

Tilburg University

Mutual trust: The virtue of reciprocity

Hirsch Ballin, Ernst

Published in:
Reinforcing rule of law oversight in the European Union

Publication date:
2016

Document Version
Peer reviewed version

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
Hirsch Ballin, E. (2016). Mutual trust: The virtue of reciprocity: Strengthening the rule of law through peer review. In C. Closa, & D. Kochenov (Eds.), *Reinforcing rule of law oversight in the European Union* (pp. 133-146). Cambridge University Press. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649856

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Mutual trust: the virtue of reciprocity

Strengthening the acceptance of the rule of law through peer review

Ernst Hirsch Ballin*

1. Introduction

All relations between persons require their reciprocal acceptance as legal subjects, which is only possible if they trust that the law will bind them together. The European Union (EU) is a polity that expresses itself in a legal order built on a diversity of national legal orders. Since it is neither possible, nor desirable to replace national legal acts of any kind – be it administrative decisions or court rulings – with European legal acts, their mutual recognition is a cornerstone of the cohesion and functioning of the Union. Both the area of freedom, security and justice (Article 3 (2) TEU) and the internal market (Article 3 (3) TEU) are built on mutual recognition, i.e. legal reciprocity. The rule of law is one of the foundational values of the Union.¹

That is embryonically why the EU must be built on the rule of law. Aristotle saw already the reciprocal nature of the law belongs to the foundations of a well-ordered society. “The public-spirited acts of a citizen motivated by a sense of justice and civic friendship are not purely altruistic or beneficent: they are based on (...) an expectation of reciprocal benefits.”² The great philosopher recognized that “the rule of men over men is less desirable than the rule of law”:³ “man is, when perfected, the best of animals, but, when separated from law and justice, he is the worst of all”.⁴

Democracy in the EU depends also on the veracity of its aspiration, i.e. to create a method of decision-making on the legal rules governing the communities and policies in which a majority under the conditions of respect for minorities decides on the realization of shared values. One cannot have a democratic and legitimate EU when the rule of law is absent or fading. The rule of law implies that the law is the same for all. Reciprocity is a virtue in the way people or

* Professor of Dutch and European Constitutional Law (Tilburg University) and Human Rights Law (University of Amsterdam). He served as Minister of Justice of the Netherlands (1989-1994 and 2006-2010) and is now i.a. a member of the Netherlands Advisory Council on International Affairs. The author thanks Caia Vlieks LLM (Tilburg University) for her valuable editing work and comments.

¹ cf Art 2 and the Preamble of the TEU (Treaty on the European Union).

² Donald Morrison, ‘The Common Good’ in Marguerite Deslauriers & Pierre Destré (eds), *The Cambridge Companion to Aristotle’s Politics* (Cambridge University Press 2013) 176-198 (194).

³ Christoph Horn, ‘Law, Governance, and Political Obligation’, in: Deslauriers & Destré, *The Cambridge Companion to Aristotle’s Politics* (n 2) 223-246 (234).

⁴ Aristotle, *Politics*, I 2, 1253a31-33, quoted by Horn, ‘Law, Governance, and Political Obligation’ (n 3) 234.

entities behave towards each other. Fidelity depends on reciprocity:⁵ it is an indispensable prerequisite for the acceptance of obligations.

With respect to the operations of the EU Institutions, the rule of law is firmly rooted in the treaties and the case law of the Court of Justice of the European Union (CJEU). It includes the principle of legality, legal certainty, fair application of the law, the principle of equality, the obligation to state the specific legal basis and the reasons for legal acts, effective legal protection and that of effective enjoyment of rights under EU law including fundamental rights.⁶ But the constitutional system of the EU depends on a much wider and complicated framework of institutions in the Member States who – in accordance with the principle of subsidiarity and decentralized enforcement⁷ co-produce with also the weakest link, precisely because of its encompassing nature. Specific legislative acts concerning procedural rights (e.g. on access to legal assistance and interpreters) may contribute to it; the CJEU will oversee its implementation.

The rule of law is more than a rule or even a principle (which might be balanced against other principles).⁸ Article 2 TEU rightly calls it a founding value. National and international political credibility and social cohesion depend on the acceptance of this principle. The rule of law in the EU is however continuously challenged by tensions between the realization of the values enshrined in Article 2, as well as the human rights norms and principles confirmed in Article 6, and “contemporary understandings of ‘law as a means to an end’”.⁹ A lack of respect for independence of the courts or rights of the citizens is difficult to redress. This is a question of political and administrative culture beyond enforcement of specific legal obligations.

