

Meaning and Scope of the EU Rule of Law

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This project has received funding from the European Union's Horizon 2020 Research & Innovation programme under Grant Agreement no. 770142. The information in this deliverable reflects only the authors' views and the European Union is not liable for any use that may be made of the information contained therein.

DISSEMINATION LEVEL

Public

Project: RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law
GA: 770142
Horizon 2020: H2020-SC6-CULT-COOP-2017-two-stage
Funding Scheme: Collaboration Project

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Work Package 7 – Deliverable 2

Due date: 30.04.2020
Submission date: 30.04.2020
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1. Introduction

The rule of law has gained global appeal and recognition, and a political system based on the rule of law is considered a paradigmatic of the constitutions of western liberal states and the ‘benchmark of political legitimacy’.¹ The European Commission considers the rule of law to be ‘the backbone of modern constitutional democracies’.² Beyond Europe’s borders, the rule of law has been recognised as a foundational value, and a central tenant of constitutional democracies.³ However, the argued ambiguity in the meaning of the rule of law, as well as the many accounts of it at national and supranational level, have led to a common criticism that it has no core meaning. Such criticism has been realised in a new and concerning pattern: some Member States of the European Union contend that the rule of law has no *meaning*. For example, Hungary’s Minister of Justice who argued in November 2019 that the rule of law ‘has become a buzzword in the European Union’ which ‘lacks well-defined rules and remains the subject of much debate’.⁴ Poland’s then Minister of Foreign Affairs recently promised ‘a horse and saddle or box of Belgian chocolates for anyone who finds the definition of ‘the rule of law’ in the Treaty or any other legally binding EU document’.⁵

This Working Paper addresses the key questions surrounding the meaning and scope of the EU rule of law: primarily whether, and the extent to which, supranational understandings of the rule of law differ, if at all, from the national understandings. The Paper comes to the conclusion that the rule of law can and should be considered a core and consensual element of Europe’s legal space. It then examines the European minimum standards of the rule of law, and whether EU has promoted or applied different understandings for instrumental reasons. To bring context and further understanding to these questions, this Working Paper will review how the rule of law was guaranteed and understood in the EU and Council of Europe’s legal frameworks.

While shared traits do not necessarily imply or justify uniformity and the rule of law can be to the subject of diverse interpretations and implementations; we contend that such diversity and dynamic evolution notwithstanding, the rule of law can, and should, be correctly considered a fundamental and consensual element of Europe’s constitutional heritage. The rule of law has furthermore firmly established itself as an essential transnational and transversal principle of what may be referred to as ‘European constitutional law’ – the body of principles common to

¹ J Waldron, ‘The Concept and the Rule of Law’ (2008) *Georgia LR* 1.

² Commission, ‘Communication to the European Parliament and Council, A New Framework to strengthen the Rule of Law’ (Communication) COM(2014) 158.

³ For example, within the preamble to the United Nations Declaration on Human Rights (1948), ‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’. See eg J Jowell, ‘The Rule of Law’ in J Jowell and C O’Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019); L Heuschling, *État de Droit – Rechtsstaat – Rule of Law* (Dalloz 2002); BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2012); and TRS Allan, *The Sovereignty of Law* (OUP 2013).

⁴ J Varga, ‘Judit Varga: Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask | View’, (*Euronews*, 22 November 2019) <www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view> For a critical assessment of the different claims made by Judit Varga see RD Kelemen, L Pech and A Alemanno, ‘Responding to Judit Varga: Separating facts from propaganda about the rule of law | View’ (*Euronews*, 25 November 2019).

⁵ Były szef MSZ komentuje list Jourovej. ‘Konia z rządem, kto znajdzie w traktatach UE definicję praworządności’, 27 December 2019, <<http://niezalezna.pl/303625-byly-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-znajdzie-w-traktatach-ue-definicje-praworzadnosci>>.

the national constitutional orders and the EU and ECHR legal frameworks – whose core meaning and components are widely accepted across legal systems.

This Working Paper acknowledges that such alleged lack of definition is a critical issue, and also one that has been the source and inspiration of critiques of the rule of law. What has been problematic is the proliferation of definitions in multiple documents of a variable legal nature. However, not least because of the European Commission and Venice Commission's efforts, a compelling working definition has gained prominence and in doing so, has brought more consistency. This paper provides a comprehensive analysis of the rule of law in the European supranational legal order: giving consideration to the key legal provisions of the supranational legal orders of the European Union⁶ and the Council of Europe;⁷ while also considering the important clarificatory jurisprudence of the European Court of Justice, and the European Court of Human Rights. The paper argues that we state that there *is* a consensual 'European' meaning.

The Working Paper also contends that despite clarity in the common and consensual meaning at the core of the rule of law within the European legal space, this has not immunised it from criticism. This paper considers the most common critiques of the rule of law which are: (1) the 'illiberal' critique;⁸ (2) the double standards critique;⁹ and (3) the 'juristocracy' critique.¹⁰ We also consider a significant critique forwarded in the context of the Hungarian constitution, based on the doctrine of the Holy Crown.¹¹ While engaging with critiques of the rule of law can help engage and empower actors to consider its fundamental value and meaning, this Paper concludes that the most common critiques against the rule of law as a core, consensual value within the European legal space are ill-founded.

2. The Rule of Law in the European supranational legal frameworks: The EU legal framework

2.1. Key provisions

The evolution of the EU primary law framework when it comes to the rule of law having been already exhaustively described in another RECONNECT working paper.¹² This sub-section will summarise its key findings before giving an overview of the key references to the rule of law

⁶ See *infra* Section 2.

⁷ See *infra* Section 3.

⁸ See *infra* Section 5.1. In brief, this is a form of criticism as to the definition of the rule of law most often originating most often from states subject to the Article 7(1) TEU procedure.

⁹ See *infra* Section 5.2. In brief, this critique is broadly understood as the targeting of certain Member States over others for reasons other than concern for compliance with the rule of law.

¹⁰ See *infra* Section 5.3. Broadly, this criticism takes exception to certain judicial recognition of fundamental rights and judicial review, considering them to be elitist projects.

¹¹ See *infra* Section 5.4. In brief, the doctrine of the Holy Crown refers to a historic concept of a constitution with significant symbolic meaning towards the continuity of the Hungarian state.

¹² L Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', RECONNECT Working Paper No 7 (March 2020) <<https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf>>; L Pech, J Grogan et al, 'Unity and Diversity in National Understandings of the Rule of Law in the EU' RECONNECT Deliverable No 7.1 (May 2020). For a further and comprehensive account of the express commitment to the rule of law in EU primary law and implied commitment to the rule of law in EU constitutional principles, see T Konstadinides, *The Rule of Law in the European Union – The Internal Dimension* (Hart Publishing 2017).

one may find in EU secondary law. While this section focuses on the explicit recognition of the rule of law, it is important from the outset to emphasise that the rule of law is, and has always been, an implicit part of the European legal order: arguably, the Copenhagen criteria and then what is now Article 2 TEU are codifications in recognition of the value rather than the ‘first instance’ of mention of the rule of law.¹³

With respect to EU primary law, ie, primarily the treaties on which the EU is founded, one may first observe the absence of any reference to the rule of law or its core meaning in the original founding treaties, with one exception: the provisions describing the jurisdiction of the European Court of Justice, originally written in French, which arguably encapsulate the core meaning of the rule of law, ie ‘the reviewability of decisions of public authorities by independent courts.’¹⁴

Following the first significant reference in the case law of the ECJ to the rule of law in the 1986 *Les Verts* judgment¹⁵ wherein the ECJ first referred to the then EEC as a community based on the rule of law, EU primary law has seen an increasing number of Treaty provisions referring to the rule of law. Building on what has been comprehensively examined in the RECONNECT Working Paper No. 7 on the evolution of the rule of law, this table contrasts the situation in 1957 at the time of the EEC Treaty and the situation post Lisbon Treaty, which will quickly enable one to understand the ‘deepening’ of the Treaty framework in respect of the rule of law which, one may note, tends to be systematically referred to alongside democracy and respect for human rights:

1957	2009
Article 164 EEC: ‘The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty.’ ¹⁶	<p>Preamble to the TEU: ‘DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’; ‘CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’</p> <p>Article 2 TEU: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...’</p> <p>Article 21(1) TEU: ‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law [...]’</p>

¹³ For consideration of the historical evolution, and consideration of pre-accession articles and the opening membership of the European Communities see D Kochenov, ‘EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?’ (2005) 9 *European Integration Online Papers* 1–23.

¹⁴ F Jacobs, *The sovereignty of law: The European way* (The Hamlyn Lectures 2006, CUP 2007) 35.

¹⁵ Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* (1986) ECR 1339.

¹⁶ As translated in Treaty establishing the European Economic Community and connected documents (Luxembourg: Publishing Services of the European Communities, [sd]) 378.

	<p>Article 21(2) TEU: ‘The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] consolidate and support democracy, the rule of law, human rights and the principles of international law’</p> <p>Preamble to the Charter of Fundamental Rights of the EU: ‘the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law’</p> <p>See also the additional and multiple indirect references via the notion of EU values:</p> <p>e.g. Article 3 TEU: ‘The Union’s aim is to promote [...] its values’;</p> <p>Article 7 TEU: ‘the Council [...] may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2’;</p> <p>Article 8 TEU: ‘The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union’;</p> <p>Article 49 TEU: ‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union’</p>
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In addition to the Treaty provisions listed above, increasing awareness of the threat posed by what has been labelled rule of law backsliding – concerning which some of the most senior European judges went as far as to recently speak of the forthcoming ‘destruction of the Rule of Law’ in the EU¹⁷ – has resulted a rapid evolution of the EU’s rule of law ‘toolbox’,¹⁸ or legislative measures adopted with the aim of addressing threats to the EU values. While the first attempt to address rule of law concerns followed the election of a far-right party in Austria in the early 2000s, leading to the ‘preventative arm’ Article 7(2) TEU being introduced with the Lisbon Treaty,¹⁹ measures to address rule of law backsliding have grown exponentially since 2012.

¹⁷ Letter to the President of the European Commission from the president of the Network of Presidents of Supreme Courts of the EU; the president of the European Association of Judges; and the president of the European Network of Councils for the Judiciary (21 February 2020) <www.encj.eu/node/552>.

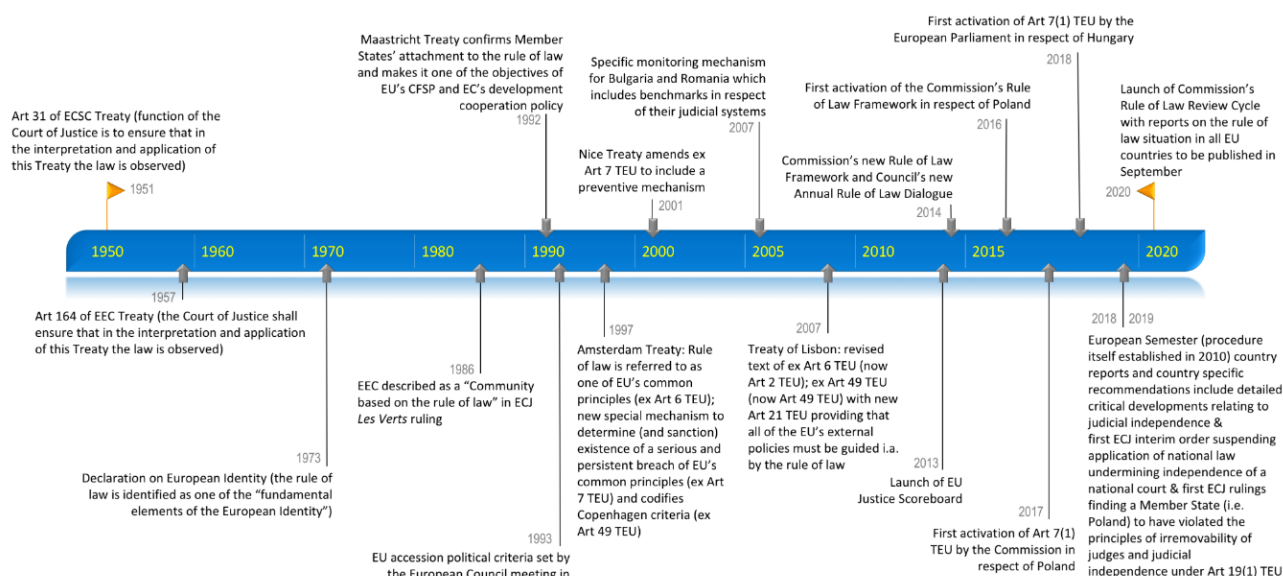
¹⁸ See D Kochenov and P Bard, ‘Rule of Law Crisis in the New Member States of the EU The Pitfalls of Overemphasising Enforcement’, RECONNECT Working Paper No 1 (July 2018) <https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf>; and C Closa, D Kochenov and JHH Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’ Robert Schuman Centre for Advanced Studies Research Paper No. 2014/25 (March 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404260###>.

¹⁹ See also KL Scheppele and L Pech, ‘Didn’t the EU Learn That These Rule-of-Law Interventions Don’t Work?’ (*Verfassungsblog*, 3 September 2018) <<https://verfassungsblog.de/didnt-the-eu-learn-that-these-rule-of-law-interventions-dont-work/>>.

Some of the instruments developed thus far are closely connected to provisions of EU primary law. For instance, the Rule of Law Framework adopted by the European Commission in 2014 is commonly presented as a pre-Article 7 TEU procedure. The Commission's new Rule of Law Review Cycle, to be launched this year, is also justified in the name of *inter alia* guaranteeing better compliance with Article 2 and preparing the ground for any eventual activation of Article 7 and/or Article 258 proceedings.²⁰ Similarly, the so-called European Semester, which has recently become more intensely occupied with issues relating to courts and judicial independence, is closely linked to Title VIII of the TFEU (economic and monetary policy) and the secondary legislation adopted on this basis.

Before exploring further relevant secondary legislation, so as to assess whether the rule of law has been defined in more details by the 'EU legislator' (ie the Commission, the Council and the Parliament), the table below should help one quickly appreciate the rapid evolution of the EU's rule of law toolbox:

EU Rule of Law timeline (1951-2020)



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In the absence of a single and comprehensive Treaty definition, one may already see that multiple provisions of EU primary law either encapsulate the core meaning of the rule of law (first subparagraph of Article 19(1) TEU) or require compliance with the core components of the rule of law such as the principle of judicial independence at European but also national levels (second subparagraph of Article 19(1) TEU and Article 47 CFR):

²⁰ European Commission, *Strengthening the rule of law within the Union. A blueprint for action*, COM/2019/343 final; Articles 4(3) TEU, 19(1) TEU and 267 TFEU are also mentioned in the communication. On Article 7, see the same point made by M Kellerbauer, M Klamert and J Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019).

Article 19(1) TEU	Article 47 EUCFR Right to an effective remedy and to a fair trial
<p>The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.</p> <p>Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.</p>	<p>Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.</p> <p>Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.</p> <p>Everyone shall have the possibility of being advised, defended and represented.</p> <p>Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.</p>

With respect to EU secondary law, a broadly similar conclusion can be offered with multiple pieces of legislation which refer to the rule of law. This is particularly true of the multiple legislative instruments dedicated to the external promotion of the EU's foundational and shared values as required inter alia by Article 21 TEU which provides that the EU's action on the international scene shall be guided inter alia by the rule of law:

EU financing instruments which aim inter alia to uphold and promote the EU's values worldwide	References to the rule of law
Instrument contributing to Stability and Peace (Regulation (EU) No 230/2014 ²¹)	Technical and financial assistance is to be provided inter alia to support 'international criminal tribunals and ad hoc national tribunals, truth and reconciliation commissions, and mechanisms for the legal settlement of human rights claims and the assertion and adjudication of property rights, established in accordance with international standards in the fields of human rights and the rule of law' (Article 3.2(e))
Instrument for Pre-accession Assistance (Regulation (EU) No 231/2014)	One of the specific objectives of the assistance to be provided under this Regulation is the 'strengthening of democracy and its institutions, including an independent and efficient judiciary, and of the rule of law, including its implementation (Article 2.1(a)(i)) with Annex II mentioning the need to establish and promoting 'the proper functioning of the institutions necessary in order to secure the rule of law', which means inter alia 'establishing independent, accountable and efficient judicial systems'
European Neighbourhood Instrument (Regulation (EU) No 232/2014)	'The rule of law, including reform of justice, of the public administration and of the security sector' is identified as one of the priorities for EU support under this Regulation (Annex II)
Development Cooperation Instrument (Regulation (EU) No 233/2014)	Under the heading 'human rights, democracy and the rule of law', a number of areas of cooperation are identified and which include inter alia the strengthening of 'the rule of law and the independence of judicial and protection systems' as well as 'ensuring unhindered and equal access to justice for all' (Annex I, I(a)(ii))
Partnership Instrument for cooperation with third countries	The rule of law is mentioned as one of the key principles which the EU aims to promote, develop and consolidate by means of dialogue and

²¹ This Regulation, similar to the other regulations cited in this table, applies from 1 January 2014 until 31 December 2020.

(Regulation (EU) No 234/2014)	cooperation with third countries (Article 3)
European Instrument for Democracy and Human Rights (Regulation (EU) No 235/2014)	EU assistance in order to strengthen the rule of law is associated inter alia with the objectives of ‘promoting the independence of the judiciary and of the legislature, supporting and evaluating legal and institutional reforms and their implementation, and promoting access to justice, as well as supporting national human rights institutions’ (Article 2.1(a)(ii)); ‘providing support for international and regional instruments and bodies in the area of human rights, justice, the rule of law and democracy’; ‘the implementation of international and regional instruments concerning human rights, justice, the rule of law and democracy’; and ‘training in and dissemination of information on international humanitarian law and support to its enforcement’ (Article 2.1(b))

A study focusing on the references to the rule of law contained in a set of technical and financial EU regulations adopted in 2006 for the period 2007-2013 previously concluded that ‘notwithstanding their relatively diverse and superficial nature, and the regrettable lack of a general and authoritative conceptual document on the EU rule of law approach, the EU is not ‘exporting’ a vague or incoherent ideal’ as ‘EU instruments always seek to increase compliance with a number of sub-components of the rule of law’²² which are selected on the basis of the specific aims to be pursued by each of the relevant regulations and which reflect different priorities and contexts. From a transversal look at these EU regulations, it was furthermore concluded that the EU may be said to promote an understanding of the rule of law which requires ‘compliance with a number of core principles in order to guarantee inter alia that governments are subject to the law and, more generally, that national legal systems give full effect to fundamental rights and democratic principles.’²³

Similarly, a study focusing on the Commission’s policy documents, decisions, and annual assessments of the candidate countries from 1997 to 2004 has argued that ‘while the Commission’s work was far from flawless, it articulated a clear vision on the core meaning of the political accession criteria *before* Poland, Hungary, and the other countries from Central and Eastern Europe acceded’²⁴ with the Commission always defending the view that the core meaning of the rule of law means ‘that the powers of the government and its officials and agents are circumscribed by law and exercised in accordance with law’.²⁵ Additional core elements such the need for an independent and impartial judiciary were consistently mentioned and one may therefore conclude that ‘the Commission’s conceptualization of rule of law thus went beyond a minimalist understanding of the rule of law [...] In short, the Commission held that democracy, rule of law, and human rights were interrelated’.²⁶

²² L Pech, ‘Promoting The Rule of Law Abroad: On the EU’s limited contribution to the shaping of an international understanding of the rule of law’ in F Amtenbrink and D Kochenov (eds), *The EU’s Shaping of the International Legal Order* (CUP 2013) 115.

