

MIND THE GAP: ISSUES OF LEGALITY IN THE EU'S CONCEPTUALISATION OF THE RULE OF LAW IN ITS ENLARGEMENT POLICY

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Abstract: The article critically examines the EU's conceptualisation of the rule of law in its enlargement practice. Two main arguments will be advanced. First, it will be argued that legality is a core element of the rule of law, and adherence to it is a fundamental characteristic of any institutional order governed by the rule of law, as evidenced in the Treaty (Article 2 TEU) and as acknowledged in the jurisprudence of the Court of Justice. Secondly, it will be shown that the EU's pre-accession process does not sufficiently address this rule of law element, to the extent that a) its main focus is alignment with the acquis, and b) changes made to domestic legislation are measured in terms of quantity and not quality. It will be demonstrated that this generates problems of legality in the candidate states, including legal inflation, instability, lack of generality of law and coherence, as well as problems of enforcement. It will be asserted that even though this is recognised by the Commission, over the years the EU has not amended its methodology, thereby failing to recognise that ensuring respect for the rule of law is not merely a process of adoption of a corpus of rules, but rather a complex process of adaptation to a particular value system. The article continues by arguing that the quality and complexity of the acquis leave considerable room for improvement, while at the same time raising questions as to its suitability as an instrument for development in the (potential) candidate countries. As a conclusion, some policy reflections will be offered on how these issues could be better addressed.

Keywords: EU rule of law, legality, EU enlargement, EU acquis, quantitative approach, benchmarking

1 Introduction

The founding Treaties attest to the fact that from its inception the European integration project has been geared towards deeper political cooperation, predicated on a set of core values with a principal emphasis on the rule of law. The current rule of law crisis in newer Member States,

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such as Poland, Hungary and Romania, has called into question the integration project by casting doubt on the extent to which foundational EU values are truly embedded in the legal orders of new Member States. While there is a significant body of literature analysing the concrete legal bases and instruments the EU may avail itself of in enforcing the rule of law, the role of the Union's pre-accession process in the emerging threat to the rule of law has largely remained unexplored. In this sense, the current debate is limited to the pitfalls of internal rule of law oversight mechanisms, whereas in reality the consolidation of the rule of law in new Member States is supposed to occur at a much earlier stage, ie during the pre-accession process. This raises the question as to whether the pre-accession process sufficiently robustly addresses rule of law reform.

In this light, this contribution critically examines the EU's conceptualisation of the rule of law in its enlargement policy with a view to ascertaining whether the current value crisis can be traced back to the interpretation of the rule of law and external mechanisms for ensuring respect for this value in the accession process. It will do so by focusing on one of the widely accepted core elements of the concept of the rule of law, namely legality. It will be shown that legality operates in two ways: it sets requirements for government in its relation to its laws, and it provides criteria for the validity of law itself. In this way, it underpins the rule of law ideal in that it helps guide the behaviour of individuals and sets requirements that curb the power of the governing. It will be demonstrated that adherence to legality is a fundamental characteristic of any institutional order governed by the rule of law, as evidenced in the Treaty (Article 2 TEU) and as acknowledged in the jurisprudence of the Court of Justice.

Against this background, the article turns next to the EU's enlargement practice in order to ascertain whether, and if so to what extent, legality forms a core principle of the Union's rule of law reform efforts in the acceding states. Two main problems are identified in this respect. First, despite the central role of legality internally, it will be shown that the element is virtually absent from the EU's external conceptualisation of the rule of law. In the Copenhagen documentation, containing the Commission's yearly monitoring reports, enlargement strategies as well as the Council conclusions on enlargement, little to no room has been dedicated to a progress analysis of this element. Secondly, it is asserted that the very methodology used in the pre-accession process undermines legality in the acceding states. More particularly, it will be argued that the EU's pre-accession methodology is problematic to the extent that its main focus is alignment with the *acquis*, and changes made to domestic legislation are measured in terms of quantity (ie the number of laws adopting EU legislation), and not quality. It is shown that this generates

problems of legality in the candidate states, including legal inflation, instability, lack of generality of law and coherence, as well as problems of enforcement. It will be asserted that even though this is recognised by the Commission, over the years the EU has not amended its methodology, thereby failing to recognise that ensuring respect for the rule of law is not merely a process of *adoption* of a corpus of rules, but rather a complex process of *adaptation* to a particular value system. The article concludes by arguing that the value narrative of European integration is undermined by the EU's own pre-accession practice, thereby being a contributing factor to the rule of law related concerns of today.

Before moving on to the main body of the text, a caveat should be added. The article does not claim that the EU's conceptualisation of the rule of law in the pre-accession process, and, more particularly, the lack of legality therein, is the sole contributing factor to the current value crisis in the aforementioned Member States.¹ Such a direct causal connection would be difficult to establish and goes beyond the ambit of this article. Rather, it suggests that the overlooked aspect of the lack of legality in the enlargement process really deserves focused attention as it suggests certain linkages between the EU's conceptualisation of the rule of law, the strategy it relies on for the value's implementation during the accession process, and the questions this raises as to the extent to which the value is 'truly and clearly embedded'² in the future Member States. Lack of embeddedness is likely to lead to issues further down the road and after accession. Accordingly, the article merely suggests that the rule of law related problems in some of the current Member States may arguably, even to a small extent, be traced back to the enlargement process.

2 Legality as a core element of the rule of law

In this section, it will first be shown that legality is a core element of the rule of law, containing various sub-elements necessary for law's overall quality, such as stability, coherence, and enforcement. Following this, it will be asserted that the rule of law, including legality, is of vital importance for the functioning of the EU legal order and should, thus, also form part of the EU's conceptualisation of the rule of law in enlargement.

There is widely held agreement amongst legal scholars that, at its core, the rule of law requires that both governments and citizens are

¹ For some broader literature on the current crisis, see, for example, Heather Grabbe and Stefan Lehne, 'Defending EU Values in Poland and Hungary' (*Carnegie Europe*, 4 September 2017) <<https://carnegieeurope.eu/2017/09/04/defending-eu-values-in-poland-and-hungary-pub-72988>> accessed 20 October 2019.

² Commission, '2019 Communication on EU Enlargement Policy' (Communication) COM (2019) 260 final 3.

bound by and act consistently with the law.³ Finnis,⁴ MacCormick,⁵ and Waldron⁶ all share the view that there are certain features the law must possess in order to successfully fulfil its function as law and for the rule of law to effectively protect citizens and guide individual behaviour. From this, a number of common characteristics have been deduced, in line with a list of formal principles articulated by, most notably, Fuller⁷ and Finnis:⁸ laws must be prospective, be made public, be general, be clear, be stable, certain, coherent, and be applied to everyone according to their terms.⁹ Consequently, formal legality provides requirements for the validity of law itself, which, in turn, can aid citizens in taking control over their own lives and curb the power of the governing. Similar key aspects of the rule of law are also reflected in many of the constitutions of the Member States. For instance, provisions on the hierarchy of norms by which administrative acts are subordinated to parliamentary statutes can be found, amongst other systems, in the Estonian, French, German, Italian, and Swedish legal systems.¹⁰ Further examples of rule of law facets include the requirement of a parliamentary statute for the imposition of obligations, administrative charges or penalties, and criminal punishment;¹¹ legal certainty and the foreseeability of law;¹² rules on parliamentary reservations and the conditions and grounds for limiting fundamental rights.¹³

For the EU, legality is one of the rule of law's central elements, mentioned first in the enumeration of rule of law elements in the Commission's initial attempt at formulating the core components of the notion

³ See, for example, Brian Z Tamanaha, 'A Concise Guide to the Rule of Law' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 4.

⁴ John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 270-276.

⁵ Neil MacCormick, 'Natural Law and the Separation of Law and Morals' in Robert P George (ed), *Natural Law Theory* (OUP 1992) 121-125.

⁶ Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *GL Rev* 1.

⁷ Lon Fuller, *The Morality of Law* (revised edition, Yale University Press 1969).

⁸ Finnis (n 4).

⁹ Fuller (n 7) 39; Finnis (n 4) 170-171.

¹⁰ See, for an overview, Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer 2019).

¹¹ See, for example, Joakim Nergelius, 'The Constitution of Sweden and European Influences: The Changing Balance between Democratic and Judicial Power' in Albi and Bardutzky (n 10) 334.

¹² See, for example, Peter G Xuereb, 'The Constitution of Malta: Reflections on New Mechanisms for Synchrony of Values in Different Levels of Governance' in Albi and Bardutzky (n 10) 157; Joan Solanes Mullor and Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Albi and Bardutzky (n 10) 553.

¹³ See, for example, Leonard Besselink and Monica Claes, 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution' in Albi and Bardutzky (n 10) 206-207.

in the context of the 'EU Framework to strengthen the rule of law internally'.¹⁴ Indeed, legality, which is described as 'a transparent accountable, democratic and pluralistic process for enacting laws',¹⁵ has been confirmed by the Court of Justice of the European Union (the Court) as a fundamental principle of the Union, by stating that '... in a community governed by the rule of law, adherence to legality must be properly ensured'.¹⁶ Similarly, the Council of Europe's Venice Commission – a body that works on interpreting and articulating the common European constitutional heritage and has been particularly active in assisting the new democracies in Central and Eastern Europe from the beginning of the 1990s on their paths to EU accession¹⁷ – identifies legality as one of five main rule of law elements.¹⁸ According to its 'Rule of Law Checklist', legality implies, *inter alia*, that state action must be in accordance with and authorised by the law, that public officials respect both procedural and substantive law, that law-making procedures are clear, and that the law is effectively implemented and enforced.¹⁹ Accordingly, legality creates a benchmark for the quality of laws and serves as a protective value against governments overstepping their power.

