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Council of Europe and the Rule of Law

Polakiewicz J[1]* and Sandvig J[2]

[1]Professor at the Europainstitut of the University of Saarbrücken and Director of Legal Advice and Public International Law (Jurisconsult), Council of Europe
[2]Master of Laws from the University of Oslo, Associate Lawyer at the Norwegian Attorney General's Office -Civil Affairs (on leave) and Intern at the Directorate of Legal Advice and Public International Law, Council of Europe. All views expressed here are personal.

Abstract

The Council of Europe works on a daily basis to promote and strengthen the rule of law in and among its member states. The Council of Europe has taken up the European Commission's invitation to engage in further discussions on the complementarity of existing and new mechanisms. The European Union's rule of law initiative could become a catalyst for a further deepening of the strategic partnership between the EU and the Council of Europe. The member states of the Council of Europe all agreed on the importance of the rule of law as a fundamental value and steering principle for future work of the organization.

Keywords: Council of Europe; Rule of Law; Venice Commission; Constitution; Legislation

Introduction

The Council of Europe is founded on the rule of law as one of three core principles. This transpires from the preamble of the Statute of the Council of Europe (ETS No. 001) and the requirements for membership in its article 3 [1]. According to this provision, respecting the rule of law is a precondition for accession of new member states to the Organisation. If a member state seriously violates the respect of the rule of law, article 8 of the Statute provides that it may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw.

In light of the extensive discussions the notion rule of law has given rise to, it is all the more interesting to see that the notion emerged in the statutory document of the organisation rather seamlessly. The minutes from the Preparatory Conference for the establishment of the Council of Europe in 1949 reveal that the references to the rule of law in the statutory text were adopted without discussion [2]. The ten founding states of the Council of Europe all agreed on the importance of the rule of law as a fundamental value and steering principle for future work of the organisation.

Since, the Council of Europe has referred systematically to the rule of law in major political documents and in numerous legal instruments. First and foremost, reference to the rule of law is made in the European Convention on Human Rights. Its preamble famously places the rule of law as an indispensable part of *'the common heritage'* of the European countries. The European Court of Human Rights (ECtHR) has come to regard the rule of law as a principle inherent in the whole Convention [3]. ECtHR case-law provides important guidance on the content of the principle, as it has been interpreted and applied under rule of law-related provisions such as the articles 6, 7 and 13 of the Convention [4].

Other important documents referring to the rule of law include the Vienna Declaration (1993), Strasbourg Final Declaration and Action Plan (1997) and the Warsaw Declaration (2005). In the Warsaw Declaration, the Heads of State and Governments committed '*to strengthening the rule of law throughout the continent, building on the standard setting potential of the Council of Europe and on its contribution to the development of international law*'. In this respect, they stressed '*the role of an independent and efficient judiciary in the member states*' and agreed to '*further develop legal cooperation within the Council of Europe with a view to better protecting our citizens and to realising on a continental scale the aims enshrined in its Statute*'. The Committee of Ministers' recommendation CM/Rec(2007)7 to member states on good administration could also be mentioned [5]. The recommendation considered that the requirements of good administration '*stem from the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency*'.

The Administrative Tribunal of the Council of Europe also referred to rule of law internally. In its judgment of 13 March 2014, it recalled that *the Council of Europe, by its very nature and the values it defends, has a duty to be an organisation upholding the rule of law, that is to say, it must fully honour staff rights in the context of legal relations between the administration and staff (see Recommendation 1488 (2000) on the nature and scope of the contractually acquired rights of Council of Europe staff, Article 4)* [6].

This paper presents in part II some reflections on an attempted consensual core content of the notion rule of law, its applicability and potential. In part III, we introduce a selected range of Council of Europe advisory bodies, monitory mechanisms and benchmarking institutions that have a particular impact on different aspects of the rule of law in member states. In part IV, we outline the cooperation between the Council of Europe and the European Union in the field of rule of law, and offer some thoughts on how to enhance synergies and provide added-value in the future. Some conclusions will be drawn in part V.

Defining the Rule of Law within Europe

Despite the general commitment to the principle of the rule of law within the Council of Europe, the content of the notion is not strictly carved out. The extensive body of legal and political instruments within the Council of Europe does not provide any authoritative definition.

***Corresponding author:** Polakiewicz J, Professor at the Europainstitut of the University of Saarbrücken and Director of Legal Advice and Public International Law (Jurisconsult), Council of Europe, E-mail: Jorg.POLAKIEWICZ@coe.int

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This is also true for the legal system of the European Union, which lacks a commonly agreed concept of rule of law [7]. Nor is the notion defined by law in the very states which can be seen to have fostered the concept in European legal doctrine. The *Grundgesetz*, the German Constitution of 1949, refers to the rule of law in three articles, but does not define its content [8]. In the United Kingdom, the rule of law is not defined in any overriding constitutional or statutory document [7]. Neither does French positive law offer any definition.

