THE WILL OF THE PEOPLE?

THE EROSION OF DEMOCRACY UNDER THE RULE OF LAW IN EUROPE

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Introduction

During the past years large sections of the European population have come to long for the protection afforded by national stability and identity. It is now widely recognised that owing to a combination of globalisation, easier labour migration and social security retrenchment many people now find themselves in precarious circumstances. This applies in particular to regions from which industrial production has disappeared.[1] The consequent sense of loss has assumed various forms, depending on the national situation. Growing distrust of the European Union has been exacerbated by the financial crisis and an inability to regulate migration properly. In response, many people have fallen back on trusted national frames of reference. This in itself is understandable and explicable. In fact, however, this is not about a division between global and national thinking with one always undermining and the other always restoring solidarity. Indeed, important movements do see the need for worldwide efforts to protect the vulnerable, the climate and peace, whereas nationalism has often smoothed the way for ruthless exploitation of society's most vulnerable members.

In its recent advisory letter *The Representation of the Netherlands Abroad* (advisory letter no. 32 of 24 May 2017), the AIV also pointed to '*the growth of a number of specific populist and nationalist movements in various countries'*. Citizens in countries such as Hungary, Poland, the Russian Federation and Turkey have placed their trust in parties and movements that regard pluralist democracy under the rule of law as an obstacle to the implementation of their programmes. They have repeatedly used their control of the institutions of government to reinforce their own position of power and safeguard their financial advantages. Nor are these developments confined to just a few countries. Fairly similar movements are a growing power factor in other countries as well, including Western European countries. But even traditional, more moderate political parties are sometimes inclined, in seeking to win back electoral support, to adopt positions at odds with the basic principles of freedom and democracy, while at the same time new and traditional movements oppose the erosion of the rule of law. This is not a total turnaround, however, but rather a search for a new balance. The recent elections in France, Austria and the Netherlands have shown that, although populist, anti-European parties have succeeded in consolidating their support base, they have in the process also frightened off a substantial number of voters, who were possibly deterred in part by the outcome of the Brexit referendum in the United Kingdom and the election of President Trump in the United States.

These developments show that citizens have become alienated from the institutions on which democracy and the rule of law are based. The existing institutions have little control over this process of alienation, which has been occurring gradually over a number of decades. In recent years, the consequences have become increasingly apparent as more and more elected politicians have started to question the legitimacy of the institutions of democracy under the rule of law. Naturally, such developments are not clear-cut: in some elections the anti-establishment forces gain the upper hand and in others traditional parties manage to maintain their position. But if temporary fluctuations are disregarded, the overall trend seems incontestable: in a number of European countries, democracy under the rule of law is in the danger zone. Formal features of democracy such as elections, political parties, parliament and the courts continue to exist, but democratic

1 Guy Standing, *The Precariat. The New Dangerous Class* (London: Bloomsbury, 2011), pp. 19-20.

freedoms and human rights are being curbed or applied more and more selectively. As a result, freedom is no longer guaranteed for all without distinction.

Similar trends are also occurring outside Europe.[2] Feelings of alienation from the very institutions that could have been expected to provide a convincing answer to the problem are emerging within democratic frameworks all over the world. Where the core values of democracy under the rule of law are attacked in such a way as to exclude minorities, blacken the good name of opposition politicians, curb media freedom and undermine the legitimacy of the independent administration of justice, this incapacitates systems of checks and balances: democracy, which started as an emancipatory movement, is devouring its own children. Parties and movements in various countries are succeeding in gaining control not by the traditional means of a coup d'état but by manipulating systems of government. As these movements are supported – or in any event tolerated – by a large section of the population, there is an urgent need to determine how support for democracy under the rule of law can be restored. Promotion of the international legal order, of which this is an essential building block, can and must not disregard the feelings of citizens either here or elsewhere.[3]

Promoting the international legal order is one of the government's constitutional tasks. An important aspect of this is implementing human rights and monitoring observance of the principles of democracy under the rule of law. For this purpose, the Netherlands is working with the other member states of the Council of Europe and the European Union.

In 2014 the AIV reported on ways of promoting recognition and practical implementation of the rule of law in the member states of the European Union.[4] The recommendations were based in part on the persuasive power of good practices. This is why it was recommended that direct contact between professionals in the field of law and the administration of justice should be promoted and that a system of peer review should be created in which representatives of the member states would pose questions to one another about the quality of the rule of law and, if necessary, make proposals for improvement. These recommendations were intended to supplement the existing arrangements for enforcing the requirements of the rule of law and human rights, for example by the European Court of Human Rights and the European Union's Fundamental Rights Agency. One of the aims of the recommendations was to prevent a situation in which it would be necessary to resort to such drastic measures as those described in article 7 of the Treaty on European Union (TEU).

The AIV's recommendations built on the initiatives launched by the Netherlands together

2 Since as early as 2006, Freedom House has noted an annual deterioration in civil liberties and political rights throughout the world: Freedom House, *Freedom in the World 2016. Anxious Dictators, Wavering Democracies: Global Freedom under Pressure,* p. 3. See also: <https://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf>. And: Human Rights Watch, World Report 2017: <https://www.hrw.org/world-report/2017> and Amnesty International, Report 2016/17: *The State of the World's Human Rights:* <https://www.amnesty.org/en/documents/pol10/4800/2017/en/>.

3 Dominique Moïsi, *The Geopolitics of Emotion: How Cultures of Fear, Humiliation and Hope are Reshaping the World*. Anchor Books, New York 2010.

4 *The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation (advisory report no. 87),* see: <http://aiv-advies.nl/download/57da03fa-3410-4aba-af05-663cb780df72.pdf>.

with the other member states since 2007, and were well-received by the government. In 2014 the European Commission established *A new EU framework to strengthen the Rule of Law*, but this is in fact still in its infancy.[5]

Now, however, the member states of the Council of Europe, including the member states of the European Union, are confronted within their own ranks by much more deep-seated tensions relating to essential features of democracy under the rule of law. The nature of the current restrictions on judicial independence and press diversity, not only in the Russian Federation and Turkey (both of which are members of the Council of Europe) but also in some EU member states, in particular Hungary and Poland, is so radical that peer review is no longer a viable way of rectifying the situation. At the same time, article 7 TEU is a difficult instrument to apply as suspension of the rights of a member state can have far-reaching and even counter-productive consequences.[6]

As already noted, the developments in these states (and, to some extent, elsewhere as well) did obtain the backing of a majority in the national parliaments. Not only European institutions but also the Dutch government and fellow EU governments are attempting in various ways to help bring about a change of course and thus prevent even greater erosion of democracy under the rule of law in Europe. An essential but delicate aspect of these attempts involves respecting the democratic character of the states concerned while, by acting as a counterweight to a transformation to a more authoritarian system of government, enhancing their democratic quality and preventing the silencing of opposition groups. In this advisory report, the AIV therefore proposes focusing its recommendations on strengthening the persuasiveness of the principles of democracy under the rule of law in societies which are experiencing major internal tensions, as is the case in the countries mentioned above.

The present sense of alienation must be addressed by strengthening public engagement. Clearly, this is possible only if the underlying social tensions in the democratic system are properly addressed. It cannot be right for democracy under the rule of law to be an obstacle to those who need it most. In retrospect, it is also incorrect to argue that these tensions and concerns have not been articulated previously. The political and ideological decision to liberalise markets and reduce protective structures held so much sway that the political mainstream absorbed very little of the dissent. The political focus on consensus was not intrinsically wrong, but it started, as it were, too early in the process of determining the democratic will, even before the differences had been identified and effectively articulated.

Bridging differences is not the same as ignoring them. Taking account of opposition and finding answers to address the issues raised is an integral part of a fully-fledged and mature democracy under the rule of law. The alienation mentioned above is indicative of a serious lack of responsiveness on the part of the structures concerned. Merely defending institutional frameworks, although necessary and appropriate, would be insufficient.

5 See the briefing by the European Commission, *Member States and the rule of law: Dealing with a breach of EU values,* March 2015, see: <http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf>.

6 For a critical discussion of the various forms of promoting and safeguarding the rule of law in the EU member states, see: C. Closa & D. Kochenov (eds.), *Reinforcing rule of law oversight in the European Union,* (Cambridge: Cambridge University Press, 2016).

Such attempts, however well-intentioned, would likely exacerbate, rather than eliminate, this sense of alienation. The AIV will therefore focus its recommendations in part on communicating the value of a pluralist democracy more effectively and improving its functioning. In this way it hopes to offer a recognisable alternative to the present impasse.

It is of the utmost importance for the Netherlands that this happens and is successful, given the risks of a further erosion of democracy under the rule of law in Europe. If this were to lead to a situation in which, after the United Kingdom, more countries were to break away, either formally or de facto, from the European Union or the Council of Europe, this would harm us all, particularly because of the expected domino effect. This is true not only of the European Union, as in the case of Brexit, but also of the Council of Europe. The Council was founded as an international organisation out of a shared wish to safeguard democracy, the rule of law and human rights in Europe. These core values are also explicitly laid down in the Treaty on European Union. Nonetheless, these same values are now being questioned by European societies themselves. Large sections of the population no longer feel any affinity for the institutions of democracy under the rule of law. The foundation of stability and cooperation in Europe and hence of post-war prosperity, peace and security is in danger of being gradually eroded. For example, obligations under EU law to provide reception for asylum seekers have been set aside by Hungary's Constitutional Court on the grounds of that country's own 'constitutional identity'.[7] This trend needs to be reversed, preferably sooner rather than later.

In view of the foregoing, the AIV felt it necessary to act on its own initiative and prepare an advisory report for submission to the government and parliament on the erosion of democracy under the rule of law in Europe. Developments outside Europe will not be discussed except in passing. Nor will the AIV deal at length with the situation in the Netherlands, since its statutory remit is confined to advising on issues of an international character. Nonetheless, the developments described in this report also have repercussions in the Netherlands.

The questions that are central to this report are:
- How do democracy and the rule of law relate to one another?
- What developments account for the loss of public confidence in democracy under the rule of law in Europe?
- How can erosion of democracy under the rule of law in Europe be halted or prevented?
- How can the Netherlands contribute to this in its foreign policy?

Structure of the report
To provide considered advice, the AIV has no option but to include a relatively theoretical assessment of the key terms 'democracy' and 'rule of law' and of how they relate to each other and to human rights. This is the subject of chapter I. This chapter identifies elements with which a democracy under the rule of law must ideally comply. It deals with the two main visions of democracy: a formal and a substantive vision. It then goes on to define the concepts of the rule of law (or *Rechtsstaat*), including human rights. The AIV notes that an intrinsic relationship exists between democracy and the rule of law. They are mutually interdependent.

7 See: Gábor Halmai, *National(ist) Constitutional Identity? Hungary's Road To Abuse Constitutional Pluralism*, European University Institute Working Paper Law 2017/08, https://ssrn.com/abstract=2962969.

Chapter II deals with citizens' waning confidence in politics as a whole, in other words not just in the holders of political office but also in democracy under the rule of law and in representative democracy as a political system. It goes on to list the factors responsible for this development. The chapter concludes that more and more people in Europe are experiencing social and economic insecurity and feelings of alienation from representative democracy and their political leaders. They are prepared to vote for political movements that reject the established order, international integration and globalisation and advocate greater protection of the country's own population.

Chapter III deals with populism as a political factor in Europe.

On the basis of recent developments chapter IV considers in what European countries democracy, the rule of law and human rights are under pressure.

Chapter V examines what instruments are available within the Council of Europe and the European Union to halt and prevent antidemocratic and anti-rule of law developments. It also discusses what instruments are available for this purpose in Dutch foreign policy.

Finally, chapter VI contains a summary and sets out conclusions and recommendations.

This advisory report has been prepared by the members of the AIV's Human Rights Committee, chaired by Professor Ernst Hirsch Ballin. The members of the Committee are: Professor Karin Arts Professor Maurits Berger, Professor Tineke Cleiren, Professor Yvonne Donders, Professor Janneke Gerards, Arjan Hamburger, Professor Nicola Jägers, Professor Rick Lawson, Professor Egbert Myjer, Dr Bart Schermer, Naema Tahir and Heikelien Verrijn Stuart.

The executive secretary was Robert Dekker, assisted by Anne Alblas and Felicia Bakker (trainees).

The AIV adopted this advisory report at its meeting on 2 June 2017.

Translator's note

While the terms 'rule of law' and *Rechtsstaat* have different meanings, as explained in section I.2, they are often used as translations of one another in official texts. In this English translation of advisory report no. 104, this will also be the case. It should be noted for the record, however, that where the term 'rule of law' appears, it is generally used not in the narrower common law sense but in the broader sense of *Rechtsstaat*. Furthermore, the Dutch term *democratische rechtsstaat* is translated here as 'democracy under the rule of law'.

I The relationship between democracy, the rule of law and human rights

After the horrors of the Second World War, the Council of Europe was founded in 1949 to protect democracy, the rule of law (or *Rechtsstaat*)[8] and human rights in Europe. These three pillars are embodied in the Statute of the Council of Europe. In the preamble, the member states reaffirm '*their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'.*

In 2008 the Committee of Ministers of the Council of Europe once again explicitly stressed the connection between these three principles: *'Democracy, rule of law and human rights can be seen as three partly overlapping circles. (…) There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law'.*[9]

The connection between democracy, the rule of law and human rights can also be found in article 2 of the Treaty on European Union: '*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*.' Membership of the Council of Europe is also a requirement for accession to the European Union.

Countries applying for membership of the European Union must also satisfy the Copenhagen criteria, which require, for example, '*stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'*.[10]

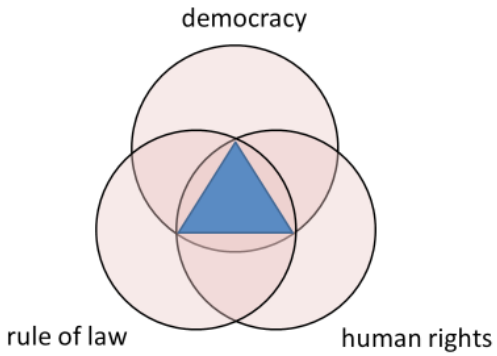
In Europe, the interdependence between democracy, the rule of law and human rights is therefore deliberate. The three notions form a triangle of which each side supports and is supported by the other two. Moreover, the substance of the terms overlaps, as shown in the image of the overlapping circles in a publication by the Committee of Ministers. The interrelationship between the three notions is illustrated by the following figure.

8 For the difference between these two terms, which are often used as translations of one another in official texts, see section I.2 below.

9 Committee of Ministers, *The Council of Europe and the Rule of Law – An overview*, 1042bis Meeting, 27 November 2008, document CM(2008)170, 21 November 2008, paras. 26-27.

10 European Commission, Accession criteria: <https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en>.

Figure 1: Relationship between democracy, the rule of law and human rights



It is noteworthy that nowhere are the concepts of democracy and rule of law (or *Rechtsstaat*) defined explicitly, neither in the treaties nor in the case law of the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR). Indeed, the Committee of Ministers of the Council of Europe even considers it undesirable to give a definition: *'The fact that the three concepts, taken together, form a single fundamental objective for the Council of Europe makes it less necessary for it to adopt a particular definition of the rule of law. Such an exercise of disentangling notions that are so closely intertwined and mutually supported might even be risky in terms of overlooking essential human rights and democratic requirements and aspects'*.[11]

To gain a better understanding of recent developments in Europe, it is nonetheless useful to take a closer look at the concepts of democracy and rule of law (or *Rechtsstaat*). The first question examined below is what ideally constitutes a modern, representative democracy. Use is made for this purpose of the two main visions of democracy: a formal and a substantive vision. Afterwards, this chapter discusses the concept of *Rechtsstaat*, which, although often used as an equivalent of 'rule of law', has a rather broader meaning. An important difference, for example, is that human rights are seen as an element of the *Rechtsstaat*, whereas this is not the case with the rule of law. No absolute distinction will be made between the two concepts in this report. The aim of outlining this theoretical model is to identify a number of (formal and substantive) elements that are essential to the concept of democracy under the rule of law. Identifying these elements can in turn help to determine when and to what extent democracy under the rule of law can come under pressure in a member state of the Council of Europe or the EU. These are states that get a low score for the elements concerned.

I.1 Two visions of democracy: formal and substantive

The precise meaning of democracy is one of the main issues in political science. The word democracy is derived from the Greek words *demos (*people) and *kratos* (rule). In its most literal sense, democracy therefore means 'self-rule by the people'. However, this does not provide an answer to the questions of how sovereignty of the people should be organised and how far it reaches. And is it absolute or are there limits to the power of the people?

11 Committee of Ministers, The Council of Europe and the Rule of Law – An overview, 1042bis Meeting, 27 November 2008, document CM(2008)170, 21 November 2008, par. 28.

Many political thinkers have already wrestled with how modern democracy should be defined. For the time being, however, this has not yielded a clear and unambiguous definition. Broadly speaking, a distinction can be made in the literature between a minimalist or formal approach to democracy and a maximalist or substantive approach.[12] These two visions are, in essence, complementary.

An adherent of the minimalist or formal vision of representative democracy is Joseph Schumpeter, who describes democracy as: '*The institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote*'.[13]

The *process* of political decision-making is central to this view. Public participation in decision-making is organised by periodically holding free and fair elections. The elections are a marketplace where the most successful political idea is determined through an open exchange. According to this view, the representatives of the political programme that gains the most votes win power. They determine the direction of political decision-making during the period until the following elections. This approach puts the emphasis on elements such as voting rights, pluralism and election procedures. It also requires guarantees for a limited number of freedoms (including freedom of expression and freedom of assembly) and for access to the courts.

A decision is viewed as democratic if it has been taken by a majority of the votes cast and in accordance with the prescribed procedures. According to this formal view, even where a regime is corrupt or violent, its decisions can be said to have been taken legitimately provided that they are taken in accordance with the applicable ground rules and the government has been elected by a majority of the population. At its most extreme, this formal approach would allow democracy itself to be abolished if the majority of the population so wished.[14]

This last point is also precisely one of the main objections to this vision of democracy. It equates the will of the majority with the will of 'the people'. However, a population is hardly ever uniform. After all, differing political and social interests and views exist

12 See W. van der Burg, *Het democratisch perspectief. Een verkenning van de normatieve grondslagen der democratie* (The democratic perspective. A survey of the normative foundations of democracy) (Arnhem: Gouda Quint, 1991, dissertation). More recently: J. den Ridder and P. Dekker, *Meer democratie, minder politiek? Een studie van de publieke opinie in Nederland* (More democracy, less politics? A study of public opinion in the Netherlands), The Hague: SCP, 2015), p. 26; P. de Morree, 'Het Europees Hof voor de Rechten van de Mens als hoeder van de democratie' (The European Court of Human Rights as guardian of democracy) in *Regt spreken volgens de wet? Bijdragen over de staatsrechtelijk positie van de (Europese) rechter,* eds. M. Duchateau and P. Kingma (Oisterwijk: Wolf Legal Publisher, 2013), pp. 53-54; G.H. Fox and G. Nolte talk of 'procedural' and 'substantive' models of democracy. See: 'Intolerant Democracies,' in *Harvard International Law Journal*, vol. 36:1 (Winter 1995): pp. 14-20.

13 J. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper & Brothers, 1947), p. 269.

14 According to some authors, these 'ground rules' should in any event provide that the majority cannot go as far as abolishing essential elements of democracy such as the principle that decisions are revocable. See the inaugural address of G. van den Bergh from 1936, *Wat te doen met antidemocratische partijen?* (What is to be done with antidemocratic parties?), republished in 2014 by B.R. Rijpkema, P.B. Cliteur and R. Cuperus (Elseviers politieke bibliotheek no. 13).

in every society. To quote Jürgen Habermas: *'The people from whom all governmental authority is supposed to derive does not comprise a subject with will and consciousness. It only appears in the plural and as a people it is capable of neither decision nor action as a whole.'*[15] In other words, there is no such thing as 'the people', nor for that matter a single collective will of the people.

In theory, a minority can grow to become a majority by garnering support in the political arena for its own positions. In practice, however, this is not always possible. Without the guarantee of certain fundamental rights and the constraining effect of an independent judiciary, these groups can become the victim of decisions about them made by others. This is what the French philosopher Alexis de Tocqueville called the danger of the 'tyranny of the majority', namely the democratically legitimated oppression of dissenting groups in society. An example is the holding of a referendum in which a government requests approval for legislation that would result in discrimination against people of a given sex, race, ethnicity, religion or sexual orientation, for example to take away women's voting rights, withdraw citizenship from inhabitants with an immigrant background or criminalise homosexuality.

The maximalist or substantive vision of democracy therefore focuses not on the democratic process itself but on the *aim* of the process, namely to promote a society which is founded on certain principles and values and treats every citizen equally.[16] This vision is based on the conviction that every citizen is born in freedom and has natural and inalienable (political and social) rights. These must be protected from violations by third parties, including the state. The existence of the rule of law, distribution of powers between its institutions,[17] independent administration of justice, decision-making that complies with the requirement of legality and respect for and protection of every person's fundamental rights are essential conditions for the functioning of democracy. Fareed Zakaria talks in this context of 'constitutional liberalism': *'Constitutional liberalism (…) is not about the procedures for selecting government, but rather government's goals. It refers to the tradition, deep in Western history, that seeks to protect an individual's autonomy and dignity against coercion, whatever the source – state, church, or society'*.[18]

While the formal vision focuses on the manner in which power is acquired, the substantive vision therefore tends to emphasise how the exercise of this power by the state is limited in relation to citizens, particularly minorities. Bojan Bugaric writes: *'Majoritarian rule (…) needs limitations which are, in liberal democracy, imposed by independent political institutions and constitutionally codified rights and freedoms'.*[19] The substantive vision therefore recognises that the definition of democracy includes both a rule of law

15 J. Habermas, 'Popular sovereignty as procedure', in *Deliberative Democracy: Essays on Reason and Politics,* eds. J. Bohman and W. Reghs (Cambridge: MIT Press, 1997), p. 41.

16 According to R. Dworkin, every individual has 'the right to equal concern and respect'. R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), p. 181.

17 On this point see, *inter alia*, W. Witteveen, *Evenwicht van machten* (Balance of power) Zwolle: W.E.J. Tjeenk Willink, 1991, inaugural address).

18 F. Zakaria, 'The rise of illiberal democracy', in *Foreign Affairs*, vol. 76:6 (November/December 1997), pp. 25-26.

19 B. Bugaric, 'Populism, liberal democracy, and the rule of law in Central and Eastern Europe', in Communist and Post-Communist Studies, vol. 41:2 (June 2008), pp. 191-203.

component and a human rights component. It is this vision which is reflected in the objectives of both the Council of Europe and the European Union, as mentioned above.

I.1.1 Representative democracy

The complementary visions distinguished here are both based on the concept of representative democracy. The underlying idea is that today's societies are too large and too complex to allow a direct form of democracy in which all citizens can vote on all decisions to be taken.[20] Periodically, the population can choose their representatives in free and fair elections. The laws and decisions subsequently promulgated by the representatives give substance to the 'public interest'. The minimalist vision is that every decision is legitimate if it represents the wish of the majority, whereas the maximalist vision requires a larger number of safeguards to be fulfilled for a decision to qualify as legitimate.

