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UDC: 343:347:061.1EU

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Rule of Law in the EU: Justice and Criminal Law Dimensions

1. Introduction

The rule of law is one of the most fundamental values upon which the European Union is founded. This common value is enshrined in Article 2 of the Treaty on European Union (TEU), which stipulates that the EU 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 considered common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The rule of law is further important for the mutual trust between the Member States and for the correct functioning of the internal market. According to the Copenhagen criteria, the rule of law is also one of the key requirements a prospective EU Member State must fulfil to join the

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EU.[1] It has been invoked as a means and as an end in the development and legitimation of a wide range of EU policies.[2]

The rule of law has been widely recognised as one of the most important political ideals today,[3] an "unqualified human good",[4] "the benchmark of political legitimacy"[5] that societies of today should maintain or aspire towards, and as a concept having an "unmatched rhetorical power"[6] that persuades and legitimates. While some still see it only as a formal concept (the rule of law, not of men), many others see it predominantly as a substantive, moral concept that conveys meaning about the content or quality of law,[7] or as a combination of both dimensions.[8] Nevertheless, it is widely accepted that today's conception of the rule of law in Europe is a "thick" one and as such encompasses more than mere legality of state decisions.[9] It includes more substantive, moral elements; it incorporates "substantive notions of justice".[10] The importance of fundamental rights in today's notion of the rule of law is taken for granted. Formalist and positivist Kelsenian models of the rule of law, as Weiler puts it, are "no longer accepted as representing a meaningful and normatively acceptable form of the rule of law, if they are not respectful of two conditions: rootedness in a democratic process of law making and respect of fundamental human rights".[11] This latter dimension is particularly important in the context of criminal law, where the State can most profoundly interfere with the individual's freedom and human rights.

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1 European Commission, Rule of Law, URL: https://ec.europa.eu/neighbourhood-enlargement/policy/policy-highlights/rule-of-law_en.

2 Calligaro, Coman, Foret, Heinderyckx, Kudria, Oleart Perez-Seoane, Values in the EU Policies and Discourse: A First Assessment (2016), p. 21.

3 Tamanaha, On the Rule of Law (2004).

4 Thompson, Whigs and Hunters (1977), p. 266.

5 Waldron, The Concept and the Rule of Law (2008), p. 1.

6 Hamara, The Concept of the Rule of Law (2013), p. 11.

7 For example, Finnis, Natural Law and Natural Rights (1980).

8 Flores and Himma, Law, Liberty, and the Rule of Law (Introduction) (2013); Peršak, Rule of Law and Institutional Legitimacy (2015), p. 370; Nardulli, Peyton, Bajjalieh, Conceptualizing and Measuring Rule of Law Constructs (2013). Note that in some contemporary scholarship, the rule of law is seen as being synonymous with societal stability, political conceptions of the rule of law focus on governmental constraint, i.e. a government's obedience to its own rules and its subordination to an independent judiciary, classical economic conceptions focus on property rights and contract enforcement, while some other conceptualisations emphasise governmental transparency, efficiency and lack of corruption, or (like Amartya Sen) treat the rule of law as being synonymous with freedom/human rights.

9 According to both the Court of Justice of the EU and the European Court of Human Rights, the rule of law is a constitutional principle with both formal and substantive components. See European Commission, A New EU Framework to Strengthen the Rule of Law (2014), p. 4.

10 Douglas-Scott, The Problem of Justice in the European Union (2012), p. 435.

11 Weiler, Deciphering the Political and Legal DNA of European Integration (2012), pp. 155–156.

Under the Treaties, the European Commission is responsible, alongside the European Parliament and the Council, for guaranteeing the respect for the rule of law. This entails its duty to act whenever the rule of law in any EU Member State is jeopardised. Whenever a national court applies EU law, it acts as a Union court, meaning that its independence must be guaranteed. In other words, this means that certain acts, such as modifying the structure of the judiciary, changing the role or status of judges, dismissing certain judicial bodies in one EU Member State etc., cannot be seen as purely "internal" acts, as they are very much "European", i.e. an EU concern, and EU has not only a right but a duty, to act whenever such conduct may endanger the rule of law in the EU.

We are drafting this article amidst one of the biggest challenges to the rule of law in the EU recently, namely, the Polish government's adoption of radical reforms of the Polish judiciary, which amount to a systemic threat to the rule of law in Poland. Events in Poland led the European Commission to, for the first time, open a dialogue with the Polish Government in January 2016 under its EU Framework to strengthen the Rule of Law (hereafter: the Rule of Law Framework).[12] The Rule of Law Framework laid down the steps the Commission would take to prevent that the so-called "nuclear option" under Article 7 TEU would be launched which, at its most severe, allows for the suspension of voting rights of an EU Member State in case of a "serious and persistent breach" of EU fundamental values.

The article aims to provide an overview of the existing rule of law efforts and challenges in the EU, specifically those linked to the functioning of justice systems and EU criminal law. It thus addresses the question of what current systemic and conceptual rule-of-law issues, problems and dilemmas the EU is faced with, and particularly how to safeguard effectively the rule of law in practice. It, firstly, describes the development of an idea for the EU to get involved in monitoring the respect for the rule of law in its Member States and presents the EU Rule of Law Framework, together with the most recent rule-of-law crisis in the EU. Next, the rule-of-law challenges in the area of EU criminal law are examined, highlighting certain rule-of-law concerns regarding the post-Lisbon EU competence in criminal matters and the role of the rule of law in guiding and/or limiting the EU criminal law and EU criminalisation powers. The article concludes with some considerations for the future, mapping certain outstanding challenges yet to be fully addressed in the EU.

2. The EU Rule of Law Framework and its Implementation in Practice

The rule of law stems from the common constitutional traditions of all Member States, and it is one of the six fundamental values explicitly referred to in Article 2 TEU. Owing to its central importance, the rule of law is identified as a prerequisite for the

[12] European Commission, A New EU Framework to Strengthen the Rule of Law (2014), p. 6.

protection of all fundamental values listed in the Treaties, including democracy and fundamental rights, acting as a "safeguard for the safeguards".[13] The ultimate protection of these values is envisaged through the mechanisms under Article 7 TEU, which sets high thresholds and is hence dubbed as the "nuclear option".[14]

While the respect for the rule of law is a precondition for accession to the EU,[15] once a country has successfully acceded, the rule of law at the national level has not been, until recently, subject to a specific examination by the EU institutions.[16] This has changed following the involvement of the Commission regarding events in two Member States, Hungary and Romania, in which primarily judicial independence, as one of the essential elements of the rule of law, has been jeopardised. In the case of Hungary, the far-reaching justice reforms adopted in 2011 presented a threat to structural judicial independence. In the absence of appropriate legal safeguards and limitations, the legislative amendments granted broad discretion to the newly created position of a President of the National Judicial Office, a non-judicial authority, to designate a court in a given case and about the possibility to transfer judges without their consent. These reforms were flagged as negatively affecting the effective application of EU law in Hungary and the fundamental right of access to an independent tribunal, guaranteed by Article 47 of the Charter of Fundamental Rights of the EU (Charter). In the case of Romania in 2012, the threats to judicial independence were directed towards the Constitutional Court and its judges. These threats were related to the decisions of the Constitutional Court on the constitutionality of extraordinary measures adopted in the attempt to oust the President of the Republic. A variety of measures—from legislative to governmental acts (the so-called emergency ordinances that amended laws) and to acts affecting the mandate of the Ombudsperson—were raising concerns with regard to the respect for the rule of law. They were addressed in the framework of the Cooperation and Verification Mechanism with which the Commission evaluates, since 2007, the progress of justice reforms in Romania (and Bulgaria).[17]

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13 Crabit, Bel, The EU Rule of Law Framework (2016), p. 203.

