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ARTICLE

Rule of Law 'Dialogues' Within the EU: A Legal Assessment

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Abstract The rule of law is a foundational principle of the EU's identity. It implies *inter alia* that member states are required to comply with this principle in their respective national realm. In that regard, the paper argues that respect for the rule of law can be conceptualized as an *erga omes partes* obligation: its indivisible nature entails that each country owes it to the EU, the other member states, as well as individuals. Yet the EU institutional system reveals some shortcomings as to the oversight on systemic deficiencies of the rule of law at national level, since the Article 7 procedure is not a sound response to systemic threats to the rule of law. In the light of a Council's invitation, the Commission has proposed a complementary mechanism, which provides for a political oversight aimed essentially at entering into a dialogue with the concerned member state. This paper, while challenging some critical remarks to the Commission's Communication, advocates that it is consistent with the Treaties. Finally, the paper highlights some positive and negative aspects of the Council's conclusions aimed at enacting a new political dialogue among all member states within the Council to promote and safeguard the rule of law.

Keywords EU · Rule of law · Political oversight

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1 Introduction

The rule of law is a foundational principle of the EU's identity, albeit Article 2 TEU does not provide for its definition. It is indeed a theoretical principle rather difficult to construe in detail,[1] and unsurprisingly so it is as regards the EU legal system.

Wide-ranging in scope, it is no doubt arguable that the rule of law has no less than three facets.[2] First, it is a legal parameter which constraints European institutions: their activities are subject to a judicial review by the ECJ, which includes the dynamic interplay with national judges through the preliminary ruling procedure.[3] As the ECJ's *Kadi I* and *Kadi II* rulings show, a substantive (or 'thick'[4]) notion of the rule of law prevails in the field of individual economic sanctions against terrorism. Both the rights of defence and the right to effective judicial review (i.e. the right to be informed of the reasons underlying listing, the right to defence, to be heard, and to have access to evidence) have been construed as inherent parts of the rule of law on which the Union is founded.[5] Indeed, the overall case law of the ECJ regarding the judicial review of individual restrictive measures adopted by the EU, illustrates that such a review is indispensable for ensuring a fair balance between the maintenance of international peace and security, as

[1] Kleinfeld Belton (2005), p. 8 ff. (discussing the rule of law as composed of five separate, socially desirable goods, or ends: (1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient justice, and (5) human rights). See also Magen (2009), p. 56 ff. (contending *inter alia* that legal scholars and practitioners should reorient their approach to the notion of the rule of law; embracing a substantive, operative conceptualization which understands the rule of law as a key dimension of democratic quality, and which views the development of rule of law conditions in domestic systems as integral to broader processes of socio-political development within those systems); and Mak and Taekema (2016), p. 25 ff. (identifying a core meaning of the rule of law in the reduction of the arbitrary use of power).

[2] Fallon (1997), p. 1 ff. (pointing out that the rule of law needs to be understood as a concept of multiple, complexly interwoven strands). It is indeed a 'multifaceted legal principle' according to Pech (2010), p. 361.

[3] Lenaerts (2007), p. 1625 ff.

[4] Magen, n. 1, p. 60.

[5] Consequently, the ECJ is in charge with the task of progressively forging its content. See Joined Cases C-402/05 and 415/05 P, *Kadi* EU:C:2008:461 in particular §§281–283, 331 ff. (*Kadi I*); Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and United Kingdom v. Kadi,* EU:C:2013:518 (*Kadi II*). It is noteworthy, however, that the ECJ has subsequently affirmed that the rights of the defense, as stated in Article 41(2) of the Charter of Fundamental Rights, include the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality (Case C-280/12 P *Council v. Fulmen and Mahmoudian* EU:C:2013:775, §§59 and 60). Moreover, as the General Court held in its judgment in Case T-390/08 *Bank Melli Iran v. Council* EU:T:2009:I-3967, §97, when sufficiently precise information has been disclosed, so as to enable the entity concerned effectively to state its point of view on the evidence adduced against it by the Council, the principle of respect for the rights of the defense does not mean that the institution is obliged spontaneously to grant access to the documents in its file. It is only on the request of the party concerned that the Council is required to provide access to all non-confidential official documents concerning the measure at issue. It would in fact be excessive to require spontaneous disclosure of the material in the file, given that when a fund-freezing measure is adopted it is not certain that the person concerned intends to check, by means of access to the file, the matters of fact supporting the allegations made against it by the Council.

encapsulated in the UN Charter, and the protection of the fundamental rights and freedoms of the persons concerned.[6]

Secondly, that foundational principle concerns securing respect for the *rule of Union law*. In that regard, it also covers the complex relationship between the supremacy of EU law, i.e. its binding authority, and the national reservations aimed at scrutinizing the legality of secondary law on several grounds (human rights, ultra vires and constitutional identity).[7]

Thirdly, it does have an external dimension too, i.e. the promotion of the rule of law beyond the EU. Its political institutions are committed to *export* principles of democracy and respect for human rights from the EU to third entities.[8] The EU, along with the USA, considers the spread of the rule of law and respect for human rights 'a strategic priority as well as a moral necessity'.[9] One may argue that the EU is not capable, at least not always, of achieving results when it comes to exporting its values on the global scene. However, while admitting that sometimes the EU acts unevenly or does too little, external circumstances pose serious obstacles to delivering on the promise of promoting the rule of law throughout the world.