According to this view, democracy is a cyclical process in which the contract between citizen and government is renewed at every election.[21] An inherent part of representative democracy is the creation of a political class which acts on behalf of citizens. Mutual trust between politicians and the electorate is therefore crucial to representative democracy. According to the formal view, the role played by citizens in a democracy is relatively passive and limited to completing a ballot paper once every few years. Citizens can also stand for election and exercise their freedom of expression and freedom of association in order to compete for power. The substantive view accords a much greater role to citizens.

Indeed, Engelen and Sie Dhian Ho go so far as to argue that the existence of a civil political culture is essential for the stability of a sound, more substantive democracy. This means that support must exist for the political system, including a certain degree of political engagement, a sense of social cohesion and solidarity with fellow citizens, and a willingness to accept decisions of the authorities, even if they run counter to the individual's own interests or the interests of the group or minority to which he or she belongs.[22] This also implies active citizenship and a willingness on the part of citizens to familiarise themselves with developments in society and their own rights and duties in relation to them.

Citizens' political engagement can also take on other forms. The French philosopher Pierre Rosanvallon refers in this connection to how citizens can form a scrutinising 'counterforce'.[23] For example, they can lodge legal proceedings against the state,

20 For a more extensive evaluation of the direct democracy model, see: G. Staszewski, 'Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy', in *Vanderbilt Law Review*, vol. 56 (March 2003), pp. 395-495.

21 M. Adams, 'Multiple politica en tegendemocratie' (Multiple Politica and counter-democracy) in *Nederlands Juristenblad*, vol. 34 (October 2010): p. 2430.

22 E.R. Engelen & M. Sie Dhian Ho, 'Democratische vernieuwing. Luxe of noodzaak?' (Democratic renewal: luxury or necessity?) in *WRR-Verkenning 4: De staat van de democratie. Democratie voorbij de staat*, eds. E.R. Engelen & M. Sie Dhian Ho (Amsterdam: Amsterdam University Press, 2004), pp. 26-27.

23 See: P. Rosanvallon, *Counter-democracy. Politics in an Age of Distrust* (New York: Cambridge University Press, 2008).

seek publicity in the traditional media and on social media and call in independent supervisory bodies such as an ombudsman. Organising referendums can also be an expression of political engagement. Ideally, such engagement results in a permanent interaction between citizens and politicians, even outside the framework of elections, and thus helps lend greater legitimacy to the decisions that are taken. On the other hand, legitimate distrust can also turn into anger, rejection of those who take a different view and opposition to the democratic system itself, for example when actual or perceived alienation occurs between citizens and political leaders.

Rosanvallon also argues that elections have ceased to be the legitimation of parliamentary democracy. No longer do the votes of the electorate provide a basis for political policy; instead they merely serve as a way of designating public administrators. According to Rosanvallon, the term majority too has acquired a different meaning. *'The "People" can no longer be apprehended as a homogeneous mass. It is felt to be rather a series of separate histories, an accumulation of specific situations. Hence societies today increasingly understand themselves in terms of minorities. (…) "People" has become the plural of "minority".'*[24]

The American politicologist Robert Dahl adds that in a representative democracy there cannot be said to be a single governing elite. He argues that government power is spread among the different democratic institutions. In other words, there are many different elites which have to work both in contention and in compromise with one another. Dahl calls this 'polyarchy'. Around these elites are all kinds of civil society organisations and social groups active in society, which are independent of one another and each represent their own interests and strive for influence. Examples include businesses, trade unions, human rights organisations, consumer groups, religious institutions and the media. As Dahl notes, this pluralist ragbag of elites, groups, organisations and interests requires a constant negotiating process that creates a certain balance of power.[25]

I.1.2 Elements of democracy

The different formal and substantive elements of representative democracy have been described above. These can also be found in the multidimensional approach to democracy advocated by Ferrin and Kriesi.[26] Part of their classification can therefore be used to identify a number of elements of the term 'democracy' which can help in determining whether and, if so, to what extent democracy is under pressure.

First of all, they identify an *electoral dimension* of democracy. This comprises mainly formal components, including competition between political parties, government accountability to citizens (vertical accountability), participation of citizens in the political debate (consultation) and willingness of government to listen to the preferences of the population (responsiveness).

24 Pierre Rosanvallon, *Democratie en tegendemocratie* (Democracy and counter-democracy), Uitgeverij Boom/ Stichting Internationale Spinozalens (Amsterdam 2012), pp. 123 ff.

25 Robert Dahl, *Who Governs?: Democracy and Power in an American City,* (Yale University Press, 1961) and *Democracy and Its Critics,* (Yale University Press, 1989).

26 M. Ferrin & H. Kriesi, 'Europeans' understandings and evaluations of democracy', in *European Social Survey Topline Results Series*, Issue 4 (September 2014).

Ferrin and Kriesi also argue that democracy has a *constitutional dimension,*[27] which mainly covers the substantive components of democracy. This concerns legality (rule of law), checks and balances on government power (horizontal accountability), protection of minorities, freedom of expression and press freedom. This dimension is consistent with the 'constitutional liberalism', to which reference was made earlier, and thus overlaps with the concept of the rule of law.

The table below provides an overview of both dimensions. It should be noted here that the dividing line between formal and substantive elements is never absolute. For example, free and fair elections presuppose freedom of expression, freedom of assembly and press freedom. In the table these freedoms are classified under the constitutional dimension. The independent judiciary too could be classified as an institution within the formal dimension, but has now been attributed to the constitutional dimension.[28]

It should also be noted that a connection exists between democracy, the rule of law and economic regulation in a society. A democracy under the rule of law also requires economic pluralism of the kind that functions in a social market economy with institutions that provide for a balance of power and the enforcement of rules in the economic system.

Table 1: Dimensions of democracy

ELECTORAL DIMENSION	
Competition	Free and fair elections
	Differentiated offer by parties
	Opposition free to criticise government
Vertical accountability	Retrospective accountability via elections
	Justification of decisions by government
Deliberation	Participation in political discussions
Responsiveness	Responsiveness to citizens
	Responsiveness to other EU governments
CONSTITUTIONAL DIMENSION	
Rule of law	Equality before the law
Horizontal accountability	Checks and balances on governmental power via the courts
Minority rights	Protection of minority rights
Freedom of expression	Freedom to express one's view
Freedom of press	Media freedom
	Media reliability

27 In their report, Ferrin en Kriesi talk of a 'liberal dimension'. The use of the term 'liberal' needs to be explained here. In English-speaking countries (particularly the United States and the United Kingdom), it is often used to mean 'socially progressive'. In this sense, the government has an active role both in promoting the freedom of citizens and in relation to socioeconomic matters such as healthcare, education and preventing income inequality. By contrast, the Dutch term 'liberaal' signifies a limitation of the social and economic role of government and liberal right-wing politics, but also stands inter alia for a more socially conservative agenda. To avoid confusion, the AIV will use the term 'constitutional dimension' in this report.

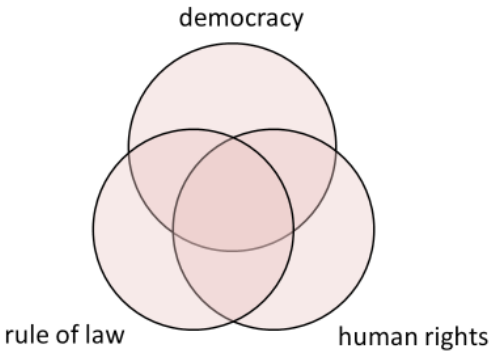
28 Ferrin and Kriesi also identify a social dimension (reducing poverty and income inequality), a direct democratic dimension (citizens' participation by means of referendums) and an inclusivity dimension (extension of the right of participation to all residents of a country).

I.2 The rule of law

In its advisory report *The Rule of Law: Safeguard for European Citizens and Foundation of European Cooperation* (report no. 87), the AIV has already dealt at length with the concept of the rule of law and its significance within European cooperation. The AIV stated at the outset that the functioning and strengthening of the rule of law will always be influenced by the interaction between a state's institutional structure and its political and legal culture. The rule of law should not be regarded merely as a formal structure; cultural factors also have an important role to play. The authorities should as a matter of course act in the spirit of the rule of law. A culture of this kind should inspire citizens to support and monitor the rule of law.[29] The rule of law is therefore a dynamic and not a static concept. It can and must be updated in keeping with social developments.

To understand the connection between the substantive concept of democracy and the concept of the rule of law, the latter must be defined in more detail. It should be noted that the notion of democracy, in particular representative democracy, is often linked to the concept of the rule of law, not only in the Council of Europe and the European Union but also in much of the literature. The importance of the common law concept 'rule of law' has increased rapidly in recent years and is equated increasingly often with the German/Dutch doctrine of *Rechtsstaat*.[30] However, treating them as the same can cause confusion. This is because the common law concept of the rule of law is more limited and focuses above all on aspects of legality (e.g. government bodies bound by the law, legal certainty, equality before the law and prevention of arbitrariness) and a certain degree of legal protection and access to the courts. *Rechtsstaat* is broader and also comprises principles such as the separation of powers, respect for human rights (both civil and political rights and fundamental social and economic rights) and rights for minorities (in the sense both that their interests are taken into account in decision-making and that their own specific rights are protected). Where the common law concept of the rule of law is used, the three overlapping circles referred to above will apply.

Figure 2: Relationship between democracy, rule of law and human rights

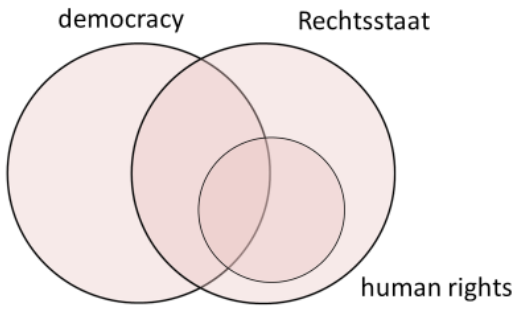


29 AIV, *The Rule of Law. Safeguard for European Citizens and Foundation of European Cooperation*, no. 87, January 2014, pp. 6 and 39-40.

30 This development is influenced in part by the fact that where the English versions of the EU treaties use the term 'rule of law', the Dutch and German versions use the term *Rechtsstaat*.

By contrast, where the term *Rechtsstaat* is used, the relationship between the three concepts can be represented as follows.

Figure 3: Relationship between democracy, the Rechtsstaat and human rights



No complete picture exists of what the rule of law or the *Rechtsstaat* means (or ought to mean). This is due to various factors. First, its meaning is constantly changing. For example, universal suffrage and sexual equality did not originally fall within the scope of the concept, but that is now clearly different. Second, various norms connected with the concept only acquire significance in a given context. An example is the principle of the separation of powers, which is as such part of the concept but interpreted differently from country to country. Third, globalisation and the increasing pluralism of the law are also affecting the indeterminateness of the concept. Law comes more and more often from international sources and is increasingly formed by international organisations and partnerships.[31] As a result, these organisations and partnerships can influence how the concept of the rule of law is defined at national level.

I.2.1 Elements of the rule of law and the Rechtsstaat

The Venice Commission of the Council of Europe has identified a number of standards to be fulfilled by a state if it is to qualify as a state governed by the rule of law.[32] These comprise the following elements, as reflected in the AIV report referred to above:

1. The principle of legality: both individuals and public officials and private actors must act in accordance with the law. Officials must act only on the basis of powers conferred on them and within the limits of those powers. Legality also implies that no one may be punished unless he or she has infringed the law. Infringements should be punished.

31 W.J.M. Voermans & J.H. Gerards, *Juridische betekenis en reikwijdte van het begrip 'rechtsstaat' in de legisprudentie & jurisprudentie van de Raad van State* (Legal significance and scope of the concept of the rule of law in the legisprudence and jurisprudence of the Council of State) (The Hague: Council of State, 2011), pp. 25-26.

32 AIV, *The Rule of Law. Safeguard for European Citizens and Foundation of European Cooperation,* no. 87, January 2014, pp. 14-15.

2. Legal certainty: the text of legislative acts must be easily accessible and the state must respect the law and apply it in a foreseeable and consistent manner. Laws must have been formulated with sufficient precision to enable individuals to regulate their conduct in conformity with it. Certainty does not mean that discretionary powers are not permitted, but the law must regulate the scope of such powers. Rules must be clear and precise. Criminal legislation may not have retroactive effect, nor may civil and administrative legislation be retroactive if this would adversely affect the interests of citizens as this is contrary to the principle of certainty. Final judgments must not be open to challenge.
3. Prohibition of arbitrariness: arbitrariness occurs where a decision is taken in accordance with personal preferences and passing whims. Arbitrariness must be distinguished from discretionary powers, which allow the decision-maker the scope to take a reasonable decision in the light of the legislation's aim. The discretionary power should be conferred in legislation on the government body or official who decides, and the legislation in question should also specify the criteria to be applied, in conjunction with principles such as that of proportionality, when taking a decision. A decision is arbitrary if it is not taken in accordance with the criteria laid down in legislation.
4. Access to justice before independent and impartial courts: an independent and impartial judiciary is a specific aspect of the principle of the separation of powers. There must be fair and public proceedings, which are held within a reasonable period. There must also be a recognised, organised and independent judiciary as well as an organisation to prosecute infringements of the law.
5. Respect for human rights directly connected with the above elements: access to justice, right to a competent court, right to be heard, respect for the *ne bis in idem* principle, principle of non-retroactivity (where measures harm citizens), right to effective legal redress, presumption of innocence and right to a fair trial.
6. Non-discrimination and equality before the law: the law treats all citizens equally and all citizens are subject to the same laws. Nonetheless, unequal treatment is permitted in order to achieve substantive equality.

The Venice Commission has now adopted these standards in its rule of law checklist. They can also be found in the European Commission's Communication entitled *A new EU framework to strengthen the rule of law*.[33]

In view of the broader definition of 'rule of law' used here to equate with the definition of *Rechtsstaat*, the following two parameters can be added:

7. Separation of powers and the existence of a system of checks and balances: to prevent concentration of power and the arbitrary exercise of power, it is necessary for the powers to be spread among the different branches of the state. The separation or spread of powers can be functional (e.g. the distinction between the legislature and the executive) or geographic (e.g. as in federal systems). The separation of powers does not have to be complete; of particular importance is the existence of sufficient mechanisms for generating mutual control and mutual dependence. Examples include mechanisms of accountability, such as parliament's power to force the resignation of a minister, and mechanisms whereby the different

33 Venice Commission, Rule of Law Checklist, CDL-AD(2016)007-e, March 2016; European Commission, Communication entitled *A new EU Framework to strengthen the Rule of Law,* COM(2014) 158 final and Annex I, 7632/14 ADD 1.

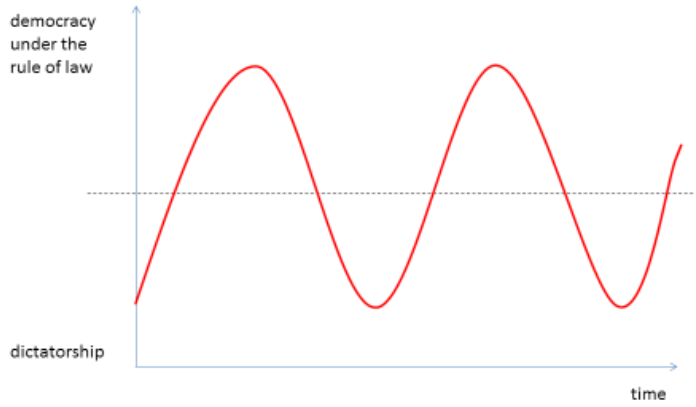
branches of the state are obliged to work together, for example in cases where legislation can only be introduced jointly by government and parliament.

8. Respect for human rights in the broad sense: not only civil and political rights but also social, economic and cultural rights, rights of minorities, respect for human dignity, and respect for the equality of every individual.

I.3 Conclusion/summary

This chapter has explained the existence of an intrinsic relationship between democracy and the rule of law. Democracy has both an *electoral* (formal) dimension and a *constitutional* (substantive) dimension. The constitutional dimension can be defined by reference to the eight parameters of the rule of law as set out above. A country that not only fulfils the electoral dimension but also complies with most or even all of these parameters qualifies as a 'democracy under the rule of law'. It follows that over time a country can move, as it were, along a curve representing democracy under the rule of law. This curve is depicted in the figure below. The rising line shows democracy under the rule of law in the development stage. In this stage the parameters of democracy and the rule of law are increasingly fulfilled. The falling line shows a gradual decline. In this stage democracy under the rule of law comes under pressure, for example because the government takes measures that impinge on individual freedoms or undermine the independence of the judiciary. At its peak, the curve represents the ideal democracy under the rule of law, in which all conditions are fulfilled. A democracy under the rule of law enters the danger zone when it is at a position on the curve below the dotted line. In such a case, the state concerned has one or more serious failings in one or both dimensions.

Figure 4: Curve representing democracy under the rule of law



II Erosion of democracy under the rule of law in a European context

II.1 Waning public confidence

It has already been noted in chapter I that mutual confidence between politicians and voters is crucial to the proper functioning of representative democracy. Various studies have shown that in Europe voter confidence in politics is on the wane. According to a survey conducted by the European Commission at the end of 2016, almost two-thirds of the citizens of EU member states have no confidence in their national government (64%) or in their national parliament (62%).[34] Other indicators are low voter turnouts and the shrinking membership of political parties.[35]

Political scientists Roberto Foa and Yascha Mounk actually go so far as to suggest that people in the United States and Europe have become more cynical about the value of democracy as a political system. They come to this conclusion on the basis of three indicators: the importance people attach to living in a democracy, the extent to which they are receptive to non-democratic alternatives such as military rule, and whether support for 'anti-system' parties is growing. Foa and Mounk conclude that support for democracy is on the wane and that the other two indicators are rising. They therefore perceive a risk of what they term 'democratic deconsolidation', in Europe as well.[36]

Although different views also exist,[37] support for the principles of democracy under the rule of law and the associated institutions does appear to be on the wane among large groups of people in Europe. This is currently reflected in the electoral success of new and existing anti-establishment movements that oppose elements of these principles. But even more established political parties sometimes seem willing to take measures that are at odds with the principles of democracy and the rule of law.

II.2 Trends and other factors

Citizens' affinity for a particular political system does not diminish suddenly. This is a gradual and often insidious process resulting from a large number of trends and factors. These can be of a very diverse nature, for example political, geopolitical, socioeconomic,

34 European Commission, Standard Eurobarometer 86, Autumn 2016, p. 14.

35 S. Tormey, 'The contemporary crisis of representative democracy', in *Democratic Theory*, vol. 1:2 (Winter 2014), pp. 2-3. See also: R.J. Dalton, *Democratic challenges, democratic choices: the erosion of political support in advanced industrial democracies* (Oxford: Oxford University Press, 2004).

36 R.S. Foa & Y. Mounk, 'The democratic disconnect', in *Journal of Democracy*, vol. 27:3 (July 2016), pp. 5-17; and 'The signs of deconsolidation', in *Journal of Democracy,* vol. 28:1 (January 2017): pp. 5-15. Foa and Mounk used the data of the World Values Survey.

37 For example, in 2015 the Pew Research Center still found widespread support in Europe for such values as freedom of religion, freedom of expression, press freedom, sexual equality and fair and free elections. See: <http://www.pewglobal.org/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech/>.

cultural, historical, institutional and ideological. A fundamental debate about why people are losing faith in democracy under the rule of law is currently taking place in politics, academia and the media. The main trends and factors mentioned in this debate are discussed below. Unlike some commentators, the AIV considers that this decline in confidence cannot be attributed to any single factor. Instead, there are numerous trends and factors of varying kinds which to some extent influence and reinforce one another but also operate independently of one another and evolve over time. No clear dividing lines can be drawn, as is apparent from the following overview.[38]

II.2.1 Economic trends and factors

Market forces and globalisation

Global economic malaise, high unemployment, large public sector deficits, a foundering welfare state and high unemployment figures necessitated a rethinking of the role of government in society in the early 1980s in Europe (as well as in the United States). This resulted in the market revolution[39] of the 1980s and 1990s. Measures such as trade liberalisation, financial and other deregulation,[40] privatisation of state enterprises and budgetary austerity helped to create more scope for the operation of market forces in the economy. The public sector was trimmed back by means of structural reforms. The welfare state too was reformed, which in fact constituted the first weakening of the social safety net.

This policy turnaround, also known as the Washington consensus, gave an enormous boost to global economic growth. Globalisation offers companies the chance to penetrate new markets and produce more efficiently. It stimulates international investment, knowledge exchange and technological innovation. All of this boosts exports, produces cheaper imports and broadens choice for consumers. The surging economic growth figures from the mid-1980s onwards show that the policy of giving freer rein to market forces and introducing open borders in an absolute sense worldwide helped to increase (national) income and raise living standards.[41] Free trade and market forces were therefore embraced by both right-wing and left-wing political parties. This is sometimes known as TINA politics: There Is No Alternative.[42]

However, the result of economies of scale and technological innovation has not only been more efficient economies and international integration and collaboration. Although in the long term globalisation has benefits for national economies as a whole, there are

38 The trends and causes described here are often of a global nature and also have an impact in Europe.

39 I. Krastev, 'Europe's Democracy Paradox', in *The American Interest*, vol. 7:4 (February 2012), see: <http://www.the-american-interest.com/2012/02/01/europes-democracy-paradox/>.

40 Under UK Prime Minister Margaret Thatcher, the financial markets of the City of London were completely deregulated on 27 October 1986. This date has been dubbed 'the Big Bang'.

41 According to the World Bank, global GDP rose from USD 11 trillion in 1980 to USD 51 trillion in 2006. See: http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2006&start=1980.

42 C. Mudde, 'Europe's populist surge, a long time in the making', in *Foreign Affairs* (November/December 2016): pp. 25-29.

also losers.[43] Economic sectors in Western countries are disappearing and relocating to countries where production costs are lower. The transition from a manufacturing economy to a services economy requires an ever more highly educated workforce, leaving the low-skilled lagging behind. Competition between countries for foreign investment sometimes leads to a race to the bottom in terms of legislation on matters such as environmental standards, taxes for multinationals and terms and conditions of employment of individual employees. Natural resource scarcity (including the climate problem) and technological development also result in global competition for resources such as land, water and commodities.

According to British economist Guy Standing, the flexibilisation of the labour market and the increased individualisation have led to the creation of a 'precariat',[44] which he defines as a highly diverse group of highly and lowly educated people, young and old, characterised by temporary jobs, low wages, limited social security and little prospect of improving their own socioeconomic position. In Standing's view, this fosters anger and social disengagement:

'The precariat feels frustrated not only because a lifetime of flexi-jobs beckons, with all the insecurities that come with them, but also because those jobs involve no construction of trusting relationships built up in meaningful structures or networks. The precariat also has no ladders of mobility to climb, leaving people hovering between deeper self-exploitation and disengagement.'[45]

Political economist Dani Rodrik considers that the modern international economy ultimately compels countries to choose between three variables: participation in economic globalisation, national sovereignty and political democracy. A country can satisfy only two of these variables at any given time. He terms this the 'globalisation trilemma'.[46] Deeper economic integration requires governments to agree among themselves ever more far-reaching common rules and standards, which their own populations feel increasingly disengaged from. Insisting on both national sovereignty and public participation in decisions leads to international isolation. And when democratic participation is raised to a higher level (as in the European Union), this is once again at the expense of national sovereignty.[47]

There is also a shift from democratic power to private, commercial power in the form of international corporate power. If a society is organised along democratic lines and functions in conditions of peace, this has a beneficial impact on its economic

43 For a detailed consideration of globalisation and its consequences, see for example: OECD, *Moving Up the Value Chain: Staying Competitive in the Global Economy* (OECD Publishing, 2007).

