EU Enlargement and European Integration: Challenges and Perspectives

Assoziiertes Institut der Universität Zürich & Kooperationspartner der ETH Zürich
RECHT BERATUNG WEITERBILDUNG

Publisher:
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EU Enlargement and European Integration: Challenges and Perspectives

14th Network Europe Conference
Stockholm, 25–26 September 2023

EIZ Publishing

Editors: Prof. Dr. Andreas Kellerhals, Dr. Tobias Baumgartner, Fatlum Ademi – Europa Institut an der Universität Zürich
Publisher: EIZ Publishing (https://eizpublishing.ch)
Layout & Production: buch & netz (https://buchundnetz.com)
ISBN:
978-3-03805-722-2 (Print – Softcover)
978-3-03805-723-9 (PDF)
978-3-03805-724-6 (ePub)
DOI: https://doi.org/10.36862/eiz-722
Version: 1.03 – 20240826

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Preface

This publication comprises the contributions presented at the 14th Network Europe Conference held in Stockholm/Sweden, in September 2023. The conference addressed various challenges for the European integration process in light of current global crises, as well as aspects of the EU enlargement perspectives.

As late as the beginning of 2022, a major round of enlargement of the European Union seemed unlikely in the foreseeable future. However, Russia's unprecedented invasion of Ukraine in February 2022 has fundamentally changed the position of the European Union. Ukraine and Moldova were granted the status of candidates for EU membership, and Georgia was added to the list of potential EU candidates. Consequently, the purpose and future of the European Neighbourhood Policy will need to be clarified and redefined.

In view of this situation, the contributions in this publication address various imperative topics. Talks have emerged about accelerating the integration process for Western Balkan countries, while neighboring countries of the EU have been offered accession perspectives. In Armenia, the question of rapprochement with the EU has been raised following the exodus from Nagorno-Karabakh, as Russia failed to act as a protective power. Switzerland has engaged in crucial new negotiations to secure and strengthen its bilateral path with the EU. Furthermore, the external relations of the EU with Russia and China as opposing global players were examined. Finally, different future perspectives for the EU and alternative options in light of the upcoming challenges were presented.

We would like to thank the participants for their contributions as well as express our gratitude to the Co-Hosts of the conference from the University of Stockholm, Prof. Dr. Björn Lundqvist and Prof. Dr. Antonina Bakardjieva Engelbrekt.

Zurich, 23 July 2024

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The Rule of Law: a major challenge for European integration and EU enlargement?[1]

Antonina Bakardjieva Engelbrekt

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[1] This chapter builds on my previous work 'The Eastward Enlargement as a Driving Force and Testbed for Rule of Law Policy in the EU', in A Bakardjieva Engelbrekt, A Moberg and J Nergelius (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Oxford: Hart Publishing, 2021), 181-228 and 'The Rule of Law and Judicial Independence in the EU: Lessons from the Union's Eastward Enlargement and Ways Forward', in Reichel and Zamboni (eds) *Rule of Law*, *Scandinavian Studies in Law*, *vol.* 69 (Jure, 2023), 177-230.

I. Introduction

There is hardly a question of European Union law and policy that has received more extensive treatment and provoked more heated debates during the last decade, than the question of the waning commitment to the rule of law in individual EU Member States and the ensuing rule of law crisis in the Union.[2] The acute attention devoted to this crisis in both policy documents and academic literature is not surprising. It is prompted by a widely shared understanding of the centrality of the rule of law for the European project and growing concerns in the face of rapid backsliding and open neglect for rule of law standards in certain EU countries. Although 'rule of law crisis' has become the established term, in fact the crisis is broader than that because disregard for the rule of law inevitably undermines democratic institutions and the quality of democracy more generally. Furthermore, while the crisis is triggered by rule of law ruptures in individual Member States, it affects deeply the Union as a whole, since it puts into question EU's ability to uphold its fundamental values.[3]

To be sure, the notion of 'crisis' is so frequently used in the context of European integration that it seems to have suffered some devaluation and even trivialisation. The number and variation of crises that the Union is bemoaned to be facing and grappling with is ever expanding: financial crisis, migration crisis, Covid19 crisis, energy crisis, ecological crisis, security crisis, to name

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2 See the contributions in A Södersten and E Hercock (eds) *The Rule of Law in the EU: Crisis and Solutions* (SIEPS, 2023), available at: https://www.sieps.se/en/publications/2023/the-rule-of-law-in-the-eu-crisis-and-solutions/; Laurent Pech, 'The Future of the Rule of Law in the EU' https://verfassungsblog.de/the-future-of-the-rule-of-law-in-the-eu/.

