

EU Rule of Law:
The State of Play following the
Debates Surrounding the
2019 Commission's Communication

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Abstract

In this paper we analyze the state of the debate on the Rule of Law challenges and developments in the European Union leading to the release of the 2019 Commission Communication 'Strengthening the Rule of Law: A Blueprint for Action' and provide a detailed assessment of the Communication itself. We explain why the short-sighted approach of the Commission gives rise to worry. All the boxes seem to be ticked during this discussion and reflection exercise, many a conclusion are drawn; yet, the outcome has seemingly brought the Commission nowhere.

Keywords

Rule of law; European Commission; consultations

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1. Introduction

In this paper we analyze the state of the debate on the Rule of Law challenges and developments in the European Union (EU) following the release of the 2019 European Commission Communication ‘Strengthening the Rule of Law: A Blueprint for Action’¹ and explain why the short-sighted approach of the Commission gives rise to worry. All the boxes seemed to be ticked during the ‘discussion’ exercise; yet, the outcome has seemingly brought the Commission nowhere.

This latest round of the debate on the Rule of Law in the EU was originally initiated in April 2019 when the Commission published its Communication ‘Further strengthening the Rule of Law within the Union. State of play and possible next steps’² and concluded in July 2019 with the publication of the blueprint for future Rule of Law action. Discussion took place in the moment when the EU is facing the most serious Rule of Law crisis since its founding.³ This crisis has been tackled with recourse to the Treaty instruments such as Article 7 TEU as well as via the route of political innovation⁴ and, crucially, in courts.⁵ Article 7 TEU predictably showed numerous shortcomings – mainly political ones – with respect to enforcing the EU values.⁶ Despite milestone rulings of the Court of Justice of the EU (CJEU; the Court) regarding the supranational Court’s competence to engage with the independence of judiciary⁷ there is a sense that those might not be sufficient to solve the problem of Rule of Law backsliding – intentional demolition of the separation of powers in Member States by those in power.⁸ The Commission’s

¹ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final.

² European Commission, ‘Further strengthening the Rule of Law within the Union State of play and possible next steps’ (Communication) COM (2019) 163 final.

³ M. Smith, ‘Staring into the abyss: A crisis of the Rule of Law in the EU’ (2019) 25 *European Law Journal* 561; D. Adamski, ‘The social contract of democratic backsliding in the ‘new EU’ countries’ (2019) 56 *Common Market Law Review* 623; L. Pech and K.L. Scheppele, ‘Illiberalism within: Rule of law backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

⁴ D. Kochenov and L. Pech, ‘Better late than never: On the European Commission’s Rule of Law Framework and its first activation’ (2016) 54 *Journal of Common Market Studies* 1062; E. Hirsch Ballin, ‘Mutual trust. The virtue of reciprocity – Strengthening the acceptance of the Rule of Law through peer review’ in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the EU* (Cambridge: CUP 2016); for an overview, see C. Closa, D. Kochenov and J.H.H. Weiler, ‘Reinforcing the Rule of Law oversight in the European Union’ (2014) *EUI RSCAS Research Paper* 2014/25.

⁵ T.T. Koncewicz, ‘The supranational Rule of Law as first principle of the European public space – On the Journey in ever closer union among the peoples of Europe in flux’ (2020) 5 *Palestra* 168; P. Van Elsuwege and F. Grimmelprez, ‘Protecting the Rule of Law in the EU legal order: A constitutional role for the Court of Justice’ (2020) 16 *European Constitutional Law Review* 8; C. Rizcallah and V. Davio, ‘L’article 19 du Traité sur l’Union européenne: sésame de l’Union de droit’ (2020) 122 *Quarterly Human Rights Review* 156; D. Kochenov and P. Bárd, ‘The last soldier standing? Courts versus politicians and the Rule of Law crisis in the new Member States of the EU’ (2019) 1 *European Yearbook of Constitutional Law* 243.

⁶ D. Kochenov, ‘Article 7 TEU: A Commentary on a much talked-about ‘dead’ provision’ (2018) 38 *Polish Yearbook of International Law* 165.

⁷ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117; Case 619/18 *Commission v Poland* [2019] ECLI:EU:C:2019:531. Cf. S. Adam and P. Van Elsuwege, ‘L’exigence d’indépendance du juge, paradigme de l’Union européenne comme union de droit’ (2018) 9 *Journal de droit européen* 334; L. Pech and S. Platon, ‘Judicial independence under threat: The Court of Justice to the rescue in the *ASJP Case*’ (2018) 55 *Common Market Law Review* 1836.

⁸ L. Pech and K.L. Scheppele, ‘Illiberalism within: Rule of Law backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

Communications and public consultations demonstrate what the available options to tackle the ongoing crisis are in the eyes of the Commission and what tools could be deployed to make the EU's response more effective. A clear vision of how to get out of the current impasse is, however, missing. Missing entirely: the Commission did not provide a convincing strategy on how to tackle constitutional capture plaguing several Member States.

2. The Rule of Law debate of the Commission – scope, topic, outcome

In April 2019, the European Commission published a communication 'Further strengthening the Rule of Law within the Union: State of play and possible next steps'.⁹ The Commission acknowledged that 'the Union's fundamental values and principles, including the Rule of Law, are under pressure and need particular attention.'¹⁰ This view was expressed already in 2013 by Commissioner Vivienne Reding, who stated that 'the testing moment for the Rule of Law always comes in times of crisis'.¹¹ She referred to three situations perceived as Rule of Law crises – in France, Hungary and Romania – which 'quickly took a systemic dimension and revealed systemic Rule of Law problems.'¹² As she stated at that time, 'the Commission has been rather successful' in dealing with those cases. Despite that optimism and the new 'pre-Article 7 TEU' mechanism introduced in 2014,¹³ the situation has deteriorated significantly since 2014 and the 2019 Communication announced that it aimed 'to enrich the debate on further strengthening the Rule of Law within the Union.'¹⁴ The Commission confirmed that there still is a problem with 'the ability of the Union to address' the Rule of Law crisis and also underlined that solving this issue is a matter of trust.¹⁵ As the situation with the Rule of Law in the captured states deteriorated with increasing pace, the Commission's Communication offered three possible avenues for reaching possible solutions, focusing on the triad of: promotion, prevention and response.

The Commission invited stakeholders to submit their input on how to deal with the crisis of the Rule of Law in the EU. As a result, more than 60 contributions have been received (from Member States, EU institutions and bodies, international organisations and political actors, the judiciary and judicial networks, civil society organisations, academia and business associations).¹⁶ On the one hand, the Open Society European Policy Institute underlined that the debate initiated by the Commission was not part of formal open consultations but informal

⁹ European Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM (2019) 163 final.

¹⁰ European Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM (2019) 163 final, p. 2.

¹¹ V. Reding, 'Speech: The EU and the Rule of Law – What next?' (4 September 2013) at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677.

¹² *ibid.*

¹³ European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 158 final; D. Kochenov and L. Pech, 'Monitoring and enforcement of the Rule of Law in the European Union: Rhetoric and reality' (2015) 11 *European Constitutional Law Review* 512.

