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The Guardian Of The Law.

The EU Rule Of Law And The Member States' Corruption Challenges.

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The Guardian Of The Law.

The EU Rule Of Law And The Member States' Corruption Challenges.

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Abstract

The use of Article 7 TEU against Poland and Hungary has shown that the EU is not toothless when Member States openly violate its values. Actually, to resort to this incisive action crowns a long process of equipping the EU with rule of law devices: the EU now owns an arsenal of tools to combat Member States defiance in both law-making and its enforcement, regardless of the law's content and provenance. The development and use of these tools is shaping the definition of the rule of law in the EU, characterizes the EU, primarily, as a rule of law actor. This article demonstrates that the EU rule of law is anchored to a "thin" conceptualization of the ideal.

Introduction.

Despite the fact that the EU sees itself as a space of freedom, security and justice,¹ founded, among others, on the value of rule of law,² EU citizens would have difficulty with sharing this optimistic opinion. Besides, while none expected that corruption could have been eradicated as a crime, one of the grand expectations was that the EU, as a supranational entity, would provide an additional guarantee that the very fabric of the law would not be tainted by corruption, and that Member States government unlawful actions

¹ Article 29 TEU.

² Article 2 TEU. Furthermore, Article 21(1) TEU establishes that the rule of law has inspired the creation, development and enlargement of the EU; the Preamble of the EU Charter of Fundamental Rights mentions the rule of law as a founding principle of the EU as well.

be emended.³ This could have been achieved once the EU became a complete and autonomous legal order. For a long time, the EU posed a more serious threat to such values than the Member States themselves. Despite great results having been achieved in making the EU itself more committed to democracy and human rights, the EU does not shine most in these fields: the democratic deficit is still high, and a clear affirmation of the EU as a human rights haven is still problematic.⁴

The core of the EU integration as an *ever closer union among its peoples*⁵ instead relies on a progressive unification of the Member States' legislations under the rule of law banner. This is the main undertaking of the EU in this phase of the integration, foreshadowing its more appealing and promising horizon: the EU as the guardian of the law, not just EU law, but the law independently from its content, provenance or effect.

Recently, the EU aspiration of being a complete and autonomous rule of law order has been dramatically challenged by three countries, Romania, Hungary and Poland, all belonging to the former Eastern bloc and now members of the Union. Their actions have disturbed the EU rule of law premises and horizon, triggering "rule of law crises."⁶ In the last few years, they have repeatedly violated the main elements that compose the EU rule of law. It may be true that almost every single action committed by Romania, Hungary and Poland has been prefigured, or echoed, by some other Member States, yet the cumulative effect of all these actions, particularly well-documented in Hungary and Poland, has had a great impact, and made these countries qualitatively different.⁷ Only in Romania, the situation is back to "normal" – despite frequent relapses –,⁸ and the EU could claim to have successfully resolved the country's rule of law crisis. The final outcomes of the Hungary and Poland crises are still to be seen. However, the list of Member States whose legal systems harm the EU rule of law is not static. It encompasses

³ A. Jakab - D. Kochenov, *Introductory Remarks*, in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 1.

⁴ G. Palombella, *Beyond Legality – Before Democracy. Rule of Law Caveats in the EU Two-Level System*, in C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press 2016, 36-58.

⁵ European Council, *Solemn Declaration of the European Union*, Stuttgart, 19 June 1983.

⁶ V Reding, "The EU and the rule of law – what next?" *SPEECH/13/677*, 4 September 2013.

⁷ W. Sadurski, *That Other Anniversary*, *European Constitutional Law Review*, 37(3), 2017, 417-427.

⁸ EU Parliament, *Motion to a Resolution To Wind Up The Debate On The Statements By The Council And The Commission Pursuant To Rule 123(2) Of The Rules Of Procedure On The Rule Of Law In Romania (2018/2844(RSP))*, 7 November 2018.

different countries at different moments: different rule of law crises take place. Problems with law-making and its enforcement also occur in countries with long-standing democracy traditions, such as Italy or France, and they potentially affect any Member States of the EU.⁹ While a rule of law crisis is relatively easy to detect and denounce, more difficult is to assess what is actually going wrong from the EU rule of law standpoint. Particularly, it is not clear yet to what a rule of law violation in the EU legal order amounts, with regard to the parameters of the values infringed, the activities involved and the threshold of violation that triggers the EU competence.

This article aims to answer the questions of why, how and to what extent the EU has taken a guardian of the law role by examining and systematizing the outcomes of the EU efforts to tackle rule of law violations during approximately twenty years. Firstly, the practice of the EU will be analyzed, and particularly the legal framework and the implementation of the rule of law tools the EU has employed and could employ, both of non-binding and binding nature. From this analysis will be clarified what is sanctioned and why it is sanctioned, adopting the perspective of corruption in public law, and thus, tentatively, drawing the boundaries of the EU notion of the rule of law.

In conclusion, this development will be examined as a EU achievement of a task of general oversight of how the Member State legislate and enforce the legislation. This will demonstrate that a EU conception of the rule of law – which is greater than EU law – has definitely emerged, and that the EU pictures itself primarily, even if not exclusively, as a rule of law actor.¹⁰

1. The EU Panoply Of Rule Of Law Tools.

There is no doubt that the rule of law has always been a foundational value for the European Union, despite it has not been explicated from the beginning. The need for a clear statement in this regard, as well as for a mechanism to ensure compliance with EU

⁹ F. Hoffmeister, *Enforcing the EU Charter of Fundamental Rights in Member States: How far are Rome, Budapest and Bucharest from Brussels?*, in A. Von Bogdandy - P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford, Hart Publishing, 2015, 195.

¹⁰ Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems*, *Common Market Law Review* 53, 2016, 597-606.

values such as the rule of law, has been a recent issue in the EU integration.¹¹ Until the Eastwards Enlargement, the EU Member States shared, or believed to share, a like-minded approach to the rule of law, together with human rights, democracy and constitutionalism, which could never be overcome. Any attempt to infringe upon them, in the worst case scenario, were expected to be swiftly rebutted by national institutions. Moreover, the European Court of Human Rights, to which all the Member States were party, had been unofficially entrusted to deal with the rule of law in Member States, being the EU mainly an economic enterprise at that time.¹²

The pending enlargement with countries once belonging to the Communist bloc, and the EU's evolution towards a fully political union as well, placed these values at the center of the EU's agenda.¹³ Previously, the main rationale for the cooperation agreements (*Europe Agreements*) had had much more to do with the promotion of a free market than the safeguard of the rule of law or other political values. This was changed with the so-called Copenhagen criteria of 1993, in which the European Council established that, in order to be successful in its pursuit of full membership, the applicant State should enjoy, inter alia, "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."¹⁴ Further in this process, the principles on which the Union was founded – liberty, democracy, respect for human rights and fundamental freedoms and the rule of law –, were listed in the Amsterdam Treaty of 1997 at the Preamble and Article 6 (now Article 2 TEU).¹⁵ More recently, the Lisbon Treaty of 2009 added equality and minorities' rights to these values.

¹¹ Even their late incorporation in the EU Treaties has been held to be due to symbolic and dissuasive reasons mostly. See D. Kochenov - L. Pech, Better, Late than Never? On the European Commission's Rule of Law Framework and its First Activation, *Journal of Common Market Studies*, 54/5, 2016, 1064.

¹² G. De Burca, Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union, *Fordham International Law Journal* 27, 2004, 683.

¹³ Madrid European Council, 15-16 December 1996, Presidency Conclusion, Part A, Introduction.

¹⁴ European Council, Presidency Conclusions, Copenhagen, 21-22 June 1993.

¹⁵ This strong connection between the Eastern Enlargement and the adoption of EU values in the Treaty is confirmed by the fact that the Treaty of Amsterdam codified the so-called Copenhagen criteria in the EU Treaties for the first time, by specifying in Articles 6 and 49 of the TEU that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law; and that respect for these principles is a condition of EU membership. See G. De Burca, Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union, *Fordham International Law Journal*, 27/2, 2003, 696.

All these values are expressly common to the Member States and to the EU, to the extent that they represent the constitutional identity of the EU itself.¹⁶ Moreover, the EU, and its institutional framework, is bound not only to ensure but also to promote these values, as expressed by Articles 3(1) TEU and Article 13(1) TEU. In accordance with Article 4(3) TEU, the Member States are equally bound to assist the EU in carrying out these tasks. To ensure that these values be respected, the Amsterdam Treaty of 1999 also provided a sanctioning mechanism at Article 7 TEU – now Article 7(2) TEU. This made it possible for the European Council to determine the existence of a serious and persistent breach of these values by a Member State. The Council could act by unanimity on a proposal by one third of the Member States or by the Commission, and after obtaining the consent of the European Parliament. According to Article 7(2) TEU – now Article 7(3) TEU –, once this decision has been taken, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the Treaties to the Member State in question.¹⁷

Interestingly, the arsenal for protecting these values has been developed starting from the most prominent and invasive tool, Article 7 TEU – nicknamed “the nuclear option.”¹⁸ Subsequently, some intermediate and soft-law tools have been elaborated. It would be wrong to interpret this pattern as a downgrading of the EU’s concern about these issues. At the beginning, individual initiatives of Member States’ governments (§ 1.1), national and EU courts (§ 1.2) and EU Parliament (§ 1.3) had the lead. Since then, the EU has expanded its panoply of rule of law tools by creating new ones, such as soft-law initiatives (§ 1.4), reshaping the accession criteria to the EU itself (§ 1.5), employing already established successful procedures, such as the infringement procedures (§ 1.6) and

¹⁶ W. Sadurski, *European Constitutional Identity?*, EUI Working Paper Law, n. 2006/33, 2.

¹⁷ The need for a declaration of values and a significant sanction for the States which do not respect them, and the connection between the two, emerged in the Reflection Group organized by the Council of Europe in 1995 to prepare the Inter-governmental Conference of 1996, which paved the way for the Amsterdam Treaty of 1997. See Reflection Group’s Report, Part 1, Section 1. On the importance of the rule of law on this account, see Reflection Group’s Report, Part 2, Section 19.

¹⁸ The affirmation of EU Commission President, Barroso, (State of the Union 2012 Address, 12 September 2012) that Article 7 TEU represented a nuclear option has been unhelpful, since it has undermined the dissuasive nature of Article 7; misleading, because there is nothing nuclear about stating the existence of a risk of serious breach to Article 2 TEU and adopting measures to address the situation; false, because the nuclear deterrence only gains meaning after being used. See D Kochenov, *Busting the myths nuclear: A commentary on Article 7 TEU*, EUI Working Paper Law, 2017/10; L Pech, *A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, 6 *European Constitutional Law Review*, 2010, 359; L. Pech - K.L. Scheppele, *Illiberalism within: Rule of Law Backsliding in the EU*, 19 *Cambridge Yearbook European Legal Studies* 3, 2017, 12.

expanding the existing sanctioning mechanism for these situations (§ 1.7). The outcome is a more detailed, intense and widespread strategy to deal with issues that are no longer considered an emergency but rather a daily affair of the EU. The analysis of these tools does not focus on a singular State crisis, even if some tools have been clearly invented or re-shaped for one particular country's situation –, but is rather centered around the development and refinement of the various typologies of the rule of law device.

This first section aims to show that the EU has learned from practice, forming an arsenal of rule of law tools, and progressively developing an own notion of the rule of law from its success and failures. The analysis follows a temporal and incremental structure, observing, typology after typology, that the EU has refined its actions over time.

1.1 Resorting To The Diplomatic Initiative: Rise And Fall Of Public International Law Sanctions In The *Haider* Affair.

The first rule of law crisis, in the EU and the first EU intervention in one Member State legal and political situation, has been the Austria crisis of 2000.¹⁹ The crisis started in 1999, when the far-right party FPO (Austrian Freedom Party) obtained a considerably high result in the Austrian general election. The FPO, together with the more moderate OVP (Austrian People's Party), started negotiations to form a Government on January 25th, 2000, which was finally sworn in on February 3rd and took power on February 5th, 2000. The FPO was notorious for their record of anti-Semitic and anti-immigrants declarations, and their leader, Jorg Haider, especially for sympathizing with the Nazism policies in security areas. Nonetheless, the new Austrian Government was a Coalition Government, where the Chancellor came from the OVP, and Haider was not even part of

¹⁹ J K. Lachmayers, Questioning the Basic Values - Austria and Jorg Haider, in the Enforcement of EU law and Values, eds. By A. Jakab and D. Kochenov, Oxford University Press, 2017, 436-455; Werner-Muller, The EU as a Militant Democracy, or: Are there limits to constitutional mutations within Eu Member States?, *Revista de Estudios Politicos*, 2014, 149; B. Bugaric, Protecting Democracy and the Rule of Law in the European Union: the Hungarian Challenge, *LESQ Paper* 79/2014, 2014, 5; W. Sadurski, Adding a Bite to a Bark? A story of Article 7, the EU Enlargement, and Jorg Haider, *2010 Columbia Journal of European law*, 385-426; H. Berit Freeman, Austria: The 1999 Parliamentary Elections and the European Union Member's sanctions, *Boston College International & Comparative law Review*, 25, 2002, 109-124; M. Merlingen - C. Mudde - U. Sedelmeier, The Right and the Righteous? European Norms, Domestic Politics, and the Sanction against Austria, *Journal of Common Market Studies*, 39, 2001, 59-77.

the Cabinet.²⁰ However, the uprising of a far-right political party in a country long dominated by a social-democratic and popular grand coalition, coinciding with the rise of other right wing parties everywhere in Europe, was of great alarm to the EU institutions. Therefore, under its Portuguese presidency, the Council issued a general statement on behalf of the other 14 EU Member States, – but not in the name of the EU as such – which provided suspension of contact with Austrian Government officials, the withdrawal of EU support for Austrian applications for positions in international organizations, and the ceasing of contact with the Austrian Ambassadors, except at technical level.²¹ These sanctions came into effect on February 4, 2000, once the Austrian Government took official power. The solution adopted here was surely not a EU initiative as such, neither in its content – being traditionally bilateral measures of public international law – nor in its provenance, coming from 14 Member States from a classic intergovernmental coordination perspective.

However, the action fell not entirely outside the EU's influence: the statement was written on official stationery of the Council Presidency, and the Commission joined the initiative by adopting a declaration expressing its concern about the situation in Austria.²² On February 3, 2000, the EU Parliament added its voice. It was the first in clearly stating that the FPO participation in Austrian Government would legitimize the uprising of xenophobic parties in Europe, and that EU should be prepared to invoke Article 7 TEU.²³

The most remarkable factor in the whole crisis was that the EU intervention took place on the basis of the FPO and Haider's past pronouncements rather than the Austrian Government's concrete actions. The actual situation in Austria, the swearing in of a new Government, clearly did not meet the conditions for actuating Article 7 TEU. There had been no serious and persistent breach of the rule of law, nor could there have been since the Austrian Government had not yet been active. Even if there had been, no proof of

²⁰ In truth, the FPO participation in the Government should not be underestimated: the Deputy Chancellor came from FPO, and several important Ministries, such as Finance, Justice and Defense, were covered by FPO Parliament Members. Actually, having gained 26.91 percent in the parliamentary elections, it was the second most popular political party in the country.

²¹ Statement of the Portuguese Presidency of the European Union on behalf of XIV Member States of 30.1.2000 in Bulletin Quotidien Europe No. 7654 of 31.1.2000, 9.

²² European Commission, Austria: Declaration by the Commission, Brussels, 1 February 2000, IP/00(93).

²³ European Parliament, Resolution of 3 February 2000, PE 284.656, particularly § 2, § 8.

these breaches was brought by the interested parties. Another problematic issue was that the adopted initiative practically denied Austria the right to be heard.

The sanctions have been maintained under the French Presidency of the second semester of 2000. However, on June 29, 2000, the 14 EU Member States together decided to appoint a committee for examining the Austrian case, and its compliance with EU values, in more detail. It was decided that, should Austria be in compliance with EU standards, the sanction would be withdrawn. On the Austria side, on July 5, 2000, the Austrian Chancellor announced a referendum on Austria's attitude to the EU for Autumn 2000. It seems that both parties were looking for an exit strategy before the crisis escalated by the erosion of the sanctions, or by the outcome of the referendum. The Report – by three experts appointed by the European Court of Human Rights at the Council's request²⁴ – was divided into two parts, regarding the Austrian Government commitment to the EU values and the political nature of FPO. Predictably, the Report did not find any violation of the rule of law or European values in the Austrian Government's activities.²⁵ The Report was more skeptical, even if not radically, about the democratic and pluralist credentials of FPO.²⁶ However, it was clear that the compliance with the first part was the one of interest for the parties. In its conclusions, the Report was in favor of the lifting of the sanctions.²⁷ Consequently, on September 12, 2000, the French Presidency withdrew the sanctions against Austria.

From today's perspective, it is possible to say that the management and the outcome of the whole crisis damaged the image of the EU, and the suitability of its intervention in a rule of law crisis. On the one hand, it was not strong enough as the action was taken by individual Member States rather than the EU Commission, which did not go further than a symbolic statement. On the other hand, it was too heavy, or better misplaced, since it gave the impression that only small, and newer, Member States could be the possible

²⁴ M. Ahtisaari, former President of Finland; J. Frowein, director of the Max Planck Institute for Comparative Public Law and International Law; M. Oreha, former Spanish Minister for Foreign Affairs were appointed on July 12, 2000 by the President of the ECtHR. L. Wildhaber, ECtHR, Press Release n. 491, June 29, 2000.

²⁵ Report by M. Ahtisaari - J. Frowein - M. Oreha, 108-109.

²⁶ Report by M. Ahtisaari - J. Frowein - M. Oreha, 110-113.

²⁷ K. Blanck, Austria: between size and sanctions, in F. Laursen (eds.), *The Treaty of Nice: Actor Preferences, Bargaining And Institutional Choice*, 2005, 28.

target of the sanction. More substantially, the initiative also lacked a certain kind of legitimacy in a broader sense. The EU institutions seem to have been dragged into the struggle, as well as the smaller EU countries, and had not been consulted promptly by the Member States who took the lead. The initiative clearly assumed a political treat, being decided by like-minded heads of big States. It assumed the characters of a *fait accompli* of a strong political character.

However, for the sake of the development of EU rule of law tools, they were good outcomes.²⁸ Firstly, with regard to resorting to public international law sanction: they have not been used in this way anymore. A common perception emerged that to resort to the traditional public international law sanction was out of place in the EU, and with regard to such delicate issues. They call to mind a past world made of political calculation, trade-offs and prevalence of politics over law. A clear example that the EU member States have learned their lesson can be found in the current Hungarian crisis: despite the fact that several countries – Germany, Denmark and others – have advocated for implementing the tools for stopping the crisis in Hungary, they have pushed the Commission to act through the legitimate procedure rather than operating independently.

Secondly, the Austria crisis has not been a complete failure from the perspective of the development of a EU arsenal. The sanctions were an important step towards creating a EU mechanism to respond to rule of law crises apart from and preceding resorting to the heavy Article 7 TEU option, as suggested in the Report's conclusions. Such a mechanism, the Report affirmed, would also have allowed an open and non-confrontational dialogue with the Member State concerned, so as to remedy the lack of *audita altera parte* in the Article 7 TEU procedure.²⁹ From this crisis emerged the need of consolidating and reframing the latter Article by adding a preventive tool. The EU adopted a new Article 7

²⁸ G. Falkener, The EU14's "sanctions" against Austria: Sense and Nonsense, 12 CSA Review, Journal of the European Union Studies Association, 2001, 14-15.

²⁹ The Austrian proposal at the Intergovernmental Governance clearly, and not surprisingly, marked this point, requiring to ensure the principle of fair hearing, to the necessity of an objectively demonstrable serious and persistent breach, and the commitment that all Member States will undertake to act solely within the framework of Article 7. See Letter from Representative of Austria at the Conference of Representatives of the Governments of the Member States to Mr. J. Solana, Secretary-General, High Representative, IGC 2000: Draft Amendments to Article 7 and 46 of the TEU, Conference of the Representatives of the Governments of the Member States, CONFER 4712/00, Brussels, February 15, 2000.

TEU mechanism within the Nice Treaty of 2001,³⁰ also taking into account the European Parliament Resolution that had exactly invoked a more expedited track for tackling rule of law crises during the crisis.³¹ The process of amendment inserted a preventive mechanism alongside the sanctioning mechanism in Article 7 TEU. It was provided that, on a reasoned proposal by one third of the Member States, by the European Parliament, or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of European Parliament, could determine whether there is a clear risk of a serious breach of the values at Article 2 TEU by a Member State. Thirdly, there was a depoliticisation of the rule of law crises and the reaction tools from a more substantial perspective as well. Putting it simply: the Austrian Government had violated neither EU law nor the rule of law in general, or at least it did not by the simple fact of having a junior party which had certain questionable positions in its ideological background in Government. The following crisis focused on the actual violation or risk of violation, but even in that case rule of law grounds were relied on and no longer political affiliation. This last outcome contained two elements: violation or the risk of violation of the rule of law should have actually occurred; violations could not be determined on political grounds alone. Under the new standards, the development on the Austria political scene of 2000 would not have met the requirements for even the new preventive action Article 7(1) TEU.

1.2. National and EU judicial procedures in tackling *Berlusconi's* Government irregularities.

Another type of rule of law crisis in the EU could be found in Italy during the two periods 2001-2006 and 2008-2011. Italy, a mature democracy and one of the EU founding members, was at first shocked, then persuaded and, at last, accustomed when tycoon Berlusconi, at the head of his political party FI (Forza Italia), won several national

³⁰ Lachmayer rightly notes that the Austrian crisis had repercussions for the building of a Network of Experts in Fundamental Rights with the task to monitor Member States' compliance with European values. With the establishment of the Fundamental Right Agency in 2007 – also suggested by the report –, and the incorporation of the network within, this task has however ceased to have importance.

