"What" versus "Who": Europe's Rule of Law Agenda Revisited

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As we all know, observance of the "Rule of Law" is a central criterium for accession. The way this concept is handled in the enlargement process raises a number of serious concerns, addressed in a recent paper by Rachel Kleinfeld and myself, entitled "RETHINKING EUROPE'S RULE OF LAW AND ENLARGEMENT AGENDA: THE FUNDAMENTAL DILEMMA". In it, we advocate inter alia a consistent rule of law approach across the EU instead of keeping the Copenhagen criteria solely for the realm of the enlargement process.

The background for the paper is this: In 2010, noting problems *inter alia* in Romania and Bulgaria, the EU Commission turned to the OECD SIGMA Programme (Support for Improvement in Governance and Management) for a background report on rethinking the way we promote and sustain the rule of law in the process of enlargement. The SIGMA Programme was created in 1991 to assist the EU in the enlargement process and is principally financed by the EU. It supports public governance reform efforts, including on the rule of law in both EU actual and potential Candidates well as European neighbours. Although I protested that Rachel and I were not lawyers, the OECD secretariat wished for us to expand on our argument in the book edited by Gianluigi Palombella and Neil Walker on Relocating the Rule of Law (2009). We thus produced this report with considerable support and enthusiasm from the OECD secretariat and a network of brilliant EU legal scholars who met at OECD. Unfortunately, in spite of being published by the OECD, the report has gone nowhere fast. Wonder why...

Anyway, it is now a Jean Monnet Paper (08/2012) and we hope it may elicit some further discussion.

This paper sets out a strategy calling for a radical overhaul of the manner in which both the EU and aspiring member states define and implement what the Copenhagen criteria refer to as the "Rule of Law" in pursuit of the elusive goal of sustainability. While pointing to the limits of the current "anatomical method" centered on legal and institutional checklists, the paper stresses the existence of a fundamental dilemma between, on the one hand, the need to be more ambitious in assessing and promoting the "Rule of Law" and, on the other hand, the imperative to exercise humility and restraint regarding the claims made by the EU on behalf of "Rule of Law" assessment and assistance.

The paper argues that while tensions shall always remain, this dilemma may be addressed through a new approach, which is ends-based and focused on the viewpoint of citizens and their empowerment. Moreover, it argues that such an approach should deal with existing and aspiring member states in a consistent manner. Crucially, the paper warns that better applying a "sustainability test" should not serve as an undue pretext to delay enlargement. As a matter of fact, if applied, this new approach is likely to facilitate accession.

The paper suggests practical steps that may help navigate the dilemma and operationalise this new approach. Recommendations include:

- The empowerment of institutional as well as civil society monitors to assess "Rule of Law" sustainability in both candidate countries and that of member states (e.g. through European Social Fund conditionalities).
- In the realm of enlargement, establishing a better link between assessment and assistance, *as well as* a sharp distinction between the legiti-

mate scope of EU assessment through "progress reports" and the more narrow legitimate scope of intervention through assistance programmes.
- A broader definition of the ambit of the "Rule of Law" to encompass the socio-political and socio-cultural realms and an upgrading of the importance of constitutional and administrative law.
- A recognition of the contested notion of the "Rule of Law" across cultural borders and the limits of EU competences in the ways definitions and list of principles are offered, including on the internet.
- The focus on the end-users of the law, namely the citizens.
- A number of concrete and immediate actions such as: identifying "Rule of Law" as the priority governance reform goal for its Public Administration Reform/Justice and Home Affairs programmes; the systematic support of local actors who can hold their government and administration to account; greater care in the pace and mode of EU *acquis* transposition; better use of ombudsmen reports; reconsidering assessment methodologies and capacities.

Although the precepts put forth in such a new approach ought to apply across all contexts of "Rule of Law" assessment and assistance, account needs to be taken of the potential drawbacks of this approach:

