

# The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU

## Towards an EU Copenhagen Mechanism

Sergio Carrera, Elspeth Guild and Nicholas Hernanz

With Thematic Contributions by  
Cinzia Alcidi, Matthias Busse,  
Roger Errera, Ivanka Ivanova,  
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**November 2013**

## **Abstract**

This study examines the triangular relationship between fundamental rights, democracy and the rule of law in the EU and the challenges that arise in reflecting on ways to strengthen EU competences in these terrains. It analyses the current 'state of play' and provides a map of EU-level mechanisms assessing respect for rule of law, democracy and fundamental rights, and Article 2 TEU general principles, by EU member states. Special attention is paid to cross-cutting dilemmas affecting the operability and effective implementation of these principles. The study thinks ahead and offers possible 'ways forward' in EU policy-making for ensuring a more optimal respect, protection and promotion of the Union's principles by member states and the EU. It proposes the creation of a new supervisory mechanism – the Copenhagen mechanism – to effectively address the current rule of law deficits facing the concept of 'democratic rule of law with fundamental rights' in the Union.

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### **Executive Summary**

This study examines the protection of fundamental rights, democracy and rule of law in the European Union (EU), and the challenges that arise in reflecting on ways to strengthen EU competences in these contested terrains. It provides a ‘state of play’ and critical account of EU-level policy and legal mechanisms assessing the relationship between rule of law, democracy and fundamental rights in the member states of the Union. The cross-cutting challenges affecting their uses, effective implementation and practical operability constitute a central point of analysis. The study argues that the relationship between rule of law, democracy and fundamental rights is co-constitutive. Any future rule of law-related policy discussion in the EU should start from an understanding of the triangular relationship between these dimensions from the perspective of ‘democratic rule of law with fundamental rights’, i.e. the legally based rule of a democratic State that delivers fundamental rights. The three criteria are inherently and indivisibly interconnected, and interdependent on each of the others, and they cannot be separated without inflicting profound damage to the whole and changing its essential shape and configuration.

The study starts by mapping out existing EU legal and policy instruments assessing or monitoring rule of law, democracy and fundamental rights-related issues of member states’ systems within the context of the EU’s Area of Freedom, Security and Justice. It shows that there is already a multi-level and multi-actor European patchwork of mechanisms engaged at different degrees in the assessment of member states’ compliance with Article 2 TEU principles. A typology is proposed, which categorises these mechanisms into four main types of methods (i.e. monitoring, evaluation, benchmarking and supervision) in order to facilitate a better understanding of their scope, common features and divergences. This modality of categorisation pays particular attention to the kinds of methodological features used. The resulting picture is the following:

Article 7 TEU represents the only supervisory tool currently in the hands of the European institutions to monitor and evaluate member states’ respect of the Union’s founding principles enshrined in Article 2 TEU. This EU supervisory mechanism can be triggered in the event of a breach in areas where member states act autonomously or outside the scope of EU law. There are in addition three systems where the Union intervenes in evaluating and benchmarking member states’ performance in the fields of corruption (EU Anti-Corruption Report), civil and commercial justice (EU Justice Scoreboard) and wider rule of law considerations in relation to Bulgaria and Romania (Cooperation and Verification Mechanism). The European patchwork of mechanisms also includes a series of annual reporting processes by EU institutions, agencies and community bodies delivering periodical assessments and reporting on member states’ fundamental rights and rule of law-related developments.

These EU instruments however are affected by a number of dilemmas. The diagnosis has revealed three cross-cutting aspects affecting these, and which mainly relate to conceptual, competence and methodological questions:

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\* Sergio Carrera, Senior Research Fellow and Head of the Justice and Home Affairs Section, Centre for European Policy Studies, CEPS; Elspeth Guild, Senior Associate Research Fellow, Justice and Home Affairs, CEPS, and Jean Monnet Professor ad personam of European Migration Law at the Radboud University Nijmegen, the Netherlands, and Queen Mary, University of London, United Kingdom; Nicholas Hernanz, Research Assistant, Justice and Home Affairs Section, CEPS.

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**1. Conceptual:** The notion of rule of law is an elusive and controversial one. It is therefore not surprising that the EU system lacks a commonly agreed conceptualisation. The European Commission for Democracy through Law (the Venice Commission) of the Council of Europe has provided one of the few more widely accepted conceptual frameworks for rule of law in Europe, and it represents a helpful starting point. That notwithstanding, the Thematic Contributions annexed to the study have unanimously revealed the ‘embeddedness’ of this term with specific national historical diversities of a political, institutional, legal and imaginary nature. Concepts such as for instance *Rechtsstaat* in Germany, *état de droit* in France, *rule of law* in the UK or *pravova darjava* in Bulgaria are far from being synonymous and present distinctive features, including their relations with the other notions of democracy and fundamental rights. The material scoping of rule of law in member states’ arenas, and its linkages with the other two criteria, remain also ever-shifting and are therefore difficult to capture from a normative viewpoint.

**2. Competences and sovereignty:** All three principles, however, are inherent to the EU through the Treaties and the EU Charter of Fundamental Rights. The Union is also a rule-of-law actor. The development of the European legal system and its evolving fundamental rights *acquis* have transformed the traditional venues of accountability which used to reside within the exclusive remit of the nation-liberal democratic member states of the Union. It has added a supra-national constellation of rule of law. The EU Charter of Fundamental Rights is also now a constitutive component of the national constitutional traditions of EU member states. This constellation is revealed through the sovereignty and competency struggles between European institutions and member states’ governments in ‘Europeanisation’ processes. ‘Who’ is (or should be) responsible for safeguarding and monitoring democratic rule of law with fundamental rights in the EU?

There seems to be a consensus amongst EU institutional actors about the existence of a ‘Copenhagen dilemma’ and the need to explore new EU mechanisms to address member states’ violations of the EU’s founding principles. The study argues that when bringing the EU into the intersection between rule of law, democracy and fundamental rights, profound sovereignty struggles emerge, which lay at the basis of the ‘Copenhagen dilemma’. While European institutions continue stressing the importance of the primacy of EU law and hence call upon member states to comply with their obligations and loyal cooperation in the scope of the EU Treaties and Article 2 TEU, member state governments in turn counter this version of ‘rule of law’ with principles of subsidiarity and national sovereignty. Moreover, when bringing the EU levels to the triangular relationship between rule of law, fundamental rights and democracy, the debates that have traditionally taken place in member states about the notions and interactions between these three criteria are played out at the level of European institutions. The study shows that a ‘triangular prism’ is the most useful visual illustration of the rule of law going supra-national in the context of the EU.

The thematic contributions included in Annex 3 of the study have additionally analysed the extent to which the EU fundamental rights framework has mutated traditional notions, scope and interactions in the triangular relationship between rule of law, fundamental rights and democracy. They reveal that in a majority of member states under examination the dividing boundaries between national law and actions within the remits of EU law can no longer be easily drawn. The evolution of the EU fundamental human rights framework has played a key role in fostering convergence in domestic judicial, juridical and constitutional practices. The EU Charter of Fundamental Rights is now part of the national constitutional traditions of the member states. The study therefore argues that this development may constitute a sound basis for further strengthening the EU’s role in evaluating and supervising rule of law, democracy and fundamental rights protection across its member states.

**3. Methodological:** The mapping of existing monitoring, evaluation and supervisory EU mechanisms and tools of the values of Article 2 TEU also sheds light on a number of methodological issues that affect the effectiveness in their usage and implementation. These relate first to their nature as experimental governance techniques and policy tools (new forms of ‘governmentality’), which constitute soft-policy coordination frameworks making use of benchmarking, exchange of ‘good/best practices’ and mutual learning processes between member states at EU level. European integration takes place and develops not only through the institutional and decision-making parameters designed in the EU Treaties, but also through a benchmarking logic consisting of the framing and diffusion of common challenges, indicators

and standardisation, and best practices/solutions. They affect the rule-of-law features designing the EU inter-institutional balance, which has been granted to the so-called Community method of cooperation and modify the ways in which EU decision-shaping and -making is supposed to take place according to the EU Treaties. Particular issues of concern include matters of democratic accountability and judicial control gaps, or the unbalanced way in which they handle scrutiny, and a lack of coherency/consistency with other existing EU legislative frameworks and policy agendas. Similar concerns have been raised concerning ongoing EU surveillance and monitoring systems in the field of economic policy coordination, in particular the European Semester for Economic Policy Coordination. The study shows the inherent difficulties in any attempt at benchmarking rule of law in the EU, which relate to its political, non-neutral and subjective methodologies. These pose additional challenges in the attempts to conduct a fully comprehensive qualitative assessment of member states' systems and their evolving domestic particularities in a reliable, accurate and objective manner. The study underlines that the use of benchmarking should be limited and taken with caution. It also highlights the importance of ensuring the provision of independent academic knowledge at times of ensuring the legitimacy and trust-worthiness of these and any future EU evaluation and supervisory methods, and recommends the setting up of a new interdisciplinary platform of academics with proven expertise on rule of law aspects which would issue an annual scientific report on the situation of fundamental rights, democracy and rule of law in EU, and would be independent from the European institutions and agencies.

The study concludes with suggestions and recommendations for taking EU policy-making on evaluating and supervising member states' compliance with Article 2 TEU forward. It is proposed that the EU should establish a new supervisory mechanism covering the triangular relationship between rule of law, democracy and fundamental rights, which could be named the 'Copenhagen Mechanism'. This mechanism should be built upon the existing Article 7 TEU, and should particularly focus on developing the phases preceding its preventive and corrective arms. The Commission currently has at its disposal several instruments that could be more effectively brought to bear against a member state even when they act outside the scope of EU law or 'autonomously', without the need of any Treaty change.

The Copenhagen mechanism should also develop the procedures surrounding the activation of Article 7 TEU. It should include an additional arm consisting of a periodic evaluation dimension or 'scoreboard' of member states which would work in parallel with the preventive and penalty arms of Article 7 TEU, and would essentially focus on constant evaluation and joint coordination of member states' efforts. No Treaty change would be required to develop the Scoreboard. In a longer-term perspective, other measures could be taken that would require an amendment of the current normative configurations delineating the EU Treaties. The activation phase of the Copenhagen mechanism in cases of alleged risk or existence of serious/persistent breach of Article 2 TEU could be improved by liberalising its current form and threshold, which remains too burdensome in practice. A revised Copenhagen mechanism should focus on ensuring its own rule-of-law compliance by guaranteeing a higher degree of democratic accountability and judicial control during the various phases comprising the procedure and supervision processes, as well as the substantive decisions potentially taken against member states.



*We face a Copenhagen dilemma.  
We are very strict on the Copenhagen criteria,  
notably on the rule of law in the accession process of a new Member State but,  
once this Member State has joined the European Union,  
we appear not to have any instrument to see whether the rule of law and  
the independence of the judiciary still command respect.*

Viviane Reding, Vice-President of the European Commission,  
addressing the European Parliament, 11 September 2012

## 1. Introduction

The European Union and its Area of Freedom, Security and Justice have been based and developed on a long-standing assumption according to which its member states respect a series of general principles including the rule of law, democracy and human rights and liberties. Article 2 of the Treaty on the European Union (TEU) formally enshrines that foundational premise of European integration by stipulating that these principles, often referred to also as ‘values’, are common and shared across its member states.<sup>1</sup> This assumption has played a critical role in every EU enlargement process. The so-called ‘Copenhagen criteria’,<sup>2</sup> which widely include stability of institutions guaranteeing democracy, the rule of law and human rights, have functioned as a key pre-condition for any candidate country to cross the bridge towards Union membership.

The Lisbon Treaty has introduced a much celebrated renewed EU fundamental rights framework, with Article 6 TEU proclaiming the Charter of Fundamental Rights of the European Union as having the same legal value as the Treaties. While the Charter now constitutes a firm, legally binding reference point for the meaning and content of fundamental rights in the European legal system, its scope of application remains limited, in the context of member states’ actions, to those cases when they are implementing Union law, as clarified by its Article 51.<sup>3</sup> Article 7 TEU constitutes the only instrument in the current EU Treaties granting the European institutions the possibility to monitor and safeguard compliance of Article 2 TEU principles by member states in a post-accession phase. This provision, however, has often been considered as a ‘nuclear option’ by the European institutions and the European Commission in particular,<sup>4</sup> and has never been used in practice since its introduction in primary European law.

The conclusive presumption according to which EU member states comply with rule of law, democracy and fundamental rights *after* accession has however become increasingly disputed lately. This has been particularly contentious in those areas where member states act *outside* the scope of European law or in domains with nuanced or blurred linkages with their obligations in implementing EU legislation in their domestic systems. A number of controversies have emerged in recent years in relation to breaches by certain member states of the Union’s foundational principles. The European Commission has, according to Vice-President Viviane Reding, faced three main “*rule of law crises*” in Europe:

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<sup>1</sup> Article 2 of the Treaty on the European Union reads as follows: “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.”

<sup>2</sup> Refer to European Council in Copenhagen, Conclusions of the Presidency, 21-22.6.1993, DOC 93/3, available at [http://europa.eu/rapid/press-release\\_DOC-93-3\\_en.htm](http://europa.eu/rapid/press-release_DOC-93-3_en.htm), which stated the criteria as follows: “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.” Also, refer to Article 49 of the Treaty on the European Union which states: “*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.*”

<sup>3</sup> Article 51(1) states “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

<sup>4</sup> See Speech of President José Manuel Barroso on the State of the Union of 12 September 2012: “A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy...these situations also revealed limits of our institutional arrangements. We need 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.” ([http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm))



These were not small, isolated incidents or illegalities, as happen from time to time in our Member States and across the world, but matters that quickly took a systemic dimension and revealed systemic rule of law problems. They included notably the Roma crisis in France in summer 2010, when the rights of the people belonging to an important minority were at stake; the Hungarian crisis from the end of 2011, where we were mostly concerned about the independence of the judiciary; and the Romanian rule of law crisis in the summer of 2012, where non-respect of constitutional court judgments threatened to undermine the rule of law.<sup>5</sup>

The ways in which the Commission has framed and reacted to these events has been the cause of inter-institutional debates, not least in light of recurrent concerns from institutions such as the European Parliament, which has called upon the Commission to provide swift and forward-looking policy responses addressing these fundamental rights and rule of law violations. The European Parliament, and in particular its Committee on Civil Liberties, Justice and Home Affairs (LIBE), has put forward a wide range of policy initiatives chiefly enshrined in its Resolutions on the situation of fundamental rights in the EU aimed at strengthening current EU mechanisms and better ensuring the respect of the Union's general principles in the EU *and* in member states' arenas, including when they act "autonomously".<sup>6</sup>

The Commission's responses have alluded to the limits of the current EU institutional and legal arrangement and the so-called 'Copenhagen dilemma', as the opening quote of Reding's speech shows above, and the need to revise the current Treaty framework in order to address these situations and strengthen the 'political union'. There seems to be consensus amongst EU institutional actors about the need to explore *new* concrete initiatives and 'mechanisms' to address member states' violations of the Union's founding principles at EU level, and as part of the 'political union'. This is even the case at the level of some EU member states.<sup>7</sup> The Council Conclusions on fundamental rights and rule of law of June 2013<sup>8</sup> requested the Commission to take the debate forward on the possible needs for new instruments and the shape of a collaborative and systematic method addressing the respect of rule of law in the Union.<sup>9</sup>

That notwithstanding, is there really such a 'Copenhagen dilemma'? And even if there is one, what is that 'dilemma' precisely about? This study critically examines the protection of fundamental rights, democracy and the rule of law in the EU and the challenges that arise in reflecting on ways to strengthen EU competences in these terrains. It analyses the policy and legal mechanisms on which the European institutions depend for safeguarding and assessing member states' compliance with Article 2 TEU. Special attention is paid to cross-cutting dilemmas or vulnerabilities affecting their operability and effective implementation. Attention is given to possible ways forward in EU policy-making for ensuring a more optimal respect, protection and promotion of the Union's principles by member states and the EU.

The study starts by showing how the Union already has in place a multi-level and multi-actor framework of mechanisms dealing directly or indirectly with rule of law, democracy and fundamental rights in the EU's AFSJ (Section 2 of this study). Relevant examples of existing evaluation systems in the framework of the EU economic governance architecture are also included. This patchwork setting of instruments is engaged at different degrees in the assessment of member states' obligations, including those under Article 2 TEU and the EU Charter of Fundamental Rights. They also present variable levels of proximity and linkages with European (primary and secondary) law. Some have no express legal foundations, but are rather part of

<sup>5</sup> V. Reding, "The EU and the Rule of Law: What Next?", speech delivered at the Centre for European Policy Studies, CEPS, SPEECH/13/677, 04/09/2013.

<sup>6</sup> The European Parliament is currently working on a new Report on the situation of fundamental rights in the Union. Refer to European Parliament, Draft Report on the Situation of Fundamental Rights in the European Union, Rapporteur: Louis Michel, 2013/2078, 18.9.2013. See also Working Documents I and II on the situation of fundamental rights in the European Union in 2012, Rapporteur: Louis Michel, 21.6.2013.

<sup>7</sup> In a letter sent to the President of the European Commission, the Foreign Affairs Ministers of Denmark, Finland, Germany and the Netherlands call for a new EU mechanism to strengthen the fundamental values and principles of the EU ([www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf](http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf)).

<sup>8</sup> Council of the European Union (2013), Council Conclusions on Fundamental Rights and Rule of Law and on the Commission 2012 Report on the application of the Charter of Fundamental Rights, Justice and Home Affairs Council Meeting, Luxembourg, 6-7 June 2013.

<sup>9</sup> The European Commission is organising an event on 21-22 November 2013 called "Assises de la Justice: Shaping Justice Policies in Europe for the Years to Come" in Brussels where these and other related issues will be discussed. For more information, see [http://ec.europa.eu/justice/events/assises-justice-2013/index\\_en.htm](http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm).

experimental governance techniques, soft-policy coordination methods and evaluation mechanisms at EU level. European integration develops not only through the usual ‘Community method of cooperation’ and other procedures envisaged in the Treaties. It also advances via the framing and diffusion of common challenges, the use of indicators and standardisation and the identification of ‘best practices’ by a benchmarking logic.

Current EU mechanisms on rule of law, democracy and fundamental rights, however, are affected by a number of cross-cutting dilemmas, which as it will be argued, affect their effective implementation, and should be taken into cautious consideration when thinking of future EU public policy directions in these domains (section 3). Three are identified in our analysis:

- A first challenge relates to the lack of a commonly shared conceptual framework on what ‘rule of law’ means in the European Union (section 3.1). The content and scope of this notion remain unresolved and tightly linked to member states’ domestic traditions, systems and memories. Similar nuances and domestic particularities emerge when looking at the ways in which rule of law relates and interacts with the other two dimensions, and what we call the triangular relationship between rule of law, democracy and fundamental rights. What are the essential elements of these three criteria and which actor or institution should be entitled to determine whether EU member states satisfy them?
- This takes us towards a second challenge, which corresponds with issues related to legal competences (section 3.2). The dilemmas that flourish when bringing the EU into the intersection of rule of law, democracy and fundamental rights raise profound sovereignty struggles, which we argue lay at the base of the ‘Copenhagen dilemma’. While EU institutions stress the importance of the primacy of EU law and call member states to comply with the Treaties obligations, member states in turn counter this version of rule of law with the principles of subsidiarity and State sovereignty. ‘Who’ is or should be responsible? And is the answer to that question affected when looking at the ways in which the evolution of the EU’s fundamental rights framework and *acquis* has affected and fostered changes in member states’ domestic constitutional systems and jurisdictions?
- Finally, a cross-cutting dilemma relates to the methodologies used by existing EU rule of law instruments and mechanisms (section 3.3). These methodologies are connected to the implications stemming from the usage of experimental EU governance orienting or indirectly influencing member states’ public policies, while creating a complex and blurred institutional setting which stands in a difficult relationship with democratic accountability and judicial control at EU level, due to limited, marginal or non-existent roles for the European Parliament and the Court of Justice of the European Union (CJEU). Other methodological dilemmas emerge due to the use of benchmarking and indexing and the tensions which these create at times of ensuring qualitative, reliable, de-politicised and objective evaluations of member states’ systems and practices.

The study concludes that any step forward in EU policy-making on monitoring, evaluating or supervising member states’ compliance with the Union’s general principles should be driven by an understanding of rule of law as *democratic rule of law with fundamental rights*, the legally based rule of a democratic State, which delivers fundamental rights. After examining the current state of affairs of initiatives and proposals that have been put forward and are being planned by the European Parliament and the European Commission in these policy discussions (section 4), a set of policy recommendations are put forward in section 5 that aim at ‘optimising’ rule of law, democracy and fundamental rights protection both at member state and EU levels. The study highlights that there are at present an ample number of policy and legal options for addressing rule of law, democracy and fundamental rights deficits at member state level without the need for any change or revision to the EU Treaties. The EU should start developing (without also needing to amend the current EU Treaties) a new EU supervisory mechanism – *the Copenhagen Mechanism* – covering the triangular relationship between rule of law, democracy and fundamental rights.

### Methodological Note

This study is the result of a collective effort. The methodology consisted of the formation of a focus group of experts on rule of law, democracy and fundamental rights in the EU. Their thematic contributions are presented in Annex 3 of the study. In addressing the triangular relationship between rule of law, democracy

and fundamental rights, we found it was necessary to cover the relevant discussions and approaches in a selection of member states' traditions in the EU.

The thematic contributions address the ways in which a number of member states, in particular the United Kingdom, Germany, France and Bulgaria, have framed and understood the notion of rule of law, and its interactions and evolving relationship with democracy and fundamental rights. They have also studied the extent to which the EU, and its evolving fundamental human rights *acquis*, may have brought about changes in the way in which their respective constitutional and jurisdictional systems conceive and deal with the triangular relationship. Two of the thematic contributions cover the experiences gained from the application of existing evaluation and surveillance systems at the EU level of member states' policies in the context of the Cooperation and Verification Mechanism (CVM), which applies to Bulgaria and Romania, and the wider EU economic policy architecture, in particular the European Semester for economic policy coordination. The analysis and findings of the thematic contributions provide the background for the investigations carried out for this study.

These have been complemented by desk research of relevant primary and secondary sources, a comprehensive mapping of current EU instruments and mechanisms in the AFSJ and relevant economic policy domains (provided in Annex 1). Our analysis does not cover other mechanisms, instruments or systems intervening in the assessment of democracy, human rights and rule of law of EU member states that exist at other regional and international levels such as the Council of Europe or the United Nations.<sup>10</sup> Nor does it deal directly with the implementation of the various EU-level enforcement mechanisms foreseen in the Treaties to monitor member states' compliance with European law, and the respective roles of the European Commission and the CJEU in this context.<sup>11</sup> A set of semi-structured interviews have been also conducted with policy-makers working in European institutions and agencies, as well as practitioners working in civil society organisations in Brussels specialised on the issues covered by this study.

## 2. Mapping EU Mechanisms on Rule of Law, Democracy and Fundamental Rights

This section examines the current legal and policy mechanisms assessing rule of law, democracy and fundamental rights performance by EU member states. The analysis is based on a *mapping exercise* provided in Annex 1 of this study, which offers a detailed overview of the set of Treaty provisions and instruments developed to date at the EU level in the context of the Area of Freedom, Security and Justice. The analysis also looks at mechanisms that have been developed in the field of European economic policy coordination of particular relevance to our discussion. In examining their scope and features, attention is paid to the following dimensions: i) who are the driving institutional actors ('who'); ii) their material scope ('what'); iii) the ways in which the assessment is conducted and the methodologies used ('how'); and iv) the existence of any follow-up dimensions during member states' implementation. The section starts the journey by synthesising the most relevant rule of law-related instruments existing in the EU legal system (section 2.1). It then offers a typology that may prove useful to gain a better understanding of their nature and implications (section 2.2).

### 2.1 An Overview of Legal and Policy Instruments in the EU

What are the main Treaty provisions and policy instruments that have so far been developed in the field of the EU's protection of rule of law, fundamental rights and democracy? The following instruments, which are profiled in considerable detail below, can be especially highlighted:

- Article 7 of the Treaty on the European Union (TEU)
- the Cooperation and Verification Mechanism (CVM)
- the EU Anti-Corruption Report

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<sup>10</sup> These mechanisms include, among others, the Council of Europe (Venice Commission, Human Rights Commissioner, CEPEJ or GRECO), the United Nations (Universal Periodic Review), the World Bank, the OSCE and the OECD.

<sup>11</sup> Refer for instance to M. Cremona (2012), *Compliance and the Enforcement of EU law*, Oxford: Oxford University Press. See also P. Craig and G. de Búrca (2011), *EU Law: Text, Cases and Materials*, Fifth Edition, Oxford: Oxford University Press, chapters 12 and 13, pp. 408-483.

- the Justice Scoreboard, which is part of the European Semester for economic policy coordination
- the EU inter-institutional annual reporting on fundamental rights and the EU Charter of Fundamental Rights.

### 2.1.1 Article 7 Treaty on European Union

**Article 7 of the Treaty on European Union (TEU) constitutes one of the most important legal instruments** currently contained in the body of the Treaties for facing a situation where there is a clear risk of a serious breach of the values outlined in Article 2 TEU or when there is a determined and persistent breach of those values by a member state.

Concerning the ‘what’ (material scope) question, Article 7 provides that on provision of a reasoned proposal by one-third of the member states, by the European Parliament or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a member state of Article 2 TEU, which includes rule of law, democracy and the respect for human rights.<sup>12</sup>

Article 7 aims at equipping the EU institutions with the means of ensuring that Article 2 TEU principles are respected by the member states. Article 7 was added to the Treaty on European Union by the Amsterdam Treaty in 1997 with what was perceived to be an intention to prevent breaches of EU principles following the EU enlargement towards former communist countries in Eastern Europe.<sup>13</sup> It confers powers on the European Commission, the European Parliament and one third of the member states to monitor fundamental rights in the EU and identify potential risks. The scope of application is not limited to member states’ actions when implementing EU law. It could also be triggered in the event of a breach in areas where member states act autonomously. As the European Commission highlighted in its Communication on Article 7 of the Treaty on European Union:

The fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. *There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction.* If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by

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<sup>12</sup> Article 7 reads:

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may 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. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

<sup>13</sup> As G. de Búrca observes, “the addition of Article 7 to the TEU by the Amsterdam Treaty (...) was evidently perceived as a necessary safeguard clause to provide for urgent action should one of the newer democracies, after its admission as a member, collapse or significantly fail to meet the standards asserted by the EU”. See G. de Búrca (2004), “Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union”, *Fordham International Law Journal* 27: 696.

Article 7, this is likely to undermine *the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs*.<sup>14</sup> (emphasis added)

As regards the ‘who’ (driving institutional actor), Article 7 TEU involves the European Commission, the European Parliament, the Council and the European Council, as well as the Court of Justice of the European Union (CJEU). The possibility of censure, however, rests with the Council: the Council acting by a qualified majority may decide to suspend certain rights deriving from the application of the Treaties to the member state in question, including voting rights of the representative of the government of that member state in the Council. The Council’s discretion is therefore large, and its hands are not bound in determining that there is a clear risk or in determining that there is a serious or persistent breach, as well as even on the application of penalties. This has been considered as a severe drawback in that “its overall features arguably create ‘expectations’ amongst the member states that it actually will never be applied”.<sup>15</sup>

These components manifest the inherently political nature of Article 7 TEU, which, as the Commission has pointed out, “leaves room for a diplomatic solution to the situation which would arise within the Union following identification of a serious and persistent breach of the common values”.<sup>16</sup> The democratic scrutiny by the European Parliament is rather limited, by only giving ‘assent’ before the Council can act and not being on an equal footing with the Council in determining the existence of a risk or a persistent breach of ‘the values’. The same holds true for the CJEU, which has only been granted the competence to review the legality of the procedure and not the substantive decision establishing that there is a clear risk or a serious and persistent breach of Article 2 TEU.<sup>17</sup>

The way in which this provision works (the ‘how’ question) is as follows: Article 7 TEU establishes a two-arm mechanism based on, first, a preventive arm whereby a clear risk of a breach of the common values of Article 2 TEU by a member state has to be determined; and second, if the risk is found to be serious and persistent, a penalty arm of the mechanism. The practical operability and the politicised nature of Article 7 constitute two central challenges in its effective implementation. Since its inception, there has not been an inter-institutional consensus as regards the actual ways or conditions under which Article 7 TEU is to be made operational in practice, which may have also contributed to its lack of practical application to date. This mechanism, indeed, has never been put in practice and is considered as a last-resort solution (a ‘nuclear option’) by EU policy-makers.<sup>18</sup> Indeed, it so far remains a theoretical means of supervising the values of the EU among its member states.

The European Commission attempted to clarify in the above-mentioned Communication in 2003 the ways in which Article 7 could be used.<sup>19</sup> The Communication laid out different conditions for the prevention mechanism and the penalty mechanism to apply. As regards the prevention mechanism, the concept of ‘*clear risk*’ mentioned in Article 7 is meant to send a warning to the offending member state before the risk materialises. According to the above-mentioned 2003 Communication, Article 7 TEU

... also places the institutions under an obligation to maintain constant surveillance, since the “clear risk” evolves in a known political, economic and social environment and following a period of whatever duration during which the first signs of, for instance, racist or xenophobic policies will have become visible.<sup>20</sup>

The clear risk may become a serious breach of Article 2 values. According to the Commission, criteria that could be used to determine the threshold as to whether the breach is “serious” include the purpose of the breach (the social class affected, for example) and its result (the breach of a single common value is enough to activate the mechanism, but a breach of several values may be evidence of a serious and persistent

<sup>14</sup> European Commission (2003), Communication on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003, p. 5.

<sup>15</sup> A. Von Bogdandy et al. (2012), “Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States”, *Common Market Law Review* 49: 496.

<sup>16</sup> European Commission (2003), Communication on Article 7 of the Treaty on European Union, op. cit., p. 6.

<sup>17</sup> The role of the Court of Justice as regards Article 7 is specified in Article 269 TFEU.

<sup>18</sup> See the State of the Union speech by Commission President José Manuel Barroso on 11 September 2013 ([http://europa.eu/rapid/press-release\\_SPEECH-13-684\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm)).

<sup>19</sup> European Commission (2003), Communication on Article 7 of the Treaty on European Union, op. cit.

<sup>20</sup> *Ibid.*, p. 7.

breach). The 2003 Communication further specifies the threshold for activating Article 7, which should be much higher than a succession of individual cases before national or international courts. A serious and persistent breach must concern a systematic problem with the values of Article 2, and must be a breach which has already taken place.

According to this Communication, EU institutions are in principle equipped with the means to ensure that all member states respect the values of Article 2 TEU. However, the Commission Communication does not add to the preventive arm of Article 7 a centralised monitoring tool to evaluate the respect of human rights or the rule of law, but rather points to existing sources of information such as the European Parliament's Annual Reports on the situation of fundamental rights in EU member states, the Council of Europe or civil society. Decisions of regional or international courts such as the European Court of Human Rights are also taken into account. Interestingly, the 2003 Communication mentions the EU Network of Independent Experts on Fundamental Rights, which used to publish an annual report on the fundamental rights situation in the EU, and highlights the fact that the information provided by this network

... should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty.<sup>21</sup>

This network of independent experts has been disbanded since then and replaced with the Fundamental Rights Agency (FRA). Also, the Communication has not been followed up since 2003, which has left a big deal of obscurity regarding the conditions for its operation and the means for securing the respect and promotion of Article 2 TEU principles. Ten years after, there is no clarity concerning the ways in which this provision would be made operational. Its non-use is not, however, related to the lack of examples where the principles of Article 2 TEU have been placed in jeopardy by certain member states, as pointed out in declarations by Vice-President Reding cited in the introduction of this study.<sup>22</sup> As regards the 'follow-up' dimension, Article 7 depends on political persuasion and a punitive dimension: the wording of Article 7 hints at a preference towards a diplomatic solution with the Council hearing the member state in question before making any determination (Article 7(1)). The punitive dimension should also be triggered only "*after inviting the Member State in question to submit its observations*" (Article 7(2)). Possible sanctions against the offending member state foreseen by the Article 7 mechanism involve a suspension of

... 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 (Article 7(3)).

A first occurrence of sanctions against a member state, albeit not adopted in the context of Article 7 TEU, were the restrictions imposed on Austria by the 14 other EU member states in 2000, following parliamentary elections and the forming of a governing coalition between a conservative party (ÖVP) and a controversial far-right party (FPÖ). These restrictions included a freezing of bilateral contacts at the political level with the Austrian government. These sanctions, however, are considered not to have been formally adopted by the EU but rather by 14 member states of it.<sup>23</sup> The 1999 Amsterdam Treaty had already foreseen a penalty mechanism in the then-Article 7 of the Treaty, but it was not until the Nice Treaty that the preventive arm of this instrument was introduced,<sup>24</sup> and confirmed by the Lisbon Treaty in 2009.

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<sup>21</sup> Ibid., p. 9.

<sup>22</sup> Reding, 'The EU and the Rule of Law: What Next?', speech delivered at the Centre for European Policy Studies, CEPS, SPEECH/13/677, 04/09/2013.

<sup>23</sup> See W. Sadurski (2010), "Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider", Legal Studies Research Paper No. 10/01, University of Sydney, January.

<sup>24</sup> The Austrian crisis of 2000 partly led to the inclusion of the preventive arm of Article 7 in the Treaty. See European Parliament (2000) Report on the constitutionalisation of the Treaties, (2000/2160(INI)), FINAL A5-0289/2000, Committee on Constitutional Affairs, Rapporteur: Olivier Duhamel, 12 October 2000, p. 10: "Respect for fundamental rights within the European Union has become a major political issue, not only owing to the Charter of Fundamental Rights, but also because of the concern to which the inclusion of an extreme right-wing party in the government of one of the Member States has given rise. The political responses to that event have included proposals from many quarters to strengthen the measures provided for in Article 7 of the Treaty on European Union."

### 2.1.2 The Cooperation and Verification Mechanism

The Cooperation and Verification Mechanism (CVM) of the European Commission constitutes a special instrument to monitor and assist progress in the reform of domestic judicial and administrative regimes in the context of anti-corruption policies and fight against organised crime in Romania and Bulgaria. The CVM was established by two Commission Decisions<sup>25</sup> shortly before Bulgaria and Romania's accession to the EU with the objective of monitoring and assisting the ongoing efforts of both countries to modernise their administrative and criminal justice systems. The decision to establish the CVM was motivated by the last pre-accession report of the European Commission on the state of preparedness of Bulgaria and Romania.<sup>26</sup> The report concluded that certain areas still needed further progress, including the AFSJ.

The material scope of the CVM covers 'judicial reform' and the 'fight against corruption' for both member states, as well as the fight against organised crime for Bulgaria only. In what concerns the 'who' (driving institutional actor), the evaluation is carried out by the European Commission (Secretary General, with direct and active input by DG Home Affairs, DG Justice, and OLAF) on the basis of information from various sources, including the governments of Bulgaria and Romania (as part of their reporting obligation). An ad-hoc working party at the Council of the EU (COVEME) regularly debates on the reports and progress.

'How' is the assessment carried out? The CVM obliges both member states to report periodically to the Commission about the reforms implemented and the measures taken to respect the EU's *acquis*. In parallel, the Commission conducts an independent evaluation of the progress made. The benchmarks set by the CVM Decisions include issues such as independence, accountability, transparency and efficiency of the judicial system, measures to prevent and fight high-level corruption and fight against crime.<sup>27</sup> However, as Ivanova's Thematic Contribution in Annex 3 of this study evidences, in the case of Bulgaria, "the actual object of monitoring under the CVM is focused on criminal justice and on the national judiciary".

The CVM has developed its own specific methodology. The Commission uses points of reference and comparative indicators 'where they are available' (points of reference include the work of the Council of Europe, the OECD and UN agencies). To compare progress in both countries with the situation in other member states, the Commission also draws upon senior experts from key professions dealing with these issues (experts used in 2012 included senior practitioners from France, Germany, Ireland, Poland, Spain, Slovenia and the United Kingdom). The Commission organises missions and field visits to both countries, sending individual experts from member states and the Commission services. Some of the external sources consulted include the Council of Europe, the United Nations Committee on Torture, the Bulgarian Helsinki Committee, or experts and academics. The reports are reviewed by the member states being evaluated for correction of any factual inaccuracies. The situation in other member states is also taken into account for a comparison of the progress made by Bulgaria and Romania. The monitoring will finish whenever the Commission decides that both countries have met the targets.

Reports are published every six months on progress made in both countries.<sup>28</sup> No sanctions are formally foreseen in the follow-up to the publication of the report – the lack of progress in correcting any shortcoming is highlighted in the next report. Safeguard clauses, however, were included in the Accession Treaty of Bulgaria and Romania (Articles 36, 37 and 38) as a way to remedy difficulties encountered as a result of accession. They could be triggered as a last resort for three years after the accession (from 2007 until 2010), and consisted of three clauses: a general economic clause, a specific internal market clause and a specific justice and home affairs safeguard clause. Measures or sanctions under safeguard clauses could have taken the form of a temporary suspension of specific rights under the EU *acquis* directly related to the area where shortcomings are discovered. Sanctions could have been, for example, a suspension of member states' obligation to recognise and execute judgments and judicial decisions from Bulgaria and Romania, such as

<sup>25</sup> See European Commission (2006) 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; as well as European Commission (2006) 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.

<sup>26</sup> See European Commission (2006) Communication - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM(2006) 549 final, Brussels, 26 September 2006.

<sup>27</sup> The full list of benchmarks for both countries is provided in the CVM table in Annex 1.

<sup>28</sup> Refer to [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm)

European arrest warrants.<sup>29</sup> As highlighted by the Thematic Contribution by Ivanova in Annex 3 of this study, these safeguard clauses were never invoked.

