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The Rule of Law in Crisis? – Some Observations from the Perspective of the Venice Commission

I. Introduction

The European Commission for Democracy through Law – better known as the *Venice Commission* – is the Council of Europe's advisory body on constitutional matters. It was established in May 1990 and its role is to provide legal advice on (draft) legislation dealing with issues concerning fundamental rights, (constitutional) justice, and electoral affairs. It does so at the request of the member state concerned,[1] bodies of the Council of Europe (such as the Parliamentary Assembly) and international organisations 'participating in the work' of the Commission (notably the European Union and the Organization for Security and Co-operation in Europe). It has adopted more than 500 opinions on more than 50 countries and 80 studies.

One of the products of the Venice Commission is its Rule of Law Checklist. It was adopted by the Commission in March 2016.[2] The Checklist 'codifies' the core elements covered by the notion of 'rule of law' on which consensus could be reached and contains benchmarks as regards those core elements: legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, and access to justice. The document was endorsed by the Ministers' Deputies of the Council of Europe in September 2016 and by the Parliamentary Assembly of the Council of Europe in October 2017. In its Resolution endorsing the Rule of Law Checklist,[3] the Parliamentary Assembly noted that "there are serious threats to the rule of law in Council of Europe member States".

In this contribution, the existence of such serious threats to the rule of law will be elaborated on in Section II. There are various methods in order to conduct such an exercise. This contribution is limited to the overarching trend to use legislative amendments to repress those who disagree with government policies, those who could potentially disagree with the government line, or those who are otherwise considered to be an 'opponent' to the regime. When examining those threats, a distinction will be made between those measures which target the judiciary (including constitu-

1 The Venice Commission is a so-called 'enlarged agreement' which means that non-member states of the Council of Europe may also take part in the work of the Commission on an equal footing with the 47 member states of the Council of Europe. In 2018, a total of 61 member states participated in the work of the Commission, including 13 non-European members and Kosovo (which should be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo) with a total population of more than 3 billion people.

2 CDL-AD(2016)007.

3 Resolution 2187(2017), based on the report prepared by *Philippe Mahoux* (Doc. 14387, 17 July 2017).

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tional justice), the press, and civil society. Reference will be made to opinions adopted by the Venice Commission over the last five years (in a non-exhaustive manner). Because of this angle (opinions, statements and studies of the Venice Commission), this article does not provide an exhaustive picture of the 'Rule of Law' landscape, nor is that the intention of this article. Some thoughts as to the underlying explanations for such a 'Rule of Law crisis' will be discussed in Section III. In Section IV some more personal comments will be made how a body such as the Venice Commission can respond to the before-mentioned threats to the Rule of Law.

II. The Rule of Law in Crisis

When examining the various opinions the Venice Commission adopted over the last few years, one can discern a tendency in various European countries which is best described as a 'winner takes it all' mentality. There are political parties that have legitimately won elections in their countries but which are now introducing measures that erode 'the critical voice' or the institutional checks and balances in a democracy based on the Rule of Law: attacks on the judiciary including constitutional justice (and for that matter the European Court of Human Rights), curtailing civil society (the so-called shrinking civic space), and limiting the freedom of the press. We often talk about the exchange of 'best practices' but unfortunately we can also see that 'worst practices' are copied. These worst practices have common features which will be analysed in this section. Some measures are blunt instruments (such as deprivation of liberty of journalists, dismissals of judges, criminalisation of certain NGO activities or liquidation of media outlets), but most measures are introduced by means of a seemingly 'technical' legislative amendment. In this section, some of the measures affecting the judiciary, civil society, and the press will be looked at.[4]

4 This article does not touch upon a fourth category of institutional actors that may also be affected by restrictive governmental policies, i.e. (higher) education facilities. These institutions may also belong to those actors within a society that take a critical stance towards the viewpoints expressed in main stream politics. In addition, universities may play a role in providing information to society concerning assertions made by the authorities. The Venice Commission has recently encountered two situations in which measures taken by the authorities affected education institutions. The first one concerns the Turkish emergency decrees on the basis of which the liquidation of several private education institutions was ordered because of their alleged connections to FETÖ/PDY. This issue was addressed in an opinion adopted in December 2016 (CDL-AD(2016)037, paras. 178 et seq). The second situation concerns the Hungarian Higher Education Law as amended in April 2017 which – although worded in a neutral way – affected specifically the Central European University. The law was severely criticised in many quarters (including the European Parliament and the Parliamentary Assembly of the Council of Europe). The European Commission launched an infringement procedure against Hungary in April 2017. The Venice Commission was requested by the Parliamentary Assembly to issue an opinion, which was adopted in October 2017 (CDL-AD(2017)022).

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1. The independent judge

An independent judiciary is "absolutely necessary to ensure that the power of the state is exercised in accordance with the rule of law and the provisions of the Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals".[5] Over the past few years several measures have been taken in various countries that affect the independence of the judiciary. One of the most obvious examples has been the mass dismissal of judges in Turkey following the failed coup attempt on 15 July 2016. Both the coup attempt as well as the reaction of the Turkish authorities to the failed coup were widely criticised by the international community.[6] Only a few days following the failed coup attempt, on 18 July 2016, the President of the Venice Commission issued a statement strongly condemning the failed *coup d'état* while emphasizing that mass dismissals and arrests of judges are not an acceptable means to restore democracy.[7]

Dismissal of judges is one of the bluntest methods in order to create an opportunity for the government to have new judicial candidates appointed. There are more subtle methods being used as well. A prominent example of the latter category is the premature dismissal of the President of the Hungarian Supreme Court, *András Baka*. *Baka* publicly criticized those reforms, initiated by the second *Orbán*-Government, that affected the Hungarian judiciary. In 2011 the Hungarian Parliament adopted a new Fundamental Law of Hungary, which inter alia proclaimed the Kúria as the country's supreme judicial organ. The Transitional Provisions to the Fundamental Law provided that the mandate of the President of the Supreme Court would terminate upon the entry into force of the Fundamental Law. Moreover, the new Organization and Administration of the Courts Act introduced a new criterion for the election of the new President of the Kúria, i.e. at least five years of experience as a judge in Hungary. The combination of these provisions led to the premature termination of *Baka's* mandate and his ineligibility for a new term. The case led to a judgment by the European Court of Human Rights.[8] The judgment primarily deals with the absence of any judicial remedy against the premature dismissal of *Baka* (and the ensuing finding of a violation of Article 6 of the Convention). However, the Court did state that "the protection of the applicant's entitlement to serve his full term as President of the Supreme Court

5 The Canadian Supreme Court [2004 SCC 42].

6 See for example the statements made by the Council of Europe's Human Rights Commissioner (https://www.coe.int/en/web/commissioner/-/situation-in-turkey) and by the European Network of Councils for the Judiciary, ENCJ (https://www.encj.eu/node/428). See also the 2016 EU Turkey Report by the European Commission at page 64 (SWD(2016) 366 final).

7 https://www.venice.coe.int/webforms/events/default.aspx?id=2266. At that time, already more than 2,700 judges had been suspended and many had been arrested and detained, including two judges of the Constitutional Court and five members of the High Council of Judges and Prosecutors. The numbers, though, might be significantly higher. Justice Minister *Bekir Bozdag* said in May 2017 that Turkey had removed more than 4,000 judges and prosecutors on suspicion of links to the failed coup (https://www.reuters.com/article/us-turkey-security-idUSKBN18M0Q9). The dismissals equate to more than one in four of the Turkey's judges and state prosecutors (https://www.ft.com/content/0af6ebc0-421d-11e7-82b6-896b95f30f58).