The bilingual preparatory documents for the Council of Europe convey that the term 'rule of law' in the English draft version of the Statute of the Council of Europe (ETS No. 001) had no corresponding parallel in French to begin with. In the early draft of the Statute dated 5 April 1949, the English version of article 4 (a) (later article 3) provided that all members of the Council of Europe must accept 'the principles of rule of law', while the French version of the same article referred to 'les principes du respect de la loi'[9].

The notion 'prééminence du droit' appears to have been introduced as an equivalent to 'rule of law' in the preparatory documents at a later stage. 'Prééminence du [d]roit' was included in the preamble and article 3 of a Draft Statute prepared by Sir E. Beckett, which was circulated amongst the States on 12 April 1949 [10]. The same notion was reiterated in the Draft Statute annexed to the Final report of the Preparatory Conference for the establishment for the Council of Europe of 14 April 1949 [11].

Recent case law of the ECtHR shows nonetheless that this notion is not always preferred when reference is made to the 'rule of law' in French. The Court uses also 'Etat de droit' when reasoning on rule of law-founded articles [12].

The Parliamentary Assembly of the Council of Europe, in its Resolution 1594 (2007) on 'The principle of the rule of law', has voiced concern that '*the variability in terminology and understanding of the term [rule of law], both within the Council of Europe and in its member states, has elicited confusion*' [13]. The Assembly stressed that the notion '*prééminence du droit*' should be favoured when translating the rule of law. It also stressed that the Russian '*verkhovensto prava*' (rule of law) should be used over the more formalistic '*verkhovensto zakona*' (supremacy of statute law) [14]. Otherwise, the Assembly warned, there is '*in these cases […] an inappropriate lack of consistency and clarity when translating into the legal terms used in the member states*' [14].

The semantic problems of translation invoked by the Parliamentary Assembly can be seen to reflect the deeper conceptual and philosophical differences between the main European legal traditions on the exact scope of the notion rule of law. Differences can be observed notably between the Common Law concept of the rule of law and the continental notions of *Rechtsstaat* and *Etat de droit*. According to Wennerström's analysis in *Rule of Law and the European Union,* significant differences arise notably concerning the element of *'legality'* within the rule of law notion [15]. While the '*German and French doctrine emphasizes the written rules of the Constitution or acts of Parliament, the Anglo-American tradition and the importance in it of the judge-made common law, does not have such a (lexical) approach to legality, nor to the rule of law*'[14]. Moreover, while in the French and German constitutional traditions the legislative assembly is the principal source of law, the principal source of law in the Common Law tradition would be the courts [16]. It has also been suggested that the British rule of law concept traditionally tends to emphasise formal and procedural requirements, whereas the modern German concept adds an important substantial dimension by stressing the protection of fundamental rights as an element of the *Rechtsstaat* principle [15]. A pursued examination of possible differences between these legal traditions is however a question of primarily academic interest. For our purposes, it is sufficient to take note of the emergence of a consensus on the core content of the notion.

The Parliamentary Assembly called upon the European Commission for Democracy through Law (Venice Commission), an advisory body of the Council of Europe, to assist in further reflections on the rule of law [17]. Its purpose was to identify a consensual definition of the rule of law which could help international organizations and both domestic and international courts in interpreting and applying this fundamental value [18]. Following thorough deliberations, the Venice Commission published a Report on Rule of Law in 2011 where it proposed a functional non-exhaustive definition of the notion [14]. This definition draws on a definition first proposed by a British judge, Lord Bingham. In 2010, he suggested the core of the principle to be '*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 administrated in the courts*' [19]. Bingham further included eight components of the principle. Those were: (1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law [14].

According to the Venice Commission, there seems to be a consensus on six formal and substantial core elements within the notion of rule of law [20]. Their approach appears to differ from Bingham's definition in some regards. For instance, the Venice Commission clearly recognised that discretionary power is necessary to perform a range of governmental tasks in modern, complex societies, provided that procedures exist to prevent its abuse [21]. Moreover, the Venice Commission did not seem to single out an international rule of law aspect - compliance by the state of its international obligations - as a core ingredient of the rule of law.

The necessary six elements, according to the Venice Commission, are the following:

i. Legality, including a transparent, accountable and democratic process for enacting law,

ii. Legal certainty,

iii. Prohibition of arbitrariness,

iv. Access to justice before independent and impartial courts, including judicial review of administrative acts,

v. Respect for human rights,

vi. Non-discrimination and equality before the law.

This definition has been operationalized into a check-list on the rule of law, to provide practical parameters to evaluate the state of the rule of law in particular countries [20]. The check-list consists of sub-requirements under each of the six core elements. For example, under point 4 on access to justice before independent and impartial courts, the check-list outlines 9 sub-requirements with detailed questions, for instance whether '*the department of public prosecution [is] to some degree autonomous from the state apparatus*'.

The functional approach of the Venice Commission has proved influential. The definition is referred to today as '*one of the few widely accepted conceptual frameworks for the rule of law in Europe*' [7]. Such adherence is illustrated by the recent Communication from the European Commission on 'A new EU Framework to strengthen the Rule of Law', which is based on the rule of law as defined by the Venice Commission [22]. The EU Communication applies an almost identical list of parameters [23]. The only difference seems to be that the EU Communication does not mention respect for human rights as such, but refers to respect for fundamental rights in respect of effective judicial review [14]. Annex 2 to the Communication puts emphasis on the strong link between the '*right to a fair trial and the separation of powers*' [24].