This paper focuses on a specific, internal facet of the role played by this foundational principle in the EU *as far as member states are concerned*. After having sketched a conceptualization of the rule of law obligations arising out of Article 2 TEU (Sect. 2), it first addresses the EU institutional shortcomings as regards the oversight on systemic deficiencies of the rule of law at national level (Sect. 3). Secondly, it suggests that the *early warning tool* set out in the 2014 Commission's Communication is consistent with the Treaties (Sect. 4). It then highlights the political debate in the Council and the solution it has adopted under the Italian Presidency (Sects. 5 and 6). A brief conclusion will then be drawn (Sect. 7).

2 The Internal Dimension of the Rule of Law as Regards the Member States: A Conceptualization

Insofar as its *internal* dimension is concerned, respect for the rule of law challenges not only the EU, but also the institutions of member states whose commitment for democratic principles and constitutional values is a foundational basis for EU membership.[10] Suffice it to recall that its effective respect is required before a third

[6] See, to that effect, *Kadi II* ruling, n. 5, §131, and C-550/09, *E and F*, ECLI:EU:C:2010:382, §57. Indeed, restrictive measures may adversely affect the working and the family life of the person concerned, as well as the public disgrace of that person which those measures cause (see, to that effect, the *Kadi I* ruling, n. 5, §§358, 369 and 375; C-27/09 P, *France v. People's Mojahedin Organization of Iran*, ECLI:EU:C:2011:853, §64; C-539/10, P *Al-Aqsa v. Council and Netherlands v. Al-Aqsa*, ECLI:EU:C:2012:711, §120, and C-239/12, *P Abdulrahim v. Council and Commission*, ECLI:EU:C:2013:331 and case law cited thereto).

[7] Editorial Comments (2016), pp. 598–599.

[8] Generally Cremona (2011); Pech (2012), *passim* (offering a comprehensive overview of how the EU promotes compliance with the rule of law abroad); Cremona (2016), p. 3 ff.

[9] Joint Statement by the European Union and the United States Working Together to Promote Democracy and Support Freedom, the Rule of Law and Human Rights Worldwide, June 20, 2005.

[10] Schroeder (2015).

state even begins negotiating for accession. This *domestic* facet of the rule of law is pivotal as to the EU integration process. In particular, it is strictly intertwined with the principles of mutual trust and recognition of judgments in both criminal and civil matters, which features the Area of Freedom, Security and Justice.[11] In fact, the mutual recognition of national decisions, as a cornerstone of judicial co-operation in both civil and criminal matters within the Union,[12] works smoothly as long as the values enshrined in Article 2 TEU, including the rule of law, are not only common to the member states, but *effectively guaranteed* within their domestic legal orders. Since the rule of law concerns also individuals, the notion of 'respect' for the rule of law in the national realm should be considered in the light of Kantian perception of persons as being the center of the society, as well as *ends* in themselves, and not as means for something else.[13] Consequently, *respect for the rule of law* leads to the consequence of positive obligations being imposed on competent authorities to take the necessary measures in their powers to secure that respect. If necessary, states have also to adopt legislative, administrative and adjudicatory measures to ensure effective enjoyment of it within their respective territories.

It would be inaccurate to underestimate this intense and structural relationship between the rule of law and the principle of mutual trust,[14] which the ECJ has qualified as a constitutional principle.[15] The components of that binomial relationship appear so closely tied that a post-EU accession disruption in respect for the internal rule of law, adversely affects the principle of mutual confidence.[16] The proper operation of the EU construct is threatened, unless member states

[11] See Article 67(3) TFEU ('the mutual recognition of judgments in criminal matters') and namely the wording set out in Article 81(1) TFEU, as well as in Articles 67(4) TFEU, and 81(2) a), which refer, perhaps more emphatically, respectively, to 'the principle of mutual recognition of judgments and judicial decisions' in criminal matters, and to the 'principle of mutual recognition of judicial and extrajudicial decisions in civil matters'. That relationship is evident as regards the system laid down in the so-called Brussels I Regulation (No. 44/2001): see *ex multis* Case C-116/02, *Gasser*, EU:C:2003, 657, §72.

[12] Baratta (2009), p. 6 ff.; Nascimbene (2011), p. 787 ff.; Lenaerts (2015), p. 525.

[13] The eighteenth century German philosopher, Kant, was the first major Western philosopher arguing that persons are ends in themselves, and not a means to something else, with an absolute dignity to be respected (Kant (1982), p. 144 ff.).

[14] ECJ case law offers several judicial examples of this intense and structural relationship. In fact the ECJ has construed the member states' compliance with the rule of law and fundamental rights as a rebuttable presumption (Cases C-411/10 and C-493/10, *N.S. and Others*, EU:C:2011:865, §78 to §80 and §83; C-399/11, *Melloni*, EU:C:2013:107, §37; Opinion 2/13, 18 December 2014, §191). Lenaerts, n. 12, 528 (arguing that the principle of mutual trust is not only a constitutional axiom that inspires legislative actions at EU level, but it also gives rise to judicially enforceable standards). Indeed, the ECJ has highlighted the fundamental importance of the principle of mutual trust since it 'allows an area without internal borders to be created and maintained' (Opinion 2/13, EU:C:2014:2454, §191).