44 *Precariat* is a combination of the words precarious and proletariat.

45 Guy Standing, *The Precariat. The New Dangerous Class* (London: Bloomsbury, 2011), pp. 19-20.

46 D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: Norton & Company, 2011). See also: <http://rodrik.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html.>

47 See: <https://www.nrc.nl/nieuws/2016/08/04/als-globalisering-de-burger-voorbij-holt-gaat-het-wringen-3502111-a1514665>.

development. However, a one-sided focus on economic interests has also been conducive to a situation in which the democratic institutions diminish their own relevance. Whereas the state, particularly in Europe, originally oversaw or was deemed to oversee the tax system, labour law, the protection of employees, the climate and the environment, and the financial and banking system, it has now itself become part of the globalised systems. As a result, citizens no longer see how the system works, let alone understand how they or their representatives in the state can take control or mount an effective countermovement. Suspicions about the existence of invisible forces that put their own interests first are causing increasing distrust of state institutions.

In all these contextual factors a tension is apparent between perception and reality. Individuals, citizens and, more generally, peoples know their own situation and know that they are trying to survive in a state of uncertainty, poverty or social exclusion. In both rich and poor countries people are well able to describe the problems they face and can often even explain the context in which these problems occur. These experiences of reality should not be dismissed as 'gut feelings' or the people as 'deplorables'.[48]

Technological innovation: deindustrialisation
Since the 1970s Western economies have switched from manufacturing to services. Heavy industries have disappeared and large sections of the labour force, mainly the low-skilled, have been made redundant. Many of them have had great difficulty in finding new employment. This is because the service economy tends to generate mainly knowledge-intensive jobs and therefore requires staff to be more highly educated. Not everyone is able to make this switch.

The prevailing theory is that globalisation has caused Western manufacturing industry to move to countries where wage and production costs are lower, particularly in Asia. Critics of globalisation therefore oppose international trade treaties, arguing that protectionism could preserve jobs for a country's own citizens. However, this picture is incomplete. Technological innovation, automation and the development of information technology have been equally responsible for accelerating this process. Much employment in the manufacturing sector has disappeared for good due to improved efficiency and the replacement of humans by robots and the computer chip. Erecting trade barriers will not bring back these jobs. Creating employment in a period of rapidly increasing automation poses an enormous and complex challenge.

Income and wealth inequality
A topic that has attracted much attention in recent years is growing income and wealth inequality.[49] This has left a substantial section of the world's population lagging behind – in relative terms in any case and sometimes to an extreme extent. In 2015 50% of global wealth was owned by just 1% of the global population.[50]

Although increasing income and wealth inequality should not be confused with increased poverty, it is not without social consequences. After all, some groups in society are

48 See also: Wendy Brown, *Undoing the demos*. Zone Books, (New York, 2015).

49 See for example T. Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014) and J. Stiglitz, *The Price of Inequality* (New York: Norton & Company, 2012).

50 Credit Suisse Research Institute, *Global Wealth Report 2015,* 2016. See: <https://www.credit-suisse.com/us/en/about-us/research/research-institute/global-wealth-report.html>.

at a permanent disadvantage when it comes to sharing in prosperity. In 2014 the Netherlands Scientific Council for Government Policy (WRR) concluded that increased income inequality in 28 European countries had been a factor in reducing social cohesion in society. Trust in other people and in institutions (including parliament, political parties and the legal system) tends on average to decline as income inequality in a particular country increases.[51] Moreover, the more extreme the inequality the more likely the public are to want government to intervene to prevent excessively unequal distribution of income and actively provide a safety net.

There are also indications that voter turnout in general elections tends on average to decline, particularly among lower income groups, as income inequality increases. The voice of these sections of the population is therefore heard less by politicians. The WRR believes that this may raise doubts about the legitimacy of democracy under the rule of law.[52]

II.2.2 Sociocultural trends and factors

Individualisation

In the 1960s the strict social hierarchy came under increasing strain in the United States and Western Europe. A vanguard consisting of students, peace and environmental activists, feminists, gay people and other groups claimed more democratic rights and individual freedoms. There was increasing recognition that a person's socioeconomic position should be determined by his or her own achievements rather than by factors such as origin, race, sex or age. While this process resulted in greater individual freedom of choice and greater diversity of social groupings and views, it also led to an unravelling of the traditional social networks which had hitherto provided structure and a sense of security.

This too was, in fact, an anti-establishment movement, albeit one which took issue with ossified government bodies and other institutions, the role of the church in society and the social control exerted by the family and the neighbourhood. Unlike current populist movements, the counterculture of the 1960s was mainly left-wing and progressive. Paradoxically, individualisation has also resulted in greater dependence on government. Although the countercultural movement claimed more individual freedoms, it also called on government to fund an increasing number of socioeconomic rights. The creation of the welfare state in Western Europe was made possible by the enormous economic growth of the 1950s and 1960s.

Declinism

Unlike Guy Standing, who has been quoted above, some academics such as Flemish sociologist Mark Elchardus consider that citizens are concerned not so much by their own position as by the future of their country and its prosperity and culture. In other words, citizens base their political choices not on their personal socioeconomic circumstances but on their view of the direction in which their society is moving. The term used by Elchardus to describe this sense of things deteriorating is 'declinism'. This is not so much about actual facts as about people's perceptions of their own circumstances and the world at large. According to Elchardus, anti-establishment movements play on this sense

51 See: H. van de Werfhorst, 'Politieke en sociale gevolgen van inkomensongelijkheid' (Political and social consequences of income inequality), in *WRR-Verkenning: Hoe ongelijk is Nederland? Een verkenning van de ontwikkeling en gevolgen van economische ongelijkheid* (Amsterdam University Press, 2014), pp. 113-131.

52 Ibid: p. 127.

of decline, while attributing sole responsibility for it to the political elite and presenting themselves as the solution.[53]

Cultural values and national identity
Inglehart and Norris also emphasise the role played by cultural values and national identity in the political choices made by citizens. In keeping to some extent with the process of individualisation discussed above, they believe that post-war (highly educated) generations in the West, who have grown up in stability and economic prosperity, are focusing on different cultural values than previous generations. These 'postmaterialistic' values include personal development and support for a multicultural society, immigration, secularisation, international cooperation, European integration, human rights, LGBT rights, the environment, sustainability and so forth.[54]

According to the authors, these progressive values are under increasing threat. The financial and economic crisis and the influx of non-Western migrants have led to a cultural backlash, particularly among low-educated white groups who see their traditional, national and sometimes religious standards and values increasingly threatened. They are now more inclined to vote for parties with a socially conservative agenda.[55] Anti-establishment movements are capitalising on this. The Brexit referendum on 23 June 2016 seems to provide some evidence of a generation gap. A majority of all voters over the age of 65 (66%) voted to leave the European Union, whereas a majority of the 18-24 age group (72%) voted to remain.[56]

Migration
Western European societies have become ever more culturally diverse in recent decades as a result of various forms of migration: migrant workers, particularly from countries around the Mediterranean and later from Eastern Europe; migrants from former colonies; more recently, large groups of refugees from the Horn of Africa and the Middle East; and family reunification with the new arrivals. This is affecting many aspects of people's daily lives, for example the availability of employment and housing, residential amenity, solidarity

53 Contribution by Mark Elchardus to panel discussion, *Wat verstaan we onder het fenomeen populisme?* (What do we understand by the phenomenon of populism?), Clingendael Debate on Populism, The Hague, 2 February 2017. See also: M. Elchardus, *Voorbij het narratief van neergang* (Beyond the narrative of decline) (Leuven: Lannoocampus, 2015).

54 R.F. Inglehart & P. Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash', in *Harvard Kennedy School Faculty Research Working Paper Series*, RWP16-026, John F. Kennedy School of Government (August 2016). See: <https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=11325&type=FN&PersonId=83>. See also: Catherine de Vries & Isabell Hoffmann (eds), *Fear not Values. Public opinion and the populist vote in Europe*, Bertelsmann Stiftung, 2016.

55 Ibid: pp. 3 and 13-16.

56 See: <https://www.nrc.nl/nieuws/2016/06/26/brexit-legt-pijnlijke-generatiekloof-bloot-a1401458>. Various British media reported that only 36% of young people voted, compared with an average turnout of 72%. These figures have proved controversial. A survey by the London School of Economics showed a turnout among young voters of 70%, see: <http://www.newstatesman.com/politics/staggers/2016/06/how-did-different-demographic-groups-vote-eu-referendum> en <http://www.volkskrant.nl/wetenschap/britse-jongeren-kwamen-niet-opdagen-bij-brexit-referendum~a4339138/>.

with other local residents, sense of social cohesion and security, education, diversity in schools and scope for interpersonal communication. The result has been a growing undercurrent of dissatisfaction with the loss of economic opportunities and loss of identity and cultural individuality. Many believe that Muslim migrants in particular are unable to adapt to Western standards and values. The question of whether Islam is actually even compatible with Western standards and values is being asked ever more vociferously. There is also a fear that the loyalty of migrants and their descendants may lie elsewhere than with the society in which they have built their lives. The latest manifestation of this dissatisfaction occurred in connection with campaign meetings in a number of Western European countries with regard to the constitutional referendum in Turkey.

Security
Disaffection and resentment about the lack of opportunities and prospects in society can cause positions to harden and this sometimes results in political or religious radicalisation, even occasionally culminating in the adoption of terrorist ideology. The 9/11 attacks by radical Muslims led to strained relations and growing friction between the West and the Islamic world. Subsequent attacks in Europe and elsewhere, usually in the name of Islam, quickly strengthened calls for tougher counterterrorism measures and stricter checks on Muslim and other immigrants or even measures to prevent their entry. Out of fear of more terror, large sections of society in Europe have proved willing to accept the consequent restrictions on liberty. In a climate increasingly opposed to the notion of the rule of law, discrimination, xenophobia, racism, Islamophobia and anti-Semitism are all flourishing.[57] The response of moderate political and religious leaders and others in positions of authority in society has been both insufficiently convincing and insufficiently vocal.

Media
Until the end of the twentieth century the media landscape was dominated by newspapers, radio and television. However, the advent of the internet in the early 1990s and social media in the early 2000s brought about a radical change. The low cost of accessing the internet means that everyone is now, in principle, able to generate journalistic content (through blogs, websites, YouTube videos, live streaming, etc.). This has resulted in democratisation of the media and diversification of the media landscape, but has also had negative effects.

The independence of the media is crucial for the credibility of reporting. But on the internet this seems to be largely immaterial: media that focus on a specific political or ideological niche are highly successful online. Besides the role of the internet, another factor instrumental in undermining media independence is the concentration of media ownership in the hands of just a few companies.[58]

The income of the traditional news media is being squeezed by greater competition.

57 John Shattuck talks here of the ‘politics of fear’: J. Shattuck, ‘Democracy and its discontents’, in *The Fletcher Forum of World Affairs*, vol. 40:2, (Summer 2016), p. 176.

58 For example, according to a report of the Media Reform Coalition, just three companies control 71% of national newspaper circulation in the United Kingdom. See: Media Reform Coalition report (2015), ‘Who owns the UK Media?’ It should be noted that a similar situation exists in the Dutch newspaper industry: the Telegraaf Mediagroep, Persgroep and NRC Media have by far the largest readership in the Netherlands (see: *Nationaal Onderzoek Multimedia,* via: nommedia.nl).

Online media are often funded from advertising revenue. Consequently, the facts are no longer necessarily central; what counts is attracting as many visitors as possible to the site, relying on the speed of posting news online, sensational content and the ideological message.[59] This undermines the reliability of the media. As everyone is now potentially able to generate news and the quantity of media content has risen explosively, it is becoming ever more difficult to check the content, sender and sources. So it is easy, for example, for populist movements to claim that the traditional media, especially newspapers, are biased and mendacious. This problem is exacerbated by the phenomenon of 'fake news', which is disinformation generally intended to substantiate one's own political positions or undermine the positions and reputation of political opponents.[60]

Whereas at the time of the Arab Spring there was much praise for the positive impact of social media (Facebook, Twitter, Instagram, etc.) on the democratic process, there is now greater awareness of its darker side.[61] First, social media contributes to the formation of 'filter bubbles'.[62] Informational bubbles of this kind are created by the user personally (self-selection) and strengthened by search and personalisation algorithms (pre-selection). This hyperpersonalisation of news and opinion has created a situation in which people are shielded from conflicting positions and isolated from people who think differently.[63] In addition, social media tends to polarise social debate. Although social media undeniably facilitates and intensifies political debate and discussion, the nature of reactions on social media (fast, brief, simplistic, one-sided and often anonymous) has made the tone of the social debate considerably more strident.[64] Finally, social media makes individuals more transparent. Connections, posts and likes help to create a more complete picture of individuals, who they are and what they think, believe and want. Within a democracy under the rule of law this picture can be used, for example, to microtarget voters with a view to influencing their political choice. But social media is

59 R. Holiday, *Trust me, I'm lying: Confessions of a Media Manipulator* (New York: Penguin Group, 2013).

60 See, for example, 'The #Election2016 Micro-Propaganda Machine'. See: <https://medium.com/@d1gi/the-election2016-micro-propaganda-machine-383449cc1fba#.65n7y6xbg>.

61 E. Morozov, *The Net Delusion: the Dark Side of Internet Freedom* (New York: Public Affairs, 2012).

62 E. Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (New York: Penguin Press, 2011).

63 V. Vike-Freiberga et al., 'A free and pluralistic media to sustain European democracy', *Report of the EU High Level Group on Media Freedom and Pluralism* (January 2013). However, research by the University of Amsterdam concludes that there is at present no convincing empirical evidence for the effects of filter bubbles on the democratic process. This is mainly because the use of search and personalisation algorithms is, relatively speaking, still in its infancy. See: F.J. Zuiderveen Borgesius et al., 'Should we worry about filter bubbles?' in *Internet Policy Review*, vol. 5:1 (March 2016).

64 The use of troll accounts is a particular problem in this connection. Troll accounts are false social media profiles controlled by a political party or real profiles belonging to vocal sympathisers of a political party or movement. Through these accounts, propaganda is disseminated and political opponents are attacked and even threatened. In countries such as Russia the use of an online 'army' of trolls has become an integral part of media strategy. See: E. Morozov, *The Net Delusion: the Dark Side of Internet Freedom* (New York: Public Affairs, 2012).

also a powerful tool for monitoring individuals and identifying political opponents.[65]

II.2.3 Political and geopolitical trends and factors

National

After the Second World War representative democracy was dominated by three main political movements: the Christian Democrats, the Social Democrats and the Liberals. However, they have gradually lost their traditional support base as a result of successive trends: secularisation since the 1960s, deindustrialisation since the 1970s, and the environmental movement and the above-mentioned TINA politics since the 1990s. The distinction between left and right has become increasingly blurred, for example as a result of the 'Third Way' of the British Labour prime minister Tony Blair and '*die neue Mitte*' of German Chancellor Gerhard Schröder. For some voters, this has given the impression that the political elites are indistinguishable from one another. In this connection, Zakaria points out that the choice between traditional and progressive cultural values is the main difference emphasised by political parties nowadays in vying for the support of the electorate.[66]

International

The post-war world order was dominated economically, politically, militarily and culturally by the West. With the emergence of new power players such as China, India and Saudi Arabia, the geopolitical landscape has undergone fundamental change. Russia and Turkey too are becoming increasingly assertive. In consequence, the ideas propagated by the West are gradually declining in influence and losing the moral high ground. In other parts of the world there is a strong sense that the West applies double standards (for example, Guantanamo Bay, immigration policy and the arms trade).

While Europe is wrestling with itself politically and economically, during the Munich Security Conference in February 2017 the Russian foreign minister Sergey Lavrov called for a '*post-West world order*' based on national sovereignty.[67] This call has been echoed by the eastern member states of the Council of Europe and the European Union, meaning, for example, that the human rights policy of these organisations is coming under pressure from the inside. The fundamental values on which the Council of Europe and the EU are based appear to be no longer endorsed by all their members.

Distrust of European institutions

It is both the strength and the weakness of the EU that it depoliticises conflicts between its member states and reduces them to the level of technical issues. It is this which has

65 E. Morozov, *The Net Delusion: the Dark Side of Internet Freedom* (New York: Public Affairs, 2012).

66 F. Zakaria, 'Populism on the march: Why the West is in trouble', in *Foreign Affairs* (November/December 2016), p. 13.

67 See: <http://www.independent.co.uk/news/world/europe/russia-post-west-world-order-lavrov-munich-security-conference-nato-trump-putin-ukraine-syria-assad-a7587006.html> and <http://www.volkskrant.nl/buitenland/lavrov-roept-op-tot-post-westerse-wereldorde-tijd-dat-westerse-landen-alles-besluiten-is-voorbij~a4464425/>.

ensured that for the last 65 years disputes between the EU's member states[68] have been resolved around the negotiating table or before the courts and no longer on the battlefield. This has the disadvantage that it requires the existence of a bureaucracy, which is perceived by many citizens in the member states as cumbersome, costly, opaque and undemocratic. The advantages of European cooperation (such as peace, security, prosperity, and free movement of persons and goods) are hard for political and other leaders to communicate, whereas such factors as the influx of cheap labour from Eastern Europe, burdensome regulation, strict budgetary agreements (which are flouted by the larger member states) or excesses such as the European Parliament's unnecessary and costly monthly move back and forth between Brussels and Strasbourg generate much negative publicity. Moreover, the governments of the EU member states have been unable to formulate a satisfactory response to the eurozone crisis or the refugee crisis. Nor did they succeed in preventing Brexit. Some citizens feel that they are only worse off as a result of European cooperation and long for more national control. National politicians are sometimes inclined to play on these feelings by hiding behind the EU in relation to difficult political decisions. 'Brussels' has become the scapegoat for everything that is wrong in Europe. Unlike the European Union, the Council of Europe is mostly unknown and hence unloved by the majority of citizens.

II.2.4 Transition in Central and Eastern Europe

The Central and Eastern European countries face specific challenges that make their region particularly vulnerable to the erosion of democracy under the rule of law.

First, they endured decades of dictatorship and repression. Not until 1989 did they regain their freedom. So it is debatable to what extent the initial optimism about their 'return to the European fold' was realistic. After all, the Central and Eastern European countries had scarcely any pre-communist democratic tradition to fall back on. They had also existed in relative isolation for fifty years. This seems to have fostered a mentality and world view marked by fear of the unknown. Moreover, the people of this region feel disadvantaged in comparison with the citizens of other EU member states. And, finally, these societies are still organised along top-down lines. Although fifty years of dictatorship have left the population distrustful of government, particularly because of widespread corruption, they still accept central authority.

As Bugaric notes, *'All those who expected (…) an irreversible break with the totalitarian past were simply naive. They forgot that institutions of liberal democracy cannot be created overnight. It is not only that developing liberal democracy requires more time, it also depends on continuous support and endorsement of the people.'*[69] (…) *'While there has been major progress in the development of 'electoral democracy' in the region, constitutional liberalism and the rule of law still remain weak.'*[70]

68 And its legal predecessors the European Coal and Steel Community, the European Community (known until 1993 as the European Economic Community) and the European Atomic Energy Community (Euratom). Euratom is still formally a separate organisation, but makes use of the institutions of the European Union for its decision-making processes.

69 B. Bugaric, 'Populism, liberal democracy, and the rule of law in Central and Eastern Europe', in Communist and Post-Communist Studies, vol. 41:2 (June 2008), p. 198.

70 Ibid: p. 192.

Western Europe viewed membership of the Council of Europe and the European Union as the main instruments for successfully implementing the democratic and economic transition in Central and Eastern Europe. The EU in particular held a tremendous attraction for the population of the Central and Eastern European countries owing to its combination of stability, economic prosperity, security and personal freedoms. The process of accession to the EU also provided a clear framework (based on the so-called Copenhagen criteria)[71] for carrying out the reforms needed to make the transition to a democratic society and open market economy.[72]

Various authors suggest that although there was originally broad social consensus on accession to the EU and the reforms needed for this purpose, the transition was in practice largely managed by a small, and often rent-seeking elite who had the most to gain in economic terms from EU membership.[73] The EU was partly to blame for this because it treated the adoption by the Central and Eastern European countries of the a*cquis communautaire* mainly as an administrative and technocratic exercise. Negotiations were of a highly technical nature and were conducted largely at expert level. This executive bias reinforced the predominantly statist culture that was still present in the candidate countries.[74]

Another reason the EU had a dominant influence over the accession process was that the *acquis* as such was non-negotiable. The candidate member states and their parliaments and voters had only a limited say over the substance of the legislation they were required to transpose into their national system. This included social legislation for which there was little support in society, for example in relation to the protection of minorities (especially Roma and Sinti). As Krastev notes, '*The European Union and the external constraints that it imposed on the accession countries contributed to the perception of the transition regimes as "democracies without choices", and thus fuelled the current backlash against consensual politics'*.[75]

71 According to these accession criteria, which were agreed by the European heads of government in Copenhagen in June 1993, a candidate country must have: 1. stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; 2. a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU; 3. the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the 'acquis'). A fourth criterion was added in 2006: 4. accession of a country may not hamper the ability of the EU to function effectively and to develop.

72 H. Grabbe, 'Six lessons of enlargement ten years on: the EU's transformative power in retrospect and prospect', in *Journal of Common Market Studies*, vol. 52 (Annual Review 2014), p. 40.

73 See, for example, H. Grabbe, 'How does Europeanization affect CEE governance? Conditionality, diffusion and diversity', in Journal of European Public Policy, vol. 8:6 (December 2001), pp. 1013-1031; F. Schimmelfennig & U. Sedelmeier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', in *Journal of European Public Policy*, vol. 11:4 (August 2004), pp. 669-687; and I. Krastev, 'The strange death of the liberal consensus', in *Journal of Democracy*, vol. 18:4 (October 2007), pp. 58-59.

74 H. Grabbe, 'How does Europeanization affect CEE governance? Conditionality, diffusion and diversity', in *Journal of European Public Policy,* vol. 8:6 (December 2001), pp. 1029.

