fair and open and must be concluded within a reasonable time. There must be a recognised, organised and independent legal profession, and an organisation that brings breaches of the law to court.

5. Respect for human rights that form part of the rule of law: access to justice, the right to a competent judge, the right to be heard, the *ne bis in idem* principle, the principle that measures that harm people may not have retroactive force, the right to an effective remedy, the presumption of innocence and the right to a fair trial.

6. Non-discrimination and equality before the law: the law is the same for all and all are subject to the same laws. Nonetheless, unequal treatment is permitted to achieve substantive equality.

II.2 Varying development of rule-of-law standards in three legal traditions

As a result of history and different philosophical traditions, rule-of-law standards have taken a different institutional form in the common law tradition, the German legal tradition and the Franco-Roman legal tradition, the three traditions that have influenced the institutional shaping of the rule of law in most of the countries of the EU. In the United Kingdom the concept is known as the rule of law, in Germany as *Rechtsstaat* and in France as *État de droit*. Historically, the conflict between King and Parliament in the UK, the French Revolution of 1789 and the experience of the Nazi regime in Germany greatly influenced the substance of these concepts and led to differences in the institutional architecture of these countries. Nevertheless, there is a sound basis for referring to a common European legal culture,[29] which is visible for example in the case law of the European Court of Justice. This advisory report does not discuss the historical development of rule-of-law institutions in these three countries, confining itself to describing how the rule of law is reflected in their constitutional law.[30] The descriptions do not provide a thorough analysis of the rule of law in the three countries in question, but serve only to make it clear that the standards of the rule of law allow for different polities.

Parliamentary sovereignty is paramount in the British concept of the rule of law. No source of law sets limits to Parliament's power to legislate. The United Kingdom has no

29 See Peter Häberle, *Europäische Rechtskultur: Versuch einer Annähering in 12 Schritten*, Frankfurt am Main: Suhrkamp, 1997.

30 This discussion is largely taken from G.E.T. Lautenbach, 'The Rule of Law Concept in the Case Law of the European Court of Human Rights', Amsterdam, 2012, pp. 33-49. See also: R. Grote, 'Rule of Law, Rechtsstaat and État de droit', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy*: *A Comparative Analysis*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 269-306.

written constitution enshrining the rights of citizens; there is thus no hierarchy in which the constitution takes precedence over legislation. The principles of British law are drawn from legislation, case law and customary law. In the UK, the rule of law developed within a common law system in which precedent is a significant factor. Judges have thus played an important role in the development of the rule of law.

The emphasis in the British tradition is on legality, in other words the principle that every act of government must have a basis in legislation. Only Parliament can confer powers – directly or indirectly – on public authorities. Individuals may ask the courts to determine whether a public authority exceeded its powers and whether it complied with the relevant procedural requirements. There is no strict separation of powers between the executive and legislature at national level but the judiciary does enjoy a high degree of independence.

Parliamentary sovereignty is an important feature of the rule of law in the British tradition. The UK's accession to the EU and the entry into force of the Human Rights Act 1998 have reduced this sovereignty somewhat, although both developments stemmed from decisions taken by the UK Parliament. EU legislation takes precedence over national legislation, and British courts apply this distinction. The Human Rights Act enables UK residents to make applications to national courts on the basis of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). If a court holds that an Act of Parliament is incompatible with the ECHR, it is ultimately Parliament's responsibility to decide whether the legislation in question should be amended. In this system democracy is the ultimate guarantee of the continued existence of the rule of law.

The constitution that entered into force in the Federal Republic of Germany after the Second World War gave pride of place to human dignity. The German constitution occupies the highest rung on the ladder of statute law and delegated legislation, and rules out any amendment to the constitutional provisions on human dignity and the legality principle. Consequently, human rights have a central place in the concept of the *Rechtsstaat*. In contrast to British constitutional law, there are limits to what the German parliament may lay down in legislation. In addition, the legislative, executive and judicial branches of the state are charged with protecting human dignity. The principle of legality is enshrined in the constitution; the legislature is bound by the constitution and the executive and the judiciary are bound by legislation. Germany also has an extensive system of judicial review of the constitutionality of the acts of public authorities. The federal constitutional court therefore plays an important role in protecting the *Rechtsstaat*. Finally, the fact that Germany is a federal state ensures that power cannot become concentrated, thus supplementing the separation of powers. In short, the *Rechtsstaat* is defined in the German constitution and protected by the separation of powers and by judicial review of all legislation and government decisions, even against a parliamentary majority.

The French concept of *État de droit* draws much of its inspiration from the German concept of the *Rechtsstaat*. In France, as in Germany, the constitution is the highest law. The Constitutional Council (*Conseil Constitutionnel*) ensures that the legislator does not exceed its powers and reviews legislation in the light of the constitution and the *Déclaration des droits de l'homme et du citoyen* van 1789, which is cited in the constitution. Until 2010 the *Conseil Constitutionnel* could only review the constitutionality of legislation that had not yet been promulgated. That year saw a major change in the French constitutional landscape with the introduction of the *exception d'inconstitutionalité*. This makes possible the independent review of the constitutionality of statutes after they have

been passed. Parties may raise the exception in legal proceedings, after which only the *Cour de Cassation* and the *Conseil d'État* may bring the question before the *Conseil Constitutionnel*. If the latter finds a law incompatible with the constitution, it will not be applied.

The AIV would note here that in many countries the judiciary or a specialised constitutional court is responsible for reviewing the constitutionality of laws. The Netherlands is not among them, but it does have provision for not applying acts of parliament if their application would be incompatible with, for example, a human rights instrument.

II.3 Societal conditions

So far this chapter has focused on constitutional issues. There are also societal conditions which must be fulfilled if a country is truly to function as a state governed by the rule of law. However, respect for these standards is not a matter of course; it must be part of a country's political culture.

The values that form the basis for the EU as a legal community should be reflected not only in common, coordinated rules of law but also in the way these rules are applied and enforced. The checks and balances in a polity should be seen not as obstacles to effective government but as the essence of a democracy governed by the rule of law. This is very largely a question of governmental and legal culture and the willingness of office-holders to take account of this culture at all times. It is in this way that the nature of the rule of law in the EU should be apparent in everyday practice. Citizens have confidence in the rule of law if they know that the authorities respect their rights and that the guarantees, procedural and otherwise, for such respect are effective. Such confidence can only grow from years of experience. The authorities must therefore consistently act in the spirit of the rule of law in order to cultivate public trust. Trust is based on facts but also on emotion, and it can therefore be seriously damaged by individual incidents.

External actors can have very little direct influence on the societal conditions for the proper functioning of the rule of law in a member state. It is mainly up to national office-holders and non-governmental organisations in the member state itself to foster these societal conditions. Member states can, however, hold each other to account if office-holders apply or enforce the law in a manner that is inconsistent with the principles of the rule of law.

II.4 Conclusion

The foregoing shows that, despite terminological differences, the standards relating to the concept of the rule of law are clear. The Venice Commission's report defines these standards in more detail. A number of them have been elaborated in more specific obligations enshrined in human rights instruments, declarations and case law. For example, the International Covenant on Civil and Political Rights, the ECHR and its protocols, and the EU's Charter of Fundamental Rights contain relevant provisions, including on the right to a fair trial and the right to an effective remedy.[31] In addition, the ECtHR has delivered many judgments clarifying rights enshrined in the ECHR, such

31 European Commission for Democracy through Law, Report on the Rule of Law, Strasbourg, CDL-AD (2011)003rev., 4 April 2011, para. 60, p. 12.

as the right to a fair trial. The concept of the rule of law is certainly not an elusive one; there is no need for a more specific definition in order to conduct a dialogue about the functioning of the rule of law in the member states.

III Utilising existing instruments and the desirability of supplementary initiatives

As explained in chapter I, the citizens and member states of the EU have a legitimate interest in the proper functioning of the rule of law in all the member states. The member states should therefore also regard the maintenance of the rule of law in every member state as a shared responsibility, which should be given institutional form within the EU.