[15] C-411/10 and C-493/10, n. 14, §78 ff. (as to the treatment of asylum seekers in all member states according to the requirements of the Charter, the Geneva Convention and the ECHR, the ECJ pointed out that at issue 'here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights', at §85).

[16] On the concept of systemic deficiency in constitutional crises see von Bogdandy and Ioannidis (2014), pp. 59–96.

unequivocally observe a minimum level of constitutional homogeneity. Should a member state fail to respect the rule of law, or democracy and human rights at a domestic level, the other EU countries would be entitled to take action under the ECJ's oversight.[17] In theory, they could lodge a claim under Article 259 TFEU, although this procedure has been used rarely and never enacted to challenge an alleged violation of the rule of law in another member state.[18] More pragmatically, national judges might ask for a preliminary ruling insofar as, for instance, according to Article 45 of Regulation 1215/2012, they consider the right of fair trial was not guaranteed in a concrete case.[19]

As a result, respect for the rule of law in the national realm can be conceptualized as an *erga omes partes* obligation: its indivisible nature entails that each country owes it to the Union, to the other member states and to individuals as well.[20] As regards the latter, one can advocate in passing that once the respect for the rule of law is enshrined in the Treaties, individuals, as being subjects of the EU legal system,[21] are entitled to its protection even with respect to the member state to which they belong or live. It is part of their legal heritage or 'legal assets'.[22]

That seems to be the logical consequence stemming from a systematic application of Treaty provisions (Articles 2 and 7 TEU), and the general principles of mutual trust and recognition of judgments.[23] This underlying rationale is based on a 'thick' rule of law concept.[24] It appears also largely coherent with the

[17] The EU legal order is a self-contained regime, which does not permit unilateral actions, in contrast to international law.

[18] Kochenov (2015), *passim*.

[19] Namely, they could ask the ECJ if one of the parties had been denied the opportunity to arrange for his defense where the judgment was given in default of appearance in a civil action linked to criminal proceedings.

[20] *Ex multis* Cases 294/83, *Les Verts* EU:C:1986:1339, §23; 46/87 and 227/88, *Hoechst*, EU:C:1989:2859, §19, C-279/09 *DEB* EU:C:2010:13849, §58 (as regards the separation of powers in the member states).

[21] Case 26/62, *Van Gend & Loos*, ECLI:EU:C:1963:1, p. 12 (pointing out that the EU is a legal order the subjects of which comprise also the nationals of member states since it confers 'upon them rights which become part of their legal heritage').

[22] EU law 'just as it imposes burdens on individuals, is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaties but also by virtue of obligations which they impose in a clearly defined manner both on individuals and on the Member States and the EU institutions' (Case C-536/11, *Donau Chemie*, ECLI:EU:C:2013:366, §20, and to that effect, Joined Cases C-6/90 and C-9/90, *Francovich and Others*, ECLI:EU:C:1991:428, §31, and case C-453/99 *Courage and Crehan*, ECLI:EU:C:2001:465, §19 and the case law cited).

[23] It is worth noting that the principle of mutual recognition in the field of internal market is quite different from the way it operates concerning the judicial cooperation in civil law and criminal matters. Unlike in the internal market, the principle of mutual recognition in civil law is often linked with the protection of individual fundamental rights (Baratta (2010), pp. 312 and 391). The same holds true as regards cooperation in criminal matters. Yet, in this field it is also relevant to ensure the effectiveness of national criminal law in order to prevent criminals from using free movement to achieve impunity (Case C-399/11, *Melloni*, EU:C:20113:107).

[24] Bingham (2010), p. 67: 'the rule of law … demands the protection of fundamental rights' (at 33), and quite likely democracy. On the link between rule of law and respect for human rights MacCormick (2007), p. 189.

Commission's assessment.[25] The rule of law is indeed a complex and composite legal concept against which EU countries' activity is to be evaluated. In essence their domestic legal orders should be framed to guarantee and promote individual rights.[26] Supremacy of law, fundamental rights, democracy and the right to a fair trial, all form a unique set of values that member states are expected to protect at a national level, since they are instrumental for ensuring the correct functioning of a supranational system without borders for citizens, goods and judgments. This is so regardless of whether a member state is implementing EU law or acting autonomously, as it is clear arguing from Article 7 TEU.[27]

3 Facing the Crises of the Rule of Law at National Level

In 2013, while the Italian Presidency was approaching, the EU institutional system had revealed some shortcomings as regards the oversight on systemic deficiencies of the rule of law at national level. The author, being at that time legal advisor at the Italian Permanent Representative, was aware of the doctrinal (and political) debate revealing some weaknesses of that system.