As a founding value of the European project,²⁰ the rule of law not only guides the EU's conduct,²¹ it also underpins the governing orders

¹⁴ Commission, 'A New EU Framework to Strengthen the Rule of Law' (Communication) COM(2014) 158 final 4. The other rule of law elements in the Commission's non-exhaustive list are: legal certainty; the prohibition of arbitrariness of executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; and equality before the law.

¹⁵ COM(2014) 158 final Annex 1.

¹⁶ Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-03891, para 63.

¹⁷ On the relation between the EU and the Venice Commission, see, for example, Wolfgang Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact' (2014) 25 EJIL 579.

¹⁸ Next to legality, the checklist also mentions legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, access to justice, including an independent and impartial judiciary and the right to a fair trial.

¹⁹ Venice Commission, 'Rule of Law Checklist' (CDL-AD(2016)007) <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)> accessed 20 October 2019.

²⁰ In the context of the high-level meeting of the United Nations General Assembly on the rule of law at national and international level on 24 September 2012, the European Union issued a statement on its relation to the rule of law in which it called the latter one of the 'pillars on which our European Union is built'. José Manuel Durão Barroso 24 September 2012, Statement by Commission President Barroso at the High-level Meeting on the Rule of Law <www.avrupa.info.tr/en/news/statement-president-barroso-high-level-meeting-rule-law-2184> accessed 20 October 2019. On the acknowledged constitutive dimension for the Union's own identity, see Joined Cases C-402/05 P and C 415/05 P *Kadi v Council* [2008] ECR I-6351, para 285. See also Annex I to COM(2014) 158 final/2 in which the Commission refers to the rule of law as 'a legally binding constitutional principle'.

²¹ See Commission, 'A New EU Framework to Strengthen the Rule of Law' (Communication) COM(2014) 158 final/2.

of all individual Member States (Article 2 TEU). Moreover, it has both an internal and an external dimension. Internally, the 'mutually interdependent legal relations'²² linking the EU and its Member States, and its Member States with each other, are premised on the existence of mutual trust between Member States in recognition of the rule of law as a shared values and respect for EU law.²³ As emphasised by Commissioner Reding, '[r]espect for the rule of law is in many ways a prerequisite for the protection of all other fundamental rights listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties'.²⁴ In addition to it being a vital precondition for the functioning of the EU legal order itself, the rule of law is also a source of legitimacy for the EU's external conduct as a value-driven international actor,²⁵ giving weight to its ambitions of value-based relations and interactions with third countries (Article 3(5) and 21(1) and (2)(b) TEU).

Enlargement, as the Union's Member State building-policy, lies at the intersection of both these dimensions, functioning as a showcase for the EU's external efforts regarding rule of law promotion, and, at the same time, as a testing ground for the Union's forays into elucidating the notion's component elements at the domestic level of the future Member States.²⁶ It would go beyond the ambit of this article to analyse all the elements of the EU's conceptualisation of the rule of law in enlargement, which include an accessible judiciary²⁷ that functions effectively,²⁸ exercises judicial review,²⁹ and can be held accountable.³⁰ It also includes

²² Opinion 2/13 pursuant to Article 218(11) TFEU (*ECHR II*) ECLI:EU:C:2014:2454, para 167.

²³ *Ibid.*, para 168.

²⁴ Viviane Reding, 'The EU and the Rule of Law – What Next?' <http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm> accessed 20 October 2019.

²⁵ Recently, see Commission, 'Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy' (Report) June 2016, para 3.5.

²⁶ See, for instance, the pre-accession process which links progression towards accession, and thus to the status of Member State, to the applicant's respect for the Union's values. See, for example, para 4 of the Preamble of Council Regulation (EC) 231/2014 establishing an Instrument for Pre-accession Assistance (IPA II) [2014] OJ L77/11.

²⁷ See, for example, Regular Report Poland (1999) 14; Regular Report Romania SEC(2002) 1409, 28; Progress Report Former Yugoslav Republic of Macedonia SEC(2007) 1432, 12.

²⁸ See, for example, Regular Report Poland (1999) 15; Regular Report Slovenia (1999) 59; Regular Report Romania (2000) 92; Regular Report Latvia SEC(2001) 1749, 17; Progress Report Croatia, SEC(2005) 1424, 15; Progress Report Former Yugoslav Republic of Macedonia SEC(2010) 1332, 57; Progress Report Serbia, SWD(2013) 412 final, 40; Report Albania SWD(2016) 364 final, 40.

²⁹ See, for example, Regular Report Poland (2000) 19; Regular Report Bulgaria (2001); Progress Report Montenegro (2008) 13.

³⁰ See, for example, Progress Report Croatia (2005) 84; Progress Report Serbia (2012) 10; Progress Report Kosovo SWD(2014) 306 final 13.

checks on police and security forces,³¹ as well as appropriate prison conditions, and the proper treatment of suspects.³² Instead, the main focus of this article will be on formal legality, and, more particularly, on the sub-elements of *stability* and *coherence* (non-contradiction) of legal rules, as well as their *enforcement*. Stability of laws implies that laws remain stable or unchanged over a period of time to provide the necessary constraints and predictability for decision-making.³³ Coherence of laws reflects clear and non-contradictory laws that enable citizens to follow them and for the judiciary to apply them consistently. This entails that the legislature has an obligation to endeavour not to include conflicting provisions within a single law, nor to enact a law that negates a provision, or even objective, of another law. Moreover, the requirement of non-contradiction also acts on a more abstract level of coherence, that of the legal system with its moral-political underpinnings.³⁴ Accordingly, Dworkin has argued that law is morally incoherent if its underlying justifications and the various prescriptions cannot be subsumed under one coherent moral theory.³⁵ However, he was well aware of the fact that the laws' moral soundness had to be balanced against the legal system's integrity, thereby allowing for the rectification of possible past mistakes.³⁶ Finally, for law to function properly, various law enforcement agencies and the judiciary must apply it, while simultaneously preventing a discrepancy between the rules as declared and as they are actually administered.³⁷ Only if deviations from the rules are treated as such can rules guide human conduct and will individuals stick to the rules.

³¹ See, for example, Regular Report Turkey (2002) 22; Progress Report Serbia (2012) 11.

³² See, for example, Regular Report Romania, SEC(2002) 1409, 28.

³³ Fuller (n 7) 70-79. Stability of the (national) legal framework features prominently as one of legality's main aspects put forward by most legal philosophers. For example, Joseph Raz, *The Authority of Law* (Clarendon Press 1979) ch 11; Finnis (n 4) 270-276; Neil MacCormick, 'Natural Law and the Separation of Law and Morals' in Robert P George (ed), *Natural Law Theory* (OUP 1992) 121-125; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 GL Rev 1; Robert S Summers, 'The Principles of the Rule of Law' (1999) 74 NDL Rev 1691.

³⁴ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 176-224.

³⁵ Andrew Marmor, 'The Rule of Law and Its Limits' USC Public Policy Research Paper 16/2003, 36 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=424613 > accessed 20 October 2019.

³⁶ Dworkin (n 34) 65-72. For Raz's opinion on this particular point, see Joseph Raz, 'The Relevance of Coherence' (1992) 72 BUL Rev 273. For the questionability of the argument on moral coherence in light of current pluralist societies, see John Rawls, *Political Liberalism* (Columbia University Press 2005) 11-14.

³⁷ Fuller (n 7) 81.

3 The EU's pre-accession process and the missing element of legality

Having highlighted the rule of law's core element of legality and placed it within the context of the Union's enlargement policy, the article will next turn to this external policy area in order to provide the background for the rest of the article. It will be shown that in spite of the increasing focus put on the rule of law in the pre-accession process, legality, in terms of legal stability, coherence, and enforcement, seems to be omitted from the Commission's understanding of the rule of law. More particularly, it will be argued that even though some attention is paid to administrative reforms in the context of the transposition of the *acquis*, the Commission has not put forward standards in relation to the quality of domestic legislation.

On 1 May 2004, ten new Member States acceded to the EU (the Baltic countries of Estonia, Latvia, and Lithuania, Cyprus, the Czech Republic, Hungary, Malta, Poland, Slovakia, and Slovenia), followed on 1 January 2007 by Bulgaria and Romania, and on 1 July 2013 by Croatia. Currently the EU is negotiating with the candidate countries Montenegro, Serbia, and Turkey. At the moment of writing, the decision to start accession negotiations with North Macedonia and Albania has just been reverted to the EU-Western Balkans Summit in Zagreb in May 2020.³⁸ Lastly, Bosnia and Herzegovina and Kosovo have been recognised as potential candidate countries. Based on Article 49 TEU, EU enlargement has developed into an elaborate process including negotiations, Commission monitoring, and far-reaching domestic reforms.

In previous enlargement rounds, both democratic (Spain, Portugal, and Greece³⁹) and economic (United Kingdom⁴⁰) considerations played a role. However, it was with the pre-accession strategy in the context of the accession of the Countries of Central and Eastern Europe (CEECs) that more details were fleshed out regarding the accession conditions. According to the well-known Copenhagen criteria of 1993, membership requires stability of institutions guaranteeing democracy, the rule of law,

³⁸ Council, 'Conclusions', Council Doc. EUCO 23/19 point 5.

