

The Maastricht Collection (9th Edition)

Edited by Sascha Hardt & Nicole Kornet

Volume II: Comparative Public Law

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Preface to the ninth edition

The Faculty of Law of Maastricht University attaches great importance to the study of European, international, and comparative law. Its curriculum includes several internationally oriented Master programmes and the *European Law School* bachelor programme, in which law is taught from a European and comparative perspective from the very first day. These four volumes, *The Maastricht Collection*, are based on the Maastricht Law Faculty's expertise and experience in teaching law with a European outlook to an international body of students.

The Maastricht Collection comprises a selection of legal instruments and provisions which have proven to be particularly relevant and useful to students and practitioners of European, international, and comparative law. It includes constitutions, codes and statutory law from France, Germany, the Netherlands, and the United Kingdom, as well as international treaties, instruments from international organisations, and legal instruments of the European Union.

The content of the present ninth edition of *The Maastricht Collection* is divided into four volumes, corresponding to different areas of the law. Volume I contains selected international treaties and protocols, important resolutions of international organisations, international and European fundamental rights instruments, as well as the treaties of the European Union and selected EU secondary legislation; Volume II contains national instruments of France, Germany, the Netherlands, and the United Kingdom from the areas of constitutional law (where the US constitution is also included as one of the standard points of reference of comparative constitutional law), administrative law, as well as criminal law and procedure; Volume III contains instruments from international and European private law, including international treaties and secondary EU legislation on international business law, private international law, European company law, European private law and civil procedure, as well as tax law; Volume IV contains national legislation from France, Germany, the Netherlands, and the United Kingdom in the area of private law and civil procedure.

With the publication of this ninth edition two years after the previous one (2024), the editors resume the two-year interval that has proven ideal to keep *The Maastricht Collection* an up-to-date companion to an evolving curriculum that remains close to current legal developments. The ninth edition presents an update to all the instruments contained in *The Maastricht Collection* and adds a number of instruments that have become central to legal education at Maastricht University and beyond, such as the EU's Digital Markets Act (Vol. III) or the UN Security Council Resolutions on Gaza and Ukraine (Vol. I). *The Maastricht Collection* thus remains a comprehensive resource for students of European, international, and comparative law. While many of the materials included in these four volumes are reproduced in the original English, *The Maastricht Collection* remains true to its original aim of facilitating the study of comparative law by offering fresh translations of legal instruments from different national legal

traditions. Many existing translations of written law, including official translations available on government websites, are often significantly out of date and not sufficiently faithful to the original. They often seek to turn old-fashioned or ambiguous original texts into modern and elegant English. Or, instead of translating, they seek to *explain* how certain terms or formulations are interpreted in practice. The translations contained in *The Maastricht Collection* remain as much as possible true to the content, style, and syntax of the original, allowing the reader to appreciate not only the substance but also the authentic form of legal sources.

Formatting styles, such as the use of §§ ('Paragraphs') rather than 'Articles' in most German statutes, and 'Sections' in UK legislation, or the absence of paragraph numbering in French legislation, are preserved. In the interest of consistency of style, the headings of individual articles are suppressed in translated materials. Enactment formulas are omitted; preambles to constitutions and international treaties are retained unless indicated otherwise. For easy reference within translated texts, key legal terms and proper names are added in the original language as in-text citations between square brackets.

The idea to create *The Maastricht Collection* came about during a conversation between Philipp Kiiver and Nicole Kornet about the need for English language learning resources for students following a programme on European and comparative law taught entirely in English. Just like students who follow a curriculum oriented on national law, students in the modern international classroom also need a compilation of legislation relevant to their studies. Since the publication of the second edition, the editorship of *The Maastricht Collection* has been continued by Sascha Hardt and Nicole Kornet. We are more than grateful to Philipp for being such a driving force behind the idea of *The Maastricht Collection*.

We would in particular like to thank Mariah Kuijer and Sofija Varkulevičiūtė, students of the *European Law School* and assistants to the editors, without whose meticulous hard work and dedication this ninth edition of *The Maastricht Collection* and its publication next to the many other responsibilities of the editors would not have been possible.