¹⁴ Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM (2019) 163 final, p. 2.

¹⁵ For a magisterial treatment of this concept in EU law, see C. Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne* (Paris: Larcier 2020).

¹⁶ Submissions available to the public were published at: https://ec.europa.eu/info/publications/stakeholder-contributions_en.

ones with targeted outreach to key stakeholders.¹⁷ On the other hand, the government of Poland expressed doubts regarding consultations and their scope suggesting that they might not bring ‘desired, viable results’, questioning ‘whether the proposals would be legally applicable in the EU legal environment.’¹⁸ Similar criticism can be found in the input from the government of Hungary, which stated that ‘reliance on opinions of external experts and non-governmental institutions raises the question of accountability and transparency’ without providing analysis if those would be correct or not. The opposite view about the Commission’s initiative was presented by Slovakia, stating that ‘[s]uch transparent and constructive approach has the potential to path the way towards proper setting of the new mechanism on the Rule of Law.’

Reactions to the Commission’s consultation revealed obvious pronounced divisions between the Member States on the issue of the Rule of Law. Indeed, the Member States that provided their input to the Commission were divided into two groups – those supporting further strengthening of the EU’s response to the Rule of Law crisis (including Sweden, Finland, and the Netherlands) and those which expressed their deep scepticism (the Member States which face the on-going Article 7 TEU procedure against them, i.e. Poland and Hungary). Especially the criticism expressed by the government of Hungary was of a fundamental nature – the government did not agree with the Commission’s diagnosis (which was not challenged by other stakeholders) that the Rule of Law is under pressure in the EU and that this issue needs particular attention. According to Hungary, the ‘Rule of Law is increasingly used as a tool of political leverage’. Instead of focusing on the national level, the Hungarian government expressed a belief in the general need to strengthen and uphold the Rule of Law in the activities of EU institutions.¹⁹ The opposite position was given by the Swedish parliamentary committee which underlined that ‘the broader discussion on further strengthening the Rule of Law initiated by the Commission is urgent’. Much more precise in this respect were recommendations presented by the International Commission of Jurists, which underlined that the EU institutions must enhance transparency and stakeholder participation, including in legislative proceedings and access to information.²⁰

An interesting example of complete denial that any Rule of Law debate is needed was the submission of the Hungarian organization Center for Fundamental Rights, advancing the arguments similar to those supported by the Hungarian government. First of all, according to the Center’s submission, ‘the debate isn’t legal in nature but political and ideological’ and represents a ‘clash of worldviews’. Secondly, they argued that ‘sufficient safeguards for the

¹⁷ ‘This appears at odds with the Commission’s commitment under the Better Regulation Agenda to design EU policies and laws transparently, with evidence, and backed up by the views of citizens and stakeholders’ (Open Society European Institute, ‘Communication from the European Commission on further strengthening the Rule of Law within the Union: state of play and possible next steps. Contribution by the Open Society European Policy Institute’ June 2019, p. 15).

¹⁸ ‘Given the above, we express our doubt whether the form of a communication and an open invitation to express thoughts on the Rule of Law framework addressed to a large group of governmental and non-governmental actors will bring desired, viable results and whether the proposals would be legally applicable in the EU legal environment.’ (‘Poland’s contribution’ 17 July 2019, p. 1).

¹⁹ State Secretariat for EU Relations of the Prime Minister’s Office, ‘Position paper of the State Secretariat for EU Relations of the Prime Minister’s Office, Hungary on the Consultation about the Communication of the European Commission on „Further strengthening the Rule of Law within the Union”’ 28 May 2019.

²⁰ International Commission of Jurists, ‘Submission by the International Commission of Jurists to the European Commission’s Consultation on “Further Strengthening the Rule of Law Within the Union”’ June 2019, p. 5.

principle of the Rule of Law were created by the Hungarian National Assembly'.²¹ Thirdly, 'disregarding the national sovereignty and constitutional identities of Member States, the Commission is trying to create an EU level control over the application of the principle of the Rule of Law within the Member States.'²² Finally, the Center pointed to the existence of 'more urgent issues' such as the migration crisis. The EU should also 'take actions regarding yellow vest movement in France, or the police abuse evident in the reaction to the Catalan independence referendum'.²³ This was however the only example of a submission which expressed complete denial that a debate is needed. Other stakeholders almost fully agreed that such debate in the EU is required.

The second fundamental issue which arises from the analysis of the submissions initiated by the Commission in April 2019 points to the differences regarding seemingly the most basic issue – the definition of the Rule of Law. According to the Commission, the Rule of Law is 'well-defined in its core meaning'.²⁴ The leading scholarly accounts seem to support this view,²⁵ at least in part, as far as the internal definition of the concept goes.²⁶ The Commission usually follows the Venice Commission's main findings in this respect²⁷ and states that the Rule of Law includes, among others, 'principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.'²⁸ Probably not surprisingly, the harshest criticism of this universal definition came from a Hungarian organization, which, first of all, found that the Rule of Law is a 'hard-to-define, malleable concept', which is of course true, but not entirely, given the clarity shaped by the Venice Commission, and, secondly, it found it 'worrying', when 'in the absence of a single, detailed definition it is possible to discriminate against certain Member States on the basis of the Rule of Law, considering political interests only.' According to the Hungarian government it is national institutions that shape the content of the Rule of Law.²⁹ Such an approach would suggest the requirement of acceptance of different Rule of Law definitions in different Member States, which could sit uneasily, at least as far as the crucial essence of all the EU's values goes, with the wording and the spirit of Article 2 TEU.³⁰ The International Bar

²¹ Center for Fundamental Rights, 'Remarks on the Press Release on the Rule of Law circulated by the European Commission' 4 June 2019, p. 2.

²² *ibid.*

²³ *ibid.*, p. 6.

²⁴ European Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM (2019) 163 final, p. 1.

²⁵ L. Pech, 'The Rule of Law as a constitutional principle of the European Union' (2009) *Jean Monnet Working Paper Series* No 4/2009.

²⁶ L. Pech, 'Promoting the Rule of Law abroad: On the EU's limited contribution to the shaping of an international understanding of the Rule of Law' in D. Kochenov and F. Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge: CUP 2013).

²⁷ Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)007-e.

²⁸ European Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM (2019) 163 final, p. 1.

²⁹ State Secretariat for EU Relations of the Prime Minister's Office, 'Position paper of the State Secretariat for EU Relations of the Prime Minister's Office, Hungary on the Consultation about the Communication of the European Commission on „Further strengthening the Rule of Law within the Union”' 28 May 2019.

³⁰ M. Klamert and D. Kochenov, 'Article 2' in M. Kellerbauer, M. Klambert, and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford: OUP 2019).

Association underlined that in case of the Rule of Law, content of the laws matters, they must for instance protect fundamental rights. So there are of course broader versions of the definition than the one provided by the Commission. Also the International Commission of Jurists underlined that the Rule of Law is ‘inextricably linked to and interdependent with protection of human rights’.³¹ Narrower definitions, however, are not easily available, which is not surprising. The Council of Europe underlined for instance the role of the judiciary and national human rights institutions as the main necessary condition for the Rule of Law.³² The broadest definition, however, was provided by the European Trade Union Confederation which underlined that ensuring the Rule of Law in the EU includes enforcement of fundamental social rights. Despite all the differences regarding the understanding of the Rule of Law, most of the stakeholders found that the April communication was needed due to the ongoing Rule of Law crisis, where an effective solution still has not been adopted. How broad the definition of the Rule of Law should be in the EU context was, ultimately, not an issue, given the clarity of the position adopted by the Venice Commission.