14 Barroso, State of the European Union Address (2012).

15 Article 49 TEU provides that "[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. […]".

16 Among the most notable previous interventions with regard to the respect of the fundamental values of the EU, we could mention the sanctions against Austria in 2000 due to the government involving a far-right party. However, that particular situation did not concern the undermining of the national institutions and safeguards of the rule of law but rather a serious political crisis which reverberated both within (and outside) the EU.

17 For a more detailed overview of the measures raising concerns in Hungary and Romania, as well as the response of the Commission, see Peršak and Štrus, Legitimacy and Trust-Related Issues of Judiciary: New Challenges for Europe (2014), pp. 109–110.

2.1. The Adoption of the Rule of Law Framework

These events revealed systemic threats to the rule of law at the national level.[18] While in each situation the Commission reacted to stop or prevent further erosion of the rule of law, it did so with tools available at hand and without following a specific blueprint. In addition to infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Commission also engaged in political dialogue through political declarations and targeted political pressure from the EU level. However, there was a need to spell out how such rule-of-law crises would be addressed in the future. For this reason, the Commission adopted in March 2014 the Rule of Law Framework. In this policy document (a Commission communication), the Commission laid down the steps it intended to follow in a situation where national rule-of-law safeguards would become endangered. The Rule of Law Framework is expected to prevent that an emerging systemic threat to the rule of law reaches a level in which Article 7 TEU would need to be activated. However, the Rule of Law Framework does not constitute a new "legal mechanism", as opposed to the one enshrined in Article 7 TEU, but rather lays down a blueprint for a more structured political dialogue between the Commission and a Member State experiencing a rule-of-law crisis. The Rule of Law Framework states that it is triggered in situations where the national authorities are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguarding mechanisms established at national level to secure the rule of law.

Under the Rule of Law Framework, a political dialogue with a Member State follows a three-stage process: a Commission assessment (sending a "rule of law opinion" to a Member State and substantiating concerns, giving it a possibility to respond), a Commission recommendation (recommending that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect) and monitoring of the Member State's follow-up to the Commission's recommendation. If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission assesses the possibility of activating one of the mechanisms set out in Article 7 TEU.[19]

[18] On the concept of a systemic deficiency see Von Bogdandy, Ioannidis, Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done, Common Market Law Review 51 (2014) 1, pp. 59–96.

[19] "Article 7 TEU aims at ensuring that all EU countries respect the common values of the EU, including the rule of law. The preventive mechanism of Article 7(1) TEU can be activated only in case of a 'clear risk of a serious breach' and the sanctioning mechanism of Article 7(2) TEU only in case of a 'serious and persistent breach by a Member State' of the values set out in Article 2. The preventive mechanism allows the Council to give the EU country concerned a warning before a 'serious breach' has actually materialised. The sanctioning mechanism allows the Council to suspend certain rights deriving from the application of the treaties to the EU country in question, including the

2.2. The Implementation of the Rule of Law Framework in Practice

In 2016, the Rule of Law Framework was starting to be implemented in practice for the first time. What led to this were actions of the Polish Government and Parliament relating to the appointment of judges to the Polish Constitutional Tribunal, the refusal to implement judgments of the Tribunal and actions relating to the functioning of the Tribunal. On 1 June 2016, following an intensive dialogue that had been ongoing with the Polish authorities since January of the same year, the Commission adopted the Rule of Law Opinion on the situation in Poland.[20] Despite additional political dialogue between the Commission and Polish authorities, the latter did not address the concerns raised in the Rule of Law Opinion and adopted new amendments to legislation affecting the functioning of the Constitutional Tribunal. What followed was the first ever Rule of Law Recommendation adopted on 27 July 2016,[21] followed by three complementary Recommendations on 21 December 2016,[22] 26 July 2017,[23] and on 20 December 2017.[24] The concerns raised in these Recommendations have been shared by the European judicial networks, such as the Network of Presidents of the Supreme Judicial Courts of the European Union and the European Network of Councils for the Judiciary, by the Venice Commission, the Commissioner for Human Rights of the Council of Europe, the United Nations Human Rights Committee and many civil society organisations. The Recommendations have also received strong support from the European Parliament and a broad majority of Member States.

As an action complementary to the Rule of Law dialogue, in July 2017, the Commission also initiated an infringement procedure against Poland concerning the Law on the Ordinary Courts.[25] The Commission's key legal concern identified in this

voting rights of that country in the Council. In that case the 'serious breach' must have persisted for some time." European Union, Promoting and Safeguarding the EU's values (2015).

20 See http://europa.eu/rapid/press-release_IP-16-2015_en.htm and http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm. The complete text of the Rule of Law Opinion was not made public, as stipulated in the Rule of Law Framework.

21 Commission Recommendation of 27.7.2016 regarding the rule of law in Poland. For more information, see http://europa.eu/rapid/press-release_IP-16-2643_en.htm and http://europa.eu/rapid/press-release_MEMO-16-2644_en.htm.

22 Commission Recommendation of 21.12.2016 regarding the rule of law in Poland. For more information, see http://europa.eu/rapid/press-release_IP-16-4476_en.htm and http://europa.eu/rapid/press-release_MEMO-16-4479_en.htm.

23 Commission Recommendation of 26 July 2017. For more information, see http://europa.eu/rapid/press-release_IP-17-2161_en.htm.