3 See András Jakab, 'Three misconceptions about the EU rule of law crisis', *Verfassungsblog*, 17 October 2022, available at: https://verfassungsblog.de/misconceptions-rol/.

but a few. Thus, the concept of crisis may no longer project the sense of urgency vested in its original meaning. The 'normalisation' of the state of crisis is further enhanced by the broadly held conviction that the Union is typically not weakened, but rather strengthened by crises.[4]

Yet, there are many who argue convincingly that the rule of law crisis which has been unfolding during the last decade is of a different, one could say existential, character for the Union, and should be a cause for greater concern and trepidation.[5] For one, the majority of crises the Union has coped with, or is currently struggling with, is caused by external factors, such as global financial streams, migration flows or climate change. In contrast, the rule of law crisis is internal to the Union. More importantly even, it strikes at the heart of the Union's constitutional principles and institutional foundations. For what happens with a Union based on mutual trust and law-governed cooperation if legal commitments are not observed and if the Member States, i.e. the composite units in the carefully intertwined common construct, cannot guarantee the integrity and accountability of their core institutions?

In addition, the state of the rule of law in the Union has substantial external implications, notably in the context of an intensified EU enlargement process. This process involves countries with poor rule of law record and, after opening accession negotiations with Ukraine, extends even to candidate states that are currently at war.[6] Showing credible commitment to the rule of law has been one of the major hurdles set before the candidate states on their path to EU accession. Therefore, ensuring respect for the rule of law in the Union becomes decisive for the authority and legitimacy of EU enlargement policy. In sum, the rule of law emerges as a major challenge for both European integration and for the continuing enlargement of the Union.

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4 See Bakardjieva Engelbrekt et al, 'The EU and the Precarious Routes to Political, Economic and Social Resilience', in Bakardjieva Engelbrekt et al (eds) *Routes to a Resilient European Union* (Palgrave McMillan, 2022), 1.

5 See Anna Södersten, 'Rule of Law Crisis: EU in Limbo Between Federalism and Flexible Integration' in: Bakardjieva Engelbrekt et al (eds) *EU Between Federal Union and Flexible Integration, Interdisciplinary European Studies* (Palgrave McMillan, 2023), 51-73; Nicole Scicluna and Stefan Auer, 'Europe's constitutional unsettlement: testing the political limits of legal integration' (2023) 99(2) *International Affairs*, 769–785.

6 See decision of the European Council to open accession negotiations with Ukraine and Moldova, European Council, Conclusions, European Council meeting 14 and 15 December 2023, EUCO 20/23, Brussels, 15 December 2023. Accession negotiations started formally by an Intergovernmental Conference held on 25 June 2024 after the Council approved the Negotiating Framework on 21 June 2024.

The rule of law crisis that is at the center of this chapter can be linked to a general political trend of nationalist and populist forces either rising to power, or gaining increasing political influence across the European continent and beyond.[7] While this trend can be discerned in a number of EU Member States, it has been most prominently visible in the ascent of self-proclaimed 'illiberal democracies', starting with the coming to power of Victor Orbán's Fidesz party in Hungary in 2010, and in Poland during the period of consecutive governments led by the Law and Justice (Prawo i Sprawedliwość, PiS) party.[8] These political parties have used their time in government to strengthen their grip on political power by engaging in a quest to undermine constitutionally established checks and balances, and by systematically assaulting the independence of key institutions, such as the media, educational establishments and notably the judiciary. As a result, in 2020, Freedom House for the first time qualified Hungary as a 'transitional or hybrid regime', while Poland slipped back into the group of semi-consolidated democracies.[9] Since then, the situation in Hun-

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7 Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) *European Law Journal*, 141–160.