²³ Ibid, 117.

²⁴ R Janse, ‘Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement’ (2019) 17(1) *ICON* 43, 46. For further consideration of the development of pre-accession criteria, and the understanding the rule of law as well as its connection to democracy and the necessary separation of powers, see C Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004); and D Kochenov, ‘Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law’ (2004) 8 *European Integration Online Papers* 1-24.

²⁵ Janse, *ibid*, 57.

²⁶ Ibid, 58 and 60.

The Commission's proposal for a regulation establishing a new Neighbourhood, Development and International Cooperation Instrument,²⁷ which aims to make EU's external action more coherent and effective via a unique and streamlined instrument building on the previously applicable instruments for the budgetary period 2021-2027, does not invalidate these conclusions. The objective to uphold and promote the rule of law continues to be a core objective but the proposed regulation also continues to fall short of offering any comprehensive definition or overview of how the Commission understands the concept, with Annex II of the proposed regulation however emphasising a number of cooperation priorities such as the development of an independent, effective, efficient and accountable judicial system, access to justice for all and the increase of transparency and accountability of public institutions.²⁸ The topics, which are listed under the heading 'Good governance, democracy, rule of law and human rights', are usually recognised as key sub-components of the concept of the rule of law.

While not a legal instrument, one may note the existence of a comprehensive definition of the rule of law provided in a Commission communication adopted in 1998 and dealing with the partnership between the EU and the group of ACP countries:²⁹

The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example:

- a legislature respecting and giving full effect to human rights and fundamental freedoms;
- an independent judiciary;
- effective and accessible means of legal recourse;
- a legal system guaranteeing equality before the law;
- a prison system respecting the human person;
- a police force at the service of the law;
- an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.

Internally oriented EU legal instruments offering brief non-exhaustive descriptions if not definitions of how the rule of law is understood can also be found, the most important of which is however yet to be adopted at the time of writing. It is worth reproducing in full however the relevant provisions of the Commission's proposed mechanism to enable suspension of EU funding in a situation where a generalised deficiency as regards the rule of law as the proposed

²⁷ COM(2018) 460 final, 2018/0243 (COD).

²⁸ COM(2018) 460 final, Annexes 1 to 7.

²⁹ European Commission, Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, COM(98) 146, 24 February 1998, at 4.

regulation had naturally to further specify how the notions of rule of law and of generalised rule of law deficiency is understood:³⁰

Article 2 Definitions

For the purposes of this Regulation, the following definitions apply:

- (a) 'the rule of law' refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including of fundamental rights; separation of powers and equality before the law;
- (b) 'generalised deficiency as regards the rule of law' means a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law;

Article 3 Measures

1. Appropriate measures shall be taken where a generalised deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union, in particular:

- (a) the proper functioning of the authorities of that Member State implementing the Union budget, in particular in the context of public procurement or grant procedures, and when carrying out monitoring and controls;
- (b) the proper functioning of investigation and public prosecution services in relation to the prosecution of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget;
- (c) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a) and b);
- (d) the prevention and sanctioning of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;
- (e) the recovery of funds unduly paid;
- (f) the effective and timely cooperation with the European Anti-fraud Office and with the European Public Prosecutor's Office in their investigations or prosecutions pursuant to their respective legal acts and to the principle of loyal cooperation.

³⁰ Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final, 2 May 2018.

2. The following may, in particular, be considered generalised deficiencies as regards the rule of law,

(a) endangering the independence of judiciary;

(b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;

(c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

While more limited in scope, the two Commission decisions which previously established a special monitoring mechanism for Romania and Bulgaria also offered an insight into the EU's understanding of the core components of the rule of law which EU candidate countries but also EU member states are expected to meet and guarantee:

Commission Decision 2006/928/EC in respect of Romania ³¹	Commission Decision 2006/929/EC in respect of Bulgaria ³²
<p>(1) The European Union is founded on the rule of law, a principle common to all Member States.</p> <p>(2) The area of freedom, security and justice and the internal market, created by the Treaty on European Union and the Treaty establishing the European Community, are based on the mutual confidence that the administrative and judicial decisions and practices of all Member States fully respect the rule of law.</p> <p>(3) This implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, inter alia, to fight corruption.</p> <p style="text-align: center;">[...]</p> <p>(6) The remaining issues in the accountability and efficiency of the judicial system and law enforcement bodies warrant the establishment of a mechanism for cooperation and verification of the progress of Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.</p>	<p>(1) The European Union is founded on the rule of law, a principle common to all Member States.</p> <p>(2) The area of freedom, security and justice and the internal market, created by the Treaty on European Union and the Treaty establishing the European Community, are based on the mutual confidence that the administrative and judicial decisions and practices of all Member States fully respect the rule of law.</p> <p>(3) This implies for all Member States the existence of an impartial, independent and effective judicial and administrative system properly equipped, inter alia, to fight corruption and organised crime.</p> <p style="text-align: center;">[...]</p> <p>(6) The remaining issues in the accountability and efficiency of the judicial system and law enforcement bodies warrant the establishment of a mechanism for cooperation and verification of the progress of Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime.</p>

³¹ Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ 2006 L 354/56.

³² Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, OJ 2006 L 354/58.

(7) If Romania should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Romanian judgments and judicial decisions, such as European arrest warrants.	(7) If Bulgaria should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Bulgarian judgments and judicial decisions, such as European arrest warrants.
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On the basis of these two decisions, more specific benchmarks were defined:³³

Benchmarks to be addressed by Romania	Benchmarks to be addressed by Bulgaria
<p>1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.</p> <p>2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.</p> <p>3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high level corruption.</p> <p>4 Take further measures to prevent and fight against corruption, in particular within the local government.</p>	<p>1. Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.</p> <p>2. Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure code, notably on the pre-trial phase.</p> <p>3. Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.</p> <p>4. Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report internal inspections of public institutions and on the publication of assets of high-level officials.</p> <p>5. Take further measures to prevent and fight corruption, in particular at the borders and within local government.</p> <p>6. Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas.</p>

At the very least, the above developments show that those arguing that ‘the organisation of the national justice system constitutes a competence reserved exclusively to the Member States, so that the EU cannot arrogate competences in that domain’³⁴ have failed to take stock of the multiple EU provisions and measures which have made clear over and over again that EU membership implies – to quote from the two EU Commission decisions in respect of Bulgaria

³³ European Commission, Progress Report on the Cooperation and verification mechanism – procedural aspects, MEO/07/260, 27 June 2007.

³⁴ Case C-619/18, para 38.

and Romania previously mentioned – ‘the existence of an impartial, independent and effective judicial and administrative system’. Since then, the ECJ has furthermore made explicitly clear what was previously implicitly accepted as obvious: while ‘the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law [...] by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore [...] arrogating that competence.’³⁵ Union law has presented a coherent understanding of the rule of law, which has inculcated itself in relevant legal provisions, and promotes that understanding. For example, the pending proposal for a Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law closely reflects the findings of the Court over the years as regards the rule of law.³⁶ In the next section, this Paper considers those findings.

2.2. Case law

Ever since its ruling in the 1986 case of *Les Verts*, in which the ECJ primarily equated the rule of law with the ‘traditional and interrelated legal principles of legality, judicial protection and judicial review, principles which are inherent to all modern and democratic legal systems’³⁷ and which the ECJ has also guaranteed since the early days of the EEC through the recognition and justiciability of general principles of EU law,³⁸ numerous rulings have clarified both the meaning and scope of the previously mentioned principles and the extent to which additional principles can also be viewed as core components of the rule of law.

When the Commission first offered a comprehensive working definition of the rule of law in a Communication published in 2014, it distinguished six core components on the basis of a number of ECJ rulings.³⁹ The table below will both recall the rulings referenced in the 2014 Communication and refer, where relevant, to the most important subsequent rulings issued since then:

Non-exhaustive list of principles included in the rule of law	ECJ rulings recognising these principles (selected examples)
Principle of legality	Case C-496/99 P, <i>CAS Succhi di Frutta</i> ECLI:EU:C:2004:236, para: 63: ‘An outcome of that kind would be contrary both to the fourth paragraph of Article 173 of the Treaty, which provides for a means of redress for persons directly and individually concerned by the contested measure, and to the fundamental principle that, in a community governed by the rule of law, adherence to legality must be properly ensured.’

³⁵ Ibid, para 52.

³⁶ Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, 2 May 2018. For analysis see KL Scheppele, L Pech, RD Kelemen, ‘Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget-related rule of law mechanism’ (*Verfassungsblog*, 12 November 2018) <<https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>>.

³⁷ L Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, 16.

³⁸ See eg T Tridimas, *The General Principles of EU law* (2nd edn, OUP 2007).

³⁹ COM(2014) 158 final (n 2) Annex I: The Rule of Law as a foundational principle of the Union.

Principle of legal certainty	<p>Joined Cases 212 to 217/80, <i>Amministrazione delle finanze dello Stato</i>, ECLI:EU:C:1981:270, para 10: ‘This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectations, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it’.</p> <p>Case 98/78 <i>Firma A Racke v Hauptzollamt Mainz</i> [1979] ECR 69, para 15: ‘A fundamental principle in the community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it.’</p>
Prohibition of arbitrariness of the executive powers	<p>Joined cases 46/87 and 227/88, <i>Hoechst</i>, ECLI:EU:C:1989:337, para 19: ‘in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law.’</p> <p>Case C-682/15, <i>Berlioz Investment Fund</i>, ECLI:EU:C:2017:373, para 51: ‘As regards, specifically, the requirement of a right guaranteed by EU law within the meaning of Article 47 of the Charter, it should be borne in mind that, according to settled case-law, protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constitutes a general principle of EU law’.</p>
Effective judicial protection by independent and impartial courts	<p>Case C-50/00 P, <i>Unión de Pequeños Agricultores</i> [2002], paras 38-39: ‘The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States.’</p> <p>C-64/16, <i>Associação Sindical dos Juizes Portugueses</i>, ECLI:EU:C:2018:117, paras 31, 37 and 41: ‘The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act [...] It follows that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection [...] In order for that protection to be ensured, maintaining such a court or tribunal’s independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy.’</p>
Effective judicial review, including respect for human rights	<p>Joined Cases C-402/05 P and C-415/05 P, <i>Kadi</i> [2008], ECR I-06351, para 316: ‘the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement’</p> <p>C-72/15, <i>Rosneft</i>, EU:C:2017:236, paras 73 and 75: ‘the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law [...] Since the purpose of the procedure that enables the</p>

	Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU.'
Equality before the law	<p>Case C-550/07 P, <i>Akzo Nobel Chemicals and Akcros Chemicals</i> [2010] ECR I-08301, para 54: 'It must be recalled that the principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union'</p> <p>Case C-83/14, <i>CHEZ Razpredelenie</i>, ECLI:EU:C:2015:480, para. 42: Directive 2000/43 'is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter, the scope of that directive cannot be defined restrictively'.</p>

As noted by the European Commission in 2019, 'recent case law of the Court of Justice of the European Union has made an indispensable contribution to strengthening the rule of law, reaffirming the Union as a community of values'.⁴⁰ The Commission is here referring to the significant rulings issued by the Court of Justice since the so-called 'Portuguese judges' or *ASJP* (*Associação Sindical dos Juizes Portugueses*) judgment in relation to some key aspects of what can be labelled the EU's rule of law crisis in particular in the form of measures specifically targeting national judiciaries and/or specific courts and/or specific judges.⁴¹ There is good argument to believe that the Court was obliged to act in the context of lack of action of the other Institutions in addressing 'rule of law backsliding'.⁴² In turn, the Court has developed what has been described as an 'existential jurisprudence', which is extremely significant not only for its practical outcomes and impact it is having but also for its conceptual impact.⁴³ Indeed, the

⁴⁰ European Commission Communication, *Further strengthening the Rule of Law within the Union: State of play and possible next steps* COM(2019) 163 final, 3 April 2019, 1-2, citing Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*; Case C-284/16, *Achmea*; Case C-216/18 PPU, *LM*; Case C- 621/18, *Wightman*; Case C-619/18 R, *Commission v Poland* (order of 17 December 2018).

⁴¹ On the Court's case law see L Pech and S Platon, 'Judicial independence under threat: the Court of Justice to the rescue in the ASJP case' (2018) 55 *Common Market Law Review* 1827; L Pech and S Platon, 'The beginning of the end for Poland's so-called 'judicial reforms'? Some thoughts on the ECJ ruling in *Commission v Poland* (Independence of the Supreme Court case)' (*RECONNECT blog*, 2 July 2019) <<https://reconnect-europe.eu/blog/pech-platon-poland-ecj-rule-of-law-reform/>>; M Bonnelly and M Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 *European Constitutional Law Review* 622; L Coutron, 'La Cour de justice au secures de la foret de Białowieska' (2018) 4-6 *Revue Trimestrielle de droit européen* 321; and P Wennerås, 'Saving a forest and the rule of law: *Commission v Poland*. Case C-441/17 R, *Commission v Poland*, Order of the Court (Grand Chamber) of 20 November 2017' (2019) 56 *Common Market Law Review* 541.

⁴² See, in particular, the Special Issue by D Kochenov, A Magen and L Pech (eds), 'The Great Rule of Law Debate in the EU' (2016) 54 *Journal of Common Market Studies* 1043-1259.

⁴³ The following developments directly draw from the RECONNECT publications of T Konciewicz, 'The Supranational rule of law as first principle of the European Public order. Facing up to the reality or daring to dream the dream?' at <<https://reconnect-europe.eu/blog/the-supranational-rule-of-law-as-first-principle-of-the-european-public-space-facing-up-to-the-reality-and-daring-to-dream-the-dream/>>; T Konciewicz, 'The Existential Jurisprudence of the Court of Justice Moving Beyond the Boats, Embracing the Journey' at <<https://reconnect-europe.eu/blog/existential-jurisprudence-konciewicz/>>. See also T Konciewicz, 'The Existential Jurisprudence of the Court of Justice Moving Beyond the Boats, Embracing the Journey' Parts I and II at <<https://verfassungsblog.de/on-the-rule-of-law-turn-on-kirchberg-part-i/>>; and 'The Existential Jurisprudence of the Court of Justice of the European Union. An essay on the judicial incrementalism in defence of European First

Court of Justice may be said to have been left with no choice but to more explicitly spell out the core of the EU rule of law read in the light of the rule of law's objective. Agreeing on the core is never about imposing uniformity but rather about enforcing these basic features of the legal order that are essential to its functioning, and more broadly, survival. Thanks to the judicial developments we have since the 'Portuguese judges' ruling, one may identify six constitutional signposts along the rule of law trajectory:

- 1) Article 2 TEU is not declaratory but has a substantive dimension;
- 2) The Court has clearly embraced Article 2 TEU as the hard core of the EU law and made it justiciable;
- 3) Article 2 TEU is not only political, but imposes legal duties which are enforceable by, and before, the Court through Article 19 TEU;
- 4) Article 19 TEU serves as the jurisdictional trigger irrespective of any linkage to substantive EU law other than Article 2 TEU and the duty to respect the values spelt out therein;
- 5) Member States are under a legal duty to have independent courts as a general matter of state organisation;
- 6) The general obligation to guarantee judicial independence of national courts is directly grounded in the Treaties (Article 2 TEU as a rationale and Article 19 TEU as a jurisdictional trigger).

The Court's case law since *AJSP* may be viewed as further confirmation that the rule of law must be seen in the EU legal framework as a meta principle that settles the most fundamental question of belonging and identity of meta politics. In other words, the rule of law as a meta principle dictates certain principles rather than being simply channelled and expressed through them. In this context, Article 19 TEU, especially the second subparagraph of paragraph 1 added by the Lisbon Treaty, has proved to offer a rescue path through which the EU judicial branch can defend the effective judicial protection by independent courts as the undisputable core of the European rule of law.

Article 220(1) TEC (now repealed and replaced, in substance, by Article 19 TEU following entry into force of the Lisbon Treaty)	Article 19(1) TEU (as inserted by the Lisbon Treaty)
The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.	The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Principles' in Krystyna Szczepanowska-Kozłowska (ed), *Profesor Marek Safjan znany i nieznan. Księga jubileuszowa z okazji siedemdziesiątych urodzin* (CH Beck 2020) 223.

	Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
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Constantinos Kakouris was right therefore to emphasise the untapped remedial potential of what is now Article 19(1).⁴⁴ As interpreted by the Court since the *ASJP* case, especially in the two infringement actions brought against Polish authorities to date, Article 19(1) TEU has been used to spell out the core constitutional elements at the heart of the EU rule of law. By introducing and then repeating over and over the terms ‘essence’ and ‘essential’, the Court’s recent case law may be understood as embodying a conception which does not view the rule of law simply as an objective, value, etc. but rather as a meta-principle which demands that that the right to a fair trial, effective judicial protection and the independence of the judiciary are considered first principles of the EU rule of law.⁴⁵ They command very concrete duties in the European public space. Article 19 TEU thus starts playing two fundamental roles in this process: it provides a normative and axiological anchoring for the rule of law and it serves as the jurisdictional trigger to enforce and protect the values of Article 2 TEU.

In the light of the *acquis* jurisprudential of fifty years, there is still untapped remedial potential in Article 19 TEU. The Court of the 1960s and 1970s always spoke of the law’s authority that binds together the union of ‘states, institutions, and individuals’. Writing with his usual farsightedness John Usher commented on the ways the Court had been using Article 164 (precursor of what is now Article 19 TEU) of the original EEC Treaty:

In fact, (...) the Court would appear to have granted a new remedy not expressly foreseen in the Treaties, by virtue of two general provisions of the Treaty, Art. 5 and 164... The door appears to have been opened to the exercise of new sorts of judicial control in the complex relationship between Community institutions and Member States, going beyond the broad interpretation which the Court had already given under the Treaties.⁴⁶

Faced with an increasing number of actions bringing to its attention different concrete measures which form part of the process of ‘rule of law backsliding’ now underway in a number of EU countries, the door has been thrown wide open to a brave new world where the Court is having to enforce the constitutional essentials of the EU legal order. In doing so, the Court is not only reminding Member States of their core commitments accepted on Accession Day but is also simultaneously further clarifying and consolidating the core meaning and core

⁴⁴ CN Kakouris, ‘La Cour de Justice des Communautés européennes comme cour constitutionnelle: trois observations’, in O Due, M Lutter, J Schwarze (eds), *Festschrift für Ulrich Everling* (Nomos 1995) 629; and in similar vein his earlier analysis CN Kakouris, ‘La Mission de la Cour de Justice des Communautés Européennes et l’ethos du Juge’ (1994) 4 *Revue des affaires européennes* 35.

⁴⁵ For consideration of the rule of law as value and principle, see L Pech, ‘A Union Founded on the Rule of Law’: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 *Eur Const LR* 359; and D Kochenov, ‘The Acquis and Its Principles: The Enforcement of the ‘Law’ versus the Enforcement of ‘Values’ in the European Union’ in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017) 9-27.

