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THE LACK OF UNIFORM UNDERSTANDING OF THE RULE OF LAW IN THE EU AND ITS IMPLICATIONS ON PROSPECTIVE MEMBER STATES

Abstract

The rule of law is a notion impossible to comprehend in its entirety, however, the lack of it in a certain country is always easily recognized. The EU has the rule of law at its core, which is often cited in the founding treaties and numerous CJEU decisions. Nonetheless, at this point the EU is facing a significant rule of law crisis. While the importance of the rule of law is particularly emphasized with each EU enlargement where rigorous monitoring of the rule of law criterion implementation is taking place, the EU fails to ensure uniform enforcement within its own jurisdiction. It is understandable that a country aspiring to join the EU may have a completely different outlook on the rule of law, or even, a substantial lack of understanding of its essence. Therefore, it needs to rely on the interpretation generally accepted by all Member States that will, eventually, decide on its preparedness to join the EU. In this paper we will discuss the lack of uniform understanding of the rule of law in all Member States and its implications on future enlargements. Not only does the enlargement represent an opportunity to reevaluate the level of integration within the EU, it also offers a unique occasion for the enforceability of the core EU values to be put to the test. In order to ensure political integration after accession, the EU needs to reevaluate its stance toward the rule of law as an accession criterion in order to ensure it becomes an *erga omnes partes* obligation uniformly recognized by all Member States, both old and new members alike.

Key words: EU values; rule of law; rule of law crisis; rule of law as an accession criterion; candidate countries

I. INTRODUCTION

The rule of law has undeniably been underlined as both the core European principle, and a value, that is common to all Member States and their constitutional systems. It is also often perceived

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as a value underpinning others that are stated in Article 2 TEU[1]such as democracy and human rights. Its importance was stressed in another primary source, with the same legal effect as the Lisbon Treaty – The Charter of Fundamental Rights of the European Union[2] of which the Preamble clearly states that the EU is 'based on the principles of democracy and the rule of law'. In the beginning, the rule of law was considered a 'given', a principle that confirms the factual situation in every Member State, because the EU, and especially its political system, was modeled after the example of a modern, democratic Member State that founded it.[3] We can freely state that the existence of the rule of law and its constant unquestionable presence in the legal and judicial system of the EU, as well as in all its Member States was considered as a sort of presumption which needs not to be proven or questioned. However, without undermining the importance and success of the European project in the economic sense, we came to realize that the rule of law was more than a political and symbolic provision.[4] Another important aspect is the evolutionary nature of the European Union that corresponds to the evolutionary nature of the rule of law.[5] With the development of the EU legal and judicial system a different approach to the relevance of the rule of law was taken. As previously mentioned, the stable position of the rule of law in the primary sources of EU law clearly pointed out that it is a foundational value of both EU's construed identity as well as the constitutional identity of its Member States. In that regard, having in mind its importance, we will probably never cease to wonder what makes its substance or whether we will ever be able to determine its formal components. This question is crucial for several reasons. Firstly, the academia can largely agree that the rule of law is a 'multifaceted legal principle'[6] that imposes legal and political obligations to the EU and to Member States. However, the following issue remains: is the rule of law understood equally in every Member State and more importantly is it even possible for it to be understood in the same way on the supranational level as on the national level? Secondly, is the rule of law really a shared and common value of every Member State, having in mind that it was firstly introduced as a condition for every subsequent enlargement of the EU, especially with the Eastern bloc countries? Evidently, stemming from the Copenhagen Criteria set in 1993[7] to Article 49 TEU, the rule of law condition has become 'pivotal for the EU integration'.[8] In addition it has also become one of the essential criteria determining the negotiations chapters set out for candidate states negotiating their way to the EU, as well as one of the conditions for the EU effective support in its neighborhood policy. Finally, taking into consideration what is in the center of the EU's public arena- the infamous 'rule of law backsliding'[9] and the (re)emergence of the 'illiberal states',we are also analyzing to what extent it is really an *erga omnes partes* obligation and/or condition for the countries both in and outside of the EU?