8 ECtHR [GC] 23 June 2016, *Baka v. Hungary* (appl. no. 20261/12).

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was supported by constitutional principles regarding the independence of the judiciary and the irremovability of judges" (paragraph 108).

The *Baka* case is just one example of authorities putting forward technical legislative amendments that come into conflict with maintaining judicial independence. In the various opinions of the Venice Commission other methods can be discerned as well.

One method is to lower the retirement age for judges. At first sight this measure may appear benign, but the intended effects of such a measure are often to create an opportunity for the ruling political party to fill the vacancies.

In April 2018, the age of mandatory retirement of Supreme Court judges in Poland was lowered from 70 to 65. An estimated 40 per cent of the court's 86 judges will be affected, which means that 40% of all Supreme Court judges can be newly appointed by the ruling *PiS* party. The Venice Commission called (in vein) on the Polish authorities to abandon the idea.[9] While it is obviously for a national legislator to define the retirement age of judges, the Commission noted that the general European trend is to introduce a higher age of retirement. More importantly, the new retirement age would be applied to the currently sitting judges.[10] The Venice Commission considered that such a measure would undermine the security of tenure of sitting judges, as well as the independence of the judicial institution as such. In addition, the Venice Commission was concerned about the fact that the President of the Republic will have a discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age, as this will give the President excessive influence over those judges who are approaching the retirement age.

The Polish measure is very similar to a reform carried through in Hungary a few years earlier. The second *Orbán*-Government initiated comprehensive constitutional and legislative reforms that, *inter alia*, lowered the mandatory retirement age for judges from 70 to 62. The sudden change of the upper-age limit meant that nearly ten per cent of the Hungarian judges would have to retire within a short period of time (between 225 and 270 out of 2,900 judges in Hungary). In its Opinion, the Venice Commission invited the Hungarian authorities "to provide for a less intrusive and not so hasty" alternative measure. It held that: "A whole generation of judges, who were doing their jobs without obvious shortcomings and who were entitled – and expected – to continue to work as judges, have to retire. The Commission does not see a material justification for the forced retirement of judges (including many holders of senior court positions).The lack of convincing justifications may be one of the reasons for which questions related to the motives behind the new regulation were raised in public".[11] In the end, the Hungarian Constitutional Court declared the sudden reduction of the upper age-limit for judges unconstitutional in a judgment of 16 July 2012.[12]

9 CDL-AD(2017)031, paras. 44-52 and 130; the Opinion was adopted in December 2017.

10 Cf. Article 8 of the Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999: "any change to the judicial obligatory retirement age must not have retroactive effect".

11 CDL-AD(2012)001, paras. 102-110, adopted in March 2012.

12 Furthermore, on 6 November 2012 the Court of Justice of the European Union ruled that the sudden lowering of the retirement age for judges in Hungary violated European equal treatment rules (C-286/12, European Commission versus Hungary). In its judgment, the

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The most recent example is the new early retirement scheme for judges in Romania, which allows retirement at the age of 60, after 25 years seniority, and even between 20 and 25 years seniority, with a slightly reduced pension. In its preliminary opinion,[13] the Venice Commission strongly recommended the Romanian authorities to conduct the necessary impact studies as the new scheme could "seriously undermine the efficiency and quality of justice". "In the current situation of conflict between some holders of political office and magistrates and increased pressure on the magistrates including through some of the amendments discussed, there is a risk that many qualified judges will choose early retirement." It was recommended to abandon the proposed early retirement scheme unless it could be ascertained that it will have no adverse impact on the functioning of the system.

Another method is to introduce a process of vetting ('qualification assessment') of all sitting judges and prosecutors by specially created bodies. Ordinarily, such vetting procedures are called for according to the authorities because of major problems both with corruption and incompetence among the judiciary. While such a drastic measure may be seen as appropriate in some extraordinary cases,[14] the Venice Commission has stressed that "such radical solution would be ill-advised in normal conditions, since it creates enormous tensions within the judiciary, destabilises its work, augments public distrust in the judiciary, diverts the judges' attention from their normal tasks, and, as every extraordinary measure, creates a risk of the capture of the judiciary by the political force which controls the process".[15] The Venice Commission has indicated it would only accept vetting procedures if such a measure enjoys wide political and public support within the country, if it is a strictly temporary measure (the Commission refers to a fixed time-limit of about three-five years at most), if the magnitude of the problem of corruption within the judiciary calls for such a radical measure, and if individuals who may be affected by the vetting procedures enjoy basic fair trial guarantees and have the right to appeal to an independent body.[16]

Yet another method is to increase the possibility to impose disciplinary sanctions on members of the judiciary on the basis of rather vague grounds for imposing a di-

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Luxembourg Court stated that early retirement could also "undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary".

13 CDL-PI(2018)007, para. 150-154 and 163, sent to the Romanian authorities in July 2018.

14 This was the case in the Albanian context, where the Venice Commission considered the vetting process "necessary for Albania to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system" (CDL-AD(2016)009, para. 52). Nearly every interlocutor met by the delegation of the Venice Commission in Tirana shared the assumption "that the level of corruption in the Albanian judiciary is extremely high and the situation requires urgent and radical measures" (CDL-AD(2015)045, para. 98).

15 CDL-AD(2015)045, para. 98. See also the Opinion of the Venice Commission on Ukraine (CDL-AD(2015)007, para. 72): such a measure "should be regarded as wholly exceptional and be made subject to extremely stringent safeguards to protect those judges who are fit to occupy their positions.".

16 *Ibidem*, para. 100.

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sciplinary sanction.[17] Although the Venice Commission has acknowledged that national law may have recourse to some comprehensive formulas when defining unethical behaviour, it has been critical in various instances when domestic legislators introduce dangerously broad grounds for disciplining judges. For example, in an Opinion on the Bulgarian Judicial System Act,[18] adopted in October 2017, the Venice Commission recommended to the Bulgarian authorities to describe some of the substantive grounds for disciplinary liability more precisely. The Bulgarian Act referred to "any act or omission, including a breach of the Code of Ethical Behaviour of Bulgarian Magistrates, which *damages the prestige of the Judiciary*" and to "any failure to discharge other official duties". As for the latter ground the Commission commented that the use of such a criterion comes "dangerously close to making a substantive assessment of the judicial decision-making process as such".[19] Similar comments were made in respect of the Former Yugoslav Republic of Macedonia[20] and the Kyrgyz Republic.[21] Concepts such as the "*dignity of a judge*" are too subjective to form the basis of a disciplinary liability. Similarly, a notion such as "*undermining the reputation* of the court and judicial function" was considered to be excessively vague.

The above-mentioned measures may create opportunities for a government to appoint (a significant number of) new judicial candidates. This is often accompanied by attempts to politicise judicial councils,[22] overseeing appointment, promotion, transfer, disciplining and dismissal of judges and prosecutors. "Getting control over [such a] body thus means getting control over judges and public prosecutors."[23]

A first example is provided by Turkey, where the ruling Justice and Development Party, *AKP*, initiated constitutional amendments aimed at introducing a "Turkish-style" presidential regime. These amendments were adopted by the Grand National Assembly of Turkey in January 2017 and subsequently submitted to a national referendum in April

17 The position of the Venice Commission has been summarised in a recent preliminary opinion on Romania (CDL-PI(2018)007, para. 112). In general, judges should not become liable for recourse action when they are exercising their judicial function according to professional standards defined by law (functional immunity). Judges' liability is admissible as long as there is intent or gross negligence on the part of the judge. A negative judgment by the European Court of Human Rights (or a friendly settlement of a case before the ECtHR or a unilateral declaration acknowledging a violation of the ECHR) should not be used as the sole basis for judges' liability, which should be based on a national court's finding of either intent or gross negligence on the part of the judge. A finding of a violation of the ECHR by the ECtHR does not necessarily mean that judges at the national level can be criticised for their interpretation and application of the law, since violations may stem from systemic shortcomings in the member States, e.g. length of proceedings cases, inadequate / unclear legislative provisions, in which personal liability cannot be raised.

