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Compromise(d)? – Perspectives of Rule of Law in the European Union

- **ABSTRACT:** *This paper introduces different perspectives of rule of law in the European Union starting out of the assumption that fear and (common) economic interests continue to be the primary motivator of European integration as to the European Union. The analysis touches upon the problematic tension between national specificities of the rule of law developed organically inside state frameworks of constitutionalism, through the practice of national constitutional courts and the practice and standards of international organizations and institutions in this matter. Starting out of problems brought about by open statehood and the “dialogical” development of rule of law in the European Union, the paper also describes the institutions, concepts and processes relevant to the enforcement of the value of rule of law in the EU.*
- **KEYWORDS:** Rule of law, TEU, Article 2, Article 7, constitutional courts, European integration, European Union, principles, values, national competences, conferral, statehood, international standard, compromise, dialogue.

1. When We All Have Our RoL(e) to Play. On the importance of crisis and compromise

The concept of European integration was born in a crisis: after World War II, the nations of Europe had no choice but to create a viable peace project as they could not risk the possibility of continued animosity. At the same time, there was no common European identity that would have allowed the construction of a federal system for Europe despite initial ideas to that effect. There were, however, common economic interests that were strong enough to serve as the focal points of integration spilling over from the field of economy to other areas of cooperation.

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For the EU, the integration process was thus brought to life by fear of crises (thereby fashioning a unique identity) and by common (economic) interests. We know this today as the European Union, and having undergone significant political, social and economic crises, having achieved great goals, we could argue that to some extent the core motivators supplying the life force of the integration still remain fear and economic interest.

In the conclusion of this paper, it will be argued that these days we see processes of integration working in a „reverse spill-over” mode, especially in the context of the rule of law. When all else fails in the eyes of the EU, mechanisms to enforce the fundamental value of the rule of law fall back on (common?) economic and financial considerations, trying to tighten the grip where it hurts the most. The question is, however, who will suffer most: the fist or the fingers, i.e. the Union or its constituents.

Economic interest as a motivator for integration is now apparent in the very real fear that Europe’s nations can only become a unified competitive actor in the globalized market. This remains a key element of the future of the European Union as well as fears regarding the national economic interests of each Member State as part of the single market. This dynamic of fear is only exacerbated by the COVID-19 pandemic and the legal, constitutional and political challenges it brings about in the Member States who all struggle with upholding the rule of law in the face of social, political and legal challenges.

When we want to look at the European Union background of something as powerful as the rule of law, we need to keep all this in mind, because only then can we understand the interests and aspirations behind European integration. We need to be able to put into perspective the processes that brought the integration to life and those it went through during its seventy years of existence. This is both a temporal and a structural enterprise, it requires looking at the chronology of its evolution and the actors involved (in Part II).

We need to see that in the development of integration, nothing has ever been black or white: the last seventy years have been lined with regular cycles of conflict, crisis and compromise. We encountered conflicting interests that seemed to exclude each other already very early on, but the parties realized they could not exist without each other, so in the end, the necessary compromise was reached ending many deadlocks in several disputes. It is enough only to think of the *Luxembourg compromise*, when De Gaulle’s France eventually abandoned its policy of “empty chairs” and returned to the Council after seven months, on the condition that the unanimity principle² should continue to apply if fundamental interests of a Member State were at stake.³ Today, whenever we talk about Council decision-making (also in terms of the rule of law⁴), this rule is still a

2 Cf. <https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/>.

3 Legal historical research is directed at this approach, e.g. Philip Bajon: *The Legacy of the Luxembourg Compromise, 1966–1986* (online), Available: <https://www.rg.mpg.de/research-project/the-legacy-of-the-luxembourg-compromise>

4 Cf. Article 7 (1)-(2) TEU, whereunder the Council can determine – by unanimous vote – if a Member State infringes upon the values of the Union, separating this from para. (3), whereby the Council can only vote via QMV. (This will be discussed in Part II in more detail).

fundamental element of the process, and few may question its validity on legal grounds, while fundamental interests of Member States remain at stake many times. Another example is the Constitutional Treaty, which had undoubtedly met a premature demise,⁵ but its core structures were included in the *Lisbon Treaty*. If nothing else, this indeed bore the hallmark of a *successful compromise* at the time of its creation.

Are we on the road towards a necessary compromise again, or had we perhaps passed by it already, leaving it unnoticed as a result of the deafening and unending noise of contempt and dissatisfaction with the European status quo.

RoL (rule of law) is a key issue for the European Union today, regarding which many conflicting (economic) interests and fears project themselves onto contemporary legal, constitutional and political processes. It is just as much a fundamental interest, a value and a principle of the Member States as it is one for the EU, and there is disagreement in how to grasp its essence due to diverging approaches. Regardless, the results achieved in efforts to try and define its place and content on a national and on an international and European level can still be looked at as compromises and evaluated as such.⁶ However, in order to find solutions that are acceptable to all Member States, this time, too, we need what has always taken the European Union forward: a compromise. In this, *we all have our RoL(e) to play*, as the title of this introduction also suggests. This play on words intends to impress upon the fact that Member States' (and their constitutional structures') roles in defining what the rule of law means in and for their national contexts cannot and should not be disregarded as part of the next necessary and *successful compromise*.