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C 326/12
[2] Charter of Fundamental Rights of the European Union, [2008] OJ C 326/2012
[3] Monica Claes,'How Common Are The Values Of The European Union?' [2019] CYELP, VIII
[4] *Ibid*, VII
[5] Thomas von Danwitz, 'Values and the Rule of Law: Foundations of the European Union - An inside Perspective from the ECJ'[2017] 21 Potchefstroom Elec. L.J, 1
[6] Roberto Baratta, 'Rule of Law 'Dialogues' Within the EU: A Legal Assessment' [2017] 2 Hague Journal on the Rule of Law, fn.2
[7] Copenhagen European Council, *Presidency Conclusions* [1993] SN 180/1/93 REV 1
[8] *Ibid*, 360
[9] Dmitri Kochenov, 'Article 7 TUE : un commentaire de la fameuse disposition "morte"' [2019] 1 RAE, 34

II. THE RULE OF LAW AS A VALUE OF THE EUROPEAN UNION

Although common values referenced in Article 2 TEU did not appear in the first treaties crafted for the purpose of establishing the EU common market, their later evolution has proven them to be essential in the public discourse regarding further political integration. As previously stated, two parallel processes occurred that gave a not so gentle push to the introduction of the common values of the European Union. The first process was depicted in the reinforced European enlargement towards the East, after the fall of the Berlin wall, which was confirmed by the second process- the establishment of the Copenhagen criteria. The later proved to be a precondition for any state that was and is in the process of becoming an EU member. It is also worth mentioning that prior to those events, the idea of having common values was a strong *moteur* for creating a new European identity set in the 1973 Declaration on the European Identity[10] proclaimed by nine Foreign ministers of the then Member States. It seemed then, as it seems today, that the values, in this form, were initially envisioned more as goals and aspirations of the newly established political community that was rebuilding itself on solid economic foundations and only subsequently were they proclaimed by the nine states of Western Europe. We underline the aforementioned reason, in order to determine the origins of different conceptions and understandings of the European values that, at first glance, are, or they seem to be, common. Common European values were also the foundation of the Council of Europe's establishment. The fact that the largest regional system for the protection of human rights stated the rule of law as one value that was the common heritage of the peoples of Europe[11] affirmed the determination of the enlarged European Union to follow this path in building a stronger political community.

Before analyzing the rule of law and its *mille-feuille* – like structure, we should stress some of the common traits of all EU values having in mind that rule of law backsliding's painful presence in the EU nowadays (or has it been there since the beginning although we have failed to notice it?). The original 'United in diversity' idea has, without a doubt, resonated in the EU legal system. It pointed out also that, Member States have and insist on their own national and constitutional identity which is 'protected' even from the application of the principle of primacy, but at the same time they have an obligation to achieve common goals for the Community as a whole. We can agree that the idea of common constitutional values was rooted in the political and constitutional development of the EU and that it was coined for the purposes of bringing the States together for more than purely economic reasons. It also underlined the complexity of the EU, proving it not to be just an international organization but a *sui generis* institute. What is very distinctive about the European common values is that they are not part of the European *acquis strict sensu* and therefore they cannot be enforced in the same manner. On the one side, they are placed in the common provisions of the EU Treaty and their presence contributed greatly to the

[10] Declaration on European Identity (Copenhagen, 14 December 1973) <https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf> accessed 3 January 2020. In the European Declaration it was stated: "Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice - which is the ultimate goal of economic progress — and of respect for human rights."

[11] Preamble of the Statute of the Council of Europe, <http://conventions.coe.int> accessed 07 January 2020.
"Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy"

overall constitutionalization of the EU, but on the other, in case of their non-respect or non-assurance by a Member State the EU response depends on the political will of the MS. Therefore, the following question naturally imposes itself: do common values solely exist in their philosophical, ethical and sociological sense, portrayed as overall goals and aspirations of the legal systems, be it a constitutional system of a state or international organization, or do they have judicial meaning and value?

In the EU, the values were mentioned for the first time and judicially qualified in the judgment of the Court of Justice *Les Verts* where it was stated clearly that the (European) Community is a 'community based on the rule of law in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty...'[12]. The rule of law is therefore both a principle and a value,[13]and, according to many, its 'multi-layeredness' stems from the fact that it is '*primus inter pares* foundational value'[14] and henceforth a foundational value from which all others stem. At the same time the accomplishment and respect of common values leads us to the respect/fulfillment of the rule of law standard. The term rule of law has been analyzed in the legal theory from every aspect[15] since Aristotle. Finding its definition and naming its elements seemed important because it gave *rationale* for monitoring and rebuilding every judicial system in transition and even more importantly for the political development of the *sui generis* system such as the EU. With other values- democracy and respect of human rights and rights of minorities, rule of law came to represent a „holy trinity" that all states, especially in the terms of the EU, should have as a foundation of their legal systems. Despite the judicial recognition of the rule of law as a legal value, in the European terms[16], a proper discussion on the substance and understanding of the rule of law did not come up until the beginning of the crisis over a decade ago. It emerged firstly in the country that was not a part of the eastern enlargement – Austria,[17] and afterwards the in the Visegrad Group, namely in Hungary and Poland, even though all these countries fulfilled the political criteria at the time and became fully-fledged EU Member States.