⁴⁶ JA Usher, *General Course: The Continuing Development of Law and Institutions*, in F Emmert, *Collected Course of the Academy of European Law. 1991 European Community Law. Vol II, Book 1*, (Martinus Nijhoff Publishers 1992) and in particular Part V ‘The European Court of Justice and its Jurisdiction’, 122-135 and his ‘How limited is the jurisdiction of European Court of Justice’, in J Dine, S Douglas-Scott, I Persaud (eds), *Procedure and the European Court* (Chancery Law Publishing 1991) 77.

subcomponents of the EU rule of law previously outlined. In this context, a key challenge is not the lack of common values or common points of reference – the rule of law is for instance a well-established legal principle and consensual value across the EU – but rather the lack of understanding among the Peoples of Europe *why* and *how* the quality of the rule of law in one of the EU Member States should matter to them. Indeed, while we might not yet be in the position to proclaim that we always know what the exact contours of the EU rule of law means in every relevant instance, it is certainly no longer the case that the rule of law, at least in the EU legal framework, can be said to mean ‘different things to different people’.

2.3. Definitional consolidation

In light of the multiple references to the rule of law and its core components one may find in EU primary and secondary law as highlighted above, one may conclude that it is not the lack of a definition which may be the issue but rather the multiplication of provisions which emphasise different components of the rule of law. This has given the impression of an à la carte definition of the rule of law by the different EU institutions. To address this criticism, the European Commission has sought to comprehensively clarify the core meaning and scope of the EU rule of law in its communication adopted in 2014 relating to the newly established Rule of Law Framework. It did so by offering a detailed definition consisting of a list of what the Commission understood as constituting the core sub-components of the rule of law within the context of the EU legal order primarily on the basis of the case law of both the CJEU but also the case law of the European Court of Human Rights. The Commission has since slightly refined the definition offered in 2014 in another communication adopted in 2019:

Commission Communication, <i>A new EU Framework to strengthen the Rule of Law</i> (2014) ⁴⁷	Commission Communication, <i>Further strengthening the Rule of Law within the Union. State of play and possible next steps</i> (2019) ⁴⁸
<p>The principle of the rule of law has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.</p> <p>[...] case law of the Court of Justice of the European Union (‘the Court of Justice’) and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe [...] provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.</p> <p>Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition</p>	<p>Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.</p> <p>The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of</p>

⁴⁷ COM(2014) 158 final/2 (n 2) 3-4.

⁴⁸ COM(2019) 163 final (n 40) 2.

of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law. [in bold in the original]	executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.
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In line with what was observed in relation to the 2014 Commission’s definitional efforts,⁴⁹ it is submitted that the Commission was correct not only in defending the view that the rule of law must be understood as a ‘constitutional principle with both formal and substantive components’ but also the view that the rule of law ‘is intrinsically linked to respect for democracy and for fundamental rights.’⁵⁰ This is also, one may note in passing, how one of the present authors of this Working Paper had previously codified the EU’s understanding of the rule of law which one may derive from the EU Treaties and associated case law:

[The rule of law is] principle of a fundamental and compelling nature stemming from the common European legal heritage and which aims to regulate the exercise of public power. [...] similarly to national traditions, this principle has progressively and rightfully become a dominant organizational paradigm as regards the EU’s constitutional framework, a multifaceted or umbrella legal principle with formal and substantive elements [...] the rule of law is once again clearly linked to the principles – or values – of democratic government and human rights protection. Indeed, these principles are so often intrinsically linked in practice that it appears impossible to clearly differentiate between them.⁵¹

The 2019 Communication definition of the rule of law has explicitly recognised one additional core component – the principle of separation of powers – to the *non-exhaustive* list first outlined in the 2014 Communication. The latter did however explicitly refer to separation of powers when explaining the aim of the then new Rule of Law Framework which was and is still supposed to address threats to the rule of law of a systemic nature which included, according to the Commission in 2014, threats to the separation of powers ‘as a result of the adoption of new measures or of widespread practices of public authorities’.⁵² In an annex to the 2014 Communication, the Commission also referred to the ECJ’s case law on ‘the principle of the separation of powers which characterises the operation of the rule of law’.⁵³ The explicit reference to separation of powers to the list of the core components of the EU rule of law seems to be connected to the references to this principle in the post 2014 case law of the ECJ⁵⁴

⁴⁹ D Kochenov and L Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 *ECLR* 512, 522-523.

⁵⁰ COM(2019) 163 final (n 40) 4.

⁵¹ L Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, 7, 9 and 68.

⁵² *Ibid*, 6. On the separation of powers as a pre-accession issue, see Kochenov (n 13).

⁵³ Case C-279/09 *DEB*, ECLI:EU:C:2010:811 para 58.

⁵⁴ C-477/16 PPU *Kovalkovas*, ECLI:EU:C:2016:861, para 36: ‘In the first place, it is generally accepted that the term ‘judiciary’ does not cover the ministries of Member States. That term refers to the judiciary, which must [...] be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive. Thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, ministries or other government organs, which are within the province of the executive’. See also C-452/16 PPU *Poltorak*, ECLI:EU:C:2016:858, para 35.

as well as the nature of the attacks on the rule of law the Commission identified in respect of the situation in Poland.⁵⁵

In light of the above, it is difficult to understand the definitional critique levelled at the EU and at the European Commission in particular in the context of its ongoing efforts to uphold and defend judicial independence. For instance, the Bulgarian prime minister, whose country, as previously outlined, has been subject to a specific rule of law monitoring mechanism since 2007, claimed that the rule of law is too ‘vague’ to be measured.⁵⁶ Yet, in the context of Bulgaria, the Commission has adopted six rather specific benchmarks having previously highlighted the nature of the rule of law problems Bulgaria was facing at the time of EU accession, ie shortcomings when it comes to the accountability and efficiency of the judicial system and law enforcement bodies. It is also difficult to understand the logic underlying the claim made by Poland’s former Minister of Foreign Affairs in December 2019 when he promised ‘a horse and saddle or box of Belgian chocolates for anyone who finds the definition of ‘the rule of law’ in the Treaty or any other legally binding EU document’.⁵⁷ There is however no definition of the rule of law in the Polish Constitution. Does this mean the rule of law does not underlie the whole Polish legal system? A negative answer is of course warranted. As made clear by Article 2 of the Polish Constitution, ‘The Republic of Poland shall be a democratic state ruled by law’. In other words, ‘this provision enacts a constitutional principle equivalent to the rule of law or Rechtsstaat’⁵⁸ on the basis of which Poland’s Constitutional Tribunal ‘has derived a number of general principles of law such as legal certainty, protection of acquired rights, protection of legitimate expectations, proportionality, non-retroactivity of law and sufficient *vacatio legis*’.⁵⁹

The EU has followed a broadly similar approach with the EU Treaties not offering a single, detailed definition of the rule of law. However, this does not necessarily imply that the rule of law is inevitably vague and therefore cannot be enforced. As a matter of fact, many

⁵⁵ See eg paras 100, 104 and 114 of European Commission reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017: ‘where the publication of a judgment is a prerequisite for its taking effect and where such publication is incumbent on a State authority other than the court which has rendered the judgment, an *ex post* control by that State authority regarding the legality of the judgment is incompatible with the rule of law. The refusal to publish the judgment denies the automatic legal and operational effect of a binding and final judgment, and breaches the rule of law principles of legality and separation of powers’; ‘the Commission considers that the procedure which led to the appointment of a new President of the Tribunal is fundamentally flawed as regards the rule of law. The procedure was initiated by an acting President whose appointment raised serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish Constitution’; ‘The law on the Supreme Court, the law on the National Council for the Judiciary, the law on Ordinary Courts Organisation and the law on the National School of Judiciary contain a number of provisions which raise grave concerns as regards the principles of judicial independence and separation of powers.’

⁵⁶ E Maurice, ‘Borisov: Poland vote would give EU ‘sleepless nights’’ (*EUobserver*, 11 January 2018) <<https://euobserver.com/institutional/140515>>.

⁵⁷ Były szef MSZ komentuje list Jourovej. ‘Konia z rządem, kto znajdzie w traktatach UE definicję praworządności’, (*Niezależna.pl*, 27 December 2019) <<http://niezalezna.pl/303625-byly-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-znajdzie-w-traktatach-ue-definicje-praworzadnosci>>.

⁵⁸ S Biernat and M Kawczyńska, ‘The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context’ in Anelli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 745, 762.

⁵⁹ *Ibid*, 759.

fundamental concepts are not defined by the EU Treaties. For instance, there could be no EU internal market without a prohibition on customs duties and yet the concept of customs duties is left undefined by the Treaties. Similarly, the EU Treaties guarantee many rights to EU workers, yet the notion of worker is also not defined in the EU Treaties. Does this mean that there is no EU binding prohibition on customs duties and no competence for the EU in this area? Of course not. The Masters of the Treaties have deliberately left it to EU institutions, and in particular the Court of Justice, to define and apply multiple key concepts and fundamental principles, which the Court has done and continues to do regularly in respect of the rule of law. It is primarily on the basis of the Court's case law that the European Commission was able to offer a comprehensive and compelling working definition of the core components of the rule of law in 2014. Arguing that the rule of law in the EU legal order is allegedly too vague or would lack a legally binding nature because the EU Treaties would lack a detailed definition does not therefore survive scrutiny.

3. The Rule of Law in the European supranational legal frameworks: The Council of Europe Legal Framework

3.1. Key provisions

The Council of Europe is founded upon the rule of law, and this is referred to in the Statute of the Council of Europe.⁶⁰

- Preamble, recital 3: 'Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'.
- Article 3: 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I'.
- Article 4: 'Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers...'
- Article 5(a): 'In special circumstances, a European country which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited by the Committee of Ministers to become an associate member of the Council of Europe...'
- Article 8: 'Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine'.

Thus, we see that membership of the Council of Europe is contingent upon respect for the rule of law and that serious violation of the principle may result in a state's suspension or eventual

⁶⁰ Statute of the Council of Europe, London, 5.V.1949, <www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680935bd0>.

expulsion from the Council. Therefore, the rule of law is referred to in major political and legal documents of the Council of Europe, notably among these the European Convention on Human Rights.⁶¹ It is referred to in the Preamble to the Convention:

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.

In addition, certain articles in the Convention expressly codify rule of law requirements. For example, Article 5 Right to liberty and security; Article 6 Right to a fair trial; Article 7 No punishment without law; Article 13 Right to an effective remedy (taken together with Article 41 Just satisfaction and Article 46 Binding force and execution of judgments); and Article 14 and Protocol No 12 Prohibition of discrimination, in particular ‘the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law’. We would also highlight Protocol No 7 which includes, among other things, the right not to be tried or punished twice. Moreover, we can see the rule of law in other Convention rights such as the right to free elections in Article 3 of Protocol No 1; and the prohibition of torture and inhuman or degrading treatment or punishment in Article 3, and the related fair trial guarantees.

More generally, adequate protection of human rights may be said to form a core component of the rule of law. To quote Lord Bingham, ‘the rule of law requires that the law afford adequate protection of fundamental human rights. It is a good start for public authorities to observe the letter of the law, but not enough if the law in a particular country does not protect what are there regarded as the basic entitlements of a human being’.⁶² In this regard, while it is beyond the scope of this working paper to explore the relevant case law in detail, we would note that some have pointed to Article 18 of the Convention as a safeguard against rule of law backsliding: ‘Human rights restrictions under false pretences present a clear danger to the rule of law, and Article 18 presents a powerful tool to address such backslides’.⁶³

The rule of law is also referred to in a plethora of other Council of Europe documents. For example, it is included in the Vienna Declaration (1993) concluded after the first summit of Council of Europe Heads of State and Government.⁶⁴ The Vienna Declaration emphasises that accession to the Council of Europe ‘presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights’. After the second such summit, the Strasbourg Declaration (1997) reaffirmed the attachment of the Heads of State and Government ‘to the fundamental

⁶¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI. 1950, <www.echr.coe.int/Documents/Convention_ENG.pdf>.

⁶² T Bingham, *The Rule of Law* (Penguin Books 2011) 84.

⁶³ F Tan, ‘The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?’ (2018) *Goettingen Journal of International Law* 9(1), Special Ed Holterhus, 109-141, 140.

⁶⁴ Vienna Declaration, First Summit (Vienna, 8 and 9 October 1993), <www.coe.int/en/web/cm/summits>.

principles of the Council of Europe – pluralist democracy, respect for human rights, the rule of law’.⁶⁵

Particularly noteworthy is the Warsaw Declaration (2005) after the third summit. It states that ‘The Council of Europe shall pursue its core objective of preserving and promoting human rights, democracy and the rule of law’ and the Heads of State and Government committed themselves to ‘developing those principles, with a view to ensuring their effective implementation by all member states’.⁶⁶ They further stated that:

We are committed to strengthening the rule of law throughout the continent, building on the standard setting potential of the Council of Europe and on its contribution to the development of international law. We stress the role of an independent and efficient judiciary in the member states in this respect. We will further develop legal cooperation within the Council of Europe with a view to better protecting our citizens and to realising on a continental scale the aims enshrined in its Statute.⁶⁷

To give another example, Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration refers to the rule of law and sets out some of its core elements:

Considering that the requirements of a right to good administration may be reinforced by a general legal instrument; that these requirements stem from the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency...⁶⁸

Similarly, the rule of law is referred to in several places in the Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. For example: ‘Wishing to promote the independence of judges, which is an inherent element of the rule of law, and indispensable to judges’ impartiality and to the functioning of the judicial system’.⁶⁹

3.2. Case law

3.2.1. *The rule of law as a fundamental guiding principle for the Court*

The general commitment to the principle of the rule of law in the core documents, is further echoed in the jurisprudence of the European Court of Human Rights. The first reference to the ‘rule of law’ in the Court’s case law was in *Golder v the United Kingdom* in 1975. The Court relied

⁶⁵ Strasbourg Declaration, Second Summit (Strasbourg, 10 and 11 October 1997), <www.coe.int/en/web/cm/summits>.

⁶⁶ Warsaw Declaration, Third Summit (Warsaw, 16 and 17 May 2005), <www.coe.int/en/web/cm/summits>.

⁶⁷ Ibid.

⁶⁸ Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration (Adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers’ Deputies) <<https://rm.coe.int/16807096b9>>.

⁶⁹ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies) <<https://rm.coe.int/16807096c1>>.

on the Vienna Convention on the Law of Treaties to emphasise the importance of the Preamble to the European Convention on Human Rights for determining the ‘object’ and ‘purpose’ of the Convention. As regards the reference to the rule of law in the Preamble, the Court considered:

that it would be a mistake to see in this reference a merely ‘more or less rhetorical reference’, devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’ was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.⁷⁰

In *Engel and Others v the Netherlands*, in its consideration of Article 5, the Court held that:

The Court considers that the words ‘secure the fulfilment of any obligation prescribed by law’ concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration (Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34).⁷¹

Similarly, in *Amuur v France*, the Court held that:

In laying down that any deprivation of liberty must be effected ‘in accordance with a procedure prescribed by law’, Article 5 para. 1 (art. 5-1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions ‘in accordance with the law’ and ‘prescribed by law’ in the second paragraphs of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2), they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention.⁷²

In this way, the rule of law has been and continues to be a fundamental guiding principle for the Court, and in fact it has been commented that, ‘The principle of the rule of law proved to be a particularly useful tool for the Court assisting it in interpreting, supplementing and enhancing the protection standards set out in the Convention’.⁷³

It is also important to note that the Court has framed the rule of law as part of a democratic society: ‘One of the fundamental principles of a democratic society is the rule of law’.⁷⁴ Furthermore, it has been commented that ‘in the *espace juridique* of the Convention, rule of

⁷⁰ *Golder v the United Kingdom* App no 4451/70 (21 February 1975) para 34.

⁷¹ *Engel and Others v the Netherlands* Apps no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1976) para 69.

⁷² *Amuur v France* App no 19776/92 (25 June 1996) para 50.

⁷³ E Steiner, ‘The Rule of Law in the Jurisprudence of the European Court of Human Rights’ in W Schroeder (ed) *Strengthening the Rule of Law in Europe: From A Common Concept to Mechanisms of Implementation* (Hart Publishing 2016) 139.

⁷⁴ *Klaas and Others v Germany* App no 5029/71 (6 September 1978) para 55.

law does not only require that society is governed on the basis of laws but also that these laws are the result of a democratic process’ and that this requirement ‘goes beyond the mere notion of majority rule and denotes that decision-making should be a participatory process’.⁷⁵ As a Committee of Ministers’ report has emphasised, ‘these three principles are closely interconnected: preserving and promoting human rights, democracy and the rule of law is nowadays even seen as a single objective – the core objective – of the Council of Europe’.⁷⁶

3.2.2. The European Court of Human Rights’ case law on rule of law-related requirements

As earlier noted, despite the strong recognition of the centrality of the rule of law within the Council of Europe, the core documents did not contain an authoritative definition of the term, elucidating the key requirements, and there remained differences in national understandings of the concept among member states. The European Court of Human Rights’ extensive jurisprudence provides guidance as to the content of the rule of law in the Convention system.⁷⁷ As has recently been commented, ‘The ECtHR thus has, and continues to hold, a crucial function in safeguarding the rule of law by fleshing out many of its principles through case-law’.⁷⁸

In 2008, the Council of Europe’s Committee of Ministers gave a useful overview of case law on rule of law-related requirements in a report titled ‘The Council of Europe and the Rule of Law – An Overview’.⁷⁹ The introduction to this document states that it was prepared by the Secretariat as part of the Deputies’ examination of rule of law issues, specifically ‘how full use could be made of the Council of Europe’s potential in promoting the rule of law and good governance’.⁸⁰ We will use this report to frame our overview of the Court’s case law.

As the Committee of Ministers’ report explains, ‘there is a strong consensus within the Council of Europe as to the basic requirements that flow from the rule of law principle’.⁸¹ In particular, it emphasises that the ‘adherence of all Council of Europe member states to the ECHR and their being subject to the jurisdiction of the European Court of Human Rights was highly instrumental in creating a common European core of rule of law requirements which is still developing further’.⁸² It concludes that, ‘Today, there exists such an impressive body of case-law on rule of law-related requirements that it is not exaggerated to state that the ECHR and the Court are not only instruments for the protection of human rights but also tools for the protection of the rule of law and the collective enforcement of its requirements’.⁸³

⁷⁵ Steiner (n 73) 140. For further discussion of the Court’s case law on the rule of law as a fundamental principle of a democratic society, see pp 140-142.

⁷⁶ ‘The Council of Europe and the Rule of Law – An Overview’ CM(2008)170, para 23, <www.coe.int/t/dc/files/Ministerial_Conferences/2009_justice/CM%20170_en.pdf>. The introduction to this document states that it was prepared by the Secretariat as part of the Deputies’ examination of rule of law issues.

⁷⁷ For a broad analysis of the Courts’ case law see G Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP 2013).

⁷⁸ Speech by J Polakiewicz, Director of Legal Advice and Public International Law of the Council of Europe, ‘The Rule of Law – Dynamics and Limits of a Common European Value’ (Minsk, 20 September 2019) <www.coe.int/en/web/dlapil/-/the-rule-of-law-dynamics-and-limits-of-a-common-european-value>.

