



Challenges to the Rule of Law in the European Union

Exemplified in the cases of Poland and Hungary

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Abstract:

The rule of law is a widely-debated concept that has captivated not only legal philosophers but whole societies. The rule of law is embedded in most western democratic systems and in the European Union. The rule of law is even a founding value of the Union and as such it enjoys certain legal protection within Union law. Currently the debate is growing in how far the Union should insist on these values being upheld and take action to protect them against possible violations in the member states. Problems with the rule of law and other basic Union values have emerged in member states, most notably in Hungary since 2010 and in Poland since 2015. The elected governments in these countries dismantled rule of law regimes in order to solidify their power. This paper contemplates the Unions competences to react to such value violations. The Unions mandate is analysed, including an evaluation of the concrete mechanisms available to the Union. The Union actions taken so far in the example cases of Hungary and Poland serve to provide a better understanding of the political reality of the Union.

I. Introduction

The rule of law is arguably one of the most universally known and discussed concepts. The idea of the rule of law is cherished by a wide variety of groups: “Christians, Buddhists and Muslims; libertarians, liberals and Confucian communitarians; democrats, soft authoritarians, even socialists and neo-Marxists.”¹ It has fascinated humans for centuries, books on the matter could fill libraries. It is an ideal bridging time and cultural differences. The basic idea behind the concept is that society should be ruled by law rather than man.² In Europe the rule of law has a very long tradition; from classical Greek times, through the Romans and the middle ages up to the current century.³

The European Union is an international organization which was established as an economic community between states. Nonetheless the goals of the Union were always value driven as well; a main goal being to ensure peace and security. Throughout time the European Union has become an increasingly value oriented Union. In 1993 the Copenhagen criteria were adopted, defining basic criteria an acceding country needs to fulfill.⁴ The rule of law is one of these criteria⁵ as well as a core principle of the European Union.⁶ The rule of law is listed as one of the founding values in Article 2 TEU.⁷ Thus, even within the European Union the rule of law has an established basis.

Current events challenge both the Union and the rule of law. Since 2010 the Hungarian government has fundamentally revised the constitutional and political order in Hungary by: unwinding checks and balances, inhibiting the independence of the judiciary, installing an illiberal constitutional order, disrespecting human rights, largely controlling the press and heavily impairing the rule of

¹ Randall Peerenboom. ‘Human Rights and Rule of Law: What's the Relationship.’ (2005) 36 Geo. J. Int'l L, 3f.

² Brian Tamanaha. *On the rule of law. History, politics, theory* (Cambridge University Press 2004) 122.

³ Randall Peerenboom (n 1) 1f.

⁴ See: ‘European Council in Copenhagen 21-22 June 1993’ (1993) Conclusion of the presidency, SN 180/1/93 REV 1.

⁵ Ibid.

⁶ See, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; (24 December 2002), Art 2.

⁷ Ibid.

law.⁸ In Poland the Law & Justice Party (PiS) gained power in 2015 and quickly raised wide concerns through their attack towards both the independence of the constitutional court and media.⁹ In both countries the power of the constitutional court/tribunal is infringed and the rule of law is genuinely threatened. The present issues in Hungary and Poland are not only problems for the states themselves but for the Union as a whole.

The research question of this paper will thus be: What actions can the European Union take when addressing member states that fail to abide by the rule of law? This will be analysed along the following sub-questions:

1. What is the rule of law?
2. What competences does the European Union hold in rule of law matters?
3. Which actions by the Polish and Hungarian governments are impeding a rule of law regime?
4. What actions has the European Union taken to address value related issues in the past?
5. Which alternative or additional actions could the European Union take in the future?
6. Which problems arise when the European Union addresses rule of law issues?

In order to clarify the questions, the concept of the rule of law and its components will be examined. The competences of the European Union in the area of the rule of law will then be expounded upon to better comprehend the issues. To deepen the understanding of the current issues the rule of law situation in Hungary and Poland will be examined. The reaction of the Union to value violations in the past will be compared in order to grasp which actions the Union is willing to take. Alternative measures suggested by scholars will be analyzed to contemplate the most promising solutions. Subsequently a discussion of the best current and long-term approaches is given. Due to the multilayered matter and material, the analysis will contain philosophical, legal, normative and political angles.

This paper addresses one of the most significant contemporary challenges the Union has to face. This moral crisis of the Union has received far less attention than the euro crisis,¹⁰ although it is damaging the moral and political core of the European Union's ambitions.¹¹ Whereas the Euro crisis was mostly caused through a policy failure, the value crisis shows a deep division on

⁸ Bojan Bugarcic, 'Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Carlos Closa and Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 82.

⁹ Daniel R. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union.' (2017), 52 (2) *Government and Opposition*, 220.

¹⁰ Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systematic Infringement Actions.' in Carlos Closa and Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 105.

¹¹ Jan Werner Müller, 'Protecting the Rule of Law (and Democracy) in the EU, The Idea of a Copenhagen Commission.' in Carlos Closa and Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 207.

normative European values which were assumed to be shared.¹² This challenge endangers the Union's fundament and jeopardizes the cooperation among members.

If such actions continue and more member states start acting in a similar manner, trust will vanish and cooperation as currently organized in the Union will become inaccessible. The rule of law is essential for the functioning of the Union's legal order which is based on mutual legal interdependence.¹³ Law is the main means of communication and cooperation in the Union. Political credibility and social cohesion is built upon recognition of the rule of law.¹⁴ Law enables a functional Union; the Union is established through legal treaties, via law the Union interacts with its member states, laws protect the rights of member states and citizens. The rule of law is a prerequisite to establish trust among citizens and trust in economic life.¹⁵ Even the four economic freedoms depend on equal access to administrative and judicial proceedings.¹⁶ Without the rule of law there would be no democratic and legitimate EU.¹⁷

At the same time, a rule of law regime falls within the core competencies of a sovereign state. It is thus questionable to which extent Union intervention would be tolerated. While a solution is urgently needed, it is extremely challenging to reach a certain amount of consensus within Union institutions and between member states on an idea, approach or action.

II. The Rule of Law Theory

The principle of the rule of law is known in many languages and countries. The German concept is the Rechtsstaat and the French concept the Etat de droit.¹⁸ Such concepts are based on common ideas, though the terms may emphasize different aspects of the notion. For example the term Rechtsstaat is closely linked to constitutionalism.¹⁹ Each term and its definition are dependent on the historical development of the state as well as the social and political contexts in which it is embedded.²⁰ These terms therefore should not be understood as synonyms. For the purpose of this paper the term the rule of law will be used to represent the general principle and not specifically the Anglo-American tradition.

¹² Ibid.

¹³ Christophe Hillion. 'Overseeing the Rule of Law in the EU, Legal Mandates and Means' in Carlos Closa and Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 61.

¹⁴ Ernst Hirsch Ballin. 'Mutual Trust, The virtue of Reciprocity- Strengthening the Acceptance of the Rule of Law through Peer Review.' in Carlos Closa and Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 134.

¹⁵ Ibid 135.

¹⁶ Ibid 136.

¹⁷ Ibid 134.

¹⁸ Geranne Lautenbach. *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press 2013) 24.

¹⁹ Ibid.

²⁰ Ibid 35.

A. Origin

The origin of the rule of law can be found in classical Greek times and was further developed by Roman jurists, medieval natural law thinkers, enlightenment philosophers, American founders, German philosophers (19 century proponents of the Rechtsstaat) and in diverse ideologies of current times.²¹ The idea of the rule of law partially developed as an answer to the age old question on how to limit power which has reoccurred in most societies throughout time. This explains both the popularity of the concept as well as the diversity of elements and definitions that emerged due to altering social contexts. The struggle against arbitrary actions by those in power takes place in almost every society.²² A government of law as opposed to a government of men, emerged from human distrust towards others and the recognition of human weaknesses.²³

The original Greek ideas were inspirations for the concepts developed in later periods.²⁴ Plato emphasized that government should be bound by law and law should have authority of its own.²⁵ Rather than the law being subject to authorities, authorities should be subject to law.²⁶ Law should make it impossible for an authority to accumulate all the power. The idea that law inhibits the power of the lawmaker can already be found in these texts. The view that the King needs to abide by the law can also be found independently in Germanic customary law.²⁷ The idea that absolute power should be limited is not a single idea which carried on through time but rather an idea that was developed by multiple sources which were not necessarily aware of a bigger context. In the past divine, natural or customary law would have restricted the law-maker, whereas today it is usually human rights law.²⁸

Constitutionalism is often considered to be an element of the rule of law. The Magna Carta, a document which arranges the relationship between the king and the people, is identified as a source of constitutionalism,²⁹ Constitutional law is usually recognized as being supreme over other law. The idea of a constitutional protection of certain ideals is now closely interlinked with protection of fundamental rights.³⁰

²¹ Randall Peerenboom (n 1) 1f.

²² Mortimer Sellers. 'An Introduction to the Rule of Law in Comparative Perspective' in Mortimer Sellers and Tadeusz Tomaszewski (eds.) *The Rule of Law in Comparative Perspective* (Ius gentium. Comparative perspective on law and justice 3, Springer 2010) 2.

²³ Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 122.

²⁴ Ibid 7.

²⁵ Ibid 8.

²⁶ Ibid.

²⁷ Ibid 23.

²⁸ Ibid 115.

²⁹ Ibid 26.

³⁰ Zachary Elkins, Tom Ginsburg & Beth Simmons. 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013), 54(1) *Harvard International Law Journal*, 61.

B. Definition

The rule of law describes or prescribes the relation between “political power (sovereignty, state), law (objective law, norms) and the individual”.³¹ The rule of law can be defined in multiple ways, usually via an enumeration of components. The scope of the concept itself and the emphasis on certain elements can vary. There is not only ambiguity about the content of the concept but the aspirations are debatable as well.³² Often the aim behind establishing a rule of law regime was to ensure a legal order within society and protect the individual against arbitrary state action and/ or power abuse.³³

The different notions of the rule of law are frequently categorized as thin or thick conceptions of the rule of law, though these should not be seen as two distinct models but rather as two ends of a spectrum across which the various concepts can be found.³⁴ A thin conception of the rule of law would be rather procedural and a thick one more normative. Thus, a basic distinction is made between a formal and substantial understanding of the rule of the law.³⁵ The following concepts which are often seen as components of the rule of law will be elaborated: “rule by law”, formal legality, control mechanisms, democracy and human rights, following Tamanaha’s cluster³⁶. The discussion will start from a thin and move towards thicker conceptions or components. Some components are both procedural and substantive simultaneously. Substantive components address the content of the law introduced. The first two components discussed below are largely agreed upon as formal elements which do not address the content of the laws and thus not question whether the law is a ‘good law’.³⁷

³¹ Pietro Costa. ‘The Rule of Law: A Historical Introduction’ in Pietro Costa and Danilo Zolo (eds) *The Rule of Law History, Theory and Criticism* (Vol. 80, Springer Science & Business Media 2007) 74.

³² Christopher May, *The rule of Law- The common Sense of Global Politics* (Edward Elgar Publishing 2014) 35.

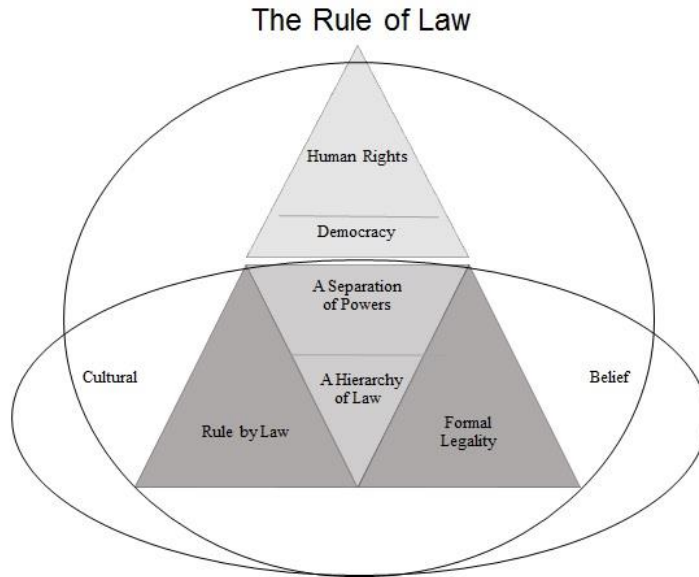
³³ Lautenbach (n 18) 22.

³⁴ Christopher May (n 32) 36.

³⁵ Paul Craig. ‘Formal and substantive conceptions of the rule of law: an analytical framework.’ (1997) *Public Law*, 1.

³⁶ 6 components, See: Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 91ff.

³⁷ Ibid 92.



Graph 1

1. 'Rule by Law'

"Rule by law" refers to law as a means through which a state conducts action.³⁸ Hence, power is exercised through the utilization of positive law.³⁹ For example a government acting through law; via the enactment of laws and abiding by its laws. Yet, legal limitations on the government are required otherwise one could substitute this narrow definition of the rule of law with the term 'rule by the government'.⁴⁰ A rule of law even in its narrow definition should not be equated with the rule by a power holder; this would be contradictory to the main purpose emerging from the historical development of the concept. Hence, law must be the tool of action, as well as supplementary being supreme and limiting the power holder.

2. Formal Legality

The most commonly agreed upon element of the rule of law is legality; it is a core element of even a thin conception. Legality is often defined through Fuller's eight criteria of law. Accordingly law should be:

1. general,
2. publicly known,
3. non-retroactive,
4. clear,
5. non-contradicting with other laws,
6. possible to obey,
7. relatively constant,
8. and congruent between the written law and the enforcement.⁴¹

³⁸ Ibid.

³⁹ Jorgen Møller & Svende-Erik Skaaning 'Systematizing thin and thick conceptions of the rule of law.' (2012), 33(2) Justice System Journal, 139.

⁴⁰ Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 92.

⁴¹ Colleen Murphy. 'Lon Fuller and the moral value of the rule of law' (2005) 24(3) Law and Philosophy, 240f.

Raz states that the basis of the rule of law is that “the law must be capable of guiding the behavior of its subjects”.⁴² Hence, basic elements as the ones above guide the process of law making, granting it validity and acceptance. If laws are not clear or understandable they will not be followed.

If equality is included in this notion has been debated equality at least before the law, meaning that law shall be applied equally to all subjects, is often included as a formal criteria of law.⁴³ These elements are rather procedural in that they limit the process in which laws are made more than the substance of the law.

Hence, a government aspiring to establish and maintain a rule of law, can only enact and enforce laws which fulfill the criteria of legality.⁴⁴ The lawmaker must respect these requirements in order to rule legally. The process of lawmaking is an essential part of the rule of law.⁴⁵ A law making authority is presupposed but it is bound to act within the given framework of law, no one is above the law. The criterion are not only intended for the legislative but also imply rules for the executive and the judiciary.⁴⁶

3. Control Mechanisms: Separation of Powers, a Hierarchy of Law

As already implied in the first two components of the rule of law elaborated above⁴⁷ a controlling mechanism would enhance the stability of the system. The government is restricted by law and the criteria of legality, though this does not seem sufficient if there is no power to check the legitimacy of the government action.

A guardian of law, a judiciary, is necessary.⁴⁸ Everyone should be able to challenge governmental action, especially if one's rights and interests are impaired.⁴⁹ This should not however develop into a rule by judges.⁵⁰ Instead a system of accountability in which powerholders are obliged to check one another's actions should be established. The judiciary needs to be independent to properly secure the rule of law and be able to check the legislative. The separation of powers is an independent concept which in its entirety does not derive from the rule of law, however parts of the two concepts are mutually dependent. The closeness and interdependence can also be explained through the shared aims of the concepts such as the limitation of absolute power. Judicial review is also an essential part of legality; a government should act within the boundaries set by law and prevent inconsistencies between the law and the government's actions.⁵¹

⁴² Joseph Raz. 'The rule of law and its Virtues' in Aileen Kavanagh and John Oberdiek (eds) *Arguing About Law* (Routledge 2009) 183.

⁴³ The creation of equal law is more a substantive aspect because it addresses the content of law making.

⁴⁴ Colleen Murphy (n 41) 243.

⁴⁵ Lautenbach (n 18) 20.

⁴⁶ Ibid 49.

⁴⁷ See: Chapter II. A. 1.-2.

⁴⁸ Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 124.

⁴⁹ Venice Commission. 'Report on the Rule on Law' (April 2011) CDL-AD(2011)003rev, 86th Plenary Session, 11.

⁵⁰ Ibid.

⁵¹ Lautenbach (n 18) 42.

A hierarchy of law can also help to secure a rule of law. In the framework of law, there is usually a form of higher law which, in general also contains the law making procedure. Hence, changes to the law making procedure normally require special legislative procedures. The government is obliged to abide to such predetermined standards which can be found for example in constitutions, statutes or/and administrative regulations.⁵² Thus, a government needs to abide by both pre-existing laws as well as by the prescribed procedures of law making through which they can add to or change the existing law.

According to Palombella the rule of law is based on the relation between two domains of law the *jurisdictio* (justice) and the *gubernaculum* (sovereignty).⁵³ *Jurisdictio* “the law rooted in the particular jurisdiction, protecting its positive idea of justice and giving liberties their due”⁵⁴ ⁵⁵ is the law by which even the sovereign is bound and the *gubernaculum* is the law through which the sovereign can express his/her will in form of governmental policies.⁵⁶ The law maker is bound by independent law which is beyond his reach. Hence, there are the positive laws adopted by the law maker and higher laws which bind and limit the law-making power.

Thus the law maker is policed by the courts and bound by the higher law (mostly the constitution).⁵⁷ The rule of law begins when law checks the law maker. The concept of the rule of law cannot be reduced to mere formal legality because it would then no longer serve its function of limiting sovereign power.

4. Connection to Democracy

For Athenians democracy was synonymous with the rule of law.⁵⁸ Scholars still perceive the rule of law to be a fundamental pillar of democracy.⁵⁹ The relation between the rule of law and democracy depends on the definition of both concepts. As a basic description democracy is referred to as government by and for the people.⁶⁰ Elements of democracy are enabled through the rule of law: political equality and protection of the individual against an arbitrary abuse of power by those elected to govern.⁶¹ Formal legality and democracy are related in that formal legality enables democracy by limiting the possible actions and power of government officials.⁶² At the

⁵² William Whitford. ‘The rule of law’ (2000), 2000(3) Wis. L. Rev 724.