The integration, in this sense, develops as language normally would. Certain words are used to mean certain things in the different regions, cultures, and in order for everyone to understand each other, a compromise is attempted requiring certain words to be understood with the same meaning everywhere, developing a usage. However, is such a thing at all possible if we talk not about language but about legal concepts and notions? Can there be unity in diversity in this sense?

On the way toward the next compromise, politics, law and academia all strive to accommodate the constitutional law concept of the rule of law to fit the current, exigent circumstances of the integration. As such, it is more often than not used as “both a carrot and a stick”, a political slogan to resolve conflicts of political nature. Ascribing political content to inherently legal notions, however, has never before led to successful compromises but more often gave birth to oppressive regimes.⁷

5 E.g. Hofmeister, 2008; Klabbers – Leino, 2013.

6 E.g. Uitz, 2020; Scheppele – Pech – Platon, 2020; Gros, 2020.

7 A photo of a local celebratory event in Szeged, a Southern town in Hungary, contained the following inscription above the podium of an event celebrating the Constitution in a Rákosist-Stalinist style (cca. 1950s): “*The constitution shall be a weapon in the hands of the working people*”. Constitutions, however, just as the legal foundations of European construction, are all “peace projects” not weapons, and can thus steer Europe towards compromises. (The photo can be found in the following digital archives: <https://www.delmagyar.hu/galeria/eletkepek-1948-es-1989-kozott-2104909/222>).

This is especially the case, if – according to many – there is no universal consensus on the exact meaning of this legal notion. Conceptualizing and condensing the constitutional content of the rule of law and then measuring how the concept performs in terms of political and legal processes is a tough nut, but some nonetheless have recently taken a few cracks at it in Hungarian academia.⁸ While in the current political climate, Hungarian stances on the concept of the rule of law might not be welcomed with open arms, we consider it important to shed light on some key arguments made in recent years by Hungarian scholars.

- (i) Tóth sees that the sole purpose of any academic endeavor in this respect can only to try and define its core as *the notion inflates* due to criticism that comes from an academic assessment of the elements of this concept over time. Therefore, he sees this inflation in the rule of law “shedding its skin”, taking on new attributes while letting old ones go.⁹
- (ii) Beyond this core, Pócza – in reference to Waldron – mentions a “minimalist definition”¹⁰ referring thereby to the rule of men being substituted by the rule of law. This wording seems a touch unfortunate given the complexity of current European political debates regarding the rule of “certain men” and how they, and their rule of law, perform on the European scales of accountability. Also, logically, if we accept that the (political) rule of men is substituted by the rule of law, then not politics but law should dominate this discourse. Simply because if it lacks or circumvents legal considerations, this will erode the relevant discourse and dialogue itself, not the rule of law.
- (iii) Varga sees another “dual factor” that erodes rule of law itself, and he calls it arbitrariness in terms of
 - (a) the interpretation of the principle by the Hungarian Constitutional Court as a form of activism before and after the entry into force of the Fundamental Law¹¹; and
 - (b) the contemporary invocation and application of the principle of rule of law in terms of ‘open statehood’ (to be discussed below). In his view, the rule of law “does not safeguard by itself the actual limitation of power, the liberty of legal subjects or primacy of law. In other words: the rule of law can also be interpreted (such exercise of power can be established in the name of the rule of law) as a form in which legal subjects benefit from less and less liberty, and where law dedicated in principle to defend their rights and liberties will ultimately lead to their comprehensive vulnerability. In other words, an application of the principle of the rule of law can start wearing marks indicating tyranny, and, in extreme cases, marks of totalitarianism.”¹²

8 E.g. Varga, 2019; Pócza, 2019 or Tóth, 2019.

9 Cf. Tóth, 2019, pp. 197-199.

10 Cf. Pócza, 2019, p. 143.

11 Varga, 2019, pp. 14-16.

12 Cf. Varga, 2019, p. 10.

Positioning this argument into the debate about the power relations (and competence limitations) between the EU and the Member States (as a form of ‘open statehood’), Varga argues that an eventually erroneous interpretation of the value of the rule of law under Article 2 TEU by the CJEU would bind the Member States to be held liable under proceedings arising out of Article 7 TEU (in a domain of sovereignty that “*had not been formally yielded by the member states to the Union*”), without the actual possibility of holding the CJEU liable for erroneous interpretation, which fact he attributes to the absence of the statehood of the EU – as in a rule of law state, these mechanisms would be implicit in the rule of law operation of a state. That is why he is of the opinion that in Member States’ relations with the European Union, the rule of law becomes an “*arbitrary means of discipline due to its vague content*”.¹³

In this regard, we will soon elaborate on the problems of “dialogical development” of the rule of law debate between Member State constitutional courts and the CJEU in another perspective.

As a legal notion, shaping the bedrocks of the legal, constitutional and political structures of the different Member States, rule of law has organically matured over the decades in the different case laws of national supreme and constitutional (apex) courts, maintaining some commonalities.