⁷⁹ CM(2008)170 (n 76).

⁸⁰ Ibid, paras 1-3.

⁸¹ Ibid, para 29.

⁸² Ibid, para 33.

⁸³ Ibid, para 34.

The report finds that, ‘on the basis of that case-law, it is possible to list a number of rule of law-related requirements (components, constitutive elements or sub-principles) that form part of the law of the ECHR’,⁸⁴ and it groups these under three main headings:

- A. The institutional framework and organisation of the state;
- B. The principle of legality: principles of lawfulness, legal certainty and equality before the law; and
- C. Due process: judicial review, access to courts and remedies, fair trial.⁸⁵

The table below gives an overview of the main rule of law-related requirements set out in the Committee of Ministers’ report, with reference to selected examples from the Court’s case law (these are mainly drawn from the Committee of Ministers’ report, though supplemented with other selected examples).⁸⁶ It is important to note that, when discussing some of these issues, the Court does not always draw an explicit link with the rule of law.

Separation of powers	<i>Stafford v the United Kingdom</i> : ‘However, with the wider recognition of the need to develop and apply, in relation to mandatory life prisoners, judicial procedures reflecting standards of independence, fairness and openness, the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner’s release following its expiry has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case-law of the Court’. ⁸⁷
Role of the judiciary	<i>De Haas and Gijssels v Belgium</i> : ‘The Courts – the guarantors of justice, whose role is fundamental in a State based on the <u>rule of law</u> – must enjoy public confidence’. ⁸⁸ <i>Baka v Hungary</i> : ‘the Court cannot but note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies, are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge... Bearing this in mind, the Court considers that the respondent State impaired the very essence of the applicant’s right of access to a court’. ⁸⁹
Impunity	<i>Okkali v Turkey</i> : ‘What is more, the procedural requirements of Article 3 go beyond the preliminary investigation stage when, as in this case, the investigation leads to legal action being taken before the national courts: the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Article 3. This means that the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This

⁸⁴ Ibid, para 35.

⁸⁵ Ibid, paras 36-58.

⁸⁶ For ease of reference, the table uses the further sub-categorisation adopted by J Polakiewicz and J Sandvig at page 116 of *Chapter 7: The Council of Europe and the Rule of Law* in W Schroeder (ed) *Strengthening the Rule of Law in Europe*, above. They note that the categorisation is based on contributions from the Court’s Registry (Research Division) to CM(2008)170 (n 76). For further discussion of the case law see CM(2008)170 and E Steiner, both referenced above.

⁸⁷ *Stafford v the United Kingdom* App no 46295/99 (28 May 2002) para 78. See also *Öcalan v Turkey* App no 46221/99 (12 May 2005) para 112 et seq.

⁸⁸ *De Haas and Gijssels v Belgium* App no 19983/92 (24 February 1997) para 37. See also *Kobenter and Standard Verlags GmbH v Austria* App no 60899/00 (2 November 2006) para 29.

⁸⁹ *Baka v Hungary* App no 20261/12 (23 June 2016) para 121.

	<p>is essential for maintaining the public's confidence in, and support for, the <u>rule of law</u> and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts...'.⁹⁰</p> <p><i>Hugh Jordan v the United Kingdom</i>: 'A requirement of promptness and reasonable expedition is implicit in this context ... It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the <u>rule of law</u> and in preventing any appearance of collusion in or tolerance of unlawful acts'.⁹¹</p>
Tribunal established by law	<p><i>Guðmundur Andri Ástráðsson v Iceland</i>:</p> <p>'...the Court places emphasis on the importance in a democratic society governed by the <u>rule of law</u> of securing the compliance with the applicable rules of national law in the light of the principle of the separation of powers'.⁹²</p> <p>'The process was therefore to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law, one of the fundamental principles of the <u>rule of law</u>. The Court emphasises that a contrary finding on the facts of the present case would be tantamount to holding that this fundamental guarantee provided for by Article 6 § 1 of the Convention would be devoid of meaningful protection. Therefore, the Court concludes that there has been a violation of Article 6 § 1 of the Convention in the present case'.⁹³</p>
Sufficiently accessible and foreseeable law ⁹⁴	<p><i>The Sunday Times v the United Kingdom</i>: 'In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.⁹⁵</p> <p><i>Malone v the United Kingdom</i>: 'The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the <u>rule of law</u>, which is expressly mentioned in the preamble to the Convention (see, mutatis mutandis, the above-mentioned Silver and Others judgment, p. 34, para. 90, and the Golder judgment of 21 February 1975, Series A no. 18, p. 17, para. 34). The phrase thus implies – and this follows from the object and purpose of Article 8 (art. 8) – that there must be a measure of legal protection in domestic law against</p>

⁹⁰ [Okkali v Turkey](#) App no 52067/99 (17 October 2006) para 65.

⁹¹ [Hugh Jordan v the United Kingdom](#) App no 24746/94 (4 May 2001) para 108.

⁹² [Guðmundur Andri Ástráðsson v Iceland](#) App no 26374/18 (12 March 2019) para 122. Note that the case was referred to the Grand Chamber in September 2019.

⁹³ Ibid, para 123.

⁹⁴ CM(2008)170 (n 76) para 43 explains that, 'The principle of legality... forms a traditional core part of the rule of law concept' and that 'The rule of law requires that the state acts on the basis of, and in accordance with, the law. This offers essential legal protection of the individual vis-à-vis the state and its organs and agents. Many ECHR provisions reflect this principle through references to the notion of 'law', in most cases in the form of a requirement that interference with human rights must be lawful'.

⁹⁵ [The Sunday Times v the United Kingdom](#) App no 6538/74 (26 April 1979) para 49.

	arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 (art. 8-1) (see the report of the Commission, paragraph 121). Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident (see the <i>Klass and Others</i> judgment, Series A no. 28, pp. 21 and 23, paras. 42 and 49). ... Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence'. ⁹⁶
Scope of legal discretion	<i>Malone v the United Kingdom</i> : 'The degree of precision required of the 'law' in this connection will depend upon the particular subject-matter (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 31, para. 49). Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the <u>rule of law</u> for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference'. ⁹⁷
<i>Nullum crimen sine lege</i> and <i>nulla poena sine lege</i>	Article 7(1): 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'. <i>Kokkinakis v Greece</i> : 'The Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable'. ⁹⁸ <i>Del Rio Prada v Spain</i> : 'The guarantee enshrined in Article 7, which is an essential element of the <u>rule of law</u> , occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment'. ⁹⁹
Legal certainty	<i>Beian v Romania (No. 1)</i> : 'The practice which developed within the country's highest judicial authority is in itself contrary to the principle of legal certainty, a principle which is implicit in all the Articles of the Convention and constitutes one of the basic elements of the <u>rule of law</u> ... Instead of fulfilling its task of establishing the

⁹⁶ [Malone v the United Kingdom](#) App no 8691/79 (2 August 1984) para 67.

⁹⁷ Ibid, para 68.

⁹⁸ [Kokkinakis v Greece](#) App no 14307/88 (25 May 1993) para 52.

⁹⁹ [Del Rio Prada v Spain](#) App no 42750/09 (21 October 2013) para 77.

	<p>interpretation to be followed, the HCCJ itself became a source of legal uncertainty, thereby undermining public confidence in the judicial system ...'.¹⁰⁰</p> <p><i>Broniowski v Poland</i>: 'The <u>rule of law</u> underlying the Convention and the principle of lawfulness in Article 1 of Protocol No. 1 require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation'.¹⁰¹</p> <p><i>Brumărescu v Romania</i>: 'The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the <u>rule of law</u> to be part of the common heritage of the Contracting States. One of the fundamental aspects of the <u>rule of law</u> is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question'.¹⁰²</p> <p><i>Baranowski v Poland</i>: '... the Court considers that the practice which developed in response to the statutory lacuna, whereby a person is detained for an unlimited and unpredictable time and without his detention being based on a concrete legal provision or on any judicial decision is in itself contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the <u>rule of law</u>'.¹⁰³</p>
Execution of final domestic judgments	<p><i>Taskin and Others v Turkey</i>: 'Such a situation [circumventing a judicial decision] adversely affects the principle of a law-based State, founded on the <u>rule of law</u> and the principle of legal certainty'.¹⁰⁴</p> <p><i>Assanidze v Georgia</i>: 'As to the conformity of the applicant's detention with the aim of Article 5 to protect against arbitrariness, the Court observes that it is inconceivable that in a State subject to the <u>rule of law</u> a person should continue to be deprived of his liberty despite the existence of a court order for his release'.¹⁰⁵</p>
Equality before the law ¹⁰⁶	<p>Article 1 of the Convention states 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Furthermore, Article 14 and Article 1 of Protocol No 12 prohibit discrimination and the Preamble to Protocol No 12 expressly refers to 'the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law'.</p> <p>The principle of equality before the law is also seen throughout the provisions of Article 6 Right to a fair trial. For example, Article 6(1) emphasises that 'In the determination of his civil rights and obligations or of any criminal charge against him, <u>everyone</u> is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.</p>

¹⁰⁰ [Beian v Romania \(No. 1\)](#) App no 30658/05 (6 December 2007) para 39.

¹⁰¹ [Broniowski v Poland](#) App no 31443/96 (22 June 2004) para 184.

¹⁰² [Brumărescu v Romania](#) App no 28342/95 (28 October 1999) para 61.

¹⁰³ [Baranowski v Poland](#) App no 28358/95 (28 March 2000) para 56.

¹⁰⁴ [Taşkin and Others v Turkey](#) App no 46117/99 (10 November 2004) para 136.

¹⁰⁵ [Assanidze v Georgia](#) App no 71503/01 (8 April 2004) para 173.

¹⁰⁶ CM(2008)170 (n 76) para 53 explains that, 'Equality before the law and non-discrimination are human rights principles as much as they are rule of law principles, and the Court's case-law tends to apply the prohibition of discrimination without there being a special need to refer to it as a rule of law principle, although there is some recognition that equality in rights and duties of all human beings before the law is an aspect of the rule of law'.

Judicial control of the executive	<p><i>Klass and Others v Germany</i>: ‘One of the fundamental principles of a democratic society is the <u>rule of law</u>, which is expressly referred to in the Preamble to the Convention ... The <u>rule of law</u> implies, inter alia, that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure’.¹⁰⁷</p> <p><i>Kurt v Turkey</i>: ‘It must also be stressed that the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention ... What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the <u>rule of law</u> and place detainees beyond the reach of the most rudimentary forms of legal protection’.¹⁰⁸</p> <p><i>Brogan and Others v the United Kingdom</i>: ‘The assessment of ‘promptness’ has to be made in the light of the object and purpose of Article 5 (art. 5) (see paragraph 48 above). The Court has regard to the importance of this Article (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty ... Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the <u>rule of law</u>, ‘one of the fundamental principles of a democratic society ...’, which is expressly referred to in the Preamble to the Convention’ (see, mutatis mutandis, the above-mentioned <i>Klass and Others</i> judgment, Series A no. 28, pp. 25-26, para. 55) and ‘from which the whole Convention draws its inspiration’ (see, mutatis mutandis, the <i>Engel and Others</i> judgment of 8 June 1976, Series A no. 22, p. 28, para. 69)’.¹⁰⁹</p>
Positive obligations of the state in the form of procedural requirements and safeguards	<p><i>Tysiac v Poland</i>: ‘Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the <u>rule of law</u>, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention ... Compliance with requirements imposed by the <u>rule of law</u> presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention...’.¹¹⁰</p>
Right of access to a court	<p><i>Golder v the United Kingdom</i>: ‘And in civil matters one can scarcely conceive of the <u>rule of law</u> without there being a possibility of having access to the courts’.¹¹¹</p>

¹⁰⁷ *Klass and Others v Germany v Germany* App no 5029/71 (6 September 1978) para 55.

¹⁰⁸ *Kurt v Turkey* App no 24276/94 (25 May 1998) para 123.

¹⁰⁹ *Brogan and Others v the United Kingdom* App no 11209/84; 11234/84; 11266/84; 11386/85 (29 November 1988) para 58.

¹¹⁰ *Tysiac v Poland* App no 5410/03 (20 March 2007) para 112.

¹¹¹ *Golder v the United Kingdom* (n 70) para 34.

	<p><i>Bellet v France</i>: ‘The fact of having access to domestic remedies, only to be told that one’s actions are barred by operation of law does not always satisfy the requirements of Article 6 para. 1 (art. 6-1). The degree of access afforded by the national legislation must also be sufficient to secure the individual’s ‘right to a court’, having regard to the principle of the <u>rule of law</u> in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights ...’.¹¹²</p>
Right to an effective remedy	<p>Article 13: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’.</p> <p><i>Čonka v Belgium</i>: ‘... it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the <u>rule of law</u>, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention...’ and ‘Each of those factors makes the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied’.¹¹³</p>
Right to a fair trial ¹¹⁴	<p>Article 6(1) ‘In the determination of his civil rights and obligations or of any criminal charge against him, <u>everyone</u> is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.</p> <p><i>The Sunday Times v the United Kingdom</i>: ‘The Court first emphasises that the expression ‘authority and impartiality of the judiciary’ has to be understood ‘within the meaning of the Convention’ ... For this purpose, account must be taken of the central position occupied in this context by Article 6 (art. 6), which reflects the fundamental principle of the <u>rule of law</u>...’.¹¹⁵</p> <p><i>Sürmeli v Germany</i>: ‘However, in the light of the continuing accumulation of applications in which the only or the principal allegation was that of a failure to ensure a hearing within a reasonable time, in breach of Article 6 § 1, the Court adopted a different approach in Kudła (cited above, §§ 148-49), in which it drew attention to the important danger that existed for the <u>rule of law</u> within national legal orders when excessive delays in the administration of justice occurred in respect of which litigants had no domestic remedy, and observed that it was henceforth necessary, notwithstanding a finding of a violation of Article 6 § 1 for failure to comply with the reasonable-time requirement, to carry out a separate examination of any such complaints under Article 13 of the Convention’.¹¹⁶</p> <p><i>Hornsby v Greece</i>: ‘... However, that right would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would</p>

¹¹² [Bellet v France](#) App no 23805/94 (4 December 1995) para 36.

¹¹³ [Čonka v Belgium](#) App no 51564/99 (5 February 2002) para 83.

¹¹⁴ CM(2008)170 (n 76) para 58 explains that, ‘Unsurprisingly, the notion of the rule of law is used in the interpretation and application of the different guarantees of Article 6...’.

¹¹⁵ *The Sunday Times v the United Kingdom* (n 95) para 55.

¹¹⁶ [Sürmeli v Germany](#) App no 75529/01 (8 June 2006) para 104.

	<p>be likely to lead to situations incompatible with the principle of the <u>rule of law</u> which the Contracting States undertook to respect when they ratified the Convention ... Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6 (art. 6); moreover, the Court has already accepted this principle in cases concerning the length of proceedings ...'.¹¹⁷</p> <p><i>Assanidze v Georgia</i>: 'In any event, the Court notes that the principle of the <u>rule of law</u> and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute ...Consequently, the Court would be extremely concerned if the legislation or practice of a Contracting Party were to empower a non-judicial authority, no matter how legitimate, to interfere in court proceedings or to call judicial findings into question ...'.¹¹⁸</p> <p><i>Kyprianou v Cyprus</i>: 'The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court ... It reflects an important element of the <u>rule of law</u>, namely that the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness'.¹¹⁹</p>
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After discussing relevant case law, the Committee of Ministers' report concludes that the common thread here is that 'All these rule of law requirements under the ECHR pursue an important objective: to avoid arbitrariness and offer individuals protection from arbitrariness, especially in the relations between the individual and the state'.¹²⁰

3.3. The Venice Commission's contribution

One can also get a sense of the Council of Europe's understanding of the rule of law from the activities of a number of its bodies and monitoring mechanisms, including for example, the Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of European Judges (CCJE), the Group of States against Corruption (GRECO), and the European Commission for Democracy through Law (the Venice Commission).¹²¹ The work of the Venice Commission, an advisory body of the Council of Europe, is particularly relevant in clarifying and streamlining the meaning of the rule of law as a concept of universal validity.

In addition to recommendations and opinions prepared for the Council of Europe Member States on draft constitutions and legislation in different fields, the Venice Commission has also elaborated a number of recommendations aimed at strengthening the principle of the rule of law. Thus, in 2007, to further assist with identifying the consensual elements of the rule of law and unifying the principle, the Parliamentary Assembly of the Council of Europe (PACE) called upon the Venice Commission.

¹¹⁷ [Hornsby v Greece](#) App no 18357/91 (19 March 1997) para 40.

¹¹⁸ *Assanidze v Georgia* (n 105) para 129.

¹¹⁹ [Kyprianou v Cyprus](#) App no 73797/01 (15 December 2005) para 119.

¹²⁰ CM(2008)170 (n 76) para 59. See, for example, *Malone* (n 96) paras 67-68 (re Article 8) and [Winterwerp v the Netherlands](#) App no 6301/73 (24 October 1979) para 39 (re Article 5).

¹²¹ CM(2008)170 (n 76) Section B.

The 2011 Venice Commission ‘Report on the Rule of Law’ proposed a functional non-exhaustive definition of the concept drawing on a definition proposed by British Judge, Lord Bingham.¹²² In 2010, Lord Bingham had grasped the essence of the principle to be ‘that all persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of the laws publicly made, taking effect (generally) in the future and publicly administered in the courts’.¹²³ The Venice Commission identified a consensus on six necessary elements of the rule of law:

- (1) Legality, including a transparent, accountable and democratic process for enacting law;
- (2) Legal certainty;
- (3) Prohibition of arbitrariness;
- (4) Access to justice before independent and impartial courts, including judicial review of administrative acts;
- (5) Respect for human rights;
- (6) Non-discrimination and equality before the law.¹²⁴

As previously outlined, the EU Commission’s 2014 Communication ‘A new EU Framework to strengthen the Rule of Law’ drew on the Venice Commission’s work. For example, it stated that, ‘case law of the Court of Justice of the European Union (‘the Court of Justice’) and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU’.¹²⁵ The EU Commission’s 2014 Communication stated that ‘Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law’.¹²⁶ Indeed, it has been commented that the EU Commission’s 2014 Communication ‘applies an almost identical list of parameters’ as the Venice Commission and that the ‘only difference seems to be that the EU Communication does not mention respect for human rights as such, but refers to respect for fundamental rights in respect of effective judicial review’.¹²⁷ It is also noted that ‘Annex 2 to the Communication puts emphasis on the strong link between the ‘right to a fair trial and the separation of powers’’.¹²⁸ As previously discussed, the definition of the rule of law in the EU Commission’s 2014 Communication was later adopted and developed in the EU Commission’s 2019 Communication ‘Further strengthening the Rule of Law within the Union: State of play and possible next steps’.¹²⁹

¹²² Ibid.

¹²³ Bingham (n 62) 8.

¹²⁴ Venice Commission, ‘Report on the Rule of Law’ CDL-AD(2011)003rev-e, <[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e)>.

¹²⁵ COM(2014) 158 final (n 2) 4.