75 I. Krastev, 'The strange death of the liberal consensus', in *Journal of Democracy*, vol. 18:4 (October 2007), p. 59.

The EU accession process was mainly incentive-driven. Once the new member states had completed their accession to the EU, they quickly lost interest in carrying out reforms. The European Bank for Reconstruction and Development (EBRD) noted that the willingness to enact reform in Central and Eastern European member states was greatest in the three years prior to accession. Since the mid-2000s the process of reform has stagnated and often been reversed. According to the EBRD, support for the market economy has declined in all new EU member states since the financial and economic crisis.[76]

The prospect of the benefits of EU membership, particularly the socioeconomic benefits, meant that citizens and politicians in the former Eastern Bloc countries were prepared to accept radical reforms. However, EU membership failed to live up to their high expectations. On the contrary, the eurozone crisis and the influx of refugees once again put pressure on their societies. Another factor is the marked increase in income inequality which the Central and Eastern European countries have experienced since the start of the transition.[77] All too often the political and business elites have enriched themselves by corrupt practices at the expense of society.

In the eyes of many citizens of Eastern Europe, the transition from a collectivist to an individualist society and from a communist to a capitalist economy has failed to improve their economic and social prospects. This provides an opening for anti-establishment parties which invoke national identity and socially conservative values, and oppose the EU as a (progressive) community of values.

Although this trend can also be seen in Western Europe and elsewhere in the world, Bugaric believes that the Central and Eastern European countries provide conditions particularly conducive to the success of these parties:

'The old member states can cope more successfully with different attacks on liberal institutions because their courts, media, human rights, and ombudsman have a longer and more developed tradition of independence and professionalism. On the other hand, if such institutions are weak and underdeveloped, as in Central and Eastern Europe, then there is always a potential danger of drift to populism and "illiberal democracy".'[78]

For the purposes of this analysis, it should be added that various countries in Central and Eastern Europe are experiencing pressure from Russia. Georgia and Ukraine have, in effect, become embroiled in an armed conflict with Russia, and other countries allege that Moscow is attempting to mobilise their Russian-speaking population groups. The result is instability and distrust.

76 Presentation given at the Dutch Ministry of Foreign Affairs by Artur Radziwill, EBRD Director for Country Economics and Policy (30 September 2016).

77 See also: EBRD Transition Report 2016-17, <http://www.ebrd.com/transition-report>.

78 B. Bugaric, 'Populism, liberal democracy, and the rule of law in Central and Eastern Europe', in *Communist and Post-Communist Studies*, vol. 41:2 (June 2008): p. 198.

II.3 Conclusion/summary

It is apparent from the complex international developments described above that in the past twenty to thirty years large groups of European citizens have missed the boat in economic, social and cultural terms and feel that they have been increasingly left to fend for themselves. Since the mid-1960s (and in Eastern Europe since 1989), the role of government, politics, church, family and traditions in personal life has been gradually whittled away. Globalisation and the ICT revolution have accelerated this process. Citizens' individual freedom of choice and independence have never been so great. At the same time, their own responsibility has increased just as much. While this may be fine for them as consumers and tourists, it can be significantly more threatening in their capacity of employee in a flexible economy in which conditions of employment and the social safety net are under pressure. As a large number of government tasks have been privatised or semi-privatised since the 1980s, the responsibilities of the public sector have also become blurred.

Many people are able to cope with these developments. But a growing number of people have the feeling that they are gradually becoming disengaged from society and being left behind. They are disappointed in their governments and mainstream political parties for failing to find an effective answer to these threats at national and European level, or indeed for ignoring or even contributing to these threats. This has fostered a sense of social alienation between citizens themselves, between citizens and politicians and between citizens and democratic institutions. These institutions are perceived as meddling and inaccessible. The result is a growing aversion to what is regarded as the ruling elite or the establishment, who are seen as no longer acting in the interests of citizens and society.

Two international crises have acted as a catalyst for this undercurrent of dissatisfaction. The first was the financial and economic crisis of 2007-2008, including the eurozone crisis, and the subsequent Great Recession.[79] Only through the injection of large quantities of government money in the US and Europe was it possible to prop up the international financial system. Just as in the 1980s, rising public sector deficits forced governments to make sweeping economic reforms and cuts in spending on the welfare state. The bill for the crisis was thus presented not to those who had caused it but – once again – to those sections of society that had already been hard hit by high levels of unemployment, the collapse of the housing market, pension reductions and wage cuts. The eurozone crisis also clearly demonstrated that international economic interdependence has greatly restricted the scope for governments and parliaments to pursue national policy in times of international crisis.

The second catalyst was the refugee crisis, the full extent of which became clear in 2015 when large numbers of refugees entered Europe in a short space of time, mainly from the Middle East. This severely tested public support for the reception of asylum-seekers throughout Europe. The protest consists of three elements. First, the reception of refugees makes great demands on scarce public resources, which have to be generated by society as a whole. Many people regard it as unjust that the national welfare state is used to benefit outsiders when many of the country's own nationals have

79 C. van Ewijk & C. Teulings, De grote recessie. Het Centraal Planbureau *over de kredietcrisis* (The Great Recession. The Netherlands Bureau for Economic Policy Analysis on the credit crisis) (Amsterdam: Balans, 2009).

difficulty making ends meet. Second, opponents fear the threat posed by the influx to their national identity and way of life. Finally, there is the fear that potential perpetrators of terrorist attacks may slip into the country with the refugees.

In this perfect storm, created by two mutually-reinforcing crises, electoral opportunities have been created for new movements that combine the left-wing emphasis on social security with right-wing ideas about national sovereignty and national identity. This is precisely what many anti-establishment movements in Europe are doing. Although their ideas are at odds with the principles of democracy under the rule of law, this does not seem to deter their supporters. Kenneth Roth has summarised this trend in the following way:

'(…) today, a growing number of people have come to see rights not as protecting them from the state but as undermining governmental efforts to defend them. In (…) Europe, the perceived threat at the top of the list is migration, where concerns about cultural identity, economic opportunity, and terrorism intersect. Encouraged by populists, an expanding segment of the public sees rights as only protecting these "other" people, not themselves, and thus as dispensable. If the majority wants to limit the rights of refugees, migrants, or minorities, the populists suggest, it should be free to do so. That international treaties and institutions stand in the way only intensifies this antipathy toward rights in a world where nativism is often prized over globalism.'[80]

80 K. Roth, 'The dangerous rise of populism. Global attacks on human rights values', in *Human Rights Watch World Report* 2017, eds. K. Roth et. al. (New York: Seven Stories Press, 2017), p. 2.

III Populism as a political force

The previous chapter examined the developments and factors that have contributed to the decline in public confidence in politics and government. Many citizens feel that democracy under the rule of law no longer works for them – and at times even works against them. This dissatisfaction fuels what are often referred to as populist tendencies, that is to say a desire to remove power from the political and administrative elite and return it to 'ordinary people'. By exploiting these sentiments, anti-establishment movements have managed to emerge as a relevant political factor in Europe in recent years.[81]

III.1 Populist movements in Europe

Movements that oppose the established political order are currently a political factor of significance in much of Europe. Often they are lumped together under the broad heading of populist movements. Populism is currently a subject of much debate, for example in politics, journalism and the academic world. However, the term covers a very wide range of views and movements which differ in a number of ways, for example in their relationship to the rule of law and human rights. The AIV does not intend to provide a precise definition of populism here. This advisory report seeks, instead, to deal specifically with the negative impact on democracy under the rule of law that is apparent in the various countries where specific 'populist' parties have held government power.

Populism is not a recent phenomenon in Europe. As early as the start of this century various authors identified increasingly populist tendencies in central and eastern Europe.[82] Following the emergence of the FPÖ in Austria, *Front National* in France, *Forza Italia* in Italy and *Lijst Pim Fortuyn* in the Netherlands, politicologist Cas Mudde identified what he termed a 'populist *Zeitgeist*' back in 2004.[83]

Those early manifestations of populism differ from the present developments in two ways. Whereas around the turn of the millennium such movements seemed to be of a largely one-off nature, populism has now acquired a more permanent presence in the political landscape. At the same time, populist movements and their ideas are gaining support. In reaction to these developments, some traditional political parties are now including populist positions in their manifestos and vice versa.

81 The emergence of anti-establishment movements has in turn been partly responsible for various local and other citizens' initiatives established, for example, to disseminate pro-European ideas. See, for instance, http://pulseofeurope.eu/. 'Human rights cities' are an example of initiatives at local level to promote social, economic and cultural rights. See: Van Aarsen, J. and others, *Human Rights Cities: Motivations, Mechanisms, Implications. A case study of European HRCs* (Middelburg, UCR, 2013).

82 See, for example, A. Skolkay, 'Populism in Central Eastern Europe', in *Thinking Fundamentals, IWM Junior Visiting Fellows Conference*, vol. 9 (Vienna 2000); B. Bugaric, 'Populism, liberal democracy, and the rule of law in Central and Eastern Europe', in *Communist and Post-Communist Studies*, vol. 41:2 (June 2008), pp. 191-203.

83 C. Mudde, 'The Populist Zeitgeist', in *Government and Opposition* (September 2004), pp. 541-563.

In the Scandinavian countries right-wing populist parties won 15-20% of the votes in recent elections. And they form part of the governing coalition in Norway and Finland, as they also do in Lithuania. In Denmark they provide passive backing for the minority government. The parliaments of Greece, Italy, Switzerland, Slovakia, Hungary and Poland are largely dominated by populist parties. In Hungary *Fidesz* has held power with no less than a two-thirds majority since 2010. The Polish Law and Justice party (PiS) won an absolute majority in both houses of parliament in November 2015. Although UKIP's role may now have been played out in the United Kingdom, it managed to play a decisive part in the Brexit referendum campaign. *Podemos* won over 20% of the vote in the Spanish general election in 2015, thereby ending the traditional two-party system in Spain. Populist leaders have been in power for much longer in Turkey and Russia. In the French presidential elections in the spring of 2017 the established political parties were rejected by voters in the first round. Although the liberal pro-European candidate Emmanuel Macron won convincingly from Marine Le Pen in the second round, the 33.9% of the vote won by the latter points to a growing public acceptance of the ideas of her party, *Front National*.

In southern Europe *MoVimento 5 Stelle*, *Podemos* and *Syriza* have a radical left-wing background. They are parties that protest, above all, against the negative socioeconomic consequences of globalisation. By contrast, populist sentiment in northern and eastern Europe is motivated more by a desire to preserve national identity and culture and, by extension, by an aversion to immigration, particularly from Muslim countries. But here too there are differences. For example, the Norwegian *Fremkskrittspartiet* has a neoliberal agenda, whereas the French *Front National* actually wishes to increase the socioeconomic protection of vulnerable groups. The national historical context also plays a role. In Turkey the Justice and Development Party (AKP) capitalises on a desire to restore certain patterns of behaviour which had been set aside by Kemalism. Finally, there are parties and movements that are simply motivated by corruption and personal gain and try to manipulate the system of government to this end.

What unites populists, however, is a dislike of the establishment and a desire to emphasise the will of 'the people' in political decision-making. The political representatives are viewed as a (corrupt) elite who do not listen to the wishes of the people and act only in their own interests or the interests of the wrong groups. Whereas in the representative democracy model political parties obtain their mandate from the electorate and the two groups are thus mutually dependent, populism treats them as being in opposition to one another: the establishment is bad and the people are good.

The people are seen in this context as a more or less homogeneous group, known for example as 'the silent majority', 'heartland' or 'hard-working families', who are properly understood only by the populist parties and their leaders. They wish to repair what they see as a rupture between people and politics, often using forms of direct democracy such as referendums or internet forums. The will of the majority is thus equated with the will of the population as a whole. This implies that anyone taking a different view is dissociated from the people.[84]

84 See: J. Müller, *What is populis*m (Pennsylvania: University of Pennsylvania Press, 2016), pp. 1-6, 20; C. Mudde, 'The Populist Zeitgeist', in *Government and Opposition*, vol. 39:4 (January 2004); pp.541-563; Daniele Albertazzi & Duncan McDonnell (eds.), *Twenty-First Century Populism: The Spectre of Western European Democracy*, (London: Palgrave Macmillan, 2008), pp. 2-7.

III.2 Populism and democracy

Although populist movements assert that they champion freedom and democracy, their critics maintain that what they really intend or achieve is the exact opposite. This is a striking difference of opinion. As the essence of democracy is that power is, in principle, vested in the people, what is wrong with citizens having a greater say? And is the majority principle not a key element of democracy? So is it not in fact very undemocratic, for example, not to implement the result of a consultative referendum?

In the context of democracy under the rule of law, very different parties must be able to operate, including populist parties; however, just as with other parties, the power or position they acquire may not undermine the democratic foundations of the system of government. The explanation of terms in chapter I of this report provides a basis for exploring the difficulties that this entails. Although populist movements should not be lumped together indiscriminately, in the cases described in the following chapter they have unilaterally emphasised the *electoral* dimension, which is to say that decisions are democratic if they have been taken by a majority of votes and in accordance with the correct procedures. Once such parties have come to power, they have undermined the *constitutional* dimension of democracy, which requires respect for rule of law principles such as an independent and impartial judiciary and protection of the political, social and economic civil rights of all citizens against infringements by others. These principles mean that the rights of certain groups (minorities) in society may not be curtailed, even where this has the support of the majority of the population.

Populist movements often turn this statement on its head. They argue that the existence of absolute constitutional rights means that the majority of the population is obliged to adapt to, say, the cultural habits of minority groups rather than vice versa, and they find support for this in the works of authors who emphasise the disadvantages of migration.[85] They argue that what is actually undemocratic is protection of the cultures of immigrants and the role of independent institutions not subject to political control. As Mudde puts it:

'*Rather than representative democracy, populism is inherently hostile to the idea of liberal democracy or constitutional democracy. Populism is one form of (…) "illiberal democracy", but which could also be called democratic extremism. (…) In its extremist interpretation of majoritarian democracy, it [populism] rejects all limitations on the expression of the general will, most notably the constitutional protection of minorities and the independence (from politics, and therefore from democratic control of key state institutions (e.g. the judiciary, the central bank).*'[86]

An example of this rejection of limitations occurred recently in the United Kingdom, where some tabloids branded three High Court judges 'Enemies of the People' for having ruled that the British parliament had to give its approval before Brexit could go ahead.

85 See, for example, R. Koopmans, 'Meerderheidscultuur verdient alle steun' (Majority culture deserves every support), in *De Volkskrant* (3 December 2016).

86 C. Mudde, 'The Populist Zeitgeist', in *Government and Opposition* (September 2004); p. 561 (underlined words italicised in the original text).

It goes without saying that in a democracy under the rule of law there may be a tension between the electoral dimension (i.e. decision-making by the majority) and the constitutional dimension (protection of the rule of law, including individual and collective rights). As indicated in chapter I, society always consists of a collection of different groups with varying views and interests, which may sometimes coincide with and sometimes contradict one another. Anyone may be at once an entrepreneur, conservative, migrant, gay, highly educated, religious and physically disabled. It is therefore an illusion to think that 'the people' are a homogeneous entity, as is often maintained by populist parties. On the contrary, society is full of contradictions. Precisely because of these tensions, the AIV emphasises the importance of linking democracy with the principles of the rule of law. Democracy under the rule of law is an instrument for channelling social diversity and safeguarding everyone's position, rights and freedoms.

Those who today belong to the majority and endorse curtailment of the rights of others may tomorrow find themselves in a minority and see their own freedoms threatened. Ultimately, such discussions affect the rights of all citizens. Human rights cannot be treated as items on a menu: *'(…) rights by their nature do not admit an à la carte approach. You may not like your neighbors, but if you sacrifice their rights today, you jeopardize your own tomorrow, because ultimately rights are grounded on the reciprocal duty to treat others as you would want to be treated yourself. To violate the rights of some is to erode the edifice of rights that inevitably will be needed by members of the presumed majority in whose name current violations occur'*.[87]

III.3 Conclusion/summary

Within a democracy under the rule of law there is an inherent tension between majority decision-making and the existence of political rights and social, cultural and economic rights of individuals and minorities. This means that the principles of democracy under the rule of law may sometimes come in for criticism if political decision-making or the independent administration of justice produces outcomes that differ from what the majority of society want or consider necessary. It follows that these tensions pose a continual risk of estrangement between the citizens and institutions of a democracy under the rule of law.

In such a democracy, politicians, civil servants, judges and citizens all shoulder a heavy responsibility for ensuring that, on balance, all groups in society feel they are properly heard. Populist movements have often emerged when this is not sufficiently the case. Owing to many different developments and factors, described in chapter II, this public support has been under considerable strain in recent decades. However, situations in which a majority unilaterally demand rights for themselves are still at odds with the common values deemed essential for a democracy.

87 K. Roth, 'The dangerous rise of populism. Global attacks on human rights values', in *Human Rights Watch World Report 2017*, eds. K. Roth et. al. (New York: Seven Stories Press, 2017), p. 2.

IV Developments in relation to democracy under the rule of law in Europe

As noted in the introduction to this report, the democratic process in various European countries - notably Russia, Turkey, Poland and Hungary - has itself led to a situation in which majorities have chosen a more authoritarian form of government that curtails safeguards for members of the opposition, dissidents and cultural minorities. These countries hold regular elections contested by various political parties. Citizens can choose their representatives in relative freedom. The election result is reflected in the composition of the parliament, which then carries out its legislative task. In these countries, however, the functioning of these rule of law institutions is hindered or circumvented by measures taken by the elected majority to appropriate the system of government, thereby jeopardising fundamental rights and freedoms.

This chapter will try to explain how this happens. To this end, it identifies four partially overlapping elements. The first concerns the undermining of the operation of democracy's *electoral* dimension. One aspect of this is amending electoral legislation in such a way as to benefit the ruling political parties, for example by giving them better access to the media (particularly the state media).

The other three elements involve the erosion of the *constitutional* dimension of democracy. In these countries the ruling parties attempt to shape public opinion and make it harder for critics to air their views. One way in which they do this is by curbing press freedom. Measures are taken to limit the diversity of media channels and restrict open and public debate. Civil society organisations and educational institutions that give voice to opposing views may also face funding restrictions or suffocating red tape.

Moreover, the balance between the three branches of government (*trias politica*) is disrupted by various specific measures to such an extent that their separation is greatly frustrated. Attempts are also made to get a grip on the judiciary in order to limit its ability to function independently and to supervise and scrutinise the actions of the executive. This may be done for instance by modifying the appointment procedures or lowering the standard retirement age for judges who are deemed a potential source of criticism. This may in turn mean that the judiciary can no longer monitor changes to the national constitution or to legislation. Problems also arise if legislation is no longer neutral but undermines individual fundamental rights or the principle of equality, or if changes result in the removal of safeguards against the arbitrary exercise of power.

Finally, legal and other measures are taken to curb the legal protection afforded to those who hold dissenting views (i.e. different from those of the numerical majority) and immigrants, particularly (cultural) minorities, dissidents, academics and artists. Such measures may be either formal (restrictive regulation) or informal (intimidation).

The following overview cannot, by definition, be exhaustive. It is therefore limited to a selection of the most noteworthy events and is intended to be illustrative.

IV.1 Undermining of the electoral dimension of democracy

Hungary

The most recent parliamentary elections in Hungary took place in 2014. These were the first elections to be held under the new constitution of 1 January 2012 and the new electoral legislation. In January 2014 the government imposed restrictions on putting up election posters. However, these restrictions did not apply to posters extolling the goals and results of government policy (and hence of the current ruling parties). In the run-up to the elections the number of seats in parliament was reduced from 386 to 199. This made it necessary to adjust the electoral districts. The law provides that a two-thirds majority is required for this purpose, which not only gives the ruling party an unlawful advantage but will also make it difficult to make changes in the future. The lack of transparency surrounding the delineation of the new electoral districts led to accusations of gerrymandering by various NGOs, including Transparency International and the Hungarian Helsinki Committee.[88] The new electoral law also gave the winner an extra advantage: the 'surplus' votes obtained by winning candidates in a given electoral district were added to the votes obtained by their party nationally. According to the Organization for Security and Co-operation in Europe (OSCE), this gave the ruling *Fidesz-KNDP* alliance an extra six seats in parliament. [89] The alliance obtained a two-thirds majority in the elections.[90] In its evaluation of the elections, the OSCE stated that: *'The main governing party enjoyed an undue advantage because of restrictive campaign regulations, biased media coverage and campaign activities that blurred the separation between political party and the State'.*

Former Yugoslav Republic of Macedonia

In February 2015 the SDSM, the largest opposition party, released wiretapped conversations of members of the ruling party VMRO-DPMNE showing that the Macedonian authorities, authorised by prime minister Nikola Gruevski, had tapped the phone conversations of some 20,000 private citizens, journalists, judges and politicians between 2010 and 2014. It was also alleged that there had been discussions regarding interference with the judiciary and the media and the commission of election fraud during the parliamentary elections in 2014. The claims led to large-scale protests in the Former Yugoslav Republic of Macedonia, which is a candidate for membership of the EU and NATO. The SDSM boycotted parliament. In an arrangement brokered by the EU, the opposition and the government subsequently agreed in April 2016 to hold early parliamentary elections. The government was required to resign 100 days before the elections. A special prosecutor was also appointed to investigate the wiretapping case.[91] In the same month the country's president suddenly announced an amnesty for the 56 suspects in the wiretapping case, but retracted this a month later following

88 Eötvös Károly Institute, Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Transparency International Hungary, *Free but not fair elections', Hungary Fact Sheet 4* (September 2014), see: <http://www.helsinki.hu/en/factsheets-on-the-situation-in-hungary/>.

89 OSCE/ODIHR Limited Election Observation Mission Hungary – Parliamentary Elections 6 April 2014, *Final Report*, p. 1.

90 When an opposition candidate won a parliamentary by-election in February 2015, the Fidesz/Christian Democratic alliance formally lost its two-thirds majority.

91 See: <http://europa.eu/rapid/press-release_STATEMENT-15-5372_en.htm>.

national and international protests. The parliamentary elections finally took place in December 2016 after being postponed twice on account of political disagreement. The elections were narrowly won by the VMRO-DPMNE. The OSCE concluded that, *'While fundamental freedoms were generally respected and contestants were able to campaign freely, the elections took place in an environment characterized by a lack of public trust in institutions and the political establishment. Allegations of voter intimidation, widespread pressure on civil servants, vote buying, coercion, and misuse of administrative resources persisted throughout the campaign'*.[92]

Russia
After the discovery of widespread fraud during the parliamentary elections in December 2011, large demonstrations took place throughout Russia against the ruling United Russia Party, the Central Election Commission and, to a lesser extent, the then prime minister Vladimir Putin. The OSCE also referred to '*the lack of independence of the election administration, the partiality of most media, and the undue interference of state authorities at different levels'*.[93] To prevent fraud during the presidential elections in March 2012 webcams were installed in the polling stations, but they in fact recorded irregularities with ballot papers or were out of operation when the votes were being counted. The OSCE once again concluded that *'the conditions for the campaign were clearly skewed in favour of one candidate.'*[94] Putin was re-elected as president with an absolute majority in the first round of voting. Once again large demonstrations took place in various major cities. In the parliamentary elections on 18 September 2016 the United Russia Party obtained a majority (54.2% of the vote). Voter turnout was only 48%. Although the OSCE considered that the Central Election Commission had operated transparently and efficiently on this occasion, it noted that '*democratic commitments continue to be challenged and the electoral environment was negatively affected by restrictions to fundamental freedoms and political rights, firmly controlled media and a tightening grip on civil society*'.[95]

IV.2 Attempts to influence public opinion and stifle criticism

Hungary
Freedom of expression and press freedom are enshrined in the Hungarian constitution, but since 2010 the Hungarian parliament, which is dominated by the *Fidesz* party, has passed a number of complex media laws that undermine these freedoms and increase government control over the media, including over media content. A Media Council has been established to check, for example, that media reporting and productions are 'balanced'. In the event of an infringement penalties and suspensions can be imposed

92 OSCE/ODIHR International Election Observation Mission Macedonia - Parliamentary Elections, 11 December 2016, *Statement of preliminary findings and conclusions*, p. 1.