18 CDL-AD(2017)018, paras. 104-110.

19 *Ibidem*, para. 109.

20 CDL-AD(2015)053, para. 36.

21 CDL-AD(2014)018, para. 22.

22 See also Resolution 2188(2017) 'New threats to the rule of law in Council of Europe member States: selected examples' of the Parliamentary Assembly of the Council of Europe, paragraph 6; based on a report prepared by *Bernd Fabritius* (doc. 14405).

23 The Venice Commission in its opinion on the Turkish amendments to the Constitution which were the subject of the national referendum on 16 April 2017 (CDL-AD(2017)005, para. 119).

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2017. The referendum was therefore held during the state of emergency in effect in Turkey at the time. A fact criticised by the Venice Commission in its Opinion 875/2017 (adopted in March 2017) out of fear that the "democratic process will be encumbered when there are restrictions on the 'normal' rule of law processes". The Commission held that there was "a risk that fundamental electoral principles will be undermined during a state of emergency, in particular the principle of equality of opportunity".[24] The outcome of the referendum held in April 2017 is well-known: 51.4% of the votes were in favour of the constitutional reform. The constitutional amendments inter alia introduced provisions which changed the composition of the Council of Judges and Prosecutors. Under the new regime, the Council of Judges and Prosecutors (CJP) will consist of 13 regular members. The President will have the right to appoint four of these members. Two other members of the CJP, the minister of justice and his/her undersecretary, would also now be appointed by the President. The President will therefore appoint almost half of the members of the CJP. In this respect, it is important to stress that the President will no longer be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining seven members would be appointed by the Grand National Assembly. However, it is likely that the political party of the President will also be a major force in the Parliament as a result of the fact that simultaneous elections are held. The result will be that one political party will be able to appoint the majority of the members in the Council. No member of the Council would be elected by peer judges anymore. A fact that is contrary to European standards: at least a substantive part of the members of a High Judicial Council should be judges appointed by their peers.[25]

A second example can be found in Poland, where the government announced plans for a large-scale judicial reform, in January 2017. In this reform package, one Act targets the National Council of the Judiciary (KRS). Under the new Act, the 15 judicial members will be elected by the Sejm (the lower chamber of Parliament) and not by their peers. Six other members of the KRS are parliamentarians, and four others are *ex officio* members or appointed by the President of the Republic. The Venice Commission therefore concluded that "the proposed reform will lead to a [KRS] dominated by political nominees".[26] A conclusion which was strengthened by the fact that the Act called for the immediate replacement of the judicial members of the KRS in office. The Venice Commission urged the Polish authorities to abandon this propo-

24 See paragraph 34 of CDL-AD(2017)005. See also the Opinion on the effects of the state of emergency in Turkey on the freedom of the media (CDL-AD(2017)007, which was also adopted in March 2017. In paragraph 91 the Commission states: "The ability to openly discuss political matters in the media becomes even more crucial when the state of emergency has been prolonged, and where a major constitutional reform is launched.".

25 See paragraphs 116-118 of CDL-AD(2017)005. As a result, the European Network of Councils for the Judiciary (ENCJ) decided on 8 December 2016 to suspend, with no Council voting against, the observer status of the Turkish CJP (https://www.encj.eu/node/449). A similar criticism was made in the recent Opinion on the Bulgarian Judicial System Act (CDL-AD(2017)018, paras. 13-15 and 112. See on the Bulgarian Judicial Council also R. Vassileva, "The Polish Judicial Council v. The Bulgarian Judicial Council: Can You Spot the Difference", VerfBlog, 2018/9/22, https://verfassungsblog.de/the-polish-judicial-council-v-the-bulgarian-judicial-council-can-you-spot-the-difference/.

26 CDL-AD(2017)031, para. 24.

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sal,[27] but to no avail. The measure – and its enforcement – was severely criticised by the international community[28] and led to the suspension of the membership of the Polish National Judicial Council from the European Network of Councils for the Judiciary (ENCJ).[29]

More control over judicial appointments is not always achieved by politicising a judicial council. There are other means to achieve the same goal. The Polish Act on Ordinary Courts, which was part of the same reform package described above, introduced the possibility for the Minister of Justice to appoint and dismiss court presidents, to exercise disciplinary powers vis-à-vis court presidents, and to extend the mandate of a judge beyond the retirement age at his/her discretion.[30]

In addition to the measures mentioned above, there are of course various other ways to weaken the power of the judiciary to exercise its controlling task. With regard to the new Polish Act on the Constitutional Tribunal, for example, the Venice Commission noted that the Act "would considerably delay and obstruct the work of the Tribunal and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning".[31] The legislative amendments concern primarily 'technical' issues: the broad possibility to refer a case to the full bench for examination (which, if applied frequently, is quite burdensome to the functioning of the Tribunal), the obligation to schedule cases in the order in which cases are received by the Tribunal (which prevents the Tribunal to prioritise its work and decide urgent matters more quickly), and the possibility to postpone a case for up to six months upon request by four judges (which could easily be abused to delay delicate cases).

In sum, over the last few years several states haven taken legislative measures which affect the independence of the judiciary, as well as the judiciary's effectiveness to exercise its controlling task. The first category of measures has the effect of ousting sitting judges from their post: dismissals by emergency degree (Turkey), the need to re-apply for a post (the *Baka* case, or via vetting procedures such as the ones in Albania and Ukraine), amending the retirement regime for judges (including lowering the mandatory retirement age; Poland, Hungary, Romania), and amending the disciplinary regime for judges (including the introduction of some vague grounds for disciplinary liability; Bulgaria, Macedonia, Kyrgyz Republic). These legislative measures are often accompanied by a hostile environment towards the judiciary in the political arena (Poland, Romania). The second category of measures amend the selection and appointment of new judicial candidates (Turkey, Poland). The third category of measu-

27 *Ibidem*, para. 31.

28 See, *inter alia*, the Consultative Council of European Judges of the Council of Europe (CCJE) that said that the measure represented a "major step back as regards judicial independence in Poland" (Opinion of the CCJE Bureau of 12 October 2017, para. 20). Also: a Preliminary Opinion by the OSCE/ODIHR of 22 March 2017 "On draft amendments to the Act on the National Council of the Judiciary and certain other acts of Poland"; and a Final Opinion of the same name of 5 May 2017. In addition, there are many more documents that relate to the judicial reform package as a whole.

29 A decision taken by the ENCJ General Assembly on 17th September 2018 (https://www.encj.eu/node/495).

30 CDL-AD(2017)031, paras. 96-126 and 130.

31 CDL-AD(2016)026, para. 123.

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res weaken the power of the judiciary to exercise its controlling task (Poland). The pressure on the judiciary applies equally to constitutional justice. In March 2016, the Venice Commission issued a statement expressing serious concern on undue interference in the work of constitutional courts in its member States.[32] It referred to the Polish constitutional crisis described above, but also to delays in appointing judges to the Constitutional Courts of Slovakia and Croatia, and to statements made by the President of Turkey threatening to abolish the Constitutional Court of Turkey.