24 Commission Recommendation of 20 December 2017. For more information, see http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

25 See http://europa.eu/rapid/press-release_IP-17-2205_en.htm. The case was referred to the CJEU in December 2017.

law related to the discrimination based on gender due to the introduction of different retirement age for female judges (60 years) and male judges (65 years), which is contrary to Article 157 TFEU and Directive 2006/54 on gender equality in employment. In this proceeding, the Commission also raised concerns that by giving the Minister of Justice the discretionary power to prolong the mandate of Supreme Court judges which have reached retirement age,[26] as well as to dismiss and appoint Court Presidents, the independence of Polish courts will be undermined (see Article 19(1) TEU read in connection with Article 47 of the Charter[27]). The law allows the Minister of Justice to exert influence on individual ordinary judges through, in particular, the vague criteria for the prolongation of their mandates, thereby undermining the principle of irremovability of judges. While decreasing the retirement age, the law allows judges to have their mandate extended by the Minister of Justice for up to ten years for female judges and five years for male judges. Also, there is no time-frame for the Minister of Justice to make a decision on the extension of the mandate, allowing the Minister to retain influence over the judges concerned for the remaining time of their judicial mandate. Finally, the discretionary power to dismiss and appoint Court Presidents allows the Minister of Justice to exert influence over these judges when they are adjudicating cases involving the application of EU law.[28]

Since the concerns regarding the threat to the rule of law have not been alleviated during the nearly two-year dialogue (including an infringement procedure), the Commission has concluded in December 2017 that there is a clear risk of a serious breach of the rule of law in Poland. This lack of progress and worsening of the situation due to additional worrisome reforms convinced the Commission to trigger, for the first time, Article 7 TEU. The Commission adopted a Reasoned Proposal for a Council Decision, which led to several hearings on the situation in Poland in the (General Affairs) Council of the EU.[29]

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[26] A separate infringement procedure regarding the issue of forced retirement of 27 out of 72 Supreme Court judges—more than one in every three judges—because the new Polish law on the Supreme Court lowered the retirement age of Supreme Court judges from 70 to 65, was launched in July 2018. For more information, see: europa.eu/rapid/press-release_IP-18-4341_en.htm.

[27] The interpretation that Article 19 TEU covers the institutional dimension of national judicial independence has been reinforced by the judgment of the Court of Justice in the case 64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Conta*, 2018 CJEU.

[28] In September 2017, Commission, having carried a "thorough analysis of the response of the Polish authorities to the Letter of Formal Notice sent in July 2017 concerning the Law on the Ordinary Courts Organisation", moved to the next stage of the infringement procedure and sent to Poland a Reasoned Opinion. See http://europa.eu/rapid/press-release_IP-17-2205_en.htm (for the Letter of Formal Notice) and http://europa.eu/rapid/press-release_IP-17-3186_en.htm (for the Reasoned Opinion).

[29] Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, available at: http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108. For more information see: http://europa.eu/rapid/press-release_

After the initial involvement on the rule of law concerns by the European Commission alone (on Poland and, less explicitly, on Hungary and Romania), recently also the Council of the EU (in hearings on the rule of law in Poland) and the European Parliament (particularly by adopting an unprecedented resolution to trigger Article 7 TEU in the Council of the EU[30]) got involved in the attempts to ensure the respect for the rule of law in Member States. The breadth of action of the EU institutions[31] has been dubbed to represent a "constitutional moment", which may profoundly impact the future path of the EU's constitutional order without formally amending it.[32]

3. The Rule of Law and EU Criminal Law (and Policy)

The rule of law encompasses several principles and standards, which can be attained in a variety of ways. As long as these principles are fulfilled to a sufficient extent, the EU as well as the Venice Commission[33] is satisfied. There is, in other words, no single way of respecting the rule of law. More precisely, this means that national rule-of-law safeguards may differ from one EU Member State to another. Concretely, as emphasised by Bertole, judiciary can be organised in a Mediterranean, Germanic or British way as long as it ensures the principle of separation of powers. Another example would be that a constitutional court has not been established in all EU countries. In some, the function of constitutional review has been fulfilled, partly or fully, by the highest ordinary court, such as the Supreme Court. Whatever the model of the national constitutional order, the basic principles of the rule of law need to be guaranteed. Standards offer certain flexibili-

IP-17-5367_en.htm. The first hearing in the General Affairs Council (GAC) took place on 26 June and the second on 18 September 2018.

30 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN&language=EN#BKMD-10. For more information, see: http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act

31 An additional important step was the Commission's regulation proposal on "generalized deficiencies as regards the rule of law", with the objective of protecting the EU funds. See Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regard the rule of law in the Member States, COM(2018)321 final, European Commission.

32 Von Bogdandy, Bogdanowicz, Canor, Taborowski, Schmidt: A potential constitutional moment for the European rule of law – The importance of red lines, Common Market Law Review 55 (2018) 4, pp. 983–996.

33 This was recently highlighted by Prof. Sergio Bertole, member of the Venice Commission, in a workshop on the rule of law crises (Brussels, 20 February 2017).

ty in implementation, they allow different solutions to problems; principles, on the other hand, cannot be negotiated.[34] This does *not* mean, however, that there is only one specific way in which a principle can be actualised, for principles unlike rules, as Dworkin notes, are more flexible and can be fulfilled in various ways.[35]

Similarly various are the ways in which the rule of law and EU criminal law interact. Here, four such interactions will be considered: two situations of EU criminal law affecting the rule of law and another two going in the opposite way, i.e. the national rule of law affecting the EU criminal law. More concretely, the EU criminal law may support or obstruct the rule of law in Member States (situations described below under sections 3.2. and 3.4.), while the national rule of law—if functioning well (situation 3.1.) or badly (situation 3.3.)—may limit the expansive EU criminalisation or obstruct effective implementation/use of EU criminal law instruments, respectively.

3.1. Well-functioning Rule of Law as a Limitation on EU Criminal Law/ Criminalisation

The EU criminal law field has seen increased legislative activity from the EU in the last decade or so with several framework decisions and directives passed in this time and the Lisbon Treaty, specifically Article 83 TFEU, conferring upon the EU for the first time *explicit* competence in criminal matters.[36] All of this has highlighted the need to establish a coherent and consistent approach to EU legislation in criminal law matters—one that would incorporate the respect for the rule of law as a necessary element or even a pre-condition of EU criminalisation.

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[34] Bertole, ibid.

[35] For Dworkin, a "principle" is a standard to be observed because it is a "requirement of justice or fairness or some other dimension of morality" (p. 22) and the distinction between the legal rule and legal principle is a logical distinction. While rules are applicable in an all-or-nothing way, principles provide direction but do not require a particular decision. Dworkin, Taking Rights Seriously (1977), pp. 22–28.

[36] Whereas the pre-Lisbon third pillar already included certain competence in criminal matters, the latter remained the exclusive competence of Member States to be tackled intergovernmentally at the EU level. Post-Lisbon, the competence in criminal matters became a shared competence, conferred upon the Union. This Treaty of Lisbon's "express conferral" of a competence in criminal matters on the EU has been described as the one that "definitively established the unequivocal integration of criminal law into the European legal order" (Sicurella, EU Competence in Criminal Matters (2016), p. 49). While the CJEU judgment in the case C-176/03 *Commission v Council* [2005] ECR I-7879 already challenged the prevailing assumption that the criminal law fell outside the competence of the Community, such competence being considered possible if the principle of the full effectiveness so required, this competence remained vague and poorly defined until the Lisbon Treaty's clear articulation thereof. See e.g. Herlin-Karnell, EU Competence in Criminal Matters after Lisbon (2012).