93 OSCE/ODIHR Election Observation Mission Russian Federation – Elections to the State Duma, 4 December 2011, *Final Report*, p. 1.

94 OSCE/ODIHR International Election Observation Russian Federation – Presidential Election, 4 March *2012, Statement of Preliminary Findings and Conclusions*, p. 1.

95 OSCE/ODIHR International Election Observation Russian Federation – State Duma Elections, 18 September 2016, *Statement of Preliminary Findings and Conclusions*, p. 1.

and media outlets can be closed down.[96] The five Council members are elected by a parliamentary vote that requires a two-thirds majority. Given that *Fidesz* had this majority until February 2015, all members of the Media Council are affiliated to it. The head of the Media Council is also the head of both the National Media and Infocommunications Authority, which all media are required to register with, and the Media Services and Support Trust Fund, which is responsible for the public media and their funding. The head of the Media Council nominates the directors of the public media outlets.

The Hungarian Criminal Code contains various provisions that allow for freedom of expression to be curtailed, for example in the event of denial of crimes committed by 'national socialist or communist systems'. Fines can be imposed for photographing people without their consent. In 2014 the Constitutional Court held that internet content providers could be held liable for user-generated comments. Since 2010 various media outlets critical of the government have been taken over and subsequently reorganised by investors linked to *Fidesz*. Other independent media have been faced with a reduction in or loss of advertising revenue from the state or from private companies dependent on state contracts. This has resulted in an impoverished media landscape. The government provides indirect support for large-scale campaigns, particularly billboard campaigns, through the Civil Unity Forum, which is a non-transparent organisation.

As a result of a fifth amendment to the constitution (in September 2013), commercial media are now allowed to broadcast political campaign advertisements, but only during official campaign periods and only if no charge is made for them. The Venice Commission argues that this puts opposition parties at a disadvantage. After all, commercial media are dependent on advertising revenue and will hardly be inclined to accept campaign ads without payment of a fee. Moreover, the ruling party has better access to the public media.[97] In its final report on the 2014 parliamentary elections, the OSCE concluded that '*Increasing ownership of media outlets by business people directly or allegedly indirectly associated with Fidesz and the allocation of state advertising to certain media undermined the pluralism of the media market and heightened self-censorship among journalists'*.[98]

Since 2011 the rectors of universities have been appointed by the state rather than, as formerly, by the university council. Every university must also have a government-appointed financial director. In April 2017 the Hungarian parliament passed a bill providing that a foreign university may be established in Hungary only pursuant to an internationally binding agreement between the Hungarian government and the country from which the institution is funded. In addition, the foreign university must also offer courses in the country where it has its seat. Lecturers from outside the EU may now teach in Hungary only if they hold a Hungarian work permit.

Although the bill may in theory affect some 28 foreign educational establishments in Hungary, it appears to be mainly aimed at the Central European University in Budapest, which was founded in 1991 with the support of the Open Society Foundations of George

96 Venice Commission, Opinion on Media Legislation of Hungary, CDL-AD(2015)015, 22 June 2015.

97 Ibid.

98 OSCE/ODIHR Limited Election Observation Mission Hungary – Parliamentary Elections, 6 April 2014, *Final Report*, p. 2.

Soros, the Hungarian-American investor and Orbán critic. The bill triggered national and international protests. Demonstrations took place in Hungary and the Hungarian Academy of Sciences also criticised the legislation. Nonetheless, the president signed the bill into law on 10 April 2017. Opponents of the legislation have referred it to the Constitutional Court, but this does not suspend its operation. Nor is the Constitutional Court subject to any deadline. The Hungarian government is also preparing legislation that will oblige NGOs with foreign donors to state in their publications that they are financed from abroad and list their donors.[99]

In April 2017 the Hungarian government launched a 'national consultation' of all Hungarian households, entitled *Let's stop Brussels*. The government sent all eligible voters a list of six questions to elicit their views on various matters, including European migration policy. However, the way the questions are framed suggests some bias on the part of those asking them. For example, one of the questions reads as follows: *'In the recent period, there have been terrorist attacks one after the other in Europe. Despite these, Brussels wants to force Hungary to let in illegal immigrants. What shall Hungary do?',* to which the following answers can be given: '*For the sake of Hungarian people's security, illegal immigrants must be placed under supervision until the authorities make a decision in their case' and 'Let us allow illegal immigrants to move freely in Hungary*'.[100]

Poland
On 7 January 2016 the Polish president Andrzej Duda signed a new media law giving the finance minister the power to appoint the directors and senior management of what had previously been independent public radio and television stations. The existing directors and management were dismissed and replaced. The government also proposed limiting the media's access to parliament from 1 January 2017 to two journalists of five media channels chosen by the government. Moreover, journalists would no longer have access to the plenary session hall or the rest of the building. The plans were retracted by the government following street protests and the occupation of parliament by members of the opposition.

Russia
Although press freedom and freedom of expression are included in the Russian constitution, various laws limiting press freedom have been introduced in recent years. Any website that disseminates calls for riots, 'extreme' activities or participation in illegal assemblies can be blocked. Some 20,000 websites have now been closed down. Under a law introduced in 2014, any website, blog or social media platform with more than 3,000 daily visitors or readers has to be registered with the authorities as a media outlet. This registration is backed by strict regulations, including provisions on legal

99 See: <https://www.trouw.nl/democratie/hongarije-wil-de-universiteit-van-miljardair-george-soros-sluiten~a862d6b0/> and <http://www.volkskrant.nl/buitenland/orban-rookt-verzetshaarden-uit-met-omstreden-wetten~a4482540/>.

100 Another question concerns the foreign funding of NGOs: *'More and more foreign-supported organizations operate in Hungary with the aim of interfering in the internal affairs of our country in an opaque manner. These organizations could jeopardize our independence. What do you think Hungary should do?'* to which the following answers can be given: *'(a) Require them to register, revealing the objectives of their activities and the sources of their finances; (b) Allow them to continue their risky activities without any supervision'*. For the complete questionnaire, see: http://budapestbeacon.com/featured-articles/lets-stop-brussels-new-national-consultation/45493.

responsibility for any visitor-generated comments. Media (or NGOs) can also be closed down without warning, for example because their offices are suddenly found to be in breach of health and safety legislation. Critical journalists and bloggers are prosecuted for offences such as defamation, extremism and deception.[101]

Since 2012 independent Russian NGOs which receive funding from abroad and are engaged in what are termed 'political activities' have been obliged by law to register with the justice ministry as 'foreign agents'. As the term 'political activities' is broadly defined, it can include activities involving human rights, the environment, HIV/AIDS prevention and even charity work. When NGOs refused to register, the Law on Non-Commercial Organisations was amended in 2014 to allow the justice ministry to register them even without their consent. The NGOs are then subjected to checks and are obliged to indicate on all their publications that they emanate from a 'foreign agent'.[102] Following a change in the law in 2015, NGOs can ask to be removed from the list if they have ceased their 'political activities' or no longer receive foreign funding. In practice, the NGO's name is then moved to a separate column of the list headed 'removed from the list'. The name of the NGO therefore remains visible. Since the law came into force, 158 organisations have been classified as 'foreign agents'. There were 98 organisations on the list in April 2017.[103]

On 27 February 2015 opposition politician Boris Nemtsov was shot dead on a bridge in Moscow near the Kremlin. Nemtsov, who was deputy prime minister of Russia under Boris Yeltsin from 1997 to 1998, had repeatedly accused the Russian government of corruption and embezzlement, for example in connection with the organisation of the Winter Olympics in Sochi. His murder remains unsolved, and has reinforced the opposition's fear of intimidation. Alexei Navalny, leader of the Progress Party, won 27% of the vote in the Moscow mayoral elections in 2013. He then announced that he wished to stand as a candidate in the presidential elections in 2018. However, in 2014 and again in 2017 he was found guilty of the theft of timber from a timber company and given a five-year suspended sentence. As a result of the conviction, Navalny is barred from standing for election under Russian law. In March 2017 Navalny accused former president Dmitri Medvedev of having secret assets worth approximately €1 billion. This unexpectedly led to demonstrations throughout Russia. Navalny was arrested during a large demonstration in Moscow and sentenced to 15 days' imprisonment and a fine. The European Court of Human Rights has now upheld various complaints from Navalny. [104]

Turkey

According to Freedom House, press freedom in Turkey has '*deteriorated at an alarming rate'* since 2015.[105] The country's criminal code, criminal defamation legislation and antiterrorism law are used to prosecute independent media and journalists. The editor-in-chief of the *Cumhuriyet* newspaper was arrested in connection with the paper's

101 Freedom House, *Russia: Freedom of the Press 2016*.

102 Amnesty International, *Agents of the people. Four years of 'foreign agents' law in Russia: consequences for the society* (November 2016).

103 See: <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle>.

104 For the most recent ruling, see ECtHR 2 February 2017, *Navalny v. Russia*, nos. 29850/12 *et al*.

105 Freedom House, *Turkey: Freedom of the Press 2016*.

coverage of Turkish arms shipments to Syria. Journalists have also faced intimidation and violence. The main media channels are owned by a few companies which also invest in other sectors of the economy and are thus partially dependent on government contracts. This is detrimental to media pluralism and inhibits critical reporting. Following the coup attempt in July 2015 (see IV.4: Restrictions on protection of dissidents and immigrants), 158 media organisations were shut down and had their assets seized. The Venice Commission has described this as a '*mass liquidation of media outlets*'.[106] Some 10,000 people who worked in the media lost their jobs. Before the attempted coup 36 journalists were held in prison. According to observers, by April 2017 this number had risen to over 230.[107]

IV.3 Erosion of the principle of separation of powers

Hungary
Since the Orbán government came to power in 2010, it has undermined the independence of the judiciary by making various changes to the law and the constitution.[108] First, it lowered the retirement age of judges, forcing about 10% of all judges to retire with immediate effect. The Venice Commission commented as follows: '*A whole generation of judges, who were doing their jobs without obvious shortcomings and who were entitled – and expected – to continue to work as judges, have to retire. The Commission sees no material justification (…)*'.[109] Second, it transferred the management and administration of the courts to a new organisation known as the 'National Judicial Office', which is headed by a president elected by parliament with a two-thirds majority vote. This office has wide-ranging powers, for example to refer cases to a different court or to determine what judge will hear any given case.

Hungary's Constitutional Court reviews the constitutionality of legislation passed by parliament. Following the revision of the constitution in 2011, the number of Constitutional Court judges was increased from eight to fifteen, thereby enabling the government to appoint seven new justices all at once. A constitutional amendment in 2013 then drastically limited the jurisdiction of the Constitutional Court. All judgments by the Constitutional Court before 1 January 2012 (the date of entry into force of the new constitution) were repealed by the amendment. Moreover, the Constitutional Court no longer has jurisdiction to conduct a substantive review of the constitutionality of constitutional amendments. It can now rule only on the procedure followed. The power of the Constitutional Court to examine laws relating to budgetary and tax matters passed by parliament has been restricted at times where government debt exceeds 50% of GDP. In effect, this means that the tax policy of the present government is no longer subject to constitutional review.

106 Venice Commission, Turkey - Opinion on the measures provided in the recent emergency decree laws with respect to freedom of the media, CDL-AD(2017)007, 10-11 March 2017, p. 4.

107 See: <https://turkeypurge.com/>.

108 For a complete analysis, see: *FIDH, Hungary: Democracy under threat. Six years of attacks against the rule of law* (November 2016), pp. 15-21.

109 Venice Commission, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, CDL-AD(2012)001-e (March 2012), p. 27.

The constitutional amendment in 2011 also provided that the president of the Hungarian Supreme Court *(Kúria)* should have at least five years' experience as a judge in Hungary. This forced the then president András Baka, who had regularly criticised the reforms to the judiciary, to resign.[110] The European Court of Human Rights held that this was a clear violation of the right to freedom of expression.[111]

Poland
Immediately after coming to power in November 2015, the Polish government made attempts to increase its control over the Constitutional Tribunal (*Trybunal Konstytucyjny*).[112] According to the ruling Law and Justice Party (PiS), this was necessary because the Tribunal was an extension of the former ruling party Civic Platform. Three judges lawfully chosen by the previous parliament (*Sejm*) were not sworn in by the president.[113] Instead, three new candidates were appointed. As the Tribunal did not consider the appointments to be lawful, it operated for some time with twelve rather than fifteen judges. The government then lowered the maximum age of the members of the Tribunal in such a way that two vacancies arose immediately and created the statutory possibility for procedures to be terminated either by the Minister of Justice or by four members of the Tribunal. When the Tribunal ruled that that these measures were unconstitutional, the government refused to publish the rulings in the official gazette, thereby denying them legal effect.

The term of office of the Tribunal's president expired in December 2016. The Tribunal's nomination of three possible successors was declared void in new legislation. This legislation contained such detailed provisions about the nomination of candidates that the only person eligible to be appointed as president was a pro-government judge of the Tribunal. After taking office, the new president allowed the supernumerary judges to become members after all and ordered the vice-president of the Tribunal to take a leave of absence. She also directed that the Tribunal should concentrate on old cases. The president of the Venice Commission expressed his concerns about these steps, which in his view were intended to '*ensure that the Tribunal act in accordance with the will of the current political majority*'.[114]

In January 2017 the Polish justice minister presented the reform plans to the National Council for the Judiciary. The Council was given only five days to respond to the

110 See: <https://strasbourgobservers.com/2016/07/12/baka-v-hungary-judicial-independence-at-risk-in-hungarys-new-constitutional-reality/>.

111 ECtHR (Grand Chamber), 23 June 2016, no. 20261/12.

112 The following overview is based on: A.W. Govers, 'Bedreiging van de rechtsstaat in Polen: recht en misbruik van het recht' (Threats to the rule of law in Poland: law and abuse of law) in *Nederlands Juristenblad*, 2016/2059, vol. 40, pp. 2960-2962; and Kees Sterk, 'Polen; onafhankelijkheid rechtspraak krijgt klap na klap' (Poland: judicial independence takes knock after knock) in *Nederlands Juristenblad*, 2017/311, pp. 393-395.

113 The previous Civic Platform-controlled parliament also appointed two judges to two vacancies that would occur only under the new parliament and government. The Tribunal ruled that these appointments were invalid. This partly explains the displeasure of the present Polish government.

114 Venice Commission, Poland – statement by the President of the Venice Commission, 15 January 2017. See also <http://www.venice.coe.int/webforms/events/?id=2352>.

plans. The Council, which consists largely of elected judges, is closely involved in the recruitment and selection of judges. Under the bill, the members of the Council lose their mandate within three months of the date on which the law comes into force. Thereafter the Council will consist of two chambers, one containing politicians and the other judges, all appointed by parliament. A decision of the new Council will be valid only if approved by both chambers. In addition, the justice minister (who has also acted as prosecutor general since 2016) has the power to appoint candidate judges without consulting the Council. The OSCE has observed that *'the proposed amendments thus raise serious concerns with regard to key democratic principles, in particular the separation of powers and the independence of the judiciary (…)'*.[115]

Turkey

In the parliamentary elections in June 2015 the ruling Justice and Development Party (AKP) lost its absolute majority, partly because the pro-Kurdish People's Democratic Party (HDP) managed to achieve the 10% election threshold. After coalition talks with the opposition parties failed, new elections were called for 1 November 2015. When the peace talks between the government and the Kurds ended during this period, violence between the Turkish army and the Kurdistan Workers' Party (PKK) flared up again. Various suicide attacks occurred, including an attack during an election meeting in Ankara which caused more than 100 fatalities. When the early elections were held the AKP won an absolute majority. Generally speaking, the OSCE took a fairly favourable view of the course of both elections, but it also reported an atmosphere of polarisation and confrontation and a large number of attacks on party offices and politicians, particularly of the HDP. According to the OSCE, media freedom and intimidation of journalists were also a '*serious concern'*. Although the OSCE noted in June 2015 that '*fundamental freedoms were generally respected'*, it omitted these words from its November report.[116]

After the elections in November 2016 the government drew up a list of eighteen constitutional amendments, which were passed by parliament in January 2017. In a referendum on 16 April 2017, 51.4 per cent of Turkish voters expressed their support for the proposed constitutional amendments which aim to replace the present parliamentary system with a presidential system. Under the reforms, the president becomes head of government and the position of prime minister is abolished. The president need no longer be neutral, and can instead act on behalf of his party. He can appoint vice-presidents, government ministers, senior civil servants, four of the thirteen highest-ranking judges and the heads of universities without parliamentary approval. The president will further have control of the army and security services. He also has the exclusive power to declare a state of emergency and then rule by decree. The state of emergency criteria have been broadly worded. The president draws up the government budget and has a veto over all legislation. Parliament no longer has the power to table a motion of no confidence in the president or the government, but can remove the president by a two-thirds majority or overturn a presidential veto by an absolute majority. However, the president can dissolve parliament and then rule by decree. The

115 OSCE Office for Democratic Institutions and Human Rights, *Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland,* Warsaw, 22 March 2017, JUD-POL/305/2017.

116 OSCE/ODIHR Limited Election Observation Mission Turkey - Parliamentary Elections 7 June 2015, *Final Report*, Warsaw 18 August 2015, pp. 1-37 and OSCE/ODIHR Limited Election Observation Mission Turkey - Early Parliamentary Elections 1 November 2015, *Final Report*, Warsaw 28 January 2016, pp. 1-27.

number of parliamentary seats is to be increased from 550 to 600 and presidential and parliamentary elections will be held simultaneously. The president may serve two five-year terms. These constitutional amendments will take effect in 2019, at which point these term limits will start at zero. In theory, President Erdoğan could thus remain in office until 2029.

The Venice Commission strongly criticised both the nature of the amendments and the manner in which they were introduced. For example, there was no possibility for civil society organisations to provide input, and the amendments were passed by parliament during the state of emergency using greatly truncated procedures. At the same time, HDP members of parliament were under arrest and AKP members of parliament were pressurised to cast their vote openly, contrary to the rules.[117] In addition, the proposed eighteen amendments were presented to the population without explanation as a single package in a referendum, to which only a 'yes' or 'no' answer was possible. The Venice Commission's substantive assessment of the proposed constitutional amendments was that they 'would introduce in Turkey a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one. (…) [T]he substance of the proposed constitutional amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey'.[118]

The OSCE noted that during the referendum campaign there had been an '*unlevel playing field*' those in favour of the proposals and their opponents.[119] Under the state of emergency, '*fundamental freedoms essential to a genuinely democratic process*'[120] were curtailed and the two sides of the campaign did not have equal opportunities to make their case to the voters. Despite a constitutional ban, the 'Yes' campaign led by the AKP was able to rely on the entire machinery of government and dominated coverage both on the streets and in the media. Students and public sector employees were required to attend campaign meetings. And journalists engaged in self-censorship. By contrast, campaign messages and meetings of the opposition parties, particularly the HDP, were often banned, broken up by the police or disrupted by violence by adversaries. 'No' voters suffered intimidation and harassment and were branded by the president as traitors and terrorists. While the votes were being counted, the electoral council ruled that 1.5 million unstamped - and hence unauthorised - ballot papers should be included in the count. As the OSCE observed: '*These instructions undermined an important safeguard and contradicted the law that explicitly states that such ballots should be considered invalid*'.[121]

117 Venice Commission, Turkey – Opinion on the amendments to the constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, CDL-AD(2017)005, 9-11 March 2017.

118 Ibid: para. 130 and 131.

119 OSCE/ODIHR International Referendum Observation Mission Turkey – Constitutional Referendum, 16 April 2017, *Statement of preliminary findings and conclusions*, p. 1.

120 Ibid.

121 Ibid: p. 13.

IV.4 Restrictions on protection of dissidents and immigrants

Hungary
In response to the huge influx of refugees from the Middle East, Hungary started to construct a fence along its border with Serbia and Croatia in June 2015. Together with the Czech Republic, Slovakia, Poland and Romania, Hungary opposed the binding decision of EU Ministers of Justice and Home Affairs to distribute refugees among the member states on the basis of a quota system. In a consultative referendum held in October, 98% of voters opposed this system. However, the result was invalid as voter turnout (48%) was too low. In December 2015 the European Commission opened an infringement procedure against Hungary on the grounds that its asylum law was incompatible with EU law.[122] In March 2017 the Hungarian parliament approved the construction of two closed-off container camps on the border with Serbia to house all asylum seekers while they await the outcome of their asylum applications. The only way in which the refugees can exit the camps is through an opening leading to Serbian territory. According to the UNHCR, the legislation is contrary to Hungary's obligations under international and European law.[123]

In May 2016 the European Commission opened an infringement procedure against Hungary in connection with discrimination against Roma children in education. According to the Commission, Roma children are disproportionally overrepresented in special schools for mentally disabled children and are also subject to a considerable degree of segregated education in mainstream schools.[124]

Russia
In June 2012 President Putin signed an amendment to the Code of Administrative Offences which greatly increased the penalties for organising or taking part in protest meetings that disrupt public order. According to the Kremlin, the amendment was intended to ensure that demonstrations do not get out of hand and to protect peaceful demonstrators from radicalism. Since 2014 repeat infringements of the ban on demonstrations has carried a prison sentence of up to five years.[125]

In November 2012 the government changed the definition of high treason to: '*the provision of financial, material, technical, consultative or other assistance to a foreign state, an international or foreign organisation, or their representatives in activities against the security of the Russian Federation*.'[126] According to Human Rights Watch, this definition is so broad that it could be used to charge any citizen who has international contacts.[127]

122 See: <http://europa.eu/rapid/press-release_IP-15-6228_en.htm>.

123 See: <http://www.unhcr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plans-detain-asylum-seekers.html>.

124 European Commission, Fact sheet: May infringements package: key decisions, Brussels 26 May 2016.

125 Ministry of Foreign Affairs, General Country Report on Russian Federation (June 2013), p. 18.

126 Ministry of Foreign Affairs, General Country Report on Russian Federation (June 2013), p. 19.

127 See: <https://www.hrw.org/news/2012/10/23/russia-new-treason-law-threatens-rights>.

In June 2013 a law came into force in Russia making propaganda aimed at minors concerning non-traditional sexual relations an offence. The purported aim of the law was to protect children. In April 2017 the independent Russian newspaper *Novaya Gazeta* reported on the prosecution and torture of gay men in Chechnya. According to the report, there had been at least a hundred arrests and three murders since February 2017. In reply, the spokesperson of Chechen president Ramzan Kadyrov stated that there were no gay people in Chechnya and that, even if there were, the authorities would not have to do anything because their relatives would send to them to a place from which they would send to them to place from which they would not not return.[128]

In April 2017 the Russian Supreme Court held, at the request of the justice ministry, that the Jehovah's Witnesses was an extremist organisation and banned it under the anti-terrorism legislation. The national headquarters of the organisation in St Petersburg and the 395 local branches are being closed and all its assets seized. The members of the organisation in Russia (approx. 170,000) risk sentences ranging from a fine to a maximum prison term of ten years.[129]

Turkey

On 15 July 2016 a coup attempt by a faction within the Turkish army in Ankara and Istanbul left 241 people dead and 2,196 injured.[130] The attempt failed because Turkish citizens poured into the streets en masse in response to an appeal by President Erdoğan to resist the coup plotters. A day later the government had regained full control. These events had a huge impact on the Turkish people. The general feeling was that the people had defeated an attack on democracy and had, by their own efforts, ended a long tradition of military coups in Turkey. There was also a view that the international community waited too long before condemning the coup.[131] In this atmosphere, there was widespread public support for the action taken by the government after the coup attempt. The measures included declaring a state of emergency and informing the Secretary-General of the Council of Europe that the European Convention on Human Rights (ECHR) had been temporarily suspended.[132] The state of emergency was subsequently extended on three occasions until July 2017. Under the state of emergency fundamental freedoms can be limited or temporarily suspended. The president also has far-reaching powers to rule by decree. Since the coup the Turkish

128 See: <https://www.hrw.org/news/2017/04/04/anti-lgbt-violence-chechnya>, <http://www.independent.co.uk/news/world/europe/chechnya-killing-gay-men-detention-nikki-haley-us-ambassador-un-cannot-ignored-russia-region-ramzan-a7690586.html> and <http://nos.nl/artikel/2166073-tsjetsjeense-mensenrechtenchef-homoseksualiteit-erger-dan-oorlog.html>.