In its plenary session 21-22 March 2014, the Venice Commission decided to deepen its work on the check-list with the Bingham Centre. The aim of the revision of the check-list is to make it more operational. One way of developing the checklist could be to specify more detailed and additional benchmarks pertaining to the sub-requirements under each rule of law-element. The danger however in charging the rule of law check-list with even more detailed and substantial requirements is that the conception constructed may be so strong that it is regarded as purely political, or conversely the conception becomes so vague that it cannot be used for an intelligent analysis; in a nutshell the analysis may be reduced simply to whether or not we consider a legal system to be good.

Moreover, measuring the 'fairness' of a procedure or a system, requires the making of very complex judgments. As Wennerström warned in 2007, attaching legal consequences and especially negative ones to a term, the meaning of which is unclear, runs counter to several if not most interpretations of the rule of law [15] In other words, by expanding the notion of rule of law too widely, and charging it too heavily with substantial requirements, there is a risk that the notion itself becomes so uncertain and unpredictable that it could fail its proper tests on clarity and foreseeability.

Any framework or mechanism to measure the rule of law performance of individual countries should take the existing diversity of European legal systems into account. Legal reasoning at European level rarely reaches the same breadth and depth as legal discourse at national level, which is one of the rationales behind the ECtHR's margin of appreciation doctrine in the field of human rights protection.

All this should however not prevent further refinement of the notion, but calls for caution.

Monitoring Mechanisms and other Rule of Law Activities

A quick glance at the web page of the Council of Europe shows a number of 21 bodies and activities of the organization listed under the heading *'Rule of Law'*[25]. Three sub-headings indicate their particular field of work. Under the first sub-heading *'Justice'* we find for example the Commission for the Efficiency of Justice (CEPEJ) the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE). Under the second subheading '*Common Standards and Policies*' we find amongst others the Venice Commission, the European Committee on Crime Problems (CDPC) and the European Committee on Legal Cooperation (CDCJ). Under the third sub-heading *'Threats to the Rule of Law'* we find monitoring mechanisms such as the Group of States against Corruption (GRECO) and Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). This glimpse of activities testifies to the major importance promoting and ensuring the respect for rule of law plays in the daily work of the Council of Europe.

An in-depth analysis and overview of this patchwork of rule of law-related mechanisms and bodies can be found in the Council of Ministers' document CM (2008)170 *'The Council of Europe and the Rule of Law – An overview'* [26]. This overview was requested by the 118th Ministerial Session of the Council of Europe to assess the potential of the organisation in the field of rule of law. The document draws up a typology of relevant activities undertaken by the Council of Europe. It distinguishes between activities i) promoting the conditions necessary for the rule of law, ii) promoting the respect for the rule of law, iii) addressing threats to the rule of law, iv) ensuring respect for the rule of law, and v) strengthening the international rule of law [27].

This paper will not reiterate the activities structured around this typology, but rather concentrate on five mechanisms and bodies of particular importance. The Venice Commission is already mentioned, and will be presented in greater detail below. The other mechanisms and bodies include the Parliamentary Assembly (PACE) Monitoring Committee, the European Commission for the Efficiency of Justice (CEPEJ), the Group of States against Corruption (GRECO) and the Council of Europe Commissioner for Human Rights. The highly important work of the ECtHR regarding individual but also systemic violations of the rule of law will be elaborated on elsewhere.

European Commission for democracy through Law (Venice Commission)

The Venice Commission is an independent consultative body established by an enlarged agreement within the Council of Europe [28]. It has 59 member states, including the USA, Israel and Brazil, and is often described as one of the great successes of the Organisation. Its specific field of action concerns the guarantees offered by law in the service of democracy [29]. The Commission is composed of independent experts in law or political science [30]. These experts are appointed by the participating states, but serve in their individual capacity without any instructions from the states [14].

One of its key objectives is the promotion of the rule of law. Article 1 (2) of the Statute of the Venice Commission establishes that its work will focus on the '*constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law*' [31]. The Venice Commission has in more than twenty years dealt extensively with rule of law issues in all member states. The rule of law is promoted as a basic feature of European constitutionalism through recommendations and opinions prepared for member states on draft constitutions and legislation in different fields [32].

The Venice Commission can be seized by the Committee of Ministers, the Parliamentary Assembly, and the Secretary General or by a participating state, international organisation or body to provide an opinion [33]. It may also carry out research on its own initiative; prepare studies and draft guidelines, laws and international agreements [34]. This flexible and ad-hoc character permits the Venice Commission to react swiftly to threats to the rule of law, and ensures its relevance in the midst of unfolding events.