- Some critics will point to the risk of weakening the legal nature of the "Rule of Law" principle, especially when it comes to judicial review of administrative decisions. For them, the "Rule of Law" should only refer to the sound exercise of the public authorities' powers. An endorsement of this new approach needs to make clear that the logic of *sustainable* "Rule of Law" reform, and its assessment by the EU, is a broader aim than sound "Rule of Law" enforcement. As this new approach requires buy-in from the world of law-enforcement, the conversation needs to be sustained.
- A distinction needs to be drawn between the ambitious ends of the "Rule of Law" as a *credible* aspirational commitment by candidate countries, and the specific benchmarks to be attained through the process of enlargement. In recognition of the complex nature of "EU Rule of Law" as a referent for change within an individual country, care should be taken not to imply that such a new approach is meant to ensure that all desirable ends must be deemed to have been attained *ex-ante,* thus constituting the ultimate arbitrary impediment to accession itself.
- A further distinction needs to be made between the legitimate scope of EU assessment ("progress reports"), and the more narrow legitimate scope of intervention through "Rule of Law" assistance programmes.
- In recognition of the current inconsistency between the monitoring of candidate countries and that of member states, "Rule of Law" assessments should apply to the latter as well as to the former by empowering "institutional monitors", such as the Council of Europe or the ombudsmen network. Such an approach should recognise that lessons regarding progress towards the "Rule of Law" can flow both ways – from non-EU members to EU members.

Concretely and rapidly the EU could:

- Publicly identify "Rule of Law" as the priority governance reform goal for its Public Administration Reform/Justice & Home Affairs programmes, not only in terms of choice of subject, but also in terms of content. This would include giving priority to the system of general administrative law.
- Adapt its sectorial reform programmes to support a "Rule of Law" agenda by including the support of local groups or parliamentary political parties, which can hold their own government and administration to account on "Rule of Law" enforcement. Additionally, it can

strengthen its support of the professionalising of the judiciary and public administration.
- Adapt the pace of EU *acquis* transposition, and when (and only when) such transposition is counterproductive, insist on legal quality and due process and use sectorial interventions to promote the "Rule of Law" and good law making.
- Support local civil society organisations, whose aim is to hold their public authorities to account on their respect and enforcement of the "Rule of Law", as well as their practices regarding corruption and clientelism.
- Encourage the setting up of ombudsmen offices in every member state and candidate country, and conduct systematic consultations and comparative analyses on their respective caseloads, achievements and assessments of the citizen's perspective.
- Reconsider assessment methodologies and capacities and provide training in sociological analysis. This may include undertaking a research programme to design metrics and measurement approaches. For example, in the mid 2000's, EUROSTAT and OECD co-operated on measuring the grey economy, and the OECD intends to update the methodology, which the EU might buy into for enlargement purposes.
- Build up a network consisting of South-East Europeans social and political scientists and survey bodies to help develop survey instruments (possibly building upon SIGMA's work on civil service attitudes), and create a system of continuity for reporting (*i.e.* not a one off project only).
- Encourage standing national "Rule of Law" debates – involving politicians (cross party), administrators, business representatives, the media, civil society as well as ombudsmen.
- Set up long term (and eventually two-way) exchange programmes for legal professionals, political, administrative and commercial leaders, social scientists and economists; bringing together a sufficient number of individuals needed to have an impact as a group from within a single country, in order that systemic change could be made possible.[i]
- Assist in the conduct of cross-university seminars on the modernisation of curricula (*e.g.* law drafting, socio-economic understanding of law, institutional economics).
- Conduct further consultations with experts and scholars to explore issues such as: the relationship between the four realms of the "Rule of Law" in specific cases; definitional strategies; checklists of principles; the concrete implementation of "problem-based assessments"; or the generalisability of this paper's conclusion beyond enlargement, especially in the context of the Neighbourhood policy to the east and the south.

At the end of the day, most people would like to respect the law, most of the time. But what if, in their country, there is no robust "Rule of Law" to be respected, whether because laws are not on their books, their institutions are defective, their politics are corrupt or their social culture has accommodated lawlessness? Only cautiously and humbly may outsiders seek to empower those who wish to change such a state of things within their own environment. And how will such actors for change – as well as their domestic and external supporters – know that "it" is happening? One way is to ask a simple question: has the grammar of societal interaction in such a country changed from the "who" to the "what"? [ii] In the former, interactions are determined by *who* one is and is dealing with, *who* is in power and *who* controls outcome, *whom* to bribe and *whom* to fear. In the latter, the questions to ask are: *what* is the issue, *what* are my rights and obligations, *what* are the penalties, and *what* are the relevant laws and institutions? In a society where "what" has displaced "who" as the core referent, the "Rule of Law" is doing well.

In the annex to the paper we propose a "living" list of "Rule of Law" principles from the view point of citizens. By "living" we mean subject to constant evaluation, amendment and enrichment in the light of experience and developments, especially on the part of

local actors engaged in monitoring the "Rule of Law" in their countries. Such a list could be posted on the EU website and open to electronic amendments. Various comments have been incorporated into the list below (we note upfront that many of these questions cannot be answered through yes or no.)

