



Trans European Policy Studies Association

TEPSA BRIEFS

JANUARY 2020

Safeguarding the Rule of Law in the European Union: Pre-Accession Conditionality and Post-Accession Reality

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Abstract

This brief discusses the current rule of law backsliding developments in some EU Member States, bringing these in correlation with the shortcomings of EU's accession methodology, particularly regarding the assessment of a candidate country's fulfilment of the EU membership criteria. These shortcomings are thereupon reflected in the post-accession reality, i.e. once the candidate country becomes a Member State and paint a problematic picture of the coherence of EU's value-based order.

In recent years, much has been said on the theme of values in the EU context - most especially on the rule of law. As the rule of law crisis in Poland and Hungary becomes more pronounced, other Member States like Malta and Romania are facing similar rule of law backsliding developments. In the period prior to EU's 2004 wave of enlargement, the

safeguarding of the rule of law in the EU was almost not considered an issue, as the implicit understanding among Member States at the time was that they all ascribed to a strict set of values which provided the basis for the Union's political and legal order. This presumption has since then been rebutted, or at least its shortcomings have become more visible. The 2004 and 2007 waves of enlargement, while making the EU family substantially bigger, seem to have underscored the 'vulnerability' of the Union's core values and the imminent need for their preservation.

The unfolding rule of law crisis undoubtedly undermines the EU's reputation as a "community of values", which, as Article 2 of the Treaty on European Union states, is based on the foundations of democracy, rule of law and respect for human rights. Presently, the threat to EU's fundamental values comes from the inside, i.e. from the EU's own Member States. This seems counter-intuitive, especially having in mind the robust screening process that all candidate countries (prospective

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Member States) undergo prior to joining the EU. In the pre-accession period, candidate countries have to pass the EU institutions' screening concerning the fulfilment of the membership criteria (political, economic, legal), among which the rule of law is given a central place. Curiously, we are now witnessing a 'paradigm shift' of sorts – one that challenges the established dichotomy between, on the one hand, the EU Member States as a representation of the "community of values" and, on the other hand, "the Others" (non-member countries with a certain level of association to the Union or a Union membership perspective, such as the Western Balkans countries).

Certainly, the reasons why some Member States have regressed on the rule of law front are manifold and arguably both internal and external in nature. In this vein, one of the questions that could be posed is whether the present situation can, to a certain degree, be ascribed to the deficiencies inherent to the methodology applied in the enlargement process and the possible ineffectiveness¹ of the EU institutions' toolkit used to assess the preparedness of a candidate country to join the EU. By the same token, can it be surmised that the ongoing process of rule of law erosion in Poland and Hungary lays bare the lack of a uniform understanding of the concept of rule of law among the EU Member States? Even if a consistent definition of the concept endorsed by the EU does exist, have the EU institutions

provided sufficient guidance to the Member States as to what the obligation to uphold and preserve the rule of law effectively comprises?

The rule of law is considered by some authors to be an elusive concept, one that is "highly variegated and contested"², and difficult to exactly pinpoint. In terms of the nature of the concept, the rule of law has its own unique social, cultural and institutional underpinnings that make it practically impossible to put all of its constitutive elements in place quickly.³ By consequence, establishing a system under the rule of law is a time-intensive and painstaking process, which is why an undemocratic society would be hard-pressed to fast-track itself into a liberal democracy along with the requisite rule of law safeguards attached.⁴ A lengthy period, potentially one of generations, needs to pass in order to instil a general cultural belief of the contingency of the role of the rule of law in a society and succeed in constructing an independent judiciary, together with a legal tradition committed to respecting the rule of law.⁵

What is it then that makes it possible for a once rule of law abiding country to slide back into a state of rule of law erosion? What causes the rule of law safeguards embedded in the national legal system to falter? Were these not sufficiently strong and fail-proof to begin with? The answer may lie in the distinction between a 'thin' and a 'thick' conception of the rule of law⁶ and the way these are applied in practice.

¹ "Non-Paper: Reforming the European Union Accession Process" (issued by the French Government in November 2019). The non-paper calls for a thorough reform of the methodology of EU's enlargement process, calling on the candidate countries to *effectively* fulfil the EU membership criteria (*effective* being the recurring operative term in the document). Accessed at: <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/Enlargement-nonpaper.pdf>.

² N. Walker, *The Rule of Law and the EU: Necessity's Mixed Virtue*, in N. Walker and G. Palombela (eds.), *Relocating the Rule of Law* (2009) Hart Publishing, p.119.