This chapter outlines the various rule-of-law monitoring practices in the member states that already exist at global, regional and national level, by international organisations, national institutes and non-governmental organisations. 'Monitoring' refers to the activities of a body which can assess the functioning of the rule of law in EU member states on the basis of norms which are binding on the countries in question. One form of monitoring is review in the light of legally established norms, such as the provisions of a treaty which obliges the parties to submit to monitoring. But monitoring can also take place in response to a political commitment by states. It may take the form of the findings of an evaluation, recommendations by experts or a binding court judgment.

This chapter does not discuss organisations which promote the rule of law in certain ways but whose primary task is not to form an opinion.

III.1 The United Nations

There are no treaties at global level obliging states in a general sense to be governed by and to uphold the rule of law. However, human rights instruments do contain relevant provisions. The International Covenant on Civil and Political Rights, for example, lists a number of human rights with a bearing on the core of the rule of law: the right to life (article 6), the ban on torture and inhuman treatment (article 7), the right to liberty and security and the ban on arbitrary detention (article 9), the right to a fair trial (article 14), the principle of *nulla poena sine lege* (article 15) and equality before the law (article 26).

There are 10 UN human rights instruments. Most of them (or their optional protocols) provide for the right of individuals to submit complaints, applications or communications to a supervisory body consisting of independent experts. In addition, these bodies may publish authoritative opinions on the interpretation of the instrument's provisions. Although the decisions on individual complaints and the supervisory bodies' opinions are not binding on the parties to the instrument, they do have great moral authority.[32]

A number of UN organisations also work to promote the rule of law. The World Bank draws up relevant indices, i.e. the World Governance Indicators and the Doing Business Index. The AIV will not discuss these UN instruments and activities any further in this report, since the relevant norms are also incorporated in European instruments, which have more powerful enforcement mechanisms.

32 See also AIV advisory report no. 57, 'The UN Human Rights Treaty System: Strengthening the System Step by Step in a Politically Charged Context', The Hague, July 2007.

III.2 The Council of Europe[33]

The Council of Europe has developed standards for the rule of law. It plays an important role in developing standards for the EU countries, as all EU member states are also members of the CoE and party to the ECHR. Accordingly, the AIV will discuss the Council of Europe and its institutions in detail below.

Article 3 of the Statute of the Council of Europe states, among other things, that every member must accept the principles of the rule of law. In short, the promotion of the rule of law is one of the Council of Europe's main aims, alongside the promotion of democracy and human rights. Accordingly, the CoE also has various mechanisms for monitoring the functioning of the rule of law in its member states. In this regard, its institutions complement one another.

The European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights
The European Court of Human Rights was established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). States may join the Council of Europe only if they accede to the ECHR, thus accepting the jurisdiction of the ECtHR. Once all domestic remedies have been exhausted, individual residents of the member states may lodge applications with the Court concerning alleged violations of the Convention by a member state. The Committee of Ministers supervises member states' compliance with the Court's judgments.

A number of the provisions of the ECHR are relevant to the concept of the rule of law. Article 6, for example, enshrines the right to a fair trial, article 7 the principle of *nulla poena sine lege* (the principle of legality), article 13 the right to an effective remedy and article 14 the prohibition of discrimination (the principle of equality). ECtHR case law has defined in more detail the related obligations on states. Hence the ECtHR plays an important role in setting standards for and enforcing the proper functioning of the rule of law in the CoE member states. Reference has already been made to the part played by the ECtHR in the implementation of European asylum policy (*M.S.S. v. Belgium and Greece,* see chapter I). Generally speaking, since all EU member states are party to the ECHR, the Court can stop the implementation of EU legislation in individual cases, provided the ECHR provides a basis for doing so. Given that national courts take this case law into account in cases brought before them, the ECtHR's judgments can significantly influence the implementation of EU legislation. The EU and the Council of Europe are currently negotiating the EU's accession to the ECHR. Following accession, the law and the acts of the EU will be subject to external supervision by the ECtHR. This will enhance the uniformity of the interpretation and application of human rights law throughout Europe and strengthen monitoring. It will be some years before accession is finalised, since all CoE member states (including all EU member states) must first ratify the accession agreement.[34]

The authorities of the CoE member states are required to implement the ECHR in their legal systems, on the basis of the ECtHR's interpretation of the Convention. In applying

33 See also AIV advisory report no. 33, 'The Council of Europe: Less Can Be More', The Hague, October 2003.

34 R. Böcker, 'Gaten dichten, toetreding van de Europese Unie tot het EVRM' ('Plugging holes: the European Union's accession to the ECHR'), *Nederlands Juristenblad*, 14 June 2013, vol. 24, pp. 1560-1566.

the ECHR in everyday practice, courts, legislative drafters and other actors endeavour to strengthen the principles of the rule of law within each country's legal culture. The receptivity of these actors to European standards should not be underestimated.

The monitoring procedures of the Committee of Ministers
In addition to the role the Committee of Ministers plays in the execution of ECtHR judgments, it supervises the obligations of member states in four other ways.[35] One is thematic monitoring. The Committee periodically selects a theme, after which the secretariat draws up a report on the situation regarding that theme in all the member states of the Council of Europe. The Committee of Ministers debates this report in camera. In response to this discussion, the Committee may, for example, decide to ask the Secretary-General to collect information or furnish advice, or it may issue a declaration or lay the issue before the Parliamentary Assembly. In 2007 it was decided to use this procedure on an ad hoc basis only. Since the debates on the reports take place in camera and many documents have not been published, it is not clear whether the Committee of Ministers has used the thematic monitoring process since 2007.

The Committee of Ministers can also monitor the situation in specific countries and have action plans drawn up. This has been done for Moldova, Georgia, Ukraine, the Russian Federation and others. Thirdly, monitoring was instituted following the accession of certain new member states, including Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia and Montenegro. Lastly, various intergovernmental committees report to the Committee of Ministers on conventions or specific themes such as human rights.

If the Committee of Ministers finds that member states are not honouring their commitments, it may issue recommendations to the state in question and request information on the implementation of the recommendations. In an extreme case the Committee may deprive a country of membership of the Council.

The monitoring procedure of the Parliamentary Assembly[36]
The Parliamentary Assembly (PA) has various committees that are specifically concerned with the situation regarding the rule of law, human rights and democracy in the member states. They conduct investigations and report to the plenary Parliamentary Assembly, which then debates the report. The most important is the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee). Since this committee was established in 1997, new member states are always subjected to monitoring. If the PA decides to open a monitoring procedure of a specific country, the committee investigates compliance by that country with commitments made in relation to the Council of Europe. Reports of this kind are discussed in camera by the committee but are debated by the PA in public. If the monitoring procedure produces sufficient results, the PA will close the procedure. A year later, however, the Committee will open a post-monitoring dialogue with the country in question, to keep an eye on the situation there.

35 A. Drzemczewski, 'Monitoring by the Committee of Ministers of the Council of Europe: a Useful "Human Rights" Mechanism?', in I. Ziemele (ed.), *Baltic Yearbook of International Law*, volume 2, 2002, pp. 83-103.

36 See also AIV advisory report no. 40, 'The Parliamentary Assembly of the Council of Europe', The Hague, February 2005.

If the PA determines that a country is unwilling to honour the norms that are binding on the member states, it may adopt a resolution and/or a recommendation, annul the credentials of the country's delegation or refuse to ratify the delegation's credentials for the following session. The Russian Federation's voting rights were suspended from April 2000 to January 2001 because of the situation in Chechnya. If such measures do not have the desired effect, the Assembly may recommend that the Committee of Ministers terminate the country's membership.

The PA recently decided not to open a monitoring procedure for Hungary. It expressed its concern at the recent changes to the Hungarian constitution and other laws, but concluded that the government should work towards acceptable solutions, in dialogue with the Venice Commission, opposition parties and civil society.[37]

The Venice Commission

The European Commission for Democracy through Law, better known as the Venice Commission, is an independent body which advises the Council of Europe on matters relating to constitutional law, including the functioning of democratic institutions and fundamental rights, the course of elections, and constitutional justice. Its members are independent experts in the relevant fields and are appointed by the countries associated with the Commission.

The Venice Commission's core task is providing constitutional support. It issues opinions at the request of states (government, parliament or constitutional court) or of the CoE's institutions (the Parliamentary Assembly, the Committee of Ministers, the Congress of Local and Regional Authorities and the Secretary-General). International organisations like the European Commission, which participate in the Venice Commission's activities, may also request advice.

