

CCBE President's speech at the Virtual 49th European Presidents' Conference on "Rule of law and democracy – closing the gap between policy and practice."

12/02/2021

Dear Mr President,
Dear Presidents from throughout Europe,
Dear honourable Guests,

I am very honoured and I would like to thank you sincerely for giving me the floor to provide you with an answer to the question - how to close "the gap between policy and practice" to ensure the Rule of Law. Through the Council of Bars and Law Societies, the CCBE, I represent more than 1 Million Lawyers in Europe and I am deeply convinced that we, the legal profession, play a very important role when it comes to ensuring the Rule of Law.

However, before considering solutions as to how to ensure the Rule of Law, let me first describe the gap we are talking about. Unfortunately, we cannot ignore the fact that the gap is big. There are some key issues which I would like to describe:

The first issue is the delay in the accession of the European Union to the European Convention on Human Rights:

Our main "policy" to ensure the Rule of Law – besides the Charter of Fundamental Rights of the European Union -, is the European Convention on Human Rights.

Since the Lisbon Treaty entered into force, the European Union has the right and the possibility to access the Convention. But up to date this accession has not taken place. Of course, I am aware that there was an agreement for accession in 2013 which was ruled out by the European Court of Justice in 2014. However, it then took the European Union another five years to ask the Council of Europe to resume the negotiations. Negotiations have started again in 2020, but we have now been waiting the accession for 12 years. The CCBE has continuously been involved in this procedure. It was only recently that the CCBE took part in the 7th negotiation meeting of the Council of Europe's negotiation group in November 2020 and underlined that the consistency of European human rights protection would be enhanced if the EU acceded to the ECHR.

Why is it so important that the EU accesses the Convention?

The importance becomes very apparent when we consider the activities and developments regarding the European Border and Coast Guard Agency, Frontex. Frontex is acting in the very sensitive area of migration. According to our common European values, every single migrant enjoys those human rights, which are enshrined in the Convention. But, as long as the EU is not a party to the Convention there is no possibility to file claims against actions by Frontex before the European Court of Human rights.

As the media reported, on 7 December 2020, OLAF raided the offices of Frontex as part of an investigation into allegations of migrant pushbacks. At the same time the European Union is increasing

the budget of this Agency for the next years to more than 1.3 billion Euros per year, which is more than threefold compared of the budget of today. This budget is foreseen for enforcement tools – personal and equipment. Since 2011, the Frontex Regulation provides for the establishment of a Fundamental Rights Officer. However, although mentioned on the Frontex website, this position has been vacant ever since. Therefore, the European Union is developing a well-equipped body which is and will be involved in coercive measures at the European Borders – but, there is no procedural tool for challenging their actions. Why does the European Union not first accede to the Convention and then equip the Agency?

This is one gap, and unfortunately there is another gap with regard to migration. A German Regional High Court has decided very recently that migrants, who have been provided with an international protection status in Greece before they entered into Germany, may not be deported to Greece. According to the German court, there is the concrete risk that they will get into situations where they suffer inhuman treatment. A German regional high court, which is not the place where revolutionaries make their careers, rules that there is on the soil of the European Union, treatment which violates Art. 3 of the Convention. The same was ruled by the European Court of Human Rights in November 2019 with regard to the removal of third-country citizens from Hungary to Serbia. In this case, the Court reiterated that “the prohibition of inhuman or degrading treatment enshrined in Article 3 of the Convention is one of the most fundamental values of democratic societies” (Illias and Ahmed v. Hungary, Appl. No. 47287/15, paragraph. 124) and, I add, not ensured in the European Union.

Ladies and Gentlemen, Dear Colleagues, I am not talking about Greece or Hungary, it is the European Union which is responsible for these situations and developments.

This is a European Union which is strong and united when it comes to enforcement, but obviously neither united nor strong enough when it comes to insuring fundamental rights for citizens.

Another deficiency is the differing prison conditions within the EU. The EU is happy with the instrument of the European Arrest Warrant, but there are no effective efforts to ensure a common high level of prison conditions for pretrial detention. The European Public Prosecutor has been established without ensuring that suspects who get detained upon request of the EPPO will enjoy the same level of prison conditions in the respective Member States. The right to a fair trial, enshrined in Art. 6 of the convention as well as in Art. 47 of the Charter of Fundamental Rights, includes the right to an effective defence and adequate facilities for the preparation of that defence. It depends on the prison conditions whether these promises are fulfilled or not. The EU has to care about them.

