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WORKING DOCUMENT

on Establishment of an EU mechanism on democracy, the rule of law and
fundamental rights - A European Pattern of Governance

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A European Pattern of Governance

The democracy that Europe has developed builds on the rule of law, and laws are made by parliaments. They are applied by the executive branch of government and enforced by the judiciary. This is the classical separation of powers which we take for granted. And all the way through the last centuries of history, the press has accompanied constitutional developments and contributed to forging public opinion, which legitimises authority while it accepts it. So, with multi-party representative democracy, separation of powers, formal rule of law and the existence of a press, do we have the form of governance that characterises the European norm of today? Again, these elements in and by themselves do not suffice.

More relevant to the free European societies of today, to democracy in the age of communications and overpoweringly well-endowed lobbies for the most diverse interests, are features which may have been considered so self-evident for a long time that the Treaty on European Union does not even mention them. Yet, their absence would mark a substantial deviation from a pattern of governance which Europeans aspire to. Some of them derive from the rigorous application of the separation of powers; others require self-restraint of the government of any one moment which may theoretically be legitimised to take action which changes the very nature of government. If they are not respected, one notices. If they are absent, one senses the lack of them. They have become part of why European states are what they are, and our societies function the way they do.

They are the substantial guarantees against arbitrary or authoritarian rule:

- The impartial nature of the state
- The reversibility of political decisions after elections
- The existence of institutional checks and balances which ensure that the impartial state is not called into question
- The permanence of the state and institutions, based on the immutability of the constitution
- The existence of a free media landscape

The impartial nature of the state

The state itself does not belong to any individual – that is the departure from absolute rule by monarchs. It also does not belong to any given ideology, political party, or interest group. It is the guarantor of the freedom of expression and of action of everyone, as these freedoms are constitutionally established. Therefore, any appropriation of the state by any political actor must be prevented.

An impartial state rests on the functioning of an impartial civil service. There was a time when, in a number of European countries, civil servants were not allowed to stand for election unless they previously resigned their positions. In other places members of the armed forces or police were not allowed to even become members of a political party. While such incompatibilities have largely been abolished, the justification for their existence was precisely the endeavour of the state to prevent its own appropriation or use or abuse, by political forces or certain categories of its own agents.

Political appointments in the service of the state must remain exactly that: appointments to serve all, and not appointments so that some can be served. Therefore, limitations to such appointments are necessary, in the first place by maintaining and guaranteeing the impartiality of the whole state administration at all times and in all circumstances. This is true for general administration as well as for the judiciary, at whichever level. With the exception of large areas of the judiciary, appointments should also be reasonably limited in time.

The reversibility of decisions

One key element of legitimate democratic governance is the reversibility of each and every decision which is taken at any one given moment. This applies to people and their positions, as well as it applies to texts.

Where people and positions are concerned, it is important to limit their terms of office – even if they can be re-appointed – to a measure which does not exceed the terms of parliament in an exorbitant manner. It must be possible for an alternative parliamentary majority and their government to re-examine appointments in the state apparatus which may have a political connotation. This does not mean arbitrarily recalling the holders of certain positions, but also not being obliged to maintain them for disproportionately long periods of time.

State and administration need to be impartial. Parliaments and governments can't be. Even elected heads of state, dependent on which powers and attributions are vested in them, are and remain political figures whose action corresponds to a certain ideological orientation. This is normal in any democracy where the act of electing somebody is a matter of political choice.

Governments and parliaments take political decisions. Most laws therefore have political content, in the sense that they are formulated and enacted because of the existence of political will and orientation. While a constitution should – must, even – require near ecumenical adherence of those entitled to enact and to modify it, a law is by nature given to change. It must be possible to change it without undue hindrance. That means that special majorities for parliamentary decisions need to be strictly circumscribed. Outside the realm of constitutional provisions, any norm must be a norm which can be changed by normal majorities.

A normal majority is a simple majority in a parliamentary vote. It may even involve specific quora, like the absolute majority of members, while remaining a simple majority – in the sense that any government would need to rely on at least that majority to be able to govern. The existence of special laws requiring special majorities is problematic. It reduces the scope of action of any normally constituted political majority and thus limits their prerogative to change.

Checks and balances

Across all the articulations of the state and its authority, it is necessary to set up checks and balances in case a deviation from the course of impartiality is detected. These checks and balances take different forms in different places.