The Venice Commission's opinions contain an analysis of the compatibility of a country's legislation with European and international standards and of the practicability and effectiveness of the solutions the country hopes to achieve with the legislation in question. A working group of rapporteurs visits the country under review and talks with national authorities and civil society organisations. The opinions that ultimately result from the process are adopted at a plenary session of the Venice Commission attended by representatives of the country. The approach is based on dialogue. The Commission's recommendations and suggestions are largely based on shared European experience in this field. After advising states on the adoption of a democratic constitution, the Commission works to strengthen the rule of law by focusing its attention on the implementation of the constitution.

Although the Venice Commission's opinions are not binding, they are frequently reflected in the legislation on which the Commission advised, thanks to its approach and its reputation for independence and objectivity.

The advice given on Hungary is a good illustration of the Commission's working methods. Since 2011 it has produced various opinions relating to the rule of law in Hungary, in particular the instrumental use of the constitution by the majority government, the status and remuneration of judges, the organisation of the courts, the status of the Prosecutor General and the organisation of the Prosecution Service. In 2012 the Commission issued

37 Parliamentary Assembly, resolution 1941 (2013), final version.

opinions on the freedom of religion and of conscience, the status of Churches, the freedom of information, data protection, the rights of national minorities and recently on the fourth amendment to the Hungarian constitution.[38]

The latest amendments form part of a pattern of instrumental use of the constitution by the Hungarian government. The Constitutional Court of Hungary had found certain legislative provisions to be incompatible with the constitution. The fourth amendment was an attempt to reverse these decisions by incorporating the contested provisions in the constitution, thus excluding the possibility of review by the Constitutional Court. The two-thirds majority currently enjoyed by the governing party in the Hungarian parliament has allowed it to embed its policies on the economy, social affairs, taxation, education and the family firmly in the country's constitution. The Venice Commission regarded this as a threat to democracy and observed that the amendments were characterised by a lack of transparency and an absence of public involvement. It advised the Hungarian government not to use the constitution as a political instrument. The Commission's opinion also made recommendations on the substance of certain provisions that are at odds with the central principles of the constitution: these include restricting the concept of the family to one based on marriage; limiting political parties' access to the press; and restrictions on the freedom of expression and the independence of the judiciary.[39]

The European Commission for the Efficiency of Justice (CEPEJ)
CEPEJ is a body of the Council of Europe that promotes cooperation among member states in the field of fair and efficient justice, by comparing legal systems, exchanging experience and drawing up recommendations. Experts collect information on the member states, which is compared and discussed in working groups. At the request of member states, CEPEJ can provide technical assistance to help them improve their judicial systems.

Group of States against Corruption (GRECO)
GRECO monitors compliance with the anti-corruption conventions concluded in the framework of the Council of Europe. Countries that are not members of the CoE may also accede to these conventions. Monitoring takes the form of evaluation rounds examining the application of specific anti-corruption provisions selected by GRECO.[40]

The Commissioner for Human Rights
The Commissioner for Human Rights is an independent non-judicial institution within the Council of Europe. He promotes human rights education in the member states, identifies possible shortcomings in human rights legislation and advises the member states on human rights in general. The Commissioner visits member states and draws up his own programme of work. After every visit he presents a report with conclusions and recommendations. The Commissioner may not act on individual complaints: in the Council of Europe's structure that task is reserved exclusively for the ECtHR.

38 For the Venice Commission's opinions on Hungary see <http://www.venice.coe.int/WebForms/documents/by_opinion.aspx>.

39 Venice Commission, Opinion on the Fourth Amendment of the Fundamental Law of Hungary, Strasbourg, 17 June 2013 (Opinion 720/2013). See <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e>.

40 GRECO, rules of procedure, Greco (2011) 20E, Strasbourg, 5 December 2011.

III.3 The Organization for Security and Co-operation in Europe (OSCE)

The OSCE aims to promote security in a broad sense, covering three 'dimensions': political and military cooperation, economic and environmental cooperation, and the human dimension. The latter involves the promotion of democracy, human rights and the rule of law. The OSCE's headquarters are in Vienna, but it mainly works through its field offices. In addition it has three autonomous institutions: the Office for Democratic Institutions and Human Rights (ODIHR), the High Commissioner on National Minorities (HCNM) and the Representative on Freedom of the Media (FOM). ODIHR is mainly concerned with long-term support for and monitoring of election processes. The HCNM works in the strictest confidence on resolving ethnic conflicts, while the FOM often issues public advisory reports and opinions.

Marc Perrin de Brichambaut, Secretary-General of the OSCE from 2005 to 2011, observed that the OSCE's role has been greatly reduced, partly because of the enlargement of the EU and the North Atlantic Treaty Organization.[41] The UN and the EU have also become more active in the fields covered by the OSCE. Consequently, the OSCE has come to supplement the work of other international organisations. In his view, the three autonomous institutions still play an important role because they each have a mandate of their own that protects them against being influenced by OSCE participating states.

III.4 The European Union

As stated above, article 2 TEU provides that the rule of law and respect for human rights are among the values on which the Union is founded. They are also values that the EU endeavours to propagate by means of a normative external policy.

The EU's political and legal structure includes various instruments, procedures and mechanisms for promoting the proper functioning of the rule of law in the member states. They include: (1) information gathering and provision; (2) evaluation and monitoring; (3) sanctions; and (4) legal obligations on member states and legal bases for further measures. Each of these is discussed in turn below.

III.4.1 Information gathering and provision

EU Justice Scoreboard

On 27 March 2013, the European Commissioner for Justice, Fundamental Rights and Citizenship, Vice-President Viviane Reding, presented the EU Justice Scoreboard, which was developed to achieve more effective justice within the Union. By publishing statistics on the justice systems in all the member states, the Justice Scoreboard gives an impression of the functioning of the rule of law. The information presented primarily concerns the efficiency of judicial systems. The Justice Scoreboard is definitely not intended to create a league table of member states, although the publication of these figures does make comparison between them possible. Moreover, as the Justice Scoreboard does not lay down minimum norms for its indicators, it does not deliver a general opinion on the functioning of the rule of law in the member states. The Scoreboard is still evolving and in future will cover more indicators and fields of law. It is therefore too early to form an opinion on its added value.

41 M. Perrin de Brichambaut, 'The OSCE in perspective, six years of service, six questions and a few answers', *Security and Human Rights*, 2012, no. 1, pp. 31-44.

Agency for Fundamental Rights
By establishing the EU Agency for Fundamental Rights (FRA) in 2007, the EU created a body that assists institutions, bodies and agencies of the Union and its member states in upholding human rights where their activities have a bearing on European law. An example is the FRA's support for the European Border Management Agency (FRONTEX).[42]

The FRA publishes thematic reports and to this end collects information by country and by theme. In this way it can serve as a valuable source of information on issues relating to the rule of law in member states. The FRA may not attach normative conclusions to its findings, nor has it any powers to enforce respect for human rights, not even if there is a connection with the implementation of EU law. It may, however, advise on new European legislation, for example at the request of the European Parliament.

III.4.2 Evaluation and monitoring
The existing EU framework encompasses various procedures that make it possible to monitor and evaluate acts of the member states relating to the functioning of certain elements of the rule of law but which extend further than collecting information.

Reporting by the European Parliament
Among the powers exercised by the EP is an oversight and control function. Human rights issues, relating both to third countries and to the member states, appear regularly on the EP's agenda. The 'Report on the situation of fundamental rights: standards and practices in Hungary' by rapporteur Rui Tavares is an example. In addition to specific resolutions, on subjects including homophobia and the status of Roma, the EP draws up annual reports on fundamental rights in the EU. These are often controversial. To ensure sufficient support for a resolution or a report, the countries concerned are not always named, but trends are identified. In some cases details are given of a situation. The closure of the network of independent experts on fundamental rights put an end to systematic reporting on the functioning of the rule of law in the EU member states which could provide input for annual and other reports. The EP regrets this development. It can investigate for itself but has only limited capacity and hence often relies on information gathered by third parties.

