EUROPEAN VALUES AND THE CHALLENGES OF EU MEMBERSHIP Croatia in Comparative Perspective

EUROPSKE VRIJEDNOSTI I IZAZOVI ČLANSTVA U EU Hrvatska u komparativnoj perspektivi

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Editor/Urednik
Dario Čepo

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EUROPEAN VALUES IN A NEW MEMBER STATE: CROATIA IN THE FIRST FIVE YEARS OF EU MEMBERSHIP

European values have always been a cornerstone of all European policies, reforms, and enlargement processes. The idea of European integration was the idea of disseminating and anchoring fundamental European values in member states, homogenizing their attitudes and solidifying their common interests in a way that would make cooperation instead of conflict the only game in town. This narrative of the spread of European values was an especially important tool in the case of enlargement policy, arguably the most successful policy the European Union has had. The idea was rather important in the case of formerly autocratic countries democratizing and subsequently becoming full members and partners in the club of advanced Western European democracies. Using enlargement as a "carrot" part of the carrot-and-stick approach to supporting democratization of the continent helped, not to a small degree, the transition from autocracy to democracy in both the South European enlargement (Greece, Portugal, Spain) in the 1980s, as well as in the Central and Eastern European enlargement (Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia) in the 2004–2013 time period.

However, the idea behind what the European values actually are, what their role is, and how they work in member states, has always been less than obvious. They were always there, but each actor used

them and defined them in a way that worked for them and not necessarily in the way they were supposed to work. This became especially visible in the last several years, with the rise of new autocratic tendencies among political actors of some member states. Citizens from Poland and Hungary, to Bulgaria and Malta, saw deterioration of their democratic foundation. In some cases this brought to power actors critical of liberal democratic bent of European institutions and the European integration project as a whole. But, instead of advocating for the dismantling of the European Union, or at least for their country's exit from the supranational organization, these new autocrats started advocating for reframing and reforming the European Union, with fundamental values as both the tool for that reform and the first casualties of it.

Hence, the interest of scholars, activists, experts, and the public in what European values are, and how they work in member states, has been as important now as ever in the history of the integration process. This is why, Centre for Democracy and Law Miko Tripalo, Croatia's foremost think tank, decided to use the opportunity of both Croatia's five year membership anniversary (the start of the project) and Croatia's rotating presidency of the Council of the European Union (the end of the project), to focus on answering the question of the influence of European values on member states, and vice versa.

As Croatia's only fully independent, non-profit and non-partisan civil society think tank, Centre for Democracy and Law Miko Tripalo has spent a lot of time and resources researching and advocating for advancing and incorporating European values into Croatian society and institutions, a process which has proven to be slow but moving steadily forward. Once Croatia joined the European Union in 2013, this progression, however, came to a halt. Public dialogue about the place of European values in Croatian society became sparse and sporadic. Moreover, the educational system failed to integrate any serious discussion of the values-component of the European project into curricula. Most of the information young people consumed con-

cerning the EU in Croatia, they encountered online on social media and in informal settings. Much of the public debate (and this was reflected in the views of young people as well) in Croatia about the EU revolved around the material benefits of membership for Croatia and the resulting expected economic and financial windfall for its citizens. Centre for Democracy and Law Miko Tripalo recognized this pattern and diagnosed the potential issues resulting from neglecting to acknowledge and discuss the values-component benefits of EU membership in the public sphere. One of the main consequences of this realization and an attempt to systemically address it was the proposal of the **European Values in a New Member State: Croatia in the First Five Years of EU Membership** Jean Monnet project.

Centre Miko Tripalo's project focused on understanding the importance of adopting, respecting, and implementing fundamental European values in member states, with the focus on Croatia. The project recognized the necessity of opening up a dialogue on what these values represent, what their intrinsic value for European societies is, and how national and local actors (media, civil society, academic community) can act to safeguard their promotion and protection in different sectors of society. This interdisciplinary approach to European values is important, not only for the protection of the European Union itself, but in the national contexts, for strengthening and normalizing the underlying values of liberal representative democracy. The project also recognized the need to employ values in the process turning citizens into active political and social actors who can partake in the supervisory role of their political system. This link between citizens and fundamental European values is reflected in the project's focus on two thematic units: citizen's rights and equality before the law.

As part of the project, European values were addressed and examined through two thematic areas in the context of Croatian society. The first thematic unit, ***Citizens' Rights***, focused on the problems and challenges that stand in the way of strengthening democracy in Croatia as a new member state, both at the national and at the local level. It also examined the impact of fundamental European values on

the process of democratic decision-making and governance, as well as the understanding of these values among those political (political parties) and social (civil society organizations, media, interest groups, academia) actors who oversee, study, and protect the democratic political order from weakening and collapsing. The second thematic unit, ***Equality before the Law***, aimed to recognize the importance of national, economic, cultural, religious, linguistic, and any other diversity as the cornerstone of the European integration project. In this context, the focus was on issues of equality before the law, tolerance towards minority groups, multiculturalism, and the protection of individual rights and freedoms, as well as fairness, justice, and access to legal institutions.

The objectives of the project were to encourage dialogue on the understanding of European values in Croatian society and to explore the influence of these values on specific segments of public life (populism, Euroscepticism, role of media, local democracy, justice system reform, minority rights, equal access to justice, and the rule of law in a transitional setting). Moreover, the project strove to increase the level of understanding and awareness of the impact of Croatian membership in the EU on the preservation and promotion of fundamental European values in Croatian society.

These objectives were accomplished through four main project activities and three outputs. The key project events were two roundtables, one international conference and a series of guest lectures. The first roundtable, **Citizens' Rights and Challenges to Democracy,** was held in March 2019 and the second one, **Justice, Equality, and Diversity,** was held in May 2019. The two roundtables brought together local and international scholars, researchers and experts. The international conference, **European Values, Member States, and the Future of the EU,** was a two-day event focused on presenting and discussing the importance of understanding the role of, preservation, and promotion of European values in member states for the future of the EU. The conference brought together as speakers over twenty public intellectuals, experts, scholars and researchers, representatives

of civil society organization, and public officials. The final set of project events were four guest lectures where the project team experts held talks in university settings for students of philosophy, sociology, law, political science and others on the meaning of European values in Croatian society and Croatia's place in the EU in general.

The project activities resulted in three main project outputs. The first is this book, **European Values and the Challenges of EU Membership,** and the second is a policy paper containing project conclusions and recommendations, aimed at Croatian policy-makers, as well as European policy-makers and those from candidate and potential candidate countries. The final project output is the digital and online content linking European values, Croatian values, and the role of accession process, primarily aimed at students, media, and the general public.

In terms of outcomes, this project accomplished most of its expected results. It contributed significantly to increased dialogue about the understanding of European values in Croatian society among scholars, policy-makers, and civil society activists and a better understanding of the influence of these values on specific sectors of Croatian society, as reflected especially in the attendance (greater than expected and projected) of all the project events. The project also helped to increase the level of understanding and awareness of the impact of Croatian membership in the EU on the preservation and promotion of fundamental European values in Croatian society among all the project's stakeholders, in particular the representatives of civil society and the policy-makers. Finally, once this publication and the policy paper become widely available they will help raise awareness among European policy-makers on the optimal way of approaching candidate and potential candidate countries in terms of the accessions requirements regarding the adoption and preservation of values.

Finally, in terms of impact, this project contributed to the promotion of European Union studies at the educational level and for the civil society in two distinct ways. The knowledge and understanding of the theoretical underpinnings of both liberal democracies and European integration process was linked to the EU's foundational elements –

fundamental (European) values. European Union studies, a growing area of scientific and educational activity in Croatia, will benefit from this focus through the development of methodology and practice of researching and teaching about supranational–national links with regards to the spread of European values. Moreover, by way of debates, publication, policy paper, and online content, the project provided concrete ways for project participants (representatives of media, civil society organizations, scholars, policy-makers) to identify, operationalize, and critically assess the success or failure of European values in the national context of a new member state.

This project aims to change the narrative in Croatia considering the benefits of the EU membership from current focus on the amount of financial gains, towards the spread of fundamental values in national contexts. The most important element of the project is, hence, this book, which encapsulates, summarizes, and offers to the general public and interested stakeholders, one of the first comprehensive overviews of what the European values are and how they influence the member states. Through several chapters focused on either general, Europe-wide context, or specific, Croatia-focused context, the authors offer their views on the history, the present, and the future of European focus on fundamental values, as well as policies (e.g. enlargement) linked to those values. This book, hence, will, our hope is, become an important tool in both understanding and deliberating on the interconnectedness of national and supranational, of domestic and European actors and institutions, and of a growing cleavage in the vision of what the European Union should be in the future – an international organization of nation-states or a value-based political system *sui generis*.

The book starts with the chapter by **Dario Čepo,** titled **European Values in Croatia and the European Union: The State of Affairs.** In it, Čepo shows the increasing use of the European values narratives by all actors, both national and supranational. He points to, often differing ideas of what those same values are and what they encompass as they become weaponized in the conflict between competing ideas on the present and the future of the European integration. Hence, the

author states, one needs to first understand what the founding fathers (and some mothers) as well as the founding treaties thought when European values were mentioned. Which of the values are *European* in its core and are ensconced in the core idea of Europe as an area of peace and cooperation? Afterward the author presents the transmitting mechanisms through which European values are delivered in national contexts and which help them become "localized" in domestic political and legal culture of the society.

In the second part of his chapter, Čepo, shows the state of affairs of European values in Croatia. As the newest member state and the (self)proclaimed success story of the European Union's enlargement policy, the failure of national and supranational actors to safeguard and promote European values in Croatia is especially disheartening. The author provides examples of that failure and offers reasons for it, which can be subsumed under the general idea of the inadequacy of the Europeanization process. This introductory chapter by Čepo offers both the definition of what a European value is and the list of fundamental European values. Those are then further explored in other chapters in specific contexts and through specific examples and methods.

The next chapter in the book, titled **European Values as a Pre-Condition of Membership and Their Subsequent Implementation,** by **Lucia Mokra,** offers a much needed description of the link between European values and the enlargement policy. The author points out that the respect for human rights and dignity, together with the principles of freedom, democracy, equality, and the rule of law, are values common to all European Union countries. These values are also part of the accession process, alongside fulfilling the Copenhagen criteria. This means that they also guide the European Union's (EU) actions both inside and outside its borders. The EU is being put to the test by some of the member states' non-compliance with the basic principles and values of the Union, especially in the last decade. The EU is, according to the author, learning the hard way that it is not powerful enough or well-equipped enough to deal with the most fundamental

problems which ultimately affect all of its members: the failure of its member states to adhere to the values of democracy, the rule of law, and the protection of human rights on which the legal systems of the Union and its member states alike are founded. The crisis of values following the economic and the migration crises, as well as Brexit and the problems stemming from these developments, are far-reaching. Hence, the author asks herself, how do current developments influence the understanding of the position of EU values in the enlargement process once the Copenhagen criteria are evaluated?

