



Rule of Law Working Group

INTRODUCTION

The contrast between the *rule of men* and the *rule of law* is first found in Plato's *Statesman* and *Laws* and subsequently in Aristotle's *Politics*, where the rule of law implies both obedience to law and formal checks and balances on rulers and magistrates. The **rule of law**, in its most basic form, is the principle that no one is above the law. Thomas Paine stated in his pamphlet *Common Sense* (1776): "For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other."

The notion of the rule of law can thus cover a large number of issues. This paper will try to address aspects of the rule of law that are relevant in the pre-accession process and could constitute the basis of donor cooperation. More specifically, it will try to answer three questions related to the rule of law:

- **Why** the issue is important for the EU;
- **What** we do;
- **How** we do it and how we can cooperate with other donors.

WHY?

The 1993 Copenhagen European Council established the basic conditions for the EU's enlargement to the countries of Central and Eastern Europe. These are called the Copenhagen criteria and set down the following requirements for membership:

- * the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- * the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;
- * the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union and the administrative capacity to effectively apply and implement the *acquis*.

First, there can be no democracy without the rule of law; this refers to the first Copenhagen criterion. Second, contracts need to be implemented and, if necessary, enforced for the market economy to operate; this refers to the second Copenhagen criterion. The *acquis* must also to be implemented and, if necessary, enforced by the tribunals; this refers to the third Copenhagen criterion. Thus, the rule of law and the judiciary are important for all three Copenhagen criteria.

The rule of law principle and the right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union, provide that the judiciary must be **independent** and **impartial**. The content of these notions has been clarified in the jurisprudence of the European Court of Human Rights (ECtHR), which is an accepted reference for the EU *acquis* under Article 6 (2) of the EU Treaty. In particular, Courts must be established by law; there shall be no discrimination in the appointment procedures of judges; the judiciary must not be influenced in its decision-making by either the executive or the legislature; judges must act impartially and be seen to do so; their conditions of tenure must be adequately ensured by law; the

grounds for disciplinary action or removal from the post must be limited and laid down in the law.

Furthermore, it is a general principle of EU law that the judiciary must have **sufficient means to work efficiently**; judges are expected to respect **high ethical standards** in the performance of their duties in accordance with the law. The Council of Europe (COE) Committee of Ministers Recommendation N° R (94) 12 on the Independence, Efficiency and the Role of Judges provides further clarifications. Similarly, the European Guidelines on Ethics and Conduct for Public Prosecutors (the Budapest guidelines) offer useful guidelines about a common European standard in the field.

WHAT?

More concretely, things we are looking at include the following:

The independence of the judiciary

The notion of independence refers to relationship to others, in particular the executive. It involves the individual independence of the judge as reflected in matters such as security of tenure, and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of Government.

- Establishment by law: courts should be established by law; legal basis in Constitution and legislation; no *ad hoc* tribunals; special criminal tribunals under strict conditions in law; specialised courts possible
- Appointment of judges: discretion as regards the appointing authority, from Judiciary to Executive, but appointment procedure without discrimination
- State officials or military staff: may not serve as judges
- Independent decision making
- Conditions of service and tenure: secured by law; principle of irremovability during the term in office; no influence from the executive or legislature on career of judges
- Discipline, suspension, removal: charges/complaints shall be processed under appropriate procedure; limited grounds for suspension/removal; the latter subject to review

The impartiality of the judiciary

It is a principle implying that decisions should be based on objective criteria rather than on bias or prejudice. It also refers to a state of mind or attitude of the tribunal in relation to the issues and the parties involved.