³¹ European Parliament Resolution containing the European parliament's proposal for the Intergovernmental Conference of April 13, 2000, A5-0086/2000.

elections. He was appointed Prime Minister three times (1994; 2001; 2008). Berlusconi's appointment as Prime Minister brought at least two dangerous situations of conflicts of interest into the public sphere: firstly, he was a public service concessionaire entrusted with half of all the television channels; secondly, he was under investigation, and was standing trial, for several crimes. His rise to political power made the public fear that he would bend the legislative power towards favoring his position as concessionaire and escaping criminal justice. Surely, Berlusconi's government style had a strong impact on the slow, accommodating and negotiating-style legislative process in Italy. However, from a rule of law standpoint, this evolution has made matters worse.³² During Berlusconi's Governments of 2001-2006 and 2008-2011, his political party had a strong majority in Parliament. This enabled a series of laws to be adopted that had the purpose of helping him in his ongoing trials. These laws were nicknamed *ad personam* because they were clearly directed at guaranteeing Berlusconi's personal interests rather than to ensure any public good.

Interestingly, the *ad personam* laws were of two different types. Some of them were clearly framed in such way that the persons concerned and the interest ensured could only have been Berlusconi and his own assets. For example, the Government sought to provide the Prime Minister with immunity from prosecution. It was clear that only Berlusconi himself would have benefitted from the law – being the Prime Minister at that time –, and that that law was exclusively made for his personal purposes – since the need of such immunity had never been felt compelling before. Other laws were however enacted with a general scope of application, and in principle serving a general purpose but *de facto*, on account of timing and circumstances, serving only, or mostly, Berlusconi's interests. For example, none can deny that a more lenient treatment for certain crimes could have been of general interest. However, it was also difficult not to see Berlusconi's interest prevailing over any legislative consideration when the law enacted regarded exactly the crimes he was on trial for.³³

³² Council of Europe, European Commission for Democracy Through Law (Venice Commission, CDL-AD(2005)017; CDL-AD(2013)038.

³³ Among these laws, we could include three sub-genus: i) a reduction of penalties for falsification of books, here discussed; ii) a change of location of trials in exceptional circumstances, enacted by the law of November 7, 2002, n. 248, and substantially stripped by the Court of Cassation, United Section, January 23, 2003, n. 1; iii) a general revision of the statute of limitations, enacted by the law of December 5, 2005,

Both these types of *ad personam* law were meant to impact on Berlusconi's criminal trials. With regard to the first type, the judicial and controls organs in Italy were strong enough to halt this irregular trend in the law-making. Particularly the law of June 20, 2003, n. 140, which provided absolute immunity from criminal prosecution for the five highest state officials in office – President of the Republic, Prime Minister, Presidents of the two Chambers and President of the Constitutional Court – was held unconstitutional mostly for violation of the principle of equality at Article 3 of the Italian Constitution.³⁴ Berlusconi proposed a similar legislative attempt to escape his ongoing trial once more when, during his last return to the Government (2008-2011), he reframed the previous law in accordance with the Constitutional Court remarks, excluding the President of the Constitutional Court from the shielded position this time, in the law of July 23, 2008, n. 124. However, this law was also declared unconstitutional for violation of the principle of equality.³⁵ Tenaciously, Berlusconi made a third attempt – this time providing to all the Government Ministries the capacity to refuse to appear before court because of their governing function – to shield himself from the ongoing trials, counting on the delays to have the process lapsed by statutes of limitations, with law of April 7, 2010, n. 51. Again, the law was partially dismantled by the Constitutional Court,³⁶ and entirely by the outcome of the popular referendum of June 12-13, 2011. It could be concluded that even serious rule of law crises in the EU, such as where the legislative power is grasped by Government and bent to serve individual purposes, could be resolved even without the intervention of EU institutions or procedures in certain situations national institutions are strong enough to deal with the crisis. The success of a national legal order in resolving a crisis means that the crisis itself has not reached that threshold of seriousness that would alarm the EU, and triggered its rule of law tools.

The other series of *ad personam* laws followed a different path. Here, Berlusconi aimed at a reduction of penalties for crimes such as falsification of books, and consequently the reduction of the statute of limitations, crimes with which he was charged at that time. The

n. 251, of which Berlusconi intended to take advantage, but, due to conflicts in his coalition, has been formulated to not apply to pending cases.

³⁴ Corte Costituzionale, January 20, 2004, n. 24, and later November 19, 2007, n. 380.

³⁵ Corte Costituzionale, October 7, 2009, n. 262.

³⁶ Corte Costituzionale, January 13, 2011, n. 23.

revision of company legislation substantially served the Prime Minister interests since it reduced the penalty for publishing false documents from an indictable offence to a summary offence, with a consequent decrease of terms of imprisonment from up to five years to less than two years.³⁷ Furthermore, the statute of limitation period decreased from ten years to four and a half years. Here, an intervention of the Constitutional Court could not have readdressed the situation, since the ground of equality, being the law treating everyone equally, was not violated. Thus, an Italian ordinary Court made a preliminary reference to the CJEU, asking if the sanctions introduced by the new law, in consideration of the recent legislative amendments, could still have been held as effective, proportionate and dissuasive, as requested by the same EU law for company law.³⁸ The CJEU did not find any ground to question the Italian law: despite their dubious effectiveness, the new provisions have been recognized as applicable on the basis of the principle of the retroactive application of a more lenient penalty. The CJEU considered that, although the new provisions could be in breach of the EU Directive, the national courts could not avoid applying them, as the Directive would otherwise have a direct effect on individuals, increasing their criminal liability.³⁹ Therefore, Berlusconi was acquitted during the following trial in Italy in September 2005, since the date of the acts that underlay the alleged crimes was before the expiry of the shortened limitation period.

Two different lessons could be drawn from these facts. Firstly, that the EU as a whole, and the CJEU in particular, is perceived to be a last instance of inquiring into the legality of law, even where the connection between EU law and national law is not so evident. After all, the values listed at Article 2 TEU are subject to the CJEU jurisdiction and, thereby, to its mandate to ensure that “the law is observed” according to Article 19 TEU. Particularly the dialogue between the CJEU and national courts appears to be a fruitful tool for examining rule of law issues caused by the same national Government. The preliminary ruling is employed for assessing the compatibility of the national law with EU law, whereby forming a more nuance tool for evaluating the legality of national law.⁴⁰ Indeed,

³⁷ Law October 3, 2001, n. 366; Legislative Decree, April 11, 2002, n. 61.

³⁸ Council Directives First Directive 68/151/EEC of March 9, 1968, Fourth Directive 78/660/EEC of July 25, 1978 and Seventh Directive 83/349/EEC of June 13, 1983.

³⁹ CJEU, C-387/02, 3 May 2005, *Berlusconi and others*, §§ 68-69.

⁴⁰ P.P. Craig, Once upon a time in the West: Direct Effect and the Federalization of EEC Law, *Oxford Journal of Legal Studies*, 12(4), 1992, 454-456.

despite the fact that the CJEU is not competent to invalidate a national law, its interpretative mechanism allows it to module the question so that it reads as if the EU law precludes a national law such as that of the Member State. If so, the Member State is obliged to amend the national law. The CJEU provides an authoritative interpretation of EU law that is in practice binding *erga omnes*; and it is for the Member States' authorities to take the measures needed to ensure that EU law is complied with. Here, the preliminary ruling is a sort of substitute for the infringement procedure. Indeed, the preliminary reference has become a tool of indirect enforcement of EU law.⁴¹ The recourse to this tool for enforcing EU law against a Member State is far from uncommon and of particular efficacy.⁴²

What is of utmost importance is that the *erga omnes* effects of preliminary rulings means that when interpreting EU law, all national courts are obliged to apply not only the operative part of a preliminary ruling, but also its *ratio*.⁴³ And this obligation applies to all national courts regardless of whether they sit as courts of last instance.⁴⁴ From this perspective, the preliminary ruling ensures a rule of law custom of obedience to the CJEU ruling by the State.⁴⁵ In this way, the EU overcomes the traditional weakness of the rule of law on the international plane: the EU supranational system puts the inherently stronger national systems in the service of the supranational order.⁴⁶

The success of the EU system in structuring a dialogue among judges has been such that eminent authors have proposed to rely on this consolidated practice for handling rule of law crises. Particularly, this theorization has been framed as a reverse *Solange* approach, enabling citizens to turn to national courts and the CJEU to vindicate their rights by reviewing the legality of national actions in light of Article 2 TEU.⁴⁷ The cooperation between national courts and the CJEU and the use of preliminary rulings could enable a

⁴¹ CJEU, C-231/06, June 21, 2007, *Jonkman*, § 36.

⁴² CJEU, C-158/80, July 7, 1981, *Rewe-Handelsgesellschaft Nord*, §§ 44-46.

⁴³ CJEU, C-260/89, June 18, 1981, *Elliniki Radiophonia Tiléorassi*, §§ 24-26.

⁴⁴ S. Andersen, *The Enforcement of EU law - the role of the European Commission*, Oxford, Oxford University Press, 2012, 32.

⁴⁵ J.H.H. Weiler, *The Community System: the Dual Character of Supranationalism*, *Yearbook of European Law*, Vol. 1, Issue 1, 1981, 301.

⁴⁶ J.H.H. Weiler, *Van Gend en Loos: the individual as subject and object and the dilemma of European legitimacy*, *ICON 12*, 2014, 96.

⁴⁷ A. Von Bogdandy et al., *Reverse Solange - Protecting the essence of fundamental rights against EU Member States*, 49 *Common Market Law Review*, 2012, 489.

virtuous dialogue between courts that could halt degrading of the rule of law. However, by itself, that may be not enough to stop rule of law crises, as shown in the Berlusconi case. In particular, the same structure of preliminary rulings presents some drawbacks: mainly, that where a singular EU law violation is not found, the legality of the measure is entirely left to the Member State national decision-makers. Where the rule of law is not underpinned by a specific EU legislation – that is to say when the EU rule of law is not underpinned by a rule of EU law –, calling for a EU intervention against a Member State law can result problematic. Furthermore, where the judicial organs such as constitutional courts cannot intervene either, the national legislator is entirely free to bend the law-making to its purposes.

The *reverse Solange* doctrine faces the same difficulties. Firstly, it is difficult for both national and EU courts to identify legislation which harms the rule of law so that the preliminary ruling can be activated and, eventually, succeed in declaring them incompatible with EU law. Secondly, even where it is possible, the mechanism is built on the idea that national and EU judicial bodies to call attention to the possible infringement done through the law. Last, the scope of the *reverse Solange* covers only the enjoyment of the rights conferred by virtue of their status as citizens of the EU, according to Article 20 TFUE. It remains possible that a rule of law violation takes place, such as in the Berlusconi case, even if no breach occurs of the concept of EU citizenship or any individual breach at all, being the rule of law violated nonetheless.

1.3. EU Parliament's oversight of Member States' law-making and its enforcement.

Another irregularity from the rule of law in Berlusconi's Government could be located in his other conflict of interests: being a public service concessionaire, there were issues not only in regard to his eligibility for Parliament, but also to his use of governmental legislative and executive powers for the sake of his business goals. Indeed, the conflict of interests led to a long disputed situation. Berlusconi, as media entrepreneur, was required to give up one of his three national channels by the Constitutional Courts rulings. He

neither complied with any of these judgments, nor did the Government, which was at his disposal, make any attempt to force it.⁴⁸

The European Parliament intervened here: in its Resolution of April 22, 2004, Parliament express its concerns about the Italian legislation, calling for the European Commission to submit a proposal for a Directive to safeguard media pluralism – so enabling a possible infringement action for a EU law violation –, and to consider the use of Article 7 TEU.⁴⁹ The European Parliament acted in the name of the principle that a free and pluralist media landscape reinforces democracy, which is a foundational EU value. Interestingly, Parliament also called for the need for a specific EU legislation to specify the conditions to be respected by Member States to ensure an adequate level of pluralism. Thus, the European Parliament identified the grounds for acting on the link between pluralism and democracy. These were however general grounds, being merely principles, not underpinned by any EU specific legislation, which could have authorized the Commission to act on the infringement procedure instead. However, even if in vague terms, the European Parliament also identified a possible rule of law ground, entirely based on the habit of obedience to the law itself. In fact, Parliament highlighted “its deep concern in relation to the non-application of the law and the non-implementation of judgments of the Constitutional Court, in violation of the principle of legality and the rule of law.”⁵⁰ The EU Parliament thus highlighted that an action could have taken place not only in the name of media pluralism – as a pre-condition or an ally to democracy –, but also directly on a rule of law ground: that the Italian rulings were ignored, and therefore the law, as declared by the Constitutional Court, was not enforced. The whole situation came to a close when the Italian government adopted law May 3, 2004, n. 112, through which the whole media system was reformed. Thanks to the effects of the reform, however, Berlusconi could keep his media channel, definitely frustrating the Constitutional Court judgment and the EU Parliament initiative too.⁵¹

⁴⁸ Corte Costituzionale, November 20, 2002, n. 466 and December 7, 1994, n. 420.

⁴⁹ European Parliament Resolution of 22 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (EU Charter of Fundamental Rights, Art. 11(2) 2004, OJ C104E), §§ 76 and 83-84.

⁵⁰ European Parliament Resolution of April 22, 2004, § 66.

⁵¹ As Lachmayer interestingly noted, a similar situation could have been found in Austria during the Haider crisis, since the Austrian Constitutional Court ruling of December 13, 2001, VfSlg 16.404/2001, has never

Another set of lessons could be drawn from this prolonged rule of law crisis in Italy. Firstly, in a rule of law debate, there is also a concern regarding the enforcement of the law *per se*, no matter if underpinned by a particular EU law – as seen, non-existing at that time –, or with a direct relevance to democracy or human rights. These considerations are not necessary: simply put, not implementing national laws or judgments is of concern for the EU, not only for Member States. Secondly, the European Parliament has become an important actor in the rule of law debate, and its non-binding acts have a certain effect too. Even before the birth of Article 7 TEU, the European Parliament already called for the Community’s monitoring of human rights in Member States.⁵² During the dispute with the Austrian Government, Parliament was the first in affirming that EU institutions should be prepared to invoke Article 7 in defense of EU values.⁵³ In the rule of law crisis in Poland as well, the European Parliament acted by adopting a Resolution on the situation, asking the Polish Government to cooperate with the EU in the name of the principle of sincere cooperation.⁵⁴ Subsequently, while the crisis was escalating, it adopted a Resolution on the situation of the rule of law, supporting the EU Commission initiatives, and considering the situation at clear risk of a serious breach of Article 2 TEU.⁵⁵

Nowadays, the strongest criticism of the current Hungarian course comes from the EU Parliament,⁵⁶ namely in the Tavares Report, named after the MEP rapporteur, and which has been adopted in July 2013.⁵⁷ The Tavares Report harshly criticized the state of

been observed, and had been circumvented by a Constitutional amendment. See Lachmayer, 451. Despite the fact that this annotation sheds light on the fact that the Haider rule of law crisis has had some fundamentals, the situation does not amount to the Berlusconi one. Here, a constitutional amendment had been adopted rather than a simple legislative reform; secondly, the conflict of interest is totally absent here; third, the compromise has been reached by a different government and with the consent of the minority.

⁵² In a resolution on human rights adopted on July 9, 1991, Parliament “[c]onsiders that the Community must ensure respect for human rights not only in other countries but more particularly in its Member States”: European Parliament resolution on human rights [1991] OJ C 240/45.

⁵³ European Parliament, Resolution of February 3, 2000, PE 284.656, particularly §§2 and 8.

⁵⁴ European Parliament, Resolution of September 14, 2016, on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774) (RSP).

⁵⁵ European Parliament, Resolution of November 15, 2017, on the situation of the rule of law and democracy in Poland (2017/2931) (RSP).

⁵⁶ B. Bugaric, Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge, LEQS Paper no. 79/2014, July 2014.

⁵⁷ EU Parliament, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of February 16, 2012 (2012/2130) Committee on Civil Liberties, Justice and Home Affairs.

fundamental rights in Hungary, recommending to set up a mechanism for controlling the development of the situation⁵⁸. The envisaged mechanism was formed by a non-political commission of experts that would review the compliance with the EU values in Hungary, and issue recommendations on how to respond to similar crises. This proposal was based on an academic idea to keep the Copenhagen criteria also alive and active after a candidate country had been accepted, performing a continuous activity of oversight and review of Member States legislation.⁵⁹

Beyond the Tavares Report, EU Parliament, with a series of Acts and Resolutions,⁶⁰ asked for the establishment of a triologue, composed of the European Parliament, Commission, and European Council - establishing a committee that would engage in close review of the activities in Hungary mentioned in the Report. Aware of the limits of these soft-law tools, the Report did not rule out the use of Article 7 TEU tool if Hungary did not comply with the monitoring program thus established.⁶¹ The EU Parliament has thereby assumed a central role in controlling Member States law-making and enforcement of law activities. However, despite that its contribution could not be underestimated now, it is a toothless body when it comes to effectively remedying rule of law crises. The EU Parliament is limited to inquiries, political statements and declarations. The proper watchdog role is left to the EU Commission.⁶²

⁵⁸ EU Parliament, Report, 2013, §80.

⁵⁹ J. Werner-Muller, A Democracy Commission of One's own or what it would take for the EU to safeguard Liberal Democracy in its Member States, in A. Jakab - D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 234-251; D. Kochenov, *Eu Enlargement and the Failure of Conditionality*, The Hague, Kluwer, 2008, 310-311.

⁶⁰ European Parliament, Resolution of June 3, 2013, on the Situation in Hungary, pursuant to the European Parliament, Resolution of February 16, 2012, 2012/2130; European Parliament, Resolution of June 10, 2015, on the Situation in Hungary, 2015/2700, June 10, 2015; European Parliament, Resolution of December 16, 2015, on the Situation in Hungary, 2015/2035, December 2015; European Parliament, Resolution of May 17, 2017, on the situation in Hungary; European Parliament, Resolution of March 10, 2011, on Media Law in Hungary; European Parliament, Resolution of July 5, 2011, on the Revised Hungarian Constitution; European Parliament, Resolution of February 16, 2012, on the Recent Political Developments in Hungary.

⁶¹ EU Parliament, Report 2013, §86.

⁶² W. Sadurski, *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jorg Haider*, Legal Studies Research Paper No 10/01, Sydney Law School, University of Sydney, January 2010, 2.

1.4. The EU adoption of soft-law initiatives: monitoring, benchmarking and dialoguing with Member States.

Mindful of the Austrian crisis and its confused ending, the EU institutions have progressively developed an arsenal of soft-law tools for bringing reluctant Member States back on the rule of law path without resorting to binding measures. This arsenal has been in continuous development, and has been employed against the Member States by scrutiny of the rule of law conditions therein. The proliferation of these tools is not surprising: on one hand, the EU acquires competences and knowledge by developing them; on the other hand, Member States generally do not fear this ever growing process since these tools have a limited legal effect on them. The soft-law tools have several effects: they form a benchmark for the rule of law situations in different Member States, creating a level playing field; they provide a report on different States to the public, to the other States and to the EU institutions in order to enable peer/citizen-pressure; they enable a dialogue with the concerned Member States so as to develop together strategies for avoiding more intrusive measures in the future. The establishment of the Fundamental Rights Agency was the first experiment from this perspective, but it has not been as successful as hoped.⁶³ The Fundamental Rights Agency was meant as the successor to the European Monitoring Centre on Racism and Xenophobia, entering the EU agenda after the Austria crisis. Its establishment was the result of the Commission Decision of 2003 to introduce regular monitoring of respect for common values and developing independent expertise that gave birth to a network of experts.⁶⁴ On this basis, the Fundamental Rights Agency was built, with the task to serve the Commission in providing information and knowledge. The Council was also allowed to seek the assistance of the Fundamental Rights Agency should it find it useful during a procedure under Article 7 TEU. The Fundamental Rights Agency, however, would not have carried out the monitoring of a Member State for the purposes of Article 7 TEU. Therefore, the Fundamental Right Agency was prohibited from doing exactly what the earlier network

⁶³ European Union, Council of the European Union, Council Regulation (EC) No. 168/2007 of February 15, 2007, establishing a European Union Agency for Fundamental Rights, February 15, 2007.

⁶⁴ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based (COM/2003/0606 final), October 15, 2003.

of independent experts had been established to do, and which could have been of utmost importance for assisting the Commission with a systematic and permanent observation. Lately, the European Parliament's Resolution of 2005 made an explicit connection between the Fundamental Rights Agency and the Charter of Fundamental Rights.⁶⁵ Since then, the agency was perceived to work within a narrower scope, focusing on fundamental rights only. With the establishment of a Multiannual Framework for 2013-2017, the rule of law was no longer among the Fundamental Rights Agency objects.⁶⁶

Another type of soft-law initiative was the EU Anti-Corruption Report. In June 2011, the Commission launched this new initiative, which consisted in a Report made on the basis of an analysis of each Member State, and contained country-specific recommendations with specific regard to the issue of corruption.⁶⁷ This initiative aimed to identify trends and best practices in the struggle against corruption, and improve information exchange among Member States. The country scrutiny specifically exposed Member States to the kind of peer review that had been successful in similar initiatives, such as GRECO for the Council of Europe, the Anti-bribery Report of the OECD and the United Nations Convention against Corruption monitoring. The Report was supposed to have been published on a bi-annual basis: however, after the first Report,⁶⁸ the Commission announced that it would not publish a second one, putting an end to the initiative.

In March 2013, the Commission introduced the EU Justice Scoreboard, similar to the Anti-Corruption Report. In contrast to the latter, it is still in operation with the task of monitoring the quality of the judiciary in the Member States in view of a range of indicators,⁶⁹ utilizing the data provided by the Council of Europe Commission for the Evaluation of the Efficiency of Justice. The Scoreboard was intended to help Member

⁶⁵ European Parliament resolution on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency (2005/2007), May 26, 2005.

⁶⁶ Council Decision No 252/2013/EU of March 11, 2013, establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights. They are: access to justice; victims of crime; information society; Roma integration; judicial co-operation; rights of the child; discrimination; immigration and integration of migrants; racism and xenophobia.

⁶⁷ EU Commission, Decision of June 6, 2011, establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report"), Brussels, 6.6.2011 Com(2011) 3673 final.

⁶⁸ Commission, Report From The Commission To The Council And The European Parliament, EU Anti-Corruption Report, Brussels, 3.2.2014 Com(2014) 38 Final.

