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Mutual Trust: The Virtue of Reciprocity

Strengthening the Acceptance of the Rule of Law through Peer Review

Ernst Hirsch Ballin*

I. Introduction

All relations between persons require their reciprocal acceptance as legal subjects, which is only possible if they trust that the law will bind them together. The European Union (EU) is a polity which expresses itself in a legal order built on a diversity of national legal orders. Since it is neither possible nor desirable to replace national legal acts of any kind – be they administrative decisions or court rulings – with European legal acts, their mutual recognition is a cornerstone of the cohesion and functioning of the Union. Both the area of freedom, security and justice¹ and the internal market² are built on mutual recognition, i.e. legal reciprocity. The Rule of Law is one of the foundational values of the Union.³

That is embryonically why the EU must be built on the Rule of Law. Aristotle saw that the reciprocal nature of the law is a part of the foundations of a well-ordered society. ‘The public-spirited acts of a citizen motivated by a sense of justice and civic friendship are not purely altruistic or beneficent: they are based on [...] an expectation of reciprocal benefits’.⁴ The great philosopher recognised that ‘the rule of men over men is less desirable than the rule of law’.⁵ ‘man is, when perfected, the best of animals, but, when separated from law and justice, he is the worst of all’.⁶

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¹ Art. 3(2) TEU.

² Art. 3(3) TEU.

³ Compare Art. 2 and the Preamble of the Treaty on the European Union.

⁴ D. Morrison, ‘The Common Good’, in M. Deslauriers and P. Destré (eds.), *The Cambridge Companion to Aristotle’s Politics* (Cambridge: Cambridge University Press, 2013), pp. 176, 194.

⁵ C. Horn, ‘Law, Governance, and Political Obligation’, in: M. Deslauriers and P. Destré, *The Cambridge Companion to Aristotle’s Politics*, pp. 223, 234.

⁶ Aristotle, *Politics*, I 2, 1253a31-33, quoted by C. Horn, ‘Law, Governance, and Political Obligation’, 234.

Democracy in the EU also depends on the veracity of its aspiration, i.e. to create a method of decision-making on the legal rules governing the communities and policies in which a majority under the conditions of respect for minorities decides on the realisation of shared values. One cannot have a democratic and legitimate EU if the Rule of Law is absent or fading. The Rule of Law implies that the law is the same for all. Reciprocity is a virtue in how people or entities behave towards each other. Fidelity depends on reciprocity:⁷ it is an indispensable prerequisite for the acceptance of obligations.

With respect to the operations of the EU institutions, the Rule of Law is firmly rooted in the Treaties and the case law of the Court of Justice of the European Union (ECJECJ). It includes the principle of legality, legal certainty, fair application of the law, the principle of equality, the obligation to state the specific legal basis and the reasons for legal acts, effective legal protection and that of effective enjoyment of rights under EU law, including fundamental rights.⁸ However, the constitutional system of the EU depends on a much wider and more complicated framework of institutions in the Member States who – in accordance with the principle of subsidiarity and decentralised enforcement,⁹ also expresses its weakest link, precisely because of its encompassing nature. Specific legislative acts on procedural rights (e.g. on access to legal assistance and interpreters) contribute to it and the ECJ oversees its implementation.

The Rule of Law is more than a rule or even a principle (which can be balanced against other principles).¹⁰ Article 2 TEU rightly calls it a founding value. National and international political credibility and social cohesion depend on the acceptance of this principle. The Rule of Law in the EU is however continuously challenged by tensions between the realisation of the values enshrined in Article 2, as well as the human rights norms and principles confirmed in Article 6, and ‘contemporary understandings of “law as a means to an end”’.¹¹ A lack of respect for

⁷ J. Brunnée and S. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (Cambridge: Cambridge University Press, 2010), pp. 38–39.

⁸ M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999), Chapter 5.

⁹ R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), p. 250.

¹⁰ On the difference between principles and values, see Fernandez Esteban, *The Rule of Law in the European Constitution*, 39–42.

¹¹ M. Krygier, ‘Rule of Law’, in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), pp. 233, 247; B.Z.

independence of the courts or citizens' rights is difficult to redress. This is a question of political and administrative culture beyond enforcement of specific legal obligations.

