EPLO
European Public Law Organization

Report
of

THE EPLO GLOBAL RULE OF LAW COMMISSION

on

THE CONCEPT AND STATE OF THE RULE OF LAW IN EUROPE

Day of adoption
12 January 2024

Contents

General Introduction

The Global Rule of Law Commission

With a formal announcement at the 6th Committee of the General Assembly of the United Nations, the EPLO established the Global Rule of Law Commission (GRoLC) as a part of the Global Rule of Law Initiative, launched in 2019 at the UN Headquarters.[1]

The aim of the GRoLC is to develop a comprehensive global concept of the rule of law concerning UN universal values and diversity. If requested, the GRoLC is available to all nations to provide advice and expertise on rule of law issues. In these cases, the GRoLC aims to discuss with the relevant State authorities how the rule of law is applied in their countries, the limits within which variations can depend on reasonable cultural differences, and the limits beyond which such variations exceed the accepted common ground.

This is the GRoLC's first annual Report on the rule of law, which it officially presents yearly to the Sixth Committee of the UN General Assembly.

The GRoLC comprises, at its present state, 21 personalities from around the world according to the principle of geographical representation and is chaired by Giuliano Amato, President Emeritus of the Constitutional Court and former Prime Minister of Italy. The members appointed by the Executive Committee of the EPLO are as follows: seven from the Western European and Others Group - Marco D'Alberti, Judge of the Constitutional Court of Italy, Ana Maria Guerra Martins, Judge at the European Court of Human Rights and Full Professor at the Law School of the University of Lisbon, Portugal, Luis María Díez-Picazo, Judge of the Supreme Court of Spain; David Feldman, Emeritus Professor at the University of Cambridge, United Kingdom, Spyridon Flogaitis, EPLO Director, Professor at the National and Kapodistrian University of Athens, Greece; Wojciech Sadurski, Challis Professor of Jurisprudence at the University of Sydney, Australia and Professor at the Centre for Europe in the University of Warsaw, Republic of Poland; two from the Eastern Europeans Group - Josip Brkić, Deputy Minister in the Ministry of Foreign Affairs of Bosnia and Herzegovina and Mikheil Sarjveladze, Member of the Parliament of Georgia and Chairman of the Human Rights and Civil Integration Committee; three from the Asian Group - Dr. Pan-Suk Kim, Professor at the Yonsei University of Korea, International Fellow of the National Academy of Public Administration in Washington DC, Member of the International Civil Service Commission, Ambassador Andreas Mavroyiannis, Member of the UN International Law Commission, Republic of Cyprus, and Professor Vishnu Varunyou, Vice-President of the Supreme Administrative Court of the Kingdom of Thailand; four from the African Group - Carlos Feijó, Full Professor of Law at the University of Agostinho Neto in Angola, President Jorge Carlos Fonseca, Former President of Cape Verde, Ambassador

[1] The GRoLC's official webpage can be accessed here: https://worldpresence.eplo.int/global-rule-of-law/.

Raychelle Omamo, Former Cabinet Secretary of the Ministry of Foreign Affairs, Republic of Kenya and Lúcia da Luz Ribeiro, President of the Constitutional Court of Mozambique and Professor at the Law Faculty of Eduardo Mondlane; four from Latin and Central America and Pacific - Allan Bredwer-Carías, Emeritus Professor at the Central University of Venezuela, President Laura Chinchilla, Former President of Costa Rica, Vice-President of the World Leadership Alliance – Club De Madrid, President of the Analítica Consultores, Gilmar Mendes, Justice of the Supreme Court of Brazil, and Marisol Peña Torres, Former President of the Constitutional Court of Chile and Professor at the Pontifical Catholic University of Chile. Their office is honorary and discretionary.

The GRoLC operates from the EPLO's Regional Branch in Cascais, Portugal and is assisted by the Institute of the Global Rule of Law.

Institute of the Global Rule of Law

The Institute of the Global Rule of Law (IGRoL) of the EPLO was established in 2022. Its mandate is to develop and promote global rule of law principles at an international scientific and educational level, and its mission is gradually evolving under the scientific umbrella of the Global Rule of Law Commission (GRoLC), through which it shall also expand its activities. The Institute assists and supports the GRoLC, follows its discussions, and executes its decisions. Moreover, it contributes to research and helps the GRoLC prepare the annual reports on the rule of law – including this one – that the GRoLC presents yearly at the Sixth Committee of the UN General Assembly.

The Institute advances and implements various scientific and educational activities through the European Law and Governance School (ELGS) of the EPLO.

A. Introduction

1. The Concept of the Rule of Law

The rule of law is a powerful idea that has been key to the development of human civilization.

The concept of submitting human communities to the rule of abstract and general rules and thus removing them from the contingency of arbitrariness and the will of a single or few rulers, be they in public or private positions of power, is a compelling and revolutionary idea central to contemporary culture.

Everyone in a position of authority should be constrained by an -*a priori* defined- framework of rules that guide his or her actions; rules that should be neither discretionary nor arbitrary. The rules should be publicly adopted as defined by previously established proceedings, binding every institution and every individual.

The rule of law is foremost about government: those who exercise public powers must operate against a framework of law in everything they do, and be accountable to the law should they infringe their powers. Such a framework of law encompasses procedural and formal elements, as well as substantive ones, concerning the core protection of human rights. Human dignity is the foundational element that underpins the national and international legal orders that emerged after World War II, which demands that the rule of law also be concerned with protecting the equality, fundamental rights and the liberties of individuals.

It was after World War II that the distinction between 'rule of law' and 'rule by law' became clear. Rule by law occurs when those in power use legal rules rather than *ad hoc* arbitrary decisions, even if those rules are oppressive or unfair, granting significant privileges to rulers. In this case, public power changes the law whenever it is useful for it and the law is at the service of policy rather than policy being subject to the law. On the other hand, the rule of law is democratic and libertarian, as it imposes limitations on the actions of those in power, ensuring that the law governs their conduct.

In addition to the challenges posed by public powers, the rule of law faces contemporary threats from private entities, particularly in the digital age where technology and multinational corporations wield significant influence. The growing dominance of tech giants like Google and other private powers raises concerns about the protection of individual freedoms. These entities, with immense resources and global reach, can impact societies in ways that may undermine the principles of the rule of law. The rule of law therefore demands initiatives to

safeguard individual freedoms. These initiatives which extend beyond governmental actions and address the potential abuses of power by private entities.

A part of legal scholars suggest that the rule of law is contested, vague, and disputed.

For the GRoLC, the rule of law is, first and foremost, an ideal: an aspirational guiding principle embedding not only the language of lawyers but human culture in its entirety.

The GRoLC acknowledges that contestation about the meaning of the rule of law and its normative and empirical implications in each geographical, temporal, and historical context. Thus, it makes every effort to fix its concrete meaning a precarious and limited task. Whereas some might regard the common law as the bulwark of protection against tyranny, others will claim that the rule of law will demand nothing less than judicial review of legislation and administrative courts separate from the remaining judiciary.

Different iterations of the rule of law only highlight the richness of diverse legal cultures, something that this Commission is bound to cherish and respect in accordance with its founding statute – recognizing that a global concept of the rule of law can only be determined by introducing a dialogue of civilizations, respecting universal values, and recognizing the diversity and equal and intrinsic worth of different legal cultures.

It should be noted that the GRoLC and the IGRoL working group conducted substantive research by reviewing the numerous distinguished rule of law theorists and key international sources, focusing on the relevant United Nations documents.[2] They weighed the various points of view, trying to offer as balanced and universally applicable a solution as possible.

In accordance with the deliberations of the GRoLC, the following definition has been adopted:

The Rule of Law is an ideal set of principles of governance that informs a legal system to a greater or lesser extent. Such a system englobes separation of powers, a government and private actors accountable by law, and an independent and accessible justice system. Its rules should be promulgated and public, stable, clear, non-contradictory, general and prospective, be enforced equally and provide for individual freedom.

[2] *E.g.* IBA Council Rule of Law Resolution of September 2005; Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, available at https://www.un.org/ruleoflaw/high-level-meeting-on-the-rule-of-law-2012/, 2012; A. Guterres, Rule of law stands between peace and 'brutal struggle for power', available at https://news.un.org/en/story/2023/01/1132402, 2023; 2016 UNDP Annual Report on The Rule of Law and Human Rights, available at https://www.undp.org/publications/rule-law-annual-report-2016; UNSG Report, *The Rule of Law and transitional justice in conflict and post-conflict societies* (S/2004/616) 2004, recalled in *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, (A/66/749), 2012, available at https://digitallibrary.un.org/record/527647?ln=en.

To guide the analytical work of this and the following reports, the above-defined concept of the rule of law comprises the following indicators:

Indicator 1: Separation of powers

- Separation between lawmaking, law enforcement and adjudication based on the law
- Effective control of the separate branches and limitation of political powers by law
- Transition of power is subject to the law
- Electoral justice is guaranteed as well as free and fair elections
- Requirements of the lawmaking process

Indicator 2: Access to justice

- Judicial accountability
- Transparency of the judiciary
- Prosecution service and support for victims of crime
- Legal aid, judicial fees, and digitalization
- Standard length of proceedings, effective and efficient justice
- Anti-corruption measures, criminal, and preventative measures
- Supporting the role of the civil society

Indicator 3: Independence of the judiciary

- Clear, strict, and written rules for recruitment, appointment, promotion, demotion, discharge of judges and judicial recusal
- Impartiality and integrity (absence of bias) of judges
- Implementation of court decisions
- Prosecutorial independence
- Protection of judges from political attacks

- Independence of lawyers and bar associations

Indicator 4: Government Accountability

- Institutional effectiveness
- Effective investigation and prosecution of high-level officials and judicial review of governmental action
- Protection of whistleblowers
- Right to access public information (transparency)
- Anti-corruption measures and criminalization tools, application of sanctions
- Quality of court bureaucracy
- Openness of government work

Indicator 5: Legal Certainty

- Measures for legal awareness
- Prospective, general, public, and accessible laws and court decisions
- Hierarchical structure of rules
- Predictable laws

Indicator 6: Protection of Individual Rights

It must be noted at this point that the present Report does not offer an extensive analysis of Indicator 6 and the specific conditions upon which its fulfillment and realization rest. The GRoLC does not consider this Indicator to be of lesser importance. Rather, the conscious choice to exclude from this Report a detailed analysis of the implementation and adherence to human rights standards in Europe springs from their omnipresence in all other Indicators (*e.g.* independence of the judiciary is a feature of the right to a fair trial; electoral justice forms part of the right to free elections). The notion of human dignity, inherent in human rights, must be understood also as the endpoint of the rule of law. As noted by Raz: “observance of the rule of law is necessary if the law is to respect human dignity.” (J. Raz, "The Rule of Law and its Virtue," in his collection *The Authority of Law: Essays on Law and Morality* (Oxford 1979), 221). Since the Commission has yet to agree upon a list of human rights and freedoms that should be incorporated in the global concept of the rule of law, this

first Report examines the pre-conditions that render human rights protection possible and refers to the many existing reports on the consequent treatment of rights and freedoms.

2. Report Objective

The first and primary objective of the GRoLC, as stated in the Regulation of the EPLO establishing it, is to develop and propose a global concept of the rule of law, through examination and study of the various rule of law traditions around the world. In this way, the GRoLC aims to contribute to a dialogue of civilizations, one of the bases on which the EPLO has been founded by its constitutive Treaty and Rules.

In order to achieve that goal, the GRoLC decided to examine and study the concept of the rule of law as developed in those parts of the world that historically share more or less the same legal culture. It was further decided to start this *iter* from Europe since Europe considers itself the cradle of the rule of law. This is not a reason for the GRoLC to postpone it in its scrutiny *vis-à-vis* other regions. To the contrary, it is a reason to start with it, with its accomplishments as well as its shortcomings.

The European Public Law Organization understands the fact that the World has developed on the basis of diverse legal cultures and, despite the fact that the predominant element in all of them is their reference to the Roman Law tradition, the Organization respects local cultures, which always color the Law and give it specific characteristics.

In view of the above, the present Report -and the rest that the GRolC intends to undertake on the Rule of Law and its current state of development- is of a different character in relation to other reports on similar matters prepared by authoritative institutions around the globe. Our Reports do not aim at denouncing violations of the rule of law here or there, but at constructively approaching the subject so that the considerations presented can be helpful to States and other public authorities in seeking to protect and promote the rule of law. Moreover, the central aim remains to understand the world and its multiculturalism, multicentric development, and to promote State equality.