The rule of law is often raised as a limitation to the EU competence in the criminal law area. For example, several national constitutional courts (e.g. in Germany and Poland) adjudicating cases brought against specific European Arrest Warrants (EAWs) issued by other Member States (or judicial orders based upon them) have expressed constitutional concerns on the grounds of their own rule of law, concretely, for example, due to incompatibility with national prohibition on the extradition of nationals and constitutional fundamental rights.[37] In some cases, this has led to non-implementation of EAW in the executing Member State and illustrated the resistance at the national level that can occur when introducing EU criminal justice regime into the domestic, national criminal justice.[38] Such EU instruments, when applied across different Member States with different legal traditions or implemented without taking into account those domestic specificities, have been seen by some as transplants acting as "legal irritants"[39] to the national rule of law. Respecting the domestic rule of law may demand in these cases the refusal to implement an EU instrument, such as EAW, in the executing Member State, despite the absence of an explicit fundamental rights-based refusal ground in the EAW and in contradiction with the *Pupino* principle of loyal cooperation,[40] later explicitly entrenched in Article 4(3) TEU as the principle of sincere cooperation.

The Court of Justice of the EU (CJEU) has recently allowed a departure from mutual recognition when fundamental rights could be violated.[41] In *Aranyosi and Căldăraru* (Joined Cases C-404/15 and C-659/15 PPU), concerning—in the case of Aranyosi—the execution in Germany of an EAW against a Hungarian national to be arrested and

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37 In 2005, the Federal Constitutional Court in Germany found the German act implementing the EAW Framework decision unconstitutional and void for the failure of the German legislator to implement the EAW in compliance with German Constitutional standards and fundamental rights protected by the German Basic Law. It consequently overturned the order of the Higher Regional Court, which had declared the complainant's extradition based on the Spanish EAW admissible, and the Free and Hanseatic City of Hamburg's decision on the application of a grant of extradition. BVerfGE 2 BvR 2236/04 (18.07.2005).

38 Douglas-Scott, op. cit. (2012), p. 429.

39 Teubner, Legal Irritants (2000); Melander, Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal law (2014), p. 276. This term also reveals a certain "psychological", not purely legal, reaction at national level.

40 In the *Pupino* case (Case 105/03, *Pupino*, 2003 CJEU), CJEU held that Member States are obliged to respect the principle of loyal cooperation in terms of implementing framework decisions in the area of judicial cooperation.

41 As the European Court of Human Rights has found Hungary to be in violation of Article 3 ECHR by reason of the overcrowding in its prisons, the German court realised that Mr. Aranyosi might be subjected to conditions of detention that are in breach of Article 3 ECHR and the fundamental rights and general principles of law enshrined in Article 6 TEU (para. 42), and referred the matter to CJEU for preliminary ruling. For more discussion see, for example, Willems, Mutual Trust as a Term of Art in EU Criminal Law (2016).

surrendered to Hungary, CJEU (sitting as the Grand Chamber) held that Articles 1(3), 5 and 6(1) of the EAW Framework Decision[42] must be interpreted as meaning that

> "where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State."

This means that the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, within certain, specified time limit, during which the executing judicial authority must postpone its decision. If, however, sufficient assurances are not received and therefore the existence of that risk cannot be discounted within a reasonable time, "the executing judicial authority must decide whether the surrender procedure should be brought to an end". These two joined cases are also a good example of the creativity on the part of the CJEU, which resolved a practical rule-of-law issue regarding the detention conditions in the executing State by advising that in such a situation the executing court simply gets in touch with the court that issued the EAW and finds out what the detention conditions actually are. It provides a simple yet effective solution that resolves, without a cumbersome and bureaucratic procedure, a concrete issue that may raise rule-of-law concerns.

A major further step in linking the rule of law and the EAW was the recent case *L.M.* (C-216/18 PPU), in which the Court of Justice held that a judicial authority (in that case an Irish court) called upon to execute a European Arrest Warrant (from Poland) must refrain from giving effect to it if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal and therefore of his fundamental right to a fair trial. According to the CJEU, to determine whether such a risk exists, the judicial authority asked to execute the EAW must determine whether there are substantial grounds for believing that the individual concerned will run such a risk if he or she is surrendered to the EAW-issuing State. Importantly, the information in a reasoned proposal recently addressed by the Commission to the Council based on Article 7(1) TEU is particularly relevant for the purposes of that assessment.[43]

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[42] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[43] Case 216/18 PPU, *LM*, 2018 CJEU LM.

Another example of how the (well-working) rule of law may be employed as a limitation on EU criminalisation can be taken from the criminal law philosophy and theory, concretely criminalisation theory. In the latter, the rule-of-law considerations and safeguards can act as a second-filter limiting factors, restraining the legitimate criminalisation process even if the proposed criminalisation has already successfully passed through the first criminalisation filter by demonstrating that the conditions of the substantive criminalisation principle (based on "serious harm" or "sufficient penal value" of the undesirable conduct) had already been met. In other words, although the proposed piece of criminal legislation proposes to criminalise conduct that is sufficiently "seriously harmful", in the second step various constitutional and rule-of-law considerations, principles of legality and *ultima ratio* can still suppress the legitimacy of the proposed legislation.[44]

Fundamental rights, considered part of today's EU-wide accepted rule of law concept,[45] can act as a limitation on the EU's criminalisation activities, as the EU legislation must be compatible with the fundamental rights (e.g. the principle of proportionality), enshrined in the Charter in 2000.[46] In that sense, the Charter may indeed provide an additional layer of protection against excessive criminalisation by providing extra safeguards and limiting judicial cooperation in situations where the issuing Member State's criminalisation is considered excessive by the authorities of the executing Member State.[47] Mitsilegas provides an example of Section 157 of the Anti-Social Behaviour, Crime and Policing Act 2014 in the UK, which introduced a new proportionality ground for refusal under section 21 A to the Extradition Act 2003. As the principles of legality and proportionality of criminal offences and penalties are guaranteed by Article 49 of the Charter, any violation of such principles would, therefore, represent a violation of fundamental rights.

The principle of legality has already played the role of a limiting factor, as reflected in the CJEU decisions, which set limits to the national criminalisation pre-Lisbon. In the *Berlusconi and Others*, the CJEU upheld the principle of the retroactive application of the more lenient penalty, which was considered as forming part of "the constitutional traditions common to the Member States" and therefore as "forming part of the general principles of Community law which national courts must respect when applying nation-

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[44] In the third step, i.e. on the level of the third criminalisation filter, more pragmatic limiting factors can be found, such as effectiveness, economic and social costs of criminalisation, defiance factor, costs of enforcement, practical feasibility of enforcement and similar. They, too, can mediate against the proposed criminalisation. See Peršak, Criminalising Harmful Conduct (2007), pp. 91–94.

