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### **Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma**

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**RETHINKING EUROPE’S “RULE OF LAW” AND ENLARGEMENT AGENDA:  
THE FUNDAMENTAL DILEMMA**

By Kalypso Nicolaidis\* and Rachel Kleinfeld<sup>+</sup>

**Abstract**

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

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

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

- The empowerment of institutional as well as civil society monitors to assess “Rule of Law” sustainability in both candidate countries and that of member states (e.g. through European Social Fund conditionalities).

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*Rethinking Europe's "Rule of Law" and Enlargement Agenda*

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

## TABLE OF CONTENTS

<b>Introduction.....</b>	<b>6</b>
<b>I. Framing the Problem.....</b>	<b>8</b>
1. Inconsistency between Accession, Assessment and Assistance.....	9
2. The fuzzy conceptual boundaries between democracy, human rights and the “Rule of Law” as political criteria.....	11
3. The pitfalls of the EU’s “anatomical” approach: institution-focussed, State- centric, means-based.....	16
- Scope: Legal-institutional focus.....	18
- Actors: EU and State-centric.....	19
- Target: A focus on means rather than ends .....	19
4. Rethinking the “Rule of Law” criterion in the context of enlargement: The “Rule of Law”/Enlargement dilemma.....	21
<b>II. The “Rule of Law”/Enlargement Dilemma (1): Maximising impact and the need for an ”ends-based” approach to assessing and promoting the “Rule of Law” .....</b>	<b>23</b>
1. From the laws on the books... ..	23
2. ...to the institutions of justice... ..	27
3. ...to power structures and processes .....	28
4. ...to socio-cultural realities .....	31
5. Summing up: From the law on the books to law in action.....	34
<b>III. The “Rule of Law”/Enlargement Dilemma (2): Minimising inconsistency and the need for restraint .....</b>	<b>38</b>
1. <u>Contestability</u> : contested interpretation is at the heart of the “Rule of Law” ..	39
2. <u>Diversity</u> : different national traditions underpin the “Rule of Law” in the EU .....	43

3. Autonomy: we cannot escape the complex relationship between national and EU versions of the “Rule of Law” .....47

4. Definitions-as-frames: towards an eclectic definitional approach? ..... 50

5. Definitions-as-aspiration: the “Rule of Law” is a shared aspiration, not an end to be “achieved” as a condition for accession.....52

**IV. Operationalising the New Approach: Definitions, Assessment, Assistance .....55**

1. Definitions and benchmarks in a pan-EU perspective.....55

2. Fine-tuning assessments and assistance in tandem ..... 62

Step 1: Assessing “ends” in the breach, identifying zones of non-law and curbing violations..... 62

Step 2: Disaggregating the problem: Four realms..... 64

Step 3: Determine new indicators, evaluation targets and measurement goals.....67

Step 4: Identify nodes of opposition and support .....76

Step 5: Assessing actual reform and designing assistance measures and programmes .....76

3. Summing up: Principles for action ..... 80

**V. Conclusion and Recommendations: The sustainability test..... 83**

1. Strategy..... 84

2. Caveats ..... 85

3. In the short term ..... 86

Last words..... 88

**Boxes**

**I. Box 1. Five citizen-centred “Rule of Law” principles .....58**

**II. Box 2. Using indicators to assess “equal access” .....72**

## I. Introduction

Societies blessed with the prevalence of the “Rule of Law” stand free from three tyrannies: the tyranny of fear – no individual may be arbitrarily treated, punished nor imprisoned by the State, nor by the powerful; the tyranny of the few – no King, Minister, nor Mafioso is above the law; and the tyranny of the majority – no minority group may be persecuted with impunity. Throughout centuries of struggle and contestation, European countries have fine-tuned the specific ramifications of such social ideals, as well as they believe, “exported” it to the rest of the world. As a result, the “Rule of Law” is considered to be a core pillar of the European Union and by implication a core benchmark for accession by candidate countries.<sup>1</sup> After all, what is the EU if not a “community of law”? The meaning of the term ranges from the most general – a statement of shared values, such as the fundamental equality and dignity of all persons – to the most specific – a reference to a set of laws binding individuals and States in the EU. Ask any EU legal scholar and she or he will tell you that the “Rule of Law” is not only one of the basic values of the European Union, but also one of the fundamental principles of the member states’ legal system, a part of what the European Court of Justice sees as the “European constitutional heritage”. They might generally concur that the “Rule of Law” should be approached within the notion of a ruling, that is, a relationship between ruler and ruled, the stuff of constitutional history. Rulers have certain powers, the ruled expect them to use these powers in certain ways and to be subject to certain constraints. But which ways and which constraints?

This matters. When it comes to accession, the idea is that member state building is not only about shared values, but also about shared practices: the existence of States capable of not only crafting, but also enforcing EU laws or EU-compatible national laws to prevent criminals from subverting the free movement of goods, services, and people across Europe while upholding European “values”. Crucially, the EU recognises that economic development is grounded on the legal certainty of transnational economic

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<sup>1</sup> Issues of definition will be treated at length within the body of this paper. Suffice it to say at this stage, that while the “Rule of Law” is a concept of positive law (it appears, for example, in the Treaty on European Union, as well as the case law of the ECtHR and the ECJ), what the concept *actually* implies is actually highly contested.



transactions, and the ability to enforce contracts, protect intellectual property, and adjudicate between businesses based on known rules applied with regularity.<sup>2</sup> As a result, the principle of legality in the performance of governments, including public administrations, underpins both the political and economic health of any aspiring member state.

This message has been conveyed by the EU in countless documents during the process of enlargement to east and central European countries. Yet, despite the importance of these rationales, the "Rule of Law" does not seem to prevail today within its own jurisdiction. Some would argue that this is true of older member states, thus reducing their ability to promote the "Rule of Law" without being accused of hypocrisy. However, it is even more notable within the newest member states of the eastern Balkans and even those of eastern Europe; illustrating the well-known phenomenon that EU leverage peaks just before enlargement. Fairly or unfairly, the "Romanian syndrome" has become a way of saying that the "Rule of Law" imperative does not stick after accession.

This paper rests upon a simple diagnostic and proposes a simple remedy.

Accordingly, we understand that the European Commission and other international actors have interpreted the "Rule of Law" requisite in too narrow a sense, as a notion confined to the functioning of the justice system, especially to criminal justice and even more specifically to corruption-related cases. Such interpretative reductionism leaves outside the "Rule of Law" framework a wider understanding of the concept, whereby the "Rule of Law" would also embrace the activity and decisions of all those holding functions of authority, in both the public and the private sectors, including governments and public administrations, and their judicial control by the administrative and constitutional justice systems. More broadly, it fails to recognise that the "Rule of Law" is not about the law per se, but the will to respect it, which in turn is a social fact. In failing to take into account the social source of the "Rule of Law", the EU fails its champions within the acceding member states. Ultimately, this narrow approach overlooks perhaps the most important function of the "Rule of Law": its social role as

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<sup>2</sup> The need for certainty and predictability of administrative action is a frequent requirement of the European legislation (some very general provisions are included in the Services Directive, 2006/123/EC).

the default mechanism to solve social and political conflicts, a role especially precious in societies still plagued by a legacy of deep ethnic and societal divisions.

We argue that in conducting its assessments on the road to enlargement, the EU must define the “Rule of Law” more explicitly, something it has failed to do to this day.<sup>3</sup> By doing so, it would need to adopt a broader definition based on desirable ends rather than easily measurable means, an approach we refer to as a second-generation definition. The EU would then need to put this new definitional strategy into practice, with a view to the end-users of the law. The key to such an approach is to focus on *sustainable* reform which in turn requires that: outside intervention be both effective and legitimate, the best possible use is made of the EU’s resources and political capital, and avoiding to the greatest extent possible the perception that the “Rule of Law” has been imposed from the outside. This in turn means that the EU needs to grapple with the implications of what we call the “Rule of Law dilemma”, which is the concurrent need to deepen its definition, while avoiding accusations of inconsistency in laying out “EU standards”. In short, we advocate both greater ambition and greater humility.

We base our diagnosis and prescription on the evidence and analysis provided by the accumulated experience of EU institutions, in particular the in-depth studies conducted by SIGMA over the last 20 years. Other actors such as the US and multilateral institutions are relevant too. This is not, however, only an inductive exercise. Part of the problem, as we see it, lies with a legal and administrative culture in the EU that is largely technocratic, obsessed with measurable benchmarks and straightforward cause-and-effect relationships. Too many actors feel that they need to set goals and say that they have achieved them. Instead, the promotion of the “Rule of Law” needs to also be informed by legal theory, political philosophy and sociology.

### **I. Framing the Problem**

One can use a number of analytical lenses and scholarly references to address the question at hand. They pertain to different worlds which often fail to connect: analysis

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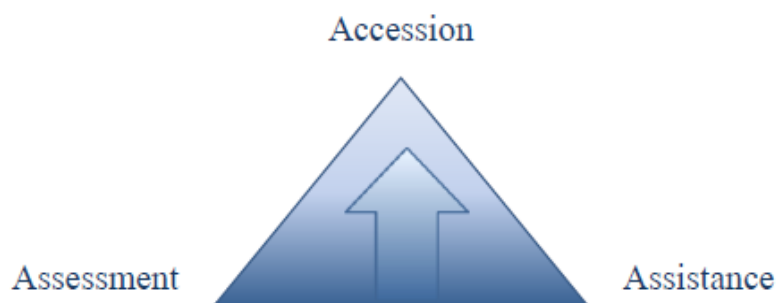
<sup>3</sup> For an analysis of EU usage of the term “Rule of Law” see Kochenov, Dimitry (2004), “Behind the Copenhagen Facade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law,” *European Integration online Papers* (EioP), no. 10, p.8. <http://eiop.or.at/eiop/texte/2004-010a.htm>

of the effectiveness of conditionality, especially political conditionality; conditionality as used in the process of EU enlargement; transnational processes of norm diffusion; the politics of assistance and intervention; action-oriented “Rule of Law promotion” or “democracy promotion” blueprints; and of course legal scholarship on the “Rule of Law”. We will not review any of these strands here, although some of the ideas within them inform our conclusions. Instead, we will start by laying out a number of steps in the diagnosis of the problem, paying special attention to the commonalities and specificities between the EU enlargement context and other contexts.

**1. *Inconsistency between Accession, Assessment and Assistance***

The need to rethink or “relocate” the “Rule of Law” agenda is universal (see Palombella and Walker, 2009). However, in the EU enlargement context, “progress” towards the “Rule of Law” matters more – or at least differently – than elsewhere. Sustainability is about staying on the same trajectory *before* and *after*. Keeping a trajectory requires a compass consistently and systematically followed. And this is where the problem begins. Many analysts have faulted EU institutions for their inconsistency in the enlargement process, especially with regards to the “Rule of Law”. To simplify, we need to keep in mind the problematic relationships laid out in the following triangle (Figure 1):

**Figure 1: Accession, Assessment, Assistance**



*Accession* is both an outcome and a process with specific steps from pre-candidacy to formal candidacy to milestones and date setting. *Assistance*, which refers to action, is how “Rule of Law” reform is supported from the outside through aid, diplomacy and

various programmes, and is not EU specific. Between the two, *assessment* or the monitoring of something labelled “progress” in the countries in question, constitutes both annual milestones for accession and guidelines for action, including aid. It is this dual character of assessment which complicates our task. In one sense, the concern for sustainability is shared by many in the “Rule of Law promotion” community around the world; but for the purpose at hand, we must combine the generic findings emanating from that front, with the special challenge associated with the *sui generis* “threshold” quality of enlargement. The questions differ:

- In the former vein: according to what principles should “assessment” and “action” be conducted to ensure sustained change in the countries at hand?
- In the latter vein, we ask: what role should be played in the actual membership decision by the “Rule of Law” assessment (and other political criteria) contained in the Progress Reports? In addition: how should action to support change and reform in the candidate countries be related to the accession process?

Many analysts see as the main culprit the inconsistency between the on-going assessment of “progress” on the Copenhagen criteria, and the actual steps taken during the accession process – ultimately the fact of accession itself – *e.g.* getting in “in spite” of the lack of progress. The lesson then would simply be to take the “Rule of Law” condition for membership more seriously. Yet ultimately, this gap can be explained and even justified away by the fact that accession is a political process involving discretion about timing, and by the different weights given to the various factors influencing the decision above and beyond the “Rule of Law”. “Rule of Law” assessments constitute one factor among others – a point this paper will come back to later.

So, the core problem lies elsewhere, namely with the principles themselves that underpin assessment –and indeed assistance. This problem is not specific to the EU, in so far as these principles are meant to support more sustainable reform. The specific EU problem arises to the extent that the principles also serve another function, *e.g.* as benchmarks for enlargement. However, can the same principles make sense on both of these fronts? Some have argued that “Rule of Law” conditionality is simply *a lack of*

*benchmarks*, so that, as Kochenov argues, the candidates are “asked to comply, but were not told with what”, thus holding them “hostage to vagueness.” Accordingly, the Commission has acted as a prolific “myth maker”: asking the candidate countries to embrace non-existent European standards, providing too general and poorly researched assessments of their progress, while omitting assessment benchmarks of the actual progress made (Kochenov, 2008). This is reflected in the inconsistency between the assessments of the different candidate countries. Therefore, in order to ensure that integration cannot be undermined by an “unworthy candidate”, the conditionality process spelling out the criteria needs to become “more predictable, transparent and clear” – characteristics which indeed constitute the very essence of the “Rule of Law” itself.

We agree, but with caveats. In the EU, a contractual logic always needs to be balanced with a geopolitical logic. The problem is not as simple as to state that EU criteria need to be more specific or clear. Indeed, we believe that the EU has been both too specific and not specific enough. We therefore need to go back to the criteria for the assessments themselves before asking how they ought to inform accession – keeping the two issues on two tracks before coming back to their connection.

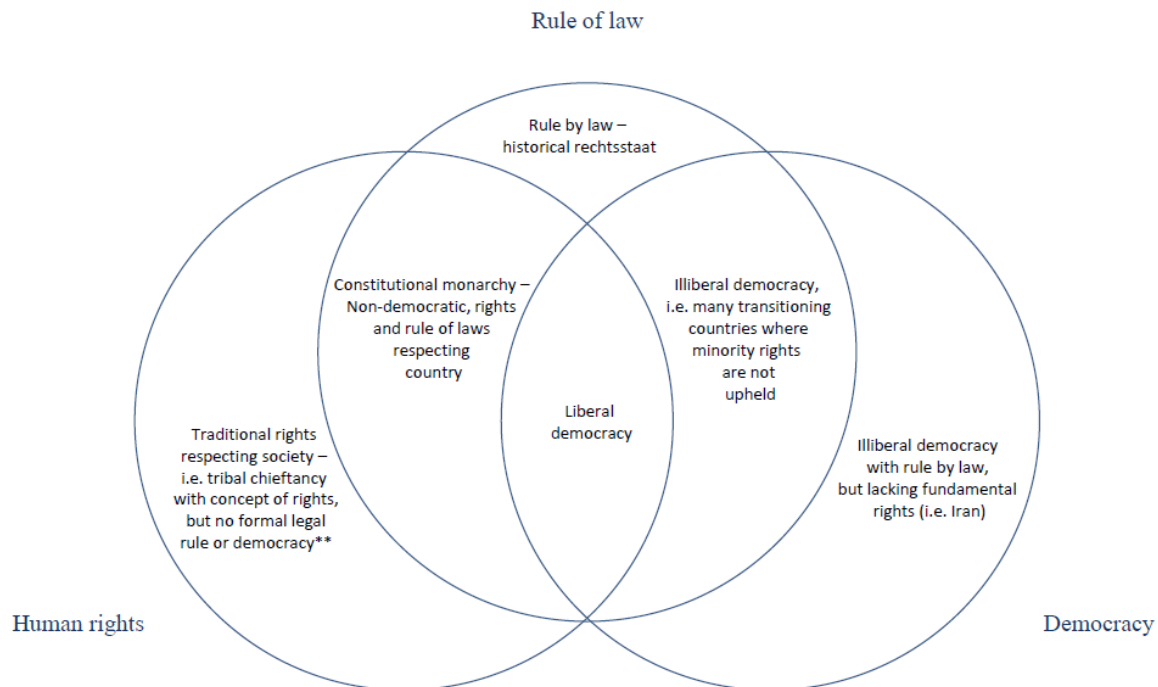
## **2. *The fuzzy conceptual boundaries between democracy, human rights and the “Rule of Law” as political criteria***

That ever since the spelling out of the Copenhagen criteria in 1993, the “Rule of Law” has been treated as part of a triptych alongside democracy and human rights is not in itself original; the sacrosanct trilogy is at the core of all international State building exercises, EU member state building *a fortiori*. However, these terms have to this day been left undefined as are their relationship with each other. In most EU documents and Progress Reports, democracy and the “Rule of Law” are conflated under the notion of “democratic Rule of Law”, while human rights and the protection of minorities are treated separately. In so doing, the EU appears to make two implicit assumptions. First, that it subscribes to a formalist definition of the “Rule of Law”, concerned with process over content which must then be supplemented by human rights criteria. Second, that formal democracy is a prerequisite to the “Rule of Law” – thus overlooking the fact that

a non-democratic country such as Singapore can also be said to uphold the “Rule of Law”, or that a majoritarian democracy with weak checks may actually undermine the “Rule of Law”. (A separate question is whether the “Rule of Law” is a prerequisite to democracy or whether illiberal – *e.g.* non “Rule of Law” abiding, democracies can still count as democracies?)

Yet, there would be real value to viewing the “Rule of Law” as *separate, albeit overlapping* with the other two categories of issues, *i.e.* in terms of both a specific criterion *and* intrinsic joint-ness (as with some of what is currently listed under the democratic “Rule of Law”, as well as what is enforcement of human rights). For one, such an approach is more easily reconciled with the diverse national intellectual traditions prevalent across the EU (see below). More pragmatically, it allows for assessments of transition countries on a spectrum along which each of these different sets of issues may not progress in lock-step. Together, the three may be seen as separate, but interwoven elements of a holistic picture that we tend to recognise as “liberal democracy”, while leaving greater room for variations in our interpretation of what this actually entails (see Figure 2).

Figure 2: Conceptual Boundaries



“Rule of Law” assessment should allow for the fact that some elements of the “Rule of Law” are not dependent on democracy, and may even be undermined by a majoritarian democracy (such as minority rights) or an oligarchic democracy (such as equality before the law). Other elements may be seen as refinements on the *functioning* of democracy as with rules on good governance. A separate assessment opens up the conceptual space for considering that many important improvements in various elements of the “Rule of Law” may take place without moving towards formal democracy, at least in the short run (*e.g.* a better justice system may actually *relieve* pressure for inclusive democratisation by providing an alternative outlet for individual grievances). While on the human rights front, to be treated in accordance with the “Rule of Law” is arguably a human right, the “Rule of Law” acts as well as an important procedural device in the protection of human rights. Nevertheless, the “Rule of Law” is distinct from human rights as well as other values, such as democracy, liberty or equality. Elements of these values may be implicit in the “Rule of Law”, but lumping them together leads to conceptual confusion and bad practice.

Three other points are relevant here.

First, special mention must be made of the issue referred to as “law and order”. The Democracy and “Rule of Law” sections of the reports may lead one to believe that law and order plays no part in the EU’s understanding of the “Rule of Law” – an objective addressed instead in the Cooperation in the Field of Justice and Home Affairs chapters of the EC Progress Reports. To be sure, the jurisprudential literature rarely discusses law and order as an element of the “Rule of Law”, yet human security or “law and order” is frequently perceived by citizens as the most relevant function of the “Rule of Law” within States that have emerged from autocracy into the chaos of freer systems.<sup>4</sup>

Second, the political criteria, and thus the “Rule of Law”, are treated not within the chapters that detail the “Ability to Assume Obligations of Membership,” but generally in the initial sections of its opinions, signalling that this is a more political and less technical part of the reports.<sup>5</sup> This could be a good thing, signalling as it does what the EU considers to be the most serious impediments to accession and which issues within the very broad categories of democracy and the “Rule of Law” need to be prioritised. However, such highlighting comes at the cost of continuity and operationalisation. Indeed, the reports lurch between the most exciting or urgent issues of the day: the lack of a fair election one year, the treatment of Roma another, the manipulation of the civil

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<sup>4</sup> Locke, John, *Two Treaties Government* (1689, reprinted 1994), Peter Laslett (ed.), Cambridge University Press, New York, pp. 9-131, 353.

