

## EUROPEAN LAW INSTITUTE

### FUNDAMENTAL CONSTITUTIONAL PRINCIPLES OF A EUROPEAN DEMOCRACY

#### DRAFT

This is a draft circulated as part of the consultation exercise carried out by the reporters and the project participants. Any comments will be very gratefully received.

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## FUNDAMENTAL CONSTITUTIONAL PRINCIPLES OF A EUROPEAN DEMOCRACY

### EXPLANATORY MEMORANDUM: OBJECTIVES, SCOPE AND METHODOLOGY OF THE REPORT

#### 1. Introduction

The purpose of this report is to identify and articulate in a Charter the constitutional principles and standards which form the foundations of a European liberal democratic state. The underlying premise is that such a state is based on majority rule but is constrained by the obligation to respect the rule of law, including fundamental human rights.<sup>1</sup> The study aims to lead to the formulation of those principles, identifying their content and providing general guidance to public authorities, the courts, and civil society. The aims of this study fall within the core tasks of the European Law Institute (ELI) to evaluate or improve principles and rules which are common to the European legal systems and provide a forum for discussion among stakeholders that take an active interest in the development of European laws.

The study has both a descriptive and a prescriptive character. Its objectives are to describe the fundamental constitutional principles as understood in European liberal democracies and also articulate standards that are expected from any such genuine democracy. It seeks to contribute to the contemporary public debate on the design and enforcement of core constitutional values of Europe.<sup>2</sup>

#### 2. Rationale

The report maps out key principles that seek to encapsulate contemporary European constitutionalism. They represent the *sine qua non* elements of liberal democracy, based in its core values. It is inevitable that the principles discussed will operate at a level of abstraction. This is inherent in their nature as fundamental constitutional principles. It is also necessitated by the nature of the study which is intended to have pan-European appeal. Given that there is a multitude of models of constitutional democracy and that it is important to respect national constitutional identities and cultures, it would be inappropriate to lay down commands which are too prescriptive. The reporters recognize that few of the principles articulated in this report could be applied without qualification

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<sup>1</sup> The term 'liberal democracy' is defined in the commentary under Principle 1 below.

<sup>2</sup> For a discussion, see among others, O Mader, 'Enforcement of EU values as a political endeavour: Constitutional Pluralism and value homogeneity in times of persistent challenges to the rule of law' (2019) 11 *Hague Journal on the Rule of Law* 133; L Rossi, La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels, (2020) *RTD Eur* 639 ; K L Scheppele, D V Kochenov and B Grabowska-Moroz, EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union, (2021) 39 *YEL*, 3.

and that context has an important, sometimes overbearing, effect. Nonetheless, the study does have practical implications at several levels.

First, in a constitutional democracy, general principles govern the making, the application, and the enforcement of the law, and provide a governance framework for the exercise of public and private power. They thus provide a statement of identity which is crucial to the forging of a political demos.

Secondly, in the last decade, European, along with other Western, democracies have faced a host of political, economic and legal challenges, some of them unprecedented. These have included a heightened terrorist threat, the eurozone crisis, migration, the covid pandemic, war and international instability, and a sharp rise in populism. A statement of principles has practical value in that it serves as a reminder of constitutional fundamentals and governance ethos. A grave threat to democracy is the risk of complacency. Given the lessons of historical experience, which teaches us that regression is possible, the importance of restating constitutional values cannot be overstated.<sup>3</sup> The practical importance of the rule of law in Europe in recent years is manifested by the extensive case law of the CJEU on judicial independence<sup>4</sup> and the Commission's intensified efforts to address rule of law violations.<sup>5</sup> As noted by Dean Spielmann, former President of the European Court of Human Rights (ECtHR), 'by defending the rule of law and ruling on cases that go to the heart of the Member States' constitutional arrangements, the CJEU is ... defending the vision of a liberal democracy against the backdrop of an economic, political and migratory crisis, which is still ongoing in a number of European Union Member States.'<sup>6</sup>

Thirdly, there is increasing realization that, in contrast to expectations, globalization and interdependence of national economies has not brought about the intended benefit of

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<sup>3</sup> Scheppele, Kim Lane, Pech, Laurent; Platon, Sébastien: Compromising the Rule of Law while Compromising on the Rule of Law, *VerfBlog*, 2020/12/13, <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/>

<sup>4</sup> See e.g. Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice) LM*, EU:C:2018:586; Case C-619/18 *Commission v Poland*, ECLI:EU:C:2019:531; Joined cases C-585/18, C-624/18 and C-625/18 *A.K. v. Krajowa Rada Sądownictwa and CP, DO v. Sąd Najwyższy (A.K. and Others)*, EU:C:2019:982; Case C-896/19 *Repubblica v Il-Prim Ministru*, EU:C:2021:311; *Eurobox*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034;

<sup>5</sup> See, in particular, Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433/I/1, on which see Tridimas, *Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, Editorial, *Croatian Yearbook of European Law and Policy*, 2020; J Lancy, 'The rule of law conditionality under Regulation No 2092/2020 – Is it all about the money?' (2021) 13 *Hague Journal on the Rule of Law* 79-105. See also *Hungary v Parliament & Council (conditionality case)*, C-156/21; ECLI:EU:C:2022:97 and further the Commission's new annual European Rule of Law Report [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en); and the role of rule of law considerations in relation to possible enlargements of the EU: L Louwerse and E Kassoti, 'Revisiting the European Commission's Approach Towards the Rule of Law in Enlargement' (2019) 11 *Hague Journal on the Rule Law* 223–250.

<sup>6</sup> D Spielmann, 'The Rule of Law Principle in the Jurisprudence of the Court of Justice of the European Union', in Elósegui M., Miron A., Motoc I. (eds) *The Rule of Law in Europe*. (Springer, 2021)

political liberalization to all citizens.<sup>7</sup> It is indicative that *Our World in Data*, an independent research organization that classifies countries in four groups, liberal democracies, electoral democracies, electoral autocracies, and closed autocracies,<sup>8</sup> has identified a retreat in democracy. Whilst the percentage of countries classified as liberal democracies increased from 11% in 1970 to 23% in 2010, it has since regressed.<sup>9</sup> Another report<sup>10</sup> reaches similar conclusions identifying a reduction in the number of liberal democratic regimes from 42 in 2012 to 34 in 2022.<sup>11</sup> The Freedom House reports that ‘[i]n 2018, Freedom in the World recorded the 13th consecutive year of decline in global freedom’.<sup>12</sup> Also, the war in Ukraine illustrates in the sharpest possible way external threats to democratic states.

Fourthly, the report seeks to capture contemporary challenges posed by populism and novel threats such as media manipulation and fake news. It also aims at providing a value framework within which to assess modern pan-European concerns, such as sustainability, artificial intelligence and automation, and the role of internet platforms. Those issues have not been previously captured in a comprehensive way in a report of this nature.

Fifthly, this report provides an overview of constitutional principles which form the foundations of a European liberal democratic state. These are manifested, at state level, in national constitutions, legislation and judgments of the highest courts. They are also to be found in constitutional conventions and traditions. They are further also proclaimed at international and supra national level. For instance, Article 2 of the Treaty on European Union provides for an agreed set of principles as values which are ‘common’ to the Member States of the EU. Also, in this vein, Article 8 of the Treaty on European Union requires that the EU develops a special relationship with neighbouring states that is ‘founded on the values of the Union’.<sup>13</sup> In the Statute of the Council of Europe, there are principles which, according to its founders, form the basis of ‘all genuine democracy’<sup>14</sup>. This report is a step in mapping out these key principles and identifying current trends in their development. While the focus is on the European continent, the ambition is that,

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<sup>7</sup> <https://www.economist.com/finance-and-economics/2022/03/19/globalisation-and-autocracy-are-locked-together-for-how-much-longer>.

<sup>8</sup> See B. Herre, 200 years ago, everyone lacked democratic rights. Now, billions of people have them, 2 December 2021, <https://ourworldindata.org/democratic-rights>. The definitions provided are as follows (emphasis omitted): ‘In closed autocracies, citizens do not have the right to choose either the chief executive of the government or the legislature through multi-party elections. In electoral autocracies, citizens have the right to choose the chief executive and the legislature through multi-party elections; but they lack some freedoms, such as the freedoms of association or expression, that make the elections meaningful, free, and fair. In electoral democracies, citizens have the right to participate in meaningful, free and fair, and multi-party elections. In liberal democracies, citizens have further individual and minority rights, are equal before the law, and the actions of the executive are constrained by the legislative and the courts.’

<sup>9</sup> See <https://ourworldindata.org/democratic-rights>

<sup>10</sup> Vanessa A. Boese, Nazifa Alizada, Martin Lundstedt, Kelly Morrison, Natalia Natsika, Yuko Sato, Hugo Tai, and Staffan I. Lindberg. 2022. Autocratization Changing Nature? Democracy Report 2022. Varieties of Democracy Institute (V-Dem), [https://v-dem.net/democracy\\_reports.html](https://v-dem.net/democracy_reports.html).

<sup>11</sup> <https://www.nytimes.com/2022/03/04/world/ukraine-russia-war-authoritarianism.html>

<sup>12</sup> See *Freedom House Report 2019, ‘Democracy in Retreat’*, [https://freedomhouse.org/sites/default/files/Feb2019\\_FH\\_FITW\\_2019\\_Report\\_ForWeb-compressed.pdf](https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf), at p.1. Freedom House is a non-partisan US organisation devoted to the defence and support of democracy.

<sup>13</sup> For the text of Article 2, see [below](#), n.21.

<sup>14</sup> Statute of the Council of Europe, signed at London on 5 May 1949, recital 3.

commensurate with the ELI's mission, it will stimulate discourse in a global context. The report also aspires to pave the way for the further development or detailed consideration of the principles under focus to be undertaken under the auspices of the ELI.

It is evident that, given the diversity of political governance systems around the globe, it is not possible to draft constitutional principles that would be acceptable to all of them. By their nature, fundamental constitutional principles have a general overarching ideological blueprint. The principles proposed here reflect the constitutional traditions of Western European democracies since the Second World War which follow the liberal democratic model. This does not mean that they are partisan. Their generality facilitates political consensus whilst allowing discretion for reaching different outcomes. In seeking to balance diverse interests, a range of equilibriums is acceptable.

Although the focus is on the fundamental constitutional principles of a European state, there is of course no assertion that Europe has the monopoly of liberal democracy. The focus on Europe is justified by the objectives and overall research orientation of the ELI. Also, post Second World War European constitutions and the European Convention on Human Rights (ECHR) serve as exemplary of a liberal democratic model. There are certain distinctly European aspects either because they are found predominantly in European constitutions or because they were spearheaded by European systems of governance. These are a commitment to supra-nationalism, namely the ECHR and the EU, and an emphasis on the need to protect not only civil liberties but also socio-economic rights. This report, however, borrows from international initiatives and constitutional norms found beyond Europe and seeks to have global resonance.

The report does not consider in detail fundamental rights but highlights that the concept of liberal democracy encompasses commitment to a minimum set of such rights. The working group searched for the essential principles that a liberal democracy based on the rule of law should expect from an independent and principled application of rules by public and private actors in a given field. As such, the study is guided by the quest for the European constitutional DNA.

The report uses as its primary point of reference the laws of European states, the ECHR, the EU Charter of Fundamental Rights (EU Charter), and international instruments to which European states are parties. Material from international law and other legal systems has also been taken into account. Although it has a European focus, it aspires to lay down principles of global reach setting out a blueprint for all liberal democracies.

The project team laboured over the choice of title of this document. Several alternatives were considered. The term 'Charter' was thought to reflect best the content and the objectives of this exercise, its essential goal being to extrapolate, from the outlook of national constitutions and international conventions, a set of fundamental constitutional expectations that a contemporary European democracy should meet. For this reason, the principles are listed under the overarching heading of a Charter of Fundamental Principles of a European Democracy. It contains principles, rights and standards and, sometimes, goes

beyond what one can expect to find in a constitutional text.<sup>15</sup> It is grounded on common European constitutional values and aspires to have a contemporary relevance. Needless to say, it is not intended to favour the ideology of any specific political party.

### **3. Methodology and format**

Principles are grouped under the following heads:

- (a) liberal democracy;
- (b) the rule of law;
- (c) judicial independence;
- (d) checks and balances - accountability;
- (e) dignity and equality;
- (f) protection of fundamental rights;
- (g) constitutional integrity.

After each principle is stated, there is a succinct commentary providing explanations on the meaning and scope of the principle, indicative references to its legal sources, and, in some cases, specific examples of what they entail. It is not intended that the comments have the status of constitutional rules.

Some of the principles included refer to governance (see e.g. Principle 2 on representative democracy), others provide for duties on the state, and others for individual rights or both. The Charter is not intended to be a model constitution or treaty. Some principles go beyond the commitments that a state may be expected to include in its constitution (e.g. Principle 6 on protection against disinformation). They are nonetheless included in light of their perceived importance as characterising a well-governed liberal democracy. It is important to stress that constitutional principles develop in the light of political experience and the social, economic, political and cultural features of each society. What may be appropriate in one state may not be in another. As a general rule, therefore, discretion should be recognised to individual polities in implementing these principles. The intention has been to provide clear, concise statements at a level of abstraction that would convey the core message whilst allowing flexibility and recognizing that there is a range of acceptable variation in their implementation, subject to respecting the essence of the principle.

The reporters view this Charter as an effort to encapsulate the principles on which a European democracy should be based. It is hoped that its principles may be drawn upon by legislatures and courts in Europe and beyond, and that it may inspire future constitutional developments. It is also hoped that it may spearhead further reports on specific principles under the auspices of the ELI. Furthermore, consideration should be given to producing a simpler version of this Charter which would appeal to a non-specialist audience and a more basic version for use in schools and colleges. The appeal of those documents would be further broadened if they were translated in various languages. Finally, consideration

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<sup>15</sup> See e.g. Principle 9, which contains specific maxims derived from the principle of legal certainty, Principle 17 (independence as a general principle of reviewing bodies); Principle 22 (anti-corruption), Principle 32 (automated decision making).

should also be given to revisiting this Charter periodically with a view to examining possible updating.

### **ACKNOWLEDGMENTS**

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## PART ONE – LIBERAL DEMOCRACY

### Principle 1: Values

*Respect for human dignity, democracy, the rule of law, equality, and fundamental rights are the founding values of a liberal democracy.*

#### Commentary

The starting premise is that liberal democracy, whilst imperfect, is the ‘worthiest of political creeds’<sup>16</sup>. Democracy can be understood at different inter-related levels. It is an ideology, a system of governance, and a political culture. As an ideology, it posits that the ultimate source of political power is the people. As a system of governance, it requires an institutional and legal framework giving effect to majoritarianism, namely the principle that decisions are taken by the majority of the people, whilst ensuring accountability. Democracy is also a political ethos. Essentially, as a political system, it can only work if its basic tenets are accepted and observed by both those who govern and those who are governed.

The term ‘democracy’ is manifold. Constitutional democracy refers, generally, to a majoritarian regime which is subject to an overarching constitutional framework. That framework governs the exercise of political power and imposes process limitations on state authorities but is agnostic in terms of substantive values. It imposes no restraints on the will of the majority. This report refers to ‘liberal democracy’ to indicate a political regime which places the freedom of the individual at its centre and recognizes, along with majoritarianism, human dignity and the protection of fundamental rights as core constitutional values. The term ‘liberal’ is not intended to express preference for the policies of any specific political party. It is instead used to indicate a polity that has political liberty and pluralism as its core values. It has essentially two attributes. It recognises that there are limitations on government; and that those limitations derive from the need to protect the liberty of the individual. Even a government that has been elected to office according to the majoritarian rule and is fully supported by the people must be subject to constraints in certain areas. These constraints derive from the need to protect fundamental values. Democracy without constraints was tested and failed in 20<sup>th</sup> century Europe. Liberal democracy is majoritarianism constrained by certain values.

As Galston puts it, the ‘presumption [is] in favor of individuals and groups leading their lives as they see fit, within the broad range of legitimate variation defined by value pluralism, in accordance with their own understanding of what gives life meaning and value’.<sup>17</sup> Liberalism places the individual at the centre of the political system. It embraces

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<sup>16</sup> A. Hacker, Liberal Democracy and Social Control, *The American Political Science Review*, 51 (1957) 1009 at 1009.

<sup>17</sup> W. A. Galston, *The Idea of Political Pluralism*, (2009) 49 *Nomos*, Moral Universalism and Pluralism, 95 at 96.

tolerance and a free political and social space for all members of society. It accepts that there are some principles and rights which are beyond the political bargain. They are so fundamental that they cannot be changed within the liberal democratic system. Thus understood, liberal democracy represents the common constitutional traditions of Western European States since the Second World War. As the ECtHR has stated ‘there can be no democracy without pluralism’.<sup>18</sup>

European liberal democracies have historically developed at the level of the nation state as an organisation of power which retains the ‘monopoly of politics, so that it is possible to speak about the state and politics as being identical’.<sup>19</sup> They are the result of millennia of philosophical reflections and political action on which classic Greco-Roman political thought has exercised considerable influence. Medieval juridical thought has also influenced modern democracies, for example by providing insights on the relationship between the authority of the sovereign, the state, and the law. Even though democratic regimes have historically crystallised at state level, the principles of liberal democracy are not owned by the nation state. Following the Second World War, international bodies and supranational institutions, especially the Council of Europe and the European Union, have made an enormous contribution to advancing democracy so that adherence to their values by nation states can be viewed as a component of their political legitimacy. By the same token, adherence by supranational organisations to the values of liberal democracy is a component of their own legitimacy.

Principle 1 lays down the founding values of a liberal democratic state. It is inspired by Article 2 TEU but the same values are also reflected in the European Convention on Human Rights (ECHR) and other international instruments.<sup>20</sup> The fact that Principle 1 does not refer to all the values stated in Article 2 TEU<sup>21</sup> does not mean that those omitted are not attributes of a liberal democracy or that they are in any way of lesser importance but that, being more specific, they can be encompassed under the overarching values of Principle 1. Those values are universal and permeate society as a whole, guiding both state action and private conduct. As guiding principles, they enable societal discourse with a view to resolving disagreements through rational dialogue.

The values referred to in Principle 1 are interconnected. They are to be understood as a system which defines the constitutional blueprint of a democratic state and from which more specific principles and rules emanate. The values listed do not exist only in an abstract constitutional plane but encompass judicially enforceable rights. Thus human dignity, equality and, to state the obvious, fundamental rights give rise to personal claims that can lead to judicial remedies.

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<sup>18</sup> *Centro Europa 7 Srl and Di Stefano v Italy*, application No 38433/09, judgment of 7 June 2012, para, 129; the dictum was made in relation to pluralism in the audio-visual sector.

<sup>19</sup> N Matteucci, ‘Stato’ in *Enciclopedia Treccani*.

<sup>20</sup> See e.g. the UN Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966).

<sup>21</sup> Article 2 TEU states as follows: ‘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.’

There is ample scope for organising a democratic regime in the form of a parliamentary or a presidential system. A state may also recognise a monarch as head of state or opt for a republican system. There are, however, some core principles which form the essence of liberal democracy and cannot be departed from. These include majoritarianism, free and fair elections, equality of citizens, and inclusive citizenship. They also include commitment to the rule of law, including a set of fundamental constitutional rights and freedoms which are legally safeguarded and can trump the wishes of the majority. These characteristics lend themselves to defining democracy as a political arrangement that ties the exercise of coercive collective power to the interests and judgments of those who are affected by collective decisions.<sup>22</sup> As de Tocqueville argued democracy is not only a form of government but also a form of society—a society of equals. While there is ongoing contention over the specific features of a democracy, there is common ground that it involves a process in which all relevant interests ought to be taken into account in a ‘conversation between equals’<sup>23</sup> based on the right of all citizens to participate equally in the decision-making process.

Faced with the totalitarianisms of the 20<sup>th</sup> century, Kelsen saw democracy as the promise of allowing individuals who are different in social conditions and value orientations to give themselves laws that treat them as equal in legal and moral dignity.<sup>24</sup> For him, democracy was an open process making and re-making decisions in a climate of freedom and contestation. Dworkin spoke of democracy as a partnership: citizens who radically disagree about politics may still come “to see their continuing disagreements as controversies about the best interpretation of fundamental values they all share rather than simply as confrontations between two different world views neither of which is comprehensible to the other”.<sup>25</sup> From the vantage point of political liberalism, Rawls argued that the “idea of public reason” specifies at the deepest level the basic moral and political values that determine constitutional democracy as opposed to a friend-foe relation. The idea of public reason is meant to bring out the moral requirement that those who are prepared to offer one another fair terms of cooperation, based on shared reasons, must be able to participate in mutual reason-giving “as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.”<sup>26</sup> Hence, while some theorists consider democracy to consist only of formal process rules, deeply intertwined with democratic procedure are substantive values that a democratic system may not depart from, lest its essence is lost: these include respect for a core of fundamental rights derived from the recognition of the dignity with which each human being is inherently endowed. In this way, the various theoretical approaches converge on an idea of democratic procedure linked to substance: a shared sense that democracy is important as a political value. Thus,

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<sup>22</sup> J. Habermas, *Between Facts and Norms* (1996); J. Cohen, *Reflections on Deliberative Democracy*, in idem, *Philosophy, Politics, Democracy* (2009).

<sup>23</sup> R. Gargarella, ‘‘We the People’ Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances’ (2014) 67(1) *Current Legal Problems* 1,13.

<sup>24</sup> H Kelsen, *Foundations of Democracy, Ethics*, Vol. 66, No. 1, Part 2: (Oct., 1955), pp. 1-101.

<sup>25</sup> R. Dworkin, ‘The Partnership Conception of Democracy’ (1998) *California Law Review* vol. 86, No. 3, idem, *Is Democracy Possible Here?* (Princeton UP: 2006).

<sup>26</sup> J. Rawls, *The Idea of Public Reason Revisited*, in idem, *Political Liberalism* (expanded edition, 2005).

all principles identified in this report are viewed as integral parts of a system of interconnected values which should be understood as a coherent whole.

## **Principle 2: Representative democracy**

- 1. Sovereignty is vested with the people, who exercise it, in accordance with the rule of majority, through legislative, executive, and judicial bodies.*
- 2. The primary legislative function is exercised by parliament.*
- 3. Members of parliament represent the electorate as a whole and are not subject to a bound mandate.*
- 4. Members of parliament have a duty to act in the public interest. They must perform their responsibilities in good faith and in accordance with the law.*
- 5. Sufficient guarantees must be provided for the protection of the minority.*

### **Commentary**

In a liberal democratic state, the source of power resides, ultimately, with the people. This marks a distinction, for example, with theocratic states, where power is founded on divine will, or totalitarian ones, where it emanates from the virtually unconstrained will of one or few individuals. Majority rule means that fundamental decisions that affect the state as a political unit must be taken by the majority of citizens. The range of decisions subject to the majority principle must be understood widely, as discussed below.

The first paragraph of Principle 2 expresses the fundamental principle that the source of power resides with the people. Similar statements are included in numerous constitutions.<sup>27</sup> The principle of popular sovereignty has a resonant symbolism and is central to the concept of state as a form of a political and social group consisting of people, territory, and institutions bound together by rules. Democracy is not only embedded in written constitutions as a legal doctrine but is perceived as the very source of the legitimacy of political authority.

All modern democracies are representative democracies. The will of the people finds expression primarily in their power to choose their representatives and thus, if indirectly, determine the organization of the state and its laws, subject to the safeguards of the values listed in Principle 1. This does not exclude forms of direct citizen participation to decision-making through referendums. Direct democracy is not incompatible with a liberal state. The role recognised to forms of direct participation by citizens is a matter for each state.

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<sup>27</sup> See e.g. the French Constitution of 1958, as currently in force, which in Article 2, para 5, states ‘The principle of the Republic shall be: government of the people, by the people and for the people’, and in Article 3, para 1, states, ‘National sovereignty shall vest in the people...’. For similar declarations, see e.g. Constitution of Italy, Article 1 (‘Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution’); Constitution of the Republic of Ireland, Article 1 (‘the state is based on the will of the people’); Constitution of Greece, Article 1(3) (‘All powers emanate from the People, exist for them and the Nation, and are exercised according to the Constitution’). See further e.g. Constitution of Spain, Article 1(2); Constitution of Austria, Article 1, Constitution of Portugal, Article 2.

National choices vary widely and have been shaped by historical experience, political, social, and cultural factors. The use of referendums may be optional or compulsory under national law and may relate to diverse matters of public policy, moral issues, or political governance. Switzerland recognises a great role for direct democracy. In 2003 it was reported that Europe accounted for about two-thirds of all the national referendums held in the world with Switzerland alone accounting for more than a third of them.<sup>28</sup> The guiding principles governing referendums are the same as those which govern elections for the legislature. A referendum may not do away with the safeguards that normally constrain the decision-making process. Referenda must be fair and representative; everyone affected must be able to vote; the questions posed and the implications of each possible outcome must be made clear to the citizen. Also, a referendum cannot be used to abrogate constitutional rights.

The second paragraph of Principle 2 expresses the idea that the core legislative authority lies with parliament. It is not intended to express a preference in favour of a parliamentary rather than a presidential form of democracy. It reflects the fact that, in Europe, the overwhelming majority of democratic regimes, albeit with notable exceptions, are parliamentary systems and that, even in systems that follow the presidential model, the elected representatives of the people forming an institution play a key role in law-making.<sup>29</sup>

Paragraph 2 highlights first, that the people, expressing their wish in free and fair elections, elect representatives chosen by the majority who exercise law making power, decide on public finances, and control the executive. Within those basic parameters, there is ample scope for constitutional rules to determine the respective relationship between, on the one hand, the parliament and, on the other hand, the president or the executive. The key point is that those who exercise political power at the highest level must be directly or indirectly elected by the people. The range of public matters to which democratic decision-making extends must be as wide as possible. It includes decisions pertaining to internal and foreign policy, economic and social issues, and military affairs.

Paragraph 2 also means that, in a parliamentary democracy, there cannot be a wholesale transfer of legislative power to the executive. Any delegation of power to the executive to pass rules of general application or exercise discretion must be accompanied by appropriate safeguards and be subject to accountability mechanisms. This is further dealt with in the principles contained in Part 2 (The Rule of Law) and Part 4 (Checks and Balances - Accountability).