[45] The Lisbon Treaty has incorporated the Charter of Fundamental Rights, thereby giving it a binding force.

[46] Banach-Gutierrez, Harding, Fundamental Rights in European Criminal Justice (2012), p. 263.

[47] Mitsilegas, From Overcriminalisation to Decriminalisation (2014), p. 424.

al legislation adopted for the purpose of implementing Community law".[48] The principle of retroactive application of a lighter penalty adopted after the commission of the criminal offence is also expressly stated in Article 49(1) of the Charter and is, therefore, a fundamental right, part and parcel of the principle of legality.

3.2. EU Criminal Law as an Instrument to Further the Rule of Law

However, EU criminal law legislation can also help the rule of law be achieved; it can provide one of the building blocks of the rule of law. Mitsilegas observes that

> "legislating on EU substantive criminal law (in particular in the case of corruption) may have limited effects if such action is not part of a broader framework addressing institutional and the rule of law deficiencies".[49]

In other words, EU legislation in the area of substantive criminal law can and should form a part of activities aiming to adhere to, and ensure respect for, the rule of law.

Although criminal law scholars are weary of any tendencies to expand criminalisation or widen the net of social control,[50] as the repression often happens at the cost of the individual's rights and freedoms, criminalisation and fundamental rights protection need not pull in a different direction. Particularly from the viewpoint of the victim, criminalisation may indeed be perceived as a realisation of her rights. As Banach-Guiterrez and Harding note,

> "fundamental rights in the criminal process can be invoked as both a justification for and as a limit on punitive action, both satisfying the need for victim redress and as a safeguard for those to whom a criminal law is applied".[51]

Indeed, criminalisation may be required to protect effectively the fundamental rights and freedoms of EU citizens. In the context of the case law of the European Court of Human Rights (ECtHR), some observe that, instead of using the criminal law as the ultimate remedy or last resort, ECtHR is, in the name of the effective protection of human rights and fundamental freedoms, progressively obliging the contracting parties to enact criminal law provisions.[52] Although ECtHR is an institution of the Council of Europe, its case law is and must be observed by the EU institutions, including CJEU,[53] and is, therefore, highly relevant for the EU legislation in criminal matters.

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48 Joined cases 387/02, C-391/02, C-403/02, *Berlusconi*, *Adelchi, Dell'Utri and Others*, 2005 CJEU, at I-3653.

49 Mitsilegas, The Future of Criminalisation after Lisbon (2012), pp. 226–227.

50 Cohen, Visions of Social Control (1985).

51 Banach-Gutierrez, Harding, op. cit. (2012), p. 262.

52 Ouwerkerk, Criminalisation as a Last Resort (2012), p. 241.

53 As stipulated, for example, in the so-called conformity clause of the Art. 52(3) of the Charter read together with the Charter's Preamble.

Looking at EU law more broadly, however, one cannot overlook the EU's contribution to the rule of law through the increase in the democratic legitimacy of the EU legislation, including criminalisation, since the Lisbon Treaty. Post-Lisbon, the European Parliament has become a co-legislator in EU criminal law, thereby increasing the democratic participation dimension in the EU decision-making. Considering that the EU conception of the rule of law presupposes the rule of law having both formal and substantive elements and therefore is intimately tied with the respect for democracy and fundamental rights,[54] the Lisbon Treaty has also in this way increased the rule of law in the EU. Moreover, it has contributed to some other principles that the rule of law is said to be based upon,[55] such as legal certainty, particularly as regards the more precise articulation of the existence and extent of EU competence in criminal matters.[56]

Furthermore, the so-called emergency brake stipulated in Article 83(3) TFEU, provides a special procedure for cases where a Member State considers that a draft directive proposed on the basis of the EU competence in criminal matters, "would affect fundamental aspects of its criminal justice system". In the case that a Member State pulls the emergency brake, it may request that the proposed directive be referred to the European Council, thereby suspending the ordinary legislative procedure. If a consensus is reached in the European Council within four months, the draft will be referred back to the Council, and the suspension of the ordinary legislative procedure will be terminated. However, in the case of disagreement at the European Council and provided at least nine Member States wish to establish enhanced cooperation based on the draft directive, they shall be authorised to proceed under the rules on enhanced cooperation. This, however, permits also other Member States (not only the one pulling the emergency brake) not to join in if they prefer not to do so.

3.3. Defective Rule of Law as a Limitation on EU Criminal Law

In the area of judicial cooperation, EU criminal law instruments increasingly rely on the so-called mutual recognition (MR), which should make the executing Member State refrain from a detailed check of existence of various rights and safeguards and the employment of correct procedure behind the issued MR-based instrument (for example, a European Arrest Warrant) in the issuing Member State. Mutual recognition indicates the immediate recognition and execution of court decisions taken in one Member State by judges in another Member State to expedite the movement of judicial decisions across the EU territory. Mutual recognition, however, turns on the assumption of mutual trust, i.e. it assumes that there exists mutual trust between the Member States, which does not

[54] European Commission (2014), op. cit. supra.

[55] Ibid., p. 4.

[56] Mitsilegas, EU Criminal Law after Lisbon (2016), p. 268.

necessarily correspond to reality.[57] Moreover, as CJEU's case law demonstrates, it may rightly be challenged or doubted, verified and disregarded in certain cases.

If the rule of law is not functioning properly or is perceived not to—as with "mutual trust", the rule of law is heavily dependent on subjective evaluations or perceptions—the EU criminal law instruments need not or should not be employed (at least not until the check of the situation on the ground provides sufficient assurances regarding the rule-of-law concern).[58] The cases *Aranyosi* and the Irish case, mentioned above in section 3.1, serve as an example here as well—in this section, however, from the viewpoint of the issuing Member State (Hungary), which was previously found deficient in terms of the fundamental rights regarding detention conditions. In this case, it will be remembered, the CJEU held that if fundamental rights could be violated in the EAW-issuing country, specifically that Mr. Aranyosi might be placed in detention conditions that would amount to inhumane and degrading treatment (violating Article 3 of ECHR and Article 4 of the Charter), the EAW could be postponed and would not necessarily require execution should the issuing Member State fail to provide sufficient assurances that the defendant's fundamental rights would not be violated in this concrete case. The defective rule of law in another Member State, the one issuing EAW, thus acts as a limit to the effective use of EU criminal law.

That national judges have the duty in certain cases to check the EU instrument's compliance with fundamental rights has already been established in the landmark decision in *N.S. v United Kingdom and M.E. v Ireland* (Joined Cases C-411/10 and C-493/10), which concerned the concept of a "safe country" within the Dublin system and the respect for fundamental rights of asylum seekers. Therein, the CJEU held that EU law prevents the application of a conclusive presumption that the Member States observe all the fundamental rights of the EU. More specifically, Article 4 of the Charter

> "must be interpreted as meaning that the Member States may not transfer an asylum seeker to the 'Member State responsible' within the meaning of the Regulation No. 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would

[57] For a critique of the mutual trust assumption, see Vermeulen, Flaws and Contradictions in the Mutual Trust and Recognition Discourse (2014).