Evaluations in the context of the area of freedom, security and justice: Schengen
The Commission and the EP recently agreed on changes to the procedure for evaluations of the Schengen acquis and changes to the regime governing the temporary introduction of controls at internal borders within the Schengen area.[43] Once the new procedures are in force, evaluations will no longer be limited to the way in which the rules are implemented but may also extend to the functioning of the authorities responsible for applying the Schengen acquis. This brings matters relating to the rule of law into the picture. These evaluations will be conducted pursuant to article 70 TFEU, which provides for a mechanism for the evaluation of the implementation of Union policies, and in particular for the application of the principle of mutual recognition. This article has not previously been used. The European Commission and the member states are jointly responsible for conducting the evaluations. Until now, evaluations were carried out by

42 Prof. M.G.W. den Boer, 'Human rights and police cooperation in the European Union: recent developments in accountability and oversight', *Cahiers Politiestudies*, 2013/2, no. 27, pp. 29-45.

43 Press release 10239/13 from the Council of the European Union, Brussels, 30 May 2013. See: <http://register.consilium.europa.eu/pdf/en/13/st10/st10239.en13.pdf>, accessed 25 October 2013.

member states only (peer review) with the Commission participating as an observer. The new-style evaluations will also take account of FRONTEX reports.

Thematic evaluations in the framework of Justice and Home Affairs
In 1997 the Justice and Home Affairs Council decided to establish a mechanism for peer evaluation of the application and implementation at national level of international instruments aimed at combating organised crime.[44] Each evaluation round is concerned with a particular theme: to date, mutual assistance in criminal matters, measures to combat drug trafficking, information exchange with Europol, the practical application of the European Arrest Warrant, and financial crime. The sixth evaluation is currently under way, addressing the implementation and operation in practice of the decisions on Eurojust and the European Judicial Network. The evaluations, which are conducted under the auspices of the Working Party on General Matters including Evaluations (GENVAL), are based on questionnaires completed by the member states and visits by evaluation teams. After being discussed in the working party, the evaluations are published. They contain recommendations addressed to the country in question, the Commission and other institutions, and to other member states.

Anti-corruption reporting
In June 2011, the European Commission established an EU mechanism for the periodic assessment of anti-corruption efforts in the Union.[45] An Anti-Corruption Report is to appear every two years. The first had not appeared by the end of 2013. Before each biennial assessment, the Commission will establish a number of cross-cutting issues of relevance at EU level as well as selected issues specific to each member state. In drawing up the Anti-Corruption Report, the Commission will be assisted by an expert group and a network of local research correspondents, both appointed by the Commission. The report will comprise a thematic section, country analyses (assessing anti-corruption efforts by member states on the basis of indicators) and a section on trends in the EU. In the report, the Commission will address recommendations to the individual member states. This mechanism supplements other similar mechanisms in the Council of Europe (GRECO), the UN and the Organisation for Economic Co-operation and Development (OECD).

In its Communication on Fighting Corruption in the EU the Commission observed that anti-corruption efforts on the part of member states left much to be desired and that this was one of the reasons for the establishment of the anti-corruption report mechanism. For example, relevant EU directives had not been transposed into national legislation in all member states. The commission blamed this failure on a lack of political will[46] and noted that existing mechanisms were sector-specific and that no cross-cutting mechanism existed.[47]

44 97/827/JHA: Joint Action of 5 December 1997, adopted on the basis of article K.3 of the Treaty on European Union and as amended by Council Decision 2002/996/JHA, L349/2002.

45 European Commission (2011), Decision establishing an EU anti-corruption reporting mechanism for periodic assessment ('EU Anti-corruption Report'), C(2011) 3673 final, Brussels, 6 June 2011.

46 European Commission, Communication on Fighting Corruption in the EU, COM(2011) 308 final, 6 June 2011, Brussels, p. 4.

47 Ibid., p. 5.

Procedure for cooperation and verification on the accession of new member states
For a country to be allowed to join the EU, the rule of law must meet high standards. The Conclusions of the European Council meeting in Copenhagen (21-22 June 1993) stated that accession of a new member state requires the existence of stable institutions guaranteeing democracy, the rule of law and human rights. Since the entry into force of the Treaty of Lisbon, article 49 TEU refers implicitly to this 'Copenhagen criterion'.[48] Since candidate countries cannot accede until they adopt the entire EU *acquis,* the EU can demand, during the accession negotiations, that new member states accept monitoring of the functioning of the rule of law and take measures to rectify any shortcomings identified. The functioning of the rule of law in Romania and Bulgaria was an important issue in the accession negotiations with these two countries. In 2006 the Commission decided to establish cooperation and verification mechanisms to check whether Romania and Bulgaria had taken adequate measures to ensure that the rule of law functioned at the level required for accession to the EU.[49] The annexes to the decisions list the benchmarks the two countries were to address. Provision is also made for the decisions to be repealed when all the benchmarks have been satisfactorily fulfilled. The verification mechanism is thus temporary and tied to the accession process. However, this does not constitute a guarantee for the future. The AIV therefore believes that the obvious course of action is to keep the Copenhagen criterion – which is reflected in EU law in various ways (see below at III.4.4) – as a permanent criterion for all EU member states and to continue to monitor whether it has been fulfilled.

III.4.3 Sanctions

Article 7 TEU
At political level article 7 TEU is the most obvious provision with which to enforce compliance with article 2 TEU. It allows the Council of the European Union to decide to suspend certain of the rights deriving from the application of the Treaties to the member state in question, including the voting rights of the representative of the government of that member state in the Council, if the Council determines the existence of a breach of the basic values of the EU on the part of a member state. This procedure has three stages.

At the first stage, the Council, acting by a majority of at least four-fifths of its members, may determine that there is a clear risk of a serious breach by a member state of the EU's fundamental values. The Council may also make recommendations to the member state, and regularly verifies whether the grounds for the determination continue to exist.

At the second stage, the European Council, acting by unanimity, may determine the existence of a serious and persistent breach by a member state of the EU's fundamental values. It may do so only on a proposal by one third of the member states or by the Commission and after obtaining the consent of the European Parliament.

48 See: <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf>, par. 3, p. 13, accessed on 3 October 2013.

49 European Commission, Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C(2006) 6570 final, Brussels, 13 December 2006, and European Commission, Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C(2006) 6569 final, Brussels, 13 December 2006.

At the first and second stages, the Council and the European Council may act only on the basis of a reasoned proposal by one-third of the member states or by the Commission, and with the approval of the EP. The EP may also make a proposal at the first stage but not the second. At both stages the member state is question is heard before a decision is taken.

If the European Council determines the existence of a serious and persistent breach, the Council may, at the third stage, decide by qualified majority vote to suspend certain of the rights deriving from the application of the Treaties to the member state in question, including the voting rights of the representative of the government of that member state in the Council. If the situation improves, the Council, acting by a qualified majority, may decide subsequently to vary or revoke these measures.

It should be noted that article 7 applies not only to cases in which the member state in question is applying EU law, but to all its acts (or omissions). There are strict procedural requirements to be met before article 7 can be used. Furthermore, it can only be used in the event of a systematic and persistent breach. Article 7 is regarded as a very politically severe remedy. Accordingly, it has never been used.[50]

The application of article 7 could be the culmination of a monitoring mechanism that has revealed a member state's unwillingness to respect the values of the EU. The use of this power by the Council of the EU should be preceded by a thorough investigation, on the basis of which the Council can conclude that there is a risk of a breach of the EU's fundamental values, and by a dialogue with the member state in question. Article 7 provides not for a monitoring mechanism, but for sanctions. It could conceivably be invoked in response to the results of Council of Europe monitoring, but so far that link has not been made.

Systematic reporting on the situation in each member state is essential to give article 7 more substance and to ensure that a decision by the Council would not be purely political. To that end, a network of independent experts on fundamental rights was established in 2002, on the initiative of the European Parliament, to produce thematic reports and systematic annual reports. However, in 2007, with the establishment of the Fundamental Rights Agency (FRA), this network was replaced by the Fundamental Rights Agency Network of Legal Experts (FRALEX), comprising experts from all the member states, who produce a scholarly analysis of a specific aspect of the human rights situation in their country. The FRA then produces comparative studies based on these analyses. FRALEX has definitely not been charged with systematically monitoring the member states; it is mainly intended to provide the FRA with information.