Kochenov convincingly argues that “the concept of the Rule of Law to be used in European law should also acquire a substantive dimension, to add substance to its procedural aspects. This substance is nothing other than the objectives of integration.”¹⁰ In view of its relation with reciprocal respect among institutions and citizens for human dignity, the close relation between rule of law and human rights should also become a part of our understanding of the rule of law. In other words: what counts is not the rule of any “law”, irrespective of its content, but law in a democratic constitutional framework that contributes to the

⁵ Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law. An Interactional Account* (Cambridge University Press 2010) 38-39.

⁶ Maria Luisa Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer 1999) chapter 5.

⁷ Roger Schütze, *European Constitutional Law* (Cambridge University Press 2012) 250.

⁸ On the difference between principles and values, see Esteban, *The Rule of Law in the European Constitution* (n 6) 39-42.

⁹ Martin Krygier, ‘Rule of Law’ in Michel Rosenfeld & András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 233-249 (247); Brian Z. Tamanaha, *Law as a Means to an End. Threat to the Rule of Law* (Law in Context Series, Cambridge University Press 2006).

¹⁰ Dimitry Kochenov, ‘The EU Rule of Law: Cutting Paths through Confusion’ (2009) 2 *Erasmus Law Review* 5 (24).

realization of human rights. The opponents of enhanced rule of law supervision refer to the diversity between the Member States, but the rule of law is part of the indispensable homogeneity of values within the Union.¹¹ The rule of law has – in the words of Abdullahi Ahmed An-Na'im – a universal significance, both in international relations and domestically in view of the “liberation from all forms of fear, including human domination”.¹²

2. The economic and political relevance of rule of law

The rule of law is not only a condition for trust among citizens, but also for trust in economic life. After the collapse of the Warsaw Pact, many West-European politicians deceived themselves and others with the idea that a multiparty system and economic liberalization would be sufficient for freedom and democracy to flourish. Economic prosperity depends on reliable institutions including the rule of law.¹³ The rule of law “implies that laws cannot be simply used by one group to encroach upon the rights of another”.¹⁴ The four economic freedoms of the European Communities and nowadays of the EU - the free movement of goods, capital, services, and people – require access to administrative and judicial proceedings on an equal footing for a Member State's own citizens and other European citizens.

The enlargement of the EU in the first decade of the 21st century with twelve Member States was, much more than Eurosceptics try to make us believe, the result of a coherent view on Europe's future. The EU wanted to bring stability across Europe, based on shared values through an irreversible inclusion of the – mostly post-communist – societies outside the former Soviet-Union in a moral, economic and legal commonwealth. (That the Baltic states were treated the same way goes back on their firm westward orientation and their independence until the brutal occupation by the Soviet-Union in 1940.)

According to the so-called Copenhagen criteria, the admission to full membership depended not only on the adaption of the legislation to the *acquis communautaire*, but also on the other “Copenhagen criteria”, defined by the European Council in 1993, in short:

“Countries wishing to join need to have:

- stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;

¹¹ Stelio Mangiameli, ‘The Union's Homogeneity and Its Common Values on the Treaty on European Union’ in Hermann-Josef. Blanke & S. Mangiameli (eds), *The European Union after Lisbon* (Springer 2012) 21-46.

¹² Abdullahi Ahmed An-Na'im, ‘Transcending Imperialism: Human Values and Global Citizenship’ in Suzan Young (ed) *The Tanner Lectures on Human Values Vol. 30* (University of Utah Press 2011) 143, also available at <http://tannerlectures.utah.edu/documents/a-to-z/a/An-Naim_10.pdf> accessed 15 March 2015.

¹³ Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Profile Books 2012).

¹⁴ *ibid.* 327.