<sup>5</sup> Kochenov, p. 9. Usually in its general “Opinions on Applications for Membership of the Union”, Progress Reports and Composite Papers. EU accession documents address the “Rule of Law” in the following places: a. Sub-chapters ‘B.1. Political Criteria’ of the Commission’s 1997 Opinions. b. Sub-chapters ‘B.1. Political Criteria’ of the Commission’s Regular Reports. c. Sub-chapters 1. of Chapters ‘C. Commitments and Requirements Arising from the Accession Negotiations’ of the Commission’s Monitoring Reports. d. Sub-chapters ‘1. Political Criteria’ of the Composite/Strategy Papers’ Chapters ‘Progress by the candidate countries in meeting the membership criteria’ (until 2002) and sub-chapters B.1., B.2. and C.1. of the 2003 Strategy Paper. e. Some elements of the Comprehensive Monitoring Report on the preparedness of the ten acceding countries for EU membership. f. Sub-chapters ‘Political Criteria of the Accession Partnerships’. In the Comprehensive Monitoring Reports on Accession Countries’ Preparation for Membership, issues related to the “Rule of Law” end goals are addressed – often without being identified as “Rule of Law issues” within Section 1 of Chapter ‘C. Commitments and Requirements Arising from the Accession Negotiations’, addressing a set of five issues: 1. Administrative and Judicial Capacity, 2. Public Administration, 3. Judicial Capacity, 4. Anti- corruption Measures and 5. Translation of the *acquis* into the language of the candidate country. The general structure of most of the Composite Papers and Strategy Papers is more or less the same.



service in a third.<sup>6</sup> Meanwhile, the day-to-day but crucial needs for systemic improvement (say curbing the political manipulation of the justice system) receive little political attention. Also, explanations are not provided as to why some issues are included and others are not. If sustainability calls for assessment *over time*, the “special treatment” of the “Rule of Law” may be problematic.

Finally, it would be unfair to state that, at least for the latest country reports, the “democratic Rule of Law” assessment lacks specificity. Indeed much is generally discussed under each of five elements:

- free and fair elections;
- the functioning of the legislature, including: the legislative activity and institutional capacity of the Parliament, its representativeness (women, Albanians in the former Yugoslav Republic of Macedonia), openness (civil society hearings), rights and the protection of the opposition;
- the functioning of the Executive, including: the relations within coalitions or the implementation of decentralisation laws, as well as administrative capacity, and the recruitment or promotion in the civil services and police forces;
- the functioning of the judiciary, including: judgments on the independence, professionalism and effectiveness of the judicial system;
- and the fight against corruption, including: activities of the criminal courts, actual investigations and arrests, and the case-law on corruption.

There is plenty that concerns the “Rule of Law” here, but little about the actual or potential impact of the changes observed over time, *e.g.* the kind of sustainability that

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<sup>6</sup> EU reform efforts in Eastern Europe took on a ‘flavour-of-the-month’, acting according to the prevailing member states’ concerns at a given moment. For instance, under the Austrian presidency, the far-right government pushed for an immigration-related “Rule of Law” for all of the countries in line for enlargement; the paedophilia scandal in Belgium led to a drive within accession countries against people trafficking for sexual purposes and pornography, and after September 11, all of the acceding countries had to pass a raft of anti-terrorism measures. Meanwhile, most of the problems facing individuals within the accession countries with regards to the “Rule of Law” were not being highlighted. Boer, Monica den, and William Wallace (2000), "Justice and Home Affairs", in Wallace H. and W. Wallace (eds.), *Policy-Making in the European Union*, Fourth edition, Oxford University Press, Oxford, pp. 504, 516.

concerns us. Krygier refers to this kind of approach as “anatomical” in that it provides lists of the characteristics of laws and institutions supposed to be necessary, if not sufficient, for the “Rule of Law” to exist. This is the starting point of our recommendation for change: the idea that somehow these elements are deemed to add up to the “Rule of Law” overlooks its organic and dynamic character (Krygier, 2009). As a result, and coming back to the assessment-accession nexus, countries may well be able to infer from these Progress Reports what changes are judged positive or negative (that is whether changes move in the right direction), but the reports neither tell us *what* changes make more of a difference than others nor *how much* difference they make on the road to accession.

### **3. *The pitfalls of the EU’s “anatomical” approach: institution-focussed, State-centric, means-based***

As a matter of fact, this line of criticism is all the more relevant when we observe the “Rule of Law” promotion world (the “assistance” side of the triangle). Only a subset of the issues raised in the EU’s assessment reports discussed above are actually “actionable” – *e.g.* the object of on the ground action comparable with that conducted by actors other than the EU. In addition, the vast majority of such “Rule of Law” promotion does not follow an analytic definition at all, but even more narrowly elucidates the institutional characteristics necessary for a given country to demonstrate in order to be deemed able to uphold a modern legal order. In its reluctance to conceptualise the “Rule of Law”, the EU has *de facto* chosen this style of description-based rather than analytically-based definition – but so have the OECD, World Bank, United States, and most “Rule of Law” reform practitioners for the past two decades (see inter Stephen Golub, 2003). In sum, we see:

- A focus on institutions -- most broadly (as with the assessment reports) on State institutions, however, in terms of practice the focus is on the functioning of the justice system, and even more specifically on the criminal justice system.<sup>7</sup>

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<sup>7</sup> The World Bank tends to focus on commercial law, while the US does a great deal of intellectual property rights and other commercial law reforms as well, though it has been moving towards laws focussing on corruption in recent years.

## *Rethinking Europe's "Rule of Law" and Enlargement Agenda*

- A focus largely determined by the legal profession, as represented by a nation's jurists, top legal officials, attorneys, and by foreign consultants and donor personnel – or in our case, EU experts.
- A tendency to define the legal system's problems and cures legalistically in terms of courts, prosecutors, contracts, law reform, and other institutions and processes in which lawyers play central roles.

As a result, funding and the measurement of its "impact" is channelled into a distinct array of activities, including: courthouse construction and repair; the purchase of furniture, computers, and other equipment and materials; drafting new laws and regulations; training judges, lawyers, and other legal personnel; establishing management and administration systems for judiciaries; the support for judicial and other training/management institutes; building up bar associations; and the international exchanges for judges, court administrators, and lawyers.<sup>8</sup>

To illustrate the drawbacks of this approach, consider the following thought experiment. A scholar analysing numerous EU strategy papers writes that the EU generally calls for the creation of judiciaries that are "independent, well-staffed and well trained, well paid, efficient, respected, and accessible to people. The self-governance of the judiciary should be real, including the non-interference of the other branches of power in: the training of judges by a special Judicial Institute, the functioning of their self-governing bodies, their judicial appointments, as well as the workings of the courts."<sup>9</sup> What if these apparently reasonable criteria were applied to the United States Court of Appeals for the Ninth Circuit, the country's largest court of appeals? Here is a court that is nominally independent, however, judicial appointments are known to be heavily political, with reporters tending to read political party ideologies into many of the more controversial decisions. The judges receive only occasional and often irrelevant continuing education.

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<sup>8</sup> Golub, S. (2003), "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative" *Carnegie Endowment Working Papers*, No. 41, Carnegie Endowment for International Peace, Washington, D. C., pp. 8-9.

<sup>9</sup> Kochenov, p. 20. For example, in trying to lay out more robust guidelines for judging judicial reform, the EU's 2002 Strategy Paper (p. 13) decided to assess countries' progress in 1) Adopting basic legislation, 2) Strengthening the human resources of the judiciary, 3) Improving working conditions, 4) Introducing mechanisms of due-enforcement of court decisions, 5) Improving citizens' access to justice and 5) Tackling the problem of backlogs.

They are paid lower salaries than most of their law clerks will receive in their next corporate law job. Backlogs are immense, and justice is exceedingly slow in comparison to other appeals courts. In short, it is fair to say that the Ninth Circuit of the U.S. Appeals Court is quite flawed, and would never be upheld as the Platonic ideal of the “Rule of Law”. Yet somehow, it would pass the EU test. Why? Because, at the end of the day, the Court delivers what most parties will accept as “justice” even if the specific outcome is not in their favour.

Which leads us to summarise the pitfalls of the anatomical approach along three lines: its institutional focus, its State-centrism and ultimately its attention to means rather than ends.

**- Scope: Legal-institutional focus**

Anatomical approaches have narrowed the scope for “Rule of Law” assessment as well as reform, by focussing on the flaws within the traditional institutions of justice – the courts, police, prisons, laws, and lawyers. However, many “Rule of Law” problems are not located primarily within these legal bodies, but are found within a country’s broader web of relationships that exist between its multiple power centres, as will be discussed below. And even while the EU Commission assessment partially recognises this fact, they do so by providing an institutional anatomy of the State itself.

There are good reasons why the EU focuses on these institutions – where after all, the EU maintains a comparative advantage and where it may have the most leverage to effect change. Moreover, a great deal can certainly be achieved by analysing the drivers for compliance with rules by institutions.<sup>10</sup>

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<sup>10</sup> There are ample empirical studies of the variables in achieving compliance with laws and constitutions. One line of research is on the nature of institutions: see: Scott, W. R. (1996), *Institutions and Organisations*, Sage Publications, London, and North, D. (1990), *Institutions, Institutional Change, and Economic Performance*, Cambridge University Press, Cambridge. Another line of research is more empirical; for leads, see: Galligan, D.J. (2007), *Law in Modern Society*, Oxford University Press, Oxford, especially Chapters 15, 16, 17; and in Galligan and M. Kurkchian (eds.) (2003), *Law and Informal Practice: The Post-Communist Experience*, Oxford University Press, Oxford. See also Sannerholm, R. Z. (2012), *Rule of Law after War and Crisis: Ideologies, Norms and Methods*, Intersentia, Cambridge – Antwerp – Portland.

However, our argument is that formal institutional design should not be the bottom line of "Rule of Law" assessment and reform. In particular, one of the main consequences of the current approach is *legal-institutional mimetism*- e.g. the failure to distinguish clearly between the institutional reforms necessary for building the "Rule of Law" in general, and those related to legislative approximation to the EU (i.e. preferring one bankruptcy law over another simply because the former aligns with the *acquis*, despite both being equally valid for a "Rule of Law"-based State). This tendency has resulted in the proliferation of laws that track EU legal developments, which are changed, and then re-changed at short intervals, and in general produce legislation of poor quality leading to legal uncertainty, thus undermining one of the key goals of "Rule of Law" reform.

**- Actors: EU and State-centric**

Such an institutional focus in turn has an impact on what actors are privileged by the EU in its assessment and interventions. To start with, "Rule of Law" promotion in general suffers from a reliance on foreign expertise, initiative, and models, particularly those originating in industrialised societies. Specifically in the case of EU accession, Brussels' experts too often are deemed to be the 'guardians of the right way', initiators of various incentives based on socialisation strategies that will find a more or less receptive response in the "target country". Moreover, even when EU assessment simply consists in noting and/or empowering national reformers, these tend to be found within the State apparatus. Where civil society engagement occurs, it is usually used as a means toward the end of a State institutional development: consulting non-governmental organisations (NGOs) on how to reform the (narrowly defined) legal system, and funding them as vehicles for advocating reform. Proactive society actors are seldom asked to frame assessments and action from their own standpoint, even if ultimately they may best represent citizens as the ultimate *raison d'être* of the "Rule of Law".

**- Target: A focus on means rather than ends**

These two biases in turn stem from one main fundamental flaw of anatomical institution-based approaches, namely their focus on means rather than the ends served by the "Rule of Law". In other words, these approaches simply limit the conceptual space for treating "Rule of Law" reform for what it is: the core mechanism addressing

socio-political conflict beyond the implementation of formal democratic representations. Institution-centred assessments usually fail to consider *why* the judicial, penal, and law enforcement systems are in their degraded states, who benefits, and what must be done about it. While some “Rule of Law” problems may indeed result from a lack of training or resources, most are at the root about politics, society and the relationship between them.

As a result, from assessment and implementation standpoints, institutional modelling fails the basic test of strategy: is the country in question matching resources to ends, and how can the EU best help it to do so? An approach that simply looks at each legal institution or law, compares it to its Western counterpart, and tries to create “improvements” aimed at convergence, does not consider the strengths and weaknesses of local reformers. It limits interventions to specific methods like developmental aid, and technical assistance to institutions, downplaying other methods of catalysing change. Nor does it take into account available domestic resources, above all the internal reformers and their understanding of the actual problems on the ground and the sources of resistance to reform, with which they are most familiar. It tends to treat reform as apolitical, without considering the ways in which vested interests may make reforming one institution more difficult than another. And it lacks a sense of punctuated time, treating all eras alike, rather than recognising that there are windows of opportunity and moments of political and social change in which reform is more likely to take root.

Here then is the core of our argument. Institution-based, anatomical definitions focus on concrete or hard institutional characteristics that are often epiphenomenal. They overlook the key actors in this game: citizens. They are about means rather than ends. By relying on them exclusively, the EU inadvertently draws attention away from the main impediments to the “Rule of Law” in the countries concerned, thus downgrading the credibility of its Progress Report, and on the action front diverting attention, money, and resources from the actual problems the EU is trying to solve.

**4. Rethinking the "Rule of Law" criterion in the context of enlargement: The "Rule of Law"/Enlargement dilemma**

These criticisms are not new and have been articulated for some time by analysts and scholars in the "Rule of Law" community around the world as well as – at least to some extent – institutional actors like the Council of Europe, the European Parliament and the World Bank.<sup>11</sup> They are now coalescing in what we refer to as the "second-generation of 'Rule of Law' reform" grounded on a different style of definition – a definition based on the ends served by the "Rule of Law" as long articulated by political philosophers.

The EU is clearly part of this general trend. It has been groping towards this second-generation, ends-based approach in recent years – and for good reasons. An ends-based approach would be much more congenial to a long term sustainability assessment beyond accession than the institutional definitions it currently employs. It would make it easier to focus on the real goals that drive the EU in its commitment to the "Rule of Law" in potentially acceding States. It would also enable EU actors to think creatively about how to achieve these goals in a sustainable way, opening up the conceptual space to examine the cultural and political impediments to "Rule of Law" entrenchment. In short, it fits with the EU's long stated intentions to "look at the way democracy functions in practice, instead of relying upon formal descriptions of the political institutions" to guide its programmes.<sup>12</sup>

Thus, the EU needs an ends-based definition of the "Rule of Law" that is both more general and more operational than the prevailing approach while in keeping with its current practice. Indeed, while the political criteria, as disaggregated in the assessment reports as they stand, do not clearly lay out "ends" in an integrated manner, various ends are implied in the texts which we need to reflect upon.

And yet, we are faced with a dilemma. Stating that we need to move towards an ends-based approach is a more complicated proposition in the context of EU enlargement than in other settings for "Rule of Law promotion". Why? Because in the latter cases,

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<sup>11</sup> See for instance the Global Justice Project and the work of the European Parliament on the State and Prospects of Administrative Law.

<sup>12</sup> European Union Composite Paper, (1998), p. 3.

greater ambition, as long as it is translated on the ground through contextual intelligence, seems like a good idea. In the EU, such greater ambition raises a separate question: what does an ends-based approach (if applied for both *assessment* and *action*) do to the threshold for enlargement or the likelihood of enlargement, which is after all an all-or-nothing proposition? How can “ends” constitute an actual and operational “test” for enlargement? And most importantly, is there not a risk that such an ends-based approach may be captured or used as a pretext to stall enlargement? This is what we call the “Rule of Law” dilemma in the context of EU enlargement; there is the need to reconcile two contradictory pulls when moving towards an ends-based approach as is discussed in the next two parts of this paper:

1. Dilemma (1): The idea that in the long run, sustainable entrenchment of the “Rule of Law” is fundamentally about the relationship between the State and society, and therefore cannot be about traditional justice institutions alone; an idea that is terribly ambitious. It calls for an ends-based approach to assessing the “Rule of Law” and therefore a more *intrusive* assessment on the part of actors like the EU.
2. Dilemma (2): The recognition that this move also calls for humility, and that if an ends-based approach is to be sustained over time and beyond enlargement it needs to be consistent with whatever such “ends” may be in the EU context, an assessment that is internally contested and in constant flux. It would be unfair within this context, to use a more ambitious approach to “Rule of Law” assessment in order to stall enlargement. This calls for greater *restraint* and tentativeness on the part of the EU.



**II. The "Rule of Law"/Enlargement Dilemma (1): Maximising impact and the need for an "ends-based" approach to assessing and promoting the "Rule of Law"**

The means-based bias stems in part from the widespread tendency to attribute causality to factors that operate as triggers — factors that are temporally proximate to outcomes of relatively minor significance — thus ignoring 'deeper' and more long-term causes. Whether we use the elusive concept of 'effectiveness' or the more neutral 'impact', "Rule of Law" assessment needs to encompass not only actual formal reforms, but also the behaviour and even the unintended changes within the target country. The overall thrust of our argument is that the standard package of expected changes in candidate countries may be far too circumscribed to address the real problems faced by countries in transition, particularly those recovering from war, such as in the Western Balkans. In countries plagued by "extra-judicial solutions" for many problems — from kidnapping to bribery — the impact of rewriting laws, or creating a more efficient and less corrupt court system, is likely to be rather negligible when few cases ever make it to court. The objective must be greater: to reinstate citizens' faith in the State as a conflict-resolution and problem-solving mechanism rather than a tool for vigilante justice.

This may entail institutional reform, of course — but sights must be set and articulated to the public more broadly. In order to fulfil this mission, the said State must be bound and seen to be bound by the "Rule of Law" in the eyes of its citizens. Here the central questions about the "Rule of Law" are sociological and political rather than only legal. Short of a 'sociology of the "Rule of Law"', a social science that does not yet quite exist (Krygier, 2009), we can at least begin by mapping out the scope of the issues at stake and the range of targets for change, whether such change is the result of policy reform or other factors.

**1. *From the laws on the books...***

One major assumption running through both assessments and the "Rule of Law" promotion efforts is that: what countries need above all in order to establish the "Rule of

Law” are good laws.<sup>13</sup> Laws shape incentives for society, and by shaping incentives, they affect the behaviour of citizens, businesses, and the members of government.<sup>14</sup> According to the legal theory of change, when new and improved laws are introduced, they change the rules of the game, creating new ways of acting that support a “Rule of Law” State. As a result, a great deal of “Rule of Law” reform to date in candidate countries and elsewhere has focussed changes upon the laws and constitutions themselves, usually with outside technical assistance.

Under this philosophy, the EU has been the catalyst for massive legal reform across Eastern Europe; reform encouraged first and foremost in its yearly Progress Reports both on the political criteria and the *acquis* sections. Some of these new laws are essential for the functioning of modern States. Yet laws can always be improved, and new laws can always be added. However, it is difficult to distinguish between serious legal reform and legislative window dressing. Indeed, new laws are also frequently amended due to the deficiencies in their initial drafting. As a result, countries such as Albania may have some of the most modern and complete legal codes in Europe, but they face significant problems due to the proliferation of new laws which have created *uncertainty* for the business community and the citizenry at large.

Indeed in this case, the EU’s stress on actual laws may have created the paradoxical situation of undermining one main function of the “Rule of Law”: namely that of providing legal certainty by framing the actors’ mutual expectations along routinised procedures. Unfortunately, this EU bias is further exacerbated by the way most South-East European countries themselves understand the “Rule of Law”. In their post-communist guise, they have embraced with a vengeance that part of the continental European tradition of law in which protection against absolutism has to be provided by

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<sup>13</sup> Channell, W. (2005) “Lessons not Learned: Problems with Western Aid for Law Reform”, *Carnegie Papers*, No. 57, Carnegie Endowment for International Peace, Washington. We are grateful to Aleksandra Rabrenovic for her input on this section.

<sup>14</sup> Merryman, J. H. (1977) “Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement”, *The American Journal of Comparative Law* Vol. 25, No. 3, American Society of Comparative Law, pp. 457-491; Trubek, D.M., and M. Galanter (1974), “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States”, *Wisconsin Law Review*, Law School of the University of Wisconsin, Madison, No. 4, pp 1062-1102.

the courts rather than the Parliaments, and where it is often assumed that something is not allowed if it is not explicitly provided by law.<sup>15</sup>

In the same vein, the first thoughts (if any) about implementation very often come only when the law is passed. Civil servants focus their energy on making sure that a law is passed, rather than on ensuring that it will be properly and successfully applied. "The practice show that this stage is extremely weak in the policy making processes in Central and East European countries. Not only are there no formal guidelines or standards on how to proceed but this need is totally neglected. The first thoughts (if any) about implementation come only when the law is passed. These thoughts tend to relate the implementation to the application of the law, and to that end some ministries occasionally prepare seminars to secure unified application of the law. Although the interviewees acknowledged the problem of implementation and enforcement they do not perceive themselves to be the ones responsible for implementation (or for enforcement of the law, for that matter). At the same time, civil servants distrust delegation of the implementation to third parties (particularly NGOs), stressing the limited human and financial resources available. Civil servants at the Ministry focus their energy on making sure that a law is passed, rather than on ensuring that it will be properly and successfully applied. Where laws are implemented, their impact remains limited, as modern principles of public administration and market economy are imposed through a largely outdated public administration structure. Additionally, a major problem remains, in that it is the dominant elites who are largely in charge of ensuring implementation.