Following the end of the three-year period after accession to activate the safeguard clauses, the only sanction that the European Commission may impose on Bulgaria and Romania for not making enough progress in the areas concerned is to link progress to EU funding, which was done at least once in 2008.<sup>30</sup> As Ivanova's thematic chapter points out, Bulgaria has suffered negative consequences related to the lack of sufficient progress in the CVM when the EU suspended the pre-accession funds to the country, thus "considerably increasing its political weight and stimulating the Bulgarian government to re-engage in the reform path". The effectiveness of the CVM in Romania and Bulgaria has been linked both to EU leverage (the CVM reports) and to domestic incentives related to national elections.<sup>31</sup>

The CVM reports have also been used by certain member states as a justification to refuse the entry of Bulgaria and Romania membership in the Schengen area. This is not part of the sanctions foreseen by the CVM and this development has been regretted by institutions such as the European Commission.<sup>32</sup> In the last report on Bulgaria in July 2012, the Commission announced that the CVM would be suspended for 18 months in the case of Bulgaria, and that the next report would be published at the end of 2013. The justification provided was that Bulgaria needs time to come up with results from the reforms that are currently being implemented.<sup>33</sup> The fact that parliamentary elections were foreseen in Bulgaria in 2013 probably played a role in the Commission's decision to freeze the CVM reporting for Bulgaria. The last set of Progress Reports published in January 2013 only concerned Romania. Interestingly, and similar to Bulgaria, the last Romanian report indicates that the Commission will also pause the CVM for Romania until the end of 2013.<sup>34</sup>

The CVM is usually considered as a useful tool by experts and by the local population (see Ivanova's Thematic Contribution). It is interesting to note that the newest member state of the EU, Croatia, which joined in July 2013, will not be monitored by the CVM, and that several statements by the European Commission appear to confirm that it has, by now, no intention of introducing the CVM model to any other future EU member state.<sup>35</sup>

### 2.1.3 The EU Anti-Corruption Report

The EU Anti-Corruption Report is a reporting mechanism for the periodic assessment of EU member states' anti-corruption policies and efforts, and aims at supporting the development of a "*comprehensive anti-corruption policy in the EU*".<sup>36</sup> The report will have the following additional objectives: to identify common trends, shortcomings and 'best practices'; to make general and tailor-made recommendations for member states to adjust their domestic policies; and to raise awareness and provide training on anti-corruption.<sup>37</sup>

The material scope of the report – the 'what' question - is rather broad and fairly indeterminate, covering issues as wide as the 'fight against corruption'. In particular, and according to the European Commission,<sup>38</sup>

<sup>29</sup> See recital 7 of both CVM Decisions (European Commission, 2006, op. cit.)

<sup>30</sup> The July 2008 Progress Report for Bulgaria had an accompanying document on the mismanagement of EU funds – see European Commission (2008) Report on the management of EU-funds in Bulgaria, COM(2008) 496 final, Brussels, 23 July 2008.

<sup>31</sup> See A. Spendzharova and M. Vachudova (2012), "Catching Up? Consolidating Liberal Democracy in Bulgaria and Romania after EU Accession", *West European Politics*, Vol. 35, No. 1, pp. 39–58, January.

<sup>32</sup> See the Statement by the European Commission on the CVM before the European Parliament's plenary session on 13 March 2013, p. 2 ([http://ec.europa.eu/cvm/docs/com\\_statement\\_on\\_the\\_cvm.pdf](http://ec.europa.eu/cvm/docs/com_statement_on_the_cvm.pdf)).

<sup>33</sup> See European Commission (2012), Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism, COM(2012) 411 final, Brussels, 18 July, p. 20.

<sup>34</sup> See European Commission (2013), Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2013) 47 final, Brussels, 30 January, p. 12.

<sup>35</sup> See Daily Tportal (2011), "EU against applying cooperation and verification mechanism to Croatia", 4 January (<http://daily.tportal.hr/104724/EU-against-applying-cooperation-and-verification-mechanism-to-Croatia.html>).

<sup>36</sup> 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. Refer also to European Commission, Communication on Fighting Corruption in the EU, COM(2011) 308 final, 6.6.2011, Brussels.

<sup>37</sup> Refer to Article 2 of the Commission Decision C(2011) 3673 final.

<sup>38</sup> European Commission (2011), Communication on Fighting Corruption in the EU, op. cit.



the following specific issues or themes may be addressed: questions related to law enforcement, police and judicial cooperation in the EU (e.g. the role of EU agencies such as for instance Europol, OLAF and Eurojust) in combating and exchanging information on corruption, financial investigations and asset recovery, protection of whistleblowers, training of law enforcement officials, public procurement policy, cohesion policy to support administrative capacity-building, accounting standards and statutory audit for EU companies, preventing and fighting political corruption, improving statistics, integrity in sport, protecting EU financial interests, etc.

As regards the ‘who’ question, the European Commission (DG Home Affairs) functions as the driving institutional actor behind this mechanism, which is expected to publish the first issue of the report before the end of 2013. The reports will be published every two years.

The EU Anti-Corruption Report is particularly interesting from the perspective of the ‘how’ question and the methods devised and displayed for its practical operation. The specifics of how this instrument is used are presented in Annex 1 of this study. Suffice it to mention here that particular attention has been paid by the European Commission to ensuring the quality, independence and objectivity of the ‘knowledge’ and ‘expertise’ providing the first assessment of the situation in member states. The assessment will be based on a wide variety of sources, such as existing evaluation mechanisms, but also on independent experts (“group of experts on corruption”) and researchers (“network of research correspondents”).

The evaluation will be also carried out in relation to a set of indicators, developed by the group of experts on corruption, which could include “perceptions of corruption, respondents’ behaviour linked to corrupt activities, and criminal justice statistics, including on seizures and confiscations of the proceeds of corruption-related crime”.<sup>39</sup> Sources of information for the reports will include, among others, the EU's ranking in Transparency International’s Corruption Perception Index,<sup>40</sup> national anti-corruption strategies, reported experiences with corruption, instances of new anti-corruption policies/practices, number of peer learning activities sponsored by the Commission, levels of awareness, time taken to transpose and implement legislation, perceptions of transparency and corruption and respondents’ behaviour linked to corrupt activities. The exact contours related to the follow-up dimensions remain rather unclear at present. As highlighted above, the report will contain general and tailor-made (country specific) non-binding recommendations, and it is expected that their implementation will be monitored in subsequent Commission Anti-Corruption reports. It has been acknowledged that on the basis of the results the Commission may justify new EU policy initiatives, including the approximation of criminal law in the domain of corruption.<sup>41</sup>

#### **2.1.4 The EU Justice Scoreboard and the European Semester for Economic Policy Coordination**

The EU Justice Scoreboard constitutes a recent initiative evaluating the functioning of national justice systems in the Union, concerning in particular civil, commercial and administrative (non-criminal justice) cases. The first Justice Scoreboard was published by the European Commission in March 2013.<sup>42</sup> As regards the ‘what’ question, the EU Justice Scoreboard can be considered as a comparative tool, which seeks to provide data on the justice systems in all EU member states. The EU Justice Scoreboard focuses in particular on the quality, independence and efficiency of justice. It presents ‘key findings’ based primarily on the indicators related to ‘the efficiency of proceedings’, which include: the length of proceedings, the clearance rate and the number of pending cases. According to the European Commission, the EU Justice Scoreboard’s objective is:

(...) to assist the EU and the Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States. Quality, independence and efficiency are the key components of an 'effective justice system'. Providing information on these components in all Member States contributes to identifying potential

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<sup>39</sup> Ibid., p. 7.

<sup>40</sup> See [www.transparency.org/research/cpi/](http://www.transparency.org/research/cpi/).

<sup>41</sup> European Commission (2011), Communication on Fighting Corruption in the EU, op. cit, p. 8.

<sup>42</sup> European Commission (2013), The EU Justice Scoreboard – A tool to promote effective justice and growth, COM(2013) 160 final, Brussels, 27 March.

shortcomings and good examples and supports the development of justice policies at national and at EU level.<sup>43</sup>

Behind the ‘who’ question is the European Commission (DG Justice), which is in charge of the monitoring exercise of the Justice Scoreboard.

The methodology used by the EU Justice Scoreboard (the ‘how’ question) reflects the business-approach taken by this mechanism as regards its scope and the indicators used. The material scope of the 2013 Scoreboard focuses on the parameters of a justice system which contribute to the improvement of the business and investment climate. The Scoreboard examines efficiency indicators for litigious civil and commercial cases, which are relevant for resolving commercial disputes, and for administrative cases. The indicators used in 2013 include factors related to the efficiency of proceedings (length, clearance rates, etc.), the quality of justice (evaluation, training of judges, etc.) and the perceived independence of justice.<sup>44</sup> The sources of information used have included the Council of Europe’s Commission for the Evaluation of the Efficiency of Justice (CEPEJ), which delivered a study on which the first Scoreboard was primarily based,<sup>45</sup> as well as data from the World Bank, World Economic Forum and World Justice Project.

Regarding the question of follow-up, the EU Justice Scoreboard defines itself as a non-binding tool, which means that no sanctions are foreseen in the event that the justice system of a member state is found to be of poor quality, lacking independence and inefficient. The Commission will only highlight these ‘shortcomings’ in the next scoreboards. However, ‘indirect follow-up’ options are foreseen in the links between, on the one hand, the Justice Scoreboard and the EU funds, and on the other hand, the Scoreboard and the European Semester for economic policy coordination. The results of the scoreboard are expected to have an influence on the allocation of Regional Development and Social Funds in the next multi-annual financial framework for possible reforms of the judicial systems.<sup>46</sup> The same report also underlines the fact that:

The issues identified in the Scoreboard will be taken into account in preparing the forthcoming country-specific analysis of the 2013 European Semester. They will also guide the work in the context of the Economic Adjustments Programmes.<sup>47</sup>

The EU Justice Scoreboard is part of the so-called ‘European Semester’, which is a yearly cycle of economic policy coordination and includes a supervision system for fiscal and macroeconomic indicators. The European Semester finds its basis in the Treaty (Article 121(1) TFEU) and is extended by the “Six Pack” and “Two Pack”. The European Semester aims to provide *ex ante* guidance to national policy-makers on budget and reform plans to prevent excessive fiscal deficits and excessive macroeconomic imbalances. The ultimate aims are to foster economic growth, ensure fiscal sustainability and converge to the Europe 2020 targets. The European Commission, the European Council and the Council of the European Union are the main institutional actors behind the European Semester. As Alcidi and Busse point out in their Thematic Contribution, there is a very unbalanced weight for each actor in the process:

The European Commission runs a large part of the show by providing background information for the assessment of the countries’ economic situation and policies at the start of the cycle and then by drafting the country-specific recommendations while the European Council has the key role to adopt the final recommendations. By contrast, the European Parliament has only the very marginal role to express an opinion before policy orientations are formulated in the early stage of the cycle.

The European Semester is based on the Annual Growth Survey and the Alert Mechanism Report, published by the European Commission, outlining challenges in the EU and individual member states. Based on the fiscal and macroeconomic indicators, the Council of the European Union and subsequently the European Council provide policy orientations for national governments. After the member states outline their budget

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<sup>43</sup> Ibid., p. 3.

<sup>44</sup> For a detailed presentation of the indicators used, please refer to Annex 1.

<sup>45</sup> E. Dubois, C. Schurrer and M. Velicogna (2013), “The Functioning of Judicial Systems and the Situation of the Economy in the EU Member States”, Council of Europe, January ([http://ec.europa.eu/justice/effective-justice/files/cepej\\_study\\_justice\\_scoreboard\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepej_study_justice_scoreboard_en.pdf)).

<sup>46</sup> See European Commission (2013), op. cit., p. 22: “The Commission has proposed that Regional Development and Social Funds will be available for reforms of the judicial systems in the next multi-annual financial framework.”

<sup>47</sup> Ibid.

and reform plans, the European Commission drafts Country-Specific Recommendations, which are thereafter endorsed by the European Council. member states are expected to take the recommendations into account when drafting their budget and reform plans for the following year.

As regards the follow-up and sanctions foreseen by this mechanism, the European Semester is organised along two arms: the preventive arm and the corrective arm. The preventive arm for budgetary restrictions (as laid down in the medium-term budgetary objectives) envisages an early sanction in the form of an interest-bearing deposit of 0.2% of GDP, however only for euro-area member states. The corrective arm, which is triggered when the European Commission determines that the proposed preventive measures have not been implemented and the budget deficit or macroeconomic imbalance persists, can entail a sanction in case of a persisting Excessive Deficit Procedure of a non-interest bearing deposit (0.2% of GDP) if the member state has adopted the euro as its currency. Should the euro-area member state fail to comply with the Commission's recommendations (after approval of the Council), the deposit will be converted into a fine. In case of an excessive macroeconomic imbalance in one of the EA member states, the final sanction is in the form of a deposit of 0.1% of GDP which can be converted into a fine if the Council approves by reverse qualified majority voting.<sup>48</sup> No deposit, let alone fine, has been demanded so far, as violations have been accommodated by deadline extensions due to exceptional circumstances i.e. the current recession.

### **2.1.5 EU Inter-Institutional Annual Reporting on Fundamental Rights and the EU Charter of Fundamental Rights**

Three different EU institutional actors play an important role in reporting on the situation of fundamental rights in EU member states (the European Commission, the European Parliament and the European Union Agency for Fundamental Rights), which we now propose to analyse.

#### **2.1.5.1 The European Commission's Annual Report on the Application of the Charter of Fundamental Rights of the EU**

Each year since 2010, the European Commission's Directorate General (DG) for Justice, Fundamental Rights and Citizenship publishes an Annual Report on the Application of the Charter.<sup>49</sup> The report follows the relevant chapters of the Charter 'area by area' and monitors progress in each of them. Its purpose is to show how the Charter has been taken into account in specific instances, such as after the proposal of new EU legislation. The Annual Report is based on the actions of EU institutions and the analysis of letters from EU citizens, as well as on parliamentary questions from the European Parliament. Also, the number of petitions received by the PETI Committee of the European Parliament concerning fundamental rights is taken into account, as well as the latest developments of the fundamental rights case-law of the Court of Justice of the EU. The Commission sees the Annual Reports as an information tool for the general public as well as a 'tracking' tool:

This Report (...) *informs the public* of the situations in which they can rely on the Charter and on the role of the European Union in the field of fundamental rights. In covering the full range of Charter provisions on an annual basis, the Annual Report aims to *track where progress is being made, and where new concerns are arising*.<sup>50</sup> (emphasis added)

The Annual Reports are composed of the Report itself, which is a document of around 10 pages outlining the main priorities of the Commission in last year's policy and legislative proposals, and the accompanying document, which represents the main substantive bulk of the Annual Report. The accompanying document presents individual examples of how the EU institutions and member states have applied the Charter, the

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<sup>48</sup> Reverse qualified majority voting is introduced in the Six-Pack for most sanctions. It implies that a recommendation or a proposal of the Commission is considered adopted in the Council unless a qualified majority of Member States votes against it, therefore increasing the likelihood of sanctions for euro-area Member States compared to normal qualified majority voting.

See [http://ec.europa.eu/economy\\_finance/articles/governance/2012-03-14\\_six\\_pack\\_en.htm](http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm)

<sup>49</sup> For a list of all reports published, see [http://ec.europa.eu/justice/fundamental-rights/charter/application/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm).

<sup>50</sup> See European Commission (2013) Commission Staff Working Document on the Application of the EU Charter of Fundamental Rights in 2012 – Accompanying document to the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2012 Report on the Application of the EU Charter of Fundamental Rights, SWD(2013) 172 final, last page.

ways in which specific issues have been raised by citizens and the relevant case-law of the Court of Justice of the EU. The 2013 version constitutes the first time when case law of national courts and tribunals on the EU Charter has been also included.<sup>51</sup>

The main body behind the Annual Report is the European Commission, more specifically the Unit on “Fundamental Rights and Rights of the Child” in DG Justice.

As regards ‘how’ the Annual Reports are drafted, the table of contents of each report can provide some information: the information is categorised according to each Chapter of the Charter of Fundamental Rights (Dignity, Freedoms, Equality, Solidarity, Citizens’ rights and Justice). The report presents the main EU policy initiatives in each field launched in the previous year and the developments in these areas. The stated purpose is to follow-up on the integration of fundamental rights into all EU legal acts and the mainstreaming of the Charter in all areas of EU competence, further to the Communication of 2010 on the effective implementation of the Charter.<sup>52</sup> Indicators include the number of letters sent by EU citizens on specific topics, how many of these letters fell outside EU competence, the number of petitions sent by citizens to Members of the European Parliament, the number of parliamentary questions from MEPs to the European Commission and the number of judgments of the Court of Justice. A new indicator in the 2012 Report is the case law of national courts on the Charter.

The Annual Reports do not evaluate fundamental rights in specific member states, but rather in a general EU context. Situations causing concerns might be followed up in the next Annual Report for the following year. The Annual Reports aim at providing an opportunity for an annual exchange of views between the European Commission and the European Parliament and the Council of the EU.

#### 2.1.5.2 *The European Parliament’s Annual Report on the Situation of Fundamental Rights in the EU*

The European Parliament adopts a resolution every year on the situation of fundamental rights in the EU on the basis of a report by the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). The first resolution was adopted in 1993.<sup>53</sup> This resolution is prepared in the LIBE Committee by a rapporteur and voted in plenary each year, and addresses the situation of fundamental rights in the EU by theme before making recommendations. One MEP is appointed as rapporteur according to the rules on the allocation of reports to political groups (known as the ‘D’Hondt system’).<sup>54</sup> The rapporteur usually changes every year.

There is very little information publicly available on the methodology used by the Annual Reports. The draft report is prepared by a rapporteur in the LIBE Committee before being voted on in plenary. The main topics of the report vary each year, focusing on one particular aspect of fundamental rights. The report generally starts with general orientations and concludes with institutional questions and recommendations to the Commission and the Council. The citations contain certain hints as to what sources of information are used in their drafting. These include, for instance, the reports and resolutions from human rights treaty bodies of the United Nations, the recommendations of the Council of Europe, the reports on the human rights situation drawn up by the Parliamentary Assembly of the Council of Europe as well as its Commissioner for Human Rights, the case law of the Court of Justice of the EU, the case law of the European Court of Human Rights, the case law of the national constitutional courts, the activities, annual reports and studies of the FRA, certain reports from NGOs on human rights, studies requested by the European Parliament, previous European

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<sup>51</sup> In 2011 and 2012, an additional Accompanying document was published along with the Annual Reports, dealing with gender equality.

<sup>52</sup> See European Commission (2010), Communication on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010) 573 final, 19 October.

<sup>53</sup> See European Parliament (1993), Resolution A3-0025/93 on respect for human rights in the European Community (annual report of the European Parliament), OJ C115/178, 26 April.

<sup>54</sup> See the European Parliament article of 27 July 2006 on “rapporteurs” at the following link: <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20060725STO09938> “The election of a rapporteur is usually done by a sophisticated points system. The seven political groups in the Parliament, who receive a number of points according to their size, bid for a report like an auction. It is easier and usually costs fewer points to propose a recognised specialist in the field of proposed legislation. (...) For regularly recurring reports like the annual EU budget report a rotation system is set up.”

Parliament resolutions on fundamental rights or on related topics (protection of minorities, Roma inclusion, etc.).<sup>55</sup>

The EP Annual Reports are non-binding and no specific follow-up steps are foreseen should a member state fail to address the recommendations listed in it. It is worth underlining, however, that the European Commission's Communication on Article 7 TEU of 2003 mentions the European Parliament's annual report as "*a major contribution to the elaboration of an exact diagnosis on the state of protection in the Member States and the Union*".<sup>56</sup> That notwithstanding, as it has been pointed out in a previous study,<sup>57</sup> the ways in which the Commission consistently follows up the EP's recommendations is far from clear and remains an issue of concern.

### 2.1.5.3 *EU Fundamental Rights Agency's Annual Report on the Situation of Fundamental Rights in Member States*

The European Union's Fundamental Rights Agency (FRA), founded in 2007, publishes every year a report on the situation of fundamental rights in the EU covering the areas of the agency's activities. This is foreseen in the Founding Regulation of the FRA in Article 2(e).<sup>58</sup> The annual report looks at fundamental rights-related developments in member states with a focus on a specific topic (such as the safeguard of rights at times of crisis for the 2012 Report). In its Annual Reports, the FRA provides data on fundamental rights in the following specific policy areas: asylum, immigration and integration; border control and visa policy; information society and data protection; the rights of the child and protection of children; equality and non-discrimination; racism and ethnic discrimination; participation of EU citizens in the Union's democratic functioning; access to efficient and independent justice and rights of crime victims.

As regards the methodology used for the FRA's Annual Reports, 'key developments', 'promising practices' and details on FRA activities are identified in each area of intervention covered by the FRA. The Annual Reports also comprise an 'outlook section' on challenges ahead. The reports focus on issues at EU and member state-level as well as relevant developments in the Council of Europe and the United Nations. Sources of data include the FRANET network, which is a network of researchers set up in 2011 providing the FRA with data at Member-State level as well as comparative data at EU and international level; as well as inputs from NGOs through the Fundamental Rights Platform and from national governments via the 28 liaison officers.<sup>59</sup>

As regards follow-up, the FRA Annual Reports highlight certain areas that could be the cause for concern every year if no improvement is established compared to the previous year. Certain issues flagged by the Annual Reports may be discussed at Council level. No sanctions are foreseen as this Annual Report is a non-binding tool. The establishment of the FRA coincided with the abolition of the previously existing EU Network of Independent Experts mentioned in section 2.1.1 above.<sup>60</sup>

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<sup>55</sup> See for example European Parliament (2012), Resolution on the situation of fundamental rights in the EU (2010-2011), P7\_TA(2012)0500, Rapporteur: Monika Flašíková Beňová, 22 November.

<sup>56</sup> See European Commission (2003), *op. cit.*, p. 9.

<sup>57</sup> S. Carrera, N. Hernanz and J. Parkin (2013), "The Lisbonisation of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice", DG IPOL, European Parliament, Brussels.

<sup>58</sup> Article 2(e) states that "the Agency shall (...) publish an annual report on fundamental-rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice." See Council of the EU (2007) Regulation EC No 168/2007 establishing a European Union Agency for Fundamental Rights, 15 February 2007 (see <http://fra.europa.eu/en>).

<sup>59</sup> For more details on the methodology, refer to Annex 1. The FRA Annual Reports have developed a systematic analysis of certain issues that are followed-up closely every year. One of the chapters focuses on the respect of international human rights obligations by EU Member States.

<sup>60</sup> See Council of the EU (2007) Addendum to Draft Minutes of the 2781st meeting of the Council of the European Union (Justice and Home Affairs), Council document 6396/07, 15 February 2007, p. 3. According to the official minutes annexed to the FRA's Founding Regulations:

The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights precludes the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met.

## 2.2 A Typology of EU Rule of Law Mechanisms

The picture resulting from the examination conducted in section 2.1 shows how the EU employs a wide array of mechanisms in assessing rule of law domains. There is a multi-level and multi-actor European framework of legal and policy instruments dealing – directly or indirectly – with rule of law, democracy and fundamental rights in the EU’s AFSJ. Two main preliminary cross-cutting features can be highlighted: First, these instruments constitute a scattered and patchy setting of EU surveillance systems as regards member states’ obligations enshrined in the Treaties, in particular Article 2 TEU and the EU Charter of Fundamental Rights; and second, they show variable degrees of proximity to the EU legal framework established in the Lisbon Treaty. Some are expressly stipulated in Treaty provisions and others only present indirect linkages with EU primary law. There are also several instruments that have no legal foundation but fall rather in the field of policy or soft methods of ‘experimental’ (policy-shaping and -making) Europeanisation processes (these issues will be further addressed in section 3.3.1 below).

Before entering into an examination of the ‘cross-cutting dilemmas and challenges’ characterising current EU rule of law mechanisms, this sub-section offers a typology aimed at facilitating their understanding and scoping. This modality of categorisation pays particular attention to the kind of assessment or methodological features used. Four main types of methods can be distinguished in examining EU rule of law instruments:

- i) **Monitoring.** This involves a description and assessment of developments in specific areas without (aiming at) intervening to induce these developments to change. The objective is to gather data and periodically report on a situation in order to inform a specific audience about ‘the state of a system’. These methods present the weakest legal foundations and are not provided by EU Treaties.
- ii) **Evaluation.** This represents a systematic analysis and determination of the merit of a subject. It entails an in-depth assessment of a given system. The evaluator will take a stand on the outcome, impact or effects of the system under examination. Evaluation entails scientifically rigorous design, collection and analysis of information. It may lead to a set of non-binding recommendations for the system to comply with the established norm or principles.<sup>61</sup>
- iii) **Benchmarking.** This is an evaluation technique (or management tool) that finds its origins in the private sector, as a way of improving quality of goods and services.<sup>62</sup> It has been defined as “*the continuous and systematic search for and implementation of best practices, which lead to superior performance*”.<sup>63</sup> Benchmarking entails the use of indicators, benchmarks (or standards) and complex indexing methodologies (calculation of averages), intended to allow for comparisons, exchange of information and the identification of ‘best/good’ practices (which correspond to the highest identified standard), and even scoring among member states. The results are often presented in graphs and complex visual representations.
- iv) **Supervision.** This implies constant monitoring of a selected system with the aim to direct it and modify its constitutional elements. Supervision combines monitoring and evaluation features with a potential intervention by the supervising actor to induce or enforce change in the given system under assessment

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<sup>61</sup> An interesting definition of “programme evaluation” has been proposed by Michael Patton: “Program evaluation is the systematic collection of information about the activities, characteristics, and outcomes of programs to make judgments about the program, improve program effectiveness and/or inform decisions about future programming.” See M. Patton (2000), “Utilization-Focused Evaluation”, in D. Stufflebeam, G. Madaus and T. Kellaghan (eds), *Evaluation Models*, Boston: Kluwer Academic Publishers, p. 426.

<sup>62</sup> European Foundation for Quality Management (EFQM), *Excellence Toolkit for Benchmarking*, Brussels: EFQM, 2003 ([www.efqm.org](http://www.efqm.org)).

<sup>63</sup> J. Niessen and T. Huddleston (2007), “Setting up a System of Benchmarking to Measure the Success of Integration Policies in Europe”, Policy Department C, Citizens Rights and Constitutional Affairs, European Parliament, PE 378.288, January. The authors argue that benchmarking comprises the following steps: “1. identifying key areas for improvement; 2. setting standards according to the ‘best’ practice found; 3. finding out how the ‘best’ companies meet those standards; 4. adapting and applying lessons learned from those approaches to meet and exceed those standards.” (p. 6).

(binding recommendations). For the purposes of this study, a supervision mechanism needs to be based on a Treaty or express legal provision foreseen in EU law.<sup>64</sup>

Table 1 below presents a typology of supervision, evaluation and monitoring instruments assessing the rule of law, democracy and fundamental rights compliance by member states in the EU.

*Table 1. A Typology of EU Rule of Law Legal Instruments and Policy Mechanisms*

Supervision	Evaluation/Benchmarking	Monitoring
Article 7 Treaty on the European Union	EU Justice Scoreboard	European Commission Annual Report on the Charter
	EU Anti-Corruption report	European Parliament Annual Report on Fundamental Rights
	Cooperation and Verification Mechanism	EU Agency for Fundamental Rights Annual Report
		European Ombudsman Annual Report <sup>a</sup>
		OLAF Annual Report <sup>b</sup>

<sup>a</sup> For a more detailed description, refer to Annex 1.

<sup>b</sup> For a more detailed description, refer to Annex 1.

*Source:* Authors' own compilation.

The Article 7 TEU instrument constitutes the only supervisory tool in the hands of the EU to carry out monitoring and evaluation of member states' respect of the principles presented in Article 2 TEU. There are in addition three evaluation systems where the Union is currently intervening in evaluating and benchmarking member states' performance in the areas of civil and commercial justice, corruption, and wider rule of law considerations in the cases of Bulgaria and Romania. The picture is completed by a series of scattered annual reporting processes performed by EU institutions, agencies and bodies which carry out periodical assessments and reporting directly and/or indirectly covering developments in member states' arenas.

### 3. Cross-Cutting Dilemmas and Challenges: The Triangular Relationship Examined

#### 3.1 Conceptual Dilemmas: 'Rule of Law' in the European Union

The championing of rule of law as a core EU principle is in evidence among many EU actors. It appears in Article 2 TEU as one of the foundational principles upon which the European Union edifice has been constructed and developed. Many EU institutional actors, member states and civil society actors have incorporated the term in their discourses, claims and demands, but what exactly does it mean and is its meaning consistent?

The concept of rule of law is an elusive and controversial one, and its bright and dark sides have been subject to rich debates in scholarly political and legal theories.<sup>65</sup> It is not surprising that it is a concept to which actors in the EU are drawn since the principle of hierarchy of rules and law-making as a core activity of the EU is inherent to the idea. Establishing and maintaining the cornerstone principle according to which European law takes priority over national laws and rules (primacy) are constant concerns of the EU

<sup>64</sup> Here, the simple definition of "supervision" provided by the Merriam-Webster dictionary can be used: "The action or process of watching and directing what someone does or how something is done" ([www.merriam-webster.com/dictionary/supervision](http://www.merriam-webster.com/dictionary/supervision)).

<sup>65</sup> Refer to N. McCormick (2010), *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford: Oxford University Press. For a critique on the ways in which rule of law has functioned as a mechanism for constructing and legitimising plunder refer to U. Mattei and L. Nader (2008), *Plunder: When the Rule of Law is Illegal*, Oxford: Blackwell Publishing.

institutions. Much of the European Commission's work revolves around convincing member states to comply with EU law and threatening them with infringement proceedings if they do not. That these activities are themselves founded on the principle of rule of law is, then, not surprising. But is rule of law in the context of the EU limited to this principle or does it have a wider remit?

The more we use the term, the less clear its meaning becomes. The European Commission for Democracy through Law (the Venice Commission) of the Council of Europe<sup>66</sup> has closely examined the content of rule of law along the lines first proposed by a British judge, Lord Bingham.<sup>67</sup> After much deliberation it published one of the few more widely accepted conceptual frameworks for rule of law in Europe.<sup>68</sup> According to the latter, rule of law is first and foremost directed at State authorities – those who make and apply the law. This becomes a complex concept in the EU context where the authorities shaping, making and applying the law are not only State authorities. While it is not necessarily limited to them, they are the most important target.

The Venice Commission has identified the following intrinsic components of the notion:

- i) Legality, which includes transparent, accountable and democratic processes for enacting laws;
- ii) Legal certainty, which is deemed essential to ensure confidence in the judicial system, and includes accessibility and 'foreseeability';
- iii) Prohibition of arbitrariness on the part of the State and its authorities;
- iv) Access to justice for those subject to administrative action before independent and impartial courts, including judicial review of administrative acts;
- v) Respect for human rights by State authorities and the guaranteeing of human rights for everyone within the State authorities' jurisdiction; and finally,
- vi) Non-discrimination and equality before the law guaranteed and assured by the State.

The separation of powers principle or the need for separate institutions sharing power has received a long-standing consideration and reflection as an essential element of rule of law and constitutionalism across the scholarly literature.<sup>69</sup> As MacCormick has for instance highlighted:

The liberal democratic State as it has developed since the seventeenth century has been marked by efforts to achieve a workable, if nowhere absolute, separation of functions among different institutional agencies...The 'separation of powers' in this sense has, in details at least, been differently conceptualised and differently put into practice in different constitutional traditions, representing different strands in a broader tradition of free government under a constitutional State or *Rechtsstaat* or 'law State'.<sup>70</sup>

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<sup>66</sup> For more information on the Venice Commission, refer to [www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation)

<sup>67</sup> T. Bingham (2010), *The Rule of Law*, London: Penguin Books. He argues that "the core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of the laws publicly made, taking effect (generally) in the future and publicly administered in the courts" (p. 8). Bingham assesses the following eight ingredients of the principle: the accessibility of the law (which must be intelligible, clear and predictable); questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; equality before the law (save to the extent that objective differences justify differentiation); the exercise of power in good faith, fairly, for the purpose for which the powers were conferred, and without exceeding limits of such powers and not unreasonably; fundamental human rights; dispute resolution, so that means are provided to resolve bona fide civil disputes; fair trial, so that adjudicative procedures provided by the law are fair; and compliance by the State with its obligations in international law as in national law.

<sup>68</sup> European Commission for Democracy through the Law (Venice Commission), Report on the Rule of Law, Strasbourg, 4 April 2011, Study No. 512/2009, Council of Europe.

<sup>69</sup> J.E. Finn (1991), *Constitutions in Crisis: Political Violence and the Rule of Law*, Oxford: Oxford University Press.

<sup>70</sup> See MacCormick (2010), op. cit., p. 5. Yet, this conceptualisation may be too easily captured by taking for granted the legitimacy of the liberal democratic State or the institutional normative order in any given State, without actually critically endorsing and discussing its limits and the need for the latter to gain its legitimacy through day-to-day democracy and the delivery of liberty, human rights and equality for everyone within its jurisdiction. MacCormick has also pointed out that "respecting the Rule of Law is of profound political value in states or confederation of states, such as the European Union. To have properly published and prospective laws, equality of citizens before them, and limitation of official power with respect to them, are foundations for democratic liberty and essentials for a stable economy" (p. 2).



The European Union legal system lacks a commonly agreed concept of rule of law. The European Parliament (EP) Report on the situation of fundamental rights: standards and practices in Hungary (so-called ‘Tavares Report’) of June 2013, pointed out that “the constitutional State under the rule of law is a system of constant values, principles and guarantees”.<sup>71</sup> It also underlined the principle of separation of powers and a properly functioning system of checks and balances as key corollaries of the rule of law in the Union. In the EP’s view, “democracy and rule of law require a separation of powers among independent institutions based on properly functioning system of checks and balances and effective control of the conformity of legislation with the constitutions” (para. 13). The report equally underlined the centrality of the principle of constitutional legality, not only from a procedural but also from a substantive viewpoint, including a transparent, accountable and democratic process of enacting laws and the respect of fundamental democratic freedoms.<sup>72</sup> The Court of Justice of the European Union (CJEU) has equally insisted on the relevance of the separation of powers theory to understand the rule of law in the EU. In its *DEB* judgment, the CJEU highlighted:

It should be pointed out, however, that EU law does not preclude a member state from simultaneously exercising legislative, administrative and judicial functions, provided that those functions *are exercised in compliance with the principle of the separation of powers which characterises the operation of the rule of law.* (emphasis added)<sup>73</sup>

Vice-President of the European Commission Viviane Reding has recently discussed the Commission’s conceptualisation of rule of law,<sup>74</sup> which puts at the heart of action “the spirit of the law and fundamental rights, which are the ultimate foundation of all laws.” Reding stated:

By "rule of law", we mean a system where laws are applied and enforced (so not only "black letter law") but also *the spirit of the law and fundamental rights*, which are the ultimate foundation of all laws. The rule of law means a system in which no one – no government, no public official, no dominant company – is above the law; *it means equality before the law*. The rule of law also means fairness and due process. It means guarantees that laws cannot be abused for alien purposes, or retrospectively changed. The rule of law means that justice is upheld by an independent judiciary, acting impartially. It means ultimately a system where justice is not only done, but it is seen to be done, so that the system can be trusted by all citizens to deliver justice. (emphasis added)

Still, the full content of the concept of rule of law remains largely unresolved. In the current state of affairs in the EU, much of the contestation around rule of law is a form of *displaced State sovereignty struggles*. While on the one hand the EU institutions insist on the primacy of EU law and thus the rule of law requiring the member states to comply with their Treaty obligations, member states sometimes counter this version of rule of law with claims based on the principle of subsidiarity and State sovereignty. We argue that these struggles lay at the background of what has come to be known as the Copenhagen dilemma. Moreover, as the next section will illustrate, conceptualisations of the definitional boundaries of rule of law are deeply embedded in EU member states’ political systems, constitutional histories and constructed societal memories.

### **3.1.1 The “National Embeddedness” of Rule of Law: Germany, the UK, France and Bulgaria**

**National constitutions are critical to our understanding of the EU’s founding principles and so also to rule of law.** Article 52(4) of the EU Charter of Fundamental Rights states that in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the member states, those rights shall be interpreted in harmony with those traditions. Rule of law as a general principle rather

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<sup>71</sup> European Parliament, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), 25 June 2013.

<sup>72</sup> The EP also identified the following features at the heart of the EU’s common values enshrined in Article 2 TEU:

... respect for legality, including a transparent, accountable and democratic process of enacting laws; legal certainty; a strong system of representative democracy based on free elections and respecting the rights of opposition; effective control of the conformity of legislation with the constitution; an effective, transparent, participatory and accountable government and administration; an independent and impartial judiciary; independent media; and respect for fundamental rights (Paragraph Q)

<sup>73</sup> Case C-279/09 *DEB v. Germany*, 22 December 2010, paragraph 58.

<sup>74</sup> Reding, “The EU and the Rule of Law: What Next?”, op. cit.

than as captured in Chapter VI of the Charter is just such a fundamental right that results from the constitutional traditions.

The country-specific Thematic Contributions presented in Annex 3 to this study have looked at the evolving relationship between rule of law, democracy and fundamental rights from their respective domestic perspectives and constitutional backgrounds. They unanimously confirm the vagueness and elusiveness of the rule of law as a concept or as a principle. They also reflect the domestic-specific diversities as regards what this notion (and its relations with the other two dimensions) means in their political, institutional and legal arenas.

Concepts such as *Rechtsstaat*, *état de droit* or *rule of law* are in this way far from synonymous. They underline the ways in which the concept of rule of law is an open-ended category malleable or adaptable to the struggles and disputes characterising each of the changing domestic histories and memories, while attempting not to lose “its core and becoming an empty formula” (Thematic Contribution by Marsch, Annex 3). The chapters also bring to light how the relationship between rule of law and other constitutional ‘principles’ is ever-shifting in countries such as the UK (Thematic Contribution by Jowell, Annex 3). Nowhere in the EU member states’ constitutional systems under examination has the rule of law been defined in a specific article or piece of legislation in the national law. Its concrete meaning is simply presupposed and often presumed.

As a way of illustration, the formal conception of rule of law in Germany is anchored in a constitutional State and a written constitution (supremacy of the constitution), the principle of separation of powers as well as the principle of legality - according to which any administrative action must be based on statutory law and be in accordance with it – and the principle of legal certainty, which means that statutory law has to be formulated in a clear and understandable way. Both the supremacy of the Constitution and the principles of legality and legal certainty are to be delivered by independent judiciary (judicial review), and each power has core spheres where the others should not intervene. Marsch also underlines the importance of the substantive elements of the *Rechtsstaat* conception, which include in short the relevance of fundamental rights’ protection highlighted by the German Constitutional Court, and which has led to the “horizontal effect of fundamental rights”, i.e. the interpretation of all the laws so as to ensure their compliance with fundamental rights and the obligation of the legislature and the judiciary to protect fundamental rights in cases of alleged violations, even in cases between private parties and with no involvement of public powers. Marsch’s Thematic Contribution raises a central point in examining rule of law from the perspective of the German case, according to which:

It is commonly believed that this reduction to a formal conception of *Rechtsstaat* at least facilitated the seizure of power by Hitler and the following abrogation of the *Rechtsstaat*. Thus, the Basic Law marks an unambiguous return to a substantial conception of *Rechtsstaat* inter alia by *conceiving fundamental rights as subjective rights of the citizens*. However, in contrast with the 19<sup>th</sup> century conception of natural law, the substantial standards which are binding on the executive, the courts and the legislature, are no longer based on nature or in reason, *rather on the written constitution*. (emphasis added)

Therefore, while a concrete definition of *Rechtsstaat* may not exist in the German legal system, its understanding is not only of a procedural, but also of a substantive nature, placing at the heart of action the respect of an individual’s human rights by State authorities.