The third paragraph expresses the idea that parliamentarians act as trustees and not as agents of the people. This flows from the representative character of democracy. Whilst making decisions in office, members of parliament are not bound by the political will of

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<sup>28</sup> See O. Boyd, Referenda around the World, History and Status of Direct Democracy, [https://www.democracy.uci.edu/files/docs/conferences/grad/Boyd\\_Referenda%20around%20the%20World.pdf](https://www.democracy.uci.edu/files/docs/conferences/grad/Boyd_Referenda%20around%20the%20World.pdf), at p. 4, where further references are given.

<sup>29</sup> In the EU, all Member States are parliamentary democracies, apart from France and Romania, whose systems are often described as semi-presidential, and Cyprus. Within parliamentary democracies, there are significant variations in the powers of the President.



their constituencies but act in the public interest in accordance with their own conscience.<sup>30</sup> Burke famously told the electors for the Bristol seat which he won in 1774 that a parliamentary representative should not take instructions from his constituents.<sup>31</sup> While “it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents,” what he owed them, as representative, was “his unbiassed opinion, his mature judgment, his enlightened conscience,” because “government and legislation are matters of reason and judgment,” and not just of will, opinion and inclination. The idea that parliamentarians represent their constituency without being subject to a bound mandate is enshrined in a number of Constitutions.<sup>32</sup>

The fourth paragraph expresses the principle of integrity in relation to members of Parliament. They must act in the public interest, perform their responsibilities in good faith, and act in accordance with the law. These principles reflect duties which extend beyond parliamentarians and apply to all public officer holders. They are discussed in Part 4 (Checks and Balances – Accountability) but are included here to highlight the fact that an effective public ethics framework applicable to the people’s representatives is an integral part of representative democracy.

The fifth paragraph recognises that, within a liberal state, the principle of majority has some limits and the oppression of minority is not allowed. Majority rule may not lead to the abrogation of fundamental rights or the other values of Principle 1. Also, parliamentary rules must provide for sufficient representation in parliamentary affairs of all political parties that are represented in parliament, including those not supporting the government. Outside parliament, political minorities should be guaranteed sufficient participation in political discourse.

Furthermore, majoritarianism cannot deny a ‘strict’ element in the constitution, meaning that the amendment of the constitution may be made subject to special procedures. Such procedures may differ from state to state. It is perfectly legitimate, indeed appropriate, for a constitution to require a super-majority for taking certain fundamental decisions pertaining to the polity. The requirement of a super-majority ensures the protection diverse political constituencies, allows for mature reflection, and safeguards the constitutional order from transient majorities. Indeed, as stated in Principle 36, fundamental constitutional principles must be sufficiently entrenched.

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<sup>30</sup> Constitution of Greece, Article 60: ‘Members of Parliament enjoy unrestricted freedom of opinion and right to vote according to their conscience’; Constitution of Italy, Article 67: ‘Each Member of Parliament represents the Nation and carries out his duties without a binding mandate’; Constitution of France, Article 27: ‘Tout mandat impératif est nul’; German Basic Law, Article 38: ‘Members of the German Bundestag [...] shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience’.

<sup>31</sup> Edmund Burke, Speech to the electors of Bristol, Cf. <https://presspubs.uchicago.edu/founders/documents/v1ch13s7.html>.

<sup>32</sup> See e.g. Constitution of Germany, Article 38(1) ‘Members of the German Bundestag ... shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience’. Constitution of Italy, Article 67 (‘*Each Member of Parliament represents the Nation and carries out his duties without a binding mandate*’). See also e.g. Constitution of France, Article 27(1). Constitution of Greece, Article 60(1) and Article 51(2).

### **Principle 3: Elections**

1. *Elections must be free, fair, and regular. Voting must be universal and secret, and the principle of one person - one vote must be observed.*
2. *In principle, every citizen must have the right to vote and stand as a candidate for election. Restrictions imposed on those rights must be laid down by law and observe the principle of proportionality.*
3. *Electoral laws, including the rules which govern the electoral system, the conduct of elections, and the certification of results, must be fair and provide for equitable representation of citizens. The electoral process must be subject to independent oversight.*
4. *Electoral constituencies must be determined on an equitable, fair, and objective basis.*
5. *Appropriate mechanisms must exist to enable interested parties to contest the compatibility of the electoral process and the results of the elections with the applicable rules.*
6. *Amendments to electoral laws must be subject to sufficient constraints to prevent abuse by the incumbent government or the parliamentary majority.*
7. *The incumbent government and all political parties have a special responsibility to facilitate, in a spirit of cooperation, the peaceful transfer of power.*

#### **Commentary**

The right to free and fair elections is a *sine qua non* for the exercise of popular sovereignty and ‘enshrines a characteristic principle of an effective democracy’.<sup>33</sup> Principle 3 refers mainly to elections for the parliament, namely, the body that exercises the primary legislative function within the meaning of Principle 2. It also applies to elections for president, where, under the law of a state, the president is directly elected. It establishes, more broadly, principles which should guide all elections for political office, including regional and local elections, and referendums.

The right to free and fair elections is recognized as a human right by Article 3 of Protocol 1 to the ECHR which states as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

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<sup>33</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, ECtHR, 2 March 1987, § 47, Series A no. 113.

According to the case law of the ECtHR, elections must be free, by secret ballot, and held at reasonable intervals.<sup>34</sup> In interpreting Article 3, the ECtHR has stressed that states have positive duties: “the primary obligation in [this] field ... is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the state of positive measures to ‘hold’ democratic elections”.<sup>35</sup>

Paragraph 1 of Principle 3 is in line with the Code of Good Practice in Electoral Matters, adopted by the Venice Commission in 2002.<sup>36</sup> The Code states that

‘The five principles underlying Europe’s electoral heritage are *universal, equal, free, secret and direct suffrage*. Furthermore, elections must be held at regular intervals’.<sup>37</sup>

Within the bounds of those principles, a wide variety of electoral systems are possible.

Paragraph 1 states that elections must be free, fair and regular. ‘Free’ means that citizens should be free to participate and exercise their right to vote the way they wish. Free elections does not preclude states from making citizen participation in elections compulsory.

‘Fair’ means that the electoral system must guarantee a fair opportunity to all eligible citizens to participate in voting and influence its outcome. It also means that the electoral process must meet certain objective standards, as specified in paragraphs 2 to 6.

‘Regular’ means that elections must be held with sufficient frequency at pre-determined intervals. The frequency at which elections are held, namely the maximum term for which a government may stay in office, must, in principle, be specified in the constitution. Indeed, many constitutions specify the electoral cycle.<sup>38</sup> Postponement of elections could only be contemplated as a last resort in highly exceptional circumstances and only under conditions specified in advance by a law of constitutional status which cannot be amended by ordinary majority. It must be subject to a maximalist consensus ensuring support across the political spectrum. Postponement could only be allowed for the minimum period necessary.

The secrecy of the ballot must be respected by both public authorities and private parties subject to arrangements necessary to ensure that everyone can meaningfully exercise the right to vote. Thus, for example, for an employer or a person to require, for whatever reason, photographic evidence of the way a voter has cast their votes should be illegal. By contrast, exceptions from secrecy may be allowed subject to safeguards, where this is objectively required to enable persons that have specific needs to exercise their right to vote.

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<sup>34</sup> ECHR, *Bompard v. France*, 2006; application no. 44081/02, decision of 4 April 2006 <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-76253%22%7D>

<sup>35</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, Application No 9267/81, judgment of 2 March 1987, para 50.

<sup>36</sup> Opinion no 190/2002, Strasbourg, 30 October 2002, <https://rm.coe.int/090000168092af01>

<sup>37</sup> Op.cit., para I.1.

<sup>38</sup> See e.g. Constitution of Germany, Article 39; Constitution of Greece, Article 53; Constitution of Austria, Article 27(1); Constitution of Belgium, Article 65; Constitution of Denmark, Article 31(1).

The principle of one person – one vote gives expression to the principle of representative democracy. It also complements the principle of fairness and the principle of universality of vote. It means that, as a general rule, everyone should be entitled to vote and that all citizens must be treated equitably.

Paragraphs 2 to 7 entail a series of more specific obligations.

Paragraph 2 establishes two principles. First, it lays down that citizens must have both the right to vote and also the right to stand as candidates in elections. Secondly, it states that those rights must, in principle, be universal. It is recognised, however, that a state may decide to impose more restrictions on the right to stand for office than on the right to vote. Many constitutional systems provide for the possibility of disqualifying persons who have breached the law from standing as candidates. Such restrictions must not be arbitrary and must be objectively justified.<sup>39</sup> Provided that essential safeguards are guaranteed, such disqualification may enhance democracy.<sup>40</sup>

Universality means that the definition of the electorate must be inclusive. All citizens must have the right to vote and stand as candidates. A person may only exceptionally be deprived of the right to vote. Whilst reasonable age restrictions are acceptable, any limitations based on cognizance requirements must be grounded on objective grounds and be subject to independent verification by a court of law. Clearly, the right to vote must exist irrespective of race, gender, ethnic, financial or other status.

There are two groups that require closer attention, namely, prisoners and non-resident citizens.

This report, in line with the case law of the ECtHR, takes the view that persons who have been sentenced to imprisonment should not automatically be deprived of their electoral rights. Any limitations on the right of prisoners to vote must be objective and satisfy the principle of proportionality taking into account the seriousness of the offence.<sup>41</sup>

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<sup>39</sup> See ECtHR, *Yumak and Sadak v Turkey*, Application No. 10226/03, judgment of 8 July 2008, para 109; ECtHR, *Melnychenko v Ukraine*, Application No 17707/02, judgment of 19 October 2004 para 57, 59.

<sup>40</sup> See T. Ginsburg, A.Z. Huq and D. Landau, *The Law of Democratic Disqualification*, (2023) 111 California L. Rev., [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3938600](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938600).

<sup>41</sup> ECtHR, *Hirst v UK*, Application No. 74025/01, judgment of 6 October 2005, para 82; ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, Application No 9267/81, judgment of 2 March 1987, para 52 (the rights to vote and stand for election may be subject to conditions, provided that these conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart ‘the free expression of the opinion of the people in the choice of the legislature’). See, to the same effect, the Code of Good Practice in Electoral Matters of the Venice Commission, op.cit., n. 36, para I.1(d)(iv).

The second group are non-resident citizens. The ECtHR has held that, in principle, the imposition of a restriction on the right of non-residents to vote is compatible with Article 3 of Protocol No. 1.<sup>42</sup> The justification has been based on the following factors:<sup>43</sup>

- the presumption that non-resident citizens are less directly or less continually concerned with their country's day-to-day problems and have less knowledge of them;
- the fact that non-resident citizens had less influence on the selection of candidates or on the formulation of their electoral programmes;
- the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and
- the legitimate concern to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country.

Notably, in *Schindler v United Kingdom*,<sup>44</sup> the ECtHR noted that, while a significant majority of member states of the Council of Europe were in favour of an unrestricted right of access of non-residents to voting rights, 'the legislative trends are not sufficient to establish the existence of any common European approach concerning voting rights of non-residents.'<sup>45</sup> On that basis, it concluded that, although the evolution of attitudes should be monitored, the margin of appreciation enjoyed by the state in this area still remained a wide one.<sup>46</sup>

This Report takes the view that, as a general principle, eligibility to vote should extend, at the very least, to all citizens who have a genuine link with the state. Non-residence is not sufficient to justify exclusion from the electoral roll. Also, although prolonged absence from the national territory may be a relevant factor, a repatriated citizen must have the opportunity to vote. Furthermore, in relation to referendums, where the issue to be decided affects specifically the interests of a group of citizens, it would be more difficult to justify their exclusion from voting.

In any event, it is necessary to ensure that all groups of citizens are treated equitably and fairly and the rules which define eligibility to vote are not manipulated in such a way as to give an advantage to the incumbent government or a specific political party. It would thus be in breach of Principles 3(2) and 3(3), if, for example, the rules which govern the location of polling stations or the verification of the identity of voters made it excessively difficult for a particular group to exercise their voting rights. It would also be a violation of Principles 3(2) and 3(3) if, in practice, the arrangements applicable placed certain groups of citizens as a disadvantage vis-à-vis others in respect of the exercise of their electoral

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<sup>42</sup> See ECtHR, *Hilbe v Liechtenstein*, Application No 31981/96, judgment of 7 September 1999; ECtHR, *Melnychenko v Ukraine*, Application No 17707/02, judgment of 19 October 2004; and ECtHR, *Doyle v United Kingdom*, Application No. 30158/06, judgement of 6 February 2007.

<sup>43</sup> See ECtHR, *Matthews v. the United Kingdom*, Application no 24833/94, judgement of 18 February 1999, para 64; and *Melnychenko*, op.cit, para 56.

<sup>44</sup> *Schindler v United Kingdom*, application no. 19840/09, judgment of 7 May 2013.

<sup>45</sup> Op.cit., para 115.

<sup>46</sup> Ibid.

rights. Any disparate treatment of citizens must be objectively justified and subject to legal redress.<sup>47</sup>

The third paragraph provides that the electoral process must be fit to achieve fairness and equitable citizen representation. Fairness means that the rules which govern the electoral process are impartial and are applied without any bias.<sup>48</sup> This applies to all aspects, including the electoral system, the way elections are carried out, and the way the results are confirmed. The rules governing the conduct of elections (e.g. opening hours of electoral centres, identification of those eligible to vote, possibility of postal or online ballots) must ensure maximalist participation whilst guaranteeing the authenticity of votes. Elections must be administered in a fair and transparent way. Their conduct must be subject to independent oversight and cannot be entrusted solely to the political parties seeking election or persons acting for them. Access to vote must be easy, and the conditions that determine access to voting and the modalities of voting must be fair. Effective measures must be in place to prevent electoral fraud, but care must be taken to ensure that such measures do not directly or indirectly disadvantage specific groups of the electorate.

The authorities responsible for electoral administration must be independent and have sufficient resources at their disposal.<sup>49</sup> The appointment of administration officials must be inclusive and impartial. The procedure of counting votes and the interpretation of the validity of ballots must be transparent and regulated by law in so far as practicable. In the interest of transparency, preliminary and final results should be immediately and comprehensively published by polling stations.<sup>50</sup>

Paragraph 4 recognises that, within the principle of one person – one vote, a variety of electoral systems is possible ranging from proportional representation at one end of the spectrum to a single constituency majority system, such as that applicable in the United Kingdom, at the other end. Three types of systems are usually identified: majority vote, proportional, and mixed systems. Proportional ones are the dominant form in Europe.<sup>51</sup> The choice depends on historical and political factors and states have ample discretion.<sup>52</sup> Nonetheless, certain limitations exist. Electoral constituencies cannot be drawn in a way that thwarts ‘the free expression of the opinion of the people in the choice of the

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<sup>47</sup> For a discussion in a specific context, see K. Scheppele, <https://archive.nytimes.com/krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-4/>;

<sup>48</sup> See J. Elklit and P. Svensson, What Makes Elections Free and Fair? (1997) 8 *Journal of Democracy*, 32 at 35.

<sup>49</sup> Council of Europe, ‘Using International Election Standards: handbook for civil society organisations’ (2016) <<https://rm.coe.int/16806c791a>> 34.

<sup>50</sup> *Ibid* 88-89.

<sup>51</sup> See ECtHR, *Yumak and Sadak v Turkey*, Application No. 10226/03, judgment of 8 July 2008, para 62.

<sup>52</sup> As the ECtHR has stated, electoral systems ‘must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the “free expression of the opinion of the people in the choice of the legislature”. See: *Mathieu-Mohin and Clerfayt v. Belgium*, Application No 9267/81, judgment of 2 March 1987, para 54.

legislature'.<sup>53</sup> Whilst there is no legal obligation to ensure that all votes have equal weight,<sup>54</sup> the electoral system must not result in systematically placing certain territorial units at a gross disadvantage. As Schmitter puts it 'citizen preferences should not be aggregated in electoral constituencies that are systematically disproportionate in size or designed to favour pre-determined outcomes.'<sup>55</sup> Electoral laws should also facilitate the participation of minorities.<sup>56</sup> It is also recognised that fairness does not exclude special measures to make possible the representation of minorities in duly justified cases.<sup>57</sup>

Paragraph 5 provides that the electoral process must be subject to objective oversight. Such oversight must cover both whether the rules governing the process meet the requirements of Principle 3 and also whether those rules have been complied with in a specific election. Objective oversight could be carried out by the ordinary courts or special courts which meet the requirements of impartiality and independence. Thus, for example, the drawing of constituencies should not be placed beyond judicial control and the authorities competent to certify the results must be accountable.

Paragraph 6 provides that the power of the incumbent government to amend the electoral law must not be unlimited.<sup>58</sup> If the governing majority were able to change the electoral law without any constraint, there is a risk that it could manipulate the electoral rules so as to perpetuate itself in power.

Paragraph 7 states that those that hold political office have a special responsibility to respect the rules of the democratic game and facilitate the peaceful transfer of power. This responsibility extends more broadly to all political parties.

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<sup>53</sup> See ECtHR, *Bompard v. France*; Application no. 44081/02, decision of 4 April 2006; *Ždanoka v. Latvia*, application no. [58278/00](#), paras 103-104, ECHR 2006-IV.

<sup>54</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, Application No 9267/81, judgment of 2 March 1987, para 54; *Py v France*, No 66289/01, para 46.

<sup>55</sup> P.C. Schmitter, Political Accountability in 'Real-Existing' Democracies: Meaning and Mechanisms, EUI, 2007, <https://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/PCSPoliticalAccountabilityJan07.pdf>.

<sup>56</sup> See, in particular, the Venice Commission Report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries, 15 March 2005.

<sup>57</sup> For example, a combination of proportional representation and preferential voting for minorities is possible, as the Danish experience shows (see L Togeby, 'The Political Representation of Ethnic Minorities: Denmark as a Deviant Case' (2008) *Party Politics* 325-343). Reserved seats may be provided for by law, according to the Constitution of Croatia, Article 15: 'Besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law.' The case of affirmative actions to ensure that minorities are not politically under-represented appears to be exceptional. Other democracies protect political participation of minorities indirectly, for example by protecting language rights: the Constitution of Estonia, Article 52, allows the use of minority languages for local authorities 'in localities where the language of the majority of the residents is not Estonian'.

<sup>58</sup> For instance, Article 54(1) of the Greek Constitution provides that 'The electoral system and constituencies are specified by statute which shall be applicable as of the elections after the immediately following ones, unless an explicit provision, adopted by a majority of two thirds of the total number of Members of Parliament, provides for its immediate application as of the immediately following elections.'

## **Principle 4: Political parties**

- 1. Political parties play a pivotal role in ensuring a functional democracy. They must be able to carry on their activities freely.*
- 2. Citizens may freely form and belong to a political party.*
- 3. Access of political parties to public funds, the media, and public space must be determined on the basis of equitable principles.*
- 4. Political parties must respect and promote the values listed in Principle 1 and the fundamental constitutional principles set out in this Charter. Their internal organization must reflect those principles.*
- 5. The finances of political parties must be transparent.*
- 6. Political advertising must be fair and transparent.*

### **Commentary**

The first paragraph recognizes the key function that political parties play in a representative democracy. They promote and structure voter interests, enable citizen participation in governance, offer policy choice, control or influence government, and also hold government to account. The role of political parties as essential institutions of democracy is recognised in many constitutions.<sup>59</sup>

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<sup>59</sup> See e.g. the Constitution of France, Article 4 of which states as follows:

‘Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They shall respect the principles of national sovereignty and democracy.

They shall contribute to the implementation of the principle set out in the second paragraph of article 1 as provided for by statute.

Statutes shall guarantee the expression of diverse opinions and the equitable participation of political parties and groups in the democratic life of the Nation.’

Article 1, paragraph 2, of the Constitution, to which Article 4 refers, states that ‘Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility.’ See also the Constitution of the Czech Republic, Article 5: ‘The political system is founded on the free and voluntary formation of and free competition among those political parties which respect the fundamental democratic principles and which renounce force as a means of promoting their interests’; the Constitution of Luxembourg, Article 32bis: ‘Political parties contribute to the formation of the popular will and the expression of universal suffrage. They express democratic pluralism’; the Constitution of Croatia lists in Article 3 ‘a democratic multiparty system’ among ‘the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution’. See, in the same vein, Article 10 TEU and Article 12(2) of the EU Charter on Fundamental Rights.



The second paragraph is based on the premise that the right of citizens to form and belong to political parties is of defining importance in establishing a democratic space. A functioning democracy presupposes that no political party is given by law the power to monopolize government. This, in turn, entails the freedom to form political parties and the freedom of those parties to carry out their activities. Historical experience suggests that the banning of parties is a powerful tool to control the political process. It may thus only be permitted in exceptional circumstances in relation to parties that deny the principles of liberal democracy, and subject to due process. A key point is that the decision to ban a political party must be subject to effective judicial oversight. Thus, for example, the German Federal Constitutional Court rejected<sup>60</sup> an application to declare the National Democratic Party (NPD) unconstitutional under Article 21(2) of the Constitution.<sup>61</sup> Although the NPD advocated the abolition of the existing free democratic legal order and its replacement by an authoritarian state, the Court held that its unconstitutionality was not warranted since, as things stood at the time of the decision, there were not sufficient indications that its endeavours would be successful.<sup>62</sup>

In principle, every citizen should be permitted to join or form a party. States enjoy a margin of appreciation but restrictions on party membership imposed on specific groups of citizens must meet the test of proportionality.<sup>63</sup>

The third paragraph recognises that, for a multi-party democracy to work, parties should be treated on an equitable basis in relation to their access to public funds, the media, and public space. Here, also, there is a margin of discretion but any difference in treatment must be objectively justified and proportionate. Parity of treatment must be guaranteed not only during the pre-election period but throughout the electoral cycle. Political parties which are not in government must not be unfairly disadvantaged vis-à-vis those which form the government.

The fourth paragraph pertains to the internal organization of political parties. It is based on the premise, recognised by many constitutions,<sup>64</sup> that political parties should mirror the values and the principles of the polity on whose governance they wish to have decisive influence. It would, for example, be against the values of liberal democracy if candidates for office sought to engage in autocratic consolidation of political power.

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<sup>60</sup> See Judgment of 17 January 2017, 2 BvB 1/13. For an English press release, see <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html>

<sup>61</sup> Article 21(2) states: 'Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.'

<sup>62</sup> Note, in this context, Principle 33(3) below.

<sup>63</sup> See e.g. *Vogt v Germany*, (Application no. 17851/91), judgment of 26 September 1995, where the ECtHR held that the dismissal of a public servant on account of her political activities as a member of the communist party had infringed her right to freedom of expression secured under Article 10 ECHR and also her freedom of assembly and association under Article 11 ECHR.

<sup>64</sup> See e.g. Article 21(1) of the Constitution of Germany which states, inter alia, that the internal organisation of political parties must conform to democratic principles; see Article 4 of the Constitution of France, above, and Article 51(5) of the Constitution of Portugal: 'Political parties must be governed by the principles of transparency, democratic organisation and management and the participation of all of its members'.

The fifth paragraph establishes the principle of transparency of party finances. Political parties must themselves know and disclose to the public the sources of their finances, including donations, members' contributions and indirect funding.<sup>65</sup> They must also explain the use of their funds.<sup>66</sup> Transparency fulfils multiple roles. It prevents the violation of party funding rules, e.g. the possibility of public funds being diverted to a political party beyond the limits provided by law. It exposes possible attempts of foreign interests to interfere with policy making. It also enables citizens to make more informed decisions. By placing in the public domain the source of party funds, it enables citizens to form a view about the possible influence of specific interest groups on the formation of party policy.

Transparency and fairness of political advertising, required by the sixth paragraph, are instrumental to combating disinformation and supporting a fair political debate.<sup>67</sup> They require, among others, the adoption of measures which seek to ensure that:

- political advertisements are readily recognisable as such;
- they are accurate and not misleading;
- the targeting of citizens for the purposes of political advertising is fair; and
- the establishment of independent authorities to oversee whether the rules are complied with.

Ensuring fairness is particularly important in relation to micro-targeting. This refers to political advertising that targets specific groups or individual voters calibrating the political message to the target group based on voter profiling that results from the mining of personal information. Micro-targeting entails risks. The selective presentation of policies which does not capture the overall policy stance of a political party increases informational asymmetry; it may make it more difficult to compare party policies; and may seek to exploit citizens' emotional biases.<sup>68</sup>

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<sup>65</sup> Indirect funding refers to benefits which do not entail the direct transfer of funds such as the avoidance of expenditure that would otherwise have to be incurred.

<sup>66</sup> See e.g. Article 21(1) of the Constitution of Germany.

<sup>67</sup> See, among others, the study of R. Austin, and M. Tjernström, *MFunding of political parties and election campaigns* (International IDEA handbook series). Stockholm: International IDEA (2003).

<sup>68</sup> See, for a discussion, M. Brkan *The Regulation of Data-Driven Political Campaigns in the EU: From data protection to specialised regulation; No more tilting at windmills?* (2022) YEL; LM Neudertž and N Marchal, 'Polarization and The Use of Technology in Political Campaigns and Communication' (2019) Study of the Panel for the Future of Science and Technology, European Parliamentary Research Service; and see Commission Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, Brussels, 25.11.2021 COM(2021) 731.

## **Principle 5: Freedom of the media**

*The freedom, independence and pluralism of media must be guaranteed.*

### **Commentary**

The freedom, independence and pluralism of media are essential for the functioning of democracy and essential for the exercise of fundamental rights.<sup>69</sup> As an important facilitator of democracy, media freedom is also ‘a principal pillar of a free government’<sup>70</sup>. It enables the dissemination of information and ideas, and the juxtaposition of different views; it is one of the best ways of finding out and forming a view on the opinions of political leaders; it facilitates accountability, and the generation of public discourse. It is thus pivotal to resolving political conflict through dialogue and enabling decision-making through a process of rationalisation. For this reason, it is particularly important that information and diverse opinions can be aired in pre-election periods.<sup>71</sup>

Media freedom means that it must be possible for media undertakings to be set up and that, in principle, they must be able to carry out their activities freely.