⁵³ Gianluigi Palombella, ‘The Rule of Law as an Institutional Ideal’ (2010), 9(1) Comparative Sociology Brill, 16.

⁵⁴ Gianluigi Palombella. ‘The Rule of Law and its Core’ in Gianluigi Palombella & Neil Walker (eds) Relocating the Rule of Law (Hart Publishing 2009) 28.

⁵⁵ Not implying that a substantive conception of Justice exist. See: Gianluigi Palombella, ‘The Rule of Law as an Institutional Ideal’ 23.

⁵⁶ Gianluigi Palombella. ‘The Rule of Law and its Core’ (n 54) 28f.

⁵⁷ Dimitry Kochenov. ‘The Missing EU rule of law?’ in Carlos Closa and Dimitry Kochenov (eds) Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016) 297.

⁵⁸ Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 7.

⁵⁹ Guillermo O’Donnell. ‘Why the rule of law matters.’ (2004), 15(4) Journal of Democracy, 32.

⁶⁰ Arend Lijphart. Thinking about democracy: power sharing and majority rule in theory and practice. (Routledge, 2007) 111.

⁶¹ Guillermo O’Donnell (n 59) 32.

⁶² Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 99.

same time the legitimacy of formal legality derives from democracy, ensuring a legitimate source of law.⁶³ Thus, the rule of law can enhance a democratic rule and vice versa.

Democracy and the rule of law are components of the same western political philosophy.⁶⁴ Most European countries are democratic states governed by the rule of law.⁶⁵ The concepts are at least interlinked and should be considered in relation to one another to attain a better understanding.

5. Connection to Fundamental Rights Protection

Human rights and the rule of law both aim to protect the individual against arbitrary governmental action.⁶⁶ Human rights limit the substantive content of law aspiring to create good or just law and would thus be a substantive element of the rule of law.⁶⁷ Some human rights are very closely connected to the rule of law; like the right to access justice and the right to a fair trial.⁶⁸ However, the content of human rights is debated and there is no uncontroversial way to determine the substance of these rights,⁶⁹ meaning that it is difficult to conclude which laws are just and good.

Some categories of human rights enjoy wider acceptance than others. Negative liberty rights are often distinguished from positive social rights.⁷⁰ Negative rights are individual rights protected by the government whereas positive rights require the government to take action. Negative rights are more often included in the definition of the rule of law than positive rights.⁷¹ However, in the thickest version of the rule of law some include social welfare rights obligating governments to take positive action to include welfare measures and enhance substantive equality.⁷²

Human rights are often codified at the highest position in the hierarchy of law⁷³ usually the constitution. Thus individual rights cannot be changed through a simple majority, constitutional changes usually require a form of qualified majority.⁷⁴ Thus, human rights are part of higher law or *jurisdicio* and protected through a rule of law control mechanism providing a hierarchy or duality of law.

Individual rights can restrict democracy for example minority rights to be free from majority oppression.⁷⁵ Personal liberty can be restricted by popular democracy, therefore the rights of people to govern themselves needs to be balanced against the rights of the individual.⁷⁶ It can be argued, that in order to exercise self-determination as part of a democracy, one must first be free

⁶³ Ibid.

⁶⁴ Lautenbach (n 18) 62.

⁶⁵ Ibid.

⁶⁶ Ibid 54.

⁶⁷ Ibid 61.

⁶⁸ Venice Commission. 'Report on the Rule on Law' (n 49) 12.

⁶⁹ Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 103.

⁷⁰ Jorgen Møller & Svende-Erik Skaaning (n 39) 141. (Following: Berlin 1969)

⁷¹ Ibid.

⁷² Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 113.

⁷³ Lautenbach (n 18) 61.

⁷⁴ Jorgen Møller & Svende-Erik Skaaning (n 39) 141.

⁷⁵ Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 104.

⁷⁶ Ibid.

and have individual rights.⁷⁷ Individual liberty rights enable thereby a person to exercise a self-determined choice as a part of a democracy which can then rule to a great extent according to the majority will. One can view democracy and human rights as concepts limiting one another but also as mutually dependent, they can enhance each other's value.

Including human rights in the rule of law would lead to a more normative understanding of the concept. The concern thereby, is that when there is no consensus on what good or just law is or what human rights are; people who do not share the codified moral understanding of these laws are then more likely to reject the rule of law in its entirety.

6. The Rule of Law a Cultural Belief

Tamanaha considers the peoples' belief in - and commitment to the rule of law to be the most essential component of it.⁷⁸ The peoples' belief in the righteousness, validity of the law and the law-making authority strengthens compliance and the authority of the law. Tamanaha attributes thereby a certain amount of responsibility for the rule of law to both the individual and the people.

Further, he points out that the rule of law is manifested differently from country to country and that each system functions within its own political, economic, cultural and social environment.⁷⁹ Hence, there is not one system of the rule of law, instead the rule of law can be implemented in a variety of different functional systems. Some scholars have therefore suggested a more sociological approach to the concept.⁸⁰

7. The Rule of Law Components Identified by the Venice Commission

The Venice Commission identified rule of law components in a rule of law checklist in 2011⁸¹ and renewed it in 2016. The later one names the following main components⁸²:

- A. legality,
- B. legal certainty,
- C. prevention of the abuse of powers,
- D. equality before the law and non-discrimination and
- E. access to justice.⁸³

Legality and legal certainty refer to procedural safeguards dealing with the creation of laws as discussed above under formal legality⁸⁴, but here legality also includes the notion of supremacy of law.⁸⁵ To prevent an abuse of power, legal safeguards against possible abuses are requested.⁸⁶ Equality refers to equality in and before the law to ensure non-discrimination.⁸⁷ An independent,

⁷⁷ Ibid 105.

⁷⁸ Brian Tamanaha. 'The history and elements of the rule of law' (2012), 2012(2) Sing. J. Legal Stud, 246.

⁷⁹ Ibid 247.

⁸⁰ Marc Hertogh 'Your rule of law is not mine: rethinking empirical approaches to EU rule of law promotion' (2016), 14(1) Asia Europe Journal, 44.

⁸¹ See: Venice Commission. 'Report on the Rule on Law' (n 49).

⁸² The 2016 components are similar to the once of 2011.

⁸³ Venice Commission. 'Rule of Law Checklist' (March 2016) CDL-AD(2016)007, 106th Plenary Session, 2.

⁸⁴ See: Chapter II. B. 2.

⁸⁵ Venice Commission. 'Rule of Law Checklist'(n 83) 11ff.

⁸⁶ Ibid 17.

⁸⁷ Ibid 18f.

impartial judiciary and fair trial rights are listed as elements to ensure justice.⁸⁸ This checklist from the Venice Commission reflects a current widely accepted legal understanding of the rule of law.

The Venice Commission, established in 1990 by the Council of Europe, has 61 member states including the 47 of the Council.⁸⁹ It closely cooperates with the EU and the OSCE.⁹⁰ The Commission focuses on constitutional matters and provides legal advice.⁹¹ The members of the Commission are professors, judges, members of national Parliaments and civil servants, they serve a four year term and are chosen by the member states to act on individual capacity.⁹² The Commission publishes requested opinions which are non-binding, on legislation and studies or reports on current issues.⁹³ The Venice Commission had an influential role during post-socialist constitutionalism in the 1990s.⁹⁴ It has issued over 500 opinions concerning more than 50 countries and has thus accumulated experience and authority.⁹⁵

These rule of law components of the Venice Commission are based on standards of European law, other regional laws, international law or rule of law indicators.⁹⁶ The Commission often refers to hard law as an authoritative source for the establishment of standards like the ECHR, but it also considers shared values, comparable traditions and the substance of standards as well as their structure.⁹⁷ It needs to consider different traditions, cultures and environments and allows for a certain flexibility in achieving objectives. The Venice Commission has become quite influential though its actions and its direct contact with member states.

8. Comparing Theoretical Components with the Rule of Law Checklist

Five rule of law components and their sub-components have been described above⁹⁸ in order to provide a better understanding of what the rule of law concept entails. The rule of law checklist of the Venice Commission was also introduced,⁹⁹ which raises the question in how far these coincide. A broader question is which of these components and rule of law measures enjoy wide support and why are they authoritative? When comparing the rule of law components listed in the theory of this chapter¹⁰⁰ which mainly follows Tamanahan's distinctions with the rule of law checklist of

⁸⁸ Ibid 20ff.

⁸⁹ Website Council of Europe, Venice Commission
<http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN>

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Kaarlo Tuori. 'From Copenhagen to Venice.' in Carlos Closa and Dimitry Kochenov (eds) Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016) 238f.

⁹⁵ Ibid 240.

⁹⁶ Venice Commission. 'Rule of Law Checklist' (n 83) 34ff.

⁹⁷ Wolfgang Hoffmann-Riem. 'The Venice Commission of the Council of Europe – Standards and Impact' (2014), 25(2) The European Journal of International Law, 581f.

⁹⁸ See: Chapter II. B. 1-5.

⁹⁹ See: Chapter II. B. 7.

¹⁰⁰ See: Chapter II B. 1-5.

the Venice Commission many similarities can be found but components and sub-components might be grouped differently.

Point A of the Venice Commission, legality, includes ‘rule by law’. Hence, compliance to law but also supremacy of law¹⁰¹ which is listed at a later stage in the theoretical approach chosen above under a hierarchy or duality of law. Point B, legal certainty, is very similar to the point of formal legality, the list of sub-components of legal certainty are also similar to the sub-components listed above following Fuller’s suggestions of formal legality. The prevention of an abuse of power in point C refers to legal safeguards against the arbitrary misuse of power by public authorities.¹⁰² This is a bit narrower than the controlling mechanisms discussed in point three of the theory part. The other parts are however included under point A and E. Point D, equality before the law and non-discrimination, is sometimes considered as criteria of formal legality and sometimes deemed to be more in the human rights domain. Equality in the sense that law should be applied equally can qualify as a criteria of formal legality.¹⁰³ The creation of equal law is arguably a more substantive aspect because it addresses the content of law making. Equal law can be tricky, if rigorously imposed.¹⁰⁴ The last point E, access to justice, is concerned with judicial independence.¹⁰⁵ Democracy and human rights are not listed as benchmark but are discussed in the elaborations on certain elements. There is a reference made to democracy under the law making criteria of point A, legality. There is no elaboration on particular human rights, but the establishment of and compliance to human rights are listed as points describing sub-components under point A, legality.

Hence, the criteria of the Venice Commission largely coincide with the theoretical evaluation of the rule of law concept above including the apparently widely accepted components: a rule by law, formal legality, a separation of powers and a hierarchy of law. However, these components are also broad theoretical notions which can be understood in multiple ways and can lead to diverse lists of sub-components. Democracy and human rights are concepts which are interlinked with the rule of law and share common components. The Venice Commission does not however include them as direct components of the rule of law.

A rule of law checklist should take into consideration the area of application, a worldwide rule of law checklist might look quite different from a European Union one. There are few studies evaluating and comparing rule of law checklists, and they often conclude that the lists could be enhanced.¹⁰⁶ The authority of each checklist depends partially on the components or benchmarks set but also on the institution behind it.

¹⁰¹ Venice Commission. ‘Rule of Law Checklist’ (n 83) 11.

¹⁰² Ibid 17.

¹⁰³ Jorgen Møller & Svende-Erik Skaaning (n 39) 139.

¹⁰⁴ Tax law is an example of laws which are intentionally unequal, wealthy people being required to pay higher taxes.

¹⁰⁵ Venice Commission. ‘Rule of Law Checklist’ (n 83) 20.

¹⁰⁶ Svend-Erik Skaaning. ‘Measuring the rule of law.’ (2010), 63(2) Political Research Quarterly, 458.

C. Conclusion

The ideal of the rule of law can be approached from a conceptual, historical, and philosophical perspectives and often as a result an interwoven conception emerges which can lead to confusion.¹⁰⁷ Acknowledgment of the development of the rule of law is essential not only in order to understand the concept, but to come to accept its changing nature across cultural settings and through time. While the institutional design of the rule of law, the adequate legal institutions which prevent law from being used as a tool may vary, common normative goals are apparent.¹⁰⁸ Although the rule of law structure may vary from one regime to another there are core components such as formal legality and the limitation of governmental power which are essential to the concept. This can be seen in the graph 1 the three triangles on the bottom form the core of the rule of law this only becomes possible if the middle stone (control mechanism: separation of powers, hierarchy of law) connects the other two. The Upper triangle (democracy and human rights) can be added to form a thicker version of the rule of law. Within western society a thick conception of the rule of law prevails, including democracy and the human rights.¹⁰⁹ The Venice Commission checklist specifies current relevant components of the rule of law which can be used as operational standards, it does not list democracy and the rule of law as core components. The components help establish legal certainty. However remaining open to adaptation and maintaining space for plurality are important. Criteria should thus never be ultimately defined, rather they help to understand and deploy the concept.

III. The Rule of Law in the European Union; Theory, Development, Mandate

A. Development / History

The historical, social and institutional contexts are essential to comprehend the concept of the rule of law. The rule of law is in practice most frequently seen in association with states and the concept has been often discussed within this paradigm. Nonetheless, the rule of law does not need to be connected to a state but to a law making and enforcing body. The rule of law requires an independent law corpus that autonomously guarantees rights, norms and principles of law against annulment through a sovereign legislative authority.¹¹⁰

At the top of the hierarchy of EU norms are the TEU and the TFEU and the Charter of Fundamental Rights which has the same status according to Article 6(1) TEU.¹¹¹ The European Treaties are understood to have the same standing as a constitution.¹¹² Hence, the European Treaties are an independent law corpus and the Union has law making and enforcing bodies.

¹⁰⁷ Gianluigi Palombella, 'The Rule of Law as an Institutional Ideal' (n 53) 4f.

¹⁰⁸ Ibid 5f.

¹⁰⁹ Brian Tamanaha. *On the rule of law. History, politics, theory* (n 2) 111.

¹¹⁰ Gianluigi Palombella, 'Beyond Legality- Before Democracy: Rule of Law Caveats in the EU Two-Level System' in Carlos Closa and Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 44.

¹¹¹ Paul Craig and Grainne de Burca. *EU Law-Text, Cases, and Materials* (5th edit, Oxford University Press 2011)

¹¹² Fabien Terpan. 'Soft Law in the European Union -The Changing Nature of EU Law' (2015), 21(1) *European Law Journal*, 68.

For many years the main focus of the European Union was economic cooperation.¹¹³ However, democracy, human rights, the rule of law and good governance began to gain significance in the Union and by 1999 a comprehensive strategy for the promotion of these values was developed.¹¹⁴ In the Amsterdam Treaty of 1997 it was declared that the Union was founded on human rights, democracy and the rule of law and that adaption of these principles are a necessary condition for EU membership.¹¹⁵ EU membership is the biggest motivator of the EU to advocate democracy and the rule of law.¹¹⁶

The rule of law is currently manifested as a founding value of the Union in Article 2 TEU and protected through Article 7 TEU.¹¹⁷ Article 49 TEU states that a new member needs to respect the values as defined in Article 2 TEU before acceding the Union,¹¹⁸ and further, that possible membership will be evaluated under conditions agreed up on by the European Council. This refers to the declaration by the European Council in June 1993 in Copenhagen which lists the so-called Copenhagen criteria.¹¹⁹

In the Europeans Commission's new EU Framework to Strengthen the Rule of Law a non-exhaustive list of six principles deriving from the rule of law are specified:

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. independent and impartial courts;
5. effective judicial review including respect for fundamental rights;
6. and equality before the law".¹²⁰

Further, it elaborates that these principles are not purely procedural but rather tools to ensure democracy and human rights which shows that the rule of law is understood as a principle with formal and substantive criteria.¹²¹ An inherent link is implied between the rule of law, democracy and human rights.¹²² All this provides a certain guidance to understanding the term at the European Union level.

¹¹³ Tanja Börzel & Thomas Risse. 'One size fits all! EU policies for the promotion of human rights, democracy and the rule of law' (2004), 4 In Workshop on Democracy Promotion, 19.

¹¹⁴ Ibid.

¹¹⁵ Craig & de Burce (n 111) 17.

¹¹⁶ Börzel & Risse (n 113) 20.

¹¹⁷ See, Treaty on European Union (n 6) Art 2, 7.

¹¹⁸ See, *ibid.*

¹¹⁹ See, 'European Council in Copenhagen 21-22 June 1993' (n 4)

¹²⁰ European Commission. 'A new EU Framework to strengthen the Rule of Law' (11 March 2014) (Communication) COM (2014) 158 final, 4.

¹²¹ Ibid.

¹²² Ibid.

The Union accepts the dominate position of the Council of Europe to address norm-building¹²³ and that the Council is the point of reference for establishing rule of law standards.¹²⁴ The Union even addresses the Council of Europe to undertake rule of law assessments and appeals to the member states to abide by the assessment.¹²⁵ Hence, the European Union is influenced by and depends on the Council of Europe in norm and value matters.

B. Treaty on the European Union

1. Article 2 TEU

The rule of law is listed as a founding value in 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, including the rights of persons belonging to minorities (Art 2, TEU).”¹²⁶ This Article further states that these are values common to all member states.¹²⁷ The Union is not only an economic Union but a Union founded on specific values and having the competence to protect and promote these values.

However, the Treaties lack a comprehensive definition of these values.¹²⁸ The Article is substantively vague¹²⁹ and the Union cannot adopt legislation based solely on this Article.¹³⁰ These values though are also reflected in the wider ambition of EU law.¹³¹ Moreover, the member states have a legal obligation to cooperate and promote Union values.¹³² The principle of sincere cooperation is specifically enshrined in the Treaty.¹³³ Hence, member states should abide by these values and are even obliged to do so, but the question remains what should be done when perfect cooperation fails.