Jowell’s Thematic Contribution on the UK starts by making reference to the ways in which written sources, behavioural patterns and fundamental principles (while not embodied in a single constitutional text), “interweave to form a sturdy fabric of democratic constitutionalism”. Jowell identifies three main values part of the British legal system: first, the presumption of liberty; second, parliamentary sovereignty; and third, the rule of law. The rule of law is said to play a fundamental role in ensuring restraints “upon the unfettered use or exercise of the powers of Parliament or the executive”. The principle of parliamentary sovereignty runs straight into the concept of rule of law at the EU level which demands EU democratic sovereignty as a principle which overarches national sovereignty. Similar to the German system, the rule of law is not formally defined in any legal act, “it is a principle rather than a fixed rule”. However, Jowell also underlines the importance that has been attributed to upholding the part of the rule of law that calls for access to justice and compliance with the principles of judicial review.

Errera's Thematic Contribution on France identifies a set of featuring components characterising the notion of *état de droit* in the French constitutional system. 'État de droit' has become an essential principle in French legal theory and its constitutional order in what concerns the respect and protection of fundamental liberties by the State. In the words of Errera, "*Le régime des libertés fondamentales est la traduction concrète, dans l'ordre juridique, des principes de l'État de droit*". France's recourse to the notion of *état de droit* pays in this manner special tribute to placing constraints to the *état legal* (the legal body of State institutions) and the protection of the "*droit des libertés fondamentales*".<sup>75</sup>

Bulgaria belongs to the group of EU member states where rule of law (denominated *pravova darjava* in the Bulgarian legal system) is understood as an attribute or component of the State. The concept in the Bulgarian constitutional system needs to be also understood from an historical perspective and the path towards democracy since the adoption of the current constitution in 1991. Ivanova's Thematic Contribution in Annex 3 of this study explains in detail the ways in which *pravova darjava* has been interpreted in the Bulgarian legal system and the importance that has been attributed to its connection with the constitutional principle of safeguarding human dignity and human rights. The role played by the Constitutional Court has been pivotal at times of delineating some of the components of *pravova darjava* in Bulgaria. Similar to other domestic systems across the EU, while rule of law is to be deemed as a general principle, it presents a binding legal value and can be used to scrutinise the acts of the legislators.

### **3.1.2 Rule of Law, Fundamental Rights and Democracy in the European Union: A Triangular Relationship**

**The relationship among the rule of law, fundamental rights and democracy is co-constitutive.** Like the three legs of a stool, if one is missing the whole is not fit for purpose. While each element can be examined separately, it is critical never to lose sight of the elementary truth that the three are inherently and indivisibly interconnected. Two diagrams may be helpful to visualise this relationship – the first is the triangle – each point of the triangle constitutes one of the three constituting elements. The second is the Venn diagram which shows that while each element may exist independently from the others in a political system, that political system will be fundamentally flawed from the perspective of Article 7 TEU if all three are not present. These are represented in Figure 1 below.

For example, totalitarian regimes may respect the principle of rule of law but the laws may be profoundly unacceptable from the perspective of fundamental rights. Similarly, there may be democracies where there is universal suffrage and regular elections but inadequate rule of law so the people are unable to foresee the consequences of their actions or those of others as State authorities act in arbitrary ways or are corrupt. Two issues arise immediately as regards these three characteristics: first, what are the essential elements of the three criteria; and, second what body or institutions are entitled to determine whether a State has satisfied them.

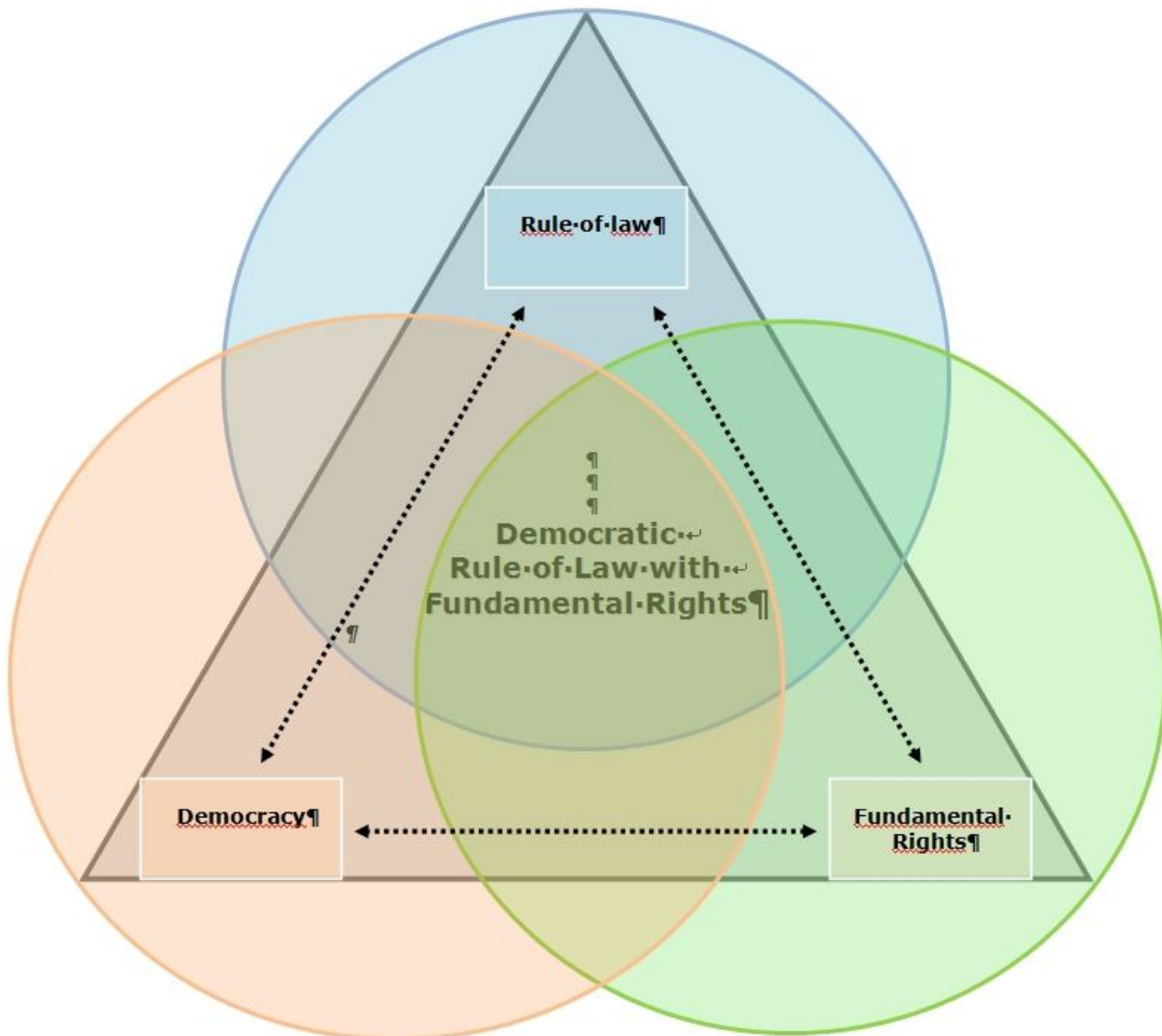
O'Donnell (2004) has argued<sup>76</sup> that the rule of law should not only be understood as a generic characteristic of the legal system and the performance of the courts, but also as the legally based rule of a democratic State, which delivers fundamental rights (and limits the use of discretion or 'exceptionalism'). O'Donnell proposes in this way to use the concept of 'democratic rule of law' whereby the legal system needs to be in itself democratic. There must be mechanisms of accountability and supervision by an independent judiciary at the heart of the system. As mentioned above, states can comply with rule of law without actually being democracies, i.e. anchored on the principles of an association of self-governing free and equal citizens and upholding fundamental human rights protection. As shown in Figure 1 below, this concept corresponds with the venues where the three concentric dimensions converge, i.e. democratic rule of law with fundamental rights. The structure of the triangle dissolves if any one of the three elements is removed. Each part is

<sup>75</sup> For a detailed study on the emergence of the concept in the French legal field at the end of the 19th century, imported from Germany, and its central role in public law discipline, refer to L. Heuschling (2002), *État de droit, Rechtsstaat, Rule of Law*, Paris: Dalloz; as well as M.J. Redor (1992), *De L'État Légal à L'État de Droit: L'Evolution des Conceptions de la Doctrine Publiciste Française (1870-1914)*, Paris: Economica, Presses Universitaires d'Aix-Marseille; see also M. Rosenfeld (2001), "The Rule of Law and the Legitimacy of Constitutional Democracy", *Southern California Law Review*, Vol. 74, pp. 1307-1351.

<sup>76</sup> G. O'Donnell (2004), "The Quality of Democracy: Why the Rule of Law Matters?", *Journal of Democracy*, Vol. 15, No. 4, October.

dependent on each of the others. They cannot be separated without inflicting fundamental damage to the whole and changing its essential form.

Figure 1. The triangular relationship between rule of law, democracy and fundamental rights: a democratic rule of law



### 3.1.2.1 Understanding the Triangular Relationship I: Fundamental Rights

A key part of understanding the scope of rule of law is based on the mechanisms set up to protect fundamental human rights and the activities of institutions established for human rights to enforce this protection, which are also essentially dependent on democratic processes. Of the elements in Figure 1, fundamental rights are perhaps the easiest to capture, not least because the EU has given binding legal force equivalent to the EU treaties themselves to the EU Charter of Fundamental Rights. This means that the Charter is the EU's defining document on fundamental rights.<sup>77</sup> All member states are obliged to comply with it and as Article 52(3) states, the meaning and scope of Charter rights which correspond to ECHR rights shall be the same as in the ECHR (with a proviso for more generous interpretation by the EU, while a more rights-restrictive one is never allowed). The Charter is the starting place for any examination of the content

<sup>77</sup> Refer to S. Peers and A. Ward (2004), *The European Union Charter of Fundamental Rights*, Oxford: Hart Publishing. See also E. Guild (2010), "The European Union after the Treaty of Lisbon: Fundamental Rights and EU Citizenship", CEPS Paper in Liberty and Security in Europe, Centre for European Policy Studies, Brussels, July.

of fundamental rights in the EU, but it is not also the end. The interpretation of the European Convention of Human Rights (ECHR) by its Court is also essential.

Further, as Article 52(4) of the Charter states, it recognises fundamental rights as they result from the constitutional traditions common to the member states and must be interpreted in harmony with those traditions. The EU benefits from a clear and precise code of fundamental rights, which has already been incorporated into EU law-making and judicial interpretation. Article 41 of the Charter provides a set of basic duties that the rule of law requires. It grants the right to fair administration to “every person”, which is the core of rule of law as a principle determining how public authorities must act. The right is to have his or her affairs handled impartially, fairly and within a reasonable time by institutions and bodies of the Union. This includes the right of all individuals to be heard before decisions are taken on individual measures potentially affecting them adversely; access to their files; the duty of authorities to give reasons for their decisions; the right to damages where these are caused by the authorities and the right to contact the administration.

The articulation of fundamental rights in the Charter was carried out in what can be considered as a democratic process – the Council appointed a ‘convention’, a body comprised of many representative bodies, organisations and stakeholders, and adopted the Charter at the Nice Council meeting in 2000.<sup>78</sup> Subsequently the Charter was made legally binding by the Lisbon Treaty, which was ratified by all member states. Thus the EU primary document of fundamental rights is the result of a democratic process which, although not based on a direct vote by EU citizens, has taken into account the views of a wide range of actors holding various degrees of democratic legitimacy.

The Venice Commission’s definition of rule of law takes a similar position in examining rule of law from a democracy and fundamental rights perspective. It identifies as one of the constitutive elements of the rule of law concept the need for transparent, accountable and democratic processes in the enactment of laws and policies. Rule of law requires all action by State authorities to be underpinned by laws adopted in accordance with prescribed procedures. The form that law takes, whether statute, regulation, circular or other, must correspond to the content and there must be clear rules of hierarchy among legal acts. It is fundamental rights that determine the scope of any exceptions, limitations or derogations from the rules set out in legal acts. They will only be lawful if they are necessary and genuinely meet an objective of general interest or the need to protect the rights and freedoms of others (Article 52(1) EU Charter).

Moreover, while the rule of law and fundamental human rights might be different in scope and reach, they sometimes overlap. As the Thematic Contribution by Jowell in Annex 3 specifies, rule of law as the right to challenge official power has at least two clear linkages with fundamental rights, both of which are of a prevailing ‘procedural’ nature: first, the right to fair trial constitutes in itself a fundamental human right, and second, the right to effective remedy against official decisions benefits from the same status. Indeed, a majority of the fundamental rights found in Chapter VI: Justice of the Charter are inherent components of the rule of law as prevailing in the EU. The centrality of access to justice in the relationships and interactions between the individual and the State is another starting point in the Venice Commission’s definition, which underlines

The rule of law in its proper sense is an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures. *The rule of law thus addresses the exercise of power and the relationship between the individual and the State.* (emphasis added)<sup>79</sup>

### 3.1.2.2 *Understanding the Triangular Relationship II: Democracy*

The second essential element is democracy and this element, too, is intrinsically linked to the other two. Democracy takes a variety of forms, for instance direct versus representative, and has many definitions but it is commonly based on the principle of equality among people entitled to political self-determination. The

<sup>78</sup> For an analysis of the EU Charter and its genesis and drafting, refer to P. Craig (2013), *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford: Oxford University Press (Ch. 6 on ‘Rights, Legality and Legitimacy’, pp. 193-198).

<sup>79</sup> Venice Commission, Report on the Rule of Law, op. cit., p. 5.

notion of democracy as a government constituted of people, for the people and by the people as US President Lincoln put it in his famous Gettysburg Address of 1863 still has a substantial grip on political thinking.

The EU Charter of fundamental rights upholds democracy in the form of the right to vote and stand for election for every EU citizen (Articles 39–40, Charter). The Charter addresses two aspects of democracy. The first is the venues of representation. EU citizens only have a fundamental right to vote and stand as candidates in European Parliament and municipal elections. There is no fundamental right for them to vote in national elections in the member states. The second involves the conditions for voting. The EU citizens who need to rely on the Charter for their enfranchisement are those who are living outside their member state of underlying nationality. This is evident from the wording of the provision, which provides for voting rights ‘under the same conditions as nationals of that State’. The EU fundamental right of democratic participation is based on the principle of equality.

The relationship of democracy and fundamental rights is also one governed by rule of law. The application of rule of law principles to the operation of EU democracy is self-evident. The importance of human rights for the mechanisms of democracy is well evidenced by the ECtHR judgment against the UK regarding the right of prisoners to vote in elections.<sup>80</sup> This judgment has been very controversial in the UK, which has still not introduced legislation to bring the situation into conformity with the ECtHR ruling. The example is one of the direct relationship between democracy and human rights, but also evidences how the arrangements between the two are not captured within State sovereignty but are subject to supranational determination.

There is a second important aspect of the relationship of human rights with democracy, which involves the determination of the scope of limitations on human rights (and on EU fundamental rights in so far as their scope is the same as the equivalent rights in the ECHR). This is the determination of what is necessary in a democratic society – a core component of all the limitations on human rights in the ECHR. The ECHR includes both absolute human rights, such as the prohibition on torture, inhuman or degrading treatment or punishment (Article 3 ECHR) and qualified rights, such as the right to private and family life (Article 8 ECHR). Any limitation on a qualified right must be contained in law, justified on one of the permitted grounds set out in the ECHR and must be necessary in a democratic society.

The ECtHR has had to consider what is necessary in a democratic society on numerous occasions and has not shied away from the subject. It has confirmed that any interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient”. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention.<sup>81</sup> Therefore, while there is a margin of appreciation for the member states as to what is necessary in a democratic society, this degree of discretion is narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights.<sup>82</sup> Further, where there is consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it – as evidenced by conventions, resolutions and other measures, – the margin is narrower.<sup>83</sup> The Court itself is the ultimate arbiter of what is necessary in a democratic society, not the member states’ authorities. In its determination, the processes of international agreement among democracies (consensus among Council of Europe States), is an important factor.

The independent supervision of ‘rule of law with fundamental rights’ goes therefore beyond State institutions. The European Court of Human Rights (ECtHR), for instance, has frequently held that in order for a legal act to fulfil the essential quality of law, it must be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual to regulate his or her conduct accordingly.<sup>84</sup> To

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<sup>80</sup> *Hirst v the United Kingdom*, [2005] ECHR 681, (2006) 42 EHHR 41

<sup>81</sup> *S & Marper v the United Kingdom* nos. 30562/04 and 30566/04 ECHR 2008.

<sup>82</sup> *Connors v. the United Kingdom*, No. 66746/01 ECHR 2004, paragraph 82.

<sup>83</sup> See L. R. Helfer (1993), *Consensus, Coherence, and the European Convention on Human Rights*, Cornell International Law Journal, Vol. 26, pp. 133-165.

<sup>84</sup> *S and Marper v. the United Kingdom*, op. cit., paragraphs 95 and 96.

qualify as law for human rights purposes, a measure must be sufficiently circumscribed and subject to adequate legal safeguards for the individual against abuse by State agents.<sup>85</sup>

The contours of the relationship between the rule of law and democracy are touched upon in Marsch's Thematic Contribution in Annex 3 when he studies the dilemmas characterising the German constitutional regime. He highlights that "the formal conception of *Rechtsstaat* is an essential condition for any democratic State", while "the substantial conception of *Rechtsstaat* is commonly regarded as a restriction of the democratic principle". As he rightly points out "The Parliament, as the only directly legitimated supreme Federal body, is bound by fundamental rights, which are enshrined in the Constitution, so that parliamentary sovereignty is limited". In the same vein, Jowell's Thematic Contribution underlines how, in the UK, while the final say on how to resolve the tensions emerging from the relationship between rule of law and other 'values' remains in Parliament's hands, the Courts are of the increasing position that in the case where judicial review would be removed by Parliament, "the Courts would uphold the rule of law above Parliament's sovereignty".

### 3.1.2.3 *Understanding the Triangular Relationship III: The Rule of Law*

The triangle presented above, which describes the articulation of rule of law, fundamental rights and democracy at the national level, becomes a 'triangular prism' when the EU's rule of law, fundamental rights and democracy is inserted. The EU itself becomes an integral part of the schema not only by providing rules about the content and application of the three notions but also by providing mechanisms for determination of the validity of national settlements regarding the three elements. All three principles are inherent to the EU through the treaties and the Charter, and the EU is also a rule of law actor.

This prism transforms the traditional venues of 'horizontal' and 'vertical' accountability channels which used to characterise the nation-liberal democratic State, by bringing in a series of 'post-national' actors and venues. 'Post-national' is meant here as referring to the increasing deprivation of the classical nation-State of its formerly enshrined and autonomous attributes, such as setting policies for its domestic markets, enforcing individual rights or securing peace inside and outside its own borders, by the phenomenon of globalisation.<sup>86</sup> Contestation about the rule of law, the meaning and application of fundamental rights and democracy takes place not only within member states but among member states and EU institutions and among member states within EU institutions. In essence the dilemmas emerging here are the product of an evolving sovereignty struggle. As stated above, the prism-fashioned relationship then transforms the field of contestation of what the rule of law is or should be and displaces the sovereignty struggles to EU-member state relations. While EU institutions stress here the importance of the primacy of EU law and hence call upon member states to comply with the Treaties obligations and 'values' enshrined in Article 2 TEU, member states in turn counter this version of rule of law with the principles of subsidiarity and State sovereignty.

The visualisation of the EU-member state relationship regarding the assemblage of rule of law, fundamental rights and democracy works well to indicate how the supranational structure interacts with national political and legal settlements. The image of the triangular prism is useful when it comes to examining how the EU itself resolves the same triangular relationship of rule of law, fundamental rights and democracy. At the same time, as the debates about the three concepts take place at the national level, so too are they being played out within the EU institutions. However, the determination of the way in which the three work, which is agreed among the EU institutions, has an enormous impact on the member states. For instance, EU agreement on the centrality of the Charter as an essential element of EU law as contained in the Lisbon Treaty means that the member states cannot disregard the Charter in their national debates. While the scope of application of the Charter is limited to the reach of EU law, there are very few areas of law that are still beyond that reach. Figure 2 provides a visual tool summarising these elements.

In the EU legal system, which has found itself entrenched into what Habermas has denominated '*the post-national constellation*',<sup>87</sup> the democratic dimensions of rule of law have been closely tied to the so-called 'democratic deficits' affecting EU policies, such as those falling within the rubric of the Area of Freedom, Security and Justice (AFSJ). The limited competences and powers granted to the European Parliament

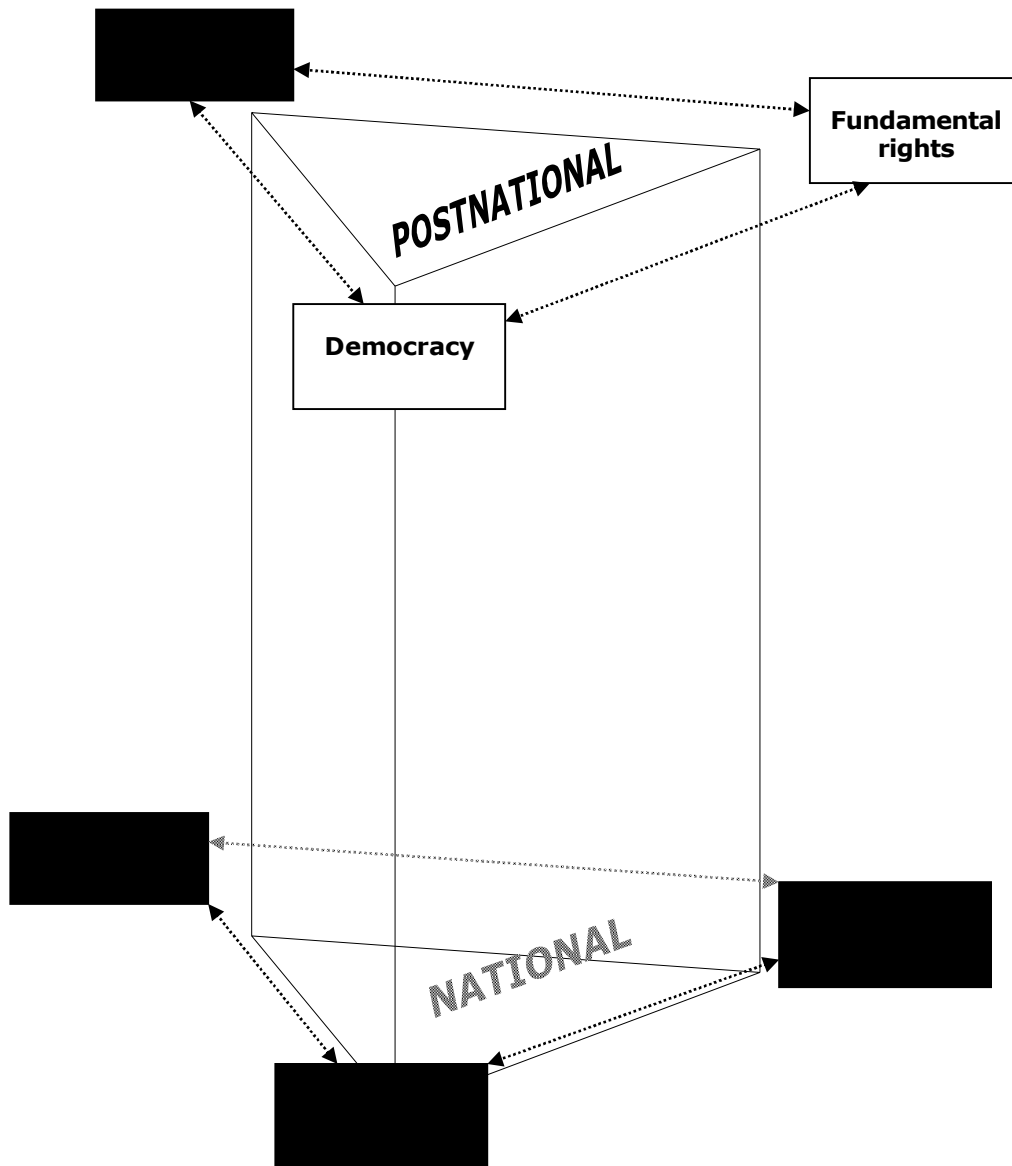
<sup>85</sup> *Quinton & Gillan v the United Kingdom*, No. 4158/05 para 87 ECHR 2010.

<sup>86</sup> See J. Habermas (2001), *The Postnational Constellation – Political Essays*, Cambridge, MA: MIT Press.

<sup>87</sup> *Ibid.*

constitute a case in point in this respect. Democratic deficit has also related to questions on (lack of) transparency in EU decision-shaping and -making processes in the AFSJ.

Figure 2. The triangular prism of rule of law, democracy and fundamental rights at national and post-national levels



The democratic deficit discussion<sup>88</sup> has many sources, not least a certain degree of contestation between the Council of Ministers, composed of elected ministers who represent the democratically elected governments of the member states, and the European Parliament, elected by universal suffrage of the citizens of the Union. With such a structure, the EU cannot avoid some tension regarding which body holds greater democratic responsibility – one representing the people of the EU (the European Parliament) and the other representing the States of the people of the EU (the Council). However, this pre-Lisbon Treaty degree of contestation rings increasingly hollow today when the powers of the European Parliament are very much increased and the EU Charter has binding force. It is difficult to characterise the EU as an area with a substantial democratic deficit, when its law-making process is compared even with that of some existing

<sup>88</sup> See P. Craig, “Integration, Democracy and Legitimacy”, in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, Second Edition, Oxford: Oxford University Press, pp. 13-40.



member states. The revisions of the treaties over the past ten years have steadily provided the EP with greater powers in the legislative process, thereby enhancing its claims to be the primary voice of the people of Europe and of democracy in the EU.

The nexus between rule of law and democracy in the EU still raises in this way (similar to the national arenas) profound legitimacy-related questions. This has been a question studied by Habermas (2001),<sup>89</sup> who has argued that the democratic constitutional State represents “a political order created by the people themselves and legitimated by their opinion – and will-formation, which allows the addressees of the law to regard themselves at the same time as authors of the law... Otherwise an essential condition for the legitimacy of democracy is endangered” (p. 65). Where can this legitimacy be found and established in the post-national democracy enshrined at EU level? In Habermas’ view, the challenges raised by globalisation will only be tackled if “‘the post-national constellation’ can successfully develop new forms for the democratic self-steering of society” (p. 88). The role played by human rights remains also central at times of grounding a legitimate rule of law.<sup>90</sup>

The idea of democracy at EU level comes out of the disputes that have taken place around questions of transparency, powers when adopting legislation, access to documents, the right to vote, the role of civil society actors, etc. It is perhaps in this field of contestation and tensions where democracy is revealed. A central challenge still remains how to tie democratic rule of law systems to an effective fundamental rights framework at EU level.

### 3.2 Competences and Sovereignty Dilemmas

A second cross-cutting dilemma affecting the triangular relationship from an EU viewpoint relates to legal competences and the subsidiarity, proportionality and conferral principles originally enshrined in Article 5 TEU. In particular, ‘who is responsible’ for protecting fundamental rights, democracy and rule of law in the EU? Article 4 TEU states that competences not conferred on the Union in the Treaties remain with the member states. Thus, the responsibility to protect fundamental rights, democracy and rule of law first of all depends on the extent to which there is a competence of the Union to do so in accordance with the Treaties. As already pointed out in the previous section 3.1, this has become one of the key controversies in the contestation on the content of ‘rule of law’ in the EU in the relations between EU institutions and national governments of the member states.

One of the limits to the EU’s intervention in the triangular relationship at member states’ levels is the current Article 51 of the EU Charter, which provides its material scope of application and limits its reach to member states when they are implementing Union law. In this context, therefore, the European Commission and the Court of Justice of the European Union (CJEU) are expressly competent to enforce and settle/interpret (in the context of enforcement procedures and preliminary rulings) rule of law-fundamental rights disputes against member states within the scope of EU law.<sup>91</sup> The European Commission made its position clear on the scope of this provision in the 2012 Annual Report on the application of the EU Charter of Fundamental Rights:<sup>92</sup>

The Commission cannot examine complaints which concern matters *outside the scope of EU Law*. This does not necessarily mean that there has not been a violation of fundamental rights. If a situation does not relate to EU law, *it is for the Member States alone to ensure that their obligations regarding fundamental rights are respected*. Member States have extensive national rules on

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<sup>89</sup> Habermas, op. cit.

<sup>90</sup> Refer to Chapter 5 (“Remarks on Legitimation through Human Rights”), pp. 113-129. In Habermas’ view, “human rights institutionalize the communicative conditions for a reasonable political will-formation”, yet their actual validity, content, raking and functions remain “as contested as ever”, p. 117 and p. 119. In his view, “The discourse of human rights is also set up to provide every voice with a hearing. Consequently, this discourse itself sets the standards in whose light the latent violations of its own claims can be discovered and corrected” (p. 120).

<sup>91</sup> For a detailed study of the enforcement actions against Member States, refer to Craig and de Búrca, op. cit., pp. 408-441.

<sup>92</sup> European Commission, 2012 Annual Report on the Application of the EU Charter of Fundamental Rights, 2013, European Commission, DG Justice ([http://ec.europa.eu/justice/fundamental-rights/files/charter\\_report\\_2012\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf)).

fundamental rights, which are guaranteed by *national judges and constitutional courts*. Accordingly, complaints need to be directed to the national level in the first instance.<sup>93</sup> (emphasis added)

That notwithstanding, inherent to the binding force of the EU Charter as having equivalent legal force as the Treaties (Article 6 TEU) is the duty of the EU institutions to ensure that the Charter is fully applied, including in member states' laws and practices. Moreover, while these limitations of EU action may hold true as regards the scope of the EU Charter, the same does not hold true as regards the task of the European Commission as guardian of the Treaties, and in particular Articles 2 and 7 TEU. Indeed, it is important to reiterate that the scope of Article 7 TEU is not limited to areas covered by EU law. As pointed out in section 2.1 above, this EU supervisory mechanism could be triggered in the event of a breach in areas where member states act autonomously.<sup>94</sup>

A key question that has been addressed by all the Thematic Contributions included in Annex 3 of this study is the extent to which the EU fundamental rights framework has transformed traditional notions, scope and interactions in the triangular relationship between rule of law, fundamental rights and democracy. The national contributions reveal that in a majority of the member states under investigation the dividing line between national law and actions within the scope of EU law can no longer be clearly drawn. The evolution of the EU fundamental human rights framework appears to have played here a determining role in fostering convergence in domestic judicial and juridical practices.

This has been the case for instance in France. The Thematic Contribution by Errera points out how the EU Charter of Fundamental Rights and the CJEU jurisprudence has contributed to the protection of fundamental rights in the French legal system, such as for instance in asylum and refugee law. It has also facilitated the reinforcement and consolidation of the 'judicial liberties' in France, which include:

[...] Le contrôle des juges a été étendu à des domaines nouveaux, tels que le droit des étrangers, celui des détenus, le droit social et celui de l'entreprise. Les pouvoirs du juge sont accrus, grâce notamment à la jurisprudence des deux cours européennes. Les tribunaux judiciaires déclarent de plus en plus fréquemment engagée la responsabilité de l'état du fait du fonctionnement défectueux de l'institution judiciaire.

The impact of supranational fundamental human rights frameworks is also signalled in Jowell's Thematic Contribution on the UK, which alludes to the ways in which parliamentary sovereignty has been weakened through the rights incorporated under the ECHR and EU law "which supplement, extend and greatly reinforce the partial restraints imposed by 'common law' constitutional principle of the rule of law on the exercise of legislative and executive power".

Similarly, Ivanova's Thematic Contribution identifies the positive effect that Bulgaria's membership in the EU had over the country's adherence to the principles of democracy, rule of law and human rights into binding constitutional principles and enforceable legal norms. This development, she argues, "is most tangible in the area of human rights protection...[and] there was a visible increase in the transparency and better access to public information related to the activity of the law enforcement, the prosecution and the courts".

In the case of Germany, however, the point may actually be a different one from that highlighted in the French, British and Bulgarian Thematic Contributions. Marsch's Thematic Contribution points out how the German debate has been rather concerned about the extent to which increasing influence of EU law on issues related to fundamental rights will lead to a decrease in the existing level of protection in the German constitutional system. The influence that the German Constitutional Court had over the CJEU upholding fundamental rights in European jurisprudence has led to this framing of the issue the other way around: the influence that national constitutional frameworks are having on the EU level as regards fundamental rights protection. The German Constitutional Court ruling of 'Solange II' in 1986<sup>95</sup> declared that as long as the

<sup>93</sup> Ibid., p. 19. See a similar statement in the European Commission, 2011 Annual Report on the Application of the EU Charter of Fundamental Rights, 2013, European Commission, DG for Justice ([http://ec.europa.eu/justice/fundamental-rights/files/charter\\_report\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/charter_report_en.pdf)).

<sup>94</sup> See European Commission (2003), Communication on Article 7 TEU – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15 October, p. 5.

<sup>95</sup> German Constitutional Court (1986), *Wünsche Handelsgesellschaft*, Decision of 22 October 1986, BVerfGE 73, 339, case number: 2 BvR 197/83.

CJEU would guarantee an equivalent level of protection to the German Basic Law, the Constitutional Court would not enter into analysing the compatibility of EU secondary law with human rights. Is the EU up to the challenge?

The Court of Justice of the European Union signalled in the case *Fransson*<sup>96</sup> that ‘outside the scope of EU law’ national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection offered by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European law are not compromised. The CJEU has in this way held that the EU Charter is a constitutive part of ‘the national constitutional traditions’ of EU member states. This development has also been highlighted by the European Commission’s 2012 Annual Report on the Application of the EU Charter of Fundamental Rights,<sup>97</sup> which for the first time included the case law of national courts and tribunals on the EU Charter, including in the domestic frameworks of judicial review of ‘constitutionality’. In particular, the European Commission stressed:

The analysis of court rulings referring to the Charter further suggests that national judges use the Charter to support their reasoning, including when there is not necessarily a link with EU law. There is also some evidence of an incorporation of the Charter in the national systems of fundamental rights protection.<sup>98</sup>

The national constitutional traditions show therefore a surprising ‘degree of convergence’ that has emerged at the member state level, and the ‘processes of constitutionalisation’ of the EU Charter and European human rights framework in the member states’ domestic legal systems, which could justify the assertion that a strengthened role for the EU ‘does something more’ and/or ‘new’ in monitoring, evaluating and/or supervising the triangular relationship between rule of law, democracy and fundamental rights by EU member states.

### 3.3 Methodological Challenges

The mapping of EU monitoring, evaluation and supervisory instruments and tools carried out in section 2 paid particular attention to the ways in which these instruments are used and the methodologies that are displayed (the ‘how question’). Our analysis reveals three main findings as regards methodological challenges affecting current EU mechanisms: i) experimental EU governance, ii) Benchmarking and iii) uses of knowledge and expertise.

#### 3.3.1 ‘Experimenting’ with EU Governance

There is a patchwork of experimental governance techniques and mechanisms, soft-policy coordination frameworks and monitoring and evaluation mechanisms at the EU level. Instruments such as the EU Justice Scoreboard or the EU Anti-Corruption Report are based on the presumption that instead of advancing supranational harmonisation in policy areas closely linked to member states’ sovereignty, the EU can instead make use of alternative and ‘softer methods’ such as evaluation and benchmarking, exchange of ‘good practices’, mutual learning processes and soft coordination of domestic policies, which are deemed to not *directly* interfere with member states’ competences.

These new modes of EU interventions move ‘Europeanisation’ forward in different guises. Radaelli (2001) has defined ‘Europeanisation’ as the

process of construction, diffusion, and institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms, which are first

<sup>96</sup> Case C-617/10, *Fransson*, 26 February 2013.

<sup>97</sup> European Commission, 2012 Annual Report on the Application of the EU Charter of Fundamental Rights, op. cit.

<sup>98</sup> *Ibid.*, p. 15. Reference was in particular made to the Austrian Constitutional Court, Cases U 466/11 and U 1836/11, 14.3.2012, where according to the European Commission, the Constitutional Court:

... recognised the very special role of the Charter within the EU legal system, and its different nature compared to the body of rights and principles which the Court of Justice of the EU has been developing throughout the years. It took the view that the Charter is enforceable in the proceedings brought before it for the judicial review of national legislation, and therefore individuals can rely upon the rights and the principles recognised in the Charter when challenging the lawfulness of domestic legislation. The Austrian Constitutional Court identified strong similarities between the role played by the Charter in the EU legal system and that played by the ECHR under the Austrian Constitution, according to which the ECHR has force of constitutional law.

defined and consolidated in the making of EU policy and politics, and then incorporated into the logic of domestic discourses, identities, political structures and public policies.<sup>99</sup>

There exists a large body of scholarly literature on the nature, implications and challenges of ‘experimental’, ‘alternative’ or ‘new’ governance methods in the EU legal system.<sup>100</sup> Bruno, Jacquot and Mandin (2006) have studied the ways in which European institutions have used these new ‘technologies of performance’ to discipline and steer forward political deliberation amongst EU member states, which they qualify as ‘new forms of governmentality’ orienting and indirectly influencing public actions in domestic and EU arenas.<sup>101</sup> European integration takes places and develops not only through the Community method of cooperation and other legal procedures in the Treaties and EU law text books, but also through the framing and diffusion of common indicators and standardisation and best practices/solutions driven by a benchmarking logic.

The academic debates have pointed out how the non-binding nature of these instruments does not facilitate gaining an accurate understanding of the results and outputs achieved.<sup>102</sup> This has been confirmed by the evaluation of the European Semester for Economic Policy Coordination in Alcidi and Busse’s contribution, which concludes: “Despite almost every government trying to implement changes in this respect, it is hard to see any significant improvement.” However, as Trubek and Trubek have rightly argued, EU methods of coordination “may not be a paper tiger, but rather could emerge as a powerful tool”, and “soft law maybe harder than you think” in fostering change across member states’ arenas.<sup>103</sup>

As examined in section 2 above, a number of rule of law-related evaluation tools are not formally or expressly envisaged in the letter of the Treaties and extend beyond ‘what we know’ about EU law and the ways in which the EU institutional and decision-making processes are supposed to work in practice. Mechanisms such as the EU Anti-Corruption Report and the EU Justice Scoreboard aim at having ‘more Europe’ through coordination methods<sup>104</sup> in areas where sensitivities with the principle of subsidiarity and ‘national competences’ of member states are very much at stake.

A number of concerns can be highlighted about these experimental policy techniques, in particular their own rule of law-compliance and normative implications from the angle of inter-institutional relations and the modifications that they bring to the EU institutional patterns. The roles attributed to each of the European institutions are also different, with the European Parliament and the Court of Justice of the European Union too often neglected or even marginalised in these processes, which remains problematic from a democratic rule of law with fundamental rights perspective.<sup>105</sup>

The European Semester for economic policy coordination, which also includes the EU Justice Scoreboard, constitutes a case in point in this respect. While its foundations can be found in Article 121(1) of the Treaty on the Functioning of the European Union,<sup>106</sup> this provision does not expressly foresee this innovation or develop its specific components and features. The European Semester entails a rather complex multi-

<sup>99</sup> C. Radaelli (2001), “The Domestic Impact of the European Union Public Policy: Notes on Concepts, Methods and the Challenge of Empirical Research”, *Politique européenne* 5, pp. 107-142.

