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SCRUTINY OVER THE RULE OF LAW IN THE EUROPEAN UNION

Abstract:
The European Union is founded on a set of common principles of democracy, the rule of law, and fundamental rights, as enshrined in Article 2 of the Treaty on the European Union. Whereas future Member States are vetted for their compliance with these values before they accede to the Union, no similar method exists to supervise respect of these foundational principles after accession. This gap needs to be filled, since history proved that EU Member State governments' adherence to foundational EU values cannot be taken for granted. Against this background this article assesses the need and possibilities for the establishment of an EU Scoreboard on EU values; viable strategies and procedures to regularly monitor all Member States' compliance with the rule of law on an equal and objective basis; and the nature of effective and dissuasive sanction mechanisms foreseen for rule of law violators.

Keywords: democracy, European Union, fundamental rights, Hungary, Poland, rule of law

INTRODUCTION: PROBLEM SETTING

The European Union (EU), and its area of freedom, security and justice (AFSJ), is founded on a set of common principles comprised of democracy, the rule of law, and fundamental rights. This is enshrined in Article 2 of the Treaty on European Union (TEU) which lists "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" as the shared values in which the Union is rooted. With the entry into force of the Lisbon Treaty, the EU became officially equipped with its own bill of rights in the form of the Charter of Fundamental Rights. Moreover, the national constitutional traditions of the EU Member States, the ECHR, and the jurisprudence of the Strasbourg court (ECtHR) are also constitutive elements of EU law.

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Future member states are filtered for their compliance with these values *before* they accede to the Union (Article 49(1) TEU). The so-called "Copenhagen criteria", established in 1993, are designed to ensure that all new EU Member States are in line with the Union's common principles before joining the EU. In addition, the Union exports these values, which are a fundamental component of the Union's international relations (Articles 21, 3(5) and 8 TEU). That notwithstanding, no similar method exists to supervise adherence to these foundational principles *after* accession. Thus a gap has emerged between the EU's proclamation of these fundamental rights and foundational values and principles, and their actual enforcement. Whereas before accession the most severe sanction can be imposed on a prospective member country – namely, that its disregard of EU values might result in not being able to join the EU – there is no counterpart to such scrutiny after accession. This has been referred to by Viviane Reding, Vice-President of the European Commission, as the "Copenhagen dilemma".[1]

Against this background, Commissioner Reding's call to stop applying a double-standard when it comes to respect for the rule of law – one for those outside the EU and another for those already in the EU – should be seen as an important initiative. "Whereas it is the duty of domestic legal systems to uphold the Treaties, including EU objectives, rule of law matters are no longer a 'domain reservé' for each Member State, but are of common European interest."[2]

This lack of monitoring, evaluating, and supervisory mechanisms would not constitute a problem if Member States would continue to adhere to these principles after accession too. This is a very unlikely hypothetical scenario though. As James Madison put it, "if angels were to govern men, neither external nor internal controls on government would be necessary."[3] But governments comprised of human beings, including EU Member State governments, may – and do – violate foundational principles, and they do so in at least two ways. In the first place, concepts such as the rule of law and fundamental rights are fluid concepts. Member States may violate them by violating the letter of the law or by sticking to their black letter law or jurisprudence instead of responding to the changed social circumstances (e.g. maintaining the criminalization of homosexuality, non-criminalization of domestic violence, or lack of reasonable accommodations are just illustrative and obvious examples). Second, a country may straightforwardly turn against its own previously-respected principles of democracy, the rule of law, and fundamental rights. This latter scenario may happen in a narrow field, but in a gravely injurious manner, which is typically the case with regard to fundamental rights, like for example the Roma crises in France in 2010-2013, the Italian Ponticelli

[1] "Once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect". European Parliament, *Plenary debate on the political situation in Romania*, statement by V. Reding, 12 September 2012. *See also* V. Reding, *The EU and the Rule of Law: What Next?*, speech delivered at CEPS, 4 September 2013.

[2] Reding (*The EU and…*), *supra* note 1.

[3] J. Madison, *The Federalist No. 51. The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, Independent Journal, 6 February 1788.

incident,[4] or the mass surveillance of EU citizens by the British GCHQ intelligence service in collaboration with the United States NSA.[5]

Alternatively, a country may make a U-turn on the rule of law path, systematically eliminating – at least in the domestic setting – channels for various kinds of internal dissent, i.e., diminishing the potentialities of criticism by the voters by, for example, controlling the media, gerrymandering, or restricting civil society by cutting funds and systematically harassing NGO representatives; and doing the same with respect to state institutions by weakening the powers of the constitutional court, by influencing the judiciary, by eliminating ombudsman's offices, etc., thereby deconstructing effective checks and balances. At the time of writing this present article Member States illustrating such systemic threats currently include, according to one or more EU institutions, Hungary[6] and Poland,[7] and the number of other potential candidates is rising.