Media independence, which is a corollary to media freedom, refers, more specifically, to the absence of censorship and government control over the dissemination of ideas. It is an integral aspect of the freedom of expression and guaranteed as such by a host of international instruments and national constitutions.<sup>72</sup> It is not an absolute right and may be restricted to protect the public interest subject to the principle of proportionality.

Media pluralism has been defined as a media structure which meets the following attributes. It is:<sup>73</sup>

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<sup>69</sup> See Committee of Ministers of the Council of Europe Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, 31 January 2007: ‘media pluralism and diversity of media content are essential for the functioning of a democratic society and are the corollaries of the fundamental right to freedom of expression and information’; and see, to the same effect, Committee of Ministers Recommendation No. R (99) 1 on measures to promote media pluralism, adopted on 19 January 1999.

<sup>70</sup> Benjamin Franklin, On Freedom of Speech and the Press, Pennsylvania Gazette, November 17, 1737.

<sup>71</sup> This has been acknowledged by the ECtHR. See e.g. *Bowman v. the United Kingdom*, judgment of 19 February 1998, application no. 24839/94, para 42; *Teslenko and Others v. Russia*, application no 49588/12, judgment of 5 April 2022, para 119.

<sup>72</sup> See e.g. Article 19 of the UDHR 1948: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers; Article 19 (2) ICCPR 1966: ‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’. It is also guaranteed by Article 10(1) ECHR, Article 11(2) of the EU Charter of Fundamental Rights, and the constitutions of European States.

<sup>73</sup> See Commissioner for Human Rights, Council of Europe, Media Pluralism and Human Rights, Issue Discussion Paper, Strasbourg, 6 December 2011, CommDH (2011) 43, at 6.

- ‘-- comprised of competing media outlets which are independent from each other, a central owner, or other influence;
- diversified on separate but overlapping planes of ownership, political views, cultural outlooks and regional interests;
- able to communicate to all corners of society;
- capable of conveying a great variety of information and opinion;
- designed to draw information from a wealth of different sources.’

The Council of Europe’s Commission for Democracy through Law (Venice Commission) has pointed out that pluralism must be understood both within the same medium (intra-media) and across different kinds of media (inter-media).<sup>74</sup> It entails not only the existence of a plurality of actors and outlets within the same medium but also the existence of different kinds of media: ‘internal pluralism must be achieved in each media sector at the same time: it would not be acceptable, for example, if pluralism were guaranteed in the print-media sector, but not in the television one.’<sup>75</sup>

The dominance of media by a small number of interests is liable to lead to the dissemination of partial information and suppress the citizens’ independence of thought. The legal framework must therefore guarantee that media ownership is diverse, avoid monopolisation of media outlets, and grant citizens free choice among different outlets. As the European Court of Human Rights has held:<sup>76</sup>

‘A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression.’

This applies to the domination of the media both by state and private broadcasters. In this vein, the ECtHR has held that the prohibition of privately owned broadcasting licences would be in breach of the freedom of expression, unless it was demonstrably justified by a pressing need.<sup>77</sup>

The ECtHR has also stressed that owing to the sensitive character of the audio-visual sector, the state’s obligations are not exhausted in its negative duty not to interfere but there is also a positive duty to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.<sup>78</sup> Given the growth and wide appeal of internet-based news sources, equivalent positive duties should also apply to them.

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<sup>74</sup> Venice Commission’s opinion no 309/2004 on the compatibility of the “Gasparri” and “Frattini” laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, adopted at its 63rd Plenary Session (10-11 June 2005).

<sup>75</sup> Op.cit., p. 48, para 262.

<sup>76</sup> *Centro Europa 7 Srl and Di Stefano v Italy*, application No 38433/09, judgment of 7 June 2012, para 133.

<sup>77</sup> See *Informationsverein Lentia v. Austria*, Commission Report of 9 September 1992, Appl. Nos. 13914/88, 15041/89, para 39.

<sup>78</sup> *Centro Europa 7 Srl*, op.cit., paras 130, 134.

## **Principle 6: Protection against disinformation**

1. *Public authorities must provide an effective legal framework against disinformation.*
2. *Public and private entities that provide access to public space, such as media undertakings, social networks, and online platforms, have a special responsibility to counter disinformation, whilst respecting fundamental rights, including freedom of expression.*

### **Commentary**

Disinformation is defined, in general, as the deliberate sharing of false or misleading information that may cause public harm, for political, financial or other gain.<sup>79</sup> The rise of digital technologies has enabled the wide and more effective dissemination of false information making the public more vulnerable to manipulation. Disinformation can take place, for example, through the use of fake accounts or bots to distribute content, through the exploitation of digital platforms algorithms, or in cruder forms, through the direct outright dissemination of false data. The exposure of citizens to disinformation distorts public discourse. It is a threat to the political process and may harm public goods such as health, security or the environment.<sup>80</sup>

A defining element of disinformation, which distinguishes it from political satire, is its deceptive intent: information is knowingly shared to cause harm. It could include true information which is taken out of context, fails to include material facts, or is ‘labelled to arouse emotion’.<sup>81</sup> For example, the prioritization of divisive news or emotion-arousing information may exploit decision-making biases and manipulate public debate. The use of personal data to ‘micro-target’ voters without their knowledge may also have a pernicious effect on democracy and citizen rights.<sup>82</sup>

An effective legal framework should counter the design, presentation, and promotion of disinformation. While there may be no explicit textual constitutional commitment to counter disinformation in European states, a democracy has an obligation to safeguard the integrity of the political process. Democracy is predicated on the active participation of an informed electorate that can express its will through free and fair elections on the basis of

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<sup>79</sup> The European Commission Communication, Tackling online disinformation: a European approach, COM(2018) 236 final, Brussels, 26.4.2018, defines disinformation as ‘verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm. Public harm comprises threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens’ health, the environment or security. Disinformation does not include reporting errors, satire and parody or clearly identified partisan news and commentary’ (pp. 3-4). A substantially similar but somewhat richer definition is provided in the EU’s Strengthened Code of Practice on Disinformation 2022 <<https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>> .

<sup>80</sup> See Commission Communication, Tackling online disinformation: a European approach, op.cit., para 2.1.

<sup>81</sup> K. Jones, Online Disinformation and Political Discourse: Applying a Human Rights Framework, Chatham House Research Paper, November 2019, para 2.2.

<sup>82</sup> Op.cit., p. 2.

accurate and trustworthy information.<sup>83</sup> Given that technology facilitates the dissemination of disinformation ‘on a scale and with speed and precision of targeting’<sup>84</sup> which hitherto had not been possible, state actors have a duty to provide certain safeguards. The problem is not only European but global with evidence that political disinformation campaigns have increased in recent years.<sup>85</sup>

Policy actions against disinformation may take the form of legislation or of non-binding regulatory instruments. The former may include measures regulating political advertising, content moderation and/or removal for social media. The latter category may consist of instruments such as codes of conduct, sharing of best practice, services engaging in countering disinformation narratives through analysis and exposition of disinformation, or raising awareness and fostering resilience to disinformation and its dangers.

Undoubtedly, a balance needs to be drawn between the need to combat disinformation, on the one hand, and competing rights, especially the freedom of expression, the freedom to conduct business, and due process on the other hand. Thus, for example, content removal from a digital platform should be subject to procedures to safeguard the proportionality of such action. Different polities may weigh those competing interests differently and there is a range of acceptable equilibria. But there is widespread acknowledgment, through regulatory initiatives both at EU and national level, that there is a need to provide mechanisms to combat disinformation.<sup>86</sup>

The second paragraph of the principle acknowledges that both public and private media undertakings, social networks, and online platforms have a special responsibility to counter disinformation. This derives from the fact that they play a pivotal role in disseminating information, providing access to public space, and empowering citizens to share opinions widely. They may thus influence decisively public discourse and political processes. Large online platforms, in particular, have a profound effect on society and the economy globally. It is thus appropriate to expect such intermediaries to exercise oversight. This can be done through maintaining policies which promote the dissemination of trustworthy content, discourage misrepresentation, ensure transparency of political advertising, and control the misuse of automated systems. In the EU, for instance, the recently adopted Digital Services Acts requires providers of very large online platforms to diligently identify ‘systemic risks’ stemming from their service, including use of algorithmic systems, for civic discourse and electoral processes or for the exercise of fundamental rights.<sup>87</sup>

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<sup>83</sup> See European Court of Auditors, EU action plan against disinformation, Audit review, March 2020, p. 2; A. Kouroutakis, EU Action Plan Against Disinformation: Public Authorities, Platforms and the People, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3472887](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472887).

<sup>84</sup> European Commission Communication, Tackling online disinformation: a European approach, COM(2018) 236 final, Brussels, 26.4.2018, at 1.

<sup>85</sup> According to S Bradshaw and P.N. Howard, The Global Disinformation Order, 2019 Global Inventory of Organised Social Media Manipulation, 2019, the number of countries where there is evidence of organized social media manipulation campaigns increased from 28 in 2017 to 70 in 2019. The authors also point out that social media has been ‘co-opted by many authoritarian regimes’.

<sup>86</sup> See in the UK, the Online Safety Bill (Bill 121, 2022-23) which at the time of writing is before the House of Commons.

<sup>87</sup> Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC; *OJ L 277*, 27.10.2022, p. 1–102; Article 34.

## PART TWO – THE RULE OF LAW

### Principle 7: Rule of law

*The rule of law governs the exercise of public power, which must always be exercised in accordance with the law, and also guides private behaviour.*

#### Commentary

The rule of law forms the cornerstone of liberal democracies. It is both an overarching constitutional value that permeates the system of governance and a set of enforceable rights. At its barest minimum, it means that the exercise of power is subject to the law and that the government cannot act arbitrarily. The concept is here understood to encompass both procedural and substantive constraints upon the exercise of political authority. In other words, it is not exhausted in process requirements but must afford minimum protection to certain substantive values.<sup>88</sup>

A substantive version of the rule of law which encompasses democracy and the protection of human dignity is supported by international organisations,<sup>89</sup> including the United Nations.<sup>90</sup> In September 2015 the UN agreed a set of Sustainable Development Goals (SDGs) for 2015-30, which came into force on 1 January 2016. Goal 16.3 enshrines a commitment by all UN members to ‘promote the rule of law at the national and international levels, and to ensure equal access to justice for all’.

In a liberal democracy, the rule of law is closely intertwined with the separation of powers, the protection of fundamental rights, judicial independence, and the accountability of

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<sup>88</sup> See P.Craig, ‘The Rule of Law’ Select Committee on the Constitution, 6<sup>th</sup> Report, 2007, Appendix 5 <https://publications.parliament.uk/pa/Id200607/Idselect/Idconst/151/15102.htm>; and J. Jowell, ‘The Rule of Law’ in J. Jowell and C. O’Cinneide, *The Changing Constitution* (OUP, 9<sup>th</sup> ed. 2019). But compare J. Raz, ‘The Rule of Law and its Virtue’, in J. Raz, *The Authority of Law: Essays on Morality and Law* (OUP, 1979), p.211 et seq.

<sup>89</sup> A prime example of an international effort to further the understanding of, and commitment to, the rule of law is the World Justice Project, which ranks States’ compliance with the rule of law according to a comprehensive list of index factors and sub-factors. The main factors are: constraints on government powers; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; and criminal justice. See the [WJP Rule of Law Index](#).

<sup>90</sup> See the Report of the Security Council in August 2004, where the UN Secretary General Kofi Annan stated that the ‘the rule of law is at the heart of the UN’s mission’ and provided the following definition: ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’ For a reiteration of this definition, see <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

government. All these must be understood as inter-related, overlapping and mutually reinforcing components of a system of democratic governance.

Many national constitutions refer to the rule of law, although they do not specifically define the term.<sup>91</sup> In the UK's non-codified constitution it is accepted that the rule of law is one of its two fundamental constitutional principles, along with the 'sovereignty of parliament'.<sup>92</sup> Although the rule of law may not necessarily override parliamentary sovereignty, statutes are interpreted in conformity with the rule of law unless clearly and expressly intended to override it.<sup>93</sup>

The rule of law is mentioned in the Preamble to the Statute of the Council of Europe as one of the three "principles which form the basis of all genuine democracy", together with individual freedom and political liberty. Article 3 of the Statute makes respect for the principle of the rule of law a precondition for accession of new member states to the Organisation. Similarly, the Council of Europe's core objective is to achieve the rule of law, in addition to a pluralist democracy and human rights. The close relationship between the rule of law and democratic society has also been underlined by the ECtHR.<sup>94</sup>

In its Report on the rule of law of 2011<sup>95</sup>, the Venice Commission examined the concept of the Rule of Law, following Resolution 1594(2007) of the Parliamentary Assembly. It drew attention to the need to ensure a correct interpretation of the terms "rule of law", "Rechtsstaat" and "Etat de droit or "prééminence du droit", encompassing the principles of legality and of due process. The Venice Commission examined the definitions proposed by various authors from different systems of law and diverse legal cultures all of which coalesced around the definition provided by Lord Bingham, as follows:<sup>96</sup>

'All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'.

Lord Bingham went further in suggesting that the rule of law is best understood by reference to various 'ingredients' or features, which form integral parts of it. These are the following:<sup>97</sup>

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<sup>91</sup> See e.g. Constitution of Greece, Article 1(3); Constitution of Spain, Articles 196, 117 and 124; Constitution of Switzerland, Article 5.1. For further references to national constitutions, see the European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law adopted at the 86th plenary session, Venice, 25-26 March 2011 (CDL-AD(2011)003 rev.), paras 30 et seq.

<sup>92</sup> A term coined by the authoritative Professor A.V. Dicey in his book, *The Law and the Constitution* (1885).

<sup>93</sup> See Jowell, note 80 above, p. 18. Note that the Constitutional Reform Act 2005 (as amended), refers expressly to the rule of law, placing a duty on the office of Lord Chancellor (Minister of Justice) to safeguard judicial independence and protect "the existing constitutional principle of the rule of law".

<sup>94</sup> See e.g. *Klass v. Germany*, 8 September 1978, § 55; *Winterwerp v. Netherlands*, 24 October 1979, § 39; *Vereniging Weekblad Bluf! v. Netherlands*, 9 February 1995 § 35; *Malone v. United Kingdom*, 2 August 1984 § 79.

<sup>95</sup> CDL-AD(2011)003 rev, op.cit., n. 91. See also the Venice Commission's Rule of Law Checklist (2016).

<sup>96</sup> CDL-AD(2011)003 rev, op.cit. n. 91, para 36; and see Lord Bingham, *The Rule of Law*, (2007) 66 CLJ 67 at 69 and, in more detail, by the same author, *The Rule of Law* (2010).

<sup>97</sup> See Lord Bingham, op.cit., n. 96.



- The law must be accessible and, so far as possible, clear and predictable;
- Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- The law must afford adequate protection of fundamental human rights;
- Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- Ministers and public offices at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- Adjudicative procedures provided by the state should be fair;
- The rule of law requires compliance by the state with its obligations in international law, which, whether deriving from treaty or international custom and practice, governs the conduct of nations.

This Charter fully endorses those elements the substance of which is encapsulated in the principles set out below (Principles 8-13). They include the principle of legality (Principle 8), the principle of legal certainty (Principle 9), the right to an effective remedy and to a fair trial (Principle 10), the principle of proportionality (Principle 11), respect for international law (Principle 12) and review of constitutionality (Principle 13). The principles of accountability, the independence of the judiciary, dignity and equality, and the protection of fundamental rights, which are also integral parts of the rule of law, are dealt with in Parts 3 to 6 of this Report.

The rule of law is one of the overarching values of the European Union listed in Article 2 TEU. It is legally material in a number of respects.<sup>98</sup> As one of the values, it has a strong signalling and interpretational force, ‘forming part of the very identity of the Union’.<sup>99</sup> Adherence to the rule of law is a sine qua non condition for a state to join the Union and failure by a Member State to comply with it may give rise to a special enforcement procedure.<sup>100</sup> Also, in combination with Article 19(1) TEU, it has been used to impose obligations on Member States regarding their system of governance, especially judicial independence.<sup>101</sup> Here, commitment to Article 2 creates governance expectations that permeate the national legal system and apply beyond the material scope of the EU Charter.

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<sup>98</sup> T. Tridimas, *Wreaking the wrongs: Balancing rights and the public interest the EU way*, (2023) 29 *Columbia J.E.L.* 185.

<sup>99</sup> C-156/21, para. 232, and C-157/21, para. 264.

<sup>100</sup> See, respectively, Articles 49 and 7 TEU.

<sup>101</sup> See e.g. Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice) LM*, EU:C:2018:586; Joined cases C-585/18, C-624/18 and C-625/18 *A.K. v. Krajowa Rada Sądownictwa and CP, DO v. Sąd Najwyższy (A.K. and Others)*, EU:C:2019:982; Case C-896/19 *Repubblica v Il-Prim Ministru*, EU:C:2021:311; *Eurobox*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034; *Hungary v Parliament & Council (conditionality case)*, C-156/21; ECLI:EU:C:2022:97.

It is also notable that Regulation 2020/2092<sup>102</sup> provides a comprehensive definition of the rule of law, under which it includes:

‘the principles of legality, implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.’

It may be said that the EU understands the rule of law to mean that the law is:

- superior to everyone, whether a citizen, a state authority or an EU institution;
- a promoter of democratic government and judicial independence;
- a safeguard against arbitrary government providing that there must be equal justice before the law for all citizens;
- committed to fundamental rights protection and legal enforcement inclusive of substantive human rights and due process.

All in all, two points may be highlighted. The rule of law is not just a political concept but also a set of legally enforceable benchmarks; and there is increasing consensus that, to be meaningful, it should be understood to encompass, apart from procedural standards, adherence to a minimum set of fundamental rights.

Principle 7 states that private behaviour must also be guided by the rule of law. This means that non-state entities must also act within the limits of the law; and that the legal system must ensure that, where appropriate, private behaviour complies with the fundamental values of the constitution e.g. refrain from discriminating against individuals on grounds of race or ethnic origin. This aspect of Principle 7 is further elaborated in Principles 23 and 28.

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<sup>102</sup> Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433/I/1.

## **Principle 8: The principle of legality**

- 1. Everyone is under the law. All branches of government and public authorities must act within the limits of the powers conferred upon them by law.*
- 2. The adoption of rules must be subject to a transparent, accountable and democratic process.*
- 3. The discretion of public authorities must be sufficiently circumscribed by law.*
- 4. Public authorities must exercise their powers for the purposes for which they are conferred observing both the letter and the purpose of the law. They must provide reasons for their decisions.*

### **Commentary**

The first element of the rule of law is legality. The law must be obeyed by all state authorities and all decisions by those exercising public functions must have a legal basis. Thus understood, the rule of law is the antithesis of arbitrariness, on the one hand, and anarchy, on the other. It requires that public powers must be conferred by law and public officials must not exceed the limits to their authority. This obligation binds all entities that exercise public power including the Government, administrative departments of the state, state organisations, and independent agencies. It also binds the courts. Furthermore, it binds all private parties since they are not beyond the law but applies, in particular, to private entities that have been entrusted with regulatory functions or tasks traditionally performed by the state.

A second element, closely related to the first, is that the law conferring authority must limit discretion. It is well understood that decision-making in complex societies necessitates the exercise of discretion. Nonetheless, as Lord Bingham has noted: ‘The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness’.<sup>103</sup>

The principle that everyone is under the law imposes both negative and positive obligations on state authorities. They must abstain from violating the applicable laws; but they must also take all steps necessary to enforce the law effectively. Failure to act legally can involve both action and inaction, such as the absence of enforcement or implementation of laws. Corruption is the antithesis of legality. States should therefore have in place measures to promote integrity and to hold corrupt officials to account.<sup>104</sup>

Principle 8(4) requires public authorities to provide reasons for their decisions. Principle 21(3) also provides for the duty to give reasons as part of the principle of good governance.

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<sup>103</sup> Lord Bingham, *The Rule of Law*, (2007) 66 CLJ 67 at 72.

<sup>104</sup> See Principle 22.

It is recognised that not all legal systems impose a general duty on public authorities to provide reasons.<sup>105</sup> Nonetheless, this Report takes the view that the duty to give reasons should be recognised as a general principle in relation to individual decisions that have adverse effects on the legal position of a private person. This is in line with the EU Charter on Fundamental Rights which provides for the duty to give reasons as a component of the right to good administration.<sup>106</sup> The exercise of state authority that affects the rights of the individual must be subject to reasoned justification. As stated by Advocate General Hogan, the right to reasons is the ‘surest protection against arbitrary decision-making and is a fundamental ingredient of a society founded on the rule of law’.<sup>107</sup> It enables the persons affected to decide whether to seek judicial redress against the decision affecting them, enables the courts to exercise their power of judicial review, and more generally, informs the parties concerned and others of the rationale of decision-makers and helps them to adjust their behaviour accordingly for the future.

The requirement of reasoning applies, *a fortiori*, to judicial decisions. It is recognised that traditions of judicial practice may differ and that in certain countries, e.g. France, courts follow a less expansive reasoning than that followed by common law courts. It is not intended here to impose a uniform level of detail in judicial reasoning but reiterate the fundamental principle that court judgments must be accompanied by robust reasoning which establishes in a clear way their legal foundations and explains the grounds on which the ruling is reached.

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<sup>105</sup> This is the case under English law.

<sup>106</sup> See EU Charter of Fundamental Rights, Article 41(2)(c) and below Principle 21 on Good Governance.

<sup>107</sup> *Bank Kargagan v Council*, Case C-134/19 P, ECLI:EU:C:2020:396, at para 80.

## **Principle 9: Legal certainty**

1. *The law must be clear and predictable so that those to whom it applies are in a position to ascertain their rights and obligations.*
2. *As a general rule, law is only binding for the future. The retroactive application of laws, other than criminal laws, is permissible in duly justified cases, provided that the legitimate expectations of those affected are respected.*
3. *Changes to the law which affect the rights of the individual should be subject to fair warning.*
4. *Laws, rules of general application, administrative acts, and any other measures which may impact legal relations, including judicial decisions, must be made available to the public without cost and in an easily accessible form.*
5. *Laws must be drafted, so far as possible, in a way which is clear, simple and precise, and makes it reasonably possible to foresee the way that they will be applied.*

### **Commentary**

Legal certainty underpins good governance. The rules which govern the behaviour of public and private entities must be stated in advance so as to ensure predictability. Clarity of rules leads to their better understanding, enhances their implementation, enables better enforcement and, ultimately, aids their effectiveness. Thus, the law must be, as far as possible, intelligible, clear, and predictable<sup>108</sup> so that legal relationships remain foreseeable.<sup>109</sup> In particular, obligations imposed on individuals must be clear and understandable.<sup>110</sup> The value of certainty and predictability of law is recognised by both national and supra-national courts,<sup>111</sup> and applies *a fortiori* to criminal laws.

The second paragraph acknowledges that effective regulation may sometimes require the retroactive application of a law, namely its coming into force from a date prior to the date of its publication. Retroactivity is strictly prohibited in relation to criminal laws where the principle of *nullum crimen, nulla poena sine lege* is sacrosanct.<sup>112</sup> In relation to non-criminal laws, retroactivity must comply with both procedural and substantive safeguards.

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<sup>108</sup> Lord Bingham, *op.cit.* n. 103, 69.

<sup>109</sup> Case 169/80 *Administration des Douanes v Gondrand Frères* [1981] ECR 1931, paras 17–18; Case 423/18 *Südzucker AG v Hauptzollamt Karlsruhe*, ECLI:EU:C:2019:872, para 55.

<sup>110</sup> Case 169/80 *Administration des Douanes v Gondrand Frères* [1981] ECR 1931, paras 17–18

<sup>111</sup> See e.g. *Administration des Douanes v Gondrand Frères*, *op. cit.*; Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, para 124. See also the judgment of the EFTA Court in Case E-15/12 *Jan Anfinn Wahl* [2013] EFTA Ct. Rep. 534, para 52.

<sup>112</sup> This is enshrined e.g. in the International Covenant on Civil and Political Rights (Article 15), the ECHR (Article 7) and the EU Charter (Article 49) and a plethora of national constitutions. See G. MacNeil, *Legality Matters* (Springer, 2021), esp. pp 27-79.

In particular, it must be justified by a pressing public interest; and it must respect the legitimate expectations of the citizens concerned.

The third paragraph supplements the second. It is of course possible for the law makers to change the law in compliance with the applicable procedures. There are many reasons why existing laws may need to be changed and, sometimes, frequent changes may be necessary. Such changes, however, should take place after fair warning and with due regard to the principles set out above. Sudden changes should be avoided and, depending on the circumstances, the introduction of new rules may be compatible with the principle of legal certainty only if it is accompanied by transitional measures.

The fourth paragraph points to the need for citizens to have access to the sources of law and their interpretation. Court decisions, preferably with full text of judgments, should be available free of charge, e.g. on the internet.

Paragraph 5 pertains to the quality of legal drafting. Clarity is a fundamental value of the legal system. It is also closely related to effective law-making which is an attribute of good governance widely understood (see below Principle 21).

Legal acts must be drafted clearly, simply and precisely.<sup>113</sup> More generally, ensuring that law-making meets a minimum standard of quality requires coordinated arrangements which include the following:

- the existence of a regulatory framework for law drafting;
- articulate policy development prior to drafting;
- high quality drafting standards and their consistent application across law-making sectors bearing in mind that drafting should be appropriate to the type of act concerned.<sup>114</sup>

Law-making, namely the procedures leading to, and the drafting of, legislation and rules, must meet certain minimum standards of quality. The introduction of primary and delegated legislation should, in particular, be accompanied by the following:<sup>115</sup>

(a) An assessment of compatibility with constitutional safeguards and the protection of fundamental rights. Proposed rules should comply with constitutional values. In many jurisdictions, this is undertaken by specialist parliamentary committees who vet the provisions of bills vis-à-vis the specific rights that may be affected and take the form of negative clearance, i.e. a certification that the proposed rules do not breach constitutional standards.

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<sup>113</sup> See Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ 1999 C 73/1, para 1. For practical guidelines, see among others, Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation, <https://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf>

<sup>114</sup> See the strategies mentioned in OECD, Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA PAPERS: No. 18, at 22.

<sup>115</sup> See also Principle 20 on open government and transparency.