Kochenov convincingly argues that 'the concept of the Rule of Law to be used in European law should also acquire a substantive dimension, to add substance to its procedural aspects. This substance is nothing other than the objectives of integration'.¹² In view of its relationship with reciprocal respect among institutions and citizens for human dignity, the close relationship between the Rule of Law and human rights should also become a part of our understanding of the Rule of Law. In other words: what counts is not the rule of any 'law', irrespective of its content, but law in a democratic constitutional framework which contributes to the realisation of human rights. The opponents of enhanced Rule of Law supervision refer to the diversity between the Member States, but the Rule of Law is part of the indispensable homogeneity of values within the Union.¹³ The Rule of Law has – in the words of Abdullahi Ahmed An-Na'im – a universal significance, both in international relations and domestically in view of the 'liberation from all forms of fear, including human domination'.¹⁴

II. The economic and political relevance of Rule of Law

The Rule of Law is not only a condition for trust among citizens, but also for trust in economic life. After the collapse of the Warsaw Pact, many Western European politicians deceived themselves and others with the idea that a multiparty system and economic liberalisation would be sufficient for freedom and democracy to flourish. Economic prosperity depends on reliable institutions including the Rule of Law.¹⁵ The Rule of Law 'implies that laws cannot be simply used by one group to encroach upon

Tamanaha, *Law as a Means to an End. Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006).

¹² D. Kochenov, 'The EU Rule of Law: Cutting Paths through Confusion' (2009) 2(5) *Erasmus Law Review*, 24.

¹³ S. Mangiameli, 'The Union's Homogeneity and Its Common Values on the Treaty on European Union', in H.-J. Blanke and S. Mangiameli (eds.), *The European Union after Lisbon* (Heidelberg: Springer, 2012), pp. 21–46.

¹⁴ A.A. An-Na'im, 'Transcending Imperialism: Human Values and Global Citizenship', in Suzan Young (ed.), *The Tanner Lectures on Human Values* Vol. 30 (Salt Lake City: Utah University Press, 2011), p. 143, at http://tannerlectures.utah.edu/documents/a-to-z/a/An-Naim_10.pdf.

¹⁵ D. Acemoglu and J.A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (London: Profile Books, 2012).

the rights of another’.¹⁶ The four economic freedoms of the European Communities and today of the EU – the free movement of goods, capital, services and people – require access to administrative and judicial proceedings on an equal footing for a Member State’s own citizens and other European citizens.

The enlargement of the EU in the first ten years of the twenty-first century with twelve Member States was, much more than Eurosceptics try to make us believe, the result of a coherent view on Europe’s future. The EU wanted to bring stability across Europe, based on shared values through the irreversible inclusion of the – mostly post-communist – societies which had emerged from the former Soviet Union in a moral, economic and legal commonwealth. (That the Baltic states were treated the same way harks back to their firm westward orientation and their independence until their brutal occupation by the Soviet Union in 1940.)

According to the so-called Copenhagen criteria, admission to full membership depended not only on their adoption of the *acquis communautaire* into their laws, but also on the other ‘Copenhagen criteria’, defined by the European Council in 1993, summarised as:

Countries wishing to join need to have:

- stable institutions guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities;
- a functioning market economy and the capacity to cope with competition and market forces in the EU;
- the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.¹⁷

Candidate Member States had to play their own part first, albeit with expensive assistance from the EU and the Western European Member States. The policymakers knew of the risks of societies backsliding into autocratic and illiberal forms of governance. They estimated that inclusion in the EU would offer the best possible

¹⁶ Ibid., 327.

¹⁷ European Commission, ‘Conditions for Membership’ *Europa.eu* (19 November 2014), at http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm.

protection against such risks. Contrary to a widespread belief at that time, they did not expect that the European policymaking process would easily assimilate its extended membership. With so many new Member States, the EU needed to change its decision-making processes and to create a direct bond of trust with its citizens. The decisions taken by the heads of state and government around the turn of the century aimed to achieve the latter through the adoption of a Charter of Fundamental Rights of the European Union (CFR), and initially through a profound overhaul of the Union's setup through a constitutional treaty. Some politicians tried to preserve old ideas of national sovereignty with rearguard actions against the Charter and judicial cooperation, but overlooked the cultural dimension of integration¹⁸ with as much naiveté as the proponents of constitutional pomp and circumstance for the constitutional treaty. The core question is trust in institutions which are not easily recognisable as the people's own institutions. This is much more a question of living values than of European legality.

