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What Rule of Law for the European Union? – Tracing the Approaches of the EU Institutions

Abstract: Although the rule of law is a normative notion, it requires a multidimensional approach. It speaks to important issues of law and politics, and its respect is essential for both legal and social security. It can be observed within the European Union (EU) where the issue of respect for the rule of law by its Member States has gained particular importance. The main goal of our study is to contribute to the academic discourse concerning the EU rule of law. The analysis particularly considers the approaches adopted by the EU institutions to the definition of this concept. Consequently, the first part of the article concentrates on difficulties in defining the rule of law. The second part presents the evolution of the Court of Justice approach toward this concept. The next part contains the analysis of the attitudes presented by other EU institutions in their documents. In the conclusions, it is underlined that although the approaches of the EU institutions towards the rule of have evolved, and they have tried to define it and indicate its main components, certain issues require clarification, e.g., the relations of the rule of law with other values.

Keywords: *formal and substantive approaches to the rule of law, the EU rule of law, Les Verts case, ASJM case, ‚A new EU Framework to strengthen the Rule of Law'*

Introduction

The rule of law in the European Union's legal system has gained considerable importance and has undergone a gradual definition, affirmation, and development, regarding its internal and external dimensions (Apostolovska-Stepanoska, Runcheva, & Ognjanoska, 2020, p. 408).

However, we agree with the opinion (Kochenov, 2009, p. 5) that understanding the rule of law as a Community legal construct is not receiving enough attention, although there is a vast literature concerning the concept. We also feel that the enforceability of the EU's values against the Member States is not the only, possibly even not the core problem we should discuss (Kochenov, 2015, p. 292). As an ultimate safeguard and template for reference, the quality of a distinctive EU rule of law should come to the forefront (Palombella 2015, p. 49).

Therefore, we would like to elaborate on this issue in particular to trace the elements that could help identify the European Union concept of the rule of law and see how its institutions have developed it. Several questions could be asked about this research problem. Firstly, have the approaches of the EU institutions changed over time? Is this change connected with the breach of the rule of law in the Member States? Secondly, are the concepts of the rule of law referred to by the European Commission, the European Parliament, and the Council compatible with the case-law of the Court of Justice (the ECJ)? Thirdly, can we observe formulating a well-defined and clear EU-law approach to the rule of law? Trying to answer these questions, certain hypotheses can be formulated as it seems that the approaches of the EU institutions have changed under current circumstances in certain Members States, connected with the breach of the rule of law, particularly by Poland and Hungary. At the same time, the concepts of the rule of law referred to by the European Commission, the European Parliament, and the Council in their documents are generally compatible with the ECJ case-law, which reflects its main role as the interpreter of the EU law. However, the EU still lacks a well-defined and clear approach to the rule of law. Moreover, there are some doubts if the EU institutions always apply this value to their own actions.

The article is based mainly on the analysis of the case-law of the Court of Justice, binding and non-binding acts adopted by the EU institutions such as the European Commission communications, documents of the Council of Europe, and vast literature on the subject. This source-based approach has provided important information concerning the EU rule of law and its possible future evolution.

1. Ambiguity of the Concept

Like the term democracy, the rule of law is a contested concept that has meant many things to many different people (Pech, 2009, p. 70). It is not easy to define even if confined to the national level as it is multidimensional and complex (Møller, 2018, p. 22). Basic definitions of the rule of law describe it as ‚government by law, not by men', or ‚the subjection of all state power to the law', or ‚the limitation of arbitrary government'. Therefore, it is emphasized that this concept has at least two core components: the control of power and law (Lautenbach, 2013, p. 19). However, the law should have several specific attributes: it should be prospective, not retrospective, and relatively stable; particular laws should be guided by open, general, and clear rules; there should be an independent judiciary and access to the courts; and that

the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules (Craig, 2019, p. 3).

