Ilina Cenevska[*]

THE RULE OF LAW AS A PIVOTAL CONCEPT OF THE EU'S POLITICO-LEGAL ORDER

Abstract

In recent years, the EU Member States like Poland, Hungary, Romania and Malta have experienced various kinds of rule of law backsliding processes which have threatened to gradually erode these countries' democratic institutions established under the rule of law. Moreover, the rise of populist movements and the growing nationalist tendencies in some of these countries have added to an ever-growing rift in the relationship between Brussels and the national governments. The persistence of rule of law eroding trends has become a compelling post-accession reality for these Member States (which joined the EU in 2004 and 2007), arguably undermining and being in open breach of the EU's fundamental values - most pressingly and most acutely, the rule of law.

While this paper does not aim to pinpoint the causes and factors that have led to the foregoing regressive trends (which are indeed manifold), its goal is rather to look in a more conceptual manner at the rule of law as an overarching principle underpinning EU's legal and political order. The paper will equally examine the mechanisms the European Union has at its disposal in confronting the value erosion trends and inspect to what degree these mechanisms are effective in tackling the rule of law backsliding processes.

Keywords: *Rule of Law, EU values, EU membership, Article 7 TEU*

I. INTRODUCTION

It is uniformly held that that the EU's fundamental values (most notably - democracy, rule of law, and respect for human rights) are the EU's "alpha-and-omega". They represent the constitutional foundations of the EU as a value-based polity. What we are faced with today is an unprecedented record of failure of certain EU Member States to respect the Union's core values, a state of affairs that threatens to produce irreversible damage upon the Union's value-based legal and political order. The developing trend of value-erosion undoubtedly compromises the

[*] Ilina Cenevska, PhD, Associate Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Law Faculty, e-mail: i.cenevska@pf.ukim.edu.mk

coherence of EU's legal framework, inevitably bringing us 'back to the drawing board' and prompting a re-evaluation of the 'glue' that binds the Member States together.

The elemental importance of the EU's fundamental values for the European integration project cannot be stressed enough. The language used recently by the EU Court of Justice best illustrates this point; the Court asserted that "the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 of Treaty on European Union, which respect those values and which undertake to promote them, *EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values*".[1] To give a further example, European civil society has equally woken up to the pressing nature of the rule of law erosion processes - namely, a recently launched European Citizens' Rule of Law Initiative, which is increasingly gaining traction, has called for the creation of an impartial verification mechanism to evaluate the application of European values by all Member States, asking from the European Commission to enact general legislation that would make it possible to verify in an objective manner the practical application of the rule of law in the different Member States.[2]

Ostensibly, in the previous decades of European integration values were almost considered a non-issue as the implicit understanding among the Member States was that they all ascribe to a strict set of values lying at the core of the European integration project. This presumption has since been rebutted, or at least its shortcomings have become more visible, seeing as the 2004 and 2007 waves of enlargement, while making the EU family substantially bigger, seems to have underscored the vulnerability of the Union's core values and the imminent need for their preservation. Admittedly, the Union's politico-legal landscape has undergone a paradigm shift in the past several years, marked by a re-conceptualization of the relationship between the Union and its Member States, rooted in the consensus that they form part of one uniform and coherent 'community of values'.

Article 2 TEU lays down the values that the EU is based upon: the respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights. These values are common to all Member States and act as 'benchmarks' for the countries aspiring to become EU Member States. A number of these values figure as part of the strict set of criteria (hailed as "Copenhagen" criteria) that countries need to fulfil as a pre-condition for joining the EU.[3] Namely, Article 49 TEU provides that "[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union". The basic presumption here is that the current Member States, which enjoy the full scope of membership rights, abide by these values (criteria) "by default", their adherence to these values flowing from the very fact of belonging to the EU. In light of recent developments, this presumption has now been put to the test.