[58] While at the EU level it is the European Commission's Directorate-General Justice and Consumers, more specifically, its Unit Justice Policy and Rule of Law that establishes the possible threats to the rule of law and responds accordingly, it is also Member States themselves or their courts that assess (and must assess) potential threats to their (and European) rule of law in their engagement with others, e.g. through judicial cooperation.

face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."[59]

If the rule of law in some Member State is not functioning properly or is not self-evident, i.e. perceived as such,[60] there will then be no actual "mutual trust", no trust on the part of others towards this Member State, and consequently MR-based instruments (issued in this state, to be implemented in another) will not function properly. They will not be applied, used or enforced, rendering this aspect of EU criminal law ineffective. However, the rule of law that is deficient at home (not in another Member State) can also jeopardise the successful performance of EU criminal law. An incorrect implementation such as an incorrect transposition of a directive or an incorrect interpretation or usage of a transposed directive can represent an infringement of EU criminal law (and of EU law, in general). For example, a Member State implementing additional grounds for refusal not allowed by the EAW FD or a Member State still requiring or evaluating double criminality for the offences listed in Article 2(2) of the EAW FD, for which the requirement of double criminality is abolished, can be seen as standing in direct opposition to the goal of such an instrument and defeating its purpose, which may be therefore—from the viewpoint of EU law— considered a violation of EU law in this respect.[61]

3.4. EU Criminal Law as an Instrument of a Challenge to the Rule of Law

The Lisbon Treaty has provided new opportunities for the development of the EU criminal law legislation. Article 83(2), of the Treaty on the Functioning of the European Union (TFEU) has provided an explicit legal basis for the EU to adopt criminal law directives to ensure the effective implementation of certain EU policies.[62] Specifically, Article 83(2) TFEU allows minimum rules to be established with regard to the definition

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[59] Joined cases C-411/10 and C-493/10, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* 2011 CJEU, para. 106. See: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0411.

[60] Perceptions count: even if the rule of law is in fact respected in the Member State A (e.g. the one issuing EAW), if Member State B (the Executing State) perceives it not to be, the problem of trust, mutual recognition and implementation of EAW can follow. This, of course, highlights also the problem of biases and national stereotypes penetrating into perceptions by other Member States, rendering MR instruments—and consequently EU criminal law—inoperative even where they should function well due to *actual* functioning or respect for the rule of law.

[61] However, in some countries, not flirting with infringement in this respect (i.e. shying away from insistence on the double criminality requirement) could represent or be perceived as a threat to its own domestic rule of law (specifically, its principle of legality), and so such a country seems to be stuck between a rock and a hard place.

[62] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,

of criminal offences and sanctions if it is "essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures".[63]

Taking into account Feinberg's categorisation of moral limits to criminal law and grounds of criminalisation,[64] Article TFEU 83(2) does not reveal a proper substantive criminalisation principle but rather a formal principle, based on the effectiveness of EU policy.[65] Effectiveness of some Union policy is the driving force of criminalisation that would be based on this provision. This "functional criminalisation"[66] uses criminal law as a means to an end; rather than being a self-standing EU policy, criminal law is used as a means to enable the EU to achieve the effectiveness of its other policies.[67]

The question is whether this poses a challenge on the part of EU criminal law or policy to the national rule of law. Is "effectiveness" introducing a new rule-of-law challenge *via* the principle of effectiveness behind Article 83(2) TFEU, overriding the classical criminal law principle of *ultima ratio*? Effectiveness of criminal law has traditionally been juxtaposed with the concern for fundamental rights and procedural safeguards in the criminal procedure. The need for the balance to be struck between the individual's rights and guarantees on the one hand and effective law enforcement and prosecution on the other in itself implies that effectiveness of criminal law implementation is likely to run counter to the fundamental human rights and procedural safeguards of the defendant. Here, moreover, we are even one leg removed from the effectiveness of criminal law and its practical implementation, i.e. enforcement, since Art. 83(2) TFEU talks about the effectiveness of *some other* Union policy or field of Union competence (that criminalisation is supposed to make effective or more effective).

Bearing in mind that criminal law (or criminalisation) is the most intrusive state (or supra-state) act with severe repercussions for the individual's human rights and freedoms,

Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, 20.9.2011, COM(2011) 573 final, p. 2.

63 With this formulation, the Lisbon treaty has incorporated the jurisprudence of the Court of Justice of the EU as developed in the environmental crime cases (Case 176/03, *Commission v Council*, 2005 CJEU and case 440/05, *Commission v Council*, 2005 CJEU). Effectiveness is one of the fundamental or constitutional principles of EU law, tightly linked with the general loyalty obligation or duty of sincere cooperation (Article 4(3) TEU), with primacy and direct effect, state liability, doctrine of indirect effect, and the autonomy of EU law. Article 83(2) TFEU, however, employs effectiveness also as a justification for EU legislative competence in criminal matters.

64 Feinberg in his tetralogy on the *Moral Limits to the Criminal Law* discusses the following moral grounds for criminalisation (without endorsing all as equally valid): harm to others (the harm principle), offence to others (the offence principle), harm to self (legal paternalism) and harmless wrongdoing (legal moralism).

65 While a substantive criminalisation principle provides guidance as to the content of criminalisation (i.e. what to criminalise), a formal one rather provides guidance on how or when to criminalise.

66 Mitsilegas, op. cit. (2016), pp. 58–62.

67 Mitsilegas, op. cit. (2014), p. 419.

and that the EU conception of the rule of law entails the respect for human rights, one may ask whether criminalisation, the aim of which is not to reduce crime but rather increase the effectiveness of some other policy, is not in itself a threat to the rule of law? This threat may only be theoretical; however, some claim it is very realistic if we consider the growing trend of "governing through crime",[68] reflected also in the repressive treatment of minor offences, such as incivilities.[69]

Drawing on Thompson's definition of the rule of law as "an ideology requiring ruling classes to accept a degree of self-limitation to govern effectively",[70] we may conclude that the rule of law therefore impedes and ought to impede effectiveness from being pursued at all costs. While Thompson's thought may have been written to apply nationally, i.e. against the country's ruling classes, it can undoubtedly be transposed, bottom-up, to be applied at the EU level as well. In the context of EU criminalisation, this idea could be translated to mean that when making decisions on whether and what to criminalise, considerations of fundamental rights (part of EU's conception of the rule of law), in addition to other limiting factors mentioned above, can and ought to overpower certain considerations of effectiveness, even if the latter is chosen to function as a first-filter, substantive principle of criminalisation.[71]