3. July 2019 Communication

The July 2019 press release ‘Initiative to strengthen the Rule of Law in the EU’, published on the Commission’s website, informed the public that the Commission ‘has set out concrete actions to strengthen the Union’s capacity to promote and uphold the Rule of Law.’ The Communication resulting from the stakeholders’ submissions underlined that it sets out ‘actions for the short and medium term’.³³ The Communication’s findings were supplemented with the results of a Eurobarometer survey undertaken by the Commission in all Member States, among more than 27.000 respondents. The principle of the Rule of Law was divided into 17 principles which were further grouped into three areas:

1. ‘Legality, legal certainty, equality before the law, separation of powers’ (equality before the law, clarity and stability of law, ease in following how parliament adopts laws, lawmakers act in public interest, independent controls of law);
2. ‘Prohibition of arbitrariness and penalties for corruption’ (clarity of public authorities’ decisions, independent review of public authorities’ decisions, unbiased decisions of public authorities, making decisions in public interest, acting of corruption, codes of ethics for politicians);
3. Effective judicial protection by independent courts (access to an independent court, length or cost of court proceedings, independence of judges, the proper investigation of crimes, respect for and application of court rulings, codes of conduct of politicians).³⁴

³¹ The ICJ referred to the ‘ICJ Tunis Declaration on Reinforcing the Rule of Law and Human Rights’ (March 2019) available at: <https://www.icj.org/wpcontent/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>.

³² Council of Europe, ‘Council of Europe’s secretariat comment to the Communication from the Commission on Further strengthening the Rule of Law within the Union State of play and possible next steps’ 2019.

³³ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 2.

³⁴ Rule of law, Report, Special Eurobarometer 489, July 2019, p. 3-4.

Such a definition of the Rule of Law is much more detailed compared with the findings of the Venice Commission or the Commission's April 2019 Communication. The survey was further supplemented with questions about media and civil society. The Eurobarometer report shows that 89% of the respondents considered it important or even essential that all EU Member States respect the core EU values, including fundamental rights, the Rule of Law and democracy. However, the majority of the respondents did not feel sufficiently informed about the EU's fundamental values.³⁵

The July Communication follows the structure offered in the Communication published by the Commission in April 2019 and analyzes the possible actions in three areas: promotion, prevention and response. Each section is summarized with conclusions divided into two groups: action which will be taken by the Commission and recommendations addressed to other institutions.

3.1 Promotion

The European Commission identified two main gaps regarding the Rule of Law which need to be fulfilled within the 'promotion' part. Those are a lack of information and limited general public knowledge about challenges to the Rule of Law.³⁶ Numerous stakeholders referred to 'Rule of Law culture'.³⁷ Especially the International Commission of Jurists presented a broad stance on this issue, arguing that 'legal and institutional safeguards for the Rule of Law amount to little without people who are committed to making their protection a reality.'³⁸ The European Trade Union Confederation referred to a 'Rule of Law society', which was confirmed by the Commission stating that 'the Rule of Law has a direct impact on the life of every citizen'.³⁹

3.1.1 Civil society and media

Many of the contributions underlined a need to support (i.a. financially) civil society.⁴⁰ The Communication underlined in this respect the role of the future Rights and Values programme, which needs to be accepted by the European Parliament (EP) and Council.⁴¹ Contributions suggested further steps such as introducing a kind of 'civil conditionality', meaning to 'link any strategy to strengthen the Rule of Law to the development of an enabling civic space in

³⁵ Rule of law, Report, Special Eurobarometer 489, July 2019, p. 10.

³⁶ European Commission, 'Strengthening the Rule of Law within the Union. A blueprint for action' (Communication) COM (2019) 343 final, p. 5.

³⁷ Dutch Ministry of Foreign Affairs, 'Commission Communication 3 April 2019 – Rule of law, Input from Netherlands' 2 July 2019, p. 1; Civil Liberties Union for Europe, 'A Response to the Commission Communication on further strengthening the Rule of Law within the Union' June 2019, p. 5.

³⁸ International Commission of Jurists, 'Submission by the International Commission of Jurists to the European Commission's Consultation on "Further Strengthening the Rule of Law Within the Union"' June 2019.

³⁹ European Trade Union Confederation, 'ETUC comments on Commission Communication on "Further strengthening the Rule of Law within the Union. State of Play and possible next steps" (COM(2019) 163 final)' 24 June 2019, p. 1.

⁴⁰ European Humanist Federation; Civil Society Europe; Helsinki Foundation for Human Rights and Hungarian Helsinki Committee; International Commission of Jurists; Open Society European Policy Institute; Civil Liberties Union for Europe.

⁴¹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the Rights and Values programme' (Proposal) COM (2018) 383 final/2.

Europe’.⁴² Furthermore, it was suggested to establish a ‘rapid response system’, allowing the detection of civic space and Rule of Law breaches. Such solutions have not been implemented, however, into the Communication. The Commission expressed its promise to ‘continue to pay special attention to attempts to pressurize civil society and independent media and further support their work.’⁴³ The cases of Hungarian Lex-NGO⁴⁴ and Lex-CEU⁴⁵ suggest that this ‘continuation’ requires further improvement.⁴⁶ The former, decided in June 2020, showed that the Commission definitely had not done enough to secure non-governmental organizations (NGOs) against negative consequences of the ‘Transparency Law’ adopted in Hungary. The new law, which imposed new obligations on NGOs receiving foreign funds, was found to violate obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union. The Court underlined that the law in question is of such a nature as to create a ‘generalized climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatize them.’⁴⁷ This particular case shows that ‘special attention’ from the Commission should involve a timing response, including application for interim measures, not only limited to diplomatic expression of ‘concerns’,⁴⁸ especially when similar measures have been already announced in other authoritarian players.⁴⁹ The latter allows coming to the same conclusions: when the case was decided by the CJEU, the Central European University (CEU) was no longer present in Hungary as a result of the government’s pressure. It constitutes the most worrying example of the destruction of a leading institution of higher education in full view, and with full knowledge, of the EU. Since the school is already in Vienna, Orbán regime’s obscurantism has won for now.

The same doubts apply to freedom of the media in the EU Member States. In light of the Eurobarometer survey, a wide range of media allowing for sufficient information and the expression of different opinions was important, or essential, to 87% of respondents.⁵⁰ However the Commission does not discuss the most extreme cases where captured public media are

⁴² Civil Society Europe, ‘Response to the EC Communication ‘Further Strengthening the Rule of Law within the Union’ 4 June 2019, p. 3.

⁴³ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication COM (2019) 343 final, p. 6.

⁴⁴ Case C-78/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:476.

⁴⁵ Case C-66/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:792.