2. The press

"The purpose of journalism is not to please those who hold power or to serve as the mouthpiece of governments. Freedom of the media plays an enormously important role in the protection of all other human rights. There are many examples where the misuse of power, corruption, discrimination, and even torture have come to light because of the work of investigative journalists. Making the facts known to the public is often the first, essential step in redressing human rights violations and holding those in power accountable".[33] For this reason the press has often been referred to in the Strasbourg case-law as the 'public watchdog'. As a potentially powerful critic of government policies it has also been the target of restrictive policies in some countries. This trend will be demonstrated on the basis of two recent examples in the work of the Venice Commission.[34]

The first example concerns the impact of emergency decree laws in Turkey on the media. Following the failed coup d'état of 15 July 2016, the Turkish Government declared the state of emergency and started legislating through emergency decree laws. The primary aim of the emergency decree laws was to dismantle the "*Gülenist* network" (referred to by the authorities as "FETÖ/PDY"). According to the authorities, "FETÖ/PDY" is an exceptional threat because of its enormous financial reserves and extremely well organised structure, and because it has an impressive capacity to resist application of ordinary sanctions. The Government asserted that certain mass media were used to pass "encrypted messages" to the members of the illegal networks. The Venice Commission was asked by the Parliamentary Assembly to look into the impact of those emergency decree laws on the media. In its opinion,[35] adopted in March 2017, the Commission concentrated on three main issues: (i) mass liquidation of media outlets, (ii) confiscation of property, and (iii) criminal prosecutions of journalists.

The liquidation of media outlets had been ordered by emergency decree laws because the media outlets were considered to "belong to, connect to, or [have] contact with" the "FETÖ/PDY". Neither the emergency decree laws, nor any other official

32 https://www.coe.int/en/web/tbilisi/-/declaration-by-the-venice-commission-on-undue-interference-in-the-work-of-constitutional-courts-in-its-member-states.

33 *Thomas Hammarberg*, Media freedom and human rights in Europe, in: Josep Casadevall a.o. (eds.), Freedom of Expression – Essays in Honour of Nicolas Bratza, Wolf Legal Publishers, 2012.

34 See also the Compilation of Venice Commission Opinions and Reports concerning Freedom of Expression and Media (CDL-PI(2016)011, issued in September 2016).

35 CDL-AD(2017)007.

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document had developed the terms of "connections" / "affiliations" to terrorist organisations in more detail. The criticism voiced by the Venice Commission was that such a broad definition was clearly not specific enough for a drastic measure such as the liquidation of the media outlet. In practice, some 190 media outlets (including publishing houses, newspapers and magazines, news agencies, TV stations and radios) were affected, leaving over 2,500 journalists and media workers without jobs. The Venice Commission considered that mass liquidation of media outlets by emergency decree laws (and hence without individualised reasoning) is incompatible with Article 10 of the ECHR, even taking into account the very difficult situation in which the Turkish authorities found themselves after the failed coup.[36]

The closing down of media outlets was accompanied by the confiscation of all their assets, which led to comparable criticism. The Venice Commission concluded that the confiscation had been ordered on the basis of very vague criteria and applied without examination of the individual circumstances of each entity concerned. Other less intrusive measures could be envisaged, such as to temporarily freeze large amounts on their bank accounts or prevent important transactions, to appoint temporary administrators and to allow only such economic activity which may help the organisation in question to survive until its case is examined by a court following normal procedures.[37]

And thirdly, the use of the criminal justice system against journalists: already in March 2016 the Venice Commission adopted an opinion on the Turkish Penal Code.[38] This opinion examined several provisions of the Turkish Penal Code, such as 'verbal act offences' (i.e. insulting the President, or degrading the Turkish nation, et cetera), which are most commonly applied to the journalists. The Commission concluded that the provisions had to be "applied in a radically different manner to bring their application fully in line with Article 10 ECHR". Some notions were considered to be "dangerously vague". The Commission noted that the number of criminal prosecutions of journalists, bloggers and political activists had intensified even further since the declaration of the state of emergency (more than 150 journalists had been arrested and detained).

The second example concerns the Hungarian media legislation. In 2010 the Hungarian Parliament passed two laws regulating the media sphere: the Media Act and the Press Act. Those laws are often referred to as the "media package". This media package was the subject of an opinion by the Venice Commission, which was adopted in June 2015.[39] The Venice Commission described the package as being "extremely lengthy (170 pages *in toto*)", creating "a labyrinth of detailed regulation covering the entire area of media services and the mass media".[40] The media package had the potential effect of curtailing the media sector, inter alia by introducing rules on the disclosure of journalistic sources, by legislative provisions affecting advertising revenues of the mass media,[41] and by

36 *Ibidem*, para. 57.
37 *Ibidem*, paras. 58-62.
38 CDL-AD(2016)002.
39 CDL-AD(2015)015.
40 *Ibidem*, para. 16.
41 Cf. the situation in Montenegro which has been described as follows: "The disbursement of public funding is nontransparent and largely unregulated, and the advertising market is lopsided, giving a significant edge to progovernment outlets" (https://freedomhouse.org/blog/montenegro-eu-accession-front-runner-moves-backward-media-freedom).

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introducing measures affecting the political independence of the Media Council being the regulatory agency. These measures were accompanied by content-based restrictions on the freedom of expression and the possibility to impose heavy sanctions. The overall criticism of the Venice Commission was that the provisions were not sufficiently precise.[42] It recommended removing certain provisions as they were "dangerously broad", such as provisions prohibiting speech aimed at "exclusion of peoples" or offending "religious or political beliefs", establish warning obligation for "disturbing" images and sounds, et cetera. In addition, the Commission recommended to amend certain provisions defining illegal media content (namely the clauses which prohibit speech affecting "public morality" and "personality", speech prejudicial to human dignity, speech violating the 'constitutional order'). These vague provisions were accompanied by the possibility to apply heavy sanctions. The Commission noted that there "is no doubt that the maximum amounts of fines provided by the Media Act are extremely high, even taking into account the size and the economic condition of the potential offender. And the "chilling effect" is greater in a situation where all members of the Media Council, irrespective of their qualifications or otherwise, have been appointed to this body at a time when the ruling coalition had a super-majority in the Parliament and are therefore perceived, rightly or wrongly, as too close for comfort with the current government."[43] Some of the powers of the Media Council were considered by the Commission as 'censorship' powers (the power to interrupt activities of a media outlet for a certain period of time, the power to withdraw from the media outlet its broadcasting licence or registration and the power to block access of users to illegal media content as a preliminary measure).[44] The Commission emphasised that the imposition of heavy sanctions should be considered a measure of last resort in case "all other reasonable attempts to steer the media outlet on the right path have failed, and where its publications repeatedly and seriously (both conditions should be satisfied) endangered public peace and order (for example, where the media outlet has repeatedly made calls for unlawful violence in respect of minority groups or advocated a violent overthrow of a democratic public order)."[45]

42 *Ibidem*, paras. 19-32.

43 *Ibidem*, para. 38.