³⁹ See Commission, 'Spain's Application for Membership' (Opinion) COM(78) 630, 9; Commission, 'Portuguese Application for Membership' (Opinion) COM(78) 220, 7; Commission, 'Greek Application for Membership' (Opinion) COM(76) 30 final.

⁴⁰ De Gaulle vetoed the first request on grounds of economic suitability. He then expressed a second veto during a press conference on 27 November 1967. Notwithstanding official support from the other EEC Member States, the Council of Ministers decided in December of the same year to shelve all four applications: 'One Member State considered that the re-establishment of the British economy must be completed before Great Britain's request can be considered'. See Christopher Preston, *Enlargement and Integration in the European Union* (Routledge 1997).

human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces; and the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.⁴¹

Under the first Copenhagen condition in relation to the rule of law, the Commission's strategy papers⁴² and monitoring reports,⁴³ as well as the Council's conclusions on enlargement,⁴⁴ indicate a clear emphasis in relation to the reform efforts in the candidate state on the traditional state-run *institutions of justice and capacity building* – the courts, police, prisons, judges, prosecutors, lawyers, as well as the regulations and procedures covering their actions and behaviour.⁴⁵ This includes, *inter alia*, the procedures regulating the careers of judges such as their remuneration⁴⁶ and dismissal,⁴⁷ legal aid provisions,⁴⁸ and anti-corruption measures.⁴⁹ However, in the EU institutions' analyses, legality is noticeably absent. To some extent this is not surprising, considering that the agreements underlying the EU's cooperation with the candidate countries – the Europe Agreements with the CEECs,⁵⁰ the Association Agreement

⁴¹ Presidency Conclusions, Copenhagen European Council, 21-22 June 1993.

⁴² The current Commission set out its thoughts on the rule of law most clearly in its 2012 strategy. Commission, 'Enlargement Strategy and Main Challenges 2012-2013' (Communication) COM(2012) 600 final, 4-6.

⁴³ See, for example, Montenegro Report, SWD(2016) 360 final 12-18.

⁴⁴ See, for example, Council Conclusions 'The Application of Conditionality with a View to Developing a Coherent EU-Strategy for the Relations with the Countries in the Region', Annex to Annex III, 2203rd General Affairs Council, 29-30 April 1997.

⁴⁵ On the institutional focus of the EU's understanding of the rule of law in enlargement generally, see Marko Kmezić, *EU Rule of Law Promotion. Judiciary Reform in the Western Balkans* (Routledge 2017); Kalypso Nicolaides and Rachel Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma' (2012) Jean Monnet Working Paper 12/2012 <<https://jeanmonnetprogram.org/paper/rethinking-europes-rule-of-law-and-enlargement-agenda-the-fundamental-dilemma/>> accessed 20 October 2019; Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).

⁴⁶ See, for example, Regular Report Lithuania (2001) 18.

⁴⁷ See, for example, Progress Report Former Yugoslav Republic of Macedonia, SEC(2011) 1203 final 58; Progress Report Former Yugoslav Republic of Macedonia, SWD(2013) 413 final 39.

⁴⁸ See, for example, Monitoring Report Romania, SEC(2006) 596 7; Comprehensive Monitoring Report Lithuania, SEC(2003) 1204 final 13; Comprehensive Monitoring Report Croatia, SWD(2012) 338 final 37.

⁴⁹ See, for example, Progress Report Estonia (2000) 17; Comprehensive Monitoring Report Latvia (2003) 14-15; Progress Report Turkey (2008) 10-11; Progress Report Albania (2012) 14-16.

⁵⁰ Europe Agreement establishing an association between the EC and the Republic of Hungary [1993] OJ L347/2; Europe Agreement establishing an association between the EC and the Republic of Poland [1993] OJ L348/2; Europe Agreement establishing an as-

with Cyprus, Malta and Turkey,⁵¹ and the Stabilisation and Association Agreements (SAAs) with the Western Balkan countries⁵² – do not provide much clarity on the notion. The Europe Agreements merely mention the significance of the rule of law for the political system of the candidate countries in the Preamble, and, in the case of the SAAs, list a number of judicial institution related rule of law elements, such as the judiciary, the police and other enforcement bodies.⁵³

In turn, the financial instruments underpinning the enlargement policy tend also to either stay silent on the topic, or emphasise the rule of law in this institutional understanding. Thus, the original PHARE Regulation and the Regulations relating to the accession partnerships of the CEECs do not add insight in terms of the EU's understanding of the rule of law in this context,⁵⁴ and the CARDS Regulation⁵⁵ as well as the

sociation between the EC and Romania [1994] OJ L357/2; Europe Agreement establishing an association between the EC and the Republic of Bulgaria [1994] OJ L358/3; Europe Agreement establishing an association between the EC and the Republic of Slovakia [1994] OJ L359/2; Europe Agreement establishing an association between the EC and the Czech Republic [1994] OJ L360/2; Europe Agreement establishing an association between the EC and the Republic of Latvia [1998] OJ L26/3; Europe Agreement establishing an association between the EC and the Republic of Lithuania [1998] OJ L51/3; Europe Agreement establishing an association between the EC and the Republic of Estonia [1998] OJ L68/3; Europe Agreement establishing an association between the EC and the Republic of Slovenia [1999] OJ L51/3.

⁵¹ Agreement establishing an Association between the EEC and Turkey [1964] OJ P217/3687; Agreement establishing an Association between the EEC and Malta [1971] OJ L61/2; Agreement establishing an Association between the EEC and the Republic of Cyprus [1973] OJ L133/2.

⁵² Stabilisation and Association Agreement with the former Yugoslav Republic of Macedonia [2004] OJ L84/13; Stabilisation and Association Agreement with the Republic of Croatia [2005] OJ L26/3; Stabilisation and Association Agreement with the Republic of Albania [2009] OJ L107/166; Stabilisation and Association Agreement with the Republic of Montenegro [2010] OJ L108/3; Stabilisation and Association Agreement with the Republic of Serbia [2013] OJ L278/16; Stabilisation and Association Agreement with Bosnia and Herzegovina, of the other part [2015] OJ L164/2; Stabilisation and Association Agreement with Kosovo,* [2016] OJ L 71/3.

⁵³ See, for example Article 80 entitled 'Reinforcement of institutions and the rule of law' of the Stabilisation and Association Agreement with Serbia (n 52).

⁵⁴ Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic (Phare Regulation) [1989] OJ L375/11; Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89 [1999] OJ L161/68; Council Regulation (EC) No 555/2000 13 March 2000 on the implementation of operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta [2000] OJ L68/3.

⁵⁵ Article 2(3) Council Regulation (EC) 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulation (EEC) No 2906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC [2000] OJ L306/1.

Instruments for Pre-Accession Assistance (IPA I⁵⁶ and II⁵⁷) stipulate that assistance should be programmed and implemented, *inter alia*, in relation to institution and capacity building.⁵⁸ Furthermore, the 2005 negotiating frameworks for Croatia⁵⁹ and Turkey⁶⁰ introduced a specific negotiating chapter meant to assist enlargement countries in establishing a society based on the rule of law. However, in a similar fashion to the EU's rule of law understanding mentioned above, this Chapter 23, focused on judiciary functioning and capacity, has, from the moment of its inclusion, demonstrated a mostly institutional/procedural understanding of the notion.⁶¹ Any reference to legality's sub-elements of the quality of the legislative framework, stability and/or coherence of legislation is absent.

However, considering that the EU, under the third Copenhagen condition, is obligated to implement the entire EU *acquis*,⁶² which now consists of 35 chapters, the issue of stability and coherence of the domestic legal framework would be expected to be especially pertinent. This particularly so, considering that the Union is not just a free-trade zone that requires its members to tear down barriers, but a community of law and

⁵⁶ Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an instrument for pre-accession assistance (IPA) [2006] OJ L210/82.

⁵⁷ Regulation (EU) No 231/2014 of the European Parliament and the Council of 11 March 2014 establishing an instrument for pre-accession assistance for the period 2014-2020 (IPA II) [2014] OJ L77/11.

⁵⁸ Article 3(1)(a) Regulation (EU) No 231/2014. According to the overall institutional approach, the specific objectives pursued under the Regulation framed the rule of law in terms of an independent and efficient judiciary as well as capacity-building measures for improving law enforcement. See Article 2. For the previous IPA Regulation, see Article 3(1) (a) Regulation (EC) No 1085/2006. Also see paragraph 13 of its Preamble, which states that: 'Assistance for candidate countries as well as for potential candidate countries should continue to support them in their efforts to strengthen democratic institutions and the rule of law... and it should therefore be targeted at supporting a wide range of institution-building measures' (emphasis added).

⁵⁹ Negotiating Framework for Croatia, 3 October 2005.

⁶⁰ Negotiating Framework for Turkey, 3 October 2005.

⁶¹ The set-up of Chapter 23 has not changed much since its inclusion and, regarding the rule of law, it is comprised of the following elements: the functioning and capacity of judicial bodies, such as Judicial and Prosecutorial Councils; judicial independence and impartiality; judicial accountability; judicial professionalism and competence; quality of justice, measured in terms of the training of judicial personnel and IT strategies; judicial efficiency (case backlog); and anti-corruption measures.