Infringement proceedings
The Commission can take legal action, by instituting infringement proceedings, against member states that contravene EU law. This is also possible in relation to certain elements of the rule of law, such as the protection of fundamental rights or the principle of effective legal protection (article 19 TEU). Under articles 258 and 260 TFEU, the Commission can institute infringement proceedings if a member state has failed to fulfil an obligation under the Treaties or an obligation concerning secondary EU legislation or has failed to do so in a timely manner. Before the Commission initiates proceedings, the

50 Formally speaking, the sanctions against Austria in 2000 were decisions by 14 individual member states, not by the European Union.

issue concerning the correct application or implementation of EU law or the conformity of national with EU law is first put before the competent Commission service and then before the member state in question. Since 2008, this procedure has taken place within the framework of the EU Pilot. In approximately 80% of cases member states were able to give a satisfactory answer to the Commission's questions and no infringement proceedings resulted.[51]

The first step in actual infringement proceedings is an administrative procedure, beginning with a letter of formal notice. This is followed by a reasoned opinion issued by the Commission to the member state. Ultimately the Commission may bring the member state before the European Court of Justice (ECJ). The Court rules on whether EU law has been breached. The member state is obliged to heed the Court's judgment, but if it does not, the Commission may bring the case before the Court once again and apply for the imposition of a lump sum or penalty payment under article 260 TFEU. In practice, the various stages in the infringement proceedings prompt a dialogue between the Commission and the member state which may result in the latter making the changes called for. In that event, the case often does not have to be brought before the Court again.

In the AIV's opinion, the infringement procedure – and the opportunity it offers for dialogue with member states concerning breaches of EU law that could be regarded as undermining the rule of law – could be employed more actively and more strategically for this specific purpose. The Commission could make this a priority area of its control policy, using the information available and the reports that are produced in increasing numbers in various fields (see sections III.4.1 and III.4.2 above).

Section III.4.2 referred to evaluations in the framework of the area of freedom, security and justice, thematic evaluations in the framework of Justice and Home Affairs and anti-corruption reporting. All of these are conducted under the responsibility of the Directorate-General for Home Affairs. The information and findings arising from these evaluations could easily be pooled to provide a basis for a more intensive and strategic use of the infringement procedure. The AIV advises the government to press the Commission to take this course of action.

III.4.4 Legal obligations on member states and legal bases for further measures

The principles of Union loyalty and effective legal protection

Article 4, paragraph 3 TEU states: 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and *refrain from any measure which could jeopardise the attainment of the Union's objectives*' [AIV's italics]. This principle of Union loyalty imposes an obligation on the member states to ensure the proper functioning of institutions involved in guaranteeing and enforcing Union law. As an example, this principle provided part of the basis for the ECJ's formulation of the obligation on member states to guarantee effective legal protection. Following the Treaty of Lisbon, this obligation is spelled out explicitly in article 19, paragraph 1 TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Failure to fulfil this obligation can therefore prompt the Commission to initiate infringement proceedings.

51 Report by the Commission, Second Evaluation Report on EU Pilot, SEC(2011) 1626 final, Brussels, 21 December 2011.

The Charter of Fundamental Rights of the European Union
Article 6 TEU accords the Charter of Fundamental Rights the same legal value as the Treaties. Since the entry into force of the Treaty of Lisbon the Charter has thus been legally binding on the member states.[52] Some of the Charter's provisions have a direct bearing on the functioning of the rule of law: the right to liberty and security (article 6), equality before the law (article 20), the right to good administration (article 41), the right to an effective remedy and to a fair trial (article 47), the presumption of innocence and respect for the rights of the defence (article 48) and respect for the principles of legality and proportionality of criminal offences and penalties (article 49). These provisions are not only addressed to EU institutions; they must also be respected by the member states 'only when they are implementing Union law' (article 51). According to the recent judgment by the Court of Justice in the Åkerberg *Fransson* case, this means that the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law.[53] The FRA and the European Commission publish annual reports on compliance with the Charter.

Article 352 TFEU
Under article 352 TFEU the Commission is empowered to propose new legislation if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers. Since this article is intended to allow for flexibility in cases not covered by the TEU or the TFEU, it is sometimes referred to as the 'flexibility clause'. This provision's forerunners – article 308 EC and article 235 EEC – applied only to measures relating to the functioning of the internal market. The material scope of this legal basis has accordingly been considerably extended to cover all areas of EU policy. Under the Declaration on article 352 TFEU (which is not legally binding) it is excluded that an action based on that article would only pursue objectives set out in article 3, paragraph 1 TEU (the promotion of peace, the values of the Union and the well-being of its peoples); such action must rather address the objectives referred to in article 3, paragraphs 2 and 3 TEU (the area of freedom, security and justice and the internal market). It can be inferred from the Declaration that it is indeed possible to take measures at EU level to promote the Union's values in the interests of improving the organisation and functioning of the internal market and the area of freedom, security and justice. In the past, moreover, the member states repeatedly gave a generous interpretation to article 308 EC and article 235 EEC.[54] The FRA, for example, was established on that basis, although there was some dispute about the required link to the internal market.

Procedurally speaking, it is the European Commission that makes proposals on the basis of article 352 TFEU and the Council that adopts them by unanimous vote after obtaining the consent of the European Parliament. This has enhanced the democratic legitimacy of the use of article 352, since previously it was only necessary to consult the EP. The Commission must now also draw up a proposal for the use of article 352

52 Official Journal of the European Communities, 2000/C 364/01.

53 Case C-617/10, Åkerberg *Fransson*, judgment of 26 February 2013.

54 This can partly be explained by the fact that the original EEC Treaty contained only a few specific bases for powers. See T. Konstadinides, 'Drawing the line between circumvention and gap-filling: an exploration of the conceptual limits of the Treaty's flexibility clause', *Yearbook of European Law*, Vol. 31, no. 1, 2012, pp. 227-262.

specifically to the attention of national parliaments with a view to the subsidiarity test. According to Theodore Konstadinides, the constitutional courts of Denmark and Germany have determined in their case law that the EU should be cautious in its use of article 352 and that the British European Union Act is also intended to set limits on such use.[55]

In the light of earlier practice in the interpretation and use of the flexibility clause, the AIV is of the opinion that article 352 TFEU offers a sufficient legal basis for additional rules or procedures to promote respect for rule-of-law norms, in so far as they can be deemed necessary for the proper functioning of the area of freedom, security and justice and the internal market (see also chapter I).

III.5 Monitoring in the member states

Institutions with a mandate involving the rule of law or related issues also exist at national level. First and foremost, of course, these are parliament and the judiciary, often including a constitutional court. Many member states have an ombudsperson with whom individuals can lodge a complaint about the authorities. The nature and number of complaints about specific government bodies can reveal to the ombudsperson the status of elements of the rule of law.

In addition, all EU member states are supposed to have a national human rights institute to which individuals may report alleged human rights violations by the authorities. In 1993, the UN General Assembly adopted a resolution calling on all its members to establish a national human rights institution, and specifying what the role, composition, status and functions of such a body should be.[56] The Dutch body is the Netherlands Institute for Human Rights. Each geographical region has a regional network: Europe's is the European Group of National Human Rights Institutions.

The relationship between national institutions may vary from one member state to another; it is nonetheless important to mention them because they bear the primary responsibility for the functioning and enforcement of the rule of law in their own countries and in relations with third countries, such as between Italy and Libya in the field of migration. International mechanisms play a supplementary role.

Mention should be made here of the association referred to in article 198 TFEU with the overseas countries and territories which have special relations with member states. The aim is to promote economic, social and cultural development. In the AIV's opinion, this limitation should not imply acceptance of an inadequate level of protection when it comes to the functioning of the rule of law. Nor would such a difference be justified by the purpose of the association. Guarantees of the functioning of the rule of law are relevant, for example, to the protection of refugees and socially and economically vulnerable groups, given that the EU legislation on these matters does not apply automatically in the overseas countries and territories.

55 Konstadinides, op. cit., p. 229 and pp. 232-234.

56 General Assembly resolution 48/134 of 20 December 1993.

III.6 Non-governmental organisations

Lastly, a number of non-governmental organisations, both national and international, are concerned with the functioning of the rule of law: some as part of a wider mandate, such as Amnesty International and Human Rights Watch, while others focus specifically on the rule of law. These organisations, too, possess information that could be taken into account in assessing the functioning of the rule of law in the EU member states.