Depending on the components described as indispensable for compliance with the rule of law, we can distinguish narrow (‚thin') and comprehensive approaches (‚thick'). The former focuses rather on procedural safeguards of the law, due process principles, and evidence rules (Magen, 2016, p. 3). Consequently, Joseph Raz (1979, p. 4) underlines that a „non-democratic legal system, based on the denial human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, confirm the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies". This approach shows, however, the emptiness of formal legality (Tamanaha, 2004, pp. 93-94). Therefore, substantive views or putting it in Dworkin's (1985, pp. 11-12) words a „rights-based understanding of the rule of law" have been developed. Those views consider the form and the content of the laws that exist within a legal system. While encompassing procedural elements, they additionally focus on the realization of values. In other words, substantive definitions of the rule of law contain the elements that form part of the formal definitions and comprise requirements concerning the content of the laws (Lautenbach, 2013, p. 21). Therefore, these approaches are morally more ambitious and include substantive outcomes as part of the conception itself – they are based on a larger vision of a good society and polity (Krygier & Winchester, 2018, p. 84).

Regarding these general difficulties connected with definitions of the rule of law, it is interesting to see what approach toward this concept is applied in the EU. The Treaties are silent on the substance of the rule of law, and for a long time, there has been no real attempt to clarify the meaning of the formula a „Community based on the rule of law" introduced by the Court of Justice[1]. Basic definitions or rather descriptions of its components can be found in some of the instruments of the external EU policies. For instance, the Cotonou Agreement of 2000 predicts that: „The structure of government and the prerogatives of the different powers shall be founded on the rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law"[2]. This definition takes into account both formal and substantive elements. The reference to the rule of law can also be found in the EC Regulation No 232/2014 of 11 March 2014 establishing a European Neighborhood Instrument which predicts that supporting human rights, good governance, and the rule of law also includes reforms of justice, of the public administration and the security sector[3]. Only these examples show that the EU instruments do not specify in detail what the rule of law entails, and even when concise definitions are offered, they are normally

[1] ECJ 23 April 1986, Case 294/83, *Parti* écologiste *‚Les Verts' v. European Parliament*, EU:C:1986:166, par. 23.

[2] Cotonou Agreement, 2000, motive 6 of the preamble and art. 9 (2).

[3] EC Regulation No 232/2014, 2014, art. 1 of the Annex.

rather superficial and not perfectly consistent with each other as various components of the rule of law tend to be referred to (Pech, 2012, pp. 22-23).

2. The Jurisprudence of the Court of Justice: The Rule of Law as an „Umbrella Rule"

The main components of the rule of law, such as legality, legal certainty, proportionality, were recognized by the Court of Justice in its early case-law (von Danwitz, 2014, p. 1314). For example, in *Algera* it referred to the „need to safeguard confidence in the stability of the situation"[4]. In the subsequent case law, the ECJ directly underlined that legal certainty requires the Community/Union legislation to be clear and predictable for those who are subject to it[5]. The first explicit references to the rule of law are the *Granaria*[6] and *Les Verts* cases. The approach applied by the Court in both judgments was rather formal as this concept was attached mainly to legality. In *Les Verts* the Court expressed its famous and commonly cited opinion that the „European Economic Community is a Community based on the rule of law since neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them conform with the basic constitutional charter, the Treaty"[7]. This line of reasoning based on the formal approach towards the rule of law was continued, and the ECJ underlined the importance of the following principles being the main components of the rule of law: legality, legal certainty, judicial review, and effective judicial protection of individuals' rights.

The last issue brought about new developments in how the Court understands the rule of law. In *UPA*, it emphasized that as Community is based on the rule of law, „its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law, including fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order (…)"[8]. Although the Court did not include fundamental rights into the list of elements important for the rule of law, it explicitly referred to them. It made clear that the EU rule of law does

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[4] ECJ 12 July 1957, Joined Cases 7/56 and 3/57 to 7/57, *Dinecke Algera and others v. Common Assembly of the European Coal and Steel Community*, EU:C:1957:7.

[5] ECJ 12 February 1981, Joined Cases 212 to 217/80, *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others and Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v. Amministrazione delle finanze dello Stato*, EU:C:1981:270, par. 10

[6] ECJ 13 February 1979, Case 101/78, *Granaría BV Rotterdam v. Hoofdproduktschap voor Akkerbouwprodukten*, EU:C:1979:38.

[7] ECJ 23 April 1986, Case 294/83, *Parti* écologiste *,Les Verts' v. European Parliament*, EU:C:1986:166, par. 23.