In a seemingly simplistic approach to this, allow me to use another reference to language and what it represents, hidden in translation. The Hungarian constitutional law term used to describe the rule of law is very revealing in this respect. “*Jogállamiság*” (wherein ‘*jog*’ corresponds ‘law’ and ‘*államiság*’ literally means ‘statehood’) describes a condition where the law primarily and primordially originates from the state, law defines statehood, and due to this fact, the state is submitted to these laws. Pócza refers exactly to this when describing the notion in a formal sense to mean the preservation and maintenance of law and order through state means, contrary to the broader view specifying the importance of the necessary to limit (state) power.¹⁴

If we accept that the rule of law is primordially tied to states and state-made laws, then we could address the issue of statehood in the European Union as well and its effect on the rule of law. Rainer Arnold conceptualizes that the external aspect of rule of law appearing in the EU represents what he calls ‘open statehood’, existing in parallel with the internal (state-bound) aspect of the rule of law (both embodied simultaneously by a national constitution). Arnold also makes the argument that establishing the rule of law is what is basically understood under ‘constitutionalization’, and under its external aspect

- (i) concepts originally anchored in national constitutional law start to appear in international, European contexts as
- (ii) states regulate their relationship with the international community.

13 Varga, 2019, p. 18.

14 Pócza, 2019, pp. 148-149.

That is why we need to talk about rule of law in Europe, he posits.¹⁵ Elsewhere, he is of the opinion that the *ultra vires* debates between the Member States' Constitutional Courts and the CJEU are manifestations of a balance sought between closed and open statehood, i.e. what falls within Member State competences and what falls within EU ones) and one of its central tenets is that the integration rests on rule of law foundations.¹⁶

Summing up: each Member State has its own constitutional rules on the concept of the rule of law and its relevant constitutional and court jurisprudence filling it with elements of meaning and interpretation. These are first and foremost the results of *national compromises* between national actors, with the ultimate role of constitutional courts being the authoritative interpreters of the constitution. Based on these, channels have opened up over time to engage with other states, forming cooperation and mark these alliances by a common commitment to the rule of law as established in the *acquis* of the resulting international organizations (such as Council of Europe and the European Union) and their institutions.

Kochenov and van Wolferen address this problematic in the form of what they describe as “dialogical rule of law”, reflecting on the relationship of the CJEU and Member States' supreme or constitutional (apex) courts. As they argue, there is a tension between positive law (*gubernaculum*) and “*principles of law beyond the sovereign's reach*” (*jurisdictio*) supported by a variety of inherently dialogical means suitable “*for analysing the adherence to that essentially contested concept, regardless of the precise list of terms that fall within it*”. They see the EU as “*a problematic example of a legal system where the Rule of Law defined in such a way is under constant attack. Even though there are clear sources from which it could derive jurisdictio, international law, the constitutional values of its members and its own constitutional principles, the Union places primacy in the value of its gubernaculum – the acquis, in combination with three deeply anti-dialogical principles: supremacy, autonomy, and direct effect, which threaten the substance of the core values and principles guiding the law in any liberal democracy.*”¹⁷

The cited authors also argue that dialogical rule-of-law-enforcement becomes problematic if national constitutional courts are put in a position where they would need to abandon their task of “*protecting inherent constitutional values and rights [...] in favour of vague euro-speak.*” What they identify as an authoritarian monologue by the CJEU, impedes – in their view – the flourishing of rule of law conditions, thus preventing the EU from “*turning into a much richer constitutional system.*”¹⁸

While effective dialogue not only shapes identity but also contributes to enriching consensus on the content of the rule of law, epistemological problems persist. Some legal scholars concede that there is some kind of mainstream approach regarding the meaning of the concept presupposing some sort of an *academic compromise* on certain

15 Arnold, 2020.

16 Arnold, 2016, pp. 6-7.

17 Kochenov, van Wolferen, 2018, p. 15.

18 Ibid.

definitional elements. If nothing else, some others argue that there is – at least – a European consensus embodied by the following statement: “*Final answers to debate are given by law and socially significant relations in life are regulated by law.*”¹⁹ However, judging by the current landscape of debates and process in the European Union (described above and below), such compromise is not at all apparent, not even at a cursory look. Let us now nonetheless traces the origins of a *European compromise*, as represented by the work of the Council of Europe.

Based on the above, it is no coincidence that the Venice Commission of the Council of Europe, in its 10-year-old report on a comprehensive interpretation of the rule of law,²⁰ described it by three words taken from three different languages (English, German and French). Thereby, the Commission explicitly acknowledged that there are in fact at least three different (mainstream?) national origins in a historical, cultural, etc. context, and proposed their reconciliation.

With regard to the post-Soviet states of Europe, the report also raises doubts as to whether the rule of law should be used as a fundamental concept of public law in those systems, due to the many different state approaches (all burdened with the memory of Socialism and the ensuing discontinuity of the previously organic rule-of-law tradition). In relation to the emergence of the concept at the level of national constitutions, the Commission’s report states that it is “*one of the principal characteristics of States*”, thereby cutting back to my previous linguistic remark on the contextual meaning of the notion. (Although, recently it is “in fashion” to deny certain aspects of our collective past not comfortable to face in the current climate, such impressions on the European constitutional landscape as the ones left by the Venice Commission, should always be borne in mind.)