Firstly, as it has often been observed, infringements pursuant to Article 258 TFEU and the preliminary ruling procedures do not tackle that issue appropriately since they do not address systemic threats to the rule of law. As a matter of course, these procedures attribute the EU powers of action covering situations where specific EU law applies and remedies to individual breaches, unlike Article 7 procedure, which it is not confined solely to areas covered by EU law and concerns risks of systemic violations of the rule of law. For instance, the European Commission tackled specific failures by Hungary to fulfil its obligations under EU law, and on 17 January 2012, it launched three infringement procedures against Hungary. Two of them came to an end with an infringement ruling of the ECJ – they concerned the equal treatment in employment and occupation by adopting national legislative provisions relating to the age-limit for compulsory retirement of judges, prosecutors and notaries, and the protection of individuals with respect to the processing of personal data, as well as the free movement of the same data.[28] Even

[25] See Annex I in *Annexes to the Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*, COM(2014)158final, 1–2, and the case law cited therein. According to the Commission six legal principles are included in the core of the rule of law: legality; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review; equality before the law.

[26] Zolo (2006), pp. 17 and 21.

[27] De Witte and Toppenburg (2004), pp. 59–82.

[28] C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687; see Vincze (2013), p. 489 ff.; and C-288/12, *Commission v. Hungary*, ECLI:EU:C:2014:237. The third infringement procedure concerned the independence of the Hungarian Central Bank. On the very same day in which the Commission launched the three infringement procedures the Hungarian Office of the Government's Spokesperson replied that 'The Hungarian government takes note of the Commission's decision to examine the compliance of certain Hungarian laws with the *acquis communautaire* following the procedures laid down in the Treaty. Hungary regards this as an opportunity to engage in a technical dialogue based on verifiable facts with the competent authority, the European Commission, acting as the guardian of the Treaties. The Hungarian

though the related procedures as a whole (pre-litigation procedure and the procedure before the Court) took less than 1 year (due also to the ECJ decision to accept the Commission's request for the application of the accelerated procedure), the impact on the respect for the rule of law was clearly minor in terms of scope. The same holds true even as to the references for preliminary rulings, which may highlight situations of systemic deficiencies for protection of fundamental rights in the member states. That is actually possible in exceptional situations resulting in a disproportionate burden being borne by them and their temporary inability to cope with those situations in practice.[29]

Secondly, the Article 7 procedure, according to some observers, is not a sound response as well. To trigger Article 7 is not only a 'nuclear option' per se,[30] but it implies several discretionary steps being taken by the political institutions. Besides the fact that the jurisdiction of the ECJ covers solely the procedural stipulations contained in Article 7 TUE,[31] may raise suspects as regards its political underlying legitimacy, given that the state concerned might claim a lack of control over the political institutions. Yet, as a matter of fact, it has never been used, although in 2012 some member states faced calls for the EU to apply this sanctioning procedure.[32] Should it be triggered, it might offer some benefits for the resilience of the overall system. That is one of the options the European Parliament was thinking of in 2013,[33] and likely when it called on the Commission to assess the respect for the rule of law in Hungary by pointing out that '(r)einstating the death penalty in Hungary would breach the EU Treaties and Charter of fundamental

Footnote 28 continued
government considers the independence of the Central Bank, the Judiciary and the Data Protection Authority as important as does the European Commission. Therefore there is no disagreement with the institutions of the European Union on the importance of basic principles, common European values and achievements. A thorough analysis of the Commission's arguments will be started. Our aim is to give satisfactory and comprehensive answers to the questions raised, and to find a solution for the problematic issues as soon as possible, preferably without going through the full infringement procedure' (press release, *The European Commission's decision of 17 January 2012 on the infringement procedures against Hungary*).

[29] C-411/10 and C-493/10, n. 14, footnote 14 §87 (whereby the governments intervening before the Grand Chamber recognized that Greece in 2010 was 'the point of entry in the European Union of almost 90 % of illegal immigrants, that influx resulting in a disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice'). See also C-4/11, *Puid*, ECLI:EU:C:2013:740, §§30–35.

[30] J.M.D. Barroso, *State of the Union 2012 Address*, Plenary Session of the European Parliament/ Strasbourg, 12 September 2012, 1–8, p. 6.

[31] See Article 269 TFEU. As the Commission pointed out in 2003, Article 7 procedure entails *inter alia* to conduct a 'meticulous examination of issues linked to respect for democracy and fundamental rights in the Member States': COM(2003)606final, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, p. 4, and pp. 5–6, as to the scope of that procedure, and to the ECJ's power of judicial review of the decision determining that there is a serious and persistent breach of common values or a clear risk of such a breach.

[32] See Fundamental Rights Agency, *The European Union as a Community of values: safeguarding fundamental rights in times of crises*, Luxembourg (2013), p. 19 ff.

[33] See *Agence Europe*, HUNGARY: Another debate and another headache to bring Orban into line, Brussels, 1 April 2013.

rights'.[34] Abolition of the death penalty in the member states appears to be one of the fundamental values on which the EU is founded. It is worth recalling that no reservation is permitted as regards Protocol N° 6 to the ECHR on the abolition of death penalty.