The final example I want to mention is the lack of transparency when it comes to (possible) infringements of EU Law by the member states. Transparency is of utmost importance for the Rule of Law. The Rule of Law is unimaginable without accountability, and accountability can only be attained if the Public Authorities’ Actions are transparent and accessible for the civil society to which the Public Authority is accountable. This is why in our modern national societies we have legislation on the right to information for everybody, and at EU level there is a Regulation from 2001 regarding public access to European Parliament, Council and Commission documents. This ensures that civil society gets information upon *request*. But this is not enough when it comes to ensuring the Rule of Law in the Member States and their supervision by the Commission. When the Commission evaluates the transformation of directives in the member states and identifies shortcomings, they confront the respective Member States with the Commission’s view. The Commission enters into a discussion with the State about the alleged shortcomings of the national legislation. This procedure is foreseen in Art. 258 of the TFEU. However, this exchange between the EU and the respective member state is not published. The civil society can find a general note on this on the Commission’s Website, but no information on the details of the exchange. If the civil society shall be able to support the Rule of Law at the national level, it should be well informed when it comes to disputes between the EU and the national authorities about the transformation of EU Law, and the details of the dispute should be made public. The Commission argues that discussions with the member states would become more difficult

if they were public. This may be right; however, this cannot justify to keep the discussions opaque and rule out the principle of transparency and accountability.

Ladies and Gentlemen, Dear Colleagues,

As I said at the beginning, the gaps between policies and practice are large and it will take great efforts to reduce and ultimately eliminate them. But there is a tool which is dedicated to make the rule of law a success – the legal profession.

It belongs to the core competences of the CCBE to monitor actively the defence of the rule of law, to protect the fundamental rights and freedoms, including access to justice and the protection of the client and the protection of the democratic values inextricably associated with such rights.

As the CCBE has highlighted in our statement on the 2020 Rule of Law Report, according to the Venice Commission's rule of law checklist, rule of law means not only the "prohibition" of arbitrariness but also the "prevention" of abuse of power.

"Prevention" in this sense requires a high level of control mechanisms for civil society and needs more efforts than just *prohibiting* the abuse of powers. "Prevention" requires power in the hands of those who are not on the side of the law makers and the state's justice systems but independent and self-controlled. With regard to the *prevention* of arbitrary decisions and actions, it should not only depend on the states' lawmakers to provide for access to justice and legal remedies for their citizens; an independent legal profession is needed to challenge decisions which are taken by those in power. In the recently published Judicial Training Strategy, the European Commission acknowledges that "lawyers play a vital role in the practical implementation of EU law in many legal proceedings... It is up to them to raise EU law issues in specific legal situations". This is exactly why the legal profession is an irreplaceable element of the Rule of Law. Our role is to make lawmakers aware of bad practice and correct injustices by taking cases to court. It is time that this role of the legal profession is recognised without ulterior motives. This role does not comply with the requirements which are imposed on us today, when we are obliged to break our client's privilege to confidentiality and are misused by the state in order to support the fight against money laundering. The Rule of Law needs a balance between power and control. If lawyers are used for the needs of the power, the system is no longer balanced. The Rule of Law is affected. The gaps will get larger. If there is an interest in filling the gaps, the European Union should support the concept of a legal profession which is based on the three core values - obligation to confidentiality, prohibition of conflicts of interest and independence - and which is **not** obliged to get involved in any investigation against and opposite to the interest of their clients. The EU should as well support a concept where data and information regarding the lawyer-client relationship are effectively protected and prevented from evidence gathering – a danger we see with the E-Evidence Regulation.

We, the legal profession, are *willing* to fill the gaps between policy and practice, we are *able* to provide our services to help filling these gaps. The gaps have become larger in the recent past – the European Union should be aware and acknowledge that the legal profession is in place to support a system which aims at a gapless balance of powers to empower the rule of law. With legislation like the Anti-Money Laundering Reporting obligations, the lawmaker weakens the tool we, lawyers build, to close the gaps. We are the guardians of the rule of law. This sort of legislation should be repealed instead of being extended. Otherwise, there is the danger that one day we will no longer see the gaps between policies and practice, but a swamp where the rule of law has drowned.

Thank you for your attention.

Margarete von Galen
CCBE President