[8] ECJ 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores v. Council of the European Union*, EU:C:2002:462, par 38-39.

not merely encompass compliance with formal requirements but has a substantive dimension in the sense that it demands judicial remedies to protect not only procedural but also fundamental rights (Pech, 2009, p. 55). The substantive approach to the EU rule of law was further developed in the case law concerning the United Nations (UN) sanctions against terrorists, which were to be implemented by the EU institutions. In its decision in the joined cases *Kadi and Al Barakaat,* considering the claims of the parties concerning *inter alia* the infringement of their fundamental rights, the Court reminded that „the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter (…)" (Bonelli & Claes, 2018, p. 623). The strong support for fundamental rights as an important part of the EU law allows agreeing with the view that „although the Court's initial understanding was predominantly formal and procedural in nature, an evolution towards a more expansive and substantive understanding can be detected" (Pech, 2009, p. 53).

The subsequent case law confirms this broader approach towards the EU rule of law. It should be noted, though, that since the entry of the Lisbon Treaty into force, the Court has referred not only to Article 2 TEU which lists the EU values but also to article 21 TEU concerning the European Union's external actions where the rule of law is mentioned among other principles which „guide the Union's action on the international scene". It is underlined that the „very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law"[9], „is of the essence of the rule of law"[10]. Thus, effective judicial review, which is connected with the ECJ's role within the EU legal order, becomes one of the most important components of this founding value.

The further evolution of the concept of the rule of law in the case-law of the Court is connected with determining the role of national courts for its full application. Undoubtedly, independent and impartial courts are active guardians of the rule of law (Gajda-Roszczynialska & Markiewicz, 2020, p. 452), and such a view is presented in the ECJ's decisions. Therefore, it should not be a surprise that the Court decided to play a role in the debate on the infringements of the rule of law in particular Member States, including Poland. It created for itself an opportunity to intervene in this debate and to assess recent amendments to the laws regulating the functioning of Polish courts (Bonelli & Claes, 2018, p. 623) based on the question asked in the case *Associação Sindical dos Juízes Portugueses* (*ASJP*) which concerned austerity measures, more precisely: the impact of general salary-reduction measures on judicial independence[11]. The ECJ started by reminding that the rule of law is one of the founding EU values, and Article 19 TEU gives concrete expression to this

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[9] ECJ 19 July 2016, Case C455/14 P, *H v. Council of the European Union and Others*, EU:C:2016:569, par 41.

[10] ECJ 28 March 2017, Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, EU:C:2017:236, par 73.

[11] ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, EU:C:2018:117, par. 18.

value. This Treaty provision entrusts the responsibility for ensuring judicial review in the EU legal order both to the Court of Justice and to national courts, and the Member States are obliged because of the principle of sincere cooperation, to ensure, in their respective territories, the application of and respect for EU law. Thus, the Court not only linked the rule of law with Article 19 TEU, which is underlined in the further part of the judgment[12], but it also considered the principle of sincere cooperation as an important element of ‚the whole puzzle'. By combining the articles 2, 4 (3), and 19 (1) TEU, the „Court effectively and positively transformed the rule of law into a legally enforceable standard to be used against national authorities to challenge targeted attacks on national judiciaries" (Pech & Platon, 2018, p. 1836).

The political objectives of the Court's decision are clear: Luxembourg wants to clarify that the organization of the national judiciaries is not exclusively a matter for each of the Member States separately, but that Member States are under an obligation, contained in primary EU law and supervised by the Court of Justice, to ensure that their courts and judges are independent in the fields covered by EU law (Bonelli & Claes, 2018, p. 623). The ECJ tries to explain that judicial independence is inherent in effective judicial protection, and the latter is an essential component of the rule of law. Such an approach can also be observed in other rulings concentrated on judicial independence, e.g., in the decisions in *LM*, also known as *Celmer*[13], and in *Commission v. Poland*[14]. In the latter case, the ECJ stated that Poland infringed article 19 (1) TEU the second subparagraph „firstly, by providing that the measure consisting in lowering the retirement age of the judges of the Supreme Court in Poland is to apply to judges in post who were appointed to that court before April 3, 2018, and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age"[15].