If we compare these different state approaches and the resulting European, *international compromise* created by the Venice Commission as to the “form and content” of the rule of law, we are faced with another obstacle of language ascribing certain meaning to certain words. How can the rule of law be best defined as a legal notion? Is it a principle or a value, is it an objective? Is it something that can only be interpreted (and assessed) as a result or consequence in itself or rather as a point of origin?

Stepping outside of national frames, and inserting this concept essentially developed in national constitutional law (and its interpretation) into political processes on the EU-level has its own challenges as well. The eventual question is whether such mechanisms serve the stability of the integration, the “master” of which is the supra-national political machinery of the Union and whose interpretation of the rule of law may differ from that which can be deduced from the practice of the apex courts of the respective Member States. The interpretation of the concept of the rule of law must not be based on political considerations but on legal grounds and must remain in line and harmony with national approaches.

19 Pócza, 2019, p. 145.

20 CDL-AD(2011)003rev, Report on the Rule of Law.

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e).

Against all this, it is undoubted that the European Union's interpretation of the rule of law is based on the provisions of the Treaties and as such an independent domain of legal interpretation can be established within the framework of EU law, taken care of by the Court of Justice.²¹ However, the pitfalls of this “dialogical rule of law” have been presented above. Before moving on, we shall bear in mind that extra-judicial interpretations of the rule of law also have taken hold of European institutions, and – in light of the above – the circumstances and content of the establishment of the EU “rule of law mechanism” (and its successors and alternatives) will be presented below.

2. On how actors play their RoL(e). Toward an EU Compromise?

■ 2.1. Setting the Scene: The Framework

The EU dimension of the value (and/or principle) of the rule of law – subject to this paper – was first christened “the EU Framework to strengthen the Rule of Law”, developed and communicated by the European Commission.²² According to the Commission, *“the rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership.”*²³ *Along with democracy and human rights, the rule of law is also one of the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).”*²⁴

In 2014, the Commission stated that the constitutions and judicial systems of the Member States are well designed and equipped to protect citizens against any threat to the rule of law. However, according to the Commission, *“in some Member States”*²⁵ [it was] *demonstrated that a lack of respect for the rule of law and, as a consequence, also*

21 See e.g. von Danwitz, 2014. Danwitz, then a judge at the CJEU, identifies the context of the debate as resulting from the „public perception that the political evolution in a Member State might be in contradiction with the values of the Union”. (p. 1336.).

22 COM/2014/0158 final: Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158&from=HU>.

23 For more on this subject, see e.g. Stephanie Ricarda Roos: The “Rule of Law” as a Requirement for Accession to the European Union. Lecture presented at a Summer School on “The Importance of the Rule of Law in the Context of Accession to EU and NATO” August 2007, Bucharest (online) https://www.kas.de/c/document_library/get_file?uuid=8279dfa9-5d97-fb5e-1015-d5b82483170c&groupId=252038.

24 COM/2014/0158 final, 1.

25 Ever since the beginning of this debate, the issue is mostly only focused on Hungary and Poland as being the “sole perpetrators”, but EU concerns have been also raised in terms of Romania (together with Bulgaria as two “law-governed states”) or Malta, to mention the most characteristic examples. (On Romania, see: Carp, 2014; on Malta, see: Borg, 2020).

for the fundamental values which the rule of law aims to protect, can become a matter of serious concern.”²⁶ In developing the rule of law framework, the Commission stated that it is the Guardian of the Treaties and thus has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union.²⁷ In April 2013, the General Affairs Council discussed the topic²⁸, then thereafter the European Parliament requested that “Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law.”²⁹

Against this background, the Commission has established the rule of law Framework to address and resolve a situation in that Member States where there is a *systemic threat*³⁰ to the rule of law.³¹ According to the Commission, the aim of the framework is to resolve potential future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU – considered by some as “only theoretically attractive procedures”³² – would be met. The Commission emphasized that the framework is not an alternative to already existing Article 7 mechanisms and infringement procedures, it has a much more preventive / complementary nature,³³ which – however – both lexically confer the meaning that they are thus designed to lead to alternate paths of EU enforcement of European values.

In justifying the need for a 2014 rule of law framework, the Commission explained that the principle of the rule of law „has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.”³⁴

The EU Commission – in line with similar conclusions drawn by the Venice Commission – acknowledged that the precise content of the principles and standards

26 COM/2014/0158, 1.

27 President Barroso played a major role in shaping the framework, who in September 2012, in his annual State of the Union speech to the European Parliament, spoke about the need for a more effective system of the protection rule of law. Cf.: http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm and http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm.

28 Cf. http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf.

29 Cf. COM/2014/0158, 1.

30 Many in legal academia have called on European institutions to define this concept to no avail, while the events surrounding the Constitutional Tribunal in Poland have been characterized by others as a systemic threat. (On the lack of a definition of systemic threat and relevant issues: Kochenov, Pech, 2015; on the Polish situation as a systemic threat: Pech, 2016).