This was last seen during the current crisis in Ukraine, where the Venice Commission played and still plays an important role. On 7 March 2014, it was asked by the Secretary General to provide an opinion on whether the decision taken by the Supreme Council of the

Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution was compatible with constitutional principles. In an opinion adopted on 21-22 March 2014, the Commission concluded that the referendum was incompatible with the Ukrainian Constitution [35]. The Commission also provides, on the request of Ukrainian authorities, valuable assistance in the on-going process of constitutional and electoral reforms in the country.

In recent years, the Venice Commission has also prepared several opinions on controversial laws in Romania and Hungary. Draft Opinion 720/2013 assessed for example the compatibility of a Fourth Amendment to the Fundamental Law of Hungary with the Council of Europe Standards [36]. The Venice Commission concluded that the amendment

Perpetuates problems of the independence of the judiciary, seriously undermines the possibilities of constitutional review in Hungary and endangers the constitutional system of checks and balances. Together with the en bloc use of cardinal laws to perpetuate choices made by the present majority, the Fourth Amendment is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics [37].

The Commission has also produced a draft report on the notion of good governance, where it emphasized that the rule of law requires an active, agile state which can draw the appropriate balance in respecting the freedoms of its inhabitants and yet ensuring the results which are required from it under human rights law [38].

Asked about the impact of the Venice Commission's opinions, its president, Gianni Buquicchio, declared in November 2013:

I can safely affirm that our opinions generally have considerable impact, for a number of reasons. To quote a few: (i) In the States where we work regularly, the reputation of the Commission is very high. Governments are reluctant to position themselves against the Venice Commission and the opposition can refer to our opinions, which are public, as an important argument. (ii) While it is often not possible to push a country towards adopting a positive reform, we can mostly prevent a country from going into the wrong direction [39].

PACE Monitoring Committee

The Monitoring Committee (Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe) of the Parliamentary Assembly of the Council of Europe was established in 1997 [40]. It is responsible for verifying the fulfilment of obligations assumed by the member states under the terms of the Organisation's Statute (ETS No. 1), the European Convention on Human Rights and all other Council of Europe Conventions, as well as honouring of specific commitments undertaken by member states upon accession [41]. In 2006, the scope of monitoring was extended from new member states to all member states [42]. Relying on cooperation and dialogue with national delegations of countries under a monitoring procedure, its findings and recommendations are based on fact-finding visits. The Committee submits annual reports to the Assembly on its activities. Since 1997, the Committee has produced numerous reports on member states under the monitoring procedure and post-monitoring dialogue [43]. Professor Serhiy Holavaty at the University of Kyiv observed in 2012 that its activities have '*proved to be a significant tool in assisting the member-states that joined the Council of Europe after 1989 to comply with the European rule-of-law standards, in particular by bringing those standards to states' national systems'* [43].

The Committee is currently working on draft reports on the honouring of obligations and commitments by Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, the Republic of Moldova, Montenegro, the Russian Federation, Serbia, Ukraine, as well as reports on the post-monitoring dialogue with Bulgaria, Monaco, 'the former Yugoslav Republic of Macedonia', Turkey and France [44]. In January 2011, in light of developments in Hungary causing concerns for the rule of law, a motion was put forward to request the opening of a monitoring procedure [45]. The Parliamentary Assembly, deciding not to open a monitoring procedure, undertook in resolution 1941 (2013) to '*closely follow the situation in Hungary and to take stock of the progress achieved*' [43].

The Assembly disposes of a range of sanctions in the context of monitoring. Resolution 1115 (1997) paragraph 12 provides that if a member state shows *'persistent failure to honour obligations and commitments accepted'* and *'lack of cooperation in [the] monitoring process'*, the Assembly may penalise the state by adopting a resolution and/or a recommendation, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session or by the annulment of ratified credentials in the course of the same ordinary session [46]. Moreover, should the member state continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action in accordance with articles 7 and 8 of the Statute of the Council of Europe [14].

Furthermore, the Rules of Procedure of the Assembly explicitly refer to the *'persistent failure to honour obligations and commitments and [to the] lack of cooperation with the Assembly's monitoring procedure'*, as well as '*serious violation of the basic principles of the Council of Europe'*, as *'substantial grounds'* for which the credentials of a national delegation may be challenged. Challenge of credentials can take place on the basis of a report prepared by the Monitoring Committee or a motion tabled by a certain number of parliamentarians [47]. For the Spring Session of the Parliamentary Assembly in April 2014, two motions were tabled to reconsider the ratified credentials or to suspend the voting rights of the Russian delegation on substantive grounds for violation of Ukrainian territorial integrity, on the basis of Rule 9 (1) (a) of the Rules of Procedure of the Assembly [48].

During the Spring Session 2014, the Assembly decided to suspend until 26 January 2015 the voting rights of the Russian delegation, as well as its right to be represented in the Assembly's leading bodies and to participate in election observation missions [49]. The Assembly invited the Monitoring Committee to *'consider setting up an investigative sub-committee tasked with examining and following the developments relating to the conflict since August 2013'*. It also reserved the right to annul the credentials of the Russian delegation, if the Russian Federation '*does not deescalate the situation and reverse the annexation of Crimea'* [50]. The suspension was renewed in 2015.