44 See also CDL-AD(2015)004 in which the Venice Commission gave its opinion on the Law on Media of Montenegro, adopted in March 2015. The proposed amendments to the Law on Media introduced, inter alia, a legal basis for temporarily banning of a publication or the functioning of a media outlet under certain conditions. In this specific case, it should be noted that the rationale behind the amendments was a lasting campaign of denigration and harassment of certain public figures and ethnic groups in Montenegro led by a tabloid newspaper. The abusive character of this campaign was stressed by many observers within the country and abroad, including by the Parliamentary Assembly of the Council of Europe (http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21499&lang=en). Nonetheless, the Commission was critical of the proposed amendments and recommended to introduce the possibility to impose such a ban only in "extreme cases where it is necessary to prevent incitement to violence, the violent overthrown of the constitutional order and similar very serious threats to the public order and only as a measure of last resort".

45 *Ibidem*, para. 41.

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In sum, various countries have taken legislative measures which have the potential of silencing the critical voice of the free press.[46] These measures target the individual journalist (the use of the criminal justice system or the imposition of heavy sanctions by a regulatory body, sometimes on the basis of vaguely formulated provisions) and/or the media outlet (liquidation of a media outlet accompanied by the confiscation of property or the use of 'censorship powers' by a regulatory body). The effect of these legislative amendments is in practice augmented by non-legislative circumstances, such as physical attacks and harassment towards journalists but also the capability to generate financial income (disbursement of public funding and the power to attract advertising revenues).

3. Civil society

Civil society is essential in developing democracies and protecting human rights, in particular through promoting public awareness (a role which is even more essential in times of limited plurality in the media landscape), participating in public life, and securing transparency and accountability of public authorities.[47] Civil society organisations (CSO's), especially those active in human rights related policy areas, frequently provide a critical perspective vis-à-vis governmental policies.[48] As a result, they have been the target of restrictive proposals in some countries.[49]

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46 See *inter alia* the 2018 World Press Freedom Index, issued by *Reporters Without Borders* (RSF; https://rsf.org/en/ranking/2018). As a region, Europe still ranks the highest on RSF's index, but its rating also dropped more than that of any other region in 2018. Four of the top five countries where press freedom deteriorated the most are in Europe: Malta, Slovakia, the Czech Republic and Serbia. According to RSF, the situation for journalists in Poland and Hungary is also particularly concerning while Turkey is now among the 25 most repressive countries in the world.

47 See Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organisations in Europe, 10 October 2007. See also, among many other documents: the 2014 Joint Guidelines on Freedom of Association by OSCE/ODIHR and the Venice Commission (CDL-AD(2014)046), the 2016 Resolution by the United Nations Human Rights Council on 'Civil society space' (A/HRC/32/L. 29), the 2017 Report 'Challenges facing civil society organisations working on human rights in the EU' by the EU Fundamental Rights Agency (http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu), and the 2018 Draft Recommendation of the Committee of Ministers on the need to strengthen the protection and promotion of the civil society space in Europe (doc. CDDH-INST(2018)04Rev 2; prepared by the Steering Committee for Human Rights).

48 See a Joint Statement on the promotion and protection of civic space by ARTICLE 19, CIVICUS, International Center for Not-for-Profit Law (ICNL), World Movement for Democracy and European Center for Not-for-Profit Law (ECNL) in March 2014: "States are seeking to exert control over these spaces, to silence critical and challenging voices" (https://www.article19.org/resources/joint-statement-promotion-protection-civic-space/).

49 See the 2018 State of Civil Society Report published by CIVICUS (https://monitor.civicus.org/SOCS2018/). See also Antoine Buyse, "Squeezing civic space: restrictions on civil society organisations and the linkages with human rights", in: *The International Journal of Human Rights* 2018, DOI: http://www.tandfonline.com/action/showCitFormats?doi=10.1080/13642987.2018.1492916.

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The Venice Commission has been called to examine legislative amendments regarding CSO's on various occasions. One recurring feature in these opinions is the proposal to introduce (additional) reporting and disclosure obligations on CSO's. By way of example, the most recent opinion on Romania will be discussed in greater detail but similar issues were addressed in an opinion concerning Hungary.[50]

In 2017 two members of the Romanian Parliament initiated a legislative proposal aimed at reducing suspicions regarding the legality of the financing of CSO's operating in Romania and at increasing public trust in the non-governmental associated life. The draft law introduced a new article, which contained additional more frequent and detailed reporting obligations for CSO's. CSO's would be obliged to publish financial statements every six months, including "the individual or activity (whichever is the case) generating each income, as well as the value of each income […] separately". The failure to publish such statements would lead to the suspension of the association, foundation or federation's functioning for a period of 30 days. If the CSO did not publish the financial statements within those 30 days, the CSO would have to cease its activities immediately. The Parliamentary Assembly of the Council of Europe requested an opinion, which was adopted by the Venice Commission in March 2018.[51] In its opinion, the Commission reiterated that the resources received by associations may legitimately be subjected to reporting and transparency requirements. However, such requirements shall not be unnecessarily burdensome, and shall be proportionate to the size of the association and the scope of its activities, taking into consideration the value of its assets and income. It further noted that the aim of 'enhancing transparency' of the NGO sector would by itself not appear to be a legitimate aim for imposing such reporting obligations. The Commission also entertained doubts as to the necessity of the proposed reporting obligations, partly as a result of the frequency of the reporting which it considered "unduly onerous and costly, all the more so as this reporting obligation will in the practice overlap with other existing reporting obligations such as the extensive checks undertaken by the Anti-Money Laundering Office".[52] The Commission also noted that there would not appear to be an apparent 'pressing need' for the public to obtain detailed information with respect to private funding sources of CSO's. The Venice Commission considered that in order to ensure transparency, it could be legitimate to publicly disclose the identity of the main sponsors. Disclosing the identity of *all* sponsors, including minor ones, is, however, excessive and also unnecessary, in particular with regard to the requirements of the right to privacy as enshrined under Article 8 ECHR. In addition, such a measure could seriously affect the willingness of individuals to donate funds.[53] The Commission therefore recommended repealing the new reporting and disclosure requirements.[54] As for the proportionality of the sanctions the Commission noted that suspending the work of a CSO for up to thirty days is already a quite serious interference with this entity's free-

50 CDL-AD(2017)015 on the Hungarian draft law on the transparency of organisations receiving support from abroad; an opinion adopted in June 2017. One month later, on 13 July 2017, the European Commission launched an infringement procedure against Hungary.
51 CDL-AD(2018)004; it is a joint opinion with the OSCE/ODIHR.
52 *Ibidem*, para. 70.
53 *Ibidem*, para. 69 and CDL-AD(2017)015, para. 53 (Hungary).
54 *Ibidem*, para. 73.

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dom of association, and should only be contemplated in cases involving potential threats to democracy, and following a court order. "The mere failure to submit a financial report would not appear to constitute such a grave breach of law, and should under no condition lead to the automatic suspension of work of an association, foundation or federation."[55] As for the dissolution of a CSO, the Commission underlined that the imposition of such a drastic measure would only be justified in case of an imminent threat of violence or other grave violation of the law.[56]

The threat of dissolution of a CSO was also addressed in another opinion concerning the so-called Hungarian 'Stop Soros' legislative package.[57] This package introduced a new criminal offence of 'facilitating illegal immigration'. It criminalises anyone 'who engages in organising activities in order to facilitate the initiation of an asylum request in respect of a person, who in their native country or in the country of their habitual residence or in another country through which they have arrived, is not subject to persecution or whose allegations of direct persecution are not well-founded'. Equally, the draft provision criminalises organisational activities in order to assist a person entering Hungary illegally or residing in Hungary illegally, in obtaining a title of residence. In the explanatory memorandum it is mentioned that "practical cases prove that those illegally entering or staying in Hungary are aided in their entry into the country not only by international, but also by Hungarian organisations".[58] The Venice Commission criticised the scope of the criminal provision,[59] but equally held that it was "particularly problematic that one consequence of a criminal conviction […] could be that the NGO as such could be discontinued […]. This is especially problematic since the scope of application of [the] draft [provision] is at the moment not limited to situations in which persons intentionally facilitate the circumvention of migration laws".[60]

Prohibiting a CSO from operating was also at the core of an opinion concerning the Russian 'Foreign Agent Law'.[61] In May 2015, the State Duma of the Russian Federation adopted a law on the basis of which certain CSO's are considered 'undesirable' and put on a list. The grounds on which a CSO may be included in the list are

55 *Ibidem*, para. 75.