⁴⁶ ‘Those civil society organisations or individuals who had conveyed their views to the EP, either in writing, in person meetings or by attending the hearings in LIBE, were frequently subjected to harassment as a result of their participation’ (Helsinki Foundation for Human Rights, ‘Opinion on the Communication from the Commission to the European Parliament, the European Council and the Council concerning “Further strengthening the Rule of Law within the Union. State of play and possible next steps” (COM(2019)163 final)’ 4 June 2019).

⁴⁷ Case C-78/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:476.

⁴⁸ P. Bárd, J. Grogan and L. Pech, ‘Defending the open society against its enemies: The Court of Justice’s ruling in C-78/18 *Commission v Hungary (transparency of associations)*’ (*VerfBlog* 22 June 2020) at: <https://verfassungsblog.de/defending-theopen-society-against-its-enemies/>.

⁴⁹ ‘The government is preparing an attack on NGOs in Poland’ (*Ruleoflaw.pl* 12 May 2020) at: <https://ruleoflaw.pl/the-government-is-preparing-an-attack-on-ngos-in-poland/>; W. Czuchnowski and A. Kondzińska, ‘Minister of Justice set to crack down on NGOs, announcing new foreign influence transparency law’ (*wyborcza.pl* 10 August 2020) at: <https://wyborcza.pl/7,173236,26198198,minister-of-justice-set-to-crack-down-on-ngos-announcing-new.html>.

⁵⁰ Rule of law, Report, Special Eurobarometer 489, July 2019, p. 44.

platforms for domestic smear campaigns against civil society, political opposition and even against EU institutions.⁵¹

In this context the Commission's proposed remedy is upsetting. The Communication mentions a 'yearly event on Rule of Law' for dialogue with civil society as well as a new communication strategy. The Commission thus wants everyone to speak with everyone about the Rule of Law, including national parliaments, international organizations and institutions. However, if some elections, although free, are not fair,⁵² how much 'Rule of Law learning' can we expect from the dialogues between the unfairly elected 'parliaments' in the captured Member States and real parliaments? What can we learn from the NGOs if captured Member States cut their funding streams and harass those who still dare to criticize the politicians in power?⁵³ The Commission seems to be willing to send a message of friendly ignorance, which could unfortunately be dangerous, given the high stakes involved.

One of the main tools allowing civil society to fulfil its functions is access to public information. Despite the fact that the need for improvement of EU institutional transparency is broadly discussed in the literature,⁵⁴ the Communication does not set any new aims in this respect. Also the analysis dealing with the European judicial networks is quite general. The Commission found that those 'should be supported to further promote the Rule of Law', whereas concrete proposals were presented by the stakeholders. It was suggested that some form of judiciary representation should be recognized at the EU level.⁵⁵

3.1.2 The Council of Europe

The second dimension of the promotion of the Rule of Law advocated by the Commission in its 2019 Communication deals with the relationship between the European Union and the Council of Europe and its institutions (especially the Venice Commission and Group of States against Corruption, GRECO). Only the submission from the Hungarian government questions the role of the findings of the Council of Europe institutions for the purpose of EU actions.⁵⁶ The recent

⁵¹ A. Chapman, 'Pluralism under attack: The assault on press freedom in Poland' (*Freedom House* June 2017) at: <https://freedomhouse.org/report/special-reports/assault-press-freedom-poland>; Joint Mission to Hungary, 'Conclusions of the Joint International Press Freedom Mission to Hungary' 3 December 2019, available at: <https://ipi.media/wp-content/uploads/2019/12/Hungary-Conclusions-International-Mission-Final.pdf>.

⁵² S. Walker and D. Boffey, 'Hungary election: OSCE monitors deliver a damning verdict' (*The Guardian* 9 April 2018) at: <https://www.theguardian.com/world/2018/apr/09/hungary-election-osce-monitors-deliverdamning-verdict>.

⁵³ M. Szuleka, 'First victims or last guardians? The consequences of Rule of Law backsliding for NGOs: case studies of Hungary and Poland' (2018) *CEPS Paper in Liberty and Security in Europe* No 6.

⁵⁴ A. Alemanno and O. Ştefan, 'Openness at the Court of Justice of the European Union: Toppling a taboo' (2014) 51 *Common Market Law Review* 97.

⁵⁵ 'Furthermore, there is a need for a formalised status within the EU, for judicial networks as representatives of the European judiciaries. The other branches of state have their own formalised EU level bodies that enable them to advise the EU Institutions. The national judiciaries of the EU do not have such a representative body.' (The General Assembly of the European Network of Councils for the Judiciary, 'The ENCJ Bratislava Manifesto. For the European Commission and European Parliament 2019 – 2024 mandate' 7 June 2019, p. 2.

⁵⁶ 'While objective and transparent sources like court judgements or opinions of the Venice Commission could be taken into account when assessing possible Rule of Law issues, the findings and analyses of the Council of Europe should not serve as an automatic basis for measures affecting rights and obligations stemming from EU membership' (State Secretariat for EU Relations of the Prime Minister's Office, 'Position paper of the State Secretariat for EU Relations of the Prime Minister's Office, Hungary on the Consultation about the Communication of the European Commission on „Further strengthening the Rule of Law within the Union”' 28 May 2019, p. 3).

main concerns regarding the relations between the Council of Europe (COE) and the EU dealt with the reservations expressed by the Parliamentary Assembly of the Council of Europe (PACE) on possible monitoring mechanisms, which could cause the ‘risks of the duplication of mechanisms and standards, fragmentation or inconsistency of applicable standards’.⁵⁷

In addition to general references to relations between the CoE and EU, the Commission surprisingly stated that the EU’s accession to the European Convention on Human Rights (ECHR) ‘will be a strong political signal of the Union’s commitment to the Rule of Law’.⁵⁸ Also numerous contributions underlined the need for the accession.⁵⁹ This was however torpedoed by the Court of Justice in its infamous Opinion 2/13,⁶⁰ coming down to a bid for the purification of the absolute autonomy of the legal order of which it is the custodian, using the Rule of Law as a shield against the introduction of the high standards of human rights protection in the EU.⁶¹ Mentioning the revamping of the Council of Europe accession process—notwithstanding the fact that the EU is obliged by the Treaties to eventually accede—is both puzzling and somewhat, if not entirely, out of place. Should the Commission formulate the constitutional capture problem clearly, there would be no need at all to spill the ink focusing on the unlikely developments that our self-minded Court does not welcome.⁶² The EU’s accession is of no relevance for the most burning issues facing Hungary and Poland today and the Commission could be expected to be clear on this: Rule of Law backsliding and the crisis it has caused has nothing to do with the EU’s accession to the ECHR. Indirectly it was confirmed in the Council of Europe contribution, which stated that ‘the expected accession of the European Union to the ECHR will reinforce the consistency of the legal obligations throughout the continent and, by subjecting the EU institutions themselves to the same obligations and same scrutiny, will reinforce EU’s credibility and legitimacy in debating on Rule of Law issues and promoting common and coherent approaches based on the Rule of Law standards enshrined in the ECHR.’⁶³

3.2 Prevention

The ‘prevention’ section of the Communication is dominated by the idea of new ‘dedicated monitoring’ of the Rule of Law related developments in Member States.⁶⁴ It will take the form

⁵⁷ Parliamentary Assembly of the Council of Europe, ‘Establishment of a European Union mechanism on democracy, the Rule of Law and fundamental rights’ Resolution 2273 (2019), point 13.