III. THE LACK OF UNIFORM UNDERSTANDING: THE CHALLENGING ASPECT

The issue of the rule of law backsliding and the challenge of its reinforcement stem greatly from the lack of understanding of the principle itself. If we acknowledge numerous academic and formal conceptions and already given definitions as well as its 'checks and balances' role in the internal legal systems, can we claim at all that the rule of law is, in terms of EU enlargement and

[12]Case C/294/83 *Parti écologiste "Les Verts" v. European Parliament,*[1986] ECR 1986 -01339

[13] For a thorough analysis between a principle and a value see: Simon Labayle,'Les valeurs de l'Union européenne', Thèse en cotutelle Doctoraten droit, EcoleDoctorale Sciences Juridiques et Politiques (Aix-en-Provence)en cotutelle avec l'Université Laval

[14]Amichai Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' [2016] 54 JCMS, 1057

[15] For example: Aristotle – 'Politics'; Cicero – 'The Laws'; Montesqieu – 'The spirit of the laws' and Bingham with his theory of the "Thick Rule of concept".

[16]Opinion 1/91 [1991] ECR I-06079, para 21: "The EEC Treaty, albeit concluded in the forms of an international agreement, none the less constitutes the constitutional charter of a Community based on the Rule of Law."

[17] Heather Berit Freeman, 'Austria: The 1999 Parliamentary Elections and the European Union Members' Sanctions'[2002] 109 International Comparative Law Review

conditionality politics, a 'theoretical principle rather difficult to construe'[18], especially having in mind the 27 different legal and political systems? The EU Framework to strengthen the rule of law[19] was brought up by the European Commission in 2014. Namely, it was the first EU document where a European institution gave a remotely close answer what the rule of law means and what this particular value encompasses in legal sense for Europeans. In short, this was the first time that the rule of law was defined in the context of EU legal system. In addition, the Framework was criticized, especially in academia,[20] as a very mild answer and as another step added to the already weak and complicated rule of law enforcement structure and mechanisms.[21] However we must stress that those several pages devoted to the EU rule of law proved that it cannot be regarded as just a value subject to different interpretations by both Member States and EU institutions. At approximately the same time, the CJEU was preparing a stronger response, to what it considered as respect of EU values, especially the rule of law. Alongside dealing with the infamous Polish cases, the Court confirmed that the rule of law is a firm legal and judicial principle in the Judgment of 27 February 2018, *Associagao Sindical dos Juizes Portugueses.*The Court firstly very explicitly referred to the values in Article 2 TEU and then it stated some crucial elements (at least for the Court) which are inherent to the rule of law: effective judicial protection and judicial independence.[22] By linking Article 2 to Article 19 TEU, the European Judge concluded that the requirements stated in the aforementioned paragraphs are not limited to the specific and defined *in concreto* situations where the EU law is applying but it 'stretches to all national jurisdictions which might in general be confronted with questions relating to the application of Union law'.[23]However, even though this judgment echoed strongly among scholars and jurists, it seemed that it have not influenced all (or any?) Member States and their concept of values, especially having in mind that the rule of law was underlined in any national public discourse as a significant part of a Member States' respective national constitutional systems and a domain through which the EU's competences cannot pierce. Even though the CJEU implicitly, and then in November 2019 explicitly, referred to the Polish judicial reforms as contrary to the EU values, especially the rule of law value,[24] the Polish government, as well as Hungarian, seem not to share the opinion- not only on the contested breach of the rule of law, but also on the issue of what the rule of law actually represents and finally should itbe a European affair at all?

[18] R. Baratta, 358

[19] Communication from the Commission (COM) 2014/0158 to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law [2014]<https://eur-lex.europa.eu/legal content/EN/ALL/?uri=celex:52014DC0158> accessed 6 January 2020

[20] Dimitry Kochenov, Amichai Magen and Laurent Pech, 'Introduction: The Great Rule of Law Debate in the EU' [2016] 54 JCMS 1045, 1049

[21] Article 7 TEU

[22]Case C-64/16*Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117 para 36 and para 39.