2. Article 7 TEU

Article 7 TEU enables Union action in case of a serious breach of the values referred to in Article 2 TEU (e.g. rule of law, human rights, democracy) by a member state.¹³⁴ Article 7 TEU provides a dual procedure; the first preventative procedure addresses a ‘clear risk of a serious breach’ and the second sanctioning procedure a ‘serious and persistent breach’.¹³⁵ The sanctioning mechanism

¹²³ Laurent 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 Dimitry Kochenov & Fabian Amtenbrink (eds.) *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2014) 110.

¹²⁴ Memorandum of Understanding between the Council of Europe and the European Union, 2007, 3.

¹²⁵ Laurent 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’ (n 123) 123.

¹²⁶ Treaty on European Union (n 6) Art 2.

¹²⁷ *Ibid.*

¹²⁸ Laurent 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’ (n 123) 111.

¹²⁹ Christophe Hillion (n 13) 67.

¹³⁰ Dimitry Kochenov & Laurent Pech. ‘Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.’ (2016), 54(4) *JCMS: Journal of Common Market Studies*, 1063.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ See: Treaty on European Union (n 6) Art 4.

¹³⁴ See: *ibid.* Art 7.

¹³⁵ See: *ibid.*

is divided again into a determination and a sanction process.¹³⁶ The sanctioning procedure was part of the Treaty of Amsterdam and the preventative procedure was added later by the Treaty of Nice, to provide an alternative softer procedure to address value violations.¹³⁷

In order to determine a ‘clear risk of a serious breach’ a four-fifth majority of the Council and a consent vote of the Parliament are required.¹³⁸ As part of this procedure the member state in question shall be able to voice their opinion and recommendations can be made.¹³⁹

To determine the existence of a ‘serious and persistent breach’ a unanimous vote in the Council and a consent vote in Parliament are necessary.¹⁴⁰ Here the member state in question is required beforehand to submit their observations.¹⁴¹ When a breach has been determined, the Council can then by a qualified majority suspend certain rights deriving from the Treaties.¹⁴² For example the suspension of the voting rights of a member state in the Council is specifically mentioned.¹⁴³

This might seem like an intervention in the internal affairs of member states, but it can also be understood as quarantine to prevent a single government from endangering the whole system of liberal democratic politics.¹⁴⁴ Such a procedure recognises the interdependence of European politics and provides a means to hinder one country’s or government’s political attitude from impairing the whole system.

Article 7 TEU is, however, vague and the procedures are not self-evident. The clarification and establishment of Article 7 TEU procedures also depends on definitions of Article 2 TEU which are imprecise.¹⁴⁵ Some suggest that the clarification of the substance of Article 2 TEU into operative standards is a prerequisite¹⁴⁶ for implementing Article 7. Since Article 7 TEU has never been applied, the precise use is, to a certain extent, open to interpretation.

The Commission set a threshold for the application of Article 7 TEU in that the value violation should be considerably higher than individual cases of breaches of fundamental rights and more of a systematic problem.¹⁴⁷ Hence, only larger scale violations of member states are addressed by the Article and not individual human rights issues.

¹³⁶ See: *ibid.* Art 7 (2, 3)

¹³⁷ Wojciech Sadurski. ‘Adding a Bite to a Bark? A story of Article 7, the EU Enlargement, and Jörg Haider.’ (2010) Sydney Law School Research Paper No. 10/01, 4ff.

¹³⁸ Treaty on European Union (n 6) Art 7(1).

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* Art 7(2).

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* Art 7(3)

¹⁴³ *Ibid.*

¹⁴⁴ Jan-Werner Müller. ‘Should the EU protect democracy and the rule of law inside member states?’ (2015), 21(2) *European Law Journal*, 144.

¹⁴⁵ Christophe Hillion (n 13) 67.

¹⁴⁶ *Ibid.*

¹⁴⁷ European Commission. ‘On Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based’ (15 October 2003) (Communication) COM(2003) 606 final, 7.

Even though Article 7 TEU was specifically created to protect European values and provides certain procedures for this purpose, is often deemed to be inadequate. It is criticised also for its high procedural hurdles, which require a strong political consensus.¹⁴⁸ Some scholars consider the threshold as virtually impossible to satisfy.¹⁴⁹ Especially, the unanimity vote in Council to determine a serious and persistent breach is hard to attain.

Some argue that the main problem is not the legal structure of the Article but the political unwillingness to act and intervene.¹⁵⁰ Article 7 TEU is even often referred to as ‘the nuclear option’ a term coined by Barosso¹⁵¹ a former president of the European Commission. The strong negative connotation through the phrase ‘nuclear option’ further impedes the European institutions’ use of this Article. It is seen as a measure of last resort and thus can only be used from a political perspective in the most extreme circumstances.¹⁵² Such labelling is deluding since especially the first preventive procedure which establishes ‘a risk of a serious breach’ and cannot really be regarded as ‘nuclear’.¹⁵³

C. Ordinary Infringement Procedure

Violations to the rule of law by a member state can alternatively be addressed by the classical infringement procedures provided for in Articles 258- 260 of the Treaty on the Functioning of the European Union (TFEU). Article 258 TFEU enables the Commission to bring action against a member state before the European Court of Justice (ECJ), if that state has failed to fulfil an obligation under the Treaty once the problems have been communicated to the member state concerned.¹⁵⁴ The Commission “shall oversee the application of Union law under the control of the Court of Justice of the European Union.”¹⁵⁵ Further, Article 259 allows a member state to initiate an action against another member state.¹⁵⁶ In addition, Article 260 TFEU grants the court the right to impose a penalty in the case of non-compliance with a judgement.¹⁵⁷ Hence, a violation of the rule of law could be brought in front of the ECJ by the Commission or another member state and such a violation can then be penalised.

¹⁴⁸Bojan Bugarcic, ‘Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism’ (n 8) 84.

¹⁴⁹ Dimitry Kochenov & Laurent Pech. ‘Upholding the Rule of Law in the EU: On the Commission's ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction.’ (2015) Robert Schuman Centre for Advanced Studies Research Paper No. 2015/24, 3.

¹⁵⁰ Bojan Bugarcic, ‘Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism’ (n 8) 84.

¹⁵¹ European Commission. ‘State of the Union 2012 Address’ (12 September 2012) Plenary Session of the European Parliament.

¹⁵² Dimitry Kochenov & Laurent Pech. ‘Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.’ (n 130) 1065

¹⁵³ Ibid.

¹⁵⁴ See: Treaty on the Functioning of the European Union (consolidated version), 13 December 2007, Official Journal of the European Union C 115/019, Art 258.

¹⁵⁵ See: Treaty on European Union (n 6) Art 17 (1).

¹⁵⁶ See: Treaty on the Functioning of the European Union (n 154) Art 259.

¹⁵⁷ See: *ibid.* Art 260.

These procedures however, are usually connected to the violation of certain provisions and specific laws. Violations of Article 2 TEU can be so addressed along with other issues which are more specifically clarified in other Union legislation.¹⁵⁸ This might lead to a reaction to the specific violation, but at the same time fall short of leading to a change in a systematic value violation.

D. Framework to Strengthen the Rule of Law

A so-called ‘pre-article seven procedure’¹⁵⁹ has been introduced; namely the new EU Framework to Strengthen the Rule of Law. It aspires to bridge the gap between action under Article 258 TFEU and Article 7 TEU.¹⁶⁰ In the sense that 258 TFEU might not be effective to address value violations and Article 7 is considered a very harsh measure. The goal of the Framework is to facilitate a solution with the member state before a “clear risk of serious damage” can develop.¹⁶¹ It aims to encourage earlier and softer intervention and more cooperation between the member state and the Union. The Framework adds a ‘pre-preventative procedure’.¹⁶² This characterisation can however further undermine the application of Article 7 since it implies the possibilities offered in the Framework should be exhausted first.¹⁶³

The Framework is a soft law approach centred on monitoring and communication between the European Union and the member state in question. The process consists of three stages; a Commission assessment, a Commission recommendation and a follow up to the recommendation.¹⁶⁴ In the first step the Commission collects and examines indications for a systematic threat to the rule of law and publishes a ‘rule of law opinion’.¹⁶⁵ In a second step a ‘rule of law recommendation’ is published, if a systemic threat is considered to be present.¹⁶⁶ In the third stage the follow-up action of the member state is to be monitored. If no satisfactory action has resulted, the activation of the Article 7 mechanisms will be assessed.¹⁶⁷

As mentioned above, six rule of law criteria are listed as an orientation,¹⁶⁸ thus following the example of the Venice Commission to offer a working definition.¹⁶⁹ Arguably the list leaves room

¹⁵⁸ Christophe Hillion (n 13) 74.

¹⁵⁹ Dimitry Kochenov & Laurent Pech. ‘Upholding the Rule of Law in the EU: On the Commission's ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction.’ (n 149) 7.

¹⁶⁰ Ibid, 2.

¹⁶¹ European Commission. ‘A new EU Framework to strengthen the Rule of Law’ (n 120) 6.

¹⁶² Christophe Hillion (n 13) 78.

¹⁶³ Dimitry Kochenov & Laurent Pech. ‘Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.’ (n 130) 1071.

¹⁶⁴ European Commission. ‘A new EU Framework to strengthen the Rule of Law’ (n 120) 6.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid 8.

¹⁶⁷ Ibid.

¹⁶⁸ Those principles include legality,...; 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. See European Commission. ‘A new EU Framework to strengthen the Rule of Law’ (n 120) 4.

¹⁶⁹ Dimitry Kochenov & Laurent Pech. ‘Monitorig and Enforcement of the Rule of Law in the EU: Rhetoric and Reality.’ (2015), 11(3) European Constitutional Law Review, 522.

for enhancement, including expanding to contain certain relevant sub-components and refining the division and establishment of the main point to make it more understandable.¹⁷⁰

The main function of the Framework is to address threats of a ‘systemic nature’ to the rule of law.¹⁷¹ However, it fails to properly clarify what constitutes a systemic breach.¹⁷² This leaves it to the discretion of the Commission as to when to apply the Framework.¹⁷³ Compared to the processes under Article 7 which always require the consent of multiple organs, the Commission has more power under the Framework since it is the sole European organ involved. In an Article 7 procedure, the Commission initiates the action, but it is left to the Council and Parliament to decide whether actions shall be taken. According to the Commission, the Framework is based on existing competences and offers a complementary option, this view is however not shared by all.¹⁷⁴

The recommendations given by the Commission in the second step of the Framework are not legally binding. If the results of the application of the Framework are seen to be insufficient, the initiation of Article 7 procedures are not obligatory.¹⁷⁵ Therefore, the application of the Framework regarding a non-cooperative member state may have no effect or consequences.

E. Conclusion

In the European Union, the rule of law, democracy and human rights protection are understood as interlinked and inseparable concepts. They are values on which the Union is founded and at the same time principles which build the basis for further legislation. The rule of law is embedded in EU primary law. It is listed as core value in Article 2 TEU and protected through Article 7 TEU. Unfortunately, these Articles do not elaborate on the content or understanding of the rule of law concept within the Union.

However, components of the rule of law are developed in the pre-accession strategy where the Commission and the Council communicate with a potential member state.¹⁷⁶ This procedure emerges from Article 49 TEU¹⁷⁷ which lists the rule of law as a pre-requisite before accession. Hence, the substantive and normative content of Article 2 TEU is elaborated in relation to candidate states.¹⁷⁸ This process might not provide a concise or uniform understanding because it is developed in direct contact with a state, but it introduces the general idea. Additionally, in the Framework to Strengthen the Rule of law the Commission refers to precedent cases for

¹⁷⁰ Ibid 522f.

¹⁷¹ European Commission. ‘A new EU Framework to strengthen the Rule of Law’ (n 120).

¹⁷² Dimitry Kochenov & Laurent Pech. ‘Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.’ (n 130) 1070.

¹⁷³ Ibid.

¹⁷⁴ Dimitry Kochenov & Laurent Pech. ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality.’ (n 169) 525.

¹⁷⁵ Dimitry Kochenov & Laurent Pech. ‘Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.’ (n 130) 1067

¹⁷⁶ Christophe Hillion (n 13) 68.

¹⁷⁷ See: Treaty on European Union (n 6) Art 49.

¹⁷⁸ Christophe Hillion (n 13) 68.

clarification on the EU values.¹⁷⁹ The Framework itself further clarifies the principle of the rule of law¹⁸⁰, and mentions criteria. Thus, while there might not be a clear definition of rule of law components in primary Union law, through multiple other sources one can grasp an understanding of the content of the rule of law from a Union perspective. Nonetheless these sources are mostly not authoritative.

The concept of the rule of law was adopted in the European Union without a clear definition or operationalization of the concept which would significantly enhance its use in law. When trying to establish such a clarification, it is beneficial to take the criteria of the Venice Commission into consideration in addition to the Union documents mentioned above. As discussed in the previous section the criteria of the Venice Commission provide an excellent insight into the current legal understanding of the concept and enjoy some authority. Ultimately, the question remains as to whether the Union only has the authority to protect its values or does it actually have effective legal instruments?¹⁸¹ Some argue that the Unions' mandate is so strong and multi-layered, that the limited use of the available mechanisms implies that their weakness might not be related to legal Treaties at all.¹⁸²

IV. Issues with the Rule of Law in Hungary and Poland

Since 1989 most Eastern European Countries have widely reformed their legal system in order to de-Sovietize.¹⁸³ It has been one of the most active regions for rule of law reforms.¹⁸⁴ Both Poland as well as Hungary were engaged after the fall of the Soviet Union with adopting a rule of law regime until counter-reforms were adopted, beginning in 2010 in Hungary and 2015 in Poland.

A. Hungary

During the global financial crisis, the Hungarian economy collapsed in 2007 and it was the first European Country to receive bail out money from IMF.¹⁸⁵ The crisis was connected with typical austerity measures.¹⁸⁶ The socialist government in charge during the financial crisis and responsible for implementing the austerity measures had little chance of being reelected.¹⁸⁷

In the 2010 general elections in Hungary, the Fidesz party, partially due to lack of credible alternatives, won 53 percent of the popular vote which resulted in 68 percent of the seats in Parliament and thus a two-thirds majority.¹⁸⁸ The Parliament was able to use its two-third majority

¹⁷⁹ See: European Commission. 'A new EU Framework to strengthen the Rule of Law' (n 120) 4.

¹⁸⁰ Ibid.

¹⁸¹ Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?' (n 144) 147.

¹⁸² Christophe Hillion (n 13) 81.

¹⁸³ Thomas Carothers. 'The rule of law revival' (1998), 77(2) Foreign Aff., 100.

¹⁸⁴ Ibid.

¹⁸⁵ Kim Lane Scheppele. 'Hungary and the End of Politics, How Victor Orbán launched a constitutional coup and created a one-party state.' The Nation (May 2014).

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele. 'Disabling the constitution.' (2012), 23(3) Journal of Democracy, 138f.

to eliminate a law which set up a four-fifth majority requirement for composing a new constitution, thus the government was able to abolish the last power constraint.¹⁸⁹ The government gained a sizable amount of power as their two-third majority enabled them to initiate all kinds of substantial legal reforms more or less independently of any controlling power. In 2011 a new constitution was passed which came into effect on the first of January 2012.¹⁹⁰ The few checks that existed to limit the power of the government authority were further reduced or eliminated.

The Venice Commission, an advisory body for the Council of Europe, published a report on the new Hungarian constitution in mid-2011. The Venice Commission questioned: some statements made in the constitution, a lack of protection of certain human rights, the extensive use of cardinal law and the limitation of the competences of the constitutional court.¹⁹¹

The Commission first emphasized that a constitutional culture distinguishes constitutional issues and ordinary politics.¹⁹² Hence, that there is a difference between a constituent and ordinary legislative power. Theories elaborating on constituent power usually identify its legitimate origin deriving from the people.¹⁹³ The Commission implies that the Hungarian society was not sufficiently involved in the development of this new constitution.¹⁹⁴ The most vital changes to the constitution should at least be a topic of general discussion and the people should have the ability to influence the content.

The Venice Commission further questions the extensive use of cardinal law and recommends a reduction in scope and scale.¹⁹⁵ In a hierarchy of laws cardinal law are found between the constitution and ordinary laws. Thus, they should be more difficult to enact than ordinary law but not as challenging as constitutional change. To enact cardinal laws in Hungary a two third majority is required¹⁹⁶ which is the same voting burden as for constitutional law. If the cardinal laws are widely enacted, it will become difficult for a government with only a simple majority to make effective legal changes.¹⁹⁷ Thus, future legislative power may become weakened significantly and laws of the current government may remain unchanged for an extensive amount of time.

The preamble of the new constitution is given a greater legal significance than usual, this is problematic due to a lack of precision as well as particular statements included.¹⁹⁸ First, the

¹⁸⁹ Ibid 139.

¹⁹⁰ Website of the Hungarian Government, 'The Fundamental Law' <<http://www.kormany.hu/en/hungary/the-hungarian-state/the-fundamental-law>> accessed 13.Feb. 2017

¹⁹¹ Venice Commission. 'Opinion on the new Constitution of Hungary' (June 2011) Opinion no. 621 / 2011, CDL-AD (2011)016, 87th Plenary Session, 3ff.

¹⁹² Ibid. 4.

¹⁹³ Andreas Kalyvas. 'Popular sovereignty, democracy, and the constituent power.' (2005), 12(2) Constellations, 237f.

¹⁹⁴ Venice Commission. 'Opinion on the new Constitution of Hungary' (n 191) 4.

¹⁹⁵ Ibid. 6f.

¹⁹⁶ The Fundamental Law of Hungary (25 April 2011) Translation of the consolidated version of the Fundamental Law as on 1 October 2013. Website of the Hungarian Government, Art T4.

¹⁹⁷ Venice Commission. 'Opinion on the new Constitution of Hungary' (n 191) 6f.

¹⁹⁸ Ibid 8.

rejecting of the constitution of 1949; declaring it to be invalid¹⁹⁹ with use of quite strong anti-communist rhetoric. This is especially controversial and paradox because it could be interpreted as a devaluation or even eradication of the legitimacy of Parliament to enact a new constitution because their powers derived from the old constitution.²⁰⁰ Hence, invalidating the old constitution, if taken seriously, would nullify the government's authority in general as well as in particular the act of passing the constitution.