⁶² In 1992, the Commission defined the *acquis* in the context of accession as 'the rights and obligations actual and potential, of the community system and its institutional framework', which encompass 'the contents, principles and political objectives of the Treaties ..., the legislation adopted in implementation of the Treaties, and the jurisprudence of the Court; the declarations and resolutions adopted in the Community framework; the international agreements, and the agreements between Member States connected with the Community's activities'. Commission, 'Report on Europe and the Challenge of Enlargement' prepared for the European Council, Lisbon 26-27 June 1992, 12.

a market-regulating organisation,⁶³ with a rather large body of rules that must be transposed into domestic law. Interestingly, already in 1995 in its White Paper on the preparation of the CEECs in their preparation for the implementation of, specifically, the internal market *acquis*, the Commission pointed to the difficulty of this endeavour in terms of legislative coherence:

The general picture is one in which old legislation, sometimes dating back many years, exists alongside new. In a limited number of sectors, the new law is almost complete, while in others legislation may be scheduled but not yet drafted. A very large amount of new law is being drafted, or is awaiting adoption by national parliaments... In some areas, the CEECs themselves recognise that enacted or prepared legislation does not conform fully with the relevant EU texts, either as a deliberate choice ... or as a result of amendments introduced during the passage of the legislation through Parliament.⁶⁴

The realisation came that the necessary administrative structures were lagging behind the legislative process itself; implementation is a complex process that requires 'the creation or adaptation of the necessary institutions and structures, involving fundamental changes in the responsibilities of both the national administrative and judicial systems and the emerging private sector'.⁶⁵ As a reaction, the European Council acknowledged that the third Copenhagen criterion, the ability to assume the obligations of membership, also presupposes adequate administrative capacity for effective transposition, implementation, and enforcement of EU rules.⁶⁶

It is interesting to note, though, that an incremental focus on public administration reform, although vital for the effective implementation of the *acquis*, seems to not necessarily have led to a better quality of legislation. This much is visible from the fact that despite the finding that the

⁶³ Frank Schimmelfennig, 'The Process of Enlargement: Problems, Interests, Norms' in Jeremy Richardson (ed), *European Union: Power and Policy-making* (Routledge 2006) 207, 209.

⁶⁴ Commission, 'Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union' (White Paper) COM(95) 163 final points 4.7-4.8.

⁶⁵ *ibid.*, point 3.25.

⁶⁶ Presidency Conclusions, Madrid European Council, 15-16 December 1995. See also Commission, 'Agenda 2000: For a Stronger and Wider Union' (Communication) COM(97) 2000 final. The emphasis on enforcement is also visible in the text of the SAAs. While the Europe Agreements recognised 'the approximation of that country's existing and future legislation to that of the Community' as the major precondition for the economic integration of the applicant state, the SAAs stipulate the 'importance of the approximation of the existing legislation in Montenegro to that of the Community *and of its effective implementation*'. See Article 68 of the Europe Agreement with Poland (n 50). For the SAAs, see, for example, 72(1) of the Stabilisation and Association Agreement with Montenegro (emphasis added) (n 52).

current Commission has made public administration reform an enlargement priority under its ‘fundamentals first’ approach in relation to the Western Balkans,⁶⁷ the Commission’s own analysis in its enlargement strategies, as well as SIGMA⁶⁸ assessments of the progress made by the candidate countries and potential candidates, frequently demonstrates that the poor quality of domestic legislation,⁶⁹ the lack of further significant progress in legislative alignment with the *acquis*,⁷⁰ as well as issues of application and enforcement,⁷¹ remain recurring problems throughout the years and across all Western Balkan countries. Considering this assessment, it is hard to escape the conclusion that the Commission primarily conceives of the rule of law in institutional/procedural terms and pays little attention to the elements of legal quality, stability, coherence, and enforcement of rules. After all, even in the context of legal approximation, its focus is on institutional public administration reform, rather than on legality itself. Against this background, the next section will focus on the pre-accession process and how the Commission’s methodology actually further undermines legality’s sub-elements outlined above.

⁶⁷ Next to the emphasis on the importance of the rule of law for the transformation the applicant countries are undertaking, administrative reforms and economic governance and competitiveness are the three strategic ingredients necessary for the consolidation of reform efforts and the implementation of the *acquis* put forward by the Commission in its 2014 Strategy: ‘All three “pillars” are closely linked, cross-cutting issues of fundamental importance for success in political and economic reforms and building a basis for implementing EU rules and standards’. Commission, ‘Enlargement Strategy and Main Challenges 2014-2015’ (Communication) COM(2014) 700 final 4.

⁶⁸ SIGMA (Support for Improvement in Governance and Management) is a joint initiative of the OECD and the EU with the objective of strengthening the foundations for improved public governance <www.sigmaxweb.org/> accessed 20 October 2019.

⁶⁹ See, for example, SIGMA Assessment Report Albania (2014) 36 <www.oecd-ilibrary.org/governance/albania-assessment-report-2014_5jm0xw5rq4f3-en> accessed 20 October 2019; SIGMA Assessment Report Serbia (2012) 3 <www.oecd-ilibrary.org/governance/serbia-assessment-report-2012_5jz2rqnf9p6g-en> accessed 20 October 2019; SIGMA Assessment Report Albania (2012) 3 <www.oecd-ilibrary.org/governance/albania-assessment-report-2012_5jz2rql8z4mr-en> accessed 20 October 2019; SIGMA Assessment Report Bosnia and Herzegovina (2012) 3 <www.oecd-ilibrary.org/governance/bosnia-and-herzegovina-assessment-report-2012_5jz2rqlcrnkd-en> accessed 20 October 2019; SIGMA Assessment Report Montenegro (2012) 3 <www.oecd-ilibrary.org/governance/montenegro-assessment-report-2012_5jz2rqn827d2-en> accessed 20 October 2019.

⁷⁰ See, for example, SIGMA Assessment Report Former Yugoslav Republic of Macedonia (2012) 3 <www.oecd-ilibrary.org/governance/the-former-yugoslav-republic-of-macedonia-assessment-report-2012_5jz2rqlfx68q-en> accessed 20 October 2019; SIGMA Assessment Report Kosovo (2012) 4 <www.oecd-ilibrary.org/governance/kosovo-assessment-report-2012_5jz2rqljfmnxw-en> accessed 20 October 2019.

⁷¹ See, for example, Commission, ‘2016 Communication on EU Enlargement Policy’ (Communication) COM(2016) 715 final 18-20.

4 The pre-accession process and the problems with legality

The argument which will be advanced here is that the EU, in the pre-accession process, has put its main focus on the alignment of legislation with the *acquis* whereby the changes made to domestic legislation are measured in terms of quantity, not of quality. It will be asserted that the demands of legal approximation in combination with the quantitative approach underlying the enlargement policy *actually undermine legality*, by creating problems such as legal inflation, instability of laws, and lack of coherence of rules (section 4.1). The article demonstrates that although these shortcomings are acknowledged by the Commission, it has not adapted the pre-accession process in relation to these legality concerns throughout the years, thereby failing to recognise the pitfalls of its own accession methodology for the implementation of the rule of law in future Member States (section 4.2). Moreover, it will be shown that there is a substantial and growing body of literature that questions the top-down and inflexible approach by the Commission towards the candidate countries. More particularly, it will be asserted that even though there is growing evidence that for law to be effective local 'adaptation' is preferred over 'adoption', the nature of the *acquis* is such that it precludes alterations by the applicant states, thereby leaving little to no room for considerations of the quality of the transposed laws within the overall domestic legal framework (section 4.3).

4.1 *Benchmarking: the quantitative approach in relation to the transposition of the acquis*

Exploring the relevant enlargement related documents, it appears that the Commission has attempted to create the impression of having constructed a pre-accession procedure that examines not just law in the books, but, rather, rule of law in action. For example, in the very first composite paper, the Commission stressed that concerning democracy and the rule of law, it has looked at 'the way democracy functions in practice instead of relying on formal descriptions of the political institutions'.⁷² In 2010, the then EU enlargement Commissioner Füle, during his presentation of the yearly Enlargement Strategy, underscored that:

The EU expects a convincing track record in the fulfilment of these benchmarks, in particular regarding judiciary and fundamental rights. Accession negotiations do not simply involve ticking boxes about legislative approximation. Countries must build a credible track record of reform and implementation, in particular in the area of rule of law.⁷³

⁷² Commission, 'Composite Paper - Reports on Progress Towards Accession by Each of the Candidate Countries' (Communication) COM(1998) 712 final 3.

⁷³ Stefan Füle, 'Speech on Enlargement Package' (2010) <http://europa.eu/rapid/press-release_SPEECH-10-639_en.htm?locale=en> accessed 20 October 2019. Similar terminology

This suggests that the Commission in the enlargement policy has not merely adopted an approach towards its rule of law reform that would focus on creating functioning institutions, the adoption of EU legislation and a quantitative progress analysis thereof during the pre-accession process, but a process that examines the quality of laws, of how law is applied in practice and of how law both guides people's behaviour and sets the boundaries for institutions. However, it will be demonstrated that in contrast to the Commission's claims, progress in the area of alignment of domestic legislation with the *acquis* is assessed not in terms of whether the adopted legislation works effectively in practice or whether it has improved domestic legislation in certain areas, but rather, in terms of quantity, ie the amount of adopted laws and regulations.