Strengthening and upholding the trust of the citizens requires much more than the enforcement of European law in the courts, and breaching their trust cannot wait to be cured until the conditions for application of Article 7 TEU are met. It is, as Article 2 TEU rightly says, a question of *values*: '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'. The question of how a public authority can promote its values – such as the Rule of Law – has been discussed in different contexts, e.g. in ombudsmen reports. The United Nations (UN) human rights enforcement system uses peer review as one of its instruments, partly because of the absence of an international human rights court in the foreseeable future. The 'Universal Periodic Review' (UPR), established by the Human Rights Council in Resolution 5/1 of 18 June 2007, gained high acclaim. The UPR is based on self-reporting by the UN member states in multi-year cycles about the protection of human rights in their jurisdictions, alongside reports from the UN High Commissioner for Human Rights, independent reports and information from non-governmental organisations and national human rights institutions. It encourages member states to take action to improve their record. In this peer review mechanism:

¹⁸ P. Lindseth, 'Constitutionalism Beyond the State? The Administrative Character of European Governance Revisited' (2012) 33 *Cardozo Law Review* 101, 107.

Council members ask questions and make recommendations to reporting states. Innovative features are: (i) universality and equal treatment among all member states [...]; and (ii) interstate, interactive dialogue between the country under review and other UN member states.¹⁹

The UPR was one of the sources of inspiration for proposals to bolster the promotion of the Rule of Law in the EU.

III. The Stockholm Programme

Article 67(4) TFEU requires the development of mutual recognition in the area of freedom, security and justice. The Hague Programme endorsed in 2004 envisaged ‘carry[ing] further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters’.²⁰ In the preparations for ‘The Stockholm Programme: An open and secure Europe serving and protecting citizens’ 2010–2014,²¹ a Dutch initiative played a significant role, which was described and evaluated by the Inspection for Development Cooperation and Policy Evaluation of the Netherlands Ministry of Foreign Affairs.²² The Dutch initiative aimed to strengthen trust through Rule of Law evaluations, based on reciprocity. It was launched at a symposium in December 2007 in Brussels with a speech by the then Minister of Justice, followed by discussion and subsequent promotion in coalition, first with Belgium and Luxemburg, later with France and Germany. Their shared interest was to create a positive context for the further advancement of the principle of mutual recognition and to respond to feelings of unease at the application of this principle. Negative experiences with pre-trial

¹⁹ G. Gori, ‘Compliance’ in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press 2013), pp. 893, 896.

²⁰ Council of the European Union, ‘Note of the General Secretariat to the Delegations on The Hague Programme: strengthening freedom, security and justice in the European Union’, 16054/04, Brussels, 13 December 2004.

²¹ European Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’ [2010] OJ No. C115/1.

²² M. van den Berge and B. Limonard, *Nederland en de onderhandelingen over het Stockholm Programma. Casestudie 3 bij IOB Evaluatie nr. 395: Strategie bij benadering. Nederlandse coalitievorming en de multi-bi benadering in het kader van de EU-besluitvorming (2008–2012)* (Inspectie Ontwikkelingssamenwerking en Beleidsevaluatie (IOB), Ministerie van Buitenlandse Zaken 2014), available in Dutch at http://www.iob-evaluatie.nl/sites/iob-evaluatie.nl/files/Casestudie%20bij%20IOB%20395_Stockholm%20Programma%20DEF_2014.pdf.