⁶⁹ Commission, Communication the EU Justice Scoreboard. A tool to promote effective justice and growth, Brussels, 27.3.2013 Com(2013) 160 final.

States achieve this priority by providing an annual comparative overview of the independence, quality and efficiency of national justice systems. The indicator collects rank-ordered data the purpose of which is to represent the past and future performance on different subjects.⁷⁰ Such indicators straddle the link between knowledge and (soft) power. The knowledge effect should consist in giving means of constructing and understanding the field of classification and contestation.⁷¹ It has been pointed out, interestingly, that if the EU wants to establish a legal procedure on the outcome of these scoreboards, the scoreboard itself cannot be contracted out to other international organizations.⁷² While there may not be necessarily be a connection between the theory informing a particular indicator and the underlying purpose and theoretical orientation of the institution that creates it, the original orientations matter a lot in case the term of comparison is such a vague and contextual term such as the rule of law. This not just because most of these indexes are biased in favor of a specific form of government or market economy,⁷³ but also because the EU makes its assessment based on a specific pool of countries – the Member States –, which are bound to specific (higher) standards, provided at Article 2 TEU.

Recently, in June 2017, the Council adopted the recommendation addressed to Poland in the course of the 2017 European Semester. Concerning the ongoing rule of law crisis, it underlined that “predictability of regulatory, tax and other policies and institutions are important factors that could allow an increase in the investment rate.”⁷⁴ Again, it seems that, when soft law tools such as indicators and recommendations are used, there is a

⁷⁰ K. L. Scheppele, *Constitutional Coups in EU law*, in M. Adams - A. Meese - E.H. Ballwin, *Constitutionalism and the Rule of Law*, Cambridge, Cambridge University Press, 2017, 426.

⁷¹ K.E. Davis - B. Kingsbury - S. E. Merry, *The Local-Global Life of Indicators: Law, Power and Resistance*, in *The quiet power of indicators: Measuring governance, corruption, and rule of law*, Cambridge, Cambridge University Press, 2015, 1.

⁷² A. Jakab - V. Lorincz, *Rule of law Indices and How they could be used in the EU rule of law crisis*, forthcoming, referring to P. Bard - S. Carrera - E. Guild - D. Kochenov, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights: Assessing the Need and Possibilities for the Establishment of an EU Scoreboard on Democracy, the Rule of law and Fundamental Rights*, European parliament, n. PE 579328, 2016, 24-28.

⁷³ Indices such as Freedom in the World (Freedom House), Bertelsmann Transformation Index (Bertelsmann Stiftung), Worldwide Governance Indicators (World Bank), Rule of Law Index (World Justice Project) have a certain biased conception of the rule of law necessarily linked to liberal market.

⁷⁴ Council Recommendation of July 13, 2017, on the 2017 National Reform Programme of Poland and delivering a Council Opinion on the 2017 Convergence Programme of Poland.

bending in favor of the invocation of economic concerns, even when the rule of law crisis hits the EU and national values hard.

Qualitatively different from the former ones, is the Rule of Law Dialogue adopted by Council in 2014. This initiative clearly means to engage Member States with soft-law tools on rule of law issues, without resorting to an indirect appeal to economic incentives. The constructive dialogue envisaged by the Council would aim to encourage respect of the rule of law, and will be prepared by the COREPER. Nonetheless, the Rule of Law Dialogue has been thought to be a response to the Commission's Rule of Law Framework, and especially on the legal exception about the Commission's tools' incompatibility with the EU Treaties.⁷⁵ Accordingly to the Council, the principle of conferred powers of Article 5 TEU prevents the adoption of tools for supervising the rule of law but for those (Article 7 TEU and Articles 258-260 TFEU) already provided by the Treaties. Particularly, the Council decided to establish a rule of law dialogue with the Member States on an annual basis grounded in the principle of objectivity, non-discrimination and equal treatment. From the substantial point of view, the Council reaches a reasonable conclusion through a quite complicated reasoning on the matter of the scope of this rule of law tool. It states that sanctions for a violation of the values of the EU may only be brought against a Member State if the EU acts on a subject matter on which it has competence, even if this includes competence not yet exercised. However, it admits that the reach of Article 7 TEU is not related to a specific competence. That is to say, only Article 7 TEU is enforceable, but this Article may cover everything in the world.

Conclusively, the EU has made use of these soft-law tools to a large extent, and their number increase day by day, despite not always being as successful or incisive as hoped. Generally, soft-law tools are kind of successful in monitoring Member States by providing and circulating knowledge and awareness in ordinary times,⁷⁶ whereas in emergency situations, such as rule of law crises, these tools are limited on account of being themselves built in the shape of questionnaire and reports, the outcome of which could reflect just a paper-compliance reality. Despite the fact that soft-law tools do not

⁷⁵ Council, Opinion of the legal service, 10296/14, May 27, 2014, §§16-17 and 20-21.

⁷⁶ M. A. Vachudova, *Defending Democracy and Fighting Corruption*, in C. Closa - D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the EU*, Cambridge, Cambridge University Press, 2016, 286.

command a legal effect, they can still have a strong indirect substantial effect where the leverage is strong, such as in the case of the EU, where there are consolidated supranational institutions that monitor the Member States. Indeed, the leverage could be even stronger and more effective when States are still trying to achieve accession to the EU.

1.5. The setting-up of accession and post-accession criteria: a EU success in guiding Romania towards the rule of law.

The rule of law assessment is, by Treaty provision, a requirement for accession to the EU. In the European Council Conclusions of June 21-22, 1993, the rule of law appears as a criterion that any state that wishes to accede to the EU must accomplish, as one of the so-called “Copenhagen criteria”⁷⁷ at that time part of the EU customary law on membership. In the admission procedure, the rule of law plays an important role, being treated as a separate chapter in all Reports elaborated by the Commission, which referred to the state of negotiations with each State. Nowadays, the EU demands the rule of law as a conditional value not only in the accession process⁷⁸ and, consequently, permanently within the European Union,⁷⁹ but in the Stabilization and Association Process and the European Neighborhood Policy as well.⁸⁰ However, in the Eastern Enlargement process, an additional evaluation mechanism has been developed, the so-called Cooperation and Verification Mechanism (CVM) for Romania and Bulgaria.⁸¹ The mechanism has been set up in consideration of the particular conditions of these two countries, which showed worrisome conditions as regards the rule of law, which did not allow them to join the EU in 2004 together with the eight other post-communist countries. The CVM function

⁷⁷ Membership requires that a candidate country has achieved stability of institutions, guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union. See Presidency Conclusions, Copenhagen European Council 1993, 7.A.iii.

⁷⁸ Article 49 TEU.

⁷⁹ Articles 2, 6(1), 7 TEU. The introduction of a forced exit procedure, resorting to a Treaties amendment, and giving the EU the power to force out a non-compliance State, is politically not feasible right now. C. Closa, Reinforcing Rule of Law Oversight in the European Union (2014) RSCAS EUI Working Paper no. 25, 1, 30.

⁸⁰ Conditions for Membership Chapters 23, 24 and 34.

⁸¹ Commission Decision of December 13, 2006, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, C(2006) 6570 final.

consists in monitoring and reporting on whether these two countries comply with benchmarks in the areas of judicial reform, fight against corruption and, specific to Bulgaria, fight against organized crime. Every six months, the Council has issued detailed Reports (a general one in July and a technical interim one in February), evaluating the progress on the established benchmarks and marking the most pressing issues, which should be addressed in the next Report. It is interesting to note that the mechanism had been established just before the Treaty to accession of these two countries entered into effect⁸²; this means that the Commission had already prepared a strategy for a transition from their former regimes. The CVM is therefore a tool that extended some of the EU's leverage over the rule of law from the pre-accession to the post-accession period. The mechanism finds its legal basis in the same Treaty of Accession⁸³ that empowers the Commission to take appropriate measures – including the suspension of Member States' obligation to recognize and execute Bulgarian and Romanian judgments – in case of imminent risk that the countries would cause a breach in the functioning of the internal market by a failure to implement the commitments it has undertaken. The CVM could therefore represent a plausible framework for assessing what is the rule of law for the EU, since compliance with this mechanism conditions the access to the EU itself, making the country enter into the space of the EU, a space based on the rule of law, and, at the same time, enrich the EU rule of law with another contributor.⁸⁴

There is no doubt that the rule of law is the main concern at the basis of the CVM: in the premises it is reaffirmed that the EU is based on the rule of law, that the EU space relies on the rule of law being assured and enforced in any Member States, and that this implies the existence of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia*, to fight corruption in all Member States. As

⁸² Treaty concerning the accession of Bulgaria and Romania to the European Union, May 31, 2005.

⁸³ Articles 37-38, Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, May 31, 2005.

⁸⁴ M.A. Vachudova, *Why Improve EU Oversight of Rule of Law? The two-Headed Problem of Defending Liberal Democracy and Fighting Corruption*, 280-289; A. Batory, *Defying the Commission: Creative Compliance and respect for the rule of law in the EU*, 94/3, 2016, 685-699; M. Dawson - E. Muir, *Enforcing Fundamental values: Eu law and Governance in Hungary and Romania*, *Maastricht Journal of European & Comparative Law*, 19/4, 469-476; U. Sedelmeier, *Anchoring Democracy from Above? The European Union and Democratic Backslidings in Hungary and Romania after Accession*, *Journal of Common Market Studies*, 52/1, 2014, 105-120; R. Carp, *The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism*, *Utrecht law Review*, Vol. 10, 1, 2014, 1-16.

explained in the addenda, especially the following benchmarks have been considered for evaluating the existence of the rule of law in the process Romania-EU (which will be taken as paradigmatic of both countries). First, a more transparent, and efficient judicial process must be ensured, notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Second, the impact of the new civil and penal procedures codes must be reported and monitored. Third, an integrity agency must be established responsible for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken. Fourth, building on progress already made, professional, non-partisan investigations into allegations of high-level corruption must continue to be conducted. Last, further measures must be taken to prevent and fight against corruption, in particular at the local level. The Commission clearly drafted these benchmarks with a thin or a procedural conception of the rule of law: there is no mention of democracy or human rights, or any particular reference to a single individual or substantial right to be guaranteed. What is required and expected is that the rule of law will be respected in the new Member State and that, as an ancillary provision, an efficient and impartial judiciary system shall be established. There is no doubt that these rule of law elements have been picked up in consideration of the particular conditions of Bulgaria and Romania, which lacked the particular elements that the EU aimed to increase through its CVM. However, this does not mean that these elements are casual or just the outcome of circumstances. The fact that the EU wants to impose these thin or procedural elements means that these are exactly the ones that matter to the EU. This perspective is reinforced in what later became the greatest accomplishment of the CVM, beyond the institutional reform enacted in the two countries, and, probably, greatest of all EU struggles in the rule of law field.

In fact, the July 18, 2012, Report on Progress in Romania was elaborated under the CVM during the escalation of the rule of law crisis of 2012 in Romania, after the suspension of the Romanian President by Parliament and in a period of harsh political struggle in the country. The Romania political landscape saw the confrontation of similar size parties of center-left (Social Liberal Union, USL) and center-right (Democrat Liberal Party, PDL), also due to the institutional system of possible “cohabitation.” During the 2012 crisis, the USL Prime Minister, Viktor Ponta, had a dispute with the PDL party’s Head of State,

Traian Basescu, and tried to activate an impeachment procedure by adopting some emergency decree for easing its success, including firing the ombudsman⁸⁵ and removing the Presidents of the Chambers⁸⁶, specifically by lowering the threshold of the popular participation requirement needed for the referendum on the impeachment.⁸⁷

The Constitutional Court had indirectly declared this last decree unconstitutional,⁸⁸ but the Government decided that the referendum on impeachment could be carried out according to the emergency ordinance. The whole scenario was aggravated by another emergency decree through which Government took away the power of publishing law on the Official Journal from Parliament, which gives them legitimacy.⁸⁹

The EU took advantage of the upcoming deadline for issuing the Romania Report and pointed out, in the Report of July 2012, that the Romanian Government recent steps had called into question its commitment to the rule of law and explicitly requested that be respected the Constitutional Court's ruling on the threshold of the referendum.⁹⁰ On July 10-12, 2012, Prime Minister Ponta went to Bruxelles to give explanations about the political development in its country to the Presidents of the European Parliament, Commission and European Council. On that occasion, he received a list with requirements that the Romania Government was expected to comply with in regard to the respect of the rule of law.⁹¹ What the EU demanded, was the enforcement of the rule of law as established in Romania, with a series of requirements that can regard the law-making procedure, such as clarity, transparency and avoidance of conflicts of interest, but mostly the law as it is enforced, such as judiciary independence and action against corruption. The Report announced the prolongation of the CVM in the light of the

⁸⁵ Decision of the Parliament 32, July 30, 2012; Constitutional Court 730, July 9, 2012.

⁸⁶ Decision of the Senate 24, July 3, 2012; Decision of the Chamber of Deputies 25, of July 3, 2012. See Constitutional Court of Romania, July 9, 2012, n. 728.

⁸⁷ Emergency ordinance 41/2012 of July 5, 2012.

⁸⁸ Constitutional Court of Romania, July 10, 2012, n. 731.

⁸⁹ Emergency ordinance 26/2012 of June 30, 2012.

⁹⁰ EU Commission, Press Release July 6, 2012.

⁹¹ Repeal Emergency Ordinance no. 38/2012 and Emergency Ordinance no. 41/2012; Ensure that Constitutional Court rulings on the quorum for a referendum and the scope of the Court's responsibilities are respected; Respect constitutional requirements in issuing emergency ordinances in the future; Implement all Decisions of the Constitutional Court; Ensure the immediate publication of all Acts in the Official Journal, including the Decisions of the Constitutional Court; Require all political parties and government authorities to respect the independence of the judiciary. EU Commission, Press Release, July 12, 2012.

Romania Government's steps, which had raised doubts about its commitment to the rule of law.⁹² In a letter of July 16-17, 2012, Prime Minister Ponta informed the Commission of his acceptance to carry out the recommendations: a joint session of the Romanian Parliament on July 17-18, 2012, amended emergency ordinance no 38/2012 on the reduced powers of the Constitutional Court and repealed the relevant provisions of emergency ordinance 41/2012. The popular participation requirement had been restored due to the publication, on July 17, 2012, of law 131/2012 as amended by the Court. In conclusion, the EU managed the crisis successfully, using the CVM Report as leverage to bring Romania back to the realm of the rule of law before the crisis could further escalate. In the Commission's January 2013 Report, the Commission noted with satisfaction that most of its demands have been complied with.⁹³

Even in the context of a visible crisis, the EU requests were mainly associated with thin and procedural conceptions of the rule of law, and even where they were of more substantial nature, they referred to the general principle of compliance with the EU framework against corruption and to actions aimed to ensure the rule of law.

The fact that there is no referral to the substantial elements of the rule of law in the EU framework is an advantage: some elements may become part of the CVM at some point in time and under certain circumstances. The EU main concerns were that the rule of law, as established in Romania, was respected in the law-making, such as with regard to the conditions for issuing an emergency decree, and enforced in the law's enforcement, such as the quorum for presidential impeachment, the implementation of the Constitutional Court's Decisions and their publication. The more substantial issues, such as the ban on issuing presidential pardons, the repeal of emergency decrees without conditions or the enforcement of integrity rules in appointing ministers, still referred to a rule of law conception according to which the ruling of law should not be tainted by corruption, favoritism or abuse of power. An outstanding example is provided with reference to the Report's analysis on parliamentary immunity: according to the Report, Parliament's refusal to grant consent to investigate Parliament Members generates a *de facto* immunity

⁹² EU Commission, 2-3, July 12, 2012.

⁹³ EU Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and the Verification Mechanism, Brussels, 30.1.2013 COM(2013) 47 final.

from criminal investigation. Not the law itself is targeted, but its gross and corrupted enforcement. To this end, the Report mentions the case of several Parliament Members where Parliament's refusal to inquiry could be equated with the impossibility of conducting criminal investigation. The Commission neither questions the mechanism of parliamentary immunity, as provided by the Constitution, nor the Romanian rule of law; but rather discusses how these provisions are being applied where the enforcement of the law goes against the principle that the law should be obeyed. In sum, the EU can admit that Romania has its own rule of law in this specific area of criminal and constitutional law; it does not say that the Romanian rule of law might be disregarded to the extent that the law is no longer ruling but corruption is.

The January Report of 2013 has followed the same structure: it did not go into detail concerning which norms have to be repealed, but simply restated the importance of the rule law, such as the enforcement of the Constitutional Court's Rulings. Respect for control organs such as the Constitutional Court appears to be one of the main concerns of the EU strategy and one of the pillars of its rule of law conception. It is interesting to note that, in a later rule of law crisis in Romania, EU intervention and resolution of the crisis was even shorter and more straightforward, despite the fact that the law concerned was entirely the business of the Member State. In January 2017, the Romanian Government intended to adopt a decree that would have decriminalized certain abuse of power offences. Another decree was proposed to grant pardons to corrupted public officials. Particularly, some high member of the largest political party would have benefitted from this reform. Yet, the reaction to this attempt to rebut the previous Romanian anti-corruption efforts has been terrific. On February 1, the EU Commission warned Romania not to backtrack on fighting corruption.⁹⁴ On February 4, the government scrapped the two controversial decrees. The CVM structure has been successful enough to be replicated within the Treaties of the conditions of accession of the Republic of Croatia, the latest country to join the EU.⁹⁵ The successful result of relying on the CVM in the Romania crisis gave birth to a hope that it would be possible to rely on a constructive procedure between

⁹⁴ J-C. Juncker: *"The fight against corruption needs to be advanced, not undone. We are following the latest developments in Romania with great concern"* EU Commission, Brussels, February 1, 2017.

⁹⁵ Article 36. Act concerning the conditions of accession of Republic of Croatia and the adjustment of the Treaty, 2012, OJ L112/21.

the Member State concerned and the Commission. This hope was shattered very soon as the events in the Hungary and Poland crises unfolded differently.⁹⁶

1.6. The launch of infringement procedures against Hungary: EU's Pyrrhic victories?

Hungary's political course is probably the major source of concern for the EU today, also representing the most prolonged crisis of all, ongoing since 2011. The Prime Minister Viktor Orban, leader of the national-populist party Fidesz, has steered the Hungarian constitutional landscape towards an autocratic regime through a skillful long-term strategy. Orban's purpose was to create an Hungarian State that would no longer be defined by a dualist space, with a reference to the Westminster model, replacing it with a new constitutional asset – a sort of populist *Politeia* – gravitating around the Government and its party.⁹⁷ Orban's strategy has consisted in systemically dismantling the checks and balances provided in the Constitution by repealing certain laws enacting counter powers and appointing officials loyal to him to the remaining control positions.

In April 2010, Fidesz obtained a two-third majority in Parliament and proceeded to repeal the Constitution of 1949, heavily amended in 1989, replacing it with a new one. The whole legal framework has been progressively dismantled and replaced by a new one, but always through legal means.⁹⁸ Orban had a point in saying that the laws that were adopted in Hungary for consolidating the new constitutional framework were just like those elsewhere in Europe.⁹⁹ In April 2011, the new Constitution was adopted; before the end of the year, cardinal laws implementing the new system, which targeted the Constitutional

⁹⁶ S. Andersen, *The Enforcement of EU law: The role of the European Commission*, Oxford, Oxford University Press, 2012; L. Conant, *Compliance and What EU Member States make of it*, in M. Cremona (Ed.), *Compliance and the Enforcement of EU law*, Oxford, Oxford University Press, 1-29; G. Halmai, *Second-grade Constitutionalism? The cases of Hungary and Poland*, CSF Working Paper Series, 1/2017.

⁹⁷ V. Orban's Declaration, June 9, 2009.

⁹⁸ G. Skapska, *The Decline of Liberal Constitutionalism in East Central Europe*, in P. Wihalemm - A. Masso - S. Opermann (eds.), *The Routledge International Handbook of European Social Transformations*, London, 2018, 134; K. L. Scheppele, *Autocratic Legalism*, *University of Chicago Law Review*, 2018, 549-550; L. Pech -K.L. Scheppele, *Illiberalism within: Rule of Law Backsliding in the EU*, 19 *Cambridge Yearbook European Legal Studies* 3, 2017.

⁹⁹ Hungary transformation into an autocratic regime has proceeded step by step. In February 2011 still, Hungary requested an opinion by the Council of Europe on the incorporation of the EU Charter of Fundamental Rights in the Constitution to be enacted. The Venice Commission, however, decided against. See Council of Europe-Venice Commission, March 17, 2011, Opinion no. 614/2011.

Courts, followed by others that jeopardized academic freedom,¹⁰⁰ the central bank, the data protection organ and the judiciary.

Specifically, by lowering the retirement age from 70 to 62 with immediate effect, the Hungarian government forced the departure of the most senior one tenth of the judiciary, including one quarter of the Supreme Court judges and one half of the Appeal Court presidents. The government then replaced these senior judges with judges of its own choosing, using a new legal procedure that put the choice of such judges into the hands of the president of a new institution, the National Judicial Office.¹⁰¹ The EU did not remain passive when confronted with these changes. While the issues regarding the academic freedom and the independence of the central bank have been resolved by negotiations, the Commission initiated infringement procedures against Hungary with respect to the replacement of the Hungarian Data Protection commissioner,¹⁰² and the measures lowering the compulsory retirement ages for judges.¹⁰³ With regard to the judiciary case, the Commission used the Anti-Discrimination Directive¹⁰⁴ as a legal ground for bringing Hungary before the CJEU. The Commission won the case – on the request of an expedite judgment –, and Hungary complied with the ruling by amending the relevant law on the judiciary,¹⁰⁵ setting a new uniform retirement and allowing for the re-instatement of the unlawfully retired judges, unless their position had been filled in the meantime. For judges who did not ask for reinstatement, compensation was provided. In the case of the data protection, the scheme was the same: the Commission invoked the violation of the Data Protection Directive and won the case,¹⁰⁶ Hungary then gave compensation to the former commissioner and appointed a new one.