Mokra's chapter is followed by that of **Susana Sanz-Caballero,** titled **Justice as the Key Component of the Rule of Law: The State of Play in Europe.** Sanz-Caballero pinpoints the main issue in contemporary cleavage between supranational and (some) national actors – that of the differing idea of the rule of law and of justice as its main component. Her contribution underlines the relevance of member states having a robust and independent judiciary as one of the most critical components of the rule of law. To do so, the chapter explores the meaning of the concepts of judicial independence and of the rule of law both in the Council of Europe and in the European Union. Once it established a similar way how the two organizations interpret these concepts, the chapter delves into the comparison between the pre-accession and post-accession experiences of South European member states (acceding in the 1980s) and Central and East European member states (acceding in the 2000s) as concerns the rule of law and human rights requirements. The last part of the chapter is devoted to the analysis of the current rule of law backsliding in Hungary and Poland, particularly in the field of judicial independence. The chapter concludes with the notion that populism and nationalism are the main causes of the rule of law backslidings that we witness in European countries today.

Chapter titled **Participation as a Fundamental Value of Citizenship: Political Participation and Its Transformation,** written by **Marco Giugni,** aims to provide some answers to the following key

questions: What is participation? Who participates? How has participation changed over time? What are the challenges posed by such a transformation? The discussion is, therefore, structured along these questions. The main focus is on political participation as both a value and a tool for the promotion and safeguarding of other values. The main issues addressed in this essay can be summarized in five points. First, participation has different meanings. Second, participation is key for citizenship and democracy. Third, there are many different ways to participate politically. Fourth, participation has transformed over time. In addition to such an expansion of the ways of doing politics, political participation has undergone a number of changes, in particular becoming increasingly normalized and plural, individualized, and digitalized, but perhaps also becoming more homogeneous across issues and by shifting scale and transnationalizing. In the end, such a transformation poses a number of challenges for citizenship and democracy. Perhaps the greatest challenge related to political participation today has to do with the participation gap.

Despite all other differences, almost all of the scolars of the democratization processes in Europe agree that the role of free media is fundamental for maintaining and furthering democracy in a country. Therefore, the chapter by **Zrinjka Peruško,** on the illiberal attacks on the media, is especially important and worth focusing on. The chapter titled, **Critical Junctures, Media Freedom, and Illiberal Turns,** views media freedom as an outcome of remote and proximate social and political conditions and policy choices, by using the historical institutionalist approach in understanding the media system change. Building on the findings of the temporal and cross-country comparison of media systems change in Southeast Europe presented elsewhere (see the chapter for more details), Peruško's chapter examines how the media freedom in Croatia developed in the years after the country became the member of the European Union, with the approach of historical institutionalism, and its idea of critical junctures, employed as an explanatory tool. The author's interesting conclusion is, mirroring the current (as of spring 2020) global and national situations,

which presents the critical juncture introduced by the pandemic of the COVID-19, that it paradoxically allows for an open-ended verdict on the future of media freedom in Croatia.

Višnja Samardžija, in her chapter titled, **Support for the European Values or the Rise of Euroscepticism in Croatia Five Years after the EU Accession,** is one of the first to offer a comprehensive overview of the gains (and losses) of Croatia's five-year membership in the European Union. Her chapter answers the question to what extent are the European values and their relevance for the development of the functioning society understood in a proper way by the citizens and embedded in the society of Croatia, as a new EU member state. The chapter, which was finished in early 2020 but nonetheless tried to analytically incorporate the crisis which followed in the first half of 2020, is based on recent EU public opinion surveys focusing, *inter alia*, on citizens' perception of values achieved through European Union membership in Croatia. The wider public attitude at the national level is compared with the EU average. In this context, the support for European project and Euroscepticism during the accession process and in the first five years of the EU membership are discussed. Samardžija's conclusion is that despite the long EU accession process and difficult timing of acceding to the EU (in the period of financial crisis), Croatia should be considered as a "Eurorealistic" rather than an Eurosceptic country.

The focus on Croatia is kept in the next chapter, by **Josip Kregar,** as well. In his essay titled, **Hrvatsko pravosuđe: može li se išta popraviti** (Croatian Judiciary: Can It Be Repaired), Kregar pinpoints the necessary link between the legal system and the sense of justice. He shows how many of the problems, which Croatian society currently faces, stem from the defects of the Croatian judiciary. Through the examples from the last thirty years of Croatian independence, Kregar shows how massive purges, political appointments, undemocratic legal culture, and the quality of new judges influenced the way the judiciary works and the way citizens perceived it and trust it. The rule of law, then, as the fundamental European value, can in that kind of

environment only suffer, which then influences the configuration and behaviour of the entire society, as well.

This chapter follows in the same overall tone, however focused not on the judicial system, but on the local administration and its deficits. **Vedran Đulabić,** in his chapter titled, **Lokalna samouprava i lokalna demokracija u Hrvatskoj: koliko prostora za demokratske inovacije** (Local Self-Government and Local Democracy in Croatia: Is There Room for Democratic Innovation), analyses the development of local self-government in Croatia by focusing specifically on several aspects of its functioning through the lens of local democracy. By using the concept of democratic innovation, the author focuses on seven areas linked to the proper functioning of local self-government: local elections, referenda and other forms of direct democracy, independent, i.e. non-party voters' electoral lists, participative budgeting, territorial issues in local self-government, decentralization policy, administration of EU funds and their influence on local development, and the ever-present issues of clientelism and corruption. Through examples and explanations, Đulabić offers a much-needed view on the state of local democracy, which is often overlooked when the context of conflicts between supranational and national levels on policies and values are analysed. He also, in the last part of his chapter, offers practical suggestions on making local self-government in Croatia more responsive.

The last, but by no means the least important, chapter in this book is one by **Biserka Cvjetičanin**, titled **Kulturna raznolikost i interkulturni dijalog – konstitutivni principi demokratskog društva** (Cultural Diversity and Intercultural Dialogue – Constitutive Principles of a Democratic Society). Cvjetičanin's chapter offers an overarching methodology as well as a specific theoretical framework through which we can understand the intricate interplay between supranational and national elements when it comes to deciding what society's values are and how to allow them to be interpreted and adapted to specific cultural contexts. She points to the notion of cultural diversity being

an important factor in achieving the universally proclaimed human rights, but also in maintaining social cohesion, and supporting the new forms of democratic engagement of citizens. She then shows the state of cultural diversity in Croatia and its perception among Croatian citizens, thus pointing to some reasons for the current state of European values affirmation and implementation in Croatian society.

The book ends with a concluding chapter offering the summary of main problems, arguments and suggestions. It offers ideas on linking European values and European policies, like budget, enlargement or cohesion policies, in the future, with the intention of using those policies as a leverage to focus member states on taking seriously the idea of internalizing European values as their own.

This book is, therefore, an amalgamation of different but complementary ideas linking global, supranational, national and subnational levels of societal integration and pinpointing differing narratives of what makes them unique and what makes them homogenous, through constant focus on fundamental values as a sort of transmitting mechanism. The present and the future of both the European Union and the member states, especially regarding their levels of (liberal representative) democracy, is analysed and presented, with suggestions and proposals for concrete reforms focused on maintaining and strengthening the common policies (e.g. enlargement or cohesion policies) put to the forefront.

We, as project coordinators, are grateful to all those who participated in our events, especially to those (authors of chapters in this book) who sent us their scholarly work despite the hectic times we are currently living in. The global pandemic, topped with the once-in-a-century earthquake hitting Zagreb, was not the best of environments to maintain basic mental health let alone engage in delivering a scholarly work of such quality as presented here. That many contributors did it anyway, shows both their resilience and their understanding of how important the question of safeguarding European values is in today's world. We thank them for it.

A sad news for the end. During the process of preparing this book we, unfortunately, lost one of its authors, a project team member, a dear colleague, and a friend, Professor Josip Kregar. Kregar passed away suddenly on 13 August 2020. He was one of Croatia's foremost legal scholars, focusing on the sociology of law and the interaction between law and society. His interest in bettering the society he was a part of, was visible not only in his academic work, but also in his activism through civil society, and in his political work as a member of parliament. He was a founding member of Centre for Democracy and Law Miko Tripalo, and one of its most prolific contributors. As a member of this project team, his insights, comments, and contribution were of the utmost importance in making our ideas more cohesive and applicable. Both the project team, as well as the entire Centre for Democracy and Law Miko Tripalo, will greatly miss Professor Kregar.

Dario Čepo

EUROPEAN VALUES IN CROATIA AND THE EUROPEAN UNION: THE STATE OF AFFAIRS

1. Introduction

The narrative of fundamental European values has become an important tool in the conflict between opposing actors in their quest to reshape the future of the European Union according to their visions. Although some differences in what is and should be the European Union always existed, it is a completely novel situation that member states among themselves, as well as some member states and the European institutions, fight about the vision of the fundamental building blocks of the European integration project. Sometimes, even the same arguments are used by opposing sides in order to argue that their position is the correct one. For example, during the March 2019 meeting of the European People's Party, which decided to suspend Hungary's Fidesz from membership, both Manfred Weber, then-president of the EPP, and Fidesz loyalists used the narrative of values to defend their positions. While Weber stressed that the suspension was necessary because "our values are not negotiable", Fidesz insisted that EPP "drifted to dangerous waters by liberal currents. Large parts of the group disowned the values of 'God, Fatherland, Family'".

This example shows that all actors accept the idea of the European Union being based on certain values, inherent to its nature and foundation. Where they differ, though, is in expressing what those values

are and what they encompass, as they become weaponized in the conflict between competing narratives on the present and the future of European integration. Hence, where these competing actors differ is in the very nature of those values. This difference is not ideological – e.g. liberal insistence on more freedom versus socialist insistence on more solidarity – but fundamental. What that means is that a value of one group negates the possibility of the existence of values of the opposing group. When Victor Orban denounces liberal democracy and states that he wants to build an illiberal democratic political system, what he means was that all those values under the "liberal" part of the "liberal democracy" umbrella, cannot stand. The rights of minorities, independence of the political institutions, media freedoms, etc., are incompatible with the narrative of illiberal democracy based on the rule of the majority and the dominance of the nation-state. This, hence, is the focus of our chapter.