- a functioning market economy and the capacity to cope with competition and market forces in the EU;
- the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.”¹⁵

Candidate-Member States had to do their own part, first of all, albeit with expensive assistance by the EU and the Western-European Member States. The policymakers knew about the risks of backsliding of societies into autocratic and illiberal forms of governance. They estimated that inclusion in the EU would offer the best possible protection against such risks. Contrary to a meanwhile widespread belief, they did not expect that the European policymaking process would easily swallow the extended membership. With so many Member States, the EU needed to change its decision-making process, and to create a direct bond of trust with its citizens. The decisions taken by the Heads of State and Government around the turn of the century aimed at the latter through the adoption of a Charter of Fundamental Rights of the European Union,¹⁶ and at the first through a profound overhaul of the Union’s setup through a constitutional treaty. Some politicians tried to satisfy old ideas of national sovereignty with rear-guard actions against the Charter and judicial cooperation, but overlooked the cultural dimension of integration¹⁷ just as the protagonists of constitutional pump and circumstances in the proposed constitutional treaty. The core question is trust in institutions that are not easily recognizable as the people’s own institutions. This is much more a question of living values than of European legality.

Strengthening and upholding the trust of the citizens requires much more than the enforcement of European law in the courts, and breaching their trust cannot wait to be cured until the conditions for application of Article 7 TEU are given. It is, as Article 2 TEU rightly says, a question of *values*: “the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” The question how a public authority can promote values – like that of the rule of law – has been discussed in different contexts, e.g. in reports of ombudsmen. The United Nations (UN) human rights enforcement system utilizes peer review as one of its instruments, partly because of the absence of an international human rights court in the foreseeable future. Much fame was gained by the “Universal Periodic Review” (UPR), established by the Human Rights Council in Resolution 5/1 of 18 June 2007. UPR is based on self-reporting by the UN member states in multi-year cycles about the protection of human rights alongside report from the UN High Commissioner for Human Rights, independent reports and information from non-governmental organizations and national human rights institutions. It encourages member states to take action to improve their record. In this peer-

¹⁵ Commission, ‘Conditions for Membership’ (*Europa.eu*, 19 November 2014) <http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm> accessed 15 March 2015.

¹⁶ Hereinafter: “Charter”.

¹⁷ Peter Lindseth, ‘Constitutionalism Beyond the State? The Administrative Character of European Governance Revisited’ (2012) 33 *Cardozo Law Review* 101 (107).

review mechanism “Council members ask questions and make recommendations to reporting states. Innovative features are: (i) universality and equal treatment among all member states (...); and (ii) interstate, interactive dialogue between the country under review and other UN member states”.¹⁸ The UPR was one of the sources of inspiration for proposals to bolster the promotion of the rule of law in the EU.

3. The Stockholm Programme

Article 67 (4) TFEU requires the development of mutual recognition in the area of freedom, security and justice. The Hague Programme, endorsed in 2004, envisaged to “to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters”.¹⁹ In the preparations for “The Stockholm Programme: An open and secure Europe serving and protecting citizens” 2010-2014,²⁰ a Dutch initiative played a significant role, which was described and evaluated by the Inspection for Development Cooperation and Policy Evaluation of the Netherlands Ministry of Foreign Affairs.²¹ The Dutch initiative aimed at strengthening trust through rule of law evaluations, based on reciprocity. It was launched at a symposium in December 2007 in Brussels with a speech by the Minister of Justice, followed by discussion and subsequently promoted through coalition, first with Belgium and Luxemburg, later on with France and Germany. Their shared interest was to create a positive context for further advancement of the principle of mutual recognition and to respond to feelings of uneasiness about the application of this principle. Negative experiences with pre-trial detention after the issuance of a European Arrest Warrant or hurdles in judicial protection for investors from other Member States illustrated the need for improvement. The lengthy pre-trial detention in some Member States after the execution of an Arrest Warrant was criticized in legal research and by parliamentarians as a shortcoming of the blanket reliance on the judicial system elsewhere in the European Union.²² The division of responsibility

¹⁸ Gisella Gori, ‘Compliance’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 893-920 (896).

¹⁹ Council, ‘Note of the General Secretariat to the Delegations on The Hague Programme: strengthening freedom, security and justice in the European Union’ (16054/04, Brussels, 13 December 2004).

²⁰ European Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’ [2010] OJ C115/1.

²¹ Mirte van den Berge & Bas Limonard, *Nederland en de onderhandelingen over het Stockholm Programma. Casestudie 3 bij IOB Evaluatie nr. 395: Strategie bij benadering. Nederlandse coalitievorming en de multi-bi benadering in het kader van de EU-besluitvorming (2008-2012)* (Inspectie Ontwikkelingssamenwerking en Beleidsbeoordeling (IOB), Ministerie van Buitenlandse Zaken 2014), available (in Dutch) at <<http://www.job-evaluatie.nl/sites/job-evaluatie.nl/files/Casestudie%203%20bij%20IOB%20395%20Stockholm%20Programma%20DEF2014.pdf>> accessed 15 March 2015.