8 See Victor Orbán's speech at Băile Tuşnad (Tusnádfürdő), available at: https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/. L Pech and K Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3. On Hungary, see Gábor Halmai and Bojan Bugaric, 'Autocracy and Resistance in Hungary since 2010', 19 June 2023, available at SSRN http://dx.doi.org/10.2139/ssrn.4484312; András Jakab, 'Institutional Alcoholism in Post-socialist Countries and the Cultural Elements of the Rule of Law: The Example of Hungary' in: A Bakardjieva Engelbrekt and X Groussot (eds) *The Future of Europe: Political and Legal Integration Beyond Brexit* (Oxford: Hart Publishing, 2019), 209. On Poland see, among others, Wojciech Sadurski, 'Constitutional Design: Lessons from Poland's Democratic Backsliding' (2020) 6 *Const Stud* 59; L Pech, P Wachowiec, D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

9 See the democracy index put together by Freedom House at https://freedomhouse.org/ and the scores for Hungary at https://freedomhouse.org/country/hungary/nations-transit/2020. In 2022, the country's democracy score fell from 3,71 to 3,68 after evidence of further deterioration of media freedom and no improvement on other counts. The score remained unchanged in 2023 and 2024. Among the EU Member States from CEE, in 2024 Freedom House qualified three other countries as 'semi-consolidated democracies': Bulgaria, Romania and Croatia. See also Kelemen's analysis of what he calls the EU's autocratic equilibrium in Dan Kelemen, 'The European Union's authoritarian equilibrium' (2020) 27 *Journal of European Public Policy* 481. Following a different index maintained by the Gothenburg V-Dem institute, Hungary is placed in a group of so called 'electoral autocracies' while Bulgaria, Poland and Romania fall into a group of 'electoral democracies', together with some of the old Member States such as Austria, Greece and Portugal. See https://v-dem.net/documents/43/v-dem_dr2024_lowres.pdf. According to the latter index, among

gary has not improved. In contrast, Poland experienced what has been described as a 'tectonic shift' with the elections of October 2023, leading to the loss of power by the PiS party and the start of a difficult process of restoring the rule of law and repairing the damage on the country's democratic institutions.[10] What has been particularly distinctive of Hungary under Orbán and the PiS-led governments in Poland, is that these regimes have not even pretended to follow European rule of law standards and have instead been taking a course of open confrontation with EU institutions.[11]

In the face of the potentially devastating effects of such rule of law backsliding[12] for the mutual trust on which European integration builds, and hence for the very survival of the European project, all EU institutions have felt bound to act to uphold the rule of law as a fundamental EU value. Indeed, the Commission, the European Parliament, the Council and the Court of Justice of the European Union (hereinafter, the Court, or CJEU) have each within their respective sphere of competence, weighed in on the question of rule of law compliance and, albeit with differing resolve, undertaken specific measures to bolster the rule of law in EU Member States more generally, and address developments in backsliding states like Hungary, and previously Poland, in particular. The avenues for action have been manifold and intersecting, prompting scholars to search for a suitable taxonomy that would enhance the understanding for the various tools and measures and their implications and relative importance. Classifications have been offered along different lines: according

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the EU Member States from CEE, only Czechia, Estonia and Latvia are classified as liberal democracies.

10 See Country Report Poland, Freedom House, 2024, available at: https://freedomhouse.org/country/poland/nations-transit/2024. On the difficulties of such restoration see A Sajó, 'On the difficulties of Rule of Law restoration' in: Södersten and Hercock (n 2), 60-65.