detention after the issuance of a European Arrest Warrant or hurdles in judicial protection for investors from other Member States illustrated the need for improvement. The lengthy pre-trial detention in some Member States after the execution of an Arrest Warrant had been criticised in legal research and by parliamentarians as a shortcoming of the blanket reliance on the judicial system elsewhere in the European Union.²³ The division of responsibility for dealing with requests for asylum under the Dublin system was stymied if a Member State failed to comply with Rule of Law-related requirements in their procedures.²⁴ In the wake of the Swedish presidency, the Dutch initiative was discussed with specialists from several Member States and the European Institutions at a conference in Maastricht in June 2009.²⁵

The Stockholm programme was proposed by the Justice and Home Affairs Council under the Swedish presidency in 2009 and decided by the European Council on December 11, 2009. The Programme included the following decision on this subject:

The European Council invites the Commission to [...] submit one or several proposals under Article 70 TFEU concerning the evaluation of the Union policies referred to in Title V of TFEU. That proposal (or proposals) should, where appropriate, include an evaluation mechanism based on the well-established system of peer-evaluation. Evaluation should be carried out periodically, should include an efficient follow-up system, and should facilitate better understanding of national systems in order to identify best practice and obstacles to cooperation. Professionals should be able to contribute to the evaluations. The Council should, in principle, have a leading role in the evaluation process, and in particular in its follow-up. Duplication with other

²³ R. Blekxtoon, *Checks and Balances van het Kaderbesluit Europees aanhoudingsbevel*, DD 2004, 43. On the application by Poland also see the highly critical questions from Members of Parliament and the Dutch Minister of Security and Justice's reply in parliamentary documents: Second Chamber 2011–2012, *Aanh.* 614 (9 November, 2011).

²⁴ ECtHR case *M.S.S. v. Belgium and Greece* [2011] App. No. 30696/09 and Joined cases C-411/10 *N.S. v. Secretary of State for the Home Department* and C-493/10 *M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865.

²⁵ Conference on Monitoring and Evaluation Mechanisms in the Field of EU Judicial Cooperation in Criminal Matters at Maastricht University, Faculty of Law, 2 and 3 June 2009. See C. Fijnaut and J. Ouwerkerk (eds.), *The Future of Police and Judicial Cooperation in the European Union* (Leiden: Martinus Nijhoff, 2010).

evaluation mechanisms should be avoided, but synergies and cooperation should be sought, in particular with the work of the Council of Europe. The Union should take an active part in and should contribute to the work of the monitoring bodies of the Council of Europe.²⁶

Peer evaluation, as foreseen in the Stockholm Programme, can be viewed as a behavioural approach to the realisation of values in public law. Behavioural approaches have recently attracted more attention, e.g. through ‘nudging’ – but may themselves raise concerns as to their compatibility with the Rule of Law.²⁷ Nudging can be applied by public authorities, but also in confrontation with them.²⁸ Naming and shaming is the opposite technique.

Nudging and naming and shaming are basically the aim behind techniques such as a ‘scoreboard’. That is also the essence of the ‘Justice Scoreboard’, introduced by the erstwhile European Commission Vice-President Viviane Reding in March 2013 and since then published annually. According to the present Commissioner for Justice, Consumers and Gender Equality Vera Jourová in her preface to the 2015 edition, the Justice Scoreboard

provides an overview of the quality, independence and efficiency of EU Member States’ justice systems. Together with individual country assessments, the EU Justice Scoreboard helps to identify possible shortcomings or improvements and to regularly reflect on progress.²⁹

This statement appears to be overly optimistic. The scoreboard method has an unavoidably narrow scope: it has to focus on more-or-less external criteria, which are definitely important, but do not cover the development of a truly supportive culture of values. Statistical data are not well suited for comparative evaluation, even leaving aside the almost complete absence of data for the United Kingdom and partially from other Member States. To achieve an effective comparison, efforts would have to

²⁶ European Council, ‘The Stockholm Programme’.

²⁷ Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *Met kennis van gedrag beleid maken* (WRR-rapportnr. 92, Amsterdam: Amsterdam University Press, 2014), p. 69.

²⁸ A. Meuwese, *Gedraggericht publiekrecht* (inaugural address, Tilburg: Tilburg University, 2014), 7.

²⁹ European Commission, ‘The 2015 EU Justice Scoreboard’ COM (2015) 116 final, 3.

extend beyond justice and police cooperation policy. Peer evaluation requires a conversation, in which a scoreboard can play a useful role if combined with other sources of information.

