

Arnisa Tepelija\* - 21 May 2024

## Past Legacies and Future Projections: The Implementation of the Rule of Law in EU Enlargement Policy

A new era of post enlargement-fatigue is unfolding. Enlargement is back on the agenda of the European Union as a **strategic interest** and geopolitical imperative following Russia's war on Ukraine. In December 2023 the Council decided to open accession negotiations with Ukraine and the Republic of Moldova, grant EU candidate status to Georgia, open accession negotiations with Bosnia and Herzegovina once it achieved certain criteria, as well as complete the opening phase of the accession negotiations with North Macedonia.

This revival follows a 10-year stall in pre-accession advancements since the signature of Croatia's accession Treaty to the EU in 2011. The multiple crises hitting the EU in the past two decades, including the financial and immigrant crises, the democratic backsliding in certain 'new' EU states, as well as concerns relating to the need for structural reforms in the EU before further expansion, were the main drivers of this process or lack thereof. Furthermore, a common perception existed amongst some Member States that enlargement could not benefit them, so they vetoed advancement in accession negotiations, even when conditionality criteria had been fulfilled. For the time being, there is a general feeling that enlargement is beneficial for the EU, insofar as a common basic denominator is the desire for **defensive enlargement**. Some of the other concerns persist nonetheless, especially those pertaining to the promotion of the rule of law. They call for a reconceptualisation of hitherto paradigms used for that purpose, as well as general consensus on the fundamentals. The good news is that one needn't look too far for direction, nor try to reinvent the wheel. Some lessons have been learned from previous enlargements which carry the potential to help navigate the new ones. The ones chosen as most substantial for the purposes of this paper are: *the substantiation and convergence to rule of law criteria, and the careful use of pre-accession conditionality.*

### Legacies of Past Enlargements and the Imperative of the Rule of Law

The rule of law is a constitutional principle of the EU, enshrined in Article 7 TEU, enforced in Article 19 TEU, as well as in Article 49 of the Charter for Fundamental Rights. **The Copenhagen criteria**, requiring amongst other things, strong institutions to uphold the rule of law, predate the provisions of Article 49 TEU<sup>1</sup> that place conditions on accession to the EU with respect to fundamental rights and rule of law, and as such they claim their place in the constitutionalisation of the EU legal order<sup>2</sup>.

Rule of law is proclaimed to be a foundational, **non-negotiable** principle of the EU legal order. No matter what kind of integration logics will be applied for the 'new Europe' (be it a Europe of same or different speeds), in no scenario does rule of law stand for an *à la carte* option. Yet, giving concrete meaning, expression and operationalisation within the existing legal framework, be it in EU Law for internal purposes or for pre-accession promotion<sup>3</sup>, is still work in progress.

Lately, the EU has advanced the concrete definition of its fundamental values, especially on judicial independence, while simultaneously putting more effort into operationalising rule of law in enlargement policy. The democratic backsliding in Hungary, Poland, Romania and Slovakia inspired/created a momentum to 'mend' the lack of rule of law oversight on countries after accession. CJEU started to give concrete meaning and substance to the already existing legal framework protecting the rule of law and judicial independence, starting in 2019 with **Case C-64/16 ASJP** (Portuguese Judges), while the Commission created the **annual rule of law report** from 2020. The democratic backslidings in EU Member States were also reflected in more stringent RoL criteria for aspiring countries so as not to be in the situation of having new 'bad pupils' accessing the EU.

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While this has initiated a new wave in the EU constitutional space with deep impacts in EU MS, these changes are still [not enough to cover the whole array of issues](#) and they are not automatically transferable to countries outside the EU. There is a need for *substantiation* of rule of law criteria and there is a need for *convergence*. The need for *substantiation* or a basic common understanding of what is meant by rule of law has been a continuing discussion since 2004<sup>4</sup>. A thread of coherence in understanding rule of law would enable a translation of the principles set recently by the CJEU into accession conditions and frameworks. This could be done by means of the second concept mentioned above, the *convergence* of those templates, both within and outside the EU, for measuring and monitoring rule of law progress. A first good sign of convergence is the Commission's annual rule of law report, which has been used so far to measure the state of the rule of law only in EU Member States, will now be used for the first time to measure the adherence of four other pre-accession countries to EU rule of law standards: [Albania, North Macedonia, Montenegro and Serbia](#). The continuation and expansion of this practice of convergence would help to put rule of law monitoring for both EU Member States and accessing states on the same track.

Substantiation of rule of law criteria and the convergence of mechanisms to monitor them does in no way represent “one-fits-all” solutions. It means building a system of constitutional principles and common references translated into a comprehensive set of criteria applicable to different challenges with the rule of law. This would help prevent the fragmentation of mechanisms used. A most recent example is [Case C-355/19](#) where CJEU refused to refer to the specific provisions of the Mechanism for Cooperation and Verification - MCV applicable only to Romania and Bulgaria, by choosing to refer to encompassing primary sources of EU Law. And yet, this opens the door for the EU to make [far-reaching and detailed legal framework](#) for the independence of the judiciary and rule of law, or differently said, update its [rule of law toolbox](#) for every backsliding scenario.

If this approach was coherent with the rule of law promotion in the pre-accession phase, it would prevent unduly lax or overly stringent judicial reforms, which has been the case lately. Examples of unduly lax reforms are precisely the cases of Romania and Bulgaria before acceding the EU, which led to the creation of the Cooperation and Verification Mechanism

as a means to compensate for lack of proper rule of law oversight before accession, while a typical case of overly stringent pre-accession reforms is Albania, where extraordinary judicial accountability mechanisms led the judicial system almost to collapse<sup>5</sup>.