[23]*Ibid*, para 39

[24]Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy*[2020] OJ C 27/6: "In the first place, having confirmed that, in the present cases, both Article 47 of the Charter of Fundamental Rights and the second subparagraph of Article 19(1) TEU were applicable, the Court stated that the requirement that courts be independent forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, rights which are of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded…"

Not undermining the obvious existence of the rule of law crisis in the previously mentioned countries and in the EU *grosso modo*, it would be useful to shed some light on a very important question: Does the rule of law crisis stems from the fact that there is not an adequate mechanism for its reinforcement or the European answer came 'a little too late' in the case of the two aforementioned Member States? Or it is not Article 7 mechanism that we should 'blame' and the crisis rather appeared because the Member States did not share the same understanding of the rule of law criterion in the first place? When it comes to European common constitutional heritage, as the Venice Commission refers to it[25] and the EU Commission endorses[26], can we claim with certainty that we have the same understanding of what constitutes a constitutional value such as the rule of law, in Western Europe, on the one hand, and in Eastern, on the other? And finally when we speak about conditionality and the enlargement process, which started with the 'Big bang enlargement', did the Eastern-European countries, that are already members, just accept the Westernized version of the values, ensuring their formal existence just like many other formal conditions on their European path without ever paying much attention to the substance? Can we even dare to claim that they were (and we add- still are) imposed on them?[27]

IV. THE RULE OF LAW AS AN ENLARGEMENT CRITERION

The rule of law, as stated earlier, being hard to define, while at the same time its lack is often easily noticeable, undoubtedly represents a backbone of the entire legal system currently existing in the EU. Despite being clearly defined as a value, as something of a superior nature, an ideal of a sort, developing a system based on the administration of justice solely through law, deprived of any other influence, nonetheless remains a challenge. After having managed to set all differences aside, the EU as a whole, and every Member State individually, accepted the rule of law as one of the core values upon which it will be based.

Another tendency and one of the main ideas of the EU is, of course, territorial expansion, formulated in the EU enlargement policy. Regardless of the shifts in sentiment toward enlargement over the course of the years since the foundation of the EU, it remains one of the main goals of integration. The scope of enlargement is yet to be determined, even so, there are, at any given moment in time, states in the process of EU accession or eligible to be considered for candidacy. The largest number of today's EU members joined the Community (Union) after its foundation adhering to a set of rules proving that they are committed to EU values. One of the main values whose implementation needs to be substantiated by a prospective member is the rule of law, a criterion defined in 1993 at the Copenhagen European Council meeting and reiterated at Madrid. The rule of law falls under the scope of what is collectively called 'political criteria' together with stability of institutions guaranteeing democracy and human rights and the protection of minorities. Over the course of the years, the political criteria have been the most difficult to meet, consuming the majority of time and effort invested by the candidate states in their attempts to join the EU, often leading to frustration and reducing the rule of law criterion to a mere instrument of stalling progress in accession at will. The recent situations taking place in the EU Member States that endured the accession process successfully and are now 'on the

[25] Sylvie Torcol 'Partager des valeurs communes, préalable à l'émergence d'un droit constitutionneleuropéen' [2017] Revue de l'Union européenne, 389

[26] Communication from the Commission to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law

[27] Monica Claes 'How Common Are The Values Of The European Union?'[2019] CYELP

inside' and the emergence of the EU rule of law crisis, clearly indicate that the EU failed to introduce its most valuable principle properly and reinforce it in an unwavering fashion throughout its territory. Furthermore, the distress of accession negotiations and the constant feeling of 'legal inferiority' found among candidate states turned into post- accession resentment. It is obvious that there must be a fallacy in relation to the understanding of the rule of law and how it is interpreted by the EU and its members as an accession criterion.

