

CCBE contribution to the EU reflection process aimed at further strengthening the rule of law

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 45 countries and, through them, more than one million European lawyers.

The CCBE welcomes the Commission's Communication on "Further strengthening the Rule of Law within the Union" (COM(2019) 163) and the reflection process launched by the Commission involving all possible stakeholders.

The CCBE supports the values upon which the European Union is founded. As the rule of law is also one of the main missions of the CCBE, we find it important – within the limits of our apolitical objectives – to contribute to this debate.

One of the lessons that we have learned from recent years' experience is that respect for the principles of the rule of law should never be taken for granted. Indeed, it requires constant guardianship, support and reinforcement. Therefore, the following suggestions are intended to strengthen and promote the rule of law and prevent continued erosion. We prefer to refrain from making suggestions regarding the institutional sanctioning of infringements.

1. One single Commissioner responsible for the rule of law and justice (actors)

The Commission's Communication underlines how the principles of the rule of law are at the heart of European integration and how the standards and requirements of the rule of law are inherent in all the Union's initiatives and activities.

The Communication also emphasises the important role of **effective judicial protection** as a guarantee of the implementation and monitoring of rule of law standards in Member States. The concept of 'judicial independence' has become an autonomous concept of EU law, based on Article 19(1) TEU, and is a concrete expression of the value of the rule of law.

The EU is based on the rule of law and every action taken is founded on treaties approved voluntarily and democratically by all EU member countries. The rule of law is essential for the effectiveness of the Treaty on the European Union, for the Internal Market, and for cooperation in the area of Justice and Home Affairs. Therefore it deserves a prominent role in the organisation and structure of the European Union's bodies.

Therefore, the CCBE strongly recommends that both the portfolio for the rule of law and the portfolio for justice (and justice actors, i.e. members of the legal profession including judges) be entrusted to one single special Commissioner in the new Commission. This makes sense for several reasons:

- Increased capacity for 'early warning' of attempts to restrict the effectiveness of judicial protection, including through measures that prevent members of the

legal profession form carrying out their duties as lawyers and judges, through direct contact with justice actors or their representative bodies;

- Possibility of interacting at an earlier stage and also intervening directly in potential structural developments of judicial systems at Member State level, that threaten to erode the required independence;
- Direct interaction and contact with European and international organisations that carry out assessments of the independence of the judiciary (Venice Commission, etc.);
- Build a knowledge centre by sourcing information directly from the network of national – and where applicable regional – representatives of justice actors and through their European organisations and develop a better monitoring capacity through using this network and more refined indicators and “traffic lights” concerning judicial protection;
- Having one focal point will help to coordinate responses with civil society on matters appertaining to the rule of law;
- Better (cost-)effectiveness in the organisation of the monitoring of the rule of law, in coordinating positive actions, promoting principles and standards and launching measures.

In addition to the existing network of justice actors, the single Commissioner for the rule of law and justice could further strengthen collaboration with the European Parliament and MEPs.

2. Codification of the principles, standards and requirements of the rule of law

As a preparatory tool, the CCBE proposes that a **manual** of the **EU’s** (core) rule of law principles, standards and requirements be carried out. This comprehensive manual or guide will make the concept, principles, standards and requirements more visible and can serve as a solid reference point for advancing the rule of law. It can be regularly updated with new findings, recent (court) decisions, new criteria and indicators of the erosion of the rule of law.

In 2004, the UN Secretary General Kofi Annan, described the rule of law as

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” (Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies(S/2004/616).

This description, scope and concept should be made more accessible and attractive to a wider audience.

Indeed, the growing lack of public knowledge about the concept of the rule of law facilitates and even reinforces doubts about the **relevance, importance and legitimacy** of the principles of the rule of law in today's society in the face of current challenges. As a self-fulfilling prophecy, this may in fact contribute to an actual erosion of the rule of law.

A clear definition and description of the concept, scope and consequences of the rule of law, as well as the development of up-to-date arguments and showcases that support the legitimacy of the rule of law in today's societies, would therefore be helpful.

Studies and projects should contribute to establishing the relevance of the rule of law, legal certainty, the predictability and reliability of government policies and decisions for the development of economic prosperity and the pursuit of individual self-fulfilment **based on robust and evidence-based material**. The effect of the erosion of the 'rule of law' on national economic performance, foreign investment, capital flows and national payment balances can be examined and correlations can be determined. This can provide strong arguments in exchanges with and between Member States.