Legal approximation of the EU *acquis*, as seen in the previous section, is a critical component of the pre-accession process; alignment leads to credibility of reforms, and thus to progress in the arduous and lengthy transition process in candidate countries to make them fit for accession. The logic behind this process assumes that the EU model brings with it a comprehensive quality and density of regulation that is superior to the existing legislation in the applicant states. Thus, according to Commission officials, 'adopting the EU *acquis*, irrespective of any imperfections, would still represent an improvement over the status quo'.⁷⁴ Indeed, the *acquis* comprises a ready-made corpus of rules that needs to be accepted *en bloc*,⁷⁵ and which will be difficult to develop in the absence of effective domestic policy-making and legislative processes.⁷⁶ Accordingly, the Commission sets the transposition of and the alignment with the *acquis* in all areas of EU law as the short and medium-term objectives in the Accession Partnerships.⁷⁷

Inevitably, this approach encourages the setting of benchmarks and an appraisal of progress on the basis of a quantitative evaluation

has also been used in relation to the CEECs. See, for example, Commission, 'Towards the Enlarged Union - Strategy Paper and Report of the European Commission on the Progress towards Accession by Each of the Candidate Countries' (Communication) COM(2002) 700 final 11.

⁷⁴ Michaela Dodini and Marko Fantini, 'The EU Neighbourhood Policy: Implications for Economic Growth and Stability' (2006) 44 JCMS 507, 513-514.

⁷⁵ Guy Harpaz and Lior Herman, 'Approximation of Laws by Non-EU Countries to the EU *Acquis*' (2007) 9 EJLR 357, 357.

⁷⁶ Andreas Herdina, 'Approximation of Laws in the Context of the European Neighbourhood Policy' (2007) 9 EJLR 501.

⁷⁷ See, for instance, the 1999 Accession Partnership with Hungary, which requests, for example, the complete transposition and enforcement of legislation in the area of nature protection under the environmental chapter: Council Decision 1999/850/EC of 6 December 1999 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Hungary [1999] OJ L335/1.

of transposed legislation. Indeed, progress is measured on the basis of a country's track record of 'decisions actually taken, legislation actually adopted, international conventions actually ratified (...) and measures actually implemented'.⁷⁸ The Commission clearly implies here that it examines what is actually happening on the ground as opposed to merely trusting the promises made by the negotiating partners. However, the analysis in the annual progress reports and remarks made in the annual reports of the financing instruments⁷⁹ shows that the approach has in actual fact been mostly quantitative with a focus on crunching data and numbers.⁸⁰ For instance, in the 2000 Regular Report on Romania's progress towards accession it is mentioned that '[i]n 1999, *only* 59 of the 453 draft laws, ordinances and emergency ordinances submitted to Parliament were adopted by the end of the year. This represents a significant decrease in comparison to previous years'.⁸¹ In a similar fashion, Turkey's 2005 Regular Report states that '[a]fter the intensive reforms of the previous two years, Parliament continued its regular legislative work. A total of 184 draft laws have been submitted to Parliament since October 2004. Between October 2004 and June 2005 Parliament adopted 166 new laws'.⁸² In relation to the CEECs, the same emphasis on legislative output is discernible. In its 1999 Regular Report the Commission admonishes the Czech Republic: 'The pace of legislative alignment ... has not picked up significantly and progress is uneven across sectors'.⁸³ Or, more positively, 'Hungary continued to make progress in aligning and implementing the *acquis* in many areas'.⁸⁴

The reports also demonstrate that, in the essentially top-down EU driven process of legal approximation, compliance with the *acquis* is equated with success in legal reform.⁸⁵ According to the Commission,

⁷⁸ See, for example, the Commission's description and justification of its methodology in the Regular Report on Slovenia's Progress Towards Accession, SEC(2002) 1411, 9.

⁷⁹ The annual reports on the PHARE Regulation in particular discuss progress of the candidate states in terms of 'the momentum reached in transposing legislation' and 'significant progress in legislative harmonization'. See, for example, Commission, 'The Phare Programme - Annual Report 1998' (Communication) COM(2000) 183 final 25; Commission, '2002 Report on Phare and the Pre-Accession Instruments for Cyprus, Malta and Turkey' SEC(2003) 910, Annex 26.

⁸⁰ Martin Mendelski, 'Das Europäische Evaluierungsdefizit der Rechtsstaatlichkeit' (2016) 11 *Leviathan* 366, 373.

⁸¹ Romania Regular Report, COM(2000) 710 final 15 (emphasis added).

⁸² Turkey Progress Report, SEC(2005) 1426 final 10.

⁸³ Czech Republic Regular Report, COM(99) 503 final 57.

⁸⁴ Hungary Regular Report, SEC(2001) 1748 final 95.

⁸⁵ Rilka Dragneva, 'CIS Model Legislation and Its Contribution to Company Law Reform and Harmonization' in Rilka Dragneva (ed), *Investor Protection in the CIS: Legal Reform and Harmonization* (Martinus Nijhoff 2007) 1-2.

'putting flesh on the legislative bones'⁸⁶ is essential to progress along the road to eventual accession. As underlined by Bruszt and Stark, the definition of success [in enlargement] is not the reduction of the state but 'getting the rules right'; the Europeanisation which the applicant states undertake is thus, 'a kind of *normalization* – a process of meeting norms and standards numbering in the tens of thousands'.⁸⁷ However, as pointed out, it is questionable whether measuring the outcome of law transplants in terms of implementation is an over-simplification, which remains short of capturing the reality of legal change.⁸⁸ While the enlargement success story of the fifth enlargement round (CEECs) comports with quantitative studies examining the behaviour of new members – finding that they transpose and comply with EU law at rates similar to older Member States,⁸⁹ in contrast, qualitative studies talk of a 'world of dead letters'⁹⁰ – pointing to problems of legality⁹¹ as well as issues of compliance.⁹² The EU's 'more is better' mindset⁹³ in combination with the compliance paradigm has led to the adoption of benchmarks that emphasises quantity over quality, whereby no consideration is given to legality's requirements at the domestic level. As will be shown in the next section, there is growing evidence that the quantitative approach followed by the EU in fact often undermines legality, and thus the rule of law, by not considering the requirements for the quality of laws at the domestic level.

⁸⁶ Poland Regular Report, SEC(2001) 1752 final 101.

⁸⁷ Laszlo Bruszt and David Stark, 'Who Counts? Supranational Norms and Societal Needs' (2003) 17 EEPS 74, 74.

⁸⁸ See also Randall Peerenboom, 'What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China' (2006) 27 MJIL 823, 834-836.

⁸⁹ Ulrich Sedelmeier, 'Is Europeanisation Through Conditionality Sustainable? Lock-in of Institutional Change after EU Accession' (2012) 35 WEurPol 20, 20; Bernard Steunenberg and Dimiter Toshkov, 'Comparing Transposition in the 27 Member States of the EU: The Impact of Discretion and Legal Fit' (2009) 16 JEurPP 951, 951.

⁹⁰ Gerda Falkner, Oliver Treib and Elisabeth Holzleithner (eds), *Compliance in the Enlarged European Union: Living Rights or Dead Letters?* (Ashgate 2008).

⁹¹ Kmezić (n 45); Martin Mendelski, 'The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe' (2015) 39 SEE 318; Martin Mendelski, 'Europeanization and the Rule of Law: Towards a Pathological Turn' (2016) 40 SEE 346.

⁹² Jonathan B Slapin, 'How European Union Membership Can Undermine the Rule of Law in Emerging Democracies' (2015) 38 WEurPol 627, 627.

⁹³ Martin Mendelski, 'The EU's Rule of Law Promotion in Central and Eastern Europe: Where and Why Does It Fail, and What Can Be Done About It?' (2016) Bingham Centre for the Rule of Law Global Rule of Law Exchange Papers 11 <<http://anticorrrp.eu/wp-content/uploads/2016/02/Mendelski-2016.-The-EUs-rule-of-law-promotion-in-Central-and-Eastern-Europe.pdf>> accessed 20 October 2019.

4.2 Pre-accession, the duty of the transposition of the *acquis*, and problems of legality

In this section it will be shown that the quantitative progress analysis of the implementation of the *acquis* and the concomitant changes to domestic legislation adopted by the Commission comes with a specific set of problems that actually undermine legality. It is submitted that in combination with the speed of reforms, the demonstrable struggle of the applicant countries with administrative and judicial capacity, and the necessity of establishing a 'solid track record', the demand for more laws has potentially fostered legal inflation, instability, lack of generality of law, as well as problems of enforcement.⁹⁴

The Commission has recognised, in a number of reports throughout the years, that there are problems of legislative quality arising from the tension between the need to attain the agreed targets and the impact on the quality of the implemented legislation at the domestic level. For example, in FYROM's 2007 Progress Report:

[A] backlog of EU-related legislation built up in the second half of 2006. The government, in pursuit of its stated objective of having all the legislation for 2006 and 2007 adopted by the end of the summer, stepped up its efforts on legislative drafting. It managed to catch up partially, but without always giving sufficient attention to the quality and enforceability of legislation.⁹⁵

Moreover, a lack of expertise on EU issues at the domestic level may also hamper the harmonisation of legislation, as evidenced, for example, by the 2007 Progress Report on Albania in which it is stated that '[t]he level of expertise available to the parliament, including on EU integration issues, remains low. This is reflected in the quality of legislation'.⁹⁶ Serbia's 2009 Progress Report highlights a related issue. There has been increased legislative output by parliament, although there is a need 'to improve ex ante compatibility checks with EU standards before legislation is adopted. There has, moreover, been insufficient public consultation on content and impact of draft laws'.⁹⁷

Furthermore, because of the quantitative agreements underlying the adoption of the *acquis*, the speed of reform becomes a particular issue in and of itself, undermining legislative quality. The 'hasty trans-

⁹⁴ For empirical evidence on these so-called 'pathologies of Europeanization', see Mendelski (n 91) 353-357.