II. THE SUBSTANCE AND SCOPE OF THE RULE OF LAW AS AN EU CONCEPT

Article 2 TEU enshrines the values the Union is founded on, which are "*the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,*

[1] Emphasis added. Case C-619/18 *Commission v Poland*, para.42; Case C-621/18 *Wightman*, para.63.
[2] https://www.formyrights.eu/sign-now.
[3] Art.49 of Treaty on European Union.

including the rights of persons belonging to minorities", common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[4] The 'Union values' article was included in the Union Treaties via the Amsterdam Treaty, prior to which none of these values had previously been inscribed into the Union's primary law. On account of the lack of a definition for the foundational values enumerated in Article 2 TEU anywhere in the Union Treaties, these have been described as "rather abstract values"[5] while the Union has been regarded as indecisive as to their content.[6]

Former European Commission President José Manuel Barroso declared on one occasion that "assuring the coherence of the [European] project is only possible through the rule of law".[7] The rule of law is considered by some to be an elusive concept which is highly variegated and contested and therefore difficult to exactly pinpoint. [8] In terms of its nature, the rule of law as a concept has its own unique social, cultural and institutional underpinnings which make it extremely difficult to put all of its constitutive elements in place quickly.[9] This is why establishing a system under the rule of law is a time-intensive and painstaking process and a lengthy period, potentially one of the generations, needs to pass in order to gradually establish and eventually succeed in creating a general cultural belief of the contingency of the role of the rule of law in society.[10] Moreover, the end product of this process would not only be to create an independent judiciary and state institutions bound by law, but also a legal tradition which is committed to respecting the rule of law.[11] Therefore, a rule of law culture is something that is nurtured and fostered over the span of lengthy periods of time.

There is a distinction to be made between a 'thin' and a 'thick' conception of the rule of law in function to the different outcomes the two provide in practice. The 'thin' conception does not necessarily require democratic institutions or a democratic political system, nor does it impose any requirements concerning the content of the law or mandatory respect for human rights within a state or society.[12] The thick conception of the rule of law, on the other hand, includes one or several of these elements as central to maintaining the rule of law.[13] Authors like Joseph Raz subscribe to a 'thin' or a 'narrow' understanding of the rule of law where the former is seen as a virtue that a legal system may possess and is to be judged by – however, one not to be confused with democracy, justice, equality or respect for human rights.[14] The example Raz provides is that a non-democratic legal system, based on the denial of human rights, may, in principle, conform

[4] Art.2 of Treaty on European Union.
[5] EU Agency for Fundamental Rights, "The European Union as a Community of values: Safeguarding fundamental rights in times of crisis" (2013) p.18. (https://fra.europa.eu/en/publication/2013/european-union-community-values-safeguarding-fundamental-rights-times-crisis).
[6] D. Kochenov and P. Bard, "Against Overemphasizing Enforcement in the Current Crisis: EU Law and the Rule of Law in the (New) Member States" in Matlak, Schimmelfenig and Kochenov (eds.), *Europeanization Revisited: Central and Eastern Europe in the European Union*, European University Institute (2018), p.88.
[7] J. M. Barroso, "Uniting in Peace: The Role of Law in the European Union" Jean Monnet Lecture, EUI Florence, 31 March 2006 (www.iue.it/PUB/ JeanMonnetLecturesPDF/JMLBarroso2006.pdf).
[8] N. Walker, "The Rule of Law and the EU: Necessity's Mixed Virtue" in N. Walker and G. Palombela (eds.) *Relocating the Rule of Law*, Hart Publishing (2009), p.119.
[9] B. Z Tamanaha, "A Concise Guide to the Rule of Law" in N. Walker and G. Palombela (eds.), *Relocating the Rule of Law*, Hart Publishing (2009), p.13.
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] J. Raz, *The Authority of Law: Essays on Law and Morality*, Clarendon Press (1979), p.210, 211.

to the requirements of the rule of law better than any of the legal systems of the Western democracies: it would be a worse legal system, but its strong point would be its conformity to the rule of law.[15]

Williams, on the other hand, distinguishes between three interrelated dimensions of the rule of law as a value underpinning the EU's legal and political framework. First, there is the *supranational* dimension reflected in the fact that Member States are subject to the Union legal rules, where central to this construction are the principles of supremacy and direct effect.[16] Second is the *institutional* dimension which covers the rule of law notions that inform the relationship between the EU institutions and the individuals affected by their actions.[17] Third and last is the *extra-territorial* dimension of the rule of law articulated in EU's external dealings on the international scene, particularly within the scope of the development, trade and accession policies.[18]