We would further like to thank the following people for their contributions and input to this and the previous editions throughout 16 years of editorial history: Prof. Bram Akkermans, Prof. Chris Backes, Prof. Anna Berlee, Stephanie Blom, Claire Boost, Caroline Calomme, Sylvain Caris, Prof. Fons Coomans, Merel Dekker, Prof. Mariolina Eliantonio, Prof. Sjeff van Erp, Dr. Catalina Goanta, Dr. Franziska Grashof, Dr. Nicola Gundt, Prof. René de Groot, Heike Hauröder, Prof. Aalt-Willem Heringa, Dr. Sander Jansen, Prof. Anselm Kamperman Sanders, Dr. Johannes Keiler, Prof. André Klip, Maartje Krabbe, Giesela Kristoferitsch, Alexandra Laplante, Prof. Raymond Luja, Prof. Gerrit van Maanen, Prof. Mieke Olaerts, Dr. Christina Peristeridou, Dr. Eveline Ramaekers, Dr. Stephan Rammeloo, Prof. Remco van Rhee, Dr. David Roef, Gereon Roetering,

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EU: Rule of Law Framework

Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. Brussels, 11.3.2014 COM (2014) 158 final [footnotes omitted].

1. INTRODUCTION

The rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. Along with democracy and human rights, the rule of law is also one of the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Mutual trust among EU Member States and their respective legal systems is the foundation of the Union. The way the rule of law is implemented at national level plays a key role in this respect. The confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into “an area of freedom, security and justice without internal frontiers”. This confidence will only be built and maintained if the rule of law is observed in all Member States.

The different constitutions and judicial systems of the EU Member States are, in principle, well designed and equipped to protect citizens against any threat to the rule of law. However, recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action. Results have been achieved. However, the Commission and the EU had to find ad hoc solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law. The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect. In September 2012, in his annual State of the Union speech to the European Parliament, President Barroso said: “We need a better developed set of instruments, not just the alternative between the ‘soft power’ of political persuasion and the ‘nuclear option’ of Article 7 TEU. In the following year’s speech, he said that “experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework [...]. The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe.”

In June 2013, the Justice and Home Affairs Council underlined that “respecting the rule of law is a prerequisite for the protection of fundamental rights” and called on the Commission “to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues”. In April 2013, the General Affairs Council held a comprehensive discussion on the topic.

In July 2013, the European Parliament requested that “Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law”.

This Communication responds to these requests. On the basis of the Commission’s experience, the inter-institutional debate and broad consultations, the Communication sets out a new framework to ensure an effective and coherent protection of the rule of law in all Member States. It is a framework to address and resolve a situation where there is a systemic threat to the rule of law.

The framework seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met. It is therefore meant to fill a gap. It is not an alternative to but rather precedes and complements Article 7 TEU mechanisms. It is also without prejudice to the Commission’s powers to address specific situations falling within the scope of EU law by means of infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU).

From a broader European perspective, the framework is meant to contribute to reaching the objectives of the Council of Europe, including on the basis of the expertise of the European Commission for Democracy through Law (Venice Commission).

2. WHY THE RULE OF LAW IS OF FUNDAMENTAL IMPORTANCE FOR THE EU

The principle of the rule of law has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ('the Court of Justice') and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.

Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components.

This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.

Within the EU, the rule of law is of particular importance. Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as "an area of freedom, security and justice without internal frontiers". Today, a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State. Those are clear examples of why all Member States need to be concerned if the rule of law principle is not fully respected in one Member State. This is why the EU has a strong interest in safeguarding and strengthening the rule of law threats across the Union.

3. WHY A NEW EU FRAMEWORK TO STRENGTHEN THE RULE OF LAW

In cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and, hence, to the functioning of the EU as an area of freedom, security and justice without internal frontiers. In such situations, the EU needs to act to protect the rule of law as a common value of the Union.

However, experience has shown that a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the instruments currently existing at the level of the Union.

Action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain rule of law concerns. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law.

There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law. For these situations, the preventive and sanctioning mechanisms provided for in Article 7 TEU may apply. The Commission is among the actors which are empowered by the Treaty to issue a reasoned proposal in order to activate those mechanisms. Article 7 TEU aims at ensuring that all Member States respect the common values of the EU, including the rule of law. Its scope is not confined to areas covered by EU law, but empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously. As explained in the Commission's Communication on Article 7 TEU, this is justified by the fact that "if a Member State breaches the

fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs”.

Nevertheless, the preventive mechanism of Article 7(1) TEU can be activated only in case of a “clear risk of a serious breach” and the sanctioning mechanism of Article 7(2) TEU only in case of a “serious and persistent breach by a Member State” of the values set out in Article 2 TEU. The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort.