The structure of the Report will follow a traditional scheme. The Introduction will be followed by an attempt to understand the concept of the rule of law as developed in Europe. Specific attention will be paid to achievements obtained in current times in line with the traditions and efforts of centuries. This will be followed by the study of a number of areas where *inter alia*, according to the GRoLC, more attention should be given by European States and institutions in order to bring about a deepening and enlargement of the rule of law in everchanging times.

3. Report Methodology

The present Report results from a thorough assessment of the global rule of law analysis that relies on various tools and sources. The evaluation has been prepared in line with the methodology discussed within the GRoLC and this methodology will continue to guide the preparation of the subsequent editions of the Annual Rule of Law Report. Under President Giuliano Amato's guidance, all GRoLC members participated in the process, providing written contributions and joining in dedicated meetings held at the EPLO Headquarters in Cascais, Portugal, in January 2023, July 2023 and January 2024. The IGRoL and the ELGS contributed to the research, helped the GRoLC to prepare the Report, and will provide further assistance with future reports.

The chapters dedicated to the research focus areas do not purport to give an exhaustive description of all rule of law issues in every State covered, but to present significant features and developments. It should be underlined that the GRoLC through this Report approaches the concept of the rule of law by targeting its most important aspects. Being fully aware and conscious of the inexhaustible nature of the matter, the GRoLC opts to analyze only those issues it considers to be of a seminal or fundamental character for the elaboration of the concept.

States can turn to the GRoLC for advice and expertise on how best to follow the Report's recommendations and implement reforms that will enable them to develop their practices according to the GRoLC's rule of law benchmarks.

The analysis, which was conducted on the basis of the indicators outlined above, was enriched by the study of best and worst practices in the research focus areas of the Report, thus providing valuable insight into the main rule of law issues as they are regulated and experienced in the countries scrutinized.

To provide a brief overview of the primary research sources, it should be mentioned that various stakeholder contributions were used, such as the United Nations documents and the work of the International Bar Association, and with specific regard to the research focus areas: the four Rule of Law Reports of the European Commission (2020-2023) with the addition of the related input from member States, the case-law of the Court of Justice of the European Union (CJEU) that was very valuable in the study of the rule of law crisis, and the Venice Commission Rule of Law Check List – for Europe.[3]

[3] See the 2020 Rule of law report and the related input from member States, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_en; 2021 Rule of law report and the related input from member States, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report_en, 2022 Rule of law report and the related input from member States, available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-

B. Focus Area: Europe

1. Introduction

Europeans are in general proud of the rule of law achievements on their territories, but there are also several shortcomings. The GRoLC wishes to help European States understand understand what needs to be done. Therefore, the research focus area of this Report will be the European continent: the GRoLC will consider the twenty-seven EU member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden), all candidate countries and countries with an EU perspective (Albania, Bosnia and Herzegovina, Moldova, Montenegro, North Macedonia, Serbia, Ukraine, Georgia) and the United Kingdom.

Europe was the first to inherit the Roman traditions of Law and State. Adapting, modernizing and further developing the State apparatus was thus easier for the Europeans. It is true that in order to reach its present situation and respect for the rule of law, European countries had to pass through all sorts of regimes, wars (including the two world wars), and crimes against humanity – to name just a few of the misfortunes of the rule of law in Europe. However, it is equally valid that with the establishment of the European Court of Human Rights (ECtHR) in the heart of the Council of Europe, the CJEU specializing in the European Union, the Constitutional Courts instituted by many State constitutions, the Supreme Courts, all sorts of other non-judicial specialized organs and agencies, Europe is proving that it is institutionally equipped to cement all the necessary guarantees that establish the rule of law.

2. History

The opposition between the rule of law and arbitrariness can be traced back to Aristotle's *The Politics*, where he developed the concept of the sovereignty of the law over men. It resurges later in English constitutionalism on the aphorism "A rule of law and not of men". The *Magna Carta*, the first version of which was issued in June 1215, was the first document to put into writing the principle that the king and his government were not above the law. It

report_en; 2023 Rule of Law Report, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en; with regard to the case-law, see for example the opinion of the Advocate General of the CJEU of 8 July 2021, *Getin Noble Bank*, in Case C-132/20, Judgments of the CJEU of 16 February 2022, *Hungary v Parliament and Council* and *Poland v Parliament and Council*, in Cases C-156/21 and C-157/21 and the Judgment of the CJEU of 5 June 2023, *Commission v Poland (Independence and private life of judges)*, in case C-204/21; the Venice Commission contribution on the rule of law, available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=IT.

sought to prevent the king from exploiting his power and placed limits on royal authority by establishing the law as a power in itself.

The proclamation of the Bill of Rights 1689 also declared the king bound by the law and formally prevented him from interfering with judicial proceedings.

3. Rule of Law, *Rechtsstaat, État de droit*

The expansion of written constitutions in the eighteenth century brought about an important demise of arbitrary and despotic power. This century saw the development of three institutions that would prove crucial to the development of the rule of law: written constitutions, the separation of powers and the judicial review. By the end of the nineteenth century, A. V. Dicey defined the rule of law as integrating three dimensions: the supremacy of law over arbitrary power, the universal application of the law by the courts, and the derivation of rights from the ordinary law of the land. He described parliamentary sovereignty and the common law as principles that are mutually reinforcing in the English legal system.

Also, in the nineteenth century, the German *Rechtsstaat* was developed as a reaction to the *Polizeistaat* in Prussia, which had been characterised by arbitrariness and violence in public and private spheres. The ideas of Kant, such as the primary function of the law being to guarantee the individual an external sphere of freedom and the purpose of the law being to limit the State's power, were paramount. The State is based on a *Staat der Vernunft* (state of reason), emerging from moral legal theory, and creating a form of constitutionalism that aimed to comprehend the public reason. The pure legal formalism that allowed the expansion of the National Socialist Party and the Nazi regime's failure led to a liberal perspective of the *Rechtsstaat*.

As far as the French *État de droit* is concerned, it was the French Revolution of 1789 that gave rise to the idea of constraining the State's power through law. The Declaration of the Rights of Man and the Citizen introduced the values of legality and equality before the law, and the effectiveness of the legal order was presented as a precondition for a constitutional regime in the Declaration.

Raymond de Carré de Malberg defended the notion that transcendental values and pillars of a State's creation could not be considered the rule of law because the law should be understood as being only the rules adopted by the legislative power. Legalist thinking conceived the law as an instrument to protect civil liberties, with control on the basis of democratic participation and to justify the administrative acts enforced by the State. The State is a rational actor whose actions should be justified by the existing law.

The Nazi and the fascist experiences of the twentieth century demonstrated that majority voting in parliaments cannot be relied upon to preserve the rule of law. By majority voting, the German and the Italian Parliaments destroyed all the rule of law components in their

countries. After World War II, the notion of a superior law, based on the values of dignity of all human beings and respect for democracy, binding also upon parliaments, entered the European concept of the rule of law.

4. Institutional Framework for the Protection of the Rule of Law

The rule of law is protected and enforced by a complex institutional framework that operates in national, international, and supranational settings. In the national setting, this framework comprises courts, civil society associations, media, and what is now called the new fourth branch of government, namely the institutions charged with protecting constitutional democracy. In the international setting, there are the Treaties, Institutions and bodies of the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), the Organisation for Economic Co-operation and Development (OECD) and the United Nations. On the supranational setting, there are the EU Treaties, Institutions and Mechanisms. For countries seeking to join the European Union, there is a requirement to fulfil the 'Copenhagen criteria' and other instruments are also used to verify compliance with the rule of law such as the Mechanism for Cooperation and Verification.

The international settings are: the Council of Europe, the Organization for Security and Co-operation in Europe, the Organisation for Economic Co-operation and Development, and the United Nations.

a. The Council of Europe

Established in 1949, the Council of Europe is a crucial force in promoting and protecting human rights, democracy, and the rule of law in Europe. Essential institutional frameworks within this international organization contribute significantly to upholding the rule of law across member States.

The ECtHR addresses violations of the civil and political rights enshrined in the European Convention on Human Rights and, through its judgments, influences legislative practices for the consolidation of the rule of law. The Venice Commission, on the other hand, is an advisory body which aids member States in aligning with European standards and international practices in the fields of democracy, human rights, and the rule of law.

The Council of Europe's comprehensive anti-corruption and counter-terrorism system involves monitoring adherence to a set of standards through specialized mechanisms, in particular the Group of States against Corruption (GRECO) and the Criminal Asset Recovery Convention. The latter also facilitates international cooperation in recovering assets obtained through criminal activities.

Outside of this area, the Division for Cooperation in Police and Deprivation of Liberty promotes collaboration among member States in police activities and ensures that measures related to deprivation of liberty adhere to human rights principles.

The Committee on Counter-Terrorism coordinates the Council of Europe's action against terrorism while the Budapest Convention, the first international treaty on crimes committed via the Internet and other computer networks, fosters international cooperation against cybercrime.

Finally, the European Commission for the Efficiency of Justice works to improve the efficiency and quality of judicial systems in member States, while the Consultative Council of European Judges and the Consultative Council of European Prosecutors address issues related to the independence, competence, and ethical conduct of judges and prosecutors respectively.

In summary, the Council of Europe employs a streamlined and effective institutional framework, covering human rights, corruption, counter-terrorism, and judicial efficiency to uphold the rule of law.

b. The Organization for Security and Co-operation in Europe and the Organisation for Economic Co-operation and Development

The Organization for Security and Co-operation in Europe (OSCE), founded in 1975, is the world's largest regional security organization. It is an inclusive forum focused on a comprehensive approach to European security – from conflict prevention to human rights and fundamental freedoms. Within the OSCE, the Office for Democratic Institutions and Human Rights promotes respect for human rights, fundamental freedoms and the rule of law and strengthens democratic institutions. Hence, the OSCE implements projects and initiatives to strengthen the rule of law in participating States.

The Organisation for Economic Co-operation and Development (OECD), the members of which include both European and non-European countries, was established in 1960 to promote economic and social well-being. The OECD actively combats corruption through the Anti-Bribery Convention (1999), setting international standards for criminalizing bribery of foreign public officials. It emphasizes good governance practices and institutional integrity, vital elements of the rule of law, and works on developing legal frameworks for fair economic activities, as well as fostering transparent legal systems.

Both OSCE and OECD contribute to the international institutional framework aimed at protecting the rule of law through a focus on issues such as conflict prevention, human rights, anti-corruption measures, good governance, and legal frameworks for economic activities.

c. International Organizations: The Role of the United Nations System

Finally, the United Nations stands as a cornerstone in the international framework dedicated to upholding the rule of law. Its multifaceted contributions include the General Assembly's role in fostering international law adherence through member State dialogue and cooperation. The Security Council, guided by the UN Charter, prioritizes peaceful dispute resolution and upholds the sovereignty of nations. The International Court of Justice significantly contributes to this cause by interpreting and applying international law. Specialized UN agencies like the United Nations Development Programme (UNDP) and the United Nations High Commissioner for Refugees (UNHCR) further promote the rule of law by addressing development, humanitarian, and human rights issues. The Rule of Law Unit in the Executive Office of the Secretary-General actively catalyzes UN efforts to strengthen the rule of law through technical assistance and capacity-building initiatives.

d. The Supranational Setting in Europe: The European Union

The protection of the rule of law within the EU is a crucial aspect of the EU's commitment to democracy, human rights, and the proper functioning of its institutions. Several fundamental institutional mechanisms contribute to this commitment.

The EU's foundational treaties, including the Treaty on European Union (TEU), emphasize the principles of the rule of law. Article 2 of the TEU highlights the EU's foundation on human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. Article 7 of the TEU establishes a mechanism to address serious and persistent breaches of EU values, including the rule of law, by a member State, involving assessments and recommendations by the European Council.

The CJEU then ensures EU law's proper application and interpretation. It is empowered to adjudicate cases involving alleged breaches of the rule of law by member States.

The European Commission (EC) monitors and assesses the rule of law situation in member States and adopted the Rule of Law Framework (2014) to address systemic threats, including a preventative tool - the European rule of law mechanism. The latter facilitates an annual dialogue between the Commission, the Council, and the European Parliament, along with member States and national stakeholders. This mechanism promotes inter-institutional cooperation and the starting point is the Rule of Law Report, which is issued by the EC annually and identifies challenges early on and fosters joint solutions.

The Recovery and Resilience Facility regulation was enacted in 2021 to address the impact of the COVID-19 pandemic and promote economic, social, and territorial cohesion. It has recently (2022) been linked to the conditionality regulation 2020/2092, emphasizing the rule of law's connection to safeguarding EU financial interests.

The European Council addresses rule of law issues through engagement and dialogue with a member State where rule of law challenges have been identified. The European Parliament actively monitors and discusses the rule of law situation in member States, and may adopt resolutions for the purpose of expressing concerns or making recommendations.