11 See judgement of the Polish Constitutional Tribunal Nr. K/21 of 7 October 2021, available in English translation at: https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

12 The term 'backsliding' is by now well established in the legal and political science literature, although it has been criticised on a number of counts. Rule of law backsliding has been defined as 'the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party', Pech and Scheppele (n 8), 10. Some have pointed out that while the term implies a regression from a previous state of consolidated democracy, many countries in CEE were not truly consolidated democracies at the time of accession in the first place. See Licia Cianetti and Seán Hanley, 'The end of the backsliding paradigm' (2021) 32 *Journal of Democracy*, 66, at 67, with reference to Tim Carothers, 'The End of the Transition Paradigm' (2002) *Journal of Democracy* 5.

to the institutional actor undertaking the respective measure (Council, Parliament, Commission, Court, other bodies)[13], according to the functional sphere within which the respective tool is situated (political, legal, financial)[14], or according to the character of the governance approach employed (proceduralization, conceptualisation, judicialization).[15]

A natural point of reference in this search for the right strategy are the lessons learned from past experiences. In this respect, as I will argue in this contribution, particular attention deserve the insights gained during the "big-bang" Eastward Enlargement of the Union of 2004, 2007 and 2013 (hereinafter the Eastward Enlargement) and the way the obligation of ensuring respect for the rule of law in the Central and Eastern European (CEE) candidate states was handled in this process. The reasons for looking closer into the Eastward Enlargement are manifold. First, although incidences of rule of law deterioration can be observed in many countries within and outside Europe[16], it is quite obvious that the risk for democratic backsliding is more imminent in the new, still immature democracies from CEE that came out of the grip of authoritarian rule after the fall of the Berlin Wall in 1989. To be sure, there is a considerable variety in the political paths of the individual CEE Member States and not all of them are showing the same tendency of rule of law backsliding and open disrespect for international commitments as Hungary and Poland under the period of PiS-led governments. Yet, there seems to be broad agreement among initiated observers that the quality of democracy and the rule of law in the region has been deteriorating.[17]

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13 See C Closa, D Kochenov and J H Weiler, 'Reinforcing Rule of Law Oversight in the European Union'(2014) EUI Working papers, RSCAS 2014/25, at 20-23.

14 See Södersten (n 5).

15 Bakardjieva Engelbrekt, 'The Eastward Enlargement as a Driving Force and Testbed' (n 1).

16 In its annual report 'Freedom in the World 2020', Freedom House found 2019 to be the 14th consecutive year of decline in global freedom, and arrived at the sombre conclusion that democracy and pluralism were under assault. In 2019, the same organisation noted that 'the reversal has spanned a variety of countries, from long-standing democracies like the United States to consolidated authoritarian regimes like China and Russia. See Freedom House, Freedom in the World 2020, available at: https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf.

17 See the introduction by Cianetti et al to the special issue of *East European Politics* on 'democratic backsliding' in CEE: L Cianetti, J Dawson and S Hanley, 'Rethinking "democratic backsliding" in Central and Eastern Europe – looking beyond Hungary and Poland' (2018) 34 *East European Politics* 243. Cf also contributions by Dawson and Dimitrova, in the same special issue.

Secondly, EU policy in the field of the rule of law, in particular seen as a requirement vis-à-vis Member States, stems to a large extent from the process of Eastward Enlargement that has unfolded in the 1990s and beginning of 2000s. At this juncture, democracy, the rule of law and fundamental rights protection were set out unequivocally in the EU Treaties as shared values and conditions for Union membership. More generally, the evolving framework for ensuring respect for the rule of law in the Union has been noticeably influenced by the critique of double standards and the urge to close the gap between external and internal standards in this domain.[18]

Thirdly, in the context of the Eastward Enlargement, EU institutions, notably the Commission, started to flesh out the broad concept of the rule of law through more detailed positive and negative requirements and obligations. Crucially, it began developing a toolbox for screening and assessing the state of the rule of law in individual candidate states, adjusting the various instruments in the toolbox as experience from their application accumulated. A closer insight into this process can thus, arguably, help improve the efficiency and effectiveness of current EU rule of law policy, both internally in respect to EU Member States and externally, in respect of the ongoing process of preparing new candidate states for their accession to the Union.