⁹⁵ The Former Yugoslav Republic of Macedonia Progress Report, SEC(2007) 1432 final 7 (emphasis added).

⁹⁶ Albania Progress Report, SEC(2007) 1429 final 6.

⁹⁷ Serbia Progress Report, SEC(2009) 1339 final 7.

plant-syndrome'⁹⁸ meant that the enormous implementation load, in combination with the time pressure and the Commission's strong emphasis on effectiveness rather than evidence-based policy-making, has rendered the accession process into a predominantly technical process of rule transfer.⁹⁹ However, where regulations during pre-accession are best transposed through a single act containing its copy/pasted text, in the case of directives, proper implementation requires substantive policy choices as to how the rights and obligations are to be distributed in society in order for the normative aim of the directive to be achieved.¹⁰⁰ This takes time and expertise – and more attention than a mere 40 seconds in parliament per piece of legislation over a period of some months in North-Macedonia,¹⁰¹ a situation assessed by the Commission as detrimental to the quality of law.¹⁰² Many similar examples can be found in relation to the CEECs. For instance, in 2002, the Commission showed concern for Romania's parliamentary ability to effectively scrutinise legislation because of tight deadlines in combination with an increased volume of legislation.¹⁰³ Where it took Greece well over a decade to adapt to the EU's single market, by contrast, the CEECs and Western Balkan countries are expected to have oriented their institutions and policies to the EU *prior* to membership. Moreover, they are doing this from a much lower starting-point and with very limited scope for negotiating transitional periods.¹⁰⁴

Because of the top-down nature of the process, the pace of implementation has also been influenced by something coined 'campaign reform'. This has meant, for example, that the timing of the output has

⁹⁸ Rilka Dragneva and Kataryna Wolczuk, 'EU Law Export to the Eastern Neighbourhood' in Paul James Cardwell, *EU External Relations Law and Policy in the Post-Lisbon Era* (Springer 2012) 217, 221.

⁹⁹ Marija Risteska, 'The Role of the EU in Promoting Good Governance in Macedonia: Towards Efficiency and Effectiveness or Deliberative Democracy?' (2013) *Journal of Nationalism and Ethnicity* 431, 442.

¹⁰⁰ According to Capeta, upon membership, regulations will acquire direct applicability in the new Member State that has, during the accession period, transposed all regulations of the *acquis* into domestic law. Consequently, this creates an obligation for the legislator to repeal these norms. In relation to the quality of law, considering the margin of error, it might not be optimal to repeal national implementing laws, particularly if the EU regulations impose obligations of financial liabilities or criminal offences. Tamara Capeta, 'Harmonisation of National Legislation with the *Acquis Communautaire*', Venice Commission seminar on The Quality of Law, CDL-UDT(2010)017, 8-10 <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT\(2010\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT(2010)017-e)> accessed 20 October 2019.

¹⁰¹ Risteska (n 99) 441.

¹⁰² Commission, 'Enlargement Strategy and Main Challenges 2008-2009' (Communication) COM(2008) 674 final.

¹⁰³ Romania Regular Report, SEC(2002) 1409 final 21.

¹⁰⁴ Heather Grabbe, 'Europeanisation Goes East: Power and Uncertainty in the EU Accession Process' in Kevin Featherstone and Claudio M. Radaelli (eds), *The Politics of Europeanization* (OUP 2003) 303, 306.

matched the financial facility constraints.¹⁰⁵ Or that high-level EU summit meetings served simultaneously as deadlines for legislative action.¹⁰⁶ Similar timeframe-related effects could be seen in the case of the Commission's proposal for a 'roadmap' for completing the negotiations with the CEECs until the end of 2002.¹⁰⁷ As a consequence, the possibility of taking local needs and/or conditions into account is severely limited. This has given rise to various fast-track procedures, risking reducing parliaments to little more than rubber stamps,¹⁰⁸ and thereby undermining their legitimacy.¹⁰⁹ Examples of such problematic urgency procedures can be found in almost all applicant countries. In Slovakia, the constitution was amended in 2001 to allow government to sidestep the parliament altogether in order to issue decrees in the execution of the Europe Agreement;¹¹⁰ in Lithuania, an average of 22.8% of legislation was enacted using urgency or special urgency procedures between 1992 and 2004, whereas in Latvia the rate was even higher at 39.1% over the period 1993-2002;¹¹¹ in Romania the adoption of some of the *acquis* into national law was done by way of extraordinary governmental decrees, which required only retrospective approval.¹¹² However, while the Commission in Romania's Report stated that this practice is a matter of concern 'since legislation can be adopted before adequate consultation has taken place and because Parliament's powers to modify or reject the ordinances, without a time limit being set for the examination of the ordinances, can lead to legislative instability', it continued to push for more 'progress'.¹¹³

¹⁰⁵ Dragneva and Wolczuk (n 98) 221.

¹⁰⁶ Vello Pettai and Ülle Madise, 'The Baltic Parliaments: Legislative Performance from Independence to EU Accession' (2006) 12 JLS 291, 298.

¹⁰⁷ Schimmelfennig (n 63) 218. For the Roadmap, see Commission, 'Enlargement on Strategy Paper and Report on Progress towards Accession by Each of the Candidate Countries' (Communication) COM(2000) 700 final 27-30.

¹⁰⁸ Darina Malova and Tim Haughton, 'Making Institutions in Central and Eastern Europe, and the Impact of Europe' (2002) 25 WEPol 101, 111-112. See also the 2012 SIGMA report on Montenegro in which poor legislative quality is linked to the trivial role of Montenegro's parliament's substantive involvement: 'Parliament functions mostly as a "law-passing factory" without debate on policy. The involvement of Parliament is seen as a formality rather than as the substantial participation of a respected, decisive power within a system of good governance'. This 'is also a reason for the poor quality of laws'. SIGMA Assessment Report Montenegro (2012) 3 <www.oecd-ilibrary.org/governance/montenegro-assessment-report-2012_5jz2rqn827d2-en> accessed 20 October 2019.

¹⁰⁹ Heather Grabbe, 'Will EU Membership Improve Governance and the Quality of Democracy?' (2003) EECR.

¹¹⁰ Wojciech Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe' (2004) 10 ELJ 371, 384.

¹¹¹ Pettai and Madise (n 106) 298.

¹¹² Romania Regular Report, COM(2000) 710 final 15.

¹¹³ *ibid.*

It is acknowledged that hasty adoption and the subsequent lack of quality can also lead to instability problems further down the road, as demonstrated, for instance, by the number of amended laws during the pre-accession period in Poland. In the 1997-2011 and 2001-2005 terms of parliament, domestic amendments accounted for approximately 60% of all adopted statutory measures. Data show that many laws were amended more than once. Out of the 184 statutory laws adopted and amended in the period 2001-2004, 50% were amended once, 20% were changed twice, and the remaining 30% were subject to change three or more times. Significantly, there is evidence to show that there were laws that were amended 23, 18 and 13 times within a period of only three years.¹¹⁴ Similar to amendments, annulments also create issues of instability and coherence. This is visible in, for example, the Progress Reports on FY-ROM. In 2011, the Constitutional Court increased the number of annulments of new legislation by 5% to nearly 30% of all laws.¹¹⁵ In 2014, this trend showed no sign of diminishing, with visible complications for the coherence of the legal framework:

The number of constitutional challenges received and handled annually remains on par with previous years, but there still have not been any steps taken to improve legal certainty as regards legislation which has been annulled due to unconstitutionality, and this often creates gaps in the legal framework.¹¹⁶

In addition to this, the reports frequently mention that monitoring implementation¹¹⁷ and compliance¹¹⁸ of new legislation with the *acquis* remains a difficult task.

Of course, legislative growth in general potentially produces legislative instability, because new laws are often introduced through amendments of the legal framework.¹¹⁹ Empirical evidence shows that the candidate countries had to deal with excessive quantities of legislation stemming, amongst other things, from the harmonisation requirements. Between 2001 and 2015, the legislative output indicator showed a 98% increase in the number of adopted laws per year for the Western Balkan

¹¹⁴ Klaus H Goetz and Radoslaw Zubek, 'Government, Parliament and Law-making in Poland' (2007) 13 JLS 517, 536.

¹¹⁵ The Former Yugoslav Republic of Macedonia Progress Report, SEC(2011) 1203 final 11.

¹¹⁶ The Former Yugoslav Republic of Macedonia Progress Report, SWD(2014) 303 final 5. The problem of gaps in the legislative framework is a recurring worry across various reports. See, for example, Bosnia and Herzegovina Progress Report, SWD(2013) 415 final 20; Kosovo Report, SWD(2016) 363 final 28.

¹¹⁷ Montenegro Report, SWD(2016) 360 final 5.

¹¹⁸ Albania Report, SWD(2016) 364 final 7; Turkey Report, SWD(2016) 366 final 15; Turkey Regular Report, SEC (2004) 1201 final 160.