Typically, depreciation of one fundamental value triggers depreciation of others as well. For example, the discrimination against the Roma went hand in hand with arbitrary determinations of a state of emergency by various Italian state and local administration organs.[8] Also, the unlimited surveillance in the UK was possible due to a lack of transparency and democratic accountability. Any systematic deconstruction of the rule of law results in violations of fundamental rights in a variety of possible ways. Since democracy, the rule of law, and fundamental rights are co-constitutive, throughout the present article they will be discussed together, with due regard to their triangular relationship.[9]

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[4] *See e.g.* for more on the French and Italian cases, Commissioner for Human Rights, *Human rights of Roma and Travellers in Europe*, Council of Europe, Strasbourg: 2012; for the latter *see also* Fundamental Rights Agency, *Incident Report: Violent attacks against Roma in the Ponticelli district of Naples*, Italy, 2008, available at: http://fra.europa.eu/sites/default/files/fra_uploads/196-Incid-Report-Italy-08_en.pdf (accessed 30 May 2017).

[5] D. Bigo, S. Carrera, N. Hernanz, J. Jeandesboz, J. Parkin, F. Ragazzi & A. Scherrer on behalf of the European Parliament, *National programmes for mass surveillance of personal data in EU Member States and their compatibility with EU law*, 2013, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE_ET(2013)493032_EN.pdf (accessed 30 May 2017).

[6] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), commonly called "the Tavares Report" after its Rapporteur.

[7] *See* College Orientation Debate on recent developments in Poland and the Rule of Law Framework, Brussels, 13 January 2016, available at: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm (accessed 30 May 2017).

[8] Fundamental Rights Agency, *Incident Report: Violent attacks against Roma in the Ponticelli district of Naples*, Italy, 2008, available at: http://fra.europa.eu/sites/default/files/fra_uploads/196-Incid-Report-Italy-08_en.pdf (accessed 30 May 2017).

[9] S. Carrera, E. Guild and N. Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, CEPS 2013, available at: http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf; the original study done for the Directorate General for Internal Policies of the European Parliament, PE 493.031; 2013, is available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf; S. Carrera, E. Guild and N. Hernanz, *Rule of law or rule of thumb. A new Copenhagen mechanism for the EU*, CEPS policy brief, 2013, available at: http://www.ceps.eu/system/files/

1. RATIONALE OF THE EU'S RULE OF LAW SCRUTINY

1.1. Upholding the Rule of Law in the EU and the Member States

As Samuel P. Huntington famously claimed

> "[e]lections, open, free and fair, are the essence of democracy, the inescapable sine qua non. Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities make such governments undesirable, but they do not make them undemocratic. Democracy is one public virtue, not the only one, and the relation of democracy to other public virtues and vices can only be understood if democracy is clearly distinguished from other characteristics of political systems."[10]

A challenge facing any rule-of-law debate at the EU level relates to its conceptual vagueness. The notion of rule of law is elusive and controversial. The thematic contributions composing the CEPS report on "The triangular relationship between Fundamental rights, Democracy and Rule of law in the EU – Towards an EU Copenhagen Mechanism"[11] revealed that there is an "embeddedness" of the term "rule of law" in specific national historical diversities of a political, institutional, legal, and even imaginary nature.

In addition, legal theory distinguishes between various concepts of the "rule of law", although there are also some uncontroversial common elements. Both the "thin" and "thick" concepts of the rule of law require more than rules created by an elected majority.[12] Even the thinnest understanding, claiming that any law that a democratically-elected Parliament passes can be the foundation for the rule of law, presupposes a minimum element: that people retain the right of expressing their discontent at least at the next democratic, i.e. free and fair, elections.[13] Raz prescribes "(1) that people should

No%20303%20Copenhagen%20Mechanism%20for%20Fundamental%20Rights_0.pdf (all accessed 30 May 2017). *Cf. also* Council of Europe (Parliamentary Assembly), *Report of the Committee on Legal Affairs and Human Rights: The Principle of the Rule of Law*, 11343, (2007), para. 5.

[10] S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman: 1991, pp. 9-10.

[11] Carrera, Guild & Hernanz (*The Triangular Relationship…*), *supra* note 9.

