The rule of law - towards a common definition?

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Introduction

In my almost 30-year career at the Council of Europe, I have had to deal with the concept of the rule of law on several occasions.

As a jurisconsult, it is my role to ensure that the principles of the rule of law are respected within the organisation. As our Administrative Tribunal has recalled, "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"[1].

The bilingual preparatory documents of the Council of Europe reveal that the term "rule of law" in the English version of the draft Statute of the Council of Europe (ETS No. 001) did not have an equivalent in French at the beginning. In the first draft Statute dated 5 April 1949, the English version of Article 4 (a) (now Article 3) provided that all members of the Council of Europe should accept the "principles of the rule of law", whereas the French version of the same article referred to the "principes du respect de la loi". The notion of "prééminence du droit" in Article 3 of the Statute seems to have been introduced later in the preparatory documents as an equivalent to "rule of law".

Some sixty years later, the Parliamentary Assembly of the Council of Europe, in its resolution 1594 (2007) on the "The principle of the Rule of Law", expressed concern that the variability in terminology and understanding of the term could lead to confusion. The semantic translation problems invoked by the Parliamentary Assembly can be seen as reflecting the deeper conceptual and philosophical differences between the main European legal traditions on the exact scope of the concept of the rule of law. In particular, differences can be observed

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[1] Decision of the Administrative Tribunal of 13 March 2014, Appeal No. 540/2013, (Staff Committee (XIV) v. Secretary General), para. 41: https://rm.coe.int/168077017f

between the Common law concept of the rule of law and the continental notions of "Rechtsstaat" and "Etat de droit".

At the intergovernmental level, the issue of the definition and scope of the rule of law has long been neglected. It was not until the ministerial session of the Committee of Ministers in May 2008 that progress was made on this issue. At that session, the ministers, having "reaffirmed the importance of the principle of the rule of law for consolidating democracy and respect for human rights", " asked their Deputies to examine how full use could be made of the Council of Europe's potential in promoting the rule of law and good governance".

The results of this work can be found in the document CM (2008)170 "The Council of Europe and the rule of law - an overview". The document establishes a typology of relevant activities undertaken by the Council of Europe. It distinguishes between the following activities: (i) promoting the conditions necessary for the rule of law; (ii) promoting respect for the rule of law; (iii) adressing threats to the rule of law; (iv) ensuring respect for the rule of law; and (v) strengthening the international rule of law.

It was on the basis of this work that the subject was introduced on the agenda of the 29th[e] Conference of Ministers of Justice of the Council of Europe (Tromsø 18-19 June 2009)[2], which adopted Resolution No. 3 on the Council of Europe's action to promote the rule of law. This resolution provided for a series of measures, including a regular review in member States of the various aspects inherent to the rule of law, as identified in the document "The Council of Europe and the rule of law - an overview", in particular on the basis of the case-law of the European Court of Human Rights, the execution of its judgments, the contributions of the relevant steering committees and advisory bodies and the findings of monitoring bodies.

This ambitious proposal has not been implemented. In a document SG/Inf(2010)20 (5 November 2010) entitled "The Council of Europe and the rule of law - Follow-up to Resolution No. 3 on Council of Europe action to promote the rule of law", the Secretary General underlines "the interest of each of those … measures, some of which are of a rather academic nature. I note that in the current budgetary situation and with the ongoing reform process, it would not be

[2] 29th Council of Europe Conference of Ministers of Justice, Tromsø (18-19 June 2009), "Breaking the silence - united against domestic violence".

appropriate to launch major new activities and those measures can thus not be implemented in 2011."

However, the idea has been taken up by the Venice Commission, an advisory body created on the basis of an enlarged agreement and therefore not subject to the constraints of the organisation's regular budget.

The Venice Commission's contribution

The 'European Commission for Democracy through Law', also known as the Venice Commission, has 61 members, the 47 member States of the Council of Europe and 14 other countries.