This chapter will proceed as follows. First, we will give the definition of fundamental European values and enumerate those values clearly stated in the European Treaties and other major documents. Afterwards, we will show the mechanisms through which the European institutions exported and enshrined fundamental European values in other countries, especially candidate countries during the accession process. The case of Croatia will serve as an example of the failure of the tools and mechanisms used by the European Commission and other institutions in the process of value-infusion. In the concluding part some reasons for this failure will be given, and some ideas about overhauling the process before the Conference on the Future of Europe commences, will be offered.

2. What (and Which) European Values?

As some authors insist "liberal theories of justice typically claim that political institutions should be justifiable to those who live under them – whatever their values. The more such values diverge, the greater the challenge of justifiability. Diversity of this kind becomes

especially pronounced when the institutions in question are supranational" (Ceva & Calder, 2009: 828). The supranational element, especially if in conflict (or if it is portrayed to be in conflict by national political actors) with national elements, forces individuals and societies to decide how close or how far the values in question are to them. Hence, European citizens are having to reassess continually their positions between their national/cultural values and those of the supranational system they are a part of. To do that successfully, they need to find answers to several foundational questions. What are European values? What is fundamental about them? How important are they for the European integration project and its continued success despite a myriad of crises? Can they be abandoned or changed without altering the EU as well?

Before enumerating specific values mentioned in the founding treaties, we need to define what a European value is. The concept of values is linked to the area of morality and the issue of ethics. Some note that the "rise of ethics in the European Union context, where ethics, constructed as an isolated set of values, has been exploited for its symbolic capacity to evoke citizenship, has become quite formalized as to certain features, and has acquired the potential to redefine the traditional divisions of powers in the State under the rule of law" (Tallacchini, 2009). Hence, there is a strong link between an idea of value and the idea of good, just or acceptable. This is an important link especially when some attacks on European values are taken into account that depict them as unjust, bad or outright hostile to traditions, norms, and customs of "our" society, which then needs to be defended against the usurping norm.

This is, for example, what lies behind the Twitter exchange mentioned at the beginning of this chapter regarding the suspension of Fidesz. Orban and his supporters are not calling for the abolishment of European values or for the Hungary to exit the European Union. He, instead, is insisting that the European elites have perverted good, Christian, traditional values under the influence of liberalism, and that he is merely defending those good European values and trying

to restore them to their rightful place. This puts Hungarian citizens in the middle of national-supranational conflict, because they inherently know that the values "represent beliefs and ideals which form the basis for choices and preferences, both at an individual and collective level… (and are) defined as that which is 'good' and which is desired and is able to make one happy" (Giordan, 2007: 5176). Hence, Orban's call for the return of Christian values of strong family cannot be wrong – they are preferred and good, because they are well known, since they were a part of the Hungarian society. The European values, on the other hand, although also good, are not sometimes preferred, especially if they are linked to a group that is usually labelled as the "other" or marginalized and which has a hard time soliciting sympathy – e.g. national or religious minorities, LGBTIQ+ population or migrants. In those cases, some citizens might think that European values, by defending the "other", are obviously not meant for the rest and hence are not community-wide values. In such a conundrum, traditional and local values will always win over modern and supranational ones.

What are the European values, though? Which of the values are European in its core and are ensconced in the core idea of Europe as an area of peace and cooperation? After analysing what values as a concept entail, let us focus on understanding what European values are. When we talk about European values in this context, we have in mind a specific set of ideals enumerated in the European Treaties, which represent our idea of what we want the Union to be. They are symbolic representation of what the European Union wants to be seen as and how the European institutions are presenting and portraying the integration project. Values in this context are an idealized portrait of a polity already being idealized as the only bulwark against the resumption of hostilities in Europe. They are an important representation of the very nature of the European Union, its institutional arrangement, and the political elite leading it. European values are "clearly espoused by the European Union, its institutions and political actors, which are written in founding treaties as a de facto constitutional framework of the European Union. We can detect them clearly in the narratives of

the European, as well as domestic, elites (using the same words but not always defining them in a similar way), from politicians and the champions of industry, to civil society organizations and local activists, including common people when they complain about the state of their societies" (Čepo, 2019: 9). As such, they need to be enshrined and depicted in a symbolically important manner, hence, their inclusion in the founding treaties in Lisbon, either directly or indirectly through the Charter of Fundamental Rights.

Treaty on European Union, Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights, are primary documents through which a depiction of European fundamental values can be seen. These three documents enumerate specific values as inherently European and through which the European Union finds it *raison d'etre.* In the Lisbon Treaty those values are: the respect of human rights, freedom, equality, and the rule of law. All of them are meant to safeguard and lead to the protection of democracy. However, the democracy those values are meant to protect is a specific kind of democracy – one based on equality, representation, and participation. Already, we can see some confusion. Equality is seen as a European value, but also a result of a certain kind of democracy, which is safeguarded by that very same value.

On the other hand, the Charter of Fundamental Rights is a bit more specific in its explanation. In the Charter, European values are defined as "common", as well as "indivisible, universal" values, meaning that they are not to be interpreted from differing points of view or made irrelevant by the insistence on cultural idiosyncrasy. The Charter then enumerates those common, universal, and indivisible European values. They are dignity, freedom, equality, and solidarity.

This chapter will not delve deeper into each of those European values, as it is done much better in the chapters of other authors that follow in the rest of the book. It is enough to show, however, that their inclusion into the European legal order, was meant as a confirmation of a specific narrative that the European Union built about its nature and its position in modern times. Insisting on equality, highlighting

freedom, and calling for dignity, solidarity, and the rule of law, was meant to show the importance, strength, and exceptionalism of liberal representative democracy and to signal that, after the fall of the Berlin Wall and the collapse of communist regimes, this type of democracy was the only game in town. This narrative was successful until Orban's introduction and legitimation of the concept of illiberal democracy a decade ago. Since then, European tools for promoting and enshrining democracy internally and abroad were being contested or, at best, their acceptance was simulated.

3. The Mechanisms of Enshrining European Values

The question of defining, transposing, enshrining, and defending European values, although inherent from the very beginning of the European integration project, has become ever more important with the waves of European Union enlargements and the corresponding need for the European Union to deal with the countries in its surrounding. In that way, the (democratic) values the European Union was based upon and which it defended abroad, were seen by the third countries (e.g. in the countries of the European Union's Neighbourhood Policy or in the Western Balkans countries) in a dual manner – as something that needs to be transposed into domestic circumstances, as well as something to be reached as proof of democratic maturity (Ghazaryan, 2014). This kind of understanding of European values is important because European actors, especially when dealing with foreign policy issues, often "refer to values, images of the world, and principles that characterise the EU and that should provide the basis for its role in world politics" (Lucarelli & Manners, 2006: 2).

Therefore, the values were an important pull factor for the countries aiming to join the European Union, as well as a major transformation incentive in the hands of European institutions. What tools did the European Union use in the process of enshrining European values and how successful were they is the focus of this part of the chapter. The main question is, therefore, how did the European Union try to

export its values into cultural, societal, and political settings of candidate countries? The analysis was focused on identifying the transmitting mechanisms through which European values were delivered in national contexts and which helped them become "localized" in domestic political and legal culture of a specific society. It showed the existence of three major mechanisms – the Europeanization process, the enlargement policy, and the conditionality principle.

The collapse of communist regimes took many in Europe by surprise. Peaceful (Czechoslovakia) or bloody (Romania) revolutions, managed transition (Poland), and the dissolution of multinational federations (Yugoslavia, USSR) that occurred in 1990 were unimaginable just a year earlier. In order to manage the process of such an all-encompassing change, the leaders of Western European countries focused on triggering fundamental transformation of European societies through the support of the integration narrative. The Europeanization was a process meant to close the values gap between member states in the West and candidate countries from Central and Eastern Europe.

Greater cross border interactions and interconnectedness of societies, led and managed by political elites, national governments, and bureaucrats in national capitals and in Brussels, was meant to bring the transformation of national political, social, and economic frameworks in a peaceful manner. It is a historical process focused on securing peace, diffusing ideas, helping in institutional adaptation to new circumstances, as well as facilitating the transplantation of legal norms through adoption of novel policies. That is why Olsen (2002) defined Europeanization as a multi-fold concept that encapsulates the adaptability of national and subnational systems of government with regards to policy inputs coming from the European centre through the export of political institutions, based on the idea of building a united Europe. This definition pinpoints an important face of Europeanization. It is an ongoing process. It happens continually, and is best understood through the concept of the "ever closer union".

Building an ever closer union is the role of the second transmitting mechanism – the enlargement policy. It keeps being touted as one of

the most successful policies the European Union ever had. With it, the European Union, more or less successfully (notwithstanding the cases of Iceland, Norway or, recently, the United Kingdom) united a divided continent, incorporating smoothly the former fascist dictatorships of Southern Europe, as well as former communist dictatorships of Central and Eastern Europe, which set them on the democratic trajectory.

Especially in the case of Central and Eastern Europe, which was abandoned in the aftermath of the Cold War, was the enlargement policy necessary. It stemmed from a "sense of a kinship-based duty" (Sjursen, 2003), and was, therefore, political in its drive. This ethics-based explanation might be the reason why some old member states did not veto the enlargement, despite the costs of the process for them (Sedelmeier, 2006). This was its major flaw, as well. By constructing the enlargement policy in political and not technical terms, the European Union painted itself in a corner, especially when some candidate countries realised that the deadlines Brussels set for potential enlargement (2004 and 2007, respectively), oblige both sides. If the time arrives and the enlargement does not occur, it would be seen as a failure not only of the candidate country but of the European Union and the entire continental integration project, as well.

This was especially visible in three examples. The first one occurred in the pre-2004 period, when Cyprus was deemed not ready for membership, partially as a retaliation for the failed referendum on the unification of the island. However, Greece threatened to block the rest of the candidate countries if Cyprus was stopped so close to accession and the European Union relented[1].