⁵⁸ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 7.

⁵⁹ ‘In this context, the EU’s accession to the European Convention on Human Rights should be pursued’ (‘Input of the Portuguese Government regarding the Commission Communication – Further strengthening the Rule of Law within the Union of 3 April 2019, to the European Parliament, the European Council and the Council’ 25 June 2019); ‘In line with the Lisbon Treaty and Article 59 of the European Convention on Human Rights (ECHR), the EU will accede to the Convention in the future’ (‘Slovenia’s response to the Communication on Further Strengthening the Rule of Law’, p. 3); ‘It is therefore important that the EU should accede to the European Convention on Human Rights (ECHR), as it is required to do by Article 6.2 TEU’ (International Commission of Jurists).

⁶⁰ Opinion 2/13 ECHR Accession II [2014] ECLI:EU:C:2014:2454.

⁶¹ D. Kochenov, ‘EU law without the Rule of Law. Is the veneration of autonomy worth it?’ (2015) 34 *Yearbook of European Law* 74.

⁶² But see J. Lindeboom ‘Why EU law claims supremacy’ (2018) 38 *Oxford Journal of Legal Studies* 328.

⁶³ Council of Europe, ‘Council of Europe’s secretariat comment to the Communication from the Commission on Further strengthening the Rule of Law within the Union State of play and possible next steps’ 2019, p. 5.

⁶⁴ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 9.

of a Rule of Law Review Cycle, which aims to ‘identify risks to the Rule of Law, develop possible solutions, and target support early on.’⁶⁵ The Cycle seems to be in line with what the European Parliament has long argued for⁶⁶ and will cover a broad scope of Rule of Law issues such as law-making, effective judicial protection, the independence and impartiality of the courts, the separation of powers, and also the capacity of Member States to fight corruption, as well as media pluralism and elections. The Commission wants it to be based on existing sources of information, which will be ‘brought together and complemented more effectively’. Despite that the Commission announced that a network of national contact points will be established, which could serve as a ‘forum for discussion’ and allow for mutual exchange of information and dialogue on Rule of Law related topics. The Commission argues that the ‘process of dialogue is particularly relevant for detecting potential Rule of Law issues early’ and provides opportunity ‘to discuss Rule of Law sensitive reforms’.⁶⁷ Furthermore, accelerated law making procedures adopted on many occasions in troublesome Member States (i.a. Poland) make such expectations naive. Solving the problem of Rule of Law backsliding (meaning a deliberate political choice of domestic political institutions) through dialogue and cooperation is impossible, since dialogue and cooperation cannot be an answer to a calculated choice not to comply with the core principles, thus abusing the vulnerabilities of the enforcement tools available in the context of the EU legal system, while freeriding on the principle of mutual trust and reaping the economic benefits of the internal market. It is one of the reasons why the peer-review process was criticized by the stakeholders during the consultations.⁶⁸ Furthermore, conducting a broad dialogue about Rule of Law developments in Member States might be challenging if the domestic environment for discussion regarding civil society, media or academia is hostile.

There are two more problems with the regular assessment proposed by the Commission, however. Firstly, it threatens to significantly alter the nature of EU federalism:⁶⁹ for the Commission to mingle with the essential features of the Member States outside the scope of fundamentally exceptional cases—such as Hungary and Poland today—has the potential to open Pandora’s box of the re-articulation of the limits of EU action. The outcome could be ongoing violations in the powerful Member States, coupled with the increased bullying of the smallest Member States, which would have little say in the face of the Commission’s pressure in a situation where the law is merely ‘soft’ and, consequently, the strictness of the basic rules regarding the division of powers between the EU and the Member States becomes more and more lax.⁷⁰ Secondly, the regular reporting is premised on the Member States’ benevolence and their willingness to comply. Given that the starting paradigm mistakenly embraced by the

⁶⁵ *ibid.*

⁶⁶ P. Bárd, S. Carrera, E. Guild and D. Kochenov, ‘An EU mechanism on democracy, the Rule of Law and fundamental rights’ (2016) *CEPS Paper on Liberty and Security* No 91.

⁶⁷ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 11.

⁶⁸ ‘MEDEL wishes to make clear its strong opposition to a peer-to-peer review mechanism between Member States as the one that has recently been proposed’ (Magistrats Européens pour la Démocratie et les Libertés, ‘Contribution to the debate launched by the European Commission on ‘Further strengthening the Rule of Law within the Union’’).

⁶⁹ R. Schütze, *From Dual to Cooperative Federalism* (Oxford: OUP 2009); D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP 2017).

⁷⁰ O. Ştefan, ‘Soft law and the enforcement of EU law’ in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP 2017).

Commission is entirely false, as demonstrated above, the outcomes of what the Commission proposed are highly unlikely to bring about a positive change to the EU’s Rule of Law landscape, let alone solve the core Rule of Law problems on which the Commission’s Communication remains silent. What they can do, however, is endanger the fragile balance of powers between the EU and the Member States in a situation where outright exceptional cases, which are absolutely clear, are not referred to by name. A false paradigm cannot be placed at the core of the crucial roadmap to solve the outstanding problems, however ill-identified.

Furthermore, the stakeholders suggested that the monitoring mechanism could build upon the experience of the United Nations (UN) peer review mechanisms, such as the Universal Periodic Review.⁷¹ In this respect the role of civil society cannot be limited only to the ‘promotion’ aspect, but needs to be secured also with respect to the ‘Rule of Law review cycle’. Additionally, ‘setting up structured means of input from civil society would greatly enhance transparency of the process’ and ‘would also contribute to protecting against possible negative consequences, such as reprisals, smear campaigns, harassment of civil society organisations or individual human rights defenders, by sending a clear message that the role of civil society is recognized and their contributions are valued by the European institutions.’⁷²

In the context of its Rule of Law Communication, the Commission underlined the role of the Fundamental Rights Agency (FRA), which developed the EU Fundamental Rights Information System (EFRIS)—a comprehensive database that is relevant for Rule of Law discussion. Grimheden and Toggenburg have long advocated the deeper involvement of the FRA in the management of the Rule of Law crises and it is great that the Commission is starting to take the Agency seriously in the Rule of Law context.⁷³ However, the Communication does not suggest that the mandate of FRA will be broadened,⁷⁴ which would support the independent role of the FRA in the Rule of Law field.⁷⁵

⁷¹ *The methods developed and used by the monitoring mechanisms of the United Nations human rights treaty bodies could serve as a model to build on in this respect, where there are clear rules about how those wishing to contribute information may do so, and such information is made publicly available.* (Helsinki Foundation for Human Rights, ‘Opinion on the Communication from the Commission to the European Parliament, the European Council and the Council concerning “Further strengthening the Rule of Law within the Union. State of play and possible next steps” (COM(2019)163 final)’ 4 June 2019); *If a credible peer review mechanism were to be established, it could probably draw on the experience of the Universal Periodic Review (UPR), where everyone reviews everyone in order to avoid a Poland reviews Hungary type of situation. However, this would probably require a significantly higher amount of commitment and domestic resources; International Commission of Jurists – To define a clear normative basis and thematic focus for such assessments, on principles of the Rule of Law, based in EU law and on established and authoritative international standards, including those of the Council of Europe and the UN; To ensure that assessments are linked with and build on existing Council of Europe and United Nations systems and standards.* (International Bar Association, ‘IBA Reflection paper on the EU Commission Communication of April 3, 2019 - Strengthening the Rule of Law within the European Union’ June 2019, p. 11).