There are clear costs to focussing on the wrong object of change. Structurally, the distorting effect of prioritising the legal transposition of the *acquis* over systemic institutional development, has led to an inadequate machinery for identifying national problems and placing them on the agenda. Moreover, when laws required for the *acquis* are passed through Executive orders because of recalcitrant Parliaments, such

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<sup>15</sup> Parau, C. (2011), Review of Piana, D. (2010), *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice*, Ashgate, Farnham, in *Law & Society Review*, Law and Society Association, Salt Lake City (forthcoming). Sadurski, W., A. Czarnota and M. Krygier (2006), *Spreading Democracy and the Rule of Law? The Impact of Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*, Springer, Dordrecht.

circumvention of popular democracy ultimately weakens the “Rule of Law”. Meanwhile, the proliferation of laws pushed by external parties may take up the energies of many a country’s best lawyers – leaving them with little time to focus on the more vital reforms that could have a greater impact. This human capital problem may seem small – but in a country such as Albania, which began the 21<sup>st</sup> century with only a few hundred lawyers, it can take on great significance.

Meanwhile, for such law-based “Rule of Law” reform to be effective, it must be supported by a strong State that enforces laws across the whole of its territory—an assumption that is rarely justified. Countries undertaking “Rule of Law” reform are notorious for passing laws that they ignore, either by design (as in Romania from 2000-2004) or from a lack of capacity to ensure enforcement. In the words of a practitioner who has spent much of his career in Eastern Europe, “Albanian lawyers today often speak proudly of the new system noting, however, that the new laws are European, not Albanian, and that they are not actually being applied.”<sup>16</sup> As Montesquieu noted centuries ago:

“We have said that the laws were the particular and precise institutions of the legislator, and the mores and manners, the institutions of the nation in general. From this it follows that when one wants to change the mores and manners, one must not change them by the laws, as this would appear too tyrannical; it would be better to change them by other mores and manners.”<sup>17</sup>

Ultimately, laws and even constitutions are mere words on paper. As historian Guido de Ruggiero wrote in 1927:

“The love of rationalistic simplification leads people to think that in the mere technicalities of law they possess the means and the power to effect unlimited changes [Such an illusion is] cherished by lawyers who imagine that, by drafting new constitutions and laws they can begin the work of history all over again,

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<sup>16</sup> Channell, W., *op. cit.*, p. 141.

<sup>17</sup> Montesquieu, C. de, in Cohler, A. M. *et al.* (eds.) (1989), *The Spirit of the Laws*, Cambridge University Press, Cambridge, p. 315. Inkeles, A. (1998), *Becoming Modern*, Westview Press, Boulder, was another early proponent of cultural change as the method of promoting economic development in the 1960s.

and know nothing of the force of traditions, habits, associations, and institutions.”<sup>18</sup>

Indeed, in order to actually shape the acceptable contours of a political system, laws and constitutions must become touchstones of social legitimacy. Only cultural acclimation and respect can transform “sheets of paper into hoops of steel”, in the words of constitutionalist Walter Murphy.<sup>19</sup>

## **2. ...to the institutions of justice...**

To be fair, these limitations have been recognised for a while in the EU and elsewhere. As discussed above, faced with these limitations, reformers usually turn to the institutions of justice including: courts, police forces, law schools, magistrates' schools, and bar associations, among others as a second major object of change.<sup>20</sup> The institutions of justice are so broken in many countries that bringing about the “Rule of Law” seems to require institutional repair, whatever else might be necessary. It is assumed of course that these institutions will function more competently once they are reformed.

The problems with focussing on institutions, and especially these institutions of justice, have already been detailed above. More damning than institutional reform failure is the fact that even reform success often does not deliver. Scholar/practitioner Linn Hammergren describes how after twenty years of reform, Latin America saw tremendous institutional improvements within the court system, such as: respectable courtrooms, judges who had access to continuing education and knew the law, and transparent case distribution systems, but achieved very little improvement in the delivery of justice and the “Rule of Law”.<sup>21</sup> If institutions can be reformed without affecting the “Rule of Law”, then they must not be the most necessary objects of change.

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<sup>18</sup> Ruggiero, Guido de, in R.G. Collingwood (transl.) (1959), *The History of European Liberalism*, Beacon Press, Boston, p. 25.

<sup>19</sup> Murphy, J. (2004) *The United States and the Rule of Law in International Affairs*, Cambridge University Press, Cambridge, p. 7.

<sup>20</sup> See Stephen Golub's deconstruction of the “Rule of Law” orthodoxy for a listing of these types of projects and their shortcomings.

<sup>21</sup> Hammergren, L. (2003), “Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries”, World Bank, p. 2. As Linn Hammergren finds in her study on Latin American

Instead, we need to ask why institutions are so flawed in the first place, whose interests are served by maintaining poorly performing institutions, and why tinkering with their make-up and functioning does not deliver in specific instances. As Carothers states, “The primary obstacles to [“Rule of Law”] reform are not technical or financial, but political and human. “Rule of Law” reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law.”<sup>22</sup>

If the “Rule of Law” is essentially a restraint on the exercise of power, and power is exercised by institutions, then it makes sense to examine the formal institutions intended to check and balance power itself.

### **3. ...to power structures and processes ...**

So we come back to our underlying argument, the need to address the root causes of the problem if candidate countries are to acquire a sustainable commitment to the “Rule of Law”.

The story is well known. As in other parts of the world, countries in southeast Europe suffer from an elite capture of power which is sustained by social permissiveness, despair or apathy. Informal patronage networks, embedded in complex socio-political dynamics, engage in petty or grand corruption and clientelism. Unsurprisingly, they resist change. Powerful elites form dominant coalitions, allowing them to exert influence over formal institutions or processes that should, *in principle*, hold officials accountable for their actions. When these dynamics are coupled with a winner-take-all political culture, whereby those in power feel entitled to replace civil servants at all levels, politics becomes a law-resistant rent-seeking game. “Rule of Law” aspirations must address the complexity of such predominantly informal relationships as well as the use and abuse of formal power structures.

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judicial reforms, significant progress in institutional improvement had little effect on the Latin American’s faith in the justice system. Most Latin Americans still believed that courts “produce costly delays, render irrelevant, sometimes politicised or purchased judgments, and are increasingly removed from the interests and concerns of ordinary citizens”, according to opinion polls, comments of national and international observers, and academic studies.

<sup>22</sup> Carothers, T. (2006) (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington, D.C., p. 4.

EU assessments cannot ignore informal as well as formal power systems and the relationships between States, public administrations and their citizens, as well as more broadly, what we can call, a "culture of the 'Rule of Law'". In this context, institutions of justice and laws may be crucial to effect such changes, but as the means, not as the ends in themselves. If the higher levels of judiciary within a given country are pervaded by the widespread mind-set amongst its judges and prosecutors, that theirs is a subservient role – to defend the sanctity and integrity of the State over and above the rights of the individual, then achieving a formal independence of the judiciary will not change outcomes – independence of mind cannot be legislated.

To be sure, the accession documents do provide assessments of the structures of the various branches of power in the candidate countries. However, they do so in an ad-hoc manner, without indicating the nature and extent of the "Rule of Law problem" stemming from such and such institutional feature. They also do not consider the informal aspects of the structures of power. Most importantly "Rule of Law" assessments need to pay equal attention both to the administrative bodies that may offer government services in an arbitrary manner, and to the courts meant to redress such problems.<sup>23</sup> Indeed, the patterns of conduct and services to be found within a State's administration, both reflect and, in the long term, drive the patterns found in the higher *political* levels of the Executive. These patterns need to be embedded in a better understanding of the main features of a "non-universalist State", plagued by sectorial capture and administrative clientelism. Assessments, furthermore, need to connect the identification of corrupt parliamentarians and the manner in which laws are crafted. They also need to ask whether Executives are routinely seen as engaging in "telephone justice" – from the self-serving biasing of courts to outright repression.

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<sup>23</sup> Sannerholm, R. (2007), "In Search of a User Manual: Promoting the Rule of Law in Unruly Lands". Available at SSRN: <http://ssrn.com/abstract=1068781>; Bergling, Per, E.O. Wennerström and R. Z. Sannerholm (2010), "Rule of Law in Public Administration: Problems and Ways Ahead in Post-Conflict Peace-building" *Hague Journal on the Rule of Law*, Vol. 2, Issue 2, Cambridge University Press, Cambridge, pp. 171-202. This study was sponsored by the Folke Bernadotte Academy (FBA), which develops and organises training for "Rule of Law" experts for peace operations; Sannerholm, R. (2007), "Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template", *Journal of Conflict & Security Law*, Vol. 12, No. 1, Oxford University Press, Oxford; See also in Whit Mason (ed.) (2011), *The Rule of Law in Afghanistan: Missing in Inaction*, Cambridge University Press, Cambridge.

Such a re-focussing of “Rule of Law” assessments needs to acknowledge the lessons of history – that in most States the “Rule of Law” is flawed, because powerful forces—the government, or major non- governmental actors, whether businesses or organised criminals, do not want it to exist. Ultimately, “Rule of Law” reform unravels, because all of the institutional reform in the world cannot overcome the determination of those governments (or at least some parts of those governments) at the time, to *not* be governed by the “Rule of Law”. This was the case with World Bank “Rule of Law” programmes in Peru and in Kazakhstan.<sup>24</sup> Legal and institutional reform can always be overturned by the powerful actors who enjoy the benefits from crime, corruption, nepotism, the unlawful arrest of opponents, and simply the freedom to do whatever they want without obstacle.<sup>25</sup> While they may rail publicly against these “scourges”, they will not support changes that allow their power to be checked. Only when the powerful accept limits on their power and submit themselves to equality under the law will the “Rule of Law” face plausible prospects. (See Stephen Holmes in Przeworski and Maravall.) Before that, the commercial laws, judicial restructuring, or computerisation will only have an impact at the margins of the system.

Progress on this front may require both strengthening and weakening government itself along three kinds of scenarios:

- If the main problem is that some segments of government are overly powerful, then the control of the Executive, public administration, and/or legislature may be required through the use of horizontal checks and balances, as well as the vertical curbs on authority needed in order to avoid authoritarianism, “telephone-justice,” and kleptocracy. Issues such as the rights of opposition political parties are also paramount.

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<sup>24</sup> (2000), “Peru: Building on Quicksand,” Human Rights First, Washington, D.C., <<http://www.humanrightsfirst.org/pubs/descriptions/perubuilding.htm>>. Information on Kazakhstan project from discussions with the programme leader and internal World Bank documents.

<sup>25</sup> See Chabal, P. and Daloz, J.-P. (1999), *Africa Works: Disorder as a Political Instrument*, The International African Institute, Oxford, which argues that political actors in Africa seek to maximise their returns from the confusion, uncertainty, and disorder that characterises many African countries. In Indonesia, an evaluation of USAID “Rule of Law” projects under the Suharto government found that work with NGO organisations and legal institutions was allowed to continue until it began to threaten the authoritarian legal culture, at which point the State would step in to limit change. See Steinberg D.I and C.P.F Luhulima (1994), *On Democracy, Strengthening Legislative, Legal, Press Institutions, and Polling in Indonesia*, The Asia Foundation, San Francisco, pp. 24-26



- If the main threat to the “Rule of Law” is oligarchic business, organised crime, or other negative “civil society” forces, the power of the State may need to be strengthened to fight these forces (while simultaneously being limited to avoid slipping into authoritarianism).<sup>26</sup>
- In States that are “captured” by business and criminal interests, reformers looking to create a power structure that would support the “Rule of Law”, may need to search for a counterweight in another area of society altogether—such as the power of the people.

As will be discussed below, recognising that power ought to be the main target of “Rule of Law” reform in the country in question, has important implications for EU assessments which, while already covering some ground in this regard, need to reorient the use made of information gathered on political structures. There is much less room for direct action in this realm—which may be restricted to signalling.

#### **4. ...to socio-cultural realities**

The need for vertical structures of accountability, or for advocacy and support for the “Rule of Law” within the broader citizenry is intimately connected with our fourth realm of relevance in assessing the “Rule of Law”: the socio-cultural dimension. Most fundamentally, laws and institutions can do little in the face of problems that are actually societal or cultural and thus deeply ingrained. Krygier refers to the most fundamental condition for the “Rule of Law”, that “the institutionalised norms need to count as a source of restraint and a normative resource, usable and with some routine confidence used in social life” (Krygier, 2009).

In attempting to come to grips with this higher order imperative, we need to consider the ways in which historical legacies may constitute formidable and structural obstacles

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<sup>26</sup> Stephen Holmes discusses this problem, claiming that the State must simultaneously be made stronger, and more accountable: Holmes, S. (1999), “Can Foreign Aid Promote the Rule of Law?” *East European Constitutional Review*, Vol. 8, No. 4, New York University School of Law, New York, <http://www1.law.nyu.edu/eecr/vol8num4/special/rule.html>. Laurence Whitehead and Migdal make similar points: Whitehead, L. (2001), *Democratization: Theory and Practice*, Oxford University Press, Oxford, pp. 82-83; and Migdal, J. (1988), *Strong Societies and Weak States: State–Society Relations and State Capabilities in the Third World*, Princeton University Press, Princeton

to the “Rule of Law” in countries in transition – be they the legacy of communism, civil war or authoritarianism. It can be argued that the echoes of communism followed by civil war still deeply permeate the social fabric of all the successor States of the Former Yugoslavia, giving rise both to an intense yearning for and resistance to the durable entrenchment of the “Rule of Law”. Accordingly, reflexes prevail on all sides created by decades of command culture as duly noted in several SIGMA assessments reports. Judicial independence for instance, is more formal than real, as many judges still perceive themselves as civil servants of the government, rather than as the guardians of legality over the activities of the public authorities. In the realm of legal equality, we find: patterns of State and self-exclusion of the ethnic minorities from the core citizenry, ethnic engineering through citizenship policies, public attitudes tolerant of discrimination, and systematic exclusion of “minorities” from elite networks or administrative service provisions.<sup>27</sup> Historical attitudes towards the government may prejudice a society from upholding the “Rule of Law”. For instance, the International Crisis Group claims that in Albania, parts of society began to see criminality as “legitimate,” because the ill-gotten wealth could be used as a source of funds for economic development. Even some leading officials used this logic to justify crime, which they saw as a form of patriotism.<sup>28</sup>

In the end, the best laws and institutions cannot supersede public prejudices. For instance, those who bemoan the failure of the EU to tackle corruption in Albania may do well to ponder a study by a USAID contractor, revealing that two thirds of Albanians surveyed felt that, “a student who gives his teacher a gift in the hope of receiving a better grade” is either not corrupt, or is justified, while the same number condemned as corrupt a flower seller who raises prices during the holidays – and nearly half thought that such a flower seller deserved punishment.<sup>29</sup> Under such conditions, courts which

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<sup>27</sup> See for instance Korosteleva-Polglase, E. (2004), “The Quality of Democracy in Belarus and Ukraine”, *The Journal of Communist Studies and Transition Politics*, Vol. 20, No. 1, pp. 122-142; Koska, V. (2011), “The Evolution of the Croatian Citizenship Regime: from Independence to EU Integration”, *CITSEE Working Paper Series*, No. 15, The University of Edinburgh School of Law, Edinburgh; and Deželan, T. (2011), “Citizenship in Slovenia: the Regime of a Nationalising or a Europeanising State?”, *CITSEE Working Paper Series*, No. 16, The University of Edinburgh School of Law, Edinburgh

<sup>28</sup> International Crisis Group (2001), *State of the Nation: Albania*, Europe Report, No. 111, p. 7.

<sup>29</sup> See Seligson, M.A. and S. Baviskar (2006), *Corruption in Albania: Report of Comparisons between 2004 and 2005 Surveys*, USAID, Casals and Associates, Arlington, pp. 73, 76.

may act in accordance with EU principles and standards, may not deliver what the average Albanian perceives as "justice."

Similarly, a 2011 survey of public opinion on corruption carried out in Serbia showed that twenty per cent of respondents who had given a bribe in the past twelve months, were not dissatisfied with such a practice given the favourable outcome of the corrupt transaction.

To be sure, professional cultural norms within government and "Rule of Law" professions can undermine the "Rule of Law" by weakening a crucial social check against the abuse of authority. Professional cultures inclined to deride the "Rule of Law" are manifold: politicians who pay for their seats and expect to "earn" that money back; public servants who expect the public to supplement their meagre pay with personal "fees"; or a judiciary seen as a servant of the State, rather than an upholder of the laws above any given regime.

Yet, misalignments between popular culture and the "Rule of Law" make it difficult, for even a willing government, to enforce "Rule of Law" norms. Ultimately, laws are upheld by the society itself. If most citizens break most laws regularly, then only a despotic State will have the power to enforce the "Rule of Law". For a State to enforce the laws without resorting to undue violence and repression, most citizens must accept the legitimacy of these laws, and their moral codes must generally align with the laws' content.<sup>30</sup> In regions characterised by what Joel Migdal calls "strong societies, weak States," this relationship often breaks down.<sup>31</sup> A culture that does not support the "Rule of Law" may take many forms such as: each motorist who tries to bribe a police officer in

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<sup>30</sup> Emile Durkheim writes of the movement from repression to democracy being co-committant between growing civilisation and acceptance of the "Rule of Law". See Lukes, S. (1975), *Emile Durkheim: His Life and Works*, Penguin, Harmondsworth, quoted in Whitehead, L. op. cit., p. 167. This theory of change animates the Culture of Lawfulness projects of the National Strategy Information Centre, a contractor with the U.S. State Department, operating from Mexican border towns to Iraq, by training police and citizens to each do their part in upholding the "Rule of Law". <http://www.cultureoflawfulness.org/>

<sup>31</sup> Migdal, op. cit., (1988). See note 27. For instance, in Ethiopia, marriage-by-kidnap-and-rape was criminalised, but few people were willing to take such cases to court, and if they did, few judges were willing to uphold laws that violated traditional practice. See Wax, E. (2004), "Ethiopian Rape Victim Pits Law Against Culture," *Washington Post*, 07 June 2004, p. A01. <http://www.washingtonpost.com/wp-dyn/articles/A20835-2004Jun6.html>.

order to evade a ticket makes it more difficult for the government to enforce the rules; informal norms in rural Albania tying land to families in perpetuity prevent banks from foreclosing and selling property; deep prejudice against the Roma in Romania makes it difficult for the State to enforce equal treatment of this population under the “Rule of Law”.

In each case, informal rules governing socially acceptable behaviour undermine the “Rule of Law”, regardless of the laws, institutions, or political will on the part of agents of the State. To be sure, cultural explanations may simply be cases of sloppy thinking – for instance, the “culture” of vigilante justice in the American West is still present, as evidenced by the recent case of citizens who have taken it upon themselves to patrol the southern border. Yet this culture has manifested itself far less frequently in the last century, as the government gained the ability to adequately enforce laws. In this case, “culture” was simply problem-solving in the face of a weak State, not a deeply popular habit. Yet, in other cases, culture may constitute a powerful impediment to change.

In short, whether in the Western Balkans, Turkey, or the former Soviet republics, “Rule of Law” promoters are also involved in reweaving the very fabric of their society. The relative arbitrariness of public authorities coupled with a low social esteem of the law, a misunderstanding of its social function, where the links between law and justice are not spontaneously established by the authorities and citizens alike, all lead to social and political behaviours where breaching the law is perceived as legitimate in many cases. In such a context, the lever of change may be that of reframing the very meaning of rights, obligations and the attributes of citizenship prevailing in a country. Renewed citizenship regimes implemented through law, education and political activism can play a key role in this regard.<sup>32</sup>

## **5. *Summing up: From the law on the books to law in action***

The idea that we need to change our focus away from the law on the books dates back at least to Erlich and his idea of “living law”, as well as Roscoe Pound and his masterful

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<sup>32</sup> For a discussion, see CITSEE Working Paper Series on citizenship regimes in the post-Yugoslav States, University of Edinburgh School of Law.

introduction to the sociology of law.<sup>33</sup> But somehow, when it comes to turning these insights into practice, they need to be reinvented from the ground-up.

And indeed, reformers in candidate countries have long understood this simple fact: entrenching the "Rule of Law" requires shifting our attention from the positive law of that country ("law in the books"), to how it is applied and enforced in practice ("law in action").<sup>34</sup> A high degree of congruence between positive law and official actions constitutes an essential element of "Rule of Law", which in turn concerns the application and enforcement of the law. This approach brings the behaviour of the private actors directly under the ambit of "official actions" including public administration.