<sup>100</sup> Refer to the overview given by P. Craig and G. De Búrca (2011), *EU Law: Text, Cases and Materials*, Fifth Edition, Oxford: Oxford University Press, Chapter 6 on ‘New Forms of Governance’, pp. 158-178.

<sup>101</sup> I. Bruno, S. Jacquot and L. Mandin (2006), “Europeanisation through its Instrumentation: Benchmarking, Mainstreaming and the Open Method of Coordination... toolbox or Pandora’s box”, *Journal of European Public Policy*, Vol. 13, No. 4, pp. 519-536. See also I. Bruno (2007), “Généalogie du Benchmarking. Itinéraire d’une technique de gouvernement”, in P. Laborier et J. Vogel (dirs.), *Les Sciences Camérales. Activités Pratiques et Histoire des Dispositifs Publics*, Paris : PUF, pp. 97-107.

<sup>102</sup> See for instance S. Velluti (2007), “What European Union Strategy for Integrating Migrants? The Role of OMC soft mechanisms in the Development of an EU Immigration Policy”, *European Journal of Migration and Law*, Vol. 9, No. 1, pp. 53-82.

<sup>103</sup> D.M. Trubek and L.G. Trubek (2005), “The Open Method of Coordination and the Debate over Hard and Soft Law”, in J. Zeitlin and P. Pochet (eds), *The Open Method of Coordination Action: The European Employment and Social Inclusion Strategies*, Brussels: P.I.E. Peter Lang, pp. 83-103. See also their views on the theory of ‘hybrid constellations’ and the ways in which ‘hard’ and ‘soft’ law and policy can play different but mutually reinforcing roles in EU policy-making.

<sup>104</sup> For an analysis of the origins of the Open Method of Coordination and a comparison between its implementation in the fields of employment and social inclusion areas, see C. de la Porte (2002), “Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?”, *European Law Journal*, Vol. 8, No. 1, March, pp. 38-58.

<sup>105</sup> V. Hatzopoulos (2007), “Why the Open Method of Coordination is Bad for You: A Letter to the EU”, *European Law Journal*, Vol. 13, No. 3, May, pp. 309-342.

<sup>106</sup> Article 121(1) TFEU states that “Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120”.

institutional actor framework, which reflects a rather unbalanced weight in the scrutiny and decision-making process. The European Commission acts as the main driving actor in the method by providing the background assessment of member states' economic policies at the beginning of the cycle and then elaborating the country-specific recommendations. The European Council plays a central function in the adoption of the final recommendations for the countries concerned. According to the analysis carried out by Alcidi and Busse in their Thematic Contribution in Annex 3, "by contrast the European Parliament has only the very marginal role to express an opinion before policy orientations are formulated in the early stage of the cycle". A similar critique has been pointed out by Mortensen (2013) as regards the intergovernmental Treaty on Stability, Coordination and Governance (TSCG) in the Economic and Monetary Union, which in his view widely ignores the parliamentary component, with Parliament being only informed of the results of European Council meetings and Eurogroup summits.<sup>107</sup> These aspects negatively affect the democratic legitimacy and entail a lack of ownership on the side of the European Parliament of the decisions and policy reforms taken and/or put forward in instruments such as the EU Justice Scoreboard.

The role of the Court of Justice of the European Union also remains very limited, subject to important constraints, and sometimes is not even formally envisaged. Which roles should the CJEU adopt in these supervisory, evaluation and monitoring systems? Its competence in the supervisory instrument embodied in Article 7 TEU is limited to procedural elements and does not extend to the actual substantial decisions that make operational the prevention or penalty mechanisms in cases of fundamental rights breaches. The fuzziness as regards the 'soft' outputs resulting from the soft-policy mechanisms (and the supposed non-legal effects of the recommendations and guidelines) leads to a high level of legal uncertainty and therefore affects the question of 'justiciability', often evading the CJEU's control.<sup>108</sup>

Another issue relates to the lack of coherency among the existing EU policy methods and tools, and between those and EU law, which leads to questions of effectiveness and compliance and consistency. While soft methods of European cooperation are supposed to be compatible with other policy coordination systems and European legislative instruments, that compatibility cannot be taken for granted and is the subject of additional concerns. This is for instance the case as regards the EU Charter of Fundamental Rights-related processes of monitoring, which currently consist of separate monitoring instruments by various EU institutional actors and agencies lacking any inter-institutional coordination, i.e. the European Parliament's Resolutions on the situation of fundamental rights in the EU, the European Commission's Annual Reports on the application of the EU Charter and the Fundamental Rights Agency's Annual Reports.

### 3.3.2 Benchmarking rule of law?

A large number of existing mechanisms make use of benchmarking methodologies. This includes the Cooperation and Verification Mechanism (CVM), the EU Justice Scoreboard and the EU Anti-Corruption Report. The use of benchmarking in public policies, however, opens a number of methodological questions and reveals deficiencies which relate to issues such as: 'What' is to be benchmarked? What do the indicators indicate? Are the results providing an objective qualitative picture allowing meaningful comparison between member states? What are the standards used when putting the indicators into practice and evaluating the national laws/practices against them?

As discussed in section 3.1.1 above, the concept of rule of law and its relations with democracy and fundamental rights differ with respect to each domestic context across EU member states. While certain points of convergence have been identified in the fundamental rights dimension in the triangular relationship across the EU member states covered in the Thematic Contributions contained in Annex 3 of this study, 'the national embeddedness' of rule of law still predominates. Benchmarking presumes that a common set of criteria or check list may be developed at the EU level, but the elements composing the triangular relationship between rule of law, democracy and fundamental rights are not of equal weight across member states. Depending on the 'national circumstances', the same component may present different weights. Moreover, a massive development in one area of intervention (e.g. rule of law) may be labelled as a 'good practice' in a member state, but it may also have profoundly negative repercussions over the other two (e.g.

<sup>107</sup> J. Mortensen (2013), "Economic Policy Coordination in the Economic and Monetary Union: From Maastricht via the SGP to the Fiscal Pact", CEPS Working Document No. 381, Centre for European Policy Studies, Brussels, August.

<sup>108</sup> F. Snyder (1994), "Soft Law and Institutional Practice in the EC", in S. Martin (ed.), *The Construction of Europe (Essays in Honour of Emile Noël)*, The Hague: Kluwer, p. 197.

fundamental rights and liberties) in that same member state. Is an indexing method going to fully capture these diversities and provide a comprehensive comparison between member states? An indicators-based system may also fall into the trap of over-simplifying national realities, contexts, traditions and perceptions, and should therefore be taken with caution. Otherwise, any benchmarking mechanical instrument is likely to reveal erroneous assessments and results.

Another central challenge inherent to benchmarking rule of law is how indicators or indexing methods will be used to conduct a *qualitative* evaluation in a reliable, accurate and objective manner. There seems to be a common assumption that these evaluation instruments are non-politicised and independent systems. Yet, is that really the case?

The way in which the European Semester works, for instance, reveals several deficiencies. The indicators used are mainly of a quantitative (non-qualitative) nature (e.g. budget balances or macroeconomic indicators) and are far from clear-cut. Alcidi and Busse argue: “The cyclical component of cyclical deficit can be based on different formulas but they all have one thing in common: they are estimates which are often revised over time. Similar caveats can be made for the MIP [*macroeconomic imbalances procedure*] scoreboard, despite having a backup indicator.” Another issue of concern relates to the criteria of evaluation. While in the case of specific quantitative targets, the assessment is simply based on the outcome, in the case of reforms or medium-term objectives, the evaluation seems to be based more on the effort made to achieve a certain objective rather than on the results obtained.

Ivanova’s Thematic Contribution on Bulgaria reveals these methodological weaknesses in relation to the Cooperation and Verification Mechanism (CVM). The choice of the rate of convictions in the criminal justice system as a key indicator, and the pressures by the European Commission in this direction, created serious risks that the new legislative reforms would aim at ‘playing tough on crime’ to the detriment of fundamental rights. In Ivanova’s view, “it legitimised the end-product of a system that was considered already to be dysfunctional and in need of reform” and allowed the government to put extraordinary pressure on the judiciary. The case of Bulgaria has also demonstrated that one of the factors that have reduced the ‘reform potential’ of EU integration has been the way in which the importance of the ‘political criteria for membership’ were overshadowed by the “economic criteria and the administrative capacity to apply the *acquis*”, and the EU “seemed to miss the point that the rule of law of a country is inseparable from the overall health of its democracy, market economy and civil society”.

### **3.3.3 Knowledge, Expertise and Politicisation**

Benchmarking is therefore not a neutral tool or exercise. It is an assessment method that remains vulnerable to politics and subjectivism. It is precisely its ‘political legitimising function’ that makes of it a peculiar (yet critical) mode of EU decision-shaping and -making. Bruno, Jacquot and Mandin (2006) have questioned the neutrality of these instruments but demonstrated how these mechanisms of ‘knowledge production and diffusion’ have prescribed norms of member state behaviour. They do influence public-policy actions and initiatives by EU member states, and hence move ‘Europeanisation’ and supranational policy convergence forward.

Alcidi and Busse’s Thematic Contribution in Annex 3 of this study emphasises the high degree of politicisation that is inherent to the European semester, which may be seen to be inconsistent with the principle of equality amongst EU member states. They argue that a certain degree of subjectivity and politics still play a role in the cycle when looking at the fact that “judgement plays a key role and as such it can be influenced, despite the fact that the Commission is supposed to act as ‘supra partes’ institution”. The Semester also shows asymmetric evaluations of Country Specific Recommendations (CSRs), with big countries like Germany tending to ignore the recommendations and not suffering any action against them. A similar critique may be applicable to the EU Justice Scoreboard (in theory only, as it is too early to assess how effective the follow-up of the Scoreboard will be) and the CVM (insofar as it has been applied only for Bulgaria and Romania after their EU accession, and not for Croatia for instance).

A key cross-cutting deficiency characterising benchmarking methodologies is indeed their dependency on and vulnerability to the differences in ideological outlook and political priorities driving their methodologies and standards. There is a strong dependency in benchmarking on a certain ideological setting, which makes the entire exercise inherently political and non-neutral in nature. Furthermore, as Carrera points out:

A substantial degree of subjectivity and value judgements predominate in the identification of ‘impediments’ or ‘the preliminary assessment of the situation, the categorisation of favourable (best) or not favourable (worst), the use of the indicators and the way in which the results are presented. (...) Questions arise as to the determination of ‘ideal’, ‘best’ or ‘good’. What do these terms mean when assessing a policy or how it is implemented? ‘Best’ and ‘ideal’ are malleable adjectives often attributed according to a certain ideological understanding and approach of ‘the common standard’ against which to test the norm or practice. What are the highest European common standards for labelling a policy as ‘the best’ or ‘the worst case’? What is the precise content of these common standards?<sup>109</sup>

The role of knowledge and expertise has therefore become increasingly central in ensuring the legitimacy of these EU evaluation methods. There have been attempts to address this challenge through the setting up and use of an independent and interdisciplinary network of scholars specialised at national and EU levels in the topics addressed in the mechanisms. As noted in Annex 1, an EU Network of Independent Legal Experts on Fundamental Rights existed between 2002 and 2006 and was referenced both in Article 7 TEU (in its pre-Lisbon version)<sup>110</sup> and in the Commission Communication of 2003.<sup>111</sup> This Network was disbanded in 2007 and replaced with the FRA in Vienna. As pointed out in section 2.1.6 above, the FRA also relies on information and research provided by the FRANET. The use of knowledge coming from the Council of Europe, the United Nations or the World Bank is also revealed in our mapping exercise. Some of these EU mechanisms make use of data, findings and methods from these non-EU actors. This is the case of the EU Justice Scoreboard or the EU Anti-Corruption Report.

Politicisation also seems to affect the follow-up dimensions in a majority of the supervisory and evaluation EU mechanisms. Both the European Semester and Article 7 TEU supervisory mechanisms have preventive and corrective arms. In neither case has the corrective arm been exercised or used in practice, and therefore it remains to be seen how the Council would rule if a strong country were on the verge of receiving a fine or a fundamental rights-based procedure. The Thematic Contribution on the European Semester by Alcidi and Busse shows how “the resort to judgement or unobservable variables has always played a crucial role” and how “strong countries [such as Germany] tend to ignore the recommendation and no action is taken against them”.

#### **4. The European Parliament and European Commission: Proposals for Evaluating Rule of Law in the EU**

This study is not the first, by far, to contemplate ways to improve rule of law monitoring, evaluation and supervision of member states at EU level. It is preceded by a rich set of debates and discussions regarding possible policy options and ways forward for improving the EU’s intervention. Before presenting the general conclusions of this study, and putting forward our own set of policy suggestions/recommendations to the European Parliament based on our research, it is first necessary to offer a synthetic overview of existing recommendations put forward by Parliament (section 4.1), as well as the policy strategy planned by the European Commission (section 4.2).

##### **4.1 European Parliament**

A number of European Parliament reports and resolutions have put forward proposals and recommendations aimed at addressing rule of law dilemmas and deficits in the EU. The following three can be especially highlighted:

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<sup>109</sup> S. Carrera (2009), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers, p. 132.

<sup>110</sup> Article 7 TEU included the following sentence: “the Council [...] may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.”

<sup>111</sup> European Commission (2003), Communication on Article 7 TEU, op. cit., p. 9.

- Report on the situation of fundamental rights: standards and practices in Hungary, June 2013, also known as the Tavares Report<sup>112</sup>
- Report on the situation of fundamental rights in the European Union (2010-2011), December 2012 (EP Fundamental Rights 2012 Report)<sup>113</sup>
- Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, December 2010 (EP Fundamental Rights 2010 Report).<sup>114</sup>

Annex 2 of this study provides a detailed comparative overview in tabular form of the three reports and their specific initiatives and recommendations.

What have been the main initiatives and recommendations that have so far emerged from the work of the European Parliament? These can be broadly grouped under the following headings or categories:

First, EU inter-institutional coherency/cooperation: A first set of suggestions by Parliament have dealt with the need to ensure a more coherent and comprehensive inter-institutional framework cooperation at Union level in the annual monitoring of fundamental rights. The EP Fundamental Rights 2012 Report proposed the launching of a yearly institutional forum on fundamental rights to ensure information-sharing and as a pre-phase to the EP's annual debate. An interesting idea contained in the same report has been that of a European fundamental rights policy cycle which would deal "on a multi-annual and yearly basis [with] the objectives to be achieved and the problems to be solved".<sup>115</sup> The 2013 Tavares Report also insisted on the need to strengthen the dialogue between EU institutions and member states,<sup>116</sup> and called for a joint reflection and debate on how to better equip the EU with the tools and instruments to better ensure its principles and duties on democracy, rule of law and fundamental rights. The EP has also insisted on the need to guarantee closer institutional linkages and cooperation with other international and regional bodies working on rule of law-related aspects, such as the Council of Europe's Venice Commission.<sup>117</sup>

Second, new 'mechanisms': In its Fundamental Rights 2010 Report, the Parliament has also called for establishing new European mechanisms to ensure the respect of democracy, fundamental rights and rule of law, and for the Commission to present a new legislative proposal on this subject.<sup>118</sup> This was reiterated in the Fundamental Rights 2012 Report, where the EP emphasised that a clear-cut monitoring mechanism would aim at assessing member states' continuous compliance with the EU's fundamental values and the fulfilment of their rule of law and democracy commitments.<sup>119</sup> The Tavares Report went a step further in proposing ways in which this mechanism could be implemented in practice: First, it suggested the creation of an 'Article 2 TEU alarm agenda' or 'new Union values monitoring mechanism', which would be dealt with by the European Commission;<sup>120</sup> and second, the setting up of a Copenhagen Commission or high-level group of wise men, which would be independent of any political influence and could issue recommendations to the EU on how to respond to and remedy any infractions.<sup>121</sup>

Third, European Commission's impact assessment, annual reporting and enforcement procedures: The fundamental rights dimensions of the European Commission's impact assessments have been a first point of concern for the EP. Following the European Commission's adoption of fundamental rights monitoring in impact assessments, the EP has pointed out that there is room for improvement with proposals still "failing to consider at all, or adequately, their impact on fundamental rights", which in turn call for a revision of the

<sup>112</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0/en>

<sup>113</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0500+0+DOC+XML+V0//EN>

<sup>114</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0344&language=EN>

<sup>115</sup> Paragraph 20 of the EP 2012 Fundamental Rights Report.

<sup>116</sup> Paragraph 78 of the Report.

<sup>117</sup> Paragraphs 35 of the EP 2012 Fundamental Rights Report and paragraph 74 of the Tavares Report.

<sup>118</sup> Paragraph 24 of the Report.

<sup>119</sup> Paragraphs 29 and 31.

<sup>120</sup> Paragraph 69 of the Tavares Report.

<sup>121</sup> Paragraphs 78 and 80.



impact assessment (IA) guidelines.<sup>122</sup> The EP has also recommended that fundamental rights implications of EU proposals and their implementation by EU member states are included in the Commission evaluation (transposition) reports, as well as its annual reporting on the application of EU law.<sup>123</sup> As pointed out in section 2 of this study, the European Commission carries out an Annual Reporting process on the EU Charter of Fundamental Rights. The EP has recommended that the scope of these Annual Reports should be expanded to include an assessment of member states' situations as regards the implementation, promotion and protection of fundamental rights, and recommendations addressed to each of them.<sup>124</sup>

An additional point of parliamentary concern has related to the current Commission's practice as regards infringement procedures. Here the EP has insisted on the need to better guarantee a more objective investigation at EU level and a more effective start of infringement proceedings whenever an EU member state allegedly violates the EU Charter of Fundamental Rights, or has engaged in a systematic constitutional, legal or practical change jeopardising fundamental rights and freedoms.<sup>125</sup> The two EP Fundamental Rights Reports reiterated these same points and underlined the importance for the European Commission to better ensure that infringement proceedings secure effective protection of human rights, "rather than aiming for negotiating settlements with member states".<sup>126</sup> This was accompanied by ideas about new mechanisms for early detection of potential violations, temporary freezing and accelerated legal procedures. A key initiative here relates to the setting up of a new freezing procedure to ensure "that Member States, at the request of the EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order",<sup>127</sup> and would complement current infringement and fundamental rights proceedings.

Fourth, Article 7 TEU: The EP has consistently referred to the need to implement, follow up and update the European Commission Communication on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, of October 2003. This should focus on defining a "*more transparent and coherent way*" to address fundamental rights violations. The Tavares Report stressed the importance to develop the practical operability of this Treaty provision and establish a better distinction between an initial phase (assessing any risks of a serious breach and developing an early warning system), and a more efficient procedure in a subsequent phase (action taken to address actual serious/persistent violations).<sup>128</sup>

Fifth, the European Parliament and the Court of Justice of the EU: There have been two specific proposals addressed to the EP and the CJEU. First, the EP should develop and reinforce its autonomous impact assessment of fundamental rights on proposals and amendments.<sup>129</sup> Second, the CJEU should better facilitate third-party interventions, in particular by human rights NGOs.<sup>130</sup>

Sixth, the EU Agency for Fundamental Rights (FRA): The FRA has been the focus of the Parliament's attention in thinking of new ways to ensure post-accession monitoring of rule of law, democracy and fundamental rights. The limited scope of the FRA's mandate has been particularly contested, with the EP recommending to expand it to also cover old EU third pillar matters (police and judicial cooperation in criminal matters), a comparative evaluation of member states' compliance with the EU Charter of Fundamental Rights and the regular monitoring of member states' compliance with Article 2 TEU.<sup>131</sup> A critical issue that has also been highlighted is the need to strengthen the independence and transparency of the FRA,<sup>132</sup> which is perhaps too vulnerable to member state governments and their concerns.

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<sup>122</sup> EP Fundamental Rights 2012 Report, Paragraph 2.

<sup>123</sup> Paragraph 3 of the EP Fundamental Rights 2012 Report.

<sup>124</sup> Paragraph 9 of the EP Fundamental Rights 2012 Report.

<sup>125</sup> EP Tavares Report, paragraph 69.

<sup>126</sup> EP Fundamental Rights 2012 Report, paragraph 28.

<sup>127</sup> Paragraph 31 of the EP Fundamental Rights 2012 Report, and paragraphs 20 and 40 of the EP Fundamental Rights 2010 Report.

<sup>128</sup> EP Tavares 2013 Report, paragraph 77.

<sup>129</sup> EP Fundamental Rights 2012 Report, paragraph 8.

<sup>130</sup> EP Fundamental Rights 2012 Report, paragraph 33.

<sup>131</sup> Paragraphs 44, 45 and 46 of the EP Fundamental Rights 2012 Report.

<sup>132</sup> Paragraph 47 of the EP Fundamental Rights 2012 Report.

## 4.2 European Commission

The existing policy evaluation initiatives and reporting processes of DG Justice and DG Home Affairs of the European Commission were examined in detail in section 2.1. The European Commission's next policy strategy and agenda have been recently presented by the Vice President of the European Commission Viviane Reding. In a speech entitled "The EU and the Rule of Law: What next?" delivered in September 2013, Commissioner Reding highlighted the Commission's policy options ahead. These include a two-step approach:

First, exploit the potential already offered by the Treaties. This step would include "*developing a process to effectively address a rule of law crisis at an early stage, upstream of the launching of any formal procedures under Article 7*", by preceding the 'reasoned proposal' with a 'formal notice'.

Second, amend the Treaties. This step would entail a "*more far-reaching rule of law mechanism*", which would require:

1. "*More detailed monitoring and sanctioning powers for the Commission, in an amendment of the Treaty*",
2. Expanding the CJEU competences and creating a new procedure to enforce the rule of law principles enshrined in Article 2 TEU "*by means of an infringement procedure brought by the Commission or another Member State before the Court of Justice*",
3. Treaty amendment for lowering the existing thresholds for activating the first stage of Article 7 TEU,
4. Expand the mandate of the FRA and a Treaty amendment that puts the legal basis of the FRA into the ordinary legislative procedure *and*
5. Abolishing Article 51 EU Charter, so as to allow "*the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law*".<sup>133</sup>

Reding's proposals have been followed up by the President of the European Commission, José Manuel Barroso, in his 'State of the Union address 2013', where he confirmed the importance to better safeguard the EU's values, and in particular the rule of law.<sup>134</sup> President Barroso reiterated the idea expressed in his previous State of the Union speech, by addressing the need "to make a bridge between political persuasion and targeted infringement procedures on the one hand, and what I call the nuclear option of Article 7 of the Treaty, namely suspension of a member states' rights." The Commission will issue a new Communication on this matter, even if there is no specific timetable for it to be implemented. President Barroso referred to the Commission's role as independent and objective and called for a more general framework that

... should be based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks... we do need a robust European mechanism to influence the equation when basic common principles are at stake.<sup>135</sup>

## 5. Conclusions and Recommendations

### 5.1 Conclusions

This study has addressed the 'state of play' of EU-level mechanisms assessing the relationship between rule of law, democracy and fundamental rights in member states of the Union in a post-accession phase. The dilemmas and cross-cutting challenges affecting their effective implementation and operability have constituted a central point of critical analysis. The study has argued that the relationship between rule of law, democracy and fundamental rights is co-constitutive. Any future rule of law-related policy discussion in the

<sup>133</sup> Reding, op. cit.

<sup>134</sup> J.M. Durão Barroso, State of the Union address 2013, Speech 13/684, 11.9.2013 ([http://europa.eu/rapid/press-release\\_SPEECH-13-684\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm)).

<sup>135</sup> Ibid.

EU should start from an understanding of the triangular relationship between these dimensions from the perspective of *democratic rule of law with fundamental rights*, i.e. the legally based rule of a democratic State that delivers fundamental rights. The three criteria are inherently and indivisibly interconnected, and interdependent on each other, and they cannot be separated without inflicting profound damage to the whole and changing its essential shape and configuration.

- Our analysis has started with a mapping of existing EU legal and policy mechanisms dealing with the assessment or monitoring of rule of law, democracy and fundamental rights-related considerations of member states' systems within the context of the EU's Area of Freedom, Security and Justice. There is a multi-level and multi-actor European patchwork of mechanisms engaged at different degrees in the assessment of member states' compliance with Article 2 TEU principles. This study has put forward a typology which has categorised these mechanisms into four main types of methods (i.e. monitoring, evaluation, benchmarking and supervision) in order to facilitate a better understanding of their scope, common features and divergences. Article 7 TEU represents the only supervisory tool currently in the hands of the European institutions to monitor and evaluate member states' respect of the Union's founding principles. The study then moves to identify a series of dilemmas affecting these EU instruments and their challenges in addressing the triangular relationship between rule of law, democracy and fundamental rights. The diagnosis has revealed three main cross-cutting aspects affecting these, and which mainly relate to conceptual, competence and methodological questions: **Conceptual:** The notion of rule of law is an elusive and controversial one, and it is not surprising that the EU system lacks a commonly agreed conceptualisation. The European Commission for Democracy through Law (the Venice Commission) of the Council of Europe has provided one of the few more widely accepted conceptual frameworks for rule of law in Europe, which represents a helpful starting point. That notwithstanding, the Thematic Contributions annexed to the study have unanimously revealed the 'embeddedness' of this term with specific national historical diversities of a political, institutional, legal and imaginary nature. Concepts such as *Rechtstaat* in Germany, *état de droit* in France, rule of law in the UK or *pravova darjava* in Bulgaria are far from being synonymous and present distinctive features, including their relations with the other notions of democracy and fundamental rights. The material scoping of rule of law in member states' arenas, and its linkages with the other two criteria, remain also ever-shifting and are therefore difficult to capture from a normative viewpoint.
- **Competences and sovereignty:** All three principles, however, are inherent to the EU through the Treaties and the EU Charter, and the Union is also a rule-of-law actor. The development of the European legal system and its evolving fundamental rights *acquis* have transformed the traditional venues of accountability which used to reside within the remit of the nation-liberal democratic member states of the Union. It has added a 'post-national constellation' of rule of law. The EU Charter of Fundamental Rights is also now a constitutive part of the 'national constitutional traditions' of EU member states. This constellation is revealed through the sovereignty and competency struggles between European institutions and member states' governments in 'Europeanisation' processes. 'Who' is (or should be) responsible for safeguarding and monitoring democratic rule of law with fundamental rights in the EU? It has been argued that this is what actually hides behind the 'Copenhagen dilemma' raised by the European Commission. While European institutions continue stressing the importance of the supremacy of EU law and hence call upon member states to comply with their obligations and loyal cooperation in the scope of the EU Treaties and Article 2 TEU, member state governments in turn counter this version of 'rule of law' with principles of subsidiarity and national sovereignty. Moreover, when bringing the 'EU level' to the triangular relationship between rule of law, fundamental rights and democracy, the debates that have traditionally taken place at the national arenas about the notions and interactions between these three criteria are being played out at the level of European institutions. It has been argued that a 'triangular prism' is the most useful illustration when the rule of law goes post-national in the context of the EU.
- **Methodological:** The mapping of existing monitoring, evaluation and supervisory EU mechanisms of the values listed in Article 2 TEU has also shed light on a number of methodological challenges that profoundly affect the effectiveness in their usage and implementation. These relate to their nature as experimental governance techniques and 'soft' policy tools, which constitute soft-policy

coordination frameworks making use of benchmarking, exchange of ‘good practices’ and mutual learning processes between member states at EU levels. They affect the rule-of-law features designing the EU inter-institutional balance, which has been granted to the so-called Community method of cooperation and challenge the ways in which EU decision-shaping and -making is supposed to take place according to the EU Treaties. Particular issues of concern include matters of democratic accountability and judicial control gaps, and a lack of coherency with other existing EU legislative and policy frameworks. Similar concerns have been raised regarding ongoing EU surveillance and monitoring systems in the field of economic policy coordination, in particular the European Semester. The study also shows the inherent difficulties in any attempt at benchmarking rule of law in the EU, which mainly relate to its political, non-neutral and subjective methodologies. These pose additional challenges in attempts to conduct a fully comprehensive qualitative assessment of member states’ systems and their evolving national particularities.

## 5.2 Recommendations

1. The EU should establish a new supervisory mechanism covering the triangular relationship between rule of law, democracy and fundamental rights,<sup>136</sup> which could be named the ‘Copenhagen Mechanism’. This mechanism should be built upon the existing Article 7 TEU, and should particularly focus on developing the phases preceding its preventive and corrective arms. It would also aim at bringing consistency and an overall framework to other existing EU (rule of law-related) monitoring and evaluation instruments.

In this way, Article 7 TEU would be made more operational, comprehensive and accountable without the need for Treaty change. While some of the recent proposals put forward by the European Commission to amend the Treaties could be welcomed (section 4.2), they should not be seen as conditional for ensuring a better and more systematic rule-of-law monitoring within the current Treaty provisions, and for the establishment of the new ‘Copenhagen mechanism’. The Commission currently has at its disposal several instruments that could be more effectively brought to bear against a member state even when they act outside the scope of EU law or ‘autonomously’.

A new Commission Communication should carefully outline and develop these conditions and procedures to ensure a more effective operability of this important mechanism.<sup>137</sup> The Communication should be the basis for European Council Conclusions and an EU inter-institutional agreement on European guidelines for improving Article 7 TEU operability and effectiveness.

In examining the existence of a “*threat or a risk of serious breach*” by a member state of Article 2 TEU principles, the Commission should establish institutionalised cooperation and formalised partnerships with non-EU bodies such as the Council of Europe (in particular, the Venice Commission and the Commissioner for Human Rights) and relevant United Nations bodies, such as the office of the High Commissioner for Human Rights. Better cooperation with existing networks of national, regional and local practitioners and authorities, such as those currently under the coordination of the European Ombudsman and the European Agency for Fundamental Rights, should also be encouraged and activated.

2. The Copenhagen mechanism should also develop the procedures surrounding the activation of Article 7 TEU.<sup>138</sup> Its functioning could be complemented with an additional arm consisting of a periodic evaluation dimension or ‘scoreboard’ of member states which would work in parallel with the preventive and penalty arms of Article 7 TEU, and would essentially focus on constant evaluation and joint coordination of member states’ efforts. The European Commission (DG Justice) would be well positioned to lead that process. Following the experience with the current EU Anti-

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<sup>136</sup> See D. Bigo, S. Carrera and E. Guild (2009), “The Challenge Project: Final Recommendations on the Changing Landscape of European Liberty and Security”, CHALLENGE Research Paper No. 16, Centre for European Policy Studies (CEPS), Brussels.

<sup>137</sup> Ibid.

<sup>138</sup> S. Carrera, E. Guild, J. Soares da Silva and A. Wiesbrock (2012), “The Results of Inquiries into the CIA’s Programme of Extraordinary Rendition and Secret Prisons in European States in light of the New Legal Framework following the Lisbon Treaty”, DG IPOL, European Parliament, Brussels.

Corruption Report, no Treaty change would be required to develop the Scoreboard. In light of the findings reached in this study, the features of the new Scoreboard should pay special attention to:

- i) Ensuring the provision of external independent academic expertise, of an interdisciplinary nature, which would lead to qualitative comparative assessments of EU member states taking due consideration of their domestic specificities and constitutional traditions and practices. The use of benchmarking should be limited and taken with caution as this methodology is affected by unresolved methodological dilemmas related to politicisation, lack of neutrality and accountability deficits. The evaluation technique to be devised should ensure that the three dimensions composing the triangular relationship between rule of law, democracy and fundamental rights (and their inherent inter-connections) would form the basis of the assessment.
  - ii) Guaranteeing the parliamentary accountability and judicial oversight of the process and its outputs. The European Parliament should play an active role in the Scoreboard, in particular in discussing the preliminary assessment results and before any policy orientations or recommendations would be formulated, as well as in the follow-up phases in order to facilitate impact. The Court of Auditors could also play a role in this process by reviewing the results in relation to EU financial and policy considerations.
3. The preventive arm of the ‘Copenhagen mechanism’ should include a new freezing enforcement mechanism.<sup>139</sup> This procedure would aim at guaranteeing that contested policies and practices by EU member states would be automatically ‘frozen’ in cases of actual, suspected or imminent breaches of fundamental rights and/or freedoms of individuals, while the legality of the case is being examined in detail. The procedure would be activated by the European Commission (on its own initiative or that of the European Parliament). The operability of this precautionary procedure could lead to the launch of accelerated infringement proceedings against the EU member state(s) in question and to an expedited procedure similar to the current urgent preliminary ruling procedure (PPU) before the CJEU.

The CJEU should also increase its sources of information and expertise. Due consideration could be given here to the procedural law tools and standards that have already been developed by the European Court of Human Rights. Specific measures could include facilitating the accessibility of third-party interventions (by developing a new procedure that would address knowledge and accountability gaps at member states’ level), and guaranteeing a proactive use of interim relief measures and accelerated judicial review.<sup>140</sup>

4. The EU should launch a ‘rule of law, democracy and fundamental rights Copenhagen Policy Cycle’, as recommended in the European Parliament’s 2012 Report on the situation of fundamental rights,<sup>141</sup> which would ensure inter-institutional coordination between the currently ongoing reporting processes related to the EU Charter and fundamental rights by European institutions and agencies.

The Copenhagen Policy Cycle should be linked to the European Semester Cycle in order to ensure exchange of information and cross-linkages between both processes. The Cycle should kick-off with the inter-institutional agreement and formal adoption of the common European guidelines on Article 7 TEU. It should be inter-institutional in nature and involve all the relevant national actors, human rights bodies, national ombudsmen, data protection authorities and other relevant civil society actors. The Cycle could be organised on an annual basis to feed into the European Parliament’s reporting on the situation of fundamental rights in the EU. National parliaments (and their specialised committees) should also be engaged in this process through an annual inter-parliamentary committee meeting dedicated to EU rule of law, democracy and fundamental rights.

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<sup>139</sup> S. Carrera (2011), “The EU’s Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration”, CEPS Paper in Liberty and Security in Europe, Centre for European Policy Studies (CEPS), Brussels.

<sup>140</sup> For a more detailed discussion, refer to the policy recommendations provided in S. Carrera, M. De Somer and B. Petkova (2012), “The Court of Justice of the European Union as a Fundamental Rights Court: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice”, CEPS Paper in Liberty and Security in Europe, No. 49, Centre for European Policy Studies (CEPS), Brussels.

<sup>141</sup> EP 2012 Fundamental Rights Report, *op. cit.*, paragraphs 20 and 21.

5. The European Parliament should put into practice a closer follow-up procedure of the European Commission's responses (or lack thereof) to initiatives and recommendations contained in the EP's own-initiative reports and resolutions related to rule of law, democracy and fundamental rights in the Union. This should go hand-in-hand with a reinforced internal consistency checking, so that the Parliament's positions expressed in non-ordinary legislative procedures have stronger links with those expressed in ordinary legislative procedures.<sup>142</sup> The Parliament should also adopt a new internal horizontal rule of law, democracy and fundamental rights strategy that would give priority to ensuring that its internal working methods and legislative procedures are subject to stronger rule of law and fundamental rights internal checking.
6. The Parliament should set up an interdisciplinary platform of academics with proven in-depth expertise on rule of law, democracy and fundamental rights aspects and covering the 28 EU member states to feed into the European Parliament's annual report on fundamental rights and other related policy and legislative works of the EP. The network would issue an annual scientific report on the situation of fundamental rights, democracy and rule of law across the Union. The platform could be linked to the Directorate General Internal Policies of the Union of the European Parliament, yet it should be fully independent from Parliament and national parliaments.
7. In a longer-term perspective, other measures could be taken that would require an amendment of the current normative configurations delineating the EU Treaties. The activation phase of the Copenhagen mechanism in cases of alleged risk or existence of serious/persistent breach of Article 2 TEU could be improved by liberalising its current form and threshold, which remain too burdensome in practice.

A revised Copenhagen mechanism should focus on ensuring its own rule-of-law compliance by guaranteeing a high degree of democratic accountability and judicial control during the various phases comprising the procedure and supervision processes, as well as the substantive decisions potentially taken against member states. The margin of manoeuvre by the Council, which is currently foreseen in Article 7 TEU, should be more balanced with increasing accountability by the European Parliament in all stages of the new supervisory process, in particular concerning the final decision as to whether there is a clear risk of serious breach or in determining that there is a serious or persistent breach, as well as in the decision of censure and/or application of penalties. The final decision should not be left entirely to the discretion of the Council and its 'political assessment'.

Priority should be given to increasing the 'judicialisation' of the new supervisory process. The Court of Justice of the European Union (CJEU) should be actively involved both in the preventive and penalty dimensions of Article 7 TEU. The CJEU should be given the competence to review any decision taken by the Council both in the preventive and the penalty phases of the Copenhagen mechanism. The European Commission and the European Parliament, as well as EU member states, should be entrusted with the competence to challenge the Council's final decision before the CJEU. Should a judgment by the CJEU determine that a member state is in serious or persistent breach of Article 2 TEU principles, the application of current Article 260 TFEU should also be foreseen.<sup>143</sup> Closer links between the CJEU, the European Ombudsman<sup>144</sup> and the European Court of Auditors<sup>145</sup> could be envisaged, in assessing and determining the risk or existence of a breach of EU rule of law, democracy and fundamental rights principles.

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<sup>142</sup> Carrera, Hernanz and Parkin (2013), op. cit.

<sup>143</sup> This provision states: "If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump or penalty payment on it."

<sup>144</sup> European Ombudsman, European Network of Ombudsmen ([www.ombudsman.europa.eu/activities/network.faces](http://www.ombudsman.europa.eu/activities/network.faces)).

<sup>145</sup> See [www.eca.europa.eu/en/Pages/ecadefault.aspx](http://www.eca.europa.eu/en/Pages/ecadefault.aspx)

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## Annexes

### Annex 1. Mapping of current instruments at EU-level supervising, evaluating or monitoring rule of law and fundamental rights aspects

#### Article 7 of the Treaty on European Union

Type of instrument	<b>Treaty-based</b> (Article 7 TEU) <sup>1</sup>
What is this instrument about?	<p>Article 7 of the TEU establishes a prevention mechanism in the event of a risk of a breach of the common values of Article 2 TEU by a member state, and a penalty mechanism in the event of an actual breach. The preventive arm of Article 7 involves that a clear risk of a breach of the common values of Article 2 TEU by a member state has to be determined; and the penalty arm applies if the risk is found out to be serious and persistent.</p> <p><b>Areas concerned:</b> principles listed in Article 2 TEU: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Also, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men are listed as founding values of the societies of EU member states.</p> <p>The scope of Article 7 is not limited to EU law or member states action when implementing EU law: it could be also triggered in the event of a breach in areas where member states act autonomously.<sup>2</sup></p>
Who is monitoring, evaluating or supervising?	<ul style="list-style-type: none"> <li>• European Commission and one-third of member states (proposal)</li> <li>• European Parliament (proposal and consent)</li> <li>• Council of the EU (acting by a majority of 4/5, the Council may determine that there is a clear risk of a serious breach by a member state of the values referred to in Article 2.)</li> <li>• European Council (acting by unanimity, the European Council may determine the existence of a serious and persistent breach)</li> <li>• Court of Justice of the EU (review of procedural aspects but not of the decision itself)</li> </ul> <p>The Commission communication of 2003 does not establish an ad-hoc mechanism to evaluate the respect of human rights or the rule of law, it rather points to existing monitoring mechanisms such as the Annual Reports on the situation of human rights in EU member states of the European Parliament, the Council of Europe or civil society.</p>

<sup>1</sup> See Article 7 TEU as well as European Commission (2003), Communication on Article 7 TEU – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15 October.