(b) An impact assessment identifying the objectives of the proposed law and the problems to be addressed, alternative options for addressing them, the advantages and disadvantages of each, and providing an overall cost-benefit analysis of the chosen option.

(c) A transparent consultation process in which interested parties have an effective opportunity to communicate their views.

(d) an assessment of the financial and budgetary implications of the proposed rules.

Predictability of law presupposes that rules must be transparent and easy to find. This, in turn, entails the need for minimum homogeneity, that is to say, the provisions included in a statute should, as far as possible, be thematically consistent and not pertain to unrelated areas. Although in a complex economy Parliament may have to act under strict deadlines, the inclusion of heterogeneous provisions, especially when they are not included in omnibus legislation but acts pertaining to a specific area, makes the law obtruse and inaccessible reducing its effectiveness.

In contemporary societies, governments are called upon to introduce rules in many diverse areas and often on technical subjects. Parliaments have to cope with heavy legislative agendas and ministries are faced with heavy workloads. Resource limitations, lack of expertise or time pressure may necessitate the delegation of the rule-drafting process to private actors, such as law firms. Whilst such outsourcing of law-making may be necessary, it should be undertaken thoughtfully. It must not lead to circumventing the application of law-making procedures and safeguards nor prejudice effective parliamentary oversight.

**Principle 10:  
Right to an effective remedy and to a fair trial**

- 1. Everyone whose rights guaranteed by the law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Principle.*
- 2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*
- 3. Everyone shall have the possibility of being advised, defended and represented.*
- 4. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

**Commentary**

The right to judicial protection includes a number of specific rights which are guaranteed by national constitutions,<sup>116</sup> the ECHR, the EU Charter, and international conventions. These encompass a set of rights that apply to both civil and criminal proceedings as listed in Principle 10, which has been modelled on Article 47 of the EU Charter. They include, in addition, a set of process rights applicable in the criminal trial. These are the presumption of innocence, the right of defence, the principle of legality and proportionality of criminal offences and penalties, and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

The obligation to respect all the above rights follows from Principle 27 but the right to an effective remedy and to a fair trial are listed here separately owing to their fundamental importance in the system of governance. They are the gateway to all other rights since, without them, any other right becomes elusive.

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<sup>116</sup> See e.g. the Constitution of Estonia, Chapter II, Article 15(1); the Constitution of Germany, Article 19(4) and Article 103; the Constitution of Norway, Article 95; the Constitution of Romania, Article 21; the Constitution of Serbia, Article 32; the Constitution of Switzerland, Article 29 and Article 29(a); the Constitution of Greece, Article 20.



## **Principle 11: Proportionality**

*Public authorities must be guided by the principle of proportionality. Their actions must be both appropriate and necessary to achieve their legitimate objectives.*

### **Commentary**

Proportionality is a general principle of public law and informs the decision-making process *ex ante* at all levels. This means that all authorities, including the legislature, the executive and other public agencies or bodies who are entrusted with decision-making powers, must, in their decision-making, fulfil the two limbs of proportionality: their action must be appropriate to achieve its objectives (principle of suitability) and it must not go beyond what is necessary to achieve them (principle of necessity).<sup>117</sup> Suitability means that, in an objective assessment, the action must be reasonably likely to achieve its avowed goals. Necessity means that it must not interfere with the rights of the individual or the powers of other public authorities beyond what is necessary to achieve those goals. The principle of proportionality applies both to the adoption of rules of general application and the adoption of administrative decisions.

Proportionality is also a fundamental principle of judicial review that has developed into a global standard of justice.<sup>118</sup> Although some countries, such as the UK, have not explicitly adopted proportionality as a ground of judicial review, it is nevertheless applied under the rubric of the need for decisions which are not ‘manifestly unreasonable’ or ‘irrational’.<sup>119</sup> Proportionality is particularly employed to assess the legality of limitations of those rights that may be qualified under the European Convention of Human Rights.

The appropriate application of proportionality does not mean that courts may substitute their own views for those of the legislature or the administration. It does not deprive decision-makers of their discretion. It rather indicates that the rule of law and the separation of powers call for the possibility of contesting acts of state authorities (and those of supranational organisations such as the EU) before a judicial body and demand a public reasons-based justification.<sup>120</sup> Proportionality cannot be applied mechanically. It is not a box-ticking exercise. As a ground of review, it entails varying degrees of judicial scrutiny, the intensity of which will depend on a number of factors, including the ranking of the

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<sup>117</sup> As a ground of review, proportionality is often said to include three tests: (a) the measure must be suitable to achieve its objectives; (b) it must be necessary in the sense that there must be no less restrictive alternatives which can effectively achieve the desired objective; and (c) *stricto sensu* proportionality, meaning that, even in the absence of less restrictive alternatives, a measure must not interfere excessively with a fundamental right.

<sup>118</sup> Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, *Columbia Journal of Transnational Law*, (2008) 47; T. Tridimas, *The General Principles of EU Law* (2006), chapters 3-5.

<sup>119</sup> See de Smith’s *Judicial Review*, ed. Woolf, Jowell, Hare et al (Sweet and Maxwell, 8<sup>th</sup> Ed. 2018), chap. 11, And see Paul Craig, *Administrative Law*, 9<sup>th</sup> ed., 2021.

<sup>120</sup> See M. Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in *Law, Rights, and Discourse* (2007)

rights which are adversely affected, the area of decision-making, the process followed for the adoption of the act in question, whether the decision is in a highly technical field, and whether the decision is in the realm of policy, which is properly within the jurisdiction of the legislature.

## **Principle 12: Respect for international law**

1. *A state must respect its international commitments and the principles of international law.*
2. *In their international relations, states shall be guided by the values of liberal democracy as defined in Principle 1.*

### **Commentary**

The first paragraph encapsulates the principle that the rule of law requires not only observance of the constraints imposed by domestic law but also respect for international law obligations. A number of European constitutions display openness to international law and cooperation.<sup>121</sup> Lord Bingham was clear that the rule of law should not only apply in the domestic sphere, but also entails compliance by a state with its obligations under international law.<sup>122</sup> These include the principles of customary international law, including *jus cogens*, and international commitments entered into by states. Customary international law is recognised as a source of international law by Article 38(1)(b) of the Statute of the International Court of Justice. For a rule to become part of customary international law, two elements are necessary: consistent state practice and *opinio juris*, that is, the understanding held by states that the practice at issue is obligatory due to the existence of a rule requiring it.<sup>123</sup> Liberal democracies should support measures which seek to hold accountable those who have breached internationally accepted standards of human rights and humanitarian law. Respect for international law also requires national courts to give effect to international law, including, where necessary, by recognising the direct effect of treaties.<sup>124</sup>

The second paragraph provides for a best-efforts obligation. It is based on the fact that liberal democracy is by no means the only form of governance and that not all states abide by the fundamental principles listed in this Report. In global affairs, liberal democracies have to interact with states who are indifferent or even opposed to those principles. In conducting their international relations, liberal democracies should, as far as possible, take due account of the values listed in Principle 1.

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<sup>121</sup> See e.g. Articles 23-26 of the Constitution of Germany; Article 28 of the Constitution of Greece; Preamble, Articles 53-55 and 87-88 of the Constitution of France; Article 10 of the Constitution of Italy.

<sup>122</sup> T. Bingham, *The Rule of Law*, (2010), chapter 10.

<sup>123</sup> See: International Court of Justice, *North Sea Continental Shelf, Judgment*, 1969 ICJ Reports, page 3, para. 74 .

<sup>124</sup> See F.G. Jacobs, *The Effect of Treaties in Domestic Law*, Sweet & Maxwell 1987.

### **Principle 13: Review of constitutionality**

*Courts must have jurisdiction to examine the compatibility of state measures, including legislative acts, with the fundamental constitutional principles.*

#### **Commentary**

National legal systems take different views regarding the review of constitutionality of legislation. Some states, such as for example, the United States, Greece, and Portugal, provide for a system of dispersed judicial review, under which any national court may review the compatibility of a law with the Constitution. Other states, such as Germany and Italy, provide for a centralised system where review of constitutionality is entrusted to a constitutional court. In the United Kingdom, where the doctrine of parliamentary supremacy prevails, courts have no power to set aside acts of Parliament. Intermediate solutions are also possible. In the United Kingdom, under the Human Rights Act 1998, where a court finds that a statute is in breach of human rights guaranteed by the ECHR, it may make a declaration of incompatibility.<sup>125</sup> The statute in question continues in force and it is then up to Parliament to decide whether to repeal or amend it. In Canada, judicial intervention has greater force but is subject to legislative override. Where a court finds that an act of the federal parliament or of the legislature of a province runs counter to the Bill of Rights and Freedoms, the law ceases to have effect but the parliament or the state legislature may decide to reinstate it.<sup>126</sup>

Legal systems also differ as to whether they accept direct or only indirect review of legislation<sup>127</sup> and also in relation to the effects of a court ruling, i.e whether a court may invalidate an unconstitutional statutory provision or merely set it aside in the case in issue.

This Report takes the view that, if certain principles are characterised as fundamental, it should be recognised that they have higher legal force than ordinary legislation (and, of course, subordinate legislation). This entails, first, that ordinary law should be interpreted, as far as possible, in the light of fundamental constitutional principles so as to avoid incompatibility. Secondly, where such consistent interpretation is not possible, courts should have jurisdiction to question the compatibility of ordinary law with the fundamental principles, where they impose specific obligations, and there should be effective ways of requiring the government to give effect to the court's ruling. The mechanisms under which a challenge could be effected is a matter for national law to decide. It is not necessary that a legal system provides for the possibility of a direct action to invalidate or set aside legislation. There is no such general principle in the laws of European states. States may also impose different standing requirements. Also, for the avoidance of doubt the reference to 'courts' in this Principle is not restricted to ordinary courts. It includes constitutional courts which are outside the ordinary court system and governed by special rules.

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<sup>125</sup> Human Rights Act 1998, section 4.

<sup>126</sup> Canadian Charter of Rights and Freedoms, section 33.

<sup>127</sup> Under a system of indirect review, an applicant may only challenge the validity of an administrative act based on a law and not directly the validity of the law itself.

The essence of this Principle is that individuals must always be able to challenge decisions of the administration that affect their interests and that there must also be a way of judicial control over the compatibility of primary legislation with constitutional premises. In other words, to be meaningful, the characterisation of a principle as fundamental should entail means of requiring the law-makers to revisit the offending norm even where it emanates from the legislature. In the absence of such power, there is a risk that the overarching principles that lie at the apex of the edifice will not be enforced.

## **PART THREE – JUDICIAL INDEPENDENCE**

### **Principle 14: Judicial independence and impartiality**

- 1. Judicial independence is an integral part of the right to a fair trial and central to the fulfilment of the rule of law and democracy.*
- 2. Judicial independence requires that judges act with independence, impartiality, and integrity.*
- 3. Independence means that judges must exercise their functions autonomously. They must be free from external orders and instructions and must not be subject to any hierarchical relationship, including within the court system.*
- 4. Impartiality means that judges must not act or appear to act with bias or personal prejudice in the exercise of their duties. No judge may take part in the disposal of a case where they have, or appear to have, a conflict of interest. The conditions under which judges may or must recuse themselves must be laid down by law.*

### **Principle 15: Rules governing judicial independence**

- 1. Judicial independence is guaranteed by rules which cover the areas listed under Principle 16.*
- 2. The general principles on which those rules are based must be laid down by primary legislation or provisions that have supra-legislative status. They must be clearly written and known in advance. Any amendments to those rules may only apply prospectively.*
- 3. Reforms pertaining to the administration of justice must be adequately justified. They must respect the rule of law, the separation of powers, judicial independence, and the right of access to the courts.*

### **Principle 16: Specific guarantees**

- 1. Judges must be appointed by an objective, transparent process on the basis of their qualifications to perform their judicial function.*
- 2. The length of service of persons holding judicial office must be provided by law in advance. As a general rule, they must hold tenure for life or until retirement, the age of which must be set in advance. By way of exception, members of certain courts, e.g. constitutional courts, may be appointed for a fixed renewable or non-renewable term of office.*

3. *Judges may only be dismissed or be subject to any other disciplinary penalty if they no longer fulfil the conditions required for the performance of their duties or no longer meet the obligations arising from their office. Disciplinary penalties may only be taken by a body which meets the requirements of judicial independence and impartiality.*

4. *Judges shall perform their functions impartially, conscientiously, and with integrity.*

5. *In the performance of their duties, judges must be independent from the legislature and the executive and not in a hierarchical relationship vis-à-vis any other state authority. They must not receive instructions from any other authority or entity.*

6. *The executive undertakes not to seek to influence judges in the performance of their functions.*

7. *Judges must receive an appropriate level of remuneration commensurate with their duties and level of seniority. The judicial system must be adequately funded.*

8. *Judges may not hold any political office during their judicial tenure.*

### **Commentary on principles 14-16**

There is universal agreement that judicial independence is an attribute of the rule of law.<sup>128</sup> The reason for this is simple. Respect for fundamental rights and constitutional principles would be an empty promise without the right of access to an independent judiciary to oversee that they are respected. As noted by Lenaerts, ‘the principle of judicial independence constitutes the essence of the fundamental right to effective judicial protection’.<sup>129</sup> Judicial independence is also a prerequisite to democracy. Democratic government presupposes the existence of a well-functioning system of independent courts.

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<sup>128</sup> See P. Craig, S. Adam, Nuria Diaz Abad, Lorenzo Salazar, ‘Rule of law in Europe – Perspectives from Practitioners and Academic’ 2019, available at <[http://www.ejtn.eu/PageFiles/19048/2019-056-RoL%20Manual-170x240-WEB\\_FINAL.pdf](http://www.ejtn.eu/PageFiles/19048/2019-056-RoL%20Manual-170x240-WEB_FINAL.pdf)>; Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart, 2017).

<sup>129</sup> K. Lenaerts, New horizons for the rule of law within the EU. (2020) *German Law Review* 21, at 32.

Judicial independence is enshrined in the majority of European constitutions,<sup>130</sup> the ECHR,<sup>131</sup> and EU law.<sup>132</sup> It is assessed against a number of parameters, including the following:

- Composition of a court;
- Appointment procedure;
- Length of service;
- Appropriate level of remuneration of judges;
- Absence of hierarchical relationships;
- Effective separation from the legislative and executive powers;
- Impartiality (i.e. equal distance) from the parties, including objectivity and neutrality towards the litigation;
- Grounds for abstention, rejection and dismissal of judges;
- Rules on disciplinary procedures (including independence, appointment, composition, and mandate of the disciplinary body, and also the context in which a disciplinary procedure is applied);
- Rules concerning the national supervisory judicial bodies (including appointment, composition, any potential irregularities in the appointment, effective independence from the legislature and the executive, impartiality and objectivity of its decision-making powers).

According to the ECtHR jurisprudence, factors to be considered when assessing the independence of courts are the following: ‘the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence.’<sup>133</sup> The case law points out that ‘what is at stake is the confidence which such tribunals must inspire in the public in a democratic society’.<sup>134</sup>

A further guarantee of judicial independence is that judgments must be reasoned.<sup>135</sup>

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<sup>130</sup> Austrian Constitution, Article 87(1); Belgian Constitution, Article 151 § 1 ; Bulgarian Constitution, Article 117(2) ; Croatian Constitution, Article 118 ; Czech Constitution, Article 81 ; Danish Constitution, Section 62 ; Estonian Constitution, Article 146 ; Finnish Constitution, Section 3 ; French Constitution, Article 64 ; German Constitution, Article 97 ; Greek Constitution, Article 87-88 ; Hungarian Constitution, Article 46(3) and 50(3) ; Irish Constitution, Article 35(2) ; Italian Constitution, Article 104 ; Latvian Constitution, Article 83 ; Lithuanian Constitution, Article 109 ; Maltese Constitution, Article 39(2) ; Polish Constitution, Article 173 and 186; Portuguese Constitution, Article 203 ; Romanian Constitution, Article 124(3) ; Spanish Constitution, Article 117 ; Slovakian Constitution, Article 141(2) ; etc.

<sup>131</sup> Article 6 ECHR. See also Opinion no. 3 of the Consultative Council of European Judges (CCJE) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality (November 2002); Venice Commission, ‘Report on the Independence of the Judicial System – Part I: The Independence of Judges’, 12-13 March 2010; Venice Commission, ‘Compilation Of Venice Commission Opinions and Reports Concerning Courts and Judges’ Strasbourg, 5 March 2015; Venice Commission, ‘Report on the Freedom of Expression of Judges’ 19-20 June 2015.

<sup>132</sup> See e.g. Article 47 of the EU Charter of Fundamental Rights.

<sup>133</sup> *Ramos Nunes de Carvalho e Sá v. Portugal*, judgment of 6 November 2018, CE:ECHR:2018:1106JUD005539113, § 144 and the case-law cited.

<sup>134</sup> To that effect, ECtHR, 21 June 2011, *Fruni v. Slovakia*, CE:ECHR:2011:0621JUD000801407, § 141

<sup>135</sup> See above, Principle 8 and the commentary thereunder.



Judicial independence must be guaranteed not only as a matter of law but also in practice. It is not exhausted simply in providing a legal framework but also requires that the rules are respected and effectively enforced in practice. Furthermore, in determining whether a specific rule may violate the guarantees of judicial independence, an overall evaluation is necessary where account is taken of the objectives of the rule, the rationale and the true reasons for its adoption, and its effects in practice. A rule which in one or more states may be compatible with the principle of judicial independence may imperil it in another state in the light of the context of its application.

Judicial independence has two dimensions, an external and an internal one.

The external dimension means lack of hierarchical subordination or obligation to follow instructions. A court must<sup>136</sup>

‘exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.’

The judiciary should be independent, in particular, from the legislative and executive power.<sup>137</sup> This does not mean that institutions of the executive may never play any role in the appointment of judges. Under some national systems, the government is involved in the appointment of supreme court judges. However, appointment must be made on the basis of objective criteria. Also, ‘it is still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges’.<sup>138</sup> Furthermore, once appointed, judges must be free from influence or pressure when carrying out their role.

The provision of appropriate remuneration contributes to the external independence of the judiciary.<sup>139</sup>

Principle 14(3) states that judges must not be subject to any orders or instructions and must not be subject to any hierarchical relationship. This includes orders or hierarchical subordination within the judicial system. For the avoidance of doubt, Principle 14(3) does not intend to affect the doctrine of binding precedent, in those systems where it is followed, nor does it intend to question the jurisdiction of higher courts to quash decisions of lower courts. Its meaning is that the principle of judicial independence must also guarantee the independence of judges vis-à-vis their judicial colleagues, the presiding judge, and judges holding administrative positions.

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<sup>136</sup> See e.g. *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, para 44.

<sup>137</sup> Joined cases C-585/18, C-624/18 and C-625/18, *A.K.* EU:C:2019:982, para 138.

<sup>138</sup> *Op.cit.*, para 134.

<sup>139</sup> C-216/18, *Minister for Justice and Equality (Défaillances du système judiciaire)* EU:C:2018:586, para 64.

The internal dimension of judicial independence is impartiality. It requires that a court must maintain an equal distance from the parties to the proceedings and their respective interests.<sup>140</sup> It also requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.<sup>141</sup>

The ECtHR has identified subjective and objective tests to evaluate the impartiality of courts.<sup>142</sup>

The subjective test focuses on the conduct of the judge. The tribunal must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary.

According to the objective test, the tribunal must offer sufficient guarantees to exclude any legitimate doubt of partiality.<sup>143</sup> As the CJEU has put it:

‘[I]t must be determined whether, quite apart from the judge’s conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. In this connection, even appearances may be of a certain importance. Once again, what is at stake is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings.’<sup>144</sup>

The guarantees of independence and impartiality ‘require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. The necessary freedom of judges from all external intervention or pressure requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office.’<sup>145</sup>

A specific aspect of independence is the principle of irremovability (tenure). This requires that judges may remain in post provided that they have not reached the obligatory retirement age or, where their mandate is for a fixed term, until its expiry. The ECJ has held that, whilst that principle is not absolute, there can be no exceptions to it ‘unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus, it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious

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<sup>140</sup> See e.g. *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para 65. C-619/18, *Commission v Poland*, EU:C:2019:531, para 73.

<sup>141</sup> *Ibid.*

<sup>142</sup> See, e.g. ECtHR, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, para 191; *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, paras 145, 147 and 149.

<sup>143</sup> T-56/09 *Saint Gobain*, EU:T:2014:160, para 498.

<sup>144</sup> Joined Cases C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, para 128.

<sup>145</sup> C-192/18, *Commission v Poland*, EU:C:2019:924, para 112.

breach of their obligations, provided the appropriate procedures are followed.’<sup>146</sup> An exception to that principle is thus acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective, and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them.<sup>147</sup>

In *Commission v Poland*,<sup>148</sup> the ECJ assessed a Polish law that lowered the retirement age of the members of the Supreme Court but granted the President of the Polish Republic discretion to extend the tenure of incumbent judges beyond the new lower retirement age. The ECJ found that such law does not protect judges from external pressures, and, thus, infringes the principle of judicial independence.<sup>149</sup>

The ECJ case law has also addressed how rules governing the oversight of the judiciary and disciplinary proceedings against judges impact judicial independence. Rules governing the disciplinary regime must provide the necessary guarantees to prevent any risk of it being used for the purposes of exercising political control over the content of judicial decisions. National bodies in charge of overseeing the judiciary’s status and independence, as well as national judicial councils,<sup>150</sup> should themselves be sufficiently independent from the legislative and executive authorities. Elements to take into account in assessing their independence include the independence of the authority electing its members,<sup>151</sup> the process for their appointment and whether it involves independent authorities, the overall context in which a disciplinary chamber operates,<sup>152</sup> and the mandate of the disciplinary judges. Ultimately, disciplinary procedures should not be used as a political means of controlling the judiciary.<sup>153</sup> It has also been held that such bodies should exercise their advisory role in an objective and relevant manner when asked to rule on the possible extension of the mandate of retiring judges.<sup>154</sup>

In *Commission v Poland*,<sup>155</sup> the ECJ concluded, even if the decision of the President of the Republic to extend the mandate of judges of the Supreme Court is supported by the opinion delivered by the national body in charge of supervising the judicial independence, this is not sufficient to exclude interferences on the activities of judges. The applicable procedural safeguards should be effectively isolating the judiciary from interferences.

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<sup>146</sup> Op.cit., para 113

<sup>147</sup> Op.cit., para 115.

<sup>148</sup> C-619/18, *Commission v Poland*, ECLI: EU:C:2019:531.

<sup>149</sup> Op.cit., para 114.

<sup>150</sup> On this theme, see David Kosař and Samuel Spáč, ‘Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back’ (2018) 9 *International Journal for Court Administration* 37.

<sup>151</sup> Joined Cases C-585/18, C-624/18 and C-625/18, A.K., ECLI:EU:C:2019:982, paras 136 *et seq.*

<sup>152</sup> Op.cit., paras 142 *et seq.*

<sup>153</sup> C-192/18, *Commission v Poland*, ECLI:EU:C:2019:924, para 114.

<sup>154</sup> C-619/18, *Commission v Poland*, ECLI: EU:C:2019:531, para 116.

<sup>155</sup> C-619/18 EU:C:2019:53.

According to the test established by the ECtHR in *Gudmundur Andri Ástráðsson v. Iceland*,<sup>156</sup> in assessing whether an irregularity in a judicial appointment is of such a gravity as to entail a violation of the right to a tribunal established by law provided for by Article 6(1) ECHR, the following criteria should be taken into account:

- whether there is a manifest breach of the domestic law, in the sense that it is objectively and genuinely identifiable as arbitrary or manifestly unreasonable;
- whether the breach relates to the fundamental rules of the procedure for appointing judges – that is, it affects the essence of the right to a tribunal established by law;
- whether the allegations regarding the breach were effectively reviewed and remedied by the domestic courts.

Applying those criteria, in *Xero Flor w Polsce sp. z o.o. v. Poland*,<sup>157</sup> the ECtHR found a violation of the right to a tribunal established by law provided by Article 6(1) ECHR on the ground that the Constitutional Court of Poland had issued a ruling with the participation of an unlawfully appointed judge.

A related question is whether public officials should be bound by a judicial decision where it has been objectively demonstrated that it has been issued by a court of final instance which fails to meet the requirements of judicial independence. The answer would depend on the circumstances of the case taking into account, inter alia, the gravity of the breach. As a general rule, the guarantees of judicial independence must be effectively enforced whilst paying due respect to the principle of separation of powers.<sup>158</sup>

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<sup>156</sup> *Gudmundur Andri Ástráðsson v. Iceland* (Application no. 26374/18), judgment of 1 December 2020, paras 243-252.

<sup>157</sup> *Xero Flor w Polsce sp. z o.o. v. Poland*, Application No 4907/18, ECHR:2021:0507JUD000490718.

<sup>158</sup> See for a specific case, urgent opinions of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the legislative situation regarding anti-corruption mechanisms following decision no. 13-r/2020 of the Constitutional Court of Ukraine, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)038-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)038-e) and [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)039-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)039-e).

**Principle 17:**  
**Independence as a general principle of reviewing bodies**

*The essence of the overriding duty to act with impartiality and independence shall also apply to any agency or body established by public or private law that is charged with the independent review of decisions.*

**Commentary**

The idea of this principle is to capture bodies which do not form part of the judicial branch and which are established by law or private agreement to review decisions that adversely affect the rights or interests of private parties. Such bodies include, for example, administrative review boards, arbitration tribunals or bodies charged with reviewing decisions taken by social media providers.<sup>159</sup> Such bodies act as independent adjudicators performing functions similar to those of courts and tribunals. Review of their decisions in a court of law is often permitted only on limited grounds. Such bodies should be subject to guarantees of independence and impartiality equivalent to those provided in the above principles.

More generally, similar standards of independence and impartiality ought to imbue decision-making of authorities or bodies, including:

- agencies which are entrusted by law with safeguarding the rights of individuals (e.g. competition authorities);<sup>160</sup>
- bodies, such as tax or audit authorities, with power to review compliance with rules in specific areas;
- specialised bodies responsible for judicial appointments; and
- election offices that implement election laws and handle the mechanics of voting including the determination of voter eligibility;
- complaints officers of private entities.