It is worth stressing here that the power structures targeted by the "Rule of Law" and affecting the day to day life of citizens are not only at the top. After all, most people's experience of the "Rule of Law" is not in the courts, but at a lower level of government through agencies delivering services at the front line, from welfare services to border agencies. In an ideal world, a neutral civil service, separate from the political sphere, and endowed with an ethics of the public good, would be made up of agents of the State capable of exercising judgment rather than applying rules rigidly or not at all. Indeed, a "European Administrative Space" has emerged slowly in the EU, building on ECJ case law, practitioner-driven convergence and the "Charter of Fundamental Rights".<sup>35</sup> This concerns policy and administrative decision-making, backed up by administrative justice and regulated by both sectorial and general administrative laws. Such general administrative law, and EU case law, convey general principles such as: proportionality, legality, transparency, protection of legitimate expectations, non-discrimination and fair procedure, which have particular relevance to the control and scrutiny of administrative powers, including discretionary powers. However, while public administration needs urgent modernisation in SEE, it is under-emphasised in the EU's "Rule of Law"

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<sup>33</sup> See for instance Pound, R. (1922), *An Introduction to the Philosophy of Law*, Yale University Press, New Haven.

<sup>34</sup> We thank Nikiforos Diamandouros for this formulation.

<sup>35</sup> Article 41 deals with the right to good administration. See Dutch Presidency Conference on Governance and European Integration, Rotterdam 29 May 1997 and [SIGMA Papers 23 and 26](#).

agenda.<sup>36</sup> This reflects the fact that much of the work published in English on the “Rule of Law” tends to neglect the significance of public administration traditionally regarded as synonymous with discretion, which was seen as incompatible with the “Rule of Law”. This continued even when by the second half of the twentieth century, large-scale public administration came to be recognised as desirable.

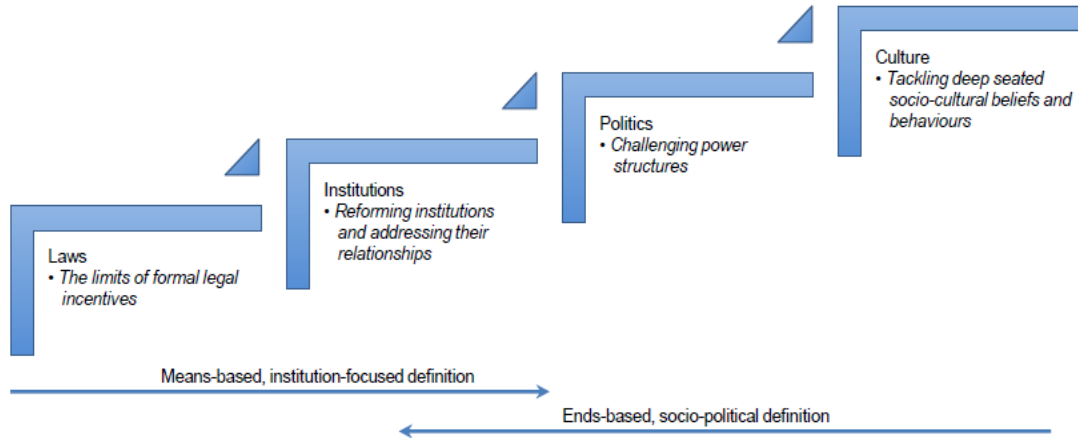
Yes, the right kind of laws must be passed, but also implemented and enforced. Yes, courts, police, prisons, and law schools must function effectively, but they do not exist in a void. As the Progress Reports make clear, the “Rule of Law” is relevant to the actions of politicians and legislators, public administration and civil servants as well as judges and policemen. To the extent that all these actors form part of the State and can be entrusted with the authority of the State, they need to be constrained by the “Rule of Law” in their relationship to one another and to the citizenry. This may require proper laws and institutions – such as laws on civil service hiring, or police watchdog organisations. However, it will also require attention to culture, history, and power relationships.

As illustrated in Figure 3, we believe that a credible assessment of the state of the “Rule of Law” in a country must ultimately be informed by an investigation of cultural patterns as reflected both in general beliefs and in specific behaviour. Is it legitimate for the EU to even attempt to affect the culture of another country by interpreting its negative implications for what it refers to as the “Rule of Law”? It depends on how and with whom. Ignoring what must be changed to focus on what is less sensitive is foolhardy. Observing power dynamics within acceding countries and commenting on their implication for the “Rule of Law”, can help empower local citizens, who can in turn foster and defend ideas more amenable to the “Rule of Law” with a long term impact. Yet, even as we recognise the importance of analysing power and socio-cultural attitudes as the main objects of change in the spirit of an ends-based approach to monitoring acceding countries, what this means for accession itself is far from clear.

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<sup>36</sup> See Sannerholm, R. Z. (2007), *op. cit.*; P. Bergling, E. O. Wennerström and R. Z. Sannerholm (2010), *op. cit.*

**Figure 3: The four realms of the "Rule of Law"**



### **III. The “Rule of Law”/Enlargement Dilemma (2): Minimising inconsistency and the need for restraint**

Establishing the need for a broader approach to domestic pursuit of the “Rule of Law”, and therefore assessment by the EU for such efforts, raises the further question: how should we define the ends intended by such efforts in order to effect *sustainable* change in the process of enlargement? In so doing, how do we guard against the even greater arbitrary potential against an “ends-based” threshold for enlargement, which could be so overly ambitious as to never be attainable? Or maybe the question should be asked differently: given that the absolute “ends” of a truly and consistently abiding “Rule of Law” society are unattainable, to what extent should ends be *approximated* for a country to “qualify” as a bona fide EU member?

Here we come back to our starting point. A trajectory requires consistency and such consistency cannot be easily attained by comparing developments across candidate countries with very different circumstances. So there is a need for a common referent and an ultimate consistency, which we believe cannot be anything other than with the EU itself; a convergence towards which the (political) criteria are supposed to deliver.

However, what does “the EU itself” mean here? Focussing on consistency between “Rule of Law” *within*, and the “Rule of Law” *as projected* seems almost an imperative “by definition” – that is after all, what convergence through conditionality is about, especially if we are concerned with *sustained* convergence beyond accession. Moreover, such consistency is key to the legitimacy of EU demands and therefore the internalisation of its principles inside the countries themselves. We find that the greatest criticism emanating from the ground, even among committed reformers, is that such and such member state “does not follow the “Rule of Law” either.” No need for examples here. We can argue over whether such perceptions are justified, but perceptions for our purposes are facts-on-the-ground. They matter whatever their underlying justification.

So the implications of this “consistency with the EU” imperative need to be teased out, not only for the purpose of drafting “progress reports”, but in order to be communicated on the ground, as part of rendering the EU approach intelligible and legitimate. The



problem here is not so much that candidate countries are asked to converge towards “non-existent European standards”. Rather, it is that they are faced with a multiplicity of such standards and ways of articulating them. Most importantly, they are faced with a fundamental ambiguity: what is the referent for convergence? “EU” or “national” “Rule of Law” standards?

The more one dwells on these questions, the clearer and more imperative the need for the EU to exercise humility and restraint in defining and assessing the “Rule of Law” from an ends-based perspective. We suggest that such humility should be grounded on a number of fundamental precepts:

**1. Contestability: contested interpretation is at the heart of the “Rule of Law”**

It is not surprising and may even be wise for the EU to shy away from a conceptual definition of the “Rule of Law”. Defining the “Rule of Law” is a perilous exercise many would say a pointless one. “We recognise it when we see it” seems to be the most widespread attitude to the definitional challenge. The “Rule of Law” can be analysed from different points of view, whether philosophical, sociological, political, or legal, each with a different semiology. Indeed, definitions, when definition we find, vary widely as a function of the writer’s purpose, tradition and era.<sup>37</sup> And today, debates among legal theorists abound – as exemplified for instance in *Relocating the Rule of Law* (Palombella and Walker, eds.), whose various authors not only reinterpret the “Rule of Law” in the history of ideas, but as an ideal and a praxis in the here and now. This paper will not summarise these debates here, but simply draw out one fundamental point well summarised by Walker:

“..the “Rule of Law” operates as a meta-rule - a rule about the importance and priority of legal rules - for a polity. Of course – and this is key to the elusiveness and contestability of the “Rule of Law” – the basic idea of a meta-rule already carries a whiff of paradox, a circular sense of justification that purports to possess, and must therefore justify for itself, the same (that is rule-like)

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<sup>37</sup> Grote, R. (1999), “Rule of Law, Rechtsstaat and Etat de Droit” in Starck, C (ed.), *Constitutionalism, Universalism, and Democracy - A Comparative Analysis*, Nomos Verlagsgesellschaft, Baden Baden, p. 271; Hayek, F. (1978), *The Constitution of Liberty*, University of Chicago Press, Chicago.

properties as the thing for which it provides higher and external justification (that is, the law).”

For sure there are few legal positivists left, who believe that it is as simple as “just follow the rules”. We have generally come to think of the law as a practice of interpretation requiring expertise, but also an institutional ethic, a certain mentality of the legal profession which cannot simply be taught, but constitutes a cultural project in and of itself. Otherwise, the “Rule of Law” simply serves as a smokescreen.

So where to go from here? Analysts often simply refer to the history of the idea in order to tease out its core content. Britain’s 1215 *Magna Carta* – granting all free men throughout the realm the right to justice – is often given primacy, but others prefer to trace its origin to the ancient Greeks, who called for societies to be governed by pre-written rules applying equally to government and governed. Aristotle considered whether it was better for kings to rule with personal discretion or according to law, and asserted that in a State governed by law “God and reason alone rule”, while “passion perverts the minds of rulers, even if they are the best of men.”<sup>38</sup> Some would argue that the likes of Plato and Aristotle were not talking about the “Rule of Law”, which is a relatively young concept, and a product of modern European national States. However, in all cases, the broad ideal of a “law-constraining power” was almost forgotten through centuries of divinely inspired monarchical rule in middle-age Europe, to return to prominence during the Enlightenment, when making the ruler bow to the law and infusing that law with the normative content of rights, became a paramount idea in liberal thought.<sup>39</sup> Crucially, Britain was the exception to this trend from the 13<sup>th</sup> century onwards.<sup>40</sup>

A. V. Dicey proposed the first modern definition of the “Rule of Law” in 1885 as the combination of three “kindred concepts.” The first is a system of government which

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<sup>38</sup> Aristotle, in *The Politics and the Constitution of Athens*, Everson, S. (1988) (ed.), Cambridge University Press, Cambridge.

<sup>39</sup> See, for instance Locke, J., *Two Treaties of Government* (1689, reprinted 1994), Laslett. P. (ed.), Cambridge University Press, Cambridge.

<sup>40</sup> Reid, J.P. (2004), *Rule of Law: The Jurisprudence of Liberty in the 17<sup>th</sup> and 18<sup>th</sup> Centuries*, Northern Illinois University Press, DeKalb, Illinois; See also Palombella G. (2010), “The Rule of Law as an Institutional Ideal,” in Palombella, G. and Morlino, L. (eds.), *Rule of Law and Democracy: Internal and External Issues*, Brill, Leiden.

excludes “the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”<sup>41</sup> The second is universal subjection to “the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”<sup>42</sup> The third is a system whereby the “general principles of the constitution” are developed as “the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.”<sup>43</sup>

Dicey's approach has since been amply dissected and debunked, especially given his contradictory emphasis on parliamentary sovereignty and the “Rule of Law”, and the incompatibility between his criteria and a great deal that is routinely done by modern States.<sup>44</sup> Yet interestingly, his work continues to serve as a referent in debates over definitions.

Friedrich Hayek, another writer of influence fifty years later, traced the history of the “Rule of Law” and argued that in its ideal form at least, it depended on the extent to which the bulk of laws are not specific commands, but rather “rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.”<sup>45</sup> If these approaches still hold a privileged referential status, they are generally superseded precisely because they tend to overlook the more substantive aspects of the “Rule of Law”, that is, why and in what way the “Rule of Law” ends up counting in a given polity.

And of course, other political philosophers have long applied their emphasis elsewhere. In the Lockean tradition, the need for security and impartial judgment remains the central reason for creating States in the first place, and the “Rule of Law” is about

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<sup>41</sup> Dicey, A. V. (1988), *Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> edition (1959), Macmillan, London, p. 188.

<sup>42</sup> Dicey, A. V. (1885), *op. cit.*, p. 193.

<sup>43</sup> Dicey, A. V. (1885), *op. cit.* pp. 195-96.

<sup>44</sup> See Jennings, I. (1933), *The Law and the Constitution*, 5<sup>th</sup> edition (1963), University of London Press, London, pp. 39-41.

<sup>45</sup> Hayek, F. (1994), *The Road to Serfdom*, University of Chicago Press, Chicago, p. 80.

ensuring that this is actually the case. For Judith Shklar (writing under the long shadow of the Holocaust), the goal of the liberal State should always be to protect those vulnerable to the abuses of power – protection from fear, protection from cruelty. In this liberal tradition, protection from State violence, and citizens-on-citizens violence should be seen as the core goal of the “Rule of Law” ideal.<sup>46</sup>

Examples could be multiplied, but the general point is this: beyond the “core intuition” of the “Rule of Law”, and beyond these very broad macro-issues of emphasis, the “Rule of Law” generates “battles of interpretation” – as is the case for every human endeavour setting down valued concepts in a constantly changing world; a trait vividly exemplified in the religious sphere, from Talmudic to Koranic debates. The very fabric of society is about finding ways for the non-violent resolution of conflict over what we mean by “equality,” “justice,” “fairness” or “liberty”. This is true both in very general theoretical terms at the level of concepts and design, *and* in particular cases, places and time, involving particular people and institutions. General disputes about what the “Rule of Law” actually means as a concept trickle down to the particular – although the outcomes of such micro-battles are under-determined if we only consider broad theoretical debates. Law-based decisions, whether by judges, legislators, administrators, civil servants, policemen or ultimately citizens in general, all involve some degree of interpretation. And each such decision can be contested on the grounds of alternative rival interpretations.

Perhaps most fundamentally, we take it for granted that most ordinary citizens like the *idea* of law by rules, and consider that they are better off with rules that are impartial, non-discriminatory etc. However, should we not sometimes question this assumption?<sup>47</sup> What is the line between seeing the social facts discussed above (II) as the most fundamental obstacles to the entrenchment of the “Rule of Law”, and seeing them as mirroring the inherent flaws of the “Rule of Law” itself? Doing away with the coin under

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<sup>46</sup> See Shklar, J. (1984), *Ordinary Vices*, Harvard University Press, Cambridge; and Shklar, J. (1998), “Liberalism of Fear” in Hoffman, S. (ed.), *Political Thought & Political Thinkers*, University of Chicago Press, Chicago. See also Zakaria, F. (2003), *The Future of Freedom: Illiberal Democracy at Home and Abroad*, W.W. Norton, New York

<sup>47</sup> Teiler argues that people obey the law because they believe that they are treated fairly by it, in a procedural way.

the table and the little help from one's official friends – the smoothing out, that is, of the hard social edges – can sometimes be seen as a machination of the elites. Contestation, let's not forget, may be of the thing itself, externally imposed modes of conflict resolution and its formalism that are destructive of local ways.

**2. *Diversity: different national traditions underpin the "Rule of Law" in the EU***

Although legal scholars and other analysts may have different normative allegiances as individuals or schools of thoughts, it is fair to say that in Europe they have tended to cluster around the national legal traditions of their member states. Indeed, there are good reasons for the EU *qua* EU to refrain from explicitly defining the "Rule of Law", lest it treads on these traditions. Some would argue that "Rechtsstaat," "Etat de Droit", "Rule of Law" all refer to the same fundamental principles: the separation of powers, the need to govern by generally valid, public legal precepts that remain the same in different contexts, the non-retroactivity of law etc.<sup>48</sup> However, beyond this very general core of common functional traits, entire scholarly careers have been made analysing the differences and similarities between these three concepts. Each arose out of a particular historical context, and each was re-interpreted to suit evolving times. At the same time, each concept draws as much from interaction with the others as from their own unique histories leading to contestation, *within* as well as *between* these traditions.

To brutally simplify, the core disagreements revolve around broad questions such as, *inter alia*:

1. *The role played by rights*: are they inherent to the principle, or can a government rule by law and through law, without requiring that the law have substantive content in terms of rights (formalist vs. substantive approaches)?
2. *The relationship between the State and law*: is the law primary, that is before and above the State, or is the law secondary to the State – with the State

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<sup>48</sup> MacCormick, N. D. (1984), "Der Rechtsstaat und die Rule of Law," *Juristenzeitung*, Vol. 50, pp. 65-70.

governing through law, but retaining the right to amend or alter laws as it sees fit?

3. *The sovereignty of Parliament*: as a subset of the previous question, is Parliament constrained by some higher (constitutional) law, enforced by a higher court and judges, or is Parliament sovereign, entitled to override any law previously enacted?

Let us “buy” for a moment prevailing notions of national adjudication. The British tend to give primacy to both rights-as-the-“Rule-of Law” and law over the State, while upholding the sovereignty of the Parliament. For Dicey and his followers, the so-called English Constitution emanates from common law decisions, and is not primary to them; while no government may disregard individual rights emanating from common law simply by changing the constitution, neither may the courts overrule lawmakers. For Dicey, English common law, which emanates from case law, may not be fundamentally altered by the government or even the judiciary. Thus, law is above the State and rights are fundamental to the substance of law.<sup>49</sup> As discussed above, there has been a long story of intra-British contestation on this, as Parliament can and indeed does overrule common law, especially in the last decades where statutory law has developed into the main source of law. Dicey himself had planted the conceptual seeds of this contradiction by emphasising parliamentary sovereignty. He did worry about the legislator himself violating individual rights, but was not able to resolve this tension.<sup>50</sup> In a seminal essay, Britain’s former senior Law Lord, Tom Bingham, recently attempted to provide a summary of what he saw as the “accumulated wisdom” on the “Rule of Law”—aiming at a universal understanding of the “Rule of Law”, admittedly with a British bias. This is but one reading of the meaning of “Rule of Law” in Britain or indeed elsewhere.<sup>51</sup>

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<sup>49</sup> Santoro, E. (2007), “The Rule of Law and the Liberties of the English; The interpretation of Albert Venn Dicey” in Caosta, P and Zolo D. (eds.), *The Rule of Law: History, Theory, and Criticism*, Springer, Dordrecht, pp. 153-199. See also Ivor Jennings critical writings in the 1930s.

<sup>50</sup> We are grateful to Karl-Peter Sommermann for suggesting this point.

<sup>51</sup> Bingham, T. (2010), *The Rule of Law*, Penguin Books, London. For a rejoinder see for instance, Bradley, A.W. and K. Ewing (2007), *Constitutional and Administrative Law*, 14th edition, Pearson Education Limited, Harlow, p. 98: “Today it is not possible to share Dicey’s faith in the common law as the primary legal means of protecting the citizen’s liberties against the State. First, fundamental liberties at common law may be eroded by Parliament and thus acquire a residual character (namely, what remains

At the other end of the spectrum, the "Rule of Law" is reduced to mere "legality": the respect of positive law or "the laws on the books". Historically, this was the position of a radical current of legal positivism in the first half of the 20<sup>th</sup> century primarily in Germany and Austria, in other words, a highly reduced historical view of the "*Rechtsstaat*". The Austrian Hans Kelsen underlined, that from a strictly positivist viewpoint, every State is a "Rule of Law"-based State (*Rechtsstaat*), insofar as every State represents a coercive legal order.<sup>52</sup> Thus, as they saw it, when in 1869, Lorenz von Stein declared that the German *Rechtsstaat* was uniquely Germanic –that it sprung from the particular German history, he meant that in this history, the State created the law and ruled by law. While the State was bound to follow the laws it had made, there was no formal content that could make a law created by the State fundamentally unjust – rights do not precede the law. Under this understanding, *Rechtsstaat* was fundamentally concerned with limiting the *arbitrary* power of the State, not in creating a sphere of inviolable rights.<sup>53</sup>

Clearly, however, this viewpoint is far from the original idea of the *Rechtsstaat* as developed in the first half of the 19<sup>th</sup> century. In Germany, Robert von Mohl, who preceded Dicey, had defined the objective of the *Rechtsstaat* as "to organise the living together of the people in such a manner that each member of it will be supported and fostered, to the highest degree possible, in its free and comprehensive exercise and use of its strengths".<sup>54</sup> The link of the *Rechtsstaat* to fundamental rights and freedoms was unsurprisingly re-emphasised after World War II, extending Robert von Mohl to imply a "*sozialer Rechtsstaat*" characterised by a positive role for the State in fostering actively

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after all the statutory restrictions have taken effect). Second, the common law does not assure the economic or social well-being of individuals or communities. Third, the belief that there is much value in a formal declaration of the individual's basic rights is widely accepted, and has led to the Human Rights Act 1998 and the creation of new procedures for protecting those rights."