The second example deals with 2007 accession of Romania and Bulgaria. Unlike other candidate countries from Central and Eastern Europe, these two Balkan countries were stopped in 2004 and made to wait until 2007 for the membership. Although neither of them was ready in 2007 either, the negative impact on the failure of the most successful policy of the European Union was too much for Brussels,

1 For more, see: https://euobserver.com/enlargement/6615.

hence a compromise was found in the guise of the verification mechanism. It stated that both Romania and Bulgaria will become members in 2007, but some oversight will remain even in post-accession period, until other member states are satisfied that all the issues were resolved. Thirteen years later, the verification mechanism is still not removed.[2]

This had an impact on our third example, that of Croatia. Due to all the weaknesses of the enlargement policy and the accession process up to that point, Croatia was placed under the most stringent rules to date. Conditionality was multifaceted and all-encompassing, with the obligation that no chapters were to close before full reform has occurred. However, there were political pressures to end the enlargement policy for a foreseeable future due to domestic backlash in some member states and also the need for the European Union to show an optimistic story of enlargement in the times of the Eurozone crisis, recession, and widespread Euroscepticism. This allowed Croatia to become a member without the post-accession verification mechanism, which, as will be shown, proved to be a key mistake.

Despite all the issues, the enlargement is still the best incentive the European Union has to get the countries interested in becoming members to reform, as the case of Western Balkan Six or the European Neighbourhood Policy countries, clearly shows. In order for the enlargement policy to be successful and the accession process to be fulfilled, a strong tool was needed. The European Union found such a tool in the conditionality principle, which is our third transmitting mechanism.

In its core, the conditionality principle can be likened to a carrot-and-stick mechanism of policy-making and incentivizing reforms. In its basic form, conditionality assumes a power asymmetry between the European Union and the candidate country. Because of a carrot, i.e. the membership and its perks, a candidate country will obligingly accept all the conditions the European Commission sets in its reform

2 For more, see: https://www.euractiv.com/section/enlargement/interview/fule-bulgaria-and-romania-s-accession-questioned-the-credibility-of-eu-enlargement/.

agenda. And if a country becomes problematic, a stick is activated, i.e. freezing of the negotiation process, introduction of additional benchmarks or insistence on post-accession mechanisms of oversight. However, the research has shown that far from complete asymmetry, the "fluid nature of conditionality, the inconsistencies in its application by the Commission over time, and the weakness of a clear-cut causal relationship between conditionality and outcome in this policy area" (Hughes, Sasse, & Gordon, 2004: 523), lead to much differentiated success of asymmetric power relations. This differentiation is especially visible once a "problematic" candidate becomes a member, as the cases of Romania, Croatia, or to some extent Poland, could attest.

Those issues were helped by the very nature of the accession process and the setup of conditionality as a tool. It was clear at the very start of the accession processes of the countries of Central and Eastern Europe that the "conditionality is based on accepting and transposing technical rules in specific, mostly economic, areas. This transposition is based on founding treaties and needs to take into account fundamental values of the European Union, but it is in its nature quite technical and, hence, apolitical. Therefore, it is hard for conditionality to win against both political elite's unwillingness to fundamentally change the rules that brought them to power, as well as against embedded values of local communities, some of which are directly opposite of the values the European Union is trying to promote" (Čepo, 2019: 11).

4. The Failure of European Values in Croatia

The case of Croatia might be of some interest for potential and current candidate countries going through the accession process, all of which are from the same area of the Western Balkans. Despite the slow but steady improvement in established democratic practices, after the accession in 2013, and especially after the 2015 elections, Croatia's democracy started lagging behind. It even experienced some backsliding, for example in the area of media freedom and the independence of oversight agencies. The problems were so pronounced by 2018

that Liberal Democracy Index, as well as other reports, highlighted Croatia as one of the major backsliders (Freedom House, 2018). For the newest member state and the (self)proclaimed success story of the European Union's enlargement policy, the failure of national and supranational actors to safeguard and promote European values in Croatia was especially disheartening.

Croatia's dominant political party, the Croatian Democratic Union (HDZ) – a member of the EPP – used membership in the European Union to reverse or curtail almost all the changes set up during the accession process. It captured, marginalized or abolished independent institutions and through legal means strengthened its stranglehold in municipalities and regions" (Čepo, 2019: 10). The use of illiberal policies by the governing HDZ in three areas of the political system – the capture of independent agencies, control of the judiciary, and the weakening of independent media – were the drivers of democratic backsliding. Causes were found in structural reasons linked to the dominant party. Without either internal power-sharing constraints or external EU conditionality pressure, HDZ has been able to take advantage of structural weaknesses of the system it built and shaped during the 1990s (Čepo, 2020), especially after it recaptured both the government and the office of the president in 2015. The capture, marginalization or abolishment of these institutions was especially problematic as almost all of them were reformed and enhanced during the accession process in order to safeguard democracy in Croatia. In a sense, they were vessels through which fundamental European values were introduced into the Croatian political system and the society at large.

HDZ's focus on independent media, specifically the non-profit media sector is of greatest concern. "The process of weakening of media freedoms in Croatia was achieved through two distinct approaches. One is led by HDZ and involves using the normative framework to capture the institutions necessary for controlling the critical voice of media. Another is led by HDZ's allies in the civil society helped by conservative and right-wing parties and involves outright attacks on

media through judicial harassment, misuse of media law, and personal attacks on 'ideologically impure' individuals within the media system" (Čepo, 2020: 7). An in-depth analysis of HDZ's focus on the media sector in pre-EU period is covered in Zrinjka Peruško's chapter in this book and will not be covered more here.

Besides independent media, HDZ's focus on curtailing the autonomy of the judiciary has proved to be the most problematic aspect in the process of democratic backsliding. As Josip Kregar showed in his chapter in this book, the dysfunctions in the judicial system were born with the birth of independent Croatia, with all-but-complete takeover of the judiciary by HDZ and its loyalists. Post-2000 that situation was frozen through the conditionality of making the judiciary completely independent, which solidified the powers of those already inside the system and made it impossible to overhaul the system from the outside. "The deficiencies the HDZ government created in the judicial sector have thoroughly undermined that part of the governing system. These deficiencies have especially remained in the (State Judicial Council, DSV), a profoundly flawed institution whose defects have been amplified by the weaknesses of post-2000 governments and frozen by insistence of the EU for full independence of judicial institutions. This allowed the DSV to consider itself untouchable even in relation to other judicial institutions such as the Constitutional Court" (Čepo, 2020: 12).

Taking all these examples into account, it does not come as a surprise that the European Union has not been seen universally as a force for good in Croatia. If anything, Croatian citizens are disappointed with the pace of reforms and sceptical that any change is possible. In that environment, European values such as freedom, equality or the rule of law, take a back seat. Solidarity, however, is seen as an important value, but is mostly viewed through the lens of financial gains and the amount of EU funds arriving from Brussels.

This is nowhere more visible than among young people. Recent research showed that despite their interest in politics, many young

people are passive and influenced by political apathy as they perceive that nobody cares about their points of view or interests. They view the European Union and its values instrumentally, as an opportunity to get better paid job, quality education, and happier life for themselves and their families abroad, which they can secure through migration (Čepo, 2019b).

6. Conclusion: the Failure of the Europeanization and the Way Forward

When thinking about the reasons for the failure of Europeanization as a tool for European values promotion, one can pinpoint three major reasons, with a fourth element stemming from the nature of the European integration project. Let us deal with that fourth element first, as it is the most profound but least interesting of the answers to issues plaguing the European Union. That element is the decision by the EU political elite that the integration project is in its nature an economic and not a political cooperation between countries of Europe. Although the idea that the European Union is a peace project, built to achieve the permanent cessation of hostilities among the societies of Europe, has been repeated *ad nauseam,* right from the start, the more ambitious plan of making the continent of Europe into a political federation of sorts has been curtailed by the domestic elites of the nation-states, who hijacked the process and reimagined it as an economic union based on (neo)liberal ideas of free flow of goods and service (and reluctantly of people, as well). Thus, European values, and processes that are meant to foster those values – like Europeanization or conditionality – are set aside as necessary but not paramount factors for the functioning of the economic union of the countries of Europe.

That element, as already stated, stems from the weakness of European actors and the power of the domestic political elites. Those are two other major reasons for the failure of the Europeanization as a tool for European values promotion in candidate countries during the enlargement policy's accession process. Taking into account the latter, the interest of domestic political elites was always focused on

the short term timeframe, based on winning next elections. Hence, deep, structural reforms, which would become an inherent part of the collective psyche of their society, were not figuring as a major goal of their policy agenda. Europeanization through conditionality was accepted as a "necessary evil", an obstacle in the guise of a checklist of mainly technical benchmarks, which the governments needed to fulfil in order to get a clean bill of health from the European Commission and get the ultimate prize – membership. The reform drive was not genuine nor wanted, so it does not come as a surprise that many of those reforms collapsed, were reversed or quietly abandoned once a country became a member of the European Union. The most known and visible example, that of the sacking of the Romanian justice minister and anticorruption crusader, Monica Macovei[3], serves as an example of myriad similar cases that passed under the radar in the post-accession honeymoon period.

Taking into account the former, the relative weakness of the European actors, based on their need to maintain one successful European policy alive, led to their insistence on satisfying technical criteria of reform, without checking, or being too interested in, how internalized those reforms actually were. This weakness is visible even now, when in post-accession period, the European actors representing the European Council or the European Commission, are focused on short term solutions, instead of on long term resolution of the issue of the breakdown of the European value system. Although it happens rarely, some actors, like the MEP's from major European party families, insist on focusing on long term defence of values and not on short term resolution of problems of the day, member states, the European Commission, and especially the European Council are resistant to linking the two. In their recent letter, majority of mainstream MEPs insisted that the "the time has come to accelerate the fight against the erosion of democracy, the rule of law and fundamental rights in the

3 For more details see: https://www.nytimes.com/2007/04/03/world/europe/03iht-bucharest-web.html.

very heart of the EU"[4], calling for the introduction of sanctions against member states breaching fundamental values of the European Union. Considering the economic issues plaguing the European Union due to COVID-19 pandemic and the need to agree on the new seven-year budget for the EU, the member states are reluctant to complicate the issues further, which recalcitrant governments, like Orban's, know and are adamant in stopping any change in how the EU deals with the breakdown of democratic norms in its member states.

Hence, these two elements, and especially the short-sighted focus of the European actors on the fulfilment of technical criteria, led to entrenchment of institutionalized deficiencies and freezing of the *status quo* in the very institutions that were meant to safeguard the nascent European values in a country. The case of the judiciary, presented in this chapter as well as in the chapter written by Josip Kregar, as well as that of media freedom, presented in Zrinjka Peruško's chapter later in this book, are prime examples of how dysfunctions that arose from critical junctures earlier in the process of the development of an institution are solidified by the narrow focus of the European actors on governments fulfilling technical conditions during the accession process.