Group of States against Corruption (GRECO)

The Group of States against Corruption (GRECO) was created in 1999 to improve its members' capacity to combat corruption by monitoring through its evaluation procedures [51]. It is based on an enlarged agreement within the Council of Europe, and provides a mechanism to ensure the respect of rule of law and address threats to rule of law in all 47 member states of the Council of Europe, along with

Belarus and the United States of America.

The creation of GRECO was a novelty in the way that a fully-fledged monitoring mechanism was set up to control simultaneously the respect of soft and hard law instruments. GRECO monitors twenty guiding principles for the fight against corruption (GPC), which are not legally binding but have the legal value of recommendations [52]. GRECO also monitors the implementation of several Council of Europe conventions and recommendations, in particular the Criminal Law Convention on Corruption (ETS 173, 1999), the Civil Law Convention on Corruption (ETS 174, 1999), CM Rec(2000)10 on codes of conduct for public officials and CM Rec(2003)4 on common rules against corruption in funding of political parties and electoral campaigns.

GRECO's monitoring activities are based on the principles of mutual evaluation and peer pressure. It is carried out by ad hoc evaluation teams, whose members are chosen on the basis of the list of experts proposed by GRECO members [53]. Evaluation teams will examine replies to questionnaires, request and examine additional information to be submitted either orally or in writing, visit member countries for the purpose of seeking additional information of relevance to the evaluation, and prepare draft evaluation reports for discussion and adoption at the plenary sessions [54]. Although evaluation reports are in principle confidential, member states have without exception agreed to make them public. The reports regularly contain recommendations inviting the members undergoing the evaluation to improve their domestic laws and practices to combat corruption [55]. The members concerned will be invited to report on the measures taken to follow these recommendations [14]. If it believes that members remain passive or take insufficient action in respect of recommendations addressed to them, GRECO is entitled to issue public statements [56].

The evaluation of member states is divided in rounds [57]. GRECO's first evaluation round (2000– 2002) dealt with the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest, prosecution and so forth. The second evaluation round (2003–2006) focused on the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons from being used as shields for corruption. The third evaluation round (launched in January 2007) addresses the incriminations provided for in the Criminal Law Convention on Corruption and the transparency of party funding.

European Commission for the Efficiency of Justice (CEPEJ)

The European Commission for the Efficiency of Justice (CEPEJ) was established in 2002 by a Committee of Ministers' resolution to promote precise knowledge of the judicial systems in Europe and of the different existing tools which enables it to identify any difficulties and facilitate their solution [58]. The CEPEJ is composed of experts from all the 47 member states of the Council of Europe. Observer states to the CEPEJ are the Holy See, Canada, Japan, Mexico, United States of America, Israel, and Morocco. The European Union also participates actively in CEPEJ activities without being a full member.

One of the main functions of the CEPEJ is to promote the *conditions* necessary for the rule of law [59]. It drafts measures and prepares pragmatic tools for policy makers and judicial practitioners to improve the efficiency and quality of the functioning of judicial systems, and develops networking between courts of the member states. CEPEJ also undertakes activities to *promote* the respect for the rule of law [60]. The CEPEJ supports individual member states in their judicial reforms, on the basis of European standards and other member states' experience. It contributes specific expertise to the debate on the functioning of the justice system in Europe and beyond: it provides the legal and judicial community with a forum for discussion and suggestions and brings justice systems and their users closer, for instance through its Internet web site and its publications in the Series "CEPEJ Studies". Lastly, CEPEJ evaluates the functioning of the member states' judicial systems through a regular process for collecting and analysing quantitative and qualitative data on the function of justice systems [61]. It prepares benchmarks, collects and analyses data, and defines instruments and means of evaluation.

Council of Europe Commissioner for Human Rights

The Commissioner for Human Rights was established in 1999 as an independent institution within the Council of Europe [62]. The Commissioner is a non-judicial body responsible for promoting respect for and education in human rights, as derived from the Council of Europe's instruments. Nils Muiznieks currently holds this office. As a non-judicial institution, the Commissioner's Office cannot act upon individual complaints, but it can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals. While his mandate regards human rights, his work encompasses an important rule of law-dimension. Administration of justice and its effect on the effective enjoyment of human rights have been increasingly important issues for the Commissioner's office. It has conducted major country monitoring work with substantial reports and recommendations on the administration of justice in countries such as Georgia, Ukraine, Russia andTurkey

The Commissioner's report on Turkey of 10 January 2012 provides a pertinent example [63]. The report followed a five day visit to Turkey in October 2011 that focused especially on justice issues, prompted by a number of ECtHR judgments against Turkey that identified long-standing, systemic problems concerning the administration of justice. The Commissioner's report dealt in particular with the independence and impartiality of judges and prosecutors, and the role of courts in combating impunity for serious human rights violations. He expressed that *'the main factor hampering progress in practice has been the entrenched culture within the Turkish judiciary, and the fact that the protection of the state often takes precedence over the protection of human rights'* [64]. The Commissioner gave several recommendations to change this course. With regard to impunity and police violence, the Commissioner suggested to *'establish a police complaints mechanism, which satisfies the principle of independence, adequacy, promptness, public scrutiny and victim involvement'* [65].