A next step could be to develop, on the basis of this manual or code, educational materials in an attractive and accessible language for broader **dissemination** to a wider audience and for the **education** of the general public and stakeholders on the rule of law.

This education can be done through debates in national parliaments, professional forums and schools, and through other channels aimed at the general public.

The CCBE is available to provide support and consider how it can most effectively contribute to this dissemination and education initiative.

3. The development of a "rule of law" culture at decision-making level

With initiatives such as Better Regulation and the Proportionality principle (including non-discrimination) the EU has already started to develop a "rule of law" culture at decision making level.

The EU High-Level Expert Group on Artificial Intelligence has published Ethics Guidelines for Trustworthy AI, claiming that *"AI systems must also embed a commitment to ensure that they **do not operate in ways that undermine the foundational commitments upon which the rule of law is founded, mandatory laws and regulation, and to ensure due process and equality before the law.**"*

The adherence to these principles should be further developed and promoted for implementation at every level . The development of a rule of law culture could embed rule of law impact assessments as an essential step when new laws, procedures or rules are being considered within Member States to answer the following questions:

- Is there a(n) (in)direct impact on democratic rules and safeguards, on the principles of the rule of law, on fundamental right or on human rights and dignity?

- Is there a (in)direct impact on the organisation and independence of institutions and professions safeguarding and promoting the rule of law, including the legal profession, on the independence, rights and obligations, on the free and unrestricted exercise of these professions?

The CCBE is available to support the development of a framework for such an impact assessment tool.

4. The development of a uniform set of criteria and indicators for the assessment of the “rule of law”

The EU – as well as other European organisations – frequently assess critical rule of law situations, both in Member States and in accession candidate countries.

The criteria and indicators used by the EU for these assessments are evolving. In assessing the effectiveness of judicial protection, a lot of attention is – for obvious reasons – paid to institutional criteria: the selection and appointment of judges, the organisation and functioning of prosecutors’ offices and law enforcement.

The more operational aspects of effective judicial protection, such as respect for procedural safeguards, the right of access to and assistance of a lawyer of one’s own choosing, the right to prepare an adequate defence, and access to legal aid, to name but a few, do not seem to receive sufficient attention. In addition, the degree of independence of the legal profession or the possibility of exercising the profession freely and without restriction or undue influence by the authorities are not sufficiently taken into account in these assessments. Nevertheless, lawyers are often at the forefront when it comes to bringing infringements against the rule of law to court for redress and/or to receive compensation. They are the first line of defence for the rule of law.

The CCBE is obviously available for the development of criteria and indicators, in particular for the state of play of effective judicial protection at the level of the legal profession and respect for procedural safeguards.

5. Creating a European alliance for the promotion of the rule of law

The Commission’s Communication mentions several other European organisations active in the field of the rule of law, such as the Council of Europe (Venice Commission, GRECO) and the Organisation for Security and Cooperation in Europe (Office for Democratic Institutions and Human Rights).

The CCBE also believes that the Fundamental Rights Agency is well-positioned to identify, promote and support rule of law issues in a comparative and objective manner. In this respect, the CCBE refers to the provisions of Article 47 of the Charter which concern safeguarding the Right to an effective remedy and to a fair trial. This Article provides that “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack

sufficient resources in so far as such aid is necessary to ensure effective access to justice.” The CCBE believes that the Fundamental Rights Agency has a proven methodology and can also be assisted by their independent research network (FRANet) which can provide relevant data to the FRA on fundamental rights issues to facilitate the Agency’s work and comparative analyses when required.

There are probably already synergies between these organisations. Nevertheless, coordinated actions by these organisations, such as, for example, the organisation of a Europe-wide awareness campaign, would clearly strengthen and enhance the effectiveness of their efforts.

In any case, increased cooperation in the development of common principles, handbooks, standards and requirements, criteria and indicators, etc. in the field of the rule of law would lead to a greater impact and would facilitate the respect and implementation of these strong common principles.

Therefore, the creation of a European alliance for the promotion of the rule of law would be a major achievement.

In this case, the **CCBE would advocate for the involvement of non-formal stakeholders and organisations in this alliance**, to optimise the exchange of information about the rule of law in Member States with regard to these stakeholders and to prepare effective warning signs, assessment criteria and indicators for the rule of law.