The most obvious problem is stemming from the fact that the EU sees the rule of law as a value and while having a very elaborate system of ensuring proper implementation of EU rules in many areas falling under the scope of it competences, it has practically no mechanism of securing the implementation of measures reflecting the rule of law principle, rather than relying on a disputable notion that the rule of law is in fact a shared value of all its members. It is often emphasized that, ironically, the EU applies more rigorous monitoring of the rule of law implementation in the candidate countries than it does among its own members.[28] Article 2 TEU and specifically Article 6(1) TEU remind us of the concept of indivisible and universal values and the principles of democracy and rule of law. The long- standing debate on the nature of values that are protected by law, their universality or particularity, certainly applies to the understanding of the rule of law as an EU value. The creators of the EU may have taken for granted this complex nature of any proclaimed value at a given period in time, relying on the assumption that European values are indisputably shared by all. In the light of the most recent events, it can be suggested that, to say the least, the EU values are not equally understood and interpreted throughout its territory. With the Treaty of Lisbon and the shift in addressing the rule of law as a value and not merely a principle indicates that the EU, with the emergence of its constitutional tendencies, realized that its even implementation depends on it being imposed and accepted as a deeply rooted ethical conviction, a reason behind normative action, rather than just a legal norm of greater significance.[29] Even before the idea of engaging in a project focused onpaving the way to a Constitution for Europe, the Member States attributed a much deeper meaning, transcending the quality of just a mere principle, to the rule of law when defining the Copenhagen criteria. Differences aside, it was clear that no successful absorption was possible in case a candidate state failed to adhere to the rule of law principle i.e. to demonstrate its willingness to accept it as one of the core values of its legal order. Hence the rigorous approach toward states aspiring to join the EU accompanied by other factors that have contributed to hardship and slow progress experienced by states on their respective EU paths. Putting so much strain on the aspiring and new members, while at the same time failing to secure a uniform understanding of the rule of law within its jurisdiction and mostly relying on its enforcement by national courts, lead to some serious discrepancies and discontent which is observed even post-accession. Instead of being an enforceable value derived from the constitutional traditions of all European states[30]it became just an item on a list of tasks to complete in order to prove yourself worthy of 'joining the big club'.

Furthermore, the toil is to precisely define what the rule of law criterion encompasses. The difficulty with this matter lies in the fact that this is mostly regulated by policy documents while

[28] Helena Raulus, 'The Growing Role of the Union in Protection of Rule of Law' in Flora A.N.J. Goudappel, Ernst M. H. Hirsh Ballin (eds), *Democracy and Rule of Law in the European Union* (Springer, 2016), 26

[29]Oliver 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

[30]*Ibid.*

some legally binding elements can be found in association agreements i.e. bilateral agreements between the EU, its Member States and a third country which is the legal framework of the accession process. Another difficulty stems from the fact that the rule of law as an accession criterion consisting of requirements such as independent judicial system, tackling corruption, implementing anti- radicalization measures[31] and other desirable and noble indicators of an efficient legal system, is merely a series of consequences that ensue when the rule of law is in place, rather than the rule of law itself. This essentially means that candidate states are being monitored for accomplishing a series of tasks which in reality are the consequences of the rule of law rather than *vice versa*. What is certain is the provision of Article 49 TFEU that states that any European state respecting the values listed in Article 2, among them the rule of law, and committed to promoting them may apply for membership. The measures to be taken to prove commitment are defined by a series of policy documents dealing with enlargement. This set of rules emerged rather spontaneously, largely at the time of expansion toward Central Europe. As enlargement slowly progressed from a set of procedural rules to a policy, the requirements became standardized and even legally binding. Primarily, they can be found in stabilization and association and in association agreements the EU and its Member States have concluded with Western Balkans and Eastern Partnership countries in the past two decades. These agreements, although not necessarily envisioning prospective membership, are often very similar in content to accession negotiations, and most certainly provide for very close cooperation, legal approximation and the recognition of core values. They contain a standard provision stipulating that the parties shall attach particular importance to the consolidation to the rule of law which essentially means assistance in the reinforcement of institutions at all levels in the areas of administration, law enforcement and the administration of justice, strengthening the independence of the judiciary, improving its efficiency, improving the functioning of the law enforcement bodies, fighting corruption and organized crime.[32]In terms of enlargement, the above mentioned Copenhagen criteria represent the base normative framework for membership hopefuls, while the 1995 Madrid criterion clearly endorses the need for structural reforms needed to ensure implementation of the EU *acquis*.[33] The Essen and Luxembourg Councils in 1994[34] and 1997[35] respectively introduced the idea of pre- accession strategy and established a monitoring system. Over the course of the years, the EU further elaborated and still adapts this monitoring system which, some argue, goes beyond the perimeter of EU *acquis* undermining the EU's commitments to the norms and values set out in the founding treaties.[36] In order to tackle some of these issues, the EU encouraged the involvement of other EU bodies and not just the