- A tribunal subjectively impartial: no member of the tribunal should hold any personal prejudice or bias;
- A tribunal objectively impartial: it must offer guarantees to exclude any legitimate doubt in this respect;
- Impartiality particularly relevant in the relations between the judicial actors: clear separation of tasks and responsibilities between judges and public prosecutors;
- Corruption in the judiciary: causes could be low remuneration, the administrative nature of the roles of judges, far reaching discretionary powers and weak monitoring of their execution. Indicators: delays in the execution of court orders, unjustifiable issuance of summons; prisoners not being brought to court; disappearance of files, etc.
- Quality education, awareness raising, code of ethics/conduct: useful result-oriented tools; also, random procedure for assignment of cases, practically tenable standards for

timely delivery, computerisation of court files, decent remuneration and merit-based career path. Last, immunity. Judges and prosecutors should be liable at disciplinary, administrative, civil and criminal level. An inspectorate and independent service should be established. Parties to proceedings should be able to lodge complaints.

Professionalism/Competence

- The development of a training programme should always be based upon a thorough needs assessment. Coordination with the overall reform agenda. E.g. focus on EU law, changes of attitude (ethics training), etc.
- Management of training programmes: from the judiciary to institutes managed by the Ministries.
- Overall, candidate countries are invited to set up an integrated national system of professional training, delivered by an independent training institute, adequately funded, staffed and equipped.
- Candidate countries are invited to take into account in their integrated national system of professional training the tool of the European Judicial Network in civil and commercial matters created by the Council Decision 2001/470/EC.

Efficiency

- Budget: annual budget
- Infrastructure, equipment, computerisation, case management tools: physical state and sufficiency of court houses, level of computerisation, on-line access to, for instance, Supreme Court jurisprudence, effective case flow and record management in courts.
- Recruitment of sufficient number of judges and support staff: human resources management; administrative and judicial support staff, statistics on the total number of judges nationwide and the number of vacancies; also, judicial trainees, prosecutors, court advisors, court clerks.
- Pending cases, length of proceedings, importance of statistical data/analysis: average duration of proceedings; the total number of court decisions rendered in a year, the total number of incoming cases and the total number of cases registered but still pending should be monitored; ADR, from mediation and conciliation to arbitration.
- Enforcement of judgements: e.g. bailiffs, enforcement judges, sheriffs, court executors and officers. Their operation should be described in law and/or regulations; they should be bound by ethical standards, and should be well trained.
- CEPEJ

Judicial reform

All these elements should come together within the framework of a judicial reform strategy.

- This strategy should start in time: judicial reform is a cumbersome and slow process
- National reform strategies should be adopted as soon as possible, taking into account the Accession Partnership priorities, and be based on a thorough needs assessment; EU assistance can be useful (twinning)
- A good strategy needs to be matched by a realistic action plan, the implementation of which needs to be monitored carefully
- Any major reform should be conceived and implemented following consultation of the main stakeholders; ownership of the reform by the stakeholders is indispensable for its success
- Political will at the highest level needs to be secured and sustained

HOW?

Ideally, the first step should be the adoption of a judicial reform strategy. This strategy should include an Action Plan for its implementation where matters such as concrete measures to be adopted, financial and human resources necessary, and a timetable need to be addressed.

On this basis, individual donors will be in a position to work with the authorities of the candidate countries and with each other. Various forms of cooperation may be envisaged. The EU (both Commission and individual Member States) usually work through either institution building projects (mainly in the form of twinning) or investments.

First of all, it is desirable that the authorities of the candidate country implement the judicial reform as a matter of national priority. This means that budgetary resources should be allocated to its implementation. The establishment and the execution of the national budget is, thus, significant in order to assess the importance given to the issue by the national authorities.

Second, all donors active in this area should try and synchronise their 'programming' process between them and with the process of the establishment of the national budget of the candidate country. This should create the necessary synergies between, on the one hand, budgetary resources and, on the other, pre-accession and other assistance.

Third, every donor has a specific profile, both in terms of priorities but, also, in terms of the resources available and the procedure of committing these resources. Donor coordination can play an important role in maximising each donor's contribution. For an instance, donor A can contribute in the preparation of projects for donor B; donor C can have a joint investment with donors D and E, etc.

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