As the guardian of constitutional probity throughout Europe, the Commission published in 2011 a "Report on the rule of law". In this report, the Commission sought to identify a consensus definition of the rule of law in order to assist international organisations and courts, both national and international, in interpreting and applying this fundamental value[3].

This report was followed by the adoption, in March 2016, of a "**Rule of law checklist**"[4], a practical, accessible tool intended for use by a wide range of actors, including national authorities, international and non-governmental organisations, academics and ordinary citizens.

The list is neither exhaustive nor definitive. Rather, it aims to cover a range of fundamental elements of the rule of law while taking into account the diversity of Europe's legal systems and traditions.

The list translates five principles of the rule of law (legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and access to justice) into concrete issues, with the intention of applying them to assess and evaluate the specific circumstances of each member State.

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[3] *Report of the Venice Commission on the rule of law* (4 April 2011), paragraph 3.

[4] Rule of Law Checklist, adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016).

With the adoption of the Rule of law checklist in March 2016, the Venice Commission established "one of the few widely accepted conceptual frameworks for the rule of law in Europe[5].

The list of criteria has been formally approved by the Committee of Ministers, the Congress of Local and Regional Authorities and the Parliamentary Assembly of the Council of Europe.

Dynamics and limits of the concept of the rule of law

According to former UN Secretary General Ban Ki-moon, "the rule of law is like the law of gravity"[6]. Gravity, however, is a scientifically defined concept that describes a universally applicable and naturally occurring reality. The rule of law, on the other hand, does not arise spontaneously. It describes a set of principles describing ideals that each society must adopt and adapt to its specific legal, historical, political and social contexts. Thus, the effective realisation of the rule of law depends to a large extent on the commitment of each individual.

We must be careful not to pit democracy against the rule of law. In some countries, it has become fashionable to present the principles of the rule of law as tools used by the "old regime" to prevent democratically elected governments from implementing policies supported by a majority of the population.

Democratic legitimacy is not a product of the laws of nature. Democracy presupposes a set of legally binding norms, which are indispensable for free and informed political speech and for the free expression of the will of the people through elections.

The rule of law is not only complementary to majoritarian democracy; it is also an elementary precondition for its establishment and articulation. The principles inherent in the rule of law are the soil on which democratic powers can flourish.

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[5] S. Carrera, E. Guild and N. Hernanz 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU' (Brussels, CEPS, 2013) 17.

[6] GA/11290 'World leaders adopt deceleration reaffirming rule of law as foundation for building equitable State relations, just societies (24 September 2012).

It is because the rule of law limits the powers of the state and their exercise that its citizens are able to exercise their rights of democratic participation[7].

As the example of the Venice Commission's list of criteria shows, it is perfectly possible to identify certain basic principles that are commonly accepted throughout Europe. It is also possible to use these principles to judge the action of States. All this seems to contradict the statement of the current ECHR judge for Sweden, Erik Wennerström, who wrote in 2007 that attaching legal consequences, especially negative ones, to a term whose meaning is not clearly established, runs counter to many, if not most, interpretations of the rule of law[8].

However, some caution is warranted for two reasons. First, by expanding the concept of the rule of law too broadly and burdening it with substantive requirements, there is a risk that the concept itself will become so uncertain and unpredictable that it may fail the tests of clarity and predictability that are inherent in it.[9]

Second, as the constitutional scholar Frank Schorkopf recently observed, "in democracy, it is not truths but majorities that rule"[10]. By this he did not mean that the outcome of the majority vote is considered true regarding the circumstances, nor that the claim to truth is not a requirement of democratic self-determination. Rather, his thesis argues that it is necessary to be careful that claims to secular truths - such as human rights or the principles of the rule of law - do not recur in our democratic societies, which, over their long histories, have effectively excluded or neutralized confessional claims.

My long career in an international organisation has taught me that caution is needed when it comes to imposing values. Legal discourse at the European level rarely reaches the same breadth and depth as at the national level where, as Dieter

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[7] On the relationship between democracy and the rule of law, see also Andreas Voßkuhle "Rechtsstaat und Demokratie" (2018) Neue Juristische Wochenschrift 3154-3159.