Overall, it can be seen that the ECJ treats the rule of law as an important value of the Community/the Union. However, this concept has always been seen as a meta or ‚umbrella' rule embracing certain components. Over time, the Court has added to the formal elements/principles and substantive ones. Still, its conception of the rule of law is rather descriptive, and the Court could be clearer in indicating which of its ends is the most important for the EU. Many rulings have referred to effective judicial review as the „essence of the EU rule of

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[12] Ibidem, par. 36.

[13] ECJ 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality v. LM*, EU:C:2018:586, par. 48.

[14] ECJ 24 June 2019, Case C-619/18, *European Commission v. Republic of Poland*, EU:C:2019:531, par. 47.

[15] Ibidem, par. 124. Similar decision was taken by the Court on 5 November 2019, Case C192/18, *European Commission v. Republic of Poland*, EU:C:2019:924. It stated that Poland infringed the EU law by establishing a different retirement age for men and women who are judges in the ordinary Polish courts and the Supreme Court or are public prosecutors in Poland.

law", but does it mean that the former is the most important element for ensuring the latter? It would be good if the Court directly confirmed such an approach. For the time being, it has not said a final word in this field. Moreover, there might be a problem with applying the rule of law to the Court of Justice itself, which can be well observed in the saga of the Eleanor Sharpston cases[16] concerning the rules for appointing Advocate Generals. They have highlighted deficiencies in the drafting of EU law and a gap in a complete system of legal remedies, which the Court has constantly referred to in its case-law. Undoubtedly, the „deficient treatment of Eleanor Sharpston will make it more difficult for the Court of Justice, when it is called upon in the future to adjudicate upon the rule of law challenges emanating from the national courts of the EU, to take the moral high ground" (Reid, 2020).

3. The Approach Presented by the European Commission

The European Commission (2014a, pp. 3-4) recognizes the rule of law as the „backbone" of democracy in the Member States and, at the same time, the foundation on which the EU is based. In the communication a „new EU Framework to strengthen the Rule of Law", the European Commission, based on the case-law of the ECJ, for the first time specified the EU's conception of the rule of law. It compiled a non-exhaustive list of seven general principles of EU law, which define the core meaning and scope of the rule of law as one of the fundamental values of the EU (European Commission, 2014a, p. 4; 2014b, pp. 1-2). These include the principle of legality, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, equality before the law, effective judicial review[17], and the principle of the separation of powers[18].

The European Commission wished to emphasize that the understanding and scope of the rule of law it has adopted are not only based on the ECJ jurisprudence but are also almost identical to the elements listed by the European Commission for Democracy Through Law (2011, par. 41). It is not surprising since the functional approach of the Venice Commission is a widely accepted conceptual framework for the rule of law in Europe.

Thus, the Commission's understanding of the rule of law was clearly outlined in the communication. However, concerns have been raised that some of its sub-components have not been included or at least properly emphasized (Kochenov & Pech, 2015, p. 523). Based on the general conception of the rule of law, such reservations may be considered justified, but the institutional and political constraints to which the European Commission was subject should also be considered. The governments of Bulgaria, Great Britain, Hungary,

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[16] ECJ 16 June 2021, Case C-685/20 P, *Eleanor Sharpston v. Council of the European Union and Representatives of the Governments of the Member States,* EU:C:2021:485.

[17] Including respect for fundamental rights.

[18] In Commission Communication only six core components are mentioned, but the attached annex additionally refers to the principle of the separation of powers (European Commission, 2014b, p. 2).

Poland, and Slovakia loudly criticized the „pre-article 7 procedures" (Kochenov & Pech, 2015; Closa, 2016; Halmai, 2019), presented in the Commission Communication (2014a, pp. 6-9), arguing that this was an excessive increase in the EU competences and limitation of the sovereignty of the member states. Consequently, Council Legal Service delivered an opinion stating that „there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of respecting the rule of law by the Member States" (Council of the EU, 2014, par. 24). The conclusions presented in the opinion should be considered erroneous, as the provisions contained in Article 292 TFEU were completely omitted (Oliver & Stefanelli, 2016, pp. 2-4). However, this indicated the Council's reluctance to extend the Commission's powers (Colsa, 2019, p. 706).

Defining the scope of the rule of law by the Commission, applying principles that are not unequivocally confirmed in the ECJ jurisprudence, could have led to a serious institutional conflict within the EU, even though the Commission has sought to ensure the strongest possible legitimacy for the actions taken. Viviane Reding (2013), Vice-President of the European Commission, summarized that „the worst result of a new rule of law mechanism would be if it leaves the Commission institutionally damaged, and thus eliminates the only institution currently accepted as being able to deal with a rule of law crises".