56 *Ibidem*, para. 76 and CDL-AD(2017)015, para. 57-62 (Hungary).

57 CDL-AD(2018)013. The original 'Stop Soros' legislative package included a bill on licencing of organisations supporting migration, a bill on an immigration financing duty and a bill on an immigration restraint order. This original package raised some questions that have already been discussed in this contribution concerning financial reporting obligations. However, the original package was not maintained. The new package introduced a new criminal offence.

58 *Ibidem*, para. 13.

59 *Ibidem*, para. 103-104: "Under the draft provision, as it currently stands, persons and/or organisations that carry out informational activities, support individual cases, provide aid on the border of Hungary may be under risk of prosecution even if they acted in good faith in line with the international law for supporting the asylum seekers or other forms of legal migrants, for instance victims of trafficking. The proposed amendment therefore criminalises activities that are fully legitimate including activities which support the State in the fulfilment of its obligations under international law. […] [O]nly intentionally encouraging migrants to circumventing the law could give rise to criminal prosecution. Assistance by NGOs of asylum seekers in applying for asylum and lodging appeals cannot be regarded as such circumvention".

60 *Ibidem*, para. 88.

61 CDL-AD(2016)020, adopted in June 2016. The notion 'foreign agent' is in Russian synonymous for foreign spies.

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formulated in particularly broad terms.[62] The automatic legal consequences of being on the list entail *inter alia* a prohibition to organise and conduct public events and a prohibition to distribute information materials. In its opinion the Commission concluded that the automatic legal consequences imposed upon NGOs whose activities are declared undesirable "may only be acceptable in extreme cases of NGOs constituting serious threat to the security of the state or to fundamental democratic principles. In other instances, the blanket application of these sanctions might contradict the requirement under the ECHR that the interference with the freedom of association and assembly has to respond to a pressing social need and has to be proportional to the legitimate aim pursued. Furthermore, the inclusion of an NGO in the list should be made on the basis of clear and detailed criteria following a judicial decision or at least, the decision should be subject to an appropriate judicial appeal".[63]

Lastly, it should be remembered that these legislative measures are sometimes accompanied by a virulent campaign by some state authorities against CSO's receiving foreign funding, portraying them as acting against the interests of society. The risk of stigmatisation was explicitly addressed in the Hungarian context.[64]

In sum, when examining legislative proposals restricting CSO activities, the criticism levelled by the Venice Commission has so far concentrated on (i) the introduction of burdensome reporting and disclosure obligations, and (ii) the possibility to impose disproportionate sanctions such as dissolution (sometimes in combination with inadequate legal protection for the affected CSO). The effect of these legislative amendments is in practice augmented by non-legislative circumstances, such as physical attacks and harassment of human rights defenders, limited access to funding,[65] and stigmatisation.

4. Concluding comments

The Venice Commission has only dealt with a limited number of situations in which one can discern a rule of law backsliding.[66] In its opinions there is a (logical) focus on *legislative* measures affecting the three categories of institutional players described in this section. These legislative measures operate against a much wider backdrop. Nonetheless, the opinions adopted by the Venice Commission over the last five years that have been described in this section clearly demonstrate that repressive measures affecting the judiciary, the press and civil society are being taken in various European countries. As stated elsewhere, a previously unimaginable situation has arisen, where-

62 "[T]hreatening the foundation of the constitutional order of the Russian Federation, the country's defence capability, or the security of the State".

63 CDL-AD(2016)020, para. 62.

64 CDL-AD(2017)015, para. 65 (because certain CSOs had to label themselves in all their publications, websites and press material as 'organisations supported from abroad') and CDL-AD(2018)013, para. 91-92.

65 See on this particular point the 2017 Report 'Challenges facing civil society organisations working on human rights in the EU' by the EU Fundamental Rights Agency (http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu), pages 8-9 and 29-37.

66 As the Venice Commission acts *at the request of* certain actors.

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by the EU now harbours Member States which, besides obviously not qualifying for Union membership if they were to apply today, work hard to undermine the founding principles enshrined in Article 2 TEU.[67] It is also important to underscore that not only Hungary and Poland are affected. These countries may be the most visible examples in public debate and the ones against which the most far-reaching action has been taken so far,[68] but the opinions described in this section show that other countries (also in the EU) are adopting similar measures (albeit in a less comprehensive fashion). This section has taken stock of *how* the attack on Rule of Law values is mounted; the following section will explore some of the underlying reasons *why* this rule of law backsliding is occurring.

III. Possible explanations for such a crisis

It is obviously dangerous to oversimplify very complex political and societal developments, especially because countries do not have a shared history. There are distinctive socio-historic specificities between countries that explain certain societal developments and the 'receptiveness' of its people to particular political rationales. Nonetheless certain common themes may be identified. In some member states of the Council of Europe one or more of the following rationales can be discerned. This section does by no means intend to be exhaustive. Rather the following comments are personal observations that are hopefully helpful understanding the rule of law backsliding that was described in the previous section.

1. The perception in the political domain that it needs to 'reclaim lost territory'

Many constitutional orders acknowledge (albeit in various degrees) parliamentary sovereignty. It holds that the legislative body has absolute sovereignty and is supreme over other government institutions, including executive or judicial bodies. That being said, the doctrine of parliamentary supremacy is not the sole corner stone in the constitutional design of many countries. It is supplemented by separation of powers and judicial review. My argument will be that the political domain lost its 'sovereign' position, mostly as a result of a growing importance of the judicial domain, and that this

67 *Dimitry Kochenov/Petra Bárd*, The Four Elements of the Autocrats' Playbook, VerfBlog, 2018/9/18, https://verfassungsblog.de/the-four-elements-of-the-autocrats-playbook/, DOI: https://doi.org/10.17176/20180918-164220-0.

68 Also because with regard to these two countries, the so-called Article 7 TEU mechanism has been invoked. In December 2017, the European Commission triggered the Article 7 mechanism vis-à-vis Poland in order to protect judicial independence in Poland after the PiS party had enacted laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. And in September 2018, the European Parliament adopted a resolution calling on the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded following the so-called *Sargentini report* (http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0340&language=EN&ring=A8-2018-0250).

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has led to a counter-reaction whereby the political domain attempts to re-establish what it considers its proper role. This – at least in part – explains in my view the recent clashes between political rulers and their judiciaries.

The role of the judge has evolved significantly in our societies over the last decades. To name just a few developments:

First, societies are nowadays much more based on individualism than a few decades ago. Modern societies consist of emancipated citizens who challenge decisions affecting their rights or interests more often before judicial authorities. As a result, judicial authorities are more frequently called to rule on the legal protection offered to the individual, which may contradict the interests of the community. The perception may arise that the judge becomes an anti-communal spokesperson.