[8] E. Wennerström *The Rule of Law and the European Union*, (Uppsala, Iustus Förlag, 2007) pp 87 and 81.

[9] Wennerström ibid.

[10] Karl Doehring Lecture (22 October 2021).

Grimm rightly observed, it takes place in a much closer context of participation and accountability.[11]

International experts or judges have in a sense more freedom than their national counterparts and therefore try to counterbalance this by respecting national identities. This idea finds expression in the European Court of Human Rights' use of the margin of appreciation and the principle of subsidiarity in the field of human rights.

Perhaps even more than human rights standards, rule of law principles are specific to a national context. They are always called upon to be applied in relation to that specific context. A good example is the assessment of the "fairness" of a judicial proceeding or a system of remedies, which cannot be accomplished without reference to the particular national context and without weighing the various factors that contribute to this complex assessment.

Moreover, the same concept can have very diverse meanings and, above all, practical applications.

Let me illustrate this with two concrete examples: the principle of non-retroactivity and the principle of proportionality.

Non-retroactivity

I myself was confronted with this problem in the context of the "Agramunt" case, which gave rise to an appeal before the Administrative Tribunal of the Council of Europe[12]. The facts are public. Mr Pedro Agramunt, a Spanish senator at the time, was elected President of the Parliamentary Assembly on 25 January 2016.

In addition to being accused of being involved in the "caviargate" affair, Mr. Agramunt made a trip to Syria in March 2017 using a Russian military aircraft. His photos with Mr Bashar al-Assad provoked indignant reactions from many members, several delegations and political groups. It is quite understandable that this has raised questions about the obligations of members of the Assembly who hold important elective offices.

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[11] D. Grimm *Europa ja - aber welches? Zur Verfassung der europäischen Demokratie* (Verlag C.H. Beck 2016) 171.

[12] Appeal N° 584/2017 brought by Mr Pedro Agramunt Font De Mora on 27 July 2017.

However, the Assembly's Rules of Procedure were silent on the procedures to be followed for the removal of a sitting President. On 8 June 2017, the Committee on Rules of Procedure, Immunities and Institutional Affairs of the Parliamentary Assembly of the Council of Europe adopted a draft report on the "Recognition and implementation of the principle of accountability in the Parliamentary Assembly"[13]. This report included a draft resolution establishing, inter alia, a procedure for the removal of the President of the Assembly. The resolution stated that it would enter into force as soon as it was adopted and that its provisions would apply to the current terms of office of the President of the Parliamentary Assembly.

The Venice Commission's list obviously mentions the principle of non-retroactivity (see point 6 under the heading "legal certainty"). However, it is in vain that one looks for more precise criteria, going beyond the general statement that " outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality".

In contrast, the legal systems of most Member States go further. Legal issues related to the application of the law to past events are discussed with the help of various concepts, such as "retroactivity", "retrospectivity", "legal certainty", "legitimate expectations", or "acquired rights". While a person may have some expectation of the (continuing) effect of the law while it is in force, no one can legitimately expect that the law will not be changed in the future. The constitutional law of many countries sets limits to the legislator seeking to retrospectively change the legal consequences of a past situation in a way that would impose additional burdens on the persons concerned ("real retroactivity").

However, retroactive effect is considered less problematic if these legal consequences only take effect after the enactment of the relevant legal provisions, even if they are triggered by a situation which, in terms of the constituent elements of those provisions, has already been set in motion beforehand (sometimes referred to as "de facto retroactivity", although technically it does not have retroactive effect). The latter can generally be justified by overriding public interests.

[13] Recognition and implementation of the principle of accountability in the Parliamentary Assembly, 8 June 2017, Doc n°14338.

The proposed amendments to the Rules of Procedure were aimed at introducing "exceptional procedures" which would provide a mechanism to make these elected representatives accountable by introducing a new sanction. Until then, there was no specific sanction for elected representatives. The code of conduct for members of the Assembly, in its version in force at the time, did not provide for any mechanism to remove them from office.