Walker differentiates between five separate but intertwined dimensions of what he calls "the social and political use-value of the rule of law": *regulation, authorisation, instrumentalisation, identification and promotion*.[19] According to Walker, as a feature of the 'constitutional turn' in the EU setting, the rule of law has been mandated a new instrumental role in the construction and legitimation of the supranational political community.[20] The author acknowledges that the value of the rule of law risks becoming too 'thick': in a practical, regulatory sense, it can only survive as such is supported by the immanent culture - such support being contingent on the nuances of the rule of law's adaptation across different national environments.[21]

Tamanaha sets forth the following elements for establishing the rule of law: a) a widely shared conviction within society (among citizens and government officials alike) that the law rules and should rule; b) an institutionalised and independent judiciary; and lastly, c) the existence of a robust legal profession and legal tradition which are committed to upholding the rule of law.[22] All of these elements are inter-dependent and inter-connected, and each depends on a myriad of related economic, political and cultural conditions.[23] Adhering to the thin conception of the rule of law, Tamanaha considers that the rule of law does not itself require democracy, respect for human rights or any particular content in the law, which is why upholding the rule of law does not necessarily guarantee that the law or legal system in question is necessarily good or deserves obedience.[24] In fact, in a similar vein to Raz, it is believed that the thin understanding of the rule of law does not require democratic institutions or a democratic political system, nor does it impose any requirements concerning the content of the law or mandatory respect for human rights.[25] By contrast, the wider (thick) conception of the rule of law includes one or several of these elements as essential to defining the rule of law.[26]

---

[15] *Ibid.*
[16] A. Williams, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge University Press (2010), p.71.
[17] *Ibid*, p.72.
[18] *Ibid*.
[19] N. Walker, "The Rule of Law and the EU: Necessity's Mixed Virtue" in N. Walker and G. Palombela (eds.) *Relocating the Rule of Law, Hart Publishing* (2009), p.132.
[20] *Ibid*.
[21] *Ibid*, p.136.
[22] *Supra* n.9, Tamanaha, p.13.
[23] *Supra*, Tamanaha, p.13.
[24] *Supra*, Tamanaha, p.14.
[25] *Supra*, Tamanaha, p.13.
[26] *Supra*, Tamanaha, p.13.

As "the backbone of any modern constitutional democracy", the rule of law is one of the founding principles that derive from the common constitutional traditions of the Member States.[27] Although the Union Treaties do not sanction a 'hierarchy' among the Union's fundamental values, the rule of law nevertheless enjoys a somewhat unique status. The rule of law operates as a *conditio sine qua non* in that the existence of all the other Union values is contingent upon it. What's more, as a constitutional principle, the rule of law itself is a prerequisite for the protection of all the other Union fundamental values (freedom, democracy, equality and respect for human rights).[28] It is equally a prerequisite for upholding the rights and obligations which derive from the Treaties and from international law.[29] The respect for the rule of law is intrinsically linked to the respect for democracy and fundamental rights - there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.[30]

As to the content of the rule of law as a requirement, the obligation to observe the rule of law ensures that actions by the state are taken within an effective and reliable legal framework, that these can be scrutinized and challenged, or be subjected to effective legal review.[31] The essential constituent elements that inform the content of the rule of law include: legality (encompassing a transparent, accountable and democratic law-making process); legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review; as well as respect for fundamental rights and equality before the law.[32] In other words, the rule of law requires that all public powers function within the constraints established by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts; it requires, in particular, that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, separation of powers, and effective judicial protection by independent courts are respected.[33] Furthermore, the case-law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as the documents drawn up by the Council of Europe, including the expertise of the Council of Europe's Venice Commission, significantly build upon the practice of enforcement of the rule of law in more concrete and practical terms.[34] It is important to underline that the essential standards to be met by the EU institutions and the Member States in safeguarding the rule of law are directly informed by the developing case law of the EU Court of Justice and the European Court of Human Rights in this field. The foregoing standards are considered as the bedrock for

[27] Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final 11.3.2014, p.1.

[28] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM (2018) 324 final, at point 3.

[29] *Supra* n.27, p.4.

[30] *Supra* n.28, at point 3.

[31] Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM (2018) 324 final, p.1.

[32] *Supra* n.27, p.4.

[33] *Supra* n.28, at point 2.