Another doubtful point is the definition of the Hungarian nation. The Hungarian nation includes Hungarians living abroad.²⁰¹ It excludes people from other nationalities living in Hungary.²⁰² Thus, defining Hungarians as an ethnic group rather than a national or citizen group. This can be seen as threat to the autonomy of other states and cause intra-state tensions.²⁰³ Moreover, it excludes residents of Hungary who are not considered part of the nation.

The constitutional court's competences, organization and functions are not laid down in detail in the constitution.²⁰⁴ However, it has already become evident that the scope of acts and subjects that can be reviewed by the court are shrinking.²⁰⁵ Some Articles explicitly limit the power of constitutional review on certain matters, such as budget and tax issues.²⁰⁶ The accessibility of the court was reduced from *action popularis* whereby anyone could challenge the constitutionality of laws to constitutional complaint where one can only challenge laws which effect one personally.²⁰⁷ Therefore, the court will be more likely to receive and hear individual rights complaints than cases challenging the constitutional order.²⁰⁸ It became quite difficult to launch a case questioning the newly established constitutional system solely on the bases of the impact it has on one individual. The government has changed the nomination process for the election of constitutional court judges so that support by another party is no longer be needed.²⁰⁹ The number of judges on the constitutional court was increased to 15 and thus the government was able to appoint seven of their candidates,²¹⁰ increasing their influence in the court.

Additionally, the retirement age for judges was reduced which opened around 300 vacancies and forced many of the most experienced judges into retirement.²¹¹ The government began filling these

¹⁹⁹ The Fundamental Law of Hungary (n 196) Preamble.

²⁰⁰ Venice Commission. 'Opinion on the new Constitution of Hungary' (n 191) 8.

²⁰¹ The Fundamental Law of Hungary (n 196) Art D.

²⁰² Ibid Art XXIX.

²⁰³ Venice Commission. 'Opinion on the new Constitution of Hungary' (n 191) 9f.

²⁰⁴ Ibid 19.

²⁰⁵ Ibid 19ff.

²⁰⁶ Ibid 25ff.

²⁰⁷ Miklós Bánkúti, Gábor Halmai, and Kim Lane Scheppele (n 188) 142.

²⁰⁸ Ibid.

²⁰⁹ Miklós Bánkúti, Gábor Halmai, and Kim Lane Scheppele (n 188) 139.

²¹⁰ Ibid 140.

²¹¹ Venice Commission. 'Opinion on the new Constitution of Hungary' (n 191) 22.

newly opened vacancies with government loyal judges. A new National Judicial Office was installed which is responsible for the selection and promotion of judges.²¹²

The ombudsman system which monitors human rights was changed; the amount of offices was reduced, their power weakened and it became less independent.²¹³ Furthermore, the protection of some human rights can be doubted when evaluating the constitution. For example it is unclear whether the life of a woman is as important as the life of the unborn child.²¹⁴ The abolition of the death penalty and the prohibition of non-discrimination on the bases of sexual orientation are not laid down,²¹⁵ thus there is no constitutional protection. It is stated that minority rights shall be respected but there is no statement about the protection of minority rights.²¹⁶ Also hundreds of churches lost their legal status,²¹⁷ restraining the freedom of religion.

Furthermore, the media law package raised wide concerns by setting up a Media Council that can use licensing power arbitrarily and can introduce fines.²¹⁸ Further the media package enables regulation of public as well as private media and deprives journalists of their right to keep source information confidential.²¹⁹ Thus the Media Council can exert huge influence on journalists and publishers and the freedom of speech and press is inhibited.

Some laws of the new Hungarian government were nullified or revised by the constitutional court.²²⁰ Other actions were revised as a reaction to European Union pressure.²²¹ In response however, the government adopted the fourth amendment to Hungary's fundamental law overriding constitutional concerns and 'overruling' the constitutional court.²²² The government simply reenacted laws which were viewed as unconstitutional. The reinstatement of laws which were annulled by the constitutional court impairs the courts capability of effectively legislative review.²²³ Moreover, the amendments include a variety of restrictive provisions: the independence of the judiciary is limited, the jurisdiction of the constitutional court is narrowed and the court is prevented from reviewing substantive conflicts regarding constitutional amendments, it allows for only recognizing religious groups cooperating with the government and universities are brought

²¹² Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele (n 188) 143.

²¹³ Ibid 144.

²¹⁴ Venice Commission. 'Opinion on the new Constitution of Hungary' (n 191) 14ff.

²¹⁵ Ibid 15ff.

²¹⁶ Ibid 18.

²¹⁷ Nóra Novoszádek. 'Some factual notes on the Fourth Amendment to Hungary's Fundamental Law' Heinrich-Böll-Stiftung (2 April 2013).

²¹⁸ Miklos Haraszti. 'Hungary's Media Law Package.' A note by Miklos Haraszti, former OSCE Representative on Freedom of the Media, Statewatch (16 January 2011) 1ff.

²¹⁹ Ibid.

²²⁰ Kim Lane Scheppele. 'Constitutional Revenge' in the Conscience of a Liberal by Paul Krugman, *The New York Times* (March 2013).

²²¹ Ibid.

²²² Kim Lane Scheppele. 'Hungary and the End of Politics, How Victor Orbán launched a constitutional coup and created a one-party state.' (n 185).

²²³ Venice Commission, 'Opinion on the Fourth Amendment to the Fundamental Law of Hungary' (June 2013) CDL-AD(2013)012, Opinion 720/2013, 95th Plenary Session, 20.

under greater government control.²²⁴ More restrictions to human rights were introduced including a restriction on the freedom of speech and homelessness was prohibited.²²⁵ The substance of many amendments is highly controversial, they harm human rights protection and disregard European values.

Not only has legislation and the constitution been changed, but also the executive use of power has been deployed to assert power. The Fidesz government amended labor laws in 2010 which decreased job protection; following which thousands of state employees lost their jobs, a disproportionately high number of them were opposed to the party.²²⁶ The government is also influential in the private sector and made clear that it will only contract parties who employ government supporters.²²⁷ This went on beyond the individual level, one could be fired for having a family member voicing opposition to the government.²²⁸ Government loyalists, on the other hand, profit from the newly available positions and are able to promote their careers.²²⁹

Hungary has turned into a semi-authoritarian regime based on an illiberal constitutional order.²³⁰ In the first four years in power Fidesz changed 800 laws,²³¹ unwound checks and balances by decreasing the independence of the judiciary and largely increasing and centralizing executive power.²³² Orbán even openly acknowledging the intent of establishing an illiberal democracy.²³³ Hence, he is openly voicing disagreement with Union values.

In 2014 Fidesz won their second term by gaining 45% of the votes.²³⁴ Due to changes of the election law during the first term, this translated into a two-third mandate in Parliament.²³⁵ The new system marginalizes small parties and aids the bigger ones, allowing gerrymandering and double and triple standards in the treatment of citizens, making voting easier for some than for

²²⁴ Bojan Bugarcic. 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge.' The Hungarian Challenge.' (2014) LEQS Paper, 12f.

²²⁵ See: Fourth Amendment to Hungary's Fundamental Law, (February 2013) Office of the Parliament T/9929, Art. 5, 8.

²²⁶ Kim Lane Scheppele. 'Hungary and the End of Politics, How Victor Orbán launched a constitutional coup and created a one-party state.' (n 185).

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Bojan Bugarcic. 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge.' (n 224) 8.

²³¹ Kim Lane Scheppele. 'Scheppele on democracy, constitutionalism, and rule of law in Hungary' *The Budapest Beacon* by Benjamin Novak (November 2014).

²³² Bojan Bugarcic, 'Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism' (n 8) 83f.

²³³ Viktor Orbán. Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp (26 July 2014) The Prime Ministers speeches. Website of the Hungarian Government.

²³⁴ Kim Lane Scheppele. 'Hungary and the End of Politics, How Victor Orbán launched a constitutional coup and created a one-party state.' (n 185).

²³⁵ Ibid.

others.²³⁶ Also advertisement for the Fidesz party and their accomplishments were wide-spread, whereas advertisement for other parties was close to impossible.²³⁷

In previous years legislative power was the most influential means, but now economic control, the government's influence on the market has become the main government tool.²³⁸ Orbán is using a two-tire strategy by rewarding loyalist, autocratic policies and scapegoating enemies (Socialist Party, refugees, migrants and now the Central European University).²³⁹ Strong corruption networks using politics, public power and resources to reward oligarchs are met with a lack of scrutiny, demonstrating the selective and biased working of police and prosecution offices.²⁴⁰ It is expected that Orbán will nationalize at least 50% of the banking sector as well as major utilities and continue to strengthen his cooperation with Eurasias' less democratic regimes.²⁴¹

Recently, the Hungarian government enacted a new law on higher education as well as introducing a new draft legislation on NGOs both of which have been largely criticized. Thousands of people demonstrated against the law on higher education, fearing that this law will lead to the closure of the Central European University.²⁴² Through the law, the Central European University would no longer be able to issue US-accredited degrees, it further provides the possibility to deny non EU-teachers working permits and bring the university under government control.²⁴³ After evaluating the law on higher education the Commission concluded that the law is incompatible with internal market freedom, the freedom to provide services and the freedom of establishment but also with the right of academic freedom and right to education.²⁴⁴ As a consequence the Hungarian government was given one month to respond to their legal concerns.²⁴⁵ The presidency of the European People's Party (EEP), to which Fidesz belongs at European level, states that Fidesz ensured to act in accordance with the Commission's request and thus will take all necessary steps to comply.²⁴⁶ Further the presidency stressed that the EEP will not accept constraints of basic freedom or that the rule of law be disregarded.²⁴⁷ Moreover, Members of the European Parliament (MEP) of the EEP accused Hungary of ignoring European values while taking European money.²⁴⁸

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Daniel Hegedüs. 'Nations in Transit 2017, Hungary Country Profile' *Freedom House* 2.

²³⁹ Zselyke Csaky. 'Hungary's Tipping Point' *Freedom House* (18 April 2017)

²⁴⁰ Daniel Hegedüs (n 238) 2.

²⁴¹ Kim Lane Scheppele. 'Hungary and the End of Politics, How Victor Orbán launched a constitutional coup and created a one-party state.' (n 185).

²⁴² Jennifer Rankin. 'Hungary investigated by EU over law threatening top university' *theguardian* (Brussel 12 April 2017)

²⁴³ Ibid.

²⁴⁴ European Commission – Daily News. 'Hungary: Commission takes legal action on Higher Education Law and sets record straight on 'Stop Brussels' consultation' (26 April 2017)

²⁴⁵ Ibid.

²⁴⁶ European Peoples Party - Press Release. 'Prime Minister Orbán to comply with EU laws and EPP values following meeting with EPP Presidency.' (29 April 2017)

²⁴⁷ Ibid.

²⁴⁸ Gábor Halmai. 'Much Ado About Nothing? Legal and Political Schooling for the Hungarian Government' *Verfassungsblog* (29 April 2017)

Although more representatives of the EEP have started to voice growing concerns about Fidesz, the EEP's protection of Fidesz remains one of the main restraints to Union action against the rule of law developments in Hungary.²⁴⁹

The NGO law targets some organizations while leaving out others. It establishes disadvantages for foreign investment in form of obliging the NGOs to disclose more data. Noncompliance can trigger heavy sanctions such as the dissolution of the association.²⁵⁰ In general the work of foreign funded NGOs is made much more difficult.

However, the Hungarian government communicates that “By adopting the new Constitution, Hungary is strengthening its commitment towards the rule of law and the values of democracy, is retaining the traditions of Hungarian Parliamentarianism within the framework of the republican form of state, (...)”²⁵¹. Moreover, Timmermans²⁵² states “there is “not a systemic threat to the rule of law” in Hungary, as there was in Poland.”²⁵³ Thus, some consider the measures of the Hungarian government to have no severe or adverse effect on the rule of law.

B. Poland

A crucial point in the rule of law debate in Poland is the constitutional tribunal; its functioning, set-up and its independence. In 2015 a constitutional crisis erupted around the appointment of judges to the constitutional tribunal of Poland, the year in which the term of five judges ended and a new Parliament was elected.²⁵⁴ In June 2015 an act on the constitutional court was passed which provided in Article 137 for all five judges to be elected by the current government.²⁵⁵ Thus, all five judges no matter during which governmental period their term ended would be elected by the government whose turn ended in 2015. The old Sejm (Parliament) elected five judges to the constitutional tribunal in October 2015 in the same month a new Parliament was elected.²⁵⁶ The new Sejm adopted a resolution which declared the former election of the judges to be void and five new judges were elected to the tribunal.²⁵⁷ During the whole process the legal acts and actions by both governments were referred to the constitution tribunal a couple of times to check on their constitutionality. The constitutional tribunal released a judgment in December 2015 declaring Article 137 of the constitutional tribunal act partially unconstitutional.²⁵⁸ Three judgeships were considered constitutional and the election of two judges, whose term started after the election of

²⁴⁹ Ibid.

²⁵⁰ Benjamin Novak. ‘Council of Europe calls on Hungary to suspend debate on NGO law, rescind Lex CEU’ *The Budapest Bacon* (28 April 2017)

²⁵¹ Website of the Hungarian Government, ‘The Fundamental Law’ (n 190)

²⁵² First Vice-President of the European Commission and the European Commissioner for the Portfolio of Better Regulation, Inter-Institutional Relations, Rule of Law and Charter of Fundamental Rights

²⁵³ Peter Teffer. ‘EU gives Hungary more time for ‘dialogue’ *Euobserver* (12 April.2017)

²⁵⁴ Małgorzata Szuleka, Marcin Wolny, Marcin Szwed ‘The Constitutional Crisis in Poland 2015-2016’ (September 2016) Helsinki Foundation for Human Rights, 6.

²⁵⁵ Act of 25 June on the Constitutional Court of Poland, 3 July 2015, Item no. 1064, CDL-REF(2016)009.

²⁵⁶ Małgorzata Szuleka, Marcin Wolny, Marcin Szwed. (n 254) 8f.

²⁵⁷ Ibid 10.

²⁵⁸ Judgment the Constitutional Tribunal Act (3 December 2015) Ref. No. K 34/15, 185/11/A/2015

the new Parliament, were deemed unconstitutional.²⁵⁹ So, according to the tribunal the old government was entitled to name three judges and the new government would have the mandate to elect the other two.

At the end of December there was another amendment to the act on the constitutional tribunal released in which certain provisions, namely Article 16 and 17 were removed which guarantee the independence of judges, its set-up, the composition of the Tribunal and re-election were made impossible.²⁶⁰ Hence, many basic features of the court were impinged upon through the amendment and new procedures were introduced. The constitutional tribunal ruled the amendment of December 2015 to be unconstitutional and further, that the act as amended, should cease to have effect.²⁶¹

The government did not publish the two judgements of the constitutional tribunal (of the 9 March and 11 August 2016) which they view as legally ineffective.²⁶² This action seriously inhibited the power of the judiciary. The constitutional tribunal can no longer effectively check government actions, if the government is free to ignore their judgment.

The constant amendments to the act on the constitutional tribunal as well as the substance of the amendments both threaten the independence and working of the tribunal, which has the power of constitutional review and should thus, in theory, check government actions. Therefore, effective constitutional review of government action is disabled. It is also disputed which judges should judge on the constitutionality of laws, for example should judges be allowed to judge on the legality of laws which might have made their judgeship possible?

In June 2016 a national Media Council was established.²⁶³ “The Council is a body that has the power to appoint and dismiss members of governing bodies of public radio and television broadcasting organizations and the Polish Press Agency, (...)”²⁶⁴ Thus, the Council can influence who is in charge of the publication in state-run media enterprises. The Council is supposed to manage and supervise national radio and television.²⁶⁵ Through this new law the government gained a great deal of power to control the public television and radio.

The Law and Justice Party (PiS) which currently holds the majority in the Polish Parliament has also introduced multiple bills to control state institutions more closely.²⁶⁶ The commissioner for

²⁵⁹ Ibid.

²⁶⁰ Venice Commission ‘Opinion on amendments to the Act of June 2015 on the Constitutional Tribunal of Poland’ (March 2016) Opinion no. 833/2015, CDL-AD(2016)001, 106th Plenary Session, 6.

²⁶¹ Judgment The Act of 22 December 2015 amending the Constitutional Tribunal Act (9 March 2016) Ref. No. K 47/15

²⁶² Venice Commission. ‘Poland- Opinion on the Act on the Constitutional Tribunal’ (October 2016) Opinion 860/2016, CDL-AD(2016)026, 108th Plenary Session, 24.

²⁶³ Act of 22 June 2016 on the National Media Council, Official Journal “Dz.U.” of 29 June 2016, no. 929, Article 20.

²⁶⁴ Ibid Article 2.

²⁶⁵ Krajowa Rada Radiofonii i Telewizji, The National Broadcasting Council's Office. ‘Act on the National Media Council enters into force’ (07 Juli 2016)

²⁶⁶ Jan Cienski ‘New media law gives Polish government fuller control’ (30 December 2015) Politico

human rights requested that the constitutional tribunal reviews some provisions of the Act of the 30 December 2015 amending the civil service act on their constitutionality.²⁶⁷ The concerns mainly evolve around the staffing of higher positions in the civil services, more precisely the fact that they should be appointed, since this would increase their dependence on the political authority and decreases employment security.²⁶⁸ Further, the access to vacancies information is not made public.²⁶⁹ The positions are not distributed on equal terms anymore and the independence and impartiality of people in office is reduced. Additionally, people currently employed are being dismissed,²⁷⁰ to make positions available which can then be distributed through the new procedure.

The Act of 15 January 2016 amended the Police Act and expands surveillance power of the police especially in the Articles 19 and 20. The Act enlarges police competences to include a broader range of crimes. It allows secret surveillance for three months with a possible extension.²⁷¹ In urgent cases secret surveillance is possible without court authorization.²⁷² The mandate for the collection of metadata barely imposes any limitation on their collection. The police just need to inform the court after their action via a report.²⁷³ This Act thus expands the powers of the executive and weakens the rights of the court to check on their action. It limits the human rights to privacy and the procedural safeguards guaranteed in and before criminal proceedings.