Is it possible to say that the Hungarian rule of law crisis has been successfully resolved through the use of infringement procedures? Indeed, the legislation has been re-shaped in accordance to the EU legislation and the judges who asked for reinstatement have been

¹⁰⁰ European Commission, “Hungary: Commission takes legal action on Higher Education Law and sets record straight on ‘Stop Brussels’ consultation” Daily News MEX/17/1116, April 26, 2017.

¹⁰¹ According to the Council of Europe, this reform amount to a severe threat to the separation of powers. See Council of Europe-Venice Commission, October 15, 2012, Opinion no. 683/2012.

¹⁰² CJEU, C-288/12 *Commission v. Hungary*, April 8, 2014.

¹⁰³ Act XX of 2013 amending Act CLXII of 2011

¹⁰⁴ Council Directive 2000/78, November 27, 2000.

¹⁰⁵ CJEU, C-286/12 *Commission v. Hungary*, November 6, 2012.

¹⁰⁶ Council Directive 95/46, November 24, 1995.

treated accordingly; the same for the Data commissioner. However, there is a perception of a catch. The situation is even more complicated since both parties in the struggle, the Commission and the Hungarian Government, claimed a victory.¹⁰⁷ The question at stake here is whether the infringement procedure could and should be used in a similar rule of law crisis, as well as its benefit and its limits.¹⁰⁸ With regard to the first point, there should no be doubt. The Treaties do not restrain the CJEU jurisdiction over values such as the rule of law: indeed, Article 19 TEU provides general jurisdiction to the CJEU.¹⁰⁹

There are explicit restrictions instead, for example in the Common Foreign and Security Policy,¹¹⁰ or with respect to the Article 7 TEU procedure, where the Court has no role to play. Nonetheless, Article 7 TEU does not exhaust the scope of the application of Article 2 TEU and the values therein contained: the Commission has expressly listed infringement procedures as rule of law tools before invoking Article 7.¹¹¹

With regard to the concrete use of the tool, infringement procedures are the classic method of enforcement of EU law, and so they should be considered the tool *par excellence* to make a State comply with the rule of law. The Commission, as guardian of the Treaties, is the main institution on the front lines of enforcement. The main mechanism that the Commission has at its disposal to enforce specific EU obligations is indeed the infringement procedure. The object of the infringement procedure is to clarify the legal position to enable the Member States to stay on the path of legality,¹¹² and not to target the constitutional order of a State. Holding on to the current and stable EU rule of law is a substantial EU interest for the very respect of the rule of EU law.¹¹³ The fact that there had been an infringement is of substantive interest as a means of establishing the basis of a responsibility that a Member State can incur, as regards to other Member States

¹⁰⁷ D. Kochenov - L. Pech, Monitoring and Enforcement of the rule of law in the EU: Rhetoric and Reality, University of Groningen, Law Faculty, Research Paper n. 5/2016.

¹⁰⁸ L.W. Gormley, Infringement Proceedings, Oxford University Press, 2017, 65-78; Z. Sente, Challenging the Basic Values - Problems in the Rule of Law in Hungary and the Failure to tackle them, Oxford, Oxford University Press, 2017, 456-475.

¹⁰⁹ CJEU, C-658/11, *Parliament v. Council*, August 8, 2014, §70.

¹¹⁰ Article 275(2) TFEU.

¹¹¹ EU Commission, A new EU Framework to strengthen the Rule of Law, COM(2014)158 final.

¹¹² CJEU, C-7/71, *Commission v. France*, December 14, 1971.

¹¹³ CJEU, C-362/90 *Commission v. Italy*, March 31, 1992.

or private parties.¹¹⁴ Infringement procedures are discretionary, and the Commission is free to bring a case to the CJEU or not: the Commission can seize the initiative and bring the cases in the interest of the public order of the EU and this discretion enables it to choose to deal with the most egregious EU law violation alone.¹¹⁵ Another interesting feature of the infringement procedure is the possibility to speed-up the EU intervention by setting up a fast-track procedure¹¹⁶ and issuing interim measures¹¹⁷: they can be both of extreme importance for effectively halting ongoing rule of law crises, as the cases with Hungary and Poland respectively have demonstrated. Moreover, the infringement procedure is a long tested tool, and the Commission has historically made the best use of it: if the dispute goes to the CJEU, the Commission wins more than four out of five cases.¹¹⁸ In conclusion, it is a tested procedure capable to deliver results quickly and effectively.¹¹⁹

Having assessed the infringement procedure's theoretical and doctrinal feasibility for sanctioning rule of law violations, it is time to explore its limitations, referring to its use in the Hungary crisis. In the judgment of November 6, 2012, the CJEU found that the compulsory retirement of judges settled by the Hungarian law infringed EU Directive 2000/78 because it gave rise to a difference in treatment on grounds of age that was not proportionate.¹²⁰ Actually, the Hungarian Constitutional Court had already declared the judicial reform unconstitutional on July 16, 2012,¹²¹ but could not have impacted on Article 12 of the Transitional Provisions, which formed the legal basis for enacting the reform and falls outside the scope of its jurisdiction. Thanks to the CJEU judgment, the Hungarian Government could not circumvent the Constitutional Court ruling by simply

¹¹⁴ CJEU, C-39/72 *Commission v. Italy*, February 7, 1973, §11; C-309/84, *Commission v. Italy*, October 15, 1986, §18; C-103/84 *Commission v. Italy*, June 5, 1986, §9; C-240/86 *Commission v. Greece*, March 24, 1988, §14; C-119/00, *Commission v. Luxembourg*, June 21, 2001, §17; C-168/03 *Commission v. Spain*, September 14, 2004, §24.

¹¹⁵ Article 17(1) TEU.

¹¹⁶ Articles 133 - 136, Rules of Procedure of the Court of Justice.

¹¹⁷ Article 279 TFEU.

¹¹⁸ M. Schmidt - P. Bogdanowicz, *The Infringement Procedure In The Rule Of Law Crisis: How to Make Effective Use Of Article 258 TFEU*, *Common Market Law Review* 55, 2018, 1065.

¹¹⁹ EU Commission Communication, *EU law: Better results through better application*, 2017/C 18/02, January 19, 2017.

¹²⁰ M. Dawson - E. Miur, *Enforcing Fundamental Values: Eu Law And Governance In Hungary And Romania*, *Maastricht Journal of European and Comparative Law*, Vol. 19, 2012, 471.

¹²¹ Constitutional Court of Hungary, decision 33/12, VII/17.

over-constitutionalizing its reform (for example including it in the Basic law) since the principle of supremacy would nonetheless have declared it to be against EU law. The EU intervention, as the supreme law of the land, therefore added an extra value that the national organs could not guarantee. However, the limit of using the infringement procedure in this case consisted in its difficulty to grapple with a more extensive situation such as the Hungary one. Admittedly, although a lot of problems arose in connection with the constitutional changes, only a few of them led to the infringement procedure initiated by the Commission and, even in those cases, the claim referred to a limited set of deviations from EU law and did not engage the whole troubled situation of the rule of law. The infringement procedure has been constructed to pursue non-compliance on a case-by-case basis and is ineffective in sanctioning systemic threat. Particularly, the removal of judges by lowering the compulsory retirement age has not been regarded as a judicial independence issue – and so a rule of law problem –, but rather as a discrimination case based on age. In other words, it seems that the infringement procedure can address the issue of violation of Article 2 TEU only indirectly. In this regard, a general discontent emerged in academic literature because the EU has exclusively vindicated the rule of EU law and not the (EU) rule of law, that is to say, asking why Article 258 TFEU has been employed and not (yet) Article 7 TEU.

With regard to these two critical points, several commentators have argued for reinvigorating the infringement procedure and deviating from its ordinary infringement, identified in the combination of Articles 258-260 TFEU. These proposals included the resort to an infringement procedure led by a coalition of willing Member States against Hungary.¹²² An attempt in this direction could be seen in the joint letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands, to the Commission on March 6, 2013, asking for a stronger oversight on the rule of law. Another possible type of amendment has been identified in shaping the infringement procedure differently according to the concept of the systematic breach, in order to more effectively target this

¹²² D. Kochenov, *Biting Intergovernmentalism: The case for the reinvention of Article 259 TFEU to make it a viable rule of law enforcement tool*, 2015, 7 *The Hague Journal of the Rule of Law*, 153.

systematic crisis in the rule of law.¹²³ Here, the Commission should combine all infringements so as to present an entire package of non-compliance to the CJEU, which should be so much more meaningful than case by case instances.

Numerous simultaneous infringements, from a holistic perspective, amount to more than just the sum of them, and this should enable the Commission to present a clear picture of systemic non-compliance and to push for the adoption of a systemic remedy. A singular value, such as the rule of law, could be held to be violated on the basis of multiple but disomogenous breaches of EU law taken together, or where a complex pattern of developments testifies to a violation of EU values. A systemic infringement action would enable the Commission to signal to the CJEU a more general concern about deviation from the principles of Article 2 TEU than a single infringement action would allow. It would also have the advantage to put evidence of a pattern of violations before the CJEU so that the overall situation in a particular Member State is not lost in a flurry of singular infringement actions. The CJEU could then assume that the symptoms – the EU law violations – amount to a general disease and find a violation of Article 2 TEU. This proposal has been the one most discussed, also because it insists on an experienced practice of the Commission, namely the general and persistent infringement procedure. The CJEU has declared admissible infringement proceedings which relate to a string of specific incidents – which have been dealt in the administrative phase – and to a general approach by the national authorities to which the specific incidents testified, even when some of those incidents were not included in the proceedings prior to going to Court.¹²⁴ In this case, infringement is characterized as being “general and persistent” as well as “structural and general” – the two definitions are used interchangeably –,¹²⁵ which is characterized by a general practice of non-compliance that is also likely to keep recurring.¹²⁶ However, as the promoter of the systemic infringement procedure pointed

¹²³ K.L. Scheppele, What can the European Commission Do When Member States violate basic principles of the European Union? The case for systemic Infringement Action, in C. Closa and D. Kochenov (eds.) *Reinforcing the Rule of Law Oversight in the EU*, Cambridge, Cambridge University Press, 2016.

¹²⁴ CJEU, C-494/01 *Commission v. Ireland*, April 26, 2005, §27; C-248/05 *Commission v. Ireland*, October 25, 2007, §63-70; C-331/07 *Commission v. Greece*, April 23, 2009, §32.

¹²⁵ CJEU, C-135/05 *Commission v. Italy*, April 26, 2007, §45 and 22 respectively.

¹²⁶ CJEU, C-494/01 *Commission v. Ireland*, April 26 2005, §44.

out,¹²⁷ it should be distinct from the general and persistent infringement procedure, by the seriousness of the values involved and by the variety of the violations alleged, while the latter violation of a single source of EU law is proven by separate instances in the same pattern.

Another unresolved criticism of the use of infringement procedure, is the issue of compliance. The CJEU left open how Hungary should comply with its ruling. However, the case law clearly states that the sentenced Member States has to readdress its wrongdoings. The CJEU had declared that the aim of the Treaty is to achieve the practical elimination of infringements and the consequences thereof, past and future;¹²⁸ in case of infringement, the Member States are obliged to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued.¹²⁹ If the compliance is not ensured, it is possible to resort to the penalties. Indeed, it is plainly accepted that the breaches to the rule of law have to be sanctioned in accordance with the EU rule of law landscape.¹³⁰

The procedure at Article 260(2) TFEU exactly concerns a Member State failure to fulfill obligations that the Court has declared “well founded.”¹³¹ Apart from the case of belated transposition of Directives (Article 260(3) TFEU), the ordinary mechanism needs a previous judgment of infringement of EU law in order to implement the sanctions. Article 260(2) TFEU must be interpreted in the light of the judgment it spurs from, addressing why and to which extent the national rules are not compatible with the EU law. This interpretation requires an integral compliance with the rule of law as established by the judgment; as provided by Article 4(3) TFUE, the competent authorities must indeed ensure that the States is in compliance with EU law as before the infringement has happened. This includes setting aside the measure incompatible with EU law, allowing beneficiaries under EU rules to obtain their rights and reparation of loss and damages suffered. A judgment declaring that national rules are discriminatory may at the same time constitute grounds for sanctioning insufficient legislative amendments as well as the

¹²⁷ K. L. Schepple, *Constitutional Coups in EU law*, in M. Adams - A. Meuwese - E. Ballin, *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, Cambridge University Press, 2017, 469.

¹²⁸ CJEU, C-70/72 *Commission v. Germany*, July 12, 1973.

¹²⁹ CJEU, C-6/60 *Humblet v. Belgium*, December 16, 1960.

¹³⁰ CJEU, C-340/02 *Commission v. France*, October 14, 2004.

¹³¹ CJEU, C-457/07 *Commission v. Portugal*, September 10, 2009.

insufficient application of the amended rules. Member States may incur sanctions for failing to nullify the unlawful consequences of an infringement¹³², such as ensuring rights which have been nullified,¹³³ providing redress for traders affected by an unlawful product scheme,¹³⁴ rescinding public contracts contrary to EU legislation,¹³⁵ or cleaning up illegal waste sites.¹³⁶

Resorting to the general and persistent infringement procedure could be particularly useful for closing this gap and ensuring that the compliance invest look like situations. The combination of general and persistent infringement and penalty payment was clearly established in the case regarding the conflicted Italian waste site. Notably, the Commission brought proceedings under Article 260(2) TFEU on the grounds that Italy had failed to close and clean up illegal sites, although not necessarily restricted to the ones that have been identified in the first infringement case. The Court precisely noted that the sites must instead be regarded as necessarily encompassed by the general and persistent failure to fulfill obligations established in the first action brought under Article 267 TFEU. Furthermore, the characterization is not only due to the character of the infringement, but also to the needed shaping of the remedy, as a situation of non-compliance can only be redressed by a revision of the general practice of the Member State in respect of the subject governed by the EU measure involved. After all, restricting the remedial action to identified cases of non-compliance would leave other situations of non-compliance intact until they too would be identified and challenged.¹³⁷ The main criticism of this theorization is that the CJEU has noted that the penalty payments stop when the law in question is repelled; whether the amended legislation achieved the result required by EU law has to be addressed in a new infringement procedure.¹³⁸ However, it is noteworthy that the matter of the procedure under Article 260(2) TFEU is not the original infringement, but whether the Member States failed to take the necessary measures to comply with the judgment declaring that infringement. Therefore, the procedure

¹³² CJEU, C-180/04 *Vassallo v. Azienda Ospedaliera*, September 7, 2006.

¹³³ CJEU, C-119/04, *Commission v. Italy*, July 18, 2006.

¹³⁴ CJEU, C-457/07 *Commission v. Portugal*, September 10, 2009.

¹³⁵ CJEU, C-503/04 *Commission v. Germany*, July 18, 2007.

¹³⁶ CJEU, C-196/13 *Commission v. Italy*, December 2, 2014.

¹³⁷ CJEU, C-494/01 *Commission v. Ireland*, April 26, 2005.

¹³⁸ CJEU, C-292/11 *Commission v. Portugal*, January 15, 2014.

necessarily concerns facts and law other than the ones in the previous infringement procedures.¹³⁹ The enforcement procedure against Hungary, following a systemic infringement procedure, could therefore also involve rule of law violations that had not been timely identified in the first procedure but belong to the same systematic threat to Article 2 TEU.

From this perspective, the general and structural/persistent infringement procedure – and the proposed systemic infringement procedure as well – could also have another advantage. There is a substantial connection between a general and persistent infringement and a serious and persistent breach of Article 7 TEU: an infringement procedure for a general and structural breach may provide a strong enough trigger to persuade a sufficient number of Member States, Parliament or the Commission to invoke Article 7 TEU and thereby attain a strong legal basis at the moment of evaluation by the Council or the EU Council. A finding of an Article 2 TEU violation – and the activation of Article 7 TEU – is unlikely to be made separately from an infringement of a concrete obligation expressed in EU law. However, it is possible to start an infringement procedure that, if not respected, may lead to the finding of a violation of Article 2 TEU. The infringement would then be evident and would allow resorting to Article 2 TEU in any exceptional case where the Member States does not follow the rule of EU law as sanctioned in the infringement procedure.

The state of affairs in Hungary is still rather problematic and, in a certain way, shocking for the EU.¹⁴⁰ The EU institutions realized that, even with rules and measures that openly defy pillars of the rule of law such as judicial independence or effectiveness of authorities' control, there is not much to be done when they do not fall within the scope of EU law action. Besides, even worse, the EU law scope of action is greatly limited here, since there exists little EU legislation on these issues. Even when the Commission is able to find a legal basis – such as the Anti-Discrimination Directive –, there is bitterness not only vis-

¹³⁹ CJEU, C-526/08 *Commission v. Luxembourg*, June 29, 2010.

¹⁴⁰ Actually, it is possible to activate Article 7(2) TEU directly without the previous preventive mechanism having been used. Actually, Articles 7(1) and 7(2) are separate and different mechanism responding to different rule of law crises, or to different levels of the same rule of law crises. Thus, there is no issue of retroactive application. Hungary could be still targeted directly through the most invasive tool of Article 7(2) TEU. Commission Communication to the Council and the European Parliament on Article 7 of the TEU “Respect for and promotion of the values on which the Union is based” COM(2003) 606 final, 4.

à-vis the ground itself, since it is clear that the underlying problem is the independence and not the discriminatory age, but also the full compliance with what the EU intended to be restored. The lesson that the EU institutions learnt was twofold. On the one hand, similar constitutional changes realized by legal means – if a Government abuses their power of legislating or enforcing the law – should be tackled from the very beginning, before their escalation and before the tools available are only black-law letter, such as the infringement procedure. Therefore, pre-contentious tools should be adopted or molded for constructing oversight over and a dialogue with the affected Member States. On the other hand, the infringement procedure may resolve some cases but for the most egregious rule of law violations, Article 7 TEU should be dusted off and employed. This idea has dominated the case of Poland and, after that, during the development of this article, it made it easier for EU Parliament to do the same against Hungary itself.¹⁴¹

1.7. The activation of the rule of law framework and Article 7 TEU against Poland: towards a preventive or sanctioning mechanism.

The Polish rule of law crisis escalated quickly and unexpectedly. The Law and Justice party (Pis), led by Jaroslaw Kaczynski, won the parliamentary election in October 2015.¹⁴² The Law and Justice party has a similar ideological background to Fidesz and aims to emulate it, but it lacked the overwhelming majority the former enjoyed in National Parliament. Therefore, in order to reshape the constitutional order towards an authoritarian one, the Polish Government mainly acted by disregarding the legal framework.¹⁴³ The newly appointed President of the Republic, from the Law and Justice party, refused to swear in the new member of the Constitutional Court, nominated by the former Parliament,¹⁴⁴ replacing them with five other judges appointed by the newly

¹⁴¹ European Parliament resolution of September 12, 2018, on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))

¹⁴² During the national elections of October 27, 2015, the PiS obtained 37.5 percent of votes, getting a majority of 5 seats in Parliament.

¹⁴³ The PiS, also taking in account its previous experience in governments, did not waste time in putting its purposes in action: all the radical projects were initiated at the very beginning of the term.

¹⁴⁴ On October 8, 2015, Parliament elected five new judges, rather than only three, to positions that became vacant during the parliamentary term. Electing those two extra judges was clearly improper, as subsequently stated by the Constitutional Court (December 3, 2015, K34/15), but electing the three judges was correct, because the vacancies fell on November 6, while the first day of the new term of the new

elected Parliament.¹⁴⁵ Consequently, the Constitutional Court could not perform its duties anymore in its due composition. The refusal of the President to swear in the elected judges correctly violated the Constitution that does not give the President any such role in designing the composition of the Constitutional Court. Another clash between the powers happened when the Government refused to publish the Constitutional Court Decisions, whereby making them ineffective, since the binding value of the Decisions is linked with their publication.¹⁴⁶

Here too there was a flagrant violation of the law, since the Government broke the Constitution rule of Article 190(2), which demands that Government publishes judgments immediately, and which does not give it any power over controlling the judgments submitted for publication. In addition to these clear violations of the law, the Government also adopted new legislation, formally within its competences, regarding the Constitutional Court's composition¹⁴⁷ and function,¹⁴⁸ the appointment of the National Council of Judiciary,¹⁴⁹ the organization of ordinary courts,¹⁵⁰ and the retirement age for

Parliament was November 12. The new Parliament adopted a Resolution on November 25, 2015, according to which all five, including the 3 correctly elected, were elected irregularly, and so the elections of all five were null and void. On that basis, on December 2, 2015, it elected five new judges. The situation became even more dramatic when, on October 24, 2017, K1/17, the Constitutional Court, now also composed of the unlawfully elected judges, struck down judgment K34/15 by reinterpreting it - mainly assessing that the constitutive moment of the appointment relies on the swearing-in by the President - and then legitimizing the unlawfully elected judges. At last, the three lawfully elected judges were removed from judging for an indefinite period of time (Minister of Justice Motion of January 11, 2017). Thus, the Government not only dismantled the Constitutional Court's control, but it turned it into an active aide in its strategy. See W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Legal Studies Research paper 18/01, January 2018, 19-22; 31-33.

¹⁴⁵ Constitutional Court, December 5, 2015, K35/15, that declared unconstitutional the law of November 19, 2015, according to which the three extra judges had been elected by the new Parliament.

¹⁴⁶ Particularly after the Judgment of March 9, 2016, K47/15, which struck down the newly adopted constraints to the Constitutional Court's scope, composition and activity of law December 22, 2015, Government deliberated that all Constitutional Court Judgments delivered in violation of that law could not be published in the official gazette. As Sadurski notes, the Government refused to publish the Judgments handed down in violation of a statute, which was invalidated in the very Judgment that the Government refused to publish. Over time, the judgments were published, except for the judgment of March 9, 2016, K47/15, which limited the Court's powers. See W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Legal Studies Research paper 18/01, January 2018, 29.

¹⁴⁷ The series of law provisions which have been adopted for preventing the work of Constitutional Court may be divided into three groups: provisions which exempt new laws from constitutional control or delay them (e.g. Art. 1(12)(a) law December 22, 2015); provisions which paralyze a Constitutional Court's judicial Decision (e.g. Art. 1(3) law December 22, 2015); provisions which reinforce the Government's control over the Constitutional Court (Art. 1(5) law December 22, 2015).