[31] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communication on EU Enlargement Policy (COM) 2019/260 final [2019], 3

[32] Such provisions can be found for instance in the Stabilization and Association Agreement between the EU and its Members and Montenegro (Article 80 Reinforcement of Institutions and Rule of Law) and in the Association Agreement between the EU and its Member States and Ukraine (Article 14 The rule of law and respect for human rights and fundamental freedoms) alike

[33] Madrid European Council on 15 and 16 December 1995, *Presidency Conclusions* <https://www.europarl.europa.eu/summits/mad1_en.htm> accessed 15 January 2020

[34] European Council Meeting on 9 and 10 December 1994 in Essen, *Presidency Conclusions* <https://www.europarl.europa.eu/summits/ess1_en.htm> accessed 15 January 2020

[35] Luxembourg European Council On 12 and 13 December1997, *Presidency Conclusions*, <https://www.europarl.europa.eu/summits/lux1_en.htm> accessed 15 January 2020

[36] Chritophe Hillion, '*EU Enlargement*' in Craig Paul, De Burca Grainne (eds), *The Evolution of EU Law* (OUP, 2011), 196

European Council, primarily the European Commission and the Council of the EU that today play a significant role in the enlargement policy implementation and accession negotiations. Many years into the process we observe today the everlasting challenges to this approach. It involves too many parties that can almost unilaterally derive any agreed measure from its course. Every Member State can impose additional conditions upon the state aspiring to join the EU without any normative framework allowing for such behavior which undermines the core values of the Union, primarily the rule of law itself, the very idea behind justice through law, free of undue influence. The EU institutions entrusted with coordinating the process are constantly making changes to the established practices in search of a more permanent, universal solution while at the same time distracting the candidate states from the aim of the structural reform and making the whole process look like a frequently updated list of petty tasks created to keep potential members at bay. Every time there is a setback a more rigorous approach is applied and every time enlargement states face a new task on their EU path they respond with resentment.

It is, therefore, clear that the rule of law criterion is undoubtedly the *sine qua non* of EU enlargement policy, however due to the lack of capacity to regulate the essence of this value and turn it into a set of tangible legal norms, applied uniformly and consistently, as a true common policy toward new membership, the rule of law is becoming more and more distant from its initial conceptualization. With a state having withdrawn from the EU and the rise of nationalism in Europe, which are great enemies of the enlargement, it is clear that this policy is in detriment, and with it so is the promotion of the rule of law in EU's neighboring and partner states. While focusing too much on increasing the pre- accession requirements and monitoring strict policy measures outside its territory, the EU has had moderate success in establishing an efficient mechanism to ensure the implementation of the rule of law in its new members. These are all significant contributing factors to the current rule of law crisis in the EU with a spillover effect on its neighbors and partners some of whom will become future members.

V. REVISITING THE UNDERSTANDING OF THE RULE OF LAW IN THE CONTEXT OF ENLARGEMENT

The idea behind accession criteria is basically having a new Member States prove it can adapt to the system existing in other Member States so that the EU, as an organization with its strengths and weaknesses, can easily absorb it. This means that the rule of law, along with other criteria, has a very practical side to it. It would be hard to imagine a judiciary subject to undue influence in a position to assume its role in the judicial mechanism ensuring proper implementation of EU law and adequate protection of citizen's rights. Yet again, we today witness concerns being raised regarding judiciary independence in two Member States while almost simultaneously we see that the rule of law is often proclaimed as the core value of the enlargement process while the experience in acceding the EU goes to show that a lot more consideration is given to economic reforms. Enlargement, being a policy defined with only a handful of vague norms, leaves much room for interpretation and altering priorities. At times, when everything seems to go smoothly inside the EU, we see that focus shifts to other areas, primarily economic in nature, while when there is a bump on the road such as the case today with Poland and Hungary, the rule of law criterion becomes more important. This goes to show that the rule of law criterion may have been taken for granted. It may have been mistaken for a universal value inherent to every European state, or at least to every state that, during a long and exhausting, mostly political,

process, managed to prove its dedication to it. The EU's somewhat inconsistent approach to the rule of law as an accession criterion, accompanied by the lack of mechanism for the rule of law implementation post- accession, is what cumulatively resulted in the crisis the EU has to deal with today.