129 See: <https://www.hrw.org/news/2017/04/20/russia-court-bans-jehovahs-witnesses>; and <https://www.theguardian.com/world/2017/apr/20/russia-bans-jehovahs-witnesses.

130 European Commission, *Turkey 2016 repor*t, SWD(2016) 366 final, 9 November 2016, p. 5.

131 On the night in question the Dutch Minister of Foreign Affairs contacted his Turkish counterpart by telephone to condemn the coup.

132 Article 15 (1) of the ECHR provides for this possibility and reads as follows: *'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'*

government has repeatedly stated that it is considering reintroducing the death penalty.

The president immediately laid responsibility for the coup at the door of the Islamic cleric Fethullah Gülen, with whom he had worked closely between 2001 and 2013 to reduce the influence of the secular Kemalists within the ranks of the civil service and the army. The allegation was that under Gülen's direction the public sector and society at large had been infiltrated by his supporters. After the coup attempt, over 120,000 military personnel, police officers, judges, teachers and public servants were dismissed or suspended on suspicion of having ties with Gülen. More than 40,000 citizens were arrested and over 1,000 schools and universities were closed, as were some 1,500 civil society organisations. In addition, businesses belonging to Gülen supporters were expropriated.[133] The speed with which this happened created the impression that the government had lists of names ready. Often action was taken on the basis of suspicions (guilt by association), for example if someone worked at a so-called Gülen school or had an account at a bank associated with the Gülen movement.

Since August 2016 the post-coup measures have also extended to groups other than the Gülenists, in particular Kurdish organisations as well as journalists and academics critical of the government. In September 11,000 Kurdish teachers were suspended for alleged links to a terrorist organisation (PKK). Thirteen pro-Kurdish HDP members of parliament were arrested, including the party leader Selahattin Demirtas. This was possible because the parliamentary immunity of members of the Turkish parliament had been lifted in May 2016. Before the attempted coup the number of imprisoned journalists was 36. By April 2017 this number had risen to over 200. On 31 March three judges in Istanbul, in response to a proposal by the public prosecutor, ordered the release of 21 journalists who had been detained on suspicion of membership of the Gülen movement. After criticism of this decision from the government and the media, the journalists were rearrested even before their release. The public prosecutors and the judges were then suspended on suspicion of having links with the Gülen movement.

The narrowly won referendum on amendments to the constitution in April 2017 was followed by a fresh wave of dismissals and arrests of several thousand public sector employees, military personnel, police officers and academics.[134]

133 Various figures are mentioned in the media reports on this subject. This advisory report uses conservative estimates. An anonymous group of young Turkish journalists keeps daily track of the figures at <http://www.turkeypurge.com>. This website reports higher figures.

134 See: <http://nos.nl/artikel/2170231-meer-dan-800-gulen-aanhangers-van-hun-bed-gelicht-in-turkije.html> and <http://nos.nl/artikel/2170783-opnieuw-massa-ontslag-onder-turkse-ambtenaren.html>.

V Policy instruments for prevention and correction

V.1 European instruments

European citizens and member states of the Council of Europe and the European Union have a fundamental interest in the functioning of democracy under the rule of law. The rule of law is essential to the protection of democracy and fundamental rights. Besides this intrinsic value, the functional value is of importance too: all kinds of European cooperation (the single market, security and justice, Schengen) depend on mutual confidence in the functioning of the rule of law at national level. So it is desirable for the member states of the Council of Europe and the European Union to treat the maintenance of democracy under the rule of law in each of these states as a shared responsibility for which provision must be made at institutional level. This would also strengthen citizens' confidence in the functioning of the European institutions.

The AIV's advisory report The Rule of Law: Safeguard for European Citizens and Foundation of European Cooperation (no. 87) has already explained in detail what monitoring practices exist in relation to democracy under the rule of law in the United Nations, the OSCE, the Council of Europe and the European Union. This overview can be found in Annexe I.[135]

One of the AIV's conclusions in advisory report no. 87 was that monitoring within the framework of European cooperation was fragmented. Another shortcoming was the lack of a mechanism for routine monitoring of developments involving democracy, the rule of law, respect for human rights and respect for minorities (known as the Copenhagen Criteria). For this reason, the AIV urged the government to work at EU level to introduce periodic peer reviews of the functioning of democracy under the rule of law in all the member states, on the basis of country reports drawn up by a committee of independent experts.[136]

Below is a brief update of the most relevant developments since publication of AIV report no. 87.

V.1.1 Council of Europe

Brussels Declaration

A subject that has been the subject of intense debate among the member states of the Council of Europe in recent years is the functioning of the European Court of Human Rights (ECtHR), which is still burdened by a heavy workload and occasional failures in the implementation of its final judgments. The most recent outcome of intergovernmental consultations is the Brussels Declaration, which was adopted in March 2015. In the Declaration the member states reaffirm their commitment to the ECtHR. The accompanying Action Plan sets out clearly how the execution of the ECtHR's judgments

135 AIV, The Rule of Law. Safeguard for European Citizens and Foundation of European Cooperation, no. 87, January 2014, pp. 19-34.

136 Ibid: pp. 35-37.

can be speeded up and improved.[137] For example, it has been agreed that the role of the national parliaments in the execution of judgments should be expanded. Where judgment is given against a member state, the government of that state will submit an action plan for its execution to the parliament. In addition, the member states have undertaken, for example, to increase knowledge about the Council of Europe and the ECtHR within government and the judiciary, and among the legal profession and NGOs.

In May 2017, however, the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe was obliged to note that not much had yet come of these good intentions. It regretted, for example, the 'delays in implementing the Court's judgments, the lack of political will to implement judgments on the part of certain States Parties and all attempts made to undermine the Court's authority and the Convention-based human rights protection system.' The Committee also noted that Italy, the Russian Federation, Turkey, Ukraine, Romania, Hungary, Greece, Bulgaria, Moldova and Poland 'have the highest number of non-implemented judgments and still face serious structural problems'.[138]

Plan of Action on Strengthening Judicial Independence and Impartiality
In April 2016 the Committee of Ministers adopted a plan of action to strengthen judicial independence and impartiality in the member states. The five-year plan focuses on three elements: (i) safeguarding and strengthening the position of the judiciary in its relations with the executive and legislature, (ii) protecting the independence of individual judgesand ensuring their impartiality, and (iii) reinforcing the independence of the prosecution service. Progress made in implementing the action plan is regularly discussed in the Committee of Ministers on the basis of information supplied by the member states.[139]

Venice Commission
Within the Council of Europe, the Venice Commission, which is officially known as the European Commission for Democracy through Law, has been extremely active in relation to countries where democracy under the rule of law has come under pressure. In recent years, the Venice Commission has published numerous reports, for example on Poland, Turkey, Russia and Hungary.[140] It has tended to focus on three main areas: democratic institutions and fundamental rights, constitutional and ordinary law; and elections, referendums and political parties. The effect of all these activities has proved to be very varied. Although the Venice Commission's recommendations are adopted as a matter of course in some countries, this is much less the case in other countries. In October 2016 the Polish government flatly refused to continue cooperating with the

137 High-level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility', Brussels Declaration, 27 March 2015. See also: <http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf>.

138 PACE, Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights: Ninth Report*, AS/Jur (2017), p. 15.

139 *Council of Europe, Plan of Action on Strengthening Judicial Independence and Impartiality*, CM(2016)36 final (April 2016).

140 See: <http://www.venice.coe.int/>.

Commission.[141]

European Social Charter
The European Social Charter, which was signed in 1961 and revised in 1996, is a human rights convention of the Council of Europe for the protection of social and economic rights. The Charter is the counterpart of the Convention for the Protection of Human Rights and Fundamental Freedoms, which focuses on the protection of civil and political rights. The rights and freedoms enshrined in the European Social Charter relate to housing, health, education, work, social protection and movement of persons. The Netherlands ratified the revised Charter in 2006.

The European Committee of Social Rights (ECSR) monitors compliance with the Charter. The Committee consists of 15 independent members chosen for a term of six years by the Committee of Ministers of the Council of Europe. The 43 member states[142] which have ratified the Charter are required to report annually on their compliance with its provisions. National and international organisations of employers and trade unions and international NGOs that have advisory status at the Council of Europe may lodge a complaint with the ECSR against member states for alleged violations of the Charter.

V.1.2 Organization for Security and Co-operation in Europe (OSCE)
The OSCE too has considered the question of Poland. In May 2017 the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) published a report critical of the plans to reform the Polish Council for the Judiciary.[143]

V.1.3 European Union
Three steps have been taken in the European Union to strengthen the instruments available to ensure compliance with the principles of the rule of law.[144]

EU framework to strengthen the rule of law (European Commission)
At the insistence of the Netherlands, Germany, Denmark, Finland and others, the European Commission published A new EU Framework to strengthen the Rule of Law in March 2014.[145] The framework gives the Commission the opportunity to consult with a member state at an early stage in cases where there is a 'systemic threat' to the rule of law. The framework is in addition to existing infringement procedures and precedes the so-called Article 7 procedure. The maximum sanction under this procedure is suspension of a member state's voting rights in the case of a 'serious and persistent breach' of the

141 See: <http://www.thenews.pl/1/10/Artykul/275645,Polish-govt-to-end-cooperation-with-Venice-Commission>.

142 Lichtenstein, Monaco, San Marino and Switzerland have not ratified the Charter.

143 See: ODIHR Opinion no. JUD-POL/305/2017-Final, Warsaw, 5 May 2017, at <http://www.legislationline.org/>.

144 See also: M. Luining and A. Schout, 'Deepening and broadening the EU's Rule of Law agenda', in *Clingendael Policy Brief* (March 2017).

145 European Commission, Communication *A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final.

common EU values set out in article 2 of the Treaty on European Union (TEU).[146]

The pre-article 7 procedure consists of three stages: 1) a Commission assessment; 2) a Commission recommendation; and 3) a follow-up to the recommendation. In the first stage the Commission collects and examines information to assess whether there are clear indications of a systemic threat to the rule of law in a member state. If this is the case, the Commission initiates a dialogue with the member state concerned. It does this by sending a 'rule of law opinion' to the member state and giving it the possibility to respond. This is followed by the start of the second stage, unless the matter has already been satisfactorily resolved. The Commission requests the member state in a 'rule of law recommendation' to resolve the identified problems within a fixed time limit. During this period the member state should keep the Commission informed of the measures it has taken. In the third and last stage the Commission monitors whether the recommendation has been implemented by the member state. If there is no satisfactory follow-up to the recommendation by the member state concerned within the specified time limit, the Commission will assess the possibility of activating one of the mechanisms set out in article 7 TEU. Throughout this three-stage procedure, there is constant dialogue between the Commission and the member state concerned. The European Parliament and the Council of the European Union are also kept regularly informed of progress.[147]

The new rule of law mechanism was activated for the first time by the Commission on 13 January 2016 in response to rule of law developments in Poland, in particular the reforms to the Constitutional Tribunal. Subsequently, the Commission made two recommendations for restoring the independence of the Polish courts and judiciary.[148] In its reply the Polish government accused First Vice-President Timmermans of the EU Commission, of being 'politically motivated' and asked him to refrain from stigmatising one of the member states.[149] None of the recommendations has been adopted. In February 2017 Polish foreign minister Witold Waszczykowski stressed that his country had originally acceded to a Union based on four freedoms. He continued: 'That is the European Union we want to be in. Unfortunately, some politicians would like to bypass the Treaties and monitor the EU states beyond them.' The Minister added that the European Commission had neither the instruments nor the right to meddle in the internal affairs of member states: 'We respect the separation of powers, and each

146 As regards article 2 TEU, see footnote 2. Article 7 TEU sets out a procedure for cases where there is a serious breach by a member state of the EU's values. The member state is first warned where there is a risk of a serious breach (paragraph 1). If it is then determined unanimously that there is a serious and persistent breach (paragraph 2), sanctions may be imposed by qualified majority. Such sanctions may include suspension of the member state's voting rights in the Council (paragraph 3). Finally, these measures may be revoked in response to changes in the situation which led to their being imposed (paragraph 4).

147 European Commission presents a framework to safeguard the rule of law in the European Union. See: <http://europa.eu/rapid/press-release_IP-14-237_en.htm>.

148 European Commission, Recommendations on the rule of law in Poland: (EU) 2016/1374, 27 July 2016 and C(2016) 8950 final, 21 December 2017.

149 See: <http://www.mfa.gov.pl/en/news/mfa_statement_on_poland_s_response_to_european_commission_s_complementary_recommendation_of_21_december_2016>.

country has a different model of democracy.'[150]

During the meeting of the EU's General Affairs Council[151] in May 2017, 17 EU member states, including Belgium, France, Germany, Italy, the Netherlands, Spain and Sweden, expressed their support for the work of the Commission. They called on the Polish government to resume the dialogue with the Commission. Member states which regard the rule of law as essentially a national matter (including Hungary, Lithuania, Slovakia, the Czech Republic and the United Kingdom) adopted a more neutral stance. They considered that the issue should not be discussed by the EU foreign ministers.[152]

Rule of law dialogue (Council of the European Union)
In December 2014 the Council of the European Union and the member states decided to establish an annual rule of law dialogue in the Council. This dialogue has now taken place twice, under the Presidencies of Luxembourg and the Netherlands, and was evaluated under the Slovakian Presidency in November 2016. It was decided at this meeting to continue the annual dialogue and prepare it more systematically. A further evaluation will occur in 2019.

EU Pact on Democracy, the Rule of Law and Fundamental Rights (European Parliament)
At the proposal of Dutch MEP Sophie in 't Veld, the European Parliament passed a resolution in November 2016 calling on the European Commission to present a proposal by no later than September 2017 for an EU Pact on Democracy, the Rule of Law and Fundamental Rights (DRF).[153] Under the pact, the European Commission, in consultation with an independent panel of experts, would draw up an annual European DRF Report on the state of DRF in member states, including country-specific recommendations. In doing so, it would make use of reports of the EU Agency for Fundamental Rights and the Council of Europe. The DRF report would then have to be discussed in the Council and between the European Parliament and national parliaments. The proposal in fact builds on the EU Network of Independent Experts on Fundamental Rights, which was established by the Commission at the request of the European Parliament and was active from 2004 to 2009.

One reason behind the European Parliament's proposal is that although candidate countries have to satisfy stringent rule of law criteria in order to join the EU, no regular assessment is carried out after accession.[154] As the current EU instruments are mainly reactive and are deployed only in response to incidents, the European Parliament

150 See: <https://www.poland.pl/politics/foreign-affairs/polish-foreign-minister-munich-security-conference/>.

151 The General Affairs Council consists of the Ministers of Foreign Affairs and European Affairs of the European Union.

152 See: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Steun-17-EU-lidstaten-voor-onafhankelijkheid-Poolse-rechtspraak.aspx>.

153 European Parliament 2014-2019, *EU mechanism on democracy, the rule of law and fundamental rights*, 25 November 2016, P8_TA(2016)0409. For the full report, see: http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA(2016)579328_EN.pdf.

154 Ibid: see recitals R and S in the resolution.

wishes, by introducing an annual DRF reporting system, to generate a permanent focus on compliance with the values laid down in article 2 TEU. The proposal thus corresponds closely with the proposal for institutionalised peer review made by the AIV in the advisory report on the rule of law referred to above (no. 87). The government embraced this proposal in its response to advisory report no. 87.[155]

However, during a debate in the House of Representatives on 19 January 2017 on the position of the rule of law and human rights in the EU, the Minister of Foreign Affairs adopted a wait-and-see approach to the European Parliament's proposal. He emphasised that countries should, above all, be held to account by each other rather than by the views expressed by experts.[156] The European Commission in turn stated that '*At this stage the Commission has serious doubts about the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a Committee of 'experts' and about the need for, feasibility and added value of an inter-institutional agreement on this matter*'.[157] In brief, the Commission did not see any merit in creating a new structure in addition to the existing instruments.

V.2 Bilateral instruments

In recent years the Netherlands has endeavoured to get the subject of the rule of law on to the European agenda. For example, the rule of law mechanism of the European Commission and the annual EU rule of law dialogue were established partly at the urging of the Netherlands. Dutch efforts have thus been focused mainly on the European Union. The contribution made by the Netherlands in the Council of Europe is less clear or visible. This is partly due to the confidential nature of the deliberations in the Committee of Ministers, which is responsible, among other things, for monitoring compliance with the judgments of the European Court of Human Rights.

The budget of the Ministry of Foreign Affairs contains various funds that can be used to promote democracy, the rule of law and human rights in European countries. The main ones are listed below.

Since 1994 the Netherlands has supported candidate and potential candidate countries of the EU and the countries of the Eastern Partnership through its social transformation programme (MATRA) to develop a pluralist and democratic society based on the rule of law. An important part of the MATRA programme is the twinning initiative between the Netherlands and local organisations. The bilateral MATRA programmes in the candidate countries are discontinued from the moment of their accession to the EU, and projects that are under way are phased out. However, the erosion of democracy and the rule of law in some countries such as Poland and Hungary raises the question of whether the Netherlands should not also continue investing in these countries even after their EU accession. Sustainable social transformation does, after all, require a sustained effort. However, the MATRA programme budget is set to decrease from EUR 13.7 million in

155 Parliamentary Paper 33877, no. 19.

156 Parliamentary Paper 34648, no. 3, pp. 19-22.

157 European Commission, SP(2017), 16, 17 February 2017.

2017 to EUR 9.1 million in 2018 and 2019.[158]

The Human Rights Fund is used to support human rights organisations worldwide. The fund focuses mainly on the priorities of Dutch human rights policy, notably human rights defenders; equal rights for lesbians, gays, bisexuals, transgender people and persons with an intersex condition (LGBTI); serious violations; freedom of expression; internet freedom; freedom of religion and belief; human rights and the business sector; and combating impunity for international crimes. The budget of the Human Rights Fund is EUR 44.3 million in 2017 and EUR 46.1 million in 2018, including a diminishing contribution of around EUR 6 million to RNW Media (formerly Radio Netherlands Worldwide).

Since 2014 the Netherlands has carried out two rule of law pilots: one in the Western Balkans and the other in EU countries Hungary, Bulgaria and Romania (plus Moldova). From 2018, however, no funds will be available to follow up on the pilots owing inter alia to spending cuts and staff reductions at the Ministry of Foreign Affairs. This means that the pilot in the Western Balkans will end in 2019 and the second pilot will have to be terminated as early as 1 July 2017. It should be noted here that the network of Dutch embassies and consulates-general abroad has been rationalised and downsized in recent years. No exception has been made for the missions in Central and Eastern Europe. The foreign ministry's budgetary reductions are adversely affecting the expertise on democracy, the rule of law and human rights that is available at the missions. In addition, relatively limited budgets for small embassy projects in cultural and other fields have been reduced or even scrapped altogether.[159]

V.3 Conclusion/summary

Within the Council of Europe, the number of ECtHR judgments awaiting execution (a responsibility of the Committee of Ministers) is growing. This aspect of the Action Plan that accompanied the Brussels Declaration (2015) has not yet been adequately implemented. The Council of Europe's Parliamentary Assembly (PA) also voiced concern about this recently. For 20 years the PA has monitored compliance by the 47 member states with their commitments under the ECHR.

The instruments available to the European Union to promote the rule of law have been improved since the publication of AIV advisory report no. 87, The Rule of Law: Safeguard for European Citizens and Foundation of European Cooperation. However, there is still no clearly defined mechanism for regular monitoring of compliance by the member states with the Copenhagen criteria. There is as yet insufficient support in the European Union for a peer review mechanism of this kind. The annual rule of law dialogue conducted in the Council of the European Union does not yet constitute an adequate alternative.

A major disadvantage of the 'EU framework to strengthen the rule of law' is that responsibility for it is vested in the European Commission. While this may seem logical in view of the Commission's role as guardian of the Treaty on European Union, it gives ammunition to governments that complain of unlawful interference by unelected

158 Ministry of Foreign Affairs 2017 budget, Parliamentary Paper 34550 V, no. 2.

159 See also AIV, *The Representation of the Netherlands in the World*, Advisory letter 32, The Hague, May 2017.

Commission bureaucrats. It also allows the other member states to hide behind the Commission rather than take a stance. However, violation by member states of common EU values is a political problem. This requires not only technical measures but above all a political solution, in other words a solution at ministerial level and at the level of EU heads of state and government.

Nonetheless, however necessary international political pressure by governments may be, it is not sufficient for the purpose of safeguarding democracy, the rule of law and human rights in Europe. What is needed, above all, is broad support for these values in society and for the public to have confidence in the institutions of democracy under the rule of law. This will require a lasting effort at social level. The Netherlands has already made an important contribution in this respect, although Dutch input and influence is limited by the cuts to the budget of the Ministry of Foreign Affairs.

VI Conclusions and recommendations

'The rule of law is not a peaceful property, a house in which we can sleep serenely.'[160] This statement, made by the late senator Willem Witteveen in a parliamentary debate on the rule of law in 2014, remains as relevant as ever. Democracy under the rule of law needs constant maintenance, in Europe as elsewhere. Since the turn of the millennium, the increasingly apparent alienation between the institutions of democracy under the rule of law and sections of the population whose circumstances and prospects have become precarious and/or who feel that the nation's cultural identity is under threat, has created an environment fraught with risk. In several European states, movements with varying degrees of influence have emerged that want to use democratically acquired power to limit the political status and legal safeguards of other population groups. This indicates that, to a large extent, they do not feel that constitutional democracy, i.e. democracy under the rule of law, is in everyone's interest, including their own.