²² R. Blekxtoon, *Checks and Balances van het Kaderbesluit Europees aanhoudingsbevel*, DD 2004, 43. See on the application by Poland also the highly critical questions of Members of Parliament and the reply by the Dutch Minister of Security and Justice in parliamentary documents Second Chamber 2011-2012, *Aanh.* 614 (9 November 2011).

for dealing with requests for asylum under the Dublin system was confronted with restrictions when a Member State failed to comply with rule of law related requirements in their procedures.²³ In the wake of the Swedish presidency, the Dutch initiative was discussed with specialists from several Member States and the European Institutions at a symposium in Maastricht in June 2009.²⁴

The Stockholm programme was proposed by the Council (in its composition of Ministers of Justice and Interior) under Swedish presidency in 2009 and decided by the European Council on December 11, 2009. The Programme included the following decision about this subject:

“The European Council invites the Commission to (...) submit one or several proposals under Article 70 TFEU concerning the evaluation of the Union policies referred to in Title V of TFEU. That proposal (or proposals) should, where appropriate, include an evaluation mechanism based on the well-established system of peer-evaluation. Evaluation should be carried out periodically, should include an efficient follow-up system, and should facilitate better understanding of national systems in order to identify best practice and obstacles to cooperation. Professionals should be able to contribute to the evaluations. The Council should, in principle, have a leading role in the evaluation process, and in particular in its follow-up. Duplication with other evaluation mechanisms should be avoided, but synergies and cooperation should be sought, in particular with the work of the Council of Europe. The Union should take an active part in and should contribute to the work of the monitoring bodies of the Council of Europe.”²⁵

Peer evaluation, as foreseen in the Stockholm Programme, can be seen as a behavioural approach to the realization of values in public law. Behavioural approaches have recently attracted more attention, e.g. through “nudging” – but may itself raise concerns as to their compatibility with the rule of law.²⁶ Nudging can be applied by public authorities, but also in confrontation with them.²⁷ Naming and shaming is the opposite technique.

Nudging and naming and shaming is basically the meaning of techniques like a “scoreboard”. That is also the essence of the “Justice Scoreboard”, introduced by the erstwhile European Commission Vice-President Viviane Reding in March 2013 and since then published annually. According to the present Commissioner for Justice, Consumers and Gender Equality Věra Jourová in her preface to the 2015 edition, the Justice Scoreboard “provides an overview of the quality, independence and efficiency of EU Member States’ justice systems. Together

²³ ECtHR 21 January 2011, *M.S.S. v Belgium and Greece*, appl. no. 30696/09 and CJEU 21 December 2011, Case C-411/10 and C-493/10, NS and ME.

²⁴ Conference on Monitoring and Evaluation Mechanisms in the Field of EU Judicial Cooperation in Criminal Matters at Maastricht University, Faculty of Law, 2 and 3 June 2009. See Cyrille Fijnaut & Jannemieke Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff 2010).

²⁵ European Council, ‘The Stockholm Programme’ (n 20).

²⁶ Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *Met kennis van gedrag beleid maken* (WRR-rapportnr. 92, Amsterdam University Press 2014) 69.

²⁷ Anne Meuwese, *Gedraggericht publiekrecht* (inaugural address, Tilburg University 2014) 7.

with individual country assessments, the EU Justice Scoreboard helps to identify possible shortcomings or improvements and to regularly reflect on progress.”²⁸ This statement appears to be overly optimistic. The scoreboard method has an unavoidably narrow scope: it has to focus on more or less external criteria, which are definitely important, but do not cover the development of a truly supportive culture of values. Statistical data are not well suited for comparative evaluation, beside the almost complete absence of data for the United Kingdom and partially from other Member States. In order to achieve this, the efforts would have to extend beyond the policy files of justice and police cooperation. Peer evaluation requires a conversation, in which scoreboard can play a useful role if combined with other sources of information.