That being said, complementary mechanisms were widely perceived as needed in order to foster the reaction capability of the EU legal order as regards systemic risks of violating the rule of law at national level. At the same time, several legal constraints were emerging. It suffices to recall that, after a comprehensive discussion on the topic in April 2013, the Justice and Home Affairs Council meeting held in Luxembourg on 6–7 June considered that respect for the rule of law is a pre-requisite for the protection of fundamental rights. It further called 'on the Commission to take forward the debate *in line with the Treaties* on the possible need for and shape of a collaborative and systematic method to tackle these issues' (emphasis added).

It would have been quite unrealistic to advocate for a revision of the Treaties, or even the conclusion of an international agreement outside the EU legal framework to fill the gap in the system.[35] To say the least, both options were time consuming and their possible outcome quite unpredictable since a reluctant member state could decide not to ratify the relevant international instrument. Thus, it was clear that any initiative in this area could not extend the institutional remit beyond the existing Treaties. This is not to say that other solutions requiring Treaty amendments were unwelcome. The problem was that many instances called for an immediate response to rule of law crises in some member states, as both the initiative of four foreign Ministers and the debate in the European Parliament clearly showed.[36]

As a matter of course, the Council's invitation may be viewed as generic. Yet vagueness is quite typical of political documents. Be that as it may, the Council noticed that it was, *inter alia*, of critical importance: (1) *to make full use of existing mechanisms*; (2) to consider the full range of possible models, while stressing the need for approaches that could be *accepted by all member states by consensus*. Thus, any Council initiative had to be coherent with the Treaties and, at the same time, had to be adopted without a vote in as much as a complete accord existed between the Governments.

4 The Consistency of the Commission's Communication with the Treaties

When the Commission issued the Communication,[37] it could be reasonably argued that it fell, and actually falls, within the mechanism set out by the Treaties. The Communication builds upon the Article 7 procedure, providing an early warning tool

[34] See *Agence Europe*, Hungary: New resolution criticises fundamental rights situation, Brussels, 10/06/2015: MEPs added that the death penalty is 'incompatible with the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights on which the union is founded' and that any member state reintroducing the death penalty would be 'in violation of the Treaties and of the EU Charter of Fundamental Rights' (ibidem.).

[35] See the Council Legal Service Opinion, No. 10296714, para. 27.

[36] See Sect. 4.

[37] Communication from the Commission to the European Parliament and the Council, 'A New EU Framework to Strengthen the Rule of Law', COM(2014)158final, Strasbourg, 11 March 2014. See Kochenov et al. (2015), pp. 689 ff.

aimed essentially at entering into political dialogue with the concerned member state. It intends to find a *preventive* (or maybe deterrent) solution on a consensual basis in order to prevent emerging threats to the rule of law from developing into a serious breach within the meaning of Article 7. Such a mechanism is to be triggered before that procedure and ultimately complements it, while being careful not to affect the launch of infringement procedures under Article 258 TFEU in case of the breach of specific EU law provisions.[38]

In brief, the Framework is to be activated as a subsidiary instrument, that is to say, when the national (rule of law) safeguards do not seem capable of effectively addressing those threats. It is divided into three phases. First, the Commission, after having collected all available data and information, initiates a dialogue with the member state concerned, by sending a 'rule of law opinion', which amounts to a warning to the member state – and substantiating its concerns when it believes that there are clear indications of a systemic threat to the rule of law. It gives the member state concerned the possibility to reply since it is expected to cooperate with the Commission in accordance with the loyal cooperation rule (Article 4(3) TEU).[39] The opinion is not made public. Second, if the matter is not satisfactorily resolved, the Commission issues a 'rule of law recommendation', while providing for a fixed time limit to solve problems. The state concerned is required to inform the Commission of the steps taken to that effect. The Commission makes public the main content of its recommendation. In the third stage, the Commission 'will monitor the follow-up by the member state concerned given to the recommendation addressed to it'. If there is no satisfactory follow-up, the Commission can resort to one of the mechanisms set out in Article 7 TEU. At all stages of the procedure, the Commission keeps the European Parliament and Council regularly and closely informed, and may benefit from external expertise and in particular the Fundamental Rights Agency and other entities specifically named in the recommendation.

Unfortunately, the Commission's Communication does not address in depth the issue of its consistency with the Treaties. It in fact points out that that Framework 'is based on Commission competences as provided for by existing Treaties'.[40]

[38] The text aims to strengthen the monitoring of compliance in the member state of the rule of law, through a process, which leads to the application of Article 7 TEU (the so-called 'nuclear option'). In fact, the conditions and the legal consequences of this provision make it applicable, according to the Commission, as an instrument of last resort resulting in some contexts even inappropriate. To confirm this, the Commission preferred to use as a deterrent means infringement proceedings with respect to Hungary and Romania (n. 27). After explaining the importance of the rule of law into the Union, the Commission shapes the 'new EU framework to strengthen the rule of law' (at 5), moving from the assumption of the existence of a 'systemic threat' (ibidem.) to the rule of law in the member states. The Communication utilises the term 'threats' (which does not require an actual breach) to indicate the 'political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists' (at 7). Threats means 'result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress' (at 7).

[39] Peers (2014); Mori (2016), p. 207.

[40] Communication, n. 36, p. 9.

Nevertheless, the legal issue was on the table, since some member states raised it almost immediately after the four Foreign Ministers' letter.[41] In addition, as is known, the Council Legal Service issued a negative legal opinion, now being made public, arguing that the Communication is not consistent with primary law.