## Conditionality

Conditionality as a cornerstone to enlargement policy, is the most transformative process in countries aspiring to enter the club and the rule of law has played a progressively central role in it. Over time, chapters pertaining to rule of law, fundamental rights and judicial cooperation, namely Chapters 23 and 24 of the *acquis*, are addressed at the early stage of the negotiation process and monitored constantly up until its completion, reflecting the [‘fundamentals first’](#) policy of the EU Commission.

The [revised enlargement methodology](#), first adopted for the Western Balkans in 2019, provides a new clustering of the negotiating chapters amongst which, chapters related to rule of law belong to the cluster fundamentals. They are now measured at every step with an ever-growing number of interim benchmarks, accompanied by corrective measures throughout the process. This new enlargement methodology reflects the need to restore credibility to the enlargement process. It puts at the center notions such as [political commitment, dynamism, capacities, and reversibility](#). Reversibility is a novelty of this enhanced methodology, connected directly to the Rule of Law progress, and represents a new form of either positive or negative conditionality, but leaves no option for stagnation. While this aspect contributes substantially to the dynamism of the process, its politicisation potential on the other side provides the opportunity for Member States to drive forward their own interests<sup>6</sup> and contradicts the promise of predictability of the conditionality process. Already its overuse based on these national self-interests has halted negotiations for pre-accession countries, peaking with the case of North Macedonia being blocked twice to open EU negotiations due to the change of name requirements by Greece and its language recognitions challenges by Bulgaria. Surely, the [proposed treaty changes](#) to change the voting procedures in the Council from unanimity to qualified majority on CFSP matters before enlargement would be ideal, but the consciousness of the actors involved in decision-making not to abuse the process is not to be underestimated either. It is important for pre-accession countries not to receive

distorted conditionality by means of politicisation of rule of law criteria, otherwise there is a risk of falling within the [unescapable transactional trap](#), which affect their [transformative capacities](#) and undermine the very credibility this process aims to enhance.

Another conditionality distortion is The Growth Plan for the Western Balkans. It is a financial tool of up to €6 billion, approved by the EU in November 2023, which aims at bringing the Western Balkans region close to the EU Single Market via the existing Common Regional Market. It dedicates two of its four pillars to giving assistance in the region for accelerating reforms. However, according to a [study from EWB](#), based on a [recent opinion of the Court of Auditors notes](#), there is a risk “*that the conditions for the plan are not ambitious enough and cannot be properly measured*”. While this was expected with a degree of enthusiasm from the recipient states, this mechanism seems to overlap at times with the main conditionality policy and sometimes forming a separate one which applies a more lenient approach towards the measuring progress, and especially towards the management of EU funds. The expectation here is to apply the logic of *budgetary conditionality* as the EU did with its Budgetary Regulation Framework 2021-2027, namely [Regulation 2020/2092](#) protecting the EU against corruption, [The Recovery and Resilience Fund Regulation 2021/241](#) setting a country-specific rule of law conditionality, and changes to Common Provisions Regulations, relating it to fundamental rights.

Again, the main term is the convergence of the conditionality mechanisms in the sense of tying them more and more with rule of law principles, and not subverting the rule of law principles to different types of conditionalities according to the most favorable principle.

## List of references

- 1 Hillion, C. (2004). *Enlargement of the European Union: The Discrepancy Between Accession Conditionality and Membership Obligations*. *Fordham International Law Journal*, Vol. 27, p. 715-740.
- 2 Thomas, D.C. (2006). *Constitutionalization Through Enlargement: The Contested Origins of the EU's Democratic Identity*. *Journal of European Public Policy*, Vol. 13, No. 8, p. 1190-1210.
- 3 Kochenov, D. (2004). *Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law*. *European Integration Online Papers*, Vol. 8., No.10, p. 1-24.
- 4 *Ibidem*
- 5 Hoxhaj, A. (2021). *The EU Rule of Law Initiative Towards the Western Balkans*. *Hague J Rule Law*, Vol 13, p. 143-172
- 6 Jano, D. (2024). *EU Accession Criteria and Procedures: Up for the Challenge?* *Zeitschrift für Europarecht*, p. 1-21.

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## Summary of Reflections

The many rounds of enlargement have provided useful insights on what needs rethinking and/or reconceptualising in EU rule of law promotion. Rule of Law Conditionality is wanted and needed and possesses the flexibility to navigate complex political landscapes. However, the risk of trade-offs at the expense of set RoL standards still persists due to the politicisation potential of such a tool. Other risks come from the application of different strains of conditionalities which again do not hold to the same standards of RoL. Substantiation and convergence of the rule of law understanding are necessary to prevent confusion on what needs to be politicised and what not when it comes to delivering rule of law promotion.

While on the technical aspect, there is a better preparedness of the European Union to deal with rule of law conceptualisation and assessment, there is still a need to substantiate rule of law requirements, agree on the fundamentals and converge the principles, agendas, frameworks and mechanisms on rule of law oversight, both inside and outside the EU, in order to help the process of rule of law promotion to become coherent and harmonised.

Europe is redefined with every exercise of enlargement, and this is undoubtedly one of them. If rule of law, democracy and human rights are at the centre of the EU's self-perception, then more work is needed to better define rule of law, define possible threats to the rule of law, substantiate and operationalise principles which could be applicable in rule of law promotion within and outside of the EU.

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