Another issue under this topic is raised by the principle of legality. As principles, such as the principle of legality, form part of the EU notion of the rule of law, problems of the EU legislation's compliance with the principle of legality could be seen as a rule-of-law problem. The recurring lack of precision in the wording of EU directives can be seen as such a compliance issue.[72] When transposing the directive into national law, Member States can define the criminal conduct in a more precise and detailed way; however, they are bound by the provisions of the directive as regards the conduct to be criminalised (and gravity of the criminal sanction, albeit less stringently)—the EU legislators now having explicit, even if not full, competence in criminal matters. The definitional imprecision at the EU level, albeit necessary to a certain extent, does therefore matter. Due to its effect on the national legislators, some emphasise that the wording of EU directives should be sufficiently precise when establishing the scope of criminal responsibility of the

[68] See e.g. Simon, Governing Through Crime (2007); Baker, Governing Through Crime – The Case of the European Union (2010); Banach-Gutierrez, Harding, Fundamental Rights in European Criminal Justice (2012).

[69] Although not at EU level, but at the level of several Member States, there is an observed trend in punitive regulation of incivilities, highlighted for example in a recent comparative work across various EU Member States (see Peršak, Regulation and Social Control of Incivilities (2016)).

[70] Douglas-Scott, ibid., p. 445.

[71] See Peršak, EU Criminal Law and Its Legitimation (2018) and, more generally, Peršak, op. cit. (2007).

[72] Sicurella, op. cit. (2016), p. 72.

individual[73]—this is particularly important to prevent Member States from overcriminalising and extending the criminalisation required by an EU directive.

The CJEU's *Melloni* case (C-399/11), however, reminds us that the national rule of law (concretely the Member States' own procedural rights and safeguards that may be higher than those granted by the Charter) must be, in some situations, set aside to ensure effective application of EU law. The *Melloni* was a landmark, albeit not uncontroversial, case regarding the relationship between EU and national standards of fundamental rights in the field of criminal justice. In this case, the Spanish Constitutional Court was confronted with a direct clash between the EU legislation on the European Arrest Warrant and the national constitution, which granted higher level of protection. The issue was referred for a preliminary ruling to the CJEU with the question whether the Spanish Constitution may, under Article 53 of the Charter, grant a higher level of protection than that provided for under EU law. In its judgment of 26 February 2013, the CJEU answered in the negative, stating that where an EU legal act harmonises the law between the Member States, national fundamental rights standards cannot be used as an obstacle to application of EU law, as the standard of protection is set by the Charter. In other words, Member States are not allowed to impose a higher level of fundamental rights' protection for cross-border cooperation in criminal matters than the standard that is set by EU law.[74] In situations that are fully governed, i.e. completely regulated, by EU law, the level of protection that may be granted to the parties can thus only be that of the Charter, the ultimate interpretation of which pertains to the CJEU.

4. Concluding Remarks: The Outstanding Rule-of-law Challenges

The rule of law is predominantly challenged in the actual practice, e.g. in the functioning of the judiciary in Member States or through governmental actions putting at risk national rule-of-law safeguards; however, it can also be challenged already at the legislation level. In fact, the legislation often acts as a *porte-parole*, announcing the potential threats and challenges to the rule of law, even though the latter can sometimes materialise without any legal basis as well.[75]

[73] Sicurella, ibid., p. 74.

[74] For more details on the case and its repercussions, see e.g. Franssen, Melloni as a Wake-Up Call (2014).

[75] Weiler notes how the exclusion of Jews from public life and the disposal of Jewish property in Nazi Germany followed a similar path of legality; both were based on elaborate legal mechanisms, similar legal structures, including judicial procedures, and so forth. Enemies were not hunted down illegally, but "arrested, tried, and then, lawfully, executed". It is this reality, in fact, that helped shape the current conception of the rule of law as something not purely legalistic, formalistic, but as a legal system validated in democratic practices and respecting human rights. Weiler, op. cit. (2012), pp. 149–150.

This article portrayed the conceptual issues and current systemic and practical challenges relating to the safeguarding of the rule of law at the EU level. Taking into account the problems described above, actions and legal challenges to the rule of law in the justice and criminal law area that play out at the EU level—be that they originate at the EU level or become an EU matter though national rule-of-law issues having repercussions for the effective functioning of the EU—, some of the outstanding legal and societal rule-of-law challenges could be summarised as follows:

(1) The most urgent issue is to raise awareness of Member States that upholding the rule of law is a matter of common interest in all Member States. In other words, if the rule of law is not respected in one Member State, it is threatened throughout the EU. The rule of law under threat in one Member State is not an "internal affair" of that state. While the rule of law can be achieved in several ways, as discussed above, it has to be achieved or respected in all Member States to be considered as respected in the EU.

(2) One of the challenges brought up in the Rule of Law dialogue, when applying the Rule of Law Framework, has also been how to approach the discussion about a fundamental value, such as the rule of law. This challenge stems from the fact that the Rule of Law dialogue is essentially a discussion on legality and constitutionality of national measures, as well as on their compliance with European standards (e.g. those on judicial independence). Any legal argumentation indispensably rests on certain common assumptions. These relate to the role of institutions in a legal system as well as more broadly on the understanding of justice delivered through the courts. For example, a government could claim that the highest courts in the country are not legitimate and start adopting measures that would fundamentally undermine their independence while claiming that the measures are aimed at "restoring" the legitimacy of courts. In such a situation, a purely legal argumentation could prove to be insufficient, and a broader dialogue on the perceived lack of legitimacy of courts would be needed to deconstruct the government's argument. This shows that a fruitful discussion on fundamental values such as the rule of law is primarily about law, but it is also about standards and about the objectives or goals to which to aspire. However, such a discussion is notoriously difficult to have in the often-encountered context where the vision of national politicians reaches no further than the next (re)election.

(3) Another challenge is to strike a good balance between the traditions of the states concerned, including their constitutional values and standards, and EU principles behind EU legal instruments. According to the Treaty, cultural diversity should be respected. In the area of criminal law, cultural diversity between states can have implications for their criminal law and criminal policy: cultural particularities, for instance, may influence the national decision regarding the selection of legitimate principles for criminalisation, affecting the content of what to criminalise (and what not to). Diversity at the level of constitutional safeguards may, on the other hand, explain some Member States'

reluctance to enforce EU instruments which clash with their own, national constitutional standards, and consequent problems with the enforcement, or even violations, of EU law. The CJEU tries to resolve such issues. However, its jurisprudence is not entirely straightforward or consistent, and many issues remain.