¹⁴⁸ Act December 22-28, 2015.

¹⁴⁹ Act December 15-18, 2017.

¹⁵⁰ Act July 24-26, 2017.

Supreme Court judges,¹⁵¹ all in order to restrain the judicial controls over the Government. Confronted with these dramatic and systemic violations of the rule of law – to the extent to doubt about the existence of the rule of law in Poland –,¹⁵² the EU activated its most relevant tool for this kind of situation, namely Article 7 TEU. However, before arriving at this important step, the EU first resorted to a less invasive tool, be it for a deliberate purpose or on account of a shameful underestimation of the situation.

In the 2013 State of Union address, the President of the Commission called for a new tool that would fill the space between the infringement procedure provisions and the activation of the tool for protecting EU values.¹⁵³ In November 2014, the First Vice-President of the European Commission in charge *inter alia* of the rule of law was appointed, as evidence of the fact that the issue of EU rule of law compliance has gained importance for the EU. In 2014, a new tool, the Rule of Law Framework, has been adopted.¹⁵⁴ This Act does not allow for enacting binding measures: it serves as a preventive measure to the mechanism provided at Article 7 TEU in its preventive and sanctioning provisions.¹⁵⁵ The Rule of Law Framework targets the same issues at Article 2 as Article 7, but where it is not yet possible to assess the existence of neither a “clear risk of a serious breach” nor a “serious and persistent breach”. The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systemically affect the proper functioning of the institutions and the safeguard mechanisms established at a national level to secure the rule of law.¹⁵⁶ The Rule of Law Framework is a relevant tool, in the arsenal of the EU tools, for being a Commission-centered act.¹⁵⁷ Differing from Article 7 TEU, where the Commission only has the right to activate the preventive and sanctioning mechanism, here the Commission may initially send the Member State concerned an early warning and then engage in a dialogue towards the resolution of the crisis. The tool has the effect

¹⁵¹ Act December 8-15, 2017.

¹⁵² W. Sadurski, How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding, Legal Studies Research paper 18/01, January 2018, 30.

¹⁵³ EU Commission, State of the Union Address, European Parliament, Speech/12/596.

¹⁵⁴ EU Commission, A New Eu Framework to strengthen the Rule of Law, COM(2014), 158 Final.

¹⁵⁵ D. Kochenov - L. Pech, Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation, Journal of Common Market Studies, 2016, 54/5, 1062-1074.

¹⁵⁶ Rule of law Framework, §4.1.

¹⁵⁷ Editorial Comments, Safeguarding EU values in the Member States – Is something finally happening?, Common Market Law Review 52, 2015, 619–628.

of an early warning, the purpose of which is to enable the Commission to dialogue with the Member State and its oversight is hoped to put it back on the rule of law path. The dialogue is composed of three steps: first, the Commission adopts a rule of law opinion regarding indications of a systemic threat to the rule of law; if the Member State does not take actions to resolve the situation, the Commission adopts rule of law recommendations with specific indications; if there is no satisfactory implementation, as monitored by the Commission, it can resort to Article 7 TEU.¹⁵⁸ For this reason, the Rule of Law Framework has been inserted in the context of Article 7 TEU and labeled a pre-Article 7 procedure.¹⁵⁹ It resolves the main problem that affects Article 7: achieving unanimity. Moreover, the new tool has also muted the perception about Article 7 TEU from an unrealistic option to something that the EU is prepared for and for which the Commission follows a set of norms, which clarify how it will proceed before exercising its power in Article 7 TEU. The tool is of particular relevance to offer a working definition of the notion of the rule of law in the EU by structuring it on the existence of a consensus on the core meaning of the rule of law - which is composed of compliance with the six requirements of: 1) legality, as the process for enacting law; 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) equality before the law.¹⁶⁰ While the precise content of these requirements may vary from country to country, these requirements are common in respect of the Member States' constitutional system, which is safeguarded as a EU value, and found the rule of law of the EU institutions and Member States, truly forming a EU conception of the rule of law.¹⁶¹

The mechanism has been criticized for being non-compatible with the principle of conferral of Article 5(2) TEU.¹⁶² However, as it is easy to observe, the Commission, being

¹⁵⁸ Rule of Law Framework, §8.

¹⁵⁹ The adoption of this tool has also been made necessary by the crisis of Poland and Hungary together, making impossible the activation of Article 7(2), which requires unanimity in the EU Council, since, as Hungary declared, one government will sustain the other against the proposed sanction. See K.L. Scheppele, *Constitutional Coups and Judicial Review*, *Transnational Law & Contemporary Problems*, 23, 2014, 51-117.

¹⁶⁰ EU Commission, *Communication to the European Parliament and the Council, A new Framework to strengthen the Rule of Law*, COM(2014) 158 Final, 11 March 2014, §2.

¹⁶¹ And here, it is clear that the Rule of Law Framework is entirely different in nature from the Council Dialogue: the purpose of the Rule of Law Framework is strengthening the rule of law and to resolve future threats to the rule of law before activating the Article 7 mechanism; in contrast, the Council has established a dialogue to promote a culture of respect to the rule of law that is a tantamount to a sociological perspective.

¹⁶² Council, *Legal Opinion n. 10296/12*, May 14, 2014, §5.

the institution empowered to invoke the relevant tool under Article 7 TEU, has not exceeded its power in adopting a guideline which explains and structures the use of this power. Following the dialogue with the Polish authorities started on January 13, 2016, the Commission adopted a Rule of Law Opinion on June 1, 2016. The Rule of Law Opinion has identified the matters of relevance as mainly the lack of implementation of the Judgments of the Polish Constitutional Tribunal of December 3 and 9, 2015, and the failure to publish and implement the Judgment of March 9, 2016.

Shortly after, on July 27, 2016, the Commission adopted Recommendation 2016/1374 regarding the rule of law in Poland.¹⁶³ The Recommendation explained the circumstances and the grounds on which the rule of law Opinion had been made and the steps to follow. In compliance with the Rule of Law Framework, after the adoption of the rule of law Opinion and the Recommendations 2016/1374, the Commission adopted two other Recommendations, 2016/146¹⁶⁴ and 2017/1250,¹⁶⁵ and of course had numerous informal meetings with the Poland authorities, in the attempt to block the escalation of the degradation of the rule of law in Poland. Particularly in the third Recommendation, the Commission clearly stated that, should the Poland authorities hold its course, the Commission stood ready to activate Article 7(1) TEU. In the meantime, the Poland Government kept going in enacting laws for restraining the judiciary control¹⁶⁶ and the now controlled Constitutional Court. The constitutionality of the statutes that were adopted by the Government was declared in panels including the unlawfully elected judges.¹⁶⁷ On December 20, 2017, the Commission at last adopted a reasoned proposal on

¹⁶³ EU Commission, Recommendation 2016/1374 of July 27, 2016, regarding the rule of law in Poland (OJ L 217, 12.8.2016).

¹⁶⁴ EU Commission, Recommendation 2016/146 of December 21, 2016, regarding the rule of law in Poland complementary to Recommendation 2016/1374 (OJ L 22, 27.1.2017).

¹⁶⁵ EU Commission, Recommendation 2017/1520 of July 26, 2017, regarding the rule of law in Poland complementary to Recommendation 2016/1374 and 2017/146 (OJ L 228, 2.9.2017).

¹⁶⁶ The Commission observes that, within a period of two years, more than 13 consecutive laws have been adopted, affecting the entire structure of the justice system in Poland: the Constitutional Tribunal, the Supreme Court, the ordinary Courts, the Council for the Judiciary, the prosecution service and the National School of Judiciary. The common pattern of these legislative changes is that the Government has been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put the independence of the judiciary and the separation of powers, which are key components of the rule of law, at serious risk in Poland. EU Commission, Reasoned proposal in accordance with article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, Brussels, 20.12.2017, §173.

¹⁶⁷ The unlawful appointment of the President of the Constitutional Tribunal, the admission of the three judges nominated by *Sejm* without a valid legal basis, the fact that one of these judges has been appointed

the determination of a clear risk of a serious breach of the rule of law by Poland, invoking Article 7(1) TEU for the first time since its inception.¹⁶⁸ The Commission recommended that the Republic of Poland would take the following actions within three months after notification of this Decision: restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed; by fully implementing the judgments of the Constitutional Tribunal of December 3 and 9, 2015, which required that the three judges that were lawfully nominated in October 2015 by the previous legislature take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected; and publish and fully implement the judgments of the Constitutional Tribunal of March 9, 2016, August 11, 2016 and November 7, 2016.¹⁶⁹ The preventive mechanism is triggered by a submission of a reasoned proposal to the Council by the Commission, as happened here, the European Parliament, or by one third of the Member States. The Council may decide that a clear risk exists by a majority of four-fifths of its members and with the consent of EU Parliament. However, it should first hear the Member State concerned, and possibly address recommendations.¹⁷⁰

In the present situation, the Committee of the Regions¹⁷¹ and the European Parliament¹⁷² – with a resolution that should be distinguished from the one eventually allowing the

as Vice-President of the Tribunal, the fact that the three judges that were lawfully nominated in October 2015 by the previous legislature have not been able to take up their function of judge in the Tribunal, as well as the subsequent developments within the Tribunal described above have *de facto* led to a complete restructuring of the Tribunal outside the normal constitutional process for the appointment of judges. For this reason, the Commission considered that the independence and legitimacy of the Constitutional Tribunal are seriously undermined and, consequently, the constitutionality of Polish laws can no longer be effectively guaranteed. The Judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review. EU Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, Brussels, 20.12.2017, §57-1.

¹⁶⁸ EU Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, Brussels, 20.12.2017, COM(2017) 835 final, 2017/0360 (APP).

¹⁶⁹ EU Commission, Reasoned proposal in accordance with article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, 42, (a); (b).

¹⁷⁰ Article 7(1) TEU.

¹⁷¹ EU Committee of Regions, Determination of a serious risk of a clear breach by Poland of rule of law, 22 February 2018, RESOL-VI/30,6391/18.

¹⁷² EU Parliament, Resolution on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland, March 1, 2018, 2018/2541(RSP).

Council Decision – have swiftly greeted the Commission initiative and urged the Council to take action. The sanctioning mechanism, instead, provides that the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission, and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the rule of law, after inviting the Member State in question to submit its observations.¹⁷³ When this determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State concerned, including the voting rights of the Member State in the Council.¹⁷⁴ It is important to highlight what the determination of a serious and persistent breach is, independent from the one declaring a clear risk; the decision to impose sanctions is, also logically, fully dependent on the determination of a serious and persistent breach. The Commission's concerns regard the adoption of new legislation regarding the judiciary by Poland, which undermined the judicial independence.

Especially, on the one hand, the series of acts which interfered with the Constitutional Court's activity and composition, and on the other hand, the law on the Supreme Court of December 15, 2017; the law on Ordinary Courts Organization of July 28, 2017; the law on the National Council for the Judiciary of December 15, 2017; the law on the National School of the Judiciary of June 13, 2017.¹⁷⁵ Since there is no previous experience with the application of Article 7, the reasoning about its content has to be done considering the preliminary tools such as the Rule of Law Framework, the Recommendations and the proposal for the Council Decision; all in all, it adds up to a lot.

First and foremost, the EU initiative against Poland has a clear foundation: the EU rule of law also contains the rule of national law; in this case Polish law. The Commission was particularly worried about the fact that binding rulings of the Constitutional Tribunal were not respected, which is a serious matter in any rule of law-dominated state.¹⁷⁶ The other criticisms, such as on the actions that undermine the legitimacy of the judiciary,

¹⁷³ Article 7(2) TEU.

¹⁷⁴ Article 7(3) TEU.

¹⁷⁵ EU Commission, Reasoned proposal in accordance with article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, 42, (c).

¹⁷⁶ Readout by First Vice-President Timmermans of the College Meeting of January 13, 2016.

were side issues: the most important issue repeated everywhere as the main concern, is that States must obey the law as established by their own rule of law. Indeed, in all three Recommendations, as well as in the reasoned proposal (§93), the Commission states that the judges elected according to the law should be reinstated, while the ones unlawfully elected should no longer be part of the Constitutional Court. Simply put, it has to apply the national law as it is provided, and to undo the Government's choice to partisan choice against the rule of law. In the same way, the Commission states that the judgments of the Constitutional Court are unconditionally binding and as such must be published (§98); the refusal of the Government to publish them is a serious concern in respect of the rule of law, as compliance with a final judgment is an essential requirement inherent in the rule of law, while any control over them by the State authority is incompatible with it (§100).¹⁷⁷

Thus, there is no reference to any EU law provision, but rather to the abstract, grandiose and general rule of law ideal itself, which the Commission takes upon itself to control. And the message of the rule of law is to obey the law as it is, sanctioning its violation or circumvention. Furthermore, as highlighted in the second recommendation, the appointment of the President of the Constitutional Court represented a serious rule of law issue (§104). This appointment was led by an acting President whose designation was in violation of the principles of the separation of powers and the independence of judiciary, which constitute pillars of any rule of law conception. The following actions regarding the Constitutional Court's composition and functions are all based on violation of these principles that have made the Constitutional Court in Poland irregular and a danger to the rule of law itself, rather than one of its guardian (§105; §109). The other concerns (§§ 115 and following) regard other troublesome issues in the rule of law, but carried out through legal means, which amount to rule of law violations according to their systematicity and the cumulative effects.

The Commission highlights that these rule of law violations through laws systemically represent a threat to the rule of law. That is to say, taken separately, they are only a matter of suspicion, whereas only their combined effect represents a violation, differently from

¹⁷⁷ T.T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: of Institution(s), Fidelities and the Rule of Law in Flux*, *Review of Central and East European Law* 43, 2018, 122.

the other Government actions which were *per se* against to the rule of law, in its pillar of obey the law and separation of powers (§175).

They seem to be side issues in respect to the more flagrant rule of law violation of acting with clear disregard for the existing law and annihilating the rule of law principles. It should therefore come as no surprise that the Commission is of the opinion that the situation in Poland represents a clear risk of a serious breach of the rule of law, as described in Article 2 TEU (§172). Moreover, as pointed out later (§180(3)), respect of the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU, it is also a prerequisite for upholding all rights deriving from the Treaties and for establishing mutual trust between citizens, corporations and national authorities in the legal system of all Member States, also with regard to the Internal Market, justice, home affairs and judicial cooperation (§180.3) The rule of law emerges as the main EU concern and the main values among the many of Article 2 TEU: because it is a value *per se* (being part of Article 2 TEU); because it protects the other ones of Article 2 TEU; lastly, because it characterizes the EU legal order, being the *raison d'être* of the EU as an international organization *sui generis*. It appears that rule of law systems are not threatened by individual or isolated infringements.¹⁷⁸ Article 7 TEU procedure is reserved for those “systemic” cases, which are likely to systemically and adversely affect the integrity, stability or proper functioning of the institutions at a national level to secure the rule of law. The EU Commission observes what does not function in Member States from an institutional point of view, in ensuring that the rule of law is enforced. The EU actions principally refer to the central position of the Constitutional Tribunal within the Polish judicial system, the situation of which is at risk of leading to an emergence of a systemic threat to the rule of law. To reach this serious conclusion, the Commission has monitored Poland for more than two years, registering at least 13 consecutive laws or initiatives that, in their combined effects, have led to this situation (§173): the common pattern of all these actions is that there has been a systematic decrease of the rule of law by the Government. It seems reasonable to ask why, confronted with the blatant violations of the rule of law in the Polish case, the employment of Article 7 TEU has taken so long. There have been

¹⁷⁸ Communication from the Commission of March 11, 2014, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, §6.

good reasons for the general reticence to use Article 7 TEU. First, it is a blunt instrument (even in preventive version at Article 7(1) TEU) in a community more based on integration than sanctioning. Voting against a fellow Member State (and votes by other member states in the Council) is politically costly and may easily be portrayed as hostility towards the nation itself, rather than *vis-à-vis* the Government of the State concerned. As a matter of fact, it is a political instrument in a community deeply legalized, where legal remedies are more privileged than political ones.

It is true that the Treaty demands respect of Member States' national identities inherent in fundamental structures, political and constitution,¹⁷⁹ thus imposing certain constraints upon a collective call to action for a Member State to align with EU constitutional values. However, Article 2 TEU values are not replicated in Article 4(2)'s features of "national identities": democracy, human rights, the rule of law and other values listed in Article 2 TEU are said to be "common to the member States" and as such, do not belong to the scope of features covered by separate "national identities." As pointed out by the Commission (§182), Member States are free to organize their justice system, including on establishing a Council of the Judiciary or not and the degree of constitutional courts' review. However, the purpose they serve, such as the independence of the judiciary, the separations of powers, should be commensurate with the EU standards of the rule of law. That is why the laws adopted do not represent a danger *per se*: they represent a danger when they blatantly undermine the purpose they serve, such as when the law is simply disregarded, or through a cumulative effect, such as by consecutive laws that dismantle the judiciary. Thus, the request of the Commission to the Council, is to declare the clear risk of a serious breach of the rule of law and for Poland to implement the judgment of December 3 and 9, 2015, and to publish and implement those of March 9, 2016, August 11, 2016, and November 7, 2016, since the Polish actions have simply defied this request. With regard to the various laws on the judiciary, which only cumulatively and systemically represent a breach of the rule of law, the request is to amend them in order to ensure the purpose of the independent judicial system. That is to say, Member States are indeed free

¹⁷⁹ Article 4(2) TEU.

to regulate judicial activity and functions, yet the law is to be obeyed and the law should provide a certain procedural guarantee in a rule of law system.

2. Twenty Years Of EU Reasoning On The Rule Of Law: What Of It?

This analysis of the rule of law tools employed against Member States by the EU over almost twenty years has sketched a landscape of unlawful practices that the EU institutions try to arrest, in different ways with different outcomes. Even recognizing that a particular tool had been developed with regard to a particular situation – and sometimes to particular national legal systems, such as the CVM –, there nonetheless appears a common and univocal pattern of practices which the EU condemns, as well as a policy and tools that target certain, and not others, undesired practices. This pattern encompasses rule of law crises that share three characteristics: they refer to violations of a “thin” rule of law concept (§ 2.1); they refer to a certain “corruption” in the fabric of the law (§ 2.2); and, last, they are “systemic” (§ 2.3). In other words, the EU activates its rule of law tools when a Member State is systemically corrupt in law-making or law-enforcing, deviating from certain rule of law parameters. The fact that all these three characteristics are represented between brackets testifies that it is not easy to pinpoint the nature of the crisis – as numerous authors acknowledged –, and that multiple and differing factors operate at the same time. A certain vagueness remains, not just in the violation but, foremost, in what is violated.

2.1 The “thin” conception of the rule of law in the EU.

Is it possible to define the rule of law or, more modestly, give an account of it in the EU legal order?¹⁸⁰ Since the end of Cold War, national governments and international organizations, regardless of the nature of their political regimes, have been supporting the rule of law ideal at least formally.¹⁸¹ At a first glance, the concept of the rule of law in

¹⁸⁰ D. Kochenov - G. De Burca - A. Williams (eds.), *Europe’s Justice Deficit*, Oxford, Hart Publishing, 2015; P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State*, Oxford University Press, 2010; B. Tamanaha, *On the rule of Law: History, Politics, Theory*, Cambridge University Press, 2004; T. Bingham, *The Rule of Law*, London, Penguin Books, 2010; M. L. Fernandez Esteban, *The Rule of Law in the European Constitution*, The Hague, Kluwer Law International, 1999; J.H.H. Weiler, *The Constitution of Europe*, Cambridge University Press, 1999.

¹⁸¹ P. Cane, *Theory and Values in Public Law*, in P. Craig - R. Rawlings (eds.), *Law and Administration in Europe: Essays in the Honor of Carol Harlow*, Oxford, Oxford University Press, 3-4.

the EU could seem a “thick” or substantial one, wherein the rule of law is informed by a material content and, particularly, human rights.¹⁸²

Actually, it was this conception of the rule of law that emerged from World War II as a binding agent and common perspective among the founding Member States.¹⁸³ Furthermore, for the newest EU Members States, it was one of the pillars of the constitutional and political transformation they undertook.¹⁸⁴ According to this conception, the rule of law in the EU would be meaningless if separated from human rights, and democracy and constitutionalism probably as well. A “thin” or formal conception of the rule of law,¹⁸⁵ by contrast, would include everything and exclude nothing.¹⁸⁶ On the one hand, it would be another name for modernity, or for societies ruled by law, which is the most common situation in most States and, therefore, it would have no informative value. On the other hand, the best outcome would simply be an account of the rule of law, which it is exactly the situations of authoritarian regimes the EU aims to fight.

This theory, despite having a considerable support, seems irrespective of certain rule of law values and needs. Before entering into further detail, however, a misunderstanding should be cleared up. Sustaining that the rule of law is separate from human rights, democracy and constitutionalism does not mean that all these values have nothing in common, nor does it mean at all that the EU does not care about them. It simply means that the rule of law, human rights, democracy and constitutionalism are separate items: close enough to be part of the same constellation, but still different stars.¹⁸⁷ Together, they compose a political constellation that represents the common features of the Member States and the EU itself to different degrees.

¹⁸² T. Bingham, *The Rule of Law*, London, Penguin, 2010; R. Dworkin, *Law's Empire*, 1986, 15-20.

¹⁸³ J.H.H. Weiler, *Epilogue: Living in a Glass House*, in C. Closa - D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, 315-317.

¹⁸⁴ W. Sadurski, *Adding a Bit to a Bark? A Story of Article 7, the EU Enlargement, and Jorg Haider*, *Legal Studies Research Paper No 10/01*, Sydney Law School, University of Sydney, January 2010, 2.

¹⁸⁵ J. Rawls, *A Theory of Justice*, Harvard University press, 1999, 206-213; J. Raz, *The rule of law and its virtue*, in *The Authority Of Law: Essays On Law And Morality*, 1979, 195; L. Fuller, *The Morality of Law*, Yale University Press, 1964, 33.

¹⁸⁶ J. Priban, *From “Which rule of law?” to “The rule of which law?”: Post-Communist Experiences of European Legal Integration*, *Hague Journal on the Rule of Law*, 1, 2009, 338.