Effective compliance with the law and protection of rights cannot be guaranteed by bodies which do not respect the essence of independent and impartial decision-making.

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<sup>159</sup> For example, the decision to refuse a person access to a social media platform.

<sup>160</sup> See *Sped-Pro S.A. v Commission*, Case T-791/19, ECLI:EU:T:2022:67, paras .89-92.

## PART FOUR – CHECKS AND BALANCES - ACCOUNTABILITY

### Principle 18: Separation of powers

- 1. The exercise of legislative, executive and judicial power is entrusted to different institutions.*
- 2. The parliament is responsible for passing legislation, monitoring the government, and controlling public finances.*
- 3. The government is responsible for determining and conducting the policy of the state. It shall be accountable to the parliament.*
- 4. The judicial function is exercised by courts which are established by law and whose independence and impartiality are guaranteed.*

#### Commentary

Although there are significant differences among individual polities, liberal democracies display conceptual and practical separation of powers among the executive, the legislative, and the judiciary. The separation of powers flows from the rule of law. It seeks to avoid the concentration of power in a single authority and establish a system of checks and balances, its ultimate objectives being to avoid arbitrariness, promote good governance, and ensure that ‘political power is exercised in the interests of citizens’.<sup>161</sup> In its essence, the separation of powers limits any one branch from exercising the core functions of another<sup>162</sup> and establishes a system of institutional balances. It also mandates that the scope of power of each branch is pre-determined by law. It is recognised that rigid separation is neither functionally possible nor desirable in policy terms. For this reason, the term ‘checks and balances’ captures better than need for ensuring the dispersal of power among different institutions and the need for controlling the exercise of authority. Often, separation is sharper in theory than it is in practice. The extent of the relative powers of each branch, their *inter se* relations and their interdependence have evolved over a long period in domestic legal systems leading to diverse outcomes in contemporary European liberal democracies.<sup>163</sup>

The four paragraphs of Principle 18 seek to capture the essence of separation of powers, subject to the reservations made above. The first paragraph states the principle. The second paragraph defines the branches of government. The third paragraph outlines the three fundamental powers of Parliament, as the body that represents the people in a democratic state: it passes legislation, it controls the executive, and has the ultimate say over public money, namely, both the raising of public funds and the way they should be disbursed. The

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<sup>161</sup> G Brennan and A Hamlin, ‘A Revisionist View of the Separation of Powers’ (1994) 6 *Journal of Theoretical Politics* 345.

<sup>162</sup> National Conference of States Legislature, ‘Separation of Powers--An Overview’.

<sup>163</sup> Rose, *Understanding Big Government* (Sage 1986).

fourth and the fifth paragraphs outline respectively the essential functions and attributes of the executive and the judiciary.

A specific aspect of the doctrine of separation of powers are limitations on executive rule making. European constitutions commonly contain clauses vesting parliament with the exclusive power to make laws. Nonetheless, it is also common for parliament to delegate legislative powers to the executive, e.g. the government sitting in cabinet, an individual minister or a regulatory body. Such executive rule-making is inevitable. Parliament simply does not have the time to legislate on everything, some areas require technical expertise, and often rules have to be adopted and adjusted within short periods of time. The complexity of governing makes delegation necessary. Nonetheless, to prevent rendering the separation of powers meaningless and ensure legitimacy and democratic accountability, executive rule making must be subject to certain constraints. The principles are the following:

- The essential elements of an area should be reserved for legislation and not be the subject of a delegation of power;
- The executive must explain and justify to Parliament the reasons for seeking delegated power and the scope of the power sought;
- The Parliament must consider carefully and justify the need for delegated legislation;
- Parliament may only authorize the executive to amend non essential elements of legislation;
- The objectives, content, scope, and duration of the empowerment should be explicitly defined in legislation in a way that is understood by the executive and the citizen;
- Delegated legislation must be subject to effective parliamentary scrutiny.

Furthermore, certain rules may only be adopted by primary legislation. This includes the rules governing liability to pay taxes and the essential elements of restrictions on fundamental rights.

Paragraph 4 recognises that the separation of powers presupposes the existence of an independent judiciary which can oversee that public authorities and private parties act according to the law. For the separation of powers to be meaningful, the courts must have jurisdiction to ensure that all state action has a legal basis and that state institutions act within the limits of their powers. It also requires that the judiciary itself must act within the limits of its competence and does not usurp the functions of the other branches of government.

## **Principle 19: Accountability**

- 1. Accountability is a key component of democracy. All branches of government and all institutions and bodies that exercise public functions are accountable as provided by law.*
- 2. They are subject to political, judicial and financial accountability.*
- 3. The main features of the system of accountability should be safeguarded at constitutional level.*
- 4. Public spending must be subject to effective mechanisms of ex ante and ex post financial controls with a view to achieving its integrity, efficiency, economy and effectiveness. The budgetary process must be transparent.*

### **Commentary**

In its widest formulation, accountability refers to ‘the obligation to explain and justify conduct’.<sup>164</sup> It is a form of *ex post* mechanism. It entails accounting for past conduct and is a narrower concept than control which includes *ex ante* systems for constraining behaviour e.g. the establishment of a legal framework defining competences or requirements for appointment to a certain office, etc. As a principle of governance, accountability applies first and foremost to the entities that exercise public power. Since public authorities must comply with the law, mechanisms should be available to ensure that their actions are so compatible, violations are prevented, and remedial action may be taken to ensure compliance. The twenty first century has seen an explosion of calls for greater accountability in democratic states and a corresponding increase in accountability mechanisms. This has been accompanied, especially in Anglo-saxon states, with the importation to the public sector of control systems applicable to private corporations.

In a democracy, accountability is a principle that pertains to the relationship between the state and society at large.<sup>165</sup> A key aspect is its universality. It applies to all branches of government although not all branches are subject to the same forms of accountability. Political accountability refers first and foremost to the executive which is responsible for making and implementing policy. The Government is politically accountable to the Parliament which, in turn, is subject to the people’s mandate. It applies to the executive as a whole, i.e. all state departments, constitutionally independent public entities, and other bodies entrusted with public duties.

The second paragraph outlines the three main forms of accountability. These are political, legal, and financial. They can take a variety of forms depending on the entity which is

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<sup>164</sup> See M. Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework*, 2006, <https://www.ihs.ac.at/publications/lib/ep7.pdf>, p. 9.

<sup>165</sup> OECD, *Accountability and democratic governance: Orientations and principles for development*, DAC Guidelines and Reference Series, p. 13.



accountable and may entail oversight, regulation, inspection or scrutiny.<sup>166</sup> As stated above, political accountability is borne primarily by the executive. Nonetheless, all branches of government are subject to a wider form of accountability in that their actions are subject to debate in the public domain. In this respect, accountability is closely intertwined with the principles of liberal democracy and the other principles of the rule of law stated in this Report which must be seen as mutually reinforcing. Thus, freedom of expression, the right to form associations, transparency and the right of access to justice are all part of a system that seeks to ensure accountable government.

In the case of the judiciary, given the need to safeguard its independence, control mechanisms tend to take different forms, e.g., rules pertaining to the selection of judges or the jurisdiction of courts. They are however supplemented by accountability in the more technical sense pertaining to financial and efficiency standards.

### *Political accountability*

Political accountability of the executive is a cornerstone of democracy. As Palumbo and Bellamy point out, it ‘directs the political system towards the public interest and allows the exercise of the principles of autonomy and self-determination that lie at the core of democratic politics.’<sup>167</sup> It is linked to the basic idea that ‘the more strictly we are watched, the better we behave’ (Bentham). Where decision-making power is transferred from the citizens to a government, mechanisms should be in place for holding the government to account. Accountability is essential for the legitimacy of public authority. Furthermore, it ensures that public officials act in the best interests of the people, increases the quality of decision-making, enables redress where errors have taken place, and has a reassuring effect on citizens.

A key aspect of political accountability is that ministers are, both collectively and individually, responsible to Parliament:

‘The minister in charge of the department is responsible and answerable to Parliament for the exercise of the powers on which the administration of that department depends. He or she has a duty to Parliament to account, and to be held to account, for all the policies, decisions and actions of the department, including its arm’s length bodies.’<sup>168</sup>

It also applies to all departments of the executive and other public bodies. The Institute of Government in the UK has identified four hallmarks of accountability in relation to public bodies:<sup>169</sup>

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<sup>166</sup> See Institute for Government, *Accountability in modern government: what are the issues?* A discussion paper, by Benoit Guerin, Julian McCrae, Marcus Shephard, April 2018, p.7.

<sup>167</sup> A Palumbo and R Bellamy, *Political Accountability* (Routledge, 2010)

<sup>168</sup> HM Treasury and Cabinet Office, *Corporate Governance in Central Government Departments: Code of good practice 2011*, 2011, para 1.1, [www.gov.uk/government/publications/corporate-governance-code-for-central-government-departments](http://www.gov.uk/government/publications/corporate-governance-code-for-central-government-departments). This principle reflects a long-standing convention in the UK.

<sup>169</sup> *Op.cit.*, p. 8.

*Clarity of accountability:* there should be clear and well-documented structures that establish exactly what an individual or organisation is responsible for, and to whom they are accountable.

*Appropriateness of control:* if people are to be held accountable in a fair way, they must have had sufficient control over the outcomes on which they are being judged.

*Sufficiency of information:* there must be enough relevant information available to judge whether responsibilities have been performed.

*Clarity of consequences:* there should be a consistent and widely understood link between performance above or below defined levels and the proportionate rewards and sanctions that flow from it.'

### *Legal accountability*

Legal accountability requires the existence of mechanisms to ensure that public actions are compatible with the law, violations are prevented, and remedial action may be taken to ensure compliance. It recognises primarily the role of the judiciary in imposing legal constraints and due process on the Government. The cornerstone of legal accountability is judicial review. Citizens must enjoy the right to easily challenge the legality of executive action before an independent court and the latter must be able to annul illegal public conduct. Courts must also have jurisdiction to award damages in cases where this is justified.

### *Financial accountability*

Public governance relies on financial resources; without money there is little a government can do to achieve its policy aims. At the same time, financial resources are always limited and the demand for spending typically outweighs the available public funds. Financial accountability, also known as financial scrutiny or audit, aims at ensuring that the limited public resources are managed and spent effectively and towards achieving worthy public interest objectives. As a general rule, when collecting and using public funds the government is under a twofold duty: first, the government must not tax people without their consent expressed through the adoption of legislation by a democratically elected body; secondly, the government must spend taxpayers' money wisely and not waste it. The rules which determine public revenue and expenditure must be approved by the parliament and cannot be changed freely by the executive.

Financial accountability has both practical value and constitutional significance. First, due to its unique status, governments rely heavily on taxpayers to fund their policies; as such, unlike private actors, governments are not subject to the same pressures of market competition and can be prone to unwise spending. Setting up mechanisms to scrutinize the collection and spending of public money can assist the government to improve its public expenditure performance. Second, since people's money is the primary means of governing, it is imperative that the parliament, as the people's representative, retains the constitutional power to authorise the collection and spending of public resources. This

means, that there should be effective mechanisms in place that will enable the parliament to hold the government into account for public money it collected and spent during its term of office.

Traditionally the auditing of public expenditure is performed based on the so called ‘three Es’ standard:

- Economy: this means that the terms under which the resources needed for an activity are obtained must be acquired at a minimum cost, at the right time, taking into consideration also the appropriate quality.
- Efficiency: this refers to the relationship between the outputs (goods, services or other) and the resources used to produce them and requires that a given set of resources must produce the maximum output.
- Effectiveness: this refers to the relationship between the intended impact and the actual impact of an activity and examines how well an activity is able to achieve its avowed objectives.

Whilst the scope of financial accountability does not typically extend to examining the merits of policy objectives, there are good reasons in favour of including within the auditing competence certain additional public interest standards that reflect fundamental societal values. These include:

- Sustainability: public expenditure should not compromise the ability of future generations to meet their needs.
- Equity: public funds must be used in a fair and equitable manner; the beneficiaries of public money should not be selected arbitrarily.
- Ethics: the managers of public funds should adhere to the highest standards of honesty and integrity in the performance of their tasks.

Different polities apply diverse models of financial accountability. As a minimum, the entity that performs the audit must enjoy a sufficient level of independence from the executive. The auditors should be awarded the power to access the audited governmental bodies and sufficient resources to perform their auditing tasks. The material scope of audit should extend to examining both past (backward-looking scrutiny) and planned expenditure (future-looking scrutiny).

**Principle 20:**  
**Open government and transparency**

*1. Open government is a key component of the rule of law. It promotes accountability, enhances citizen participation, and contributes to better decision-making.*

*2. Open government requires, among others, that:*

*(a) Government bodies and entities that exercise public functions must conduct their work as openly as possible;*

*(b) The decision-making process at all levels of government must observe the highest possible level of transparency;*

*(c) The law must enable stakeholder participation through information, consultation and engagement; an open dialogue should be maintained with citizens, representative associations and civil society.*

*(d) Individuals and legal persons must have the right of access to documents held by entities that exercise public functions.*

*3. Any limitations on the above principles must be provided by law, be proportionate, and be justified by an overriding public interest.*

**Commentary**

The first paragraph recognizes that openness is an attribute of good governance. It is critical to building citizen trust,<sup>170</sup> facilitates input by those affected by the law, and more generally, contributes to a shared public domain where government choices are explained and diverse views can be aired. Openness is both a value in its own right, in that it promotes democracy, and a utilitarian tool in that it is likely to lead to more coherent and effective governance. The OECD defines open government as ‘a culture of governance that promotes the principles of transparency, integrity, accountability and stakeholder participation in support of democracy and inclusive growth’.<sup>171</sup>

The second paragraph enumerates specific aspects of open government. Sub-paragraph (a) borrows from Article 15(1) TFEU. Sub-paragraph (b) refers, in particular, to the decision-making process. Sub-paragraph (c) highlights the main components of citizen participation. The provision of information is the most basic level of participation and entails both proactive measures by the government to disseminate information to the general public and groups of interested parties and *ad hoc* provision of specific information following freedom of information requests. Consultation entails the opportunity for citizens to provide feedback and express their views, whilst engagement refers to a more advanced form of

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<sup>170</sup> See Recommendation of the OECD Council on Open Government, 14 December 2017, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0438>.

<sup>171</sup> OECD, op.it.

participation thorough which stakeholders have the opportunity to be involved via dialogic processes in specific phases of the policy cycle.<sup>172</sup>

The need for consultation in developing policy is particularly important in relation to those groups who are likely to be impacted by proposed laws. The following guidelines may here serve as a point of reference:<sup>173</sup>

- The purpose of consultation should be stated clearly and sufficient information should be provided as to the stage of policy development and the issues on which consultation is sought;
- The timeframe of consultation should be realistic;
- Those in charge of developing policy should make every effort to consult all groups impacted by the policy in question, and particular attention should be paid to facilitate the engagement of any vulnerable groups affected;
- Decision making processes should ensure that responses received as a result of consultation are duly considered.

The third paragraph recognises that transparency is not an absolute principle. The specific requirements that it entails may differ depending on the entity or the process concerned. The public interest, for example, public security, may require the secrecy of certain deliberations. Cost and resource considerations may also be taken into account in determining the scope and modalities of public access. The public interest exception may also include the protection of the interests of private parties.

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<sup>172</sup> OECD, *op.cit.*

<sup>173</sup> For detailed guidance, see e.g. UK Government Consultation Principles 2018.

## **Principle 21: Good Governance**

*1. In the exercise of their functions, public authorities must comply with the law and act fairly and impartially in the public interest.*

*2. Members of Parliament, members of the Government and all state officials have a duty to comply with the law. They must act in the public interest, with integrity, and in good faith. In particular, they must:*

- 1. be honest and truthful;*
- 2. avoid conflict of interests;*
- 3. act with integrity and place public good above personal benefit when they exercise their public functions;*
- 4. not allow themselves to be subject to inappropriate influences;*
- 5. decide with impartiality and fairness, without bias, with due diligence, and on the basis of the best available evidence;*
- 6. act in an open and transparent manner;*
- 7. promote and maintain a culture and an environment where the above principles are respected.*

*3. Every person has the right to have their affairs handled impartially, fairly and within a reasonable time by public authorities. As a general rule, this right includes the right of every person to be heard before an individual measure which would affect them adversely is taken and the right to receive reasons for a decision that affects them individually.*

### **Commentary**

In its widest sense, good governance refers to certain principles and standards governing the political and institutional process by which decisions are taken. These include respect for the rule of law, political pluralism, fundamental rights, checks and balances, accountability, an efficient and effective public service, and also ‘equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance’.<sup>174</sup>

It also requires that law-making must be effective. There is little point in adopting rules if there is little chance that they will be complied with. There are various reasons why laws may fail to achieve their avowed objectives.<sup>175</sup> These include, among others, lack of understanding by those to whom the law applies;<sup>176</sup> complex, expensive or slow

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<sup>174</sup> See UN Office of the High Commissioner, <https://www.ohchr.org/en/good-governance/about-good-governance>. It has been said that good governance has 8 principal features: ‘It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society’. See UN Economic and Social Commission for Asia and Pacific, What is Good Governance, <https://www.unescap.org/sites/default/files/good-governance.pdf>

<sup>175</sup> D. Goddard, *Making Laws that Work*, Hart Publishing, 2022.

<sup>176</sup> See Principle 9 on legal certainty.

enforcement procedures; over-reach, where a law goes beyond what it intends to achieve, or, more generally, unsuitability of the provisions passed to address the targeted problem. Good law-making is an attribute of a well-governed society.

In Principle 21 the term ‘good governance’ is used with a narrower meaning to refer to minimum qualitative standards of decision-making. These entail both general institutional duties (paragraph 1) and more specific individual duties imposed on those who hold public office (paragraph 2). They also include the corresponding right of good administration on the part of the citizen (paragraph 3).

The principles listed in paragraph 2 have been inspired by the Seven Principles of Public Life laid down by a Committee on Standards in Public Life chaired by Lord Nolan.<sup>177</sup> Those principles have been included in many codes of conduct applicable to public officials in the United Kingdom.

Many of the principles stated in paragraph 2 are included, or further articulated, *inter alia*, in the Guidelines of the Committee of Ministers of the Council of Europe on public ethics<sup>178</sup> They are closely linked to accountability and, to be meaningful, need to be operationalised. They require the articulation of specific rules that are capable of being enforced through an institutional system that applies them effectively and fairly.

The third paragraph provides for the right to good administration and is partly modelled on Article 41 of the EU Charter on Fundamental Rights. According to the case law of the CJEU, the principle of good administration is a general principle of law that applies not only vis-à-vis EU authorities but also the authorities of the Member States when they act within the scope of application of EU law.<sup>179</sup> It is recognised that, in appropriate cases, some of the specific rights flowing from the right to good administration may not apply. For example, it would not be impermissible for a fine to be issued for the violation of a traffic regulation without the person concerned having a right to a hearing. In such cases, the protection of the individual is safeguarded by the right of access to a court of law.

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<sup>177</sup> The Committee was established by the United Kingdom Government in 1994 to make recommendations to improve standards of behaviour in public life. The principles were published on 31 May 1995. See <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life-2>

<sup>178</sup> Adopted by the Committee of Ministers in its 1370<sup>th</sup> meeting on 11 March 2020, <https://www.coe.int/en/web/good-governance/public-ethics>

<sup>179</sup> Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform*, EU:C:2014:302; confirmed in Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel*, ECLI:EU:C:2014:2081.

## **Principle 22: Anti-corruption**

*Public authorities must take effective measures to prevent and fight corruption.*

### **Commentary**

Corruption, defined as ‘the abuse of entrusted power for private gain’,<sup>180</sup> poses serious threats to the security and financial interests of liberal democracies. If endemic, corruption can go as far as undermining state institutions both from a functional perspective (e.g. institutional rules are not correctly applied) and financially (e.g. public funds are mismanaged). Studies have proved that high levels of corruption weaken both democracy and the rule of law.<sup>181</sup> In particular, corruption undermines two aspects of the rule of law: the equal application of the law and the prohibition of abuse of power by public authorities. Hence liberal democracies should adopt all measures necessary to fight and eradicate it.

The importance of combating corruption is increasingly acknowledged in national,<sup>182</sup> international<sup>183</sup> and European legal instruments.<sup>184</sup> There is evidence that international law, including international trade agreements, can act as constraints and correctors for the ‘vicious circle’ of corruption experienced by economies across the world.<sup>185</sup>

Crucial in the fight against corruption is the correct management of public funds. The allocation of public money has a direct impact not only on the resources of the community but also on trust in the public authorities and on their legitimacy. If public money is misspent by state authorities, private parties who have contributed to funding the state budget will lose their trust in the public actors. In turn, the legitimacy of state authorities in the eye of the community will be negatively impacted.

The establishment of an independent body provided with oversight and enforcement powers in the field of anti-corruption is key to the effectiveness of anti-corruption policies. Such a body should be granted adequate resources to be able to fulfil its mandate.

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<sup>180</sup> Transparency International, ‘Corruption and the UK’, available at <https://www.transparency.org.uk/corruption-and-uk>.

<sup>181</sup> <https://www.transparency.org/en/news/cpi-2018-global-analysis>.

<sup>182</sup> See the US The Whistleblower Protection Program (<https://www.whistleblowers.gov>), the UK ‘Whistleblowing: Guidance for Employers and Code of Practice’ ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf)) and the French Anti-corruption Agency Guidelines <https://www.agence-francaise-anticorruption.gouv.fr/files/files/French%20AC%20Agency%20Guidelines%20.pdf>).

<sup>183</sup> See ICC 2022 Guidelines on Whistleblowing, available at <https://iccwbo.org/publication/icc-2022-guidelines-on-whistleblowing/>.

<sup>184</sup> See Article 325 TFEU on combating fraud and other illegal activities affecting the EU’s financial interests.

<sup>185</sup> Alina Mungiu-Pippidi, ‘Fostering good governance through trade agreements An evidence-based review’, (2018) available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603867/EXPO\\_STU\(2018\)603867\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603867/EXPO_STU(2018)603867_EN.pdf).



At EU level, a key instrument in the fight against corruption is the Conditionality Regulation.<sup>186</sup> Its underlying rationale is that respect for the rule of law is an essential precondition for compliance with the principles of sound financial management provided in Article 317 TFEU. The regulation requires appropriate measures to be taken where rule of law breaches affect or seriously risk affecting the principles of sound financial management or the protection of the financial interests of the Union. Appropriate measures include suspension of payments, disbursements, or commitments guaranteed by the EU budget.

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<sup>186</sup> Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433 I/1. For an analysis, see K.L. Schepele, R.D. Kelemen, and J. Morijn, The EU Commission has to Cut Funding to Hungary: The Legal Case, [https://danielfreund.eu/wp-content/uploads/2021/07/220707\\_RoLCR\\_Report\\_digital.pdf](https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf), 43-54 and T. Tridimas, Recovery Plan and Rule of Law Conditionality: A New Era Beckons?, Editorial, (2020) 16 Croatian Yearbook of European Law and Policy, pp. VII-XXI.

### **Principle 23: Non-state parties**

*Private parties whose activities substantially impact on core elements of a liberal democracy may be subject to similar constraints as those that apply to the exercise of public authority.*

#### **Commentary**

This principle refers to non-state entities which, by reason of their mandate, power, or activities, play a pivotal role in political governance. This would include, for example, private media organisations that have a wide appeal and online intermediaries which control access to public space.<sup>187</sup> Such organisations should be subject to obligations equivalent to those imposed on state bodies. They must, for example, comply with transparency standards, fight corruption, observe the principle of non-discrimination, avoid arbitrariness and treat fairly those who use their services.

As the German Constitutional Court has stated:<sup>188</sup>

‘Depending on the circumstances, especially, where private companies take on a position that is so dominant as to be similar to the state’s position, or where they provide the framework for public communication themselves, the binding effect of the fundamental right on private actors can ultimately be close, or even equal to, its binding effect on the state.’

But even where a private party falls short of exercising such a gate keeping function, fundamental rights provide a strong point of reference for interpreting obligations between private parties.<sup>189</sup>

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<sup>187</sup> At EU level, see the Digital Services Act: Regulation (EU) 2022/2065 on a Single Market For Digital Services, OJ 2022, L 277/1.

<sup>188</sup> Decision of 6 November 2019 – 1 BvR 16/13 “Right to be forgotten I,” para 88, for an English translation see [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/rs20191106\\_1bvr0016\\_13en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/rs20191106_1bvr0016_13en.html).

<sup>189</sup> Thus, on that basis, the German Federal Court has reversed decisions of online platforms moderating content. See e.g. Federal Court of Justice, decisions of 29 July 2021 – III ZR 192/20 and III ZR 179/20. For a commentary and transatlantic comparisons, see

D. Holznel, Enforcing the Rule of Law in Online Content Moderation: How European High Court decisions might invite reinterpretation of CDA § 230, American Bar Association, 9 December 2021, [https://www.americanbar.org/groups/business\\_law/publications/blt/2021/12/online-content-moderation/](https://www.americanbar.org/groups/business_law/publications/blt/2021/12/online-content-moderation/)

## PART FIVE – DIGNITY AND EQUALITY

### **Principle 24: Human dignity**

*Human dignity is inviolable. It forms the basis of the fundamental rights of the individual and must be respected and protected.*

#### **Commentary**

In the post-Second World War constitutional discourse, respect for human dignity occupies a distinct position. It is both an inalienable, self-standing right that protects the intrinsic worth of each individual, and the basis for all other fundamental rights. It provides the justification for, and the underlying thread of, the system of fundamental rights protection. It forms part of the common constitutional heritage of European states and has been recognised as a general principle of law by the CJEU.<sup>190</sup> As pointed out by Advocate General Sir Francis Jacobs, the constitutional traditions of the Member States ‘allow for the conclusion that there exists a principle according to which the State must respect not only the individual's physical well-being, but also his dignity, moral integrity and sense of personal identity’.<sup>191</sup>

Respect for human dignity originates in the humanistic faith in the worth of human beings expressed during the Renaissance.<sup>192</sup> It is a moral principle that has distinctly Kantian connotations but also a legal doctrine. Post World War II, in revulsion against the Nazi atrocities, references to human dignity became more widespread and more insistent, as opposed to merely symbolic, in international treaties and constitutional texts. The preamble to the 1948 Universal Declaration of Human Rights proclaims that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), to which virtually all European states are parties, state that all human rights derive from the inherent dignity of the human person.<sup>193</sup> References to human dignity appear in numerous other international law instruments, such as the Geneva Conventions on the laws of war<sup>194</sup> and many Council of Europe conventions.<sup>195</sup>

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<sup>190</sup> C-377/98 *Netherlands v Parliament and Council*, ECLI:EU:C:2001:523, para 70.