These are just some of the most controversial actions taken by the current government in Poland. The constitutional tribunal is sidelined by being incapable of resolving matters on its own composition and mandate, thus having difficulties to review other controversial acts and laws passed by the current Parliament. The power of the judiciary to check the legislative and executive power is substantially limited, which also weakens the separation of powers. Further, developments endangering a rule of law will be discussed in the section on Poland below²⁷⁴ in connection to the Union reaction towards these measures and laws.

C. Conclusion

Considering the limitations of this paper, the issues regarding the rule of law in Hungary and Poland cannot be examined in their entirety, this is just a brief summary of the most significant events, relevant to provide a basic understanding of the situation in Hungary and Poland. This basic amount of information shall suffice for the purpose of this paper and allow for an evaluation of the European Union's reaction towards these current events. In Hungary as well as in Poland the competences of the judiciary have been seriously curtailed, primarily paralyzing the

²⁶⁷ Office of the Commissioner for Human Rights 'The Commissioner referred the amendments in the civil service act to the Constitutional Tribunal' (01 February 2016) <<https://www.rpo.gov.pl/en/content/commissioner-referred-amendments-civil-service-act-constitutional-tribunal>> accessed 18.02.2017.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Act of 15 January 2016 amending the Police Act and certain other acts, Journal of Laws of the Republic of Poland (4 February 2016) Item 147, CDL-REF(2016)036, Art 19 (a, 4).

²⁷² Ibid Art 19(8).

²⁷³ Ibid Art 20 (ca, 2).

²⁷⁴ See. Chapter V. A. 4.

constitutional courts but also weakening the ordinary judiciary. Power has been centralized mainly to strengthen the government and consequentially undermining the separation of powers. Moreover, the substance of the laws enacted is worrisome from a human rights stand point.

Since Hungary's government had the advantage of having a legislative supermajority, they could simply keep amending the constitution.²⁷⁵ On the other hand, PiS has disregarded law to enable its own actions, since it has not been able to push through constitutional changes so easily.²⁷⁶ Taking into consideration the rule of law criteria: 1. legality, 2. legal certainty, 3. prevention of the abuse of powers, 4. equality before the law and non-discrimination and 5. access to justice; the later three are heavily impaired in both countries. In Poland legality and legal certainty are additionally substantially weakened. Therefore Hungary is better able to defend itself with the formal criteria of the rule of law.

V. The Rule of Law Issues in the European Union

A. How the Union Addressed Member States Endangering the Rule of Law

1. Austria

In 2000 the possible new coalition government in Austria was planning to include the right wing FPÖ, which provoked a discussion about the responsibilities and possibilities of the Union to protect European values. The presidency of the Council issued a declaration on behalf of the 14 member states announcing diplomatic sanctions, if the FPÖ should gain power as part of the new government in Austria.²⁷⁷ When the FPÖ was sworn in, the 14 states adopted bilateral but coordinated sanctions against Austria.²⁷⁸ These sanctions were adopted as a reaction to the government formation and thus based on previous statements of the FPÖ and therefore came into force before the government could breach EU values.²⁷⁹ The actions were consequently perceived to lack a proper legal basis.²⁸⁰ There had been no prior involvement of the Commission or the Parliament, the main supranational European institutions, before this action.²⁸¹ Though the European Parliament adopted a resolution expressing their concern about the soon to be formed Austrian government coalition.²⁸² The sanctions were an unprecedented action in the European integration process and were quickly contested from in- and outside of the Union.²⁸³ The sanctions

²⁷⁵ Daniel R. Kelemen (n 9) 229.

²⁷⁶ Ibid.

²⁷⁷ Statement from the Portuguese Presidency of the EU, 31 January 2000, 1/31/00.

²⁷⁸ Cécile Leconte. 'The Fragility of the EU as a 'Community of Values': Lessons from the Haider Affair' (2005), 28(3), 621.

²⁷⁹ Dimitry Kochenov & Laurent Pech. 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.' (n 130) 1067

²⁸⁰ Bojan Bugarcic, 'Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism' (n 8) 91.

²⁸¹ Cécile Leconte (n 278) 639.

²⁸² European Parliament, European Parliament resolution on the result of the legislative elections in Austria and the proposal to form a coalition government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party), 3 Feb. 2000.

²⁸³ Cécile Leconte (n 278) 620f.

were eventually lifted after seven months.²⁸⁴ In this case, as European values were perceived to be at stake, the member states acted as a cooperation of individuals, intergovernmental rather than as a Union, not involving supernatural bodies in the decision making. This caused debate as to whether the measures were adopted in such a manner due to lack of Union competences or unwillingness to act as a Union or whether simply through lack of forethought.

2. Romania

In 2012 the Romanian Ponta government aspired to impeach and suspend the Romanian president.²⁸⁵ In order to do so new procedures were enacted and powers, for example, of the constitutional court were limited.²⁸⁶ Doing so heavily impaired the independence of institutions, in particular that of the judiciary. The European Commission addressed the situation through the Cooperation and Verification Mechanism (CVM). The CVM's scheduled publication coincided with the crisis.²⁸⁷ The Commission's July 2012 CVM report focused on recent government actions hampering the independence of the judiciary and the rule of law. Its most essential recommendations were that Romania should respect the rule of law and the independence of the judiciary, should reform and establish accountability of the judicial system, as well as promoting consistency and transparency of the judicial process and effectiveness of judicial action.²⁸⁸ Heavy social pressure, both explicit and implicit, contributed to broad complaisance with the EU demands by the Romanian government.²⁸⁹ Through the discussion of the Schengen membership²⁹⁰ and the CVM the EU had a high degree of leverage on Romania.

3. Hungary

The Commission launched a series of infringement cases against Hungary before the ECJ.²⁹¹ This led to Hungary's mostly technical compliance with marginal issues, while the government continued to centralise power, which was viewed by some as playing a legal cat and mouse game with Brussels.²⁹² For example when Hungary significantly lowered the retirement age for judges, the Commission launched a case on grounds of age discrimination which they subsequently won.²⁹³ The judges were then compensated and sometimes even reinstated in new positions,²⁹⁴ which is a normal remedy for a discrimination case. However, the problem of massive

²⁸⁴ Paul Magnette. 'European Democracy between Two Ages' in Catherine Bernard (eds) *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press, 2007) 19.

²⁸⁵ Ingi Iusmen 'EU Leverage and Democratic Backsliding in Central and Eastern Europe: the Case of Romania' (2015), 53(3) *JCMS*, 595.

²⁸⁶ *Ibid.*

²⁸⁷ Ulrich Sedelmeier. 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014), 52(1) *JCMS*, 117

²⁸⁸ European Commission. 'On Progress in Romania under the Cooperation and Verification Mechanism' (18 July 2012) (Communication) COM(2012) 410 final, 20ff.

²⁸⁹ Ulrich Sedelmeier. (n 287) 117.

²⁹⁰ *Ibid* 118.

²⁹¹ European Commission – Press release. 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary.' (17 January 2012) (IP/12/24).

²⁹² Daniel R. Kelemen. (n 9) 224.

²⁹³ Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?' (n 144) 148.

²⁹⁴ Daniel R. Kelemen. (n 9) 224.

replacements of the old judges by party loyalists²⁹⁵ impairing the judicial independence was not addressed. These judicial actions ultimately failed to address the broader issues threatening the rule of law.²⁹⁶

In 2013 the European Parliament adopted the Tavares report through which a European Institution for the first time harshly criticised the new Hungarian constitutional order as well as the state of fundamental rights in Hungary.²⁹⁷ It even suggested an independent mechanism to monitor fundamental rights in Hungary.²⁹⁸

In 2015 the European Parliament adopted two resolutions addressing the situation in Hungary. The first resolution in June condemned Prime Minister Orbán's repeated statements about the possible re-establishment of the death penalty, clearly stating that both such an action and the promotion of the idea, violate fundamental European values.²⁹⁹ In addition, the collection of personal data via online questionnaires asking for political opinions was also condemned as a breach of rules and termination of the practise was requested.³⁰⁰ A lack of action by the Council, the member states, and most significantly, the Commission was called into question, urging the Commission to take the first step of the EU Framework to Strengthen the Rule of Law.³⁰¹ Ultimately, the resolution criticised the actions of the Hungarian government mostly from a human rights standpoint but also stressed the relevance of a stronger reaction from the European Union.

In the second resolution in December 2015, the Parliament articulated more clearly the danger to democracy, the rule of law and fundamental rights. The resolution emphasized that legislation and administrative actions need to be conform to such basic European values as democracy, the rule of law and fundamental rights.³⁰² Serious concerns about the legislative measures taken in the last months are specifically mentioned.³⁰³ The resolution also expressed concern about the Union's capability to ensure that member states respect the Copenhagen criteria once they had acceded the Union and stated that the infringement proceedings failed to have a real and broad effect.³⁰⁴ The Commission was urged again to start a monitoring process within the new Framework to Strengthen the Rule of Law.³⁰⁵ The Commission was pressured to use all legislative tools to their

²⁹⁵ Ibid.

²⁹⁶ Bojan Bugaric, 'Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism' (n 8) 20.

²⁹⁷ Bojan Bugaric, 'Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism' (n 8) 4.

²⁹⁸ Ibid.

²⁹⁹ European Parliament resolution of 10 June 2015 on the situation in Hungary (10 June 2015) (2015/2700(RSP))

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² European Parliament resolution of 16 December 2015 on the situation in Hungary (16 December 2015) (2015/2935(RSP))

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

full extent.³⁰⁶ With this resolution, the Parliament emphasizes the severity of the situation, pressuring both the Commission and the Union as a whole to act.

Even after the rule of law Framework was established, EU leaders hesitated to use it to address the situation in Hungary.³⁰⁷ In particular, many politicians within the European Peoples Party (EEP) have tolerated Orbán's actions and democratic violations.³⁰⁸ Thus, being part of such a strong European Party seems to be of benefit to Orbán.

4. Poland

In April 2016 the European Parliament adopted a resolution on the situation in Poland, in which they voiced their serious concerns about democracy, the rule of law and the respect for fundamental rights.³⁰⁹ It stressed that administrative and legislative actions must respect basic European Values.³¹⁰ Concern was expressed especially about the paralysis of the constitutional court.³¹¹ The resolution insisted on the publication of the judgment of March 9, 2016 and the implementation of the judgments of December 3rd and 9th, 2015.³¹² Further, it urged the government to put the recommendations of the Venice Commission into effect.³¹³

In June 2016 the Commission adopted a rule of law opinion on the situation in Poland, the first step of the EU Framework to strengthen the rule of law. Thereby three concrete concerns regarding the Constitutional Tribunal were named: the appointment of judges to the constitutional tribunal, the law amending the law on the Constitutional Tribunal and the effectiveness of constitutional review of new legislation.³¹⁴ Moreover the implementation of the judgments of the constitutional tribunal was demanded.³¹⁵

In July 2016 the Commission initiated the second step of the Framework to Strengthen the Rule of Law and issued a rule of law recommendation on the situation in Poland, observing a systemic threat to the rule of law.³¹⁶ Again the implementation of the judgments of the tribunal of the 3rd and 9th of December 2015, which address the nomination of the judges to the tribunal, was called for.³¹⁷ The judgments affirm that the nomination of three judges by the previous legislature was lawful and authorizes them to take up their function.³¹⁸ The Commission also endorsed the

³⁰⁶ Ibid.

³⁰⁷ Daniel R. Kelemen (n 9) 224.

³⁰⁸ Ibid 225.

³⁰⁹ European Parliament resolution of 13 April 2016 on the situation in Poland (13 April 2016) (2015/3031(RSP))

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Ibid.

³¹⁴ European Commission – Press release. ‘Commission adopts Rule of Law Opinion on the situation in Poland’, (1 June 2016) (IP/16/2015)

³¹⁵ Ibid.

³¹⁶ European Commission – Press release. ‘Rule of Law: Commission issues recommendation to Poland’ (27 July 2016) (IP/16/2643).

³¹⁷ Ibid.

³¹⁸ Ibid.

publication and implementation of the judgment of the 9th of March 2016,³¹⁹ and stated that these processes should not be dependent on executive or legislative powers.³²⁰ A reform of the law of the constitutional tribunal should respect the judgments of the tribunal.³²¹ Poland was advised to take into account the opinion of the Venice Commission and to ensure the effectiveness of the constitutional tribunal including the review of the law adopted on July 22, 2016.³²² The Commission lastly reminded that in the case of lack of satisfactory reactions to the recommendations, Article 7 procedures could be started.³²³

The Polish government did not pursue the implementation of the recommendations, nor initiate any change, nor asked for further dialogue.³²⁴ Instead the government started to question the authority and legality of the Framework.³²⁵ The Polish government issued a statement reminding the Union to respect sovereignty and national identity and describing the Commission's recommendation as interference with internal affairs as well as being based on incorrect and incomplete knowledge, in conclusion the recommendation was found to be groundless.³²⁶

In December 2016 the Commission issued complementary recommendations to Poland which as well as repeating the previous recommendations, included some demands addressing new worrisome developments, such as the appointment of a new president of the constitutional tribunal.³²⁷ Thus, instead of moving on to the procedures of Article 7 the Commission gave Poland another chance to comply.

By 2017 the Law and Justice Party had attained the majority in the Constitutional tribunal, through passing the laws it was explicitly asked not to pass by the Commission in the recommendations.³²⁸ The curbed power of the constitutional tribunal will make it possible for Poland's government to adopt unconstitutional laws without fearing legal consequences.³²⁹

In response to the Commission recommendation of December 2016, the Polish government communicated that the enacted laws and measures taken by the government had created a proper Constitutional Tribunal which is operating normally.³³⁰ It referred thereby in particular to the

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

³²² Ibid.

³²³ Ibid.

³²⁴ Laurent Pech. 'Systemic Threat to the Rule of Law in Poland: What should the Commission do next?' *Verfassungsblog* (31 Oktober 2016)

³²⁵ Ibid.

³²⁶ Ministry of Foreign Affairs Republic of Poland. 'MFA statement on the Polish government's response to Commission Recommendation of 27.07.2016' (27 October 2016)

³²⁷ European Commission – Press release. 'Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland' (21 December 2016) (IP/16/4476).

³²⁸ Laurent Pech & Kim Lane Scheppele. 'Poland and the European Commission, Part I: A Dialogue of the Deaf?' *Verfassungsblog* (3 January 2017)

³²⁹ Ibid.

³³⁰ Ministry of Foreign Affairs Republic of Poland. 'MFA statement on Poland's response to European Commission's complementary Recommendation of 21 December 2016' (20 February 2017).

appointment of the president of the constitutional tribunal and the new legislation as leading to the establishment of a proper constitutional tribunal.³³¹ Thus, the Polish government cites exactly those laws as measures establishing a proper constitutional tribunal which allowed the government to fill the tribunal with a majority of judges loyal to the government.

While the outcome of launching the Framework remains doubtful, the very fact that it was used is a contrast to the Hungarian case.³³² To some, the Framework has already proven to be ineffective since recommendations in the case of Poland have been issued twice and the Polish government refuses to comply.³³³

5. Conclusion and Analysis of the European Union's Actions

In the cases of Romania, Hungary and Poland, the Union seems to mostly rely on soft law and dialogue mechanisms, which seem to have an inadequate impact on the large scale systemic rule of law issues that have emerged in Hungary and Poland.

When considering the political dimension of the issue many factors come into play. In general member states seem to be lenient to one another which makes it difficult to acquire a strong political consensus on suing or punishing another state. This is demonstrated by the rare use of Article 259 TFEU.³³⁴ The absence of external support by other member states might also limit the ambition of the Commission to take the initiative.³³⁵ Additionally, the negative experience during Haider's affair led to a greater unwillingness to introduce Article 7 TEU procedures.³³⁶ Moreover the Commission stated: "The European Union is first and foremost a Union of values and of the rule of law."³³⁷ "The Commission is convinced that in this Union of values it will not be necessary to apply penalties pursuant to Article 7 of the Union Treaty"³³⁸ All this shows reluctance to react to the issues around the Union's fundamental values.

The Commission's unwillingness to utilize the rule of law Framework in the case of Hungary can scarcely be justified merely on legal grounds.³³⁹ Fidesz enjoys a certain protection by belonging to the powerful central right EEP,³⁴⁰ whereas the Law and Justice Party in Poland belongs to a more marginal group in the European Parliament.³⁴¹ Often strong federal parties shield local

³³¹ Ibid.

³³² Daniel R. Kelemen (n 9) 229.

³³³ Gábor Halmai (n 248)

³³⁴ Bojan Bugarcic, 'Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism' (n 8) 84.

³³⁵ Dimitry Kochenov & Laurent Pech. 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.' (n 130) 1066.

³³⁶ Bojan Bugarcic, 'Protecting democracy inside the EU- On Article 7 TEU and the Hungarian Turn to Authoritarianism' (n 8) 84.

³³⁷ European Commission. 'On Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based' (n 147) 12.

³³⁸ Ibid 12.

³³⁹ Dimitry Kochenov & Laurent Pech. 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.' (n 130) 1070.

³⁴⁰ Daniel R. Kelemen (n 9) 230.

³⁴¹ Dimitry Kochenov & Laurent Pech. 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.' (n 130) 1072.

autocrats who contribute to the party's gain of seats at the federal level.³⁴² The Union's stronger reaction towards Poland might be related to the political standing of the respective parties within the European Union.

The actions of the Union regarding Hungary and Poland should be considered, in light of the fact that the Union has had to deal simultaneously with both countries' rule of law issues. As a result both countries benefit, gaining political power by backing one another, while the Union loses power when threatening, for example, the implementation of Article 7 procedures. Article 7(2, 3) TEU can hardly be used in the current situation since unanimity in the Council is required³⁴³ and Hungary has already announced that it would veto sanctions against Poland.³⁴⁴ Thus, as soon as two member states depart from the basic European values, it becomes significantly more difficult for the Union to act under the current legal setting.³⁴⁵

However, the Union also has some leverage, for example; the Orbán regime heavily relies on financial transfers from the Union.³⁴⁶ The Union was also successful in temporarily reinstating the rule of law in Romania, mainly using the CVM, a rather soft law mechanism without significant sanctions. Ultimately, the lack of legal actions towards Hungary and Poland might be largely influenced by the Union's political and economic situation and not just inadequate legal mechanisms.