[34] *Supra* n.27, p.4.

the respect of the rule of law in all Member States, irrespective of their constitutional structures.[35]

The Council of Europe, from its part, has worked on gradually developing its own rule of law standards and regularly issues opinions and recommendations that provide valuable guidance in promoting and upholding the rule of law. These include: the Venice Commission's "Rule of Law Checklist", the Council of Europe's "Plan of Action on Strengthening Judicial Independence and Impartiality", as well as the Opinions of the Venice Commission and the Evaluations of the GRECO (Group of States against Corruption).[36]

III. THE RULE OF LAW: A VALUE OR A PRINCIPLE?

Article 7 TEU represents the key institutional mechanism for dealing with cases of risk of a serious breach or the actual existence of a serious breach by a Member State of the values listed in Article 2 TEU. Prior to delving further into the issues related to the application of the Article 7 procedure, it would be helpful to give several preliminary observations regarding the terminology of Article 2 TEU which enumerates the values that 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*.[37] The Lisbon Treaty, through the modified wording of Article 2, termed the foregoing notions as "values" whereas the Amsterdam Treaty (1997) and the Nice Treaty (2001) version of the same article operate with the term "principles", used to denote what is now referred to as "values". By contrast, the Preamble to the Charter of Fundamental Rights refers to "democracy and the rule of law" as principles that the Union is based on, while "values" is used in reference to "human dignity, freedom, equality and solidarity".

Possibly rightly so, commentators have made a qualitative distinction between "values" and "principles" as two different and differentiable notions. Namely, "value" denotes an abstract term and a notion that bears an absolute positive significance within a certain community (e.g., dignity, liberty, equality, solidarity, justice)[38] while principles, on the other hand, are understood as "normative propositions that translate values into general 'constitutional' standards for policy action".[39] This (possibly deliberate) change in terminology introduced by the Lisbon Treaty essentially makes little difference in practice. The lexical change seems to be merely perfunctory as can be further inferred from the language employed in the relevant policy documents of different EU institutions; these documents suggest an interchangeable use of "principle" and "value" when speaking about the rule of law. By the same token, the 2014 Commission Communication "New EU Framework to Strengthen the Rule of Law" refers to the rule of law as a "legally binding constitutional principle" that is "unanimously recognized as one of the

[35] Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of Play and Possible Next Steps, COM/2019/163 final, Brussels, 3.4.2019, Part IV.

[36] *Ibid.*

[37] Art.2 of Treaty on European Union.

[38] S.Lucarelli, "Introduction" in S.Lucarelli and I. Manners (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, 2006, p.10.

[39] *Ibid.* According to the authors *supra*, the ways in which these values are translated into principles depends on how values are interpreted based on a particular worldview or dominant cultural traditions.

founding principles inherent in all the constitutional systems of the Member States of the EU and the Council of Europe".[40]

Leaving aside the terminological inconsistency, what may potentially prove more challenging is the lack of any concise Treaty definition for the values listed in Article 2 TEU. Hence, the exact scope and content of these values (not least the rule of law) still remain largely open-ended. A part of these values may indeed be perceived as vague and too abstract on account of the Union Treaties failing to offer a precise and comprehensive definition therefor. In this sense, when a Member State is required to uphold a certain Union value it is not always completely clear what kind of behaviour the said Member State is expected to follow within its national constitutional setting and legal system.

IV. THE ESSENTIALS OF THE ARTICLE 7 TEU PROCEDURE

Conceived as a Treaty instrument to cope with value infringement issues, the procedure foreseen under Article 7 TEU pertains to cases of risk of a serious breach or actual existence of a serious breach of the Union's fundamental values enumerated in Article 2 TEU. The option to activate the Article 7 procedure against a particular Member State has been considered a radical one, referred to by former Commission President Barroso as the "nuclear option" whereby the EU exerts its "hard power" over a Member State – in contrast to the 'soft power' alternative of political persuasion.[41]

The Article 7 procedure is not a Lisbon Treaty invention; it was originally included in the 1997 Amsterdam Treaty since the earlier 1992 Maastricht Treaty did not contain any reference to the Union's foundational principles (now values). It was through the Amsterdam Treaty that the Union's fundamental values were codified in an act of primary Union law.[42] The original version of Article 7 in the Amsterdam Treaty had been drafted after the 1995 wave of enlargement (which included Austria, Finland, Sweden), arguably, in anticipation of the subsequent enlargement round which was to welcome European countries from the former Eastern Bloc. After the EU accession criteria were agreed upon at the European Council Summit in Copenhagen in 1993 (some of which presently figure among the values espoused in Article 2 TEU), the addition of the Article 7 procedure to the Treaties pointed to a certain lack of confidence among the 'Masters of the Treaties' regarding the effectiveness of EU's pre-accession conditionality, Article 7 presumably being considered as a sufficient deterrent against democratic or rule of law backsliding in the Member States post-accession.[43]