31 This came – through Article 1 of the Nice Treaty – as a direct reaction or response to the Austrian events of 1999 leading up the rule of law procedure not being triggered due to lack of actual violations, but the adoption of the so-called “Wise Men Report” on the country’s commitment to European values, by Martii Ahtisaari, Jochen Frowein and Marcelino Oreja (online) <https://www.jstor.org/stable/20694076?seq=1>.

32 Fekete – Czina, 2015; Orbán, 2016.

33 Cf. COM/2014/0158, 1.

34 COM/2014/0158, 2.

stemming from the rule of law may vary at the national level, depending on the respective Member States' own constitutional arrangements, however the Commission considered this much less significant than its CoE counterpart. In 2014, the EU Commission essentially adopted the interpretation of international judicial forums and bodies as the sole guideline, which approach, as we will see later, will form the basis of the 2020 rule of law Mechanism. According to the EU Commission, the case law of the CJEU and the ECHR, as well as documents drawn up by the Council of Europe, „*building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.*”³⁵

On the basis of these sources, the Commission defined the content of the rule of law as

- (i) legality „which implies a transparent, accountable, democratic and pluralistic process for enacting laws”³⁶,
- (ii) legal certainty,
- (iii) prohibition of arbitrariness of the executive power,
- (iv) independent and impartial courts,
- (v) effective judicial review including respect for fundamental rights, and
- (vi) equality before the law.

However, the Commission did not define the content of the above, but referred to the case law of the CJEU and the ECtHR, according to which these are not purely formal and procedural requirements but vehicles “*for ensuring compliance with and respect for democracy and human rights*”. It is then stated that the rule of law is a „*constitutional principle with both formal and substantive components*”, but the Commission no longer ponders upon substantive difficulties of content. In essence, they developed the Framework circumventing the consequences of their finding that the elements of rule of law may have a different content in the respective national legal systems. The Commission resolved the problem by relying on the absolute supremacy of the CJEU’s and ECHR’s practice over the jurisprudence of the Member States. Frankly, in so deciding, the Commission may have assumed that these courts have already taken into account the practices of the Member States, but the fact remains that they did not wish to include these circumstances, such as national specificities, into the rule of law framework. This is, in part, understandable, given their mandate to promote European interests. Regardless, the resulting rule of law mechanism was (and is) based on this approach.

The Commission stated that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: „*there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa*” and „*fundamental rights are effective only if they are justiciable*”. It is also stated that „*democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of*

35 COM/2014/0158, 2.

36 COM/2014/0158, 2.

*expression, freedom of assembly and respect of the rules governing the political and electoral process.*³⁷

The processes identified by the Commission, which are to be protected by them and the EU at large are consequences in themselves: they are based on the national legal systems of the Member States, which includes, *inter alia*, not just the regulation of the MSs, but the case law of the national judicial systems and constitutional courts. They encompass legislation that has evolved organically over decades and that has contributed to the creation of a set of rules correlating a set of criteria referred to as the “rule of law”. The Commission’s approach is feared for its destabilizing effect regarding these foundations, trying to mold the rule of law into (and based on) the case law of our international (judicial) forums. It is not, of course, a question of these bodies playing a decisive role in determining the rule of law requirements, however, we must not forget *the role of these bodies*.

The ECHR is a complementary forum for the protection of human rights, while the CJEU is the forum for the protection of EU law. The practice of these bodies can therefore only be taken into account in determining the content of the rule of law in so far as the issue under consideration falls within the remit of these forums. Otherwise, we will disregard the requirements of the founding treaties regarding the division of powers when defining the content of the rule of law, whereas, in matters falling within the scope of national sovereignty, instead of the case law of national constitutional courts and judicial bodies, we establish a system of requirements based on *general principles* relying on the practice of supranational judicial forums, which may not have the power to decide on these questions. Consequently, the system of requirements thus established bears the risk of an *ultra vires* act. The Commission itself stated that the “*action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain rule of law concerns. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law.*”³⁸

The question is whether a measure complies with the ideal of the rule of law, in which a political body considers the possibilities available to it by the Treaties to be insufficient and itself creates extending competencies. In practice, the Commission itself states that, in the circumstances which it has identified above, it does not consider the Founding Treaties to be appropriate and therefore intends to create quasi new powers for itself. At the same time, it becomes problematic that the assessment of requirements is carried out by a political body which does not have an express competence to do so under the Treaties.³⁹

37 COM/2014/0158, 2.

38 *Ibid.*, 2.

39 According to the Commission’s reasoning, the EU intervene in those cases where the mechanisms established at national level to secure the rule of law cease to operate effectively and because of it there is a systemic threat to the rule of law and in such situations, the EU needs to act to protect the rule of law as a common value of the Union.

According to the Commission, the purpose of the Framework was „to enable [themselves] to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a “clear risk of a serious breach” within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched.”⁴⁰

The process of this rule of law Framework is considered to be the predecessor of the rule of law Mechanism, and is activated in those situations when the Member States are taking measures or are tolerating situations which are „likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law”,⁴¹ and it comprises three stages:

- (i) a Commission assessment,
- (ii) a Commission recommendation and
- (iii) a follow-up to the recommendation.