In the end, it seems the current failure of the European Union institutions to not only stop but also reverse the backsliding of democratic norms in countries like Poland or Hungary, through the threat of sanctions, was long in the making and has its roots in the failure of sanctions the very first time they were used – against Austria in 2000. Although the European Union managed to agree on sanctions against Austria due to far right OFP becoming a member of the governing coalition, the breakdown of this 'cordon sanitaire' was largely due to the reluctance of domestic political elites to institutionalise a principle which might backfire against their own countries, which in the end had far-reaching consequences on the Europeanisation of domestic politics (Leconte, 2007).

4 For more see: https://www.euractiv.com/section/justice-home-affairs/news/top-meps-to-merkel-no-eu-budget-without-rule-of-law/1499343/

The issue was, and still is, in the actors whose agreement is needed for the sanctions to take place. Because the European governments are not keen on giving too much power to European institutions (and sanctioning one of the member states seems like the ultimate power), both the Council and the European Council have been blocking any meaningful articulation of the need to safeguard fundamental European values, beyond paying lip service to the idea of the importance of values as such. However, when supranational institutions, like the European Commission or the European Parliament, insist that practical steps need to be taken, the system grinds to a halt and no decision is taken.

After showing the reasons behind the failure of the Europeanization, as the main process of enshrining European values in new member states, this chapter will end with two proposals that could help in reversing the trend of undercutting European values by member states. The first proposal is linked to reimagining and enhancing the role of judicial institutions, both on the national levels, as well as on the European level, through the European Court of Justice, while the second is linked to the role of the European party families, especially the destructive effect of the European People's Party tolerance toward aberrant behaviour among their members.

As presented here and throughout this book, the cases of Poland and Hungary show us the major bottlenecks in the European Union's process of safeguarding European values, as well as the democratic elements of the national political systems in those countries. However, "the responses of EU institutions have so far been ineffective in bringing these member states back into line with European values… (although) there is promise in some legal strategies that are available now, but have yet to be tried" (Pech & Scheppele, 2017: 3). In that regard, "more can be done to maximize the effectiveness of existing judicial tools, such as infringement proceedings brought to the European Court of Justice (ECJ) by the Commission and private enforcement litigation in national courts… (However) despite their importance, judicial safeguards alone – whether existing ones or novel

proposals – will not suffice to stop democratic backsliding by a determined national government: if the Union is to rein in such attacks on its core values, heads of government and other EU leaders will have to intervene politically as well" (Blauberger & Kelemen, 2016: 321).

The second proposal is linked to maintaining pressure on European party families, especially on the European People's Party, to force their national sister parties to observe the rules of the game. "The dominance of the EPP, a Christian Democratic/conservative party family, shows us that as long as the stability of the (economic/security) system is maintained and as long as the centre-right conservative forces hold power in member states, the EU politicians from this party family will turn a blind eye towards democratic backsliding on the national level" (Čepo, 2020: 15). The cases of Bulgaria, Croatia, and Hungary show that clearly. The parties need to be serious in using the tools at their disposal, including the threat of suspension or expulsion to force their members to safeguard European values in their countries. Even without threats, some experts posit that "under favourable conditions the EU can … elicit governments to repeal illiberal practices by relying primarily on social pressure and persuasion" (Sedelmeier, 2016: 337), and the internal party setting might be the perfect pressure and persuasion environment.

No matter what, European values remain an important tool in building an imagined utopia based on peace and prosperity on the European continent. They are strong tools of (self)representation both internally and when posited against others. They will, hence, remain an important element of the European Union's toolbox, especially in foreign affairs, cohesion, environmental or trade policies. This is something all actors understand and accept. The focus is (and will be in the future) on redefining those fundamental values in a way that reflects ideological proclivities of different European political actors. Once successfully redefined, it would be hard to revert to their previous definitions. That is why it is especially important that the Conference on the Future of Europe, which will arguably have the power to reassess and rebuild European integration fit for the 21st

century, be the focus of all those interested in safeguarding European values as they are now. The possibility of a monopoly of member state governments in the proceedings of the Conference, are a worrying sign that the fundamental building blocks of the European integration project might be destabilized through the move to make the European Union more an intergovernmental international organization and less a community-based polity in the making. Hence, it is important for the pan-European and national civil society organizations to be involved in the Conference, with media focused on the processes that will have profound consequences on the lives of generations of European citizens to come.

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Lucia Mokra

EUROPEAN VALUES AS A PRE-CONDITION OF MEMBERSHIP AND THEIR SUBSEQUENT IMPLEMENTATION

1. Introduction

The founding Treaty on European Economic Community (EEC, 1957) contained the intention to set some common values in the Preamble, including the text of building an "ever closer union" (EEC, 1957). When looking for details of this common attitude, some vague treaty provisions are revealed: Article 1 simply proclaimed the establishment of the European Economic Community, Article 2 set out the tasks of the EEC intending to build a common market and progressively bringing the economic policies of member states closer together, Article 3 listed the objectives of cooperation. Generally, there had not been value-driven provisions. This attitude of leaving out any explicit text on EU values had lasted until the adoption of the Lisbon Treaty in 2009. From the moment when this Treaty went into effect on 1 December 2009, the European Union has had proclaimed values, and these are explicitly stated in the Treaties in advance of any engagement with objectives and activities (Weatherill, 2016: 393).

Article 2 of the Treaty on European Union (TEU) identified the European Union as a project based on values. It states that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

By stating its values in the text of the treaties, the EU confirmed its intention to be considered as the modern democratic international entity. The article, in its fifth paragraph, confirms the plan for the EU to also implement its values in external relations, by stating that:

The Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity, and mutual respect among peoples, free and fair trade, eradication of poverty, and the protection of human rights.

The Court of Justice of the EU confirmed these values as common for all member states as well as fundamental for the EU itself, for its internal and external policies, insisting that:

The system is based on the fundamental premise that each Member State shares with all the other Member States and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU implements them will be respected" (CJ EU, 2014: 168).

Article 6 of the TEU makes a concrete contribution to this plan of preserving and promoting values. It states that the Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms, and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard for the explanations referred to in the Charter, that set out the sources of those provisions. As it had been confirmed again by the Court of Justice of the EU, "The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter." (CJ EU, 2013: 21)

Article 7 of the TEU then supplements the protection of values inscribed in Article 2 of the TEU by providing a procedure whereby their breach to a sufficiently severe degree may lead to the imposition of sanctions on the offending Member State. The Treaty proceeds in Article 10, paragraph 1 to state that: *"the functioning of the Union shall be founded on representative democracy"*. And in Article 10, paragraph 3, the TEU states that: *"every citizen shall have the right to participate in the democratic life of the Union"*. And finally, Article 13, paragraph 1 provides the Union with "*an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness, and continuity of its policies and actions"*.

Article 49 of the TEU, which structures the procedure for new applicant states, confirms the requirement for application to respect the values referred to in Article 2 of the TEU and is committed to promoting them.

This article is focused on the analysis of the current understanding of EU values in the accession process, mainly on the shift between the stated Copenhagen criteria in 1993 and EU values in 2009, the way in which the criteria fulfillment are evaluated within the enlargement process of associated countries. Since EU values should be implemented in relation to the EU member states as well, we analyse the conduct of member states in the last decade and the EU in its enforcement. By comparing both approaches in implementing values inside and outside the EU, we can evaluate the position of values overall and answer

the question of the legitimacy of the EU and its member states in the practical implementation of values in associated countries.

2. European Union Values in the Association and Enlargement Process

European Union has adopted Accession criteria or so-called Copenhagen criteria (EU, 1993), that set the essential conditions for all candidate countries, which must be satisfied to become a member state. These are:

- political criteria: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- economic criteria: a functioning market economy and the capacity to cope with competition and market forces;
- administrative and institutional capacity to effectively implement the acquis and ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union.

In the case of the countries of the Western Balkans, additional conditions for membership were set out in the so-called 'Stabilisation and Association Process', mostly relating to regional cooperation and good neighbourly relations.

The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration. The EU reserves the right to decide when a candidate country has met these criteria, and when the EU is ready to accept the new member. As of 2019, there are five candidate countries – Albania, North Macedonia, Montenegro, Serbia and Turkey, but the negotiations started only with the last three. Since the beginning of the accession process of Turkey, whose application came before the Lisbon Treaty and even before the Copenhagen criteria had been set, we focus the analysis only on Montenegro and Serbia.

2.1. Rule of Law in the Association Process

European Commission considers the rule of law as a dominant organisational paradigm of modern constitutional law that is commonly recognised as a key principle at national and international levels for regulating the exercise of public power. The rule of law ensures that all public authorities act within the constraints of the law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts (EC, 2014).

The first judicial reference to the rule of law in the EU was made by the Court of Justice in its judgment Les Verts v Parliament (CJ EU, 1986: 23), which referred to the EU as a 'Community based on the rule of law.' Since then, multiple references have been made to the rule of law in the Treaties. Initially, these references were largely symbolic. However, subsequent and successive treaty amendments reinforced the constitutional significance of the rule of law and made clear that this principle had both internal and external dimensions (Pech, 2012: 9).

The rule of law is, for instance, a prerequisite for membership in the EU (TEU, 2009: 49). It has, therefore, played a significant role in the enlargement process of the EU. The so-called Copenhagen criteria were established in 1993 as a means of assessing whether Candidate States were eligible to accede to the EU. They include compliance with the values in Article 2 of the TEU, including the rule of law. "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities..." and can be divided into the following sub-criteria: respecting the supremacy of law, the separation of powers, judicial independence, fundamental procedural rights, and taking active measures to counter corruption (Wennerström and Valter, 2015: 622).

In relation to the enlargement process, the European Commission had presented the non-exhaustive list of the principles enshrined in the notion of the *rule of law,* which should be evaluated under these criteria (EC, 2014):

- legality
- legal certainty
- prohibition of arbitrariness of the executive
- independent and impartial courts
- effective judicial review, including respect for fundamental rights
- equality before the law.

All of them became part of Chapter 23 Judiciary and Human Rights and Chapter 24 Justice, Freedom, and Security.

2.2. The Case of Serbia

The rule of law is a fundamental value on which the EU is founded. According to the criteria set out in the accession process, countries aspiring to join the EU need to establish and promote, from an early stage, the proper functioning of the core institutions necessary for securing the rule of law.

According to the European Commission approach to the rule of law, this priority (or criteria) has to be addressed properly, including those reforms related to the rule of law and fundamental rights. A part of this is the opening of chapters 23 and 24, which provide an important framework for the accession countries, including Serbia, to implement comprehensive action plans covering a wide range of the rule of law issues.