³ Brian Z Tamanaha, *A Concise Guide to the Rule of Law*, in N. Walker and G. Palombela (eds.), *Relocating the Rule of Law* (2009) Hart Publishing, p.13.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Authors such as Joseph Raz subscribe to a thin or a narrower conception of the rule of law where the

The thin conception, for instance, does not require democratic institutions or a democratic political system, nor does it impose any requirements concerning the content of the law or mandatory respect for human rights within a state or society⁷. The thick conception of the rule of law, on the other hand, includes one or several of these elements as central to maintaining the rule of law.⁸ Taking guidance from the text of EU policy documents relevant to the issue of the rule of law, it is safe to deduce that the EU subscribes to a thick conception of the rule of law. In the view of the

European Commission, the obligation to observe the rule of law ensures that actions by the state are taken within an effective and reliable legal framework, that they can be scrutinized and challenged, or subjected to effective legal review.⁹ The essential constituent elements which form the content of the rule of law as a principle include: legality (transparent, accountable and democratic law-making process); legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.¹⁰ According to the European Commission, the rule of law provides the basis for the democratic system in all Member States and should be seen as a reflection of their common identity and common constitutional traditions.¹¹ Furthermore, in terms of its

rule of law is understood as a virtue that a legal system may possess and is to be judged by, and is not to be confused with democracy, justice, equality or respect for human rights. In fact, a non-democratic legal system, based on the denial of human rights, may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the Western democracies: it would be a worse legal system, but its strong point will be its conformity to the rule of law (Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 1979, Clarendon Press, p.210, 211).

⁷ *Supra* n.3.

safeguarding, the primary responsibility to ensure the rule of law must rest with each Member State, and the first recourse should always be to national redress mechanisms.¹²

However, the downside of the rule of law becoming too ‘thick’ is that in a practical regulatory sense it can only survive as such if it is supported by the immanent (domestic) culture where it would lend itself to the nuances of its adaptation across different national environments¹³.

Aside from the European Commission and the European Parliament’s involvement in

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safeguarding the rule of law in the EU, the role played by the Court of Justice of the EU (CJEU) should also not be neglected. In relation to the Polish case as the most poignant example at hand, in a number of recent judgments concerning the controversial reforms of the Polish judicial system, the CJEU has been very vocal about the seriousness of the state of the

⁸ *Supra* n.3.

⁹ Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final 11.3.2014.

¹⁰ *Ibid.*

¹¹ Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of Play and Possible Next Steps, COM/2019/163 final Brussels, 3.4.2019.

¹² *Ibid.*

¹³ *Supra* n.2, p.136.

rule of law deterioration in Poland.¹⁴ The Court of Justice expressly pointed out the instances of violation of the rule of law standards (most notably, the requirements of judicial independence and effective judicial protection, as established by EU law) and offered concrete instructions and guidance to the Polish government on how to rectify them. Regrettably, even though some time has passed since these judgments were delivered, there is little to suggest that the Polish government is taking steps to remedy the situation.¹⁵

The EU has indeed found itself in a bit of bind, struggling to apply its rule of law standards against its own contravening Member States, while also holding the candidate countries of the Western Balkans to these same standards.

The current rule of law deadlock inevitably puts forth the dilemma of whether Member States such as Poland are arguably paying the

price for an incoherently and not fully efficiently conducted EU enlargement policy. Could it be that the presently compromised national mechanisms for safeguarding the rule of law in Poland have been lacking to begin with (during the accession period), but the EU institutions were nevertheless – favouring politics over policy - prepared to turn a blind eye? If this were the case, an incoherent (and in some respects insufficiently thorough) approach implemented by the EU institutions during the accession process would have the effect of jeopardizing the rule of law as a foundational value of the EU system further down the line, i.e. once a candidate country becomes a Member State. Looking at things from this perspective, French President Macron’s observations about the ineffectiveness of the EU accession methodology start to increasingly ring truer.

¹⁴ C-619/18 Commission v Poland, ECLI:EU:C:2019:531; C-192/18 Commission v Poland, ECLI:EU:C:2019:924; Joined Cases C-585/18, C-624/18 and C-625/18 A. K. and Others v Sąd Najwyższy, ECLI:EU:C:2019:982;.

¹⁵ “EU’s top judge warns Poland over overhaul of judiciary” (Reuters, 9 January 2020): <https://www.reuters.com/article/us-poland-judiciary-eu/eus-top-judge-warns-poland-over-overhaul-of-judiciary-idUSKBN1Z81VV> (last accessed: 13 January 2020).

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Co-funded by the
Europe for Citizens Programme
of the European Union



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