The European Public Prosecutor's Office, established in 2020, is responsible for investigating and prosecuting crimes affecting the EU's financial interests. It contributes to upholding the rule of law by addressing corruption and fraud.

To ensure appropriate rule of law standards among countries wishing to join the EU, stringent criteria and other mechanisms are used to ensure compliance with those standards as part of the accession process. This includes the Copenhagen criteria (1993), addressing political, economic, and administrative aspects, and the Mechanism for Cooperation and Verification (2007) – a protective measure activated in cases of insufficient commitment during accession negotiations. Both mechanisms involve regular monitoring and reporting by the EC.

C. Seminal Matters

1. Separation of Powers with a Special Focus on Requirements of the Law-making Process - Checks and Balances

a. The Foundations: The European Conception of the Separation of Powers

The principle of 'separation of powers' to describe governmental structures is traceable at least as far back as Aristotle. The idea of separating State powers is a prescription to ensure protection against tyrannical rule. At the same time, in a State that respects the rule of law, no one is above the law, not even the government. It is therefore crucial that checks and balances are embedded in the Constitution in order to prevent the executive from exerting undue control, influence and pressure over other mechanisms of the State apparatus. One of the first thinkers to provide a clear conception of the separation of powers was Montesquieu. In 1748 he stated that the legislative, executive and judicial institutions of the State should be divided to ensure the citizen's liberties and safeguard them against tyranny. Undoubtedly, the foundations for the modern instantiation of the principle of separation of powers have been laid in continental Europe and the United States.

The principle of checks and balances, incorporated in a legal text for the first time in the US 1787 Constitution, is a necessary element of a democratic society in the sense that the exercise of power by any power-holder needs to be balanced and checked by the exercise of power by other power-holders. The existence of adequate mechanisms of checks and balances guaranteeing the effective control of each power is inherently linked to the principle

of the rule of law. This close relation reveals that the absence or the weakening of checks and balances undermines the quality of liberal democracy.

A plurality of State mechanisms may guarantee the effective implementation of separation of powers and most of them originate in the States under scrutiny in this Report. Courts - and in particular constitutional courts – are the traditional counterweight to excessive authority which is usually reserved to the political power. And it is no surprise that under the influence of Hans Kelsen, Austria was the first democratic state to establish (in 1919) a dedicated constitutional court. Today, thirty such courts operate in Europe. Other key institutions in the checks and balances system are the Ombudsmen, the independent oversight agencies, judicial review of administrative acts, and even media and civil society. These actors can effectively fulfill their roles only if structural guarantees of independence exist and if they are able to truly exercise the role that the Constitution or the law confers to them.

Another essential aspect of the rule of law concept is the legitimate expression of the will of the voters. Such an expression requires a regulatory structure that is fair, clear and applied equally to all members of society. Electoral justice suggests not only that standards of integrity of organized elections remain high, but also that there are mechanisms in place to restore electoral integrity when the latter has been violated. The increasing threats to electoral integrity due to the new challenges that all democratic countries face, such as the expanded use of social media, underline the necessity of creating a solid institutional and legal framework guaranteeing electoral justice. In addition, the existence of a stable electoral law which should remain unchanged - at least in its fundamental elements - until the next elections is a necessary precondition to public trust in the electoral process. In the same sense, the right to free elections is inherently connected to the fundamental principle of the rule of law. Any relevant limitation should not, thus, be imposed automatically or without respecting the proportionality principle.

An important number of the reporting countries have incorporated all of the above into their legislative framework, respect their constitutional arrangements, and their governmental systems present a balanced institutional framework despite the, lesser or greater, use of exceptional legislative procedures. However, vigilance is essential, particularly given the fragility of adherence to the rule of law globally.

b. Meaningful Features of the Separation of Powers in Europe

According to the Venice Commission, the law-making process must ensure the supremacy of the legislature. In the case of the United Kingdom, the parliament is the supreme legislative organ. However, the delegation of law-making powers to the executive constitutes an inevitable reality which is considered compatible with the rule of law so long as the “objectives, contents and scope of the delegation… [are] defined in a legislative act”.

Exceptions to the regular law-making process may arise in emergency situations but they must be “limited in duration, circumstance and scope”.

Overall, there exists no single scheme/design of separation of powers in Europe: there are methods which try to replicate Montesquieu’s scheme. According to the latter, each of the functions of the government corresponds to a different body, but States have completely different systems which sometimes do not operate along the lines of checks and balances at all. There are different schemes in Europe, as around the world, of separation of powers – perhaps, therefore, it would be better to use the terminology “dispersion of powers”.

Although the UK does not reproduce Montesquieu’s scheme, it ensures the dispersion of powers. Most people refer to the 4th sector, in addition to the three branches, namely the independent and autonomous bodies, which are bodies that do not fit any of the three branches but belong to the European landscape of dispersion or separation of powers. As a western system, the executive and legislature will always have, by definition, the same political colors, so that the executive has comfortable control of the legislation.

The UK government’s frequent recourse to skeletal legislation, which contains a substantial delegation of powers, means that law-making power is essentially exercised by the executive. This raises at least two concerns for the rule of law. First, the fact that the executive is endowed with considerable law-making powers, which extend beyond mere gap-filling, indicates that the supremacy of the parliament cannot be guaranteed. Second, executive law-making necessarily entails the use of secondary legislation, which by definition lacks the same level of parliamentary scrutiny as primary legislation. As a result, both the role of the parliament and the checks and balances towards the activity of the executive are weakened. While delegating legislative power is an unavoidable practice in any democratic regime, delegated powers must be drafted in a language that conforms to the requirement of being explicitly defined in their scope. If this is not the case, governments may use secondary legislation to regulate essential issues rather than technical matters. Primary legislation in the United Kingdom tends to be skeletal in the sense that it lacks substance and is left to be filled up in all its essential issues by secondary legislation.

In addition, the independence of judicial controls is particularly important for the UK, as parliamentary supremacy has acquired qualifications. Over the last four decades, there has been a significant broadening and strengthening, by the judiciary, of judicial control over the executive. Despite the fact that courts’ competence is limited to the interpretation of legislation, judicial independence seems ensured by a relatively effective removal of governmental control over judicial appointments. It is worth noting that the recommendations for judicial appointments belong to a Judicial Appointments Commission or, in the case of vacancies at the Supreme Court created to replace the House of Lords, an *ad hoc* selection commission. Although a cabinet member, the Lord Chancellor, can disapprove these recommendations, but would pay a political price for doing so. As a result, these institutions are able to function as impartial bodies outside the government.

Ukraine's Constitutional Court (CCU) has been designed to be as non-partisan as possible and it is covered by guarantees of independence from executive power. It is composed of 18 judges appointed equally by the president, the Supreme *Rada*, and the Congress of Judges of Ukraine, with each justice limited to a single nine-year term on the bench. Its jurisdiction is limited to constitutional disputes, while the ordinary courts handle all other cases. In 2020, the CCU issued a highly controversial case declaring several key components of Ukraine's anti-corruption architecture unconstitutional. Among them, criminal liability for submitting false declarations was deemed disproportionate to the actual offense committed and was overturned. In addition, the Court ruled that the right of the National Anti-corruption Bureau (NABU), which is a criminal investigative agency, to review the declarations of public officials - including judges - encroached on the independence of the judiciary and Ukraine's separation of powers. As a result, the Court struck down the statute establishing NABU. In response to this lack of judicial restraint, President Zelensky issued a decree by which he temporarily (for two months) removed from office the Chairman of the Court. In addition, he submitted a draft law 'On the renewal of public confidence in the constitutional judiciary' to the Parliament to declare the Court's decision null and void by requesting at the same time that the parliament terminate the powers of the judges of the Constitutional Court. However, it is not clearly established in Ukraine's Constitution whether the President or the Parliament has the power to annul a Court decision or suspend judges of the Constitutional Court from their offices.

At the urgent request of the President, the Venice Commission was asked to assess the overall legality of the Court's decision. The Commission stressed the fact that it is a fundamental "requirement of the separation of powers that a constitutional court should not usurp the role of the legislature", strongly criticizing in this way the flawed reasoning of the Court. In July 2021, the Parliament of Ukraine launched an ambitious reform concerning the governance of the judiciary with the aim to increase transparency, judicial independence and introduce integrity and financial checks. The reform suggested that the members of the High Council of Justice (HCJ) and the High Qualification Commission of Judges (HQCJ) are selected through open and transparent competitions with the involvement of independent international experts holding decisive votes. According to new legislation, introduced in late 2022, an Advisory Group of Experts (the AGE) was established, composed of three international experts and three Ukrainian political appointees and its role consists of vetting all candidates for the CCU.

c. Key Challenges to be Addressed

Despite the different constitutional traditions of the countries examined in this Report, a global rule of law concept refers to a solid system of checks and balances allowing institutions and organizations to have an independent voice. In this sense, respect for the rule of law and democratic norms requires a high quality of law-making process as well

as appropriate involvement of stakeholders and civil society. The formal participation of stakeholders contributes to the improvement of transparency and thus the quality of the legislative procedure. By contrast, the lack of an adequate institutional framework for consulting stakeholders constitutes one of the main challenges to be addressed in a number of States.

Regulation of exceptional circumstances: It is common ground in modern democracies that the Parliament's role is often reduced to the mere approval of governmental decisions while the law-making process has become less transparent and inclusive, mainly due to recourse to accelerated or exceptional legislative procedures. Especially when it comes to controversial aspects of policy making, the need for consultation and scrutiny is crucial in order to guarantee the legitimacy of the final decision as well as the quality and intelligibility of the procedure. However, the role of the executive in the legislative process has expanded while parliamentary control over it has weakened and this is the case not only in times of crisis but rather under normal circumstances.

The challenges presented to the application of the separation of powers during the outbreak of COVID-19 constitute an exemplary case-study.

In Italy, emergency situations are dealt with by recourse to Article 77 of the Constitution which allows the government to issue law decrees which should be approved and converted into law by the Parliament in a short term (60 days), otherwise they lose effectiveness from the outset. From a strictly formal point of view, this governmental practice is legitimate. However, it has been used so widely that it transforms exceptional legislation into an ordinary form of legislation.

In Ireland, since the beginning of the COVID-19 pandemic, there has been constant recourse to the so-called "guillotine motions" which raises concern. This possibility allows the shortening of the time allocated to debate legislative proposals and motions. In 2022, 56 such motions were prepared in the Lower House in relation to the bills that were passed and enacted and of those, 27 motions were used in order to shorten the debate.

Secret surveillance regulation: Another shortcoming which demonstrates the lack of effective institutional counterweights concerns the absence of effective oversight regarding the use of secret surveillance measures outside criminal proceedings. This occurs in countries where the government has discretion in allowing secret surveillance of any citizen for reasons of national security, without any possibility of judicial control or relevant control by a data protection authority (Judgment of the European Court of Human Rights of 29 September 2022, *Hüttl v Hungary*, 58032/16, paras. 16 and 18. See also pillar III). The advent of AI technologies introduces a new layer of complexity to this challenge. With the emergence of sophisticated AI applications in law enforcement, the potential for unwarranted intrusion into individuals' privacy and the improper use of personal data becomes more pronounced. Recognizing this evolving landscape, recent European

regulation (the Artificial Intelligence Act of 2024) has taken a proactive stance by addressing the use of AI methods by police and intelligence services.

Strengthening of oversight mechanisms: Constitutional justice is another key component of checks and balances in a democracy. At the EU level, the effective application of EU law is a necessary precondition to ensure the integrity of the EU legal order. Therefore, both the member States and the candidate countries are required not only to enforce the case-law of the CJEU but also to take all the necessary actions in order to comply with the fundamental values on which the EU is founded. Further, it is generally accepted that a well-functioning system of institutional checks and balances reserves an important role to the Ombudsmen, national human rights institutions, equality bodies and other independent authorities. In some countries, the status of these bodies needs to be further strengthened in order to function as effective counterweights to the expansion of the competences of national governments. In the case of some EU candidate countries, special focus has to be given to the rule of law standard, which is a key requirement for EU membership as it has been set out in the 'Copenhagen criteria'. More specifically, reforms that will reinforce the independence of the judiciary and of key State institutions, enforcement mechanisms in the fight against corruption, media freedom and effective checks and balances mechanisms constitute a necessary rule-of-law toolbox allowing alignment with the EU *acquis*.

2. Access to Justice

a. The Foundations: Access to Justice as a Fundamental Asset to Democracy

Access to justice is a fundamental principle in ensuring the rule of law and in upholding human rights. Ensuring equal access to justice for all individuals, regardless of socio-economic status, race, ethnicity, gender, or other characteristics, is a fundamental principle enshrined in international human rights law. European countries are committed to upholding this principle, yet disparities persist in access to justice, reflecting broader inequalities within society. Efforts to address systemic barriers, promote diversity and inclusion within the legal profession, and strengthen anti-discrimination laws are essential for advancing access to justice for marginalized and vulnerable groups.