IV. From Scoreboard to political dialogue

With a new coalition of states, the Dutch government took up the gauntlet again. In a joint letter dated 6 March 2013 to the President of the Commission, the Ministers of Foreign Affairs of Denmark, Finland, Germany and the Netherlands called for more European safeguards to ensure compliance with the fundamental values of the Union in the Member States. Their main argument emphasised the importance of the cultural dimension of the founding values of the EU:

The EU should place greater emphasis on promoting a culture of respect for the rule of law in Member States. In its recent Annual Growth Survey for 2013 the Commission identifies the quality, independence and efficiency of judicial systems as a means of reducing costs for businesses and increasing the attractiveness of countries for foreign investment. Further ways to promote the rule of law within the framework of the European semester should be explored. While it is right to highlight the economic benefits of the rule of law, its significance obviously goes far beyond that.³⁰

One month later, following up on its own initiative, the Dutch Government asked the Advisory Council on International Affairs (AIV or Advisory Council) to produce an advisory report on the functioning of the Rule of Law in the EU Member States of the EU. In January 2014, the AIV presented an extensive report on the Rule of Law, the existing mechanisms in the EU and the Council of Europe, and the desirability of additional instruments.³¹ In the Advisory Council's view, any new mechanism should build on the insights available in the case law of domestic and EU courts as well as

³⁰ Letter of 6 March 2013 from four Ministers of Foreign Affairs to the President of the European Commission, <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>.

³¹ Advisory Council, 'The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation' (No. 87, January 2014) <http://aiv-advies.nl/download/57da03fa-3410-4aba-af05-663cb780df72.pdf>.

the European Court of Human Rights and the reports of other bodies including the EU Fundamental Rights Agency (FRA) and the Council of Europe's Venice Commission. It recommended the active use of infraction procedures by the European Commission with a view on the complete realisation of the Rule of Law, but it also recommended that a monitoring and evaluation procedure be established by the Member States through consultations and agreement in the Council and the European Council. A more effective use of this procedure was also recommended by Kim Lane Scheppele.³² The peer review procedure as proposed in the report consists of three phases:³³

1. A committee of experts prepares a report based on consultations with organisations possessing relevant information on each Member State, and which considers a number of evaluation points and specific points of concern for each Member State. The European Commission would provide the secretariat for these expert committees.
2. The report is discussed by representatives of the Member States at the official level (the actual peer review), which leads to draft operational conclusions.
3. These conclusions are discussed and adopted by the Council in the form of Council Conclusions. The results of the reviews are also submitted to the Justice and Home Affairs Council, which oversees the follow-up. The recommendations and follow-up should be reported to the European Parliament.

V. A new EU Framework and the Council's response

In March 2014, in its last year under the presidency of José Manuel Durão Barroso, the European Commission presented 'a new EU Framework to strengthen the Rule of Law',³⁴ which is supposed to fill the gap between the infraction procedure (Article 258 TFEU) in cases of alleged breach of EU law and the most drastic measures against a Member State under Article 7 TEU. The legal nature of the framework is

³² For a detailed analysis, see, K.L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' in this volume.

³³ Compare Advisory Council, 'The Rule of Law', 36–37.

³⁴ European Commission, 'A New EU Framework to Strengthen the Rule of Law' COM(2014) 158 final/2.

merely a Communication from the Commission to the European Parliament and the Council.

In her explanation, Vice-President and Justice Commissioner Viviane Reding³⁵ nicknamed the proposal ‘a *pre*-Article 7 procedure’, consisting of three stages. Whenever the Commission arrives at the conclusion that in a Member State ‘a systemic threat to the rule of law’ exists, it will give it a ‘rule of law warning’. The Commission listed in the Communication the following principles on to the Rule of Law:

legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.³⁶

If the Member State fails to remedy its shortcomings, the warning will be followed by a ‘Rule of Law recommendation’. Assuming that the Member State responds to this recommendation, the Commission will in the third stage ‘monitor *how* the Member State is implementing the recommendation’.³⁷ If not, Article 7 is the fallback position with respect to the Member State concerned. The dialogue between Commission and Member State will, according to the text of the Communication, be based on ‘an objective and thorough assessment of the situation at stake’.³⁸