Secondly, certain legislative techniques used by the (parliamentary) legislator such as the use of open norms have *de facto* amplified the role of the judiciary. Judges have never only applied and interpreted the law; they have always made policy-related choices in their judicial decisions when interpreting a legal text. But the increasing use of so-called open or vague norms by some legislators in order to ensure the necessary level of flexibility when applying the law (and in practice equally important: to ensure the support of a parliamentary majority to adopt a certain bill) has increased this aspect of judicial work. An unwarranted consequence of this development has been that the judge is increasingly seen as a political actor, which makes the judge more vulnerable.

Thirdly, the role of the judge in the courtroom is changing as well. The trial judge is no longer expected to remain passive, but to assume a more active role in order to ensure the fairness of the proceedings. The case-law of the European Court of Human Rights seems to stress this point. In the *Cuscani* judgment the Court stated that the trial judge was "the ultimate guardian of the fairness of the proceedings".[69]

And finally, in some countries (such as the Netherlands) the changing role of the judge is also the result of certain 'European' tendencies, for instance, the pivotal role that is allocated to national judges in applying EU law and the European Convention on Human Rights. Especially where the national judge was not empowered under constitutional law to rule on the constitutionality of ordinary laws, these European-related developments have drastically changed the role of the judiciary.

All these aspects led to the perception in some quarters that judges have become too decisive in modern-day societies and that they are invading the political domain. This perception in turn has led to a counter-reaction.

Very often – especially in the Council of Europe – we mention democracy, Rule of Law and human rights in one breath, sometimes referring to these notions as 'the Holy Trinity' for the Council of Europe. In 2008 the Committee of Ministers adopted a text in which this intrinsic link between the three concepts was stressed.[70] Personally, I think we have to be mindful that there is also a tension between these notions.

Whereas the primordial aspect of a democracy is that the will of the majority (or rather changing combinations of minorities) is decisive, the concept of Rule of Law and human rights focus on offering (judicial) protection to those who are vulnerable

69 ECtHR 24 September 2002, *Cuscani v. The United Kingdom* (appl. no. 32771/96), para. 39.
70 Doc. CM(2008)170, par. 27.

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(for example immigrants or Roma), providing them with a necessary safety net. Certain inalienable rights and freedoms are guaranteed to all persons irrespective of the majority's will. Hence judicial institutions are expected to ensure the full respect of human rights standards, *also in situations where this goes against the majority's will*. We expect them to a certain degree to act as a counterweight. This is sometimes referred to as the 'counter-majoritarian difficulty of human rights law'.[71] It is also reflected in the case-law of the European Court of Human Rights. In the case of *Gorzelik* the Court stated that democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[72]

There are two sides to liberal democracies based on the Rule of Law. One side focuses on protecting individuals from the raw will of the majority through checks and balances and constitutional-style rights. The second focuses on handing power to the people.

For many decades these two sides coexisted without major difficulties. However we are increasingly seeing examples where the popular will comes into conflict with individual rights. A certain part of the population feels unheard because (previous) administrations have invoked 'rights' to exclude certain policy choices which helps to fuel populists who are willing to dispense with constitutional rights in the name of 'the people'.[73] It is another reason which explains the clash between the political domain and the judicial domain, because it is often the judge – domestic or European – who is asked to rule on the compatibility of national policies with 'rights' / Rule of Law standards. And, not uncommonly, the judge holds that the new policies are incompatible with those standards.

This is particularly true with regard to certain policy fields, such as the fight against terrorism and organised crime,[74] and the regulation of migration.[75] It is a particularly toxic combination if these two policy issues coincide. In the Hungarian case

71 *M. Hunt*, Introduction, in: M. Hunt, H.J. Hooper & P. Yowell (eds), Parliaments and Human Rights – Redressing the Democratic Deficit, Hart Publishing: Oxford and Portland, 2015, pp. 1-25.

72 ECtHR 17 February 2004, *Gorzelik and others v Poland* (appl. no. 44158/98), para. 90.

73 In his 2016 State of the Union address President *Juncker* of the EU Commission said: "Never before have I seen national governments so weakened by the forces of populism and paralysed by the risk of defeat in the next elections".

74 See more elaborately *M. Kuijer*, Van Lawless naar een rechtmatige bestrijding van terrorisme, Wolf Legal Publishers: Nijmegen, 2005 in which *inter alia* the response of the British authorities to the *Mc Cann* judgment of the ECtHR (appl. no. 18984/91, 27 September 1995) is described. The case concerned an anti-terrorist operation by Special Forces in which three alleged IRA terrorists were killed. The Court found a (procedural) violation of Article 2 of the Convention. The British tabloids characterized the judgement as a victory of the IRA; 'Europe' was frustrating an effective fight against terrorism. Prime Minister *John Major* described the judgement as "irresponsible and defying common sense" (The Independent of 28 September 1995). Vice-Prime Minister Hesseltine announced "not to take the slightest notion of this ludicrous decision".

75 See more elaborately *M. Kuijer*, The Impact of the Case Law of the European Court of Human Rights on the Political Debate in the Netherlands concerning the Court, in: M. van Roosmalen, B. Vermeulen, F. van Hoof & M. Oosting (eds), Fundamental Rights and Principles – Liber Amicorum Pieter van Dijk, Intersentia: Cambridge, Antwerp and Port-

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the authorities have propagated a causal connection between 'mass immigration' and national security risks. For example, one of the questions in the consultative national consultation 'Let's Stop Brussels' read: "In recent times, terror attack after terror attack has taken place in Europe. Despite this fact, Brussels wants to force Hungary to allow illegal immigrants into the country".

2. The Rule of Law discourse is perceived and portrayed as European intrusion in domestic affairs

The Rule of Law discourse is driven to a large extent by European actors: there are heated debates in the European Parliament, condemning statements from the Parliamentary Assembly of the Council of Europe, Article 7 mechanisms triggered by EU institutions, judgments from both European courts, and expert opinions by the Venice Commission. This enables domestic policymakers to create the impression and/or to further foster the perception that Rule of Law concerns are a 'European' notion. Something that has been imposed onto the domestic legal culture by the international community and that does not sufficiently take into account the specific national socio-cultural context, i.e. a lack of ownership. This translates into a discourse of 'Europe' *versus* the sovereign nation state.

Especially in the 'new' EU member states there is a fertile ground for such a discourse. The effort to join the EU was enormous; countries had to digest 80,000 pages of rules in order to comply with demands from Brussels. For some, this fuelled a fear that their country would become one of the EU's satellite countries just as it was Moscow's in the past.[76] Look for example at the rhetoric of the Hungarian government when introducing the 7th amendment to the Basic Law. In the general reasoning attached to this Bill it is stated: "The mass immigration affecting Europe and the activity of the pro-immigration forces are threatening the national sovereignty of Hungary. Brussels intends to introduce a mandatory, automatic quota-based distribution of migrants residing in and coming to Europe, which endangers the safety of our country and would permanently change the population and culture of Hungary".

A similar discourse can be discerned in other Council of Europe states, such as Russia:

> [T]he ECtHR is not yet inclined to recognise the specificity of a socio-historical (socio-cultural) context as a sufficient ground for admissibility of deviation from the European consensus. […] It is important to understand deep-rooted socio-cultural grounds for such quite a predictable position of national authorities. [77]

land, 2013, pp. 99-114. See also *inter alia M. Bossuyt*, Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers, Inter-American and European Human Rights Journal 2010, pp. 3-48 and *B.E.P. Myjer*, Het leest als een boek, Wolf Legal Publishers: Nijmegen, 2011.