<sup>52</sup> Kelsen, H. (1925), *Allgemeine Staatslehre*, Julius Springer, Berlin, p. 91.

<sup>53</sup> Palombella, G. (2010), op. cit.; Gozzi, G. (2007), "Rechtsstaat and Individual Rights in German Constitutional History," in Costa P. and D. Zolo (eds.) (2007), *The Rule of Law History, Theory and Criticism*, Law and Philosophy Library, Volume 80, Springer, Dordrecht, p. 237-259.

<sup>54</sup> Mohl, R. von (1844), *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, 2<sup>nd</sup> edition, Vol. 1, H. Laupp, Tübingen, § 1, p. 5. Indeed, all organisational and procedural requirements which have been identified since then as constituent elements of a *Rechtsstaat*, such as: separation of powers, principles of legality, judicial control of public power and effective protection of individual (and minority) rights, legal security, accountability, proportionality etc., are means to prevent arbitrary State action and protect individual freedom.

favourable social conditions for the free development of the individuals.<sup>55</sup>As a corollary, when the Nazi-doctrine explicitly declared a new understanding of the *Rechtsstaat* – a State based on the ideas of justice of “national socialism”, that justified as legal any action conducted by the State in a “legal” way – *e.g.* through generally valid, public legal precepts that remained the same in different contexts, and were non-retroactive. This was clearly a perversion of the original idea of the *Rechtsstaat*.<sup>56</sup>

Despite von Stein’s claims of a unique Germanic character, the French term *Etat de Droit* is a literal translation of *Rechtsstaat*, and is based on the same fundamental principles. The State must operate through law, and the State’s powers are constrained by law, particularly the separation of powers and judicial review. However, in some conceptions of *Etat de droit*, “fundamental rights” are used structurally as a way of limiting excesses of power – the excessive authority of the monarchs, firstly, and of the people, secondarily, as with the arbitrary and brutal “people’s rule” during the reign of terror after the French revolution. To be sure, these rights are enshrined in statute law, and therefore can be altered by the State.<sup>57</sup> So while the historical roots of the French understanding provide for a more rights-based understanding, the codification of the French fundamentally differentiates it from the idea of a “Rule of Law” emanating organically from individual decisions.

In the end, however, many would argue that these three variants are not really at odds, but rather subject to a continuing conversation within and between each tradition. German scholars explain how in the aftermath of WWII, the Germans modified the concept of *Rechtsstaat* to fundamentally limit the power of the State, and enshrined human rights as central to the concept – as they were in its earliest glimmerings in the writings of Immanuel Kant.<sup>58</sup> Meanwhile, in the Anglo world, formalist scholars claim

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<sup>55</sup> For an enlightening discussion see Sommermann, K. P. (2002), “The Rule of Law and Public Administration in a Global Setting”, in: International Institute of Administrative Sciences (ed.), *Governance and Public Administration in the 21<sup>st</sup> Century, Proceedings of the XXV<sup>th</sup> International Congress of Administrative Sciences Athens 2001*, IISA/IIAS, Brussels, pp. 67, 72.

<sup>56</sup> See Sommermann, K. P. (1997), *Staatsziele und Staatszielbestimmungen*, Mohr, Tübingen, pp. 150 et seq.

<sup>57</sup> Laquieze, A. (2007), “Etat de Droit and National Sovereignty in France,” in Costa P. and D. Zolo (eds.), *op. cit.*, pp. 261-291.

<sup>58</sup> Böckenförde, E.-W. (1992), “Rechtsstaat”, in: Ritter J. *et al.* (eds.), *Historisches Wörterbuch der Philosophie*, Vol. 8, WBG, Darmstadt, pp. 332-342.



that the "Rule of Law" does not include the concept of rights – in effect, stripping the "Rule of Law" down to the original meaning of "*Rechtstaat*".<sup>59</sup> Thus while the Germans moved from a formalist to a more substantivist vision of the "Rule of Law", some of their English counterparts were tempted to move in the opposite direction. Moreover, each of these traditions is subject to intense debates over judicial activism and the issue of constitutional vs. parliamentary sovereignty.

At this stage, it might be worth noting that scholars and lawyers operating in the non-European world have argued that the general idea of the "Rule of Law" is not specifically European but universal – with variants of course. Analysts of Muslim-majority countries, for instance, have pointed out that although there are of course intense controversies among Muslim scholars (admittedly liberal Muslims) on how to interpret the relationship between the Law and the Koran, it is possible to situate the genesis of the "Rule of Law" in Islam. This includes the idea that a polity should not be built on belonging to a common identity, but on a voluntary adhesion to common principle or the idea that clerics form a counterweight to the powers that be. And that whatever the historical record, and as long as there is a willingness to historicise the inheritance of Islam, the "Rule of Law" provides the grammar and vocabulary with which the demands of reformers in Arab countries are articulated in the here and now.

In sum, when it comes to the "Rule of Law", as in all other walks of social life, one size does not fit all, not only because the target countries themselves differ (even if part of their "tradition" is deemed outside the "Rule of Law"), but because of the diversity of the referent itself. Even single market standards are subject to mutual recognition. How then could we find "a European standard" when it comes to the "Rule of Law"?

### **3. *Autonomy: we cannot escape the complex relationship between national and EU versions of the "Rule of Law"***

Several strategies are possible in the face of interpretative and national diversity. For one, there is the search for a common core vested in the idea that member states adhere

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<sup>59</sup> For a legal formalist viewpoint, see Raz, J. (1979), *The Authority of Law: Essays on Law and Morality*, Oxford University Press, Oxford, pp. 210-230, or Scalia, A. (1989), "The Rule of Law as the Law of Rules," *The University of Chicago Law Review*, The University of Chicago, Chicago, Vol. 56, p. 1179.

to broadly similar liberal democratic principles domestically on which their supranational democratic polity is predicated: fair elections, equal access to justice, respect for social and political minorities. However, as we have seen, this search is elusive and eminently contestable in an operational sense. And of course, in such a quest for commonality, difficulties are magnified in the context of the current enlargement. For what is ‘normal’ for current EU member states is not always perceived as ‘normal’ and ‘appropriate’ by applicant countries, especially in post-conflict societies where the notion of normalcy and justice is affected by irreconcilable perceptions and misperceptions (Anastasakis, 2008).

An alternative approach is to start from the premise that an EU’s ends-based approach should rely on the principles by which the EU *qua* EU claims to hold its own States to account, and therefore by which candidate countries will continue to be judged *as they become members*. In other words, an ‘autonomous Union concept of the “Rule of Law” needs to be identified’ (Arnold 2002, p. 240). Some would argue that we can read the Commission’s reports as doing exactly that, albeit implicitly – that there is already an *acquis politique* of commonly accepted legal standards, norms, and practices which simply needs to be teased out.

However, we cannot embark on such an approach without pointing out its limits. Above all, is that many of the issues that the Commission considers and assesses in candidate countries belong to national competences within the member states. The idea that it is perhaps legitimate for EU institutions to police the criteria lying beyond the competences of the EU, stems from the assumption that member states had already *reached* acceptable standards as initial members, and have thus been able to maintain them *on their own*; though, with EU law policing them at the margin of the national system *to the extent* that they impinge on the EU’s domain – albeit a domain that has considerably traded on human rights issues, thanks to the activism of the European Court (Weiler, 1991). However, even if this justification held, the limits of EU competence bolster the core argument of this paper – that delving into the specific *means* for achieving certain ends may indeed be much too specific when one considers the limits of EU jurisdiction.

This point takes on added weight when one considers that EU edicts on the “Rule of Law” are not only questionable in terms of competence, but that they exhibit a specific bias. Some analysts have argued that the EU can be characterised by a litigation style which is very different from that of its member states, especially on the continent (Kelemen, 2010). Accordingly, “Europeanisation as legalisation” leads to prevailing approaches that may be at variance with what individual member states see as the core tenets of the “Rule of Law” that remain predominantly under their jurisdictional prerogatives. “Euro-legalism” is closer to an American, adversarial, legalistic style based on formal and prescriptive approaches, transparency, the broad empowerment of private litigants and the reliance on private enforcement. By contrast, many European States operating under a more dirigiste tradition, rely on a corporatist style with a greater degree of informality and discretion vested in administrative and policy networks, while relying on relationships of trust between the actors relevant to the operation of the law.

To be sure, it would make sense that EU level “Rule of Law” culture would not be able to rely on the same degree of trust as member states given its fragmented political nature, and that it should seek to give greater degree of certainty to outsiders through explicit trust. This in turn encourages a greater reliance on judicialisation and the framing of policies as rights that can be enforced by private parties in the absence of “public enforcers”. The idea and purpose of “constitutional courts” is magnified in such a context, and individual grievances may take precedence over the abstract weighing of “the public interest” by civil servants and administrators. This in turn might be a good thing when one considers the need to protect groups – from minorities to consumers, who might be overlooked in such a top down weighing. Yet, such an EU bias is not without detractors for the power it gives to judges and social settlements (say over the operation of capitalism), and the unpredictable nature of enforcements. Though, wherever one falls on this debate, there are indeed different possible views (as discussed above) on: the desirable balance between the public and private mechanisms of the enforcement of the law, the legitimacy of constitutional review and the issue of the democratic credentials of the courts and judges viz. legislators, the implications of legal delegation, as well as the status of rights protection in the policy making process. Why then should an “EU view” rather than a Portuguese, French or British view prevail when

it comes to accession countries? And of course, the devil is in the detail. So for instance, “constitutional review” may be embedded in the European social fabric, contra-mainstream British view, but the core tenets of such review may be highly contested – witness the critique of east European court jurisprudence as rhetorical ornaments. An accession State’s performance on the “Rule of Law” might in the end depend on whose scale is used.

#### ***4. Definitions-as-frames: towards an eclectic definitional approach?***

With all of these caveats in mind, how can the EU possibly agree on an ends-based definition of the “Rule of Law” that could guide its assessment exercises? We believe that it is possible, as long as it is recognised that such a definition is not meant to move away from “the politicised process of enlargement”, or to reassert the power of “rationality” and “predictability” of the law over politics. Instead, it can provide a focal point for discussion and socialisation as part of an enlargement process which remains intrinsically a political exercise.

With such caveats in mind, we go a long way by teasing out desired ends inductively from the EU’s own self-understanding of the “Rule of Law”, as applied to member states *in conformity and support of the EU’s own legal goals and philosophy*. With that in turn, we must acknowledge that there exists a broad palette of approaches to defining the “Rule of Law”, let alone to definitions themselves (see for instance the annex to Bingham’s “the Rule of Law”; and for an analytical discussion of the analytical palette “A Concise Guide to the Rule of Law” by Brian Z Tamanaha in Palombella and Walker, eds.). Such diversity and contestation does not necessarily call for a pure definitional relativism, as with Judge Potter Stewart’s famous definition of hard-core pornography: *“I shall not today attempt further to define it...; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...”*.<sup>60</sup>

Instead, we suggest that if and when EU institutions get set to lay out alternative definitional approaches, they do so as broad frames for the conversations that must accompany “Rule of Law” promotion; acknowledging that multiple frames can exist as

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<sup>60</sup> Justice Potter Stewart, concurring opinion in *Jacobellis v. Ohio* 378 U.S. 184 (1964)

long as these frames are compatible. In other words, we ask whether it might be desirable and possible to lay out an eclectic definitional approach.

Such a strategy would in turn help guard against reifying any definition put forth by the EU. Instead, a number of points may be distilled from EU texts as well as supporting SIGMA documents.<sup>61</sup> This evidence suggests that the EU's pursuit of the "Rule of Law" within its own realm is predicated on a number of main ends which can serve as starting points for what the OECD has termed "actionable consequences."<sup>62</sup>

While there are countless ways of spelling out these various ends, they must be general and intuitive, as well as compatible with the various legal traditions and assumptions discussed above. If indeed, the "Rule of Law" is a goal, goals by definition are dynamic and need to be redefined, adjusted and adapted.

However, we also need to keep in mind that these are principles that must travel and be operational. Some general intuitions stem from the challenge of translation from diverse internal legal traditions to a single external "Rule of Law promotion" approach: that while Europeans can and should attempt to define a "common core", they cannot and should not attempt to impose or reify any specific definition of the "Rule of Law"; that this common core must be motivated by a logic of consequence – to facilitate effective, legitimate and ultimately sustainable change in the countries in question—rather than a logic of (rhetorical) appropriateness settling doctrinal or theoretical debates; and that in so doing, EU officials need to exercise restraint.

In this spirit, we suggest that ends-based definitions must make explicit the relevance they have to the life-experience of the citizen as an "end-user", and that no single frame should claim primacy as "the" EU definition.

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<sup>61</sup> For a more thorough discussion of this definition, see Kleinfeld, R. in Marshall, Will (ed.) (2006), *With All our Might: A Progress Study for Defeating Jihadism and Defending Liberty*, Rowman & Littlefield Publishers, Lanham.

<sup>62</sup> See "Rule Law: A shortcoming in the Progress Reports," SIGMA, (2010).

**5. Definitions-as-aspiration: the “Rule of Law” is a shared aspiration, not an end to be “achieved” as a condition for accession**

Ultimately, we need to be clear on the “political status” of any ends-based definitional exercise to guide the accession process. In light of the diversity and autonomy of “Rule of Law” practices within EU member states themselves, on the one hand, and the very general nature of definitions-through-end, on the other hand, EU judgments of consistency and inconsistency within the “Rule of Law” cannot escape a certain degree of “ad-hoc-ness”. This leads us back to the problem of consistency. There is clearly a need for consistency between the internal and external realms of EU action, or, in other words, the simple precept that Europeans ought to advocate abroad that and only that which it does at home. We could contrast such a need with the need for deference: the simple idea that European practices need to start by acknowledging that standards and norms must adapt to the different contexts in which they are implemented, and that they display “contextual intelligence.” Yet, more subtly, we need to ask what consistency really means? Is the argument here that consistency with EU norms ought to be balanced with a sensitivity to local stories and contextual intelligence (that too)? Or rather that deference itself is part and parcel of what consistency with the EU actually means. Consistency, if we are faithful to the European spirit of subsidiarity, requires adaption underpinned by a sensitivity to differences in circumstances and the preferences of others.

If the sustainability of “Rule of Law” promotion rests on the perceived legitimacy of EU actions, then how could the EU be promoting something called the “Rule of Law”, which means something different within different member states, and which concurrently is not, at least not clearly, part of the remit of the EU itself? Consistency with the diverse variants of the “Rule of Law” prevalent within the EU itself *requires* contextual sensitivity – if “Rule of Law” means slightly different things within different member states, it can and should mean even more different things within aspiring member states. As a general rule, the EU should not impose more specific requirements outside its boundaries or towards aspiring members than it does for existing member states. This precept would seem to be the most basic expression of consistency. But of course, the

problem is not that simple as the "Rule of Law" only became an explicit criterion for membership in 1993, and has never subsequently been applied as a constraining criterion to existing member states.<sup>63</sup>

As a result, if standards are to be seen as implemented in the accession process and beyond, they cannot be considered as a separate category for candidates and member states, but rather as ends that are *shared* today between members and non-members and will continue to be shared tomorrow among members.

Here, we need to take full account of the understanding that a society's commitment to the "Rule of Law" is *aspirational*, an end or ideal to inspire political actors and citizens alike, not a goal-post that may be deemed to have been reached. Indeed, such an ideal-typical character is intrinsic to the "Rule of Law" itself, an ideal bound up with interpretation and the differences in interpretations between interpreters and over the passage of time. So the stated ends of the "Rule of Law" are to be considered as *common* aspirations that will continue to be common aspirations after enlargement – not measurable targets that can ever be achieved once and for all.

In short, an ends-based approach to defining and promoting the "Rule of Law" *in the context of enlargement*, needs to rest on a clear distinction between two logics:

1. An aspirational commitment on the part of candidate countries with regards to accession *per se*, assessed through sustainable progress along a number of issues;
2. An operationalisable ends-based approach for the purpose of assessment and action to guide the strategies followed by local actors and the type of assessment and assistance provided by the EU.

To be sure, some would argue that such should be our understanding of the other political criteria as well. However, in these other realms, it may be easier to find

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<sup>63</sup> See Wise, A, "The Mafia Is Italy's Biggest Business," *ABC News*, 12 November 2008, for a recounting of the 2007 study by the Confeserenti business organisation claiming that organised crime is Italy's largest business.  
[http://abcnews.go.com/International/story?id=6238022&page=1#.UH\\_oSsX9GGM](http://abcnews.go.com/International/story?id=6238022&page=1#.UH_oSsX9GGM).

thresholds and absolute benchmarks (*e.g.* free elections). And indeed, the “Rule of Law” criterion may include absolute thresholds too. Moreover, the alleged vagueness of the political criteria has served precisely to create the kind of margin of manoeuvre that is necessary to continue to approach enlargement strategically rather than mechanically. There are risks that an ends-based approach could appear as even more arbitrary than the current means-centred one, and that it could be prone to political exploitation – delaying enlargement as ends-based deficiencies could always be invoked.

So what difference would an “ends-based” approach make to accession itself, if accession could not be explicitly linked to “reaching” particular ends or fulfilling a list of “Rule of Law” components? The idea of aspiration is dynamic and implies agency –there are specific actors or groups of actors upholding certain commitments and behaving accordingly. The idea of “sustainable progress” is pervasive in EU politics, albeit much abused, as in the case of EMU (where it has meant admitting member states that did not fulfil core criteria, but were “moving in the right directions” without assessing the grounds for such movement). Could it be applied more effectively in the realm of the “Rule of Law”?

In the end, the change in approach for which we argue rests on a simple diagnosis: that progress on the “Rule of Law” front within acceding States does not necessarily require institutional emulation of EU States *per se*; that convergence towards “EU standards” needs to be evaluated according to a broader range of references than the mainstream legal-institutional anatomy; that the relevant appraisal of what “Rule of Law” in the EU actually means, as well as crucially, *does not necessarily mean*, needs to be consistent within and outside the EU. If “Rule of Law” understandings differ among EU member states”, they can take different forms within acceding States. If broad principles are shared rather than “emulated”, then means can vary.

It is with this distinction (between *aspirational* and *operational* perspectives) in mind that we now turn to more detailed suggestions with regards to the kind of “Rule of Law” strategies to be deployed under an ends-based approach.



#### **IV. Operationalising the New Approach: Definitions, Assessment, Assistance**

How then could such a new approach be operationalised? Our suggestions are incremental; to add to, not to replace the current EU approach to "Rule of Law" conditionality in two broad ways:

1. We suggest that EU officials engage more systematically the various publics and public administrations alike on what the "Rule of Law" actually means *within the EU itself*, while at the same time respecting the autonomy of member states. This may involve empower existing "institutional monitors" *across Europe* – including the systematic use of the internet and perhaps above all bottom-up monitors within countries;
2. We suggest a step-by-step approach to putting an ends-based philosophy into practice *within the specific context of enlargement*, which we believe can be valid both for assessment/monitoring as for assistance/promotion.

##### **1. *Definitions and benchmarks in a pan-EU perspective***

First then, let's ask what can be done to clearly signal to aspiring members that the "Rule of Law" is a *European* topic not just an *enlargement* topic. Embedding candidate countries in this broader dynamic will help both counter the "inconsistency" accusations, and sustain the monitoring dynamic post-enlargement. The message: the "Rule of Law" is as much an EU concern post as pre-accession.

##### **i) Inspiring: Definitions, plural**

We concluded above, that however problematically, it does make sense to clarify the meaning of "*Rule of Law*" – as understood and expected *across the EU* – if only to inspire change and anchor the legitimacy of assessment in a holistic way. At the same time, the EU must not enter a definitional battle as discussed above. Instead, it could adopt an eclectic approach to the issue of definition by simply dedicating a "Rule of Law"

website to posting various established definitions (*e.g.* UNSG<sup>64</sup>, the Council of Europe<sup>65</sup>, OSCE<sup>66</sup>). It could also host on this site definitions provided by individuals as variations on a theme with differences in emphasis, but a common core (like poems, such fundamental definitions must appeal to different sensitivities).<sup>67</sup> How to eliminate “noise” on such a website is a classic challenge, rather easily addressed.

We started this paper by suggesting that the “Rule of Law” may be recognised by a triple absence: freedom from fear, from the tyranny of the majority, and from the tyranny of the minority. Our own one liner would then be:

“The ‘Rule of Law’ is about how power is constrained, in all its forms, to ensure that citizens are truly free from its arbitrary use.”