The original version of Article 7 in the Amsterdam Treaty as well the subsequent Nice Treaty version, puts the weight of decision-making squarely on the Council of ministers (here, it is important to note that the European Council only formally became a Union 'institution' after the

[40] *Supra* n.27, Annex I, p.1.

[41] In his annual "State of the Union" speech to the European Parliament in September 2012, former Commission President Barroso stated: "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."
(J. M. Barroso, "A Europe of values and principles", Speech given at European Parliament plenary debate, Strasbourg, 18 January 2012).

[42] Art.6(1) (Article F of Amsterdam Treaty): "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

[43] L. Pech and K. L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies* Vol 19 Issue: December 2017, p.3.

Lisbon Treaty). Under the original version of the article, "the Council, meeting in the composition of the Heads of State or Government and acting by *unanimity* [44] on a proposal by one-third of the Member States or by the Commission and after obtaining the assent of the European Parliament" could determine "*the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)".*[45] Further to this, "(w)here such a determination has been made, the Council, acting by a qualified majority, may decide to *suspend certain of the rights*[46] deriving from the application of [the TEU] Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council."

The Amsterdam version of Article 7 did not envisage a 'preventive option', relative to cases of "risk of breach", and only foresaw the 'definitive' sanctioning option for a Member State considered in violation of the Union's values. This shortcoming was rectified with the Nice Treaty where the amended version of Article 7 provided two separate avenues – a first one, relating to the determination on the existence of a *clear risk of a serious breach* of the Union's values, and a second one, concerning the *actual existence of a serious and persistent breach* of the Union's values. The Council, acting by a *majority of four-fifths*[47] of its members, "pursuant to a reasoned proposal by one-third of the Member States, by the European Parliament or by the Commission" and "after obtaining the assent of the European Parliament" can determine that there is a *clear risk of a serious breach*[48] by a Member State of the principles mentioned in Article 6(1). Further on, "the Council, meeting in the composition of the Heads of State or Government and acting by *unanimity*[49] on a proposal by one-third of the Member States or by the Commission, and after obtaining the assent of the European Parliament, may determine the existence of a *serious and persistent breach* by a Member State of principles mentioned in Article 6(1)". Once such a determination has been made, the Council, "acting by a qualified majority, *may decide to suspend certain of the rights*[50] deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".

The current version of Article 7 TEU provides that "[o]n a reasoned proposal by one-third of the Member States, by the European Parliament or by the European Commission, *the Council, acting by a majority of four-fifths*[51]of its members after obtaining the consent of the European Parliament, may determine that there is a *clear risk of a serious breach* [52] by a Member State of the values referred to in Article 2. Before making this determination, the Council will hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. On the other hand, the European Council, *acting by unanimity* on a proposal by one-third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the *existence of a serious and persistent breach* [53] by a Member State of the Union's values, after inviting the Member State in question to submit its

[44] Emphasis added.
[45] Emphasis added.
[46] Emphasis added.
[47] Emphasis added.
[48] Emphasis added.
[49] Emphasis added.
[50] Emphasis added.
[51] Emphasis added.
[52] Emphasis added.
[53] Emphasis added.

observations." Once such a determination has been made, "*the Council, acting by a qualified majority, may decide to suspend certain of the rights* deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council". [54] Although the necessary thresholds and pre-conditions attached to the activation of the Article 7 mechanisms have been kept identical as before the Lisbon Treaty amendments, the only (albeit significant) difference is that instead of the Council "meeting in the composition of the Heads of State or Government", presently it is the European Council which is tasked with making the 'definitive' determination as to the existence of a serious and persistent breach of the Union's basic values.