<sup>191</sup> Case C-168/91 *Konstantinidis* [1993] ECR I-1191 at para 39 of the Opinion.

<sup>192</sup> C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) EJIL 655.

<sup>193</sup> See ICESCR, preamble, recital 1; ICCPR, preamble, recitals 2 and 3.

<sup>194</sup> See Article 3(1)(c) of Geneva I, Geneva II, Geneva III and Geneva IV Conventions.

<sup>195</sup> See e.g. Article 26 of the Revised European Social Charter (ESC) and the preamble and Article 1 of the Convention on Human Rights and Biomedicine (Oviedo Convention)).

It receives express mention in a number of national constitutions, including the constitutions of Germany, Italy, Greece and South Africa<sup>196</sup> and in Article 1 of the EU Charter of Fundamental Rights.<sup>197</sup> According to the Explanations accompanying the Charter, dignity is part of the substance of the rights laid down therein and must therefore be respected, even where a right is restricted.<sup>198</sup> Even in countries where there is no express constitutional reference to human dignity, courts may refer to it as a principle which underlies the constitutional order and produces legal effects. References to the principle appear, for example, in the case law of the French *Conseil constitutionnel*,<sup>199</sup> and the US Supreme Court.<sup>200</sup>

Although the ECHR makes no express reference to it, the ECtHR often refers to human dignity in its case-law<sup>201</sup> and has held that respect for human dignity and human freedom are the very essence of the objectives of the Convention.<sup>202</sup> They provide the backdrop of the interpretation of a number of Convention rights, including the right to life (Article 2), the prohibition of inhuman and degrading treatment (Article 3) and the right to family life (Article 8).<sup>203</sup>

Human dignity is understood differently in the various European legal systems. It has been applied with particular vigour by the German Constitutional Court. An indicative example is provided by the judgment of 15 February 2016.<sup>204</sup> In the aftermath of 9/11, the Bundesverfassungsgericht held that the German military was prohibited from downing a passenger aircraft taken over by terrorists and intended to be used as a suicide bomb, even if that was the only way of averting widespread loss of life, on the ground that that would violate the right of human dignity in combination with the right to life. The Court held that

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<sup>196</sup> Constitution of Germany, Article 1; Constitution of Italy, Article 41(2); Constitution of Greece, Article 21; Constitution of Poland, Article 30; Constitution of South Africa, Articles 10 and also, among others, Articles 1(a) and 7(1).

<sup>197</sup> See also, specifically in relation to workers' rights, Article 31 of the Charter.

<sup>198</sup> Explanations relating to the Charter of Fundamental Rights, OJ C 303/17 at 17.

<sup>199</sup> The Conseil Constitutionnel has referred to it, inter alia, in cases pertaining to bioethics, abortion, minimum living conditions, and inhuman and degrading treatment. See <https://www.conseil-constitutionnel.fr/la-constitution/la-dignite-de-la-personne-humaine> and further M. Verpeaux, P. de Montalivet, A. Roblot-Troizier, A. Vidal-Naquet, « Droit constitutionnel. Les grandes décisions de la jurisprudence », 2<sup>nd</sup> Ed., Thémis droit PUF, 2017, p. 544 and Véronique Champeil-Desplats. Dignité de la personne humaine : peut-on parler d'une exception française? . Les Cahiers de l'Institut Louis Favoreu, Presses Universitaires d'Aix Marseille 2013, Existe-t-il une exception française en matière de droits fondamentaux?, pp.173-180 : <https://hal.parisnanterre.fr/hal-01665264/document>

<sup>200</sup> See e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (on homosexuality), *Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognition of same sex marriage); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (concerning abortion); but see now *Dobbs v. Jackson Women's Health Organization*, judgment of 24 June 2022.

<sup>201</sup> See Heselhaus, S., Hemsley, R. (2019). Human Dignity and the European Convention on Human Rights. In: Becchi, P., Mathis, K. (eds) Handbook of Human Dignity in Europe. Springer. Note that Protocol No 13 to the ECHR concerning the abolition of the death penalty refers to human dignity in its preamble: 'the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings'.

<sup>202</sup> *SW v United Kingdom* (1995) 21 EHRR 363.

<sup>203</sup> See e.g. *Pretty v United Kingdom* (2002) 35 EHRR 1, 33, para 52; *East African Asians v United Kingdom*, (1973) 3 EHRR 76, 86, para 207.

<sup>204</sup> BVerfG, judgment of 15 February 2016, 59 Neue Juristische Wochenschrift(NJW) 751 (2006).

Article 14 of the Air Transport Security Act of 2004 (Luftsicherheitsgesetz), which empowered such downing, showed no respect for the well-being of innocent passengers who were treated as part of the weaponized aircraft. Death cannot be viewed as unavoidable damage for the achievement of other objectives nor can decisions about human life be reduced to a mere quantitative exercise comparing numbers.<sup>205</sup>

Despite the variations in the understanding of human dignity in different states and that fact that its precise content is sometimes difficult to pin down, there is no denying that it is an overarching value that imbues the interpretation of human rights norms and places the individual at the heart of the legal order. Far from being an empty word, it is a fundamental attribute of a ‘decent society’.<sup>206</sup> It plays an important role in human rights discourse and defines the outlook of post World War II European constitutionalism.

There is consensus on its minimum content. Torture, degrading treatment, or the legalisation of marital rape would be contrary to human dignity.<sup>207</sup> Beyond a ‘minimal universalism’,<sup>208</sup> however, it is not the case that the concept must have a uniform interpretation throughout Europe.

Respect for human dignity entails not only negative but also positive obligations on the state. It requires that one of the fundamental goals of the state is to facilitate the social, political and economic fulfilment of the individual as a member of society. State action should be guided by the need to ensure that the basic needs of each individual are met. Understood in that way, respect for human dignity entails recognition of a minimum of socio-economic rights.<sup>209</sup> The link between human dignity and socio-economic rights is particularly manifested in some constitutions. For example, Article 23 of the Constitution of Belgium enumerates a series of socio-economic rights that derive from the right to human dignity<sup>210</sup> but it is accepted that it is not directly effective, i.e. the specific rights provided therein only apply according to any laws passed to implement them.<sup>211</sup> The Italian

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<sup>205</sup> See also as a further example *Wackenheim v. France* where the UN Human Rights Committee found that the French ban on dwarf tossing, a game where a person suffering from dwarfism would, wearing protective clothing, be tossed by players was not in breach of the principle of non discrimination: *Manuel Wackenheim v. France*, 15 July 2002, Communication No 854/1999 and, for the full text of the decision: <http://www1.umn.edu/humanrts/undocs/854-1999.html>

<sup>206</sup> *R v. Secretary of State for the Home Department ex parte Adam (FC)* [2005] UKHL 66, per Lord Bingham at para 76 (in relation to the right to life).

<sup>207</sup> Provide reference

<sup>208</sup> The term is borrowed from W.A. Galston, op.cit., at 97.

<sup>209</sup> See e.g. CJEU, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, ECLI:EU:C:2019:218, para 92 and ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, CE:ECHR:2011:0121JUD003069609, paras 252 to 263.

<sup>210</sup> These rights include among others, the right to employment and to free choice of an occupation; the right to social security, health care and to social, medical and legal aid; the right to decent housing; the right to the protection of a healthy environment; the right to cultural and social development; and the right to family benefits.

<sup>211</sup> For a discussion of the way the Belgian courts approach human dignity, see G. Schamps, “La notion de dignité humaine en droit belge: diverses approches”, in B. Feullet-Liger et F. Orfali, (dir.), *La dignité de la personne : quelles réalités ?*, 1e édition, Bruxelles, Bruylant, 2016, p. 43-68).

Constitution refers expressly to human<sup>212</sup> and also social dignity.<sup>213</sup> The Italian Constitutional Court has developed rich case law. It has, for instance, derived from it the right to housing.<sup>214</sup> It has held that the principle limits the state's power to impose on individuals' medical treatments against their will,<sup>215</sup> and used the principle to protect migrants, refugees,<sup>216</sup> and detainees.<sup>217</sup> The Court has invoked the principle as a basis for finding that, under specific circumstances, the criminalization of assisted suicide is in violation of the Constitution;<sup>218</sup> and has also used it to uphold the de-criminalization of prostitution.<sup>219</sup>

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<sup>212</sup> See Article 41, [THE CONSTITUTION OF THE ITALIAN REPUBLIC \(cortecostituzionale.it\)](https://www.cortecostituzionale.it)

<sup>213</sup> See Article 3, [THE CONSTITUTION OF THE ITALIAN REPUBLIC \(cortecostituzionale.it\)](https://www.cortecostituzionale.it).

<sup>214</sup> E.g. Corte Costituzionale, Sentenza 43/2022, ECLI:IT:COST:2022:43, para. 6.2 recalling previous case-law sentenza n. 217/1988; 404/1988; Sentenze n. 44/2020 and 168/2014; 161/2013; 61/2011; 176/2000; 112/2021.

<sup>215</sup> E.g. Corte Costituzionale, Sentenza 22/2022, ECLI:IT:COST:2022:22.

<sup>216</sup> E.g. Corte Costituzionale, Sentenza 194/2019, ECLI:IT:COST:2019:194.

<sup>217</sup> E.g. most notably Corte Costituzionale, Sentenza 12/1966, ECLI:IT:COST:1966:12.

<sup>218</sup> E.g. Corte Costituzionale, Sentenza 249/2019, ECLI:IT:COST:2019:242.

<sup>219</sup> E.g. Corte Costituzionale, Sentenza 44/1964, ECLI:IT:COST:1964:44.

## **Principle 25: Equality before the law**

*Everyone is equal before the law.*

### **Commentary**

This clause expresses the principle of formal equality as a constitutional virtue and represents one of the basic tenets of the rule of law. It has, perhaps, greater resonance than any other legal principle.<sup>220</sup> Equality before the law means that the law must be applied in the same way to all people irrespective of status. It is supplemented by Principle 26 on non-discrimination or substantive equality.

Formal equality is enshrined in Article 1 of the 1789 Declaration of the Rights of Man and Citizen issued by the French National Constitutional Assembly.<sup>221</sup> It has since been included in many constitutions worldwide and international conventions. Some of its most evocative expressions are found in Article 1 of the 1948 UN Universal Declaration of Human Rights,<sup>222</sup> and Articles 2(1) and 26 of the International Covenant on Civil and Political Rights of 1966.<sup>223</sup> It is also recognised in Article 20 of the EU Charter and Article 14 of the ECHR. It is guaranteed, among others, by the German Basic Law,<sup>224</sup> the Constitutions of France,<sup>225</sup> Italy,<sup>226</sup> Belgium,<sup>227</sup> Poland,<sup>228</sup> and the United States.<sup>229</sup>

Inevitably, the specific obligations that formal equality entails are fact-dependent and courts in different countries may take different views on the boundaries of the principle. There is however no denying that it is perceived as fundamental constitutional tenet and it is highly influential. Thus, for example, it is frequently invoked by the French *Conseil Constitutionnel*;<sup>230</sup> also, the equality clause enshrined in Article 3(1) of the Basic Law of Germany is one of the most frequently invoked provisions in the case law of the Federal Constitutional Court.<sup>231</sup>

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<sup>220</sup> T. Tridimas, *The General Principles of EU law*, 59.

<sup>221</sup> Article 1 states: 'Tous les êtres humains naissent libres et égaux en dignité et en droits'

<sup>222</sup> This provision states: 'All human beings are born free and equal in dignity and rights'

<sup>223</sup> Article 2(1) states: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>224</sup> Article 3(1).

<sup>225</sup> Article 1.

<sup>226</sup> Article 3(1).

<sup>227</sup> Articles 10 and 11.

<sup>228</sup> Article 32.

<sup>229</sup> See the XIV Amendment (Equal Protection Clause).

<sup>230</sup> See M. Verpeaux, P. de Montalivet, A. Roblot-Troizier, A. Vidal-Naquet, « Droit constitutionnel. Les grandes décisions de la jurisprudence », 2<sup>nd</sup> Ed., Thémis droit PUF, 2017, p. 614.

<sup>231</sup> See Donald P. Kommers and Russel A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany (Third Edition)* (Duke University Press 2012), 420, available [here](#).

Article 14 ECHR enshrines the protection against discrimination in the enjoyment of the rights set forth in the Convention.<sup>232</sup> This provision has an ancillary character. It does not provide a self-standing right but requires the equal enjoyment of the rights guaranteed in the Convention irrespective of the grounds listed in Article 14. This is a non-exhaustive list. In the *Belgian Linguistic* case, the ECtHR held that Article 14 does not presuppose breach of another article in order to come into operation. Provided that the applicant's claim falls within the ambit of one of the rights guaranteed by the Convention, the applicant may establish violation of Article 14 even though violation of another article is not established.<sup>233</sup> The prohibition of discrimination covers both direct and indirect discrimination.<sup>234</sup>

Equality before the law has both a positive and a negative aspect. Persons who are in a comparable situation must be treated in the same way in the application of the law unless there is an objective and reasonable justification for differential treatment (positive aspect). Also, persons who are in different situations must not be treated in the same way in relation to the application of the law without an objective justification (negative aspect).<sup>235</sup> An example of the negative aspect can be provided by the case law of the ECtHR. The Strasbourg Court has held that the refusal to appoint a person as a chartered accountant on the ground that, in the past, he had been convicted for insubordination for refusing to wear a military uniform ran counter to Article 14 ECHR.<sup>236</sup> The person concerned was a Jehovah's Witness and had refused to wear military uniform because he considered that his religion prevented him from doing so. There was a breach of Article 14 because, in the application of the law, no distinction was made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences. He was treated like any other person convicted of a serious crime although his own conviction resulted from the very exercise of his religious freedom which is guaranteed by Article 9 of the Convention.

Strictly understood, formal equality does not pertain to the content of the law but prohibits arbitrary distinctions in its application, irrespective of its content. Many legal systems or international instruments enshrine both formal and substantive equality.<sup>237</sup> Nonetheless,

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<sup>232</sup> Article 14 ECHR states as follows: 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

<sup>233</sup> See *Belgian Linguistic (No. 1)* case, judgment of 9 February 1967, Series A, No. 5 (1979–80) 1 EHRR 241; *Abdulaziz, Cabales and Balkandali v UK*, judgment of 28 May 1985, Series A, No 94(1985) 7 EHRR 471; *Inze v Austria*, Series A, No. 126 (1987).

<sup>234</sup> *D.H. and Others v. the Czech Republic* [GC], 2007, § 184.

<sup>235</sup> See *Thlimmenos v. Greece* [GC], 2000, §44.

<sup>236</sup> *Thlimmenos v. Greece (Application no. 34369/97)*. For an example in EU law, see *Chatzi*, C-149/10, ECLI:EU:C:2010:534.

<sup>237</sup> See e.g. Articles 20 and 21 of the EU Charter of Fundamental Rights; Article 26 and Article 2 of the the International Covenant on Civil and Political Rights 1966 (right to non discrimination). Article 26 does not simply duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. The application of the principle of non-discrimination contained in Article 26 is therefore not limited to those rights which are provided for in the Covenant. See *Manuel Wackenheim v France*, Communication No 854/1999, U.N. Doc.



the two are closely linked and it would be difficult to conceive the principle of equality before the law in purely formal terms. As the Belgian Constitutional Court has held, the principle of equality and non-discrimination is not simply a principle of good legislation and good administration. It is one of the foundations of a democratic state based on the rule of law.”<sup>238</sup> The CJEU has seen the principle of substantive non-discrimination as a particular expression of the general principle of equality before the law.<sup>239</sup>

Formal equality is also closely linked to the protection of minorities.<sup>240</sup> Thus, the Council of Europe Framework Convention for the Protection of National Minorities<sup>241</sup> includes the right to equality before the law for persons belonging to national minorities. Article 4(1) states: ‘The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited’.

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CCPR/C/75/D/854/1999 (2002), UN Human Rights Committee, Seventy-fifth session, 15 July 2002, <http://www1.umn.edu/humanrts/undocs/854-1999.html>

<sup>238</sup> [Judgment n°17/2009, 12 February 2009, B.10.3.](#)

<sup>239</sup> See e.g. *A v Veselības ministrija*, C-243/19, ECLI:EU:C:2020:872, para 35.

<sup>240</sup> See, e.g. Article 11 of the Belgian Constitution, added in 1970, according to which ‘The enjoyment of the rights and freedoms granted to Belgians must be guaranteed without discrimination. To this end, the law and the decree guarantee in particular the rights and freedoms of ideological and philosophical minorities’. This provision was initially added to better protect ideological minorities in Belgium (see B. Renauldt and S. Van Drooghenbroeck, “Le principe d’égalité et de non-discrimination”, *Les droits constitutionnels en Belgique*, Bruxelles, Bruylant, 2011, p. 557).

<sup>241</sup> ETS No. 157.

## **Principle 26: Non-discrimination**

*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

### **Commentary**

A liberal democracy must protect both formal and substantive equality. It is not sufficient that the law applies in the same way to all persons. It is also necessary that the content of the law does not make arbitrary distinctions on the basis of status. In fact, the distinction between formal and substantive equality is not clear cut and aspects of status equality may be viewed as part of equality before the law. Principle 26 refers to an indicative and not an exclusive list of statuses. It requires essentially that persons who are in a comparable position should not be treated differently unless there is objective justification. It also requires that incomparable situations must not be treated in the same way.<sup>242</sup> This is the understanding of the principle, for example, under the case law of the CJEU and the German Federal Constitutional Court.<sup>243</sup>

Principle 26 does not prohibit any difference in treatment but only arbitrary distinctions. According to the case law of the ECtHR, objective justification exists if there is a legitimate aim and a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.<sup>244</sup> A similar test is followed by the CJEU and other courts and adjudicative bodies, including the UN Human Rights Committee.<sup>245</sup> Inevitably, a margin of appreciation is recognised to states. This will vary according to the subject-matter and the circumstances.<sup>246</sup> Subject to this, Principle 26 prohibits both direct and indirect discrimination. The definition of indirect discrimination may differ from state to state or, even within the same legal order, from statute to statute, depending on its objectives. It can be defined as differential treatment which, although not based on a prohibited criterion (e.g. race) leads essentially to the same result by placing persons who meet that criterion at a particular disadvantage without adequate justification. Indirect discrimination does not necessarily require discriminatory intent and may exist because of the effects of a measure on a particular group.<sup>247</sup>

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<sup>242</sup> See above, [n.235](#) and accompanying text.

<sup>243</sup> Uwe Kischel, ‘GG Art. 3 [Gleichheit vor dem Gesetz]’ in Volker Epping and Christian Hillgruber (eds), BeckOK Grundgesetz (50. Edition) (Beck Online 2022), available [here](#).

<sup>244</sup> See e.g. judgment of 28 May 1985, Series A, No. 94, para 72.

<sup>245</sup> See Manuel Wackenheim v France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), <http://www1.umn.edu/humanrts/undocs/854-1999.html>

<sup>246</sup> See e.g. *Rasmussen v. Denmark*, ECtHR, judgment of 28 November 1984, Series A, No. 87, para 40.

<sup>247</sup> Thus, according to the ECtHR, a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. See e.g. *D.H. and Others v. the Czech Republic* [GC], 2007, § 184, and see further the Guide

The principle of non-discrimination is enshrined in Article 21 of the EU Charter and Protocol No 12 to the ECHR. Protocol 12 was concluded on 4 November 2000 and entered into force on 1 April 2005, following its tenth ratification. So far, 20 of the 46 CoE Member States have ratified it. Notably, not all EU Member States have done so.<sup>248</sup> Nonetheless, the lack of ratification by all states should not deny the principle the status of a fundamental one. As already stated, the distinction between formal and substantive equality is difficult to make. The two are ‘closely intertwined’.<sup>249</sup> and, to a great extent, the obligations imposed by Principle 26 reflect obligations already undertaken by the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Also, the principle is recognised by the EU in primary law and concretised in extensive EU legislation. Notably, the Joint Committee on Human Rights of the UK Parliament took the view that Protocol 12 should be ratified by the UK and that the Government’s concern that ratification might lead to an explosion of litigation was not justified.<sup>250</sup> Further calls for the ratification of Protocol 12 have been made more recently.<sup>251</sup>

The goal of substantial equality allows positive action to correct structural inequalities by supporting minorities, vulnerable groups or groups that have historically been disadvantaged. As stated in the preamble to Protocol 12, the principle of non-discrimination does not prevent State Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.<sup>252</sup> Thus, affirmative action is not *per se* prohibited by Principle 26 but it is up to each individual state to decide the areas and extent to which it should be introduced.

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on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention.

<sup>248</sup> For a list of ratifications, see <https://sdg.humanrights.dk/en/instrument/signees/2470>

<sup>249</sup> See Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000, Council of Europe, European Treaty Series, No 177, para 15.

<sup>250</sup> See Joint Committee On Human Rights Seventeenth Report, Session 2004-05, paras 31-34, <https://publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9902.htm>

<sup>251</sup> See the views of the Equal Rights Trust (ERT) <https://www.equalrightstrust.org/news/uk-does-not-need-new-bill-rights-should-join-protocol-12-echr>.

<sup>252</sup> ECHR Protocol 12, preamble, recital 3.

The principle of non-discrimination as a substantive principle of law is enshrined in many constitutions, including the German Basic Law,<sup>253</sup> and the Constitutions of Italy,<sup>254</sup> Poland,<sup>255</sup> and France.<sup>256</sup>

Several Conventions developed within the framework of the Council of Europe prohibit specific forms of discrimination, including discrimination against women,<sup>257</sup> national minorities,<sup>258</sup> and regional and minority languages.<sup>259</sup>

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<sup>253</sup> Article 3(3) states that no person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.

<sup>254</sup> See Article 3(1) and for its interpretation, see EPRS, [I principi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato \(europa.eu\)](#) [2020].

<sup>255</sup> The principle is provided in Article 32 of the Constitution. The second paragraph specifies that no one shall be discriminated against in political, social or economic life for any reason whatsoever. Article 33 of the Constitution enshrines the principle of equality between men and women. A number of other provisions in the Constitution providing for a specific protection for persons from vulnerable groups indicate the importance of the principle of non-discrimination within the Polish legal order. See e.g. Article 68, paragraph 3 and Article 69.

<sup>256</sup> Article 1 of the French Constitution states as follows:

‘France is an indivisible, secular, democratic and social Republic. It ensures the equality before the law of all citizens without distinction of origin, race or religion. It respects all beliefs. It shall be organisation on a decentralised basis.

Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility.

The law favours equal access of women and men to electoral mandates and elective functions, as well as to professional and social responsibilities.”

The principle of non-discrimination is treated as a general principle of law by the *Conseil d’Eta*. See Fiches d’orientation, « Principe de non-discrimination », janvier 2022, Dalloz.fr ; Décisions fondamentales: Cons. const. 29 déc. 2009, n° 2009-599 DC, Taxe carbone ; Cons. const. 15 nov. 2007, n° 2007-557 DC ; Cons. const. 12 juill. 1979, n° 79-107 DC, Pont à péage; CE 10 mai 1974, Denoyez et Chorques, nos 88032, 88148.

<sup>257</sup> See e.g. Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210).

<sup>258</sup> See the Framework Convention for the Protection of National Minorities (ETS No. 157), referred to **above**, note 241 and accompanying text.

<sup>259</sup> European Charter for Regional or Minority Languages (ETS No. 148).

## PART SIX – PROTECTION OF FUNDAMENTAL RIGHTS

### Principle 27: Protection of Fundamental Rights

- 1. A liberal democracy must guarantee and protect effectively the rights and freedoms enshrined in the European Convention on Human Rights.*
- 2. States have a duty to uphold not only civil liberties but also social and economic rights. They must be guided, in respect of social and economic rights, by the principles stated in the European Social Charter.*

#### Commentary

Part Six of this Charter provides for the protection of fundamental rights. There is no intention to duplicate the provisions of the ECHR or other pan-European instruments. The emphasis is on making it clear that a liberal democracy must respect not only process but also a set of substantive rights. Principle 27 states this general commitment. Principle 28 refers to the application of fundamental rights to non-state actors. Principles 29 to 32 refer to certain rights which are particularly important in contemporary societies and which are not necessarily included in constitutional texts. These are the right to environmental protection and sustainability (Principle 29), the right to international protection (Principle 30), the right to welfare support (social solidarity) and the rights of the individual in relation to automated decision-making (Principle 32).

Principle 27(1) recognises the special position that the ECHR occupies in European constitutionalism. European States must respect the rights guaranteed by the Convention and the Protocols to that Convention which they have ratified. More generally, those rights establish important benchmarks for all states even if a state has not ratified a specific Protocol.<sup>260</sup> The obligation to respect the Convention applies also to international organisations established by European States such as the European Union. Article 6 of the TEU commits the Union to accede to the Council of Europe and also states that fundamental rights, as guaranteed by the ECHR, constitute general principles of law.<sup>261</sup> The EU Charter on Fundamental Rights also commits the European Union and its Member States to comply, as a minimum, with the ECHR.<sup>262</sup>

Furthermore, as the ECtHR has held, a Contracting Party to the Council of Europe cannot avoid its responsibilities under the ECHR by entering into international commitments.<sup>263</sup>

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<sup>260</sup> For a list of ratifications of each Protocol as they currently stand, see <https://www.coe.int/en/web/conventions/full-list>.

<sup>261</sup> See Article 6(2) and 6(3) TEU respectively.

<sup>262</sup> EU Charter, Article 52(3).

<sup>263</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no. 45036/98 (ECtHR, 20 June 2005).