The most interesting indications come from the monitoring of EU member States and EU candidate countries. The assessment considers various factors affecting access to justice, including legal aid availability, court efficiency, affordability, and legal awareness. No homogeneity is discernible among EU member States when it comes to creating enforcement mechanisms that ensure access to justice. Generally, such States prioritize the provision of legal aid to individuals who cannot afford legal representation. At the EU level, the CJEU acts as a safeguard for ensuring access to justice, providing a forum for resolving disputes between member States and individuals. However, challenges such as language

barriers and disparities in legal systems across member States persist, affecting access to justice, particularly for marginalized communities.

According to international and European human rights law, the notion of access to justice obliges States to guarantee everyone's right to go to court - or, in some circumstances, an alternative dispute resolution body - so as to obtain a remedy if it is found that the individual's rights have been violated. Thus, it is also an enabling right that helps individuals enforce other rights. Access to justice encompasses several core human rights, such as the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights, and the right to an effective remedy under Article 13 of the ECHR and Article 47 of the Charter. Although different systems govern enforcement of the ECHR and the EU Charter of Fundamental Rights, both emphasize that the right to an effective remedy and to a fair trial should primarily be enforced at the national level. At the EU policy level, access to justice in EU member States is regularly assessed through the EU Justice Scoreboard. This draws data mainly from the European Commission for the Efficiency of Justice (CEPEJ), a Council of Europe expert body, and forms part of the European Commission's Annual Growth Survey.

The ECtHR has established that State authorities should provide everyone within their jurisdiction with the assistance of a lawyer in civil cases when this proves indispensable for effective access to court, or when lack of such assistance would deprive a person of a fair hearing. It has also held that the requirement to pay fees to a civil court should not hinder access to a court for applicants who are unable to pay them. The Committee of Ministers ("CM") *Resolution (78) 8 On Legal Aid and Advice* recommends Council of Europe member States to ensure that persons in an economically weak position are able to obtain necessary legal advice on civil, commercial, administrative, social or fiscal matters. In the same direction, CM *Recommendation R (93) 1 On Effective Access to the Law and to Justice for the Very Poor* invites member States to promote legal advice services to the very poor by adopting several intiatives; by defraying the cost of legal advice through legal aid schemes, by supporting advice centers in underprivileged areas, and by enabling non-governmental organizations or voluntary organizations providing support to the very poor to give legal assistance. The Council of Europe published a set of guidelines adopted by the Committee of Ministers on 31 March 2021 to help the 47 member States improve the functioning of national systems of legal aid in the fields of civil and administrative law. The aim of the guidelines is to provide to the member States generic solutions for increasing the efficiency and effectiveness of their national legal aid schemes in the areas of civil and administrative law. Although the guidelines are drafted with the civil and administrative laws in mind, they tackle the issues that are equally relevant to the development of the legal aid system in general and can be used by any member State considering reforms to improve their legal aid services.

b. Meaningful Features of Access to Justice in Europe

In particular, the principle of access to justice can be further broken down to three key aspects such as legal aid availability, court systems, and alternative mechanisms for dispute resolution.

A. Legal Aid Availability: Legal aid systems vary across European countries, with some providing comprehensive publicly funded programs while others offer limited assistance. Many member States provide legal aid through publicly funded programs or legal assistance schemes, although the scope and eligibility criteria may differ. Countries such as Sweden, Finland, and the Netherlands have well-established legal aid systems that cover a wide range of legal matters and ensure access to representation for those in need. However, disparities exist, with some countries facing challenges in providing adequate legal aid due to resource constraints or complex eligibility criteria. England & Wales, Scotland, Ireland, Finland and the Netherlands have centralized legal aid systems. France, Germany, Belgium and Poland have more decentralized systems. Similarly, as many as 46 municipalities out of the 145 in Serbia have Municipal Legal Aid Centers (MLACs), and another 10 provide legal aid without a MLAC. Scotland, Ireland and the Netherlands have independent legal aid boards. In France and Belgium, legal aid councils situated at the courts decide on legal aid entitlements. In Germany and Poland, the courts decide. The costs of legal aid systems are borne by the central government, except in Germany, where the 16 *Länder*/States are responsible for the costs.

The countries studied appear to have difficulties in formulating a broader access to justice strategy. Some countries have engaged in legal aid reforms whose focus has been that of improving legal aid organization. Such reforms are primarily aimed at changing the legal aid management bodies. For instance, England and Wales have abolished the Legal Services Commission (LSC), which was an executive non-departmental public body governing legal aid. Functions of the LSC were transferred to the Legal Aid Agency, an executive body of the Ministry of Justice. Finland has introduced six Legal Aid Bureaux led by district directors, each of them headed by a director of the legal aid and public guardianship district, while the legal aid offices operate under the legal aid and public guardianship districts. Some reforms are aimed at improving legal aid delivery schemes. For instance, in Belgium, reforms provided for better co-ordination between legal advice providers of the so-called “first line legal aid” and social welfare bodies and organizations.

Several countries have introduced digital document-flow to simplify processing of legal aid applications, to allocate the cases more efficiently and to speed up payments to legal aid lawyers for work done. A characteristic example in this respect is the Legal Aid Agency (LAA) in England and Wales. Providers submit monthly electronically completed controlled work “claims” for payment to the LAA and all cases are processed and paid through the LAA’s electronic case management system.

B. Court Systems and Dispute Resolution: The ECJ's case-law has proven fundamental to determining the boundaries of access to EU justice. The relevant case-law is particularly rich: *Antoine Boxus, Willy Roua, Guido Durlet and Others, Paul Fastrez, Henriette Fastrez, Philippe Daras, Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), Bernard Page, Léon L'Hoir, Nadine Dartois v Région wallonne*, Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, 18 October 2011 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, C-363/11, 16 February 2013 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and others* (Bulgaria and the European Commission intervening), C-394/11, 31 January 2013.

European countries have diverse court systems, ranging from civil law to common law jurisdictions, each with its own procedural rules and processes. While many countries strive to ensure the efficient resolution of legal disputes, backlogs and delays are common in some jurisdictions, leading to prolonged wait times for litigants. And severe delays in the delivery of justice are strongly connected to the principle of access to justice. Efforts to improve court efficiency through digitalization, case management reforms, and alternative dispute resolution mechanisms are underway in several countries, aiming to streamline judicial processes and reduce delays. The presence of pending cases is not intrinsically worrying but cases that remain too long in the system become problematic from the perspective of the right to a trial within a reasonable time. In fact, most European States have difficulties in delivering judgments within a reasonable timeframe, especially in administrative cases.

COVID-19 had a significant impact on the efficiency rates of delivery of justice in the EU member States. Some of them resorted to various innovative measures to mitigate the COVID-19 effects and make the best use of existing resources to ensure the functioning of their courts. Most of them relied on electronic services which enabled electronic filing of documents, video conferencing for hearings, remote work by judges and staff, etc. In Ireland, all written judgments were delivered electronically and published on the Courts Service website. In the Netherlands, hearings were dislocated, held online or hybrid and some of the hearings were held after regular hours.

C. Alternative Dispute Resolution Mechanisms: In addition to traditional court proceedings, the EU promotes alternative dispute resolution (ADR) mechanisms as a means of resolving conflicts efficiently and cost-effectively. Mediation, arbitration, and other forms of ADR offer parties flexible options for resolving disputes outside of formal court proceedings, promoting access to justice while relieving pressure on court systems.

i. The Struggles of EU Candidate Countries

As the experience in many EU candidate countries demonstrates, guaranteeing access to justice relies upon several prevailing circumstances and its effective promotion and realization is heavily dependent upon the peculiarities of each legal system.

In the Georgian justice system, access to justice is a still open challenge. To date, the State has limited the provision of access to justice to territorial and physical access to courts. However, a multitude of inhibiting factors render the effective realization of the principle of access to justice rather challenging; legislative deficiencies, lack of access to translators and free legal aid, and low level of legal awareness. In 2007, the Law of Georgia on Legal Aid entered into force, which defined the institutional arrangement of the legal aid system, the circle of beneficiaries, and the conditions for using the service. Since then, the Legal Aid Service has gradually expanded in terms of institutional leverage and resources, as well as territorial coverage. Notwithstanding these considerable efforts to comply with international standards regarding access to justice by establishing legal aid bodies and a legal framework supporting access to justice, the lack of available resources and the existing legal and practical barriers still represent a significant limit to the advancement of access to justice in this country.

In Serbia, costly court processes constrain access to justice. In fact, affordability remained the most serious barrier to access to justice for citizens and businesses. Court and attorney costs represent a significant proportion of average income in Serbia, even for a simple case. Businesses report that the courts are becoming increasingly inaccessible due to court and attorney costs. Small businesses are the most affected. Key improvements in Serbia include the Law on Free Legal Aid, the Central Application for Court Fees (to facilitate application for fee waivers), online databases of law and case status, and incentives for mediation.

In Ukraine, the right to access justice has received significant and noticeable consideration in the legal practice of the country. In this regard, the Constitutional Court of Ukraine has consistently indicated that the accessibility of justice requires substantial and comprehensive legal regulation. Nevertheless, individuals living in rural areas in Ukraine do not enjoy the same level of access to justice. The 2013 legal aid legislation takes a comprehensive and systemic approach to the provision of legal aid services, including both criminal and civil legal matters. It classifies legal aid to defendants as “secondary” legal aid. At the same time, there are 32 community-based “primary” legal aid centers funded by regional governments and municipalities, which provide legal information and advice for all citizens. Undoubtedly, the most pressing issue today in the country is how to guarantee access to justice at a time of war.

c. Key Challenges to be Addressed

Access: While the EU has made significant strides in promoting access to justice, challenges remain in ensuring equal access for all individuals, particularly marginalized and vulnerable populations. Disparities in legal aid availability, language barriers, and procedural complexities can hinder access to justice, especially for those with limited resources, language or legal knowledge. A similar scenario endures for candidate countries. Addressing these challenges requires ongoing efforts to strengthen legal aid systems, improve court efficiency, and promote legal awareness among the population.

Resources: Resource constraints or complex eligibility criteria still represent a barrier to accessing legal aid. On this basis and considering other developments that took place in the period of reference, it is recommended to continue efforts to provide adequate human and financial resources for the justice system. The affordability of legal services remains a significant barrier to accessing justice in some European countries, particularly for low-income individuals and marginalized communities. Legal fees can be prohibitively expensive, leading to underrepresentation or self-representation in court. Furthermore, limited legal awareness among the population poses challenges, as individuals may be unaware of their rights or the available legal remedies. Legal education initiatives and public awareness campaigns are essential for promoting legal literacy and empowering individuals to navigate the legal system effectively.

Digitalization: Technological advancement presents some challenges for the member States of the EU and for the candidate countries as a persistent lack of data on court proceedings still hampers progress on the efficiency of justice, with efforts ongoing to map judicial backlogs.

3. The Independence of the Judiciary

a. The Foundations: Judicial Independence as a Fundamental Asset to Democracy in Europe

The emergence and evolving importance of judicial independence is intimately linked to the principle of the separation of powers and the rule of law. The problem of establishing a comprehensive set of standards of judicial independence has been addressed in a considerable number of different documents dealing with these matters and aimed at working out some reference points. These documents, independently of whether they have been issued by international organizations and official bodies or by independent scientific groups, offer a comprehensive view of the elements of judicial independence, the role and significance of judicial independence in ensuring the rule of law, and the challenges to be met by either the executive or the legislature.

At the EU and international level, many texts already refer to provisions that have been officially adopted to enshrine the principle of judicial independence as a fundamental feature for the endurance of the rule of law. Among these texts, particular reference should be made to the UN Basic Principles, adopted in 1985 by the VI United Nations Congress on Crime Prevention and Treatment of Offenders and subsequently approved by the General Assembly, the EU Treaties and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency, and Role of Judges.