¹¹⁹ Capeta (n 100).

countries.¹²⁰ For a few examples, Serbia went from 47 to 265 adopted laws per year in the period 2003-2009, with Croatia (from 182 to 308) demonstrating a similar trend.¹²¹ Between 1995 and 2001, the legislative output in Romania grew from 132 to 782 adopted laws per year.¹²² Lithuania went from a total of 1,690 adopted laws in the period of 1992-1996 to 2,631 over the period of 2000-2004, with the other two Baltic states of Latvia and Estonia showing similar increases.¹²³ The parliamentary workload during the pre-accession process was such that a former deputy speaker of the Polish Sjem discussed it in terms of 'a true legislative deluge'.¹²⁴

The acknowledgement that the legal approximation process undertaken by the candidate states has led to questionable developments in relation to the requirements of formal legality such as stability, and coherence has recently gained traction in political science literature but has so far not been recognised in legal literature.¹²⁵ Political science scholars have been building on the critical law and development literature and the growing realisation that 'law is not a kitchen appliance that we can unplug in the United States or Germany and simply plug in again in Russia',¹²⁶ and that introducing the right laws is insufficient to create incentives for the correct behaviour in developing and transition countries.¹²⁷ After all, laws do not catalyse change, but merely reflect change that has already taken place at a cultural/societal level.¹²⁸ Generally speaking, for law to be effective, it must be meaningful in the context in which it is applied so citizens have the incentive to use the law, and institutions will enforce and develop the law. The notion of compliance means that simply drafting new laws is not enough to ensure that they work.¹²⁹ The quality of the rule of law and the effective transposition of the *acquis* depends not only on the administrative capacity in an applicant state, but also the degree to which the new rules and practices are internalised by state functionaries and citizens alike. Thus, faster and more extensive implementation processes produce serious problems of compliance, especially in societies demoralised by decades of authoritarian rule.¹³⁰

¹²⁰ Mendelski (n 91) 353.

¹²¹ *ibid* 353.

¹²² *ibid* 354.

¹²³ Pettai and Madise (n 106) 299-301.

¹²⁴ Quoted in Goetz and Zubek (n 114) 535.

¹²⁵ See the work undertaken by Mendelski (n 91) and (n 93) and Slapin (n 92).

¹²⁶ Stephen Holmes, 'Can Foreign Aid Promote the Rule of Law?' (1999) 8 EEC Rev 68, 71.

¹²⁷ Dragneva and Wolczuk (n 98) 220.

¹²⁸ Rachel Kleinfeld, *Advancing the Rule of Law Abroad. Next Generation Reform* (Carnegie Endowment for International Peace 2012) 85.

¹²⁹ Slapin (n 92) 631.

¹³⁰ Grzegorz Ekiert, 'Dilemmas of Europeanization: Eastern and Central Europe after the EU Enlargement' (2008) 25 ActaSI 1, 20.

Accordingly, judges, lawyers, politicians, and other legal intermediaries that are responsible for developing the law 'must be able to increase the quality of law in a way that is responsive to demand for legality'.¹³¹ Interestingly, the origin of the law *per se* is not necessarily the crux of the problem, rather, complications stem from 'law reform processes that generally do not permit users to participate in adapting the draft – whatever its origin – to local conditions. ... Lack of local input, not transplantation is the problem'.¹³² Consequently, it is emphasised that 'adaptation' is preferred over 'adoption', ie without taking local conditions into account, attempting to use a pattern of law outside the environment of its origin entails the risk of rejection.¹³³ However, it should be pointed out that the EU's model is one of adoption rather than adaptation because of the specific nature of the *acquis*.

4.3 The impenetrable nature of the *acquis* and the questions this raises for its role as an instrument of development

The *acquis* is a unifying concept in that it is a shared standard in which, at least in principle, every Member State, and thus, also every future Member State, has an equal stake.¹³⁴ It is the EU's genetic identity¹³⁵ and acts to preserve the *sui generis* code of European integration,¹³⁶ which accounts for the need to ensure its self-preservation and continued coherent development. Accordingly, it is projected by the EU as the 'right' legal template, as an objective standard, albeit one over which the EU has exclusive control. Of course, as Magen has pointed out, as a non-national, shared patrimony of democratic Member States with a high degree of international standing who adhere to it themselves, 'the *acquis communautaire* enjoys a respectable pedigree and a high degree of legitimacy'.¹³⁷ This makes it also the exclusive and comprehensive legal template from which deviations or opt-outs are not permitted for the aspiring Member States.¹³⁸ In this sense, the term 'negotiation' is mislead-

¹³¹ Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic Development, Legality and the Transplant Effect' (2003) 47 EE Rev 165, 167.

¹³² Wade Channell, 'Lessons Not Learned about Legal Reform' in Thomas Carothers (ed), *Promoting the Rule of Law Abroad - In Search of Knowledge* (Carnegie Endowment for International Peace 2006) 137, 140.

¹³³ Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1, 27.

¹³⁴ Amichai Magen, 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Relations' (2007) 9 EJLR 361, 370.

¹³⁵ Loïc Azoulay, 'The *Acquis* of the European Union and International Organisations' (2005) 11 ELJ 196, 197.

¹³⁶ Magen (n 134) 362.

¹³⁷ *ibid*, 387.

¹³⁸ In this regard, the European Parliament has stressed that '... all the candidate States must accept the *acquis communautaire*, including the Treaty on European Union, as well as the goal of further European integration, and insists that there be no further opt-outs

ing, as it suggests an openness that does not exist in the accession process.¹³⁹ Indeed, the one-sided nature of the pre-accession process has led Zielonka to characterise it as looking 'rather like an imperial exercise of asserting political and economic control'.¹⁴⁰ As demonstrated above, the pre-accession negotiations mainly consist of a process of rule-transfer, Commission screening and reporting, during which the applicant's progress in adopting the *acquis* is monitored. Essentially, the *acquis* comes as a non-negotiable package, with implementation being portrayed as a technical/administrative task rather than a political one.¹⁴¹ However, this absence of the possibility of engagement limits from the outset its potential for becoming 'living law' in the applicant states.¹⁴² Indeed, 'the effort to plough through reform blueprints ... resembles a form of dependent development, to the point of precluding the 'organic' development of accountable domestic policies'.¹⁴³ Since the requirements in relation to the *acquis* are non-negotiable, uniformly applied, and closely enforced, there is little possibility of actual adaptation.¹⁴⁴

It seems that there is an assumption in much of the language used in the 'Copenhagen documents' on enlargement that accession and transition are part of the same process. Or, in the words of Grabbe, 'that preparations to join the Union are coterminous with overall development goals'.¹⁴⁵ This is, for example, visible in the 2016 enlargement strategy in which the Commission stated that '...it is important to recognise that accession negotiations are not – and never have been – an end in themselves. They are part of a wider process of modernisation and reforms'.¹⁴⁶ However, there are various reasons to be sceptical about the *acquis*' suit-

similar to those obtained by the UK and Denmark'. European Parliament Resolution on Enlargement [1993] OJ C255/207.

¹³⁹ Schimmelfennig (n 63) 212.

¹⁴⁰ Jan Zielonka, *Europe as Empire* (OUP 2006) 13-14.

¹⁴¹ Heather Grabbe, 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity' (2001) 8 JEPP 1013, 1016-1017.

¹⁴² Dragneva and Wolczuk (n 98) 219.

¹⁴³ Anna Grzymala-Busse and Abby Innes, 'Great Expectations: The EU and Domestic Political Competition in East Central Europe' (2003) 17 EEPS 64, 66.

¹⁴⁴ Risteska has remarked that '[t]he level of adaptation of EU legislation ... to Macedonian conditions is minimal'. Risteska (n 99) 442. From the perspective of the acceding states, Albi has made the argument that the transposition of the *acquis* was often viewed as an administrative rather than a legislative process, resulting in a lower level of national parliamentary engagement. Anneli Albi, 'The EU's "External Governance" and Legislative Approximation by Neighbours: Challenges for the Classic Constitutional Templates' (2009) EFA Rev 209, 227.

¹⁴⁵ Heather Grabbe, 'European Conditionality and the *Acquis Communautaire*' (2002) 23 IPS Rev 249, 253.

¹⁴⁶ Commission, '2016 Communication on EU Enlargement Policy' (Communication) COM(2016) 715 final 2.

ability as a template for reforms in the (potential) candidate states. The EU regulatory framework was never designed as a development agenda.¹⁴⁷ The Union's policies and regulatory models have been created to fit economies at a different level of development than the CEECs at the time or the Western Balkan countries now,¹⁴⁸ and they require complex institutional structures for implementation. Moreover, the *acquis* contains anomalies that are the outcome of a bargaining process between the different interests of the Member States and the institutions,¹⁴⁹ and has accumulated over a period of up to half a century, often amended and incrementally adjusted. According to Cameron, it is no exaggeration to say that:

... on accession, the new members will be re-created as states, committed to processes of policy-making and policy outcomes that in many instances bear little or no relation to their domestic policy-making processes and prior policy decisions but reflect, instead, the politics, policy-making processes, and policy choices of the EU and its earlier Member States.¹⁵⁰

Interestingly, the Commission seems, at least to some extent, to be aware of this paradox in relation to its instrumental use of the *acquis* in enlargement. In a 2001 Communication on 'simplifying and improving the regulatory environment' it stated that

¹⁴⁷ On the broader argument regarding the unsuitability of neoliberal economic policies in relation to countries at this stage of development, see Joseph Stiglitz, *Globalization and its Discontents* (WW Norton & Company 2002).