¹⁸⁷ J. Waldron, *The Rule of law in Public law*, Cambridge, Public Companion, 2014, 11.

Nonetheless, the fact that they share common features and they coordinate action aimed at the same purpose does not mean that they are the same thing, as much as, for the sake of constitutionalism, having checks and balances or free and democratic elections contributes to the same object but they are not the same thing. Nothing is achieved and much is lost by simply listing rule of law, human rights, democracy and constitutionalism as though they have the same rationale: clarity in practice and effectiveness of the theory is achieved by recognizing their diversity.¹⁸⁸

Historical circumstances bear this out as well.¹⁸⁹ The time for the conception of the rule of law that merges human rights, democracy and constitutionalism together has passed within the EU project. A “thick” conception of the rule of law may have had value in the time of division, when EU was an appealing community of values for countries with an authoritarian past, first Fascist and Nazi, then military leaderships and lastly Communist. Nowadays, the EU expresses a slightly different ideal. Particularly, the statement of being a space of liberty and justice means that its community of values has two dimensions: a political-legal dimension, centered around human rights, to which even democracy should submit, and a legal-political dimension, built upon the rule of law, where the consistency with the rule of law, without inquiry into the type of law, represents its first and foremost condition. From among the two, the EU derives its appeal from the latter dimension rather than the former one. Indeed, its legitimacy neither springs from being a human rights actor, nor from being a continent-wide democracy: rather, it claims legitimacy because the Member States have freely voted to bind themselves to and follow a rule of law system, at the top of which lies the EU law. Here, the principles of supremacy and direct effect are the foundations values of the EU rule of law system.¹⁹⁰ Moreover, they are immediately linked with a rule of law concept that is not mandatorily embedded with human rights or any other substantial content.

¹⁸⁸ J. Raz, *The Law's Own Virtue*, Tang Prize Lecture, 2018, 11.

¹⁸⁹ Also considering that, from an historical standpoint, it is difficult to sustain that many modern rule of law States, fatherlands of the concept, which did not have this or that human rights were not rule of law system: the rule of law has been strong and alive in non-democratic and in non-human rights societies. J. Raz, *The Rule of Law and Its Virtue*, in *The Authority Of Law: Essays On Law And Morality*, 1979, 211.

¹⁹⁰ D. Kochenov, *The EU and the rule of law - Naivité or Grand Design?*, in A. Jakab - D. Kochenov, *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 428.

As a last preliminary remark, it also seems important to stress that the fight for the rule of law should not be captured by the inherent politicization which characterizes fields such as human rights, constitutionalism and democracy: nothing is to be gained from this approach for the rule of law, the other values at stake or the EU and its Member States. Democracy means uncertainty – nobody can know or should know the outcome of an election in advance –, while the rule of law means certainty for the sake of legal stability and effectiveness of its command.¹⁹¹ Human rights and constitutionalism instead require certainty in terms of substantial contents and structures more than the rule of law, which requires openness to changing lawmakers' political will.

On this account, in the European integration, the rule of law was not included – and could not have been included – in the *summa divisio* that, in the early days of the EU, assigned the establishment of the common market to the EU institutions and the protection of human rights to the Council of Europe.¹⁹² Both of these were political tasks, as was the advancement of democracy and establishment of a EU constitutional structure, which were also parts of the process at the root of the EU enlargement. Rule of law is a different matter: one of maturity of the legal system, not of political bargain. The EU is laboriously reaching this threshold.

However, there is a more substantial kind of criticism of an allegedly “thick” conception in the EU’s rule of law system. Firstly, from an historical standpoint, could the thin rule of law conception have allowed totalitarian regimes and their abuses, from a logical point of view, it is the thick conception of the rule of law that is super inclusive, giving no legal explanation to different phenomena and adding no informative value. This “thick” rule of law criticism of the “thin” one is mostly of a political nature, and it has also got an inevitable tendency of a *reductio ad Hitlerum*. Indeed, the legal theory view of the law as a moral project, according to which a law grossly violating the principle of justice is a lawless law, could be sustained even without resorting to a “thick” rule of law conception. Injustice in the rule of law is not caused when the rule of law does not contain this or that human right, but when the law is framed utterly unjustly, with regard to its requirements,

¹⁹¹ J. Werner-Muller, The EU as a militant democracy, or: are there limits to constitutional mutations within EU Member States?, *Revista de Estudios Políticos*, 2014, 157.

¹⁹² G. De Burca, Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union, *Fordham International Law Journal* 27, 2004, 683.

here referring to a “thin” or “procedural” rule of law conception, and when the law is enforced unjustly, against the very sense of the law.

Secondly, once we open up the possibility of fleshing out the rule of law with substantial content, and not just formal and procedural requirements, a competition among possible substantial values would suddenly take place. Should dignity or freedom be the main substantial component of the rule of law in the EU? Or perhaps the market economy and property rights or social justice, or any other values listed in the EU Charter? Perhaps human rights, but among them, which ones? The result will be a general decline in articulation and framing of the rule of law, as people – or, as it happens, Member States – will struggle to use the same term to express different ideals or different terms to express the same ideal.¹⁹³

A third point in favor of a “thin” conception of the rule of law in the EU relies on the fact that it alone provides fidelity to the law that the EU needs as a functioning mechanism of the its rule of law system. A “thick” conception of the rule of law will always be ideologically and politically compromised, and thereby precarious. Fidelity to a “thin” rule of law, by contrast, is predicated on what the law is, and not just what it is used for (enforcing this or that right or policy), thus independent from any instrumental conception of the law. Rule of law has a peculiar dimension of allegiance that is expected to sustain itself, even when there exists disagreement on the goal to be achieved.¹⁹⁴ This is exactly the legal landscape that has sustained the development of the EU and EU law. In the “thin” conception of the rule of law, there is a source of autonomous respect inherent in legality, which sustains this fidelity as such, not depending on the substantive aim the law is pursuing. Accordingly, the formal law requirements provide the link between legality and fidelity.¹⁹⁵ Laws that satisfy those requirements have, for that reason, a claim to allegiance, independent from their substantive ends. As Dworkin highlights, we prove repugnance and we loose fidelity to the law i by “checkerboard” statutes, such as, for example, a statute making abortion illegal for women born in even years but not for

¹⁹³ J. Waldron, *The Hamlyn Lectures 2011: The rule of Law and the Measure of Property*, 27.

¹⁹⁴ L. Fuller, *Positivism and Fidelity to Law - A reply to Professor Hart*, *Harvard L Review* 71, 1958, 630-632.

¹⁹⁵ J. Waldron, *Why Law - Efficacy, Freedom, or Fidelity?*, *Law and Philosophy*, 1994, 13, 275.

those born in odd years, regardless of what we think about the substantial issue – abortion – at stake.¹⁹⁶

We expect the law to be in compliance with law's formal requirements, even if we may disagree about what it should provide. Herein lies the first core principle of the rule of law: the law should have certain requirements to be such. These requirements may vary, but they all identify a series of elements that are held to be essential to the law: generality, publicity, consistency and so on.¹⁹⁷ EU Parliament's alarm about Berlusconi Government's irregularity was exactly founded on this conception that the law, to be such, must be general, irrespective of how debatable its content can be. Saving the Prime Minister from criminal prosecution or reducing the statute of limitation could be acceptable under EU rule of law – there is a great variety in Member States' legislation in this area –: what is incompatible with the rule of law requirement of generality is the coincidence between lawmaker and the only possible beneficiary of the law.

However, having laws that respect certain requirements does not exhaust the rule of law values, even in its “thin” version. It is possible to imagine a scenario wherein all the formal requirements of the rule of law are present, but still the law does not rule at all. Following the previous example, concerning a law that provides that abortion is illegal (or legal) for everyone, it would be not acceptable that the law itself is disregarded, in the law's enforcement, by making abortion exclusively legal (or illegal) for a specific someone. The fidelity to the law relies on the fact that the law as such is the object of allegiance, no matter its content. Even if a departure from the law would actually help to achieve the goal of the law itself, the principle of the rule of law prevents it. In other words, the State's demands for pursuing the goal will never be made differently from the provided legal background. The appeal to fidelity is not made on the grounds of any of substantial content; it is made on the ground of bond reciprocity.¹⁹⁸ There is reciprocity between

¹⁹⁶ R. Dworkin, *Law's Empire*, Cambridge, Harvard University Press, 1986, 166.

¹⁹⁷ L. Fuller, *The Morality of Law*, Yale, Yale University Press, 1964, 33-94; J. Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law: Essays on Law and Morality*, Oxford, Clarendon press, 1979, 210.

¹⁹⁸ J. Waldron, *Why Law - Efficacy, Freedom, or Fidelity?*, *Law and Philosophy*, 13, 1994, 280.

rulers and the ruled with respect to the observance of rules: when the bond of reciprocity is broken, nothing is left on which ground the law should be observed.¹⁹⁹

Thus, considering that the law should rule, the law should rule alone. In order for the law to rule, the law should apply to all actors in the legal order. A shared, diffuse, prevailing habit of obedience to the law by everyone is the central concern in this matter. This forms the second core principle of the rule of law: the law requires obedience not because it is the law (which would be a tautology),²⁰⁰ but because this obedience to the law and the law itself are parts of the rule of law system.²⁰¹ This principle is clearly described in the eighth requirement of Fuller's list regarding the congruence between rule and official action,²⁰² or in Rawls' deontological requirement to take the law seriously.²⁰³ Be it declared in Constitutions or Treaties or not, the law always presupposes obedience,²⁰⁴ consequently, so does EU law. This characterizes the EU rule of law system in all its relations of governance: between the EU and its citizens, between Member States and their citizens, and between the EU and its Member States.²⁰⁵

With reference to the rule of law crises examined, it appears clear that the EU approach to the rule of law leans towards this direction of a "thin" rule of law conception, also in respect of this issue. In the EU, the rule of law is considered compromised when national actors do no longer respect the sovereignty of the law. The cases of Italy, Romania and Poland are self-explanatory. "The law rules exclusively" principle means that all actors must obey the law, and that the only way to challenge it consists in changing it, rather

¹⁹⁹ This principle applies to the whole package of formal requirements of the law: *ad personam*, unintelligible, retroactive, unstable laws have few grounds on which to stimulate citizens' loyalty in term of a duty to obey the rules. Still, it is possible to enact such laws and pretend obedience to the claim for allegiance passed through parameters that are universal *in abstracto* and applicable to anyone who meet certain conditions *in concreto*. Deviations from the formal requirements are sometimes needed: the rule of law can bear them and inspire allegiance as long as the law's enforcement is not the result of the present concrete situation, but the consequence of the abstract meaning of the law, as required by the congruity principle. Interestingly, Fuller describes this principle as the most "procedural," meaning its importance in the law's enforcement: formal-procedural requirements work in close synergy, as a law may be formally good, yet abused and/or rendered useless at the enforcement level.

²⁰⁰ J. Waldron, *Legisprudence, Legislation and the rule of law*, Vol. 1., No. 1, 97.

²⁰¹ K. Nicolaidis - R. Kleinfield, *Rethinking Europe's rule of law and Enlargement agenda*, Sigma Paper 49, 8.

²⁰² L. Fuller, *Morality of Law*, Yale, Yale University Press, 1965, 39-40.

²⁰³ J. Rawls, *A Theory of Justice*, Oxford, Oxford University Press, 206-213.

²⁰⁴ J. Waldron, *Public Rule of Law*, Keynote Address at ICONS, 2014, Firenze, 19.

²⁰⁵ D. Francis, *From Utopia to Apology: The European Union and the challenge of liberal supranationalism*, Classical Liberal Institute, NYU 2017, 5.

than disregarding it, as required by the congruence principle of the rule of law.²⁰⁶ The EU rule of law does not ask for the national law to bear some specific content – the rule of the good law –,²⁰⁷ but rather requires formal requirements for rulings and for the rulings to be respected.²⁰⁸ Therefore, it seems that the EU rule of law encompasses both aforementioned core principles: the law should be obeyed, and the law should be such of being obeyed. Both could however be brought back under the same umbrella term: the rule of law. Here, the term “rule” should be considered in the same way that Kant addresses the term “reason.” The “rule” is both the rule that defines, shapes and characterizes the law and the explanation, exploitation, and enforcement of the same law. The law rules because it is ruled by these standards, and these standards exist because they are inherent to the concept of law ruling.

Actually, going back to Aristotle conceptualization, the rule of law ideal is expressed in the terms of *nomon archein*,²⁰⁹ meaning the sovereignty of the law, which encompasses both the ideals of law being sovereign and effective, and that the sovereign must be lawful and not manned.²¹⁰ However, allegiance to a “thin” rule of law ideal does not mean to accede to an entirely positivist concept of the law. The rule of law is not mere legality or obedience to the current law, it includes the possibility to lawfully challenge the law. This makes up the third core principle of the rule of law: there are requirements for framing, requirements for enforcing, and requirements for judging the law itself. There should be procedural requirements for which courts, operating according to standards of due process, will offer an impartial forum where the law can be judged according to legal parameters.²¹¹ This holds true for any legal system, but it is even truer for the EU, as it is a multi-level system: the EU rule of law needs to have national courts which apply the EU law autonomously, even when conflicting with national law; at the same time, the EU rule of law needs the ECJ to judge both EU law and national law; last, the Constitutional Courts in the EU Member States are needed for challenging EU law itself.²¹² The

²⁰⁶ C.R. Sunstein - A.Vermule, *The Morality of Administrative Law*, 131 *Harvard Law Review*, 2018, 1958.

²⁰⁷ J. Raz, *The rule of law and its virtute*, in *The authority of law: essays on law and morality*, Oxford, Clarendon press, 1979, 227.

²⁰⁸ W. Sadurski, *The Other Anniversary*, 13 *European Constitutional Law Review*, 3, 2017, 424.

²⁰⁹ Aristotle, *Politics*, Book III, H Rackham trans, 1932, 1287a.

²¹⁰ J. Waldron *Rule by Law: A much maligned preposition*, Robin Cook Lecture, 2015, 7.

²¹¹ J. Waldron, *The Rule of Law and the Importance of the Procedure*, 2010, 4.

²¹² CJEU, C-294/83, *Les Verts*, April 23, 1986.

downgrade in the independence and effectiveness of the judiciary in Hungary and Poland represents a serious problem for the whole EU on account of depriving the latter of a rule of law forum.

The rule of law conception in the EU is a “thin” or procedural one, also from the point of view of black letter law. Article 2 TEU provides democracy, human rights *and* rule of law, meaning that they relate to each other but as separate and independent concepts. In most EU policy areas, such as Enlargement policy and European Neighborhood policy, the concept of the rule of law adopted is a “thin” one.²¹³ The Rule of Law framework, the most explicit statement on how the EU intends the rule of law, enucleates six principles: legality; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; equality before the law. Surely, the inclusion of fundamental rights could sound as a reference to a “thick” conception of the rule of law. However, defining the first and the foremost principle of the rule of law (legality) as including “a transparent, accountable, democratic, and pluralistic process for enacting the law”, clearly refers to a “thin” conception of the rule of law, and a “procedural” conception, where the requirements of impartial courts and effective judicial review serves to guarantee the enforcement of whatever is expressed by the law. The same Commission states that the precise content of the principles and standards stemming from the rule of law, might vary at a national level, depending on each Member States’ constitutional system.²¹⁴

It is the formal notion of the rule of law and its violation rather than substantive issues that are of concern in these rule of law crises, as examined in the cases of Italy, Romania, Hungary and Poland.²¹⁵ There is a certain tradition of what is considered the rule of law in EU legislation, considerably less so in CJEU case law. This is not surprising: the rule of law is a concept that mainly deals with non-economic concerns, which had little to do with

²¹³ P. Blokker, EU Oversight and domestic deviation from the rule of law: sociological reflections, in C. Closa - D. Kochenov, Reinforcing Rule of Law Oversight in the European Union, Cambridge, Cambridge University Press, 2016, 253.

²¹⁴ Communication from the Commission of March 11, 2014, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, §4-5.

²¹⁵ Also the Council of Europe stated that in Poland the refusal to obey the law – not publishing the Constitutional Tribunal rulings as required by the law or the refusal by the President to swear in certain judges properly elected to the Tribunal – is contrary to the rule of law, Council of Europe, Venice Commission, Opinion n. 833/2015, March 11, 2016, §5.

the initial CJEU case law. But why should it matter to this analysis? Firstly, case law is a source for assessing the state of art of the rule of law from a theoretical standpoint. Secondly, in the infringement procedure – even if not in Article 7 TEU –, the CJEU is the body of last instance in assessing a breach of EU law, and thereby not only what the breach itself amounts to, but also the paradigm of the law and its rule.

Actually, the CJEU lists some principles in its case law, which can be led back to a unitary definition of what the rule of law stands for in the EU. The principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law.²¹⁶ The principle of legal certainty goes hand in hand with the one of the legitimate expectations for which the laws have to be clear, predictable and prospective. In this regard, the CJEU recognizes the prohibition of retroactivity, but limited to the criminal law area (otherwise applying the legislation in force).²¹⁷ The CJEU recognizes that the rule of law is twofold, or that the same principle has two implications: the presence of the rule of law on one the one hand means that any public intervention must have a legal basis and be justified on the grounds laid down in the law,²¹⁸ and that, on the other hand, its action is effective.²¹⁹ In other words, the ruling should be lawful and the law should be ruling,²²⁰ as also recently clearly expressed with regard to the Hungarian case.²²¹ In addition, the EU legal system as a rule of law system includes the right to challenge the validity of regulations by legal action. That principle also imposes upon all persons subject to EU law the obligation to acknowledge that regulations are fully effective as long as they have not been declared to be invalid by a competent court.²²²

Its binding nature is a particular requisite of the law and its proper enforcement.²²³ The CJEU has recently reiterated that the effective application of EU law is an essential

²¹⁶ CJEU, C-147/13, *Spain v. Council of the European Union*, May 5, 2015, §79.

²¹⁷ CJEU, C- 212/80 *Amministrazione delle Finanze dello Stato v. Salumi*, November 12, 1981, §9-10.

²¹⁸ CJEU, C-46/87, *Hoechst AG v. Commission*, September 21, 1989, §19.

²¹⁹ CJEU, C-46/87, *Hoechst AG v. Commission*, September 21, 1989, §33.

²²⁰ CJEU, C-362/12, *Franked Investment Group Litigation v. Commissioners of Inland Revenue*, December 12, 2013.

²²¹ CJEU, C-286/12, *Commission v. Hungary*, November 6, 2012, §68.

²²² CJEU, C-101/78, *Granaria BV v. Hoofdprodukschap voor Akkerbouwprodukten*, February 13, 1979, §5.

²²³ CJEU, C-167/73, *Commission v. France*, April 4, 1974, §35.

component of the rule of law principle as envisaged in Article 2 TEU²²⁴ and that adherence to legality must be properly ensured.²²⁵ The CJEU clearly affirms that the law, whatever its content, must be effective, meaning that the law must rule. Ultimately, the CJEU is firm in stating that every person has the right to a fair hearing in an independent tribunal, as provided by the EU Charter.²²⁶ The very existence of effective judicial review is especially of the essence for the rule of law.²²⁷ More in detail, the CJEU holds that the operation of the rule of law requires a clear organizational and functional separation of the executive from the judiciary.²²⁸ The guarantee of independence, which is inherent to the task of adjudication, is expressly required at the level of the Member States.²²⁹ A system of justice that does not provide this kind of guarantees could not be said to be consistent with the concept of a rule of law State in the EU.²³⁰ This procedural conception of the rule of law is reinforced by the statement that separation of powers characterizes the rule of law, and that the judiciary has an its own autonomy.²³¹

The failure to satisfactorily address the Hungarian situation perhaps remains the most critical point in this reconstruction. The contested issue is that, as illustrated, during the infringement procedure against Hungary, the Government waited until it had replaced most of the prematurely retired judges, before indicating that it would comply by allowing back any retired judges who wanted to. They could however not return to their former positions because those positions had already been filled, resulting in lower positions than before. Meanwhile, the Hungarian government offered compensation to the prematurely retired judges if they would not go back to work, a compensation accepted by most. Herein lies the most problematic issue for any rule of law system: unlawful consequences – such

²²⁴ CJEU, C-441/17, *Commission v. Poland*, November 20, 2017, §102.

²²⁵ CJEU, C-496/99, *Commission v. CAS Succhi di Frutta*, April 29, 2004, §63.

²²⁶ CJEU, C-174/98, *Netherlands v. Commission*, January 11, 2000, §14.

²²⁷ CJEU, C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, February 27, 2018, §36.

²²⁸ CJEU, C-477/16, *Ruslanas Kovalkovas*, November 10, 2016, §36.

²²⁹ CJEU, C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, February 27, 2018, §42.

²³⁰ CJEU, C-216/18, *Minister for Justice and Equality v. LM*, July 25, 2018, §22.

²³¹ In more detail, the concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. In this way, it is protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions, see CJEU, C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, February 27, 2018, §44.

as replacement of judges – should be set aside for not complying with the rule of law; but this is not always possible.²³² However, there is no reason to believe that a “thick” rule of law notion would have ensured a different outcome. It is not a matter of theoretical qualification of the law infringed, or of legal basis resorted to, but rather, compliance with the rule of law should be integral, whatever conception we adhere to. It is indeed naïve to think that a substantial concept of a theoretical legal concern automatically corresponds to an integral implementation of the same legal concept.