The aim of the first stage is to collect and examine the relevant information and assess whether there are clear indications of a “systemic threat” to the rule of law in a Member State. The Framework has not yet allowed for a joint examination of all Member States; the first comprehensive rule of law Report has been issued only in 2020, but more on this follows below.

The aim of the second stage of the framework is to issue a “rule of law recommendation” addressed to the examined Member State, if the Commission finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it.⁴²

The third and final stage of the Framework is the follow-up to the Commission’s recommendation. In this stage, the Commission is monitoring the follow-up given by the Member State to the recommendation. The Commission examines whether the Member State concerned have (appropriately) implemented the recommendations made by the Commission in the meantime to resolve the situation. As it was presented earlier, the Framework was set up by the Commission as a procedure established in its own competence. Therefore, a separate sanction system was not (then) attached to it. Based on the Framework, in case the Member State concerned did not (satisfactorily) follow-up on the recommendations, the Commission assessed the possibility of activating one of the sanction-mechanisms set out in Article 7 TEU.

Before moving on to the next phase of the transformation of the Framework, a few thoughts are noteworthy hereby that have been provided by none other than the Legal Service of the Commission back in 2014. Regarding the division of competences between the Member States and the Union, the Legal Service argued that the Framework is “not compatible with the principle of conferral which governs the competences of the institutions of the Union. The possibility exists, however, for the Member States to agree

40 COM/2014/0158 final, 4.

41 Ibid. 4.1.

42 Ibid. 4.2.

*among them on a review system of the functioning of the rule of law in the Member States [...].*⁴³ As a direct consequence, the Legal Service concluded that “*there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis.*”⁴⁴

Five eventful years have passed, and on 3 April 2019, the Commission issued a Communication in which it assessed the status of the rule of law and summarized the tools available, including on the basis of the Framework.⁴⁵ In this document, they defined the rule of law⁴⁶ (under Article 2 TEU) with the definition also adopted word-to-word by the 2020 Rule of Law Report, see below. The Commission’s “rule of law toolbox”⁴⁷ was detailed in Chapter II of the Communication,⁴⁸ which included

- (i) Article 7 TEU and the rule of law framework (described earlier),
- (ii) infringement proceedings and preliminary rulings, and
- (iii) other (alternative) mechanisms and frameworks (e.g. European Semester, EU Justice Scoreboard, Cooperation and Verification Mechanism, Commission’s Structural Reform Support Service, etc.).

In the same year, on 17 July, the Commission issued another Communication, which was already a blueprint for action about strengthening the rule of law within the EU.⁴⁹ In this document, the Commission set out the possibility of a comprehensive annual rule of law Report covering all Member States, described below. As we saw above, the European clause of the rule of law requirements (values) is Article 2 TEU.⁵⁰ Thus, the legal basis for the rule of law mechanism established in 2020 also rests on this Article. In its Conclusions of 21 July 2020, the European Council stated that the Union’s financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU, as well as the respect of the rule of law.⁵¹ Part II describes the process of how the Commission built the current character of rule of law enforcement in the EU, culminating in the adoption of Regulation 2020/2092.

43 10296/14 Opinion of the Legal Service, 27 May 2014, point 24. <https://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>

44 10296/14 Opinion of the Legal Service, 27 May 2014, point 28. <https://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>

45 COM(2019) 163: Further strengthening the Rule of Law within the Union. State of play and possible next steps. See: <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-163-F1-EN-MAIN-PART-1.PDF>

46 COM(2019) 163, Introduction.

47 Cf.: https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf.

48 Cf. COM(2019) 163, Chapter II.

49 COM(2019) 343: Strengthening the rule of law within the Union.

50 For more information on the interpretation of Article 2, See: Blanke – Mangiameli, 2013, pp. 109-157.

51 EUCO 10/20, A24. See: <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>

■ 2.2. *Building the Character: the Mechanism, the Report and the Regulation*

Based on the above, the “rule of law toolbox” has been further developed in 2020 by the *Rule of Law Mechanism* which is based on the so-called *Rule of Law Report*.⁵² The Mechanism incorporates those set out in the Framework and has been complemented by a system of financial sanctions adopted on 16 December 2020.⁵³ The Commission produced its first comprehensive *Rule of Law Report* covering all Member States on 30 September 2020.⁵⁴

According to the Commission’s statement of purpose, the Mechanism is an annual process between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders.⁵⁵ The annual Report will be compiled as part of the Mechanism, and theoretically will serve as a basis for discussions in the EU as well as to prevent problems from emerging or deepening further. According to the Commission it helps “*identifying challenges as soon as possible and with mutual support from the Commission, other Member States, and stakeholders including the Council of Europe and the Venice Commission, could help Member States find solutions to safeguard and protect the rule of law.*”⁵⁶

The structure of the Report is based on four pillars:

- (i) justice systems⁵⁷,
- (ii) anti-corruption framework,⁵⁸
- (iii) media pluralism and media freedom,⁵⁹ and
- (iv) other institutional issues linked to checks and balances.⁶⁰

The first (2020) Report posits to that in the past years the EU had to develop numerous instruments to help enforce the rule of law and that further debates on how to strengthen the EU’s ability to address such situations were triggered by severe rule of law challenges in some Member States.⁶¹ The Report emphasizes that its approach,

52 For more information on the methodology of the report, see: https://ec.europa.eu/info/sites/info/files/2020_rule_of_law_report_methodology_en.pdf.