The threshold for applying the new framework is quite high. According to the Communication, the ‘main purpose of the Framework is to address threats to the rule of law [...] which are of a systemic nature’.³⁹ On its webpage, the Commission offered two examples of the ‘challenges to the Rule of Law on several occasions in recent years’, although the ‘systematic nature’ is not apparent in the first example: France’s Roma crisis in 2010 and threats to the independence of the judiciary during

³⁵ V. Reding, ‘A new Rule of Law initiative’ (Speech 14/202, Strasbourg, 11 March 2014), at http://europa.eu/rapid/press-release_SPEECH-14-202_en.htm.

³⁶ European Commission, ‘A new EU Framework to strengthen the Rule of Law’, 4.

³⁷ Reding, ‘A new Rule of Law initiative’.

³⁸ ‘A New EU Framework to Strengthen the Rule of Law’, 4.

³⁹ Ibid.

Romania's 2012 political crisis.⁴⁰ In its press release, the bar is raised further to the level of a 'systemic breakdown':

- The framework can be activated in situations where there is a *systemic breakdown* which adversely affects the integrity, stability and proper functioning of the institutions and mechanisms established at national level to secure the rule of law. The EU framework is not designed to deal with individual situations or isolated cases of breaches of fundamental rights or miscarriages of justice.
- *Equality of Member States*: the framework will apply in the same way in all Member States and will operate on the basis of the same benchmarks as to what is considered a systemic threat to the rule of law.⁴¹

These conditions make it quite unlikely that the framework will be applied anytime soon. The Hungarian situation – changes in the constitution, including the early retirement of a large group of judges with a negative impact on judicial independence – is not mentioned as an example, but a further deterioration could trigger a change of direction.⁴²

The new Commission, appointed in late 2014 under the presidency of Jean-Claude Juncker, has endorsed the procedure laid down in the Communication. The First Vice-President Frans Timmermans is, *inter alia*, in charge of the Commission's policy with respect to the Rule of Law and the Charter.

In its response to the AIV Report, sent to Parliament on 24 April 2014,⁴³ the Dutch government endorsed most of its recommendations. It recognised that the

⁴⁰ European Commission, 'EU Takes Action to Protect Rule of Law', *Europa.eu* (12 March 2014), at http://ec.europa.eu/news/justice/140312_en.htm.

⁴¹ European Commission, 'European Commission Presents a Framework to Safeguard the Rule of Law in the European Union', Press Release, *Europa.eu* (11 March 2014), at http://europa.eu/rapid/press-release_IP-14-237_en.htm.

⁴² Bojan Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2014) LEQS Paper No. 79/2014, at <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf>; see also D. Kochenov, 'Europe's Crisis of Values' (2014) 48 *Revista catalana de dret públic*, 160.

⁴³ *Parliamentary papers II* 2013/14, 33877, 19.

Commissions' initiatives and the peer review proposal go very well together, complementing each other in various contexts.⁴⁴ Peer review under the aegis of the Council appears to be better suited to a process of gradual enculturation of the Rule of Law.

In its meeting of December 16, 2014 the Council of the European Union (General Affairs Council) embarked on an initiative on its own. Based on the Italian Presidency note on 'Ensuring Respect for the Rule of Law',⁴⁵ it 'adopted conclusions on respect for the Rule of Law, establishing a political dialogue among member states to promote and safeguard the Rule of Law within the EU'.⁴⁶ The purpose of the conclusions is 'a dialogue among all Member States within the Council' that would promote 'a culture of respect for the Rule of Law within the European Union'.⁴⁷ The

dialogue will take place once a year in the Council, in its General Affairs configuration, and be prepared by the COREPER (Presidency), following an inclusive approach. The Council will consider, as needed, to launch debates on thematic subject matters.⁴⁸

The issue was thus effectively taken out of the hands of the Justice and Home Affairs Council, who had dealt with the subject in previous years. Any relationship with the Commission's framework is not visible, which gives the impression that the Council wanted to create an alternative.