The Commissioner is a source of information on systemic rule of law problems in the member states, focusing especially on justice issues. To quote him, three recurring rule of law-related problems revealed by his country visits are '*non-enforcement of court decisions, challenges to the legitimacy of the judiciary and pressure on the independence of judges'* [66].

Another increasingly important dimension of the Commissioner's rule of law-involvement is related to his role under article 36 of the ECHR [67]. It provides that the Commissioner can take part in the proceedings of the ECtHR at the invitation of the President of the Court or on his own initiative. The underlying idea, as envisaged by the Explanatory report of Protocol No. 14 to the ECHR, is that the Commissioner's experience may enlighten the Court on certain questions,

'particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties' [68].

These various monitoring mechanisms and activities within the Council of Europe contribute significantly to promote and to ensure the respect of the rule of law [69]. The work of the Council of Europe in the field of rule of law cannot, however, be fully understood without emphasising its interplay with another key actor for safeguarding the rule of law in Europe -the European Union. The next part focuses on the level of cooperation between the Council of Europe and the European Union in the field of rule of law, and how synergies between the two can be further improved.

Cooperation on Rule of Law with the European Union

Both the Council of Europe of 47 member states and the European Union of 28 member states are seeking to achieve greater unity between the states of Europe through respect for the shared values of pluralist democracy, the rule of law and human rights. The rule of law is referred to in article 6 (1) of the Treaty on European Union as a principle on which the Union is founded, and the Copenhagen criteria of 1993 set out the rule of law as a condition for membership.

The 'Memorandum of Understanding between the Council of Europe and the European Union' of May 2007 identifies the rule of law as a priority area of common interest and commits both institutions to co-operate in the development of a European area based on law [70]. It provides in particular that

[t]he Council of Europe and the European Union will endeavour to establish common standards thus promoting a Europe without dividing lines, without prejudice to the autonomy of decision. Bearing this in mind, legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules [71].

During recent years, the cooperation between the Council of Europe and the European Union has further deepened, transforming mutual relations into a truly '*strategic partnership in the areas of political dialogue, legal co-operation and concrete cooperation activities'*[72] EU accession to the ECHR will mark another major shift in the strengthening of the protection of human rights and the rule of law in Europe, by ultimately submitting the EU and its legal acts to the jurisdiction of the European Court of Human Rights. In April 2013, a draft agreement on the accession of the EU to the ECHR and related instruments were finalised at expert level. The draft agreement was however declared incompatible with the EU treaties by the Court of Justice of the European Union on 18 December 2014.

It was against this background of an ever closer across-the-board cooperation between the Council of Europe and the European Union that the EU Council conclusions on fundamental rights and the rule of law of June 2013 emphasised the importance to *make full use of existing mechanisms and cooperate with other relevant EU and international bodies, particularly with the Council of Europe, in view of its key role in relation to promotion and protection of human rights, democracy and the rule of law, in order to avoid overlaps* [73].

Referring specifically to proposals for an EU framework to strengthen compliance of EU member states with rule of law standards, the Committee of Ministers in its reply to Parliamentary Assembly Recommendation 2027 (2013) stressed in February 2014 that it *fully supports the efforts deployed by the Secretary General, who has intensified his political consultations with the EU institutions, emphasising in particular the message that a possible future EU framework should take into account the instruments and expertise of the Council of Europe and co-operate closely with it* [74].

It is therefore to be welcomed that the European Commission's Communication on a new Rule of law mechanism within the EU asserts that the suggested new EU Framework to strengthen the Rule of Law will be complementary to '*all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law*' [75]. The Communication states that the Commission '*will as a rule and in appropriate cases seek the advice of the Council of Europe and/or its Venice Commission'* [76].

Any initiative to set up new mechanisms to respect the rule of law by developing indicators, monitoring the situation in EU member states and producing recommendations or adopting sanctions should indeed take into account existing instruments and mechanisms within the Council of Europe. The fact that these mechanisms are not restricted to the 28 EU member states but cover nearly the entire continent is an extremely important added-value. One might argue that the more there are instruments and institutions to protect and promote the rule of law the better. This rather simplistic view ignores the real risk that the multiplication of standards and actors may lead to unnecessary duplications, inconsistencies and forum-shopping, which are in the interests of neither citizens nor governments. Experience shows that concerted action by the EU and the Council of Europe has a stronger impact (e.g. in the Hungary and Romania files).