Principle 1: **Citizens are free from the arbitrary use of power** (*breach example: testimonies of citizens are subject to arbitrary action from State administration).* This applies to power exercised by the powerful actors in society as well as the State. More specifically, the necessary discretion associated with the exercise of power is constrained in ways that are predictable and transparent to them. In the case of State power, such discretion is exercised first and foremost towards policies, rather than towards citizens as persons. As Bingham states, "Questions of legal right and liability should be resolved by application of the law and not the exercise of discretion." In such a country, rulers, administrations and the State apparatus are subject to laws and must be seen as such. They must follow pre-established and legally-accepted procedures to create new laws, as well as various possible forms of judicial control or review.

a) Are specific laws in place that limit the discretionary power of public officials and the judiciary?

b) Is the process for enacting law transparent, accountable and democratic?

c) Is the exercise of power authorised by law?

d) To what extent is the law applied and enforced against government officials?

e) To what extent does the government operate without using the law?

f) To what extent does the government use incidental measures (including Executive orders that bypass Parliaments), instead of general rules?

g) Are there exception clauses in the law of the State, allowing for special measures, and how frequently are they used?

h) Does the *nulla poena sine lege* ("no penalty without a law") system apply?

i) Is there a system for the publicity of government information, including FOIA or sunshine laws, assets disclosure for elected officials, and a funded, independent body that can enforce such rules?

j) Is the judiciary independent of Executive and parliamentary control, in law, in practice, and in budgetary matters?

k) Is the department of public prosecution to some degree autonomous from the State apparatus? Does it act on the basis of the law and not out of political expediency?

l) Are individual judges subject to political influence or manipulation?

m) Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis? Is the judiciary perceived to be impartial?

n) Is the use of State power towards citizens proportional to the needs of achieving the State's legitimate aims?

o) Do citizens have the right to claim damages suffered due to the illegal/unlawful act of the State power (Executive, judicial, and even legislative)?

p) Are there adequate Government and judicial accountability mechanisms?

Principle 2: **Citizens benefit from legal certainty** *(breach example: citizens are not warned that a law will apply to them).* Political, judicial and administrative decisions are regularised and are not subject to the whims of individuals, nor the influence of corruption. In the words of Bingham, legislation and rules should be adopted by the bodies that are constitutionally competent to do so and must be accessible, clear, intelligible and predictable, as well as respectful of the hierarchy of norms recognised by the Constitution and/or precedent. This means that when citizens commit to a course of action, they should be able to know in advance the possible consequences of such an action in legal terms. Legal certainty implies that citizens know what they are up against – the rules by which they are bound should be ascertainable by reference to identifiable sources that are publically available. Legal certainty in this sense contributes not only to a just society, but also to an economic climate conducive to enterprise and innovation.

a) Are all the laws published? Is the law codified and kept in a good order, or is it scattered in many micro-statutes? Is a process of consolidation possible?

b) If there is any unwritten law, is it accessible and understood by the majority of the citizenry? (Unwritten law may exist in very diverse ways, depending on its source (customary, administrative, judicial), on its object (private, constitutional, administrative), and on the features of the system (common or civil law).

c) Are there limits, in law and in practice, to the legal discretion granted to the Executive? To the judiciary?

d) Are there many exception clauses in the laws? Are they used in practice?

e) Are the laws written in an intelligible language?

f) Is retroactivity of laws prohibited in law and in practice?

g) Are final judgments by domestic courts regularly called into question (such as for suspicion of corruption, or lack of legal ability)?

h) Is the case-law of the courts coherent? Where applicable, does precedent appear to be followed?

i) Is legislation generally implementable and implemented, or do many laws go unenforced?

j) Are laws generally foreseeable as to their effects?

k) Do similar cases appear to result in similar judgments?

l) Are judicial decisions published? Are reasons required for judicial decisions? Are judges schooled in legal reasoning, (rather than making decisions for political or bureaucratic reasons)?

m) Is judicial control practiced within the judiciary in such a way that decisions may vary significantly depending on the judge who decides?

n) Is there a coherent legal system that promotes economic growth and social welfare?

o) Are adequate instruments in place for monitoring the implementation of laws and evaluating their impact?

p) Are there effective mechanisms of enforcement of judicial decisions?

q) Do public agencies have a duty to provide guidance concerning their interpretation of the law and what is needed for individuals to get a favourable decision? Is there certainty on the duration of proceedings, are there expiration terms?

r) Can public agencies change their mind and repeal their acts (favourably and/or unfavourably for citizens)?