⁷² Helsinki Foundation for Human Rights, ‘Opinion on the Communication from the Commission to the European Parliament, the European Council and the Council concerning “Further strengthening the Rule of Law within the Union. State of play and possible next steps” (COM(2019)163 final)’ 4 June 2019.

⁷³ G.N. Toggenburg and J. Grimheden, ‘The Rule of Law and the role of fundamental rights: seven practical pointers’ in C. Closa D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP 2016).

⁷⁴ J. Wouters and M. Ovádek, ‘What political role for the EU’s Fundamental Rights Agency?’ (2019) *KU Leuven Working Paper* No 209.

⁷⁵ L. Pech and J. Grogan, ‘Upholding the Rule of Law in the EU. What role for FRA?’ in B. Rosemary and H. Entzinger (eds), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency* (Oxfordshire: Routledge 2019).

The result of the Rule of Law Review Cycle will be an annual Rule of Law Report published by the Commission, providing synthesis of the developments and a source of information for further inter-institutional dialogue.⁷⁶ The Communication does not explain, however, how this aspect will contribute to prevention of Rule of Law backsliding, whereas the Annual Rule of Law Report could contribute to adoption of ‘autocrat-proof EU legislation’, which would include a suspension mechanism activated automatically when a Member State is subject to the Article 7 TEU procedure.⁷⁷ Analysis of some contributions to the report submitted in May 2020 already shows how comprehensive the report needs to be to cover all basic Rule of Law elements. On the other hand, covering all of the issues presented by the stakeholders might lead to blurring the extreme cases of Rule of Law backsliding by comparing incomparable threats to the Rule of Law (i.a. comparing systemic undermining checks and balances in Poland with technical obstacles to extensive length of judicial proceedings in Italy). Besides it is highly important to avoid thinking that a Rule of Law report can replace timely actions under Article 258 TFEU.

3.3 Response

Surprisingly one of the main features of the ‘response’ section seems to be minimalism: reducing response as much as possible. In light of the Commission’s Communication, ‘response’ should be introduced ‘when national Rule of Law safeguards do not seem capable of addressing threats to the Rule of Law in a Member State’.⁷⁸ Furthermore, regarding the core principles underlying EU action in terms of the Rule of Law, the Commission stated that ‘the objective must not be to impose a sanction but to find a solution that protects the Rule of Law’. Interestingly, the government of Poland underlined that ‘openness to dialogue must prevail over the temptation to impose sanctions or threaten with their immediate use.’⁷⁹ A completely different approach was presented by the International Bar Association, which found that ‘unless or until the stakes are raised and meaningful sanctions are in place (and enforced with greater speed) infracting Member States will continue to operate with perceived impunity’.⁸⁰ That is why it should be of no surprise that ‘the need for a stronger EU Rule of Law toolbox clearly emerged from’⁸¹ the consultations initiated in April 2019, whereas the Commission still believes in the power of dialogue leading to ‘swift de-escalation’.⁸²

We will concentrate on three main ‘response’ actions provided in the Communication: ‘systemic’ infringement actions, the Rule of Law Framework and the Article 7 TEU procedure.

⁷⁶ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 11.

⁷⁷ L. Pech and D. Kochenov, ‘Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid’ (2019) *RECONNECT Policy Brief*, p. 13.

⁷⁸ *ibid*, p. 13.

⁷⁹ ‘Poland’s contribution’ 17 July 2019, p. 3.

⁸⁰ ‘*Ergo, in the absence of a significant financial disincentive, the problem is unlikely to be resolved. The Article 7 procedure is, in effect, never-ending as a process. It requires unanimity, which can be hard to obtain if sympathetic Member States defend each other or have similar political priorities*’ (International Bar Association, ‘IBA Reflection paper on the EU Commission Communication of April 3, 2019 - Strengthening the Rule of Law within the European Union’ June 2019, p. 9).

⁸¹ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 2.

⁸² *ibid*, p. 13.

3.3.1 Strategic approach to infringement actions

The Commission underlined the role of the CJEU case-law constituting a reaction to attacks on independence of the judiciary and expressed its commitment that it will pursue ‘a strategic approach to infringement proceedings related to the Rule of Law, requesting expedited proceedings and interim measures whenever necessary’,⁸³ especially when Rule of Law problems ‘could not be solved through the national checks and balances’.⁸⁴ Let us not forget that this is—and has always been—the Commission’s duty as the guardian of the Treaties and that its timid fulfilment of these duties coupled with the failure to see the full picture—like in *Commission v. Hungary*,⁸⁵ has unquestionably contributed to the aggravation of the Rule of Law crisis in the European constitutional space. It is great that the Court has taken the lead and that the Commission acknowledges this and seemingly stands ready to start learning from its mistakes. The problem, however, is that the Commission could be expected to be just as active as the Court from day one when the troubles with the constitutional capture started and this has not been the case, lending many years of largely untroubled existence to the backsliding governments busy dismantling the Rule of Law.

Despite the fact that the idea of a more systemic approach to infringement actions was analyzed in the literature for years⁸⁶ and was supported by the stakeholders,⁸⁷ the recent deterioration in the field of judicial independence in Poland did not result in a timely reaction from the Commission – the request for an interim measure was submitted almost three months *after* the infringement action, regarding disciplinary regime against judges, was sent to the Court.⁸⁸ Furthermore, the latest ‘muzzle law’ adopted in Poland still did not result in an infringement action, despite political declarations,⁸⁹ including the one expressed in the Communication that it is ‘important that the EU institutions act swiftly and have a more coherent and concerted approach’.⁹⁰

⁸³ *ibid*, p. 14.

⁸⁴ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication COM (2019) 343 final, p. 4.

⁸⁵ C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687.

⁸⁶ K.L. Scheppele, ‘Enforcing the basic principles of EU law through systemic infringement actions’ in C. Closa and D. Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: CUP 2016); A. Śledzińska-Simon and P. Bárd, ‘The Teleos and the anatomy of the Rule of Law in EU infringement proceedings’ (2019) 11 *Hague Journal on the Rule of Law* 439; P. Bárd and A. Śledzińska-Simon, ‘Rule of Law infringement procedures. A proposal to extend the EU’s rule of law toolbox’ (2019) *CEPS Paper in Liberty and Security* No 2019-09.