¹²⁶ Ibid, 4.

¹²⁷ Polakiewicz and Sandvig (n 86) 120-121.

¹²⁸ Ibid, 121.

¹²⁹ COM(2019) 163 final (n 40) 1.

The six elements identified by the Venice Commission in its 2011 report were further distilled into five, in its 2016 ‘Rule of Law Checklist’, making clear that respect for human rights informs the other elements: ‘The Rule of Law would just be an empty shell without permitting access to human rights. Vice-versa, the protection and promotion of human rights are realised only through respect for the Rule of Law’. The Checklist, developed with the help of the Bingham Centre for the Rule of Law, was adopted in March 2016.¹³⁰ In the Checklist, each of the five elements of the rule of law is accompanied with practical benchmarks which are intended to serve as a practical tool for assessing adherence to the rule of law within a state in a manner that is ‘objective, thorough, transparent and equal’. Without aiming to be exhaustive, the Checklist comprises the core elements of the rule of law whilst acknowledging the diversity of Europe’s legal systems and traditions.¹³¹

The strength of the functional approach to the rule of law adopted by the Venice Commission is proved by the wide acknowledgement, use of and adherence to this approach by different Council of Europe and EU institutions. Thus, in September 2016, the Committee of Ministers of the Council of Europe endorsed the Rule of Law Checklist and invited relevant authorities in the member states to make use of the Checklist and to disseminate it widely in the relevant circles. One month later, in October 2016, this was followed by the Congress of Local and Regional Authorities who endorsed the Checklist and committed to use it as a reference document to assess the legal and political context of local and regional democracy in Council of Europe member states. A year later, in October 2017, PACE also decided to endorse the Checklist and pledged to use it systematically in its work.¹³² Moreover, since 2016 the definition of the rule of law in the Venice Commission Checklist has been often referenced in CJEU judgments and opinions of the Advocate General.¹³³ Additionally, the Checklist is becoming a key reference document for scholars and researchers assessing the rule of law in different countries.¹³⁴

The acknowledgement that the Checklist is ‘one of the few widely accepted conceptual frameworks for the Rule of Law in Europe’ is not just rhetoric.¹³⁵ In the words of the Director of the Directorate of Legal Advice and Public International Law of the Council of Europe, the Checklist and the case law of the European Court of Human Rights ‘are highly relevant for the setting up, by the Committee of Ministers and the Parliamentary Assembly, of a new joint procedure of reaction to serious violations of the Council of Europe’s fundamental principles

¹³⁰ ‘Rule of Law Checklist’ adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) <www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>.

¹³¹ See A Drzemczewski, ‘The Council of Europe and the Rule of Law: Introductory Remarks regarding the Rule of Law Checklist Established by the Venice Commission’ (2018) 37 *Human Rights Law Journal* 179.

¹³² PACE Resolution 2187 (2017).

¹³³ Case T-731/15 *Klyuyev v Council*, 21 February 2018, para 76; Case T-346/14 *Yanukovych v Council*, 15 September 2016, para 98; Case T-245/15 *Klymenko v Council*, 8 November 2017, para 74; Case T-242/16 *Stavytskyi v Council*, 22 March 2018, para 69; and Opinion of AG Tanchev delivered on 27 June 2019, Joined Cases C-585/18, C-624/18 and C-625/18, paras 71 and 128.

¹³⁴ B Matias, Group for Legal and Political Studies, ‘Rule of law findings on Kosovo: Assessment based on the Rule of Law Checklists developed by the Council of Europe (The Venice Commission)’, Pristina, November 2018; and O Garner and J Simson Caird, *The European Union (Withdrawal Agreement) Bill and the Rule of Law*, Bingham Centre report, 10 January 2020.

¹³⁵ S Carrera, E Guild and N Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU* (CEPS 2013) 17.

and values including the rule of law'. The Court's case law or the Venice Commission's Rule of Law Checklist will provide important parameters for such an exercise.¹³⁶

4. A consensual 'European' meaning?

4.1. The crystallisation of a consensual core meaning at the European level

In light of the definitions put forward by the Venice Commission and the European Commission in the past decade, one may reasonably submit 'there is now a consensus on the core meaning of the rule of law and the elements contained within it'¹³⁷ at least as far as the European legal space is concerned. Consensus should not however be confused with uniformity and it goes without saying, for instance, that 'common approaches, standards and norms do not entail their implementation in an identical manner'¹³⁸ and neither should they.

Venice Commission's understanding of the rule of law (2011) ¹³⁹	European Commission's understanding of the rule of law (2014/2019) ¹⁴⁰
<p>Core meaning: all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.¹⁴¹</p> <p>Core elements:</p> <ul style="list-style-type: none"> (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts (5) Respect for human rights; (6) Non-discrimination and equality before the law. 	<p>Core meaning: all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.</p> <p>Core elements:</p> <ul style="list-style-type: none"> (1) Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws (2) Legal certainty; (3) Prohibition of arbitrariness of the executive powers; (4) Effective judicial protection and effective judicial review by independent and impartial courts, including respect for fundamental rights; (5) Separation of powers; (6) Equality before the law.

As made obvious by the table above, the elements contained in the 'EU list' are virtually identical to the elements listed by the Venice Commission. This should not come as a surprise since the EU and Council of Europe have been promoting a similar conception of the rule of law.¹⁴² And while separation of powers is not explicitly mentioned as a core element of the rule

¹³⁶ J Polakiewicz, *The Rule of Law – Dynamics and Limits of a Common European Value, Presentation to the Scientific-Consultative Council on International Legal Issues of the Ministry of Foreign Affairs of Belarus*, Minsk, 20 September 2019.

¹³⁷ Venice Commission (n 124) para 35.

¹³⁸ COM(2019) 163 final (n 40) 11.

¹³⁹ Venice Commission (n 124) 41.

¹⁴⁰ COM(2014) 158 final (n 2) 4. The principle of separation of powers has been explicitly added to this list by the European Commission in 2019: COM(2019) 163 final (n 40).

¹⁴¹ The Venice Commission borrowed this definition from Lord Bingham (n 62).

¹⁴² See L Pech, 'Promoting The Rule of Law Abroad: On the EU's limited contribution to the shaping of an international understanding of the rule of law', in F Amtenbrink and D Kochenov (eds), *The EU's Shaping of the International Legal Order* (CUP 2013) 108.

of law by the Venice Commission, the Venice Commission did present judicial independence as being ‘an integral part of the fundamental democratic principle of the separation of powers’.¹⁴³

In light of the findings made in RECONNECT Working Paper D.7.1, it is furthermore submitted that the core components of the rule of law highlighted by both the Venice Commission and European Commission adequately reflect the essential characteristics of the rule of law one may draw from Europe’s national legal orders. Some minor criticism can naturally be expressed in relation to specific core elements. For instance, it is not obvious that the principles of non-discrimination (Venice Commission’s list) and equality before the law (both lists) ought to be distinguished from the broader notion of fundamental rights. It may be that the drafters of the Venice Commission may have been influenced by Dicey who reserved a special place for the principles of equal subjection of all legal persons to the law of the land and equal access to a system of ordinary courts.¹⁴⁴ To follow Dimitry Kochenov and Laurent Pech, one may also argue that a number of core principles are also arguably missing from both lists:

The principle of accessibility of the law, which requires that the law must be intelligible, clear, predictable and published, the principle of the protection of legitimate expectations and the principle of proportionality. The principle of legality may however be understood as encompassing the requirement that the law must be accessible and the protection of legitimate expectations is closely linked to the principle of legal certainty. As for the principle of proportionality, its limited use in English administrative law – to oversimplify, proportionality as a ground of review is only applied in cases raising points of EU and ECHR law – may have thought to justify its exclusion from what have been presented as consensual lists.¹⁴⁵

Be that as it may, what is also striking about the core meaning and core components of the rule of law adopted by both the Venice Commission and the European Commission is their similar embrace of the rule of law as a foundational not to say constitutional principle with formal and substantive components which furthermore shares a consubstantial and mutually reinforcing relationship with democracy and respect for human rights:

The Rule of Law is linked not only to human rights but also to democracy [...] Democracy relates to the involvement of the people in the decision-making process in a society; human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties and to secure human dignity; the Rule of Law focuses on limiting and independently reviewing the exercise of public powers. The Rule of Law promotes democracy by establishing accountability of those wielding public power and

¹⁴³ Venice Commission (n 124) para 55.

¹⁴⁴ See Venice Commission (n 124) para 9: ‘For Dicey the rule of law had three core features: First, that no person should be punished but for a breach of the law, which should be certain and prospective, so as to guide peoples’ actions and transactions and not to permit them to be punished retrospectively. He believed that discretionary power would lead to arbitrariness. Secondly, that no person should be above the law and that all classes should be equally subjected to the law. Thirdly, that the rule of law should emanate not from any written constitution but from the “common (judge-made) law”’.

¹⁴⁵ Kochenov and Pech (n 49) 523.

by safeguarding human rights, which protect minorities against arbitrary majority rules.¹⁴⁶

[R]espect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.¹⁴⁷

This understanding has been regularly reaffirmed by the main institutions of both the Council of European and the EU such as the Parliamentary Assembly of the EU, the European Parliament and the Council of the EU:

The Assembly [of the Council of Europe] reiterates that democracy, the rule of law and respect for human rights are interlinked and cannot exist without one another. Respecting, but also fostering and strengthening, these three fundamental principles is an obligation incumbent upon all member states. Conversely, any developments in a member state that undermine or weaken one of these fundamental principles is of immediate concern.¹⁴⁸

[R]espect for the rule of law within the Union is a prerequisite for the protection of fundamental rights, as well as for upholding all rights and obligations deriving from the Treaties and from international law, and is a precondition for mutual recognition and trust as well as a key factor for policy areas such as the internal market, growth and employment, combatting discrimination, social inclusion, police and justice cooperation, the Schengen area, and asylum and migration policies, and as a consequence, the erosion of the rule of law, democratic governance and fundamental rights are a serious threat to the stability of the Union, the monetary union and the common area of freedom security and justice and prosperity of the Union¹⁴⁹

Democracy, the rule of law and fundamental rights are essential building blocks of our societies and the very foundation of the European project. Anchored in our constitutional traditions, the EU Treaties and the EU Charter of Fundamental Rights, as well as in the international obligations common to us, they should be the things that unite us [...] Democracy, the rule of law and fundamental rights are interlinked, interdependent and mutually reinforcing. One cannot exist without the others. They should be promoted in a horizontal, integrated and comprehensive manner.¹⁵⁰

¹⁴⁶ Venice Commission, Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Study No. 711/2013, CDL-AD(2016)007, 18 March 2016, para 33.

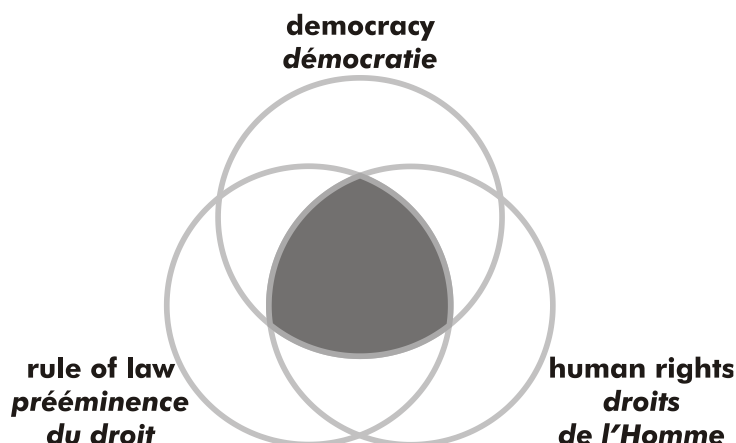
¹⁴⁷ COM(2014) 158 final (n 2) 4.

¹⁴⁸ PACE, The functioning of democratic institutions in Poland, Resolution 2316 (2020) para 1.

¹⁴⁹ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)) recital H.

¹⁵⁰ Council of the EU, *Presidency conclusions from the conference by the Finnish Presidency of the Council of the EU held in Helsinki*, Finland on 10-11 September 2019, 12128/19, 12 September 2019, paras 1 and 6.

Europe's dominant rule of law approach therefore may be understood as one which views the rule of law, democracy and respect for human rights as an 'interrelated trinity of concepts'.¹⁵¹ In other words, the rule of law along with democracy and respect for human rights must be understood as *interconnected* and *interdependent* principles, a number of subcomponents of which can be said to simultaneously fall within the scope of two if not all three principles:¹⁵²



Understanding democracy, the rule of law and respect for human rights as inextricably linked principles (or values) means among other things that they must not only be construed in light of each other, but also be viewed as mutually reinforcing principles that are dependent on each other. Few in Europe would therefore accept the view that the principle of the rule of law may be 'compatible with gross violations of human rights' as Raz controversially suggested,¹⁵³ or be properly satisfied by non-democratic or self-labelled illiberal regimes.

In light of the above, the understanding and approach promoted by the both the Council of European and the EU predominantly amount to what a number of scholars have often labelled the thick or substantive conception of the rule of law.¹⁵⁴ This basic distinction should not lead one to forget however that the formal versions of the rule of law 'have substantive implications' while the 'substantive versions incorporate formal requirements.'¹⁵⁵ Notwithstanding the rather artificial nature of the divide between formal and substantive conceptions, it would be wrong, in our opinion to label the understanding of the rule of law promoted by the Council of Europe and the EU as a 'thin' one. Based on the multiple documents, legally binding or otherwise, examined previously, it would appear more accurate to speak of a dominant approach which presents, correctly in our view, the rule of law as an umbrella or multifaceted principle with formal and substantive components.¹⁵⁶

¹⁵¹ Council of Europe (Parliamentary Assembly), *The Principle of the Rule of Law*, Report of the Committee on Legal Affairs and Human Rights, no 11343 (6 July 2007) para 5.

¹⁵² Figure borrowed from Council of Europe (Committee of Ministers), *The Council of Europe and the Rule of Law – An overview*, CM(2008)170 (n 76) para 25.

¹⁵³ J Raz, 'The Rule of Law and its Virtue', in J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 221.

¹⁵⁴ For further analysis, see A Timmer, B Majtényi, K Häusler and O Salát, *EU Human rights, democracy and rule of law: from concepts to practice*, FRAME Deliverable 3.2, 30, <www.fp7-frame.eu/frame-reps-3-2/>.

¹⁵⁵ Tamanaha (n 3) 92.

¹⁵⁶ Pech (n 45) 369 et seq.

4.2. Processes of horizontal and vertical ‘norm-diffusion’ between domestic and supranational legal orders

The Council of Europe and EU experiences suggest that the migration of the rule of law from the national to the regional level in Europe has subsequently led to a process that may be described as ‘downstream retroaction’, that is, a process whereby regional legal developments have affected not only new but also well-established national democracies such as, for instance, the UK. The case law of the European Court of Human Rights on key components of the rule of law such as the principles of legality or proportionality or the EU Treaties’ increasing use of the concept seem to have been the background factors which contributed to the British Parliament’s first explicit statutory recognition of the rule of law. Not that there was any doubt that the rule of law is an important constitutional principle of UK law, which is regularly applied by British courts. A statutory reference appeared however to have been viewed as necessary in the context of an external environment where the principle was increasingly relied upon by the Strasbourg and Luxembourg Courts to review British measures and judgments.

Looking beyond the British example, it is clear that when one looks at the principles and other legal standards that courts traditionally uphold by way of judicial review, one may in fact discover additional examples of conceptual migration and mutual borrowings from the national to the regional level. The principles of proportionality, legal certainty or the protection of legitimate expectations come easily to mind in this regard. It would however be wrong to think of the relationship between national understandings and European ones as being one-dimensional and static. On the contrary, one may reasonably contend that EU legal developments as well as the case law of the European Court of Human Rights have led to a reappraisal of national understandings. In other words, after assimilating the values and principles which the rule of law encompasses in various legal traditions, legal developments at the European level have shaped national understandings and the judicial interpretation and application of the different sub-components of the rule of law. In turn, national legal developments influenced by membership of the EU and the Council of Europe have, at times, revealed some innovative features which could then be ‘re-exported’, so much so that one can perhaps speak of constitutional ping-pong in this area, or, to use a less trivial expression, of intertwined constitutionalism.¹⁵⁷

It is submitted that the impact or outcome of these processes of vertical and horizontal norm-diffusion has led to the emergence and subsequent solidification of the following shared traits between the dominant European and national legal understandings of the rule of law:¹⁵⁸

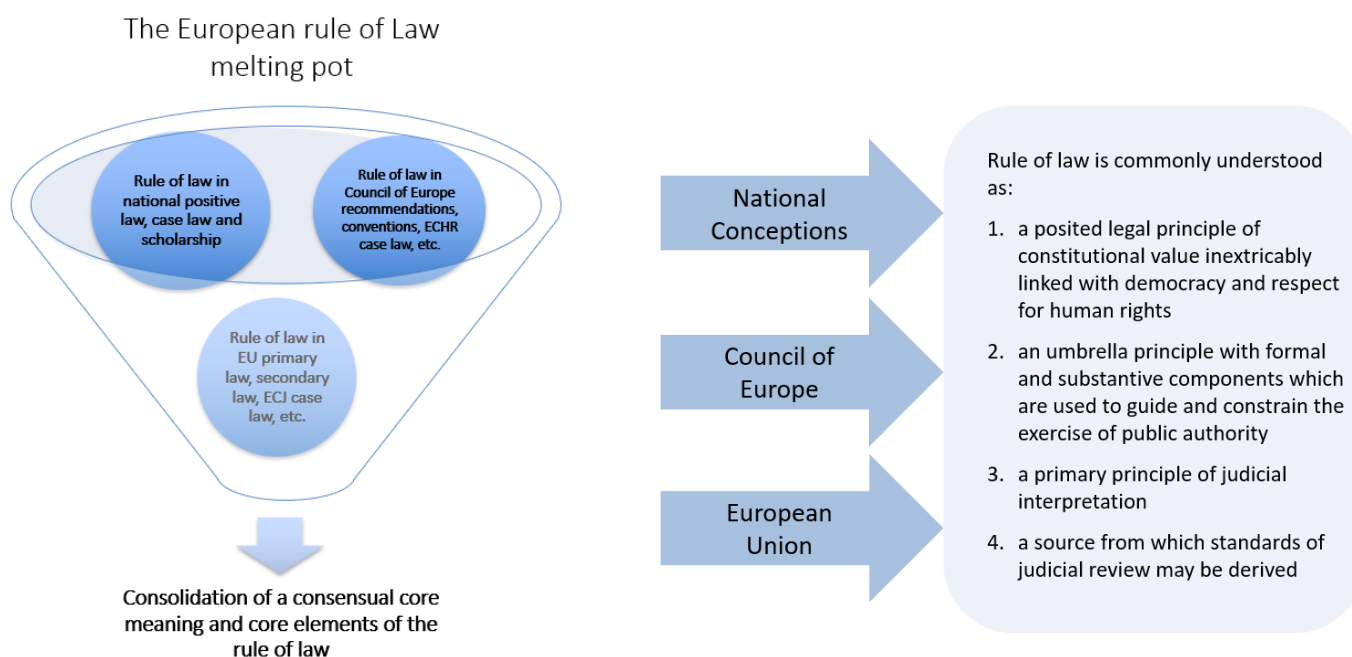
- (1) The rule of law is predominantly viewed as a shared political ideal as well as a posited legal principle of constitutional value underlying the relevant legal system as a whole;
- (2) The meaning and implications of the rule of law tends to be fleshed out by academic, legal and political actors in a situation where the rule of law as a foundational principle is generally not comprehensively defined in a single provision let it be in the national constitution or the relevant treaty, which also leads to a never-ending debate about the precise meaning and scope of the rule of law;

¹⁵⁷ J Ziller, ‘National Constitutional Concepts in the New Constitution for Europe’ (2005) 1 *European Constitutional Law Review* 452, 480.