¹⁴⁸ Grabbe (n 145) 253; Susan S Nello and Karen E Smith, *The European Union and Central and Eastern Europe: The Implications of Enlargement in Stages* (Ashgate 1998) 18. Interestingly, on a broader note, points have been raised in the literature questioning to what extent a large number of the economies in the CEECs were built on sustainable grounds in the light of IMF conditionality and the financial crisis in 2008. Instead of boosting the economies, there is some evidence to suggest that the IMF's emphasis on credit liberalisation and market self-regulation has resulted in increased poverty, inequality and various other social problems, as well as the rise of illiberalism in some of those countries. Stiglitz (n 147) chapter 5; Albi (n 144) 229; Michael A Wilkinson, 'The Reconstruction of Postwar Europe: Lineages of Authoritarian Liberalism' (2016) LSE Law, Society and Economy Working Papers 5/2016, 38 <http://eprints.lse.ac.uk/66570/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_LSE%20Working%20Paper_The%20Reconstitution%20of%20Postwar%20Europe_Wilkinson_The_ReconstitRecon_of_Postwar_Europe_Author.pdf> accessed 20 October 2019. For an explanation of the linkages between economic instability, sovereign debt management and constitutional crisis in relation to Hungary, see Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Enquiry' (2015) EUI Working Paper Law 34/2015, 25-28 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617171> accessed 19 October 2019.

¹⁴⁹ Grabbe (n 104) 306-307.

¹⁵⁰ David R Cameron, 'The Challenges of Accession' (2003) 17 *EEPS* 24, 25.

the *acquis communautaire* is highly regarded for its basic raft of rights and integrating provisions and, at the same time, denigrated for its complexity of access, comprehension and application. ... Any difficulties are bound to increase with the arrival of new Member States which will have to digest this corpus of rules and regulation.¹⁵¹

However, 15 years later, little seems to have changed. After over a decade of plans involving attempts at prioritising better regulation principles, the Commission echoed its earlier assessment of the *acquis*: 'The EU has frequently been criticised – often rightly – for producing excessive and badly written regulations and for meddling in the lives of citizens or businesses with too many detailed rules'.¹⁵² Accordingly, in the light of the critique and the Commission's own acknowledgement of the negative effects that stem from the transposition of the *acquis* during the pre-accession period, in combination with the above, at the very least questions arise as to the extent to which the EU's method of legal approximation in the enlargement policy is bound to undermine legality by its very nature.

5 Conclusion: some policy reflections on conceptualisation, methodology, and parliamentary engagement

In this article, it was argued that the EU's conceptualisation of the rule of law in enlargement is flawed by virtue of the fact that the core element of the rule of law, namely, legality, is largely absent. It was demonstrated that in the Copenhagen documentation, containing the Commission's yearly monitoring reports, enlargement strategies, and the Council conclusions on enlargement, little to no room has been dedicated to the progress assessment of this element. Against this background, the article took a closer look at the pre-accession process and it was asserted that the very methodology used in relation to the implementation of the *acquis* has the potential of undermining legality in the acceding states. It was demonstrated that, despite the promises made by former Commissioner Füle to the effect that the accession negotiations would not simply involve a ticking of boxes on the issue of legislative approximation, the accession framework is set up in such a way to do just that – with its emphasis on the quantitative progress analysis of the implementation of the *acquis*. On the basis of careful analysis of the relevant documents, it was argued that the use of benchmarks in this area, in combination with the inflexibility of the process and the added time pressure, undermine legality, leading to problems of legal inflation, instability, lack of generality

¹⁵¹ Commission, 'Simplifying and Improving the Regulatory Environment' (Communication) COM(2001) 726 final 4-5.

¹⁵² Commission, 'Better Regulation: Delivering Better Results for a Stronger Union' (Communication) COM(2016) 615 final 2.

of law and coherence, as well as problems of enforcement. Consequently, by choosing quantitative progress analysis over qualitative scrutiny of the applicant states' headway in their process of legal approximation, the Commission might not be taking all rule of law elements into account in the way that it should.

The article went on to argue that even though this is recognised by the Commission, over the years the EU has not amended its methodology, thereby failing to recognise that ensuring respect for the rule of law is not merely a process of *adoption* of a corpus of rules, but rather a complex process of *adaptation* to a particular value system. However, the article concluded by questioning whether the particular nature of the *acquis* itself might not be a limiting factor in this. It was shown that the *acquis*, as the genetic code of the European project, forms a corpus of rules under the exclusive control of the EU, making it an inherently inflexible legal template for the applicant states to take on. Moreover, it was demonstrated that, by the Commission's own admission, the quality and complexity of the *acquis* leaves considerable room for improvement, raising questions as to its suitability as an instrument for development in the (potential) candidate countries.

Where does this leave the EU in relation to its conceptualisation of the rule of law in the pre-accession procedure? Two policy reflections are presented here. The first reflection relates to the necessity to incorporate legality in its rule of law conceptualisation. The institutions have consistently underlined 'the importance of placing the rule of law even more at the heart of enlargement policy'.¹⁵³ This has resulted in an enlargement strategy which has placed a high value on addressing the rule of law at the early stages of the process in order to afford candidates the opportunity to 'demonstrate their ability to strengthen the practical realisation of the values on which the Union is based at all stages of the accession process'.¹⁵⁴ However, while this has led, amongst other things, to additional moments for measuring progress,¹⁵⁵ the underlying conceptualisation of the rule of law has, by and large, not substantively changed. This means that even though the Commission, as shown above, has acknowledged the recurring problems in relation to legislative approximation, the large-

¹⁵³ Commission, 'Communication on Enlargement Strategy and Main Challenges 2012-2013' (Communication) COM(2012) 600 final, 10 October 2012, p. 4. See also, for example, Council, 'Enlargement and Stabilisation and Association Process' (Conclusions) General Affairs Council, Doc. No.17604/12, 11 December 2012, point 37, as well as Council, 'Enlargement and Stabilisation and Association Process'(Conclusions) General Affairs Council, Doc. 10555/18, 26 June 2018, point 5

¹⁵⁴ Commission, 'Communication on Enlargement Strategy and Main Challenges 2012-2013' (Communication) COM(2012) 600 final, 10 October 2012, 4.

¹⁵⁵ By way of interim benchmarks, next to the opening and closing benchmarks.

ly *institutional* focus and the lack of attention to legality has remained. Considering the problems outlined in section 4 of this article, it is apparent that the EU, at the very minimum, should try and look past its institutional lens in relation to the rule of law to incorporate legality and its constituent aspects in its understanding of the value. In order to do this and also to make the applicant countries more aware of the problematic issues underlying legality, the already existing rule of law dialogues that were set up with three of the Western Balkan countries under the Stabilisation and Association Process¹⁵⁶ could be used. They would need to include, next to the current focus on the institutional rule of law elements related to an independent judiciary, issues of legality fleshed out by the Commission in more concrete terms.

The second reflection concerns the related issue of the engagement of national parliaments with the approximation process. As was shown above, the issues undermining legality mainly focus on the deluge of EU legislation that needs to be transposed and the speed of reforms required by the EU, in combination with a lack of capacity and/or sufficient EU-related expertise. A study related to the CEECs and enlargement concluded that there was little debate on EU conditionality within the CEEC parliaments.¹⁵⁷ Since the implementation was/is often viewed as an administrative rather than a legislative process,¹⁵⁸ the substance of parliamentary debates often remains rather general.¹⁵⁹ In any case, candidate countries are not expected to debate the *acquis* since it is non-negotiable and EU law takes priority over national law, a duty in which the applicant states are expected to shadow the Member States. This mechanical approach entails very limited involvement for national parliaments in the accession process beyond the formal structure. It has also led at times to a failure to adopt mechanisms to soften the transition which would have allowed national problems and particularities to be better taken into account – particularly further down the road.¹⁶⁰

Furthermore, the quantitative approach has facilitated this lack of engagement with EU rules. However, while such an approach is, to a large extent, part and parcel of a policy that relies on benchmarking and conditionality, the pre-accession strategy seems to have elevated it to an end in and of itself. Only targets are evaluated, not the (quality of) transposition. Of course, the scope of the rule transfer extends to

¹⁵⁶ These are Bosnia and Herzegovina, Kosovo, and North Macedonia.

¹⁵⁷ Heather Grabbe and Kirsty Hughes, *Eastward Enlargement of the European Union* (Royal Institute of International Affairs 1998) 34.

¹⁵⁸ Grabbe (n 141) 1017.

¹⁵⁹ Albi (n 144) 227.

¹⁶⁰ *ibid.*, 228.

the *acquis* and does not transcend this in order to incorporate how the national legislative processes address it.¹⁶¹ Approximation of the *acquis*, legally speaking, amounts to voluntary adaptation, since it differs from the harmonisation obligations incumbent on the Member States. Apart from national control mechanisms, no enforcement procedures exist. However, since a demonstrable track-record of implementation is valued more than parliamentary involvement, for legality to be higher on the radar, this is an issue that would need to be addressed. In order to do this, similar programmes to the existing ones on best practices relating to the rule of law in connection with judicial training spring to mind.¹⁶² The idea behind these is to facilitate exchanges between the staff of the various (levels of) judiciaries in the Member States and their counterparts in the applicant countries in order to provide the latter with insights into the different practices in the EU. In order to tackle the issue of the lack of knowledge related to EU affairs, this approach could be useful. Particularly, if the Member States of Central and Eastern Europe were willing to share their experiences, having gone to similar exercises themselves.



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¹⁶¹ See Marc Maresceau and Elisabetta Montaguti, 'The Relations between the European Union and Eastern Europe' (2008) CML Rev 1327, 1336.

¹⁶² See <https://e-justice.europa.eu/content_good_training_practices-311-en.do> accessed 22 October.