For citizens, this sector is of crucial importance. Not only is the rule of law a key condition for peace, security, and prosperity, but it also reinforces the social and economic strength and capacities of the country and has a powerful transformative effect on society. A well-functioning judicial system, which is independent, effective, transparent, accountable, and accessible, helps improve the quality of people's lives. The prevention and fight against corruption allow for better economic conditions and prosperity. The rule of law is crucial for a stable business environment, for providing legal certainty for economic actors, supporting consumers and stimulating investment, jobs, and growth. Well protected and respected fundamental rights allow the creation of a strong, fair, and democratic society.

Under the General EU Position for the accession negotiations with Serbia (Negotiation Framework), the Commission is requested to keep the Council duly informed on the state of advancement of negotiations under the chapters "Judiciary and Fundamental Rights" (Chapter 23) and "Justice, Freedom and Security" (Chapter 24), and to report to the Council twice a year. Since the opening of accession negotiations in July 2016, and following the presentation of the annual report for Serbia in November 2016, the first report in 2017 (one year after the opening of the accession negotiations) states, that "Serbia needs to increase its focus and efforts in providing adequate and reliable statistical information in all areas as a practice of the legislative reform process, as well as to the capacity of the rule of law institutions and the environment within which they operate" (YUCOM, 2017).

The non-paper on the rule of law in Serbia urged that in the coming period, the country needs to focus in particular on increasing its efforts on reforming the judiciary. In the fight against corruption, Serbia still needs to enhance institutional cooperation and broad ownership, underpinned by a stronger political will, in order to achieve tangible results. With regards to fundamental rights, Serbia also needs to substantially advance legislative reforms in data protection, gender equality, free legal aid, and protection of minorities. Serbia needs to enhance its efforts in the areas of fighting against trafficking in human beings, financial investigations, and cybercrime (YUCOM, 2017).

Although there had been clearly identified achievements in Serbia's accession process, the developments in 2018 lead once again to critiquing Serbia due to delays in delivering tangible results in areas such as judicial reform – including war crimes – freedom of the media and the fight against corruption. "Threats, intimidation, and violence against journalists are still troubling, and the general environment is still not appropriate and does not contribute to the exercise of the freedom of expression and freedom of the media" (EC, 2018a). As the concrete results in the field of efficiency of justice in Serbia, the Commission lists the reduction of the number of unresolved cases in the courts and the measures taken to prepare for the introduction

of a comprehensive system based on IT management of court cases. With regard to war crimes prosecution, the prosecution's strategy has been adopted, and certain procedural measures and institutional improvements have been implemented. At the same time, Serbia has yet to show evidence of indictments based on its own investigations and final verdicts (EC, 2018a). In the part related to the fight against corruption, the EC document says that Serbia has taken "organizational steps" following the Law on Jurisdiction of State Authorities entering into force in March 2018. The Serbian legislation revision is lagging behind when it comes to the activities of the Anti-Corruption Agency and the financing of political activities. "There is a lack of effective coordination and monitoring of Serbia's anti-corruption policy as well as the constructive engagement of the relevant stakeholders" (EC, 2018a).

On the other hand, Serbia has made some progress on legislative and institutional reforms, including on the issues of national minorities, asylum, and the fight against money laundering (EC, 2018a). Generally, the Commission refers to the fact that the inclusivity, transparency, and quality of law-making and effective oversight of the executive need to be further enhanced, and the use of urgent procedures in the national assembly limited.

In the last 2019 report, the Commission states that Serbia has achieved a level of preparation in the fight against corruption. It is emphasized that "limited progress has been made". "The revised Law on the Prevention of Corruption was adopted … The revisions refer to the organization and jurisdiction of government authorities in suppression of organized crime, terrorism, and corruption, as well as to the confiscation of the criminal assets… The revisions need to comply with the acquis, international agreements, and GRECO recommendations…" According to the EU Commission, "law enforcement and judicial authorities still need to establish a credible track record of operationally independent prosecutions and finalized high-level corruption cases" – overall, corruption is prevalent in many areas and remains an issue of concern" (EC, 2019b).

In the 2019 Country Report, the European Commission emphasizes that political will is necessary in order to adequately tackle the numerous issues and to meet numerous preconditions for the efficient fight against corruption, including the improved cooperation and data exchange among the institutions (EC, 2019b). Chapter 23 in the accession process (Human Rights and Judiciary) stated that the EU's founding values, including the rule of law, respect for human rights, a properly functioning judicial system and an effective fight against corruption are of paramount importance, as well as the respect of fundamental rights in law and in practice, and underlined that Serbia has to achieve some level of preparation to apply the acquis and European standards in this area. They concluded that Serbia made limited progress (EC, 2019b).

Particularly in the realm of the judiciary, the following measures had been identified and need to be taken:

1) strengthening the independence of the judiciary and the autonomy of the prosecution, including through amendments to constitutional and legislative provisions related to the appointment, career management and disciplinary proceedings of judges and prosecutors;

2) ensuring both in law (in the context of the ongoing constitutional reform) and in practice that the High Judicial Council and the State Prosecutorial Council can fully assume their role and achieve an independent and efficient judicial administration in line with European standards, including regarding the execution of the judicial budget;

3) adopting and implementing a human resources strategy for the entire judiciary and establishing a uniform and centralised case management system, which in combination should lead to a measurable improvement in efficiency and effectiveness of the justice system.

2.3. The Case of Montenegro

Under the General EU Position for the accession negotiations with Montenegro (Negotiation Framework), the Commission is requested to keep the Council duly informed on the state of advancement of negotiations under the chapters "Judiciary and Fundamental Rights" (Chapter

23) and "Justice, Freedom and Security" (Chapter 24), and to report to the Council twice a year. Since the opening of accession negotiations in December 2013, the non-paper was presented in November 2018 for the sixth time and stated that "Montenegro has achieved continuous progress in legislative reform and institution building, and has an initial track record in the fight against high-level corruption and organised crime, money laundering and temporary seizures of assets, but has only limited results in some other areas" (EC, 2018).

The EU Ambassador to Montenegro, Aivo Orav, said that the fight against organised crime is yielding better results than in the preceding years, partly due to strengthened police cooperation with EU member states, adding that Montenegrin police participated in a number of high-profile international police operations that led to the arrest of the members of crime groups and many significant illegal drug seizures: "The judicial reform process has yielded some results, such as the organisation of national competitions and regular assessments of prosecutors and judges, but challenges remain, particularly related to efficiency, rationalisation, implementation of the Information & Communication Technology strategy, and enforcement of disciplinary and ethical standards for judges and prosecutors" (EC, 2018).

The negotiator for Chapters 23 and 24, Marijana Laković, said that the European Commission recognises all the activities undertaken by the Montenegrin institutions in order to improve the rule of law, and consequently to improve the quality of life and security of citizens: "The results of the judicial reform process are recognised, not only when it comes to the high degree of application of standards in the legislative and institutional framework, but also the successful three-year implementation in practice carried out by the Ministry of Justice and judicial institutions" (EC, 2018).

A very important step in fulfilling the rule of law criteria is the establishment of direct cooperation with EUROJUST, which contributed to the effective treatment of criminal cases with an international element and the latest actions by the Police Directorate, resulting from good cooperation with EUROPOL, INTERPOL and EU member states (EC, 2018).

Despite the presented achievements, many tasks still remain, once the Rule of Law Framework is clearly stated (Council, 2018):

a) in relation to independence and impartiality, the regular professional assessment of judges and prosecutors has to continue, in line with the assessment criteria revised in 2017, and the vacancies should be filled in Judicial and the Prosecutorial Councils. As stated in the non-paper on the state of play, transparency of the work of both Councils still needs to improve.

b) in relation to accountability, though a new Code of Ethics had been adopted, track records on disciplinary and ethical standards for judges and prosecutors are still very limited. Since July 2018, several cases were reported against judges; five are still pending, with no violation established in one case. Relevant decisions by the Judicial and Prosecutorial Councils are insufficiently elaborated, and case law remains to be developed.

c) On efficiency and professionalism, the implementation of the action plan of the 2016 ICT Strategy for the judiciary has continued with some delays. The European Commission for the Efficiency of Justice (CEPEJ) guidelines are not yet fully implemented. According to the mid-term strategy for the rationalisation of the courts network for the period 2016-2019, specific rationalisation measures are postponed until after 2019. Amendments to the Law on Courts, which would lay down the minimum number of judges per court in accordance with the Judicial Council decision of 2017, have not yet been prepared.

d) On domestic handling of war crimes, no new cases have been opened since 2016, while four cases are currently in the preliminary phase of investigation by the Special Prosecutor's Office for the fight against corruption, organised crime, war crimes, terrorism, and money laundering. A more proactive approach is needed to effectively investigate, prosecute, try, and punish war crimes in line with international standards and to prioritise such cases.

e) In the area of the fight against corruption, the Anti-Corruption Agency has prepared and has been implementing an action plan to

address concrete recommendations. Despite some overall improvement, including on communication and outreach, the Agency is, however, still not perceived as sufficiently independent or proactive by the general public, and allegations of it being instrumentalised for political purposes persist. In order to strengthen public confidence, the Agency and its staff must ensure maximum transparency, integrity, impartiality, and independence. By the end of September 2018, the Anti-Corruption Agency had issued 118 opinions on requests by public officials and bodies.

f) In the area of fundamental rights, cooperation with the European Court of Human Rights (ECtHR) remains good, and the overall awareness of the Montenegrin institutions, including the judiciary, about the rights protected by the ECHR, is improving. The government continues to demonstrate its willingness to conclude amicable settlements in cases concerning the length of proceedings, as well as in cases of non-enforcement of domestic decisions. The two main institutions in charge of the promotion and enforcement of human rights - the Ministry of Human Rights and Minorities (MHRM) and the Ombudsman's Office - continued to receive EU and international assistance with a view to reinforcing their capacities. The Ombudsman Office's capacity to handle complaints, the quality of decisions, and the visibility of its work have improved.

g) In the particular area of human rights protection, Montenegro is improving slowly, but constantly. Concerning the prison system, the material conditions continue to improve. On personal data protection, capacity-building activities aimed at reinforcing the Agency for Personal Data Protection and Free Access to Information have continued. In the field of freedom of expression, concerns remain regarding the overall situation of media freedom. Draft laws on media and on the public broadcaster are in preparation. In non-discrimination, the work of the Ombudsman office in this area has improved, but its capacities, notably on the gathering of statistics, are hampered by a lack of unified approach to data collection and classification of such cases by the reporting institutions.

h) In the area of equality between women and men, 67% of measures in the 2017–2021 action plan have been achieved, but there are no data or evaluations of its impact. Besides, 218 criminal complaints on gender-based violence were lodged in 2018. This is significantly higher than in the previous years and could signal increased confidence among victims to report this type of offense.

i) Regarding the rights of the child, the Ombudsman office continued with its awareness-raising activities, but the overall institutional response remains reactive. Challenges remain in coordinating policies concerning children. Procedural rights are a very specific field – in the protection of the above-mentioned substantive rights. There, substantial efforts remain to ensure the full alignment with the EU acquis and European standards, notably on rights for suspects and accused persons in criminal proceedings. However, this is one of the biggest challenges for Montenegro in the general rule of law area due to a lack of capacities, technical deficiencies, and financial resources.