The Rule of Law Index of the World Justice Project is based on a broad definition of the rule of law. The Index measures perceptions of the functioning of the rule of law among the residents of three cities per country and experts in 97 countries (including 20 EU member states), on the basis of hundreds of indicators reflecting nine elements of the rule of law.

The Economist Intelligence Unit's democracy index divides countries into four types: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes, on the basis of their scores on indicators in five categories: electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture, which together form the democracy index.

Transparency International's Corruption Perceptions Index is based on opinion polls, and hence reflects public perceptions of the level of public-sector corruption in a particular country.

The Press Freedom Index of Reporters without Borders is also compiled on the basis of questionnaires, which are completed by journalists, academics, lawyers, human rights defenders and members of staff of other non-governmental organisations.

III.7 Conclusions

The above overview of existing instruments shows that the EU and other organisations already possess a wide range of monitoring mechanisms, sanctions and legal bases for further measures to strengthen the rule of law in the member states. This leads the AIV to the following conclusions.

First, European law offers more scope for strengthening the rule of law in the member states than is currently being used. The AIV is of the opinion that the scope offered by EU law has not yet been exhausted. The Commission can institute infringement proceedings against member states that are in breach of the Charter or the principle of effective legal protection – both specific obligations arising from EU law. In this way the Commission could promote the functioning of the rule of law in the member states.

Second, the AIV concludes that a great deal of information is available but that it could be put to better use. The present chapter referred *inter alia* to evaluations in the framework of the area of freedom, security and justice, the Justice Scoreboard and – for new member states only – the Cooperation and Verification Mechanism. The Council of Europe's GRECO and CEPEJ also possess a lot of relevant information. The AIV believes that better use could be made of the available information, for example by organising feedback to political forums from court judgments that identify shortcomings. Feedback from the courts to legislation and policy, as the Dutch Council of State advocated several years ago, could also be applied to judgments of the ECtHR and the ECJ on matters that are relevant to the rule of law. The government of the Netherlands should urge forums

such as the Council of the EU and – in the Council of Europe – the Committee of Ministers to take action along these lines. The EP and the PA could subject them to scrutiny.

Third, the above discussion shows that monitoring is fragmented. The various processes address specific elements of the rule of law but there is no forum, either in the EU or in the Council of Europe, where all the information can be brought together. The only cross-cutting review of the rule of law is conducted of new EU member states on their accession, on the basis of the Copenhagen criterion. Since this criterion does not apply to countries that are already EU member states, there is a double standard at work here.

Fourth, the various forms of monitoring address different dimensions of the rule of law, but do not cover all of them. It is advisable to pursue concerns about the rule of law before any breach is made of fundamental norms and principles. In particular, such concerns should forestall situations in which rule-of-law safeguards are put under pressure, for instance because the legal infrastructure is inadequately funded or because government officials are not sufficiently aware of citizens' rights. Situations of this kind do not actually involve a breach of EU law but do affect the functioning of the EU as a legal community. The instruments currently available are lacking in this regard.

In the absence of a forum for bringing together information from various sectors relating to every dimension of the rule of law, the AIV recommends that a new forum be established. The AIV would note here that it is important for the EU to make good use of the Council of Europe's instruments for strengthening the rule of law, in order to preserve the acquis, to avoid duplication, to ensure that the standards of the EU and the CoE do not diverge and to take full advantage of the network that has built up between the organs of the Council of Europe and its member states.

IV A supplementary initiative

Given the multiplicity of existing monitoring mechanisms, it is advisable to exercise restraint in proposing new, additional bodies. Accordingly, the AIV is not recommending any new institutions. However, it will make a proposal in response to the observation in the request for advice that what is currently lacking is an early-stage mechanism for permanently focusing attention on the state of the rule of law in the member states. The AIV recommends a new initiative that will address this specific issue within the existing treaty frameworks.

All the member states of the EU may be expected to adopt a constructive attitude towards strengthening the rule of law, in the interests of the rights of EU citizens and of continuing and enhancing existing cooperation within the EU. Particularly since the EU is now increasingly confronted with questions about its public support base, it is important to boost confidence in decisions made by the authorities in the member states which affect EU citizens in other member states, for example in relation to the free movement of persons or the European arrest warrant. There must be no doubt about the foundations in the rule of law that are common to the member states or about their importance to European citizens.

This should be the starting point for a supplementary initiative that should serve primarily to safeguard the interests of citizens and thus provide a solid foundation for close cooperation within the EU. It is not appropriate at this point to consider negative sanctions, since these could not be employed until after a thorough investigation and after it had become clear that a member state was not prepared to introduce the necessary reforms. It is thus not a matter of introducing a new penalty mechanism; for one thing the EU already has such mechanisms (article 7 of the Treaty on European Union (TEU) and articles 258 to 260 of the Treaty on the Functioning of the European Union (TFEU)). For practical reasons, too, it would be preferable for a supplementary initiative to take effect as soon as possible: it should fit within the existing powers of the EU's institutions so that there is no need for any treaty amendment.

Peer review

Against this background, the AIV believes that peer review offers an appropriate form for a supplementary initiative. In other contexts, extensive experience has been gained with peer review, defined by the OECD as the examination of one state's performance in a particular policy area by other states.[57] The aim is to help the reviewed state to improve its policymaking, adopt best practices, and comply with established standards and principles. As the term implies, peer review is a discussion among equals, not a hearing before a higher authority that delivers judgment or hands down a penalty. This makes peer review a flexible instrument; all those involved are prepared to take a constructive attitude.[58]

57 See: AIV advisory report no. 54, 'The OECD of the Future', The Hague, March 2007.

58 F. Pagani, 'Peer review: a tool for co-operation and change – an analysis of an OECD working method', General Secretariat, Directorate for Legal Affairs, SG/LEG(2002)1, 11 September 2002. See: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/1955285.pdf>, accessed 30 October 2013.

The OECD states that peer reviews can serve various purposes. A peer review increases the participants' knowledge of one another, for instance because the country under review is given an opportunity to explain the background, i.e. the national rules and conditions. This can lead to greater understanding on the part of other participants. In some cases, the information gathered is published, which increases transparency. Peer review can also strengthen capacity by allowing all the participants to learn about good practices and ineffective policies. Lastly, peer review may serve to monitor compliance with agreements that have been reached.

A fixed cycle of periodic peer reviews, where each country is reviewed in turn, is less politically charged than a series of ad hoc investigations. After all, an ad hoc investigation requires a – political – decision and will be undertaken only if there are already indications that shortcomings exist. In addition, a fixed cycle ensures that all countries receive equal treatment. The UN Human Rights Council (HRC) introduced its Universal Periodic Review system to ensure that the Council was less politicised than its predecessor, the UN Human Rights Commission.[59] The HRC is indeed less politicised than the Commission. Opting for universal periodic reviews implies that all member states are obliged to participate; voluntary participation is ruled out.

The AIV would advise the government to seek to convince the Council of the European Union to adopt Conclusions agreeing to conduct periodic peer reviews at EU level of the functioning of the rule of law in all the member states, on the basis of reports drawn up by a committee of independent experts. The AIV believes that such Conclusions could be implemented in three stages.

The peer reviews will be carried out in cycles, with every country being evaluated. Before the start of each cycle, the committee of experts will establish a number of cross-sectoral points to be used to evaluate all the member states, and a number of focal points for specific countries. The restriction to certain cross-sectoral issues is necessary to keep the peer reviews manageable in scope.

The first step is for a committee of experts to draw up a report on each member state. This committee should be obliged to consult organisations that possess relevant information, such as the EU Agency for Fundamental Rights (FRA), the organs and committees of the Council of Europe, and civil society organisations and authorities in the country concerned. Consideration could be given to forming small committees of authoritative experts, whose members are periodically replaced, with experience in relevant sectors of the legal infrastructure, such as the courts, the public prosecution service, the police, the prison system and migration policy. Authoritative professionals may be expected to assess situations on their merits. If independent experts draw up the reports, their opinions will not be influenced by the potential consequences of a negative assessment. The European Commission should provide the secretariat for an expert committee of this kind.