<sup>2</sup> Ibid., p. 5.

How is this instrument used?	<p>Can be triggered if there is “a clear risk of a serious breach by a member state of the values referred to in Article 2”.</p> <p><b>Clear risk:</b> the concept of “clear risk” is meant to send a warning signal to an offending member state before the risk materialises. According to the Commission’s communication, “it also places the institutions under an obligation to maintain constant surveillance, since the “clear risk” evolves in a known political, economic and social environment and following a period of whatever duration during which the first signs of, for instance, racist or xenophobic policies will have become visible.”<sup>3</sup></p> <p><b>Serious breach:</b> criteria used to determine if the breach is “serious” include the purpose of the breach (the social class affected for example) and its result (the breach of a single common value is enough to activate the mechanism, but a breach of several values may be evidence of a serious breach).</p> <p><b>Sources</b> used to determine if a clear risk exists include:</p> <ul style="list-style-type: none"> <li>• The European Parliament’s annual reports on the situation of fundamental rights in the EU</li> <li>• Reports of international organisations (such as the United Nations, the Council of Europe and the OSCE)</li> <li>• Reports of non-governmental organisations (such as Amnesty International, Human Rights Watch and the Fédération International des Droits de l’Homme)</li> <li>• Decisions of regional and international courts (such as the European Court of Human Rights, the International Court of Justice and the International Criminal Court)</li> <li>• Individual complaints addressed to the European Commission</li> <li>• Independent persons (it is worth mentioning that in the pre-Lisbon version of the text of Article 7, a sentence included the possibility for the Council to rely on the expertise of independent persons: “the Council [...] may call on independent persons to submit within a reasonable time limit a report on the situation in the member state in question”. The Commission communication of 2003 underlined the existence of an EU Network of Independent Experts on Fundamental Rights that published an annual report on the fundamental rights situation in the EU, and highlighted the fact that “the information should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty”.<sup>4</sup> The amended text of Article 7 after the Lisbon Treaty does not include this reference to independent persons anymore. This network of independent experts does not exist anymore and has been replaced with the Fundamental Rights Agency.)</li> </ul>
Follow-up	<p>As a follow-up, the sanctions against the offending member state constitute a clear way of enforcing Article 7 and putting an end to the breach of Article 2 values. The sanctions involve a suspension of “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” (Article 7.3 TEU).</p> <p>Article 7 has never been used and remains a theoretical means of supervising the values of the EU among its member states.</p>

<sup>3</sup> Ibid., p. 7.

<sup>4</sup> Ibid., p. 9.

## Cooperation and Verification Mechanism, CVM

Type of instrument	<b>Not Treaty-based</b> – Legal basis: Commission Decisions C(2006) 6570 final and C(2006) 6569 final <sup>5</sup>
What is this instrument about?	The CVM is a special mechanism established in 2006 to evaluate the progress made by Romania and Bulgaria in the fields of judicial reform, corruption and organised crime following their entry into the EU on 1 January 2007. Progress reports on both countries are published every six months by the Commission. <sup>6</sup>  <b>Areas concerned:</b> Judicial reform and fight against corruption in Bulgaria and Romania, as well as fight against organised crime for Bulgaria only.
Who is monitoring, evaluating or supervising?	The evaluation is carried out by the <b>European Commission’s Secretariat-General (with direct and active input by DG Home Affairs, DG Justice, and OLAF)</b> on the basis of information from various sources, including the governments of member states concerned and NGOs or experts. The reports published by the European Commission every six months assess the progress made by Bulgaria and Romania in the areas of judicial reform, corruption and organised crime. An ad-hoc working party at the Council of the EU (COVEME) meets regularly in order to discuss the interim reports and adopt Council conclusions.
How is this instrument used?	<b>Methodology/Sources:</b> The reports are drawn up from an array of information sources. The Bulgarian and Romanian Government are a primary source of information. Information and analyses are also received from the Commission Representation Office and member states’ diplomatic missions in Bulgaria and Romania, civil society organisations, associations and expert reports. The Commission organises missions and on-field visits to both countries, sending individual experts from member states and Commission services. The experts’ reports resulting from these visits are subsequently transmitted to the two governments for correction of any factual inaccuracies.  The situation in other member states is also taken into account for a comparison of the progress made by Bulgaria and Romania. The Commission uses points of reference and comparative indicators where they are available (points of reference include the work of the Council of Europe, the OECD and UN agencies). To compare progress in both countries with the situation in other member states, the Commission also draws upon senior experts from key professions dealing with these issues (experts used in 2012 included senior practitioners from France, Germany, Ireland, Poland, Spain, Slovenia and the United Kingdom).  Some of the external sources consulted include the Council of Europe, United Nations Committee on Torture, Bulgarian Helsinki Committee, or academics. Reports are reviewed by the member states being evaluated “for correction of any factual inaccuracies”. Bulgaria and Romania submitted a first report on progress achieved under the Cooperation and Verification Mechanism by 31 March 2007 and both have continued to update the Commission on pertinent developments since then.  <b>Indicators/Benchmarks:</b> Progress by Bulgaria and Romania is evaluated by the European Commission by following a benchmarking methodology.

<sup>5</sup> See European Commission (2006), 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; as well as European Commission (2006), 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.

<sup>6</sup> Reports are available at [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm)

Benchmarks to be addressed by Romania:

1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high level corruption.
4. Take further measures to prevent and fight against corruption, in particular within the local government.

Benchmarks to be addressed by Bulgaria:

1. Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
2. Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure code, notably on the pre-trial phase.
3. Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.
4. Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report internal inspections of public institutions and on the publication of assets of high-level officials.
5. Take further measures to prevent and fight corruption, in particular at the borders and within local government.
6. Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.

The results of the CVM mechanism are presented in Progress Reports every six months by the European Commission. Each Progress Report is accompanied by a Staff Working Document (Technical Report) which sets out the information and the data that the Commission has used as the basis for its analysis. Each benchmark is assessed in a separate chapter and the data and sources are provided.

There are no sanction mechanisms. **Safeguard clauses** could be triggered in last resort until 2010. These safeguard clauses were never invoked. These safeguard mechanisms were included in the Accession Treaty of Bulgaria and Romania as a way to remedy difficulties encountered as a result of accession and concerned:

- a general economic safeguard clause; (Article 36)
- a specific internal market safeguard clause; (Article 37)
- a specific justice and home affairs safeguard clause. (Article 38)

Measures of sanction could have taken the form of temporary suspension of specific rights under the EU acquis directly related to the area where shortcomings are discovered.<sup>7</sup>

Follow-up

<sup>7</sup> Article 38 of the Protocol concerning conditions and arrangements for BG and RO: “If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the Treaty on European Union and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the Treaty establishing the European Community, and European laws and framework laws adopted on the basis of Sections 3 and 4 of Chapter IV of Title III of Part III of the Constitution, the Commission may, until the end of a period of

Following the end of the three-year period after accession to invoke the safeguard clauses, the only sanction that the European Commission may impose on Bulgaria and Romania for not making enough progress in the areas concerned is to **link progress to EU funding**, which has been done at least once in 2008. The CVM reports have also been used by certain member states as a justification to refuse the entry of Bulgaria and Romania in the **Schengen** area. This is not part of the sanctions foreseen by the CVM and this development has been regretted by the European Commission.<sup>8</sup>

## EU Anti-Corruption Report

Type of instrument	<b>Non-Treaty-based. Related legal basis:</b> Commission Decision Establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report") <sup>9</sup> Reference made to Article 67 TFEU and Article 83 TFEU which envisages the adoption of Directives (adopted through the ordinary legislative procedure) establishing minimum rules covering the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, including corruption.
What is this instrument about?	The EU Anti-Corruption Report is a European Commission proposal to publish a bi-annual Anti-Corruption Report to monitor and evaluate the efforts of EU member states in tackling corruption. The first report is expected to be published before the end of 2013. <sup>10</sup> <b>Areas concerned:</b> Fight against corruption, including questions related to law enforcement, police and judicial cooperation in the EU (e.g. issues such as the role of EU agencies like Europol, OLAF and Eurojust in combating and exchanging information on corruption, financial investigations and asset recovery, protection of whistleblowers, training of law enforcement officials, public procurement policy, cohesion policy to support administrative capacity building, accounting standards and statutory audit for EU companies, preventing and fighting political corruption, improving statistics, integrity in sport, protecting EU financial interests, etc.)
Who is monitoring, evaluating or supervising?	The EU Anti-Corruption Report will be managed by the <b>European Commission (DG Home Affairs)</b> .
How is this instrument used?	<b>Methodology:</b> Starting in 2013, every two years the Commission will release a 'diagnosis' of corruption-related problems in the EU, pointing to critical issues and proposing solutions to help intensify anti-corruption measures. The Commission will select at each assessment round a number of cross-cutting elements/themes relevant at EU level (cross-border nature) at a given moment, as well as aspects specific to each member state. These will be assessed against certain indicators, some selected in line with already existing standards, and some newly developed.  The Commission will streamline information from a wide variety of sources, such as existing evaluation mechanisms, civil society, specialised networks, EU institutions, services and agencies, Commission studies, surveys (e.g. the Eurobarometer on corruption), as well as independent experts ("group of experts on corruption") and researchers ("network of local research correspondents"), one for each member state, appointed by the Commission following an open call procedure. It will also include civil society assessments (to be contracted through targeted calls for proposals). The civil society organisations will be encouraged to apply for subject specific assessments of member states' anti-corruption efforts.

up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, adopt European regulations or decisions establishing appropriate measures and specify the conditions and modalities under which these measures are put into effect. These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation."

<sup>8</sup> See the Statement by the European Commission on the CVM in front of the European Parliament's plenary session on 13 March 2013, p. 2 ([http://ec.europa.eu/cvm/docs/com\\_statement\\_on\\_the\\_cvm.pdf](http://ec.europa.eu/cvm/docs/com_statement_on_the_cvm.pdf)).

<sup>9</sup> See 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.

<sup>10</sup> See the European Commission Forward Programming for 2013, p. 46 ([http://ec.europa.eu/atwork/pdf/forward\\_programming\\_2013.pdf](http://ec.europa.eu/atwork/pdf/forward_programming_2013.pdf)).

*The expert group* will advise on establishing indicators, assessing member states' performance and identifying best practices – selected experts must have an undisputed expertise on corruption and will be chosen from a wide range of backgrounds (such as law enforcement or civil society). The network of local research correspondents will include civil society representatives as well as academics and will collect information in each member state.

Experts: the group of experts on corruption has been appointed by the Commission after a selection procedure (call for applications). The members of the group are appointed for four years, renewable. The group is composed of 17 members who are nationals of EU member states and who are individuals of proven expertise and experience in the prevention and fight against public and private sector corruption, and in the monitoring and/or evaluation of anti-corruption policies and practices. According to the call, “*the composition of the group shall reflect the required balance of expertise required on anti-corruption matters, and the various aspects involved, such as, but not limited to, law enforcement, the judiciary, prevention, policy-making, monitoring and/or supervision, research into trends, policies and/or indicators, the public and private sector, criminal law, and economic and social aspects/impacts.*”<sup>11</sup> Members of the group do not represent member states or their employer/organisation, but act in a personal capacity.

Members were appointed in September 2011 and include 17 experts from 12 member states, coming from national ministries, academia, legal professions, civil society organisations or international organisations.<sup>12</sup>

The report will build on cooperation with other network and monitoring and evaluation mechanisms (such as the GRECO evaluation from the Council of Europe, the OECD Working Group on Bribery and the UN Convention against Corruption mechanisms).

#### **Indicators and sources:**

According to the European Commission,<sup>13</sup> the EU Anti-Corruption Report will include a quantitative assessment of those indicators and a qualitative analysis of corruption trends and results. The information sources used in the Anti-Corruption Report will include:

- The EU's Corruption Perception Index (CPI) ranking as established by Transparency International,<sup>14</sup>
- national anti-corruption strategies,
- reported experiences with corruption,
- instances of new anti-corruption policies/practices,
- number of peer learning activities sponsored by the Commission,
- levels of awareness,
- time taken to transpose and implement legislation,
- perceptions of transparency and corruption,
- respondent's behaviour linked to corrupt activities,
- criminal justice statistics, including on seizures and confiscations of the proceeds of corruption-related crime.

<sup>11</sup> European Commission, Commission Decision of 28 September 2011 setting up the Group of Experts on Corruption (2011/C 286/03) ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/com\\_decision\\_expert\\_group\\_on\\_corruption\\_oj\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/com_decision_expert_group_on_corruption_oj_en.pdf)).

<sup>12</sup> See the “List of selected experts – Group of experts on Corruption” ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/list\\_of\\_selected\\_experts\\_group\\_of\\_experts\\_on\\_corruption\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/list_of_selected_experts_group_of_experts_on_corruption_en.pdf)).

<sup>13</sup> European Commission, Communication Fighting Corruption in the EU, COM(2011) 308 final, 6.6.2011, Brussels.

<sup>14</sup> See <http://www.transparency.org/research/cpi/>

Follow-up	It remains unclear at present. Each report will focus on a number of cross-cutting issues of particular relevance to the EU level, as well as selected issues specific to each member state which will be highlighted in country analyses. The report will thus comprise both cross-cutting and country specific recommendations. While the recommendations will not be legally binding for EU member states, their follow-up will be monitored in subsequent reports. The results of the Report may also give grounds to the European Commission to consider new EU policy initiatives including the approximation of criminal law in the field of corruption.
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## EU Justice Scoreboard

Type of instrument	<b>Not Treaty Based.</b> <sup>15</sup> <b>Indirect legal basis:</b> provisions on justice cooperation in civil matters and Article 121(1) TFEU
What is this instrument about?	<p>The EU Justice Scoreboard is a comparative tool, which seeks to provide data on the justice systems in all 28 member states, and in particular on the quality, independence and efficiency of justice. The objective of the EU Justice Scoreboard is to assist the EU and the member states to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all member states. Quality, independence and efficiency are the key components of an 'effective justice system'. The main characteristics of the Scoreboard are:</p> <ul style="list-style-type: none"> <li>• It is a comparative tool which covers all member states.</li> <li>• it aims to present trends on the functioning of national justice systems over time.</li> <li>• it is a non-binding tool.</li> </ul> <p><b>Areas concerned:</b> Civil and Commercial justice (litigious civil and commercial cases and administrative cases).</p>
Who is monitoring, evaluating or supervising?	The <b>European Commission (DG Justice)</b> is in charge of the monitoring exercise of the Justice Scoreboard.
How is this instrument used?	<p><b>Methodology:</b> The first Justice Scoreboard was published in March 2013. The “Justice Scoreboard” mechanism is developed in the context of the European Semester, which is a yearly cycle of economic policy coordination undertaken by the European Commission (See below).</p> <p>The scope of the 2013 Scoreboard focuses on the parameters of a justice system which contribute to the improvement of the business and investment climate. The Scoreboard examines efficiency indicators for non-criminal cases, and particularly for litigious civil and commercial cases, which are relevant for resolving commercial disputes, and for administrative cases.</p> <p><b>Sources:</b> For preparing the 2013 Scoreboard, the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) was asked by the European Commission to collect data and conduct an analysis. A group of experts was appointed by the CEPEJ Bureau to carry out the study, which was delivered in January 2013.<sup>16</sup> The methodology was based on CEPEJ biannual exercises, which consist of a questionnaire that the national correspondent of the CEPEJ (usually from countries' Ministries of Justice) completes and the results of which are then statistically processed and analysed. The scoreboard questions were prepared by DG</p>

<sup>15</sup> See European Commission (2013), The EU Justice Scoreboard – A tool to promote effective justice and growth, COM(2013) 160 final, Brussels, 27 March.

<sup>16</sup> E. Dubois, C. Schurrer and M. Velicogna (2013), The Functioning of Judicial Systems and the Situation of the Economy in the EU Member States, Council of Europe, January ([http://ec.europa.eu/justice/effective-justice/files/cepej\\_study\\_justice\\_scoreboard\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepej_study_justice_scoreboard_en.pdf)).

Justice of the European Commission, and focused on: First, business friendliness (of land and property registration, company registration, insolvency proceedings and obtaining licenses); second, resources of justice (including budget, human resources, workload and ICT); and third, the use and accessibility of justice (length and costs of procedures, use of simplified and alternative dispute resolution procedures), each attributed with a number of indicators.<sup>17</sup> The Scoreboard also uses data from other sources, such as from the World Bank, World Economic Forum and World Justice Project.

**Indicators:**

How is efficiency measured? In 2013, the Justice Scoreboard presents key findings based primarily on the indicators relating to the efficiency of proceedings:

- the length of proceedings,
- the clearance rate,
- and the number of pending cases.

The Scoreboard further examines indicators on certain factors related to the quality of justice:

- the monitoring and evaluation of court activities,
- the Information and Communication Technology (ICT) systems for courts,
- the alternative dispute resolution methods,
- the training of judges,
- the resources (budget) allocated to the respective justice systems.
- The Scoreboard also presents findings based on indicators relating to the perceived independence of the justice system.

Follow-up

In the context of the Justice Scoreboard, which is a non-binding tool, poor performance revealed by indicators will not trigger any sanctions but will be the sign that these shortcomings require a deeper analysis of the reasons behind the result and, where necessary, that the member states concerned should engage in reforms, bearing “*in mind that the comparability of data can be limited by differences in procedures and legal frameworks*”.<sup>18</sup>

Indirect sanctions are foreseen, however, in the links between the Justice Scoreboard and the European Semester. The issues identified in the scoreboard will be taken into account when preparing the forthcoming country-specific analyses of the European Semester as well as the Economic Adjustment Programmes. So, there is a link with the follow up system which has been attributed to the European semester. The results of the scoreboard are expected to have an influence on the allocation of Regional Development and Social Funds in the next multi-annual financial framework “*for reforms of the judicial systems*”.<sup>19</sup> Indeed, as it will be outlined in detail below, the European Semester provides policy recommendations to member states on the overall macroeconomic situation. If these recommendations are not acted on within the given time-frame, policy warnings may be issued. There is also an option for enforcement through incentives and sanctions in the case of excessive macroeconomic and budgetary imbalances.

<sup>17</sup> Ibid., pp. 14-16.

<sup>18</sup> See European Commission (2013), op. cit., p. 3.

<sup>19</sup> Ibid., p. 22.



## European Commission's Annual Report on the Application of the Charter of Fundamental Rights of the EU<sup>20</sup>

Type of instrument	Non-Treaty based. <sup>21</sup> Foreseen in the 2010 Commission Communication on the Strategy for the effective implementation of the Charter. <sup>22</sup>
What is this instrument about?	<p>The Annual Report is about the implementation of the EU Charter of Fundamental Rights by EU institutions and Member states. It functions since 2010 and reviews progress in ensuring the effective implementation of the EU Charter and highlights important developments during the reporting year. The Annual reports illustrate concrete problems faced by individuals. The 2013 version constitutes the first time when case law of national courts and tribunals on the EU Charter have been also included.</p> <p>The Annual Reports are considered by the European Commission as a means to inform the general public as well as a monitoring tool tracking progress made and new concerns appearing.</p> <p>Areas concerned: EU Charter of Fundamental Rights</p>
Who is monitoring, evaluating or supervising?	The <b>European Commission</b> (DG Justice).
How is this instrument used?	<p><b>Methodology:</b> DG Justice reports every year on the application of the EU Charter of Fundamental Rights. The annual report goes through each relevant policy area where fundamental rights must be taken into account. The Report presents the main EU policy initiatives in each field launched in the previous year and the developments in these areas.</p> <p><b>Sources:</b> Available data include the number of letters from citizens received by the European Commission, according to the area concerned, as well as the number of parliamentary questions from MEPs. Also, the number of petitions received by the PETI Committee of the European Parliament and concerning fundamental rights is taken into account. The Commission's Annual Reports also assess the latest developments in terms of case-law of the Court of Justice of the EU (such as for example the number of cases with a direct reference to the Charter).</p>
Follow-up	There is no assessment of member states, and all analyses or recommendations focus on the general EU scope. There is no follow up dimension, except for the opportunity provided for an annual exchange of views with the European Parliament and the Council of the EU following the publication of the reports.

<sup>20</sup> See [http://ec.europa.eu/justice/fundamental-rights/charter/application/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm) for a list of all the reports available.

<sup>21</sup> See European Commission (2013), Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2012 Report on the Application of the EU Charter of Fundamental Rights, COM(2013) 271 final, Brussels, 8 May. See also European Commission (2013), Staff Working Document on the Application of the EU Charter of Fundamental Rights in 2012 – Accompanying document to the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2012 Report on the Application of the EU Charter of Fundamental Rights, SWD(2013) 172 final, Brussels, 8 May.

<sup>22</sup> See European Commission (2010), Communication on “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union”, COM(2010) 573 final, Brussels, 19 October 2010, p. 12.

## European Parliament's Annual Report on the Situation of Fundamental Rights in the EU

Type of instrument	Non-Treaty based. <sup>23</sup>
What is this instrument about?	<p>Since 1993, every year, the European Parliament has adopted a resolution on the fundamental rights situation in the EU on the basis of a report by the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee).</p> <p>This resolution is prepared in the LIBE Committee by a rapporteur and voted in plenary each year, and addresses the situation of fundamental rights in the EU by theme (within the scope of the EU's Area of Freedom, Security and Justice) before making recommendations.</p> <p>Areas concerned: Fundamental Rights</p>
Who is monitoring, evaluating or supervising?	The European Parliament (Committee on Civil Liberties, Justice and Home Affairs: LIBE Committee). One MEP appointed as rapporteur (tends to change each year).
How is this instrument used?	<p>Methodology: A draft report is prepared by a rapporteur in the LIBE Committee before being voted on in plenary. The topics examined in the report vary each year, focusing on one particular aspect of fundamental rights (minorities, sexual orientation, or the post-Lisbon fundamental rights architecture). The report makes recommendations to the other European institutions and the member states.</p> <p>In 2012, the Parliament's report focused on the following headlines:</p> <ul style="list-style-type: none"> <li>• General recommendations</li> <li>• Discrimination</li> <li>• Protection of individuals belonging to minorities</li> <li>• Equal opportunities</li> <li>• Young people, the elderly and people with disabilities</li> <li>• Data protection</li> <li>• Migrants and refugees</li> <li>• Rights of the child</li> <li>• Victims' rights and access to justice</li> </ul> <p><b>Sources:</b> There is little information on how the information is gathered. The only data which is quoted in the citations of the Reports, and which include for instance decisions by the CJEU and the European Court of Human Rights, case law of national constitutional courts, annual reports and studies by the FRA, NGO reports and studies on human rights and relevant studies requested by the LIBE Committee, previous resolutions by the EP, as well as relevant information from public hearings.</p>
Follow-up	The reports do not provide an assessment by member states, and all analyses or recommendations focus on a general EU scope. No follow up dimension is expressly foreseen.

<sup>23</sup> See European Parliament (2010), Resolution on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI)), Strasbourg, 15 December; as well as European Parliament (2012), Resolution on the situation of fundamental rights in the European Union (2010-2011) - 2011/2069(INI), Strasbourg, 12 December.

## EU Fundamental Rights Agency's Annual Activity Report<sup>24</sup>

Type of instrument	Non-Treaty based. Based on the Agency's mandate as set out in Council Regulation (EC) No 168/2007. <sup>25</sup>
What is this instrument about?	<p>Each year, the Fundamental Rights Agency of the EU publishes a report on the situation of fundamental rights in the EU. The annual report looks at fundamental rights-related developments in member states with a focus on a specific topic (e.g. safeguarding rights during a crisis for the 2012 Report).</p> <p>Areas concerned: Fundamental Rights, more specifically (linked to the FRA thematic areas of work as stipulated in the mandate):</p> <ul style="list-style-type: none"> <li>• asylum, immigration and integration;</li> <li>• border control and visa policy;</li> <li>• information society and data protection;</li> <li>• the rights of the child and protection of children;</li> <li>• equality and non-discrimination;</li> <li>• racism and ethnic discrimination;</li> <li>• participation of EU citizens in the Union's democratic functioning;</li> <li>• access to efficient and independent justice;</li> <li>• and rights of crime victims.</li> </ul> <p>For each area the Annual Activity Reports identify 'key developments', 'promising practices' and details on FRA activities. They also comprise an 'outlook section' on challenges ahead. They look at EU level and member states and relevant developments in the Council of Europe and the UN.</p>
Who is monitoring, evaluating or supervising?	The Fundamental Rights Agency of the EU (FRA).
How is this instrument used?	<p>Methodology: Some elements on the methodology used by the FRA in its Annual Reports can be found in the reports themselves: <i>"The report draws on data and information from in-house research and from the agency's FRANET network, a multi-disciplinary research network composed of National Focal Points in each EU Member State and the acceding country Croatia."</i><sup>26</sup> FRANET was set up in 2011 and provides the FRA with data and information from each member state as well as EU comparative data. FRANET members are chosen by the FRA following an invitation to tender. Some research findings from the projects carried out by FRANET are referred to in the FRA's Annual Reports <i>"only when the findings are directly relevant to the thematic area covered."</i> Representatives from member states are given the possibility to review the reports: <i>"A first draft of the report is sent to the 28 liaison officers from the governments of each EU member state and from Croatia to</i></p>

<sup>24</sup> See a list of the FRA Annual Reports here: <http://fra.europa.eu/en/publication-type/annual-report>

<sup>25</sup> Council of the EU (2007) Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53/1, 22 February 2007, article 4(1)(e), available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/351-reg\\_168-2007\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/351-reg_168-2007_en.pdf)

<sup>26</sup> See FRA Annual Report 2012, p. 9.

*check the information provided for factual accuracy.*” The final draft then goes through an internal review procedure and “*is submitted to the FRA Scientific Committee for evaluation.*”<sup>27</sup>

The FRA Scientific Committee is a high level committee of eleven experts tasked to guarantee the highest scientific quality of FRA deliverables. The Scientific Committee is composed of experts who all have many years of professional experience as members of EU expert networks and relevant independent expert institutions, prominent international monitoring bodies or high Courts, including the European Court for Human Rights, national constitutional Courts, national human rights institutions, various Council of Europe bodies or the UN Committee of Human Rights.<sup>28</sup>

Also, the Fundamental Rights Platform, a network of NGOs from all member states, regularly meets at the FRA premises in Vienna and may provide inputs from civil society to be used in the Annual Reports.

Chapter 10 of the Annual Reports focuses on formal commitments to and compliance with international human rights, which may present interesting results regarding the respect of international obligations by member states. For several other specific areas, such as hate crime, national human rights institutions or equality bodies, the FRA has also developed a systematic analysis, in some cases with indicators, allowing these issues to be followed up closely from year to year. This should be expanded further in the next versions of the Annual Reports.<sup>29</sup>

Sources: FRA staff members, with input from FRANET (network of legal and social sciences experts),<sup>30</sup> the FRA’s research network.

#### Follow-up

The Annual Reports are following up on the main issues each year – problematic areas may be highlighted in the next Annual Report. These reports are also used to identify areas of concern which might lead to new research, issues brought up with governments or raised at Council meetings by the FRA Director. No sanctions, direct or indirect, may be applied following the publication of the Reports.

<sup>27</sup> Ibid.

<sup>28</sup> See the members of the Scientific Committee and their CVs at <http://fra.europa.eu/en/about-fra/structure/scientific-committee/members>

<sup>29</sup> Source: Interview conducted with a high-level official from the FRA.

<sup>30</sup> For more information on FRANET, refer to <http://fra.europa.eu/en/research/franet>

## Annual Report by the European Ombudsman<sup>31</sup>

Type of instrument	It is a monitoring mechanism. Treaty based (Art. 228(1) TFEU, last sentence, provides for an annual report from the Ombudsman to the EP on the outcome of its inquiries). It should also be noted that the right for EU citizens to complain to the European Ombudsman is enshrined in Article 24 TFEU and Article 43 of the Charter.
What is this instrument about?	The European Ombudsman may investigate complaints alleging maladministration in the institutions and bodies of the EU. These may include alleged violations of fundamental rights, such as discrimination or the right of access to information, which are often due to a refusal to grant access to official documents. The Ombudsman may conduct inquiries either on its own initiative, or on the basis of complaints submitted to it directly or through a Member of the European Parliament. Any EU citizen, or any natural or legal person residing or registered in a member state, can make a complaint – this is a treaty-based right (Articles 24 and 228 TFEU).  Areas concerned: The right to good administration.
Who is monitoring, evaluating or supervising?	The European Ombudsman.
How is this instrument used?	Methodology and indicators:  The European Ombudsman's Annual Reports provide an overview of the cases and complaints from EU citizens regarding their administrative relations with the European institutions. They list the number of complaints by member state of origin and provide information on how many inquiries have resulted in the Ombudsman finding that there had been maladministration. The reports also list 10 “star cases” as examples of best practices.  Most interestingly, the reports provide information on the number of cases that were found to be not admissible by the European Ombudsman because they fell outside his mandate. A majority of these cases are transferred to the European Network of Ombudsmen representing national and regional ombudsmen throughout the EU member states.  Also, national or regional ombudsmen may ask the European Ombudsman for written answers to queries about EU law and its interpretation. However, this special procedure is not used very often: in 2012 only three queries were submitted by national and regional ombudsmen (Ombudsman of Ireland, regional ombudsmen of Marches (Italy) and Veneto (Italy)).
Follow-up	The annual reports of the European Ombudsman may “name and shame” one of the EU institutions and bodies. As an example, the 2012 Annual Report underlines the problems of the European Personnel Selection Office (EPSO) in replying to inquiries of the European Ombudsman. <sup>32</sup>  Apart from this example, no sanctions are foreseen. The European Ombudsman's reports can be considered as a good thermometer of the trends in citizens complaints regarding the right to good administration at EU level throughout the years.

<sup>31</sup> See the list of Annual Reports on the European Ombudsman's website: <http://www.ombudsman.europa.eu/activities/annualreports.faces>

<sup>32</sup> “I regret to say that EPSO's response to some of the issues raised in 2012 has given cause for concern.” See European Ombudsman (2013), Annual Report 2012, Strasbourg, 27 May, p. 6.

## Annual Reports by the European Anti-Fraud Office (OLAF)<sup>33</sup>

Type of instrument	Treaty-based (Article 325 TFEU)
What is this instrument about?	OLAF conducts internal investigations (inside any EU institution or body funded by the EU budget) and external investigations (in member states where EU budget is at stake) in order to combat fraud and corruption. OLAF's Annual Reports provide an overview of the situation at EU level regarding fraud. Areas concerned: Fraud, corruption and any other irregular activity in the EU institutions.
Who is monitoring, evaluating or supervising?	OLAF - OLAF has an individual independent status for investigations but is also part of the European Commission (DG TAXUD). OLAF Staff Members, with a source of information coming from "whistleblowers" from any EU institution who can provide OLAF with information while remaining anonymous and staying protected.
How is this instrument used?	Methodology and indicators: First, OLAF receives information about possible frauds and irregularities. The information comes from a wide range of sources. In most cases this information results from controls by those responsible for managing EU funds within the Institutions (such as the European Court of Auditors) or in the member states. Second, OLAF assesses if this information to determine whether the allegation falls within the remit of the Office and meets the criteria for opening an investigation. Third, OLAF opens a case and classifies it under one of the following four categories: Internal investigations: administrative investigations within the EU institutions and bodies for the purpose of detecting fraud, corruption, and any other illegal activity affecting the financial interests of the EU; including serious matters relating to the discharge of professional duties. External investigations: administrative investigations outside the European Union institutions and bodies for the purpose of detecting fraud or other irregular conduct adversely affecting the Union's financial interests by natural or legal persons. Coordination cases: OLAF contributes to investigations carried out by national authorities or other Union departments by facilitating the gathering and exchange of information and contacts. Criminal assistance cases: cases in which the competent authorities of a member state or third country carry out a criminal investigation with assistance from OLAF. Investigative activities include: interviews, inspections of premises, on-the-spot checks, forensic operations and investigative missions in non-EU countries. During the investigation, OLAF also helps in coordinating anti-fraud activities of member states.

<sup>33</sup> See European Commission (1999), Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L 136/20, Brussels. Also the amending Commission Decision 2013/478/EU of 27 September 2013.

## Follow-up

OLAF investigates and makes recommendations if the case is found to be fraudulent. These recommendations are not public but the **Annual Reports** present a certain number of case studies of successful investigations of OLAF in various areas. Previous annual reports showed a table (or a map) of EU member states where the most cases of fraud or corruption were investigated upon. In 2010, 2009 and 2008 for example, Bulgaria, Italy and Belgium had the most open cases. As from the 2011 Annual Report, OLAF decided not to report on specific member states anymore and to focus on case-studies.<sup>34</sup>

OLAF has no judicial power. It is an administrative and investigative service and can only make recommendations following its investigations. OLAF can suggest follow-up measures and request EU and national authorities to cooperate.

- Financial: OLAF and the European Commission can decide to ask for misused funds to be recovered.
- Judicial: If there is evidence of a potential criminal act OLAF will send its report to the relevant national authorities recommending legal action.
- Disciplinary: If professional standards of conduct have been breached by an EU official, the case is referred to a disciplinary panel. The European Commission operates a zero-tolerance policy.
- Administrative: OLAF can recommend changes to procedures which are susceptible to fraud (e.g. conditions for responding to a call for proposals).

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<sup>34</sup> See OLAF's Annual Reports at [http://ec.europa.eu/anti\\_fraud/about-us/reports/olaf-report/index\\_en.htm](http://ec.europa.eu/anti_fraud/about-us/reports/olaf-report/index_en.htm)

## Annex 2. European Parliament Initiatives to Improve/Strengthen Monitoring the Triangular Relationship

	<b>Report on the situation of fundamental rights: standards and practices in Hungary, June 2013<sup>1</sup></b>	<b>Resolution on the situation of fundamental rights in the European Union (2010-2011), December 2012<sup>2</sup></b>	<b>Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, December 2010<sup>3</sup></b>
<b>EU Inter-institutional Coherency and Cooperation with other national or international bodies or institutions</b>	Calls EU institutions to launch a joint reflection and debate on how to equip the Union with the necessary tools to fulfil its Treaty obligations on democracy, rule of law and fundamental rights (Paragraph 76)	A Yearly institutional forum on fundamental rights situation in the EU, to ensure information sharing between relevant bodies and institutions, as a preparatory step for the EP's Annual debate (Paragraph 21)  A European Fundamental Rights Cycle, dealing on multi-annual and yearly basis the objectives to be achieved and the problems to be solved (Paragraph 20)	Increase coherence and cooperation among the various bodies responsible for monitoring and implementation and establish a 'comprehensive framework' for the annual monitoring of the situation of human rights in the EU (points 7 and 14)
	Closer cooperation between Union institutions and other international bodies, particularly the Council of Europe and Venice Commission (Paragraph 74)	Closer cooperation between EU and other international bodies like the Council of Europe (and the Venice Commission) (Paragraph 35)	
	A strengthened Commission-Council-European Parliament-Member States dialogue (Paragraph 78)	Permanent link between the LIBE Committee, the Council Working Group on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) and national parliamentary committees dealing with fundamental rights (Paragraph 41)	
<b>New Mechanism(s)</b>	To create an Article 2 TEU alarm agenda – i.e. a new Union values monitoring mechanism, to be dealt with by the Commission (Paragraph 69).	European mechanisms to ensure the respect of democracy, rule of law and fundamental rights (Paragraph 1), and that member states are continuously assessed on their compliance with EU's fundamental values and the fulfilment of their rule of law and democracy commitments (Paragraph 29)  The Commission is called to draw up a detailed proposal for a clear cut monitoring mechanism (Paragraph 31)	A cross-EU monitoring mechanism as well as an early warning system, such as the Universal Periodic Review (Paragraph 7) and new legislative proposal by Commission to enforce values and principles enshrined in the Treaty and the Charter (Paragraph 24)
	A detailed proposal for a swift and effective monitoring mechanism "independent of any political influence" (Paragraphs 78 and 80), which should warn the EU at an early stage of any risk of deterioration of the values enshrined	Calls on the EP and national parliaments to be involved in the permanent scoreboard on justice (Paragraph 4)	

<sup>1</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//en>

<sup>2</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0500+0+DOC+XML+V0//EN>

<sup>3</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0344&language=EN>



	<b>Report on the situation of fundamental rights: standards and practices in Hungary, June 2013<sup>1</sup></b>	<b>Resolution on the situation of fundamental rights in the European Union (2010-2011), December 2012<sup>2</sup></b>	<b>Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, December 2010<sup>3</sup></b>
	in Article 2 TEU and issue recommendations to the EU on how to respond and remedy. The mechanism could assume the form of a 'Copenhagen Commission' or high-level group, group of 'wise men' (Paragraph 78)		
		A mechanism to ensure that the EU and its member states respect, implement and transpose the ECtHR's case law (Paragraph 25)	
<b>European Commission's Impact Assessments and Annual Reporting</b>		There is still room for improvement, proposals emerge failing to consider at all, or adequately, their impact on fundamental rights (Paragraph 2); systematic use should be made of external expertise, including FRA (Paragraph 6).	Introduce a fundamental rights impact assessment of all new EU legislative proposals and oversee the 'legislative process' to guarantee that the final texts comply with fundamental rights (Paragraph 17)
		Revise existing IA guidelines to give more prominence to fundamental rights - impact of EU legislation on fundamental rights and its implementation by member states should form part of the Commission's evaluation reports on the implementation of EU legislation, and its annual reporting on EU law application (Paragraph 3)	
		The Commission to implement an annual report on the situation of fundamental rights in the Union, including an analysis of member states, addressing the implementation, promotion and protection of fundamental rights of the EU and member states, and containing specific recommendations (Paragraph 9)	The Commission to improve the annual fundamental rights monitoring (Paragraph 22)
<b>European Commission's Enforcement Procedures</b>	The Commission should launch an objective investigation and start infringement proceeding whenever it considers that a member state is violating the EU Charter, focus not only on specific infringements of EU law, but respond appropriately to a systematic change in the constitutional and legal system and practice of a member state, and ensure that they respect the EU Charter (Paragraph 69)	The Commission to better ensure that infringement proceedings secure effective protection of human rights, <i>"rather than aiming for negotiating settlements with Member States"</i> (Paragraph 28), and to launch objective investigation and start infringement proceedings if well grounded, thus avoiding double standards (Paragraph 29)	In depth investigations and initiating infringement procedures when member states are in breach of fundamental rights when implementing EU law (Paragraphs 17 and 19), and cooperation with NGOs and civic bodies (Paragraph 41)
		A freezing procedure to ensure that member states, at the request of the EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order (Paragraph 31)	Complement current infringement and fundamental rights proceedings with a new procedure by which contested national policies and practices will immediately be frozen until the Commission decides upon the formal launching of infringement procedures (Paragraph 20) / Mechanisms for early

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			detections of potential violations, temporary freezing, accelerated legal procedures and sanctions in cases that the measures are nonetheless implemented (Paragraph 40)
<b>Article 7 TEU</b>	To implement and if necessary update the 2003 Communication (paragraph 69).	Update of the 2003 Communication by the European Commission (paragraph 31).	Follow up of 2003 Commission Communication on Article 7 TEU to define a "more transparent and coherent way" to address violations (paragraph 17).
	A better distinction between an initial phase (assessing any risks of a serious breach), and a more efficient procedure in a subsequent phase (action would be taken to address actual serious/persistent violations) (Paragraph 77)		
	A more comprehensive approach to addressing any potential risks of serious breaching of fundamental values in an early stage and immediately engage in a structured political dialogue (Paragraph 69) and an early warning system (Paragraph 80).		
<b>European Parliament</b>		European Parliament should strengthen its autonomous impact assessment of fundamental rights on proposals and amendments (Paragraph 8)	European Parliament to strengthen its own impact assessment on fundamental rights (Paragraph 26).
<b>Court of Justice of the European Union (CJEU)</b>		Revision of the procedural rules of the CJEU and the General Court to facilitate third party interventions (Paragraph 33)	
<b>FRA</b>	Reforming and strengthening the mandate of the FRA (Paragraphs 78 and 79)	A yearly report monitoring the situation of media freedom and pluralism in the EU (Paragraph 38)	Review and strengthen the mandate of the FRA (Paragraph 32).
	FRA to regularly monitor member states' compliance with Article 2 TEU	FRA to be consulted in any legislative proposal (Paragraph 43)	
		FRA's mandate to be enhanced to include regular monitoring of EU member states compliance with Article 2 TEU (Paragraph 44) and cover criminal justice and police cooperation (and economic and social rights) (Paragraph 45)	
		Increase the number of member states' comparative evaluations and assessments (Paragraph 46)	
		Strengthen the independence of the FRA and ensure access	

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		to its documents (Paragraph 47) The FRA scientific committee and the FRANET network should submit to the EP and national parliaments, and publish annually, a more focused report on member states situation “ <i>as was done until 2006 by the former Network of Experts on Fundamental Rights</i> ” (Paragraph 47)	
<b>Member States</b>		To set up appropriate national human rights institutions (NHRIs) and facilitate networking between this bodies at EU levels (Paragraph 34)	

Source: Authors' own elaboration.