53 The European Parliament and the Council adopted that Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget on 16 December 2020 under ordinary legislative procedure aimed at complementing the protection system of rule of law, thereby creating a rule of law mechanism for financial sanctions. OJ L 433I , 22.12.2020., See: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020R2092&qid=1614509244631&from=HU>.

54 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report – The rule of law situation in the European Union, COM(2020) 580. See: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en.

55 Cf. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

56 See: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en

57 COM(2020) 580, 2.1.

58 Ibid. 2.2.

59 Ibid. 2.3.

60 Ibid. 24.

61 In this part of the report, neither Hungary nor Poland are named.

as well as that of the Mechanism is based on “*close dialogue with national authorities and stakeholders, bringing transparency and covering all Member States on an objective and impartial basis.*”⁶²

However, the Report contains that it is the result of collaboration with Member States at a political level in the Council and “*through political and technical bilateral meetings, and relies on a variety of sources.*”⁶³ Consequently, the Report itself admits to its political nature. In the future, therefore, these annual Reports will form the basis for the use of the tools at the disposal of the Commission and the European Union, as set out above, under the EU Rule of Law Mechanism.

In 2018, the Commission suggested that the budget of the European Union should serve the realization of the values of the European Union, consequently there is a direct link between the use of EU funds (represented by the MFF, Multiannual Financial Framework) and the respect of its values.⁶⁴

Then in the same year, the Commission presented a legislative proposal entitled “*on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States.*”⁶⁵ The Regulation 2020/2092 of the European Parliament and of the Council *on a general regime of conditionality for the protection of the Union budget* finally was adopted on 16 December 2020, and It shall be applied from 1 January 2021 (hereinafter: Regulation).

Based on the case law of the CJEU [and on the verbatim repetition of the definition laid out in COM(2019) 163], the reasoning of the Regulation declares that the rule of law requires that

- (i) *all public powers act within the constraints set out by law,*
- (ii) *in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the ‘Charter’) and other applicable instruments, and*
- (iii) *under the control of independent and impartial courts.*

Going into some essence of its structural elements, it is said that the rule of law requires

- (i) *in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process;*
- (ii) *legal certainty;*
- (iii) *prohibition of arbitrariness of the executive powers;*
- (iv) *effective judicial protection, including access to justice, by independent and impartial courts;*

62 Cf. COM(2020) 580, Introduction.

63 Ibid.

64 Cf. COM(2018) 98: A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020. See: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0098&from=en>

65 COM(2018) 324, 2018/0136(COD).

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0324&from=HU>.

(v) *and separation of powers [...].*⁶⁶

In its reasoning, the regulation refers to the pillars of the rule of law report and identifies the efficient use of EU funds as the basis for achieving the values enshrined in the pillars.⁶⁷ Based on the reasoning of the Regulation, Article 19 TEU expressly mentions the value of the rule of law set out in Article 2 TEU, and because of it “*requires Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget.*” The very existence of effective judicial review designed to ensure compliance with Union law – continues the reasoning – is the essence of the rule of law, and requires

(i) independent courts as well as

(ii) *“the judicial review of the validity of measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures which may also be brought before the courts.”*

In view of all this, the Regulation states in its reasoning – relatively generously – that with regard to the above there is “*a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.*”⁶⁸

In addition, the Regulation contains another concept of the rule of law,⁶⁹ according to which

(i) it refers to the Union value enshrined in Article 2 TEU⁷⁰, and it includes

(ii) *the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process;*

(iii) *legal certainty;*

(iv) *prohibition of arbitrariness of the executive powers;*

(v) *effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights;*

(vi) *separation of powers;*

(vii) *and non-discrimination and equality before the law.*

Article 3 of the Regulation sets out the three instances, which constitute a breach of the rule of law in relation to the Regulation. These are:

(i) endangering the independence of the judiciary;

(ii) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;

66 OJ L 433I, 22.12.2020., Reasoning (3).

67 Ibid. (6) – (11).

68 OJ L 433I, 22.12.2020., Reasoning (12) – (13).

69 OJ L 433I, 22.12.2020., Article 2.

70 The provision also states that the rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

- (iii) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

However, the procedure and sanctions set out in the Regulation can only be applied if the violation of the rule of law concerns specific cases determined by the Article 4, which provision applies with familiarly rhetorical phraseology from the early days of the Framework. It talks about “serious risk” affecting the sound financial management of the Union budget or the protection of the financial interests of the Union „in a sufficiently direct way”.⁷¹

Let us stop here for a brief moment of reflection on how this new financial narrative squares with our setting of the scene for this paper in the introduction. It has been argued above that fear and economic interests still provide the continuing motivation for European integration.⁷² This time, it is economic interest, virtually translating legal rule of law conditions into statistics and data-sets. With economic interest as a political motivation for integration comes the essential need to quantify loss and profit, assign them a tangible number value. This, consequently, also brings about a myriad of ways to quantify the rule of law, translating (some of) its consensual content into numbers, measuring their performance along “compliance indicators”.