In recent years, the case-law of the CJEU has been playing a pivotal role in the development of the emerging common minimum standards for judicial independence, binding on the EU member States as a matter of Union law. The CJEU has based its case-law primarily on Article 19 of the TEU, which requires member States to provide for effective judicial protection in areas covered by EU law, on Article 47 of the Charter of Fundamental Rights of the EU (CFR), which requires member States to guarantee a fair trial and effective judicial protection when implementing EU law, and on Article 2 TEU, which includes the rule of law among the values that are common to the member States and to which they have committed when joining the EU (as required by Article 49 TEU). The CJEU sees the development of common minimum standards of judicial independence as necessary not only for national courts to guarantee effective judicial protection but also to preserve the mutual trust between national judiciaries within the EU. In particular, the CJEU has focused specifically on the autonomy of the judiciary from the other branches of government (legislative and executive), on citizens' perceptions of independence, and on specific guarantees of independence within appointment procedures and disciplinary proceedings for judges. Whereas the CJEU has reiterated that laws setting the rules on how the national judiciaries are to be organized is a competence of the member States, it has also required, given the member States' Treaty obligations stemming from Articles 2, 19 and 49 TEU and from Article 47 of the CFR, that they may not, following their accession to the EU, lower their standards of judicial independence (principle of non-regression). The efforts of the CJEU in securing judicial independence have been reiterated in recent decisions (CJEU 5.6.2023, C-204/21, *Commission v Poland (IV)*; CJEU (GC) 24.7.2023, C-107/23 PPU, *Lin*; CJEU 7.9.2023, C-216/21, *Romanian Judges (II)*).

At the EU level further progress in the field of the rule of law has been made possible thanks to the Conditionality Regulation (which entered into force on 1 January 2021). While more limited in scope than initially proposed, the Regulation allows the EU to reduce the funds that a member State receives if it is held to be in breach of rule of law principles, affects or seriously risks affecting the "sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way." Poland and Hungary challenged the Conditionality Regulation before the CJEU, seeking to annul it as contrary to EU law. On 16 February 2022, the CJEU issued landmark decisions rejecting Poland's and Hungary's challenges to the Conditionality Regulation.

Another important tool for the monitoring of judicial independence in Europe (not only in the EU), was put in place in 2000 with the establishment by the Council of Europe of the Consultative Council of European Judges (CCJE) to act as an advisory body to the Committee of Ministers. This unique body, made up entirely of judges, focuses exclusively on the independence and impartiality of judges. Each of the forty-six member States is represented by well-respected sitting judges. While serving on the CCJE, the judges act in a personal capacity and not on behalf of their country. The CCJE examines issues in working groups and through surveys of member States. It publishes opinions on issues such as how to strengthen the right to an independent and impartial court. These opinions are conveyed to the Council of Europe and its member States to assist in the formation of domestic law. Likewise, the Venice Commission of the Council of Europe (European Commission for Democracy through Law) is the Council of Europe's advisory body on constitutional law and legal advice and has member States also outside Europe. Regarding the independence of the judiciary, it has provided some criteria in its rule of law checklist, such as independence of judges, impartiality of judges, autonomy and control of the prosecution service and independence and impartiality of the Bar.

In general, with respect to judicial independence, as the EU yearly reports show - and the data retrieved from national institutions confirm - significant progress has been made in specific country-related judiciaries. Denmark represents one of the most outstanding examples of judicial independence, the level of which continues to be perceived as very high. This is the case since the appointment procedure for judges is transparent and fair. The independent Judicial Appointments Council makes non-binding proposals for the appointment of judges to the Ministry of Justice, which then proposes formal appointment by the executive (the Queen). There have been no cases where the executive did not follow the proposal of the Appointments Council. Disciplinary measures for judges can be issued by Court Presidents or the Special Court of Indictment and Revision. The prosecution service is an autonomous institution acting under the supervision of the Ministry of Justice and led by a Prosecutor General.

Denmark scores a rule of law index of 0.90 ranking it 1st of 142 in the World Justice Project (WJP) global listings both in the European Union and worldwide. The Danish judiciary enjoys a very high level of perceived independence. Overall, 86% of the general population and 85% of companies perceived the level of independence of courts and judges to be 'fairly or very good' in 2023. This level of perception of judicial independence is favored by the involvement of civil society in the public sphere. Civil society space in Denmark is, in fact, considered to be open and the civil society organizations are closely involved through a Human Rights Council. The independence of the judiciary has been further secured thanks to the adoption of several measures to strengthen the accountability framework for judges.

Moreover, recent legislation (the 2021 Court Fees Act) has simplified the rules on court fees and incentivized settlements, by allowing the parties a longer period to reach a settlement, under which the plaintiff or appellant can be reimbursed the court fees.

b. Features of Judicial Independence in Europe

The normative legitimacy of courts as institutions vested with the power of adjudication is heavily grounded on their independence, which demands that the judges who apply the law to the disputes brought before them be free from undue pressures or influences from external actors. At the same time, their legitimacy might also be contingent on other values, such as accountability or transparency. In the following paragraphs, a comparative (non-exhaustive) overview of the state of the independence of the Judiciary will be offered in a selection of liberal democracies based on certain indicators identified by the GRoLC. The indicators are appointment procedures, judicial ethics, implementation of judicial judgments, judicial accountability and self-government.

Appointment procedures represent one of the key features to investigate as they can reveal fundamental evidence of the state of judicial independence and effective separation of powers in each national context.

In Austria, a law was adopted in December 2022 to provide for judicial involvement in the appointment of the Supreme Court president and vice-president. Legislation to ensure judicial involvement in the appointments of candidate judges was also adopted. However, the need for judicial involvement in appointments of the administrative court presidents has not been addressed.

A best practice example is the European Network for Councils of the Judiciary (ENCJ) that gathers the judiciary institutions of EU member States in order to promote the independence, accountability and quality of these institutions. This European Network is very active and establishes several standards, such as stating that the majority of Council members should be judges themselves and elected by judges rather than politicians.

Judicial ethics is currently attracting a rising interest both at the scholarly and at the political level due to the growing number of corruption scandals involving members of the judiciary in diverse national contexts. Several legislative actions have been taken in European countries which are worth mentioning. For example, in Italy, judicial ethics are on the agenda of the government along with the reform of the judicial system (Law No. 71).

In France, the *Ministry of Justice Orientation and Programming Bill* 2023-2027 [*Projet de loi d'orientation et de programmation du ministère de la justice 2023-2027*] presents the justice budget for the period 2023-2027, details the Ministry's objectives and resources, and simplifies and improves the procedure and organization of the justice system. It is complemented by the Draft organic law on the openness, modernization, and accountability of the judiciary [*Projet de loi organique relatif à l'ouverture, à la modernisation et à la responsabilité du corps judiciaire*]. These two texts reflect the action plan for faster, more efficient justice [*plan d'action pour une justice plus rapide et plus efficace*] presented by the Minister of Justice in January 2023, at the close of the Estates General on Justice. In its July

2022 report, the Estates General Committee referred to "the advanced state of disrepair in which the judicial institution finds itself" after "decades of failing public policies".

Law No. 2021-1729 of 22 December 2021 on trust in the judicial institution [*Loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire*] sets out the main guidelines for reforming the professional ethics and discipline of legal professionals. The law was inspired by the findings of a 2020 report entitled Mission on discipline in the legal and accounting professions [*Mission sur la discipline des professions du droit et du chiffre*] in which the Inspectorate General of Justice noted "the heterogeneity and complexity of the regimes [for discipline in the legal and accounting professions], their procedural flaws and cumbersomeness", "a source of confusion", and "an obstacle to the implementation of disciplinary measures, which are still subject to fundamental criticism (insufficient distance, uncertain impartiality of the investigator, etc.)".

Several texts implementing the ordinance have already been adopted, relating to all legal professionals (*Décret n°2022-545 du 13 avril 2022 (JO 14 avr.), Arrêté du 22 avril 2022 (NOR: JUSC2211529A, JO 27 avr.), Décret n°2022-900 du 17 juin 2022 (JO 18 juin)*). There has been also an update in 2019 of the Compendium of 2010 [*Recueil des obligations déontologiques des magistrats*], a deontological handbook which provides French magistrates with recommendations and disciplines their obligations. The update considered the development of social networks, among other issues. It also made use of the reports presented annually to the High Council of the Judiciary (HCJ) by the *Service d'aide et de veille déontologique*, which collects cases and questions that had been referred to it in a very abstract way (*e.g.*, can a magistrate be appointed to a specific court if they have previously been a lawyer in a court that is geographically proximate?).

In Belgium, ethics issues are addressed by the recent law of 22 November 2022 (amending the Law of 16 March 1803) on the organization of the notarial profession. This legislative initiative introduces a disciplinary board for notaries and bailiffs into the judicial code. The law aims to radically reform notary disciplinary law and, at the same time, bailiffs' disciplinary law: it provides for the establishment of a single disciplinary board for these two legal actors with civil servant status.

In Spain**,** the Judicial Ethics Committee issued two reports in September 2023 [*Dictamen (Consulta 02/23), de 18 de septiembre de 2023. Asistencia a manifestaciones; Dictamen (Consulta 05/23), de 19 de septiembre de 2023. Asistencia a manifestaciones y mítines de carácter político*] which made the following recommendations: first, that members of the judiciary should not attend political party rallies; second, in the case of demonstrations, to consider public perception before attending them, as the ethical duty that affects their non-strictly professional life requires them to avoid any action that could call into question the independence of, or society's confidence in, the Judiciary.

In Bulgaria, a noteworthy development has been the official opening of the *Judicial ethic platform of the National Institute of Justice* (NIJ) [*Националният институт на правосъдието*] in July 2023. It operates as a digital space for all magistrates in the European Union in order to demonstrate proficiency in their competence and have a mutual network for discussions about current ethical challenges, as well as reflections and suggestions for solving particular ethical dilemmas. Despite such initiatives, the level of perceived judicial independence in Bulgaria continues to be low among the general public and companies. (According to data in the 2022 EU Justice Scoreboard, 31% of the general population and 28% of companies perceive the level of independence of courts and judges to be 'fairly or very good'.) Nevertheless, there has been improvement since 2016 (when the figures were 23% for the general public and 21% for companies), suggesting that the country is in the process of reform.

In Finland**,** the National Courts Administration increased recently its activities to facilitate the work of the courts. It regularly organizes training on the rule of law and training for junior and new judges that include elements of the ethical behavior of judges. The working group 'Rule of Law Guarantees and Development of the Judicial System' was appointed by the Ministry of Justice in January 2023 to further strengthen the independence of the administration of justice. The group is expected to deliver proposals by the end of 2027.

In the EU candidate countries, efforts have been made in the perspective of accession. Nevertheless, the progress is slow. At the Council of Judges of Ukraine, a working group is working on updating the Code of Judicial Ethics. The group includes members of the Council of Judges of Ukraine, representatives of the High Council of Justice, the High Qualifications Commission of Judges of Ukraine, the National School of Judges of Ukraine, judges, and retired judges.

In Georgia**,** in March 2023, the High Council of Justice of Georgia issued an order on the creation of a working group for the purpose of drafting comments on Georgia's judicial ethics rules [საქართველოს სამოსამართლო ეთიკის წესების კომენტარების შემუშავების მიზნით სამუშაო ჯგუფის შექმნის შესახებ]. This constitutes evidence of the efforts of the country to comply with the requests of the EU to successfully obtain membership to the Union.

In 2021, the United Kingdom became a signatory to the *Bangalore Principles of Judicial Conduct* and in 2022 the first ever Guide to Judicial Conduct based on those principles appeared. The Guide was revised in July 2023. Key changes include: the *Statement of Expected Behaviour* has been integrated, to ensure that all judicial office-holders are aware of the standards expected of them; clarifications on how judicial office-holders should behave in a manner consistent with the expectations of court staff, as well as towards their colleagues and anyone else with whom they interact in the workplace; conflict of interest guidance, media guidance and social media guidance have been updated. One of the issues of concern relates to conflicts of interest, as the British judiciary is exclusively recruited from

the ranks of practicing lawyers and most judges are not full-time judges but lawyers who act as judge for some time. In this context, the Guide does not attempt to lay down hard and fast rules, but sets out principles and responsibility for implementation rests with the judge.

The implementation of court judgments is another important indicator of judicial independence and efficiency, as unimplemented judgments reduce the authority of courts and make their activism less defensible. In relation to implementation of judgments of national courts, research is unfortunately limited and so is the available data. Nevertheless, it could be recalled that the government of Republika Srpska has withdrawn from the Constitutional Court of Bosnia & Herzegovina and does not seem to consider the Court's judgments to be binding on Republika Srpska. The Republika Srpska seems to have rejected most of the authority of State institutions and this makes it difficult, if not impossible, to enforce the Court's judgments in the Republika Srpska, with significant implications for the rule of law.

In Belgium, the government's non-compliance with court orders, especially those involving periodic penalty payments related to asylum seeker reception, is troubling. Despite government initiatives, numerous court orders remain unfulfilled, leading to the establishment of a "rule of law observatory" by bar associations. Persistent non-compliance extends to areas like extradition and weapons exports, highlighting broader threats to the rule of law.