In addition, what is noteworthy is that the EU Court of Justice has not been completely excluded from the scope of application of Article 7. The EU Court of Justice has been accorded a 'corrective' role in the application of Article 7's procedural requirements. Namely, the EU Court of Justice has jurisdiction to decide on the legality of the acts adopted by the European Council or the Council within the scope of the Article 7 procedure, solely at the request of the Member State concerned and only regarding the procedural stipulations of said article.[55] The Court does not enjoy the power of judicial review over the substance of the decision-making process relative to determining the existence of a serious (and persistent) breach of the Union's values or a clear risk thereof – its scope of judicial review being confined to the procedural aspects of Article 7.

V. PROVIDING THE NECESSARY GUIDANCE: THE 2019 COMMISSION COMMUNICATION "FURTHER STRENGTHENING THE RULE OF LAW WITHIN THE UNION STATE OF PLAY AND POSSIBLE NEXT STEPS"

The EU has devised a number of instruments to help enforce the rule of law which go beyond the hard-power approach of the Article 7 procedure. Namely, the 2019 Commission Communication "*Further strengthening the Rule of Law within the Union State of Play and Possible Next Steps"*[56] provides important guidance as to the scope and merits of the rule of law assessment the relevant EU institutions are expected to undertake, in an attempt to deal with the rule of law issues through reliance on regular political dialogue with the Member States' institutions. The Commission document puts the emphasis on a collaborative effort between the Commission, Parliament and Council, each within their sphere of competence. The document's pre-cursor, the 2014 Communication "*A New EU Framework to Strengthen the Rule of Law*"[57], was adopted in order to respond in a preventive manner to indications of systemic risks to the rule of law in the Member States, that could potentially result in a serious breach of Union values, thereby triggering the Article 7 provisions.

The 2019 Communication adds to the pre-existing institutional framework for the safeguarding of the rule of law established under the 2014 Communication. It sees the rule of law as a reflection of the common identity and common constitutional traditions of European nations and the basis of the democratic system in all Member States.[58] Consequently, the failure to

[54] Emphasis added.
[55] Art.269 of the Treaty on the Functioning of the European Union.
[56] Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of Play and Possible Next Steps, COM/2019/163 final, Brussels, 3.4.2019.
[57] *Supra* n.27.
[58] *Supra* n.56, part I.

adequately protect the rule of law in all Member States is believed to be able to undermine the Union's foundations of solidarity, cohesion, and the functioning of the internal market altogether.[59] The Communication makes reference to the "Rule of law toolbox" which comprises of EU mechanisms that have been put in place to help address the rule of law challenges. Apart from the option to activate Article 7, these mechanisms include: the Commission's Rule of Law Framework (introduced via the 2014 Communication); judicial mechanisms such as infringement proceedings and preliminary rulings; the annual EU Justice Scoreboard; The Cooperation and Verification Mechanism;[60] the Commission's Structural Reform Support Service (providing technical support for structural reform in the Member States); The European Structural and Investment Funds; and others.[61]

The Commission has stressed that it is each Member State's primary responsibility to ensure the rule of law so that the first recourse in rule of law backsliding situations should always be to national redress mechanisms. The nature of EU's role must be objective and treat all Member States alike whereas the objective in this regard should not be to sanction but to find a solution that protects the rule of law through cooperation and mutual support.[62] Again, in the same 'preventive' vein, the Commission has underscored the duty of the EU institutions to recognize early "warning signs" for rule of law backsliding developments in a particular Member State, along with developing an "awareness" about such signs which can help address them in good time.[63] Notably, certain warning signs can only be identified through acquiring a deep understanding of Member States' practices and by establishing a dialogue with national authorities and stakeholders.[64]

What is then the protocol for EU's engagement in cases where the rule of law is jeopardized? The Communication signals that EU intervention should primarily revolve around a 'dialogue' approach and placed within a structured process that could increase the chances for success, especially since many rule of law problems are time-sensitive and the longer they take to resolve, the greater the detriment to the rule of law.[65] This is why EU institutions should also take intermediate steps which are proportionate to the seriousness of the issue.[66] Furthermore, the Commission considers that the effective enforcement of the rule of law in the Union should rest on three pillars: *promotion, prevention and response*.[67]

The *promotion* pillar has to do with building knowledge and working on creating a common 'rule of law culture'. The rule of law obligations imposed by Union membership requires national rules and structures to reflect the EU rule of law standards and respect the rule of law guarantees embedded in EU's primary and secondary law. Promoting awareness among the general public regarding the importance of the rule of law and undertaking activities aimed at communicating the importance of the rule of law to the citizens is essential. This is because, at the end of the day, protection of the rule of law is a joint effort – it depends both on the existence