Applying these principles to the proposed amendments, it would seem that arguments relating to public policy and the need for effective control of the conduct of elected representatives far outweigh the legitimate expectation that procedures will not change. The failure of an office-holder, such as the President, to gain the confidence of the Assembly, and thus to discharge his or her duties, can be considered a permanent event.

However, an attempt to penalise conduct, however inappropriate, *ex post facto*, by introducing a new sanction applying to acts or omissions which took place before the entry into force of that procedure, may be regarded as contrary to the principle of legal certainty.

In the present case, no final decision was required. Mr Agramunt announced his resignation as President of the Parliamentary Assembly of the Council of Europe on 6 October 2017. The debate on a motion for his removal which was scheduled for the opening of the plenary session on 9 October in Strasbourg did not take place. Mr Agramunt's appeal was furthermore declared manifestly inadmissible.

Principle of proportionality

The principle of proportionality is considered an integral part of the rule of law and is recognised in every democratic society. The principle of proportionality is primarily intended to safeguard fundamental rights and therefore to protect substantive justice in any decision taken by state authorities. It complements the more formal (often procedural) guarantees by adding a substantive component.

The principle of proportionality is a general principle; its central importance is largely based on its general applicability. This does not mean, however, that further contextual differentiations are not possible, which has led to the development of specific and rather divergent lines of jurisprudence based on proportionality in different countries and legal systems.

In Germany, the principle of proportionality is the central substantive limit for restrictions on fundamental rights (= prohibition of excess). According to well-established case law, the principle requires a balancing of the measure used and the objective pursued by it. The state measure must pursue a constitutionally legitimate objective and be appropriate, necessary and adequate (= proportionate in the individual case) to promote it.

These same principles are enshrined in the case law of most, if not all, European countries, as well as by the ECHR and the CJEU. A superficial analysis might conclude that there is a perfect convergence of case law, which would act in a mutually enriching way, thus contributing to the harmonisation of European law.

However, the reality is more ambiguous. In the case law of the CJEU, the principle of proportionality is sometimes treated as an isolated principle without any necessary link to other fundamental rights guarantees, to the principle of equality or to other principles. In other cases, such as the famous *Achbita*[14] case, the CJEU does not rigorously apply the third step of the test, the most crucial one from a normative and social point of view. Indeed, even if a measure pursues a legitimate aim and is "necessary", it is still needed to ask why the values embedded and reflected in the legitimate aim of the necessary measure outweigh the values inherent in the protected freedom that is affected and compromised by that measure. For this reason, judicial review by the EU institutions is sometimes considered deficient because of the lack of guidance as to what is truly necessary or appropriate[15].

Nor does the European Court of Human Rights always strictly follow the three-step test of adequacy, necessity and proportionality of restrictive measures. Instead, it has developed its own principles. The State must have chosen the most lenient means possible, taking into account the practice of the Contracting States when assessing proportionality. States thus have their own "margin of appreciation".

The establishment of the proportionality control in French law has been comparatively more laborious. In French constitutional law, there is no general principle of proportionality; in fact, as Professor Valérie Goesel-Le Bihan

[14] See J Weiler ‘Je suis Achbita ‘ EJIL: Talk! (2018).

[15] P. Huber 'The Principle of Proportionality' in W. Schroeder *Strengthening the Rule of Law in Europe* (Bloomsbury 2016), p. 112.

explains[16], "a systematic analysis of the case law shows that, for the French constitutional judge, realism consists in varying the intensity of the control she/he exercises according to the importance of the rights and freedoms concerned, as well as, in certain cases, to the extent of the infringements of these rights and freedoms by the law and the importance - itself variable - of the conflicting objective pursued". There are therefore rights and freedoms that rank first in the hierarchy of norms and which are, hence, subject to proportionality control in the classic sense of the threefold test assessing the adequacy, necessity and proportionality of the restriction placed on these rights and freedoms. Examples of this category of "primary rights and freedoms" include, but are not limited to, freedom of communication and individual freedom. Moreover, the legislator can only justify the restriction of such rights and freedoms by the implementation of an objective or another right of constitutional value, and not by invoking a simple general interest. At the same time, there are rights and freedoms whose restrictions can be justified by a simple general interest and which are subject only to a limited proportionality review aimed solely at ensuring that the restrictions imposed are not "manifestly excessive" in relation to the objective pursued. Examples of such rights and freedoms include entrepreneurial freedom and contractual freedom.