Scholarship has engaged more extensively in the recognition of data regarding the enforcement of the CJEU's judgments, where several issues of concern are raised by the non-compliance of certain member States to the Court's rulings. Concerns can be raised with respect to the non-compliance by Poland with a CJEU judgment of July 2021. The CJEU had ruled that the whole disciplinary system for judges in Poland was 'not compatible with EU law'. The CJEU instructed the Polish government to suspend the operations of the disciplinary chamber and revoke its earlier decisions. The government has yet to fully comply with these rulings and, in October 2021, the Polish Constitutional Court ruled that CJEU verdicts regarding judicial independence may not be implemented in Poland. Recently, the 5 June 2023 (C-204/21) CJEU judgment acknowledged partial implementation of the 2021 judgment and reiterated these previous findings.

Relatedly, the CJEU found Hungary to be in breach of its EU obligations as a result of government policies on border checks, asylum and immigration in the aftermath of the 2015 migration crisis (C-808/18 *Commission v Hungary* of 17 December 2020). The Hungarian Constitutional Court was asked by the government to review the compatibility of the CJEU ruling with the Hungarian Fundamental Law. In its decision of December 2021, the Constitutional Court concluded that the review before it cannot lead to the "examination of the primacy of the EU law", thereby refusing to abide by the CJEU's decision.

Turning to another important indicator, it must be stated that judicial independence cannot be tested without taking into consideration judicial accountability and the bodies of self-governance which have been vested with the task of overseeing its implementation. Recently, some extremely interesting scholarship has focused on the issues of judicial accountability and self-governance, collecting data, and conducting a country-oriented analysis, which has led to some relevant conclusions.

The strategy for the safeguarding of judicial independence has consisted, in some of the countries analyzed, in creating and vesting a new institution with functions related to the appointment, promotion, and discipline of judges that were traditionally under the purview of the executive.

Among the EU candidate countries, Georgia relies on the High Council of Justice (HCOJ) that was created in 1997 with eight members, mostly political figures, including the Minister of Justice and Prosecutor General. The HCOJ's mandate and membership have undergone many changes over the years, with significant reforms in 2005, 2007, 2013, 2017, and 2021. In 2021, the Council was given the authority to submit candidates for the Supreme Court to Parliament. The HCOJ has 15 members, including nine members from the judiciary (the chief justice and eight judges elected by the Conference of Judges). Representatives from the executive and legislative branches no longer serve on the HCOJ.

Among the country-cases analyzed in this Report, Denmark stands out for its achievements in the field of implementation of judgments. The efficiency of the justice system ranks very high as it handles its caseload efficiently, avoiding lengthy proceedings that are affected only marginally by the allocation of human and financial resources. Moreover, the National Court's Administration has been particularly active in promoting the rule of law and the awareness of a rule of law culture, and significant progress has been made as regards digitalization.

Nevertheless, Denmark's case is not isolated. As research and data retrieved confirm, Northern European countries generally rank among the first ten countries in the global listings for standards in the field of the rule of law and judicial independence. In fact, Norway, Finland and Sweden occupy, along with Denmark, the first four positions in the ranking of the rule of law provided by the WJP.

c. Key Challenges to be Addressed

The absence of a rigorous assessment of the quality of judges at the time of appointment might be compensated by structures and processes of in-service *encadrement* but it may not suffice. The absence of institutional protections like life-tenure and guaranteed remuneration might be compensated according to certain scholarship by strong administrative autonomy vested in courts. The absence of formal guarantees of independence in a written constitution might be compensated by a strong political and social

culture supporting judicial integrity. Research and the application of the comparative analysis show that the way in which these alternative tools may operate and deliver judicial independence and consequently protect the rule of law, is heavily dependent upon the country context and the institutional architecture.

Citizen Perception: Best practices in some of the countries recognised for promoting a rule of law culture could be followed as a model to enhance the perception of judicial independence among the population. To this end, informal meetings and dialogue between decision makers, politicians, members of the judiciary and citizens should be encouraged.

Separation of powers: There are specific cases in which the functions of the Minister of Justice are not sufficiently distinguished from those of the Prosecutor General and in those country-specific cases it is also assessed that further efforts shall be put in place to separate the function of the Minister of Justice from that of the Prosecutor General and to ensure functional independence of the prosecution service from the government.

Proceedings: The evidence gathered while drafting this Report has pointed to the excessive length of the proceedings in several cases. Notwithstanding the acknowledgement of the significant progress made in most of the countries considered, further efforts should be made to reduce the length of proceedings and thereby improve the efficiency of justice.

Appointments: The nomination of judges by political institutions in some of the countries considered in this Report could raise concerns as to their independence. The same concerns could emerge for the countries where members of the judiciary are popularly elected.

Measuring tools: The development of the workload measuring tools to better monitor and evaluate the needs of the judiciary is praised.

Resources: Addressing budgetary and staff shortages in the justice system is a pressing issue, and despite significant investments and initiatives in certain regions highlighted in this Report, structural resource deficiencies persist across Europe. These challenges have been further exacerbated by the enduring impact of the years of austerity that followed the international banking crisis and the resulting financial instability. The prolonged period of financial constraints has hindered the justice system's ability to adequately address its resource needs, contributing to ongoing shortcomings in various aspects of the legal infrastructure. As a result, the justice system faces formidable hurdles in delivering efficient and timely services, affecting the overall effectiveness and accessibility of justice in the European region.

4. Government Accountability with a Special Focus on Anti-corruption Measures and Criminalization Tools, Application of Sanctions, Protection of Whistleblowers, Right to Access Public Information (Transparency), Quality of Court Bureaucracy, Institutional Effectiveness and Openness of Government Work

a. The Foundations: Anti-corruption as a Pillar of the Rule of Law in Europe

Corruption is an ancient and pervasive societal issue that hinders the effective management of public affairs and erodes trust in the private sector. It is estimated that significant sums of money are paid in bribes every year, while a growing number of global corruption scandals have made headlines, spanning across continents and involving increasingly complex operations. Although governments are constantly seeking new approaches and tools to detect corrupt activities, technical solutions and compliance measures are not sufficient to eradicate corruption. In many societies, corruption is deeply ingrained and requires cultural change and the involvement of all sectors of society to address it effectively. In addition to the legislative framework, the ability to enforce the law, both administratively and judicially, is a fundamental requirement for an effective fight against corruption. According to the evidence presented, a strong legal and institutional framework guaranteeing transparency and integrity is crucial for effective anti-corruption policies. Looking at the Corruption Perceptions Index (CPI), a respected indicator, most of the States under consideration in this Report rank among the least corrupt countries in the world, while some others fall below the global average.

Especially in the EU, the fight against corruption is crucial in upholding the rule of law, requiring both preventative and punitive measures. Efforts to combat corruption are mainly focused on prevention, investigation, prosecution, and the recovery of illicit assets. Through collaborative efforts and the implementation of comprehensive strategies, progress is being made in fighting corruption and promoting the rule of law. Recognizing the importance of a strong legal and administrative framework, most EU member States have already implemented comprehensive legislation to tackle corruption in all its forms.

The EU's contribution to the development and exchange of best practices through the annual cycle of reports on the rule of law is a strong weapon in its anti-corruption arsenal. From 2020, the EC monitors progress in tackling corruption at national level as one of the key aspects of the rule of law. The reports include country-specific recommendations to support member States in their efforts to promote ongoing or planned reforms, to encourage positive developments and assist in identifying areas for improvement, and to track recent changes or reforms. Furthermore, the European Commission has recently adopted two targeted proposals to strengthen EU legislation. The first concerns the adoption of a directive to update and align EU rules on definitions and sanctions for corruption offenses, to ensure high standards against the full range of corruption offenses, to better prevent corruption and

to improve enforcement. The second is to supplement the Common Foreign and Security Policy (CFSP) toolbox of restrictive measures with an exclusive CFSP sanctions regime to combat corruption when and where acts of corruption seriously affect or threaten to affect the fundamental interests of the Union and the objectives of the CFSP, as defined in Article 21 of the TEU.

These initiatives aim to strengthen the establishment of a comprehensive and systematic strategic approach. By combining existing work and developing new directions and tools at both the EU and member State levels, the EU will be able to demonstrate a clear commitment to the fight against corruption both at the EU level and the global level. Indeed, the success of the project will depend on joint and continuous efforts at the EU, national, regional and local levels, with the joint participation and support of public authorities, civil society and the private sector, as well as international organizations. The aim is not only to curb the phenomenon, but also to raise public awareness of the consequences of corruption and to increase confidence among citizens and businesses.

b. Meaningful Features of Combating Corruption in Europe

The key steps implemented recently by certain governments provide a regulatory framework that may bring changes in States where corruption was considered an acute issue. Bulgaria, for example, is in the process of implementing a new National Strategy for Prevention and Countering Corruption. The government has tabled a reform of the Anti-Corruption Commission which has not been adopted yet. This reform aims at introducing investigative powers and further reorganizing the structure of the Anti-Corruption Commission by splitting it into two separate bodies. The parliament is currently progressing with a new draft law but has not yet nominated a chair for the Anti-Corruption Commission. Recently, the competence of the special judicial authorities deciding on cases concerning special criminal offenses (including high-level corruption) has been transferred to the regional and appellate judicial authorities around the country. There is also the National Anti-Corruption Council with a broad mandate (including verification of asset and interest declarations, carrying out integrity checks as well as confiscation of criminal assets), which continues to operate and function as an inter-ministerial advisory body.

The National Strategy for Prevention and Countering Corruption is still being mplemented. However, it remains difficult to evaluate the anti-corruption strategy without the yearly implementation reports for the period 2021-2027 that the government has committed to provide by 2026 at the latest. Further, because the Group of States against Corruption (GRECO) recently stressed the lack of proactive and systematic investigations and prosecutions for corruption linked to top executive functions, the Ministry of Interior implemented a series of projects that focus on corruption prevention measures. There has, admittedly, been some progress on the improvement of the integrity of specific sectors of

the public administration, police and judiciary. Finally, concerning the protection of whistleblowers, relevant legislation has been adopted in January 2023.

The EU also focuses on the right to information for its citizens as a pillar to achieve transparency. As a result, Article 10 of the TEU declares that decision-making should be made closely to the citizens and Article 15 of the Treaty on the Functioning of the European Union stipulates that institutions need to act transparently and individuals should have access to documents. In addition, Article 42 of the CFR clearly states that any EU citizen or legal person residing in a member State has the right to access documents of any institution, body, agency or office of the EU.

In the EU candidate countries, significant reforms to fight corruption are being made mainly with the aim of EU accession. Nevertheless, the progress is slow and the track record in most of these countries is still short of meeting the requirements for membership.

Georgia is one of the countries where the rate of high-level corruption remains above what is required by the EU and Georgia has undertaken a strong commitment to reverse this situation. In fact, the fight against corruption is one of the 12 priorities stipulated by the EU to Georgia in order to gain candidacy status. Thus, a good example is set by Georgia when it took into consideration the recommendations of both the EU and the Venice Commission and established an Anti-corruption Bureau, combining several anti-corruption functions in a single body. An action plan on “de-oligarchizing” was endorsed in September 2023, which primarily aims at reinforcing the rules on competition policy, media diversity and the financing of political parties. Furthermore, in 2022 there has been a significant increase in prosecutions and convictions for corruption as compared with the previous year. However, further action is needed in order to establish a track record of investigations, prosecution, adjudication and final convictions in corruption cases, notably high-level corruption. Further action is needed in order to deal with large-scale vested interests and their influence in the political, judicial and economic spheres.

In addition, Georgia has adopted new anti-money laundering legislation, implementing the recommendations of the Financial Action Task Force, and a new national strategy for combating organized crime. While a new counterterrorism strategy for 2022-2026 has been adopted, there are important steps to be made in order to improve law enforcement in fighting corruption-related crimes, such as money laundering and financial crimes. There is a specialized whistleblowing institution, which has been in place since 2009, and since 2015 there is an electronic platform, administered by the Civil Service Bureau, which allows for anonymous disclosure. However, the effectiveness of the whistleblowing mechanism, including the electronic platform, is very limited, partly because the number of whistleblowing cases is very low and also because in many public institutions the whistleblowing mechanism has not been introduced at all. It is noteworthy that in a survey carried out in 2020 by the Institute for Development for Freedom of Information (IDFI), which is a Georgian

non-governmental organization, 62% of the respondents were not aware of the electronic whistleblowing mechanism.

Finally, States that traditionally have had a better track record of combating corruption are also constantly engaged in the fight against corruption by updating their legislative and implementation arsenal. This demonstrates the acuteness and severity of the issue and its potential threat to democratic institutions and the establishment of the rule of law.