4. From Scoreboard to political dialogue

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

“The EU should place greater emphasis on promoting a culture of respect for the rule of law in Member States. In its recent Annual Growth Survey for 2013 the Commission identifies the quality, independence and efficiency of judicial systems as a means of reducing costs for businesses and increasing the attractiveness of countries for foreign investment. Further ways to promote the rule of law within the framework of the European semester should be explored. While it is right to highlight the economic benefits of the rule of law, its significance obviously goes far beyond that.”²⁹

One month later, following up to its own initiative, the Dutch Government asked the Advisory Council on International Affairs (AIV)³⁰ to produce an advisory report on the functioning of the rule of law in the EU Member States of the EU. In January 2014, the AIV presented an extensive report on the rule of law, existing mechanisms in the EU and the Council of Europe, and the desirability of additional instruments.³¹ In the Advisory Council’s view, any new mechanism should build on the insights available through the case law of domestic and EU courts as well as the European Court of Human Rights and the reports other

²⁸ Commission, ‘The 2015 EU Justice Scoreboard’ COM (2015) 116 final, 3.

²⁹ Letter of 6 March 2013 from four Ministers of Foreign Affairs to the President of the European Commission <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>> accessed 15 March 2015.

³⁰ Hereinafter also: “Advisory Council”.

³¹ Advisory Council on International Affairs (Adviesraad voor Internationale Vraagstukken (AIV)), ‘The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation’ (No. 87, January 2014) <<http://aiv-advies.nl/download/57da03fa-3410-4aba-af05-663cb780df72.pdf>> accessed 15 March 2015.

existing bodies including the EU Fundamental Rights Agency (FRA) and the Council of Europe's Venice Commission. It recommended an active use of infringement procedures by the European Commission with a view on the full realization of the rule of law, but it also recommended a monitoring and evaluation procedure, to be established by the Member States through consultations and agreement in the Council and the European Council. A better use of this procedure was also recommended by Kim Lane Scheppele.³² The peer review procedure as proposed in the report should consist of three phases:³³

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

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

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

In her explanation, Vice-President and Justice Commissioner Viviane Reding³⁵ nicknamed the proposal "a *pre*-Article 7 procedure", consisting of three stages. Whenever the Commission arrives at the conclusion that in a Member State "a systemic threat to the rule of law" exists, it will give it a "rule of law warning". In the Communication, the Commission listed the following principles pertaining to the rule of law: "legality, which implies a transparent, accountable, democratic

³² Kim Lane Scheppele, "What can the European Commission do when Member States violate basic principles of the European Union? The Case for Systemic Infringement Actions". <http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion_en.pdf> accessed 15 April 2015.

³³ cf AIV, 'The Rule of Law' (n 29) 36-37.

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

³⁵ cf Viviane Reding, 'A new Rule of Law initiative' (Speech 14/202, Strasbourg, 11 March 2014) <http://europa.eu/rapid/press-release_SPEECH-14-202_en.htm> accessed 13 March 2015.

and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.”³⁶

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

The threshold for applying the new framework is quite high. According to the Communication, the “main purpose of the Framework is to address threats to the rule of law [...] which are of a systemic nature”.³⁹ On its webpage, the Commission gave two examples of the “challenges to the rule of law on several occasions in recent years”, although the “systemic nature” is not apparent in the first example: France’s Roma crisis in 2010 and threats to the independence of the judiciary during Romania’s 2012 political crisis.⁴⁰ In its press release, the bar is even raised to the level of a “systemic breakdown”:

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

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

³⁶ Commission, ‘A new EU Framework to strengthen the Rule of Law’ (n 32) 4.

³⁷ Viviane Reding, ‘A new Rule of Law initiative’ (n 33).

³⁸ Commission (n 32) 4.

³⁹ *ibid.*

⁴⁰ Commission, ‘EU takes action to protect rule of law’ (*Europa.eu*, 12 March 2014) <http://ec.europa.eu/news/justice/140312_en.htm> accessed 13 March 2015.

⁴¹ Commission, ‘European Commission presents a framework to safeguard the rule of law in the European Union’ (Press Release, *Europa.eu*, 11 March 2014) <http://europa.eu/rapid/press-release_IP-14-237_en.htm> accessed 13 March 2015.

⁴² cf Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014 <<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf>> accessed 13 March 2015;

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

In its response to the AIV Report, sent to Parliament on 24 April 2014,⁴³ the Dutch government endorsed most of the recommendations in the report. It recognized that the Commissions' initiatives and the peer review proposal go together very well. In different contexts, they can complement each other.⁴⁴ Peer review under the aegis of the Council appears to be more suited to a process of gradual enculturation of the rule of law.