Recent developments in some Member States have shown that these mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State.

There are therefore situations where threats relating to the rule of law cannot be effectively addressed by existing instruments. A new EU Framework to strengthen the Rule of Law as a key common value of the EU is needed in addition to infringement procedures and Article 7 TEU mechanisms. The Framework will be complementary to all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law. It reflects both the objectives of the EU to protect its founding values and to reach a further degree of mutual trust and integration in the area of freedom, security and justice without internal frontiers.

By setting up a new Framework to strengthen the Rule of Law the Commission seeks to provide clarity and enhance predictability as to the actions it may be called upon to take in the future, whilst ensuring that all Member States are treated equally. On the basis of this Communication, the Commission is willing to engage in further discussions with the Member States, the Council and the European Parliament on these issues.

4. HOW THE NEW EU RULE OF LAW FRAMEWORK WILL WORK

The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a “clear risk of a serious breach” within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched.

In order to ensure the equality of Member States, the Framework will apply in the same way to all Member States and will operate on the basis of the same benchmarks as to what is a systemic threat to the rule of law.

4.1. What will trigger the new Framework

The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.

The new EU Rule of Law Framework is not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice. These cases can and should be dealt with by the national judicial systems, and in the context of the control mechanisms established under the European Convention on Human Rights to which all EU Member States are parties.

The main purpose of the Framework is to address threats to the rule of law (as defined in Section 2) which are of a systemic nature. The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national “rule of law safeguards” do not seem capable of effectively addressing those threats.

The Framework would not prevent the Commission from using its powers under Article 258 TFEU in situations falling within the scope of EU law. Nor would it prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU.

4.2. The Framework as a three stage process

Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission will initiate a structured exchange with that Member State. The process is based on the following principles:

- focusing on finding a solution through a dialogue with the Member State concerned;
- ensuring an objective and thorough assessment of the situation at stake;
- respecting the principle of equal treatment of Member States;

- indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.

The process is composed, as a rule, of three stages: a Commission assessment, a Commission recommendation and a follow-up to the recommendation.

The Commission's assessment

The Commission will collect and examine all the relevant information and assess whether there are clear indications of a systemic threat to the rule of law as described above. This assessment can be based on the indications received from available sources and recognized institutions, including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights. If, as a result of this preliminary assessment, the Commission is of the opinion that there is indeed a situation of systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a “rule of law opinion” and substantiating its concerns, giving the Member State concerned the possibility to respond. The opinion could be the result of an exchange of correspondence and meetings with the relevant authorities and, where appropriate, be followed by further exchanges.

The Commission expects that the Member State concerned cooperates throughout the process and refrains from adopting any irreversible measure in relation to the issues of concern raised by the Commission, pending the assessment of the latter, in line with the duty of sincere cooperation set out in Article 4(3) TEU. Whether a Member State fails to cooperate in this process, or even obstructs it, will be an element to take into consideration when assessing the seriousness of the threat.

At this stage of the process, while the launching of the Commission assessment and the sending of its opinion will be made public by the Commission, the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate quickly reaching a solution.

The Commission's recommendation

In a second stage, unless the matter has already been satisfactorily resolved in the meantime, the Commission will issue a “rule of law recommendation” addressed to the Member State concerned, if it finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it.

In its recommendation the Commission will clearly indicate the reasons for its concerns and recommend that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect. Where appropriate, the recommendation may include specific indications on ways and measures to resolve the situation.

The Commission's assessment and conclusions will be based on the results of the dialogue with the Member State concerned as well as on any additional evidence on which the Member State would also need to be heard in advance.

The sending of its recommendation and its main content will be made public by the Commission.

Follow-up to the Commission's recommendation

In a third stage, the Commission will monitor the follow-up given by the Member State concerned to the recommendation addressed to it. This monitoring can be based on further exchanges with the Member State concerned and could, for example, focus on whether certain practices which raise concerns continue to occur, or on how the Member State implements the commitments it has made in the meantime to resolve the situation.

If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU.

Institutional interaction

The European Parliament and the Council will be kept regularly and closely informed of progress made in each of the stages.

Benefitting from third party expertise

In order to obtain expert knowledge on particular issues relating to the rule of law in Member States, the Commission may, notably during the phase of assessment, seek external expertise, including from the EU Agency for Fundamental Rights. Such external expertise could notably help to provide for a comparative analysis about existing rules and practices in other Member States in order to ensure equal treatment of the Member States, on the basis of a common understanding of the rule of law within the EU.