This logic was what brought about first checklists⁷³ (in a less numeric fashion), then indexes, scoreboards⁷⁴ and conditionality lists.⁷⁵ [In the context of EU integration, the latter two have been introduced as later alternatives to Article 7 proceedings, adding to the initial duality that has been created by the Nice Treaty within Article 7 by introducing a “preventive alternative” (through unanimity) to the original sanctioning mechanism (through QMV).]

When addressing the methodological pitfalls of measuring rule-of-law performance through similar means, Pócza argues that the first challenge really is which layer (and which concept or definition) to measure, thereby referring to a very difficult

71 In the event of a violation of the rule of law as defined above in the Regulation, its Articles 5 and 6 set out the applicable measures and relevant proceedings) to protect the Union budget. (Examples are: a prohibition on entering into new agreements on loans or other instruments guaranteed by the Union budget, an interruption of payment deadlines, a prohibition on entering into new legal commitments, etc.).

72 It can clearly be seen by the international reaction to the German Federal Constitutional Court’s (GFCC) most recent PSPP ruling how the interplay of fear of certain economic impacts on Member State economic interests can trigger constitutional responses from within the integration. Previously, too, the most influential GFCC decisions regarding the limits of EU integration were the results of legal issues touching upon core economic interests and policies affecting Germany and the German national economy. Consider, for that matter, their OMT decision (2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13) or their ESM decision (2 BvR 1390/12) before the PSPP.

73 Cf. The Venice Commission’s Rule of Law Checklist from 2016. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

74 Cf. the EU Justice Scoreboard https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

75 In this regard, please refer to the 2018 Mechanism also dubbed „conditionality mechanism”.

choice between the previously addressed broad and narrow interpretations of the rule of law concept (in the introduction and in setting the scene). Using an overly broad, more complex concept bears the risk of internal tensions as well: the more layers it encompasses, the more difficult it gets to render it measurable,⁷⁶ which leads up directly to our conclusion.

3. Ending the Scene: Back to Square One?

Having gone through the transformative elements of crises and their resolution through compromises in the context of European integration with our sights set on addressing the issue of the rule of law, we now need to assess where we stand.

We have dealt with the necessity of a legally anchored consideration of the foundational elements of the concept in all EU-level legal and political debates, from the point of view of the national, Member State level, referring to coexisting dimensions of ‘closed’ and ‘open statehood’, projecting the constitutional issues and relevant legal debates into the European sphere as well.

In light of the above and of what has been just argued regarding the challenges of rule-of-law performance indicators: we are right “back to square one”, where we started. Successful measurement depends on the concept used as a baseline, but this time, we do not fully know what the concept really is, and how it should be interpreted for European interests and purposes. Add to this the problematic that the “performance indicators” measured firstly manifest on the national level, leaving the national legal and judicial systems to dispose of them – and the picture does not become clearer.

European efforts to clarify the content of the rule of law as an EU value have been put on the backburner by early attempts at creating rhetorical vehicles such as “systemic violation” or “clear risk of a serious breach” to be used as leverage against Member States considered “outliers”, then the focus of the process shifted towards more than one enumerative exercise relying on pre-existing international compromises regarding the concept of rule of law, transformed into an EU-image. The efforts then quickly spilled over into the financial sphere, drawing another alternative concentric circle and the attached layer of uncertainty to the conceptual debate about the content of the rule of law.

In trying to grasp the constitutional, legal, political or even economic essence of the rule of law, we can create as many sets of requirements as we can think up, but we shall bear in mind that in the long run, creating more and alternating and alternative orbits around the same gravitational mass is futile and counterproductive. The intention might be to throw out the bathwater, but the action actually might hurt the baby itself – to paraphrase a well-known idiom tailored to the fate of the integration.

⁷⁶ Póczy, 2019, 150.

Eventually, one might just find that only compliance with nationally-anchored legal criteria provide the most accommodating answer, and – for any European compromise to prevail – national specificities cannot and should not be disregarded or circumvented, with the necessary legal space afforded to those forums that are constitutionally empowered to settle matters in this context. Suppressing national specificities of and constitutional authorities in charge of rule of law might only contribute to the further chilling of interstate relations within the integration, creating yet another crisis, sliding backwards slowly towards disintegration, towards gradual erosion – but not that of the rule of law.⁷⁷ After such crisis, who knows what the next necessary compromise needs to be to preserve European unity in diversity.

The latest development in the EU rule of law saga is that on 11 March 2021, Poland and Hungary have announced to challenge the Regulation at the CJEU pointing to a lack of competence of the EU to define the rule of law and relevant conditionality for compliance.⁷⁸ So, the story goes on, with no possible end in sight.

77 For more on this topic, see: Jakab 2019.

78 <https://euobserver.com/political/151211>.

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