In its meeting of December 16, 2014 the Council of the European Union (Council of General Affairs) embarked on an initiative on its own. Based on the Italian Presidency note on "Ensuring Respect for the Rule of Law"⁴⁵ it "adopted conclusions on respect for the rule of law, establishing a political dialogue among member states to promote and safeguard the rule of law within the EU."⁴⁶ The purpose of the conclusions is "a dialogue among all Member States within the Council" that would promote "a culture of respect for the rule of law within the European Union".⁴⁷ The "dialogue will take place once a year in the Council, in its General Affairs configuration, and be prepared by the COREPER (Presidency), following an inclusive approach. The Council will consider, as needed, to launch debates on thematic subject matters."⁴⁸ The issue was thus effectively taken out of the hands of the Council of Ministers of Justice and Interior, who had dealt with the subject in previous years. Any relation with the Commission's framework is not visible, which gives the impression that the Council wanted to create an alternative.

see also Dimitry Kochenov, 'Europe's Crisis of Values' (2014) 48 *Revista Catalana de Dret Públic* 160.

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

⁴⁴ *ibid*, available in Dutch at <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/04/24/gecombineerde-kabinetsreactie-aiv-advies/gecombineerde-kabinetsreactie-aiv-advies.pdf>> accessed 15 March 2015; and available in English at the webpage of the AIV <<http://aiv-advies.nl/6d4/publications/advisory-reports/the-rule-of-law-safeguard-for-european-citizens-and-foundation-for-european-cooperation#government-responses>> accessed 15 March 2015.

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

⁴⁶ Council, '3362nd Council Meeting – General Affairs' (Press Release, 16936/14, *Europa.eu*, 16 December 2014 <<http://www.consilium.europa.eu/en/workarea/downloadasset.aspx?id=40802192315>> accessed 13 March 2015.

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

⁴⁸ *ibid.* para 6.

The Ministers of Foreign Affairs emphasized furthermore

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

Even before controversial issues related to the rule of law could be raised, the Ministers appeared to accept lines of defense for illiberal democracies. Much will depend on how the Council will prepare its annual “dialogue”. Only if the debate will be prepared, possibly with the assistance of the FRA, with a substantive analysis of the rule of law situation, it may prove to be useful in truly promoting the rule of law.

6. The way ahead

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

The rule of law initiative, however, is meant to *prevent* such situations. The importance of peer review is tailored for prevention and growth in the virtue of reciprocity, i.e. as a stimulus for a growing acceptance of the value of the rule of law. Peer review procedures should definitely not be viewed as an alternative

⁴⁹ *ibid.* para 4.

⁵⁰ Dimitry Kochenov & Laurent Pech, ‘From bad to worse? On the Commission and the Council’s rule of law initiatives’ (*EU Law Analysis*, 19 January 2015) <<http://eulawanalysis.blogspot.nl/2015/01/from-bad-to-worse-on-commission-and.html>> accessed 13 March 2015.

⁵¹ Sionaidh Douglas-Scott, ‘Justice, Injustice and the Rule of Law in the EU’ in Dimitry Kochenov, Gráinne de Búrca & Andrew Williams, *Europe’s Justice Deficit?* (Hart Publishing 2015) 51, earlier published as Sionaidh Douglas-Scott, ‘Justice, Injustice and the Rule of Law in the EU’ (2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457266> accessed 12 March 2015.

⁵² Dimitry Kochenov & Andrew Williams, ‘Europe’s Justice Deficit introduced’ in Kochenov, De Búrca & Williams, *Europe’s Justice Deficit?* (n 49) 1, earlier published as Dimitry Kochenov & Andrew Williams, ‘Europe’s Justice Deficit introduced’ (2015) University of Groningen Faculty of Law Research Paper Series No. 9/2015 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534812> accessed 12 March 2015.

for political or legal actions against Member States that disregard the founding values of the European Union. When the political system has drifted away from the rule of law, it is too late to rely on dialogues between representatives of the justice systems. However, if we wish to prevent such situations and reverse negative developments, it is still worthwhile to strive for the inculturalization of rule of law principles in the attitudes and practices of professionals and officials. In the end, these professionals and officials are the ones who can make a difference, for the citizens of their own state but also for other European citizens who – as a result of the mutual recognition of judicial decisions and arrest warrants, or when they avail themselves of the economic freedoms of the Union – have to rely on the rule of law in other Member States.

Bringing a value to life is in the first place a question of development of attitudes and virtues. The rule of law depends on reciprocal respect and mutual trust, and that might very well start with the way in which we promote it.