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# I. Rule of Law, Human Rights and Democracy in the United Kingdom

Professor Sir Jeffrey Jowell QC\*

## 1. Introduction and Context

Accounts of the United Kingdom's constitutional principles must begin with the explanation that the United Kingdom has no codified constitution. It is often said that the United Kingdom has no constitution. That is wrong. Its constitutional foundations are deeply-rooted and well-established, although it is right to say that they are not set out in any single document. It is also not accurate to say that the British constitution is unwritten. A great deal of its content is based on written sources, including many statutes and decided cases (the common law). However, its content is also based upon unwritten sources, including settled expectations arising from conventional patterns of political behaviour and accepted democratic principles (such as the rule of law). These different strands – deriving from written sources, settled behavioural patterns and fundamental principles – although not contained in any single overriding text, interweave to form a sturdy fabric of democratic constitutionalism.

This constitutional fabric has acquired its current shape and texture through a process of slow, incremental and often turbulent evolution, and especially through the struggles between the King and Parliament in the 17<sup>th</sup> century. The British constitution finally took its modern form with the extension of the franchise to working-class men and finally to women in the late 19<sup>th</sup> and the first half of the 20<sup>th</sup> centuries and the confirmation of the supremacy of the elected House of Commons over the unelected House of Lords in the Parliament Act 1911. This led in turn to the emergence of mass participatory democracy and modern political parties, the creation of the welfare state in the wake of the two world wars, and the ensuing expansion of the power and responsibilities of the executive branch of government.

The British constitution continues to evolve. The entry of the UK into what is now the European Union via the enactment of the European Communities Act 1972, the introduction of sweeping privatisation measures in the 1980s, the incorporation of the European Convention on Human Rights into UK law via the Human Rights Act 1998 and the devolution of powers to legislative assemblies in Scotland, Wales and Northern Ireland are all fresh constitutional milestones laid down over the last few decades.

Three core values in particular underlie the British system. The first is the *presumption of liberty*, which directs that people have a right to do what is not explicitly and lawfully forbidden. The second is *parliamentary sovereignty*, which endorses the notion of representative government and requires decisions as to where the public interest lies to be made by the elected government of the day. The third value, *the rule of law*, mediates between the first two, seeking a balance between unrestrained freedom and unrestrained governmental authority.

## 2. The presumption of liberty

For many years it has been argued that the UK does not need a constitutional bill of rights – an entrenched framework of positive rights - because such rights and freedoms are in any event legally protected under the common law. Professor Dicey, in a work written in 1885 which attained huge authority,<sup>1</sup> believed that liberties were better protected in England through the common law than in countries with written constitutions and a separate system of public law. Dicey may have been wrong about that, but he rightly observed that British freedoms are inherent and do not need to be explicitly granted by the State in order to exist and be enforced. When challenged, these inherent rights are declared by the courts to exist, despite the fact that they have not necessarily been specifically authorised by any constitution, statute or other juridical means. This creates a default presumption of personal liberty, which in turn has the effect of ensuring that public authorities must have a clear legal basis for any action that they may take which infringes upon individual freedom. In the absence of clear legislative or common law authorisation (ambiguity will not suffice) the State cannot interfere with how an individual lives their life.

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\* Sir Jeffrey Jowell KCMG QC, Professor of Law at the University College London and Director of the Bingham Centre for the Rule of Law, London, United Kingdom.

<sup>1</sup> A. Dicey (1885) *An Introduction to the Study of the Law of the Constitution*, Indianapolis: Liberty Fund Inc; 8th Revised edition (1982).

However, in a society dependent on collective provision to ensure the achievement of key social objectives, individual liberty can inevitably come in tension with other important values, or with the liberty claims of others. As a consequence, liberty alone cannot serve as the dominant core value of a constitutional system: the tensions generated by a strong emphasis on individual freedom are therefore mediated by a collective decision-making process and the growth, especially after World War II, of the welfare state.

The presumption of liberty remains a residual value of considerable importance in the UK constitutional system. However, it is another core value, the sovereignty of Parliament, that tends to dictate who can confer such a legal basis and thereby authorise interference with personal liberty in the name of the common good.

### 3. The Sovereignty of Parliament

The principle of popular self-governance lies at the heart of the value system of all democratic societies. The UK is no exception. However, in the British constitutional system, particular emphasis is placed on representative government as the mechanism through which the democratic will of the British people is expressed. The UK Parliament is conventionally considered to be ‘sovereign’, meaning that legislation passed in Westminster cannot be challenged, nullified or overruled by any other organ of the State. Under the doctrine of parliamentary sovereignty, Parliament can make and re-make all law, a power that extends to re-shaping the contours of the British constitutional system. This sovereign status of Parliament is justified on the basis that it represents the people and serves as the vehicle through which popular self-governance is exercised.

However, over the years, the automatic identification of the doctrine of parliamentary sovereignty with the principle of democratic self-governance has come under strain. Giving unlimited power to the sovereign Parliament has meant the adoption of a majoritarian view of democracy: a political party that controls a majority of seats in the House of Commons can wield its sovereign power, subject only to the constraints imposed by the prevailing political climate. The growth of unified and disciplined political parties has also meant that the day-to-day workings of Parliament is controlled by the party leaderships, with the leadership of the majority party often able to control the exercise of its sovereign power for extended periods of time.

The continuing evolution of the UK constitutional system has also seen the emergence of *de facto* limits on the exercise of the sovereign power of Parliament. For example, the establishment of devolved assemblies in Scotland, Northern Ireland and Wales with law-making powers has involved a delegation of authority by the Westminster Parliament to these new representative institutions. In addition, UK membership of the European Union (EU), as established by the European Communities Act 1972, means that EU law becomes part of UK law and must be treated by British courts as superior to any conflicting domestic laws. As with the devolution settlement, the supremacy of EU law does not *per se* contradict the doctrine of parliamentary sovereignty, as it takes effect in UK law by virtue of the European Communities Act 1972, a legislative enactment that the sovereign UK Parliament could presumably repeal in the highly unlikely event that it chose to do so. However, repeal of the 1972 Act would be essentially incompatible with continuing UK membership of the EU and would almost certainly require popular approval via a referendum process, in particular given that entry into what was then the EEC was approved via a popular referendum in 1975.

Another contrast between the existence of *de facto* limits on the day-to-day exercise of parliamentary sovereignty and the persistence of the ultimate *de jure* sovereign power of Parliament can be seen when it comes to the European Convention on Human Rights (ECHR) and the decisions of the European Court of Human Rights, which have been incorporated into UK law through the Human Rights Act 1998 (HRA). The ECHR does not have the status of EU law within domestic law: the courts lack the power under the HRA to strike down or suspend parliamentary legislation and must give effect to such legislation even if they consider it to be incompatible with the Convention. However, the courts may issue a declaration of incompatibility which states their opinion that the legislation in question is incompatible with the Convention and a special fast-track mechanism allows for legislation to be amended rapidly in response to such a declaration. The practice of UK governments since the HRA came into force in 2000 has been to take account of declarations of incompatibility and to amend legislation that appears to violate the Convention. In practice, therefore, domestic law is made subservient to the requirements of the ECHR.

## 4. The rule of law

Superficially, the two values already discussed, the presumption of liberty and the primacy of representative governance as manifested through the doctrine of the sovereignty of parliament, appear to be contradictory: if Parliament has the legal authority to extinguish any liberties, either by passing a law or by conferring discretionary power to an official who then may disregard any so-called ‘inherent freedoms’, then the presumption of liberty appears to lack all force. It is here, however, that the rule of law comes into play, seeking to place some restraint upon the unfettered use or exercise of the powers of Parliament or the executive. The pressure to conform to the rule of law emanates from the deeply rooted set of expectations woven into the UK’s constitutional fabric that certain patterns of official behaviour are both necessary and ordinary in a democratic society.

The rule of law is not defined in any overriding constitutional or statutory document. It is a principle rather than a fixed rule. It should be given due weight, but may not constitute a trump card in all cases.

### 4.1. The content of the rule of law

The rule of law has recently been outlined clearly by one of the most famous British judges, Lord Tom Bingham, in his book *The Rule of Law*. Bingham’s definition<sup>2</sup> was adopted by the report of the Venice Commission on the subject, as were many of his eight “ingredients” of the rule of law.<sup>3</sup> In summary the rule of law consists of three main parts, the first speaking to the nature of law and a legal system, the second to the implementation of law and the third to challenges to the law and dispute-resolution.

The first element of the rule of law (the nature of law) requires two principal elements, legality and legal certainty. Legality requires a functioning legal system in which there is a sense of obedience to the law. The requirement that the law must be followed is reflected in the popular demand that ‘law and order’ must be maintained, both by the public and also by officials like the police who are expected to enforce the law. However, legality goes further than that, as it also addresses the actions of public officials, requiring that their acts be legally authorised.

Certainty is an instrumental value in that it allows people to know clearly where they stand so that they may plan their actions without confounding their legitimate expectations. Dicey was so intent upon legal certainty that he opposed any form of discretionary power being conferred upon officials. He saw discretion as equivalent to arbitrary power. However, discretion is necessary in any complex State and one of the most important developments in recent public law has been judicial review of official decisions, which requires powers to be exercised within the law, under fair procedures, and rationally, not interfering disproportionately with liberties, rights or important interests.

The second aspect of the rule of law (enforcement) requires no person to be above the law and that the law must be implemented equally among all classes.

The third aspect of the rule of law engages the right to challenge official power, to have access to courts or equivalent decision-making institutions to do so. Once in those courts the claimant must receive a fair hearing (‘natural justice’ or ‘due process’) before an independent and impartial judge. This aspect of the rule of law connects with fundamental human rights in two respects. First, some of the elements of the rule of law (such as the right to a fair trial) are themselves fundamental rights (expressed, for example, in Art. 6 ECHR), and second, the right to challenge decisions provides access to rights.

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<sup>2</sup> “All persons within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.” See T. Bingham (2010), *The Rule of Law*, London: Penguin Books, p. 8.

<sup>3</sup> Bingham assesses the following eight ingredients of the principle: the accessibility of the law (which must be intelligible, clear and predictable); questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; equality before the law (save to the extent that objective differences justify differentiation); the exercise of power in good faith, fairly, for the purpose for which the powers were conferred, and without exceeding limits of such powers and not unreasonably; fundamental human rights; dispute resolution, so that means are provided to resolve bona fide civil disputes; fair trial, so that adjudicative procedures provided by the law are fair; and compliance by the State with its obligations in international law as in national law.

## 4.2. Application of the rule of law

How is the rule of law applied? As has been said above, the notion of parliamentary sovereignty permits Parliament to override the rule of law, but its moral force is often successfully invoked in opposition to attempts to do so. The courts also make the presumption that powers conferred by Parliament are intended to be subject to the rule of law, unless Parliament speaks clearly to the contrary. Thus, where Parliament confers discretionary powers, the exercise of those powers is assumed to comply with the principles of judicial review set out above (legality, procedural fairness and rationality).<sup>4</sup>

One of the more recent developments of common law was the notion of a ‘constitutional right’ – even in a country without a codified constitution – to the rule of law. In that way a prison official, despite having been conferred broad discretionary power to impose discipline in prisons, was held not to be able to obstruct a prisoner’s correspondence with his lawyer.<sup>5</sup> In another case, the Minister of Justice was held not to be able to impose excessively high court fees.<sup>6</sup> Both of these cases in effect upheld that part of the rule of law that requires access to justice. Similarly, an asylum-seeker could not be deprived of State benefits in advance of being informed of the fact that his/her request to remain in the country had been refused.<sup>7</sup>

## 5. The resolution of conflict between the presumption of liberty, the rule of law and the sovereignty of parliament

The relationship between the core value of commitment to the rule of law and the other two core values of the presumption of liberty and the sovereignty of Parliament is ever-shifting under the UK’s evolving constitution. The final say as to how this tension should be resolved is still reserved for the elected Parliament. However, some of the UK’s highest judges have suggested that the courts might review legislation which offends fundamental democratic principle. This has been suggested both extra-judicially, through academic articles<sup>8</sup> suggesting that democracy may itself provide a “higher order” law, in the hypothetical cases of Parliament seeking to abolish judicial review or to suspend elections. And even judicially, it has been suggested more forthrightly that since the notion of parliamentary sovereignty is a common law (judge-made) concept, and because the common law is inherently flexible and permits incremental elaboration, the judges may, in a suitable case, regard themselves as authorised to elevate the rule of law to the highest constitutional order under a “different hypothesis of constitutionalism”<sup>9</sup>. It may be that this matter will never be tested, as the rule of law has such moral force as a constitutional principle in its own right as to prevent laws which may contradict its strictures becoming law in the first place.

Another way in which parliamentary sovereignty has been weakened has been via the rights incorporated under the ECHR and the provisions of EU law, which supplement, extend and greatly reinforce the partial restraints imposed by the ‘common law’ constitutional principle of the rule of law on the exercise of legislative and executive power.

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<sup>4</sup> See *de Smith’s Judicial Review* (7<sup>th</sup> ed. 2013), by Woolf, Jowell et al.

<sup>5</sup> *R v. Secretary of State for the Home Department, ex p. Leech (No.2)* [1994] QB 198

<sup>6</sup> *R v. Lord Chancellor ex p. Witham* [1997] 2 All E.R. 779

<sup>7</sup> *R. (on the application of Anufrijeva) v. Secretary of State for the Home Department* [2003] UKHL 36. See generally J. Jowell, “The Rule of Law Today” in J. Jowell and D. Oliver eds, *The Changing Constitution* (7<sup>th</sup> ed. 2011).

<sup>8</sup> See e.g Lord Woolf, “droit public – English Style” [1995] Public Law 57; Sir John Laws, “law and Democracy” [1995] Public Law 72.

<sup>9</sup> The words of Lord Steyn in *Jackson v Attorney General* [2005] UKHL 56. Lord Hope and Baroness Hale spoke in similar terms, Lord Hope saying that “The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based. (...) Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law”.



## II. Rule of Law and Rechtsstaat: The German Perspective

Dr. Nikolaus Marsch, D.I.A.P. (ENA)\*

### 1. A first short outline

#### 1.1 The term Rechtsstaat in German Constitutional Law

The word *Rechtsstaat* is a compound of the German words *Recht* (law) and *Staat* (State). As the combining of two words to make one is infrequent in many other languages, a literal translation of the word is hardly feasible.<sup>1</sup> A translation fails, however, primarily because of the nature of the term *Rechtsstaat*. Like other notions of constitutional theory, *Rechtsstaat* cannot be defined on its own terms, but it is a rather vague notion that has, to a certain extent, adapted in response to changing historical contexts without losing its core and becoming an empty formula.<sup>2</sup>

Hence, the Grundgesetz (Basic Law), the German Constitution of 1949, only refers to the notion of *Rechtsstaat* in three articles without defining it. In Article 28 Par. 1, the Basic Law requires the constitutional order of the federal states to conform to the principles of a republican, democratic and social *Rechtsstaat*, within the meaning of the Basic Law.<sup>3</sup> However, there is neither an article in the Basic Law defining the meaning of *Rechtsstaat*, nor is there any article setting forth that the Federation itself has to be a *Rechtsstaat*. Both the meaning and the validity of the principle of *Rechtsstaat* also for the Federation are presupposed by Article 28 Par. 1 and the entire Basic Law.<sup>4</sup> The same is true for Article 23 Par. 1 that became part of the Basic Law through a constitutional amendment in 1992. It states that the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles and to the principle of *Rechtsstaat*. While the meaning or the content of *Rechtsstaat* is not defined, sub-principles of *Rechtsstaat* are explicitly laid down in the Basic Law, as for instance the principle of legality in Article 20 Par. 3.<sup>5</sup>

#### 1.2 Historic development: Formal and substantial conceptions of Rechtsstaat

Being presupposed by the German Constitution without being concretised, the notion of *Rechtsstaat* can only be conceived in a systematic way on the basis of its historical development.<sup>6</sup> It appears at the beginning of the 19th century and originates from early liberalist's theory of the State.<sup>7</sup> Based on the theory of natural law and strongly influenced by the philosophy of Kant, the early meaning of *Rechtsstaat* was that the State is man-made (not divine), that it is based on principles of reason and that it should serve the common well-being, without harming freedom and security of people and property.<sup>8</sup> During the 19th century, this substantial conception of *Rechtsstaat* was reduced to a formal conception for several reasons.<sup>9</sup> On the one hand, the guarantee of freedom and security of person and property had become real in the constitutional monarchy, so that the focus shifted towards controlling and constraining the State administration. Central to

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\* Nikolaus Marsch, Lecturer at the Law Faculty of the University of Freiburg in Breisgau, Germany.

<sup>1</sup> P. Kunig, "Rechtsstaat (Rule of Law: German Perspective)", in N.J. Smeler and P.B. Baltés (eds), *International Encyclopedia of the Social & Behavioral Sciences*, Amsterdam: Elsevier, 2001, p. 12824.

<sup>2</sup> E.-W. Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs", in E.-W. Böckenförde (ed.), *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, Frankfurt: Suhrkamp, 1991, pp. 143-144.

<sup>3</sup> All articles of Basic Law are cited in the translation by Christian Tomuschat and David P. Currie ([www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0142](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0142)).

<sup>4</sup> P. Kunig, "Der Rechtsstaat", in H. Dreier and P. Badura (eds), *Festschrift 50 Jahre Bundesverfassungsgericht - Band 2: Klärung und Fortbildung des Verfassungsrechts*, Tübingen: Mohr Siebeck, 2001, p. 422.

<sup>5</sup> F.E. Schnapp, "Art. 20", in I. von Münch and P. Kunig (eds), *Grundgesetz Kommentar - Band 1*, 6th ed., München: Beck, 2012, p. 34.

<sup>6</sup> E.-W. Böckenförde, op. cit., pp. 143-144.

<sup>7</sup> Ibid., pp. 144-148.

<sup>8</sup> Ibid., pp. 144-148.

<sup>9</sup> R. Grote, "Rule of Law, Rechtsstaat and «Etat de droit»", in C. Starck (ed.), *Constitutionalism, Universalism and Democracy - a comparative analysis: The German contributions to the fifth world congress of the International Association of Constitutional Law*, Baden-Baden: Nomos, 1999, pp. 280-281.

this effort were the principle of legality and the guarantee of judicial review.<sup>10</sup> On the other hand, after the failure of the liberal revolution of 1848, the German middle class concentrated on the strengthening of judicial protection as compensation for its unfulfilled goal of political participation.<sup>11</sup> As a result, the notion of *Rechtsstaat* lost its substantial (philosophical) meaning – the substantive elements, such as the common well-being as the main purpose of all State action, had been eliminated.<sup>12</sup> It is commonly believed that this reduction to a formal conception of *Rechtsstaat* at least facilitated the seizure of power by Hitler and the following abrogation of the *Rechtsstaat*. Thus, the Basic Law marks an unambiguous return to a substantial conception of *Rechtsstaat* inter alia by conceiving fundamental rights as subjective rights of the citizens. However, in contrast to the early 19th century conception of natural law, the substantial standards that are binding on the executive, the courts and the legislature, are no longer based on nature or in reason, but rather on the written constitution.

## 2. Elements of a formal conception of *Rechtsstaat*

### 2.1 Separation of powers and the supremacy of the constitution

The separation of powers as a key element of modern statehood is one important characteristic of a *Rechtsstaat*.<sup>13</sup> Even if this principle is not realised in a pure and strict way by the Basic Law, each power has core spheres in which the other powers should not intervene.<sup>14</sup> The legislature is even protected against self-abandonment by the Basic Law and the jurisprudence of the Federal Constitutional Court. In contrast to the French Constitution of 1958 (Article 37), Article 80 of the Basic Law excludes the possibility of autonomous rule-making by the executive branch and requires a statutory delegation of power. This law must specify the purpose and scope of the authority conferred. Furthermore, the Federal Constitutional Court obliges the legislature to reserve for itself the most important decisions, the answers to which must be found in statutes.<sup>15</sup> These limits to parliamentary sovereignty can only derive from a constitution, which is vested with supremacy above all legislative acts. For this reason it is commonly argued in Germany that the *Rechtsstaat*, even in its formal conception, has to be a Constitutional State.<sup>16</sup> In the Basic Law, the supremacy of the Constitution is explicitly laid down in Article 20 Par. 3, saying that “the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice”.

### 2.2 Principles of legality and legal certainty

The principle of legality, also laid down in the above cited Article 20 Par. 3, is the traditional core element of the *Rechtsstaat* principle. All administrative action has to conform to statutory law (supremacy of statutory law) and it must be based on an explicit statutory competence if an individual human right is affected by State action.<sup>17</sup> Closely linked to the principle of legality, the principle of legal certainty obliges the legislature to adopt precise rules in order to make judicial control possible. Moreover, it is a requirement of the *Rechtsstaat* that the application of statutory rules by the State shall be (to a certain extent) predictable.<sup>18</sup> Furthermore, the retroactive application of norms is only admissible under narrow conditions and the legitimate expectations of citizens are protected.<sup>19</sup>

<sup>10</sup> E.-W. Böckenförde, op. cit., pp. 150-158.

<sup>11</sup> M. Stolleis, “Rechtsstaat”, in A. Erlner and E. Kaufmann (eds), *Handwörterbuch zur deutschen Rechtsgeschichte: IV. Band: Protonotarius Apostolicus – Strafprozeßordnung*, Berlin: Schmidt, 1990, p. 371.

<sup>12</sup> E.-W. Böckenförde, op. cit., pp. 150-158.

<sup>13</sup> H. Maurer, *Staatsrecht I: Grundlagen - Verfassungsorgane - Staatsfunktionen*, 5th ed., München: Beck, 2007, § 8 Rn. 12.

<sup>14</sup> P. Kunig op. cit., pp. 437-439.

<sup>15</sup> So-called ‘Wesentlichkeitslehre’; see M. Morlok and L. Michael, *Staatsorganisationsrecht*, Baden-Baden: Nomos, 2013, pp. 327-328.

<sup>16</sup> P. Kunig, op. cit., p. 434.

<sup>17</sup> M. Koetter, “Rechtsstaat und Rechtsstaatlichkeit in Germany”, in M. Koetter and G.F. Schuppert (eds), *Understandings of the Rule of Law in various legal orders of the World: Rule of Law Working Paper Series Nr. 1*, Berlin, 2010, p. 3 <http://wikis.fu-berlin.de/download/attachments/29556758/Koetter+Germany.pdf>.

<sup>18</sup> See for this double functionality of the principle of legal certainty, M. Morlok and L. Michael, op. cit., pp. 341-342.

<sup>19</sup> *Ibid.*, pp. 349-359.

## 2.3 Federal Constitutional Court I, Judicial Review and Public Liability

The supremacy of the constitution and the principle of legality are not political principles; rather they are enforced by independent courts (see Articles 92 and 97 Basic Law). Statutes infringing on the Constitution can be challenged by the Federal Government, a State government, or by one-fourth of the members of the Bundestag (Article 93 Par. 1 Nr. 2 Basic Law). In addition, the Federal Constitutional Court is entitled to protect the separation of powers in a special procedure, under which it is authorised to decide cases concerning “the extent of the rights and duties of a supreme federal body” (Article 93 Par. 1 Nr. 1 Basic Law). This procedure, which has an equivalent in only a few other states,<sup>20</sup> has resulted in the Constitutional Court playing a significant role in the political sphere.

As to the principle of legality, it is protected mainly by the administrative and the ordinary courts. Each formal or informal administrative action can be challenged by a citizen under the condition that his subjective rights could be infringed by it. If illegal administrative action has resulted in an infringement of rights, compensation can be claimed: Public liability commonly is regarded as an element of the principle of legality.<sup>21</sup>

## 3. Elements of a substantial conception of *Rechtsstaat*

### 3.1 Fundamental rights and proportionality

According to the formal conception of *Rechtsstaat*, the State administration is bound by the statutory law, whereas the legislature is not bound by substantive standards.<sup>22</sup> While the fundamental rights of the Weimar Constitution were already binding the legislator, they were commonly not interpreted as subjective rights that could be invoked before the courts by the citizens. Thus, after the end of the Nazi-regime, which had deprived millions of citizens of all their rights, the Basic Law constitutes a commitment to the substantial conception of *Rechtsstaat*. In its very first article (Par. 3), the Basic Law states that “The following basic rights shall bind the *legislature*, the executive and the judiciary *as directly applicable law*.” And at the end of the first chapter of the Basic Law, entitled “Basic Rights”, Article 19 Par. 4 elevates the right to judicial remedy to the rank of a fundamental right. But the success story of the fundamental rights is also closely linked to the progressive jurisprudence of the Federal Constitutional Court. In one of its early judgements (“Elfes“), the Court interprets Article 2 Par. 1 of the Basic Law (“freedom of action”) as protecting all human action against restrictions by unlawful action of the State.<sup>23</sup> This means that even the violation of a constitutional rule in the legislative process represents a violation of the fundamental rights of those citizens on whom an obligation was placed by the statutory law in question. Furthermore, the result of this jurisprudence is that every administrative action creating prohibitions or requirements must be made pursuant to an explicit statutory delegation of power.

The importance of fundamental rights for the German legal order has been particularly stressed by the Federal Constitutional Court as it developed the objective dimension of fundamental rights.<sup>24</sup> In its early judgments, the Court emphasised that the Constitution, and especially fundamental rights, are not only protecting the citizen against State action but are also setting up an “order of values”, which influences the entire legal order. While the controversial terminology “order of values” has been widely replaced by the Court, the constitutionalisation of the legal order has progressed, especially on the basis of the horizontal effect of fundamental rights, which influences the interpretation of all law. Furthermore, the Court has found an implied duty to protect fundamental rights, obliging the legislature and the executive to protect fundamental rights against violations by private persons or bodies.

<sup>20</sup> K. Schlaich and S. Koriath, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen*, 8th ed., München: Beck, 2010, pp. 79-82.

<sup>21</sup> K.-P. Sommermann, “Art. 20”, in H. von Mangoldt, F. Klein and C. Starck (eds), *Kommentar zum Grundgesetz - Band 2*, 6th ed., München: Beck, 2010, p. 271.

<sup>22</sup> D. Grimm, “Reformalisierung des Rechtsstaats als Demokratiepostulat?”, 1980, *Juristische Schulung (JuS)*, p. 704.

<sup>23</sup> Federal Constitutional Court, Judgment of the 16.1.1957, 1 BvR 253/56 (BVerfGE 6, p. 32).

<sup>24</sup> See for the following H.D. Jarass, “§ 38 Funktionen und Dimensionen der Grundrechte”, in D. Merten and H.-J. Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa: Band II: Grundrechte in Deutschland: Allgemeine Lehren I*, Heidelberg: C. F. Müllelr, 2006, pp. 625–654, par. 5-14.

Finally, the protection of the fundamental rights has been strengthened by a strict application of the principle of proportionality. Thus, all State action must pursue a legitimate aim by taking only suitable, necessary and adequate measures.<sup>25</sup>

### 3.2 Federal Constitutional Court II

The protection of fundamental rights by the Constitutional Court is particularly effective because any person can lodge a constitutional complaint alleging that one of his basic rights has been infringed by a public authority (Article 93 Par. 1 Nr. 4a Basic Law). This constitutional complaint can be directed not only against statutory law, but also against administrative action or judgments of the ordinary or administrative courts under the condition that all other judicial remedies have already been exhausted.

## 4. The ambivalent relationship between *Rechtsstaat* and Democracy

*Rechtsstaat* and Democracy, as two core principles of the Basic Law, are overlapping and closely linked to each other so that a clear theoretical distinction in all details seems hardly feasible.<sup>26</sup> By generalising, it can be concluded that the formal conception of *Rechtsstaat* is an essential condition for a democratic State. This formal conception also requires that the rules related to the law-making process must be incorporated into the constitution itself and have supremacy over rules concerning the law-making process made by the legislature.<sup>27</sup> The principle of legality binds the State administration to the democratically adopted statutory law – while judicial control of administrative action ensures the democratic legitimation of administrative action. A democratic State has to be a *Rechtsstaat* (in its formal conception) in order to prevent it from sliding into an anarchistic or authoritarian State.<sup>28</sup> The majority rule is only acceptable for the minority if there are guarantees that the current minority has the chance to become the majority and to change the earlier adopted law. As a consequence, at least the majority rule has to be irreversible.<sup>29</sup> Thus, no antagonism exists with regard to the formal conception of *Rechtsstaat* and democracy.<sup>30</sup>

By contrast, the substantial conception of *Rechtsstaat* is commonly regarded as a restriction of the democratic principle.<sup>31</sup> The Parliament, as the only directly legitimated supreme federal body, is bound by fundamental rights, which are enshrined in the constitution, so that parliamentary sovereignty is limited. Moreover, certain parts of the Basic Law cannot be amended at all. According to Article 79 Par. 3 of the Basic Law, “amendments (...) affecting (...) the principles laid down in Articles 1 and 20 shall be inadmissible”. Thus, the legislature, even with the two-thirds majority generally needed to amend the constitution (Article 79 Par. 2), cannot abrogate the essential elements of the *Rechtsstaat*, for instance the supremacy of the constitution and the principle of legality laid down in Article 20 Par. 3. However, it is not only the formal part of the principle of *Rechtsstaat*, which is protected by Art. 79 Par. 3. By safeguarding Article 1 against any amendment, the inviolability of human dignity as guiding principle of the German Constitution is also emphasised. Hereby, the cores parts of the major fundamental rights are also protected because it is commonly argued that they are based in human dignity.<sup>32</sup> Finally, the order of values set up by the Basic Law and especially the fundamental rights is also protected through the concept of a fortified democracy (“wehrhafte Demokratie”). “(Political) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional” (Art. 21 Par. 2) and can be banned. Citizens who

<sup>25</sup> The principle of proportionality is commonly regarded as part of the principle of *Rechtsstaat*, see K. Sobota, *Das Prinzip Rechtsstaat: Verfassungs- und verwaltungsrechtliche Aspekte*, Tübingen: Mohr Siebeck, 1997, p. 234-253.

<sup>26</sup> P. Kunig, op. cit., p. 424.

<sup>27</sup> D. Grimm, op. cit., p. 708.

<sup>28</sup> By contrast, a State can adopt the formal conception of *Rechtsstaat* without being a democracy (see D. Zacharias, “Verfassungsrechtliche Terminologie und Begrifflichkeit im europäischen Rechtsraum”, in A. von Bogdandy, P. Cruz Villalón and P. M. Huber (eds), *Ius Publicum Europaeum - Band II: Offene Staatlichkeit - Wissenschaft von Verfassungsrecht*, Heidelberg, 2008, pp. 843–890 para 25).

<sup>29</sup> D. Grimm, op. cit., p. 708.

<sup>30</sup> M. Morlok and L. Michael, op. cit., p. 311.

<sup>31</sup> D. Grimm, op. cit., p. 708.

<sup>32</sup> P. Kunig, op. cit., pp. 425-426.

abuse particular fundamental rights (for example their freedom of expression and of assembly) “in order to combat the free democratic basic order shall forfeit these basic rights” (Art. 18).

## 5. The German *Rechtsstaat* and the European Union

Regarding the European influence on the German understanding of *Rechtsstaat* and fundamental rights, Germans have traditionally thought about this relationship the other way around. In 1974 the Federal Constitutional Court decided that European secondary law must conform to the fundamental rights of the German Basic Law as long as no catalogue of fundamental rights existed on the European level.<sup>33</sup> The Court has softened its approach in a 1986 decision when it held that it would not review European secondary legislation as long as the European Court of Justice guaranteed a level of fundamental rights protection equivalent to that found in the Basic Law.<sup>34</sup> This jurisprudence is commonly analysed in Germany as having put pressure on the ECJ to develop European fundamental rights. However, even after the EU Charter of Fundamental Rights came into force, the jurisprudence of the ECJ regarding the scope of the Charter (Art. 51 Par. 1 of the Charter) continues to be a matter of heated discussions among German scholars.<sup>35</sup> This debate centres primarily on the fear that by increasing the influence of European law on questions of fundamental rights at the national level, the level of protection for these rights will be decreased.

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<sup>33</sup> Federal Constitutional Court, 29.5.1974, BvL 52/71 (BVerfGE 37, p. 271 – Solange I).

<sup>34</sup> Federal Constitutional Court, 22.10.1986, 2 BvR 197/83 (BVerfGE 73, p. 339 – Solange II).

<sup>35</sup> Compare D. Thym, “Die Reichweite der EU-Grundrechte-Charta – Zu viel Grundrechtsschutz?”, 2013, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, pp. 889–896; the relationship between the ECJ and the Federal Constitutional Court has also been subject of a widely noted decision of the Federal Constitutional Court, 24.4.2013, 1 BvR 1215/07, see F. Fontanelli, “*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog”, *European Constitutional Law Review* 9, 2013, pp.315-334.

### III. La protection des droits fondamentaux, la démocratie et l'État de Droit dans l'Union européenne : Rapport sur la France

Prof. Roger Errera\*

Le but de ce rapport est d'examiner la situation actuelle du droit français concernant l'État de droit et les droits fondamentaux. Il comprend trois parties : I. Le contenu de la notion d'État de droit. II L'évolution récente du droit relatif aux libertés fondamentales. III: Les instruments du progrès du contrôle du respect des droits fondamentaux: du droit de l'Union et du droit international des droits de l'homme à l'extension de l'intervention et des pouvoirs des juges.

#### 1. Le contenu de la notion d'État de droit<sup>1</sup>

Ses principaux caractères sont les suivants :

- séparation des pouvoirs
- limitation du pouvoir
- hiérarchie des normes juridiques
- contrôle juridictionnel des lois et des actes administratifs
- affirmation et garantie constitutionnelle des droits fondamentaux
- sécurité juridique
- existence de recours effectifs devant un juge indépendant et impartial respectant les règles du procès équitable.

La notion française d'Etat de droit a été utilisée par des juristes français dès le début du XXème siècle. Elle est alors due aux échanges avec les principaux auteurs allemands et à la traduction de leurs ouvrages. Elle a ensuite été développée par R. Carré de Malberg dans son ouvrage « Contribution à la théorie générale de l'Etat ». Elle s'efface au cours des années 1930 et fait à nouveau surface à partir de la fin des années 1970. L'apparition de la notion de *Rechtsstaat* dans la littérature juridique allemande est bien antérieure et remonte à la première moitié du XIXème, mais tend à disparaître presque complètement des ouvrages de droit public à partir de la fin du siècle. En Angleterre, la date de publication de l'ouvrage de Dicey, «Introduction to the study of the Law of the Constitution» (1885) est généralement retenue comme point de départ, en tenant compte de l'acquis des XVIIème et XVIIIème siècles. La notion de *rule of law* sera de plus en plus utilisée à partir de l'adoption du *Human Rights Act* en 1998. Dans les trois pays, l'essor et l'application concrète de ces trois notions depuis une quarantaine d'années sont étroitement liés au développement du constitutionnalisme,<sup>2</sup> à l'utilisation des instruments internationaux de protection des droits de l'homme, notamment la convention européenne des droits de l'homme (CEDH) et à la création du droit de l'Union européenne, marquée récemment par l'apport de la Charte des droits fondamentaux.<sup>3</sup>

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\* Conseiller d'État honoraire. Ancien membre du Conseil supérieur de la magistrature.

<sup>1</sup> Pour une étude de droit comparé, cf. L Heuschling, *État de droit, Rechtsstaat, Rule of Law*, Dalloz, 2002; Commission européenne pour la démocratie par le droit (Commission de Venise), *Report on the Rule of Law*, on the basis of comments by P. van Dijk, J. Jowell and K. Tuori, CDL-AD ( 2011) 03 rev. 2011 ; id, Martin Loughlin, *The Rule of Law in European Jurisprudence*, CDL-DEM ( 2009) 006, 2009; Conseil de l'Europe, Assemblée parlementaire, *La notion de Rule of Law*, Résolution 1594 ( 2007); Comité des ministres, *The Council of Europe and the Rule of Law. An Overview*, CM (2008) 170, 21 novembre 2008 ; Lord Bingham, "The Rule of Law", *Cambridge L.J.* 66, 1, 2007, p. 67; id, *The Rule of Law*, Allen Lane, Londres, 2010; J. Jowell, " The Rule of Law and its Underlying Values", in *The Changing Constitution*, dir. J. Jowell et D. Oliver, 7ème éd., Oxford University Press, 2011; P. Craig, " The Rule of Law", in *House of Lords Select Committee on the Constitution*, 6ème rapport, "Relations between the Executive, the Judiciary and Parliament", 2007, p. 97.