B. Alternative Future Actions to Address Issues around the Rule of Law

In this section some of the main ideas on how to better approach issues concerning the rule of law within the European Union will be discussed.

1. New Interpretation of Existing Procedures

a) Systematic Infringement Action

Scheppele advocates to rethink the possibilities of the ordinary infringement procedures of Articles 258 and 260 TFEU which are introduced above.³⁴⁷ These procedures are mostly used to address the violations of particular laws. A systematic infringement action would however identify a pattern of member state's practices which are serious, systemic and persistent breaches.³⁴⁸ A systemic remedy towards a systemic violation of EU principles would be directed towards the nature of the issue.³⁴⁹ Thus, it would have a wider scope than a usual infringement procedure and therefore be able to address the principle violation and not only a specific issue. Such a case would require systemic compliance and the judgment could be enforced through sanctions.³⁵⁰

³⁴² Ibid 231.

³⁴³ See: Treaty on the European Union (n 6) Art 7 (2).

³⁴⁴ Daniel R. Kelemen (n 9) 230.

³⁴⁵ Ibid.

³⁴⁶ Daniel R. Kelemen (n 9) 230.

³⁴⁷ See: Chapter III. C.

³⁴⁸ Kim Lane Scheppele. 'Enforcing the Basic Principles of EU Law through Systematic Infringement Actions.' (n 10) 107 f.

³⁴⁹ Ibid 112.

³⁵⁰ Ibid 108.

Article 260 TFEU foresees a monetary penalty in case of non-compliance with the ECJ judgment under Article 285.³⁵¹ Schepple is proposing withholding funds rather than imposing fines to provide a stronger initiative to act,³⁵² since the European institutions can then enact the sanction directly, rather than waiting for the member state to comply. However, for such fines to be deployed in a positive way, in that the member state receives the funds after compliance, a change of the law on financial sanctions would be necessary.³⁵³

A systematic infringement action would acknowledge the legal nature of the problem by employing a legal remedy rather than only considering political reactions.³⁵⁴ This suggestion seems to have a valid legal basis, legal effectiveness and political acceptability.³⁵⁵ Nonetheless, it is argued that such a substantial change to a procedure without treaty change may be problematic or even unlawful.³⁵⁶

b) Creative interpretation of Article 51 CFR, Reverse Solange

The Charter of Fundamental Rights (CFR) Article 51(1) very clearly states that the scope of the CFR is limited and applies to member states only when they are enacting Union law: “The provisions of this Charter are addressed (...) to the Member States only when they are implementing Union law.”³⁵⁷ In the current ECJ case law, the interpretation is not strictly literal and it has developed into “if it is capable of indirectly affecting EU law”.³⁵⁸ Thus, Jakab argues that this interpretation read together with Article 2 and 7 TEU would result in expanding the scope of the Charter to cover all human rights violations.³⁵⁹ Such an interpretation would lead to the EU charter of fundamental rights becoming a federal standard and fundamental rights would then be directly applicable in the member states.³⁶⁰ This would however contradict the defined intent of limiting the scope of the Charter in Article 51CFR.

A similar approach is suggested through the reverse Solange idea. It is not based on EU primary law but on a case before the German Constitutional Court which became known for the establishment of the Solange doctrine. This approach suggests that, in general, it is presupposed

³⁵¹ Ibid 130.

³⁵² Ibid.

³⁵³ Carlos Closa, Dmitry Kochenov & Joseph H. Weiler. ‘Reinforcing rule of law oversight in the European Union.’ (2014) EUI Working Paper RSCAS 2014/25, Robert Schuman Centre for Advanced Studies, 19f.

³⁵⁴ Kim Lane Schepple. ‘Enforcing the Basic Principles of EU Law through Systematic Infringement Actions.’ (n 10) 125.

³⁵⁵ Carlos Closa, Dmitry Kochenov & Joseph H. Weiler (n 353) 16.

³⁵⁶ Dmitry Kochenov & Laurent Pech. ‘Monitorig and Enforcement of the Rule of Law in the EU: Rhetoric and Reality.’ (n 169) 528.

³⁵⁷ Charter of Fundamental Rights of the European Union, 26 October 2012, Official Journal of the European Communities 2012/C C 326/02 (18 December 2000) Art 51(1).

³⁵⁸ Referring to Fransson, See: Andras Jakab. ‘The EU charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States’ in Carlos Closa and Dmitry Kochenov (eds) Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016) 196.

³⁵⁹ Ibid.

³⁶⁰ Dmitry Kochenov & Laurent Pech. ‘Monitorig and Enforcement of the Rule of Law in the EU: Rhetoric and Reality.’ (n 169) 526.

that member states comply with fundamental rights obligations arising from EU primary law.³⁶¹ Thus, if there is a systemic violation an EU citizen can rely on EU law to readdress the issues before a court.³⁶²

Both ideas suggest incorporating a stronger human rights jurisdiction at Union level and requiring member states in their national legal system to respect European human rights of the CFR. Whereas in the broad interpretation of Article 51 there would be a constant inclusion of human rights, with the reverse Solange idea, only systemic violations would fall under Union level human rights jurisdiction. It is moreover questionable as to whether relying entirely on human rights is an adequate mechanism to sufficiently protect the rule of law.

2. Treaty Changes

a) Copenhagen Commission

One of the most prominent ideas for the protection of the rule of law in the European Union is the establishment of a so called Copenhagen Commission as suggested by Müller. The term refers to the Copenhagen criteria which member states need to fulfill before acceding the Union.³⁶³ The Copenhagen Commission is supposed to be an ‘EU Democracy and Rule of Law watchdog.’³⁶⁴ Müller emphasizes the need for an agent capable of a credible legal and political judgment to deal with systemic challenges,³⁶⁵ those to the system as such (democracy and the rule of law) rather than individual violations. The Commission should work alongside the existing tools under Article 7 TEU and 258-260 TFEU which should remain in place.³⁶⁶

The Commission should be composed of a panel of independent legal and political experts; and states-men and states-women.³⁶⁷ The Commission shall not judge the compliance to specific laws but the overall framework, and be granted the mandate to offer a legal and political judgment including condemnations accompanied by sanctions.³⁶⁸ The Copenhagen Commission should thus be able to initiate investigations and their determinations should be made binding.³⁶⁹ Hence, the commission would investigate, make a judgement and determine further steps. This could include the European Commission deducting funds as a form of sanction.³⁷⁰ The European Commission could thus become the sanctioning body following the Copenhagen Commission’s decision.

³⁶¹ Armin Von Bogdandy et al. ‘Reverse Solange-Protecting the Essence of Fundamental Rights against EU Member States.’ (2012), 49, Common Market L. Rev. 518.

³⁶² Ibid.

³⁶³ Jan Werner Müller. ‘Protecting the Rule of Law (and Democracy) in the EU, The Idea of a Copenhagen Commission.’ (n 11) 209.

³⁶⁴ Ibid.

³⁶⁵ Jan-Werner Müller. ‘Should the EU protect democracy and the rule of law inside member states?’ (n 144) 149.

³⁶⁶ Ibid 151.

³⁶⁷ Ibid 150.

³⁶⁸ Jan Werner Müller. ‘Protecting the Rule of Law (and Democracy) in the EU, The Idea of a Copenhagen Commission.’ (n 11) 213

³⁶⁹ Ibid.

³⁷⁰ Ibid 217.

Furthermore, a member state should be able to take the Copenhagen Commission before the ECJ.³⁷¹

Müller argues in order to address the Unions' democratic and justice deficit, a comprehensive reform of the Union as a whole is necessary.³⁷² The establishment of a Copenhagen Commission would most likely require a treaty amendment. A treaty amendment or revision is a slow and tiresome process.³⁷³ An amendment would arguably significantly enhance the legitimacy and potential success of such a mechanism.³⁷⁴

b) Ejecting a Member State

To have the possibility to expel a member state in extreme cases in which there is a total eradication of democracy³⁷⁵ and the rule of law is occasionally emphasized as relevant. The capacity for such a sanction may be added as an extension to the sanctioning competences under Article 7 TEU.³⁷⁶ If the Union is allowed to eject member states, that might deter³⁷⁷ some from acting against Union values. It might also increase the effectiveness of other measures.³⁷⁸ However it is not to likely that member states would agree³⁷⁹ to introduce such a treaty amendment.

3. Soft law Procedures, Promotion of Values

a) Advanced CVM

Vachudova proposes to introduce an advanced CVM mechanism which should be applied to all member states and to add a sanctioning mechanism which makes it possible to withhold EU funds.³⁸⁰ In the case of Bulgaria and Romania, the CVM was implemented to ensure that the standards of EU membership such as an effective judicial system are achieved.³⁸¹ It introduces certain benchmarks and the mechanism should support progress to reach these objectives.³⁸² Basically Vachudova is suggesting the establishment of a constant dialogue mechanism, to be monitored by the Commission evaluating the rule of law in all member states.

b) Socratic Contestation

Kochenov suggests that the Union and the member states should engage in Socratic contestation.³⁸³ Socratic contestation refers to engaging authorities to critically assess, whether their claims are

³⁷¹ Ibid.

³⁷² Ibid 210.

³⁷³ Carlos Closa, Dimitry Kochenov & Joseph H. Weiler (n 353) 7.

³⁷⁴ Ibid 8.

³⁷⁵ Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?' (n 144) 150.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ Carlos Closa, Dimitry Kochenov & Joseph H. Weiler (n 353) 20.

³⁷⁹ Ibid.

³⁸⁰ Milada A. Vachudova. 'Why Improve EU Oversight of the Rule of law? The Two- Headed Problem of Defending Liberal Democracy and Fighting Corruption' in Carlos Closa and Dimitry Kochenov (eds) Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016) 289.

³⁸¹ See: European Commission Website. 'Cooperation and Verification Mechanism for Bulgaria and Romania'

³⁸² See: Ibid.

³⁸³ Dimitry Kochenov. 'The Missing EU rule of law?' (n 57) 301.

based on sound reasoning.³⁸⁴ And would encourage self-critical self-evaluation. Kochenov's idea of self-evaluation appears favorable in theory because change would be driven from within. The idea could be introduced as part of a value promotion mechanism.

c) Value Promotion

To prevent such situations of serious rule of law shortcomings from reoccurring, it is essential to strive to reach enculturation of the rule of law.³⁸⁵ The aim is to promote a culture of respect for the rule of law, in which it can flourish and encourage growing reciprocity and eventually lead to a growing acceptance of the rule of law idea.³⁸⁶ Peer review demands conversation, a scoreboard can contribute to the process but there is a need for other sources of information.³⁸⁷ Dialogue is the keystone to encourage self-awareness and a supportive and respectful environment for EU values.

VI. Problems when the EU Enforces the Rule of Law

The European Union's attempts to enforce the rule of law can be viewed as problematic for several reasons. There are structural problems resulting from the Union design, for example, the division of power between the member states and the EU, as well as criticisms towards the methods the EU uses.

The Union suffers under a functionality problem; it lacks enforcement mechanisms to protect Article 2 values but it moreover suffers under a rule of law design problem at the Union level itself.³⁸⁸ The former has been elaborated in the previous chapters, but a new depth of understanding can be achieved when the enforcement mechanisms are considered in relation to the design problem. The Union should order its points of contention regarding the rule of law and democracy³⁸⁹ in order to address rule of law issues in the member states with more authenticity which might also lead to wider acceptance. Moreover, when addressing problems at a member state level it is vital to consider in how far the Union has impacted on the issue.³⁹⁰

When evaluating the rule of law design at Union level the duality and division of Union law into *jurisdictio* – *gubernaculum* is unclear.³⁹¹ Kochenov criticizes that the *jurisdictio* at EU level is underdeveloped, it is lacking quality, quantity and a clear distinction to *gubernaculum*.³⁹² A rule of law regime begins when the law is above the sovereign and checks his/her power. This can be

³⁸⁴ Mattias Kumm. 'Institutionalising Socratic contestation: The rationalist human rights paradigm, legitimate authority and the point of judicial review.' (2007), 1(2), Eur. J. Legal Stud, 155.

³⁸⁵ Ernst Hirsch Ballin (n 14) 145f.

³⁸⁶ Ibid 144ff.

³⁸⁷ Ibid 140.

³⁸⁸ Dimitry Kochenov. 'The Missing EU rule of law?' (n 57) 292.

³⁸⁹ Joseph H.H. Weiler. 'Epilogue: Living in a Glass House, Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds) Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press 2016) 295.

³⁹⁰ Dimitry Kochenov. 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' 2015 Yearbook of European Law, 4.

³⁹¹ Dimitry Kochenov. 'The Missing EU rule of law?' (n 57) 292ff.

³⁹² Ibid 311.

done through control mechanisms like a hierarchy/duality of law or/and through a separation of powers. Hence, the weak distinction between higher or constitutional law and changeable legislation in Union law can be seen as a deficit of the rule of law in the Union.

The way the Union was established presupposes compliance with the Union's value basis by the member states. The notion of mutual recognition, equality and a level playing field do not go hand in hand with enforcement.³⁹³ Accepting sanctions is acknowledging that these notions do not hold true in their entirety.³⁹⁴ Intervening and serious sanctioning of member states are not consistent with the ideas of consensus finding and constitutional tolerance.³⁹⁵ Enforcing values might appear to impair the basis of cooperation, overstepping competences and impairing national sovereignty. Thus, there is a need to find a balance between these values.

Member states can claim that they act on the bases of democracy,³⁹⁶ the national government holds the democratic mandate of its country, and thus they might feel able to call any intervention into question. Some claim that the EU tries to protect liberalism whereas national governments uphold a proper democracy and contrast these two.³⁹⁷ Hence, the enforcement of European values can be seen as hampering the democratic mandate of nation states. Others believe that democracy and the rule of law are co-original as formulated by Habermas,³⁹⁸ and the one depends and enhances the other. Thus, certain values and rights need to be established before there can be a free democratic choice.³⁹⁹

Additionally, the Unions method of introducing its values to the acceding states can be called into question. The Union is founded on a certain set of values and through the accession procedure and the Copenhagen criteria new member states are required to adopt the already existing value base. National politicians aiming to join the Union for the social security and economic benefits might view the democratic conditions for membership more as a means and employ those measures more halfheartedly.⁴⁰⁰ Such governments might not really consider the value basis of the Union as a relevant good in itself and thus not really support its proper establishment. To be able to identify with and properly support EU values every member state should have equal weight to influence the shared value basis. This is difficult however because it would open the Union to fluctuation, inconsistency and may even lead to a constantly changing foundation. It is nonetheless vital that new member states adopt values willingly and stand behind these values rather than adopting them without proper understanding or honest intent to enforce them. It is crucial that member states feel committed to the values and institutions they create and consider them something worth protecting.

³⁹³ Dimitry Kochenov. 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (n 390) 18.

³⁹⁴ Ibid.

³⁹⁵ Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?' (n 144) 160.

³⁹⁶ Ibid 142.

³⁹⁷ Ibid.

³⁹⁸ Ibid 143.

³⁹⁹ See Chapter II. B. 4.

⁴⁰⁰ Johnathan Slapin. 'How European Union Membership Can Undermine the Rule of Law in Emerging Democracies.' (2015), 38 (3) West European Politics, 629.

The transposition and adoption of a large corpus of law as EU law during the accession process can be difficult and might impair the functioning of the preexisting system.⁴⁰¹ EU laws and regulations prescribing implementation of the finest details are sometimes viewed as hampering the independent organic development of responsible and accountable domestic politics.⁴⁰² The general effectiveness of transposed law is called into question and enforcement of these rules is often seen as lacking.⁴⁰³ Hence, the idea that acceding states just adopt the Unions legal corpus might impair the functioning of the pre-existing system as well as it introduces the danger of establishing a large law corpus which not completely understood or enforced.

Others warn that normative power in the EU is only tenable, if it is perceived as legitimate by the ones who experience and practice it.⁴⁰⁴ Especially when promoting the rule of law it is important to consider cultural diversity, the contested and divers understanding of the rule of law and the view of the society in question and not only focus on formal conceptions, legal institutions and state centric ideas.⁴⁰⁵ A main criticism from the socio-legal school of thinking towards EU law is that a lack of agreement and support in the society for Union laws leads to less abidance and enforcement.⁴⁰⁶ If existing EU laws lack proper implementation and acceptance, this might weakens the authority of law as a whole.

The common method of the rule of law promotion often focuses on enumerations of elements such as the list of Lon Fuller or that of the European Commission which was introduced in their new Framework.⁴⁰⁷ Scheppele points out that monitoring the rule of law via a checklist is a limited approach which misses the interactive effect of components.⁴⁰⁸ Hence, Articles and the mandate they provide may be perfectly normal and legal by themselves but in combination with others they can become hazardous and impair a rule of law regime. This can be seen in actions which where possible on the bases of the Germany Weimar Constitution and in the actions taken by the Hungarian Fidesz Party, a constitutional perfect storm while abiding by the criteria of legality and passing the rule of law indicators.⁴⁰⁹ In the end a checklist might miss the harm to a rule of law regime which is caused through interaction of laws rather than the laws in themselves. When reasonable constitutional components thus enable the creation of a defective rule of law regime, a state emerges which Scheppele terms 'Frankenstate'.⁴¹⁰

⁴⁰¹ Ibid 630.

⁴⁰² Ibid 629.

⁴⁰³ Ibid 629f.

⁴⁰⁴ Ian Manners. 'The Normative Ethics of the European Union' (2008), 84(1) International Affairs, 46.

⁴⁰⁵ Marc Hertogh (n 80) 57.

⁴⁰⁶ Johnathan Slapin. (n 400) 631.

⁴⁰⁷ Marc Hertogh (n 80) 45.

⁴⁰⁸ Kim Lane Scheppele. 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work.' (2013), 26(4) Governance, 559.