Or more specifically:

“The ‘Rule of Law’ deals with the social relationships of power by spelling out the general manner by which governments, the State apparatus that they command, and any actor powerful enough to exercise power arbitrarily over citizens, ought to behave, and how conflicts between citizens ought to be adjudicated. Its core aim is to limit the scope of the arbitrary exercise of power by governmental and non-governmental actors, by regulating legitimate discretion and distinguishing such discretion from arbitrariness, wherever and by whomever such power may be exercised.”

It is worth stressing here again that we do not advocate an EU-sanctioned definition of the “Rule of Law”.

- ii) Guiding: A very cautious approach to five citizen-centred “Rule of Law” principles and the development of a “living list”

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<sup>64</sup> United Nations, Security Council (2004), “The rule of law and transitional justice in conflict and post-conflict societies”, Report of the Secretary-General, Doc. S/2004/616. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No4/395/29/PDF/No439529.pdf?OpenElement>.

<sup>65</sup> Council of Europe, European Commission for Democracy Through Law (Venice Commission) (2011), Report on the Rule of Law, Study No. 512 / 2009 CDL-AD(2011)003rev. [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)003rev-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)003rev-e.pdf).

<sup>66</sup> [http://www.osce.org/documents/odihr/2009/01/36062\\_en.pdf](http://www.osce.org/documents/odihr/2009/01/36062_en.pdf).

<sup>67</sup> A broad approach to the “Rule of law’ can also be found for instance in the “Rule of Law index” of the World Justice Project, which includes aspects such as: lack of corruption, security, administrative transparency and access to justice.

It would be nice if definitions however, could be mainly supplemented by more “actionable principles”, which could serve as useful short cuts for policy making. But how do we do this without falling into the trap of the kind of anatomical checklists which we have criticised? Many law scholars would argue that while specific rules of conduct may vary according to national or local cultural and historical circumstances, it is legitimate to try to suggest universal “Rule of Law” *principles* which can be easily recognisable, and upon which local actors may draw. It is this conviction that has led to the crafting of the “Rule of Law” indexes mentioned in this paper. In order to provide an example, we chose to start with the 2011 Venice Declaration (itself quite similar to the “Rule of Law” index) as a basis for developing a “living list” as provided in the annex to this paper.<sup>68</sup> The list then includes principles, as well as the range of questions that can be attached to each.

Crucially, however, we suggest amending the Venice Declaration from an ends-based perspective in three fundamental ways:

1. **Citizen-focus:** By this we mean presenting these principles through the eyes of the citizens. Of course, the viewpoint which we espouse can itself be questioned ad-infinitum: who is this ideal-typical citizen whose perspective we embrace? We will come back to this question in our second set of recommendations. One important consequence of this focus is to avoid the State-centric character of many such exercises. The arbitrary use of power we are after certainly gives pride of place to the State – but not exclusively.
2. **In the breach:** If such lists of principles are to be faithful to an ends-based approach, and while there may be countless ways to define positively the principles that are encompassed under the broad label of “Rule of Law”, it is often intuitively easier and operationally more feasible to address such ends as “in the breach” when denied, or in philosophical jargon as “non-values” or even anti-values.

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<sup>68</sup> Council of Europe, op. cit.

3. Living list: Finally, we suggest that such a list be a “living list”, *e.g.* to be discussed, amended and fine-tuned over time by anyone who can fruitfully contribute to its organic evolution. We further suggest that the EU Commission provide such a “living list”, clearly open to amendments and additions, in order to give life to “actionable principles” and their importance when breached. This or a similar list could be provided through the internet and subjected to a Talmudic process of constant refinement and revision by scholars and non-scholars alike. Crucially, such a living list is not a checklist nor do we suggest the crafting of any “definitive list” by the EU. Instead it is meant as a tool for self-reflection and as a way of assessing change over time. Box 1 is an abstract of the guiding headline principles on our list.

**Box 1. Five citizen-centred “Rule of Law” principles**

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

Principle 2: Citizens benefit from legal certainty (*breach example: citizens are not warned that a law will apply to them*). Political, judicial and administrative decisions are regularised and are not subject to the whims of individuals, nor the influence of corruption. In the words of Bingham: legislation and rules should be adopted by the bodies that are constitutionally competent to do so and must be accessible, clear, intelligible and predictable, as well as respectful of the hierarchy of norms recognised by

the Constitution and/or precedent. This means that when citizens commit to a course of action, they should be able to know in advance the possible consequences of such an action in legal terms. Legal certainty implies that citizens know what they are up against – the rules by which they are bound should be ascertainable by reference to identifiable sources that are publically available. Legal certainty in this sense contributes not only to a just society, but also to an economic climate conducive to enterprise and innovation.

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

Principle 4: All citizens are granted accessible and effective justice (*breach example: citizens are not able to access the courts*). All citizens have access to dispute-solving mechanisms, regardless of their financial means, and justice is delivered and enforced effectively in the eyes of the population. The right to a fair trial is shared by all actors in society –whether criminals, consumers, companies or public authorities. In all cases, justice should be impartial to all sides.

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

Clearly, these definitions may be subject to numerous qualifiers. It is a hard call to agree on what separates the necessary discretion exercised by political and administrative actors, from arbitrariness in addressing disagreement and conflict within society. The

point of stating principles regarding ends is not to provide a traditional checklist, but to reflect on how all of these stated goals are interrelated. For instance, unequal treatment under the law may be made possible by the threat of physical violence to petitioners who protest unlawful decisions. For all citizens to have access to dispute-resolution mechanisms, and for those mechanisms to deliver regularised decisions, all citizens require a recognition of their equal human rights. Thus, these principles should be viewed as a whole and interrelated set of desirable states-of-affairs from the viewpoint of individual citizens, rather than a set of discrete imperatives.

iii) Monitoring: Leveraging “Rule of Law” “institutional monitors” in Europe, as well as civil society monitors.

However, who can or should monitor such a “living list”, or more generally, basic “Rule of Law” principles in Europe? Of course, there are legal bases and procedures for basic monitoring within the EU Commission, including that linked to Article 7 as a ground for suspending membership rights (eg waiving right to vote for the member states incriminated). However, the latter are often inappropriate for the task at hand and constitute a kind of “nuclear option” which member states would be very reluctant to use. And political conditionality linked to economic intervention on the part of the IMF-EU in the context of the partial bail-outs can be counterproductive.

We suggest that the best way to promote the “Rule of Law” consistently *across Europe*, rather than to target accession countries exclusively, would be to leverage existing pan-European “institutional monitors” of the “Rule of Law” in Europe, whose memberships usually encompass both EU and non-EU member states. Setting aside turf battles, the Commission could publicise their work on its website, signalling that it considers their appraisal as providing an intra- and extra-EU benchmark for accession- assessment purposes.

One goal would be to build “national maps” of the system of grievances and redress against denials of “Rule of Law” available to citizens in individual member states.

Existing institutions which could be mobilised in such an exercise could include:

## *Rethinking Europe's "Rule of Law" and Enlargement Agenda*

- The Council of Europe provides a monitoring mechanism for the implementation of the European human rights convention, which has become part of the EU system through the Lisbon Treaty;<sup>69</sup>
- The Vienna-based EU Agency for Fundamental Rights created to monitor human rights breaches in the EU, whose membership is open to candidate countries;
- The Venice Commission (or European Commission for Democracy through Law), the Council of Europe's advisory body (or think tank) on constitutional matters, also with a recently open membership;
- Last, but not least, many national bodies, aside from courts are also charged with promoting and monitoring legal rights and principles vis-à-vis the public administration. These include: ombudsmen, national human rights institutions, audit institutions, bodies designated under the EU equality directives and data protection authorities. In particular, the network of national EU ombudsmen (or their national functional equivalents, such as in Germany), which was recently institutionalised by the EU ombudsman, as well as candidate countries' ombudsmen, when applicable, are able to play a crucial role as institutional monitors.

In addition, the EU could also envisage to create a new body, akin to a Copenhagen Commission which would be charged simply to monitor the Copenhagen political criteria, but this time post-enlargement.

We would also like to stress the importance of non-State "Rule of Law" monitoring organisations in this context; in particular, the importance of citizen-based monitoring, as is now commonplace in election monitoring and citizen-watchdogs tracking human rights abuse. Such citizen-based maps are made possible through new information technology, and contribute to the kind of societal ownership which we have advocated throughout this paper. The Lisbon Treaty has formalised the EU's commitment to

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<sup>69</sup> In addition, the Commission should provide assistance enabling the Courts to directly apply the convention, something of which domestic Courts are not always aware.

“participation”, “dialogues” of all kinds and “engagement” with civil society. Even if the drafters of these texts only paid lip-service to such a commitment, the Commission is bound by the nature of the treaty to build this kind of dialogue. But why appeal to legal commitment? Such a pan-European turn would simply be in the *spirit* of the “Rule of Law”, and needs to be supported financially, politically and symbolically.

## **2. *Fine-tuning assessments and assistance in tandem***

Such a *pan-European* backdrop should make it easier to amend (not replace) the current yearly exercise of assessment through EU Commission reporting, as well as the kind of assistance provided by EU related agents. Our second set of recommendations relates directly to the enlargement process. We suggest that, for each relevant candidate country, the Commission report and act on the basis of the following five steps:

### **Step1: Assessing “ends” in the breach, identifying zones of non-law and curbing violations**

As discussed above, it is often easier to assess the “Rule of Law” in the breach. What one observes as a citizen of a “country in transition” are *zones of non-law*, or at a minimum, a myriad of impediments to or denial of the “Rule of Law”. Consider the various ways in which the non-“Rule of Law” may prevail in a given country: laws are outdated, often unpublished and if they are, usually ill-understood by the population at large. The judiciary is riddled with corruption and unused to writing out decisions, which means that their legal reasoning may not be checked and lacks transparency. Government Ministers interfere in judicial decisions that involve their own business dealings, and bend the outcomes of procurement decisions and government contracts to benefit a select group of influential businesspeople. Parliamentarians pay significant amounts to party bosses and campaign costs for their seats – and expect to receive their investment back through kickbacks during their time in office. Meanwhile, a largely illiterate and overstretched police force is often in league with criminal gangs. Most of the population sees the government as an obstacle, and feels little social opprobrium when violating laws, such as bribing civil servants or resorting to vigilante justice when the predatory police seem more hindrance than help.



An ends-based approach will start by trying to ascertain which are the core problems faced by this society. For instance, a core problem might be the lack of legal certainty faced by the economic actors (foreign or domestic) and thus a lack of economic growth. If the cause of the problem lies with the fact that the business community may be more constrained by organised criminals who “tax” any business that becomes moderately successful, than by gaps in commercial law, then the EU cannot assume that the answer lies in such commercial laws.<sup>70</sup> If the core problem is a lack of equal opportunity to the poor, the answer may not be “equal access to justice”, as dispute resolution may require too much time for poor day-labourers who cannot spare the time off work. They may feel better served by reducing corruption in the delivery of government services.

Generally speaking, it is the task of domestic actors, from governments to NGOs, to ascertain the outright violations of, or broad-based deviations from, the “Rule of Law” in order to guide their action. The EU’s assessments must take their cues from the ways in which this is done or not done. Determining core problems may be seen as a major part of the democratic game in given countries, and at its best the EU may simply be an observer to that process.

Of course, there are realms and ways in which the EU may want to intervene more directly, including focussing on a specific problem or set of problems to which it chooses to give priority. This is in effect what has been done in a number of Progress Reports to date as noted at the outset of this paper. In terms of sustainability, the more a core problem has been highlighted by local constituencies, the greater the chance for addressing it in a lasting manner.<sup>71</sup> When the EU embarked on first-generation reforms

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<sup>70</sup> For instance, in an Indonesian survey of business attractiveness, businessmen placed the greatest importance on the factor of “legal certainty” within the variable set that itself had received top priority, “Regulation and Government Services”. However, when the former’s weighting was broken down, the preponderance of responses dealt with law enforcement and corruption issues. While respondents touched on the courts, particularly in regard to corruption, they were hardly focussed on commercial legal dispute resolution. Crucially, security was more important to foreign than local businesses, and larger businesses reported more security fears than smaller ones. See: (2003), *Regional Investment Attractiveness, A Survey of Business Perception*, Indonesia, pp. 30, 67-69, 74-75.

<sup>71</sup> The World Bank Participation Working Group, and Crosby B.L. (2000), “Participation Revisited: A Managerial Perspective”, USAID Implementing Policy Change Project, Monograph #6, p. 8, elucidates this benefit of participation, as well as other implementation benefits. Although there remains little empirical work, the scant quantitative research available suggests that participation in identifying problems yields greater project success. The field of participation in executing projects is more diverse in its findings, as participation slows programmes and may divert focus as well—this paper makes no claims

and started with pre-ordained institutional reforms, it often discovered that it needed to “create” demand, to convince individuals within a country that they needed new bankruptcy laws, a judicial career system, or some other reform.<sup>72</sup> Reforms that are focussed solely on the desires of outside reformers, or solutions looking for a problem, are unlikely to find a fertile environment or local champions. When it comes to financial aid and “Rule of Law” promotion programmes, starting with a jointly determined end in a stakeholder-focussed, problem identification process, ameliorates this problem. By choosing to support the tackling of a problem that is actually seen as a problem by the local community, the EU will be able to rely on a constituency for reform from the outset.<sup>73</sup>

### **Step 2: Disaggregating the problem: Four realms**

As the ample literature on institutions makes clear, starting with Douglas North, institutions develop their own normative standards and their agents are often pressured into conforming with such, regardless of the broader legal environment. We may think of institutions as closed worlds and look for the conditions that will enable the law to penetrate such closed worlds. The analyst needs to find these openings through careful research on particular institutions, analyse the incentive structures that shape conduct, and identify the entry points to reframe incentives. In short, we need to go back to contexts and refine institutional diagnostic tool kits.

On the other hand, as institutional failings tend to reflect larger political and cultural issues, clearly these may not be addressed only through institution-focussed reform. Let us propose that a problem identified within a country is a lack of equality under the law as experienced by specific groups (women, Roma, minorities, the poor). That, for instance, the rights of poor individuals are frequently violated by the wealthy and

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on behalf of participation within programme implementation. Cernea, M. (1992), “The Building Blocks of Participation: Testing a Social Methodology”, in *Participatory Development and the World Bank: Potential Directions for Change*, Bhatnagar B. and Williams A.C. (eds.), *World Bank Discussion Papers*, No. 183, which analyses twenty-five World Bank projects.

<sup>72</sup> For instance, USAID devotes a section of its Indefinite Quarterly Contracts (IQCs) for “Rule of Law” reform to “constituency building”, a crucial area of work in any reform effort, and one we address in our stakeholder analysis. This work becomes simpler if the problem outsiders are working on has at least some natural constituency within the country.

<sup>73</sup> Participatory approaches to implementation, which are subject to a great deal of empirical and theoretical debate. For a good overview of this discussion, see Crosby (2000), op. cit.

powerful. However, the poor are reluctant to use the courts, as they assume they will not be treated equally. Politicians and rich businessmen consider themselves above the law, and can evade punishment by paying bribes or calling on well-placed contacts. Business contracts with these well-connected individuals are shaky; if they wish to evade their contractual responsibility, they can simply break the contract. Thus, most business flows to a few well-connected companies and individuals, skewing the market and reducing competition. Development is constrained, and wealth is unevenly distributed. Citizens regard the justice system with widespread disdain and cynicism, and believe that they have little legitimate recourse for their grievances.

To be sure, the problem of lack of equality before the law has legal and institutional components. Legal change may be required, such as laws that ensure equal treatment for the maligned or minority groups. Institutional change may also be necessary, within and beyond the courts. If bribery and corruption are reduced in the courts but not in the police, criminals and politicians will simply find new arenas for propelling themselves above the law.

However, beyond institutional and legal reforms, equality before the law is about politics: politicians and connected, rich businessmen benefit from their above-the-law status, and seek to protect it. They may even use physical threat to maintain their position, as with the connections that Russian oligarchs forged with the Russian mafia. Finally, there is often a cultural element: there may be cultural patterns of deference based on gender, hierarchy, caste, or class that are hard to break. A largely female judiciary, for instance, might be seen as a low-status job, making it more difficult for judges to stand firm in the face of strong businessmen or high-status politicians – a problem that has both institutional and cultural components.<sup>74</sup>

In short, the second step of ends-based approaches is to map the problem, so that connections can be made between areas in need of reform, and which reforms can be chosen that have the greatest spill-over effect throughout society. This stage is not yet

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<sup>74</sup> In many Eastern European judiciaries, the high percentage of female judges is not a reflection of women's liberation movements carrying on into the post-Communist era, but rather reflects the low status of jobs in the civil service judiciary. The presence of a preponderance of women both creates this low status and perpetuates it.

about where to target reform efforts—there may be many avenues by which to affect the problem, and those domestic actors committed to change may explore all of them. When it comes to “Rule of Law” promotion, only a few might be appropriate for the EU.

At this stage, there is a need to evaluate not only institutions, but also the status of the “Rule of Law” within society at large. Through background readings, stakeholder interviews, meetings and discussions with local political scientists, and conducting sociological evaluations attuned to culture and power relationships, a trained sociologist should be able to collect information on the various roots of an identified problem. This work may be best conducted in tandem with Step 1. problem identification. Therefore, how do we go about addressing the *principle* of equality? As in principle 3, “equality is a big word most often uttered in vain. Yet it may be the last bastion of resistance to fall in transition countries.” It can be disaggregated by issue areas –such as equality before the law for small businesses owned especially, but not only, by minority groups. A finalised mapping for such a lack of equality before the law may look something like this:

<b>Problem: Lack of equality before law is hurting small business development especially from minority groups</b>		
<b>Institutional &amp; Legal Components</b>	<b>Political Components</b>	<b>Socio-cultural Components</b>
Law: not drafted or implemented. Courts and Police: corruption	Executive, Legislature and wealthier business community Fuel corruption	Paying fees for speeding processes of government so widespread that not considered corruption
Laws: not enforced against intimidation Courts: fear of physical threat Police: Lack of bailiff protection	Oligarchs with close ties to government also held close ties to mafia who intimidate judges	Female judiciary is low status, easily intimidated, judiciary isn’t respected institution
Courts: unable to prosecute government officials and	President’s children have preferential access to	Culture of nepotism and family self-help. People

friends for corruption Laws: inadequate	government contracts	complain but happy when obtain a nepotistic connection.
Courts: Courts too far away for easy access by rural areas, contract enforcement low Police: Few police in rural areas, property theft high	President overly favours home region proportional representation system means legislature does not represent rural regions directly	Rural inhabitants intimidated by city itself and by written procedures of courts. Police in rural areas have social/patronage ties with higher classes of those regions
Laws: losing plaintiff to pay court fees discourages poor Courts: fees and cost in lost time too great for poor	Wealthy/business men lobby for existing court fee structure	Poor are unorganised, few groups represent their interests
Laws: No laws on anti-discrimination Courts: minority groups not hired Police: Police drawn from groups especially inimical to minority population	Politicians attack minority group to win popular appeal or appear "tough on crime"	Minority groups subject to widespread private and public discrimination

**Step 3: Determine new indicators, evaluation targets and measurement goals**

Significantly, while we have advocated a citizen-centric approach to assessment, this does not in any way mean that assessment should solely or even mostly be based on perceptions. There are many other ways to "get at" the bottom-up perspective both in an objective and subjective manner. Indeed, citizens' experiences are not necessarily correlated with other measures of institutional performance *which affect them*. Citizens may have different understandings of what the "Rule of Law" is, and may be disappointed by outcomes reached and what they perceive as their fairness. Thus, how

citizens experience the law ought to be measured separately from other measurements of whether the “Rule of Law” is respected, and how this respect in turn affects citizens.<sup>75</sup>

Indicators may be used directly by the Commission in its evaluation reports, or they may serve as an input in internal self-reflective exercises.

Indicators do matter since a key component of an ends-based approach is to be able to evaluate progress over time and find ways to “measure” such progress. Such “indicators”, “performance measurements” and “evaluation targets” may be broad and qualitative, especially in the context of Commission Progress Reports. They may be more specific and quantitative when they constitute the backdrop of specific “Rule of Law” promotion programmes.<sup>76</sup> They also may be about extracting meaning from anecdotal evidence, which is important to the public perception of “Rule of Law” denial. Ultimately, monitoring needs to take into account the social and cultural integration of “Rule of Law” norms.