⁸⁷ ‘*Infringement proceedings should therefore be initiated regularly and promptly by the Commission where it identifies violations of the Rule of Law, including in cases of violation of basic principles of the Rule of Law under Article 2 TEU or the right to legal protection under Article 19.1 TEU, or where violations of Rule of Law principles affect the application of EU legislation.*’ (International Commission of Jurists, ‘Submission by the International Commission of Jurists to the European Commission’s Consultation on “Further Strengthening the Rule of Law Within the Union”’ June 2019, p. 13).

⁸⁸ European Commission, ‘Daily News 14 / 01/ 2020’ (14 January 2020) at: https://ec.europa.eu/commission/presscorner/detail/en/mex_20_56.

⁸⁹ ‘Polish parliament approves judge ‘muzzle law’, Commission ‘very concerned’ (*Euractiv* 24 January 2020) at: <https://www.euractiv.com/section/justice-home-affairs/news/polish-parliament-approves-judge-muzzle-law-commission-very-concerned/>.

⁹⁰ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication COM (2019) 343 final, p. 14.

3.3.2 The Rule of Law Framework and the Article 7 TEU procedure

It is most regrettable that the Commission provides no critical assessment of the practices of the Rule of Law Framework or the Article 7 TEU procedure, both boasting zero results up to now—and for very sound reasons. While the Commission awoke to the time-sensitive nature of the infringements of the values,⁹¹ not a single word in the Communication explains why the deeply problematic Rule of Law Framework, which bought the backsliding governments so much time thanks to the Commission’s own initiative, is still part of the tool-box. The government of the Netherlands suggested, for instance, that within the Rule of Law Framework ‘recommendations to Member States should be accompanied by specific action plans and technical support programmes, and linking them to specific time paths’.⁹²

Setting aside diplomatic optimism⁹³ and criticism expressed before by the Council Legal Service,⁹⁴ the Commission should not only speed up the conduct of the Rule of Law Framework but also make it more transparent and inclusive.⁹⁵ ‘Limited transparency impedes the Commission’s ability to fully assess the situation in a Member State’.⁹⁶ As it was underlined by the Helsinki Foundation for Human Rights and the Hungarian Helsinki Committee, the notion of ‘discussion’ – a basic tool applied in the Rule of Law Framework – ‘assumes that the Rule of Law can be negotiable and that it is possible to destroy the constitutional safeguards of checks and balances and then simply discuss this with the Member State.’ Together with a lack of any time limits it allowed for further backsliding, which was not recognized by the Commission as a problem in its Communication. Such a dialogue ‘may often benefit Rule of Law violators more than its defenders.’⁹⁷

Also the debate on the Article 7 TEU procedure did not result in any critical assessment in the Communication, except ensuring the role of the European Parliament in the procedure and providing *ad hoc* openness to the Council of Europe bodies. ‘Clearer procedures and timelines’

⁹¹ M. Schmid and P. Bogdanowicz, ‘The infringement procedure in the Rule of Law crisis: How to make effective use of Article 258 TFEU’ (2018) 55 *Common Market Law Review* 1061; L.W. Gormley, ‘Infringement proceedings’ in A. Jakab and D. Kochenov (eds), *The Enforcement of EU law and Values* (Oxford: OUP 2017).

⁹² Dutch Ministry of Foreign Affairs, ‘Commission Communication 3 April 2019 – Rule of law, Input from Netherlands’ 2 July 2019.

⁹³ ‘*The Rule of Law Framework has proven to be a useful preliminary stage to the article 7 where important information is gathered and analyzed by the Commission, the Guardian of the Treaties. This process is useful not only to the Member State in question but also to others as it highlights concrete actions and practices giving guidance to the compliance of the Rule of Law.*’ (‘Swedish input to the European Commission Communication on Further strengthening of the Rule of Law within the Union (COM(2019) 163 final)’ 17 July 2019).

⁹⁴ ‘*Rule of law framework is not compatible with the principle of conferral which governs the competences of EU institutions*’ (State Secretariat for EU Relations of the Prime Minister’s Office, ‘Position paper of the State Secretariat for EU Relations of the Prime Minister’s Office, Hungary on the Consultation about the Communication of the European Commission on „Further strengthening the Rule of Law within the Union”’ 28 May 2019).

⁹⁵ ‘The Commission did not recognise the role of non-governmental organisations, media or academia as sources of information relevant for a full and correct assessment of the situation in a Member State. Non-governmental actors are indispensable to verify the information provided by the government.’ (Helsinki Foundation for Human Rights, ‘Opinion on the Communication from the Commission to the European Parliament, the European Council and the Council concerning “Further strengthening the Rule of Law within the Union. State of play and possible next steps” (COM(2019)163 final)’ 4 June 2019).

⁹⁶ *ibid.*

⁹⁷ International Bar Association, ‘IBA Reflection paper on the EU Commission Communication of April 3, 2019 - Strengthening the Rule of Law within the European Union’ June 2019.

recommended towards the Article 7 TEU procedure mean, however, nothing without clear political will to decide upon clear violations of the Rule of Law by Member States. It should be worth noting not to miss the role of the procedure expressed by the Swedish government: ‘One of its advantages is still the fact that the process brings light to the actual situation, which creates a pressure to comply with the breached rules. It is therefore important to continue the political dialogue within the context of article 7.’⁹⁸ Nevertheless, the consultations showed that it is difficult to avoid discussion about how Article 7 TEU should be amended in order to improve its efficiency, meaning the probability that effective sanction will be imposed on a rogue Member State.⁹⁹

4. What is missing in this picture?

The Communication tries to be as politically correct as possible and that is why it avoids calling a spade a spade. ‘Political developments in several Member States’ and ‘deliberate policy choices’¹⁰⁰ are soft descriptions of Rule of Law backsliding – deliberate dismantling of checks and balances – applied in Hungary and Poland in order to secure a one-party system. The Commission does not introduce any differentiation between those two hard cases (where effective national redress mechanisms do not exist in practice) and typical every-day shortcomings regarding implementation of the Rule of Law principle. The Eurobarometer survey showed that 80% of the respondents expressed the need for some improvements regarding the Rule of Law in their countries.¹⁰¹ However ‘nobody’s perfect’¹⁰² shouldn’t be a threshold for assessing systemic Rule of Law backsliding. The Member States that took a political choice, which is not formally available in the EU’s constitutional landscape, to oppose the values of Article 2 TEU are the most important problem, not the ones which are unknowingly non-compliant and negligent.¹⁰³

Meanwhile contributions showed that the causes of the Rule of Law crisis might be more complex than only technical or financial shortcomings.¹⁰⁴ The Dutch Parliament points, for

⁹⁸ ‘Swedish input to the European Commission Communication on Further strengthening of the Rule of Law within the Union (COM(2019) 163 final)’ 17 July 2019.

⁹⁹ ‘In the long term, therefore, consideration should be given to amending the TEU to reduce the scope for political influence on the Article 7 process. Such an amendment could assign the determination of a serious and persistent breach under Article 7.2 as well as the decision on sanctions under Article 7.3 to the Court of Justice, thereby providing further judicialization of the procedure. In the shorter term and within the current legal framework, the working methods of the Council should be amended to provide for greater transparency in the Article 7 process, including through increased consultation with civil society.’ (International Commission of Jurists, ‘Submission by the International Commission of Jurists to the European Commission’s Consultation on “Further Strengthening the Rule of Law Within the Union”’ June 2019).