The chapter proceeds as follows: In the next section, I go back to the beginnings of European integration and enquire into the status of the rule of law as a Community/Union value in the early days of the European project. I then trace the growing formalization and codification of the rule of law in the EU legal framework and the Treaties, taking place largely in anticipation of the

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[18] The link between rule of law policy in the EU and the Eastward Enlargement is widely acknowledged in the scholarly literature. See E Wennerström, *The Rule of Law and the European Union* (Iustus förlag, 2007); D Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer, 2008); Gráinne de Búrca, 'Beyond the Charter: How Enlargement has enlarged the human rights policy of the European Union' (2003) 27(3) *Fordham International Law Journal*, 679; Wojciech Sadurski, 'EU Enlargement and democracy in New Member States', in W Sadurski, A Czarnota and M Kryiger (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht, Springer, 2006), 27-49; Wojciech Sadurski, 'Charter and Enlargement' (2002) (8)(3) *European Law Journal*, 340-362; Wojciech Sadurski, 'Accession democracy dividend: The Impact of the EU Enlargement upon democracy in the New Member States of Central and Eastern Europe' (2004) 10 *European Law Journal*, 371--401; Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing, 2004); C Hillion, 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (2013) 11 *SIEPS European Policy Analysis*.

Union's Eastward Enlargement. In a subsequent section I look into the process of preparing the Candidate Countries (CCs) from Central and Eastern Europe (CCE) for accession to the Union, focusing on respect for the rule of law as part of the Copenhagen criteria for membership. Particular attention is given to the evolving Commission toolbox of instruments for screening the status of the rule of law in the CCs and guiding them towards building the necessary safeguards for the protection of the rule of law in their national legal and institutional systems. After this review, the chapter turns to the crisis of the rule of law in some of the CEE Member States of the Union post accession. The current multi-track mobilisation of Union institutions to respond to the rule of law backsliding is assessed, gauging the relative weight of different instruments in the internal rule of law policy of the Union. In a concluding section, the chapter identifies the challenges ahead, paying particular attention to the place of rule of law requirements in the ongoing Enlargement process. The overarching question is to what extent the lessons learned from the Eastward Enlargement of the Union can contribute to forging a more effective and sustainable internal and external EU rule of law policy.

II. The Rule of Law in the EU legal framework prior to the Eastward Enlargement

In recent academic debate, it is argued that there is a sufficiently firm common understanding of the meaning and scope of the principle of the rule of law in the EU. According to Pech, 'there is now a broad legal consensus in Europe on the core meaning of this principle, its minimum components, and how it relates to other key values such as democracy and respect for human rights'.[19] While this statement may be correct as a reflection of the current state of affairs, at the time when the Eastward Enlargement first came into sight as a political option for the EU, the situation was quite different. As most commentators agree, there was at that juncture a relatively thin express normative basis for the rule of law as a condition for EU membership, and scarce detail as to the exact content of the rule of law as an EU law principle.[20] Indeed, if we try to trace the evolution of the concept of the rule of law in Community/Union law,

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19 Laurent Pech and J Grogan, 'Unity and Diversity in National Understandings of the Rule of Law in the EU', *Reconnect*, WP 1 D, April 2020, available at https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf, 6 (hereinafter 'Unity and Diversity'); see also L Pech and Joelle Grogan, 'Meaning and Scope of the EU Rule of Law', *Reconnect*, WP 7 D2, April 2020, available at https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf (hereinafter 'Meaning and Scope').

20 See Kochenov (n 18); Wennerström (n 18); Hillion, 'Enlarging the European Union' (n 18) 10.

we must start by acknowledging that in the course of the four decades of legal history preceding the process of Eastward Enlargement the concept appears only rarely in legislative documents and in the jurisprudence of the European Court of Justice (ECJ).