The involvement of civil society organisations will help to ensure that more information becomes available and that concerns felt by the public come to light. It will also help to keep the peer review's conclusions on the political agenda of the country in question, which in turn fosters the accountability of governments to their peoples. A significant

59 R. Freedman, 'New mechanisms of the UN Human Rights Council', *Netherlands Quarterly of Human Rights*, vol. 29/3, pp. 289-323.

contribution could be made by networks of professional organisations in member states, for example horizontal networks of ombudspersons, networks of professional organisations representing judges, or networks linking lawyers, interest groups, citizens' initiatives and the like. The context required for this can be created through public access to administrative processes and a transparent balancing of interests. The EU could offer financial support to non-governmental organisations of this kind that support a peer organisation in another member state while the latter is involved in drafting a national report, in the framework of a European mechanism, on the functioning of the rule of law.

The second step is a discussion of the report by representatives of the member states at official level (the actual peer review), which should lead to draft operational conclusions. Such discussions could encourage all the member states to improve the cultural and organisational conditions for government action in relation to the rule of law. This could be supported by exchanges of expertise and meetings between officials holding similar positions in different member states.

The third step is for the Council of the EU to discuss and adopt the operational conclusions in the form of Council Conclusions. The results of the reviews should be submitted to the Justice and Home Affairs Council, which will also supervise the follow-up. The recommendations adopted by the Council (in the form of operational Council Conclusions) will be made public, thus enabling citizens and civil society organisations to assist in their implementation. The European Council could then take note of these Conclusions at its next meeting; this could further encourage the member states to set improvements in motion.

The AIV believes this process could increase public confidence in the functioning of the EU. Parliamentary involvement, both in the member states to which recommendations are addressed and in the EU itself, is required as the democratic basis for efforts to strengthen the functioning of the rule of law. The Council of the EU should report to the European Parliament on the recommendations and on its Conclusions. The Commission could report to the EP at a later stage on how the recommendations are followed up. Using its existing powers, the EP can then monitor the course of the peer reviews and the follow-up in a critical manner.

V Summary, conclusions and recommendations

The EU should have sufficient instruments to guarantee the proper functioning of the rule of law in the member states. From the outset, after all, the EU was intended as a legal community, based on shared values and aimed at furthering common interests. One of these values is the rule of law. The government's first question concerned the elements of the rule of law in the EU that the AIV believes to be especially important. The AIV views the rule of law from two perspectives: that of the citizen and that of cooperation within the EU. The core principle of European citizenship is that nationals of one member state who are in another member state enjoy essentially the same rights as the nationals of the latter member state, so that citizens can avail themselves of the EU's four freedoms: free movement of goods, services, capital and persons. These freedoms can only be guaranteed if the rule of law functions effectively in all the member states. Citizens may be faced in another member state with decisions that affect them, involving, for example, permits or action by the criminal justice authorities. It is thus vital to consolidate and strengthen the confidence of EU citizens in the quality of the rule of law in other member states. Moreover, the member states cooperate very closely, and such a high degree of interconnection can only work if the rule of law functions well in each member state. Lastly, it is also essential for the credibility of the external policy of the EU and the member states – a central value of which is promoting the rule of law – that the member states themselves are governed by the rule of law.

The concept of the rule of law has many dimensions, which cannot be viewed in isolation. All these dimensions combine to define the concept and all are relevant to some extent to the citizens of the member states and to cooperation within the EU. This is the answer to the first part of the government's first question.

The second part of the first question is whether the definition of this concept in the recent report by the Venice Commission offers any relevant assistance. In the AIV's opinion, there is sufficient consensus on the standards by which the concept of the rule of law should be measured in the EU. The Council of Europe has played a leading role in developing these standards, particularly through the European Court of Human Rights (ECtHR) and the Venice Commission. These standards have acquired institutional form in varying ways in the different member states, partly depending on their history and philosophical traditions. A supplementary mechanism therefore does not need to develop standards but should promote understanding of whether the rule of law is strong enough in the member states to give substance to the rights of EU citizens and to allow the close cooperation within the Union to proceed smoothly.

The government's second question concerns how the proper functioning of the rule of law can be promoted in the member states and how shortcomings in member states in this area can be addressed at EU level. The AIV recommends three courses of action in this regard:

- make better use of existing powers, mechanisms and available information;
- open up debate on the culture surrounding the rule of law in the member states;
- set up a supplementary initiative to examine and discuss the functioning of the rule of law in the member states.

These recommendations are elaborated on in the answers to questions 3 to 6.

Question 3 asks whether existing instruments in and outside the EU offer sufficient scope and if not, whether these mechanisms could be supplemented or strengthened. In chapter III, the AIV observed that existing instruments do offer scope and recommended that better use be made of existing powers, mechanisms and available information.

As regards existing powers, chapter III argued that the scope offered by European law for promoting the rule of law is not yet exhausted. The AIV sees ways of making better use of infringement proceedings to promote the proper functioning of the rule of law in the member states. The European Commission could deploy this instrument more actively and more strategically. Considering that the proper functioning of the rule of law is essential to safeguarding the rights of the citizens of all member states and to allowing EU cooperation to run smoothly, the principle of Union loyalty implies that the member states have an obligation to ensure that the rule of law functions properly in their territory and that member states may hold another member state to account if there are grounds for suspecting that this is not the case. The obligation to provide effective legal protection – an essential element of the rule of law – could also be enforced where necessary by the Commission through infringement proceedings. In the case of the area of freedom, security and justice or the internal market, it is conceivable that supplementary rules or procedures could be introduced – if it is agreed that they are desirable – pursuant to article 352 TFEU, to help ensure that rule-of-law standards are observed.

As regards the use of available information, the AIV observed in Chapter III that various institutions and organs possess relevant information but that the institutions or organs that promote the rule of law are not always aware of it. Steps should be taken to organise more information transfer, for instance by means of feedback from the courts and other supervisory mechanisms to political forums. The AIV advises the government to press the Commission to pool the information and findings arising from evaluations carried out by the Directorates-General for Home Affairs and Justice, to provide a basis for a more intensive and more strategic use of the infringement procedure.

Responsibility for the proper functioning of the rule of law lies primarily with the individual member state. A democracy governed by the rule of law has mechanisms which should correct any shortcomings in this area. These may include judicial review, parliamentary scrutiny, and the media and non-governmental organisations which can mobilise public opinion. This is not to deny that – as stated above – all EU citizens and member states have an interest in the proper functioning of the rule of law in other member states.

It is important to foster debate on the culture surrounding the rule of law in the member states. Chapter II observed that the rule of law should not be regarded merely as a formal structure; cultural factors also have an important role to play. Authorities should as a matter of course act in the spirit of the rule of law. A culture of this kind should inspire citizens to scrutinise the rule of law. Legal proceedings, complaint and application procedures and other forms of oversight are not enough. The decisive factor is the operating culture among state agencies and officials who play a key role in the rule of law. Thus strengthening the rule of law also depends on vigilance, respect for the independence of the judiciary and constitutional awareness. Politicians and others in positions of authority, such as senior judges and police chiefs, should set a good example. The AIV recommends that a debate be opened on the culture surrounding the rule of law in the member states. However, at present there is no suitable forum for such a debate.

Question 4 asks if there is a need for a supplementary initiative. Since there is no forum that can bring together information from various sectors and oversee all the dimensions

of the rule of law, including the culture in the member states, the AIV recommends that a new forum be established for this purpose. The form that such an initiative could take is outlined in Chapter IV. This is also the answer to question 5 (how existing structures could best be deployed) and question 6 (which institutions could play a role).

The AIV would advise the government to seek to convince the Council of the European Union to adopt Conclusions agreeing to conduct periodic peer reviews at EU level of the functioning of the rule of law in all the member states, on the basis of reports drawn up by a committee of independent experts. In Chapter IV the AIV indicated the outlines of a supplementary initiative along these lines to promote the rule of law in the EU member states. This would constitute the first step necessary to open up debate on how the rule of law functions. The EU procedure would be distinguished from other mechanisms in this field by its cross-sectoral and periodic character.