As pointed out in the introduction to this advisory report, it is an essential but delicate task, when standing up for the rule of law in the international arena, to respect the democratic character of the states concerned and enhance their democratic quality. As societies become ever more complex, rights, obligations and diverse social interests must constantly be weighed against one another and conflicts resolved. This means that all levels of government need to strike a balance between catering to the public's wishes and making an independent assessment based on the general interest. Due to a large number of developments and factors, which have been described in this report, this balance has gradually been disturbed in recent decades. Many people across Europe now feel that the institutions of democracy under the rule of law mainly benefit others, including 'the establishment' or minority groups. This dissatisfaction is fuelling alternative political movements that promise more consultation and more effective government.

In Europe, a broad effort is required to restore and strengthen public support for democracy under the rule of law. It should be clear to all that the rule of law does not hamper democracy but rather bolsters it. There needs to be greater awareness that democracy only benefits all citizens if it is accompanied by rule-of-law safeguards. Citizens also need to know that their voices are being heard at international level. EU institutions must serve the public visibly and tangibly. That is not sufficiently the case at present.

All member states of the Council of Europe and the European Union are responsible for maintaining democracy under the rule of law in Europe. The fact that national governments working together in the EU appear unwilling to call one another to account for the erosion of democracy, the rule of law and human rights does nothing to enhance the EU's credibility in the eyes of its own citizens. It merely confirms the widespread perception that the EU promises human dignity but does not effectively protect it.

This does not just undermine norms and values that are a key part of the European identity; the stability of Europe, too, is at stake. If the protection of individual rights and minorities is eroded, this rapidly generates domestic tensions, bilateral conflicts and, inevitably, migratory flows that can sometimes assume unmanageable proportions.

160 From senator Willem Witteveen's contribution to the debate on the rule of law, Proceedings of the Senate 2013-2014, 22-5-1 (March 2014).

And if the erosion of democracy under the rule of law goes hand in hand with the undermining of common EU institutions, as is often the case, those institutions will increasingly be incapable of taking effective action to resolve such crises.

Even if no large-scale escalation occurs, the erosion of democracy under the rule of law eats away at the foundations of interstate cooperation that are important in Europe. Police cooperation, the European arrest warrant, the transfer of asylum seekers under the Dublin system – all these forms of cooperation are based on mutual trust in the quality of legal systems and the protection of the core values of the rule of law. But if the factual basis for that mutual trust disappears, mutual recognition and solidarity will sooner or later also be put in jeopardy.[161]

In addition to these considerations, a deficient democracy under the rule of law creates an unattractive investment climate. Confidence in constitutional stability and in the fair and effective public administration of justice is, after all, essential. Without such confidence, investors will be forced to resort to arbitration and other forms of investment protection; they will then have to contend with both increasingly critical public opinion and legal objections.[162]

VI.1 Recommendations

Below the AIV will make a number of policy recommendations concerning how the Netherlands can work in the appropriate international bodies and bilaterally to preserve the constitutional structures of democracy under the rule of law from (further) erosion. The Netherlands must be prepared to swim against the tide and continue its engagement on this issue, with a view to preventing the operation of the democratic system from eroding its own principles.

It needs to be completely clear, of course, that such efforts should support states' democratic functioning – taking account of their historically acquired characteristics; a democracy's procedural and substantive features must not be further torn apart, but rather woven together in a more convincing manner. This requires respect for the diversity that can exist among the member states of the Council of Europe and the European Union. Alignment should constantly be sought with the common fundamental values of democracy and the rule of law as accepted by all the nations concerned. The recommendations made here therefore build on what has been agreed with and by the other states.

There is a need for caution here. For various reasons, there is bound to be some discrepancy between the complexity of the problems described in this report and the recommendations presented below. First, there is no magic bullet that will halt the erosion of democracy under the rule of law in Europe in a simple manner, because numerous complex factors are involved (see chapter II). What is needed is a differentiated approach at various levels: national, international, governmental, societal, etc. Second, a society can

161 For example, Germany will no longer be able to avoid the decision not to send asylum seekers back to Hungary. See Politico, 11 April 2017, 'Germany suspends migrant returns to Hungary – Hungary's been criticized for detaining migrants in camps on its border with Serbia', <http://www.politico.eu/article/germany-suspends-migrant-returns-to-hungary/>.

162 See case C-284/16 (*Achmea*), now pending before the EU Court of Justice, which, among other things, revolves around the question of whether the Dutch-Czech arbitration agreement is compatible with EU law.

only achieve democracy under the rule of law from within. Individuals and organisations from other countries can merely play a supporting role. It stands to reason that the Dutch government – to which many of the recommendations relate – can mainly offer support in the realm of social developments and their anchoring in the rule of law. Third, the political balance of forces in Europe, especially in the European Union, currently offers limited scope for voicing a powerful counter-message. Only a limited number of European countries are firmly committed to defending the principles of the rule of law. Finally, account must be taken of the increased public scepticism towards EU cooperation that has developed in the Netherlands, as in other countries.

1. Increasing institutional responsiveness

Council of Europe

The Council of Europe is the most important organisation in Europe when it comes to setting standards for human rights and monitoring how they are reflected in member states' legislation, policy and practices. Nevertheless, there appears to be little awareness in Europe of the Council's importance in this regard. The Netherlands could take the lead in a political re-evaluation of the Council's importance. This could be done in the following ways:

a. Working with like-minded countries to secure a greater political role for the Committee of Ministers in monitoring the implementation of judgments of the European Court of Human Rights in the member states. The Committee of Ministers should not restrain the Council of Europe's independent institutions (the European Court of Human Rights and the European Committee of Social Rights), but support and encourage them.

b. Promoting the implementation of the Brussels Declaration and the Plan of Action on Strengthening Judicial Independence and Impartiality by entering into a twinning relationship with certain countries and helping them to increase knowledge about the Council of Europe and the European Court of Human Rights within government and the judiciary, and among the legal profession and NGOs, to expand national parliaments' role in implementing judgments by the European Court of Human Rights in the member states and to create an independent national human rights institute.

c. Taking the initiative to expand the Committee of Ministers' traditional focus on civil and political human rights to include the social rights laid down in the European Social Charter. The Netherlands could highlight this by providing extra support for the HELP programme.

d. At set times, the government should provide the Permanent Parliamentary Committees on Foreign Affairs and Justice with confidential information about the deliberations in the Committee of Ministers, especially as regards the implementation of judgments by the European Court of Human Rights.

e. The Netherlands can support reciprocity within the Council of Europe by asking the Venice Commission for advice on Dutch legislation in the event of dilemmas like those concerning the judicial review of legislation and the consequences of referendums.

European Union

a. Within the EU, the Netherlands must continue its efforts to strengthen the annual rule of law dialogue, as a stepping stone towards a peer review mechanism,[163] for which there is still insufficient support in the Union.

b. The Netherlands can join with like-minded countries to form a (possibly informal) group of 'trailblazers' that launches a peer review. Such a group can set a positive example of European cooperation for EU citizens, including people in countries that do not yet want to participate. It will show them that ideas on the rule of law can be exchanged in an atmosphere of openness and mutual trust.

c. Some EU member states, notably Poland and Hungary, are currently firmly opposed to the notion that membership of the Union entails certain responsibilities in terms of democracy and the rule of law. At the same time, these countries receive substantial amounts in EU subsidies. In the upcoming negotiations on the EU budget (multiannual financial framework) and how to reform it, the Netherlands should seek to link receipts from the cohesion and structural funds to success in satisfying the original Copenhagen criteria for EU accession.

d. The Netherlands can express support for the European Parliament's proposal for an EU Pact for Democracy, the Rule of Law and Fundamental Rights.

e. The Senate and the House of Representatives can play a constructive role in promoting the principles of democracy under the rule of law in Europe by raising this issue with other European national parliaments. Consideration could be given to creating a parliamentary network focusing on practical cooperation and knowledge-sharing on linking democracy and the rule of law. This could be done bilaterally, but also, for example, by setting up a trilateral partnership among a number of parliaments. In addition, like-minded leaders of European political parties should enter into a dialogue in their own political group in the European Parliament with those parties that approve measures at national level that undermine democracy under the rule of law.

f. Dialogue should always be preferred over confrontation in international diplomacy. The same applies when addressing the issues of democracy, the rule of law and human rights. Where dialogue repeatedly fails, however, the international community should be willing, as a last resort, to draw a line in the sand. In concrete terms, this means that the Netherlands and its EU partners should make clear that there can be no room for Turkey in the Council of Europe and the European Union if it decides to reintroduce the death penalty.

g. Legislation like Russia's 'foreign agent' law and its abuse of general legislation in respect of NGOs should consistently be condemned by the Netherlands, both bilaterally and internationally, in cooperation with like-minded countries.

163 See the earlier recommendation for a peer review in AIV advisory report no. 87, *The Rule of Law: Safeguard for European Citizens and Foundation of European Cooperation*, The Hague, January 2014, pp. 35-37.

OSCE

The Netherlands could in the near future consider launching a candidacy for the Chairmanship of the Organization for Security and Co-operation in Europe (OSCE). This would give it the opportunity to put democratisation and the principles of the rule of law more emphatically on the organisation's agenda, including in the field of human rights.

G20/OECD

The Netherlands is currently taking part in the G20 at the invitation of Germany, which now holds the Presidency. The Netherlands should strive for ongoing participation in this forum, which is ideally suited for working with like-minded countries to address the adverse consequences of globalisation. As in the OECD, a discussion on this subject should focus not only on trade, investment and development but also on socioeconomic rights, environmental rights and the relationship between government and citizens. The Sustainable Development Goals could provide a useful tool for this purpose.

2. Social diplomacy

The above recommendations are aimed mainly at governments and multilateral institutions. Earlier in this report, however, the AIV stated that international political pressure by governments, however essential, is not sufficient to safeguard democracy, the rule of law and human rights in Europe. Above all, there should be broad support in society for these values, and the public should have confidence in the institutions of democracy under the rule of law. This requires a long-term dialogue with civil society organisations, opposition movements and institutions that can translate international human rights to the national level. The AIV would make the following recommendations for this purpose.

a. As part of its human rights policy, the Ministry of Foreign Affairs should set up a democracy and rule of law programme that focuses on the member states of the Council of Europe where democracy under the rule of law is in danger. It should also draw on the expertise of other relevant ministries (e.g. the Ministries of Education, of Security and Justice, and of Economic Affairs).

   To support this programme, a rule of law fund should be created. During the next government's term of office, around €2.5 million per year should be set aside for this purpose in the Ministry of Foreign Affairs budget. The existing MATRA programme, which focuses exclusively on strengthening democracy and the rule of law in candidate and potential candidate countries of the EU and the countries of the Eastern Partnership, can be integrated into this broader rule of law fund. The MATRA programme budget is set to decline from €13.7 million in 2017 to €9.1 million in 2018 and 2019. The AIV recommends that, at the very least, this reduction should be reversed.

   The rule of law fund will support civil society organisations with a regional focus on areas such as the following:

   - People-to-people and profession-to-profession contacts. Through placements and exchanges, knowledge and experience can be shared between socially relevant professional bodies, like the judiciary and legal profession, the ombudsman, educational, knowledge and cultural institutions and the media.

- Raising public awareness of the value and importance of democracy under the rule of law. This can be achieved, for example, by promoting education in citizenship, democracy and human rights, especially among young people. The expertise of the Council of Europe's Directorate of Democratic Citizenship and Participation can be used for this purpose.
- Supporting citizen and other initiatives aimed at research and quality journalism in vulnerable democracies.

b. In international forums dealing with internet freedom and governance (e.g. the World Summit on the Information Society/Internet Governance Forum and the Freedom Online Coalition), the Ministry of Foreign Affairs can devote more attention to the internet's potential role in strengthening the principles of democracy under the rule of law where they are under threat.

c. The Ministry of Foreign Affairs can work with the private sector (e.g. via major social media platforms and the Global Network Initiative) and NGOs in organising projects on digital citizenship, democracy and human rights. A concrete example is the organisation of a Democracy Hackathon, where European software programmers and website developers work together on ICT products (e.g. an app) that can improve trust between citizens and government (both local and national). This 'hackathon' could focus on a different theme every year, such as the internet and privacy, social media etiquette, fake news and fact-checking, as well as services provided by local and national government, migration and election observation.

3. Strengthening the capacity of the Ministry of Foreign Affairs and its missions

a. The AIV strongly recommends that the policy capacity of the Ministry of Foreign Affairs and Dutch missions in Council of Europe member states be evaluated and, where necessary, expanded with local knowledge. This will enable the ministry and missions to identify and respond quickly to local initiatives and opposition movements in the fields of democracy, the rule of law and human rights. Missions will need to have sufficient funds at their disposal for this purpose.[164]

b. In its strategic secondment policy, the Ministry of Foreign Affairs could focus more explicitly on both non-governmental and multilateral organisations that exert influence, directly or indirectly, on democratisation and the principles of the rule of law, for example the G20, the OECD and the World Summit on the Information Society/Internet Governance Forum and the Freedom Online Coalition.

164 See also AIV advisory letter no. 32, *Representing the Netherlands Throughout the World*, The Hague, May 2017.

Annexe I

Multilateral rule of law instruments

The following overview is taken from AIV advisory report no. 87, *The Rule of Law: Safeguard for European Citizens and Foundation of European Cooperation*, January 2014.

I. The United Nations

There are no treaties at global level obliging states in a general sense to be governed by and to uphold the rule of law. However, human rights instruments do contain relevant provisions. The International Covenant on Civil and Political Rights, for example, lists a number of human rights with a bearing on the core of the rule of law: the right to life (article 6), the ban on torture and inhuman treatment (article 7), the right to liberty and security and the ban on arbitrary detention (article 9), the right to a fair trial (article 14), the principle of *nulla poena sine lege* (article 15) and equality before the law (article 26).

There are 10 UN human rights instruments. Most of them (or their optional protocols) provide for the right of individuals to submit complaints, applications or communications to a supervisory body consisting of independent experts. In addition, these bodies may publish authoritative opinions on the interpretation of the instrument's provisions. Although the decisions on individual complaints and the supervisory bodies' opinions are not binding on the parties to the instrument, they do have great moral authority.

A number of UN organisations also work to promote the rule of law. The World Bank draws up relevant indices, i.e. the World Governance Indicators and the Doing Business Index. The AIV will not discuss these UN instruments and activities any further in this report, since the relevant norms are also incorporated in European instruments, which have more powerful enforcement mechanisms.

II. The Council of Europe[1]

The Council of Europe has developed standards for the rule of law. It plays an important role in developing standards for the EU countries, as all EU member states are also members of the CoE and party to the ECHR. Accordingly, the AIV will discuss the Council of Europe and its institutions in detail below.

Article 3 of the Statute of the Council of Europe states, among other things, that every member must accept the principles of the rule of law. In short, the promotion of the rule of law is one of the Council of Europe's main aims, alongside the promotion of democracy and human rights. Accordingly, the CoE also has various mechanisms for monitoring the functioning of the rule of law in its member states. In this regard, its institutions complement one another.

The European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights
The European Court of Human Rights was established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). States may join the Council of Europe only if they accede to the ECHR, thus accepting the jurisdiction of the ECtHR. Once all domestic remedies have been exhausted, individual residents of the member states may lodge applications with the Court concerning alleged violations

1 See also AIV advisory report no. 33, *The Council of Europe: Less Can Be More*, The Hague, October 2003.

of the Convention by a member state. The Committee of Ministers supervises member states' compliance with the Court's judgments.

A number of the provisions of the ECHR are relevant to the concept of the rule of law. Article 6, for example, enshrines the right to a fair trial, article 7 the principle of *nulla poena sine lege* (the principle of legality), article 13 the right to an effective remedy and article 14 the prohibition of discrimination (the principle of equality). ECtHR case law has defined in more detail the related obligations on states. Hence the ECtHR plays an important role in setting standards for and enforcing the proper functioning of the rule of law in the CoE member states. Reference has already been made to the part played by the ECtHR in the implementation of European asylum policy (M.S.S. v. Belgium and Greece, see chapter I). Generally speaking, since all EU member states are party to the ECHR, the Court can stop the implementation of EU legislation in individual cases, provided the ECHR provides a basis for doing so. Given that national courts take this case law into account in cases brought before them, the ECtHR's judgments can significantly influence the implementation of EU legislation. The EU and the Council of Europe are currently negotiating the EU's accession to the ECHR. Following accession, the law and the acts of the EU will be subject to external supervision by the ECtHR. This will enhance the uniformity of the interpretation and application of human rights law throughout Europe and strengthen monitoring. It will be some years before accession is finalised, since all CoE member states (including all EU member states) must first ratify the accession agreement.[2]

The authorities of the CoE member states are required to implement the ECHR in their legal systems, on the basis of the ECtHR's interpretation of the Convention. In applying the ECHR in everyday practice, courts, legislative drafters and other actors endeavour to strengthen the principles of the rule of law within each country's legal culture. The receptivity of these actors to European standards should not be underestimated.

The monitoring procedures of the Committee of Ministers
In addition to the role the Committee of Ministers plays in the execution of ECtHR judgments, it supervises the obligations of member states in four other ways.[3] One is thematic monitoring. The Committee periodically selects a theme, after which the secretariat draws up a report on the situation regarding that theme in all the member states of the Council of Europe. The Committee of Ministers debates this report in camera. In response to this discussion, the Committee may, for example, decide to ask the Secretary-General to collect information or furnish advice, or it may issue a declaration or lay the issue before the Parliamentary Assembly. In 2007 it was decided to use this procedure on an ad hoc basis only. Since the debates on the reports take place in camera and many documents have not been published, it is not clear whether the Committee of Ministers has used the thematic monitoring process since 2007.

The Committee of Ministers can also monitor the situation in specific countries and have action plans drawn up. This has been done for Moldova, Georgia, Ukraine, the Russian Federation and others. Thirdly, monitoring was instituted following the accession

2 R. Böcker, 'Gaten dichten, toetreding van de Europese Unie tot het EVRM' ('Plugging holes: the European Union's accession to the ECHR'), *Nederlands Juristenblad*, 14 June 2013, vol. 24, pp. 1560-1566.

3 A. Drzemczewski, 'Monitoring by the Committee of Ministers of the Council of Europe: a Useful "Human Rights" Mechanism?', in I. Ziemele (ed.), *Baltic Yearbook of International Law*, volume 2, 2002, pp. 83-103.

of certain new member states, including Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia and Montenegro. Lastly, various intergovernmental committees report to the Committee of Ministers on conventions or specific themes such as human rights.

If the Committee of Ministers finds that member states are not honouring their commitments, it may issue recommendations to the state in question and request information on the implementation of the recommendations. In an extreme case the Committee may deprive a country of membership of the Council.

The monitoring procedure of the Parliamentary Assembly[4]
The Parliamentary Assembly (PA) has various committees that are specifically concerned with the situation regarding the rule of law, human rights and democracy in the member states. They conduct investigations and report to the plenary Parliamentary Assembly, which then debates the report. The most important is the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), which uses four procedures:

- *Full monitoring procedure*: regular visits, an ongoing dialogue with national authorities, and occasional plenary debates on the progress made. This procedure currently applies to 10 states (Albania, Armenia, Azerbaijan, Republic of Bosnia and Herzegovina, Georgia, Republic of Moldova, Russian Federation, Serbia, Turkey and Ukraine).
- *Post-monitoring dialogue*: a less intensive procedure for states that have made progress, focusing on a limited number of remaining issues. This procedure currently applies to three states (Bulgaria, Montenegro and The former Yugoslav Republic of Macedonia).
- *Periodic reviews*: all other member states (currently 33 of the 47 members) are subject to an assessment every five to six years, which collates all the information available on the country concerned.
- *Specific report on the Functioning of Democratic Institutions*: finally, the committee can issue ad hoc reports if the situation in a member state requires it.

Since this committee was established in 1997, new member states are always subjected to monitoring. If the PA decides to open a monitoring procedure of a specific country, the committee investigates compliance by that country with commitments made in relation to the Council of Europe. Reports of this kind are discussed in camera by the committee but are debated by the PA in public. If the monitoring procedure produces sufficient results, the PA will close the procedure. A year later, however, the Committee will open a post-monitoring dialogue with the country in question, to keep an eye on the situation there.

If the PA determines that a country is unwilling to honour the norms that are binding on the member states, it may adopt a resolution and/or a recommendation, annul the credentials of the country's delegation or refuse to ratify the delegation's credentials for the following session. The Russian Federation's voting rights were suspended from April 2000 to January 2001 because of the situation in Chechnya. If such measures do not have the desired effect, the Assembly may recommend that the Committee of Ministers terminate the country's membership.

4 See also AIV advisory report no. 40, The Parliamentary Assembly of the Council of Europe, The Hague, February 2005.

The PA recently decided not to open a monitoring procedure for Hungary. It expressed its concern at the recent changes to the Hungarian constitution and other laws, but concluded that the government should work towards acceptable solutions, in dialogue with the Venice Commission, opposition parties and civil society.[5]

The Venice Commission
The European Commission for Democracy through Law, better known as the Venice Commission, is an independent body which advises the Council of Europe on matters relating to constitutional law, including the functioning of democratic institutions and fundamental rights, the course of elections, and constitutional justice. Its members are independent experts in the relevant fields and are appointed by the countries associated with the Commission.

The Venice Commission's core task is providing constitutional support. It issues opinions at the request of states (government, parliament or constitutional court) or of the CoE's institutions (the Parliamentary Assembly, the Committee of Ministers, the Congress of Local and Regional Authorities and the Secretary-General). International organisations like the European Commission, which participate in the Venice Commission's activities, may also request advice.

The Venice Commission's opinions contain an analysis of the compatibility of a country's legislation with European and international standards and of the practicability and effectiveness of the solutions the country hopes to achieve with the legislation in question. A working group of rapporteurs visits the country under review and talks with national authorities and civil society organisations. The opinions that ultimately result from the process are adopted at a plenary session of the Venice Commission attended by representatives of the country. The approach is based on dialogue. The Commission's recommendations and suggestions are largely based on shared European experience in this field. After advising states on the adoption of a democratic constitution, the Commission works to strengthen the rule of law by focusing its attention on the implementation of the constitution.

Although the Venice Commission's opinions are not binding, they are frequently reflected in the legislation on which the Commission advised, thanks to its approach and its reputation for independence and objectivity.