Generally, the European Commission believes that the rule of law must be construed as a „constitutional principle with both formal and substantive components", which is consistent with the case law of the ECJ and ECHR. Similar to the Council of Europe (2008), the European Commission understands the rule of law, democracy, and human rights as an inextricably linked trinity of concepts, mutually reinforcing and interdependent because one cannot exist without the others. As a consequence, the rule of law should be interpreted in a way that ensures the most effective protection of these rights (Pech, 2009, pp. 55-56).

In the communication of April 2019, the Commission (2019a, p. 1) presented its own definition of the rule of law:

Under the rule of law, all public powers always act within the constraints set out by law, following the values of democracy and fundamental rights, and under the control of independent and impartial courts. 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.

The essence of the position on the rule of law was presented in the Communication of 2014. However, the Commission decided to make the principle of the separation of powers more visible. The differentiation between independent and impartial courts and the principle of effective judicial review was abandoned. Two reasons for putting a stronger emphasis on the principle of the separation of powers can be given. First, several instances of referring to this principle in the post-2014 case-law of the ECJ, as a result of which the doctrine on the principle of the separation of powers and judicial independence was significantly

developed[19]. Second, the growing threat to the independence of the judiciary from the executive power, particularly in Hungary and Poland (European Commission for Democracy Through Law, 2018, 2019; European Commission, 2017, 2019b), motivated the Commission to emphasize the substantive components of this concept.

The Commission treats the principle of the separation of powers as the central component of the EU rule of law. In its Communications, the European Commission (2019a, note 12; 2019b, p. 1) reveal what is the main objective of the rule of law – according to it, this is „preventing the abuse of power by public authorities" by guaranteeing an independent review of the exercise of public powers, thus establishing accountability of government entities. It is confirmed in the Commission Communication of July 17, 2019, which constitutes a medium-term plan for further strengthening the rule of law within the European Union. It recognizes the non-respect for the separation of powers as an important issue subject to monitoring as part of the Rule of Law Review Cycle.

In the communication of April 3, 2019, the European Commission (2019a, p. 11) emphasized the importance of substantive aspects of the rule of law. It should be reflected not only in the law and institutional structures of Member States but „also in institutional practice". In this context, based on the work of the Venice Commission[20], the European Commission drew attention to the necessity of loyal cooperation among institutions of the state, which is to constitute a „foundation stone for the rule of law". It requires state institutions to recognize that each has a legitimate function to perform. Thus, all constitutional bodies should act transparently, within the Constitution's limits, and comply with the European Constitutional Heritage.

The European Commission (2019c, p. 7) believes that the consequence of signing the Memorandum of Understanding between the Council of Europe and the European Union in 2007 is the recognition of the achievements of the Council of Europe as a „benchmark for human rights, the rule of law, and democracy in Europe". As the jurisprudence of the ECJ has been under constant evolution, the achievements of the Council of Europe appear to be a natural point of reference for the EU's fundamental values. The evaluation of the compliance of Member States with the rule of law, as part of the Rule of Law Review Cycle, is not possible without the adoption of general standards which specify the core aspects of the rule of law identified in Commission Communications. It is interesting to note that when preparing the first Rule of Law Report, the Commission (2020) applied both the standards resulting from the ECJ jurisprudence and the standards, issued opinions, and recommendations developed by the Council of Europe. In practice, these standards interpret the concept's meaning and define its scope to a significant extent. In the standards it promotes, the Council of Europe emphasizes the importance of substantive components of the rule of law (European Commission for Democracy Through Law, 2008; 2011). For example, it takes

[19] E.g., cited judgment in Kovalkovas (C-477/16).

[20] European Commission for Democracy Through Law (2012; 2016).

the position that the principle of equality before the law and of non-discrimination, or the right to a fair trial „are human rights principles as much as they are a rule of law principle" (Commission for Democracy Through Law, 2008, p. 10).