This is relevant to both assessment and assistance of course. In the world of assessment, measures are often connected to “what can be measured that year”, a highly circular type of approach. Similarly, in the world of specific “Rule of Law” promotion programmes, measures are usually found before deciding which actions to support and how. Evaluations will be prone to circularity and based on targets that measure narrow project outcomes, rather than actual goals; means rather than ends.

Thus, for instance, an assessment of progress in the realm of policing will often count success by the number of police trained in the country as a whole that year, or trained by a specific programme if we are in the business of assistance. However, shouldn’t success be measured by the amount of crime reduced, or the number of human rights complaints filed? Anti-corruption programmes might be evaluated by the measure of class attendance, not the perceptions of corruption or attempts at corruption in the local

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<sup>75</sup> On the attitudes and perceptions of citizens, see, inter alia, Galligan and Kurkchyan (eds.) (2003), *Law and Informal Practice: The Post-Communist Experience*, Oxford.

<sup>76</sup> To be sure, quantification has been often criticised as providing the illusion of precision and false objectivity, while composite indicators can cumulate errors and uncertainties (see Arndt, Christiane and Oman, Charles (2006), *The Uses and Abuses of Governance Indicators*, OECD Development Studies, OECD, Paris). In the end, such exercises are about judgement.

or foreign business communities. If they must determine what to evaluate before its measure is devised, reformers will be forced to focus on the problem, not the programme.<sup>77</sup>

The same general conclusion is true for more general assessment programmes. EU reports have been criticised for such approaches as counting *vacancies* in courts rather than the number and types of judges actually needed, or the quantity of backlogged cases without assessing whether and to what extent cases were brought in the first place.

Yet, tourists worried about safety will not ask about the number of police academy graduates in a potential vacation spot, but rather about the country's crime statistics. Second-generation performance approaches should measure outcomes at such a societal level. If the goal is equality before the law, we may wish to measure the changing rates by which people in disadvantaged groups (impoverished, minority, female, low status) initiate court cases, as well as the percentage of times they win cases—not how many judges we have sensitised, or how many alternative dispute resolution programmes have been created.

Finding the proper metrics is always a difficult undertaking. Because most assessments and virtually all programmes inevitably end up measuring or working towards targets (the equivalent of teaching to the test), it is essential to measure the right things, not the easy things.<sup>78</sup> There are of course a number of prior experiences to draw from, including the World Bank's in-house "Rule of Law" appraisals. Measurement devices might include:

- Attitudinal data: Includes perception surveys of end-users (the courts, police, administration) targeting real experience. As Aleksandra Rabrenovic notes, such surveys may be more reliable than ordinary broad public perception surveys.

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<sup>77</sup> Some useful ideas for evaluation of such projects can be found in Robert Picciotto's thinking on policy coherence development evaluations, drawn from decades of service to the World Bank's Office of Evaluations Department. See, for instance, Picciotto, Robert (2004), "Background Paper: Policy Coherence and Development Evaluation: Concepts, Issues and Possible Approaches," OECD Workshop: Policy Coherence for Development, Paris, pp. 21-22.

<sup>78</sup> Performance targets always, inevitably, affect programme design and output. The difference with ends-based performance targets is that they *should* affect programme design, because they will help programmes focus on ends.

The perception of justice and public administration systems by the general public may oftentimes be distorted, as public perception is less subject to the routine personal experience of users, than to the influence of scandals, revelations of dysfunctions, and events of the day. Surveys targeting instances of corruption that people have experienced within the police force, may provide more useful insight than a survey of the simple perception of the level of corruption within a country's police force. Surveys may also target the perceptions of potential domestic and foreign investors of a country's legal and business environment and investment risk; or surveys may ask whether various categories of citizens feel that they benefit from safe mobility, including within areas in which they are not familiar.

- Measure of the outcome through proxies: For instance, if the goal is to attract foreign capital through improvements in the "Rule of Law", one indirect measurement might be changes in the levels of foreign capital inflow; another possible measure might be to use estimates of the "grey economy": is there general confidence in "doing business with strangers"? Economic and societal-level metrics: for example, the tax yield relative to tax base, educational attainment assessments (compared to exam results); this includes so called "objective data", including administrative statistics.
- Analysis of case information: for example, the analysis of the causes of administrative court cases, ombudsmen workload and types of cases, freedom of information Commissioners, CSOs. New data collection mechanisms through local institutions could be developed; analysis of laws and their implementation concerning administrative procedures, as well as the duty to state reasons and participatory rights for administrative acts.
- Procedural analysis: from a user perspective, for example, use of "doing business indicators" (WEF, WB etc.) as well as corruption indicators.
- Assessment of "professionalism": political, administrative and legal professionals' attitudes, values and educational levels, and the reality of the



institutional environment (e.g. extent of patronage); as seen through the perceptions of users, clients and the citizenry as a whole; while investigating in particular, whether civil servants are protected from the pressure that politicians may put on their decisions, jeopardising the administration's impartiality.

Because the end-goals should be assessed based on the experience of the end-user, assessment tools should include methods drawn from the social sciences, including sociology, anthropology and political science:

- *Focus interviews*: walking through the actual impediments encountered by various actors, including the use of stakeholder interviews
- *Deliberative democracy*: stakeholder forums
- *Expert assessments*: using structured interview techniques including those at the sectorial level
- *Polling and attitude/value surveys*: Euro-barometer
- *Case analysis*: for example, administrative court cases

Societal-level measurements are difficult, because such metrics are inevitably affected by numerous variables. Sustainability requires repeat assessment and ways of evaluating incremental change. However, two key principles to choosing appropriate society level performance targets for ends-based monitoring, as well as programmes might be:

1. Choose indicators broadly, but humbly. If the goal is law and order, the measurements need to include crime rates, not police academy graduates. However, many factors affect crime rates, including demographic bubbles, economic downturns, etc. The measurement, therefore, might best be the change from a linearly projected rate, rather than a decline in the overall crime rate. Even after these steps, impacts of domestic reform or foreign support

should be expected to be minimal—any policy or programme with a big and immediate effect would be suspect.

2. Be aware of time lags and unexpected side effects. Counterintuitive side effects should be expected and built into assessment and monitoring. For instance, in a good anti-corruption strategy, perceptions of corruption tend to rise before they fall, as a result of societal awareness campaigns. When police begin to do their jobs better, crime rates often rise, due to more people bothering to report crimes.<sup>79</sup> Well-conceived assessment needs to address such lags.

### **Box 2. Using indicators to assess “equal access”**

A mix of appropriate indicators could also be used to periodically conduct a more comprehensive assessment of one of the principles laid out in the living list. For example, when assessing whether *effective and accessible justice is granted to all citizens* (question number 4, and to some extent number 5 in the living list), the following indicators could be used:

- *Accessibility*, that could be measured through court-user satisfaction (percentage of interviewed litigants satisfied with the accessibility of the courts in terms of costs, distance, navigability, and with the quality of services provided, disaggregated according to minority, gender, age, income); access to legal aid (percentage of litigants having obtained legal aid); access to information (percentage of interviewed lawyers and litigants satisfied with the accessibility of case related information from the court).
- *Effectiveness*, assessed again through stakeholder satisfaction (percentage of interviewed litigants and practicing lawyers satisfied with the quality of services provided, disaggregated according to minority, gender, age); quality of judgments (percentage of judgments assessed as satisfactory based on case-file analysis); level of judicial competence (percentage of interviewed lawyers satisfied with the level of

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<sup>79</sup> Discussion with police sergeants and academics, “Culture of Lawfulness Training Workshop,” National Strategy Information Center, (April 2005).

professional competence of judges and court staff).

- *Efficiency*, court clearance rates (number of outgoing cases as a percentage of the number of incoming cases); time for disposition and enforcement (percentage of cases disposed or otherwise resolved and enforced within established time frames); age of pending caseload (age of the active cases pending before the court, measured as the number of days from filing until the time of measurement).

- *Fairness*, satisfaction among minorities and marginalised groups with court decisions, fairness and impartiality of judgments (extent to which minority litigants obtain outcomes compared to outcomes obtained by non-minority litigants, based on case-file analysis); enforcement against the State (percentage of decisions against the State that are enforced within a reasonable time) etc.<sup>80</sup>

#### **Step 4: Identify nodes of opposition and support**

Increased commitment to the "Rule of Law" in a given country will alter the rules of the political game and will inevitably create winners and losers within the government and administration.<sup>81</sup> Greater judicial independence reduces the power of the Executive, anti-corruption drives drive out the corrupt, etc. Even "technical" reforms, such as making the courts more efficient by transferring administrative duties from the judges to clerical staff, may create losers, such as the judges whose powers over case assignment and speed have created opportunities to solicit bribes. Even wholly non-political reforms, such as a new teaching arrangement in a law faculty, will meet bureaucratic resistance from people who simply don't want to change their ways, and who think they can outlast any external reformer. In countries that may be partially "captured" by corrupt politicians and criminal groups, the very goal of improving the "Rule of Law" will encounter resistance. Such resistance can be especially difficult to break. While captured politicians may still weigh their self-interest against the political costs of appearing to be against reform, the criminal elements who control these

<sup>80</sup> We thank Aleksandra Rabrenovic for her input on this schema.

<sup>81</sup> European Stability Initiative (2000) "Reshaping International Priorities in Bosnia and Herzegovina - Part Two: International Power in Bosnia," European Stability Initiative, Berlin

politicians are not interested in constituencies or the public good, and are unaffected by the accession process' socialisation effects, and the carrots and sticks of diplomacy that may work on politicians.

Overcoming such resistance is first and foremost the job of agents for change in the countries concerned. The challenge for the EU and other external actors is to identify and empower such agents for change, rather than define their task for them. This is, of course, not a new insight. However, if an ends-based approach to reform implies that ends must be shared, and means devised locally first, the point of external assessment must not be to adjudicate between means directly. Moreover, “reformers” motives are often mixed, and the more the mixture is understood, the greater the ability to affect change. A Ministry of Justice may support an anti-corruption strategy so long as it is focussed on corruption in the courts, rather than in the Ministry. A Supreme Court justice campaigning for judicial independence may be trying to gain autonomy and political power for her or his own use. Even reformers acting out of “pure” and non-self-interested motives may have blind spots of which outside actors must be aware. A progressive law school Dean, for instance, may be interested in speaking opportunities, international junkets, and the praise that comes with being singled out as a reformer, but may lack a great vision of her or his own. In fact, those who are the most broad ranging reformers are often outsiders in their own countries—domestic resistance may give them the psychological need to seek approval and support from outsiders, or they may become more estranged from their country as they grow to be seen as overly identified with outsiders. Meanwhile, individuals who appear to be reformers may suddenly turn against their external supporters and revert to un-progressive tendencies once they have gained some power—a reversal so embarrassing that outsiders are often slow to admit it.<sup>82</sup>

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<sup>82</sup> President Askar Akayev of Kyrgyzstan, for example, was a darling of international financial institutions and was lauded by U.S. diplomats as the “Thomas Jefferson of Central Asia” for years—but slowly accrued greater powers for himself and his family until he became just another autocrat, which led to his recent ouster by reformist forces. See Spence, Matthew (March 30, 2005), “Kyrgyzstan’s Lesson to the West: Reform Follows Function,” *The New Republic Online*, <<http://www.tnr.com/doc.mhtml?i=w050328&s=spence033005>>/. In America, the infamous Boss Tweed originally became known for creating peace and order amidst New York’s civil war draft riots, creating a workable and fair system for draft exemptions, and gaining home rule for New York City.

Such “stakeholder analysis” can inform the monitoring process linked to accession, simply by mapping out likely *and* actual nodes of support and opposition to particular reform activities focussed on a handful of the most prominent “Rule of Law” issues within a country. These maps must extend beyond “Rule of Law” institutions to other areas of political and cultural power within a country, such as the religious and civic institutions. They must also take into account the intensity of support—someone who has staked his political career on being seen as “clean”, may be more likely to expend personal energy and political capital on an anti-corruption reform effort, than a passively supportive but otherwise unengaged group of business leaders. Finally, such stakeholder analysis must gauge supporters’ and detractors’ levels of organisation, power and influence.<sup>83</sup>

Such analysis should also inform and affect the design of “Rule of Law” programmes. Many current such programmes undertake a cursory stakeholder analysis to gain “participation’. However, doing so after the programme has been designed is not the point, as this should not be about trying merely, or even primarily, to build support. Instead, the aim is to identify the best nodes through which to achieve certain ends. If for instance, a nascent anti-corruption reform programme finds that the judiciary is likely to be a big source of opposition, the project might choose to postpone reforming the judiciary, where it will simply meet stonewalling or attempts to capture and then undermine the programme. Instead, a campaign would do well to start with likely sources of support—perhaps supporting anti-corruption groups that exist among parents, local businesses, or the few politicians who want to make their names as “clean-hands” reformers. The programme may eventually move to incorporate institutional reform within the judiciary, but only after cultural and political momentum have been harnessed to put pressure on judges domestically.

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Tweed was considered a reformer in his early days and was regularly invited to speak to progressive clubs—before his Tammany ring was eventually held responsible for graft estimated at between one and four billion in today’s dollars. See Ackerman, Kenneth D. (2005), *Boss Tweed: The Rise and Fall of the Corrupt Pol Who Conceived the Soul of Modern New York*, Carroll & Graf, New York.

<sup>83</sup> See for instance Crosby’s determinants of influence (information, economic resources, status, legitimacy/authority, coercion). Crosby, Benjamin L. (1992), “Management and the Environment for Implementation of Policy Change, Part One”, USAID: Technical Notes #4, pp. 9-10.

It is also important to cast the net wide in mapping sources of support and opposition. Ends-based reform – and the external programmes of incentives to support them – may target civic or religious institutions, schools, or business groups. Considering sources of support from: the media, the various political wings, civil society, small local business, large foreign business, educational communities, and other such constituencies is essential to learning about potential nodes of change. In Sicily’s fight against the mafia, an initial, institution-based strategy of courageous police round-ups and high-profile mafia trials began to falter when the mafia started killing the generals and public figures leading the charge. When the people of Palermo took to the streets, however, the mafia could not fight the rising tide altogether. A combination of: housewife protests using bed sheets outside their windows; educational programmes teaching children about the evils of the mafia; a strong mayor who organised children and civic groups to retake the streets and monuments; and business reclamation of mafia-owned land and enterprises after mafia arrests; all combined to put organised crime on the defensive and reduced the killings and corruption it had caused for centuries.<sup>84</sup> To be sure, if one is concerned about the opportunity costs in casting the net too wide, Crosby’s rule of thumb is useful: “only those groups or actors with real and mobilisable resources that can be applied for or against the [policy reform] should be included.”<sup>85</sup>

### **Step 5: Assessing actual reform and designing assistance measures and programmes**

The first five steps outlined above ultimately ought to form the backdrop (albeit not, of course, in this way explicitly) for any actor seeking to assess and affect change in the country in question. As we have discussed, there are many nodes of potential change, and many areas where change must occur to solve the various components of the societal issue needing to be addressed. Domestic policy is usually, one way or another, relevant to all these areas –whether or not each area is the subject of explicit reform.

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<sup>84</sup> Stille, Alexander (1996), *Excellent Cadavers: The Mafia and the Death of the First Italian Republic*, Vintage Press, New York. Lo Dato, Enzo (2000), “Palermo’s ‘Cultural Revolution’ and the Renewal Projects of the City Administration,” *Trends in Organized Crime* 5, no. 3, pp. 10-34.

<sup>85</sup> Crosby, Benjamin L. (1991), “Stakeholder Analysis: A Vital Tool for Strategic Managers,” USAID Technical Note #2, p. 2.

At this stage, however, we may consider in a more focussed way the options faced by the EU in the use of its various instruments for assessing change in the country in question, and for assisting in this change through its own actions via "programme design" (the latter can indeed be carried out by other actors). The EU must consider problem analysis, sources of support and opposition, and evaluation benchmarks. From these, it can determine the most likely node or nodes of change where either domestic reform or outside intervention might be most effective. The most likely nodes will be the areas where change could have decisive effect, could cause multiplicative ripple effects into other areas (political, institutional, and cultural), and where the most support and least opposition are lodged. The domestic reformer and the external "programme designer" (in different ways and with different emphases) will then need to ask the following questions:

- Which of these areas need to change for overall end-goal success? Which are primary, and which are secondary?
- Which areas are likely to be affected by changes made in other areas, and which must be addressed directly?

To the extent that outside intervention is possible and desirable:

- Which areas should the EU address, given its skills, expertise, and comparative advantages?
- Which areas can and should be addressed simultaneously by other organisations if success is to be achieved?

An ends-based approach implies that means are contextually determined. Local actors tend to know best. For instance, in trying to create a strong business environment where equality before the law is wanting, some countries may absolutely require prior political reform to break entrenched monopolies or the consolidation of oligarchic power.<sup>86</sup> In

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<sup>86</sup> In Indonesia under Suharto (and in Iraq under Saddam Hussein), the President's children controlled many crucial business sectors and were viewed by businesspeople as key bottlenecks to the emergence of an equal playing field in business. See Colmey, John and David Liebhold (1999), "All in the Family," *Time*, < <http://edition.cnn.com/SPECIALS/1999/indonesian.elections/time.suharto/>>.

other countries in which business is primarily family, clan, or communally-based due to distrust, there may be no oligarchies to break-up. Instead, what may be needed is enhanced contract enforcement through the training and arming of bailiffs, tied to a programme expanding social ties and social networks, (such as the Rotary Club) in order to create greater trust among businessmen from different backgrounds.<sup>87</sup> The political and cultural nature of the “Rule of Law” means that the most salient methods of change in one country may not work in another. However, there are a few guidelines that may assist in programme design.

When the power structure is the key to reform, methods of change may take multiple forms. Reforming power structures is about ensuring that real power exists within the different parts of society in order to check other parts – thus, reforms should focus on creating “horizontal” and “vertical” checks and balances on power centres.<sup>88</sup> “Vertical checks” can best be built through using bottom-up strategies which support the civil society groups that may hold power to account. For instance, outsiders may train investigative journalists to expose and delegitimise powerful criminal actors; they may train and fund advocacy groups to fight internally for greater transparency, or for rights (NGOs in Romania have been supported to ensure transparency with regard to corruption). They may even establish a local foundation to fund this sort of civil society, bottom-up effort. Some of the most successful programmes in Eastern Europe did just that, enabling movements such as Mjafte! in Albania.

In sum, the EU’s accession process is a strong method for creating horizontal checks on power. It provides diplomatic carrots and sticks that are powerful tools in creating an incentive structure that pushes powerful actors to see greater self-interest in abiding by

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<sup>87</sup> Rotary Clubs exist around the world and their popularity is a testament to their design—letting in only a few businesspeople from each type of profession to socialise in a non-business setting. It is easy to forget, when focussing on legal institutions to enhance a market economy, that most people stay as far away from these institutions as possible. The last thing most people want, in almost any country, is to have a run-in with the police, to waste time and money in court, or to be forced to turn to lawyers to resolve a dispute.

<sup>88</sup> O’Donnell, Guillermo (1999), “Horizontal Accountability in New Democracies,” in Andreas Schedler, Larry Diamond, and Marc Plattner (eds.), *The Self-Restraining State*, Lynne Rienner, Boulder, CO, pp. 29-62.



the "Rule of Law" than violating it.<sup>89</sup> These diplomatic actions pressing for horizontal accountability – such as a strong judiciary—may be usefully combined with technical assistance to aid institutional change undertaken, not as an end in itself, but with an eye towards checking the powers of the Executive, Parliament, or criminal gangs that have bought judges. Diplomacy, in the form of regular progress reports and other means of EU attention to the State, may then be used to press for vertical accountability – such as demanding freedom of the press – in combination with technical assistance to help the media use its platform responsibly.

When the issue is primarily cultural, change must be sought in the cultural realm as well. Trying to affect culture through laws, as Ataturk did for nascent Turkey, has obvious limits in the 21<sup>st</sup> century. At best, some laws might be necessary but not sufficient – such as laws passed to protect minority groups. For instance, when the EU pressed Romania to adopt a law legalising homosexuality, the law helped curb the government's ability to use homosexuality accusations against political opponents, but it did not address the cultural dimension: in opinion polls in 2005, 38% of Romanians still claimed that "homosexuals are hardly better than criminals."<sup>90</sup> Thus, the socio-cultural realm will most likely be the subject of long term change resulting from developments in the sphere of ideas, knowledge and framing – be it in the realms of education or the media, as well as the prevailing ideas conveyed by politicians.