Depending on the situation, the Commission may decide to seek advice and assistance from members of the judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the

EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils. The Commission will examine, together with these networks, how such assistance could be provided swiftly where appropriate, and whether particular arrangements are necessary to that end.

The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.

5. CONCLUSION

This Communication sets out a new EU Framework for the Rule of Law as the Commission's contribution to strengthening the capacity of the EU to ensure effective and equal protection of the rule of law in all Member States. It thereby responds to requests from the European Parliament and the Council. While not excluding future developments of the Treaties in this area – which will have to be discussed as part of the broader reflections on the future of Europe –, it is based on Commission competences as provided for by existing Treaties. In addition to the action of the Commission, the role of the European Parliament and the Council will be crucial in reinforcing the EU's determination to uphold the rule of law.

France: Declaration of 1789

Declaration of the Rights of Man and the Citizen [Déclaration des Droits de l'Homme et du Citoyen] of 26 August 1789.*

The Representatives of the French People, organized in a National Assembly, considering that ignorance, neglect or contempt of the rights of man are the only causes of the public misfortunes and of Governments' corruption, have decided to expose, in a solemn Declaration, the natural, inalienable and sacred rights of man, so that this Declaration, constantly present to all members of the social body, continually reminds them of their rights and their duties; so that the acts of the legislative power and those of the executive power may be compared at any time with the aim of every political institution, and that they would be more respected; so that the grievances of citizens, founded henceforth on simple and incontestable principles, result in the preservation of the Constitution and in the happiness of all.

Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen:

First Article. Men are born and remain free and equal in rights. Social distinctions may be based only on the common good.

Article II. The aim of every political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance to oppression.

Article III. The principle of all Sovereignty resides essentially in the Nation. No body, no individual may exercise any authority that does not expressly emanate from it.

Article IV. Liberty consists of being able to do everything that does not harm anybody else: thus the exercise of the natural rights of every man has no boundaries except those that ensure to other Members of Society the enjoyment of those same rights. Those boundaries may be defined only by Law.

Article V. The Law does not have the right to forbid any action except those that are harmful to society. Nothing which is not forbidden by the Law may be barred, and no-one may be forced to do what it does not dictate.

Article VI. The Law is the expression of the general will. All Citizens have the right to contribute personally, or through their Representatives, to its formation. It must be the same for everybody, whether it protects or punishes. All citizens, being equal before it, are equally eligible to all public dignities, positions and employments, according to their capacities, without any distinction other than those of their virtues and their talents.

Article VII. No man may be accused, arrested or detained except in the cases determined by Law and in the forms that it has prescribed. Those who solicit, send, execute or let execute arbitrary orders must be punished; however, every Citizen summoned or arrested pursuant to the Law must obey immediately: he makes himself guilty with his resistance.

Article VIII. The Law must establish only strictly and evidently necessary penalties, and no-one may be punished except pursuant to a Law established and promulgated prior to the crime, and lawfully applied.

Article IX. Every man being presumed innocent until he has been declared guilty, if it is deemed indispensable to arrest him, any harshness which is not necessary for the securing of his person must be severely repressed by Law.

Article X. No-one may be disquieted because of his opinions, even religious, provided that their manifestation does not disturb the public order established by Law.

Article XI. The free communication of thoughts and of opinions is one of the most precious rights of Man; every Citizen may therefore speak, write, print freely, save answering for the abuse of this freedom in the cases determined by the Law.

* Translation by Irene Wieczorek and Sascha Hardt.

PART I CONSTITUTIONAL LAW

Article XII. The guarantee of the rights of Man and the Citizen requires a public force: such force is therefore established for the advantage of all and not for the specific utility of those who have been entrusted with it.

Article XIII. For the maintenance of the public force, and for the expenses of the administration, a common contribution is indispensable. It must be equally distributed among the citizens according to their means.

Article XIV. All Citizens have the right to ascertain, personally or through their Representatives, the necessity of the public contribution, to freely consent to it, to monitor its use and to determine its proportion, base, collection and duration.

Article XV. Society has the right to call every public Agent to account for the administration.

Article XVI. Any society in which the guarantee of Rights is not ensured and the separation of Powers is not determined, has no Constitution.

Article XVII. Property being an inviolable and sacred right, no-one may be deprived of it, except when public necessity, lawfully assessed, evidently requires it, and under the condition of a just and prior indemnity.