Between institutions, the prevention of arbitrary decisions and of deadlocks can be ensured by a system of mutual checks: heads of state can be recalled – as governments can – if parliaments, either alone or in conjunction with certain branches of the judiciary, deem their actions to be unacceptable. Parliaments can be dissolved before the end of their electoral term and new elections called. This system is designed to ensure that no institution overpowers another, but that they function concurrently in fulfilment of their respective constitutional roles.

The checks system can be at risk if and when any given political force controls the executive and legislative powers at the same time. Arbitrary or purely partisan decisions of any of the institutions could then be simply endorsed by the other, as is customary in authoritarian systems of government. In such cases, guarantees against “ruling through” exist – notably in the form of specific courts or tribunals, the constitutional ones.

Constitutional courts and tribunals, whichever their specific designation, are designed to ensure that no political authority, no institution, can violate the constitution by acting or

adopting laws contrary to its provisions. This is why constitutional jurisdictions need to fulfil the highest standards of impartiality. Constitutional judges are the ultimate guarantors of the impartiality of the state. Their own impartiality must never be seen to be in doubt. Therefore, the appointment of constitutional judges is a process of the utmost delicacy. The whole legal and judicial system of a state is based on the notion that justice must not only be done, but must also be seen to be done. The formulation aims at the legitimacy and rightfulness of judicial decisions. In the case of constitutional decisions, the perception of their legitimacy and rightfulness, of their being right and just, conditions the trust which citizens have in their state.

The permanence of the state and the institutions

A constitution is the basic, the fundamental charter of any state. In most cases, it is written, and where it isn't, constitutional practice is entrenched enough to warrant a substantial measure of respect. Constitutions are not electoral manifestoes. They don't belong to specific political majorities. They belong to all the citizens as they create, define and organise their state.

The constitution establishes the state. That is a permanent arrangement. There is never an absence of state. Political majorities may and do change, governments may take time to form after elections, but the state is always there. It cannot – and must not – be taken hostage by ideologies and political parties. No-one must appropriate it.

Elections change political majorities, and that is as well. European democracies thrive on “change”, in the sense that those who govern are not always the same, and they do not always govern in the same way. If change happens, voters have decided that they wanted something different from what they had. If it doesn't, they have expressed their content with existing political realities and confirmed them for another term. But the perspective of policy and team change always exists. Not so for the state. The essence of the state must not change.

The state in Europe is a neutral state. It is separate from religions, in whatever form they are constituted. It may not serve one religion more than the other; it may not prefer one religion over the other. The same holds for philosophical beliefs and personal convictions, inclinations and preferences of legal nature. These are of no concern to the state. The organs of the state also do not rule for or against anyone, but always and exclusively for the existing rules. The rules themselves must be applicable to the greater number. Legislation serves a general purpose and is directed at the population as a whole, not towards specific groups or individuals. This must not be changed. If it were, the change would be illegitimate, because it would not be acceptable to the population as a whole.

This state which has evolved into its present form, acceptable to the overwhelming majority, neutral in outlook and perspective, must not be changed. Elections can change policy, but they must not change the state. If they did change the state, they would at some point fix policy. At that moment, arbitrary and authoritarian rule becomes possible. If the state changes, policy changes no more. Therefore, such a change would be a change for the worse.

Free media

Not a constitutionally established power, the media do wield considerable influence of their own. They carry opinions, and convictions. They report what happens and put in perspective what could or should happen. They comment on the evolution of the state, society and political forces. The media are an expression of the collective conscience. They also forge what is commonly called public opinion – even if often, this public opinion is more the

published opinion. Be that as it may: free media have become a quasi institutional feature of the democratic and legitimate European state.

It is the freedom of the media that matters, not their existence. In dictatorial regimes, there have always been media, but they were at the exclusive service of the regime itself. Published opinion was official opinion, unpublished opinion was punishable opinion – that state of affairs continues in the dictatorships remaining today. Free media write, say and show what they see fit, within deontological boundaries in most cases, but otherwise unhindered and undirected. This makes them consubstantial to a free society expressing itself in a democratic manner.

All media, public and private, must enjoy editorial freedom. Deontological rules apply to them in prominent place, of course – but nothing else. As there cannot be any form of cultural expression fostered by the state to the exclusion of any other, it is neither the state's duty, nor within its legitimate remit, to instruct media organs as to their editorial line. The modern European state guarantees freedom of expression, it does not direct expression or condition it. Finally, the proportion of public media must not be overpowering in comparison to private outlets, there must not be the impression that the state intends to control.