Principle 3:**All citizens are treated as equal before the law** (*breach example: minority citizens are victims of discrimination)*. Thelaw must apply equally to all except when existing differences between people can justifiably lead to differential treatment – be they children, retirees or prisoners. Equality is a big word most often uttered in vain. Yet it may be the last bastion of resistance to fall in transition countries.

a) Are there laws that discriminate against certain individuals or groups where justification is not justified by a proper and legitimately protected status?

b) Are laws interpreted in a discriminatory way?

c) Are there individuals or groups with special legal privileges?

d) Are the laws applied generally and without discrimination in judicial decisions, police action, and other State interactions with citizens, or are they differentially applied based on wealth, status, ethnicity, etc.?

e) Are powerful, non-State actors able to act with greater impunity in contractual or criminal matters by escaping punishment, enforcement, etc.?

f) Are criminal and civil decisions reasonably similar for similar cases with regards to different classes of defendants and plaintiffs?

g) Are cases brought to courts, or disputes brought to the police, with reasonable regularity across societal groups, or do some portions of society choose to avoid courts, police, and other State actors out of a belief they will not be granted justice by State authorities?

h) What kind of affirmative measures are taken to further equality before the law?

Principle 4:**All citizens are granted accessible and effective justice** *(breach example: citizens are not able to access the courts).*All citizens have access to

dispute-solving mechanisms, regardless of their financial means, and justice is delivered and enforced effectively in the eyes of the population. The right to a fair trial is shared by all actors in society –whether criminals, consumers, companies or public authorities. In all cases, justice should be impartial to all sides.

a) Are there administrative acts which are not subject to judicial review?

b) Do citizens have effective access to dispute settlement regardless of their financial means? Is there free legal assistance for the poor?

c) Are dispute settlement locations prevalent enough across the country so that the majority of citizenry have non-onerous physical access to them?

d) Are dispute settlement authorities prevalent enough so that disputes are settled in what is perceived in the society as a timely manner?

e) Are judgments implemented?

f) Do citizens have effective access to the judiciary for judicial review of governmental action?

g) Does the judiciary have sufficient remedial powers?

h) Do citizens turn to extra-judicial or non-State sources of arbitration due to a lack of confidence in or availability of State-based sources of dispute resolution?

Principle 5:**All citizens can claim their rights including a substantial degree of "law and order"***(breach example: citizens fall prey to State violence)*. A robust "Rule of Law" reform agenda needs to include human rights *that are protected by laws and their implementation* (currently treated by the EU as a related, but separate category of "human rights and minority rights"), as well as *the prevalence of law and order* (not currently treated as a "Rule of Law" goal, but instead is separated into a capacity issue under the obligations to assume membership). Law and order is prevalent enough so that citizens do not unduly fear that their personal property or security will be violated either by agents of the State or by predatory citizens.

Are basic human rights guaranteed in law and in practice, including:

a) *Ne bis in idem and res iudicata*, so that citizens are not repeatedly at risk of new arbitration for settled matters among the different domains (*e.g.* civil, criminal, administrative)?

b) The non-retroactivity of measures?

c) The presumption of innocence?

d) The right to a fair trial?

e) The right to recognition as a person before the law?

f) The right to freedom of opinion, religion, peaceful assembly, and organisation?

g) The right to life, liberty, and security of person via freedom from extra-judicial punishment by State authorities, and adequate law and order?

h) Do State authorities prohibit, in law and in practice, torture and cruel, inhumane, or degrading treatment?

i) Do State authorities prohibit, in law and in practice, arbitrary arrest and detention?

j) Is law and order prevalent enough so that citizens do not unduly fear that their personal property or security will be violated either by agents of the State or by predatory citizens.

k) Is property crime/white-collar crime/State corruption low enough so that businesses do not unduly fear or expect such activity to limit their business?

l) Is the use of force by public agencies only when provided for by the law? Are there procedural rules?

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[i] This must be done "en masse" –research has shown that taking single individuals out of context, putting them in a "Rule of Law" context, and then returning them to flawed government structures does little good, as these individuals cannot "buck the system". The only likely success is when individuals within similar professions are separated and trained as a group, then returned to their home country so that the group can enact change within a system.

[ii] We thank Bohan Vitvitsky for suggesting this distinction.

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