<sup>2</sup> Cf. *European and US Constitutionalism*, dir. G. Nolte, Cambridge University Press, 2005

<sup>3</sup> *Protection constitutionnelle et protection internationale des droits de l'homme: concurrence ou complémentarité ?* IXème conférence des cours constitutionnelles européennes, Paris, mai 1993, 2 vol.

## 2. L'évolution récente du droit des libertés fondamentales en France

### 2.1 Droit pénal et procédure pénale

#### 2.1.a Réformes libérales

- abolition de la peine de mort<sup>4</sup>
- abolition des tribunaux militaires<sup>5</sup> en temps de paix
- suppression de la cour de sûreté de l'Etat, juridiction d'exception<sup>6</sup>
- réforme du régime de la garde à vue, permettant une présence et une assistance effectives d'un avocat.<sup>7</sup>

#### 2.1.b Réformes contestables

- La rétention de sûreté<sup>8</sup>. Elle permet le maintien en détention d'un condamné à l'expiration de sa peine si sa dangerosité est établie. Cette notion se rapporte à la probabilité très élevée de récidive, associée à un trouble grave de la personnalité. La décision est prononcée par une juridiction spéciale après avis d'une commission interdisciplinaire, pour une durée d'un an renouvelable. Dans sa décision du 21 février 2008,<sup>9</sup> le Conseil constitutionnel a posé trois conditions : nécessité, proportionnalité et adéquation, et affirmé que la rétention ne pouvait, vu ses conséquences et l'absence de durée maximum, s'appliquer rétroactivement aux faits commis avant la loi la créant. S'agissant d'une mesure analogue, la Cour constitutionnelle allemande a admis sa rétroactivité.<sup>10</sup> Dans sa décision du 17 décembre 2009,<sup>11</sup> la Cour européenne des droits de l'homme a condamné l'Allemagne pour violation de l'article 5.1 CEDH (droit à la liberté et à la sûreté).

- Les peines-minimum automatiques en cas de récidive.<sup>12</sup> Elles sont contraires au principe de l'individualisation de la peine et réduisent la liberté d'appréciation du juge et contribuent à la surpopulation des prisons. Un projet de loi prévoit leur suppression.

- Le développement des procédures dérogatoires au droit commun en matière, notamment de garde à vue, de perquisition et d'écoutes. Les domaines concernés sont le trafic de stupéfiants, la criminalité organisée et le terrorisme.<sup>13</sup>

### 2.2 Les droits des détenus

Depuis 1995, la jurisprudence du Conseil d'Etat et celle des autres juridictions administratives a étendu la liste des décisions pouvant faire l'objet d'un recours en annulation: sanctions disciplinaires, mise à l'isolement, transfert dans un autre établissement, changement de régime à l'intérieur d'un établissement, etc. Elle a également mis en cause la responsabilité de l'État du fait de suicides de détenus ou de violences dont ils ont été victimes. La jurisprudence a souligné, conformément à celle de la Cour européenne des droits de l'homme, les obligations positives de l'État concernant le droit à la vie, l'interdiction de la torture et des

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<sup>4</sup> Loi du 9 octobre 1981.

<sup>5</sup> Loi du 21 juillet 1982.

<sup>6</sup> Loi du 4 août 1981.

<sup>7</sup> Loi du 14 avril 2011. Les décisions du Conseil constitutionnel, de la Cour européenne des droits de l'homme, de la Cour de cassation et de la Cour de justice de l'Union européenne qui ont conduit à cette réforme sont commentées dans mon livre *Et ce sera justice. Le juge dans la cité*, Gallimard, 2013, p. 66 ss.

<sup>8</sup> Loi du 28 février 2008.

<sup>9</sup> N° 2008- 562 DC du 21 février 2008, p. 89

<sup>10</sup> *Mueck*, 2008. BvR 2029/01.

<sup>11</sup> *M. c Allemagne*.

<sup>12</sup> Loi du 10 août 2007.

<sup>13</sup> Cf. *Et ce sera justice*, op. cit., p. 252 ss

traitements inhumains ou dégradants et le respect de la vie privée.<sup>14</sup> La loi du 24 novembre 2009 a précisé les droits et obligations des détenus. La création d'un contrôleur général des lieux de privation de liberté<sup>15</sup> a conduit à la publication de rapports d'une grande qualité et de constats et de recommandations concernant l'insuffisante protection des droits fondamentaux des détenus par l'administration.<sup>16</sup> La France a été condamnée, au cours des années passées, à de nombreuses reprises par la Cour européenne des droits de l'homme, notamment pour violation de l'article 3 CEDH.<sup>17</sup> La loi du 15 juin 2000 a créé un droit à l'indemnisation de l'ensemble du préjudice subi par une personne emprisonnée en cas de non-lieu ou d'acquiescement.

### 2.3 La liberté d'expression.

Sous l'influence directe de la jurisprudence de la Cour européenne des droits de l'homme, plusieurs dispositions limitant la liberté d'expression ont été abrogées : celles qui permettaient au gouvernement d'interdire toute publication étrangère, qui créaient un délit d'offense aux chefs d'État étrangers,<sup>18</sup> aux chefs de gouvernement étrangers et ministres des affaires étrangères d'un tel gouvernement<sup>19</sup> et qui interdisaient, en matière de diffamation, d'établir la vérité des faits lorsque ceux-ci remontaient à plus de dix ans ou concernaient des faits relatifs à une infraction amnistiée ou prescrite<sup>20</sup> ou une condamnation effacée par la réhabilitation ou la révision. Mais les délits d'offense au Président de la République et d'outrage envers les ambassadeurs et autres agents diplomatiques étrangers accrédités auprès du gouvernement français subsistent. Une loi protégeant les sources d'information de la presse a été adoptée. Un nouveau projet de loi la complétant sera prochainement soumis au Parlement.

### 2.4 Écoutes téléphoniques

La loi du 10 juillet 1991 régit celles qui sont ordonnées par le gouvernement et crée une commission de contrôle.<sup>21</sup>

### 2.5 Droits des étrangers

Deux tendances peuvent être mentionnées : plusieurs lois ont étendu les garanties de procédure et de fond concernant les conditions d'octroi et le retrait des titres de séjour et les décisions d'expulsion. D'autres lois, notamment depuis 2002, ont restreint ces garanties, notamment en ce qui concerne les étrangers atteints d'une affection grave ne pouvant faire l'objet d'un traitement adéquat dans le pays de destination<sup>22</sup> ou la date à laquelle intervient un juge en cas de détention<sup>23</sup> d'un étranger en instance d'éloignement.

<sup>14</sup> Sur cette jurisprudence, cf. R. Errera, « Un nouveau domaine de responsabilité de l'Etat de l'Etat du fait du service public de la justice », in *Justices et droit du procès. Du légalisme procédural à l'humanisme processuel. Mélanges en l'honneur de Serge Guinchard*, Dalloz 2020, p. 113 et *Et ce sera justice*, op. cit., p. 78.

<sup>15</sup> Loi du 30 octobre 2007.

<sup>16</sup> Voir en particulier le *Rapport d'activité 2012*, Dalloz 2013, qui comprend des analyses politiques et des études sur la discipline et les sanctions, l'exercice des droits de la défense, l'accès aux soins et l'enfermement des enfants.

<sup>17</sup> Pour une liste de ces condamnations, voir *Et ce sera justice*, op. cit., p. 86, n. 1.

<sup>18</sup> À la suite de la condamnation de la France par la Cour européenne des droits de l'homme dans l'affaire *Association Ekin c France*, 17 juillet 2001, il a fallu une décision du Conseil d'Etat, *GISTI*, du 7 février 2003, p.31, ordonnant au Premier ministre d'abroger le décret-loi du 6 mai 1939. Ce que fit, vingt mois plus tard, le décret du 4 octobre 2004.

<sup>19</sup> Loi du 9 mars 2004

<sup>20</sup> Une décision du Conseil constitutionnel du 7 juin 2013, QPC n° 203-319, a déclaré cette disposition contraire à la Constitution.

<sup>21</sup> Cf. R. Errera, « Les origines de la loi du 10 juillet 1991 », in Commission de contrôle des interceptions de sécurité », *10<sup>ème</sup> Rapport d'activité*, La Documentation française, 2002, p. 325, reproduit in *Revue trimestrielle des droits de l'homme*, 2005, 3, p. 851. Cette réforme du droit français, la première loi applicable à ce domaine a été la conséquence directe de la condamnation de la France par la Cour européenne des droits de l'homme dans les affaires *Kruslin* et *Huvig*, 24 avril 1990. 18 ans plus tôt, un rapport parlementaire avait déjà attiré -en vain- l'attention du gouvernement sur cette question: Sénat, Commission de contrôle des services administratifs procédant à des écoutes téléphoniques, rapport de MM. R. Marcihacy et R. Monory, n° 30, 1973.

<sup>22</sup> Avant la loi du 16 juin 2011, deux dispositions du code de l'entrée et du séjour des étrangers en France et du droit d'asile (CESEDA) relatives à la délivrance d'une carte de séjour temporaire portant la mention « vie privée et familiale » (article L. 31-11 - 11, loi du 12 mai 1998) et aux mesures d'éloignement ( article L.511-4, loi du 24 avril 1997) protégeaient «l'étranger qui réside habituellement en France dont l'état de santé nécessite une prise en charge médicale dont le défaut pourrait entraîner pour lui des conséquences d'une exceptionnelle gravité, sous réserve qu'il ne puisse effectivement bénéficier d'un traitement approprié dans le



En matière d'extradition, la jurisprudence du Conseil d'État a posé, en matière de droits fondamentaux, des conditions à l'extradition des étrangers : elle est interdite si l'étranger risque d'être condamné à mort ou de subir des traitements contraires à l'article 3 CEDH.<sup>24</sup>

## 2.6 Droit d'asile et des réfugiés

Les juridictions compétentes, cour nationale du droit d'asile et Conseil d'État, interprètent de façon satisfaisante, dans l'ensemble, tant la convention de Genève que les directives et règlements communautaires. En outre, et cela est significatif, elles utilisent et citent fréquemment, dans leurs décisions, d'autres instruments juridiques - ceux du droit international humanitaire, du droit international des droits de l'homme et du droit pénal international.<sup>25</sup> Elles mentionnent aussi, à l'occasion, des rapports d'organisations

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pays dont il est originaire...». Depuis 2010, la jurisprudence du Conseil d'État se résumait en quatre points: lorsque l'administration envisage de refuser de délivrer à un étranger, qui invoque la disposition déjà mentionnée, la carte de séjour précitée, elle doit vérifier, au vu de l'avis du médecin chargé du contrôle, que cette décision ne peut avoir de conséquences d'une exceptionnelle gravité sur son état de santé. Elle doit en particulier apprécier, sous le contrôle du juge administratif, la nature et la gravité des risques qu'entraînerait un défaut de prise en charge médicale dans le pays étranger dont l'intéressé est originaire. Lorsque ce défaut risque d'avoir des conséquences d'une exceptionnelle gravité sur la santé de l'intéressé, l'administration ne peut refuser le titre que s'il existe des possibilités de traitement approprié de l'affection dans ledit pays. Si de telles possibilités existent et si l'étranger fait valoir qu'il ne peut en bénéficier, soit parce qu'elles ne sont pas accessibles à la majorité de la population, et égard notamment au coût du traitement ou à l'absence de prise en charge adaptée, soit parce que, en dépit de leur accessibilité, des circonstances exceptionnelles tirées des particularités de sa situation personnelle l'empêcheraient d'y accéder effectivement, il incombe à l'administration de décider, au vu des informations dont elle dispose, si l'étranger peut ou non bénéficier effectivement d'un traitement approprié dans son pays d'origine. Conseil d'Etat, 7 avril 2010, *Ministre de l'immigration*, p. 94, rejetant le recours du ministre contre un arrêt d'une cour administrative d'appel ayant correctement appliqué la loi. Pour une application de cette jurisprudence, voir l'arrêt de la cour administrative d'appel de Lyon du 1<sup>er</sup> décembre 2010, *Lamri*, annulant un refus de délivrance de titre de séjour à un Algérien souffrant d'un diabète très déséquilibré compliqué par les problèmes cardiaques, nécessitant une insulinothérapie quotidienne et une intervention médicale spécialisée et coordonnée. Une offre de soins existait en Algérie. Mais l'étranger ne pouvait accéder au système de protection sociale algérien et faire prendre en charge le traitement. Cette jurisprudence équilibrée correspondait à l'intention du législateur et permettait aux juridictions administratives d'effectuer un contrôle concret, indispensable ici et à l'étranger de disposer d'un recours effectif. Cette jurisprudence a déplu à l'administration. La loi adoptée en 2011 supprimait les mots « qu'il ne puisse *effectivement* bénéficier » et les remplaçait par « de l'absence ». Un tempérament était apporté: « sauf circonstance humanitaire exceptionnelle », appréciée par l'administration. Cette réforme méconnaissait le droit au recours effectif et le principe constitutionnel de protection de la santé, affirmé par le Conseil constitutionnel dans sa décision n° 80-117 (DC du 22 juillet 1980, p. 42, § 4). Saisi d'un recours contre cette loi, et en particulier cette réforme, le Conseil constitutionnel l'a jugée conforme à la Constitution pour deux raisons: la loi avait « entendu mettre fin aux incertitudes et différences d'interprétation nées de l'appréciation des circonstances socio-économiques » dans le pays d'origine de l'intéressé afin d'établir si l'étranger peut effectivement y bénéficier du traitement médical approprié. De plus, elle avait réservé le cas d'une circonstance humanitaire exceptionnelle. Conseil constitutionnel, décision n° 2011-631 DC, 9 juin 2011, p. 252, § 36. Ce raisonnement doit être critiqué: les divergences de jurisprudence sur un point donné sont un fait normal. Il appartient aux cours suprêmes d'harmoniser cette jurisprudence, ce que le Conseil d'Etat avait précisément fait en 2010.

<sup>23</sup> Lorsqu'une mesure d'éloignement a été prise contre un étranger, l'administration peut le placer en rétention administrative, c'est-à-dire le priver de liberté, le temps de préparer son départ. Avant la réforme de 2011, dans un délai de 48 heures suivant le placement en rétention, si l'administration demandait la prolongation de celui-ci, ce qu'elle fait le plus souvent, un juge judiciaire, le juge de la liberté et de la détention, devait statuer. Si l'étranger soulevait un moyen de l'irrégularité de la procédure ayant immédiatement précédé son placement en rétention (irrégularité du contrôle d'identité ou de la garde à vue, du point de vue de l'exercice effectif des droits que la loi accorde aux étrangers), ce juge avait le pouvoir de remettre l'étranger en liberté, en vertu d'une jurisprudence de la Cour de cassation datant de 1995. Selon la réforme de 2011, l'étranger comparait devant ce juge dans les cinq jours suivant son internement. (article L. 552-1 CESEDA). Il en résulte plusieurs conséquences: pendant ces cinq jours, la privation de liberté de l'étranger ne sera contrôlée par aucun juge. Si la mesure d'éloignement est exécutée pendant ce délai, l'étranger sera privé de tout recours contre la régularité de la procédure. Ici aussi, le droit à un recours effectif était méconnu. Le Conseil constitutionnel, dans la décision précitée, a jugé cette réforme conforme à la Constitution. La loi avait, selon lui « assuré entre la protection de la liberté individuelle et les objectifs à valeur constitutionnelle de bonne administration de la justice et de protection de l'ordre public une conciliation qui n'est pas déséquilibrée ». Ce raisonnement ne peut convaincre personne.

<sup>24</sup> Sur l'évolution du droit français de l'extradition, cf. R. Errera, « L'internationalisation du droit de l'extradition et l'avenir du contrôle juridictionnel », in *Le dialogue des juges. Mélanges en l'honneur du président Bruno Genevois*, Dalloz, 2009, p. 419.

<sup>25</sup> Sur ce point cf. R. Errera, « Humanitarian Law, Human Rights Law and Refugee Law : The Three Pillars », in International Association of Refugee Law Judges, *The Asylum Process and the Rule of Law*, Manak, New-Delhi, 2006, p.173. En France, la commission de recours des réfugiés (CRR), devenue la cour nationale du droit d'asile, et le Conseil d'Etat utilisent et citent fréquemment d'autres instruments que la convention de Genève de 1951 et les textes de l'Union européenne. Voir, entre autres, CRR, *Tebourski*, 17 octobre 2006, p. 103, prenant en considération une résolution du Conseil de sécurité de l'ONU du 28 septembre 2001 pour appliquer la clause d'exclusion de l'article 1<sup>er</sup> F b) de la convention de Genève; cf. aussi Conseil d'Etat, *OFPRA c. Mme S.*, 18 janvier 2006, p. 904, citant la résolution 1244 du 10 juin 1999 du Conseil de sécurité sur le Kosovo; plusieurs décisions utilisent les statuts des juridictions pénales internationales : cf. CRR, *Kurta*, 18 mai 2006, p. 95, mentionnant, à propos des crimes de guerre, l'article 6 b) de l'accord de Londres de 1945 créant le tribunal militaire international de Nuremberg et le statut de Rome

non gouvernementales ou du Haut Commissariat de l'ONU aux réfugiés. L'inclusion de l'immigration et de l'asile dans la compétence de l'Union européenne a conduit à la publication d'un certain nombre de règlements et de directives. En conséquence, la CJUE a édicté, sur renvoi préjudiciel de juridictions des États membres, une série de décisions interprétant dans un sens libéral, bienvenu dans le climat actuel de l'Europe, ces nouveaux instruments, à la lumière de la convention de Genève, de la CEDH et des autres instruments internationaux relatifs à la protection des droits de l'homme.<sup>26</sup>

## 2.7 Le droit de propriété

Sa protection constitutionnelle a été renforcée et étendue grâce à la jurisprudence de la Cour européenne des droits de l'homme relative à l'application et l'interprétation de l'article 1<sup>er</sup> du protocole additionnel n° 1 à la CEDH. La notion autonome de « biens » par rapport au droit national a conduit à y inclure les créances exigibles ou virtuelles, à utiliser la notion d'espérance légitime, nouvelle en droit français, à inclure tout intérêt substantiel à caractère patrimonial, les sûretés, la propriété intellectuelle, les prestations sociales existantes obligatoires et les pensions. Un deuxième aspect de cette jurisprudence concerne les restrictions légitimes de ce droit, qui doivent être fondées sur l'utilité publique et proportionnées au but poursuivi. Les juridictions françaises appliquent cette jurisprudence, notamment en matière de lois de validation, qui doivent être fondées sur un impératif motif d'intérêt général, d'expropriation et de préemption. Dans des affaires importantes, le Conseil d'État a modifié sa jurisprudence à la suite de décisions de la Cour de Strasbourg condamnant la France. Les juridictions françaises appliquent aussi la jurisprudence de la CJUE, qui s'en inspire étroitement.<sup>27</sup>

## 2.8 Liberté religieuse

Le cadre juridique du statut des confessions religieuses, fondé sur les principes de séparation des Églises et de l'État et de laïcité, n'a pas changé.<sup>28</sup> Deux tendances doivent toutefois être mentionnées : la première est

créant la Cour pénale internationale. Une décision a reconnu la qualité de réfugié à un ressortissant de la République démocratique du Congo enrôlé de force à 13 ans dans l'armée du Rwanda, en citant l'article 77 du premier protocole additionnel à la convention de Genève du 12 août 1949, l'article 38 de la convention de l'ONU de 1989 sur les droits de l'enfant et l'article 8 du statut de la Cour pénale internationale: CRR, *Mme Ngambini*, 1<sup>er</sup> mars 2007. La décision refusant toute protection internationale à la veuve de l'ancien président du Rwanda assassiné en 1994, au titre des clauses d'exclusion cite plusieurs jugements du tribunal pénal international pour le Rwanda, des rapports d'organisations non gouvernementales et des rapports parlementaires belges et français : CRR, *Mme Kanziga, veuve Habyarimana*, 15 février 2007, p. 91, confirmé par le Conseil d'État, 16 octobre 2009, p. 743 Voir R. Errera, « La directive européenne du 29 avril 2004 sur le statut de réfugié, la protection internationale et les garanties contenues dans la convention européenne des droits de l'homme », *Revue trimestrielle des droits de l'homme*, n° 74, 1<sup>er</sup> avril 2008, p. 347 –Le Conseil d'État a annulé des décisions de l'Office français des réfugiés et apatrides classant un pays parmi les «pays sûrs». Pour un exemple récent, cf. Conseil d'État, 4 mars 2013, *Association des avocats ELENA et autres*, annulant l'inscription du Bangla Desh parmi ces pays. J'ai commenté la notion d'appartenance à un certain groupe social, mentionnée dans l'article 1-A 2) de la convention de Genève : «The Concept of Membership of a Particular Social Group in Refugee Law », *Völkerrecht als Weltordnung. Common Values in International Law. Festschrift für/ Essays in Honour of Christian Tomuschat*, dir. P.M. Dupuy, B. Fassbender, M.S. Shaw et K.P. Sommermann, Éditions N.P. Engel, Kehl, Strasbourg et Arlington (VA), 2006, p 133.

<sup>26</sup> J'ai commenté deux décisions importantes de la CJUE. La première, *Elgafaji v Staatssecretaris van Justitie*, affaire C-465/07, CJUE, GC; 2009, ECR I-1921; 2009, 21( (2009) *International Journal of Refugee Law*, p. 297 concerne l'octroi de la protection subsidiaire créée par l'article au titre de l'article 15 c) de la directive sur l'attribution de la qualité et de réfugié et l'asile. R. Errera, « The CJEU and Subsidiary Protection: Reflections on *Elgafaji and after* », *International Journal of Refugee Law*, 21 (20), p.93. La deuxième, *Abdulla et a. c. République fédérale d'Allemagne*, affaires jointes C-175/08, C-176/08, C. et C-179/98, 2 mars 2010, se rapporte à l'interprétation de l'article 11-1 e) de la même directive concernant la cessation de la qualité de réfugié: R. Errera, « Cessation and Assessment of New Circumstances: a Comment on *Abdulla*, 2 March 2010 », id, *International Journal of Refugee Law*, p. 521

<sup>27</sup> Sur le droit français voir M. Smel, « La déclaration des droits de l'homme. L'énigme de l'article 17 sur le droit de propriété, La grammaire et le pouvoir, *Revue du droit public*, 1974, p. 1295. Sur les deux décisions du Conseil constitutionnel de 1982 concernant les nationalisations, n° 81-132 DC, 16 janvier 1982, p. 18 et n° 82-139 DC du 11 février 1982, p. 31, voir notamment J. Rivero, « Ni vu, ni compris », *AJDA*, 1982, p. 209 ; B. Savy, « La Constitution des juges », *Recueil Dalloz*, 1983, p. 105; J.L. Mestre, « Le Conseil constitutionnel, la liberté d'entreprendre et la propriété », id, 1984, p. 2; J. Bell, *French Constitutional Law*, Clarendon Press, Oxford, 1992, p. 176; A. Stone, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective*, Oxford University Press, Oxford et Londres, 1992, chp. 6, p. 140.-Cf. aussi P. Delvolvé, « Droit de propriété et droit public », *Mélanges Braibant*, Dalloz, 1996, p. 14 F. Pez, « Le droit de propriété devant le juge administratif du référé-liberté », *Revue française de droit administratif*, 2003, p. 370. S. Boissard, « Référé-liberté et voie de fait. A propos du droit de propriété », id, 2004, p. 772; « Confrontation du droit de propriété et du droit au logement », *Bulletin d'information de la Cour de cassation*, 15 mars 2010, p. 6

<sup>28</sup> Pour un vue d'ensemble du droit applicable, voir *Traité de droit français des religions*, dir. F. Messner, P.H. Prétot et J.M. Woehrling, dir., Litec, 2003; *Liberté religieuse et régime des cultes en droit français - Textes, pratique administrative, jurisprudence*,

une intervention directe de l'État en matière religieuse. Une illustration en a été l'adoption de deux lois dont l'objet est, en fait, d'interdire le port de certaines tenues religieuses par les femmes musulmanes<sup>29</sup>. Une autre illustration a été la tentative du ministère de l'intérieur de créer un organisme représentatif de l'Islam de France. À ce jour, elle n'a pas permis d'obtenir les résultats attendus. La deuxième tendance a été une série de déclarations des responsables politiques contenant une interprétation restrictive du principe de laïcité.<sup>30</sup>

## **2.9 Protection des données personnelles**

Deux préoccupations doivent être notées : la première concerne l'insuffisance des mesures de contrôle sur le contenu et l'utilisation de certains fichiers du ministère de l'intérieur (exemple : le Système de traitement des infractions constatées (STIC)) et les conséquences qui en découlent pour certaines personnes, par exemple en matière d'emploi.<sup>31</sup> La deuxième se rapporte au développement, au niveau européen, des fichiers contenant de telles données (SIS Schengen, SIS II, Eurodac, VIS, etc) et, ici aussi, l'insuffisance des contrôles tant au niveau communautaire qu'au niveau national. Les points essentiels concernent le contenu des données collectées, la définition des autorités et des personnes habilitées à les collecter, les conserver et les traiter, la durée de conservation des données, leur mise à jour et le droit d'accès et de rectification des personnes concernées.

Dans tous ces domaines, le regard extérieur joue un rôle essentiel: celui des autorités publiques nationales (le contrôleur général des lieux de privation de liberté) et internationales (le comité européen contre la torture; le commissaire européen aux droits de l'homme) ; celui, aussi, des organisations non gouvernementales, non seulement par les informations qu'elles diffusent mais aussi par leurs actions en justice.

## **3. Les instruments du progrès du contrôle du respect des droits fondamentaux : du droit de l'Union européenne et du droit international des droits de l'homme à l'extension de l'intervention et des pouvoirs du juge**

### **3.1 Le droit de l'Union européenne**

Enrichi récemment par la Charte européenne des droits fondamentaux et l'interprétation qui lui a donnée la CJUE dans deux décisions récentes,<sup>32</sup> il a contribué à la protection des droits fondamentaux au niveau de l'UE et des pays membres lorsqu'ils appliquent le droit communautaire. Des exemples en ont été cités. Le rôle de la jurisprudence de la CJUE, notamment lorsqu'elle statue sur des recours préjudiciels, aspect remarquable du dialogue entre juges, a été capital. S'agissant du droit de l'asile et des réfugiés, pour la première fois une juridiction supra-nationale statue dans ce domaine, innovation remarquable et bienvenue.

### **3.2 Le droit international des droits de l'homme**

En vertu de l'article 55 de la Constitution les traités régulièrement signés et ratifiés ont une force supérieure à la loi. Tout juge a donc le pouvoir d'écarter l'application d'une loi contraire à un traité. La principale source, au niveau européen, est la CEDH et la jurisprudence de la Cour européenne des droits de l'homme.

J. Dufaus, Ph. Dupuy, J.P. Durand, C. Dutheil de la Rochère, F. Gasztowt, M. Guillaume, A.V. Hardel et B. Jeufroy, dir, nouvelle ed., Ed. du Cerf, 2005. Pour un recueil de textes et de jurisprudence, cf. Ministère de l'intérieur, *Laïcité et liberté religieuse. Recueil de textes et de jurisprudence*, Editions des Journaux officiels, 2011. Pour un commentaire parmi une littérature très abondante, citons P. Cabanel, *Entre religions et laïcité. La voie française: XIXème - XXIème siècles*, Privat, Toulouse, 2007; M. Gauchet, *La religion dans la démocratie. Parcours de la laïcité*, Gallimard, 1998; E. Poulat, *La solution laïque et ses problèmes*, Berg International, 1997; *Notre laïcité publique*, id, 2003; avec le concours de M. Gelbard, *Scruter la loi de 1905. La République française et la Religion*, Fayard, 2010 ; pour une étude comparative, *Religions et laïcité dans l'Europe des douze*, dir. J. Baubérot, Syros 1994

<sup>29</sup> Lois du 15 mars 2004 sur le port du foulard islamique dans les établissements publics d'enseignement primaire et secondaire et du 11 octobre 2010 sur le port de la burqa dans les lieux publics.

<sup>30</sup> Les tribunaux sont de plus en plus fréquemment saisis de litiges concernant l'interprétation des notions de laïcité et de séparation, qu'il s'agisse du droit du travail, de celui des fonctionnaires ou des initiatives des municipalités aidant un groupe religieux à construire un édifice du culte ou à disposer d'un local afin de célébrer celui-ci.

<sup>31</sup> La Commission Nationale Informatique et Libertés a notamment souligné le fonctionnement contrasté des fichiers d'antécédents du ministère de l'intérieur. Voir CNIL (2013) Conclusions du contrôle des fichiers d'antécédents du ministère de l'intérieur, Rapport adopté par la CNIL réunie en séance plénière le 13 juin 2013.

<sup>32</sup> 26 février 2013, *Stefano Melloni*, affaire C-399/11 et *Aklagaren c Hans Akerberg Fransson*, affaire C-617/10. Il faut noter aussi l'importance de la notion de protection juridictionnelle effective, mentionnée à l'article 47.

L'acquis de celle-ci est considérable, qu'il s'agisse de la notion de recours juridictionnel effectif, du droit à un juge indépendant et impartial statuant au terme d'un procès équitable, de la qualité du droit applicable, des obligations positives des États parties, de la portée des mesures provisoires demandés par la Cour ou de l'application extra-territoriale de l'article 3. La jurisprudence des deux cours de Luxembourg et de Strasbourg a été un instrument de l'extension des pouvoirs du juge français. En voici des exemples en matière de responsabilité de l'État. Le Conseil d'État a jugé que celle-ci pouvait être engagée du fait d'un jugement définitif possédant l'autorité de la chose jugée lorsque ce jugement a manifestement violé une norme de droit communautaire ayant pour objet de conférer des droits aux particuliers<sup>33</sup>. Le Conseil d'État a appliqué ici un arrêt de la CJUE.<sup>34</sup>

S'agissant du délai excessif avec lequel un jugement a été rendu, la jurisprudence déclare engagée la responsabilité de l'État, écho de la jurisprudence de la cour européenne des droits de l'homme relative à l'article 6-1 CEDH. Enfin le Conseil d'État a déclaré engagée la responsabilité de l'État dans le cas d'une loi de validation non justifiée par d'impérieux motifs d'intérêt général.<sup>35</sup>

Le résultat d'ensemble peut être résumé de la façon suivante : au cours des quarante dernières années, ce que l'on peut nommer les «libertés judiciaires» a été affermi et consolidé en France. Cette notion inclut les progrès de la formation des juges, grâce à l'École nationale de la magistrature, le rôle d'un organisme indépendant, le Conseil supérieur de la magistrature, dans la gestion de la carrière des magistrats et la diminution corrélative des pouvoirs du ministère de la justice.<sup>36</sup> Le contrôle des juges a été étendu à des domaines nouveaux, tels que le droit des étrangers, celui des détenus, le droit social et celui de l'entreprise. Les pouvoirs du juge se sont accrus, grâce notamment à la jurisprudence des deux cours européennes. Les tribunaux judiciaires déclarent de plus en plus fréquemment engagée la responsabilité de l'État du fait du fonctionnement défectueux de l'institution judiciaire.

#### 4. Conclusion: Etat de droit, démocratie et libertés fondamentales

Je ferai ici les remarques suivantes.

1. La notion d'Etat de droit concerne essentiellement les principes de base des institutions politiques et juridiques. Elle a une importance particulière en ce qui concerne les libertés fondamentales, mais sa portée est plus générale. Le régime des libertés fondamentales est la traduction concrète, dans l'ordre juridique, des principes de l'Etat de droit. La notion de démocratie englobe l'ensemble et désigne le régime politique résultant de l'acceptation et du respect des deux éléments précités.
2. En France comme ailleurs, une des conséquences a été l'augmentation de l'intervention des juges (constitutionnels, judiciaires et administratifs) et de leurs pouvoirs, déjà notée.
3. L'Etat de droit inclut aussi la notion selon laquelle la démocratie n'est pas le règne absolu de la majorité.<sup>37</sup>
4. Au-delà des différences sémantiques et historiques entre les trois notions de Rule of Law, d'Etat de droit et de Rechtsstaat, il convient de noter la convergence des pratiques juridiques et des jurisprudences dans les trois pays considérés. La double dimension du droit européen (Convention européenne des droits de l'homme et droit de l'Union européenne)<sup>38</sup> a eu ici et continue à avoir une influence déterminante.

<sup>33</sup> *Gestas*, 18 juin 2008, p. 230

<sup>34</sup> *Köbler*, 30 septembre 2003, affaire C-224/01.

<sup>35</sup> *Gardiedieu*, 8 février 2007, p.78.

<sup>36</sup> On se reportera ici aux rapports annuels d'activité de ce Conseil

<sup>37</sup> Cf. P. Pasquino, *Le principe de majorité et ses limites*, Ed. du Seuil, 2011.

<sup>38</sup> Cf. J. Schwarze, *Droit administratif européen*, Office des publications officielles des Communautés européennes et Bruylant, Luxembourg et Bruxelles, 2 vol., 1994; P. Birkinshaw, *European Public Law*, Butterworths, Londres, 2003

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## IV. Rule of Law in Bulgaria and the Influence of EU Accession

Ivanka Ivanova\*

### 1. An Historical Note

Bulgaria had two so-called ‘socialist’ constitutions – adopted respectively in 1947 and in 1971. Both proclaimed the principle of unity of the power, but also contained lists of rights that were not so different than the lists of rights in liberal constitutions. The meaning of “rights” and “Constitution”, however, were heavily influenced by several communist dogmas:

- The socialist constitutions did not have the status of a law and had no direct effect so they needed a law of transposition in order to become effective.
- There were no limitations to popular sovereignty – international legal norms also needed transposition in order to have effect in the national legal order and there was no judicial review of the constitutionality of the laws.
- Individual rights were always interpreted in correlation with corresponding obligations; the Marxist critic of human rights was adopted as a dogma. They were deemed to be individualistic (hence egoistic) and contrary to the collectivistic spirit promoted by the communist propaganda.
- The State and the law were considered as a part of the superstructure of the society – they reflected the inequality of the economic power of the different individuals and were interpreted as a disguise for the domination of the bourgeoisie. Both the State and the law were expected to fade away in the future communist society.
- There were institutions corresponding to the ones in a democratic State (a Parliament, elections, two political parties), but to a very large extent they were ‘empty shells’ because they were under the control of the Communist Party.

In Bulgaria the concept of rule of law gained importance for the first time in the second half of the 1980s during the times of the *Perestroyka*. Following closely on the footsteps of the Soviet Communist Party, the Bulgarian Communist Party also launched a reform package that included initiatives to promote transparency of the public sector and critical review of the government (known in both Russian and Bulgarian as *glasnost*), to liberate the private economic initiative, to enhance the ‘socialist’ legality and even to set up a separate organ for controlling the constitutionality of the laws. Promoting a specific (‘socialist’) form of the rule of law (in Bulgarian *sotzialisticheska pravova darjava*) was part of the *Glasnost* and *Perestroyka* movement. The concept of the ‘socialist’ rule of law was not very different from the principle of legality. It peacefully coexisted with the totalitarian State described above. The ideological abuse of the concept of ‘rule of law’, however, influenced considerably the way it was later on interpreted by legal scholars.

The Bulgarian expression for “rule of law” is *pravova darjava*. Bulgaria belongs to the group of European countries where the rule of law principle is understood primarily as an attribute/characteristic of the State (Rechtsstaat or Etat de droit). The official English translation of the current Bulgarian Constitution is using the expression “a State governed by the rule of law”, but because this is a tautology, in this text we would rather use the Bulgarian expression *pravova darjava*.

### 2. The meaning of the *pravova darjava* in Bulgaria

Bulgaria adopted a new constitution in 1991, immediately after the fall of the Communist regime. The purpose of the new constitution was to guide the democratic transition of the country. It includes specific reference to *pravova darjava*, on two occasions.

First the Preamble to the Constitution proclaims the resolve of the MPs to create a new State that has three main features: democracy, welfare and *pravova darjava*. It states that “the rights, dignity and security of the

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\* Ivanka Ivanova, Programme Director of the Law Programme of the Open Society Institute (OSI) in Sofia, Bulgaria.

person” are held as the highest principles. In the Preamble, democracy, *pravova darjava* and human rights are presented as different principles, amongst which the human rights principle seems to be held in slightly higher esteem than the other two. According to the dominant legal theory, however, the Preamble does not have a binding nature and it is not directly applicable. Its role is only to provide guidance when there is a need to clarify the meaning of the constitutional norms.

Besides in the Preamble, *pravova darjava* is mentioned in Chapter 1 of the Constitution as one of its fundamental principles. The Constitutional Court established<sup>1</sup> that the content of the *pravova darjava* principle from the Preamble is developed in Art.4 and Art.5 of the Constitution.

According to Art.4 -

- (1) The Republic of Bulgaria shall be a State governed by the rule of law. It shall be governed by the Constitution and the laws of the country.
- (2) The Republic of Bulgaria shall guarantee the life, dignity and rights of the individual and shall create conditions conducive to the free development of the individual and of civil society.
- (3) (new, 2005) The Republic of Bulgaria shall participate in the building and development of the European Union.

According to Art.5 –

- (1) The Constitution shall be the supreme law, and no other law shall contravene it.
- (2) The provisions of the Constitution apply directly.
- (3) No one shall be convicted for action or inaction that did not constitute a crime at the time it was committed.
- (4) International treaties that been ratified in accordance with the constitutional procedure, promulgated and come into force with respect to the Republic of Bulgaria shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.
- (5) All legislative acts shall be promulgated and shall come into force three days after the date of their publication, unless otherwise envisaged by the acts themselves.

According to the Bulgarian constitution, *pravova darjava* and human rights are fundamental constitutional principles that are interconnected. There is no legal definition as to what *pravova darjava* is or what are the components of the principle. The content of the concepts of *pravova darjava* and *human rights* in the national legislation is interpreted by national institutions usually in concert with the ECHR. From this perspective, an important element of the constitutional complex of norms that regulate them is the provision of Art.5 (4) of the Constitution allowing for the primacy of the acts of the international law over the national legislation. It is a new constitutional principle (not known in Bulgaria before 1991), which served after the accession of the country to the ECHR as an effective vehicle to adapt the predominant part of the national legislation to the standards of the ECHR.

The basic constitutional texts related to *pravova darjava* and *human rights* were not altered since 1991. What has changed, however, is the way in which they are interpreted and implemented.