¹⁵⁸ For further analysis and references, see RECONNECT Working Paper D.7.1.

- (3) Its contested theoretical usefulness and the use of different terminology notwithstanding, the rule of law tends to be understood by lawyers and judges ‘as a meta-principle which provides the foundation for an independent and effective judiciary and essentially describes and justifies the subjection of public power to formal and substantive legal constraints with a view to guaranteeing the primacy of the individual and its protection against the arbitrary or unlawful use of such public power’. In other words, the dominant understanding of the rule of law understands it as consisting of mutually reinforcing formal and substantive components;¹⁵⁹
- (4) Last but not least, while the rule of law is not traditionally used as *a rule* of law, it is normally understood as an ‘umbrella principle’¹⁶⁰ from which a set of fully justiciable principles ‘can be derived to help the judiciary in their day-to-day mission to interpret and scrutinise the validity of public authorities’ measures, and as a primary and transversal constitutional principle to assist their interpretation of other norms’.¹⁶¹

The shared traits outlined above and summarised in the figure below should not lead one to think that national or supranational understandings of the rule of law are static in nature.



On the contrary, each legal system has naturally demonstrated a dynamic, evolving understanding of this principle. The ‘institutionalisation’ of the rule of law has also led to the creation and implementation of different arrangements and mechanisms. In other words, the historical and socio-economic contexts proper to each legal order matters.¹⁶² This was rightly recognised for instance by the Venice Commission:

¹⁵⁹ Pech (n 45) 373.

¹⁶⁰ To borrow the expression used by G Marshall, ‘The Rule of Law. Its Meaning, Scope and Problems’ (1993) 24 *Cahiers de philosophie politique et juridique* 43.

¹⁶¹ Pech (n 45) 377.

¹⁶² N Lacey, ‘Populism and the Rule of Law’ (2019) LSE Working paper no 28.

The Rule of Law has become ‘a global ideal and aspiration’, with a common core valid everywhere. This, however, does not mean that its implementation has to be identical regardless of the concrete juridical, historical, political, social or geographical context. While the main components or ‘ingredients’ of the Rule of Law are constant, the specific manner in which they are realised may differ from one country to another depending on the local context; in particular on the constitutional order and traditions of the country concerned. This context may also determine the relative weight of each of the components.¹⁶³

The shared traits highlighted above therefore do not necessarily imply or justify uniformity and the rule of law can be to the subject of diverse interpretations and implementations. The European Commission was therefore correct to point out that ‘the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State’s constitutional system,’¹⁶⁴ and the European Parliament to observe that the definition of the Union’s set of core values such as the rule of law ‘is a living and permanent process’¹⁶⁵ with these values and principles evolving over time. This diversity and dynamic evolution notwithstanding, it is submitted that the rule of law can be considered a fundamental and consensual element of Europe’s constitutional heritage, which has firmly established itself as an essential transnational principle of what may be referred to as ‘European constitutional law’ – the body of principles common to the national constitutional orders and the EU and ECHR legal frameworks – whose core meaning and components are widely accepted across legal systems.

5. A consensual ‘European’ understanding under challenge?

In its 2011 report on the rule of law, the Venice Commission, having looked ‘at the legal instruments, national and international, and the writings of scholars, judges and others’ submitted that ‘there is now a consensus on the core meaning of the rule of law and the elements contained within it’,¹⁶⁶ which ‘are not only formal but also substantive or material’.¹⁶⁷ The subsequent evolution of the national and European legal systems, as previously outlined in this RECONNECT Working Paper, may be viewed as further evidence of the accuracy of the Venice Commission’s diagnosis. Looking beyond legal instruments, case law and the writings of scholars and legal professionals, the results of a 2019 Eurobarometer survey also indicate a broad public consensus across the EU and strong support (above 85%) for each of the principles the survey presented as a key aspect of the rule of law and the proposal that all EU Member States must respect the core values of the EU.

Simultaneously, however, the rule of law, as a concept, appears to have become increasingly challenged in particular by representatives of national authorities whose rule of law records have been politically and legally challenged by the EU and Council of Europe bodies. This section will address the most common strands of the conceptual challenge directed at the rule of law as enforced by European supranational bodies. These are the illiberal critique and the double

¹⁶³ Venice Commission (n 130) para 34.

¹⁶⁴ COM(2014) 158 final (n 2) 4.

¹⁶⁵ European Parliament resolution (n 149) recital J.

¹⁶⁶ Venice Commission (n 124) para 35.

¹⁶⁷ Ibid, para 41.

standards critique. We also consider the ‘juristocracy’ critique, and the country-specific critique invoked by Hungary, based on the Holy Crown. Some focus has been paid to Hungary in particular in this section, not only as it has originated some of the most common critiques of the rule of law, but also as it is the first Member State to be considered an electoral authoritarian regime, or non-democratic country.¹⁶⁸

5.1. The illiberal critique

Ever since the then President of the European Commission first detected in 2012 the emergence of a new type of threat to the rule of law and the democratic fabric in some of our Member States, a new discourse and new justifications have simultaneously emerged to seemingly justify these developments and to pre-empt and/or criticise EU interventions. One of the main forms of criticism of EU intervention may be labelled the ‘illiberal critique’ of the rule of law (as understood by the European Commission but also the Venice Commission). This critique most often originates from representatives of national governments subject to Article 7 TEU and/or other types of political and legal procedures. However, such labelling does not mean that the authors of this Working Paper are of the opinion that there is in fact such a thing as an illiberal democracy.¹⁶⁹ As a matter of fact, it could be more accurate to speak of the ‘authoritarian critique’ or ‘authoritarian populist critique’ of the European rule of law but considering the prevalence and acceptance of the term ‘illiberalism’ and its different variants, we will refer to the ‘illiberal critique’ so as to make it more immediately clear we are referring to discourses/justifications primarily originating from national authorities within the EU which have embraced the illiberalism label.

5.1.1. Reframing the Rule of Law to avoid the Stigma

Being identified as a ‘rule of law violator’ is a stigma in the democratic world, especially on the European continent. What has been said of the human rights paradigm could easily be said be of the rule of law with both having become such powerful legitimising forces ‘in national politics

¹⁶⁸ V-Dem Institute, ‘Autocratization Surges – Resistance Grows: Democracy Report 2020’ (V Dem Institute, University of Gothenburg, March 2020) <www.v-dem.net/en/>.

¹⁶⁹ The term ‘illiberal democracy’ is not recent but it gained practical relevance in the EU after the Hungarian Prime Minister embraced the term while simultaneously praising Singapore, China, India, Russia and Turkey as models to emulate in his speech given in Tusnádfürdő on 25 July 2014: ‘And so in this sense the new state that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom, and I could list a few more, but it does not make this ideology the central element of state organisation, but instead includes a different, special, national approach. Prime Minister Viktor Orbán’s Speech at the 25th Bálványos Summer Free University and Student Camp, full text reproduced on the official website of the Hungarian government, 30 July 2016: <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>. Since then we have seen an attempt to equate ‘illiberal democracy’ with Christian democracy. See eg Prime Minister Viktor Orbán on the Kossuth Radio programme ‘180 Minutes’, radio interview on 27 July 2018: <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-on-the-kossuth-radio-programme-180-minutes20180727>: ‘Let us confidently declare that Christian democracy is not liberal democracy is liberal, while Christian democracy is, by definition, not liberal: it is, if you like, illiberal. And we can specifically say this in connection with a few important issues – say, three great issues. Liberal democracy is in favour of multiculturalism, while Christian democracy gives priority to Christian culture; this is an illiberal concept. Liberal democracy is pro-immigration, while Christian democracy is anti-immigration; this is again a genuinely illiberal concept. And liberal democracy sides with adaptable family models, while Christian democracy rests on the foundations of the Christian family model; once more, this is an illiberal concept.’

and international relations that no government in any part of the world today would openly reject or defy¹⁷⁰ their dictates. Open rejection of the need for and importance of the rule of law would immediately invoke the darkest days of European history. Accordingly, the illiberal critique tends to be self-contradictory: whereas in practice the core elements of the rule of law, as outlined previously, are being violated, the defenders of self-described ‘illiberal regimes’ tend to argue instead that the EU institutions and/or critics cannot rely on an allegedly undefined principle while simultaneously claiming that they are in fact the ones respecting the rule of law.¹⁷¹

To give a single example, Hungary’s Minister of Justice Judit Varga once said that the rule of law was nothing but a ‘buzzword’ in the EU which ‘remains the subject of much debate’.¹⁷² At the same time, Minister Varga did not shy away from stating she is most proud of the fact that Hungary has always respected the rule of law.¹⁷³ Hungary’s Prime Minister Viktor Orbán likewise claimed that the problem was the EU’s reliance on the rule of law rather than the concept itself which he however presented as a ‘new concept’ and redefined in an extremely narrow if not a particularly crude manner:

The EU does not always apply to itself the principles of the rule of law by which it judges its individual members. The rule of law means that people do not rule other people: in contrast with people – who are often biased – it is the law which rules supreme, according to a single standard applied equally to all, making no distinctions between individuals. As a new concept, I could also add that neither does it make any distinction between countries. The Member States have never transferred control over enforcement of the rule of law to the institutions of the EU. The remit of the EU institutions refers solely to the enforcement of EU law.¹⁷⁴

The reference to the principle of equality before the law and the importance of making no distinction between individuals is worth noting not because the principle would not be a component of the rule of law – it is – but because it comes from a Prime Minister who has justified the adoption of measures specifically targeting Georges Soros¹⁷⁵ and prior to this, we saw for instance measures specifically targeting the President and Vice-President of the

¹⁷⁰ ‘[T]he human rights paradigm has become such a powerful legitimizing force in national politics and international relations that no government in any part of the world today would openly reject or defy its dictates.’ AA An-Na’im et al (eds), *Human Rights and Religious Values* (William B Eerdmans Publishing Company 1995) 427.

¹⁷¹ See RECONNECT Working Paper D7.1.

¹⁷² Varga (n 4).

¹⁷³ Bea Bakó, ‘Varga Judit: A jogállamiság folyamatos tiszteletben tartása a kormány egyik legfőbb teljesítménye’ [Judit Varga: One of the greatest achievements of the government is the continuous respect for the rule of law], 11 February 2020, <https://azonnali.hu/cikk/20200211_varga-judit-a-jogallamisag-folyamatos-tiszteletben-tartasa-a-kormany-egyik-legfobb-teljesitmenye>.

¹⁷⁴ Prime Minister Viktor Orbán’s speech at the launch of the Judicial Handbook on 5 March 2018, Budapest: <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-launch-of-the-judicial-handbook>.

¹⁷⁵ See eg Venice Commission and OSCE/ODIHR, ‘Joint Opinion on the Provisions of the so-called “Stop Soros” Draft Legislative Package which directly affect NGOs’ Opinion No 919/2018 OSCE/ODIHR Opinion No Opinion-Nr NGOHUN/326/2018. For commentary see L Pech and D Kelemen, ‘Of Red Lines and Red Herrings’ (*Verfassungsblog*, 15 March 2019) <<https://verfassungsblog.de/of-red-lines-and-red-herring-the-epps-delusions-about-restraining-orban/>>.

Hungarian Supreme Court.¹⁷⁶

Notwithstanding the noticeable lack of consistency, it is also worth noting that similarly to the argument made by Minister Varga, the Hungarian Prime Minister argued that ‘Hungary can be especially confident’ when it comes to the rule of law ‘because in 2013 it was fully audited, and ‘we have documentary proof that here the rule of law is in order’.¹⁷⁷ It was not made clear however what this documentary proof may be and it is not clear what he meant by an audit in 2013. Since then, Hungarian Prime Minister has presented the rule of law not as a legal issue but rather as a matter of honour: ‘whenever the rule of law is questioned, they step on our honor.’¹⁷⁸ By reframing the rule of law this way, any meaningful debate becomes impossible. This tactic was not new however with for instance Prime minister Orbán said that politics was not a power issue in a speech presenting the national consultation’s outcome concerning the new constitution:

[I]t appeared to me that whenever you are discussing the constitution or talk about democracy, you focus on the question of power. This is a very awkward phenomenon. It might reflect the general and routine attitude in Hungary, but it is still awkward since it is a reminiscence of Communism. (...) Politics is not a power issue, it concerns people’s lives, the concepts of good life (*Socialists rumbling. – Intervention from the same faction: ‘Jesus Christ!’*), the questions whether our children have a future, whether there is such a thing as public good, and whether people can live their lives in security.¹⁷⁹

As András Bozóki pointed out, ‘important as they are, political speeches often hide, rather than express, real political intentions. ‘Do not pay attention to what I say, but what I do’ said Viktor Orbán memorably to the US ambassador in Budapest about ten years ago. Further, hybrid regimes, in holding on to the name of democracy, are even more likely to use public speeches to obfuscate rather than to reveal the inner workings of the regime.’¹⁸⁰ The use of the term ‘illiberalism’ may be viewed as forming part of this obfuscating agenda.

5.1.2. *Illiberalism as the rejection of ‘Liberalism’*

Political leaders of countries that are named or proclaim themselves to be illiberal, often equal, or rather deliberately misinterpret illiberalism as the opposite and rejection of liberalism. In this process, ‘liberals’ become scapegoats and are often presented, for instance, as the enemies of prosperity or the enemies of the nation working for foreign interests. Most recently, the Prime Minister of Hungary equated ‘liberals’ to communists with a diploma.¹⁸¹ By blending together

¹⁷⁶ *Baka v Hungary* App no. 20261/12 (ECHR 27 May 2014).

¹⁷⁷ The Prime Minister, Viktor Orbán, ‘It is a moral duty to ‘see through’ the anti-migration constitutional amendment’, Kormany (website of the Hungarian government), 4 May 2018: <www.kormany.hu/en/the-prime-minister/news/it-is-a-moral-duty-to-see-through-the-anti-migration-constitutional-amendment>.

¹⁷⁸ Zoltán Kovács, ‘PM Orbán: “When they question the rule of law, they step on our honor”’ (*About Hungary*, 1 October 2019) <<http://abouthungary.hu/blog/pm-orban-when-they-question-the-rule-of-law-they-step-on-our-honor/>>.

¹⁷⁹ Minutes of the Hungarian Parliament, 28 March 2011, 2m.

¹⁸⁰ András Bozóki, The Shadows of ‘Illiberal Democracy’, 20 February 2019, <www.filodiritto.com/shadows-illiberal-democracy>.

¹⁸¹ Alastair Jamieson, ‘Hungary's Orban lashes out at slow EU growth, “sinister menaces” and George Soros’ (*Euronews*, 17 February 2020) <www.euronews.com/2020/02/16/hungary-s-orban-lashes-out-at-slow-eu-growth-sinister-menaces-and-george-soros>.

liberalism and liberal democracy, the foundational elements of the latter, such as the separation of powers or judicial independence are also attacked. In this context, violations of the core components of the rule of law such as judicial independence tend to be justified in a crude ‘ends justify the means’ manner. No matter how unconstitutional or obviously in breach of EU law and the absence of supporting evidence, so-called ‘judicial reforms’ end up being defended in the name of the greater good as understood by the ruling party. Due to this deliberate terminological chicanery, there is no point trying to frame the tensions along ‘normal’ ideological differences. In other words, to follow MEP Frank Engel, one must distinguish between differences among Member State which can be celebrated, differences which must be tolerated and disagreements regarding the European core values which put the European project in danger.¹⁸²

Illiberalism fits ill with *any* ideology, even its self-proclaimed majoritarian or Christian ideology. This became obvious after the term ‘illiberal democracy’ became untenable and due to mounting international criticism, the Hungarian PM repackaged it as Christian democracy,¹⁸³ supported by the exercise of its coalition party, the Christian Democratic People’s Party (KDNP). But paradoxically, the proposals of KDNP show most vividly how Christian democracy as understood by leaders of illiberal regimes in neither Christian, nor democratic.¹⁸⁴ Recently, the Hungarian government furthermore opposed judicial decisions awarding compensation to segregated Roma pupils, and prisoners who are detained in inhuman circumstances with KDNP proposing in this context to withdraw from the European Convention on Human Rights.¹⁸⁵ At the very least, this recent development shows that while continuing adherence to the rule of law is not expressly and publicly rejected as such by Hungarian authorities, we are witnessing obvious and serious attacks on the most fundamental elements of it, in this case, compliance with courts’ rulings.

5.2. The double standard critique¹⁸⁶

One of the recurrent and strongest criticism against EU rule of law related monitoring/enforcement actions invokes a treatment based on a ‘double standard’. The main thrust of this critique is the argument that the EU is targeting certain Eastern European Member States (and typically those which joined after 2004), while not focusing either its attention or its censure on States from western Europe. Implicit within this critique is the accusation of hypocrisy by the EU institutions, and often aims to also serve as a justification for measures

¹⁸² MEP Frank Engel at the ALDE conference on the EU Democratic Governance Pact, 4 February 2015, <www.sophieintveld.eu/alde-presents-eu-democratic-governance-pact/>.

¹⁸³ Zoltán Kovács, PM Orbán at Tusványos: ‘The essence of illiberal democracy is the protection of Christian liberty’, 27 July 2019, <<http://abouthungary.hu/blog/pm-orban-at-tusvanyos-the-essence-of-illiberal-democracy-is-the-protection-of-christian-liberty/>>.

¹⁸⁴ See eg the legislative proposal to withdraw support from the parents of children who do not continue their studies up until the age of 18 or until acquiring vocational training: T 7843/17, 7 November 2019, <www.parlament.hu/irom41/07843/07843-0017.pdf>.

¹⁸⁵ ‘Government aims to stop “prison business”’ (*Daily News Hungary*, 20 February 2020) <<https://dailynewshungary.com/government-aims-to-stop-prison-business/>>; ‘Fidesz group to discuss “prison business”, Roma segregation case’ (*Daily News Hungary*, 12 February 2020) <<https://dailynewshungary.com/fidesz-group-to-discuss-prison-business-roma-segregation-case/>>. See also the legislative proposal T/9241 voted into a law on 25 February 2020 on the immediate measures to eliminate abuses of compensation in relation to prison overcrowding.

¹⁸⁶ Cristiene Domingas Somboca provided research assistantship for this part.

which apply to all states, or to diminish or otherwise downplay concerns for rule of law backsliding in certain Member States. In this section, we examine the prevalence of the double standard critique while also considering its content and form, before then considering its credibility.