4. The Rule of Law in the Documents of the European Parliament and the Council

The Council and the European Parliament have not played an equally active role in defining the rule of law in the EU legal order as the ECJ and the European Commission. The prevailing belief in the College of Commissioners was that most Member State governments were unwilling to engage in the strengthening of the rule of law in the EU (Closa, 2019, pp. 696-716). In turn, the European Parliament has been calling for the consolidation of EU fundamental values by establishing an EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights since 2016. It has also adopted resolutions pointing to a threat to the rule of law in some Member States.

The Council and the European Parliament, as the two legislative bodies in the EU, adopted the first legally binding definition of the rule of law in the EU in Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget. It reads as follows:

‚the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood regarding the other Union values and principles enshrined in Article 2 TEU[21].

It is in line with both the case-law of the ECJ and the position taken by the European Commission. The adopted regulation recognizes the Member States' compliance with the rule of law as an „essential precondition for compliance with the principles of sound financial management"[22] when implementing the EU budget. Article 3 of the Regulation provides indicative examples of breaches of the rule of law. It indicates that infringements of the rule of law may result from both the adopted legal solutions and the practice of state institutions.

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[21] EC Regulation No 2020/2092, 2020, art. 2.

[22] Recital 7 of the Regulation 2020/2092.

5. Conclusions

Our analysis has confirmed that all the EU institutions apply a substantive approach to the rule of law – they refer to both formal aspects and further elements connected with the realization of values, thus treating substantive elements as indispensable. Consequently, the real commitment to the rule of law manifests itself in a well-established system of legal norms and – or perhaps most importantly – in institutional practice, which reflects respect for fundamental rights. Judicial review and effective judicial protection of individuals' rights have always been at the center of the ECJ's approach to the rule of law. However, it seems that the nature of infringements of the rule of law identified by the Commission in several Member States, including Hungary and Poland, motivated this „guardian of the Treaties" to put a stronger emphasis on certain sub-components of this concept, in particular the principle of separation of powers and judicial independence. Hence, we can agree with von Danwitz (2014, p. 1346) that the „rule of law is not a static concept, but a living instrument which is shaped according to the challenges ahead". It can be particularly observed in the European Commission approach, which, similarly to the case law of the Court of Justice, has been under constant evolution.

Trying to trace the attitudes of the EU institutions towards the rule of law, we observe that they are quite similar and generally refer to the same set of standards formulated by the ECJ. When we compare the components referred to by the Court, e.g., in its Annual Report for 2019 such as legality, equality before the law, legal certainty, prohibition of arbitrariness, access to justice before an independent and impartial court, and respect for human rights with the ones given in the Commission Communication of 2019, we note that they correspond to each other. However, as mentioned before, the latter institution refers also to the separation of powers and the requirement to imply a transparent, accountable, democratic, and pluralistic process for enacting laws. It seems that this is the answer of the guardian of the rule of law to the current problems with its respect in certain Member States.

The Court of Justice is the main interpreter of this foundational value which is not surprising. However, some of its decisions are disappointing, and in our opinion, the Court of Justice could clarify its approach towards the rule of law, e.g., by defining it directly in its jurisprudence or at least firmly indicating which of its ends is/are the most important for the EU. It seems that this hesitance of the Court has prompted the European Commission to refer to the standards of the Council of Europe to gain further legitimacy for its own actions concerning the breaches of the rule of law. It can have positive aspects as in this way we can gain ‚the European rule of law' understood in the same way in both the EU and the Council of Europe. However, it also means that the European Union is still on its way to define and, at the same time to clarify this ambiguous concept. In particular, the institutions should clarify that although democracy, the rule of law, and human rights are closely interconnected and interdependent, they are still distinct values, all of which should be respected by the

Member States. This aspect, together with indicating which of the rule of law ends is/are the most important for the EU, needs further elaboration.

Another important issue is the compliance of EU institutions with the rule of law. The EU common response to the Eurozone Crisis and COVID-19 Coronavirus Pandemic, on the one hand, showed the Community's capacity for flexibility, but on the other hand, the treaties were stretched to the limit and even beyond (Viterbo, 2016; Ruffert, 2011). In the opinion of some scholars, „departure from the rule of law has been a choice and not an accident" (Costamaga, 2016, p. 7). Thus, it is also important for the EU to comply with the value it has developed for years. However, this issue requires further research, and its results should be presented in a separate publication.

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