It is important to note that ends-based approaches may well decide to target institutions as critical components towards achieving overarching ends. The key difference is that such institutional change is targeted at affecting socio-political goals, not at direct emulation of external counterparts. Such institutional reform takes place within a broader palette, recognising that institutional reform is usually a process of evolution,

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<sup>89</sup> See strategic choice theorists, most notably O'Donnell, Schmitter, and Whitehead in their four-volume work on democratic transitions *Transitions from Authoritarian Rule*. See also Diamond, Larry (1994), "Introduction: Political Culture and Democracy," in Larry Diamond, (ed.), *Political Culture and Democracy in Developing Countries*, Lynne Rienner, Boulder, CO, p. 4; and Geddes, Barbara (1996), "Initiation of New Democratic Institutions in Eastern Europe and Latin America," in Arendt Lijphart and Carlos H. Waisman (eds.), *Institutional Design in New Democracies: Eastern Europe and Latin America*, Westview Press, Boulder, CO, p.6.

<sup>90</sup> IRSOP Market Research and Consulting (2005), "Romanian and European Values and Beliefs: Are They Different or Not?"

not creation.<sup>91</sup> The internal reformer, supported by outside parties, must work with the bone, sinew, and muscle of his society and transform it bit by bit, not craft anew out of nothing. Even a new institution will be shaped by the power dynamics and political pressures inherent in the environment. Therefore, even when institutional reform is the visible tactic, changing political dynamics and cultural patterns remain the strategic goal.

### **3. *Summing up: Principles for action***

#### i) Sequencing and timing

If our concern is above all about the sustainability of change, it is important to note in closing that an ends-based approach offers a tension here. It needs to sustain the kind of assessment prescribed above *over time*, but at the same time the benchmarks necessary to do so ought not to be devised *in advance*. Anatomical institution-focussed approaches can be designed years in advance, and can be applied along a pre-designed track in which allegedly apolitical, technical projects have already been “sequenced” and budgeted. By moving mechanically through institutional checklists, these approaches overlook the benefits of “multiplicative” initiative, such as empowering an institution that will then promote change. Promoting the creation of ombudsmen, for instance, may be much more effective in the defence of human rights than discrete pressure to implement international conventions. First-generation reforms also obscure the idea that some initiatives may be “subtractive” because of the opportunity-cost in time, resources, and political capital that could have been better deployed. Meanwhile, as multiple studies have found, over-planning is not only unhelpful, it may be detrimental by eliminating the flexibility essential to respond to events as they unfold.

A second-generation approach to assessment must be sensitive to sequencing and the kinds of changes that may be small at first but yield big effects. Also, the assistance that follows needs to take advantage of political cycles and cultural moments, fluctuations and windows of opportunity. Thus, a moment of political scandal over corruption may provide impetus to anti-corruption initiatives, a new government might provide a more

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<sup>91</sup> See Piron, Laure-Helene (2005), “Time to Learn, Time to Act in Africa,” in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad*, Carnegie Endowment for International Peace, Washington, D.C., pp. 286-287.

salient time to launch public administration reform, or the appointment of a particularly well-respected judge may create an opportunity for action in the judiciary. The EU needs to assess such windows of opportunity, both generally in framing its assessment reports, and in the kind of programmes that provide the flexibility to seize these moments with greater resources or manpower. By providing flexible funding and rules for the rapid mobilisation of human resources, the EU can empower its delegations to take advantage of such moments with greater impact and at lower cost.

In monitoring violations of the "Rule of Law" in accession countries, the EU is not a passive observer, but acts through the power of the signals it may send, which in turn may be bolstered through action on the ground. Identifying the widest array of obstacles pertaining to a given problem, as well as the agents for change and moments of opportunity, are key to long term sustainable strategy.

ii) Victims, beneficiaries, reformers and activists: Empowerment at the core

In the end, long term sustainability may only be achieved through empowering local forces and reformers, civil society, the media and also independent regulatory bodies, who each have their own version of the necessary means to achieve shared ends in keeping with the precepts of diversity and autonomy spelled out above. Even as the EU offers membership, it remains an external actor, shaping incentives within complex domestic systems.<sup>92</sup> A great deal of "Rule of Law" reform can be driven by the accession process – but in order to be sustainable, it must eventually affect the local political and popular culture. A robust process requires understanding the local actors, who serve not only as the EU's hands, but as its eyes and ears into their society. Such local actors have deeper knowledge, and longer time horizons than any outsider. Even the classic term in the trade of "stakeholder" does not do justice to this basic fact. Nationals are playing for high stakes that will affect their lives over the long-term of their political, judicial,

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<sup>92</sup> There is a growing literature on the interaction between international actors and domestic reform, most of it centred around democratisation. For an overview, see Pridham, Geoffrey (1991), "International Influences and Democratic Transition: Problems in Theory and Practice in Linkage Politics," in Geoffrey Pridham (ed.), *Encouraging Democracy: The International Context of Regime Transition in Southern Europe*, Leicester University Press, Leicester pp. 1-30. See also, Whitehead, Laurence (2001), "Democracy by Convergence: Southern Europe," in Laurence Whitehead (ed.), *The International Dimensions of Democratization: Europe and the Americas*, expanded edition, Oxford University Press, Oxford.

business, or activist careers. Even the most simple, supposedly technical reform is likely to create winners and losers, and in a classic Olsonian pattern, while the winners from improved “Rule of Law” are often diffuse across society, the losers are few with concentrated losses.<sup>93</sup>

No one denies these realities in the abstract. But does the EU follow through on this shared insight? As discussed in the beginning of this paper, it seems that the EU and a majority of other donors have focussed their assistance up to now on strengthening government capacities. Largely disregarded is the need for the development of a relatively underdeveloped civil society sector and media, which should play an important role in the system of checks and balances of the ruling elites’ power. In order to promote “Rule of Law” values, it would be crucial to support the independent bodies and genuine civil society organisations who are not in any way dependent on the public authorities, and provide them with not only financial, but moral support as well, in the face of the various modes of more or less overt repression. (*e.g.* One of the judges of the High Judicial Council in Serbia, who was supporting the appeals of non-appointed judges in the re-appointment review process, faced significant political pressures which eventually resulted in criminal charges being pressed against him and his subsequent arrest.) The return on EU investment in financing an independent NGO, which traces government procurement expenditure, holding officials accountable for corruption and clientelism, trumps other investments by degrees of magnitude, as recent examples in Romania have demonstrated.

It is also worth stressing that empowering the actors who are for change, requires visible change that involves targeting the top of society, signalling that respect for the “Rule of Law” suffers no special dispensation. Encouraging countries to lift the myriads of political immunities which shield culprits from justice, goes a long way towards persuading the members of society that arbitrariness and the abuse of power will be punished from wherever it emanates.

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<sup>93</sup> Crosby, Benjamin L. (1996), “Organizational Dimensions to the of Policy Change,” USAID, Implementing Policy Change Project, Monograph #2, p. 2.; Lindenberg, Marc M. and Noel Ramirez (1989), *Managing Adjustment in Development Countries*, , International Center for Economic Growth, San Francisco.

Political buy-in of this new "Rule of Law" approach (including the use of new indicators by domestic politicians themselves) could become part of the EU's soft conditionality. This approach has proved to work well for some other donors in the region, such as the World Bank: when faced with resistance from the Serbian government to its new survey-based approach to reforming the justice system, made further assistance conditional on acceptance. Perhaps most importantly, the European Commission must hesitate less in publicly denouncing anti-"Rule of Law" behaviour within candidates States, not only to enhance its own credibility in pursuing sustainable change, but also to encourage, support and truly empower, courageous and dedicated reformers, who need not be isolated in order to signal that they are not co-opted by outsiders.

#### **V. Conclusion and Recommendations: The sustainability test**

This paper suggests a number of ways to address the EU institutions' wish to see greater sustained commitment to the elusive idea of the "Rule of Law" in countries acceding to the Union. Most fundamentally, we believe that Europeans need to reflect on the social purposes served by the "Rule of Law", and the extent to which the EU's conditionality strategy can and should affect this domestic equation.

Ultimately, the "sustainability test" must rest on a combination of effectiveness and legitimacy. It is not an easy proposition to rethink the role and application of a political criterion which has been used for over two decades in enlargement negotiations. However, the EU needs acceding countries to pay greater heed to the "Rule of Law" if they are to develop economically, bolster human rights and democracy, and take part in the widening of peace and prosperity on the continent. At the same time, we strongly believe that continued enlargement, in the right circumstances, is a historical necessity and that a new approach should not serve as cause or pretext for undue delay. On the contrary, rightly implemented, it is likely to facilitate accession.

We have suggested that concerns for sustainability must lead to a rethinking of the way in which "Rule of Law" conditionality is applied within the EU context with the following implications.

## 1. *Strategy*

The current monitoring offered in EC Progress Reports needs to be supplemented by a new ends-based approach based on:

- The EU giving a greater pre-eminence to the “Rule of Law” as a *horizontal* subject in the accession agenda. As one of the values referred to in Article 2 TEU, it is, according to Article 49 TEU, an explicit, not an implicit, legal obligation for candidate countries.
- A recognition of the limits of the current “anatomical method” centred on legal and institutional checklists.
- A broader definition of the ambit of the “Rule of Law”, which encompasses the socio-political and cultural realms, as well as the laws and institutions of justice.
- A realisation that the EU must pay more attention to administration and general administrative law: that the existence of a good law is not enough, one also needs an administration quantitatively and qualitatively good enough, either to implement it, or to control its correct implementation by others.
- A recognition of the contested nature of the “Rule of Law” and its implication among legal theorists, leading ends-based definitions to include *inter alia*: an array of broad formulae to encapsulate the spirit of the “Rule of Law”; a “living list” of universal principles, that follow in the annex; and areas of disagreements and variants.
- The need to use as “actionable consequences” instances of *breach* rather than ends as such, by identifying a series of impediments to the “Rule of Law” or “problems” to be addressed in the countries in question, along with mapping the context relevant to addressing them.
- Making a better link between assessment and assistance.
- In so doing, the adoption by the EU of a focus on the end-users of the law, namely the citizens.

- An introduction of new methods of assessment borrowed from sociology and polling.

## **2. Caveats**

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

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

recognise that lessons regarding progress towards the “Rule of Law” can flow both ways – from non-EU members to EU members.

### **3. *In the short term***

Concretely and rapidly the EU could:

- Publicly identify "Rule of Law" as the priority governance reform goal for its Public Administration Reform/Justice & Home Affairs programmes, not only in terms of choice of subject, but also in terms of content. This would include giving priority to the system of general administrative law.
- Adapt its sectorial reform programmes to support a "Rule of Law" agenda by including the support of local groups or parliamentary political parties, which can hold their own government and administration to account on “Rule of Law” enforcement. Additionally, it can strengthen its support of the professionalising of the judiciary and public administration.
- Adapt the pace of EU *acquis* transposition, and when (and only when) such transposition is counterproductive, insist on legal quality and due process and use sectorial interventions to promote the “Rule of Law” and good law making.
- Support local civil society organisations, whose aim is to hold their public authorities to account on their respect and enforcement of the “Rule of Law”, as well as their practices regarding corruption and clientelism.
- Encourage the setting up of ombudsmen offices in every member state and candidate country, and conduct systematic consultations and comparative analyses on their respective caseloads, achievements and assessments of the citizen’s perspective.
- Reconsider assessment methodologies and capacities and provide training in sociological analysis. This may include undertaking a research programme to design metrics and measurement approaches. For example, in the mid 2000’s, EUROSTAT and OECD co-operated on measuring the grey economy, and the



OECD intends to update the methodology, which the EU might buy into for enlargement purposes.

- Build up a network consisting of South-East Europeans social and political scientists and survey bodies to help develop survey instruments (possibly building upon SIGMA's work on civil service attitudes), and create a system of continuity for reporting (*i.e.* not a one off project only).
- Encourage standing national "Rule of Law" debates – involving politicians (cross party), administrators, business representatives, the media, civil society as well as ombudsmen.
- Set up long term (and eventually two-way) exchange programmes for legal professionals, political, administrative and commercial leaders, social scientists and economists; bringing together a sufficient number of individuals needed to have an impact as a group from within a single country, in order that systemic change could be made possible.<sup>94</sup>
- Assist in the conduct of cross-university seminars on the modernisation of curricula (*e.g.* law drafting, socio-economic understanding of law, institutional economics).
- Conduct further consultations with experts and scholars to explore issues such as: the relationship between the four realms of the "Rule of Law" in specific cases; definitional strategies; checklists of principles; the concrete implementation of "problem-based assessments"; or the generalisability of this paper's conclusion beyond enlargement, especially in the context of the Neighbourhood policy to the east and the south.

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<sup>94</sup> This must be done "en masse" –research has shown that taking single individuals out of context, putting them in a "Rule of Law" context, and then returning them to flawed government structures does little good, as these individuals cannot "buck the system". The only likely success is when individuals within similar professions are separated and trained as a group, then returned to their home country so that the group can enact change within a system.

## ***Last words***

At the end of the day, most people would like to respect the law, most of the time. But what if, in their country, there is no robust “Rule of Law” to be respected, whether because laws are not on their books, their institutions are defective, their politics are corrupt or their social culture has accommodated lawlessness? Only cautiously and humbly may outsiders seek to empower those who wish to change such a state of things within their own environment. And how will such actors for change – as well as their domestic and external supporters – know that “it” is happening? One way is to ask a simple question: has the grammar of societal interaction in such a country changed from the “who” to the “what”?<sup>95</sup> In the former, interactions are determined by *who* one is and is dealing with, *who* is in power and *who* controls outcome, *whom* to bribe and *whom* to fear. In the latter, the questions to ask are: *what* is the issue, *what* are my rights and obligations, *what* are the penalties, and *what* are the relevant laws and institutions? In a society where “what” has displaced “who” as the core referent, the “Rule of Law” is doing well.

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<sup>95</sup> We thank Bohan Vitvitsky for suggesting this distinction.

**ANNEX: A LIVING LIST OF "RULE OF LAW" PRINCIPLES FROM THE  
VIEW POINT OF CITIZENS**

(See explanatory text in IV. 1) ii). By "living" we mean subject to constant evaluation, amendment and enrichment in the light of experience and developments, especially on the part of local actors engaged in monitoring the "Rule of Law" in their countries. Such a list could be posted on the EU website and open to electronic amendments. Various comments have been incorporated into the list below (we note upfront that many of these questions cannot be answered through yes or no.)

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

- a) Are specific laws in place that limit the discretionary power of public officials and the judiciary?
- b) Is the process for enacting law transparent, accountable and democratic?
- c) Is the exercise of power authorised by law?
- d) To what extent is the law applied and enforced against government officials?
- e) To what extent does the government operate without using the law?

- f) To what extent does the government use incidental measures (including Executive orders that bypass Parliaments), instead of general rules?
- g) Are there exception clauses in the law of the State, allowing for special measures, and how frequently are they used?
- h) Does the *nulla poena sine lege* (“no penalty without a law”) system apply?
- i) Is there a system for the publicity of government information, including FOIA or sunshine laws, assets disclosure for elected officials, and a funded, independent body that can enforce such rules?
- j) Is the judiciary independent of Executive and parliamentary control, in law, in practice, and in budgetary matters?
- k) Is the department of public prosecution to some degree autonomous from the State apparatus? Does it act on the basis of the law and not out of political expediency?
- l) Are individual judges subject to political influence or manipulation?
- m) Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis? Is the judiciary perceived to be impartial?
- n) Is the use of State power towards citizens proportional to the needs of achieving the State’s legitimate aims?
- o) Do citizens have the right to claim damages suffered due to the illegal/unlawful act of the State power (Executive, judicial, and even legislative)?
- p) Are there adequate Government and judicial accountability mechanisms?

Principle 2: **Citizens benefit from legal certainty** (*breach example: citizens are not warned that a law will apply to them*). Political, judicial and administrative decisions are regularised and are not subject to the whims of individuals, nor the influence of

corruption. In the words of Bingham, legislation and rules should be adopted by the bodies that are constitutionally competent to do so and must be accessible, clear, intelligible and predictable, as well as respectful of the hierarchy of norms recognised by the Constitution and/or precedent. This means that when citizens commit to a course of action, they should be able to know in advance the possible consequences of such an action in legal terms. Legal certainty implies that citizens know what they are up against – the rules by which they are bound should be ascertainable by reference to identifiable sources that are publically available. Legal certainty in this sense contributes not only to a just society, but also to an economic climate conducive to enterprise and innovation.

- a) Are all the laws published? Is the law codified and kept in a good order, or is it scattered in many micro-statutes? Is a process of consolidation possible?
- b) If there is any unwritten law, is it accessible and understood by the majority of the citizenry? (Unwritten law may exist in very diverse ways, depending on its source (customary, administrative, judicial), on its object (private, constitutional, administrative), and on the features of the system (common or civil law).
- c) Are there limits, in law and in practice, to the legal discretion granted to the Executive? To the judiciary?
- d) Are there many exception clauses in the laws? Are they used in practice?
- e) Are the laws written in an intelligible language?
- f) Is retroactivity of laws prohibited in law and in practice?
- g) Are final judgments by domestic courts regularly called into question (such as for suspicion of corruption, or lack of legal ability)?
- h) Is the case-law of the courts coherent? Where applicable, does precedent appear to be followed?

- i) Is legislation generally implementable and implemented, or do many laws go unenforced?
- j) Are laws generally foreseeable as to their effects?
- k) Do similar cases appear to result in similar judgments?
- l) Are judicial decisions published? Are reasons required for judicial decisions? Are judges schooled in legal reasoning, (rather than making decisions for political or bureaucratic reasons)?
- m) Is judicial control practiced within the judiciary in such a way that decisions may vary significantly depending on the judge who decides?
- n) Is there a coherent legal system that promotes economic growth and social welfare?
- o) Are adequate instruments in place for monitoring the implementation of laws and evaluating their impact?
- p) Are there effective mechanisms of enforcement of judicial decisions?
- q) Do public agencies have a duty to provide guidance concerning their interpretation of the law and what is needed for individuals to get a favourable decision? Is there certainty on the duration of proceedings, are there expiration terms?
- r) Can public agencies change their mind and repeal their acts (favourably and/or unfavourably for citizens)?

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

*Rethinking Europe's "Rule of Law" and Enlargement Agenda*

- a) Are there laws that discriminate against certain individuals or groups where justification is not justified by a proper and legitimately protected status?
- b) Are laws interpreted in a discriminatory way?
- c) Are there individuals or groups with special legal privileges?
- d) Are the laws applied generally and without discrimination in judicial decisions, police action, and other State interactions with citizens, or are they differentially applied based on wealth, status, ethnicity, etc.?
- e) Are powerful, non-State actors able to act with greater impunity in contractual or criminal matters by escaping punishment, enforcement, etc.?
- f) Are criminal and civil decisions reasonably similar for similar cases with regards to different classes of defendants and plaintiffs?
- g) Are cases brought to courts, or disputes brought to the police, with reasonable regularity across societal groups, or do some portions of society choose to avoid courts, police, and other State actors out of a belief they will not be granted justice by State authorities?
- h) What kind of affirmative measures are taken to further equality before the law?

Principle 4: **All citizens are granted accessible and effective justice** (*breach example: citizens are not able to access the courts*). All citizens have access to dispute-solving mechanisms, regardless of their financial means, and justice is delivered and enforced effectively in the eyes of the population. The right to a fair trial is shared by all actors in society –whether criminals, consumers, companies or public authorities. In all cases, justice should be impartial to all sides.

- a) Are there administrative acts which are not subject to judicial review?
- b) Do citizens have effective access to dispute settlement regardless of their financial means? Is there free legal assistance for the poor?

- c) Are dispute settlement locations prevalent enough across the country so that the majority of citizenry have non-onerous physical access to them?
- d) Are dispute settlement authorities prevalent enough so that disputes are settled in what is perceived in the society as a timely manner?
- e) Are judgments implemented?
- f) Do citizens have effective access to the judiciary for judicial review of governmental action?
- g) Does the judiciary have sufficient remedial powers?
- h) Do citizens turn to extra-judicial or non-State sources of arbitration due to a lack of confidence in or availability of State-based sources of dispute resolution?

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

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

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



*Rethinking Europe's "Rule of Law" and Enlargement Agenda*

- d) The right to a fair trial?
- e) The right to recognition as a person before the law?
- f) The right to freedom of opinion, religion, peaceful assembly, and organisation?
- g) The right to life, liberty, and security of person via freedom from extra-judicial punishment by State authorities, and adequate law and order?
- h) Do State authorities prohibit, in law and in practice, torture and cruel, inhumane, or degrading treatment?
- i) Do State authorities prohibit, in law and in practice, arbitrary arrest and detention?
- j) Is law and order prevalent enough so that citizens do not unduly fear that their personal property or security will be violated either by agents of the State or by predatory citizens.
- k) Is property crime/white-collar crime/State corruption low enough so that businesses do not unduly fear or expect such activity to limit their business?
- l) Is the use of force by public agencies only when provided for by the law? Are there procedural rules?