[59] *Ibid*.
[60] The Cooperation and Verification Mechanism has been specifically devised for Bulgaria and Romania in order to assist these Member States in addressing the remaining shortcomings in the areas of judicial reform, the fight against corruption, and organised crime.
[61] *Supra* n.56, part II.3.
[62] *Supra* n.56, part IV.
[63] *Ibid*.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid.*
[67] *Supra* n.56, part V.

of legal constraints and safeguards and consistent institutional practice. The *prevention* pillar involves cooperation and support to strengthen the rule of law at the national level. A deeper understanding of developments in the Member States is required in order to identify risks to the rule of law in a timely manner. An established system of information collection can serve as a framework for regular cooperation and dialogue with the Member States. The approach towards those Member States where weaknesses or particular risks have been identified should be balanced against the importance of having sufficient knowledge and understanding of the specificities of their respective national political and legal systems. Finally, in the event that national rule of law safeguards fall through, the EU institutions and the Member States are under a common responsibility to take action to defend EU values. For this reason, the *response* pillar comes into play to address the need to enforce the rule of law at Union level due to the ineffectiveness of national mechanisms. The judicial route for tackling these issues is through the EU Court of Justice, more specifically through the institution of infringement proceedings and preliminary reference procedures. The Commission is equally to take guidance from the case-law of the EU Court of Justice relevant to rule of law issues such as independence of the judiciary and effective judicial protection.

VI. HOW WELL-EQUIPPED IS THE EU IN PROTECTING THE RULE OF LAW: A DEVELOPING DISCUSSION

The recent developments on the rule of law front in Poland and Hungary have demonstrated that being part of the EU family is not a sufficient guarantee that a Member State abides by the Union's fundamental values. Effectively, the reality of the present-day rule of law crisis in the EU seems to offer a rebuttal to the presumption that a Member State's adherence to the Union's values should be considered inherent to the mere fact of belonging to the EU.

In the enlargement context, EU's fundamental values are considered part of the Union *acquis* (Union "positive law") since their initial inclusion in the Treaties manifested the need to articulate a defined set of membership criteria to be applied to countries joining the EU in subsequent enlargement rounds.[68] Indeed, EU's values should undoubtedly be seen as part of the Union's customary law on enlargement, some authors have referred to these as "unwritten principles of enlargement law".[69] Having this in mind, it is truly a self-fulfilling prophecy that those Member States where the rule of law violations are presently most acute (Hungary and Poland, with Romania and Malta not falling too far behind) are countries that joined the EU during the 2004 and 2007 enlargement rounds and, coincidentally, countries that the pre-accession conditionality and value-protection safeguards were originally conceived for back in 1997, with the adoption of the Amsterdam Treaty.

The Union is regarded by some as being powerless when it comes to the enforcement of its values and, more importantly, indecisive as to their content.[70] EU's powerlessness to tackle the rule of law backsliding in the certain Member States is the result of conceptual and practical

[68] See D. Kochenov, "The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017.

[69] *Ibid.*

[70] D. Kochenov and P. Bard, "Against Overemphasizing Enforcement in the Current Crisis: EU Law and the Rule of Law in the (New) Member States" in Matlak, Schimmelfenig and Kochenov (eds.), *Europeanization Revisited: Central and Eastern Europe in the European Union, European University Institute* (2018), p.88.

difficulties inherent to the very exercise of value enforcement as both a legal and political endeavour, as well as due to a lack of consensus among the EU institutions to act more forcefully in dealing with rule of law violations.[71] Alas, the perceived powerlessness can certainly not be attributed to a lack of Treaty mechanisms giving the EU power to intervene. Presumably, the problem is rather that the mechanisms available are considered to be 'too strong' – in fact, Article 7 as the 'nuclear' option had not been activated for a long time for fear of the unforeseeable and far-reaching (primarily political) consequences it would produce.[72]