3. European Union Values' Implementation in the Member States

Commitment to the European Union's shared fundamental values is a prerequisite for membership in the EU. This obligation lasts throughout the whole period of membership, according to Article 2 of the TEU, stating that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Under the rule of law, all public powers always act within the confines set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

From the point of implementation of EU values, there are three milestones in the history of strengthening EU's shared values (EU, 2019):

1) The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council and the Commission in Nice in 2000.

2) The fundamental values of the European Union are enshrined in the EU treaties and in the Charter of Fundamental Rights of the EU. The Charter has been legally binding since 2009.

3) On 17 July 2019, the European Commission adopted a Communication on the measures it intends to adopt in order to reinforce the implementation of the rule of law within the Union. The most important new procedure is an annual monitoring cycle to review the rule of law developments in the member states, resulting in an annual rule of law report.

As stated in these documents, the EU values are common to the EU countries in a society in which inclusion, tolerance, justice, solidarity, and non-discrimination prevail. These values are an integral part of the European way of life. This means that the member states are obliged to continuously enshrine these values. The problem can be found in the missing unified characteristics, benchmarks, or the system of evaluation of their implementation.

As FRAME analysis states, the concepts of democracy, the rule of law and fundamental rights may be said to be dynamic if not 'famously elusive' concepts, whose boundaries may remain relatively unclear (FRAME, 2014: 3). In the European Treaties, these concepts are usually mentioned together, which at the very least shows their interconnection and interdependence in the context of the EU legal framework. Accordingly, any debate on how to strengthen member states' compliance with Article 2 of the TEU should start from the premise that democracy, the rule of law and fundamental rights are mutually reinforcing principles whose relationship may be described as triangular (EP, 2013: 59). There is however some disagreement among stakeholders concerning which of these three values should be considered the most fundamental one. For the European Union Agency for Fundamental Rights, human rights should be considered the overarching concept. For the Commission's DG Justice, the overarching concept would appear to be the rule of law, while other stakeholders may feel that democracy is the glue that binds the three elements together (FRA, 2014). The new Rule of Law Framework

established by the European Commission, however, considers the values in Article 2 of the TEU from the perspective of the rule of law (EC, 2014: 3-4)

Different mechanisms and processes exist at the EU level to promote, protect, and safeguard EU values laid down in Article 2 of the TEU, in particular, democracy, the rule of law and fundamental rights. These include legally binding mechanisms stated in the Article 7 of the TEU, which allows EU institutions to act in situations where there is 'a clear risk of a serious breach' of EU values by a member state or where there is a serious and persistent breach of EU values laid down in Article 2 of the TEU. The legally binding mechanisms for enforcement of the EU values also include the traditional infringement procedure set out in Articles 258 to 260 of the TFEU. There are also non-binding or soft law tools, in the form of annual reports prepared by EU institutions covering matters related to Article 2 of the TEU. In 2014, both the European Commission and the Council introduced two new additional mechanisms: the Commission adopted a new Rule of Law Framework (EC, 2014), and the Council committed itself to organizing a new annual rule of law dialogue between member states (CoEU, 2014).

Developments in some member states have led to criticism regarding the EU's ability to act upon serious threats or breaches of EU values by the member states. Relevant examples include the situation of Roma minority rights in France in the summer of 2010, the measures adopted by Viktor Orbán's government in Hungary concerning, for example, the independence of the judiciary, as well as the non-respect for constitutional court judgments in Romania in 2012 (Reding, 2013).

Despite the body of EU instruments and processes to uphold Article 2 values, serious concerns remain with respect to their effectiveness. The Commission's Rule of Law Framework was activated for the first time in response to the constitutional crisis in Poland (Brunsden, 2016).

3.1. The Case of Poland

Poland is the first country against which the European Commission has started proceedings under its Rule of Law Framework. Poland is the first member state of the EU ever to become subject to the measures described in Article 7 of the TEU and subject of the Court of Justice of the EU decision.

The case against the Polish government started in 2016. The European Commission initiated its Rule of Law Framework proceedings on 13 January 2016 (Niklewicz, 2017). This was done in response to both the assault on Poland's Constitutional Tribunal by the ruling Law and Justice Party (Prawo i Sprawiedliwość, PiS) and the new legislation relating to public service broadcasters, which gave the government political control over the public media (European Commission, 2016c). While both areas are equally important, it is the Constitutional Tribunal issue that, understandably, raised the most fears. In December 2015, the PiS majority in parliament, acting under the pretext of seeking political pluralism in the composition of the Tribunal, passed a new law concerning its functioning and the nomination of its judges (European Commission, 2016a). Before being effectively crippled, the Tribunal managed to rule on 9 March 2016 that the law of 22 December 2015 was unconstitutional (Poland, Constitutional Court, 2016). The Polish government under the majority of PiS simply refused to publish that ruling, claiming that it had no legal standing and in the following months, the president and the vice-president of the Tribunal were replaced with lawyers close to PiS, and additional judges were nominated, despite the fact that the previous (unpublished) ruling of the Tribunal had deemed such actions unconstitutional (Poland, Constitutional Court, 2016).

The European Commission's initial assessment was that there was the possibility of a threat to the rule of law in Poland (European Commission, 2016a). This was validated by the official opinion of the European Commission for Democracy through Law, known as the Venice Commission. In its March 2016 opinion, the Venice Commission stated that PiS's actions endangered not only the rule of law but

also the functioning of Poland's democratic system. It warned that PiS undermined all three basic principles of the CoE: democracy, human rights, and the rule of law (European Commission for Democracy Through Law, 2016: 24). The Polish government waved the Venice Commission's opinion aside, as it did the European Commission's initial findings.

As the situation in Poland deteriorated, the European Commission's Rule of Law Framework proceedings continued, albeit at a relatively slow pace. On 1 June 2016, almost half a year after the dialogue with the Polish government started, the Commission adopted its formal opinion, effectively concluding the first stage of the procedure (European Commission, 2016a). The next stages took place in July and December 2016, and then in July 2017, the Commission issued formal recommendations to the Polish government (European Commission, 2016b, 2017). The third and most recent recommendation covers a relatively new, additional issue: legislative proposals in the area of court organisation that would limit the judicial independence of ordinary courts. In the European Commission's view, this further increases the systemic threat to the rule of law in Poland (European Commission, 2017).

While adopting the third Rule of Law recommendation, the European Commission explicitly warned that it was finally ready to launch the sanctions procedure under the framework of Article 7 of the TEU (European Commission, 2017).

The Commission has finally brought infringement proceedings against the Republic of Poland under Article 258 of the TFEU for failing to fulfill its obligations under the combined provisions of the second subparagraph of Article 19(1) of the TEU and Article 47 of the Charter of Fundamental Rights of the European Union, on the grounds that, firstly, national measures lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) appointed to that court before 3 April 2018 infringe on the principle of irrevocability of judges, and secondly, national measures granting the President of the Republic discretion to extend the active mandate of Supreme

Court judges upon reaching the lowered retirement age infringe on the principle of judicial independence (EC, 2019).

Fundamentally, this case presents the Court with the opportunity to rule, for the first time, within the context of direct action for infringement under Article 258 of the TFEU, on the compatibility of certain measures taken by a member state concerning the organisation of its judicial system with the standards set down in the second subparagraph of Article 19(2) of the TFEU, combined with Article 47 of the Charter, for ensuring respect for the rule of law in the Union legal order. It also raises some important questions concerning the material scope of the second subparagraph of Article 19(2) of the TFEU in relation to that of Article 47 of the Charter and the relationship between the procedures of Article 258 of the TFEU and Article 7 of the TEU (Tanchev, 2019).

European Commission stated in its press release that activation of Article 7 of the TEU is focused on the protection of the rule of law in Europe. With reference to Poland, it was pointed out that judicial reforms in this country have led to political control over judicial power. "In case of missing courts' independence, this brought the EU law implementation under serious doubts, from the protection of investments the mutual recognition of judgments in various areas, the disputes on children's care to European Arrest warrant" (EC, 2019).

The Commission had issued the additional (fourth) recommendation connected to the rule of law, identifying steps that Polish authorities can do to resolve the current situation. Onc e Polish authorities implement the recommendations properly, the Commission after consultation with the European Parliament and the Council may reconsider its submission to the Court. The European Commission confirmed that it has the intention to conduct a constructive dialogue with Polish authorities to consensually settle the situation.

The Commission expressed in its statement that Polish authorities had adopted more than 13 laws, which influence the whole structure of judicial power in Poland and have a serious influence on the Constitutional Court, the Supreme Court, courts of general jurisdiction, the National Judicial Council, the prosecutor's office and the National

Judicial School. Its common characteristics are that legislative and executive power may systematically interfere in the content, competencies, administration, and work of justice. Such influence of executive and legislative power on judicial power is contrary to the principle of separation of powers. "The new disciplinary regime undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control, as required by the Court of Justice of the European Union" (EC, 2019).

The Court of Justice of the EU ruled, that, firstly, by mandating that the measure consisting of lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) applied retroactively to judges who were appointed to the Court before 3 April 2018 and, secondly, by granting the President of the Republic the discretionary right to extend the period of judicial activity for judges of that Court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfill its obligations under the second subparagraph of Article 19(1) of the TEU (CJ EU, 2019: C-619/18).

Following this decision, all member states and EU institutions should learn the lesson from this judgment and start preparing modifications both to Article 7 of the TEU, which includes the sanctions mechanism and to the European Commission's Rule of Law Framework, so that the EU's internal defenses are strengthened for future needs. Especially to clarify when this "nuclear option" of initiating Article 7 of the TEU should be activated and prevent differing approaches between the member states in this sensitive matter.

The different treatment of Poland and Hungary by the EU was rationalised by offering a purely legalistic explanation: while "concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play", the situation in Poland is allegedly different to the extent that the main issue is "the fact that binding rulings of the Constitutional Tribunal are currently not respected", which "is a serious matter in any rule of the law-dominated state" (EC, 2016).