Principle 27(2) takes the position that not only the rights guaranteed by the ECHR but also the more extensive corpus of rights, freedoms, and principles enshrined in the European Social Charter<sup>264</sup> should be considered as constitutional attributes of a European democracy. It is acknowledged that not all provisions included therein amount to enforceable rights.<sup>265</sup> It is also well understood that there are variations in the effect of the European Social Charter among the states that have signed it,<sup>266</sup> and that states must have ample discretion in relation to the recognition of specific socio-economic rights and the extent and circumstances of their protection. They are, however, an important pillar of European constitutionalism. They are protected by numerous national constitutions,<sup>267</sup> the EU, and the Council of Europe. European states share<sup>268</sup> a common commitment to ensure the well-being<sup>269</sup> of their citizens in a spirit of solidarity<sup>270</sup> between people, with the determination to improve living and working conditions, and combat exclusion.<sup>271</sup> This includes a shared understanding of the necessity to promote employment, dialogue between management and labour, as well as to ensure proper education<sup>272</sup>, health care<sup>273</sup> and social protection<sup>274</sup>, with specific attention for vulnerable groups.<sup>275</sup>

Some rights. e.g. the right to vote, freedom of assembly and association, and freedom of expression, are, in practice, functionally more important for the realisation of liberal democracy. Nonetheless, they cannot be separated from the rest of the fundamental rights of the individual. Civil liberties and social rights are closely connected and must be

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<sup>264</sup> The European Social Charter of 1961 (revised in 1996) is a Council of Europe treaty that guarantees fundamental social and economic rights and forms the counterpart of the ECHR, which provides for civil and political rights. It provides for rights related to employment, housing, health, education, social protection and welfare.

<sup>265</sup> The EU Charter draws a distinction between, on the one hand, rights and freedoms, and, on the other hand, principles which do not give rise to rights: see Article 52(5). Nonetheless, it is not always clear which provisions establish rights and which provide for principles. There is also some uncertainty surrounding the legal effect of principles.

<sup>266</sup> For the state of ratification, signature, and reservations, see <https://www.coe.int/en/web/european-social-charter/signatures-ratifications>.

<sup>267</sup> Constitution of Germany, Articles 1 *et seq.*, ‘acknowledg[ing] inviolable and unalienable human rights as the basis of every community, of peace and of justice in the world’ and providing for basic rights which ‘bind the legislative, the executive and the judiciary as directly applicable law’; Constitution of France, preamble, recital 1 (‘The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty’); Constitution of Greece, Article 25 (‘The rights of the human being as an individual and as a member of the society [...] are guaranteed by the State’); Constitution of Italy, Article 2 (‘The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed’).

<sup>268</sup> Sources used, and possibly to be further explored, are: TEU, TFEU, CFREU, Social Pillar, European Social Charter (Turin, 1961) and Community Charter of the Fundamental Social Rights of Workers (1989).

<sup>269</sup> Art. 3(1) TEU. See also, ‘social well-being’ in European Social Charter, Turin, 18.X.1961, Preamble.

<sup>270</sup> EU Charter, Preamble, recital 2: ‘Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity’.

<sup>271</sup> Preamble, TFEU; Art. 151 TFEU.

<sup>272</sup> See, for the Member States of the EU, European Pillar of Social Rights, Ch.1(1); Article 14 of the EU Charter. The European Pillar of Social Rights was proclaimed by the European Parliament, the Council and the Commission at the Gothenburg Summit in 2017. It sets out [20 key principles](#) intended to provide guidance towards a strong social Europe that is fair, inclusive and full of opportunity.

<sup>273</sup> European Pillar of Social Rights, Ch.3(16); Article 35 CFEU.

<sup>274</sup> European Pillar of Social Rights, Ch.3(12).

<sup>275</sup> Article 151 TFEU.

understood as a coherent whole. Taken together, they enable citizens to act and perceive themselves not only as addressees but also as co-authors of a mutually shared legal order.

Fundamental rights, subject to certain exceptions, are not absolute. According to a formula shared among European countries, and reflected in Article 52(1) of the EU Charter, they can be limited provided that the limitations imposed fulfil three conditions: (a) they are provided by law; (b) they are proportionate; and (c) respect the essence of the right.<sup>276</sup>

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<sup>276</sup> See, for a discussion, T. Tridimas and G. Gentile, *The essence of right: An unreliable boundary?* (2019) 20 German Law Journal, pp. 794.

## **Principle 28:**

### **The application to non-state parties of the obligation to respect fundamental rights**

- 1. Fundamental rights provide a value system that permeates not only the public sphere but also the private sphere. Legislation, administrative action and court decisions that regulate private relations must protect individuals against the exercise of private power that poses a serious threat to fundamental rights.*
- 2. Non-state parties, especially those that, as a result of their legal status, the nature of their activities or their market position, enjoy exceptional powers over individuals, must respect their fundamental rights.*

### **Commentary**

This principle is based on the premise that fundamental rights reflect values which are universal and guide not only the actions of the state but also the behaviour of private parties.

The first paragraph recognises that, in regulating private relations, all branches of government must be guided by the values of the constitution, including the protection of fundamental rights. Although, traditionally, national constitutions tend not to recognize the direct horizontal application of fundamental rights, there are many forms of indirect horizontality. Thus, statutes which regulate private relations must be interpreted in line with the constitution since it stands at the apex of the legal system. Also, courts, as emanations of the state, may be required not to enforce contractual covenants that run counter to fundamental principles, such as the prohibition of discrimination on grounds of race.<sup>277</sup> In some instances constitutional norms specifically outlaw private agreements that are incompatible with fundamental rights.<sup>278</sup>

The case law of the ECtHR recognizes that that the state may be under a positive obligation to protect Convention rights. On the basis of the case law,<sup>279</sup> a positive obligation has been defined as one which requires ‘national authorities to take the necessary measures to safeguard a right or, more specifically, to adopt reasonable and suitable measures to protect the rights of the individual’.<sup>280</sup> Such positive obligations attach to many Convention rights

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<sup>277</sup> See *Shelley v Kraemer* 334 U.S. 1 (1948).

<sup>278</sup> See e.g. Article 9(3) of the German Constitution outlawing agreements that restrict or seek to impair the right to form associations to safeguard and improve working and economic conditions.

<sup>279</sup> See e.g. the *Belgian linguistic case*, App No 1474/62 (ECtHR, 23 July 1968); *Marckx v Belgium*, App No 6833/74 (ECtHR, 13 June 1979); *Airey v Ireland*, App No 6289/73 (ECtHR, 9 October 1979); *X and Y v. The Netherlands*, App No 8978/80 (ECtHR, 26 March 1985).

<sup>280</sup> See Jean-François Akandji-Kombe, Positive obligations under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights, Human rights handbooks, No. 7, Council of Europe, 2007, p. 7 (footnotes omitted); and, for a recent discussion, C. Loven, “Verticalised” cases before the European Court of Human Rights unravelled: An analysis of their characteristics and the Court’s approach to them, 38 (2020) *Netherlands Quarterly of Human Rights*, 246.



and may require the state to take the measures necessary to guarantee Convention rights in relations between individuals.

The case law of the CJEU also takes the view that Member States must take the steps necessary to ensure that non-state parties do not violate the provisions of the EU Treaties<sup>281</sup> but goes much further. It recognizes the horizontal application of certain Charter rights given expression in EU legislation, including social rights, and derives from them specific remedies against private parties.<sup>282</sup> This is in line with the case law of the German Constitutional Court which, since its famous *Lüth* judgment, has recognized the horizontal or third-party effect (*Drittwirkung*) of fundamental rights.<sup>283</sup> The Bundesverfassungsgericht stated that the fundamental rights enshrined in the Basic Law exist primarily to protect the citizen against the state but held that they also incorporate a system of objective values. That system applies throughout the entire legal system and thus fundamental rights are also expressed indirectly in the domain of private law, affecting the relation between private parties. In case of a violation of their fundamental rights, individuals can thus invoke them in a suit against another individual. The Bundesverfassungsgericht has since recognized the horizontal effect of various constitutional rights, e.g. freedom of expression,<sup>284</sup> the right to freely choose one's occupation<sup>285</sup> and the right to the free development of one's personality.<sup>286</sup>

Even though European constitutions typically lack an express clause extending the obligation to observe fundamental rights to private actors, some courts or commentators consider that at least some constitutional provisions, for instance those relating to respect for human dignity, may be interpreted as applicable to non-state parties<sup>287</sup>.

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<sup>281</sup> Case C-265/95 *Commission v France* [1997] ECR I-6959.

<sup>282</sup> See e.g. Case C-144/05 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Case C-193/17 *Cresco Investigation v Markus Achatzi* of 22 January 2019 (EU:C:2019:43); Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* of 6 November 2018 (EU:C:2018:871).

<sup>283</sup> BVerfGE 7, 198, available [here](#).

<sup>284</sup> BVerfGE 7, 198, available [here](#).

<sup>285</sup> BVerfGE 81, 242, available [here](#).

<sup>286</sup> BVerfGE 89, 214, available [here](#).

<sup>287</sup> See e.g. in relation to Poland, P. Czarny, *Konstytucyjne podstawy prawnej regulacji stosunków prywatnoprawnych w Polsce (na tle koncepcji horyzontalnego oddziaływania praw konstytucyjnych oraz obowiązków ochrony tych praw przez państwo)* w: *Oddziaływanie współczesnych konstytucji na stosunki między podmiotami prywatnymi*, red. M. Florczak-Wątor, Kraków 2015, p.172-173 [https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/20015/czarny\\_konstytucyjne\\_podstawy\\_prawnej\\_regulacji\\_stosunkow\\_prywatnoprawnych\\_2015.pdf?sequence=1&isAllowed=y](https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/20015/czarny_konstytucyjne_podstawy_prawnej_regulacji_stosunkow_prywatnoprawnych_2015.pdf?sequence=1&isAllowed=y) and in relation to France, Jörn Reinhardt, « L'effet horizontal des droits fondamentaux », Editions Pedone, 2018. <https://univ-droit.fr/recherche/actualites-de-la-recherche/parutions/28197-l-effet-horizontal-des-droits-fondamentaux> ; Thomas Perroud, « La constitutionnalisation de droits fondamentaux explicitement horizontaux », *Revue des droits de l'homme*, n°21/2022, <https://journals.openedition.org/revdh/13953>. For an Italian example, see for instance [L'efficacia orizzontale dei diritti fondamentali al vaglio della Corte Federale Tedesca. Brevi note a margine di alcune recenti sentenze del Bundesverfassungsgericht di Francesca Episcopo - Giustizia Insieme](#). The author quotes as example of horizontal effect of fundamental rights the Italian Constitutional Court judgment 248/2013, ECLI:IT:COST:2013:248.

The second paragraph of Principle 28 recognizes that the distinction between public and private entities is porous and seeks to capture the fact that some non-state actors have special powers by reason of their mandate, their function, or their economic might. In modern vibrant economies many functions traditionally entrusted to the state are carried out by institutions of hybrid status or are outsourced to the private sector. Such functions include, for example, utilities, such as electricity supply or telephony or even policing services such as the running of a prison. This category also includes private law organisations that exercise quasi-regulatory functions within a specific field, such as trade unions or sporting organisations. The application of fundamental rights must be determined not by a formal criterion, i.e. the public or private law status of an entity, but by the function it performs.

A private organisation may also have special responsibilities because it may exercise substantial influence as a result of its market power or economic might. This includes intermediaries, such as online platforms, which, by the nature of their activities, control access to public space and may have a considerable influence on the political process.

Nonetheless, Principle 28(2) is not restricted to private organisations that have special powers. It recognises that some rights are so fundamental that they must be respected by all citizens. Thus, an employer may not discriminate against an employee on grounds of race or ethnic origin. In the overwhelming majority of cases, such prohibitions would be imposed by statute. But a core element of the right should be considered to emanate directly from the constitutional principle of non-discrimination.

Essentially, the extent to which private actors are bound by fundamental rights depends on a number of factors, including the importance and the nature of the right involved, the nature of the actor and the function it performs.<sup>288</sup>

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<sup>288</sup> See further ELI Report, *Business and Human Rights: Access to Justice and Effective Remedies*, 2022.

**Principle 29:**  
**Environmental protection and sustainability**

*1. The state must provide a high level of protection of the environment and promote sustainable development.*

*It must take effective action to achieve and maintain sustainability, mindful of humanity's responsibilities to future generations, and provide for effective remedies to ensure compliance with the right to environmental protection.*

*2. Environmental protection requirements must be integrated into the definition and implementation of state policies and activities.*

*3. States must endeavour to coordinate their actions with a view to achieving common standards for sustainability and environmental protection.*

*4. The obligation to respect the environment and promote sustainable development is a shared responsibility to be promoted in a spirit of solidarity by both state and private parties.*

**Commentary**

The protection of the environment and the promotion of sustainable development are key objectives that have made it to the very top of the political agenda at both national and international level. It is reported that, as of 2013, at least ninety national constitutions,<sup>289</sup> including the constitutions of many European states,<sup>290</sup> contained some kind of explicit reference to the right to environmental protection and three quarters of the World's Constitutions contained references to environmental rights or responsibilities.<sup>291</sup> Such references vary considerably in scope, content, and legal effect. In France, for example, the Charter for the Environment, which acquired constitutional force as a result of the constitutional revision of 2005,<sup>292</sup> elevates the safeguarding of the environment to a

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<sup>289</sup> See D. Boyd, The Effectiveness of Constitutional Environmental Rights, Yale UNITAR Workshop, April 26/27, 2013, <https://environment.yale.edu/content/documents/00003438/Boyd-Effectiveness-of-Constitutional-Environmental-Rights.docx?1389969747>. See also E. Daly, Constitutional Protection for Environmental Rights: The Benefits of Environmental Process, International Journal of Peace Studies, Volume 17, Number 2, Winter 2012.

<sup>290</sup> These include Germany (Articles 20a), Greece (Article 24), France (which devolves the protection of the environment to an entire Charter, see Charter for the Environment, Constitution of 1958), Hungary (Article 21), Italy (Article 9), Malta (Article 9(2), Chapter II), Portugal (Article 66), Spain (Article 45), and Switzerland (whereby the protection of the environment is provided for in Section 4, and more specifically Articles 73 and 74).

<sup>291</sup> D. Boyd, The Status of Constitutional Protection for the Environment in Other Nations, David Suzuki Foundation, p. 6, <https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf>, states that three quarters of the world's constitutions (149 out of 193) include explicit reference to environmental protection.

<sup>292</sup> See Révisions constitutionnelles de mars 2005: <https://www.conseil-constitutionnel.fr/les-revisions-constitutionnelles/revisions-constitutionnelles-de-mars-2005>

fundamental interest of the nation.<sup>293</sup> It provides that each person not only has the right to live in a balanced environment which shows due respect for health but also has a duty to participate in preserving and enhancing the environment.<sup>294</sup> By means of a constitutional reform effected in 2022, the protection of the environment has been inserted into Article 9 of the Italian Constitution.<sup>295</sup>

Notably, in July 2022, the UN General Assembly adopted a resolution recognising the right to a clean, healthy and sustainable environment as a human right, pointing out its interrelation with other rights recognised by international law and the fact that its implementation requires joint effort by states, international organisations, and private enterprises.<sup>296</sup>

The World Commission on Environment and Development (WCED) defines sustainable development as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>297</sup> The main reference point for this concept is the Declaration of Principles of the 1992 Rio Conference on Environment and Development which, although non-binding, have proved influential. As a result of the Rio declaration and subsequent developments, in international law, the term ‘sustainable development’ is understood to combine two principles: intergenerational and intragenerational equity.<sup>298</sup>

Principle 29 includes a number of clauses that give legal effect to the protection of the environment and sustainability.

The first paragraph imposes an obligation on state authorities to provide a high level of protection of the environment and promote sustainable development. It recognizes that the right to environmental protection and sustainability are enforceable rights that must be supported by effective remedies. This is not to say that they are absolute rights. They have to be balanced with other rights and can be limited, subject to the restrictions on limits that apply on any fundamental right.<sup>299</sup> But they have to be recognised as fundamental

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<sup>293</sup> See recital 6 of the preamble to the Charter for the Environment.

<sup>294</sup> See Articles 1 and 2 of the Charter for the Environment.

<sup>295</sup> As a result of the amendment, the first paragraph of Article 9 now reads: “The Republic promotes the development of culture and of scientific and technical research. It protects the environment, biodiversity and ecosystems, also in the interest of future generations. The law shall provide the ways and the means to protect animals”. Article 41, which deals with the regulation of private economic enterprise, now reads: “Private Economic Enterprise is free. It may not be carried out in conflict with social utility or in such a way as to harm health, the environment, security, liberty or human dignity. The law determines the appropriate programmes and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes.” (unofficial translation; see, for the original, [La Costituzione della Repubblica Italiana - con note \(cortecostituzionale.it\)](#)). For the amendment, see Constitutional Law of 11 February 2022, nr.1, (22G00019), entered into force on 09 March 2022.

<sup>296</sup> See UN General Assembly Resolution of 26 July 2022, <https://digitallibrary.un.org/record/3982508?ln=en>.

<sup>297</sup> See Report of the WCED, *Our Common Future* (1987), at 51.

<sup>298</sup> V. Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, p. 379.

<sup>299</sup> See above, Principle 27.

justiciable rights on a par with other constitutional rights.<sup>300</sup> References to the promotion of sustainable development are not intended to merely endorse an alternative paradigm of economic development, but, rather, to recognise sustainability as a horizontal priority of policy-making among European liberal democratic states.

Paragraph 2 is an integration clause modelled on Article 11 TFEU and Article 37 of the EU Charter of Fundamental Rights. Environmental protection and sustainability are transversal objectives and can be achieved effectively only if they underpin all aspects of economic and social policy.

The third and fourth paragraphs indicate respectively the need for coordinated action and solidarity. On the one hand, environmental protection and sustainability can only be achieved through international cooperation since environmental harm recognises no national borders. On the other hand, the promotion of these objectives is a shared responsibility of the public and the private sector.

State and private action in this field must be guided by an assessment of harm based on scientific evidence, taking a long-term perspective and taking into account the precautionary principle. This posits that, where there is uncertainty as to the existence or extent of risks to human health or the environment, action may be taken without having to wait until the reality and seriousness of those risks become fully apparent.<sup>301</sup>

In a number of countries, courts have become more assertive in enforcing the duties of state and private actors to protect the environment. In *Sharma*,<sup>302</sup> a landmark case, the Federal Court of Australia held that the Minister of the Environment had a common law duty of care to avoid causing children harm arising from climate impact when deciding to approve a coalmine extension. The judgment recognizes the special vulnerability of children and pays close attention to scientific evidence.<sup>303</sup> It has potentially far-reaching implications not only for public bodies but also private actors as it may condition their ability to undertake new projects, and lead to liability arising from actions that have an appreciable effect on the increase of global emissions.<sup>304</sup> European courts follow the same trend. In 2021, the French Conseil d'Etat annulled the government's refusal to introduce additional measures to reach the target resulting from the Paris Agreement which sets as a goal the reduction of greenhouse gas emissions by 40% by 2030. The Conseil d'Etat ordered the

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<sup>300</sup> See, to this effect and for the way the balancing should be conducted, the judgment of the German Federal Constitutional Court of 24 March 2021, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>.

<sup>301</sup> For a judicial expression of the principle, see, e.g. *Neptune Distribution*, C-157/14, EU:C:2015:823, paras 81 and 82.

<sup>302</sup> *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*, [2021] FCA 560.

<sup>303</sup> [Jacqueline Peel, Rebekkah Markey-Towler](#), A Duty to Care: The Case of *Sharma v Minister for the Environment* [2021] FCA 560, (2021) 33 *Journal of Environmental Law*, 727.

<sup>304</sup> See E de Wit, Landmark climate change decision, <https://www.nortonrosefulbright.com/en-au/knowledge/publications/a2f31ca9/landmark-climate-change-decision>

Government to take additional measures by 31 March 2022, since it had not shown that the greenhouse gas reduction trajectory for 2030 could be met without further action.<sup>305</sup>

In the same vein, the Bundesverfassungsgericht held<sup>306</sup> that the provisions of the Federal Climate Change Act of 2019 (KSG) which establish climate targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights<sup>307</sup> insofar as they failed to define with sufficient specificity emission reductions post 2030. The Court also found that fundamental rights were violated by the fact that the emissions allowed until 2030 substantially narrowed the remaining options for reducing emissions after 2030, irreversibly offloading emission reduction burdens after that time.

In 2021, the District Court of The Hague ordered Royal Dutch Shell to reduce its worldwide CO2 emissions by 45% by 2030.<sup>308</sup> The judgment has been hailed as the first globally where a court has imposed a duty on a company to contribute to the prevention of dangerous climate change.<sup>309</sup> The court found that Shell owes an ‘obligation of result’ to reduce CO2 emissions generated worldwide by its group’s operations and also a ‘best-efforts obligation’ to reduce CO2 emissions generated by its business partners, including suppliers and end-users.<sup>310</sup> Those obligations were derived from the open-ended provision of Article 6:162 of the Dutch Civil code which provides for liability in tort for unlawful acts. The requisite standard of care was determined, in part, in the light of international soft law instruments and Articles 2 and 8 ECHR. The specific level by which emissions must be reduced was determined by reference to IPCC reports and the Paris Agreement, the court observing a “widely endorsed consensus” that emissions must be reduced by net 45% by 2030 and to net zero by 2050. According to the court, this consensus applies globally and also to non-state actors.

The above developments illustrate a marked judicial shift towards recognising concrete rights and obligations to protect the environment and promote sustainability.

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<sup>305</sup> Conseil D’Etat, Décision de Justice du 2 juillet 2021 nr. N° 427301.

<sup>306</sup> the judgment of the German Federal Constitutional Court of 24 March 2021, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>

<sup>307</sup> The rights in issue were the right to life and health, the right to property, and Article 2(1) (right to personality) in conjunction with Articles 20a (right to an ecological minimum standard of living (ökologisches Existenzminimum)) and Article 1(1), 1st sentence, (human dignity) of the German Constitution.

<sup>308</sup> District Court of the Hague, 26 May 2021.

<sup>309</sup> See Cleary Gottlieb comment, Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company, 30 June 2021, [https://www.clearygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company#\\_ftn26](https://www.clearygottlieb.com/news-and-insights/publication-listing/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company#_ftn26).

<sup>310</sup> Op.cit.

### **Principle 30: Right to international protection**

1. *The right to asylum, as guaranteed by the Geneva Convention, is a fundamental right of constitutional status.*
2. *A state must provide legal protection to refugees in compliance with the principle of non-refoulement.*
3. *A state must protect, as provided by national law, third country nationals or stateless persons who, if they were returned to their country of origin, would face a real risk of suffering serious harm.*
4. *States have the power to control their borders in accordance with the law and subject to their obligations under international law.*

#### **Commentary**

The right to international protection covers the right to asylum and the right to subsidiary protection.

The first paragraph enshrines the right to asylum which is provided by the 1951 UN Convention relating to the Status of Refugees.<sup>311</sup> It is granted by a foreign state to a person who has a well-founded fear of persecution in his or her country of origin on the basis of race, religion, nationality, membership of a particular social group or political opinion.<sup>312</sup> Although the right to asylum does not receive express constitutional protection in all constitutions, it is guaranteed by some of them and there is no doubt that it is a fundamental right under international and EU law. It is recognised, among others, by the German,<sup>313</sup> the Italian,<sup>314</sup> the Polish,<sup>315</sup> and the French<sup>316</sup> constitution. Although the ECHR does not expressly guarantee the right, the obligation of Contracting Parties to guarantee the right to life (Article 2) and the prohibition of torture, inhuman or degrading treatment or punishment (Article 3) impose barriers on removing asylum seekers.<sup>317</sup> The ECtHR has

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<sup>311</sup> The Convention was adopted on 28 July 1951 and came into force on 22 April 1954.

<sup>312</sup> Article 1(2).

<sup>313</sup> Article 16a of the Basic Law provides for the right of asylum and limitations to its scope. The right was created in response to the political persecution during the Nazi dictatorship. See Hans-Georg Maaßen, ‘GG Art. 16a [Asylrecht]’ in Volker Epping and Christian Hillgruber (eds), BeckOK Grundgesetz (50. Edition) (Beck Online 2022), available [here](#).

<sup>314</sup> Articles 10(2) and 10(3).

<sup>315</sup> Article 56.

<sup>316</sup> The Preamble of the French Constitution of 1946 states that “any man persecuted in virtue of his actions in favour of liberty may claim the right of asylum upon the territories of the Republic”. The *Conseil Constitutionnel* affirmed the constitutional value of the right of asylum in *Décision n° 93-325*, 13 August 1993, para 83.

<sup>317</sup> Other ECHR rights may also engage. For a summary of the ECtHR case law, see [https://echr.coe.int/Documents/COURTalks\\_Asyl\\_Talk\\_ENG.PDF](https://echr.coe.int/Documents/COURTalks_Asyl_Talk_ENG.PDF) and [https://www.echr.coe.int/Documents/Guide\\_Immigration\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf).

reiterated that turning away individuals and thereby putting them at risk of torture or other forms of inhuman or degrading treatment would be a violation of Article 3 of the ECHR. The ECtHR has developed an extensive case-law on the principle of non-expulsion or non-return (*non-refoulement*) and the rights of migrants and asylum seekers, in some respect going beyond the protection offered by UK and US courts.<sup>318</sup>

The second paragraph reiterates the principle of *non-refoulement*. That principle is provided in Article 33 of the 1951 UN Convention relating to Refugees which states as follows.<sup>319</sup>

‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’

The UNHCR takes the view that the principle of *non-refoulement*, as enshrined in Article 33 and complemented by *non-refoulement* obligations under international human rights law, is a rule of customary international law.<sup>320</sup> This means that it is binding on states including those that are not party to the 1951 Convention or its 1967 Protocol.<sup>321</sup>

In European Union law, the principle of *non-refoulement* is enshrined in Article 18 of the EU Charter of Fundamental Rights and Article 78(1) TFEU. The rights of refugees are the subject of several measures adopted by the EU institutions.<sup>322</sup>

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<sup>318</sup> See *Hirsi Jamaa et al. v. Italy*, App. No. 27765/09, 55 Eur. Ct. H.R. 21 (2012). Cf *European Roma Rights Centre and others v Immigration Officer at Prague Airport*, [2004] UKHL 55; *Sale v Haitian Centers Council*, (1993) 509 U.S. 155.