Several authorities focus on the fight against corruption in Germany both at the federal level and at the level of the *Länder*. Among them, the Federal Ministry of Interior and the Supreme Audit Institution have an important preventive role mainly in monitoring public spending. A decentralized approach is adopted for the repression of corruption, which means that the *Länder* are in charge of the investigation and prosecution of corruption offenses. Some of them have specialized police and prosecution offices on corruption, while through the Federal Criminal Police Office they exchange information with international authorities. Germany aims to update its strategic anti-corruption framework at the federal level, but the reform was still pending as of late 2022. Overall, it is to be noted that corruption in Germany is broadly criminalized. However, the legislative framework concerning the monitoring of secondary activities of the members of the Parliament remains problematic. While the relevant reform prohibits remunerated lobby activities as secondary activities, as well as the remunerated lectures which relate to parliamentary work, there is no independent oversight body which would ensure the supervision and enforcement of this prohibition.

The six Worldwide Governance Indicators (WGI) - voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law and control of corruption - show that the EU is at the forefront of institutional quality, having some of the best scores at a global level. The ascending trend was halted and even declined somewhat after the 2008 crisis. At that point, disparities between member States increased, especially in the Voice and Accountability and Regulatory Quality indicators. Overall, however, the disparities have declined among the member States as regards institutional quality, but Nordic and Western countries retain a lead over Central and Eastern Europe on this indicator. Also, the Baltic countries have overtaken the Mediterranean ones.

c. Protection of Whistleblowers as a Success Story

A striking example of the effectiveness of EU anti-corruption legislation can be seen in the many recent high-profile cases that have come to light thanks to people speaking out when they face wrongdoing. The key role of whistleblowers in defending the public interest is recognized in the 2019 Whistleblowing Directive. This Directive helps to fight corruption in many key EU policy areas, such as public procurement, financial services, financial protection of EU interests, environmental protection, transport safety, public health and nuclear safety. It also sets effective standards of protection against retaliation for whistleblowers who disclose illegal activities.

This process requires EU member States to establish clear internal and external reporting channels to ensure confidentiality for whistleblowers in both the public and private sectors, as well as defined feedback and follow-up. Effective implementation of the Directive on the Protection of Whistleblowers is a key step in building strong anti-corruption enforcement and encouraging people to report corruption without fear of reprisal. In Germany for example, legislation on whistleblower protection has been adopted and seems to be very efficient. According to official data, in 2022, 76.7% of corruption investigations were initiated on the basis of external information and public disclosures.

Beyond the EU normative framework, the protection of whistleblowers under the European Convention on Human Rights is also quite extensive. According to settled case-law, the balancing exercise between those conflicting interests must be assessed on the basis of six criteria: (1) the reporting channel used, (2) the public interest in the disclosed information, (3) the authenticity of the information, (4) the damage suffered by the employer, (5) the good faith of the employee, and (6) the severity of the sanction imposed. Within this approach, the Court has ruled consistently that there is a violation of the freedom of expression protected under Article 10 of the Convention when disciplinary measures against whistleblowers (such as lawyers or civil servants) are imposed and that such measures could be justified only in exceptional circumstances (ex. ECHR Case of *Rogalski v Poland* 2023 (5420/16), Case of *Guja v Moldova* 2008 (14277/04).

d. Key Challenges to be Addressed

Citizen perception: Despite these rankings, what remains a point of concern for most States is that the majority of their citizens believe that corruption is widespread in their countries, and they are dissatisfied with their national governments' efforts to combat it. Changing this perception and at the same time raising awareness on corruption issues remains one of the greatest challenges faced by governments.

Resource allocation: While some European States have been able to allocate additional resources specifically to law enforcement agencies, others report serious problems in terms of resources to prevent, investigate and prosecute corruption, or even to recruit and retain highly qualified staff.

Effective procedures: A further necessary tool in the fight against corruption is the removal of procedural obstacles, which often prevent the effective investigation and prosecution of corruption cases. The length of criminal proceedings (investigation and prosecution), which influences final decisions, legal provisions to remove immunities, especially for high-ranking officials, and very short statutes of limitations are among the most important obstacles to a decisive anti-corruption strategy.

Adoption of an integrated strategy: This Report underlines the importance of countries adopting an effective national anti-corruption strategy in order to meet international standards in a comprehensive manner. It emphasizes the need for these strategies to address legislative and institutional gaps, as well as integrate anti-corruption provisions into relevant policy areas. To achieve this, a coherent anti-corruption strategy is necessary, based on consensus and broad consultation, and accompanied by clear objectives, a budget, staffing, and defined responsibilities. The European Commission's recent Rule of Law Report 2021 indicates that, within the EU, several member States are taking steps in this direction by implementing criminal law reforms to combat corruption, particularly in relation to investigations, prosecution, and sanctions.

5. Legal Certainty

a. The Foundations: The European Conception of Legal Certainty

Legal certainty is a complex component of the rule of law. The theory of law indicates that the principle of legal certainty aims to protect and preserve the fair expectations of the people. When dealing with this principle, it is possible to detail its content as ensuring: (1) accessibility of legislation and court decisions; (2) non-retroactivity; (3) generality and promulgation of laws; and (4) hierarchical structure of rules.

It is possible to argue that legal certainty is mostly based on predictability, conceived as the possibility of foreseeing human actions and their consequences (the situation resulting from those actions). This may refer to natural actions (such as driving on the right or on the left) or institutional actions (legal acts), performed either by individuals (*e.g.* a dismissal) or by legal bodies (imposing a fine, awarding compensation, granting or denying a permit, etc.). The first requirement linked to this dimension is obviously that of making legal norms public and accessible. A secret rule, or one to which access is restricted, will destroy predictability in this dimension. Alongside formal accessibility, substantive accessibility refers to citizens being able to effectively know and understand the applicable law. When referring to this dimension, some authors invoke transparency, referring to something more than the mere formal possibility of access, *i.e.* that the norm not only be known but also understood by those to whom it is addressed.

Many factors can play a role here, such as clarity of wording, level of technical complexity, legal references, the dispersion of regulatory competence (having to know beforehand which public authority is competent in a certain matter), the proliferation of so-called *omnibus statutes* (those which regulate very disparate matters), etc. These factors can all make it very difficult, or practically impossible, for the lay citizen (and even non-specialized jurists) to be acquainted with the applicable rule or understand it in detail. Connected to this is the requirement of non-retroactivity. Prediction is always made at a specific time and refers to future events. Prediction may vary in length; thus, the longer the predicted term is, the more predictable a legal regulation will be. It is precisely this aspect or dimension of predictability

that justifies certain legal requirements such as that of a specific type of non-retroactivity or that of regulatory stability.

Stability is another important aspect of predictability and has two relatively independent meanings. The first, more formal meaning, understands stability as the absence of changes: legal norms must have a minimum duration in time to allow subjects to plan their medium- and long-term behavior. From this perspective, frequent legal changes lead to a lack of predictability. In the second, less formal meaning, stability is understood as continuity (coherence), rather than a simple absence of changes. With regard to this second meaning, one has to assess the content of any changes made to determine whether or not they imply instability and, therefore, whether or not they affect legal certainty. At times, certain normative changes (*i.e.* a lack of stability as under the first meaning) may not affect predictability but actually increase it: for instance, changing a rule worded ambiguously or a reform which consists in eliminating a rule that was incoherent with other rules or principles. To comply with this temporal dimension of predictability, it is not enough to simply incorporate a diachronic perspective, under which the law would be conceived as a dynamic system, *i.e*., a series of elements changing over time. It is also essential to incorporate its central aspect as a social practice developed over time and aimed at achieving certain objectives considered valuable from the point of view of those participating in the practice. From this perspective, the practice must have a certain continuity, at least in its fundamental principles. However, stability is not a value *per se*, but the rule of law requires finding a balance between stability and change, and law reforms may introduce a degree of uncertainty.

Besides predictability, legal certainty as a component of the rule of law encompasses the requirement of clarity of the grounds, purposes, and content of regulations, especially those addressed directly to the legal subject. A person must be able to foresee the legal consequences of his or her behavior. However, experience shows that the absolute certainty of such consequences is unattainable due to a number of circumstances, such as the peculiarities of language which formulates legal rules, their generality, the inability to predict in all real-life situations and so on. Legislation which seeks to regulate people's actions and determine the consequences of such actions through excessive rigidity of wording, is rapidly becoming obsolete. Hence, the law must keep up with changing circumstances.

Finally, language plays a fundamental role in ensuring legal certainty. Legal certainty is first and foremost a lack of ambiguity. Certainty is most fully achieved in a homogeneous language environment. The precepts of national law (constitution, laws, bylaws, etc.) are related to the commonality of professional (legal) terminology, as well as background knowledge of legally significant words and expressions.

In ensuring this understanding of legal certainty, Europe has played a leading role since ancient times. Indeed, the principle of legal certainty had already emerged in Ancient Greece, where the law's stability was considered a fundamental pillar of the legal system up

to the point that a certain preference for the immutability of statutes was entrenched. For instance, Demosthenes reports that Locrians allowed the proposal of new laws only under the risk of the proponent's death if his peers deemed the new statute not good. In the following centuries, Justinian's codification was evidence of the will to ensure legal certainty. Ditto, King François I of France's Ordinance of Villers-Cotterêts (1539) to put judgments in writing to avoid uncertainties, ambiguities, and interpretation.

However, it was during the seventeenth century that the most important evolution with regard to legal certainty occurred. Indeed, the affirmation of the Cartesian logic, as developed through the studies of Descartes, Galileo, and Newton, impregnated legal theory with scientific thinking and made the issue of predictability pivotal. Legal thinkers such as Grotius and Leibniz believed that mastering legal causes should allow the predictability of legal consequences; in other words, they established the relevance of legal certainty for legal systems. Besides, with the development of social contract theories, John Locke, counter-arguing Hobbes's absolutist conception of the social contract, believed that trust was a fundamental element for the people (the holders of sovereignty) to judge the activity of the legislative power and, as a last resort, to dissolve it.

This logic fully bloomed during the Enlightenment, when the distrust toward judges, which resulted in the conception of their role as a mere 'mouth of the law', was established. Indeed, Montesquieu promoted the Cartesian logic of legal certainty and believed that laws should provide the same certainty as the laws of science. Thus, if only the legislator has the legitimacy to create law, judicial intervention must remain purely mechanical. This line of thinking had an important influence on the Italian philosopher and legal scholar Cesare Beccaria, who sought to apply the notion of "syllogism" to law, so "in every criminal cause, the judge should reason syllogistically. The major syllogism should be the general law; the minor one the conformity of the action, or its opposition to the laws; the conclusion liberty or punishment" (C. Beccaria, *Dei Delitti e Delle Pene* (1764), Chapter 4).

This understanding of judging, which is still shared by many European continental lawyers and legal scholars today, had a major impact in England. William Blackstone, in his famous *Commentaries on the Laws of England*, also refused to grant judges the power to create law and strongly supported the notion that binding precedent could only be overcome in exceptional circumstances.

In the nineteenth century, August Comte further confirmed the idea that social phenomena should be acknowledged on an equal footing with other phenomena, thus underscoring the relevance of legal certainty. The importance of certainty did not decline, while natural law theories were being questioned by legal positivists. French and German civil codes gave substance to the belief that the law could be predetermined by abstractly defined concepts, notwithstanding the anti-rationalist reaction of the German historical school and the authority of Portalis. In England, the unsuccessful plea of Jeremy Bentham for codification seems to have won him over to the Cartesian logic of legal certainty.

The nineteenth century also set the stage for the German *Rechtsstaat* and the French *État de droit*, which share the idea of a political power that guarantees individual rights and is subjected to legal principles such as legal certainty. Indeed, the notion of a certain and predictable law appears essential in framing the substantial economic development caused by European industrialization. Similar pillars are consolidated also in the UK conception of the rule of law. The British legal system, rooted in common law, has long been seen as complex yet grounded in citizens' trust. A. V. Dicey introduced the concept of the rule of law as a fundamental contribution to the construction of modern constitutional law (*Lectures Introductory to the Study of the Law of the Constitution*, London, 1885).

The rule of law can be understood at the same time as synonymous with legal certainty and as its identifying element. For this reason, Dicey, starting from the premise that a diffusive principle such as 'the rule of law' makes law far more certain than any written constitution, wanted to directly connect the principle to the question of fundamental rights and incorporate it as an element of constitutional law. Between rule of law and constitutional law, an ideal consonance was created. Dicey argued that the rule of law is acceptable only as a supreme principle. However, its chameleon nature and diverse interpretations raise doubts about its concreteness. Legal certainty in the British context can be assessed through the concrete application of intrinsic principles such as the supremacy of law, separation of powers, predictability, fair application, just laws, robust and accessible enforcement, independent jurisdiction, and the right to participation. These principles can provide a basis for evaluating confidence in the British legal system.