3.2. The Case of Hungary

The existing EU mechanisms for the protection of democracy, the rule of law, and fundamental rights all have limitations and therefore are not entirely adequate to ensure full compliance with Article 2 values. As the example shows, the key EU institution appears reluctant to use Article 7 of the TEU. The Commission has refused to activate its Rule of Law Framework until very recently despite calls by the Parliament to do so with respect to Hungary. This general reluctance to act may reflect a political disagreement on how to best address instances of non-adherence to Article 2 of the TEU.

In its Resolution of 10 June 2015, the Parliament urged the Commission to "activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary, assessing a potential systemic serious breach of the values on which the Union is founded (EP, 2015)

The Commission has made clear that it will not hesitate to use the Framework if this is required by the situation in a particular member state, and has justified its non-activation with respect to Hungary on the grounds that the Commission sees no systemic threat to democracy, the rule of law and fundamental rights in Hungary. However, different actors presented several contentious issues in Hungary, including the treatment of asylum seekers, segregated education and discrimination of the Roma, the treatment of non-governmental organisations managing Norwegian funds, questionable judgments by the judiciary, state aid to media and for the construction of a nuclear plant, as well as corruption affecting public procurement in Hungary, The Commissioner concluded that "these concerns are being addressed by a range of infringement actions, and as the Hungarian judiciary also has its role to play, the Commission found that conditions to start a rule of law framework procedure are not fulfilled" (EP, 2015a). The European Parliament in its 16 December 2015 Resolution expressed regret that the current approach taken by the Commission with regard to Hungary has been focused mainly on marginal, technical aspects

of the legislation while ignoring the trends, patterns and combined effect of the measures on the rule of law and fundamental rights. It also stated that infringement proceedings, in particular, have failed in most cases to lead to real changes and to address the situation more broadly (EP, 2015b).

In 2018 the European Parliament asked for the activation of Article 7 of the TEU against Hungary. However, after the debate in EP in January 2019, the application to a judicial proceeding is still pending. The Commission instead decided about next infringement proceedings, criminalising activities in support of asylum seekers, and opened new infringement for non-provision of food in transit zones (Commission, 2019a). Such an attitude did not contribute to the proper and effective implementation of the rule of law by the main authorised institution – the European Commission.

4. How Much Does the EU Pay Attention to Its Values?

Article 2 of the TEU does not explicitly define or prescribe specific obligations for the EU member states, but these principles have been interpreted in EU primary and secondary law, the CJEU case-law and the multiple documents produced by EU institutions when assessing candidate countries' compliance with the EU acquis and the Copenhagen criteria. A working definition of the rule of law can also be found in the Commission's Communication on the Rule of Law Framework. Having already taken the particular decision in the case of the Commission against Poland (CJ EU, 2019: C-619/18), there is still room for further clarity, and the EU should consider, for instance, adopting a single all-encompassing document offering the EU's set of standards in these areas.

As there are ongoing procedures in different stages of investigation or process before the Court of Justice of the EU for different member states (Hungary, Romania, Bulgaria), we may conclude, that as far as the competence of the EU and its member states to enforce proper implementation of values is concerned, there exists a doubt from the point of the EU legitimacy to enforce it to associated countries. The

EU and some of the member states are in precarious situation when the basic principle of the rule of law is threatened. The approach of the relevant EU institutions is ambivalent and, in some cases, even involves double standards between different member states. How can the association countries fulfill the stated rule of law criteria properly, if the EU is not able to enforce it in relation to its own members within EU law framework?

As Kochenov argues "in this general context where the acquis and values are not synonymous, the application of the Copenhagen criteria in the context of the recent enlargement rounds particularly teaches a lesson of caution: the Commission has emerged as an institution that, when given all the responsibility regarding the preparedness of the new member states for accession (values compliance outside the scope of the acquis included) failed the exercise" (Kochenov, 2008). And we have to agree with his statement: "besides illustrating the EU's built-in limitations with regard to its ability to generate the substance of Article 2 TEU rules, the pre-accession context also sounds the alarm bell on institutional capacity: the Commission is probably not the best actor to entrust with the internal monitoring of member states' compliance with Article 2 TEU" (Kochenov, 2008).

The key to the modern European Union is that it should be an entity that is not only supervising the member states in fulfillment of their obligations but is also able to provide a clear and transparent definition, guidance, and help in their proper implementation. Such definition and guidance should be developed by EU institutions in close cooperation with different actors, such as the Venice Commission, non-governmental organisations, and the general public as well.

Without these steps, we may have to rely on the discussion of the content and role of values only in the infringement process. Getting back to the situation in both member states as well as the candidate countries, we need to establish a dialogue about the rule of law, in connection with the need to strengthen trust in the judiciary not only for achieving the rule of law, but also to sustain it within the timeframe of the entire membership. The EU concept is not a goal; it is a road built on common values and principles.

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Susana Sanz-Caballero

JUSTICE AS THE KEY COMPONENT OF THE RULE OF LAW: THE STATE OF PLAY IN EUROPE[1]

1. The Concept of the Rule of Law

We are living in turbulent times. Values that we take for granted are under attack. This is the case in Europe as well as in other parts of the world. It is quite perplexing to have to delve into the discussion of whether democracy is worth it or whether a "strong" regime would be more advisable. It is painful to experience that the rule of law is not defended as much as it used to be. As an example of this, the expression illiberal democracy is now widely used in politics as if this ambiguous, self-contradicting formulation was legitimate and exportable.

The rise of populism and nationalism is at the root of this situation which affects democracy and the rule of law, but also many other values that are enshrined in Article 2 of the Treaty on European Union (TEU). These values have been considered indisputable since the end of World War II in Western Europe. Some of these values are the following: respect for human dignity, freedom, equality, and respect for human rights. These values are supposed to be common to the European Union (EU) and the member states in a society in

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which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

The rule of law is not a theoretical concept. It is a precondition for ensuring that decision-makers are accountable and that public authorities do not commit abuses. It is also the only guarantee for equal treatment before the law and for the protection of human rights. However, its content is not always easy to grasp. That said, we do not have to invent a definition. There is no need to reinvent the wheel because the Council of Europe has been showing us the way since the post-war period.

To name but one of the more recent elaborations of this organization,, the *Rule of Law Checklist* of the European Commission for Democracy through Law (also known as the Venice Commission) established in 2016 that this notion requires a system of certain and foreseeable laws, where everyone has the right to be treated by decision-makers with dignity, equality, and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.

In this Checklist, the Venice Commission said that the rule of law standards, against which State activity is to be assessed, are the following: legality (including the supremacy of the law, compliance with the law, relation between international law and domestic law, law-making powers of the executive, law-making procedures, exceptions in emergency situations, duty to implement the law); legal certainty (including accessibility of legislation, accessibility of court decisions, foreseeability of the laws, stability and consistency of law, legitimate expectations, non-retroactivity, the *nullum crimen sine lege* and *nulla poena sine lege* principles, and *res judicata*); prevention of the abuse of powers; equality before the law and non-discrimination; access to justice (including the independence of the judiciary, the independence of individual judges, impartiality of the judiciary, autonomy of the prosecution service, independence and impartiality of the bar) and a fair trial (including access to courts, presumption of innocence, effectiveness of judicial decisions).

The rule of law is a constitutional model of political organization and a substantive tool for ensuring compliance with and respect for human rights. Thus, the Venice Commission warns against the risks of using a purely formalistic concept of the rule of law, merely requiring that any action was taken by public officials to be authorised by law. Unfortunately, this kind of misinterpretation is spreading, and there are distorted interpretations of the rule of law, such as the "Rule by Law or the "Rule by the Law". It is not always easy to explain what the rule of law is, but everybody is capable of identifying when it is absent because we associate the rule of law as the opposite of arbitrariness (Schukking, 2018).

Inspired by the Council of Europe, the European Commission also provided a definition of the rule of law in its Communications of July 2019 on the need to reinforce the rule of law in the EU (EC, 2019). The rule of law is considered a system in which all public powers always act within limits set out by law, in accordance with the values of democracy and fundamental rights, under the control of independent and impartial courts. So, both organizations include the value of justice as one of the key components of the rule of law. For both, the Council of Europe and the European Union, independence, quality, and efficiency are the key elements of an effective justice system and are crucial for upholding the rule of law and the values upon which the EU is founded.

Judicial independence is also a requirement stemming from the principle of effective judicial protection referred to in Article 19 of the TEU and from the right to an effective remedy before the court enshrined in Article 47 of the Charter of Fundamental Rights of the EU. It guarantees fairness, predictability, and certainty of the legal system. The Court of Justice of the EU defines judicial independence as:

"…presuppos(ing), in particular, that the body concerned exercises its judicial functions wholly autonomously without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable

to impair the independent judgment of its members and to influence their decisions" (CJ EU, 2018: C-64/16).

The President of the Court of Justice of the European Union clearly stated that the Union does not mean a mere integration through the law, but an integration through the rule of law. In his words, granting the rule of law means, in essence, that any person whose rights are violated should have access to an effective judicial remedy. Therefore, judicial independence is the pillar upon which a society grounded on the rule of law is built (Lenaerts, 2019).

The European Court of Human Rights confirms that the rule of law necessarily includes the separation of powers and the respect of independent and impartial courts (ECHR, 2017). Paradoxically, the judiciary has been captured today in at least two EU member states. In its recent rulings against Poland concerning serious breaches of the independence of the judiciary, the Court of Justice underlined that the rule of law is central to the EU legal order (CJ EU, 2019: C-619/18, C-192/18). According to the EU Court of Justice, the very existence of effective judicial protection guaranteed by independent judges is the essence of the rule of law (CJ EU, 2018: C-72/15).

It could not be otherwise; when the executive branch oversteps its purview by undermining the powers of the legislative body, and especially those of the judiciary, the rule of law is eroded, and we head towards an authoritarian regime. Why is judicial independence so important? Because judicial independence is the best antidote against impunity for unlawful acts. Without it, there is no real freedom, no real privacy, no checks and balances, no separation of powers, no guarantee against decision-makers' arbitrariness. Possible abuses of power within the democratic process must be controlled by courts (Sanders & von Danwitz, 2018). If court members become delegates of the government, judgments lose their authority, separation of powers vanishes, and the democratic system collapses. Judges cannot provide an effective judicial remedy if they succumb to internal or external pressures (Lenaerts, 2019).

Without judicial independence, the Law itself becomes a useless piece of paper. The rule of law covers how accountable laws are