<sup>319</sup> The principle of non-refoulement was also incorporated and expanded in the 1967 United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, which entered into force on 4 October 1967.

<sup>320</sup> See UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, paras 14-15, <https://www.unhcr.org/4d9486929.pdf>, and see Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, 16 January 2002.

<sup>321</sup> See UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, op.cit., para 15.

<sup>322</sup> These include: (1) the Dublin Regulation (Regulation (EU) No 604/2013, OJ L 49, 25.2.2017); (2) the Asylum Procedures Directive (Directive 2013/32/EU, OJ L 180); (3) The Reception Conditions Directive, (Directive 2013/33/EU, OJ L 180); (4) The Qualifications Directive (Directive 2011/95/EU, OJ L 337/9); (5) The EURODAC Regulation (Regulation (EU) No 603/2013, OJ L 180); (6) the Return Directive (Directive 2008/115/EC, OJ L 348/98); and (7) the Temporary Protection Directive (Directive 2001/55/EU, OJ 2001, L 212/12).



The third paragraph provides for the right to subsidiary protection. The drafting group considered that, in accordance with contemporary developments in European law,<sup>323</sup> protection should be extended to persons in peril beyond the very narrow protection provided in the UN Refugee Convention.

Subsidiary protection is provided by the EU Qualifications Directive.<sup>324</sup> It is granted to third country nationals or stateless persons who do not qualify as refugees but in respect of whom substantial grounds have been shown for believing that if they were returned to their country of origin, they would face a real risk of suffering serious harm. Serious harm includes (a) the death penalty; (b) torture or inhuman or degrading treatment or punishment; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>325</sup> Such protection is to be provided under terms to be specified under the law of each state.

The fourth paragraph recognises that states have a legitimate interest to control their borders. Such control must be exercised in accordance with the rule of law. This means that any control measures must be provided by law and exercised in accordance with it. They must also respect international law obligations.

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<sup>323</sup> These are the extensive case law of the ECtHR and the measures adopted by the European Union, as interpreted by the CJEU in the light of the EU Charter of Fundamental Rights. Thus, for example, under the case-law of the ECtHR, Article 3 of the ECHR precludes the removal of a seriously ill person where he or she is at risk of imminent death or where substantial grounds have been shown for believing that, although not at imminent risk of dying, he or she would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of suffering a serious, rapid and irreversible decline in his or her state of health resulting in intense pain or a significant reduction in life expectancy: see *Paposhvili*, CE:ECHR:2016:1213JUD004173810, paras 178 and 183; and see *Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)*, C-69/21, ECLI:EU:C:2022:913.

<sup>324</sup> The Qualifications Directive (Directive 2011/95/EU, OJ L 337/9).

<sup>325</sup> See Qualifications Directive, Article 15, but note also the exclusions under Article 17.

### **Principle 31: Social solidarity**

- 1. The State must endeavour to guarantee the provision of a minimum of welfare support in the interest of social solidarity.*
- 2. Welfare support includes healthcare, education, housing and basic means of subsistence.*
- 3. Non-state entities and civil society shall be mindful of the objective of social solidarity and may endeavour to complement the state-guaranteed provision of welfare support.*

#### **Commentary**

A liberal democratic state is expected to demonstrate concretely an interest in the well-being of its citizens and the socio-economic conditions in which they live. To this end, the first paragraph requires that the state must endeavour, to the maximum of its available resources, to provide welfare support to those who are in need of it. This is closely related to respect for human dignity as the basis of individual rights (Principle 24), and the broader, communitarian objective of social solidarity, which permeates the constitutional identity of European states. It also aligns with the obligation of progressive realisation of rights provided by the International Covenant on Economic, Social and Cultural Rights.<sup>326</sup>

Many constitutions recognize a minimum obligation on the state to provide welfare support. Thus, for example, the Greek Constitution provides that the ‘principle of the welfare state rule of law’ is guaranteed by the state.<sup>327</sup> The Italian Constitution also acknowledges the importance of social solidarity<sup>328</sup> and provides that citizens who are ‘unable to work and [are] without the necessary means of subsistence’ are ‘entitled to welfare support’.<sup>329</sup> The Portuguese Constitution refers to the commitment to build ‘a free, just and *solidary* society’;<sup>330</sup> Article 63 thereof provides for a specific article on ‘the right to social security’,<sup>331</sup> which precedes more specific articles on health, housing and quality of life. The Polish Constitution refers to solidarity as one of the tenets of the state’s

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<sup>326</sup> UN General Assembly Resolution 2200A(XXI), 16 December 1966. Article 2(1) of the Covenant commits each State party to the Covenant to undertake ‘to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

<sup>327</sup> Constitution of Greece, Article 25(1).

<sup>328</sup> Constitution of Italy, Article 2: ‘The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled’.

<sup>329</sup> Constitution of Italy, Article 38. Also see Constitution of Croatia, Articles 49 and 64.

<sup>330</sup> Constitution of Portugal, Article 1. Emphasis added.

<sup>331</sup> This is similar to Article 41 of the Constitution of Spain: ‘The public authorities shall maintain a public Social Security system for all citizens which will guarantee adequate social assistance and benefits in situations of hardship, especially in cases of unemployment’.

economic paradigm of ‘social market economy’.<sup>332</sup> Reference to that term is also made in Article 3(3) TEU which sets out the objectives of the Union.

The second paragraph of the principle sets out the areas in which welfare support may be provided. The right to education, in particular, is protected in many European constitutions<sup>333</sup> and international instruments and Europe and beyond. For example, Article 14 of the EU Charter on Fundamental Rights states that everyone has the right to education and that right includes the possibility to receive free compulsory education.<sup>334</sup> Welfare support to ensure a minimum level of education is instrumental in facilitating active engagement in democratic life by informed citizens, which, in turn, is central to the functioning of representative democracy as elaborated upon in Part I of this Report.

Paragraphs 1 and 2 impose a best-efforts obligation that requires concrete planning. It is recognised that the intensity of the obligation will vary depending on the right in issue. Rights, or aspects thereof, that do not create allocative burdens, have much stronger force. For example, to state the obvious, the right not to be evicted from a house without effective due process is a hard right.<sup>335</sup> Furthermore, the Principle has a very basic minimum core element. Thus, as noted in relation to the International Covenant on Economic, Social and Cultural Rights, a state where ‘any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations’.<sup>336</sup>

The third paragraph recognises that the provision of welfare support is not exclusively a state objective. Non-state entities and civil society may generally endeavour to act in pursuit thereof, with a view to complementing the state-guaranteed provision of welfare support.<sup>337</sup>

Principle 31 does not dictate the way in which such welfare support is to be provided, administered or funded. It lays down a minimum requirement which is in line with the common traditions of European states as developed after the Second World War. It leaves ample scope for discretion in determining the beneficiaries, the level of support and the conditions under which it is to be granted. The scope of welfare support will, inevitably, depend on competing state interests, including fiscal prudence. The Principle does not amount to a state obligation to adopt any particular economic model. It rather recognizes that, to respect human dignity and promote social solidarity, a degree of redistribution of

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<sup>332</sup> Constitution of Poland, Article 20: ‘A social market economy, based on the freedom of economic activity, private ownership, and solidarity [...] between social partners’.

<sup>333</sup> See e.g. Article 14 of the Austrian Constitution, Article 24 of the Belgian Constitution, Article 53 of the Bulgarian Constitution, Article 66 of the Croatian Constitution, Articles 18 and 20 of the Cypriot Constitution, Articles 16 and 33 of the Czech Constitution, Articles 57 of the Slovenian Constitution, Article 27 of the Spanish Constitution, Articles 2 and 21 of the Swedish Constitution.

<sup>334</sup> See also e.g. Articles 13-14 of the International Covenant on Economic, Social and Cultural Rights, and Articles 24 and 28 of the Convention on the Rights of the Child.

<sup>335</sup> See Joint Select Committee on Human Rights, Parliament of the United Kingdom, 21<sup>st</sup> Report, para 46, <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/18307.htm>

<sup>336</sup> [General Comment No. 3 on the Nature of State Parties' Obligations under the Covenant, 1990, para 10.](#)

<sup>337</sup> Cf Constitution of Italy, Article 38: ‘Private-sector assistance [to entities and institutions established by or supported by the State] may be freely provided’.

economic means, coordinated by the state, is needed to ensure that the basic needs of every citizen are met.

### **Principle 32: Automated decision-making**

- 1. The use of automated means to take decisions which affect the individual shall not undermine the safeguards and level of protection applicable by law to the rights or interests affected.*
- 2. Where authorities that exercise public functions use automated means to take decisions which affect the rights of the individual, automatic decision-making must be transparent and accountable.*
- 3. The law shall lay down the categories of decisions which must be subject to human review by virtue of the fact that they affect substantially the rights of the individual.*
- 4. Automated decision-making shall not prevent or unduly limit the exercise of the right to judicial protection of fundamental rights.*

#### **Commentary**

Major and fast-paced advances in computational technology have enabled machines to execute tasks and take decisions which traditionally required human intervention. Machine learning entails the application of complex algorithms or artificial intelligence (AI) to make decisions which affect the rights and interests of the individual. The remit of Automated decision-making (ADM) is immense. It spans many areas of economic, political and social life, including, for example, education, employment, credit, and even sentencing.

The ELI Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration define an ‘Algorithmic Decision-Making System’ to mean

‘a computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that makes a decision, or supports human decision-making used by a public authority.’<sup>338</sup>

Whilst ADM offers many advantages it is accompanied by many risks and pitfalls. These include the perception of unfairness where no human agency is involved, the lack of transparency, the lack of accountability, and, more generally, concerns arising from a novel and highly attenuated form of asymmetry. The citizen is unable to control or even understand the decision-making process, prompting fears of possible manipulation, discrimination and arbitrariness by government or other actors.

It is acknowledged that this is a nascent area of law in which there is a thriving debate and normative standards are still being developed. There are no common principles in the laws of European states. Nonetheless, this area is too important to be ignored, and certain

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<sup>338</sup> See Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration ELI, 2022, Article 2.

guidelines may be identified deriving from fundamental rights and principles of good governance.<sup>339</sup>

This Charter does not assert that there is a general right to a human decision. In line with the ELI *Guiding Principles for Automated Decision-Making in the EU*,<sup>340</sup> it starts from the premise that automated decision-making must be subject to safeguards equivalent to those that would apply if the decision was taken by non automated means. It proposes, however, that, in certain circumstances, restrictions may be necessary where automated decision-making has a direct and significant impact on the rights of the individual.

Paragraph 1 provides an obligation of equivalence: automated decision-making must be subject to the same safeguards that would apply if the decision in question had been taken through human intervention. Automation cannot lead to undermining the rights of the individual.

Paragraph 2 requires that automated decision-making must be transparent and accountable. Depending on the type of the decision involved, this may entail a series of more specific procedural safeguards which may include the following:

- (a) The persons concerned must be informed in advance where a decision is taken solely or principally by automated means;*
- (b) The role of technology and the general principles of the methodology used to arrive at the decision must be explained in advance in an intelligible form to the persons concerned;*
- (c) The decision must be reasoned;*
- (d) The person concerned must have the right of access to justice and the right to judicial protection.*

The requirement of transparency has to be seen in the light of the inherently complex and highly technical nature of automated processes the workings of which cannot be perceived with ease. Furthermore, automation must not be used at the expense of accountability.

Whilst paragraph 2 relates primarily to decisions taken by authorities that exercise public functions, it has to be read subject to Principle 28 on the application to non-state parties of the obligation to respect fundamental rights. It is also noted that, in practice, many of the automated systems used to reach decision by public authorities are developed by private enterprises. This cannot be an excuse to avoid compliance with the standards of Principle 32.

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<sup>339</sup> For a thorough discussion, see A.Z.Huq, *A Right to Human Decision*, 106 (2020) Virginia L.Rev.611.

<sup>340</sup> ELI Teresa Rodríguez de las Heras Ballell, *Guiding Principles for Automated Decision-Making in the EU*, ELI Innovation Paper, 2022.

Paragraph 3 recognises that in some cases, owing to the serious impact of a decision on a right or the importance of the right affected, special safeguards must apply and a decision cannot be entrusted solely to automated means. Such decisions must be subject to human review. An important point of reference in this context is Article 22(1) of the GDPR<sup>341</sup> which states that the data subject must have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her. This right is not absolute; Article 22(2) provides for certain exceptions.<sup>342</sup>

Paragraph 4 makes clear that automated decision-making may not prevent recourse to a court of law for the protection of a fundamental right and that, ultimately, there is a right to judicial protection by a human court. Thus, to give an extreme example, it would not be possible to allow the taking by automated means of sentencing decisions that may lead to deprivation of a person's liberty.

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<sup>341</sup> See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016, L119/1.

<sup>342</sup> In particular, under Article 22(2), the right does not apply if the decision (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller; (b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or (c) is based on the data subject's explicit consent.

## PART SEVEN – CONSTITUTIONAL INTEGRITY

### **Principle 33: Duty to uphold and respect constitutional values**

- 1. All branches of government have a duty to uphold the values and principles of liberal democracy and respect constitution. In exercising their powers and duties, they must act with integrity, in good faith, and observe not only the letter but also the spirit of the constitution.*
- 2. The above duties apply to all political actors.*
- 3. Private entities and individuals have a duty to respect the constitution and uphold the values and principles of liberal democracy.*

#### **Commentary**

This principle states that institutions of government, public authorities, and those who exercise public power have a paramount duty to observe the fundamental constitutional principles and act in accordance with the constitution. As stated under Principle 1, liberal democracy is not only an ideology and a system of governance but also a political culture. Its effectiveness presupposes that the incumbents must respect the ethos of democracy. This means acting with integrity, i.e. acting with a view to complying with the constitution and in the honest belief that the action taken respects it; and seeking to pursue the public interest rather than personal gain. The references to good faith and the spirit of the constitution do not suggest that free standing values can act as substitutes of, or trump, the letter of the law. Rather, they seek to capture the fact that constitutionalism is not exhausted in written norms since they cannot provide ready-made solutions to each and every issue or conflict. Where the norms are unclear, the exercise of political discretion and the balancing of conflicting rights or interests should be guided by the values and the objectives that underlie the constitution. Principle 33 is a transversal principle that complements the principles stated in the other Parts of this Charter.

The second paragraph extends the duty beyond public authorities and the branches of government to all political actors e.g. political parties and those who aspire to public office. Thus, for example, making baseless allegations that the election process is fraudulent or inciting the populus to resist the lawful exercise of power would be in breach of the principle whether they originated from the political party that holds power or one that sought to acquire it.<sup>343</sup>

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<sup>343</sup> Note however the guarantees provided by Principle 4 and the commentary thereunder.



### **Principle 34: State of emergency**

1. *Where an emergency threatens the life of a nation or the existence of the liberal democratic order, a derogation from the constitution may be introduced.*
2. *Any such derogation must, in particular, be subject to the following conditions:*
  - a) *It must be authorized by law;*
  - b) *It may only be used where there is an emergency that threatens the life of the nation or the existence of the liberal democratic order;*
  - c) *It must be strictly limited to what is necessary;*
  - d) *It must be limited in time with limited possibilities for renewal;*
  - e) *Its exercise must be subject to judicial review;*
  - f) *It may not derogate from non-derogable rights and may not affect the essence of fundamental rights.*

#### **Commentary**

Many constitutions contain clauses on state of emergency.<sup>344</sup> These grant to the government special powers in extraordinary circumstances which may result from external or internal threats, e.g. where a state is at war, where it is under attack or imminently threatened by one, or where it faces an extraordinary natural disaster or breakdown of law and order. In such cases, special powers may be recognized to the executive and derogations may be provided from fundamental rights. Emergency clauses are also present in the European Convention<sup>345</sup> and the EU Treaties.<sup>346</sup>

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<sup>344</sup> See e.g. the Constitution of Germany, Articles 115a et seq.; Article 80a, Article 91; for a comprehensive overview, see <https://www.venice.coe.int/files/EmergencyPowersObservatory/T09-E.htm>

<sup>345</sup> Article 15(1) ECHR permits derogations from certain Convention rights, but only (i) "in time of war or other public emergency threatening the life of the nation", (ii) if the measures taken go no further than is "strictly required by the exigencies of the situation", and (iii) if the measures are not inconsistent with the State's other obligations under international law. Under Article 15(2), derogations are not permitted from Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, or from Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery), and Article 7 (no punishment without law). Protocols to the Convention contain further clauses which prohibit derogation from certain rights: see Article 3 of Protocol No. 6 (abolition of the death penalty in time of peace), Article 4(3) of Protocol No. 7 (*ne bis in idem*), and Article 2 of Protocol No. 13 (complete abolition of the death penalty).

<sup>346</sup> See Articles 347-348 TFEU.

The expression ‘emergency that threatens the life of a nation’ refers to an exceptional situation of crisis or emergency which affects the population and constitutes a threat to the organised life of the community of which the state is composed.<sup>347</sup>

The above principle recognizes that, in such circumstances, deviations from constitutional standards may be necessary but, to be lawful, they must satisfy strict conditions. Otherwise, there is a risk of abuse. As characteristically put by Hardiman J, ‘The cry of emergency is an intoxicating one, producing an exhilarating freedom from the need to consider the rights of others and productive of the desire to repeat it again and again’.<sup>348</sup> Two limitations are particularly important in this context: compliance with the principle of proportionality, and availability of judicial review. A state of emergency can justify enhanced powers for the government but cannot lead to uncontrollable executive unilateralism. It cannot justify, for example, detention without trial for an unlimited period of time or doing away with the requirements of fair trial. The level of protection of fundamental rights cannot become solely a matter of conversation between the executive and the legislature excluding the involvement of the judiciary. It is significant in this respect that, following the attacks of September 11, courts on both sides of the Atlantic resisted the temptation to abstain from questioning detentions of individuals and other restrictive anti-terrorist measures.<sup>349</sup> As the US Supreme Court has declared, it is the courts’ duty ‘in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty’.<sup>350</sup> It is also notable that courts around the commonwealth and in England have distanced themselves from the majority in *Liversidge v Anderson*.<sup>351</sup>

Principle 34(2) contains an indicative list of safeguards. In addition to those stated therein, the following should also apply:

- A constitution must not be amended during a state of emergency;
- Neither the courts nor the parliament may be disbanded;
- Judicial redress should be available not only retrospectively after the state of emergency has been lifted but also, in appropriate cases, while it is in force;

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<sup>347</sup> See ECtHR, *Lawless v Ireland (No. 3)*, Application no 332/57, judgment of 1 July 1961, para 28; and see further *Ireland v. the United Kingdom*, Application no 5310/71, judgment of 18 January 1978, para 205; *Aksoy v. Turkey* (1996), para 70.

<sup>348</sup> [Dellway Investments and Others v. NAMA and Others \[2011\] 4 I.R. 1](#) at 289.

<sup>349</sup> See e.g. *Hamdan v Rumsfeld*, 126.S.Ct. 2749; *Boumediene v Bush*, 128 S.Ct. 2229, *A & X v. Secretary of State for the Home Department*, [2005] 2 AC 68; Within the EU, see C-402/05 P *Kadi*, EU:C:2008:461. C-300/11 ZZ (*ZZ v Secretary of State for the Home Department*) EU:C:2013:363.

<sup>350</sup> *Hamdan v Rumsfeld*, 126.S.Ct. 2749 at 2772.

<sup>351</sup> [1941] UKHL 1. In that case, the House of Lords held by majority that, under war legislation which enabled the Secretary of State to detain persons if he had ‘reasonable cause’ to believe that they had hostile associations, the Secretary of State’s belief was subject to a subjective and not an objective test. In other words, it sufficed that he believed that there was reasonable cause and it was not necessary to establish that his belief was subject to an objective standard of reasonableness. Cf the dissenting opinion of Lord Atkin. For subsequent cases adopting an objective standard, see e.g. *George v Rockett* (1990) 170 CLR 104 (Australia); *A & X v. Secretary of State for the Home Department*, [2005] 2 AC 68 (United Kingdom).

The above limitations also apply, more generally, in times of crisis which, even though do not reach the magnitude of threat stated in Principle 34, nonetheless pose exceptional challenges and thus require state intervention beyond that applicable at ordinary times, e.g. in the case of a health pandemic.<sup>352</sup>

In all cases of emergency identified above a balance needs to be reached. It is clear that state authorities must be able to take swift and effective action to safeguard the paramount interests at stake. But it should also be borne in mind that such action must be limited and supervised. It cannot be immune from the obligation to respect essential constraints nor can be used as a pretext to suppress constitutional guarantees.

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<sup>352</sup> Thus, for example, a fundamental right that CJEU held that must be protected in the context of a state of emergency declared in one Member State because of the mass influx of aliens is the right to apply for asylum: C-72/22 PPU, *M.A. v Valstybės sienos apsaugos tarnyba*, ECLI:EU:C:2022:505, paras 61-63. The CJEU also held, in that context, that limitations to the right to liberty must also apply only in so far as is strictly necessary: see para 83 of that judgment.

**Principle 35:  
Prohibition of abuse of rights**

*No state authority, group or private party has the right to engage in any activity aimed at undermining or destroying the fundamental constitutional principles.*

**Commentary**

A number of European constitutions prohibit the abusive exercise of civil liberties and fundamental rights.<sup>353</sup> Anti-abuse clauses are also contained in the ECHR<sup>354</sup> and the EU Charter for the Protection of Fundamental Rights.<sup>355</sup> These clauses reiterate the duty of political actors to act in good faith and uphold the constitution. Their extension to private parties may, at first sight, appear strange since, in principle, it is the citizen that needs to be protected from the state rather than the state that deserves protection from the citizen. The underlying idea, however, is that rights should not be used to undermine the democratic constitutional order, for example, by leading to a change of government that intends to abolish the very safeguards of the rule of law. Whilst a liberal democracy is an open system of government that places the individual at the heart of the community, it cannot allow its self-destruction. Thus, the purpose of the clause is not to authorize limitations on fundamental rights further and above those that are permitted by other fundamental principles. It is rather to supplement Principle 27 and resolve the liberal conundrum: liberalism thrives in pluralism of ideas but cannot tolerate diversity that denies its preservation.<sup>356</sup>

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<sup>353</sup> See <https://fra.europa.eu/en/eu-charter/article/54-prohibition-abuse-rights#national-constitutional-law>

<sup>354</sup> See Articles 17 and 18 ECHR.

<sup>355</sup> See Article 54 of the EU Charter which is modelled on Article 17 ECHR.

<sup>356</sup> See Andrew Koppelman, 'Unparadoxical Liberalism' (2017) 54 San Diego Law Review 257.

**Principle 36:**  
**Entrenchment of fundamental constitutional principles**

*Legal provisions which guarantee the fundamental constitutional principles stated in this Charter should enjoy entrenched protection.*

**Commentary**

The principles stated in this Charter represent the basic premises of a liberal democracy. They are fundamental in that they have an overarching character and stand at the apex of the legal system. As such, they have distinct legal qualities.

First, they have heightened interpretational value. All rules should be interpreted, as far as possible, so as to comply with them. A liberal democracy is presumed to intend to comply with them and, thus, when interpreting legislation and other measures, courts must do so in their light. As the US Supreme Court has put it, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”<sup>357</sup>

Secondly, to the extent that those principles are sufficiently specific, they should be able to give rise to enforceable rights. This is true, for example, in relation to Principle 24 (human dignity), Principle 25 (equality before the law), and Principle 26 (non-discrimination). Individual legal systems may provide for their own procedural requirements under which a right can be exercised. There are, for example, diverse rules on standing and remedies. It is not intended here to dictate a single solution or to require, for example, that a private applicant must have the right to challenge legislation directly before a court with a view to obtaining its annulment. It is however necessary for the rules governing procedure and remedies to provide effective protection of rights and ensure, as a minimum, that a measure is not applicable in specific circumstances where to do so would violate the above principles.

Thirdly, to be meaningful, fundamental constitutional principles must benefit from some degree of entrenchment, namely, special rules should apply for their amendment.

Constitutions around the world have various degrees of strictness. Some, like the German constitution, contain eternity clauses which prohibit the amendment of some of their provisions under any procedure.<sup>358</sup> This way, the protection of core values and rights cannot be effected even by a unanimous decision of a constitutional assembly. Various constitutions provide for different degrees of strictness.<sup>359</sup> The South African Constitution follows a system of granular entrenchment under which constitutional clauses are divided into different tiers, each tier being subject to a different revision procedure depending on

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<sup>357</sup> *Hooper v. California*, 155 U. S. 648, 657, *Obama care case*.

<sup>358</sup> Constitution of Germany, Article 79(3); Constitution of France, Article 89; Constitution of Italy, Article 139; Constitution of Greece, Article 110(1); Constitution of the Czech Republic, Article 9(2); Constitution of Portugal, Article 288.

<sup>359</sup> See, for instance, US Constitution, Article V; Constitution of the Federative Republic of Brazil, Article 60(4); Constitution of the Hellenic Republic, Article 110; Constitution of the Italian Republic, Article 139; Constitution of Portugal, Article 288.

the importance of its component clauses.<sup>360</sup> Although the degree of constitutional entrenchment is for each legal system to decide, it is considered that entrenchment as such is a logical consequence of adherence to fundamental constitutional principles. To the extent that those principles are intended to constrain the exercise of power by the majority, it makes eminent sense to recognise that, at the very least, the ordinary majority cannot amend them. Otherwise, there would be nothing to prevent it from liberating itself from those constraints. It will be recalled that, to safeguard himself from the deadly allure of the sirens, Ulysses ordered his sailors to tie him and gave them strict instructions not to untie him under any circumstances until his boat was well past their captivating songs. But what would be the value of such constraint if he could untie himself? For a constraint to be meaningful, its removal cannot be a prerogative of the authority on which it is imposed.

It is recognised that not all principles stated in this Charter require entrenchment. Some of them, for example, Principle 6 (protection against disinformation), Principle 22 (anti-corruption), and Principle 32 (automated decision-making) need not be included in a constitutional document. They are nonetheless constitutional in nature in the following respects. First, they impose certain limits on how a polity should be governed and provide benchmark at a fundamental level on how a state should function. Secondly, their essence must be respected by states and by all incumbent governments within a state.

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<sup>360</sup> See Constitution of South Africa, Article 74.