The Ministers of Foreign Affairs also emphasised

⁴⁴ Ibid, available in Dutch at <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/04/24/gecombineerde-kabinetsreactie-aiv-advies/gecombineerde-kabinetsreactie-aiv-advies.pdf>; and available in English at the webpage of the Advisory Council: <http://aiv-advies.nl/6d4/publications/advisory-reports/the-rule-of-law-safeguard-for-european-citizens-and-foundation-for-european-cooperation#government-responses>.

⁴⁵ Council of the European Union, 'Note from the Presidency to the Council on the subject of ensuring the respect for the rule of law in the European Union' (16862/14, Brussels, 12 December, 2014).

⁴⁶ Council of the European Union, '3362nd Council Meeting – General Affairs' (Press Release, 16936/14, *Europa.eu* (16 December 2014), at <http://www.consilium.europa.eu/en/workarea/downloadasset.aspx?id=40802192315>.

⁴⁷ Council of the European Union, 'Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring the respect for the rule of law' (17014/14, Brussels, 16 December 2014), para. 1.

⁴⁸ Ibid., para. 6.

that such an approach will be without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States inherent in their fundamental political and constitutional structures, inclusive of regional and local self-government, and their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security, and should be brought forward in light of the principle of sincere cooperation.⁴⁹

Even before any controversial issues related to the Rule of Law could be raised, the Ministers already appeared to be accepting excuses for illiberal democracies. Much will depend on how the Council will prepare its annual ‘dialogue’. Only if the debate is prepared, possibly with the assistance of the FRA, with a substantive analysis of the Rule of Law situation, will it prove useful in truly promoting the Rule of Law.

VI. The way ahead

The real significance of the Council’s conclusions will largely depend on how the recent decisions in the Council are implemented. Whether the introduction of peer evaluation can be viewed as effective will depend on the climate in and between the Member States. If a Member State’s government steadfastly undermines the Rule of Law, the review procedure will not be sufficient. From that point of view, it is understandable that Kochenov and Pech view the recent decisions as ‘grossly inadequate to tackle the problem of “Rule of Law backsliding post EU accession”’.⁵⁰ Rule of law enforcement can only take the form of direct, legally binding interventions in situations of serious shortcomings – in other words, when trust has already been undermined. Concerns such as those expressed by Sionaidh Douglas-Scott⁵¹ and Kochenov on Europe’s ‘justice deficit’⁵² relate to such situations.

The Rule of Law initiative, however, is meant to *prevent* such situations. The importance of peer review is tailored for prevention and growth in the virtue of

⁴⁹ Ibid., para. 4.

⁵⁰ D. Kochenov, and L. Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s “Pre-Article 7” Procedure as a Timid Step in the Right Direction’, EUI Working Papers No. 2015/24, RSCAS.

⁵¹ S. Douglas-Scott, ‘Justice, Injustice and the Rule of Law in the EU’ in D. Kochenov, G. de Búrca and A. Williams, *Europe’s Justice Deficit?* (Oxford: Hart Publishing 2015), p. 51.

⁵² D. Kochenov and A. Williams, ‘Europe’s Justice Deficit introduced’ in D. Kochenov, G. de Búrca and A. Williams, *Europe’s Justice Deficit?*, p. 1.

reciprocity, i.e. as a stimulus for a growing acceptance of the value of the Rule of Law. Peer review procedures should definitely not be viewed as an alternative for political or legal actions against Member States which disregard the founding values of the European Union. Once a political system has drifted away from the Rule of Law, it is too late to rely on dialogue between justice systems representatives. However, if we wish to prevent such situations and reverse negative developments, it remains worthwhile to strive for the enculturalisation of Rule of Law principles in the attitudes and practices of professionals and officials. Ultimately, these professionals and officials are those who can make a difference, for the citizens of their own state but also for other European citizens who – as a result of the mutual recognition of judicial decisions and arrest warrants, or when they avail themselves of the economic freedoms of the Union – have to rely on the Rule of Law in other Member States.

Bringing a value to life is first a matter of developing attitudes and virtues. The Rule of Law depends on reciprocal respect and mutual trust, which could very well start with how we promote it.