In order to illustrate the change in the interpretation of the constitutional principle we will compare here two texts: the description of *pravova darjava* (rule of law) in a commentary<sup>2</sup> of the Constitution published in 1999 and the definition that the Constitutional Court adopted in the legal reasoning to a decision<sup>3</sup> in 2005.

In 1999, the commentators of the Constitution stated the following:

The constitutional provision that Bulgaria is *pravova darjava* is a declaration that has no real value. It is there to set up the future trend in the development of the statehood, rather than to determine the present character of the state. ... What is proclaimed in the Constitution is the intention to build a *pravova darjava*, i.e. it is in the making, but it is not ready yet. A

<sup>1</sup> Decision of the Constitutional Court No. 22/1995.

<sup>2</sup> B. Balamezov et al. (1999), “The Constitution of the Republic of Bulgaria”, Commentary, Ciela, p.35.

<sup>3</sup> Decision of the Constitutional Court No. 1 of 27 January 2005, p.1.

considerable time period is needed for the establishment of the necessary material, legal, organisational, human resources and other preconditions for the establishment of a *pravova darjava*. Of particular importance is to establish first a new system of social values, new way of thinking and new attitude towards the individual human being and the state, in accordance with the principles of the civil society. ... The democratic state is a state based on law .... The *pravova darjava* is a guardian of the freedom of the individual... The dignity of the unemployed and the other indigent people is a fiction.

The distinctive elements of this interpretation of *pravova darjava* are:

- *Pravova darjava* is examined in its relation to democracy and human rights. But there is more to it. There is a fourth, silent component – the welfare State. By accepting that *pravova darjava* depends on material preconditions, the authors sustain the communist dogma that political rights cannot have a real meaning without socio-economic equality.
- *Pravova darjava* is examined also in its relation to the concept of civil society; the rule of law is presented here as a function of the civil society.
- *Pravova darjava* in this interpretation is not part of the national legal order; it is a mere political project to be implemented in the future; a promise, rather than a reality. It is not binding and it cannot be used to scrutinise the use of the legislative power.

It is difficult to say to what extent this interpretation is shared among the national legal establishment. A Constitutional Law manual<sup>4</sup> published in 2002 seems to be pretty much of the same opinion – it refers to *pravova darjava* in Art. 4(1) of the Constitution as a “declaration”, even though it says “this declaration is essential and it is of great legal and political importance”. The legal importance of the concept is represented as a function of the availability of special mechanisms to guarantee legality and constitutionality. The author distinguishes three such mechanisms: a Constitutional Court, an independent judiciary and the legal science (doctrine).

In 2005, the Constitutional Court gave the following definition of *pravova darjava*:

*The court believes that it is not necessary to enumerate all the elements and all the forms of pravova darjava, because it is a dynamic concept, which is explaining why in the contemporary constitutions there is no positive legal definition. Historically the content of this concept is built of ideas and civilisational standards for the establishment of society, which main concern is the human being. ...*

*Today in the European legal space there is a widespread understanding that pravova darjava includes the principle of the legal certainty (that is, the formal element), as well as the principle of material justice/fairness (the material element).*

*Pravova darjava means exercise of the State authority on the basis of the constitution, within the limits of the laws which are consistent with the constitution from material and formal point of view and which are made with the purpose to safeguard the human dignity, for the achievement of freedom, justice and legal certainty.*

*The prohibition of arbitrariness is an important material component of the rule of law and is applicable to every law.*

There are only six years between these two interpretations of *pravova darjava* and yet they are very different. The common element between the two interpretations is that they consider the concept of *pravova darjava* in connection with the constitutional principle to safeguard human dignity (human rights). But in 2005 for the Constitutional Court there is no doubt that *pravova darjava* is a principle that is anchored in reality; it is legally binding and it can be used to scrutinise the acts of the legislators.

In its practice, the Constitutional Court has stressed other distinctive features of *pravova darjava* as well:

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<sup>4</sup> B. Spassov (2002), Constitutional Law, Part 1, Sofia, 2002, p.99.



- The normative acts have to be clear, precise and should not contain contradictions (Decision No9/1994; also Decision No5/2000).
- Legal certainty is a feature of the rule of law (Decision No22/1998).
- Tax laws are subject to the principle of legality and non-retroactive (Decision No. 9/1996; also Decision No. 22/1996).
- The foundations of the legal order as established by the Constitution are equally valid for the organs of the legislative, executive and judicial power, as well as for all legal subjects (Decision No22/1996).
- The prohibition of judicial review of specific administrative acts has no retroactive effect and the court procedures that have already started cannot be suspended by a subsequent legislative amendment (Decision No8/1999).

The Constitutional Court has been active since 1991 and it referred to the principle of *pravova darjava* for the first time in 1994. In spite of the fact that the Court works with an elaborate definition of the concept, to date the Court has never implemented it as a sole ground to declare the unconstitutionality of a legal norm. There are judges,<sup>5</sup> however, who have referred to it in several important dissenting opinions.

Between 1999 and 2005, there was a significant change in the interpretation of the concept *pravova darjava* – its meaning was transformed from a mere political declaration to a binding constitutional principle; from a political goal to an enforceable legal norm. The internal factors that motivated this development were similar to the ones that led to the gradual promotion of judicial independence in the late 19<sup>th</sup> century in Bulgaria – political pluralism and free elections, the restoration of private property rights, the development of market economy/competition between autonomous economic agents and the development of civil society. They created the demand for rule-of-law reforms and provided the ‘agents’ of the reform on national level. For the most part, however, the internal reforms related to the democratisation of politics, the restoration of private property and the transition from a centralised planned economy to market economy were driven by the political and legal complex surrounding the prospects for membership of Bulgaria first in the Council of Europe and then in the EU.

### 3. EU Integration and the CVM

Bulgaria joined the COE and the ECHR in 1992, and until the end of the 1990s the ECHR became the most important legal text of reference when the issues of rule of law and human rights were debated.

In 1995 the Bulgarian government presented the country’s application for membership of the EU and the Copenhagen criteria provided a powerful impetus for reforms.

In 1997 the European Commission gave an initial opinion<sup>6</sup> on Bulgaria’s preparedness to meet the Copenhagen criteria for membership.

At the time, EU membership itself was seen by the Bulgarian government as an instrument “to consolidate the results of the democratic reforms which have been carried out since the beginning of the 1990s”, i.e. the national government did not anticipate having to engage in further democratic reforms within the framework of the EU membership negotiations.

Further reforms in relation to the rule of law and human rights were anticipated, however, and actually implemented. Four amendments to the Constitution were made between 2003 and 2006, explicitly with the goal of meeting the Copenhagen criteria. New laws were adopted and new institutions created.

Bulgaria’s EU membership negotiations were conducted in 31 thematic chapters – based on the different areas of the *acquis communautaire*. There were no thematic chapters for the political criteria. The content of Chapter 24, Justice and Home affairs, was largely dominated by the Schengen *acquis* – border control, immigration etc.

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<sup>5</sup> See in particular Rumen Jankov’s dissenting opinions to the decisions of Constitutional Court cases No. 11/2000, No. 6/2001, No. 7/2001 and No. 2/2002.

<sup>6</sup> Commission Opinion on Bulgaria’s Application for Membership of the European Union, DOC/97/11 of 15 July 1997.

Within the assessment of the political criteria, Bulgaria's capacity to implement effectively the ECHR and other legal instruments of the COE was not evaluated in detail. The question was approached from a formal point of view – whether or not Bulgaria has ratified the ECHR and the main additional protocols. In particular the question of the application of the ECtHR's judgments against Bulgaria was not pursued as a separate problem in the negotiations for EU membership.

Negotiations were technically completed in June 2004. At the time, the Commission concluded<sup>7</sup> that Bulgaria (and Romania) fulfilled the Copenhagen political criteria, they were functioning market economies and they “have continued to make good progress in adopting the *acquis* and have generally fulfilled their commitments made in the negotiations”. A note was made with regard to the political criteria and the capacity to adopt the *acquis*: “Improvements need to be made in particular in the reform of their public administration, the functioning of their judicial system, and the fight against corruption...”

Between then and 2007 (when Bulgaria officially joined the EU), the concerns of the other EU member states with the capacity of Bulgaria to meet the political criteria for membership grew immensely. These concerns were not connected to all the political criteria – problems with human rights and democracy were rarely mentioned. The entire focus of attention was on the high level of corruption and organised crime that at the time were perceived as challenges to the rule of law.

The last pre-accession report<sup>8</sup> of the European Commission concluded that despite Bulgaria's readiness to join the EU, some problems still remained “in the accountability and efficiency of the judicial system and law enforcement bodies with regard to their capacity to implement and apply the measures adopted to establish the internal market and the area of freedom, security and justice”.

In order to address these challenges, the Commission introduced<sup>9</sup> the Cooperation and Verification Mechanism (CVM) – a special instrument to monitor and assist progress in the reform of the national judicial and administrative systems and the fight against corruption and organised crime in Bulgaria and Romania post-EU accession.

Under the CVM, Bulgaria and Romania are obliged to report periodically to the Commission about the reform measures they implement and their results; for each country there are specific benchmarks to be achieved. The benchmarks that Bulgaria is expected to meet are defined as follows:<sup>10</sup>

- 1) Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
- 2) Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase.
- 3) Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.
- 4) Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials.
- 5) Take further measures to prevent and fight corruption, in particular at the borders and within local government.
- 6) Implement a strategy to fight organised crime, focusing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.

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<sup>7</sup> Communication from the Commission to the Council and to the European Parliament, Strategy Paper of the European Commission on progress in the enlargement process, COM (2004) 657 final, of 6 October 2004, p.3.

<sup>8</sup> European Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 final, 26 September 2006

<sup>9</sup> Commission Decision 2006/929/EC from 13 December 2006.

<sup>10</sup> Commission Decision 2006/929/EC, Annex 1.

The Commission is assessing independently the progress of the two countries and on its own behalf it is reporting to the European Parliament and the Council. Six annual reports have been produced so far for Bulgaria. The method consists of periodic reports sent from the Bulgarian government to the Commission and visits by Commission experts and experts from other EU member states. There is no time limit for the implementation of the CVM. The monitoring will end if and when the Commission decides that Bulgaria and Romania meet all the benchmarks. The Commission also can, on its own discretion, amend the benchmarks set for each country. The understanding of the Commission is also that the benchmarks are interconnected they describe a situation that has to be achieved.

Despite the fact that there are six benchmarks, the actual object of monitoring under the CVM is focused on criminal justice and on the national judiciary. In the words of the Commission: “The rationale for the CVM is not to establish a check-list, but to develop an independent, stable judiciary which is able to detect and sanction conflicts of interest, combat corruption at all levels and deal effectively with organised crime.”<sup>11</sup> In the first CVM report, the outcome that Bulgaria has to deliver was described: “The real tangible measure of success remains the number of successful prosecutions and convictions”.<sup>12</sup>

In response to the CVM, Bulgaria maintained a pre-accession policy assorted with an effort to increase the effectiveness of criminal justice. The measures taken consisted in numerous legislative amendments; constant, but not important rearrangement of the institutional setting related to the pre-trial phase of the criminal proceedings and granting law enforcement institutions new, specialised powers to combat corruption and organised crime.

These, however, were never the real problems: the law enforcement institutions were very strong and influential in communist times and they survived intact the democratic transition. The actual challenge still is to put them under parliamentary scrutiny and independent judicial review, but the government took no such measures under the CVM.

The choice of the number of convictions as a “measure of success” was criticised at the national level because the Bulgarian criminal justice system has a very high rate of convictions any way – the share of acquittals in some years is less than 2% of all criminal court cases. There are regional prosecution services in the country that were proud to report even less than 1% acquittals.

By playing ‘tough on crime’, the government also created serious risks for fundamental rights. The most notorious examples are connected to the establishment of the specialised criminal court (for organised crime) and the adoption of a new law on confiscation of illegal assets. These were reform steps of the Government taken in response to the CVM; as such, they were explicitly recommended by the European Commission and strongly supported by the ambassadors of key EU member states in Sofia. Bulgarian civil society organisations, however, were against the adoption of both measures with the argument that they were in violation of constitutional rights.

Under intensive pressure from the government, in 2009 the Supreme Judicial Council singled out some 80 criminal cases and set up a specialised commission to monitor their progress. The only report of this special commission was criticised at the national level as being unscientific and utterly unconstitutional. The selection of the cases to be monitored was arbitrary: the list of the cases was never made public, but it allegedly included cases of money laundering, embezzlement of EU funds, as well as traffic accidents. Moreover, according to the Bulgarian Constitution, the sole function of the SJC is the career development of judges and prosecutors, so the Council did not have any legal ground for arbitrary monitoring of criminal law cases. Many judges perceived the monitoring of the cases on behalf of the SJC as an undue influence on their independence.

At the end of 2009 and in 2010, the police and prosecutorial statistics showed an increase in the number of indictments for organised crime (drug offences, money laundering, trafficking in human beings, bribery, and EU funds embezzlement). Top administrators and politicians were brought to court under criminal charges for the first time in recent history. This trend was not sustained in 2011 and 2012 and most of the high-

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<sup>11</sup> Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2009) 402 final, 22 July 2009.

<sup>12</sup> Report from the Commission to the European Parliament and the Council on Bulgaria’s progress on accompanying measures following Accession, COM (2007) 377 final, 27 June 2007.

profile cases ended up in acquittals, so if the results are to be measured by convictions, the ‘success’ was temporary.

For the time being, the CVM goals have not been achieved and the Commission has announced the intention to continue monitoring under the CVM for an indeterminate length of time without altering the benchmarks and the method.

Technically speaking, there are no legal sanctions if Bulgaria fails to meet the CVM benchmarks. The Decision for its establishment makes reference to the safeguard clauses that are part of the Bulgaria’s EU accession treaty, which include general economic safeguard clause (Art. 36), a specific internal market safeguard clause (Art. 37) and a specific justice and home affairs safeguard clause (Art. 38), allowing the Commission to propose measures against the country in case it fails to implement the relevant *acquis*. But any such measure would require a unanimous decision of the other EU member states. The clauses expired at the 3<sup>rd</sup> year of Bulgaria’s EU membership, which in no way affected the implementation of the CVM.

In practice, however, Bulgaria suffered twice negative consequences related to the lack of sufficient progress under the CVM.

In the spring of 2008, the Commission suspended the pre-accession funds for Bulgaria (that were still not absorbed at the time) and froze the payments under various other financial instruments. With the July 2008 CVM report, the Commission published a separate report “On the Management of EU Funds in Bulgaria”. By linking the CVM to the country’s capacity for the absorption of EU funds, the Commission effectively provided the mechanism with a tangible sanction, thus considerably increasing its political weight and stimulating the Bulgarian government to re-engage on the reform path.

Bulgaria and Romania’s accession to the Schengen zone was postponed on several occasions, in spite of the fact that they fulfil the membership criteria. For the time being both countries do not have a clear time horizon as to when (if at all) they will join. Representatives of EU member states (the Netherlands, Germany and Finland) made an explicit link between advancement under the CVM and Schengen membership.

#### **4. The influence of EU integration and the CVM on democracy, *pravova darjava* and human rights in Bulgaria**

The main positive effect that the membership in the Council of Europe and EU accession had with regards to Bulgaria’s adherence to the principles of democracy, *pravova darjava* and human right consists of anchoring the concepts of *pravova darjava* and of human rights in the legal reality – they were transformed from a mere political declaration into binding constitutional principles; from political goals into enforceable legal norms.

In spite of the fact that contemporary Bulgarian jurisprudence interprets the three concepts as interconnected and mutually dependent, this positive development is most tangible in the area of human rights protection. For the time being, it seems that the achievements are lasting and reform is impossible (unlike the achievements related to rule of law and democracy). The following factors may explain the relatively lasting success of the reforms in the area of human rights:

- the standard is set through a coherent body of legal norms (the ECHR);
- there is a fixed supranational legal mechanism to monitor and sanction deviant behaviour of the states (the ECtHR);
- the triggering of this mechanism is relatively easy and is not dependent on political circumstances – individuals can address the ECtHR; and
- the political weight of the EU is supporting the implementation of the ECHR.

Additional positive effects of the EU accession are that there was a visible increase in the transparency and better access to public information related to the activity of law enforcement, the prosecution and the courts. This is a precondition for the development of mechanisms for accountability of the institutions and for putting them under democratic control, which is an element of democratic government.

The factors that reduced the reform potential of EU integration in Bulgaria may be summarised as follows:

- Throughout the process of EU membership negotiations, the importance of the political criteria for membership seemed to be overshadowed by the economic criteria and the question of the administrative capacity to apply the *acquis*.
- With the CVM, the Commission is not following a fixed definition of rule of law and it considers the problem in isolation from human rights or democracy. This approach allowed the Bulgarian government to report as reform steps acts that made it look ‘tough on crime’, but which were restricting fundamental rights.
- The CVM does not rely on preliminarily agreed progress indicators; hence it is difficult to actually track progress. The monitoring has been focused exclusively on the performance of the criminal justice system and relied heavily on one indicator – convictions. This approach actually contradicts the CVM logic – it legitimised the end-product of a system that was considered already to be dysfunctional and in need of reform.
- This approach also allowed the government to distort the CVM into an instrument to put undue pressure on the judiciary; judges who pronounced acquittals in so-called ‘high-profile’ cases were attacked publicly by the government and media, without due assessment of who was really to blame for the failure of the case. So, instead of promoting judicial independence as the core element of the concept of rule of law, the CVM provided an excuse for the national government to undermine it.
- After EU accession, the CVM focused monitoring primarily on the judiciary and law enforcement, and underestimated the challenges that Bulgaria was facing in rule-of-law reforms – in designing the CVM, the Commission seemed to miss the point that the rule of law in a country is inseparable from the overall health of its democracy, market economy and civil society.

## V. European Semester for Economic Policy Coordination as a Blueprint for the Rule of Law Supranational Surveillance

Cinzia Alcidi and Matthias Busse\*

### 1. Introduction

Financial and economic crises usually cause large losses in countries' income and citizens' welfare, but they also offer the opportunity to promote reforms that otherwise would be deemed politically infeasible. The euro-area crisis is certainly a suitable example in this respect. Following in the wake of the crisis and the pressures from the financial markets, European institutions and national governments hastened to introduce changes aiming, on the one hand, to manage the crisis and, on the other hand, to set up a new system of governance that would prevent other crises from reoccurring.

Under the hypothesis that a full fiscal and political union (as a complement to the monetary union) is not an outcome that will materialise soon, the EU strategy has been guided by the objective to strengthen economic governance at European level to ensure that policies are sound *ex-ante* in the different countries and coherent among member states. As the crisis showed that the Stability and Growth Pact (SGP) had failed to deliver fiscal discipline and large macroeconomic imbalances had built up within the monetary union eroding competitiveness of some member states and abating their economic growth prospects, the new governance has aimed at strengthening the existing Stability and Growth Pact (SGP) and complement it with the macroeconomic imbalances procedure (MIP) and a more effective enforcement mechanism.

It is worth noting that since changes have been triggered in response mainly to the euro area crisis and its features, and not to a crisis of the EU as a whole, they have resulted in a very complex system of economic governance with different layers of legislation, i.e. six-pack, two-pack and Treaty on Stability, Coordination and Governance (TSCG), and overlaps of competences at EU and euro area level, which often are difficult to disentangle.

The six-pack derives its name from the fact that it contains five regulations and one directive which build on the EU Treaties, specifically Art. 121(1)<sup>1</sup> of the TFEU, and introduce the macroeconomic surveillance mechanism as well as strengthen the existing SGP. They set the framework of the European Semester for Economic Policy Coordination. The European Semester is the cycle of economic and fiscal policy coordination which combines such changes. As the name already indicates, it is set as one-half of the year in which national economic policy plans are analysed and evaluated on a European level. Budget plans and reform programmes are scrutinised to make sure meeting fiscal targets is not jeopardised, economic growth is fostered and excessive macroeconomic imbalances are prevented.

The two-pack is the set of two regulations building on the legislation included in the six-pack and which aim at strengthening the legal basis of the European semester, particularly for the euro area countries and those in severe economic and budgetary difficulties.

The TSCG introduces a commitment to incorporate the so-called debt-break into national constitutions for the member states of the Monetary Union and other EU member states that opted to sign.

All three pieces of legislation have the common objective to strengthen the economic coordination and fiscal discipline, particularly for the euro area, either by increasing the competences of the European Commission over the budgetary powers of the national governments or by ensuring that member states commit in the strongest manner, i.e. through national constitutional law, to budgetary discipline. As of today, the hypotheses that these two approaches are complementary, overlapping or competing remain all untested.

Apart from the question of how this new framework will work and how effective it will be, another issue relates to the democratic legitimacy of the initiatives, which, as is argued in this paper, is rather weak.

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\* Cinzia Alcidi, Research Fellow and Head of the Economic Policy Section, CEPS; Matthias Busse, Research Assistant, Economic Policy, CEPS.

<sup>1</sup> "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council" and furthermore "The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States."

Against this background, the rest of this note is organised as follows. The next section provides a detailed description of how the European semester architecture is drawn. Section 3 considers its enforcement mechanisms and highlights the strengths and weaknesses of this process. Section 4 looks at the features of TSCG and tries to put it in relation to the SGP. The last section tries to answer the question of whether such a framework could be mimicked in other fields and draws some conclusions.

## 2. The European Semester's architecture

As illustrated in Figure 1, the full cycle of the European Semester starts in January (or even December) with the European Commission's publication of the *Annual Growth Survey* (AGS) and the *Alert Mechanism Report* (AMR). The AGS provides a (potential) foundation for the entire cycle concerning budgetary measures and reform agendas. Besides its growth forecasts, the AGS states policy goals on which policy recommendations and then the action of the member state during the ensuing cycle should focus. In the AGS 2013 (same as the year before), these goals were:

- Pursuing differentiated, growth-friendly fiscal consolidation
- Restoring normal lending to the economy
- Promoting growth and competitiveness for today and tomorrow
- Tackling unemployment and the social consequences of the crisis
- Modernising public administration

The pursuit of these targets filters into the *Stability and Convergence Programmes* (SCPs) and *National Reform Programmes* (NRPs) which are to be published by each member state in April. Beforehand, however, the AGS are assessed by the Council and adopted by the European Council to be converted into policy orientations for the member state. This process precedes national plans with the specific purpose of influencing national policy-making in its initial stage.

During the same period the AMR portrays macroeconomic trends and levels to signal current and potential macro imbalances.<sup>2</sup> Member states that are considered to be at risk of multiple imbalances posing a threat to Union receive in April an 'in-depth report'. The imbalances are identified on the basis of a scoreboard entailing a series of 11 (plus background and complementary) quantitative indicators. Either a threshold or a range of 'normality' is attached to each of them to identify deviations that can lead to excessive imbalances.

In May, together with the most recent estimations under the Commission's winter economic forecast, the European Commission combines the findings in the in-depth report (MIP arm) and the MS reform and budget plans submitted under the NRP and SCP and produces its *Country Specific Recommendations* (CSRs).<sup>3</sup> These are once again picked up by the Council and subsequently adopted by the European Council. This ends, broadly speaking, the European Semester in mid-year and is followed by national member states implementing the CRS. The Commission closely scrutinises their implementation throughout the rest of the year.

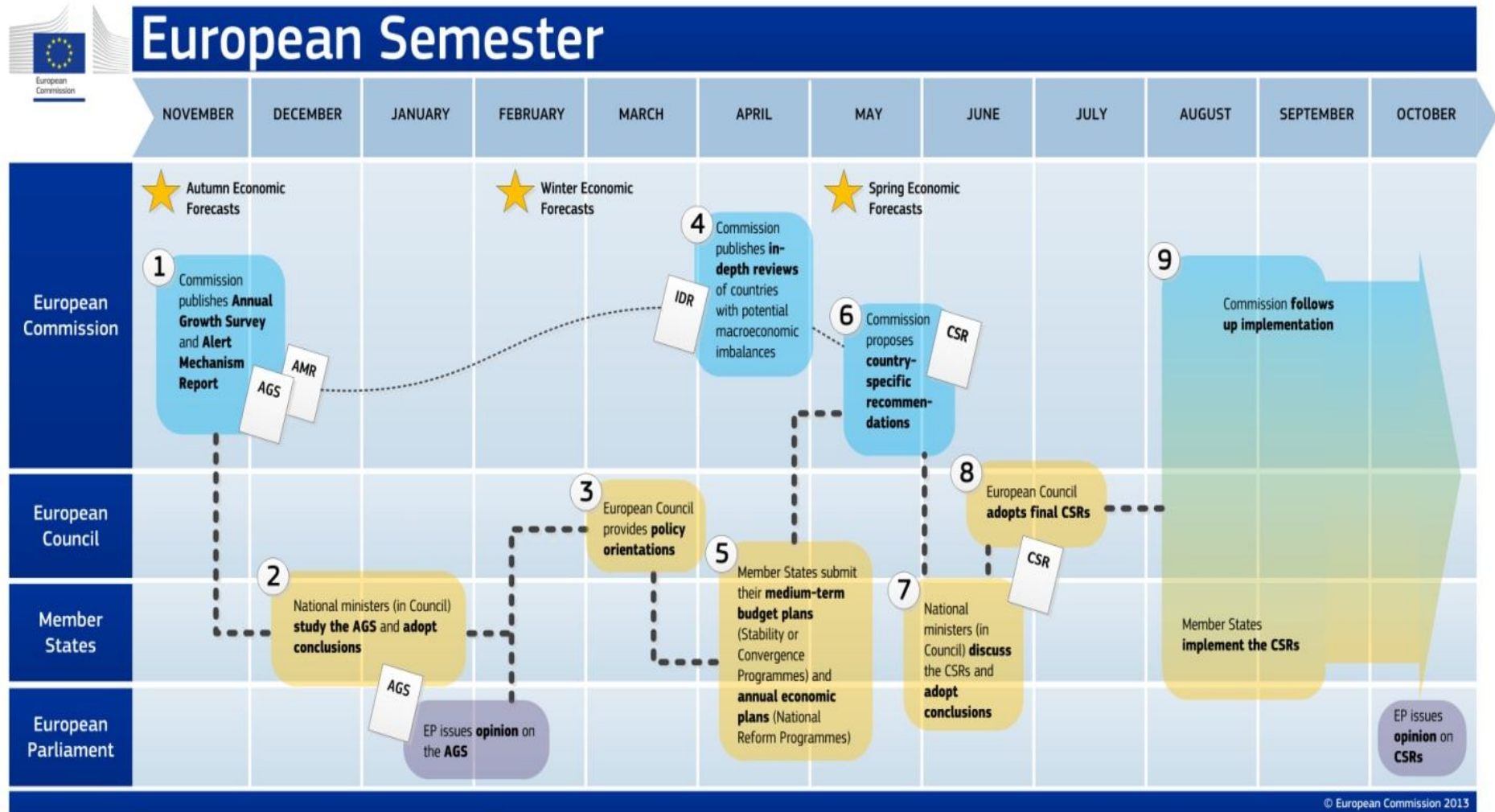
As illustrated in the figure below, the European semester involves the action of different European actors with rather specific tasks and a very unbalanced weight in the process: The European Commission runs a large part of the show by providing background information for the assessment of the countries' economic situation and policies at the start of the cycle and then by drafting the country-specific recommendations, while the European Council has the key role to adopt the final recommendations. By contrast, the European Parliament has only the very marginal role to express an opinion before policy orientations are formulated in the early stage of the cycle, as described below.

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<sup>2</sup> As will be explained in the next section, not all measures/sanctions applied to euro-area countries are applied to other EU, non-EMU MS.

<sup>3</sup> An exception to this is applied to the 'programme countries' i.e. Cyprus, Greece, Ireland and Portugal, which do not receive any CSRs as they are already under close surveillance of the ECB, IMF and European Commission.

Figure 1. The European Semester cycle



Source: European Commission.



“In a resolution adopted on 1 December 2011, Parliament expresses its concern regarding the **lack of democratic legitimacy** of the introduction of the European Semester. It considers that Parliament should be recognised as the appropriate European democratic forum to provide an overall evaluation at the end of the European Semester and therefore should organise, from 2013, prior to the Spring European Council each year, an interparliamentary forum at the European Parliament for members of the competent national parliamentary committees. It also takes the view that its President should participate in the European Council's meetings on the European Semester” ([www.europarl.europa.eu/oeil/popups/thematicnote.do?id=2050001&l=en](http://www.europarl.europa.eu/oeil/popups/thematicnote.do?id=2050001&l=en)). “The European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of European Council or the President of the Eurogroup to discuss issues related to the European Semester. Individual Member States may also be offered the opportunity to participate in an exchange of views” ([www.consilium.europa.eu/special-reports/european-semester/how-does-the-european-semester-work](http://www.consilium.europa.eu/special-reports/european-semester/how-does-the-european-semester-work)).

Meetings between the European Parliament and national parliaments can take place both in the pre-spring Council (in the ECON, EMPL & BUDG committees) and the ECON meetings in September, but the aim is only to discuss national policies on the basis of the AGS. In addition, the European Parliament can publish an own initiative report on the opinion on employment guidelines, but neither the Council nor the Commission is accountable to the European Parliament. They merely have to ensure that the EP's opinion is acknowledged.

There is little doubt that from a technical point of view (both in terms of staff and competences) that the European Commission is best placed for the surveillance of national economic conditions and policies. Moreover its status as the body that voices the European interest, above national interests, should ensure that such a process is carried out in effective fashion. However monitoring and assessing may be less objective and more complicated than one would expect. Even the quantitative indicators are seldom as clear-cut as they might seem at first glance. For instance the cyclical component of cyclical deficit can be based on different formulas but they all have one thing in common: they are estimates that are often revised over time. Similar caveats can be made for the MIP scoreboard, despite having a backup indicator.

Two crucial issues arise in the context of the MIP. The first relates to the concept of ‘normality’, for which there is neither theoretical nor empirical economic foundations. In the end thresholds and ranges are not objective and subject to judgement. One example of the importance of a judgement component is given by asymmetric range imposed on current account imbalances,<sup>280</sup> which has provoked much debate in the last few months. The second issue is about what kind of action a government can undertake to affect matters falling outside the fields of budgetary and reform policies. While it must be acknowledged that the MIP represents the clearest attempt to learn from the mistakes made before the crisis and the information it collects is relevant, as it could work as warning mechanism, the fact remains that, in most cases, governments do not control the mechanisms behind macroeconomic imbalances, which are mainly driven by market forces. What policies can do is to affect behaviour through incentives, which means that their influence on the final target is only indirect and implies a lag.

Lastly, if we assume that the framework is monitoring the correct indicators and imposing the appropriate policies to bring the member states back on course, the question remains what tools do the European institutions have at their disposal to ensure compliance? The next section tries to answer this question.

### 3. The enforcement of the rules

As described above, the European Semester is organised along two arms: the preventive arm and the corrective arm. In the case of the budget section, the preventive arm consists of the medium-term budgetary objectives (MTOs) under the SGP. Every member state has a certain timeframe and level to be reached along a determined path unless they already fully fulfil the MTOs.<sup>281</sup> Advices on how to achieve the MTOs as well

<sup>280</sup> A current account deficit larger than -4% (of GDP) is considered an excessive imbalance, just as a current account surplus of more than 6% (of GDP); hence, it is clearly visible that upper bound is more leniently set. This is relevant in the current debate as the German current account is just below 6%. If the range were symmetric, Germany would be in position of excessive imbalance.

<sup>281</sup> [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/preventive\\_arm/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/preventive_arm/index_en.htm)

as macroeconomic rebalancing measures are delivered within the CSRs each year, thereby providing *ex ante* guidance to the member state to prevent the engagement of the corrective arm.<sup>282</sup>

Once the Commission has determined that proposed preventive measures have not been implemented and the budget deficit or macroeconomic imbalance persists, and after adoption by the Council, the corrective arm is triggered. An excessive deficits procedure (EDP)<sup>283</sup> and an excessive imbalance procedure (EIP) will be launched by the European Commission, thereby openly attesting that the concerned member state is in violation with regard to its budget or imbalances. It is worth noting that a member state that receives a recommendation (for example, to reform its pension system or liberalise its service sector) is neither fined with an EDP nor an EIP, as long as its indicators are within the specified limit (even if the underlying, criticised problems remain and pose a threat in the long run). Under such an hypothesis, the member state is obliged to hand in its short-to-medium-term plan to bring the budget/economy back onto a sustainable path. If the intended budgetary corrections are deemed by the Commission to be non-credible, it can ask the concerned member state to draft a new budgetary plan. If the excessive deficits persist, the European Commission can opt to file a recommendation to the Council to exact a non-interest-bearing deposit (0.2% of GDP). Note that this sanction is only applicable to euro-area member state. The deposits may not exceed 0.5% of GDP and after two consecutive years of neglected correction of the EDP (confirmed by the Council), the deposit is converted into a fine. Reverse qualified majority voting was introduced in 2010 for these procedures in the Council in order to facilitate the adoption of the Commission's recommendations. Moreover, the member state concerned is excluded from the vote, setting the bar even higher to overrule the Commission's recommendation. A similar approach is used for the EIP, although the interest-bearing deposit is capped at 0.1% of GDP.

Neither the fine nor the interest-bearing deposit has been made use of thus far and it remains still to be seen how the Council will rule should a strong country be on the verge of receiving a fine. The reverse majority procedure is meant to rule out a *quid pro quo* outcome, which was observed during the 2004 SGP violation of German and France.

#### 4. Strength and weaknesses of the process

The two previous sections have illustrated the complex architecture of the European semester. The good intentions behind this new framework of governance should certainly be acknowledged, yet this set-up suffers from a number of limitations.

The first one is about democratic legitimacy of decisions. This is largely related to the European actors involved in the process and mainly, to the limited role played by the European Parliament. This aspect spills over into the issue of lack of ownership of policies and structural reforms, which are perceived by countries as being imposed by Brussels, i.e. the Commission.

Another limitation relates to the assessment of the implementation of CSRs by national governments. While in the case of specific quantitative targets, the assessment should be simply based on the outcome (that is indeed the task of the EDP and the MIP), in the case of reforms or medium-term objectives, the evaluation seems to be based more on the effort made in order to achieve a certain objective rather than on the results obtained. In fact, the short experience gained so far suggests that even in the case of numerical targets, the assessment is not always based on outcome. The extension offered to Spain and France to achieve their budgetary targets given the negative cycle is an example in this direction. This may not necessarily mean that such an approach is wrong, but it certainly suggests that judgement plays a key role and as such it can be influenced, despite the fact that the Commission is supposed to act as a '*supra partes*' institution. Until now the sanctions foreseen in case targets are not met have never been triggered and the resort to judgement or unobservable variables has always played a crucial role.

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<sup>282</sup> The legal basis is anchored in Article 121(4) TFEU<sup>282</sup> and that for the SGP, in Article 126 TFEU. Interestingly, for the euro-area Member States, even a failure to comply with the MTOs (determined by the Council) will incur the obligation to set up an interest-bearing deposit account of 0.2% of GDP.

<sup>283</sup> See TFEU Protocol on the excessive deficit procedure.

In practice, there seems to be an asymmetric evaluation of CSRs: strong countries tend to ignore the recommendation and no action is taken against them.<sup>284</sup> Similarly weaker countries tend to be too proactive without being able to deliver. Italy and the systematic recommendation to improve its judicial system is an example in this respect. Despite efforts on the part of almost every government to implement changes in this respect, it is hard to see any significant improvement.

## 5. The Treaty on the Stability, Coordination and Governance (Fiscal Compact)

The TSCG was signed in March 2012 by 25 of the 27 EU member states<sup>285</sup> and by December 2012, it was ratified by 12 euro-area member states, a sufficient condition for the treaty to enter into force on 1 January 2013.<sup>286</sup>

The treaty contains two main provisions:

- First, the annual structural balance of the general government of the signatory countries must respect a country-specific medium-term objective as defined in the SGP with a lower limit of a ‘structural deficit’ of 0.5% of GDP and ensure rapid convergence towards it in the case of deviation (Art. 3).
- Second, in the case of failure of a contracting party to comply with the recommendation, a procedure may be launched within the Court of Justice of the European Union (CJEU), which can impose a sanction not exceeding 0.1% of its GDP.

According to the Treaty, the member state will have to incorporate the provision on the budgetary discipline and the automatic correction mechanism into their national legal systems, preferably at constitutional level within the year following the entry into force, i.e. 1 January 2014. Many countries have already proceeded in this sense, including the introduction of the so-called ‘golden rule’ into their constitution, but this mechanism is still not working and how the rule will be applied is still not known.

What is certainly known is that the concept of ‘structural budget’, which is central in this framework, is at best uncertain. It is not observable and its calculation is subject to revisions, which may also prove to be substantial over time. In practice, this may limit considerably the stiffness and certainty of this simple rule.

The TSCG has a significant overlap with the new SGP and the subsequent extensions for euro-area member states. In all three of these extensions, the six-pack, the two-pack and the TSCG, fiscal discipline is the common denominator, but specific targets are different (nominal deficit in the case of the SGP and structural deficit in the case of TSCG). Furthermore, correction mechanisms are triggered under different circumstances, sanctions are different and the actors involved are also different. In this last respect, under the SGP, the European Commission plays a dominant role, in contrast to the TSCG where its role is rather limited and where national countries have first of all to respect their own (constitutional) rules; in the case of infringement of certain rules, the matter can end up before the CJEU.

This last point reminds us of the key difference between country-specific recommendations issued in the framework of the European semester, whose implementation is assessed by the Commission with limited enforcement power in case of non-compliance, and the case of non-compliance with national, constitutional law under the TSGC and the possibility of the case being brought before the CJEU.

## 6. Conclusion

The European Semester is still a young procedure and it certainly is too early to make a final assessment about its efficiency and impact on national policy-making. The first three cycles do provide a hint of what has worked well and where results fell short of expectations.

While on the one hand, the effort to improve surveillance and coordination within the EU must be acknowledged, the process seems to suffer from some limitations in terms of democratic legitimacy as well in terms of quality of the assessment of the countries’ results and the effort to comply with the

<sup>284</sup> See the example of Germany about improving competitiveness in Gros & Alcidi (2013).

<sup>285</sup> The United Kingdom and the Czech Republic opted not to sign the treaty, which is not mandatory for EU countries as it is not part of the EU treaties.

<sup>286</sup> The Treaty is legally binding as an international agreement (the result of an intergovernmental initiative). According to Art. 16, its substance will be incorporated into the existing EU treaties within five years from the entry into force.

recommendation issued by the Semester exercise. The analysis above suggests that the latter problem often exists when the assessment is based on both qualitative and quantitative indicators.

Can this procedure be applied to fields other than economic governance? The analysis in this note suggests that the European Semester performs a useful exercise but its limitations should be taken into consideration. This should especially be the case when quantitative indicators and targets do not exist at all or are just proxies for un-measurable variables.

Overall it is advisable to beware of systems based on procedures/processes where judgement plays a key role and which lack democratic legitimacy.

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