⁴⁰⁹ Ibid 559ff.

⁴¹⁰ Ibid 560.

Krygier refers to these lists of legal characteristics and legal institutions which are deemed to be essential as an anatomical approach to the rule of law.⁴¹¹ The enumeration of elements cannot be equalized to the establishment of a concept. Thus, stressing the importance of the substantive element. Ultimately, if the rule of law is installed in form of an institutional perception without proper understanding, this may even lead to a contradictory effect.

Thus, the Unions' rule of law regime and the methods employed to improve rule of law regimes in the member states can be enhanced. A more in depth analysis of the Union deficit can be found elsewhere and will not be elaborated further here due to the limits of this paper. But the outline of the problems provided here serve to demonstrate the interconnectedness of the deficits at Union level and the member states rule of law deficits in order to consider both in the attempt to find a good approach.

VII. Discussion

A. What can be done to address the current problems in Poland and Hungary?

Framework to Strengthen the Rule of Law	EEP Expulsion	Article 7(1) Procedure	Article 7(2) Procedure	Systematic Infringement Action	Stronger Human Rights Protection	Bilateral Coordinate Sanctions
Hungary	Hungary	Both	Both	Both	Both	Both
Immediate	Immediate	Immediate	Alternative Interpretation (to Apply to Current Situation)	Alternative Interpretation (Can be Taken by ECJ)	Alternative Interpretation (Can be taken by ECJ)	Immediate
Dialogue Mechanism	Political Pressure	Dialogue Mechanism	Sanctioning Mechanism	Law Suit/Possible Sanctioning	Law Suit	Sanctioning Mechanism

Graph 2

This section contains a specific explanation of the Unions' options to address the situation in Poland and Hungary, followed by a more general analysis of the Union's possibilities to address current problems in both member states. Since the rule of law violations in Poland and Hungary as well as the Commission's reaction towards them were divergent, the individual situations will be elaborated first, to consider the best approach for each state.

In Poland the Commission has already launched the rule of law Framework,⁴¹² initiating the first two steps: issuing a rule of law opinion and a rule of law recommendation.⁴¹³ The Commission even published a second set of recommendations⁴¹⁴ which is not foreseen in the mechanism. The

⁴¹¹ Martin Krygier. 'The rule of law: legality, teleology, sociology' (2008) 2007-65 UNSW Law Research Paper, 2.

⁴¹² See above Chapter V. A. 4. Poland.

⁴¹³ See: European Commission – Press release. 'Commission adopts Rule of Law Opinion on the situation in Poland' (n 314) & European Commission – Press release. 'Rule of Law: Commission issues recommendation to Poland' (n 316).

⁴¹⁴ See: European Commission – Press release. 'Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland' (n 327).

Polish government reacted to these measures by denying the existence of a systematic threat to the rule of law, moreover it requested the Commission respect for national sovereignty and sincere cooperation.⁴¹⁵ Further, it asserted that all complaints of the Commission had been addressed, while simultaneously packing the constitutional tribunal with government loyal judges.⁴¹⁶ This dialogue procedure has proved to have no intended impact up to now, the Polish government has not complied with any of the recommendations.⁴¹⁷ Thus, after attempting to address the situation in Poland through soft law communication, a further step is advisable.

In the case of Hungary, the Commission could first initiate the rule of law Framework as it did in the case of Poland. This appears necessary to fulfil the goal emphasized in the Framework of equality towards member states.⁴¹⁸ It is however debatable in how far these soft law monitoring mechanisms would still be an adequate measure to address such a progressively dismantled rule of law regime.⁴¹⁹ The probability that this determined and active government will reverse most laws they initiated over the last seven years, solely on the basis of social pressure and soft law dialogue, appears to be slim.

The Hungarian government is using market influences as a tool to pressure people to political consensus.⁴²⁰ People voicing opposition to the government are losing their jobs; this started in the state sector, spread to the public sector and is even going beyond the individual level.⁴²¹ On the other hand, corruption networks are used to reward government loyalists.⁴²² Thus, it is argued that enforcing sanctions or austerity measures on Hungary would cut the government's cohesive power and strengthen the political freedom of the individual.⁴²³ Therefore, it seems proper to withhold funds in order to ensure that the EU money attributed to Hungary is not used to strengthen a regime violating Union values. Withholding funds must not be understood as punitive measure but as steering device. The funds should be attributed to Hungary after it has complied with the Union demands.

Another possibility is that the EEP can increasingly pressure Fidesz to abide by European values. Recently more MEP's of the EEP have voiced their concerns about the Orban regime.⁴²⁴ Even the presidency of the EEP urged Fidesz to revoke their law on higher education and withdraw their

⁴¹⁵ Ministry of Foreign Affairs Republic of Poland 'MFA statement on Poland's response to European Commission's complementary Recommendation of 21 December 2016' (n 330).

⁴¹⁶ Laurent Pech & Kim Lane Scheppele. 'Poland and the European Commission, Part III: Requiem for the Rule of Law.' *Verfassungsblog* (3 March 2017).

⁴¹⁷ Gábor Halmai (n 248).

⁴¹⁸ "In order to ensure the equality of Member States, the Framework will apply in the same way to all Member States" See: European Commission. 'A new EU Framework to strengthen the Rule of Law' (n 120) 6.

⁴¹⁹ See: Chapter 4. A.

⁴²⁰ Kim Lane Scheppele. 'Hungary and the End of Politics, How Victor Orbán launched a constitutional coup and created a one-party state.' (n 185)

⁴²¹ Ibid.

⁴²² Daniel Hegedüs (n 238) 2.

⁴²³ Kim Lane Scheppele. 'Hungary and the End of Politics, How Victor Orbán launched a constitutional coup and created a one-party state.' (n 185)

⁴²⁴ Gábor Halmai (n 248).

draft legislation on NGO's.⁴²⁵ In the past the EEP had protected Fidesz.⁴²⁶ A clear statement of disapproval and/or the threat of expulsion might discourage Fidesz from continuously violating Union values and law. Even if Fidesz does not react to the EEP, the expulsion from the party would significantly weaken Fidesz's position within the Union, because some Union institutions might become more willing to take action against Fidesz when it is no longer an EEP member.⁴²⁷

The following discussion centers on the possibilities to address the situation in both Hungary and Poland the analysis is based primarily on the Unions competences to address value violations granted through the primary law of the European Treaties. The treaties establish that the rule of law is a founding value of the Union and as such is enshrined in Article 2 TEU⁴²⁸ and protected through Article 7 TEU.⁴²⁹ Article 7 TEU provides a dual procedure to protect Union values, with both a preventative and a sanctioning mechanism.⁴³⁰ Further, Article 285-260 TFEU lays down the ordinary infringement procedure⁴³¹ which can be deployed towards all possible violations.

From a legal perspective therefore, the application of Article 7 TEU, which is designated to address breaches of European values, appears to be the most obvious option. Article 285 TFEU is, in contrast, directed at all possible infringements.⁴³² In principle, a specific law should preempt the use of a general law.⁴³³ It can be argued that Article 7 TEU it is the *lex specialis*⁴³⁴ and that it should be used to address value violations.

However, Article 7 TEU has been stigmatized as the 'nuclear option'.⁴³⁵ The Article is branded as a measure of last resort, which should not be employed before all other possible means are exhausted and only in the most severe cases. It is thus politically challenging to explain the usage of such an extreme measure. The Union's institutions and the member states have in the past signalized a general unwillingness to enact such a measure.⁴³⁶

This stigma is misleading and causes both the Article 7 TEU as such as well as its duality to be overlooked. Particularly the preventative mechanism of Article 7 TEU is not nuclear in nature, as it only provides for the determination of 'a clear risk of a serious breach'.⁴³⁷ Before the Council establishes such a risk it shall hear the member state in question and may address concerns or

⁴²⁵ European Peoples Party - Press Release (n 246).

⁴²⁶ Daniel R. Kelemen (n 9) 230.

⁴²⁷ See: Chapter V. A. 5.

⁴²⁸ See: Treaty on European Union (n 6) Art 2.

⁴²⁹ See: Ibid Art 7.

⁴³⁰ See: Ibid.

⁴³¹ See: Treaty on the Functioning of the European Union (n 154) Art 258-260.

⁴³² See: Treaty on European Union (n 6) Art 7 and See: Treaty on the Functioning of the European Union (n 154) Art 258.

⁴³³ Nancie Prud'homme. 'Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship?' (2007), 40(02) Israel Law Review, 367.

⁴³⁴ Dimitry Kochenov & Laurent Pech. 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality.' (n 169) 520.

⁴³⁵ A term coined by Barosso a former president of the European Commission. See: European Commission. 'State of the Union 2012 Address' (n 151)

⁴³⁶ Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?' (n 144) 147.

⁴³⁷ Dimitry Kochenov & Laurent Pech. 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation.' (n 130) 1065 and See: Treaty on European Union (n 6) Art 7(1).

formulate recommendations,⁴³⁸ thus giving the member state the chance to voice their opinion or to take action. This preventative mechanism is a dialogue process; it does not provide sanctioning procedures.⁴³⁹ Article 7(1) voting burdens are high but not impossible to reach.⁴⁴⁰ Essentially, Article 7(1) TEU could legally be easily applied but the political connotation as a measure of last resort makes this difficult.

An effective way to employ Article 7(1) TEU could be the endorsement of the recommendations made by the Venice Commission which have not been implemented by Hungary or Poland. To refer to the work of an independent outside body which is well acquainted with rule of law issues through years of experience, can increase the authority of the recommendations. By integrating the recommendations of the Venice Commission within the preventative procedure of Article 7(1) TEU the EU could operationalize the recommendations as well as increase the pressure to comply. The advantage of such a step would be the combination of the experience, authority and independent judgment of the Venice Commission with the Union's competence to protect the founding values of the Union such as the rule of law.

Another possibility is to launch Article 7(2) directly, since sanctioning might be more effective than soft law monitoring in a severe state of rule of law dismantlement as it can be found in Hungary and Poland. This would certainly at least offer higher and alternative pressure. However, the voting requirements of Article 7(2) TEU are very high⁴⁴¹, especially the unanimity vote in the Council is challenging. Hungary has already announced its intention to veto such actions against Poland.⁴⁴² Hence, under the current political situation it is unlikely that there will be an anonymous vote in the Council for determining the existence of "serious and persistent breach". In general, if there is more than one member state that violates Union values, the countries can support each other and thus impede possible Union action, as it can be seen in this example of Poland and Hungary.

In order to be able to apply the sanctioning mechanism of Article 7(2) in the current political situation of two member states violating Union values and protecting one another, Scheppele introduces the idea of a "fellow traveler".⁴⁴³ According to this idea, Article 7 TEU should be launched against Poland and Hungary simultaneously and any member state which is subject to Article 7 procedures should not be eligible to vote.⁴⁴⁴ Hence, the Union should exempt Hungary's and Poland's ability to vote in the Council simultaneously so that one cannot protect the other. Such an exception is not mentioned in the Treaty and would be an added interpretation of Article 7(2). Therefore political will would be necessary to introduce such an altered interpretation.

The treaties also establish an ordinary infringement procedure (Article 258-260 TFEU).⁴⁴⁵ The Commission has already tried to address rule of law issues in Hungary via the ordinary

⁴³⁸ See: Treaty on European Union (n 6) Art 7(1).

⁴³⁹ See: Ibid.

⁴⁴⁰ A four fifth majority in the council and consent in the parliament. See: ibid Art 7(1).

⁴⁴¹ Unanimity in the Council & consent in the European Parliament. See: ibid Art 7(2).

⁴⁴² Daniel R. Kelemen (n 9) 230.

⁴⁴³ See: Scheppele, K. L. 'EU can still block Hungary's veto on Polish sanctions' *Politico* (1 November 2016)

⁴⁴⁴ Ibid.

⁴⁴⁵ See: Treaty on the Functioning of the European Union (n 152) Art 258-260.

infringement procedure.⁴⁴⁶ The Hungarian government reacted with artificial and marginal compliance to the concrete matter addressed in the law suit, while continuing their systematic violations of the rule of law regime.^{447 448} Thus, the ordinary infringement process has proved to be rather inefficient to address broad issues.⁴⁴⁹

Scheppele therefore proposed systematic infringement actions,⁴⁵⁰ which would also be based on Article 258-260 TFEU. A systematic infringement action would identify a pattern of state practices and bundle complaints to demonstrate the seriousness of the violation.⁴⁵¹ The pattern behind the joint individual infringements would enable the establishment of a persistent and systematic breach of EU laws and principles.⁴⁵² It would be directed towards the core of the issue, namely the systematic nature of the violations and demand systematic compliance,⁴⁵³ thereby addressing the overall issue and not individual violations. Moreover, in case of non-compliance with the judgment, the Commission could bring the case before the ECJ again and the court can then impose a penalty payment, as laid down in Article 260 TFEU.⁴⁵⁴

A law suit is a remedy which obligates member states to comply with the judgment.⁴⁵⁵ Union remedies are overall limited and present mechanisms like Article 7 TEU procedures which are restrained by political unwillingness. Through a systematic infringement action the determination of a violation would be taken by the ECJ and thus require less political decision making. Nonetheless, the systematic infringement action needs to be brought to the court by the Commission (Article 258 TFEU) or a member state (Article 259 TFEU). Some might question the court's authority to determine such a systematic infringement action, because it is a significant variation from the normal procedure.⁴⁵⁶ Thus, it might not be the most idealistic solution but a practical, fast and efficient one. The procedure can be applied directly and a law suit induces a great initiative to comply.

A systematic infringement action is an alternative interpretation of the ordinary infringement procedure, but the alteration is minor when compared to the ideas of Jakab and Bogdandy et al.. Their suggestions imply in contrast a nullification of the original Article whereas the systematic infringement only requires an alternative interpretation of an Article. Small alterations are more common to develop through legal interpretation whereas revision must be introduced via amendments.

⁴⁴⁶ European Parliament resolution of 16 December 2015 on the situation in Hungary (n 302)

⁴⁴⁷ See: Chapter V. A. 3.

⁴⁴⁸ Daniel R. Kelemen (n 9) 223f.

⁴⁴⁹ Ibid.

⁴⁵⁰ See: Chapter B.1.A.

⁴⁵¹ Kim Lane Scheppele. 'Enforcing the Basic Principles of EU Law through Systematic Infringement Actions.' (n 10) 107f.

⁴⁵² Ibid 131.

⁴⁵³ Ibid 107f.

⁴⁵⁴ Treaty on the Functioning of the European Union (n 154) Art 260.

⁴⁵⁵ See: *ibid* Art 260.

⁴⁵⁶ Dimitry Kochenov & Laurent Pech. 'Monitorig and Enforcement of the Rule of Law in the EU: Rhetoric and Reality.' (n 169) 528.

Both Jakab and Bogdandy et al. suggest making human right standards of the CRF directly applicable. Whereas Article 51 CRF limits the applicability of the Charter of Fundamental Rights to the implementation of Union law,⁴⁵⁷ Jakab proposes that the ECJ should interpret Article 51CFR differently and make human right standards of the charter apply directly to all human rights violations,⁴⁵⁸ contradicting the intent of the Article which is of a limited scope. The argumentation and method of Bogdandy et al. is different⁴⁵⁹ but the intent is the same: the incorporation of a stronger human rights jurisdiction at Union level, requiring member states to comply even when acting within their national legal system.

Both approaches suggest to address rule of law violations purely through human rights protection. Using human right measures to address rule of law issues can be the cause of limited effectiveness; they are interrelated but not synonymous concepts. To address the rule of law issues through a human rights court case for example, might have marginal or partial effect on the rule of law violations.⁴⁶⁰ A human rights court case is generally more concerned with the individual, whereas rule of law violations often occur at an institutional level. Hence, the human rights issue might be solved in the court case but the rule of law violation may persist.

After evaluating the possibilities established in primary Union law as well as the proposed interpretations of these laws, one should consider that member states can also act independently of the Union's framework. They can act as individual states using their sovereign power more or less independently from the Union and its institutions as they did when addressing Austria in 2000. During the Haider Affair the Union's member states agreed to launch bilateral coordinated diplomatic sanctions against Austria,⁴⁶¹ rather than applying a Union mechanism. The sanctioning action was organized and even initiated by the presidency of the Council and all Union member states launched the same sanctions.⁴⁶² When acting on the basis of state power, the member states forfeit the competence conferred on them as a Union.⁴⁶³ Such action might thus appear more oppressive because the addressed state did not consent to the common values being enforced on them.

To sum up, all options comprise drawbacks and no option seems to be compelling. The Framework to Strengthen the Rule of Law could still be used to address rule of law violations in Hungary. Nonetheless, it appears unlikely the Hungarian or the Polish government would react to soft law monitoring in such a progressive state of rule of law violations. The most plausible action of the Union to imminently address rule of law issues in Hungary and Poland are thus: systematic infringement action or bilateral coordinated sanctions. They would introduce greater pressure and add sanctioning possibilities.

⁴⁵⁷ Charter of Fundamental Rights of the European Union (n 357) Art 51 (1).

⁴⁵⁸ See: Andras Jakab (n 358) 196.

⁴⁵⁹ See: Chapter V. B. 2.b.

⁴⁶⁰ See: court case against Hungary. Chapter V. A. 3.

⁴⁶¹ Ulrich Sedelmeier (n 287) 108.

⁴⁶² See: Statement from the Portuguese Presidency of the EU (n 277)

⁴⁶³ See: Treaty on European Union (n 6) Art 7.

B. What are medium or long term solutions to protect the rule of law?

Advanced CVM	Copenhagen Commission	Ejecting a Member State	Value Promotion Mechanism	Modified 7(2)
Introduced by Commission ?	Treaty Change	Treaty Change	Introduced Either by Commission or Treaty Change	Treaty Change
Dialogue/ Sanctioning Mechanism	Dialogue/ Sanctioning Mechanism	Expelling, Deterring	Dialogue mechanism, Peer Review, Mutual Learning	Sanctioning Mechanism
Elaboration on Work Mechanisms Necessary	Elaboration on Work Mechanisms Necessary	Procedure Known	Elaboration on Work Mechanisms Necessary Many Possibilities	Procedure Known, Reduce Voting Burden, Possibly add Sanctions

Graph 3

Vachudova and Müller suggest the establishment of a constant monitoring and dialogue mechanism with a sanctioning possibility. Mechanisms that encourage value guidance and rule of law promotion and include a possibility to react to violations.