The division “thick” versus “thin” rule of law does not coincide with the division “full” or “integral” versus “formal” or “cosmetic” compliance with the rule of law.²³³ The former distinction is about what the rule of law is composed of, the latter one on whether this rule of law is respected, integrally or partially. Here again, the criticized inclination of the Court and the Commission to focus on the unlawfulness of national measures in the case against Hungary rather than on the ultimate failure to get results has nothing to do with the division “thick” versus “thin” conception of the rule of law. It is a matter of implementation of the content that could be most various. The need to set aside the unlawful measure and to implement the correct one is completely compatible with a “thin” rule of law conception; at the same time, the thick conception could allow a cosmetic compliance, if the content (for example, human rights) is subsequently not enforced. Thus, the integral implementation of what the law commands matches with both concepts of the rule of law. What is remarkable, however, is that, in the thin conception of the rule of law, the integral implementation is due to the law’s existence and not its content.²³⁴ Moreover, it commands this integral implementation because the law requires fidelity, and Member States have acceded to this relationship to EU law, as

²³² Undoubtedly, a claim to restore judicial independence would have led to a more comprehensive approach to the issue of the judicial early retirement than the discrimination grounds, but values, such as the Article 2 TEU ones, are less tangible than clear obligations under EU law. Nonetheless, there is one value, the one of the rule of law, which could always be applicable in its “thin” version, in junction with the rule of EU law deriving obligations: and this value requires that the compliance with the rule of law should be integral. The failure in the Hungarian case is not of not having resorted to a “thick” rule of law notion or to not have employed Article 7 TEU: it is to not have required the “integral” compliance with the EU rule of law.

²³³ J. Waldron, *Rule by law: A much maligned preposition*, Robin Cook Lecture, 2015, 7.

²³⁴ J. Waldron, *Dignity of Legislation*, Cambridge University Press, 1999, 15-16.

highlighted in Article 4(3) TFEU. From this perspective, the “integral” implementation is simply the last step in the rule of law’s “thin” concept implementation.

2.2. Member States’ Corruption in law-making and enforcement of the law.

What is typical of a legal system is its “by and large” effectiveness.²³⁵ A legal system requires the existence of institutions that are generally capable of making and enforcing their decision for a collectivity in a certain territory.²³⁶ This capacity, resorting to coercion if necessary, is a classic identification of statehood,²³⁷ and relies on an idea of compliance, or habit of compliance, by its actors. Mature legal systems have a culture of compliance the self-reinforcing mechanisms of which make possible to affirm that they are systems of law observance. Compliance goes hand in hand with the very idea of the rule of law;²³⁸ actually, it goes hand in hand with the listed core principles of this ideal: that the law should be framed in a certain way, that it rules alone, that it requires obedience by every actor and that it needs a forum where it is to be evaluated. A good measure of the rule of law in a country is, for example, the extent to which public authorities obey the decisions, even uncomfortable ones, of their own courts.²³⁹ Nonetheless, all legal systems have a certain degree of non-compliance: they are legal systems yet, and so is the EU.

It has been said in particular that the EU system shows an extraordinary compliance record by standards of international law and appropriately comparable to national legal systems.²⁴⁰ This is why it is possible to talk of a EU rule of law, while it is difficult to predicate the existence of an international rule of law.²⁴¹ However, over the years, serious rule of law violations have shaken the EU and its Member States. It is now time to examine

²³⁵ H. Kelsen, *General Theory of Law and State*, 1949, 120.

²³⁶ T. Risse, *Governance in Areas of Limited Statehood: Introduction and Overview*, in T. Risse (ed.), *Governance Without a State?*, Columbia University Press, 2014, 4.

²³⁷ M. Weber, *Wirtschaft und Gesellschaft*, 1972, 29.

²³⁸ K Raustiala - A-M Slaughter, *International Law, International Relations and Compliance*, in W Carlnaes - T Risse -B Simmons, (eds), *The Handbook of International Relations*, Sage Publications, 2002, 538.

²³⁹ R. Bieber - F. Maiani, *Enhancing Centralized Enforcement of EU law: Pandora’s Toolbox?*, *Common Market Law Review*, 2014, 1057.

²⁴⁰ L. Conant, *Compliance an what EU Member States make of it*, in M. Cremona (eds.), *Compliance and the Enforcement of EU Law*, Oxford, Oxford University Press, 2012, 1.

²⁴¹ J.H.H. Weiler, *Epilogue: Living in a Glass House*, in C. Closa - D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, 324.

the scope of these violations in terms of which activities are relevant for triggering a rule of law crisis.

The first issue to be considered is the epistemic problem of defining the features of rule of law violations in the EU space of liberty and justice. Particularly in a multi-level legal system such as the EU, it is firstly necessary to address the question of whether a rule of law violation is relevant due to the source of law (EU law rather than national law); due to the specific issue concerned (e.g. agricultural policy rather than migrant policy); specific to the cause of violation (deliberated choice rather than error of judgment). It seems that these three indexes only indirectly regard the rule of law crisis. All of them are political issues somehow. The first one concerns the general attitude of the State with regard to EU law, and mainly targets the issue of the dialogue or conflict between courts in the EU, and the national constitutional courts' approach towards the principle of supremacy as well.²⁴² There is no doubt that this is an ongoing and relevant issue. However, in the rule of law crises addressed presently, the decline of the rule of law regards both national and EU law, without distinction. Hungary has broken EU law, Poland its own national law. When it comes to the EU rule of law, it makes no difference which source of law is disregarded. Whatever its source, the law must be obeyed: that is the message of the EU rule of law.

Therefore, in the EU, the rules of law crises for violation of EU law are not worrisome *per se*. They are worrisome for the violation of any law, be it EU or national law. In addition, the second index identified – violation specific to the issue – does not seem crucial in this analysis. For certain, some policies have a better compliance records than others: for example, the migrant policy particularly lacks compliance in Member States. Once more, however, this index belongs much more to the realm of politics than to law, and it has no added informative value for a rule of law crisis' analysis. With regard to the third one, violation of the rule of law specific to a determined cause, many could be the underlying factors which may determinate a rule of law violation. Rule of law violations can be part of an ideological plan designed by national government to overturn the constitutional landscape or the result of weakness of state institutions. Two authors in particular have

²⁴² See at last, the *Taricco* saga: CJEU, C-105/14, *Taricco and others*, 8 September 2015; C-42/2017, *M.A.S and M.B.*, 5 December 2017.

identified the following causes: ideological choice to violate, violation caused by the weakness of institutional system, economic free-riding and exceptional violations due to error of judgment or interpretation.²⁴³

Accordingly, the spectrum of violations ranges from the conscious dismantlement of the rule of law – by legal means such as in Hungary or by unlawful means such as in Poland –, to a Member State's inability to act due to internal failures or different reasons – such as weakness, corruption or incompetence, which is the case of Romania –, or is simply the result of mistakes or delays, of which Italy is a champion. In the opinion of the author, this division is also interesting and useful for policy reasons, but the focus should lie elsewhere in a rule of law analysis. For the sake of rule of law, the spectrum of violations could be reduced to two options, which regard which State activities have been involved in the rule of law crisis. These two options could both be grasped under a single typology, or better pathology, of the rule of law, for the benefit of exploring the rule of law crises in the EU. In all countries where a rule of law crisis has taken place, the law, as framed and enforced by the State, deviates from the rule of law's essential parameters. Particularly, the law – no matter the law provenance, content or cause of violation – does not respect the three core principles of the rule of law, as previously described.

In a rule of law crisis, the quality of the law is somehow corrupt, no matter the reason for it, for not complying with the core principles of the rule of law. In these circumstances, the law may still exist, while there is no longer an unchallenged rule of law: instead, there is a rule of men, who may make use or non-use of, or abuse the law.²⁴⁴ However, is it the law itself – content – or its enforcement that is corrupted? The Italian case, for example, shows a clear distinction between these two options. Certain defiance of the rule of law were of concern for what the law clearly and openly provided, since its normative content was against what the Constitutional Court intended as due law-making. Reversely, other violations regarded the incorrect use or lack of application of the law, while the law itself was entirely sound. Similarly, Romania showed a combination of both law-making and law-enforcing deviations from the rule of law. Some legislation was enacted for the

²⁴³ A. Jakab - D. Kochenov, *Introductory Remarks*, in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 3.

²⁴⁴ S. Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform*, Cambridge, Cambridge University Press, 2004, 6-14.

purpose of defeating the political enemy *ad personam*; other valid legislation was simply not enforced or unduly applied for the same political goal. Hungary has been sanctioned because its laws fail to comply with law-making requirements. In contrast, Poland is targeted for deviations in the manner in which the law is enforced, since many Constitutional Court rulings are simply not respected and many actors in the constitutional arena act in disregard of the law.

It seems that the EU targets two different State activities that could be understood according to their functions with regard to the law. These functions are law-making and enforcement of law. These functions are clearly distinguishable in any legal system: creating the law is one thing, applying it is another. With regard to the compliance issues, law-making and enforcement of law are at the same time identical and distinct. The matter at hand is always the compliance with the rule of law. However, the former concerns how the law is made, what the law openly affirms; the second, instead, regards how the law is enforced, what its implementation is for society. According to the Rule of Law Framework and CJEU case law, the rule of law is composed of principles that regard both law-making and its enforcement: legal certainty, equality before the law, the prohibition of arbitrariness of the executive powers, the need for independent and impartial courts, and the effective judicial review all have both law-making and implementation requirements. Some of them, such as legal certainty and prohibition of arbitrariness are directly linked to a rule of law executive function, which has its own, distinct dignity. This means that the rule of law does not only imply institutional limits of powers – how the law should be framed –, but also effectiveness of the ruling – that the law should be enforced. Without legal certainty and prohibition of arbitrariness – considering that arbitrariness could also include non-application of relevant law –, ²⁴⁵ the rule of law is incomplete. ²⁴⁶

From a EU perspective, therefore, the enumerated violations of the rule of law in these countries hit the rule of law in the two constitutive features of the very fabric of the law

²⁴⁵ J. Corrales, *Autocratic Legalism in Venezuela*, 26 *Journal of Democracy*, 27, 2015, 38-45; M.J. Radin, *Reconsidering the Rule of Law*, 69 *Boston University Law Review*, 1989, 785-786.

²⁴⁶ G. A. Tòth, *Illiberal Rule of Law? Changing features of Hungarian Constitutionalism*, in M. Adams - A. Meuwese - E. Ballin (Eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge: Cambridge University Press, 2017, 402.

and its delivery. In all legal systems, there are sporadic violations in law-making and its enforcement. Nevertheless, a threshold exists after which a society is no longer ruled by the law, in both senses of forming a legal framework for the community (law-making) and taking actions in accordance with the same legal framework (enforcement). In this scenario, customized and case-by-case driven economic considerations determine the normative relationships. Law is just window-dressing (with respect to law-making) or a misleading prospect (with respect to enforcement). It is thus possible to define overcoming of these other forces in the law-making and enforcement as corruption of the same: corruption substitutes the rule of law, as a matter of conflict resolution, with the rule of men.²⁴⁷ Where there is corruption in law-making, defiance of the rule of law is contained in the law itself. There is no inquiry on the motivation or the ideology on the basis of which the defiance takes place: reasons include personal interest, fanaticism, ideology, or mismanagement. It has been said that Poland's defiance of the rule of law differs from the Hungarian one: the first ideological, the second a cunning plan of self-interest.

In the view of the author, this division serves no purpose in a rule of law analysis. First of all, it is always difficult to assess with precision the interests of law-makers and to what extent it is possible to separate their own interests from the people's, or at least from their constituency. Let us take Berlusconi's example. Some of the laws enacted by his Government were clearly directed towards protecting his personal interests. One law was meant to shield the highest public officials from criminal inquiry during their mandate. Not only did the other public officials have no interest in or need of this legislation – nor had anyone before Berlusconi ever needed it –, but it was clear that it was of no interest to the people or even the State bureaucracy. For other laws, however, assessment was more difficult, if they were not in any case in the interest of the people or the party's ideology, debatable as it may be. A legislation abolishing certain financials crime could be presented as a more liberal commitment to financial activity, whereas in truth, it was a legislation *ad personam* for allowing the Prime Minister to avoid certain charges. But, and here is the second point, beyond the impossibility of the separation, is the irrelevance

²⁴⁷ S. Rose-Ackerman, Corruption and conflicts of interest, in J.-B. Auby - E. Breen - T. Perroud Corruption and Conflicts of Interest. A Comparative Law approach, Edward Elgar Publishing, 2014, 5.

thereof for rule of law purposes.²⁴⁸ A law that fails to comply with the requirements of being a law is simply a failure in law-making, it is wrong in itself. Governments are not there to promote their own interest, but that of the governed. This ideal of custodianship of the common good informs the rule of law.²⁴⁹ When corruption affects law-making, the rule of law is itself corrupted: it fails to serve its purpose anymore. It is no longer a tool for serving the common good, but an *escamotage* for bending the situation in favor of a party or individual.

However, what are the parameters for judging law-making? In national legal systems, this is the province of constitutional law, and a constitutional courts' affair. Constitutional courts assess the compatibility of law-making with their constitutions, providing specific norms and general principles. These requirements command that the law is created according to certain parameters. Circumstances help to find corrupt laws in the vast array of law-making today. Timeliness (or untimeliness), lack of parliamentary debate, recourse to accelerated procedures, and over-constitutionalization²⁵⁰ are classic procedural symptoms that point towards the existence of corruption in law-making.²⁵¹

There is indeed a strong association between rule of law and formal *virtutes* of legislation. The clearest symptoms could be found in the same framing of the law that denounces itself as corrupt. The law does not serve the collective purposes, since it was clearly and unduly directed towards only certain individuals; the law is retroactive in regularizing or modifying a certain situation in bad faith; the law is obscured or, more frequently, its outcomes are hidden, unpredictable, or unclear; the law itself is unclear; the law is transitory or unstable; the law is contradictory, leaving discretion of implementation entirely to the enforcement or public officials or other bodies, such as a blank check; the law may be enforced in a way that diverges from its apparent meaning. The last two risks

²⁴⁸ L. Pech - K.L. Scheppele, *Illiberalism within: Rule of Law Backsliding in the EU*, 19 *Cambridge Yearbook European Legal Studies* 3, 2017, 12.

²⁴⁹ J. Raz, *The Law's Own Virtue*, Tang Prize Lecture, 2018, 8.

²⁵⁰ D. Landau, *Abusive Constitutionalism*, 47 *UC Davis Law Review*, 2013, 199.

²⁵¹ On the opposite, as Waldron brilliantly argues, bicameralism, check and balances, clause by clause consideration, formality and solemnity of the treatment of the bills in the Chambers, the publicity of the legislative debates, the time for consideration, formal and informal, internal and external to the legislature, these are all elements which compose a legislative due process that are central in procedural conception of the rule of law for the safety of the legislation as the rule of law, see J. Waldron, *Legislation and the Rule of law*, *Legisprudence*, Vol. 1, No. 1, 107.

are closely related to corruption in enforcement, but still diverge from it. The procedural *virtutes* in legislation, or legislative due process,²⁵² are the guarantees of the rule of law, fundamental to the aim that the law will comply with its formal requirements.²⁵³ Generality, prospectivity, predictability etcetera will be genuinely framed by law-makers and accepted by citizens as much as their legislative process is respectful of certain procedural requirements.

Thanks to the supremacy principle, the EU is indifferent to what kind of source of law or type of legislation is at stake in a rule of law crisis. It could be parliamentary law, law decrees, ministerial decrees, administrative practices or general behavior. Even constitutional law does not escape its grasp. Indeed, despite the fact that constitutional law is statistically less targeted for political reasons, the rule of law crises here observed encompass different types of legislation: laws in Hungary and Poland; cardinal law (quasi-constitutional law) in Hungary; every type of legislation in Italy; laws and decrees in Romania. The only type of situation where the EU does not seem to operate anymore is the one where no current action is taken (yet), as was the case in the *Haider* affair. The only parameter of interest to the EU is that there is a certain kind of targeted activity at the Member State level. In these cases, indeed, the law itself is corrupted and the law's enforcement, even if in line with the law and strictly adhered to, would provide undesired outcomes. Corruption in enforcement is slightly different as it regards a much bigger area. It could possibly concern all laws, also ones that comply with the rule of law's formal requirements, that are infinitely more numerous than the failing ones for a presumption of stability in any system. All situations where the challenge to the rule of law is not apparent, but it regards its correct implementation or effective enforcement, fall within this area. Here again, the causes for corruption of people – are laws not enforced for criminal corruption? For weakness or inadequacy of the apparatus? For political or sociological reasons? – do not matter, they all fall under the lack of enforcement of what has been prescribed by law.

²⁵² S. Gardbaum, *Due Process of Lawmaking Revisited*, UCLA Public Law Research paper n. 18/12, 7.

²⁵³ For example, in regard to the decrease of the procedural legislative virtue and due process in Poland, see W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Legal Studies Research paper 18/01, January 2018, 46.

A corrupt enforcement of the law is never legal: it is reprehensible in any legal system.²⁵⁴ The rule of law exploits all its significance in having the law respected once it is in force. Why does this type of corruption strike the rule of law in particular, and, even more dramatically, the EU rule of law, even more than corruption in law-making, as proven by the actions recently taken? There exist at least two reasons. The first one is structural. The EU relies on the administrative apparatus of Member States. The enforcement of EU law is delegated to the Member States. Sanctioning is in the hands of the Commission, but ordinary compliance remains with national public administrations. The EU has only limited capacity in directly implementing its own law: the human, fiscal and management resources needed for the implementation are borrowed from the Member States. However, what is left to Member States in the matter of application must be severely controlled and sanctioned. It is clear that the EU institutions should fight corruption in enforcement harder because it is the responsibility of Member States to enforce the rule of law. If Member States do not have the ability to implement EU law, EU law's effectiveness is jeopardized. When this happens, the EU must intervene: it is on this presumption that the whole EU and EU rule of law is based. This explains why all the tools at the disposal of the EU are exceptional and should be unlocked only in grave situations. They represent a last resort for the EU supranational normative ideal.

The second reason for the impact of corruption in enforcement is the substantial aim animating the EU: there is a close interdependence between the Member States of the EU, because of the effect of the Single Market.²⁵⁵ The EU is based on intra-community or inter-Member State exchange of goods, services, people and capital. Negative externalities owed to one members' lack of compliance have a greater impact upon the others, compared to the ineffectiveness of states located in separated legal systems. The principle of mutual recognition presupposes the trust in the effectiveness of domestic administration that allows goods and services to enter onto the markets of Member States if lawfully marketed in one Member States.²⁵⁶ Only lawfully circulated products and

²⁵⁴ J. King, I-CONnet Symposium on "Constitutional Boundaries" - The Social Dimension of the Rule of Law, Int'l J. Const. L. Blog, April 27, 2018.

²⁵⁵ L. Pech - K.L. Scheppele, Illiberalism within: Rule of Law Backsliding in the EU, 19 Cambridge Yearbook European Legal Studies 3, 2017, 11.

²⁵⁶ CJEU, C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung*, February 20, 1979.

services can enter onto the Single Market: Member States need to enjoy a mutual trust and recognition greater than in any other trade areas.²⁵⁷

Moreover, this concern does not just regard the Single Market but also citizens and interests in the area of justice and security, and so the mutual trust should be as within the internal borders. The EU's legal space presupposes mutual trust: strictly speaking, there are no purely internal affairs in the EU: all of the EU is affected by developments in a particular Member State. EU law operates on the presumption that all actors, public and private, supranational and national, are law-abiding. Failure to accept other Member States' Decisions, CJEU Judgments and EU legislation, is prohibited. Therefore, while the law-making can be freely exercised in certain areas of the EU, the law's enforcement cannot. It should be the same in the whole EU. An equal, fair, consistent, non-arbitrary (in a word, non-corrupt) enforcement is even more important than law-making. It involves the access to justice, and it is expected and presumed to be equally fair. Deviating from this expectation would be a dramatic downfall in all legal systems, but even more so in the EU, which is intended to be a supranational space of liberty and justice.

2.3. The threshold of systemic violations in rule of law crises.

Now that is established what value is threatened by Member States, which the EU aims to restore, in a rule of law crisis ("thin rule of law"), and what the state activities are which may trigger a EU response ("corruption" in both law-making and its enforcement), it is time to inquiry into whether, and to what extent, the EU has the competence to intervene in these circumstances. The general principle regulating the EU competence has always been that the EU only has the competences conferred by the Treaties. After the Lisbon Treaty, there are different categories of competence: exclusive competence,²⁵⁸ shared competence²⁵⁹ or competence only to take supporting, coordinating or supplementary actions.²⁶⁰ All the other competences not conferred by the Treaties remain within the

²⁵⁷ *"The very functioning of the Union and its internal market is endangered if in one of its Member States the fundamental values, in particular the rule of law, are no longer respected"* Vice-President Timmermans, E-009716-16, April 12, 2017.

²⁵⁸ Article 2(1) TFEU.

²⁵⁹ Article 2(2) TFEU.

²⁶⁰ Article 2(5) TFEU.

purview of the Member States.²⁶¹ The TFEU states that the EU should act within the limits of the powers attributed to it, but also that the EU should be accorded the powers necessary to fulfill the tasks assigned by the Treaties. The TFEU also includes provisions on how the competence should be exercised, under the principle of subsidiarity and proportionality.²⁶² With reference to the rule of law, it is up to Member States to enforce the EU and national law according to the principles of the EU rule of law. Establishing that the EU has an exclusive competence on the rule of law would require a laborious process. Despite the fact that the EU's enumerated exclusive competences also encompass areas where the rule of law could be infringed impacting on the objectives that these competences pursue, such as the establishment of competition rules necessary for the functioning of the internal market, something more is needed. The competence should be the beginning, and not be justified by the answer needed. The shared competence category represents a more suitable candidate for justifying a EU intervention against Member States for a rule of law violation. Shared competence is a general and residual category, therefore implying that the listed reasons for intervention are not exhaustive: the goal to establish space of freedom and justice clearly falls within.²⁶³ Moreover, the concept of pre-emption best suits the intervention of the EU as enforceable only within its competence. Member States can and should continue to exercise power even if the EU has already intervened, and that competence will revert to Member States once the EU has ceased to exercise its competence in that area.

Actually, enforcements of rule of law by the EU are of an exceptional kind, and so it is normal that the control over law law-making and its enforcement should be exercised by Member State in periods of "business as usual". It is also normal that subject matter that falls within the scope of shared competence may also have an impact on powers retained by Member States.²⁶⁴ Even in areas where the EU has no competence, national rules must be exercised consistently with the principles governing the EU.²⁶⁵ In any case, the competence to be reached could lastly fall within the third categorization, that is, of

²⁶¹ Article 4(1); 5(2) TEU.

²⁶² Article 5(1) TFEU.