Undoubtedly the rule of law as an accession criterion needs to be revisited, not because the necessity of it is in question, but because of its fluctuating importance in the enlargement process falsely reduces its significance for the functioning of the EU, both internally and externally, which ultimately creates a potential situation of serious and persistent breach.[37]The most significant step forward happened with the Treaty of Lisbon and the codification of institutional practice[38] which allowed for the Copenhagen criteria to be rooted in legally binding provisions therefore giving a greater role to the EU institutions in the enlargement policy and diminishing the possibility of arbitrariness.

The other problem is the question of the role of the CJEU in the enlargement policy application. It can be concluded that the Court of Justice refrains from meddling with enlargement issues. This is almost always an indicator of it still being a sensitive topic where uniform understanding across the EU cannot be reached. However, the CJEU may have the greatest individual interest and, more so, the responsibility, to ensure the rule of law is respected. Although timid, there are some instances of the CJEU preparedness to assume a more active role in the enlargement process. In its *Mattheus*[39] decision the Court clearly indicated that enlargement is a precise procedure while the conditions of accession remain under the auspices of the authorities indicated as responsible for the realization of the process.

For the time being, in the post- Lisbon era, the accession criteria remain as they are. We can, of course, observe a greater involvement of the EU institutions which helps establish a clearer path to membership to aspiring states. In addition, it also allows for the rule of law not to be seen as a relative term subject to interpretation, but as the foundation of the EU as an organization. Still, the influence of Member States is significant to the point that cannot be easily balanced out by the means the EU institutions have at their disposal. It would be outrageous to suggest that the role of the Member States in the enlargement should be absolutely diminished or reduced to the mere adherence to EU decisions, however, greater involvement requires greater level of preparedness. Ultimately, enlargement will always be a mostly political process where the EU and its members work together toward the established common goals while honoring the decisions of states wishing to join.

As the EU realized itself, it is now high time to distinguish the political and economic aspect of EU accession from the legal one and to establish a set of clear, transparent rules that will be applied unwaveringly with every new application for membership. Without it, it will be impossible for the EU to ensure adherence to the rule of law uniformly and persistently throughout its territory in the long run. In the so- called new accession methodology,[40] the Commission willingly accepted the initiative of France to revise the accession process rules, leaving the option for Serbia and Montenegro, as the two states furthest into the process, to opt for the new methodology or stay with the one already in use. After having campaigned for the

[37]Article 7(2) TEU

[38] Hilllon Christophe, 211-212

[39] Case C-93/78 *LotharMattheus v Doego Fruchtimport und TiefkühlkosteG* [1978] ECR 1978 -02203

[40]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *Enhancing the accession process - A credible EU perspective for the Western Balkans* COM(2020) 57, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf> accessed 10 February 2020

new methodology in the Western Balkans, the Commission can reasonably expect that it will be easily embraced by all states of the region. The reasons behind it are presented as rather noble, such as the rule of law, effectiveness of the process, building trust among stake- holders, predictability and credibility.[41] These are all, undoubtedly, very legitimate goals, and it is obvious that almost no significant progress was made in the enlargement department during the mandate of the Juncker Commission. With the rule of law crisis in the more recent member States, something needed to be done. However, considering that the proposal came from the state that objected the opening of negotiations talks with North Macedonia and Albania just a few months prior to drafting the new methodology proposal, the 'good intentions' toward the states aspiring to join the EU may be questionable. Still, this represents a minor concern, as opposed to the fact that revising the process half-way, with at least two states too far into it, creates more legal uncertainty and arbitrariness than it was the case with the already established methodology. It even contradicts the Court in *Mattheus* that described the enlargement as a precise procedure while the conditions of accession remain under the auspices of the authorities indicated as responsible for the realization of the process, as we mentioned before. With this different approach, it could be concluded that the enlargement is not in fact a precise procedure, but rather something that can be substantially changed at any given moment in time regardless of how convenient it may be, and even the relevant stake- holders may be given more or less power even in the middle of the negotiations process. Giving more power to Member States at first may seem like a good idea and an easy task, however, it is often neglected that not all Member States are equally familiar with or even interested in the enlargement. It needs to be taken into consideration that, while weighing in between different priorities, accession negotiations may be very low on each Member States' agenda. This can lead to unnecessary stalls, some of the achieved progress may be neglected and the aspiring members would, once again, find themselves overwhelmed with resentment. The resentment will outlive the negotiations, and will emerge post- accession, as it is the case in Poland and Hungary and the rule of law as an EU value will face another setback.