Another challenge that arises in this context is whether the EU is sufficiently equipped (and prepared) to cope with the political, legal and economic consequences from a fully-fledged application of the Article 7 procedure. A full application of Article 7 would entail finding a Member State to be in serious and persistent breach of EU's values and partly suspending said Member State's rights as these are guaranteed under the Union Treaties. The wariness with regard to containing the aftermath of such a scenario that would involve activating and seeing through the Article 7 procedure, should nevertheless not be used as a justification for inaction or overreliance on soft-law mechanisms, especially in light of the radical deterioration of the state of the rule of law in some of the backsliding Member States.[73]

Taking into account the noted shortcomings of the Article 7 procedure, the truth is that in safeguarding the rule of law the EU is faced with a "certain political reluctance".[74] A further obstacle to applying the Article 7 procedure is its predominantly political nature as demonstrated by the dominant role accorded to the Council and the European Council throughout the procedure, with the substantive jurisdiction over the whole process being kept away from the EU Court of Justice.[75] In the absence of Treaty guarantees for material judicial review by the EU Court of Justice, the possibility to reach arbitrary decisions becomes high.[76] What is also especially discouraging is that the European Commission - the guardian of the Union Treaties and guardian of the rule of law – sees the Article 7 mechanisms as an "exceptional" tool for the EU to act *only* in the event of "serious rule of law failings" of a Member State.[77] Nevertheless, as the gravity of the situation grows by the day and the erosion of the rule of law continues, the EU institutions may soon wake up to realize that the 'nuclear' option may be the only viable option to protect the rule of law as a fundamental concept underpinning the EU's legal and political system.

References:

A. Williams, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge University Press, 2010.

B. Z Tamanaha, "A Concise Guide to the Rule of Law" in N. Walker and G. Palombela (eds.), *Relocating the Rule of Law*, Hart Publishing, 2009.

[71] *Ibid*, p.81.
[72] *Ibid*.
[73] See D. Kochenov, "Busting the Myths Nuclear: A Commentary on Article 7 TEU", EUI Working Paper LAW 2017/10.
[74] C. Hillion, "Fundamental Rights and EU Membership: Do as I Say, Not as I Do", *Common Market Law Review*, Vol. 49 (2012), pp. 481–488.
[75] *Supra* n.16, Williams, p.93.
[76] *Ibid*, p.106.
[77] *Supra* n.56, part II.1.

C. Hillion, “Fundamental Rights and EU Membership: Do as I Say, Not as I Do”, *Common Market Law Review*, Vol. 49, 2012.
D. Kochenov and P. Bard, “Against Overemphasizing Enforcement in the Current Crisis: EU Law and the Rule of Law in the (New) Member States” in Matlak, Schimmelfenig and Kochenov (eds.), *Europeanization Revisited: Central and Eastern Europe in the European Union*, European University Institute, 2018.
E. Kochenov, “Busting the Myths Nuclear: A Commentary on Article 7 TEU”, EUI Working Paper LAW 2017/10.
1. D. Kochenov, "The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017.
2. J. M. Barroso, “A Europe of values and principles” (Speech given at European Parliament plenary debate), Strasbourg, 18 January 2012.
3. J. M. Barroso, “Uniting in Peace: The Role of Law in the European Union” Jean Monnet lecture, EUI Florence, 31 March 2006 (available at: www.iue.it/PUB/ JeanMonnetLecturesPDF/JMLBarroso2006.pdf).
4. J. Raz, *The Authority of Law: Essays on Law and Morality*, Clarendon Press, 1979.
5. L. Pech and K. L. Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU”, *Cambridge Yearbook of European Legal Studies* Vol 19 Issue: December 2017.
6. N. Walker, “The Rule of Law and the EU: Necessity’s Mixed Virtue” in N. Walker and G. Palombela (eds.) *Relocating the Rule of Law*, Hart Publishing, 2009.
7. S.Lucarelli, “Introduction” in S.Lucarelli and I. Manners (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, 2006.
8. Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final 11.3.2014.
9. Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM (2018) 324 final.
10. Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and Promotion of the Values on which the Union is Based, COM (2003) 606 final.
11. Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of Play and Possible Next Steps, COM/2019/163 final.
12. EU Agency for Fundamental Rights, “The European Union as a Community of values: Safeguarding fundamental rights in times of crisis”, 2013.
13. Case C-619/18 Commission v Poland, ECLI:EU:C:2019:531.
14. Case C-621/18 Wightman, ECLI:EU:C:2018:999.