Building on this evolution - notwithstanding the varieties of tools through which it is achieved in each legal system - legal certainty is conceived as a cornerstone of the rule of law in almost all European countries. Indeed, it is an established principle in EU member States, as well as the UK. It is also a very relevant principle for candidate countries, such as Albania, Ukraine, and Georgia, in the context of EU conditionality as well as the broader evolution of their legal systems.

b. Meaningful Features of Legal Certainty in Europe

The above-mentioned conception of legal certainty derives from a consolidated understanding of the law stemming from the constitutional provisions of European countries. In France legal certainty has a constitutional ground since the approval of Art. 2 of the Declaration of Human Rights. Germany has provided since the nineteenth century an understanding of legal certainty that is strictly connected with the legal method; according to it norms shall be applied syllogistically to the case at hand, subsuming the factual case under the applicable law. Evidently, the German structure of the legal method promotes legal certainty as long as it serves the guidance function of the rule of law by paying attention to the needs of the subjects of the law. In Italy, too, both the case-law of the Constitutional

Court and the legal doctrine have deeply contributed to identifying objective and subjective components of legal certainty, especially underscoring the need for clarity and unambiguity of the legal provisions (Constitutional Court, No. 384, 10 November 1994; Constitutional Court, No. 94, 30 March 1995 and Constitutional Court, No. 1570, 26 January 2012. More recently, Constitutional Court, No. 18, 14 February 2019). Further examples from EU member States consolidating the relevance of legal certainty can be found. In Denmark, decision U 2008.2394H makes it clear that the the principle of legal certainty trumps any other applicable legislation. And by the 1990s, it was fully acknowledged by the Austrian legal system that it is necessary to assess clarity from a linguistic perspective (*Henrich* case (VfSlg. 12.420/1990)).

A similar approach can be identified in the constitutions of EU countries transitioning from the communist legal system. For instance, the Czech Constitutional Court has extensively contributed to developing the concept of legal certainty with regard to administrative law. The predictability of the outcome of administrative procedure guarantees legal certainty and ensures confidence in the law. The behavior of administrative bodies can be deduced in accordance with statutory laws, which also excludes possible arbitrariness. “The principle of legal certainty must then be combined with the prohibition of arbitrary decisions, so that the discretion of public authorities is limited by procedures to prevent abuse of that discretion...” (Constitutional Court, Pl. OS 12/14, 16 June 2015). Further, “This requirement is all the more urgent in a situation where the legislation on the basis of which a decision is made is made up of only very general principles” to limit the scope of arbitrariness (Constitutional Court, II. OS 482/18, 28 Nov. 2018).

Among EU candidate countries, the understanding of the principle of legal certainty does not change, thanks in part to the harmonizing role played by the ECtHR. Albania’s Constitutional Court has quite recently derived the principle of legal certainty from Art. 4 of its Constitution (Constitutional Court Decision no.15/2010, 15 April 2010). The Constitutional Court of Bosnia & Herzegovina recognized that the principle of legal certainty and equality before the law are indivisible elements of the principle of the rule of law (Constitutional Court, No. U 16/08, 28 March 2009, Para 47) and that the legislative body must not formulate the prescription in such a way that it leads to essential impossibility or unjustified difficulties in the exercise of rights (Constitutional Court, No. U 158/03, 22 September 2003, Para 35). In Serbia, a long-awaited evolution of the legal system aimed at strengthening the rule of law was introduced in January 2023. After the successful referendum and the promulgation of constitutional amendments, and then the adoption of a whole set of judicial laws that make the constitutional provisions more specific, the Republic of Serbia improved and reshaped the position and role of the judiciary and, cascading downwards, reinforced the principle of legal certainty.

c. Key Challenges to be Addressed

Although its definitive elements seem to be clear, the principle of legal certainty may be put at risk both theoretically and in practice. Some scientific discoveries of the twentieth century (such as Heisenberg's principle of uncertainty) and new philosophical thoughts (such as Popper's) weakened the foundations of the concept more than ever before. Individual interests and the uncertainties of language have culminated in legal theoreticians accepting that indeterminacy of law is unavoidable, at least to some extent. Still, most cannot avoid adhering to the need for certainty in law and predictability in case-law.

Relationship with other State interests: From a practical perspective, the main issue is whether the principle can be balanced with and can succumb to other State interests. There are Constitutional Courts, for instance, believing that, in cases where a major public interest is perceived to be at stake, the principle of legal certainty should not prevail (Constitutional Court of Albania, Decision no. 26/2005, 2 November 2005).

Opening the principle of legal certainty to interpretation could, however, weaken the whole understanding of the rule of law. This has been evident in a number of countries, which tend to interpret the goals of the legislature and justify them through the Constitution. It has been stated at the Constitutional Court level, when dealing with the application of the principle in criminal matters, that "the *lex certa* principle does not prohibit the legislature to grant a certain margin of appreciation to the judge, because of the general character of legislation, its applicability to a wide variety of cases and the evolution of the acts they aim to sanction. The condition that an offense must be clearly defined by the law is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable." (Constitutional Court of Belgium, no. 1/2016, 14 January 2016, B.5.3).

Infra-State organization restrictions: The territorial organization of the State can also impinge on the ability of the State to fully respect the principle of legal certainty. In federal structures, for instance, only an efficient coordination among different levels can avoid an infringement of the principle. *A contrario*, this is instantiated by the case of Bosnia & Herzegovina. Despite the growing interest in legal certainty issues in Bosnia & Herzegovina, many challenges remain. The Constitution of Bosnia & Herzegovina, established as Annex IV of the Dayton Agreement, created a complex federal system comprising the Federation of Bosnia & Herzegovina and Republika Srpska as constituent parts. This system decentralizes powers among Bosnia & Herzegovina's institutions, the Federation, and Republika Srpska, making it one of Europe's most intricate federal structures. Legal certainty in such a federal State is challenged due to multiple laws on the same subject and several potentially overlapping courts. The Constitutional Court of Bosnia & Herzegovina is the sole State court explicitly recognized in the Constitution. Other central State bodies (Office of the Prosecutor, Court of Bosnia & Herzegovina, High Judicial and Prosecutorial Council) were

established later, lacking explicit constitutional recognition, which could lead to potential conflicts.

Additionally, due to autonomous legislative procedures at the Entity and Brčko District levels, legal orders vary substantially, causing fragmentation in State powers, legislation, and judicial bodies. Discrepancies and inconsistencies permeate the legal system. Some areas are regulated by one legal order but not others, and even within Entities, regulations for similar situations differ. Interpretations of similar laws also vary. The absence of clear rules to resolve conflicts between legal orders creates confusion and practical difficulties for citizens. Although attempts have been made to harmonize legislation (*e.g.*, the 2003 adoption of common civil and criminal procedural codes), challenges persist.

The competence and jurisdiction of Bosnia & Herzegovina courts, the lack of tools for harmonizing jurisprudence, and diverse legal interpretations are critical issues. Backlogs in cases and obstacles to accessing legal instruments further compound the challenges. Addressing these complexities requires comprehensive reforms, possibly including constitutional revisions, to establish clear rules, enhance cooperation, and ensure consistent application of laws throughout Bosnia & Herzegovina, fostering legal certainty and effective governance (European Commission for Democracy through Law, 2012).

The confusion in the allocation of powers related to legislative and administrative authority, and legislative powers between the State and regions, seems a problem also in Italy, which is further exacerbated by the need to respect supranational regulations.

Supra-State organization restrictions: The issues depending on the infra-State organization exist as well when dealing with the impact of the supranational dimension.

In France, the Constitutional Council's position regarding the interpretation of rights and freedoms does not contribute to the promotion of legal certainty. This is so, because the Council has kept for itself the interpretation of rights and freedoms guaranteed by the Constitution and at the same time it has delegated to administrative courts the interpretation of those rights and freedoms protected by the ECtHR and the CJEU. Thus, the Constitutional Council favors divergent visions of fundamental rights with identical content, which is at odds with legal certainty as an essential component of the rule of law. Further, despite the general prevalence of the case-law from the EU courts, the intended coordination through the preliminary ruling on the issue of constitutionality has not always been successful. In the realm of protecting fundamental freedoms, statutes initially deemed in line with the Constitution by the Council may later be deemed incompatible with EU law, causing ambiguity and impacting both the authority of the Constitutional Court and citizens' attachment to the historical republican pact.

The imperative of respecting the primacy of the supranational legal system has become crucial in certain EU member States. And while primacy of EU law may not necessarily mean

supremacy over national constitutions, it definitely determines in favor of EU law conflicts between the latter and ordinary domestic legislation. Notably, Constitutional Courts in some EU countries have repeatedly rejected the primacy of EU law in their rulings, introducing uncertainty regarding adherence to EU rules (*cf.* Constitutional Court of Poland, No. K 18/04, 11 May 2005; Constitutional Court, No. P 1/05, 27 April 2005; Constitutional Court, No. K 33/12, 26 June 2013; Constitutional Court, No. U 2/20, 20 April 2020; Constitutional Court, No. P 7/20, 14 July 2021 and Constitutional Court, No. K 3/21, 7 October 2021).

Similarly, a recent legally binding decision of another Constitutional Court (Constitutional Court of Romania, No. 390, 8 June 2021) has examined the primacy of EU law over contrary national law. Article 148(2) of the 1991 Romanian Constitution stated that "As a result of the accession, the provisions of the constituent treaties of the European Union as well as the other mandatory community rules take precedence over conflicting provisions of national law, in conformity with the terms of the Accession Act.". With respect to this provision, the Constitutional Court held that a national Romanian court does not have the power to review the conformity of a provision of national law with the provisions of EU law, if that provision of national law was previously found to be constitutional by the Constitutional Court. That decision diverges from the ruling of the CJEU in joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România' & Others*. As a result, Romanian national courts find themselves torn between the Constitutional Court and the CJEU regarding the application of EU law primacy in judicial review. This conflicting situation creates legal uncertainty.

It is also important to note that, according to the so-called counter limits (limits due to the defense of constitutional fundamental principles) or the protection of constitutional identity, in some EU member States, the decisions of the CJEU are accepted as long as fundamental principles of the national constitutions are not at stake. Moreover, some national courts, such as the German *Bundesverfassungsgericht*, have developed doctrines to control the acts of EU institutions that exceed their competencies (*ultra vires* review) on the basis of the breach of the democratic principle (Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15). This means that the principle of primacy, a foundational yardstick for national and EU constitutional law, has been subject to different accommodations by the CJEU and national constitutional courts.

Implementation impediments: Finally, it should be mentioned that notwithstanding the existence of relevant provisions at the constitutional and legislative levels, the principle of legal certainty cannot find adequate protection given certain non-legal elements. In systems with high corruption, the law's mode of production and its interpretation can be jeopardized. Political instability entails a huge degree of legislative instability, which is contrary to legal certainty. The lack of public administration may hamper coherence in the application of the law. Overall, detachment from formal rules due to non-juridical issues seems to be a rather widespread problem.

D. Concluding Remarks

Europe considers itself the cradle of the rule of law. A great tradition of development of public law and public institutions has characterized Europe for many centuries and coincided with the development of the ideas of State, Constitutionalism, Human Rights, development of International Law, etc.

This does not mean that the path ahead for the rule of law to further develop and produce its results in Europe for the years and the centuries to come is linear, easy or simple.

Although a global concept of the rule of law is not a reality yet, the drafters of the present Report consider that the contribution of European States has proven fundamental for the development and progress of this notion and, most importantly, for the diffusion of a culture of the rule of law at the global level. They represent a model for States where the principles intertwined with this concept (democracy, separation of powers, legal certainty, judicial independence and freedom of elections) are still not consolidated.

Global rule of law requires that there be fair systems of adjudication, an independent legal profession and robust civil society, and a dynamic system for revising, challenging and changing international, European and domestic law to better serve the needs of the world today. It is a new concept and as such it is still evolving. The aim of the drafters of this Report is to contribute to the development of a comprehensive global concept of the rule of law concerning UN universal values and diversity. To this end, this first Report analyzes different components of the concept, among which judicial independence, legal certainty, separation of powers and government accountability feature prominently.

The Report appreciates Europe and its accomplishments. At the same time, it expresses concerns and, faithful to the objectives underpinning the GRoLC's inception, it suggests ways in which these accomplishments will become more embedded in the years to come: to gradually produce a comprehensive concept of a Global, not Regional, rule of law and assist the States in their need for furthering and deepening the rule of law in their territories and worldwide.

EPLO
European Public Law
Organization