To conclude, while obviously trying to tackle the difficulties of understanding and implementing the rule of law accession criterion, the Commission and the Member States clearly needed to take measures to enhance this enlargement process. However, doing it at the moment in time where the EU is facing, arguably, some of the most difficult challenges in its existence can hardly lead to desired results and may easily have an adverse effect in years to come. It should not be forgotten that legal certainty and legitimate expectations are also very important principles of EU law, and even the membership hopefuls are entitled to benefit from them, with an overall goal to be truly prepared for being inside the EU, with all the rights and obligations it encompasses.

VI. CONCLUSION

The rule of law finds its place in the most important international and regional documents and it is, undoubtedly, a positive aspiration and one of the most significant components of both political and legal systems, national or supranational. But its real substance and its purpose remain subject to different understandings and interpretations within and outside the EU. The rule of law is an aspiration, a tireless struggle to maintain and improve mechanisms that allow for it to turn into reality. It is even a belief system that, as any other value, may not be entirely

[41] *Ibid.*

universal and unhesitatingly accepted by all. The accession process is very indicative of all the misconceptions and faults that exist in relation to the implementation of the rule of law even in the EU. While engaged in an effort to satisfy the conditions allowing for EU membership, accession states rarely have the time to truly reflect on the very essence of the rule of law criterion. Upon joining, they often develop some sort of resentment toward it, identifying the rule of law as a vague accession criterion that is only there to leave the Member States some room to stall negotiations. The EU obviously needs to tackle this discrepancy, and the Commission's most recent efforts to reform the enlargement process putting emphasis on the rule of law are a step in that direction. However, there are concerns to be raised regarding the efficiency of this new approach especially considering that it is proposed at a very difficult time for the European Union and at a time where there are two states already too far into the negotiation process. While the involvement of Member States is prerequisite for successful accession of a new member, it is rarely considered whether they are in fact prepared to assume this responsible role. In order to truly adhere to the goals and realities of enlargement, the Commission will need to invest itself into drafting a more elaborate plan with clear outcomes and strictly defined roles that does not leave room for arbitrariness when it comes to the rule of law promotion in accession countries. We are fearful that this new approach will allow for all these necessary changes, especially considering that it could undermine the principle of legal certainty and legitimate expectations.

Taking into account that there is no uniform understanding of the rule of law as an EU value, that the rule of law as an accession criterion is often misconstrued and reduced to a mere technicality, the existing rule of law crisis is just an obvious consequence. In countries aspiring to access the EU, rule of law appears to be far away from, as Raz describes it, a virtue by which a legal system is to be judged[42] and slowly turns into a term often used in public discourse without any substantial meaning to it. With lax interpretations, an occasional turning of a blind eye when other, mostly political, aims are at stake, combined with the lack of will to truly adhere to the core values on the side of candidate states, the rule of law is slowly becoming another vague term under bureaucratic supervision immensely vulnerable to undue political influence. Even though the EU offered a semi-successful answer to the rule of law crisis, depicted in its Framework in 2014 and the application of Article 7.1 TEU for the first time, the issue of the EU rule of law double standards when it comes to (for now) particular Member States, on the one hand and Candidate Countries, on the other, still lingers. The question, therefore, remains: how did such a noble intention of justice for all deprived of arbitrary, unlawful practices turn into a vague, arbitrarily interpreted criterion? How did we come to the point where the rule of law is to be perceived as symbol of superiority of the old members over the new members rather than an ideal and an attainable and desirable goal for all? This could be in part due to the fact that the pre-accession policy of conditionality is always replaced, upon accession, with a policy of mutual trust and loyalty which is a significant transition. However this should never imply that joining the EU is an exclusive membership ticket to a club that erases all memory. EU accession is not a moment of discontinuation of all previous efforts nor is it the final destination for membership hopefuls. It is a logical progression of all previous actions undertaken during accession negotiation and just one of the many stops on the journey to prosperity and sustainability. Therefore, until the EU, each Member State and all candidates are able to understand accession negotiation and EU membership as two phases of one whole the rule of law implementation and promotion will remain at risk of backsliding.

[42] Joseph Raz, 'The Rule of Law and Its Virtue' [1977] 93 Law Quarterly Review, p.198

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