The government's last question concerned the role the Netherlands can play – either independently or in cooperation with its EU partners – in promoting the rule of law in the EU. First, the Netherlands could once again seek support from other member states for the active and strategic use by the European Commission of infringement proceedings as a way of promoting the rule of law. The Netherlands could also investigate whether other member states support the introduction of a supplementary initiative along the lines indicated above. Even if there is opposition to the institution of infringement proceedings and the holding of peer reviews, it is more important to ensure that the EU itself does not encounter opposition because of failings in the rule of law in one or more member states. The government should therefore continue to stress that the proper functioning of the rule of law is essential to maintaining trust among EU citizens and is the foundation for close cooperation among the member states. The principle of Union loyalty and the obligation to provide effective legal protection are also arguments in favour of peer review of the functioning of the rule of law in the member states.

The Netherlands can also play a role by setting a good example, in other words by being open to criticism and following up on recommendations. There is scope for strengthening the rule of law in every member state. The Netherlands could also fund technical support of the kind provided by the Venice Commission and other bodies. Lastly, when reviewing new EU legislation in the light of the principles of subsidiarity and proportionality, the Netherlands should also consider what influence the new legislation could have on the functioning of the rule of law in the member states. That is essential for EU citizens, in this country and elsewhere.

In his State of the Union address in 2012, the President of the European Commission, José Manuel Barroso, said that the EU needs a better developed set of instruments – not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of article 7 of the Treaty. In this advisory report the AIV has indicated how the gap between 'soft power' and the 'nuclear option' might be bridged. The introduction of peer review would create a cross-sectoral forum which could discuss questions concerning the functioning of the rule of law and the surrounding culture in the member states. The visible adoption of conclusions at a high political level would increase the pressure on member states. Where necessary, the EU could make greater use of existing options in order to take appropriate measures, without having to resort to article 7 TEU.

Annexes

Request for advice

Mr F. Korthals Altes
Chairman of the Advisory Council
on International Affairs
P.O. Box 20061
2500 EB The Hague

Date: 19 April 2013

Re: Request for advice on the rule of law in the European Union

Dear Mr Korthals Altes,

The EU treaties stress the importance of respect for human rights, freedom, equality, democracy, human dignity and the rule of law, as the fundamental values of the Union. These values are vital to the effective functioning of EU cooperation, for citizens, businesses and member states. The effective rule of law is essential to the Union as a legal community. Achieving the objectives set for policy fields such as the area of freedom, security and justice, the internal market and EMU depends in good measure on mutual trust between the member states. This applies, for example, to the mutual recognition of court judgments and to making investments in another member country. It is essential that rights and obligations can be enforced in an effective justice system based on an independent judiciary.

In recent years various studies have been made of the scope of the concept 'rule of law' and of how monitoring takes place in this field both in and outside the EU. For instance, in April 2001 the Venice Commission of the Council of Europe published its 'Report on the Rule of Law', which addressed specific aspects of the concept. The Research and Documentation Centre (WODC) has carried out studies into monitoring in relation to justice and home affairs and in other areas. These studies have shown that different definitions and descriptions of the rule of law are used in practice, which gives rise to a lack of focus in policy discussions on this subject. Different monitoring methods are also used for different elements of the concept.

A variety of requirements related to the rule of law apply in the EU and various types of monitoring take place. For instance, candidate member states are expected to meet a whole range of requirements pertaining to the judiciary and the protection of fundamental rights (Chapter 23 of the acquis), including effective measures aimed at combating corruption and organised crime. Once a country joins the EU, the Commission can initiate infringement proceedings in response to any violations of the EU acquis, including the Charter of Fundamental Rights. Furthermore, in the event of a serious and persistent breach of the values on which the EU is founded, such as democracy, the rule of law and respect for fundamental rights, it is possible to suspend a country's voting rights (article 7 TEU). However in political and legal terms this is a very rigorous instrument and one that has not been applied to date. The monitoring instruments associated with the Council of Europe (including the ECHR) have a similar shortcoming; the most serious sanction is a decision ending a country's membership of the organisation (article 8 of the Statute of the Council of Europe), and such a decision has never been taken in practice. These instruments do not therefore

offer an entirely cohesive and effective system for addressing challenges posed to the rule of law, democracy and fundamental rights in Europe. What is currently lacking is an early-stage mechanism for permanently focusing attention on the state of the rule of law in all member states. No provision has yet been made for an EU system for monitoring compliance with the Union's fundamental values.

The impact of shortcomings in the rule of law on EU citizens, member states and the EU as a whole in key fields such as the Schengen area and the eurozone has recently become apparent. These experiences demonstrate the need for stability in the rule of law, for an effective EU, and for trust to exist both between member states and between citizens and the EU itself.

Developments are afoot both in and outside the EU that could help promote the rule of law and address potential shortcomings. For instance, European Commission President José Manuel Barroso spoke of the EU's need for a better developed set of instruments in this field in his State of the Union 2012 Address. Furthermore, in the context of the European Semester, the Commission recently took the initiative to examine a number of aspects of the quality, independence and efficiency of justice, in the form of the Justice Scoreboard. In a joint letter of 6 March 2013 to the President of the European Commission, the foreign ministers of Denmark, Finland, Germany and the Netherlands called on the Commission to develop an effective mechanism to safeguard and strengthen the rule of law and fundamental values in the EU. And the EU Agency for Fundamental Rights (FRA), whose task and work programme involve providing EU institutions and member states with 'assistance and expertise' in relation to fundamental rights, has been operating for a number of years, publishing reports in this field. The Council of Europe is currently also examining how to make the results of monitoring mechanisms more directly useful and enforceable, thereby improving their effectiveness.

The question is whether more needs to be done to promote the rule of law in the EU, and if so, what? Will initiatives such as those described above be sufficient to address all of the challenges posed to the rule of law in the EU in a timely and structured manner? How can this be built on when enforcing and promoting the rule of law in the EU, and what role can the Netherlands play? For instance, taking into account the sovereignty of the member states, would it be useful to create an instrument to provide an insight into the functioning of the rule of law in other member states as a way of improving mutual understanding and trust, addressing potential shortcomings and preventing problems, including those of a political nature? What monitoring method would be most effective for this purpose?

Questions that the government wishes to submit to the AIV:

1. Which elements of the rule of law does the AIV believe to be especially important in the EU, in view of the specific nature of EU cooperation? Does the description of this concept in the recent report by the Venice Commission offer any relevant assistance in answering this question? Are there any elements that are missing from the report, or that are of less relevance to the EU?

2. How does the AIV believe that the proper functioning of the rule of law can and ought to be promoted in the EU? And how can shortcomings in member states in this area be addressed at EU level?

3. Do existing instruments in and outside the EU offer sufficient scope for this purpose? If not, could these mechanisms be supplemented or strengthened to achieve this aim?

4. Besides these instruments, is there a need for the development of one or more supplementary mechanisms in or outside the EU? And if so, what form could they take?

5. How could existing structures (e.g. EU institutions such as the Commission, EU agencies such as the FRA, or the Council of Europe) and the results produced by these structures best be involved and deployed in designing these instruments?

6. Which institution(s) – for instance the Council, the Commission, or any other or new institutions – could be given an executive or other role in relation to a supplementary instrument?

7. What role can the Netherlands play – either independently or in cooperation with its EU partners – in promoting the rule of law in the EU in general and more particularly in promoting existing structures and developing one or more supplementary mechanisms?

I look forward to receiving your recommendations.

Yours sincerely,

Frans Timmermans

Minister of Foreign Affairs

List of abbreviations

ACP	African, Caribbean and Pacific countries
AIV	Advisory Council on International Affairs
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CEPEJ	European Commission for the Efficiency of Justice
CoE	Council of Europe
EC	Treaty establishing the European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	Treaty establishing the European Economic Community
EP	European Parliament
EU	European Union
FOM	Representative on Freedom of the Media
FRA	EU Agency for Fundamental Rights
FRALEX	Fundamental Rights Agency Network of Legal Experts
FRONTEX	European Border Management Agency
GENVAL	Working Party on General Matters including Evaluations
GRECO	Group of States against Corruption
HCNM	High Commissioner on National Minorities
HRC	Human Rights Council
ODIHR	Office for Democratic Institutions and Human Rights
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
PA	Parliamentary Assembly
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

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