Vachudova proposes to implement a mechanism similar to the CVM for all member states and add the possible sanction of withholding EU funds.⁴⁶⁴ A dialogue mechanism would be established that periodically evaluates the rule of law in all member states.⁴⁶⁵

When establishing an advanced CVM mechanism one should start by evaluating positive and negative experiences from the CVM and other soft law mechanisms like Europe 2020. The CVM operated for the last seven years with limited impact on the rule of law in the two states addressed and a common conclusion has been, that it has failed.⁴⁶⁶ On the other hand, during the 2012 crisis, the Romanian Ponta government broadly complied with the EU demands published in the CVM report,⁴⁶⁷ thus it had an impact during a concrete state of crisis. All in all, available data on the working, success and impact of soft law mechanisms should be considered, before a detailed elaboration on the function of this new mechanism is published, in order to ensure consistency and equality.

An advanced CVM has some similarities to the Framework to Strengthen the Rule of Law, however the advanced CVM would be a constant process and it would include a sanctioning mechanism. A consistent mechanism would have the advantage that it would be hard for the Union to fail to acknowledge emerging rule of law issues in member states. Such a mechanism would increase awareness of rule of law issues and therefore strengthen a value based Union.

⁴⁶⁴ See: Milada A. Vachudova. (n 380) 289.

⁴⁶⁵ See: Chapter V. B. 3. a.

⁴⁶⁶Linka Toneva-Metodieva. 'Beyond the carrots and sticks paradigm: Rethinking the Cooperation and Verification Mechanism experience of Bulgaria and Romania.' (2014), 15 (4) Perspectives on European Politics and Society, 537.

⁴⁶⁷ Ulrich Sedelmeier (n 287) 117.

However, the CVM centralizes all power in the Commission⁴⁶⁸ and the advanced CVM would probably do the same. This can be a disadvantage since the Commission has not been so successful in ensuring that the Union values are adopted by member states in the pre-accession stage.⁴⁶⁹ An approval phase where the Parliament needs to consent could be introduced at least before determining sanctions. However, if more institutions need to agree this might decrease the chance of activity.

Müller proposes quite a similar mechanism. The main difference would be that a new body called the Copenhagen Commission would be in charge of the dialogue process.⁴⁷⁰ The Copenhagen Commission should be established as a constant monitoring and judgment body.⁴⁷¹ It should have the ability to give binding recommendations on sanctions of a member state to the Commission.⁴⁷² To establish a Commission entrusted with the protection of the rule of law, a treaty amendment would be necessary. A treaty change would require the consensus of all member states⁴⁷³ and is a lengthy procedure. It is moreover questionable whether all member states would agree to introduce such a mechanism.

The advantage of a new institution would be the creation of an agent of credible legal-political judgment.⁴⁷⁴ Then even the Commission which according to Müller would be the most plausible current Union body to fulfill this task is impartial to an extent.⁴⁷⁵ The establishment of such a new Commission can be seen as final manifestation of the Union's competence to protect its value bases, instead of continuing to outsource responsibility to the Council of Europe and the Venice Commission. Some members of the Venice Commission would have a hard time meeting the Copenhagen criteria, thus it would be easier to prevent double standards and discusses intervention⁴⁷⁶ in a Union related body where member states, at least in theory, share common values. The Venice Commission is a guidance institution whereas Müller envisions the Copenhagen Commission to be an institution which is in constant interaction with the member states, has a more holistic view, is proactive and has the ability to initiate intervention.⁴⁷⁷

Another possible measure is the introduction of a procedure which allows for the ejection of a member state from the Union. At the moment a member state can only voluntarily withdraw from the Union.⁴⁷⁸ Through a treaty change, the Union could introduce an ejection procedure, this can deter member states from radical violations of Union values, laws and principles. It can also

⁴⁶⁸ See: European Commission Website. 'Cooperation and Verification Mechanism for Bulgaria and Romania' <https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en>

⁴⁶⁹ Carlos Closa, Dmitry Kochenov & Joseph H. Weiler (n 353) 22.

⁴⁷⁰ See: Chapter V. B. 2.

⁴⁷¹ Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?' (n 144) 150.

⁴⁷² Ibid 151.

⁴⁷³ Armin von Bogdandy et al. 'Protecting EU Values - Reverse Solange and the Rule of Law Framework' (2016) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-04, 21.

⁴⁷⁴ Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?' (n 144) 150.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid 157.

⁴⁷⁷ Ibid.

⁴⁷⁸ See: Treaty on European Union (n 6) Art 50.

enforce the effectiveness of other sanctioning measures⁴⁷⁹ when it is possible to threaten member states with such a radical step. However, such a measure can be viewed as denial of the Unions' direct responsibility toward their citizens which is contradictory to the idea of EU citizenship in Article 9 TEU.⁴⁸⁰

Within the different suggested approaches the scholars often discuss different sanctioning possibilities and their effectiveness, especially the idea of withholding funds has gained attention.⁴⁸¹ Withholding funds could be connected to one of the already existing mechanisms of either Article 7 TEU or Article 260 TFEU or a newly suggested mechanism. The advantage of withholding funds is that it would be within the Unions' power to stop funds and the Union would not be obligated to wait for a member state to comply as it is in the case of fining a member state.⁴⁸² The funds would be withheld temporarily and distributed when the country complies. The idea behind it being that a member state disregards the values of the Union shall no longer profit from the membership. Moreover, it should not be able to use Union money to manifest power.

On the long run, a preventative approach aspiring to ensure long term support and compliance with the Unions values is advisable. Such a mechanism is not meant to address rule of law violations in member states but prevent them from occurring, aiming to prevent further rule of law violations by striving for rule of law enculturation.⁴⁸³

If a value promotion mechanism is established it appears most likely that it would fall in the responsibility of the Commission. The Commission also introduced the Framework to Strengthen the Rule of Law and administers the process.⁴⁸⁴ Moreover, the Commission is the guardian of the treaties⁴⁸⁵ and thus of the Union values laid down within. The value promotion mechanism can be adopted as part of the Framework to Strengthen the Rule of Law or as a new mechanism. A new mechanism has the advantage that the intent of the rule of law promotion can be introduced as the main focus of the mechanism. Value consultation should be a periodic process in order to ensure constant awareness of founding values and make communication and evaluations less susceptible to current political events.

Kochenov proposes that the Union and the member states engage in Socratic contestation.⁴⁸⁶ The idea of self-evaluation appears beneficial because change would be driven from within. Member states should actively partake in the process of value promotion so that they initiate the change and then it will be better supported, understood and accepted. A value promoting mechanism should

⁴⁷⁹ Carlos Closa, Dmitry Kochenov & Joseph H. Weiler (n 353) 20.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid 20 & Kim Lane Scheppele. 'Enforcing the Basic Principles of EU Law through Systematic Infringement Actions.'(n 10) 130 & Jan-Werner Müller. 'Should the EU protect democracy and the rule of law inside member states?'(n 144) 151.

⁴⁸² Kim Lane Scheppele. 'Enforcing the Basic Principles of EU Law through Systematic Infringement Actions.'(n 10) 130.

⁴⁸³ Ernst Hirsch Ballin (n 14) 145f.

⁴⁸⁴ European Commission. 'A new EU Framework to strengthen the Rule of Law' (n 120)

⁴⁸⁵ Dmitry Kochenov & Laurent Pech. 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction.'(n 149) 13.

⁴⁸⁶ Dmitry Kochenov. 'The Missing EU rule of law?' (n 57) 301.

respect the variety of institutional settings of the rule of law regimes in the member states. Hence, the intent should not be the equalization. Value promotion should leave room for individual development but at the same time it should be guided by clear-cut criteria. Criteria should ensure that the interpretation is not entirely left to the subjective understanding of individuals. Rule of law criteria provide a guideline and establish legal certainty. However, Scheppele⁴⁸⁷ and Krygier⁴⁸⁸ have pointed out the dangers of a too narrow focus on criteria and checklists such as missing troublesome situations arising from the interaction of laws and a possible failure to consider the situation as a whole. Guidelines and criteria should be considered in connection with additional sources such as opinions from the member states and recommendations or standards of other international bodies like the Venice Commission.

A separate sanctioning mechanism should be available to the Union to address serious rule of law violations. A modification of Article 7(2, 3) TEU, by reduction of current voting requirements of Article 7(2) TEU⁴⁸⁹ especially in the Council could increase its accessibility. Additionally, the possibility to withhold funding should be mentioned in such an amendment to Article 7(2, 3). An alternative sanctioning procedure is the introduction of systematic infringement action discussed above.⁴⁹⁰

Overall, the most promising approach appears to be the establishment of a preventive value promotion mechanism as well as a sanctioning mechanism for severe issues. There should be a detailed elaboration on the scope, working methods, responsible institutions and orientation criteria for each mechanism. It is usually easier to reinterpret and deploy old mechanisms than to invent new ones.⁴⁹¹ However, considering the current problems, inability and unwillingness to properly address rule of law issues, larger scale changes seem necessary.

The EU should be better prepared for situations where cooperation is not perfect. As evident from the discussion above, in order to find an adequate, long term solution a political decision needs to be made. The European Union has avoided this so far which is partially the cause for the current dilemma. The Union needs to decide between taking the idea of a political Union founded on common values seriously and acting in an appropriate way, finally establishing mechanisms and institutions to protect its founding values or whether to dissolve cooperation based on values and move back towards an economic Union. However, even in an economic Union it is difficult to cooperate and trust a country impairing their rule of law but responsibilities would be divided more clearly.

Strengthening the Union and establishing a closer political Union is especially difficult considering the current political situation. With the increase of emerging crisis, the chance of European disintegration is growing.⁴⁹² For example, migration remains a much contested topic,

⁴⁸⁷ See: Kim Lane Scheppele. 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work.' (n 408) 559.

⁴⁸⁸ See: Martin Krygier (n 411) 2.

⁴⁸⁹ See: Ibid. Art. 7 (2).

⁴⁹⁰ See: Chapter VII. A. and for detail on the procedure V. B. 1.

⁴⁹¹ Carlos Closa, Dmitry Kochenov & Joseph H. Weiler (n 353) 14.

⁴⁹² Wolfgang Muchau. 'A history of errors behind Europe's many crises' *Financial Times*. (29 March 2016)

especially after the large number of migrants entered the European Union in 2015.⁴⁹³ Member states are unable to agree on a common response.⁴⁹⁴ Then the Brexit provoked the worst political crisis the Union has been confronted with.⁴⁹⁵ Finally, member states are still recovering from the economic crisis and with each unresolved crisis euro skepticism grows.⁴⁹⁶ In such a period of instability and fragility it is very hard to find consensus to move towards an ever closer Union.

Many scholars as shown in the discussion above have difficulties finding an appropriate measure without significant drawbacks. Notwithstanding, an approach addressing rule of law issues should take into account the following aspects. The kind of measure which might be taken; preventative, soft law dialogue, or sanctions among others. The institution which shall be in charge or a combination of institutions and whether it should be an external or an internal one. There should be a clear rule of law mandate defining who is responsible for what. Finally possible ways of implementing the idea should be considered e.g. treaty change. Throughout this process one should keep in mind, if this mechanism is able to address current issues or if it is rather based on a long term nature or possibly both. All in all the complexity of the situation should not be underestimated, measures should be evaluated carefully and the intent, operationalization and function of the mechanism should be clearly outlined and evaluated beforehand.

VIII. Conclusion

The rule of law is an age-old concept which emerged in multiple societies, developed, changed and grew through societal adaptation and time. Many contemporary states claim that they are built on a rule of law regime or aim towards becoming one. The rule of law is a highly influential concept of our time and widely accepted and promoted. The idea of the rule of law was generally developed with the intent to limit and balance the power of the sovereign.

However, there are manifold adaptations contemporary societies and scholars hold when it comes to the elements the concept entails. Even when the conceptualization of the rule of law is the same, the institutional set-up is often divergent because there are multiple ways of incorporating the concept. Scholars mostly agree upon certain core components like formal legality, a separation of powers and a hierarchy of law. The idea that elements like democracy and human rights qualify as components of the rule of law is widely debated and often rejected. Ultimately, there are thin and thick conceptions of the rule of law, the thinner⁴⁹⁷ the wider the acceptance. However, a minimum of elements are required to ensure that the intent⁴⁹⁸ of the concept is met. Hence, when conflating the rule of law to a rule by law scholars will start disagreeing again. Currently, the conceptualization of the rule of law by Tamanaha is very influential and widely accepted many other scholars use his work as a basis. When assessing concrete elaboration of rule of law elements the rule of law checklist published by the Venice Commission is highly influential and can serve as point of orientation. Nonetheless, further analysis and evaluation of components and sub-

⁴⁹³ Matthias Matthijs. *Europe After Brexit, A Less Perfect Union*. (2017), 96(1) *Foreign Affairs*, 93.

⁴⁹⁴ *Ibid*.

⁴⁹⁵ *Ibid* 85f.

⁴⁹⁶ Wolfgang Muchau. (n 492)

⁴⁹⁷ Hence, the lesser elements the conception entails.

⁴⁹⁸ The limitation and balance of governmental or sovereign power.

components is required in order ensure good benchmarks, before these components are deployed in practice.

In western thinking and especially in the European Union rule of law, democracy and human rights protection are understood as at least interlinked concepts. Through time the Union has come closer to being an organizational structure as usually present at state level, where the rule of law is widely adopted. The Union has moved from an economic cooperation closer to a political Union. A crucial step in that process was the adoption of the Copenhagen criteria in 1993 requiring acceding states to establish politically stable institutions ensuring the rule of law, democracy and human rights.⁴⁹⁹ The rule of law is manifested as a founding value in Article 2 TEU and protected through Article 7 TEU which was amended through the Treaty of Nice, introducing the current dual procedure of the Article. Moreover, the Commission established a new Framework to Strengthen the Rule of Law in 2014. Finally, the Union has a mandate to protect its values like the rule of law. However, the Unions' value foundation lacks clear definitions which makes justiciability and enforcement difficult. Mechanisms to promote and enforce the Union's value basis are also limited.

The Hungarian and the Polish governments centralized power in their hands, substantially weakened the judiciary and seizing control over the highest court, paralyzing it and disabling constitutional review. Separation of powers was thereby impaired and seriously inhibited. The Hungarian government further diminished the hierarchy of laws. Whereas the Polish government does not comply with criteria of formal legalist. Both governments have substantially dismantled the rule of law. The main difference being that the Hungarian government holds a legislative supermajority allowing them to change the constitution. Therefore, it is more difficult to determine Hungary's rule of law violations through simple checklists and criteria. Both government took many additional measures to secure their power such as curtailing the freedom of the media. Especially the way the Hungarian government uses market forces to ensure compliance with their position is alarming. Rule of law issues, their causes and development in Poland and Hungary should be observed carefully in order to address them in a proper manner and learn from them to develop tools to ensure the rule of law in the future.

The Union took quite divergent approaches to address value violations in Austria, Romania, Hungary and Poland which can be explained in relation to the time at which the violation occurred and the position of the member state and ruling government within the Union. The adoption of sanctions as a reaction to the newly formed government coalition including the FPÖ in Austria 2000 appeared extreme. The sanctions were often criticized as being too early since they were adopted before the government could take any action. The Union addressed the actions of the Ponta government in Romania in their regular CVM report and the government largely complied. Hungary's government has been curtailing the rule of law since 2010, but the first harsh criticism of the Union was the publication of the Tavares report in 2013. This action showed that even though Fidesz belongs to the EEP, the Parliament is willing to condemn their actions. The Parliament published two more resolution in 2015 and the Commission launched a couple of law suits against Hungary to which the government reacted with marginal compliance. The rule of law Framework was adopted to address the situation in Poland and notably not adopted in the case of

⁴⁹⁹ Among other criteria like a stable market economy.

Hungary. The Commission responded more strongly towards the actions of the Polish government. Nonetheless, the Polish government did not react to the Commission's recommendation published as a second step of the Framework and also showed no reaction to the additionally published recommendations. There has been no Union reaction so far to this inactivity of the Polish government. These varied and unproportioned reactions show that the current Union system to address rule of law violations is inadequate and very susceptible to politics.

Possible Union reactions to rule of law violations can be divided in three categories: new interpretations of existing laws, treaty amendments and soft law procedures. This grouping emphasizes the preconditions of the implementation of the suggested idea. When considering possible approaches to address rule of law violations one should also keep the limitations of the Union design in mind as well as its impact on the measure and vice versa.

In the case of Poland, more soft law monitoring would seem to be ineffective and future measures should introduce new incentives. In Hungary soft law monitoring can still be tried, but here too it is an arguably inadequate method when considering the extent of the current situation of the rule of law in Hungary. Systematic infringement actions are the most promising possibility to address current issues in Hungary and Poland where the rule of law is already heavily impaired and other mechanisms have failed. The advantage of systematic infringement action is that it addresses the core of the issue, requests systematic compliance and can be employed immediately. Alternatively the member states could launch bilateral coordinated sanctions which can also be done immediately.

The Union already uses soft law mechanisms with mixed results. Therefore, a long term approach shall strive for the development of a concrete value promotion mechanism and a workable sanctioning mechanism. In the long run, the establishment of a value promotion mechanism addressing all member states should be initiated by the Commission, engaging member states in constant dialogue but still giving room for individual national development. Additionally, an accessible sanctioning option should be introduced possibly through modification of Article 7(2, 3) TEU.

Future assessments should contemplate the goal and implementation of a measure. Hence, should the measure address a current problems or should it address long term functionality issue. A measure addressing current problems should be immediately availability and it should be assessed weather the measure adds to steps already taken. A long term mechanism should focus on greater change and will probably require a treaty amendment which also increases the authority and leverage of the measure. It should moreover offer alteration to the mechanisms which are already available to the Union.

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