76 https://visegradinsight.eu/kaczynskis-poland-vs-europe/.

77 *Valery Zorkin*, Challenges of implementation of the Convention on Human Rights, a speech given at the international conference on 'Enhancing National Mechanisms for Effective Implementation of the European Convention on Human Rights' (proceedings available at: https://rm.coe.int/16806fe1a5), p. 13-14. See also his Rossia I Strasburg, Problemy realizatsii Konventsi po pravakh cheloveka in the Rossiiskaia Gazeta of 21 October 2015 (https://rg.r

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International bodies will attempt to accommodate those concerns by allowing certain discretion. Allowing a certain discretion acknowledges that (a) implementation of international Rule of Law standards often requires policy choices to be made, (b) that national authorities are in principle best placed to make these policy choices because of their direct contact with their societies, (c) that these national authorities in addition have a democratic legitimacy that an international body does not possess, and hence (d) that a certain self-restraint is called for.

This approach is visible in many documents adopted by the Venice Commission. It is for example stated in the Rule of Law Checklist (paras. 37-42):

> One of the relevant contextual elements is the legal system at large. Sources of law which enshrine legal rules, thus granting legal certainty, are not identical in all countries: some States adhere largely to statute law, save for rare exceptions, whereas others include adherence to the common law judge-made law. States may also use different means and procedures – for example related to the fair trial principle – in criminal proceedings (adversarial system as compared to inquisitorial system, right to a jury as compared to the resolution of criminal cases by judges). The material means that are instrumental in guaranteeing fair trial, such as legal aid and other facilities, may also take different forms. The distribution of powers among the different State institutions may also impact the context in which this checklist is considered. […] The contextual elements of the Rule of Law are not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law.

Likewise, the case-law of the ECtHR allows States Parties a margin of appreciation in how they apply and implement the Convention, depending on – *inter alia* – the rights and freedoms engaged, the circumstances of the case, the seriousness of the infringement, the existence of a European consensus, and the thoroughness of the analysis carried out by the domestic (judicial) authorities.[78] In doing so, the ECtHR is willing to take into account socio-cultural and historical specificities:

> […] the obligation imposed on certain categories of public officials including police officers to refrain from political activities is intended to depoliticise the services concerned and thereby to contribute to the consolidation and maintenance of pluralistic democracy in the country. […] This objective takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party. […] Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a "pressing social need" in a democratic society. [79]

However, obviously there are limits to an approach of deference as the international body will otherwise face the criticism that it allows for double standards.

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u/2015/10/21/zorkin.html): "being a party to an international treaty does not mean giving up your sovereignty, the judicial expression of the supremacy of the constitution".

78 See more elaborately *M. Kuijer*, Margin of Appreciation Doctrine and the Strengthening of the Principle of Subsidiarity in the Recent Reform Negotiations, Human Rights Law Journal Volume 36 No. 7-12, pp. 339-347.

79 ECtHR 20 May 1999, *Rekvényi v. Hungary* (appl. no. 25390/94), paras. 41 and 48.

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IV. How to respond to these challenges

Against the backdrop described in sections II and III of this contribution, the work of the Venice Commission is sometimes difficult. Authorities are often dismissive in their replies to reports and occasionally derogatory. Turkish President *Recep Tayyip Erdoğan* for example said: "Now they are talking about a Venice Commission report. Do you know what the Venice Commission is? It is just a technical delegation, a group from the Council of Europe. They just get information from there. That is to say, it does not count for anything. You can write as many reports you want. We do not recognize your reports. We will not recognize them in the future, either, for your information".[80] Another (in)famous example is the statement by *PiS* official *Ryszard Terlecki*: "The visit of the Venice Commission in Warsaw is very much a holiday tour. We do not attach particular importance to it".[81]

That raises the question how a body such as the Venice Commission should respond to the before-mentioned threats to the Rule of Law given some of the underlying rationales used in the national discourse. Allow me to make one or two strictly personal observations.

Generally speaking, the authority of an international body such as the Venice Commission can only be maintained if it resists the temptation to 'overplay its hand'. It can do so if:

- the Commission it is too firm in stating that a 'standard' has been breached if it is not convincingly demonstrated that such a standard exists. One of the added values of adopting the Rule of Law Checklist is precisely that it identifies core elements covered by the terms 'rule of law', 'Rechtsstaat' and 'État de droit'. Even so, it is useful to make a distinction between hard and soft standards, as is also explicitly done in the Rule of Law Checklist.
- the Commission does not act as a technical body of constitutional experts, but as a human rights activist or lobbyist.
- the Commission does not sufficiently attach importance to the fact that constitutional designs among the various member states differ. It is not the Commission's task to harmonize the various legal orders.

In my personal opinion, the Commission has been very mindful in its opinions of the above-mentioned risks. Discussions among rapporteurs and debates in sub-commissions often revolve around the (limits of the) role of the Commission and the (tone of the) opinion.

The authority of the work of the Venice Commission as an advisory body with no political or judicial power[82] depends in the end on the quality of its argumentation, and whether it adopts a constructive attitude offering where possible alternative solutions to the measures taken by national authorities and considered problematic by the

80 https://stockholmcf.org/erdogan-we-do-not-recognize-venice-commission-reports/.

81 http://www.thenews.pl/1/9/Artykul/270601,Venice-Commission-visit-not-important-PiS-club-leader.

82 Its influence is often of a more indirect nature as opinions of the Venice Commission form the foundation for other European institutions, such as the European Commission, the European Parliament or the Parliamentary Assembly of the Council of Europe, to take further action.

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Commission.[83] I have noticed that there is a tendency – perhaps also as a result of the abovementioned point – to use a very technical approach referring to precedents in the case-law of the European Court of Human Rights, previously adopted opinions of the Venice Commission on similar issues, or standards as codified in constitutional, European or international texts. We need to be mindful of the fact that this approach is not necessarily persuasive for the recipients in the rule of law discourse. Often, the recipients are politicians who are used to simply changing the legal framework if their policy aims so demand. Nor is the 'technical' language necessarily persuasive for the broader public. In short, there is a need to explain ourselves better if we address rule of law concerns. I think this is reflected in some of the more recent opinions of the Commission. The Commission still refers to judicial precedents and legal standards, but in addition it increasingly explains what the societal consequences will be in case of non-compliance with those legal standards.[84] I acknowledge that this makes the Commission more vulnerable to the criticism that it acts as a 'political' body, but I fear this is unavoidable and acceptable in case the Commission is mindful of the three points mentioned above. There will always be a party not satisfied with the content of an opinion. And nothing is easier than to blame the institution that 'got it wrong'. This is not a new phenomenon; it has always existed, and it will always exist. It is an unwelcome, but intrinsic part of the work.

83 It also depends on the factual accuracy of its opinions of course. This is not always easy to guarantee as the Commission has no fact finding powers and usually has to deliver an opinion within a fairly short period of time. This explains why opinions always warn that inaccuracies may occur in the opinion as a result of incorrect translations of (draft) legislative texts.

84 There might also be a need to invest in more frequent use of pro-active distribution to the press of 'user-friendly' materials explaining the viewpoints of the Commission. There is usually a lot of media attention during a visit of a delegation to the capital (i.e. at a stage when the opinion has not yet been adopted by the Commission and restraint is therefore called for) but it is more important to attract the same level of media coverage when the opinion is adopted (also in countries that are not directly affected by the opinion).

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