By contrast, a completely different assessment, as I said earlier, is possible and reasonable. Let's address this issue concisely. To start with, the Communication does not aim to enlarge the areas of EU competence. As the 'new Rule of Law Framework' is to be enacted within the mechanisms provided for in Article 7, to claim a violation of Article 5 TEU, i.e. the doctrine of attributed powers to the EU as a whole, seems hardly convincing.[42]

Certainly, another aspect of the principle of conferral is relevant – institutions and organs ought to act within the limits laid down by the Treaties 'and in conformity with the procedures, conditions and objectives set out in' thereto (Article 13(2) TEU). Admittedly the Commission was seeking to fill a gap within Article 7 on the assumption, shared with several *Brussels quarters*, that a comprehensive enhancement of the legal tools concerning the respect for the internal rule of law was needed.[43] The legal problem was: if the Commission were to carry out the 'new Rule of Law Framework', would it circumvent powers attributed to it pursuant to Article 7? Or more broadly, may an institution, absent a specific provision, supplement existing legal instruments through a *normative activity* that, moreover, is generally felt as needed? And if so what, if any, are the limits?

That is a matter of interpretation to be solved by taking into account the principles of division of powers and institutional balance as defined by the ECJ case law.[44] Since the Commission may launch an Article 7 procedure whenever a member state is allegedly posing 'a clear risk of a serious breach' or 'a serious and a persistent breach' of the values set out in Article 2 TEU (and that, as discussed, even outside the areas covered by EU law), the Commission's activity under the Communication appears in principle covered by the attributed powers under primary law. Arguably, Article 7 confers to the Commission a discretionary task, which is, on the one hand, aimed at pursuing the primary objective of guaranteeing the effectiveness of some basic values in the domestic legal orders. Insofar as that provision is rather open-ended, the 'Pre-Article 7 Procedure', as envisaged by the

[41] As is known, in March 2013 the Foreign Ministers of Denmark, Finland, Germany and the Netherlands asked to the President of the Commission to vigorously protect EU fundamental values – democracy, rule of law and human rights. In their perspective a new mechanism was necessary. The topic was examined by the Council on its meeting of 18 March 2014, in which several legal issues were raised by the member states.

[42] *Contra* Council Opinion, n. 34, para. 15.

[43] von Bogdandy and Ioannidis, n. 16, p. 59.

[44] An illustrative example of this approach is Case C-233/02, *France v. Commission*, EU:C:2004:I-2781, §40: 'Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account, since in this case the measure seeks to reduce the risk of conflict related to the existence of technical barriers to trade in goods'.

Commission, falls within the scope of that Treaty provision.[45] In other words, a broad interpretation of Article 7 so as to include a 'Pre-Article 7 Procedure' is legally conceivable by implication.[46] As a rule of interpretation, implied powers can flow from the grant of express powers. In this situation, there is an explicit power – i.e. the power to launch an Article 7 procedure – from which another power can be construed as being inherent.[47]

On the other hand, whenever an EU institution enjoys a discretionary power, its intervention is to be coherent with the objectives for which the same power is granted. In that respect, it is arguable that the political early warning tool, as envisaged in the Commission's Communication, is consistent with the objectives of Article 7 TEU. In that legal framework, the Commission could even collect information and carry out checks in accordance with the general provision of Article 337 TFE.[48] Moreover, the Communication examines carefully and impartially all the relevant elements of the situations upon which that mechanism may be triggered, complying also with the duty to state the reasons (Article 296(2) TFEU). The Commission's act seems in line with the proportionality principle (Article 5(4) TFEU) too, since the new political mechanism appears both suitable to pursue the aim of the Article 7 procedure, and necessary in the sense that no other option is available to the Commission. In short, by making full use of an existing mechanism in line with the Council's demand, the Commission neither derogates primary law, nor adversely affects the principle of institutional balance.

It may be added, as to the former, that the procedure envisaged by the Commission is not *contra legem* (i.e. is not inconsistent with primary law): it does not deviate from the procedure, conditions and objectives set out in Article 7 TEU. Nor does amend that provision since it falls within the discretionary power

[45] It has been argued that the institutions cannot build upon Article 7 procedure. This is not convincing. As long as the conditions indicated in the text are fulfilled, institutions may build upon the discretionary powers granted to them by the treaties. In that respect, institutional practice is so rich in cases, which contradict that argument. For instance, lawyers who are familiar with infringements procedure practice do know the 'EU pilot' and 'SOLVIT' procedures. The Commission set up them through the means of non binding acts: all the member states have accepted those procedures and it is evident that unanimity does not permit Governments to depart from primary law. It is also worth mentioning that all the agreements, declarations and modus vivendi concerning codifications, better law making and so forth show that institutions and member states are quite inclined to build upon existing primary law rules. In other words, a restrictive approach according to which institutions must stick to written law does not reflect the rich institutional practice. In addition, if that argument was pertinent, how could the Council ground the new political oversight (see Sect. 5) approved by consensus under the Italian presidency?