The advice given on Hungary is a good illustration of the Commission's working methods. Since 2011 it has produced various opinions relating to the rule of law in Hungary, in particular the instrumental use of the constitution by the majority government, the status and remuneration of judges, the organisation of the courts, the status of the Prosecutor General and the organisation of the Prosecution Service. In 2012 the Commission issued opinions on the freedom of religion and of conscience, the status of Churches, the freedom of information, data protection, the rights of national minorities and recently on the fourth amendment to the Hungarian constitution.[6]

The latest amendments form part of a pattern of instrumental use of the constitution

5 Parliamentary Assembly, resolution 1941 (2013), final version.

6 For the Venice Commission's opinions on Hungary see: <http://www.venice.coe.int/WebForms/documents/by_opinion.aspx>.

by the Hungarian government. The Constitutional Court of Hungary had found certain legislative provisions to be incompatible with the constitution. The fourth amendment was an attempt to reverse these decisions by incorporating the contested provisions in the constitution, thus excluding the possibility of review by the Constitutional Court. The two-thirds majority currently enjoyed by the governing party in the Hungarian parliament has allowed it to embed its policies on the economy, social affairs, taxation, education and the family firmly in the country's constitution. The Venice Commission regarded this as a threat to democracy and observed that the amendments were characterised by a lack of transparency and an absence of public involvement. It advised the Hungarian government not to use the constitution as a political instrument. The Commission's opinion also made recommendations on the substance of certain provisions that are at odds with the central principles of the constitution: these include restricting the concept of the family to one based on marriage; limiting political parties' access to the press; and restrictions on the freedom of expression and the independence of the judiciary.[7]

The European Commission for the Efficiency of Justice (CEPEJ)
CEPEJ is a body of the Council of Europe that promotes cooperation among member states in the field of fair and efficient justice, by comparing legal systems, exchanging experience and drawing up recommendations. Experts collect information on the member states, which is compared and discussed in working groups. At the request of member states, CEPEJ can provide technical assistance to help them improve their judicial systems.

Group of States against Corruption (GRECO)
GRECO monitors compliance with the anti-corruption conventions concluded in the framework of the Council of Europe. Countries that are not members of the CoE may also accede to these conventions. Monitoring takes the form of evaluation rounds examining the application of specific anti-corruption provisions selected by GRECO.[8]

The Commissioner for Human Rights
The Commissioner for Human Rights is an independent non-judicial institution within the Council of Europe. He promotes human rights education in the member states, identifies possible shortcomings in human rights legislation and advises the member states on human rights in general. The Commissioner visits member states and draws up his own programme of work. After every visit he presents a report with conclusions and recommendations. The Commissioner may not act on individual complaints: in the Council of Europe's structure that task is reserved exclusively for the ECtHR.

III. The Organization for Security and Co-operation in Europe (OSCE)

The OSCE aims to promote security in a broad sense, covering three 'dimensions': political and military cooperation, economic and environmental cooperation, and the human dimension. The latter involves the promotion of democracy, human rights and the rule of law. The OSCE's headquarters are in Vienna, but it mainly works through its

7 For the Venice Commission's opinions on Hungary see: <http://www.venice.coe.int/WebForms/documents/by_opinion.aspx>.

8 Venice Commission, Opinion on the Fourth Amendment of the Fundamental Law of Hungary, Strasbourg, 17 June 2013 (Opinion 720/2013). See: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e>.

field offices. In addition it has three autonomous institutions: the Office for Democratic Institutions and Human Rights (ODIHR), the High Commissioner on National Minorities (HCNM) and the Representative on Freedom of the Media (FOM). ODIHR is mainly concerned with long-term support for and monitoring of election processes. The HCNM works in the strictest confidence on resolving ethnic conflicts, while the FOM often issues public advisory reports and opinions.

Marc Perrin de Brichambaut, Secretary-General of the OSCE from 2005 to 2011, observed that the OSCE's role has been greatly reduced, partly because of the enlargement of the EU and the North Atlantic Treaty Organization.[9] The UN and the EU have also become more active in the fields covered by the OSCE. Consequently, the OSCE has come to supplement the work of other international organisations. In his view, the three autonomous institutions still play an important role because they each have a mandate of their own that protects them against being influenced by OSCE participating states.

IV. The European Union

As stated above, article 2 TEU provides that the rule of law and respect for human rights are among the values on which the Union is founded. They are also values that the EU endeavours to propagate by means of a normative external policy.

The EU's political and legal structure includes various instruments, procedures and mechanisms for promoting the proper functioning of the rule of law in the member states. They include: (1) information gathering and provision; (2) evaluation and monitoring; (3) sanctions; and (4) legal obligations on member states and legal bases for further measures. Each of these is discussed in turn below.

IV.1 Information gathering and provision

EU Justice Scoreboard

On 27 March 2013, the European Commissioner for Justice, Fundamental Rights and Citizenship, Vice-President Viviane Reding, presented the EU Justice Scoreboard, which was developed to achieve more effective justice within the Union. By publishing statistics on the justice systems in all the member states, the Justice Scoreboard gives an impression of the functioning of the rule of law. The information presented primarily concerns the efficiency of judicial systems.

The Justice Scoreboard is definitely not intended to create a league table of member states, although the publication of these figures does make comparison between them possible. Moreover, as the Justice Scoreboard does not lay down minimum norms for its indicators, it does not deliver a general opinion on the functioning of the rule of law in the member states. The Scoreboard is still evolving and in future will cover more indicators and fields of law. It is therefore too early to form an opinion on its added value.

Agency for Fundamental Rights

By establishing the EU Agency for Fundamental Rights (FRA) in 2007, the EU created a body that assists institutions, bodies and agencies of the Union and its member states in

9 M. Perrin de Brichambaut, 'The OSCE in perspective, six years of service, six questions and a few answers', Security and Human Rights, 2012, no. 1, pp. 31-44.

upholding human rights where their activities have a bearing on European law. An example is the FRA's support for the European Border Management Agency (FRONTEX).[10]

The FRA publishes thematic reports and to this end collects information by country and by theme. In this way it can serve as a valuable source of information on issues relating to the rule of law in member states. The FRA may not attach normative conclusions to its findings, nor has it any powers to enforce respect for human rights, not even if there is a connection with the implementation of EU law. It may, however, advise on new European legislation, for example at the request of the European Parliament.

IV.2 Evaluation and monitoring

The existing EU framework encompasses various procedures that make it possible to monitor and evaluate acts of the member states relating to the functioning of certain elements of the rule of law but which extend further than collecting information.

Reporting by the European Parliament
Among the powers exercised by the EP is an oversight and control function. Human rights issues, relating both to third countries and to the member states, appear regularly on the EP's agenda. The 'Report on the situation of fundamental rights: standards and practices in Hungary' by rapporteur Rui Tavares is an example. In addition to specific resolutions, on subjects including homophobia and the status of Roma, the EP draws up annual reports on fundamental rights in the EU. These are often controversial. To ensure sufficient support for a resolution or a report, the countries concerned are not always named, but trends are identified. In some cases details are given of a situation. The closure of the network of independent experts on fundamental rights put an end to systematic reporting on the functioning of the rule of law in the EU member states which could provide input for annual and other reports. The EP regrets this development. It can investigate for itself but has only limited capacity and hence often relies on information gathered by third parties.

Evaluations in the context of the area of freedom, security and justice: Schengen
In 2013 the Commission and the EP agreed on changes to the procedure for evaluations of the Schengen acquis and changes to the regime governing the temporary introduction of controls at internal borders within the Schengen area.[11] Once the new procedures are in force, evaluations will no longer be limited to the way in which the rules are implemented but may also extend to the functioning of the authorities responsible for applying the Schengen acquis. This brings matters relating to the rule of law into the picture.

These evaluations will be conducted pursuant to article 70 TFEU, which provides for a mechanism for the evaluation of the implementation of Union policies, and in particular for the application of the principle of mutual recognition. This article has not previously been used. The European Commission and the member states are jointly responsible for conducting the evaluations. Until now, evaluations were carried out by member states

10 Prof. M.G.W. den Boer, 'Human rights and police cooperation in the European Union: recent developments in accountability and oversight', *Cahiers Politiestudies*, 2013/2, no. 27, pp. 29-45.

11 Press release 10239/13 from the Council of the European Union, Brussels, 30 May 2013. See: <http://register.consilium.europa.eu/pdf/en/13/st10/st10239.en13.pdf>, accessed 25 October 2013.

only (peer review) with the Commission participating as an observer. The new-style evaluations will also take account of FRONTEX reports.

Thematic evaluations in the framework of Justice and Home Affairs
In 1997 the Justice and Home Affairs Council decided to establish a mechanism for peer evaluation of the application and implementation at national level of international instruments aimed at combating organised crime.[12] Each evaluation round is concerned with a particular theme: to date, mutual assistance in criminal matters, measures to combat drug trafficking, information exchange with Europol, the practical application of the European Arrest Warrant, and financial crime. The sixth evaluation is currently under way, addressing the implementation and operation in practice of the decisions on Eurojust and the European Judicial Network. The evaluations, which are conducted under the auspices of the Working Party on General Matters including Evaluations (GENVAL), are based on questionnaires completed by the member states and visits by evaluation teams. After being discussed in the working party, the evaluations are published. They contain recommendations addressed to the country in question, the Commission and other institutions, and to other member states.

Anti-corruption reporting
In June 2011, the European Commission established an EU mechanism for the periodic assessment of anti-corruption efforts in the Union.[13] An Anti-Corruption Report is to appear every two years. The first had not appeared by the end of 2013. Before each biennial assessment, the Commission will establish a number of cross-cutting issues of relevance at EU level as well as selected issues specific to each member state. In drawing up the Anti-Corruption Report, the Commission will be assisted by an expert group and a network of local research correspondents, both appointed by the Commission. The report will comprise a thematic section, country analyses (assessing anti-corruption efforts by member states on the basis of indicators) and a section on trends in the EU. In the report, the Commission will address recommendations to the individual member states. This mechanism supplements other similar mechanisms in the Council of Europe (GRECO), the UN and the Organisation for Economic Co-operation and Development (OECD).

In its Communication on Fighting Corruption in the EU the Commission observed that anti-corruption efforts on the part of member states left much to be desired and that this was one of the reasons for the establishment of the anti-corruption report mechanism. For example, relevant EU directives had not been transposed into national legislation in all member states. The commission blamed this failure on a lack of political will[14] and noted that existing mechanisms were sector-specific and that no cross-cutting mechanism existed.[15]

12 97/827/JHA: Joint Action of 5 December 1997, adopted on the basis of article K.3 of the Treaty on European Union and as amended by Council Decision 2002/996/JHA, L349/2002.

13 European Commission (2011), Decision establishing an EU anti-corruption reporting mechanism for periodic assessment ('EU Anti-corruption Report'), C(2011) 3673 final, Brussels, 6 June 2011.

14 European Commission, Communication on Fighting Corruption in the EU, COM(2011) 308 final, 6 June 2011, Brussels, p. 4.

15 Ibid., p. 5.

Procedure for cooperation and verification on the accession of new member states
For a country to be allowed to join the EU, the rule of law must meet high standards. The Conclusions of the European Council meeting in Copenhagen (21-22 June 1993) stated that accession of a new member state requires the existence of stable institutions guaranteeing democracy, the rule of law and human rights. Since the entry into force of the Treaty of Lisbon, article 49 TEU refers implicitly to this 'Copenhagen criterion'.[16] Since candidate countries cannot accede until they adopt the entire EU acquis, the EU can demand, during the accession negotiations, that new member states accept monitoring of the functioning of the rule of law and take measures to rectify any shortcomings identified. The functioning of the rule of law in Romania and Bulgaria was an important issue in the accession negotiations with these two countries. In 2006 the Commission decided to establish cooperation and verification mechanisms to check whether Romania and Bulgaria had taken adequate measures to ensure that the rule of law functioned at the level required for accession to the EU.[17] The annexes to the decisions list the benchmarks the two countries were to address. Provision is also made for the decisions to be repealed when all the benchmarks have been satisfactorily fulfilled. The verification mechanism is thus temporary and tied to the accession process. However, this does not constitute a guarantee for the future. The AIV therefore believes that the obvious course of action is to keep the Copenhagen criterion – which is reflected in EU law in various ways (see below at III.4.4) – as a permanent criterion for all EU member states and to continue to monitor whether it has been fulfilled.

IV.3 Sanctions

Article 7 TEU
At political level article 7 TEU is the most obvious provision with which to enforce compliance with article 2 TEU. It allows the Council of the European Union to decide to suspend certain of the rights deriving from the application of the Treaties to the member state in question, including the voting rights of the representative of the government of that member state in the Council, if the Council determines the existence of a breach of the basic values of the EU on the part of a member state. This procedure has three stages.

At the first stage, the Council, acting by a majority of at least four-fifths of its members, may determine that there is a clear risk of a serious breach by a member state of the EU's fundamental values. The Council may also make recommendations to the member state, and regularly verifies whether the grounds for the determination continue to exist.

At the second stage, the European Council, acting by unanimity, may determine the existence of a serious and persistent breach by a member state of the EU's fundamental values. It may do so only on a proposal by one third of the member states or by the

16 See: <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf>, par. 3, p. 13, accessed on 3 October 2013.

17 European Commission, Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C(2006) 6570 final, Brussels, 13 December 2006, and European Commission, Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C(2006) 6569 final, Brussels, 13 December 2006.

Commission and after obtaining the consent of the European Parliament.

At the first and second stages, the Council and the European Council may act only on the basis of a reasoned proposal by one-third of the member states or by the Commission, and with the approval of the EP. The EP may also make a proposal at the first stage but not the second. At both stages the member state is question is heard before a decision is taken.

If the European Council determines the existence of a serious and persistent breach, the Council may, at the third stage, decide by qualified majority vote to suspend certain of the rights deriving from the application of the Treaties to the member state in question, including the voting rights of the representative of the government of that member state in the Council. If the situation improves, the Council, acting by a qualified majority, may decide subsequently to vary or revoke these measures.

It should be noted that article 7 applies not only to cases in which the member state in question is applying EU law, but to all its acts (or omissions). There are strict procedural requirements to be met before article 7 can be used. Furthermore, it can only be used in the event of a systematic and persistent breach. Article 7 is regarded as a very politically severe remedy. Accordingly, it has never been used.[18]

The application of article 7 could be the culmination of a monitoring mechanism that has revealed a member state's unwillingness to respect the values of the EU. The use of this power by the Council of the EU should be preceded by a thorough investigation, on the basis of which the Council can conclude that there is a risk of a breach of the EU's fundamental values, and by a dialogue with the member state in question. Article 7 provides not for a monitoring mechanism, but for sanctions. It could conceivably be invoked in response to the results of Council of Europe monitoring, but so far that link has not been made.

Systematic reporting on the situation in each member state is essential to give article 7 more substance and to ensure that a decision by the Council would not be purely political. To that end, a network of independent experts on fundamental rights was established in 2002, on the initiative of the European Parliament, to produce thematic reports and systematic annual reports. However, in 2007, with the establishment of the Fundamental Rights Agency (FRA), this network was replaced by the Fundamental Rights Agency Network of Legal Experts (FRALEX), comprising experts from all the member states, who produce a scholarly analysis of a specific aspect of the human rights situation in their country. The FRA then produces comparative studies based on these analyses. FRALEX has definitely not been charged with systematically monitoring the member states; it is mainly intended to provide the FRA with information.

Infringement proceedings
The Commission can take legal action, by instituting infringement proceedings, against member states that contravene EU law. This is also possible in relation to certain elements of the rule of law, such as the protection of fundamental rights or the principle of effective legal protection (article 19 TEU). Under articles 258 and 260 TFEU, the Commission can institute infringement proceedings if a member state has failed to fulfil

18 Formally speaking, the sanctions against Austria in 2000 were decisions by 14 individual member states, not by the European Union.

an obligation under the Treaties or an obligation concerning secondary EU legislation or has failed to do so in a timely manner. Before the Commission initiates proceedings, the issue concerning the correct application or implementation of EU law or the conformity of national with EU law is first put before the competent Commission service and then before the member state in question. Since 2008, this procedure has taken place within the framework of the EU Pilot. In approximately 80% of cases member states were able to give a satisfactory answer to the Commission's questions and no infringement proceedings resulted.[19]

The first step in actual infringement proceedings is an administrative procedure, beginning with a letter of formal notice. This is followed by a reasoned opinion issued by the Commission to the member state. Ultimately the Commission may bring the member state before the European Court of Justice (ECJ). The Court rules on whether EU law has been breached. The member state is obliged to heed the Court's judgment, but if it does not, the Commission may bring the case before the Court once again and apply for the imposition of a lump sum or penalty payment under article 260 TFEU. In practice, the various stages in the infringement proceedings prompt a dialogue between the Commission and the member state which may result in the latter making the changes called for. In that event, the case often does not have to be brought before the Court again.

In the AIV's opinion, the infringement procedure – and the opportunity it offers for dialogue with member states concerning breaches of EU law that could be regarded as undermining the rule of law – could be employed more actively and more strategically for this specific purpose. The Commission could make this a priority area of its control policy, using the information available and the reports that are produced in increasing numbers in various fields (see sections III.4.1 and III.4.2 of AIV advisory report no. 87).

Section III.4.2 of this report referred to evaluations in the framework of the area of freedom, security and justice, thematic evaluations in the framework of Justice and Home Affairs and anti-corruption reporting. All of these are conducted under the responsibility of the Directorate-General for Home Affairs. The information and findings arising from these evaluations could easily be pooled to provide a basis for a more intensive and strategic use of the infringement procedure. The AIV advises the government to press the Commission to take this course of action.

IV.4 Legal obligations on member states and legal bases for further measures

The principles of Union loyalty and effective legal protection
Article 4, paragraph 3 TEU states: 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and *refrain from any measure which could jeopardise the attainment of the Union's objectives*' [AIV's italics]. This principle of Union loyalty imposes an obligation on the member states to ensure the proper functioning of institutions involved in guaranteeing and enforcing Union law. As an example, this principle provided part of the basis for the ECJ's formulation of

19 Report by the Commission, Second Evaluation Report on EU Pilot, SEC(2011) 1626 final, Brussels, 21 December 2011.

the obligation on member states to guarantee effective legal protection. Following the Treaty of Lisbon, this obligation is spelled out explicitly in article 19, paragraph 1 TEU: '*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*.' Failure to fulfil this obligation can therefore prompt the Commission to initiate infringement proceedings.

The Charter of Fundamental Rights of the European Union
Article 6 TEU accords the Charter of Fundamental Rights the same legal value as the Treaties. Since the entry into force of the Treaty of Lisbon the Charter has thus been legally binding on the member states.[20] Some of the Charter's provisions have a direct bearing on the functioning of the rule of law: the right to liberty and security (article 6), equality before the law (article 20), the right to good administration (article 41), the right to an effective remedy and to a fair trial (article 47), the presumption of innocence and respect for the rights of the defence (article 48) and respect for the principles of legality and proportionality of criminal offences and penalties (article 49). These provisions are not only addressed to EU institutions; they must also be respected by the member states 'only when they are implementing Union law' (article 51). According to the recent judgment by the Court of Justice in the *Åkerberg Fransson* case, this means that the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law.[21] The FRA and the European Commission publish annual reports on compliance with the Charter.

Article 352 TFEU
Under article 352 TFEU the Commission is empowered to propose new legislation if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers. Since this article is intended to allow for flexibility in cases not covered by the TEU or the TFEU, it is sometimes referred to as the 'flexibility clause'. This provision's forerunners – article 308 EC and article 235 EEC – applied only to measures relating to the functioning of the internal market. The material scope of this legal basis has accordingly been considerably extended to cover all areas of EU policy. Under the Declaration on article 352 TFEU (which is not legally binding) it is excluded that an action based on that article would only pursue objectives set out in article 3, paragraph 1 TEU (the promotion of peace, the values of the Union and the well-being of its peoples); such action must rather address the objectives referred to in article 3, paragraphs 2 and 3 TEU (the area of freedom, security and justice and the internal market). It can be inferred from the Declaration that it is indeed possible to take measures at EU level to promote the Union's values in the interests of improving the organisation and functioning of the internal market and the area of freedom, security and justice. In the past, moreover, the member states repeatedly gave a generous interpretation to article 308 EC and article 235 EEC.[22] The FRA, for example, was established on that basis, although there was some dispute about the required link to the internal market.

20 Official Journal of the European Communities, 2000/C 364/01.

21 Case C-617/10, Åkerberg Fransson, judgment of 26 February 2013.

22 This can partly be explained by the fact that the original EEC Treaty contained only a few specific bases for powers. See: T. Konstadinides, 'Drawing the line between circumvention and gap-filling: an exploration of the conceptual limits of the Treaty's flexibility clause', Yearbook of European Law, Vol. 31, no. 1, 2012, pp. 227-262.

Procedurally speaking, it is the European Commission that makes proposals on the basis of article 352 TFEU and the Council that adopts them by unanimous vote after obtaining the consent of the European Parliament. This has enhanced the democratic legitimacy of the use of article 352, since previously it was only necessary to consult the EP. The Commission must now also draw up a proposal for the use of article 352 specifically to the attention of national parliaments with a view to the subsidiarity test. According to Theodore Konstadinides, the constitutional courts of Denmark and Germany have determined in their case law that the EU should be cautious in its use of article 352 and that the British European Union Act is also intended to set limits on such use.[23]

In the light of earlier practice in the interpretation and use of the flexibility clause, the AIV is of the opinion that article 352 TFEU offers a sufficient legal basis for additional rules or procedures to promote respect for rule-of-law norms, in so far as they can be deemed necessary for the proper functioning of the area of freedom, security and justice and the internal market (see also chapter I).

IV.5 Monitoring in the member states

Institutions with a mandate involving the rule of law or related issues also exist at national level. First and foremost, of course, these are parliament and the judiciary, often including a constitutional court. Many member states have an ombudsperson with whom individuals can lodge a complaint about the authorities. The nature and number of complaints about specific government bodies can reveal to the ombudsperson the status of elements of the rule of law.

In addition, all EU member states are supposed to have a national human rights institute to which individuals may report alleged human rights violations by the authorities. In 1993, the UN General Assembly adopted a resolution calling on all its members to establish a national human rights institution, and specifying what the role, composition, status and functions of such a body should be.[24] The Dutch body is the Netherlands Institute for Human Rights. Each geographical region has a regional network: Europe's is the European Group of National Human Rights Institutions.

The relationship between national institutions may vary from one member state to another; it is nonetheless important to mention them because they bear the primary responsibility for the functioning and enforcement of the rule of law in their own countries and in relations with third countries, such as between Italy and Libya in the field of migration. International mechanisms play a supplementary role.

IV.6 Non-governmental organisations

Lastly, a number of non-governmental organisations, both national and international, are concerned with the functioning of the rule of law: some as part of a wider mandate, such as Amnesty International and Human Rights Watch, while others focus specifically on the rule of law. These organisations, too, possess information that could be taken into account in assessing the functioning of the rule of law in the EU member states.

23 Konstadinides, op. cit., p. 229 and pp. 232-234.

24 General Assembly resolution 48/134 of 20 December 1993.

The Rule of Law Index of the World Justice Project is based on a broad definition of the rule of law. The Index measures perceptions of the functioning of the rule of law among the residents of three cities per country and experts in 97 countries (including 20 EU member states), on the basis of hundreds of indicators reflecting nine elements of the rule of law.

The Economist Intelligence Unit's democracy index divides countries into four types: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes, on the basis of their scores on indicators in five categories: electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture, which together form the democracy index.

Transparency International's Corruption Perceptions Index is based on opinion polls, and hence reflects public perceptions of the level of public-sector corruption in a particular country.

The Press Freedom Index of Reporters without Borders is also compiled on the basis of questionnaires, which are completed by journalists, academics, lawyers, human rights defenders and members of staff of other non-governmental organisations.

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