There are many ways the Council of Europe and the EU could complement each other. The Council of Europe has a wealth of accurate and objective information on shortcomings of human rights and the rule of law collected and analysed by independent monitoring bodies and in accordance with agreed procedures. The Committee of Ministers' supervision of the execution of ECHR judgments also constitutes an invaluable source of information on efforts made by member states to remedy both individual and systemic violations identified by the ECtHR. Various forms of concrete cooperation on the rule of law issues already exist, involving in particular the Venice Commission, CEPEJ, GRECO and the Human Rights Commissioner [77]. The CEPEJ contributes to the EU justice scoreboard process, providing annually statistical and numerical data on the functioning of the justice systems in each EU member state and country specific information, analysis and trends. The EU justice scoreboard relies on information provided through the CEPEJ, thus avoiding the duplication, increasing CEPEJ's visibility, and confirming its status as a common European reference point.

The EU has also been cooperating closely with the Council of Europe Human Rights Commissioner with a view to mutually exchanging information [78].

Finally, it should not be forgotten that the effective realisation of values such as democracy and the rule of law depend on the critical mass of institutional actors, women and men enforcing them at national level with their own integrity. For this reason cooperation activities which assist member states in their efforts to adapt legislation, practice and institutions to European standards are so important. The Council of Europe and the European Union cooperate also closely in the field, notably within the framework of the latter's Neighbourhood policy. The European Commission regularly consults the Council of Europe when assessing the situation in these countries. On 1 April 2014, the

EU and the Council of Europe signed a "Statement of Intent" putting in place a new framework for cooperation in the EU Enlargement and Neighbourhood Regions for the period 2014-2020 [79]. The agreement will enable a more strategic and result-focused cooperation to promote *inter alia* the rule of law in the EU Enlargement and Neighbourhood Regions based on the Council of Europe's binding international conventions, monitoring bodies and assistance programmes [80].

Several EU-Council of Europe cooperation programmes which cover South-East Europe, the south Caucasus, Russia and Turkey focus on the development of the judiciary, on penitentiary reforms, on the fight against various forms of economic and organised crime, and international cooperation in criminal matters [81]. Two successful examples could be mentioned here. First, there is the Council of Europe/EU Joint Programme on 'Strengthening the Court Management System in Turkey' (JP COMASYT). This joint programme has introduced and tested new models for increasing the efficiency and the user-friendliness in 21 pilot courthouses. New judicial functions were put in place, and information desks and front offices were installed in the pilot courthouses. Second, the Council of Europe/EU Joint Programme 'Enhancing judicial reform in the Eastern Partnership countries' financed by the EU and implemented by the Council of Europe concerns the reform of judicial systems of Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. The objective is to identify legal and practical obstacles to the implementation of relevant European standards, and to formulate recommendations and best practices to address these obstacles.

Concluding Observations

Despite the lack of an authoritative definition of the notion of the rule of law, the examples of rule of law-related mechanisms and activities presented in this paper show that the Council of Europe works on a daily basis to promote and strengthen the rule of law in and among its member states [82].

With a view to further advancing the rule of law, the Council of Europe has taken up the European Commission's invitation to engage in further discussions on the complementarity of existing and new mechanisms [83]. The 'Reports on the state of democracy, human rights and the rule of law in Europe' that the Secretary General presented at the Committee of Ministers' ministerial session in Vienna (May 2014) and Brussels (May 2015) provide a strategic assessment of the current situation all over Europe, while also critically examining the Council of Europe's own capacity to assist member states in complying with European standards [84]. The impact of Council of Europe monitoring mechanisms is limited by certain constraints, in particular resources. Monitoring cycles are sometimes rather long. Capacities for rapid reaction which the Venice Commission so successfully demonstrated in the Ukrainian crisis do not exist in all other mechanisms or are rarely used.

The European Union's rule of law initiative could become a catalyst for a further deepening of the strategic partnership between the EU and the Council of Europe. More than simply drawing on existing Council of Europe standards and data, the EU could have a unique role in strengthening existing mechanisms and ensuring the implementation of conclusions and recommendations in EU member states. Last but not least, the EU could also resort to Council of Europe mechanisms and procedures when it comes to specific intervention, such as a set of measures or sanctions in order to better safeguard the rule of law and fundamental rights within the EU, in particular on issues where EU action is hampered by a lack of competences. Legal certainty being a key feature of the rule of law, it is of paramount importance that European institutions use the same language and standards when they assess the situation in the member states.