²⁶³ Article 4(2)(j) TFEU.

²⁶⁴ L. Boucon, *EU Law and Retained Powers of Member States*, in L. Azoulay, "Introduction: The Question of Competence in the European Union, Oxford, Oxford University Press, 2014.

²⁶⁵ CJEU, C-246/89 *Commission v. United Kingdom*, October 4, 1991.

supporting, coordinating or supplementary actions. Here, the aim of the EU is not to harmonize the rule of law, but have it enforced, when needed, even against its own Member States. Beyond speculation, it is important to note that with regard to Article 7 TEU, there is a EU law conferred competence and relative tool for protecting the rule of law.²⁶⁶ With regard to this procedure, indeed, the competence problem simply does not arise: it is impossible to delimit the scope of EU law from that of Member States when it comes to its foundational values. The duty of the EU to respect the national identity inherent in a Member State's political and constitutional structure is not a limit to the invocation of Article 7 TEU for dealing with threats to Article 2 TEU values. It is a logical need, since these provisions – common values clause and the homogeneity clause – represent the very essence of the EU. Member States' constitutional identity autonomy has meaning insofar it complies with Article 2. TEU.²⁶⁷ With regard to the exercise of competence, it is interesting to note that, in the application of the CVM, the Commission did not refer to the subsidiarity principle, only to the proportionality principle; and that not even directly, but just with reference to the sanctioning measures to be adopted in case of non-compliance.²⁶⁸

To label the current rule of law crises, the term “systemic violations” has mostly been used.²⁶⁹ A systemic violation is a type of violation of the law which is especially grave, so that it affects the very essence of the fundamental principle of the whole legal system. Isolated infringements to the rule of law are tolerated, until they reach a significant amount. It is however possible to face a structural, persistent and cross-sector ineffectiveness in making or enforcing the law.²⁷⁰ Structural, persistent and serious deficiencies call into question the binding character of a legal order: a systemic deficit

²⁶⁶ Communication from the Commission to the European Parliament and the Council - A new EU Framework to strengthen the Rule of Law (COM/2014/0158 final) March 11, 2014.

²⁶⁷ L. Besselink, *The Bite, the Bark, and the Howl. Article 7 and the Rule of Law Initiatives*, Oxford, Oxford University Press, 2017, 129.

²⁶⁸ Art. 37 Croatia Accession Treaty.

²⁶⁹ M. Aveblj, *Pluralism and Systemic Defiance in the European Union*, in A. Jakab - D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2015, 49.

²⁷⁰ M. Ioannidis, *Weak Members and the Enforcement of EU law*, in A. Jakab - D. Kochenov, *Introductory Remarks*, in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 476.

spreads throughout the entire system to the extent then it fails to exercise its core functions.

The systemic deficiency concept is already present in the law and the practice of the EU institutions.²⁷¹ In 2013, the Council requested that it should “take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle” rule of law backsliding.²⁷² Additionally, the Commission resorted to a “systemic” label for defining its intention to make strategic use of the infringement procedure tool,²⁷³ and recently for understand the reality of rule of law crises.²⁷⁴ The Commission observes what does not function in Member States from an institutional point of view: the Rule of Law Framework Conclusion and the following Acts lean in that direction. The letter to Poland principally refers to the “central position of the Constitutional Tribunal within the Polish judicial system,” whose situation puts it at risk of an emergence of a systemic threat to the rule of law. In clarifying the conditions for action, the Commission argued that “purely contingent risks” should be excluded.²⁷⁵ Interestingly, the recent Commission Regulation proposal for reduction of funding to Member States with generalized deficiencies in the rule of law – another possible rule of law tool in the hands of the Commission – gives a definition of the systemic deficiency concept referring to “a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law.”²⁷⁶

Recently, the CJEU also started to use the expression “systemic” deficiencies for a situation, in this case Poland, where a Member State legal landscape does no longer

²⁷¹ European Parliament resolution of December 16, 2015, on the situation in Hungary (2015/2935 (RSP), § F; European Parliament, Resolution of July 3, 2013, on the situation of fundamental rights: standards and practices in Hungary, A7-0229/2013, §57.

²⁷² Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council meeting, Luxembourg, June 6-7, 2013, §9.

²⁷³ EU Commission, Commission Communication, Better monitoring of the application of EU Law, COM(2002)725 final/4, May 16, 2003, §11.

²⁷⁴ EU Communication from the Commission to the European Parliament and the Council - A new EU Framework to strengthen the Rule of Law (COM/2014/0158 final) March 11, 2014, §6.

²⁷⁵ EU Commission, Commission Communication to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and Promotion of the Values on Which Union is based, COM (2003) 606 final (October 15, 2003).

²⁷⁶ EU Commission, Proposal For A Regulation Of The European Parliament And Of The Council On The Protection Of The Union's Budget in case of generalized Deficiencies As Regards The Rule Of Law In The Member States, 2.5.2018 COM(2018) 324 final, Art. 2(b).

comply with EU standards of the rule of law due to cumulative and structural factors.²⁷⁷ Additionally, Article 7 TEU does not focus on what is breached, but the manner in which it is breached and how it occurs: all deviations from law-making and its enforcement are relevant to the extent that they represent a serious risk of a breach or a breach in itself, concerning which the Commission refers to the “purpose” and the “result” of the breach. An actual breach has to go beyond specific situations – which are the target of the infringement procedure –. It concerns a more systematic problem, which could be inferred by a simultaneous breach of several values, which could be evidence of the seriousness of the breach, as well as a systematic abundance of individual breaches. Article 7 TEU addresses the most egregious breaches of EU rule of law, which deserve the label systemic.

Any alarm on the part of the EU is thus reserved for those “systemic” cases, namely “likely to systemically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.”²⁷⁸ Political and legal transformations in Hungary and Poland should be seen as systems in which individual aspects are inter-connected, and reinforce each other. The disempowering of the Constitutional Tribunal in Poland or the lowering of the age of ordinary judges in Hungary should not be seen as individual issues in the respective system, but as important instances of disabling the previous legal orders.²⁷⁹ While individual aspects of what happened in Hungary and Poland also happen in other EU Member States –judicial control fluctuates in many Member States –, what makes these transformations worrisome in the former States is the sistematicity and cumulative effect of attempts to diminish the rule of law. Individual aspects are functionally connected with others: the whole is greater than a sum of its parts, both in its comprehensiveness, for the functionality in the system of the rules violated, and in the number of rules violated.

The first condition for an intervention is the existence of a track record of violating EU rule of law; there is no space for preemptive action, if not through the Rule of Law Framework. The *Haider* case is explanatory in this regard. The EU is a political project

²⁷⁷ CJEU, C-216/18, *Minister for Justice and Equality v. LM*, July 25, 2018, §23.

²⁷⁸ Preliminary Report of the UN Special Rapporteur (July 7, 2004) (UN/CN.4/Sub.2/2004/23), §57.

²⁷⁹ W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Legal Studies Research paper 18/01, January 2018, 16.

bringing together states from among the most advanced worldwide, with considerable economic resources and well-established legal systems, and should therefore set an even higher threshold for rule of law compliance.²⁸⁰ Being part of, and remain in, the EU legal order brings advantages that do not exist outside it.²⁸¹ The EU targets the sistematicity of the rule of law crisis as a unique element, for reasons that go beyond the scope of competences and rule of law. Firstly, the character of sistematicity enhances the gravity of the corruption of the rules, both separately and holistically. Separately, because they represent a piece of a bigger (corrupted) plan to subjugate law-making. Holistically, because together, they pursue a bigger plan. The *Orban* cases provide a perfect illustration of this. Secondly, non-systemic corruption could conversely be simply a misunderstanding of a law or a naïve attempt to bend it for a specific purpose through legal means. Actually, when corruption is not systemic, it is possible to affirm that a law serves a clear, unique, needed and unidentified public purpose. Thirdly, while constitutional courts, parliamentary committees and the public have the chance to check and debate law in the Member States, the EU only targets systemic deviations on account of limited resources and its being a supranational framework, based on a rule of law, overlapping but complimentary to national law. National rule of law systems – and the EU rule of law system as well – are not threatened by individual breaches or isolated infringements, which, furthermore, should always be contextualized:²⁸² national courts, and the ECtHR, can more effectively deal with individual violations.²⁸³ The *Berlusconi* case is very helpful to shed light on this: from many perspectives, its sistematicity is not grave enough to require the strongest EU intervention, despite the gravity of corruption in law-making and its enforcement, and even being part of a bigger plan, as it affects only one person.

²⁸⁰ In the EU, the threshold of compliance with the rule of law is placed at a much higher level compared to international standards. EU member States are not simply required to meet the international law standard of law compliance, but the EU ones. Their capacity is judged with reference to their participation in the advanced project of EU integration and the requirement to uphold EU law, as stipulated in Article 197 TFEU.

²⁸¹ Editorial Comments, Polar exploration: Brexit and the emerging frontiers of EU law, *Common Market Law Review* 55, 2018, 4.

²⁸² J. Werner-Muller, A Democracy Commission of One's own or what it would take for the EU to safeguard Liberal Democracy in its Member States, in A. Jakab - D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, 247.

²⁸³ C. Closa, Carlos - D. Kochenov - J.H.H. Weiler, J. H. H., *Reinforcing Rule of Law Oversight in the European Union*, Robert Schuman Centre for Advanced Studies Research Paper No. 2014/25.

Conclusions.

Conclusively, there is a guardian of the rule of law in Europe, which is the EU. This guardian is equipped with a variety of different weapons for dealing with different crises. This guardian, or watchdog as many say,²⁸⁴ acts when the rule of law is compromised in the following terms: when the law does systemically not rule and when its rule is systemically unlawful, according to a “thin” or procedural rule of law definition.²⁸⁵ As a first conclusive remark, it is thus appropriate to speak of THE rule of law in the EU and its Member States, since one rule of law is ruling them all. This rule of law is twofold: it is both a unification principle, under the name of the rule of EU law, and a unifying principle, under the name of the EU rule of law.²⁸⁶ With regard to the areas directly covered by EU legislation, it is appropriate to invoke the rules of EU law, which is a unification principle that does not tolerate deviations from what it prescribes, and sanctions them when they occur. Instead, it is a unifying principle when we observe them from the perspective of the EU rule of law, whose aim is to ensure rule of law conditions all across the EU, no matter the type, scope or object of the law that is ruling. The conclusive picture is of a supranational entity, which adjudicates on national legal systems’ conformity with the rule of law, relying on a “thin” conceptualization of the rule of law ideal.

An analysis of the countries’ situations proves that, in relation with Hungary, the EU has adopted a rule of EU law approach, sanctioning the State for not complying with EU law in areas where the EU has competence, such as age discrimination or independence of certain authorities. Conversely, for Poland, the approach taken was of a EU rule of law type, assuming the EU as the general guarantor of the rule of law, also in areas where its

²⁸⁴ The role of the guardian in the EU is particularly entrusted to the Commission, which has the control of both the major mechanism for detecting and sanctioning rule of law violations, namely the Art 7 TEU and Art. 258 TFUE. However, with respect to both the mechanisms the Commission works as an introductory body: it is not up to the Commission to establish the violation of the EU principles or of its provisions; in one case the Council and the European Council, with the consent of the European Parliament, and in the other case the CJEU, affirms the existence of the risk or of the breach and may define the penalties.

²⁸⁵ W. Sadurski, *Adding a Bite to a Bark? A story of Article 7, the EU Enlargement, and Jorg Haider*, 2010 *Columbia Journal of European law*, 1.

²⁸⁶ N. Urbinati, “Representative Democracy and its critics, in S. Alonso - J. Keane - W. Merkel (eds.), *The future of Representative Democracy*, Cambridge University Press, 45.

competence is not as clear, or does not exist at all. Surprisingly enough, it seems that the EU has accomplished more in situations where it has no direct competence – in Poland, with regard to the conflict between the Government and the Constitutional Court and, before that, in Romania, in the conflict between the Government and the Head of State – than the ones where the EU has competence, as happened in Hungary, where the infringement procedures have proven to be only of little if any effect.

Several theories have been offered in response to this apparent paradox. Firstly, with regard to Poland, it was possible to use the newly adopted Rule of Law Framework; with regard to Romania, there was the threat of the Cooperation and Verification Mechanism pending to the country's accession. Secondly, in both countries, there exists a more complex political landscape where no one party has the predominant position, and civil society is not entirely aligned with Government, other than in Hungary. Thirdly, the Polish and Romanian parties did not enjoy²⁸⁷ the same support in the EU Parliament that Fidesz and Orbán were able to manage rally in Parliament and the Council (and in the Commission too).²⁸⁸ Fourthly, the delay in dealing with the crisis in Hungary has provided a meaningful example of how not to act; action should come quickly, and attitude about these issues serious. Fifthly, there was a material impossibility of merely adopting a cosmetic compliance in light of the EU's request in Poland (either the Constitutional Court's Decision was accepted and published or it was not), while Hungary was able to shape the situation in its favor.

It should be concluded that the EU Commission option for a soft reaction to the rule of law challenges in Hungary, exclusively resorting to infringement procedures, was not just a matter of political realism (considering the support for Orbán in the EU *and* in his own country), it is a matter of law, and especially rule of law. The infringement procedure is

²⁸⁷ However, it is noteworthy that in the EU Parliament at least half of the EPP members split from the party's official position, which Fidesz belongs to, and allowed the Tavares Report to pass. See D Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union" (2017) 52(2) *Government and Opposition*, 2017, 335.

²⁸⁸ According to F. Timmermans "*Poland and Hungary are different. Orbán and the Hungarian government have never refused a dialogue with us. A constructive dialogue, not only pointing at divergent views, is the European way of solving such disputes. But the truth is that a few times we have opened procedures against Hungarian handling of the law. And this has stopped, for instance, decrease of the pension age for the judges*" B Wieliński, interview with Timmermans, "Poland should be a leader in Europe – but it needs to cooperate" (Euractiv, May 22, 2017).

narrowly construed, only able to engage EU law violations. The tool is structurally incapable to engage the most troublesome violations of the rule of law: Article 258 TFUE is directed at violations of rules of EU law and not to violations of the EU rule of law. According to the Commission, Hungary had plenty of the first ones, but it has actually not been possible to find any of the second. Dismantling the procedural guarantees for administering the law as in Hungary is really close to, but it has not yet reached, the threshold needed for affirming that the rule of law is no longer governing the country.

During the development of this article, EU Parliament has expressed a different opinion on this matter. Bemoaning that the Commission did not respond to its call to activate its EU Framework to strengthen the rule of law,²⁸⁹ Parliament acted independently, affirming that the Commission's approach failed to lead to real changes and voted for the application of Article 7 TEU against Hungary.²⁹⁰ The Parliament's Resolution links "thin" rule of law concerns, regarding the independence of the judiciary, to more "thick" rule of law concerns, such as the ones regarding migrant's rights, which the Commission tackled with the infringement procedures, for which there are still cases pending before the ECJ (§§ 70, 71). Beyond this, many concerns described in the proposal do not amount to systemic rule of law violations, lacking an actual and concrete Government action (§§11, 51, 58), and insisting on singular rights denials. It is not the case that the main source of information is the ECtHR case law (§§16, 25, 29, 55), which deals with individual complaints and only indirectly with rule of law matters. Lastly, the progress made by Hungary in many areas (§§13, 19, 29, 48), its continuous dialogue with the EU (§§ 4, 18) – Hungary asked to be, and has been, heard according to Article 7(1) TEU –, and the lack of Recommendations as provided by the Rule of Law Framework, makes the Hungarian situation a grey area still.

The situation in Poland is less complicated. There, the national institutions simply disregarded the rule of law: among the many questionable measures, the ones against the

²⁸⁹ European Parliament Resolution of May 17, 2017, on the situation in Hungary (2017/2656(RSP), §8.

²⁹⁰ European Parliament Resolution of September 12, 2018, on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL). Also here the PPE split itself between voters against and in favor of Hungary.

Constitutional Court are clear cases of violation of the rule of law.²⁹¹ Poland simply acted to avoid, interfere with and disregard the enforcement of what the law provides.²⁹² Poland operated then in a legal vacuum, artificially elaborated by the same institutions, insomuch that Poland is nowadays no longer a rule of law state, mostly because the ruling is not enforced in a lawful manner.²⁹³ This is something that the EU cannot tolerate beyond any doubt, and it therefore requested that the Commission invoke Article 7 TEU. Its reach as protecting the EU rule of law has been clearly affirmed: “The scope of Article 7 is not confined to areas covered by Union law [...] Article 7 is horizontal and general in scope.”²⁹⁴ It would indeed be paradoxical to confine the EU’s possibilities of action to the areas covered by EU law, asking it to ignore serious breaches in areas of national jurisdiction.²⁹⁵

If a Member State breaches the fundamental values in a manner sufficiently serious to be covered by Article 7, this is likely to undermine the foundations of the EU, whatever the field in which the breach occurs. Article 7 TEU confers a power to the EU over matters that relate to a Member state’s activity outside the scope of EU law. It is an emblematic representation of EU rule of law encompassing more than EU law.²⁹⁶ It cannot be said more clearly: EU rule of law is greater than rules of EU law. The EU rule of law appears as the main constitutional ideal of the EU. Only the law can set binding commands (the law rules), and the law should be framed in a certain way in order to have this effect (the law is ruled). That is why the CJEU stresses the importance of the rule of law as a defining

²⁹¹ A. Von Bogdandy - P. Bogdanowicz - I. Cano - M. Taborowski - M. Schmidt, A Constitutional Moment for the European Rule of Law - Upcoming Landmark Decisions Concerning the Polish Judiciary, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-10, 6.

²⁹² For Poland, the EU has chosen the hard option of Article 7 TEU just with regard to the (defective) enforcement of the law and limited the infringement procedure to law-making problems. Theoretically, it is indeed entirely possible to activate Article 7 TEU, both versions, for risks or breaches in law-making as well.

²⁹³ J. Waldron, Rule of law: a much maligned preposition, Robin Cook Lecture, 2015, 21.

²⁹⁴ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, §3-5.

²⁹⁵ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, §8.

²⁹⁶ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, §17.

element of the EU's constitutional framework.²⁹⁷ The EU rule of law is fundamental to the EU, more than the rules of EU law, which are not unchallengeable and unchallenged *per se*: national Constitutional Courts give several indications in this direction. However, they do so in regard to the rules of EU law, not towards the EU rule of law. The EU rule of law instead encompasses the whole of the EU space and project: it underlies and informs the purpose, function and character of the EU.²⁹⁸

The consequence of the identification of the EU rule of law as the core of the EU enterprise is its impact on the pluralist concept of the EU framework. It is common said that the EU ought to be legally pluralist because it is socially pluralist. According to a pluralist understanding, there is no uniformity in the EU: a great majority of foundational values are shared, but are expressed differently across the EU.²⁹⁹ Pluralism commands this composition, allowing each entity of a pluralist identity to achieve its own balance between fundamental values, for example constricting or expanding the media space, keeping the judiciary and the executive apart or join them together, enacting or dismantling a judicial review and so on. This is undoubtedly true, but these same areas have to be framed and enforced in the same way. In the EU context, national governments can determine different legislations, also regarding important areas. However, there could not be a disregard of the rule of law, which is a common value. The pluralist construction of the EU enacts a EU rule of law that, surely, admits concurrent rule of laws views, but it is politically committed to a closer union and a respect of the rule of law. In other words, due to the pluralist principle, internal boundaries may arise within the EU: by judging on these boundaries, the EU rule of law encompasses them. Constitutional and national laws are not limits to EU rule of law, but are simply internal boundaries in the EU rule of law space.³⁰⁰

²⁹⁷ CJEU, C-402/05 *Kadi v. Council of the European Union*, September 3, 2008, §24.

²⁹⁸ T.R.S. Allan, *Constitutional Justice: A liberal Theory of the Rule of Law*, Oxford, Oxford University Press, 2003, 4.

²⁹⁹ From the EU rule of law perspective, these values are not restricted to the EU's specific competences: they are foundational values at the basis of the exercise of all the public authorities in the EU rule of law, both of the EU and Member States. Only this legal basis provides for the EU competence to supervise the application of the rule of law, as a value of the EU in a context that is not related to a specific competence.

³⁰⁰ H. Lindahl, *Fault lines of Globalization*, Oxford, Oxford University Press, 2013, 174.

They must be respected, but they are not out of reach of the EU rule of law: only a system where the laws respect certain parameters (the formal requirements of the law), enforce the commands (obedience of the law), and may be challenged (procedural requirement) may set these internal boundaries, and only Member States' legal systems which comply with these parameters fall within the EU rule of law boundaries. Paraphrasing Von Bogdandy, when it comes to the rule of law, the EU legal space turns into a EU legal order.³⁰¹ The rule of law in the EU context is fundamental since its presence does not allow a State to comply with its rules of law, and at the same time disregard the rule of law. When this happens, being the rule of law common to the State and EU, the EU is authorized to act in defense of that supranational community that is the EU rule of law, which allows the redefinition of the content of the community which stands to the extent its limits are recognized.³⁰²

The EU promise is an open space where the law can be articulated and redefined in the course of debate, with the general and uncompromised guarantee that this law complies with certain parameters and, on that basis and on that basis alone, it rules. Here, there is a legitimate source of appealing to the EU. The EU as a political arena, where it is possible to democratically complain about, and fight for the enactment or the repeal of, this or that legislation, but the rule of law is not questioned.

Having Article 2 TEU and Article 7 TEU is something like a constitutional control by the EU, grounded on neither constitutional provisions nor its substantial content – that is up to national Constitutional Courts or the ECtHR –, but on the concept of the rule of law itself. EU law has been an instrument for political transformation of new dimensions for Member States, not only intended to protect the existing current legal framework, but also to change it, when needed, with a view toward a common European future. And this future could not be anything else than a rule of law order.

³⁰¹ A. Von Bogdandy, *European Law Beyond "Ever Closer Union" Repositioning the Concept, its Thrust and the ECJ's Comparative Methodology*, *European Law Journal*, Vol. 22, No. 4, 2016, 528.

³⁰² M. Koskenniemi, *The Gentle Civilizer of Nations*, Cambridge, Cambridge University Press, 2004, 507.