5.2.1. Prevalence of the double standard critique

To better understand how the double standard critique tends to be used, let us begin by offering an extensive quote from a 2018 speech by Viktor Orbán:

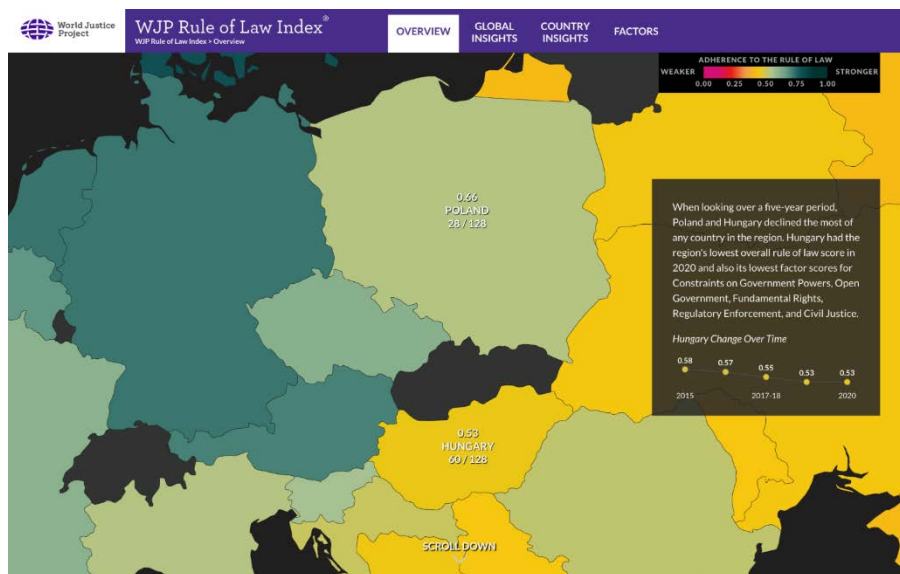
This is the debate on identity that is taking place on the European scene. So accordingly I've entitled my speech, 'A Europe of common sense and fairness – on double standards, on the European Commission's politicisation of issues, and on the rule of law'. This is what I'd like to talk about now. [...]

We see further clear examples of double standards in the field of the judiciary. In 2011–2012 Hungary set out to modernise its judicial system and, in order to accelerate the delivery of rulings, it transformed judicial administration. This included the introducing of compulsory retirement for judges over a certain age. In response, the European Commission launched an infringement procedure – and subsequently court proceedings – against our country in order to protect the social rights of the retired elderly judges. In every forum it portrayed the Hungarian measure as an attack on judicial independence. This would have all been very well. A few years later, however, when the left-wing Italian government retired off older judges, the Commission wholeheartedly welcomed the development as an acceleration of judicial procedures. Clearly, 'Italy is Italy'. In its latest – soon to be released – country report, the European Commission finds the entitlement of the National Judicial Council to be inadequate. In doing so, the Commission is engaging in unprecedented interference in Hungary's election campaign. It is also intentionally 'forgetting' the fact that such a body, which functions as an additional guarantee, does not even exist in Germany or Austria, where judges are appointed directly by the executive. 'Germany is Germany', we could say. EU institutions likewise felt no compulsion to speak out when in Austria the most important civic right suffered a disastrous blow, as they were unable to conduct a valid presidential election – to put it politely. While not saying a word about these instances, on a monthly basis EU bodies adopt decisions on Hungary and Poland, citing the allegedly appalling state of the rule of law, Ahmed H. or the archives of the communist György Lukács. Austria was given the respect that is due to every Member State: the EU waited until Austria itself internally remedied the unprecedented violation that had occurred, and repeated the election under regular and lawful circumstances. We were not accorded this respect, and our Polish friends are likewise being denied it. 'Austria is Austria', we could say. [...]

This is a complete contradiction of the principle of the rule of law. Surrendering the principle of neutrality leads to the destruction of cooperation within the European

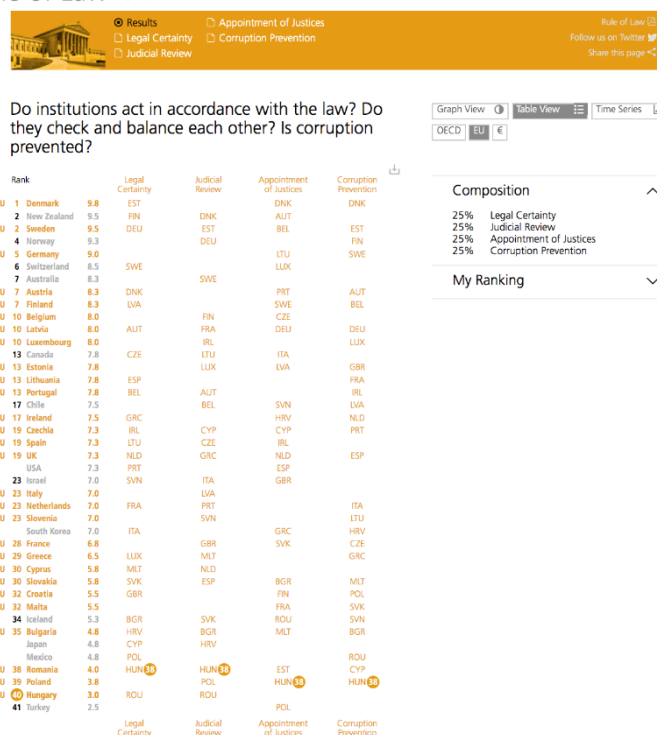
Union, because it institutionalises double standards – always in favour of larger countries and at the expense of smaller ones.¹⁸⁷

While there is no need in the framework of the present working paper to assess the (in)accuracy of the claims made above, it may be worth pointing out that a quick look at the major rule of law indexes and other measuring tools available easily reveals that Hungary's rule of law record is usually found to be the worst of all the EU Member States with the process of rule of law backsliding having started, if not dramatically accelerated, under the stewardship of Prime Minister Viktor Orbán. One may for instance refer to the most recent edition of the World Justice Project Rule of Law Index and the rule of law ranking of the Sustainable Governance Indicators platform:¹⁸⁸



¹⁸⁷ Prime Minister Viktor Orbán's speech at the launch of the Judicial Handbook, 15 March 2018: <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-launch-of-the-judicial-handbook>.

¹⁸⁸ World Justice Project, *Rule of Law Index 2019* (WJP 2019): <<https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2019>>.



Be that as it may, in essence, the double standard critique claims that the EU (and/or its Member States) apply the same principle/rule on a case by case or ad hoc basis systematically biasing against Central and Eastern European member states. As a result, the governments of these countries would allegedly be systematically mistreated. Even though rule of law-related issues appear to be the most invoked as part of this narrative, it is by no means restricted to those issues. Thus, the use of farmland under the 2014 Hungarian Land Act, which was challenged by the Commission, was criticised by Orbán on the ground that whilst Hungary had transposed the corresponding directive, Austria and France had not and they were not chased by the Commission.¹⁸⁹ He repeated a similar accusation in relation to the treatment of workers' rights.¹⁹⁰

In any case, discriminatory (mis)treatment remains the main theme in the 'double standards' counter-criticism. In order to assess the contents and reach of this counter-criticism, we have surveyed the European Parliamentary debates between 2011 and 2019. Filtering by the countries dealt with (Hungary and Poland) and the substantive content of these debates (ie topics related to the rule of law or the particular situation of the country: e.g. 'Situation in Poland', 'Recent political developments in Hungary'), the analysis returned 37 debates about Hungary and 18 about Poland. We selected statements from Hungarian and Polish politicians

¹⁸⁹ Prime Minister on Kossuth Radio's '180 Minutes' Programme (18 July 2014) <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-interview-on-kossuth-radio-s-180-minutes-programme>.

¹⁹⁰ Prime Minister Viktor Orbán interviewed on Kossuth Rádió's '180 Minutes' programme (14 January 2016): <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-interviewed-on-kossuth-radio-s-180-minutes-programme>.

but also from other member states in relation to these two countries (as these are the only EU countries to which Article 7 has been applied so far). The results are as follows:

Interventions in the EP invoking double standards in the treatment of Hungary and Poland in rule of law related processes

Party	EP Group	Member State	Number of intervening MEPs	Number of interventions (total)
PiS	ECR	PL	8	13
Right Wing of the Republic	ECR	PL	1	3
United Poland	EFDD	PL	1	2
KORWiN	EFDD	PL	1	1
Democratic Union of Hungarians in Romania	EPP	HU	1	4
Fidesz	EPP	HU	7	17
Jobbik	NI	HU	2	2
DPP	ECR	DK	1	1
ODS	EDF	CZ	1	1
Lega Nord	EFDD	IT	1	1
UKIP	EFDD	UK	1	1
FPÖ	ENF	AU	1	1
National Front	ENF	FR	4	4
Party For Freedom	ENF	NT	1	1
SDS	EPP	SL	1	1
Golden Dawn	NI	GR	1	1
Homeland Union – Lithuanian Christian Democrats	EPP	LI	1	1
Nationalist Party (of Malta)	EPP	MA	1	1
PDL	EPP	RO	1	1
IMRO	ECR	BU	4	4
PP	EPP	SP	1	1
Independent	NI	PL	1	1
Independent	ECR	PL	1	1
Independent (former AfD)	ECR	DE	1	1
Total			44	65

*EFD was succeeded by the EFDD in 2014

A close examination of data reveals some interesting trends. Firstly, the double-standard critique in relation to Rule of Law breaches is tightly connected to right and extreme right parties. Five groups (EPP, ECR, EFD/EFDD, ENF and NI) have voiced criticism of EU/member states positions appealing to this argument. If measured by number of MEPs using this argument, EPP and ECR dominate (being those the groups of adscription of Hungary's Fidesz and Poland's PiS respectively) as they do by the number of claims (26 and 23 respectively). The

EPP is the only one among the traditional non-Eurosceptic EP party groups recording these kind of arguments although few among its members have endorsed them (ie PP-Spain, SVS-Slovenia and Nationalist Party- Malta). Extreme right parties and groups have relatively often voiced a double-standard critique. Secondly, the presence of these extreme right parties as endorsers of the double standard criticism prevents this for being seen as a purely West versus Central and Eastern European member states: next to the three Western EPP affiliated parties (PP, SVS and Nationalist Party), parties from Austria, France, Germany, Greece, Italy and UK have subscribed it. In any case, if the number of statements is taken as a measurement of the intensity and systematicity of the critique, then, it becomes clear that MEPs belonging to ruling parties supporting offending governments take the lead (ie PiS in Poland and Fidesz in Hungary). Smaller extreme right parties from these states have also been particularly vocal in their critiques and only the French National Front equals the intensity of the last group.

5.2.2. The content of the double-standard critique

(a) Identification of allegedly similar situations in other member states which would not be equally denounced/prosecuted/criticised/treated

The double standard criticism takes as its central building block the argument that the EU and its member states do not treat equally similar situations encountered in other member states. In general, their proponents seek to identify examples of violations of European values in other Member States that the EU did not condemn,¹⁹¹ although in some cases it becomes an unspecific allegation¹⁹² (referring, for instance, very vaguely to the existence of rule of law violations in other countries¹⁹³). Criticizing the Tavares Report, Orbán argued that it uses double standards and entails that the European Parliament oversteps its functions.¹⁹⁴ Orbán has often presented Hungary as the most widely scrutinized EU member state under rule of law rules¹⁹⁵ and he has repeated that this happens because ‘Hungarians think different’ (sic).¹⁹⁶

Hungarian politicians initiated the double standard argument¹⁹⁷ but Polish ones have harnessed to it. Thus, in the debate on *the situation of the rule of law and democracy in Poland* (November 2017), Iwaszkiewicz (EFDD/KORWiN, Poland), Legutko (ECR/PiS, Poland) and Saryusz-Wolski (NI/Independent, Poland) mention the rule of law violations taking place in

¹⁹¹ See interventions by Béla Kovács (NI/Jobbik) and Zbigniew Ziobro (EFD/United Poland) on the Constitutional situation in Hungary (debate) (17 April 2013).

¹⁹² See the debate on the *Situation of fundamental rights: standards and practices in Hungary* (Tavares Report) 2 July 2013. Schöpflin (EPP/Fidesz) and Legutko (ECR/PiS) allude to the violations of fundamental rights by other Member States that were not criticized by the EU. See also the Debate on the situation in Poland (19 January 2016). Szydło and Wojciechowski (ECR/PiS) and Henkel (ECR/Independent (former AfD) make reference to other countries carrying out the same practices as Poland and not being condemned.

¹⁹³ See interventions of Zoltán Balczó (NI/Jobbik) and Marek Jurek (ECR/Right Wing of the Republic) in the debate on the Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015 (2 December 2015).

¹⁹⁴ Situation of fundamental rights: standards and practices in Hungary (A7-0229/2013 – Rui Tavares) (3 July 2013).

¹⁹⁵ Situation in Hungary (debate) (19 May 2015): Orbán complained about Hungary being ‘the most widely-screened member of the European Union’s rule of law x-ray.’

¹⁹⁶ See his remarks at the debate on the situation in Hungary (11 September 2018). András Gyürk (EPP/Fidesz, Hungary) repeated the same idea. See his intervention at the debate on *The rule of law and fundamental rights in Hungary, developments since September 2018* (30 January 2019).

¹⁹⁷ Kinga Gál (EPP/Fidesz, Hungary) affirmed that says violations of fundamental freedoms have taken place in other Member States but the EU only condemns Hungary. See her intervention at the debate on Recent political developments in Hungary (debate) (18 January 2012).

other Member States which, according to them, the EU ignores.¹⁹⁸ By 2019, MEPs from other member states shared the general argument of a double standard treatment.¹⁹⁹

Beyond the ‘general case’ of differential treatment, actors have constructed their allegations of mistreatment on the identification of specific issues. Thus, absence of reports on minorities in other member states renders very unfair any discussion on this issue in relation to Hungary.²⁰⁰ Also, the treatment of migration during the 2015 crisis is presented as unfairly focusing on Hungary when other EU member states are going through the same crisis.²⁰¹ Later on, in relation to the same issue, Zoltán Balczó (NI/Jobbik) argues that Hungary is being treated differently for wanting to control its own sovereign borders.²⁰² In 2017, Marek Jurek (ECR/Right Wing of the Republic, Poland) argued that the EU is using double standards on Hungary for wanting to protect its borders, as according to him, other Member States, like France have undertaken undemocratic practices without any consequences. In the same debate, Jan Zahradil (ECR/ODS, Czech Republic) agrees with Jurek as, in his view, Central European countries are always being discussed in the European Parliament because they oppose the quota system for the redistribution of refugees.²⁰³ Similarly, the criticism of the treatment of CEU met with the same double standards counter argument: Orbán argued that double standards are being applied because that there are countries that are more restrictive with foreign universities than Hungary.²⁰⁴ On the same issue, Csaba Sógor (EPP/Democratic Union of Hungarians in Romania, Romania) complains about a university in Romania that has been operating in opposition to Romanian laws, while the EU has shown no worries about the issue and Andrea Bocskor (EPP/Fidesz, Hungary) says there was no academic freedom at the Hungarian institution in which she was a teacher, but the EU did not criticize it.²⁰⁵

The situation of women’s rights in Poland met also with complains that, whilst nothing has happened in Poland, some women were raped in Germany and no debate on this issue took

¹⁹⁸ The situation of the rule of law and democracy in Poland (debate) (15 November 2017). See also the intervention of Urszula Krupa (ECR/Independent, Poland) in the debate on the Commission decision to activate Article 7 (1) TEU as regards the situation in Poland (B8-0119/2018, B8-0120/2018, B8-0121/2018) (1 March 2018). She argued that the EU applies double standards to Poland as the reforms carried out by the Polish government resemble the practices that are usual in other Member States. See also the intervention of Karol Karski (ECR/Polis, Poland) during the Debate with the Prime Minister of Poland, Mateusz Morawiecki, on the Future of Europe (4 July 2018). According to Karski, the Polish government adopts similar practices to those of other Member States but Poland is the only one being accused of violating the rule of law.

¹⁹⁹ Thus, Anders Primdahl Vistisen (ECR/DPP, Denmark) and Georgios Epitideios (NI/Golden Dawn, Greece) agreed with András Gyürk (EPP/Fidesz, Hungary) and Csaba Sógor (EPP/Democratic Union of Hungarians in Romania, Romania) on the fact that the violations of fundamental freedoms in other Member States are not condemned. See their interventions at the debate on The rule of law and fundamental rights in Hungary, developments since September 2018 (30 January 2019).

²⁰⁰ See the intervention of Csaba Sógor (EPP/Democratic Union of Hungarians in Romania) at the Debate on Situation of fundamental rights: standards and practices in Hungary (debate) (2 July 2013) (Tavares Report). He repeated the same argument in his intervention of Csaba Sógor (EPP/Democratic Union of Hungarians in Romania, Romania) in the debate on the situation in Hungary (A8-0250/2018 – Judith Sargentini) (12 September 2018). Sógor complains about the rights of minorities not being equally examined in all Member States.

²⁰¹ See the intervention of Zdzisław Krasnodębski (ECR/Polis) during the debate on the Situation in Hungary (19 May 2015).

²⁰² Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015 (debate) (2 December 2015).

²⁰³ Situation in Hungary (B8-0295/2017, B8-0296/2017) (17 May 2017).

²⁰⁴ See his remarks at the debate on the situation in Hungary (11 September 2018).

²⁰⁵ See their interventions in the debate on the Situation in Hungary (26 April 2017).

place.²⁰⁶ Arguments have not only compared the treatment of the same issue in different countries but also different issues in different member states as a test of double standard. Thus, the very heated debate in May 2015 on the eventual re-introduction of the death penalty in Hungary had Polish MEP Marek Jurek (ECR/Right Wing of the Republic) complaining about the debate taking place. In his view, abortion is against the right to life but it is legal in many member states and is never debated. Therefore, in his view, the death penalty should not be debated either.²⁰⁷

(b) Rule of law actions against Hungary/Poland as allegedly ideologically motivated actions

Ideological motivation, next to comparative mistreatment, is a powerful element in the double standard counter criticism. In a nutshell, this argument holds that rule of law is an ideological artefact of left-wing governments and parties to unfairly attack right wing parties. Same or similar policies by left wing governments in the same or different states have not been condemned. In an extreme case, proponents of stronger scrutiny of rule of law in Hungary or Poland are portrayed as misusing politically fundamental rights and false facts.²⁰⁸

Hungarian and Polish politicians have enthusiastically subscribed to this thesis. The favourite way to portray this ideological motivation is to compare the acts of the current government with previous (leftish) ones in the same member state. For instance, in the debate on the media law in Hungary, Tamás Deutsch (EPP/Fidesz) provides examples of violations committed by the previous administration (ie a leftish one).²⁰⁹ Other MEPs compare with other member states governments with leftish parties whose actions went unchallenged.²¹⁰ The later MEP (Kinga) called the Tavares Report ‘a tool in the political game of the left’, including the Hungarian leftists as they are no longer in power, a critique that Viktor Orbán repeated in the same debate.²¹¹

²⁰⁶ See Ryszard Czarnecki (ECR/PolS), debate on Women’s rights in Poland (5 October 2016).

²⁰⁷ See Marek Jurek (ECR/Right Wing of the Republic, Poland) Situation in Hungary (debate) (19 May 2015).