References

1. Statute of the Council of Europe (1949) ETS No 001, London.
2. CE (Prep) (1949) M 5th Meeting Final, 6 April 1949, point 5 (c): CE (Prep) M, 8th meeting Final, 12 April 1949, Minutes from the Preparatory Conference for the establishment of the Council of Europe, St. James' Palace, London.
3. Engel and others v The Netherlands Series A no 22 (1976) para 69; Amuur v France, no 19776/92, para 50, ECHR 1996-III.
4. ECtHR Registry (2008) Rule of law-related ECtHR case law (Research Division) to the CM 170.
5. Recommendation CM/Rec (2007)7 of the Committee of Ministers to member states on good administration.
6. Appeal no. 540/2013, Staff Committee (XIV) v. Secretary General.
7. Carrera S, Guild E, Hernanz N (2013) The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU.
8. (1949) Basic Law for the Federal Republic of Germany, arts 16 (2), 23 (1) and 28 (1).
9. (1949) CE (Prep) P4, Preparatory conference for the establishment of a Council of Europe. The Rapporteur of the Legal and Drafting Committee.
10. (1949) CE (Prep) P6 Annex A (a) Draft Statute prepared in accordance with instructions of the Preparatory Conference for the Establishment of a Council of Europe by Sir E Beckett.
11. CE (Prep) P7 Appendix A, Final rapport of the Preparatory Conference for the establishment for the Council of Europe.
12. Stafford v United Kingdom [GC], no 46295/99, para. 63, ECHR 2002-IV; Kress c France [GC], no 39594/98, para. 69, ECHR 2001-VI; Río Prada c Espagne [GC], no 42750/09, ECHR 2013, compare paras. 77 and 125 with the partially dissenting opinion of Judge Mahoney.
13. PACE Resolution 1594 (2007), adopted by the Standing Committee, acting on behalf of the Assembly.
14. Ibid.
15. Wennerström EO (1984) The Rule of Law and the European Union.
16. Ibid, p 51.
17. (2007) PACE Resolution 1594.
18. Venice Commission Report on the Rule of Law CDL-AD (2011) 003rev.
19. Bingham T (2010) The Rule of Law.
20. CDL-AD (2011) 003rev
21. Ibid, pp 10-11.
22. COM (2014) 158 Communication from the Commission to the European Union and the Council, A new EU Framework to strengthen the Rule of Law.
23. COM (2014) 158 final p 4.
24. COM (2014) 158 final, Annex 2.
25. www.coe.int.
26. CM (2008)170.
27. CM (2008)170 Chapters I and IV.
28. (1990) Resolution (90)6 On a Partial Agreement Establishing the European Commission for Democracy through Law, adopted by the Committee of Ministers.
29. CM Resolution (2002)3 Revised Statute of the European Commission for Democracy through Law, article 1.
30. Ibid, article 2.
31. Ibid, article 1 (2).

32. CM (2008)170, para 78.

33. Resolution (2002)3, article 3 (2).

34. Ibid, 3, article 3 (1).

35. Opinion no. 762 / 2014, CDL-AD (2014) 002-e, paras 27-28.

36. CDL (2012) 023* Opinion 720 / 2013. Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD (2012) 001 on Hungary7.

37. Ibid. para 154.

38. CDL-AD (2011)009 p 22.

39. Buquicchio G (2013) 79th Steering Committee for Human Rights, Appendix VI to the CDDH.

40. (1997) PACE Resolution 1115.

41. (2011) PACE Resolution 1822, Rules of procedure, section 8.1.

42. (2006) PACE Resolution 1515.

43. Holavaty S (2012) The rule of law as a practical concept.

44. (2013) PACE Resolution 1941.

45. Lundin P (2011) Motion for a resolution on 'Serious setbacks in the fields of the rule of law and human rights in Hungary', Doc. 12490.

46. (1997) PACE Resolution 1115 para 12.

47. Rules of Procedure of the Parliamentary Assembly, rule 8.2.

48. Walter R (2014) The first Motion for a resolution, Doc. 13457.

49. Resolution 1990 (2014) Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation.

50. (2014) PACE Resolution 1990.

51. CM Resolution (98)7.

52. CM Resolution (97)24.

53. Appendix to CM Resolution (99)5, Statute of GRECO, article 12.

54. Ibid, article 13.

55. Ibid, article 15.

56. Ibid, article 16.

57. Ibid, article 10.

58. CM Res (2002)12.

59. CM (2008) 170, para 67.

60. Ibid, para 80.

61. Ibid, para 105.

62. CM Resolution (99)50.

63. CommDH (2012) 2.

64. Ibid, para 127.

65. Ibid, para 146.

66. Muižnieks N (2014) Leaning on judges: eroding the rule of law in Europe.

67. (2010) Protocol No. 14 to the ECHR entered into force.

68. Explanatory report to the Protocol No. 14 to the ECHR, para 87.

69. CM (2008) 170, para 97.

70. (2007) Memorandum of Understanding between the Council of Europe and the European Union.

71. Ibid. paras 23-24.

72. State of cooperation (2014) '124th Session of the Committee of Ministers (Vienna, 5-6 May 2014) - Cooperation with the European Union – Summary report'.

73. (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 of the European Union. Justice and Home Affairs Council meeting, Luxembourg.

74. CM/AS(2014)Rec2027 final 'European Union and Council of Europe Human Rights Agendas: Synergies not Duplication.

75. COM(2014) 158 final, p 6.

76. Ibid, p 9.

77. CM(2008)170), para 123.

78. COM(2003)0606 Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union.

79. (2014) Statement of Intent for the Cooperation between the Council of Europe and the European Commission in the EU Enlargement Region and the Eastern Partnership and Southern Mediterranean Countries (EU Neighbourhood Region).

80. (2014) Press release - DC037.

81. CM (2008) 170, para 120.

82. CM (2008)170), paras 29-30.

83. COM (2014) 158 final, p 6.

84. http://hub.coe.int/c/document_library/get_file?uuid=5df90407-7663-4361-b5fb1bbcc84c9

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