[46] According to Kochenov and Pech 2015, p. 11, Article 7 'necessarily implicitly empowers the Commission to investigate any potential risk of serious breach of the EU's values'. They conclude however that the Commission's light-touch proposal falls short of effectively addressing threats to the rule of law within the EU.

[47] A specific instance of this rationale occurred when the ECJ forged the well-known *ERTA doctrine*: the implied power to conclude international agreements in the fields in which the EU enjoyed no explicit competence has been justified on the basis that primary law provisions, which allowed the EU to exercise competences *internally* (Case 22/70, *ERTA*, EU:C:1971:263, §16; Opinion No. 1/76 EU:C:1977:741, §3, and No. 2/91, EU:C:1993:I-1061, §7). The Treaty of Lisbon (2009) has codified that judicial doctrine (Articles 3(2) and 216(1) TFEU), as the ECJ has pointed out in Case C-114/12, *Commission v. Council*, EU:C:2014: not yet published, §§64 ff.

[48] Moxham and Stefanelli (2013), p. 22.

conferred to the Commission insofar as the triggering of the mechanism is concerned. As regards the latter condition, the Communication appears respectful of the principle of institutional balance since it does not impact on the powers attributed to other institutions pursuant to Article 7 TEU.[49]

Conclusively, the 'new Rule of Law Framework' may be conceived as a *praeter legem* procedure, which ultimately derives from the Treaties by implication.

5 The Opportunity to Avoid a Legal Conclusion in the Council

That being said, a legal conclusion or debate in the Council as regards the Commission's powers under Article 7 TEU, was unnecessary. As a matter of principle the final word about the consistency with the Treaties of the Communication does not pertain to the EU political institutions, but to the ECJ (in accordance with Article 19 TEU). Unlike under international law where in principle each organ of an international institution is, at least *prima facie*, able to determine its own jurisdiction,[50] in the more evolved EU legal order a strict judicial approach prevails.[51] The locus of authoritative decision-making, as regards the legality of the activity of EU institutions, ultimately lies with the ECJ.[52] Put differently, complementary normative activity is subject to a judicial legal assessment: only the validation of the ECJ confers to the social rule created by the practice of the institution the guise of a legal rule. Until the Court has ruled on the legality with primary law of a given act, only hypothetical reconstructions can be made.

That explains the reasons why, bearing in mind that there was no specific judicial precedent dealing with the same issue, it would have been better to skip such a political discussion. Besides, a lawyer may reasonably be quite apprehensive about the ideological, distorted or watered-down approaches that a complex subject, such as the rule of law, may receive in a debate within the Council – whose political nature may not be well suited for such legal determinations. In addition, there was no clear consensus among member states to endorse the 'New Rule of Law Framework', since several Governments objected to its legality.

Lastly, it is worth recalling that if the Commission initiates a pre-Article 7 procedure issuing a recommendation addressed to a state, the latter could challenge it since it would be an act producing legal effects. On the contrary, the same

[49] The Italian Presidency Doc. No. 15206/14 'Ensuring respect for the rule of law in the European Union', could have pointed out in a clearer way that the Commission Communication is not only 'without prejudice to the Commission's powers of launching procedures under Article 258 TFEU in case of breaches falling under the scope of EU law' (point 10, at 3), but that the same holds true as regards the powers of other institutions under Article 7 procedure.

[50] *Certain Expenses* case, ICJ Rep., 1962, 151, at 168; Sarooshi (2007), p. 22.

[51] One illustrative example of this approach is the *Bosman* case, whereby the ECJ stressed its primary role, pointing out that, 'except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty' (Case C-415/93, *Bosman*, EU:C:1995:I-5041, §136).

[52] In that respect, the EU legal order reflects Kelsen's theories according to which the judiciary is the ultimate guardian of the system Kelsen (1980), p. 128, and as regards international law, Kelsen (1939), p. 253 and pp. 264–266.

requisite seems difficult to prove as regards the Commission's Communication itself, which is a non-binding act.[53] It does not mean however that the Communication is deprived of legal effects: it may for instance reflect the practice of the Commission as regards the interpretation of Article 7. Should that interpretation be correct, it could even entail that member states are expected to comply with it according to the duty of loyal cooperation. Yet a situation of legal uncertainty follows, as long as the Commission does not trigger the new mechanism against a given member state. That leaves open the question of the practical importance of member states objections to the way in which the power attributed to the Commission under Article 7 have been interpreted, insofar as a clear legal remedy against the Communication does not exist.

Finally, the coherence of the objecting states against the early warning system set out by the Commission should be assessed in the light of the new political mechanism of the Council. If the Article 7 procedure cannot be developed by political institutions, first and foremost by the Commission, so that they are prevented from exercising powers beyond those that the provision accords to them explicitly, one may wonder whether it would be legally feasible to accept political oversight exercised by the Council. That leads us to the last point to mention.