As far as the administrative jurisdiction is concerned, the proportionality control of administrative action carried out by the *Conseil d'Etat* (Council of State), in the context of conventionality review, is not always very demanding. However, a recent innovation favourable to the strengthening of the conventionality review carried out by the Council of State should be noted. Since the *Gonzalez Gomez*[17] decision, the Council of State has explicitly supplemented its traditional *in abstracto* review of conventionality with an *in concreto* review. This review was intended to ensure that the implementation of the prohibition contained in French law was not, in the very specific circumstances of the case in question, likely to result in a violation of the provisions of Article 8 of the European Convention on Human Rights[18]. The Council of State was thus directly inspired by the concrete proportionality control exercised by the European Court of Human Rights.

[16] Le contrôle de proportionnalité exercé par le Conseil constitutionnel, Cahier du Conseil constitutionnel n° 22 (Dossier : Le réalisme en droit constitutionnel) - June 2007 (English traduction).

[17] CE, Ass. 31 May 2016, Gonzalez Gomez, No. 396848, Rec. Lebon.

[18] Speech by Jean-Marc Sauvé, Vice President of the Council of State, University of Tokyo, Wednesday 26 October 2016: https://www.conseil-etat.fr/site/actualites/discours-et-interventions/le-conseil-d-etat-et-le-droit-europeen-et-international

Nevertheless, despite this consecration, it seems that the implementation of this in *concreto* control remains limited, at present, to certain types of disputes.

As for the *Cour de Cassation* (Court of Cassation), it had preceded the Council of State in the implementation of a concrete control of conventionality in a famous decision of 4 December 2013[19]. The highest court of the judicial order had declared conventional a marriage between a father-in-law and his daughter-in-law then prohibited by Article 161 of the Civil Code. The concrete application of this legislative provision in this case was disproportionate in relation to Article 8 of the Convention insofar as it was a question of ending a union that had lasted for more than 20 years. Recently, recourse to concrete conventionality review has moreover been the subject of a certain form of "institutionalisation" insofar as the Commission for the implementation of the reform of the Court of Cassation published in December 2018 a Memento of conventionality review with regard to the European Convention on Human Rights[20] expressly referring to such a review. We can also mention the more recent example of the concrete conventionality review exercised by the *Cour d'appel* (Court of Appeal) of Reims concerning the scale of compensation for dismissal without real and serious cause, known as the "Macron scale". The Court of Appeal had indeed ruled, in a decision of 25 September 2019[21], that if the "Macron scale" was conventional *in abstracto*, it should not, *in concreto*, bear "a disproportionate infringement of the rights of the employee concerned"[22]. Thus, the development of this *in concreto* control favours the implementation, in French law, of the triple test of proportionality as applied by the case law of the European Court of Human Rights. However, the Court of Cassation has sometimes been reluctant to apply the proportionality test, applying it only superficially and often in a purely formal manner, without actually implementing it[23].

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[19] See Cass, Civ. 1re, 4 December 2013, No. 12-26.066.

[20] Mémento du contrôle de conventionalité au regard de la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales, Cour de cassation, Commission de mise en œuvre de la réforme de la Cour de cassation, décembre 2018.

[21] Cour d'appel de Reims, 25 September 2019, No. 19/00003.