¹⁰⁰ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 5.

¹⁰¹ *ibid*, p. 13.

¹⁰² A. Rettman, ‘Von der Leyen signals soft touch on migrants, Rule of Law’ (*EUObserver* 19 July 2019) at: <https://euobserver.com/news/145504>.

¹⁰³ D. Kochenov, ‘The *acquis* and its principles: the enforcement of the ‘law’ vs. the enforcement of ‘values’ in the European Union’ in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP 2017).

¹⁰⁴ The academic literature on this important point is growing: P. Blokker, ‘Populist counter-constitutionalism, conservatism, and legal fundamentalism’ (2019) 15 *European Constitutional Law Review* 518; D. Adamski, ‘The social contract of democratic backsliding in the “New EU” countries’ (2019) 56 *Common Market Law Review* 623; A. Sajó, ‘The Rule of Law as legal despotism: Concerned remarks on the use of “Rule of Law” in illiberal democracies’ (2019) 11 *The Hague Journal on the Rule of Law* 371; P. Blokker, ‘Populist constitutionalism and

instance, to a ‘winner-takes-all mentality’ as one of the factors which might lead to direct attacks on the checks and balances system.¹⁰⁵ Without dealing with such a political challenge, the need for inter-parliamentary dialogue,¹⁰⁶ as a suggested part of promotion of the Rule of Law, might be a meaningless exercise. The situation in Hungary and Poland today is thus radically different from that of the Member States with troubled institutional structures, such as Greece;¹⁰⁷ Member States with particular electoral outcomes;¹⁰⁸ or Member States in principled disagreement with the EU on the functioning of some principles, as was the case with Germany and its courts pushing through the change in the EU’s approach to the idea of human rights protection.¹⁰⁹

Unfortunately, the Commission does not explain the nature of Rule of Law backsliding in troubled Member States. Scholars have been clear on what the key causes of the latter are: the lack of a clear will by the Member States and the inability of the EU institutions to utilize the full potential of the available legal instruments to match the gravity of the problem. Without outlining the causes, it is difficult, of course, to expect effective solutions.

Lack of political will can be seen not only with respect to the Article 7 TEU procedure but also can be seen during budget negotiations.¹¹⁰ The Communication refers to the regulation proposal allowing the linking of EU funds and ‘general deficiencies as regards to the Rule of Law in Member States’,¹¹¹ as a tool which would ‘avoid or remedy specific risks to the implementation of EU law or policies’.¹¹² On the one hand, it was suggested during the debate that conditionality ‘is unlikely to produce beneficial outcomes’ and might ‘stimulate an instrumental, rather than a normatively driven, value-based engagement with reforms’.¹¹³ On

meaningful popular engagement’ (2018) *The Foundation for Law, Justice and Society Policy Brief*. K.L. Scheppele, ‘The social lives of constitutions’ in P. Blokker and C. Thornhill (eds), *Sociological Constitutionalism* (Cambridge: CUP, 2017).

¹⁰⁵ Tweede Kamer, ‘Report by the Rapporteur on Rule of Law developments in the European Union’ 13 March 2019.

¹⁰⁶ European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 7.

¹⁰⁷ M. Ioannidis, ‘Weak members and the enforcement of EU law’ in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP 2017).

¹⁰⁸ I.a. FPÖ crisis in Austria leading to a reform of Article 7 TEU: K. Lachmayer, ‘Questioning the basic values—Austria and Jörg Haider’ in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP 2017).

¹⁰⁹ F.C. Mayer, ‘Defiance by a constitutional court’ in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press 2017).

¹¹⁰ E. Zalan, ‘EU leaders face major clash on Rule of Law budget link’ (*EUObserver* 19 February 2020) at: <https://euobserver.com/political/147495>; J. Rankin and D. Boffey, ‘Tensions mount between EU members ahead of budget talks’ (*The Guardian* 19 February 2020) at: <https://www.theguardian.com/world/2020/feb/19/tensions-mount-between-eu-members-ahead-of-budget-talks>.

¹¹¹ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the Rule of Law in the Member States’ (Proposal) COM (2018) 324 final. Cf. M. FisiCaro, ‘Rule of Law conditionality in EU funds: The value of money in the crisis of European values’ (2019) 4 *European Papers* 695.

¹¹² European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final, p. 15.

¹¹³ Paul Blokker’s submission, p. 7.

the other hand, the Commission does not review whether such a link between the Rule of Law requirement and access to EU funds can be established according to EU law already in force.¹¹⁴

The Communication fails to take the problem—a deeply exceptional depth of the constitutional capture in two Member States—seriously enough to place it at the centre of its resulting hugely befogged analysis. By failing to mention, let alone explain, what the actual core problems with the Rule of Law that the EU is facing are, the Commission has consequently left the most fundamental Rule of Law problems out of the picture. As a result Rule of Law Communication became effectively disconnected from the essence of the ongoing fight for the Rule of Law on the ground in the abusive Member States. It is the idea that some Member States would proactively seek to undermine the Rule of Law in order to create *de facto* one-party regimes where democracy is paralyzed, and the Rule of Law is hollowed, that is missing from the Communication. Furthermore, the Commission does not provide critical analysis of the Rule of Law in the EU, which would strengthen the EU against criticism that the EU itself does not meet adequate institutional¹¹⁵ and procedural requirements.¹¹⁶

5. Conclusion

It does not seem that the Communication has provided a new approach to Rule of Law ‘hard cases’. The Commission absolutely failed to clarify this crucially important matter: ‘what is the essence of the EU’s Rule of Law problem?’ The Commission’s contribution seems to be punching way below the weight of that institution in terms of supplying a clear and realistic assessment of what the EU is dealing with today. Commission President von der Leyen arguing that ‘nobody’s perfect’¹¹⁷ and belief in more dialogue constitutes an approach which will only lead to ‘more time being wasted even while Rule of Law backsliding is spreading to more EU countries and endangering the very survival of the EU legal order.’¹¹⁸

¹¹⁴ R.D. Kelemen and K.L. Scheppele, ‘How to stop funding autocracy in the EU’ (*VerfBlog* 10 September 2018) at: <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>.

¹¹⁵ D. Kochenov, ‘EU law without the Rule of Law. Is the veneration of autonomy worth it?’ (2015) 34 *Yearbook of European Law* 74.

¹¹⁶ A. Alemanno and O. Ştefan, ‘Openness at the Court of Justice of the European Union: Toppling a taboo’ (2014) 51 *Common Market Law Review* 97.

¹¹⁷ A. Rettman, ‘Von der Leyen signals soft touch on migrants, rule of law’ (*EUObserver* 19 July 2019) at: <https://euobserver.com/news/145504>.

¹¹⁸ L. Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, ‘The Commission’s Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism’ (*VerfBlog* 5 September 2019) at: <https://verfassungsblog.de/the-commissions-rule-of-law-blueprint-for-action-a-missed-opportunity-to-fully-confront-legal-hooliganism/>.

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