1. Rule of Law in the Original Treaties

The original treaties of the European Communities contained no solemn declarations or formal commitment to the rule of law, democracy and fundamental rights.[21] There is no consensus in the literature as to the reasons for this conspicuous silence. Some seek the explanation in the fact that the United Kingdom (UK) was not among the founding Members of the European Communities. Since 'the rule of law' is a very central concept in UK law, it is seen as not surprising that the concept does not appear in the founding Treaties of the European Communities, while in contrast it occupies a prominent place in the Statute of the Council of Europe (CoE) and the ECHR.[22] At the same time, it is argued that by defining the function of the ECJ as being to guarantee 'that the law is observed', the legal system of the EU has from its inception been solidly based on the rule of law. Certainly, the very existence of the ECJ and the bold scope of its jurisdiction, including a mandate to review the legality of the acts of EU institutions, are in themselves a robust evidence of the importance of the rule of law in the legal and institutional system of the EU.[23] However, this can hardly be equated to the prominent commitment to the rule of law, as, for example, in the Statute of the CoE, nor to an explicit requirement of respect for the rule of law addressed to the Member States.

A more plausible explanation for the silence is in my view to be sought in the different approaches to European cooperation represented by the two major European organisations established in the aftermath of World War II. Whereas the CoE was conceived as an intergovernmental organisation with the main mission of upholding human rights in its Member States, the European Coal and Steel Community and, later on, the European Economic Community (and

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21 On the original provision of Art 31 ECSC Treaty and the controversies around the correct translation of the concept 'respect du droit' used therein, see Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (2020) *Reconnect*, WP 7, available at https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf (hereinafter 'The Rule of Law in the EU') 7.

22 See Art 3 Statute of the Council of Europe. As to the corresponding German and French concepts, namely *Rechtsstaat* and *état du droit*, the emphasis on statehood in these concepts is considered a plausible explanation for their avoidance in the founding Treaties and in subsequent ECJ jurisprudence. See Pech, 'The Rule of Law in the EU' (n 21), 8–9.

23 See Pech, 'The Rule of Law in the EU' (n 21), 8 et seq; Wennerström (n 18).

Euratom) were set up as international organisations of a hybrid type, with a substantial degree of delegation of sovereignty to supranational institutions and centered around the idea of a Common Market. This approach, closely associated with the architect of European integration Jean Monnet, and aptly referred to as 'functionalist', relies on achieving political unity through the logic of market integration.[24] It envisages pragmatic steps towards intertwining the economies of the Member States, while avoiding a debate over 'the political'.[25] If this view is correct, the absence of a reference to the rule of law in the original Treaties should not be seen as an unfortunate omission but rather as a conscious choice that followed logically from the model of European cooperation pursued by the Communities.

Certainly, the absence of an explicit rule of law clause in the original treaties did not mean that the founding members were tolerant or indifferent towards the rule of law. Quite to the contrary, the minimalist approach was partly possible due to the lack of sharp incongruences in the original Member States' understanding of fundamental constitutional values.[26] The traumatic heritage of World War II, and the living example of the detriments caused by authoritarian rule in the European countries within the Soviet sphere, had the effect of limiting, if not eliminating, the basis for political movements questioning the values of democracy, the rule of law and human rights in Western Europe. Moreover, all founding Member States of the European Communities were Members of the CoE. One might say that the rule of law, understood as a fundamental limitation on the exercise of state power, had been taken for granted among existing Member States.[27] The fact that countries like Greece, Spain and Portugal, which went through periods of military juntas and authoritarian rule

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24 See EB Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford, CA, Stanford University Press, 1964). See in this sense Gráinne De Búrca, 'Poland and Hungary's EU membership: On not confronting authoritarian governments' (2022) 20(1) *International Journal of Constitutional Law*, 13.

25 As succinctly put by Grabbe, "This is the heart of the 'Monnet method' of European integration: focus on practical economic integration and knit interests together so that people will stop paying so much attention to nationalist claims." See Heather Grabbe, 'Six Lessons of Enlargement Ten Years on: The EU's Transformative Power in Retrospect and Prospect (2014) 52 (Annual Review) *Journal of Common Market Studies* 46.

26 See Ivan Damjanovski, Christophe Hillion and Denis Preshova, 'Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts' (2020) *EU IDEA Research Papers* No 4, available at www.iai.it/sites/default/files/euidea_rp_4.pdf, 5.

27 Ibid.