(4) A crucial rule-of-law challenge in the EU, although at the national level, is also the national institutions' respect for the separation of powers, respect for law and court decisions. Weiler suggests that one good, albeit not perfect, measure of the rule of law is "the extent to which public authorities in a country obey the decisions, even uncomfortable ones, of their own courts".[76] Moreover, the obedience to laws and court decisions also has to be seen or observed, particularly from the people at the highest positions in the public sector. When you have a university rector publicly declaring that, owing to the university autonomy, they do not feel bound by the laws, such as the Institutes Act, of the state (in essence that they are above the national law) or declaring that the court conviction for mobbing committed by him is to be understood merely as political pressure against him and the university, or an official of the Ministry of Justice (and former judge of the European Court of Human Rights and of the Constitutional Court) publicly disrespecting constitutional rights and mocking gender equality,[77] the challenges to the rule of law can seem very serious indeed.

(5) While there is no detailed blueprint for the rule-of-law-respecting institutional design, "no formula for its realisation"; Douglas-Scott observes that there are "crucial requirements" that relate to the key values of the rule of law, although these requirements can be achieved in different ways over different periods. Among these key values, she highlights that law must not be administered or implemented in arbitrary ways, laws must be sufficiently intelligible and public so that people may comply with them, and finally, that it is necessary that people "*believe* in and be committed to the rule of law".[78] This brings us to another challenge, linked to the trust in law and law authorities. Social psychologists and criminologists studying this phenomenon empirically observe that trust, or lack thereof, affects the perception of an authority's legitimacy and, in turn, people's cooperation and compliance with the law, thus having a significant impact on

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[76] Weiler, ibid., p. 154.

[77] "Law; if you look at why there is no rule of law in Slovenia [verbatim translation: why Slovenian state is not a state based on the rule of law], the problem lies precisely in the feminisation [of the legal profession]—women are not so well suited for this profession." ("*Pravo, če pogledate zakaj slovenska država ni pravna država, nimamo vladavine prava, je problem točno v feminizaciji – ženske za ta poklic niso tako zelo primerne.*") A statement by Boštjan M. Zupančič, former professor of law, former Constitutional Court judge, former judge of the ECtHR and later an official of the Ministry of Justice, on *Tednik* (weekly current affairs programme on Channel One of the national Radio Television Slovenia), 4 September 2017.

[78] Douglas-Scott, ibid., p. 446 (emphasis in the original).

the "effective rule of law".[79] Accordingly, if trust (in the effectiveness of the rule-of-law safeguards or in those who are entrusted with safeguarding it) is lacking, this presents a problem for the Member State in question, for instance for the functioning of its judicial system.[80] The lack of trust, however, also affects the EU, considering that mutual trust is crucial for the functioning of instruments based on mutual recognition, which are progressively being used in the judicial cooperation in criminal matters. It is, therefore, clear that, apart from legal considerations, there are important social psychological dimensions of the rule of law that must likewise be addressed, as they very much impact on the legal dimension of the rule of law—at the domestic as well as at the EU level.

The manuscript has been finalised in September 2018 and notes key developments in the area of rule of law in the EU until then. It does not reflect the developments in the area of rule of law since.

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[79] Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law (2003).

[80] On the importance and factors of trust in judiciary, see Peršak, Shared Standards of Justice (2014), particularly pp. 39–41.

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UDK: 343:347:061.1EU
Zbornik znanstvenih razprav
LXXIX. letnik, 2019, Perspektive prava Evropske unije, strani 149–174

Nina Peršak
Jože Štrus

Vladavina prava v EU: pravosodne in kazenskopravne razsežnosti

Članek preučuje, kako se na področju pravosodja in kazenskopravnega delovanja Evropske unije uveljavlja temeljno načelo vladavine prava oziroma pravne države in s tem povezane izzive. Najprej je predstavljen pravni okvir načela vladavine prava, nato ukrepi za njegovo uresničitev v praksi, nazadnje pa različna razumevanja vloge načela v kontekstu kazenskega prava. Načelo se uresničuje v dialogu med Komisijo in državami članicami ter hkrati na ravni EU. Ta ima s Pogodbo o delovanju Evropske unije izrecno določene pristojnosti na področju kazenskega prava. Načelo vladavine prava se zato na ravni EU lahko kaže tudi kot orodje, s katerim je mogoče omejevati kazenskopravno pravodajno dejavnost organov EU. V članku so analizirane temeljne odločbe sodišča EU, ki kažejo na domet omejevalne vloge načela vladavine prava. Kazensko pravo EU je mogoče razumeti hkrati kot sredstvo za krepitev in sredstvo za šibitev načela vladavine prava. Krepitev kazenskopravnih pristojnosti je prinesla hkrati tudi vzpostavitev mehanizmov, ki povečujejo demokratično legitimnost zakonodaje EU, zlasti z okrepitvijo vloge Evropskega parlamenta. Na drugi strani ostajajo kazenskopravne pristojnosti trdno povezane s cilji in politikami EU, zato lahko kazensko pravo EU še vedno razumemo tudi kot orodje za doseganje ciljev politik EU. Članek prepoznava različne vidike vladavine prava v kontekstu kazenskega prava EU in razkriva, kateri izzivi na področju vladavine pravaše čakajo EU.

Ključne besede: načelo vladavine prava, Okvir EU za krepitev načela pravne države, kazensko pravo EU, kazenskopravna politika, Pogodba o delovanju Evropske unije, načelo (kazenskopravne) škode, vzajemno zaupanje.

UDC: 343:347:061.1EU
Zbornik znanstvenih razprav
LXXIX. letnik, 2019, Perspectives on European Union Law, pp. 149–174

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Rule of Law in the EU: Justice and Criminal Law Dimensions

The article examines the existing rule of law efforts and rule of law challenges in the EU, specifically those linked to the functioning of justice systems and EU criminal law. First, the legal framework of the principle of the rule of law is presented, then the measures for its realisation in practice, and finally the different understanding of the role of the principle in the context of criminal law. The principle is pursued in a dialogue between the Commission and the Member States and at the same time at the EU level. The Treaty on the Functioning of the European Union explicitly defined competences in the field of criminal law. Therefore, the principle of the rule of law can be regarded at the EU level also as a tool for limiting the criminal-law lawmaking activity of the EU bodies. The article analyses the fundamental judgments of the EU Court that demonstrate the scope of the restrictive role of the principle of the rule of law. EU criminal law can function as a means of strengthening and a means of undermining the rule of law. Strengthening of criminal jurisdiction has also brought about the creation of mechanisms that strengthen the democratic legitimacy of EU legislation, in particular by strengthening the role of the European Parliament. On the other hand, criminal law jurisdiction remains firmly linked to EU objectives and policies, and EU criminal law can still be understood primarily as a tool for achieving EU policy goals. The article identifies various aspects of the rule of law in the context of EU criminal law and concludes by revealing some outstanding rule-of-law challenges yet to be fully addressed in the EU.

Keywords: rule of law, Rule of Law Framework, EU criminal law, criminal law policy, Treaty on the Functioning of the EU, the harm principle, mutual trust