[22] 25 septembre 2019 - France. Arrêt de la cour d'appel de Reims sur le plafonnement des indemnités prud'homales. », Encyclopædia Universalis [en ligne], consulté le 16 décembre 2021. URL: http://www.universalis.fr/evenement/25-septembre-2019-arret-de-la-cour-d-appel-de-reims-sur-le-plafonnement-des-indemnites-prud-homales/

[23] See Cass. 3ème Civ, (8 June 2006), 05-14.774

All these differences at national level in the concrete implementation of proportionality control and in particular regarding the scope of this control are generally not problematic. They simply reflect divergent approaches based on different legal contexts and traditions. Conflicts are, however, not excluded, in particular if two or more courts claim the last word on a question of interpretation.

This is evidenced by the famous case law of the German Federal Constitutional Court on the unconstitutionality of the public *sector asset purchase programme* (PSPP) adopted by the ECB in March 2015. In the view of the Bundesverfassungsgericht, the Court of Justice[24] did not properly review the ECB's compliance with the principle of proportionality by not taking sufficient account of the actual effects of the PSPP on economic and budgetary policy[25]. In particular, it should not have limited itself to a review of the manifest error of appreciation in the implementation by the ECB of its monetary policy powers. By limiting its judicial review in this way, the CJEU does not ensure compliance with the division of powers provided for in the EU Treaties and to which the German people had consented by a vote in the Bundestag.

It is not for me to comment on whether Karlsruhe or Luxembourg has the final say in this matter. For the purposes of this intervention, it is sufficient to note that there is a fairly fundamental difference between two high courts, one national and one European, in the application of the principle of proportionality.

Conclusions and outlook

This conference is part of the conference on the future of Europe. Let me conclude by saying a few words about the interaction between the Council of Europe and the European Union in the field of the rule of law.

EU action on rule of law issues should make full use of and cooperate with the work of the relevant Council of Europe bodies and mechanisms, in particular the ECHR, the Venice Commission, the CEPEJ and the Group of States against

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[24] Judgment of the Court (Grand Chamber) in Case C-493/17 of 11 December 2018, Heinrich Weiss and Others; PRESS RELEASE No 192/18, 11 December 2018, The ECB's PSPP programme for the purchase of government bonds on secondary markets does not infringe EU law: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180192en.pdf

[25] Bundesverfassungsgericht, Judgment of 5 May 2020 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15: Bundesverfassungsgericht- Decisions - ECB decisions on the Public Sector Purchase Programme exceed EU competences

Corruption (GRECO). The existing strategic partnership between the EU and the Council should be strengthened in order to ensure, inter alia, that the conclusions and recommendations of the Council of Europe's rule of law mechanisms are effectively implemented by the EU Member States. The EU could also join a number of mechanisms as a full member, such as the GRECO, and, above all, finally accede to the ECHR.

As legal certainty is an essential feature of the rule of law, it is essential that the European institutions use the same language and standards when assessing the situation in the member States. On this point, I refer you to Recommendation 2151 (2019) - "Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights" and to the reply of the Committee of Ministers.

While the diversity of legal systems and cultures in Europe must not be used as a pretext to justify violations of fundamental principles, it is also true that the standards of the rule of law cannot be harmonised in the same way as air traffic safety standards.

On this point I can only agree with Armin von Bogdandy who warned us of the dangers of a tyranny of values:

“To many people, the European institutions appear distant and foreign. If they urge or even try to force democratically elected governments to revise important political projects, invoking European values, they run the risk of being rejected as self-important, arbitrary and illegitimate actors. The same holds when other Member States insist on values.

Just thumping on the lawfulness of such actions is hardly an appropriate response to accusations of moving towards a tyranny of values. “Being right” is not sufficient. Rather, in order to credibly defend European values, one must make use of fair procedures to convincingly show a broad European public what the values require, why they have been violated and what needs to be done.” [26]

Finally, and most importantly as lawyers, we must never forget that the law is inherently limited in its ability to remedy the failure of democracy and the rule of

[26] A. von Bogdandy 'Principles and Challenges of a European Doctrine of Systemic Deficiencies' MPIL Research Paper Series No 2019-14, 32 (author's translation).

law. The values of democracy and the rule of law depend on the critical mass of institutional actors, women and men, who enforce them with their own integrity.