²⁰⁸ In relation to the Tavares Report, Kinga Gál (EPP/Fidesz, Hungary) argued that the Report is not based in true facts and that fundamental rights are being misused politically. Situation of fundamental rights: standards and practices in Hungary (A7-0229/2013 – Rui Tavares) (3 July 2013).

²⁰⁹ Tamás Deutsch (EPP/Fidesz) Intervention in the debate on media law in Hungary (16 February 2011). Similarly, Ryszard Antoni Legutko (ECR/PolS, Poland) and Algirdas Saudargas (PPE/Homeland Union – Lithuanian Christian Democrats, Lithuania) accused the EU of treating some countries and parties differently as similar actions were taken by the previous administration, but no criticisms were made by the EU. See their interventions in the debate on the Situation in Poland (19 January 2016). Ryszard Antoni Legutko (ECR/PolS, Poland) and Nigel Farage (EFDD/UKIP, UK) abounded in the same criticism. Both believe double standards are being applied to Poland as the legal system had many problems under the previous administration and still was not condemned, while the current administration is trying to improve the legal system and is being criticized for it. See their interventions at the debate on the Commission decision to activate Article 7 (1) TEU as regards the situation in Poland (28 February 2018). Also, Ryszard Antoni Legutko (ECR/PolS, Poland) stresses that no criticism was directed to Hungary under the Socialist government. Interventions at the debate on Recent political developments in Hungary (18 January 2012).

²¹⁰ Kinga Gál (EPP/Fidesz) Intervention in the debate on media law in Hungary (16 February 2011). On the other hand, Zbigniew Ziobro showed his support towards Orbán’s conservative government and says the debate is an excuse to attack the Hungarian Prime minister. To back his arguments, he says that the Polish Government (ie a leftish government at that moment) was not respecting freedom of speech but the EU has remained silent. Intervention at the Media law in Hungary debate (16 February 2011).

²¹¹ Viktor Orbán (EPP/Fidesz) and Kinga Gál (EPP/Fidesz) Interventions at the debate on the Situation of fundamental rights: standards and practices in Hungary (02-03/07/2013) (Tavares Report).

The ‘ideologically motivated attack’ argument is very powerful because of the highly instrumental effects it activates: it galvanizes support from other right wing and extreme right parties. MEPs from these parties have enthusiastically echoed this thesis to a larger extent than the more ‘plain’ comparative mistreatment. Hypothetically, the ‘ideologically motivated attack’ thesis nurtures their domestic discursive and electoral strategies.²¹² Thus, MEPs from the Nord League,²¹³ the National Front²¹⁴ or the Austrian FPÖ,²¹⁵ just to mention a few have ardently voiced the ideological origin of the rule of law criticism. More worryingly, MEPs from the EPP have also subscribed to this line of argument and these include former Spanish Home Affairs minister Jaime Mayor Oreja who, in his intervention at the debate of the Tavares Report, coincided with Viktor Orbán in saying that the European Parliament is biased and the approval of the Tavares Report is a left-wing decision that would put Hungary under political custody.²¹⁶ Other EPP MEPs from Slovenia and Romania have followed the same path.²¹⁷

The ideological motivation expands to echo also a deep critique of pro-EU/pro-Europeanism ideology. In this frame, EU institutions are presented too as an instrument of a certain ideology.²¹⁸ Nigel Farage (UKIP) argued that Poland and Hungary are being attacked only because they do not have pro-European Union governments.²¹⁹

²¹² For instance, Ryszard Antoni Legutko (ECR/Poland) and Mirosław Piotrowski (ECR/Poland) use their own country (Poland under a liberal government) as an example of a country where violations of European values are taking place. Both argue that despite all the infringements the EU has not criticized it. Interventions at the debate on Recent political developments in Hungary (18 January 2012).

²¹³ See Mario Borghesio (EFDD/Lega Nord, Italy) Intervention in the debate on media law in Hungary (16 February 2011). He argues that the criticisms towards the Hungarian government is due to an ideological bias.

²¹⁴ See Marie-Christine Arnautu (ENF/National Front, France) intervention in the debate on the Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015 (B8-1349/2015, B8-1351/2015, B8-1351/2015, B8-1358/2015, B8-1359/2015, B8-1360/2015, B8-1361/2015) (16 December 2015) She argues that human rights are being used as an excuse by the left to attack the Hungarian government. In addition, Schaffhauser (ENF/National Front, France) and Dominique Bilde (ENF/ National Front, France) argued that Poland is being attacked because it is Conservative and does not want a globalized Europe. Interventions in the debate on the Situation in Poland (19 January 2016). See also the intervention by Sylvie Goddyn (ENF/National Front, France) in the debate on Recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (B8-0865/2016, B8-0977/2016, B8-0978/2016) (14 September 2016). According to her, the Polish are being attacked because they are under a conservative government as the EU remained silent on the violations that happened under the previous administration and in other Member states.

²¹⁵ See Harald Vilimsky (ENF/FPÖ) intervention at the debate on The situation in Hungary (11 September 2018) when he argued that the EU implements double standards to right-wing governments, like in the case of Hungary, as, in their view, infringements committed by left-wing governments are not criticized.

²¹⁶ Jaime Mayor Oreja (PPE/PP, Spain). Intervention at the debate on the Situation of fundamental rights: standards and practices in Hungary (2-3 July 2013) (Tavares Report).

²¹⁷ See the intervention of Milan Zver (EPP/SDS, Slovenia) at the debate on the situation in Hungary (11 September 2018). He argued that the EU implements double standards to right-wing governments, like in the case of Hungary, as, in their view, infringements committed by left-wing governments are not criticized. See also the intervention of Csaba Sógor (EPP/Democratic Union of Hungarians in Romania, Romania) in the debate on the situation in Hungary (A8-0250/2018 – Judith Sargentini) (12 September 2018). He argued that the application of Article 7 is politically driven.

²¹⁸ See Kinga Gál (EPP/Fidesz, Hungary) Intervention on the Situation in Poland debate (B8-0461/2016, B8-0463/2016, B8-0464/2016, B8-0465/2016) (13 April 2016). She defended the Polish government and argued that the EU politically attack the Polish government.

²¹⁹ See his intervention at the debate on the Commission decision to activate Article 7 (1) TEU as regards the situation in Poland (28 February 2018).

5.2.3. How credible is the double standard counter-critique?

The extensive appeal to double-standards to criticise rule of law scrutiny in the EU cannot be summarily dismissed as not warranting attention. Whilst the Treaties and other instruments clearly establish the legitimacy of rule of law scrutiny, refuting double-standard treatment allegations would increase its strength. This does not mean buying the two building blocks of the double standard critique (ie the ideological motivation argument and the comparative mistreatment argument). Firstly, the allegation of a general double-standard treatment is simply not admissible since only specific issues can be checked. Secondly, refuting those allegations require that multiple independent bodies (such as the Venice Commission) document the same violation in different states with different treatment by EU bodies/governments. Proponents of double-standard critique may argue that those bodies are 'biased'. And certainly, they are biased towards a notion of constitutional liberal order. Hence, what determines the differential treatment is the orientation towards liberal orders and the unacceptable fitting of illiberal ones within it. This is the true essence of the differential treatment: violations cannot be considered the same when some of these violations pursue the aim and/have the effect of subverting the fundamental elements of rule of law-based systems.

5.3. The 'Juristocracy' critique

Amongst the many concepts not to say conceptual subterfuges which have been used to mask or justify measures or actions which undermine the rule of law, is the concept of juristocracy. 'Popular constitutionalism' not only wants to take away the constitution from courts,²²⁰ but talks about the enforcement of the constitution by the legislative, the executive, and the people. It was pushed to the forefront by theories sceptical towards formal legal constitutionalism and the rule of law. One such theory is that of 'juristocracy' as described by Ran Hirschl, blaming constitutional rights and judicial review to be elitist projects.²²¹ Notwithstanding the limited scope of the study which only looks at four common law jurisdictions for analysis (Canada, New Zealand, Israel, and South Africa), the author claims universal application for his theory.²²² Since then, the concept of 'juristocracy' has helped justified attacks in Continental law countries against courts for their alleged judicial or constitutional activism²²³ while also serving as the fundamental source to formulate calls for a populist constitutional law.²²⁴

²²⁰ M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999).

²²¹ R Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

²²² For this and more substantive criticism see C Closa 'Review of Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press 2004' (2006) *International Journal of Constitutional Law* 581-586.

²²³ By using the example of the Romanian Constitutional Court, Simina Tănăsescu shows how the it 'had no choice but to step into the realm of politics by addressing political questions which meanwhile had become part and parcel of its jurisdiction.', for which the Constitutional Court was heavily criticized later. See S Tănăsescu, 'Constitutional Review or Judicial Activism?' (2013) III/2 *International Law Review* 19-36.

²²⁴ P Blokker, 'Populist Constitutionalism', in C de la Torre (ed), *Routledge Handbook of Global Populism* (Routledge 2018); G Halmai, 'Is there Such Thing as 'Populist Constitutionalism'? The Case of Hungary' (2018) *Fudan Journal of the Humanities and Social Sciences* 323-339. See also JW Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 113-127.

In Hungary, for instance, a 2019 issue of a law journal was devoted to the concept of juristocracy, including analysis of corresponding works of Béla Pokol,²²⁵ Hungarian Constitutional Court (HCC) judge, on the same topic.²²⁶ Pokol claims that after the fall of the Berlin Wall, instead of giving way to the democratic will, juristocracy gained more and more powers. This means that judicial procedures take over the role of political debates. Instead of political arguments, issues are decided along legal, constitutional and procedural quibbles. As a consequence, decisions no longer reflect the will of the majority population, but the political constellation of judicial bodies, and the financial and organizational powers of jurists advising the judges or rights protection groups.

Pokol condemns the European Court of Human Rights the most, claiming that the Strasbourg forum does not even qualify as a court, and judgments are passed by the legal apparatus, especially the lawyers in the ECtHR's Registry. But he does not spare the EU from criticism claiming that it also constitutes a typical case of juristocracy. Even though drafters of the Rome Treaties entirely abandoned the idea of supranationalism due to the negative experiences with the European Coal and Steel Community, promoters of the European idea managed rewrite EU history, and equal pro-Europeanness with pro-federalism. What is more, they established institutions, such as the European University Institute and scholarship, including the five volumes of 'Integration through Law' engaging in European propaganda, deliberately interchanging pro-Europeanness with pro-federalism, labelling everyone who is anti-federalist as Eurosceptic.²²⁷

Another pillar of this power structure is the Common Market Law Review, where the majority of articles in the first few decades was written by bureaucrats in Brussels, and through the law journal have been transformed into scholarship with a scientific air. Criticism against federalism or 'today's half-federative integration oppressing the Member States' by their scholarship is constructed as EU-scepticism. Whereas Pokol's opinion is not as devastating about Luxembourg judges as about Strasbourg judges, still his thesis that comes close to a conspiracy theory, is that the official language of the Court narrows the pool of potential judges and *référéndaires* to a great extent; and in addition, more than one third in the latter group of lawyers used to work for the Commission in Brussels before moving to Luxembourg, meaning they is a certain interlocking, and little wonder that the Commission has a 93% chance to win cases against Member States. József Szájer, Hungarian MEP, underlines this point by referencing cases where Hungary lost infringement cases, such as the forced retirement of judges, where in his view under the disguise of age discrimination, the Court established jurisdiction over a case, which in reality was about a Member State's judicial structure – something which should be a national

²²⁵ B Pokol, *A jurisztokratikus állam* [The juristocratic state] (ialóg Campus Kiadó 2017); B Pokol, *Európai jurisztokrácia: Az Európai Unió jurisztokratikus szerkezetének kérdései* [European juristocracy: Questions regarding the juristocratic structure of the European Union] (Dialóg Campus Kiadó 2019). For criticism and debate see a 2015 issue of the law journal *Jogelméleti Szemle*, <http://jesz.ajk.elte.hu/2015_4.html>; the debate between G Halmi and B Pokol in 2016, <<http://noLhu/velemenyl/jurisztokracia-a-demokracia-ellen-1626291>>; and K Arató, 'Pokol Béla "Európai jurisztokrácia. Az Európai Unió jurisztokratikus szerkezetének kérdései" című írásáról [On the paper by Béla Pokol on 'European juristocracy. Questions regarding the juristocratic structure of the European Union], *Jogelméleti Szemle* 2019/2, 69-74.

²²⁶ *Jogelméleti Szemle* 2019/2.

²²⁷ B Pokol, *Unió hatalmi szerkezet és EP-választás* [Union power structure and EP elections], *Jogelméleti Szemle* 2019/2, 3-11, 3.

competence. Szájer contends that the same power grab of the Court is visible in Polish cases, where Luxembourg judges disregard the principle of national sovereignty.²²⁸

5.4. Member State Specific Critique: the Hungarian historical constitution and the Doctrine of the Holy Crown

A more country-specific concept has been used in Hungary to challenge constitutionalism and the rule of law: the concept of historical constitution and the associated doctrine of the Holy Crown. In 2011 a new constitution, the so-called Fundamental Law (FL) was adopted in Hungary, which entered into force on 1 January 2012. Counterintuitively, the FL was used with the aim of realizing short term political or financial profits, as tools in deconstructing checks on the government that equals in Hungary the majoritarian unicameral Parliament. Hungary, a country which was previously seen as a solidified democracy, shows a clear decline, whichever rule of law assessment one reads is doing worse than ever since the regime change.²²⁹

The shift towards illiberalism did not mean that the constitution-maker wanted to abandon the concept of the rule of law. In an effort to still adhere to the concept of the rule of law – similarly to the '89 Constitution, Article B) (1) FL declares that 'Hungary is an independent, democratic state based on the rule of law.' –, but filling it with partially novel content, the drafters attempted to revive the concept of the historical constitution and the Doctrine of the Holy Crown.²³⁰ Already the preamble, the so-called National Avowal states that 'We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation.' There is a reference to these concepts in the actual body of the FL, too, which in Article R)(3) states that 'The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.'

But the reference to the historical constitution and the Doctrine of the Holy Crown is very problematic for a number of reasons. Most importantly, as leading constitutional scholars agreed, the concept of the historical constitution is very unclear, there is no consensus whatsoever on its content in the legal literature.²³¹ The concept of the historical constitution is rather a myth, that allows for any interpretation of the Fundamental Law. If the historical constitution was so embedded in Hungarian constitutional thinking, there would be a theory

²²⁸ J Szájer, szuverenitásvédelem lehetőségei és szükségessége az Európai Unióban, *Jogelméleti Szemle* 2019/2, 20. In light of the alleged power grab by EU institutions József Szájer also recommends among others abandoning the principle of an 'ever closer union'; respecting Member States instead of lecturing and sanctioning them; freeing EU institutions from political biases and ideologies; halting rule of law-mechanisms, which not only violate the principle of national sovereignty, but use double standards, go against basic Union principles, such as equality, and have no legal basis; not creating parallel institutions such as OLAF and the European Prosecutor's Office; and respecting constitutional identity.

²²⁹ See Freedom House, *Democracy in Retreat Freedom in the World 2019*, 13 and for an analysis of the significance of this downgrading, see R. Daniel Kelemen, 'Hungary's democracy just got a failing grade' (*The Washington Post*, 7 February 2019).

²³⁰ The Holy Crown was mentioned already in Article 76 of the '89 Constitution, but only when describing the national coat of arms. No further meanings were attached to it. Later, under the first Fidesz government, Act I of 2000 was adopted on the Commemoration of the Saint Stephen's State Foundation and the Holy Crown, which however failed to mention the corresponding Doctrine.

²³¹ Z Fleck, G Gadó, G Halmai, S Hegyi, G Juhász, J Kis, Z Körtvélyesi, B Majtényi, G Attila Tóth, Vélemény Magyarország Alaptörvényéről [Opinion on the Fundamental Law of Hungary] *Fundamentum* 2011/1, 61-77, 76.

established on the basis of it. Instead, interpretation is left to the HCC, which engages in a struggle to attach some meaning to the concept that still corresponds to modern constitutionalism.²³² To be more precise, it allows for arbitrariness and cherry-picking, a problem well reflected in HCC Decision 22/2016 (XII. 5.).²³³ In a government-friendly ruling, the HCC signalled it would support the government's 'constitutional identity' justification for defying EU migration law. When delivering its abstract constitutional interpretation in relation to the European Council decision 2015/1601 of 22 September 2015 establishing provisional measures benefitting Italy and Greece, to support them in better coping with an emergency situation characterized by a sudden inflow of nationals of third countries in those Member States, the HCC stated the following:²³⁴ If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may, in the course of exercising its competences, examine the existence of an alleged violation on the basis of a relevant petition.²³⁵ According to the HCC 'constitutional identity equals the constitutional (self-)identity of Hungary', and its content is to be determined by the HCC on a case-by-case basis based on the Fundamental Law, its purposes, the National Avowal and the achievements of the Hungarian historical constitution. As explained considered in Working Paper 7.1, the latter is so vague, and the National Preamble is written in a language that is so far from legal precision, that this definition can only be understood as granting a *carte blanche* type of derogation to the executive and the legislative from Hungary's obligation under EU law. As Gábor Halmai put it, it was 'nothing but national constitutional parochialism, which attempts to abandon the common European constitutional whole.'²³⁶

Concluding Remarks

While it has been commonly viewed as a shared political ideal, the rule of law is a legal principle of constitutional value which forms part of the common legal heritage of the Member States, as well as a foundational value the European Union and the Council of Europe. The European Commission sought to comprehensively clarify the core meaning and scope of the EU rule of law, and largely and successfully did so in its communications adopted in 2014 and reinforced in 2019. The rule of law is a meta-principle with formal and substantive components which guide and constrain the exercise of public authority and protect against the arbitrary or unlawful use of public power. The rule of law is a principle of both judicial interpretation and a source form which standards of judicial review may be derived. The rule of law, as a primary and transversal constitutional principle, shares a substantial and mutually reinforcing relationship with democracy and respect for human rights. Critiques of the EU rule of law as

²³² Z Szente, 'A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza' [The myth of connecting the Fundamental Law of 2011 with the historical constitution], *Közjogi Szemle*, 2019/1, 1-8.

²³³ For a contextual discussion see P Bárd and L Pech, 'How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The "Hungarian model"', RECONNECT Working Paper No 4, October 2019, <<https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>>.

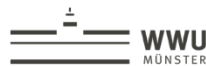
²³⁴ 22/2016 (XII. 5.) HCC decision.

²³⁵ Case 22/2016 quoted and translated by G Halmai, 'Abuse of constitutional identity: the Hungarian constitutional court on interpretation of article E) (2) of the fundamental law' (2018) 43 *Review of Central and East European law* 23, 34-35.

²³⁶ G Halmai, 'Absolute Primacy of EU Law vs. Pluralism: the Role of Courts' (2018) <https://me.eui.eu/wp-content/uploads/sites/385/2018/05/IJPL_Special_Issue_Concluding_remarks_Halmaj_final.pdf>.

being ill-defined or only worth a “box of chocolates” are either a misunderstanding of the value and nature of the rule of law, or an intentional attempt to mislead and diminish a core, common and consensual value of constitutional importance within the European legal space.

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