6 The Council Political Way Out

Without explicitly questioning the legality of the Commission's Communication against the principle of conferral, the Council has shaped an additional political way out based on a *new* rule of law dialogue. The Italian presidency, acting as an honest broker, pursued this route. It focused on the role of the Council to accompany the future development of a new framework to strengthen the rule of law within the EU in accordance with the treaties.[54] Indeed, 'Council and member states meeting within the Council' decided to 'commit themselves to establishing a dialogue among all member states within the Council to promote and safeguard the rule of law in the framework of the Treaties'; and 'agree that this dialogue will take place once a year in the Council, in its General Affairs configuration, and be prepared by the COREPER (Presidency), following an inclusive approach'.[55]

This way out has both positive and negative aspects. As regards the former, the Council agreed that 'this dialogue will be developed in a way which is

[53] Case 22/70 *Commission v. Council* EU:C:1971:263, §§38 to 42; Case C-366/88 *France v. Commission* EU:C:1990:348, §8; Case C-58/94 *Netherlands v. Council* EU:C:1996:171, §24). As is known, measures binding only the institutions concerned and giving no rights or obligations on third parties, do not constitute acts adversely affecting any person against which an action for annulment can be brought (Case 366/88, *France v. Commission*, §9, relating to internal instructions). The Court has consistently held that only measures producing binding legal effects are open to challenge by an action for annulment (order in Case 135/84, *F.B. v. Commission*, EU:C:1984:320, §6; order in Case C-50/90, *Sunzest v. Commission*, EU:C:1991:253, §12).

[54] See Italian Presidency Doc. No. 15206/14 of 14 November 2014 'Ensuring respect for the rule of law in the European Union', point 14.

[55] Press release 16936/14, 3362nd Council Meeting, General Affairs, Brussels, 16 December 2014.

complementary with other […] International Organisations'.[56] Arguably, the Council considers that ensuring respect for the rule of law by member states does not pertain to the EU only, but also to other international organisations and namely to the Council of Europe.[57] This is hardly questionable. Yet the Council's determination does not imply the externalization of an EU task.[58]

As regards the negative aspects, the Council's conclusions reveal loopholes to be addressed by subsequent Presidencies if they wish to trigger this new mechanism.[59] One may further opine that the Council's conclusions do not appear ambitious enough, since they remain within the realm of political dialogue. A new political oversight is not a bad thing per se, though it hardly ensures the respect of the rule of law in an effective manner. However, any more ambitious result would likely imply the revision of the Treaty and, as said above, that was outside the scope of the entire exercise. Indeed, a system of political dialogue to foster the respect of the rule of law at a domestic level had to be shaped 'a Trattati costanti' (without revising the treaties).

Moreover, one may wonder what an *inclusive approach* actually means.[60] If it refers to the involvement of the member states concerned in the rule of law dialogue, the necessity of such wording is doubtful. Another noteworthy element is that the decision to set up a political dialogue has been adopted by both the *Council and the members states meeting within the Council*. This formulation seems to entail that debating about possible threats to the rule of law in member states does not fall, at least not entirely, within the current jurisdiction of the Council. Legally speaking, this is surprising. The Article 7 procedure and the related powers conferred to the institutions therein, as well the ECJ case law cited above,[61] seem to lean in the opposite direction. Indeed it would be quite difficult to demonstrate that under Article 7, the EU does not enjoy a comprehensive competence to supervise the application of the rule of law, as a foundational value of the EU, in the member states.

The problem is to find the political strength to trigger that procedure, perhaps in addition to political dialogue.[62] However, as a matter of fact, on 13 January 2016

[56] Press release 16936/14, n. 55, 21, point 5.

[57] For a brief overview and analysis of monitoring systems of the rule of law according to some international instruments see Moxham and Stefanelli, n. 48, p. 6.

[58] Against externalization of the EU tasks concerning respect for the rule of law to Council of Europe's bodies, see Kochenov and Pech (2015), p. 10.

[59] For instance, it is not clear what evidences the Council dialogue could be based upon. The avenue to rely on Fundamental Rights Agency (FRA) data and evidence could likely be pursued provided that the FRA mandate is enhanced.

[60] Kochenov and Pech, n. 46, p. 14.

[61] Section 2.

[62] See the European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP), in which it 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 as per Article 2 TEU, including the combined impact of a number of measures exacerbating the state of democracy, the rule of law and fundamental rights, and evaluating the emergence of a systemic threat to the rule of law in that Member State that could develop into a clear risk of a serious breach within the meaning of Article 7 TEU; asks the Commission to report back on this matter to Parliament and the Council before September 2015'.

the Commission has launched a dialogue with Poland under the Rule of Law Framework because it was concerned about the composition of the Polish Constitutional Tribunal, as well as of the domestic changes in the law on the Public Service Broadcasters.[63]

7 Conclusions

Respect for the rule of law in the EU cannot be taken for granted. It is essential for each member state and for the EU itself. As a matter of course states have different national experiences in the development of their systems of the rule of law so as that its notion is naturally connected with their respective national context. However, in the EU there are common features and values as identified by its judiciary, as well as by its practice (such as, for instance, the refusal of death penalty). Respect for the rule of law in the member states is also a responsibility for the EU institutions. If the EU strives to protect it, the rule of law will benefit the EU and its citizens as a whole. A stronger EU can legitimize itself in the eyes of the citizens primarily through its outcomes aimed, among other things, at construing effective instruments capable to oversight respect for the rule of law at national level.

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[63] See *European Commission – Fact sheet. College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers*, Brussels, 13 January 2016.

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