[12] Adherents of a formal theory, while emphasizing the distinction between rule of law and other values, go beyond legitimacy through majority rule and look into the authority of the lawmaker, procedure, form, clarity and stability of the norm, and the temporal dimension of the law, i.e. the prohibition of retroactivity; an independent judiciary; access to the courts; and the requirement that norms should be based on clear rules and the discretion left to law enforcement agencies shall not be allowed to undermine the purposes of the relevant rules. Even those who emphasize the legitimizing power of majority rule as the cornerstone of all political order maintain that dissatisfied citizens reserve a lasting right to revolution. *See* J. Raz, *The Autority of Law*: Oxford University Press, Oxford: 1979, p. 210; J. Locke, *Second Treatise*, § 240. *See also* N. Luhmann, *Legitimation durch Verfahren*, Suhrkamp, Frankfurt: 1983.

Proponents of substantive rule of law requirements focus on the content, i.e. substance of the laws, which in their views must reflect certain values such as justice, equality, or human rights. For a summary, see B. Z. Tamanaha, *A Concise Guide to the Rule of Law*, in: G: Palombella and N. Walker (eds.), *Relocating the Rule of Law*, Hart Publishing, Portland: 2009, p. 4.

[13] J. A. Schumpeter, *Capitalism, socialism, and democracy*, Harper Collins, New York: 1950.

be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it."[14] Fuller identifies a number of principles, such as generality, publicity, prospectivity, clarity, consistency, the possibility of compliance, constancy, and faithful administration of the law.[15] Before going on to examine further potential constituent elements, Krygier's warning should be borne in mind: it is impossible to list the prerequisites of the rule of law in anatomical terms; instead it should be seen as a teleological notion.[16]

Weber brings us closer to the desired objective: Although they have good chances to survive, neither traditional nor charismatic authority will render a system legitimate without adhering to some minimum element of rationality,[17] which is often formulated as *salus populi suprema lex esto,*[18] the good of the people as the supreme law. A social contract can never be rewritten in a way that does not respect at least this minimum requirement.[19] Dworkin straightforwardly rejects the value of majoritarianism as a legitimizing force,[20] and searches for the substantive value behind majority rule, which he traces in political equality.[21] Along these lines he argues for an alternative concept of democracy, which he calls the partnership conception,[22] meaning "government by the people as a whole acting as partners in a joint-venture of self-government." In the same vein, Sajó argues[23] that the majority – and even more the supermajority – of MPs in

[14] Raz, *supra* note 12, pp. 212-213

[15] L. Fuller, *The Morality of Law*, Yale University Press, New Haven: 1969, p. 43.

[16] According to Krygier, the rule of law is "concerned with the morphology of particular legal structures and practices, whatever they turn out to do. For even if the structures are just as we want them and yet the law doesn't rule, we don't have the rule of law. And conversely, if the institutions are not those we expected, but they do what we want from the rule of law, then arguably we do have it. We seek the rule of law for purposes, enjoy it for reasons. Unless we seek first to clarify those purposes and reasons, and in their light explore what would be needed and assess what is offered to approach them, we are bound to be flying blind." M. Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?*, Talk delivered as the 2010 Annual Lecture of the Centre for Law & Society, University of Edinburgh, 18 June 2010, UNSW Law Research Paper No. 2010-22, available at SSRN: http://ssrn.com/abstract=1627465 (accessed 30 May 2017).

[17] M. Weber, *Politik als Beruf*, Duncker & Humblot, München und Leipzig: 1919.

[18] Originally mentioned by Marcus Tullius Cicero, de Legibus (book III, part III, sub. VIII), as *ollis salus populi suprema lex esto*, also referenced by Locke in the Second Treaties and Hobbes in his Leviathan, believing that it is rationality that makes men abandon the natural state of mankind, i.e. the state of *bellum omnium contra omnes*. For a summary, *see* P. Costa, *The Rule of Law. A Historical Introduction*, Springer, Dordrecht: 2009, pp. 73-74.

[19] *Cf.* V. Orbán, *Új társadalmi szerződés született* (A new social contract was born), Demokrata, 25 May 2010, available at: http://www.demokrata.hucikk/orban_uj_tarsadalmi_szerzodes_szuletett/ (accessed 30 May 2017).

[20] R. Dworkin, *What Is Democracy*, in: G. A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, CEU Press, Budapest: 2012, pp. 25-34, 31.

[21] *Ibidem*, at 29.

[22] *Ibidem*, pp. 26 and 31.

[23] A. Sajó, *Courts as representatives, or representation without representatives*, speech delivered in Yerevan, Armenia at the conference on The European standards of rule of law and the scope of discretion of powers in the Member State of the Council of Europe, 3–5 July 2013.

so-called representative democracies might subvert a rule of law, first by not representing the majority of voters, i.e. by not fulfilling the promises made during the election campaign,[24] and second, by becoming too responsive to popular wishes, denying the rule of law to the powerless, mainly those who do not constitute part of the electorate.

Joseph Goebbels infamously held that "[i]t will always be one of the best jokes of democracy that it gives its deadly enemies the means to destroy it."[25] Against this background, in order to prevent this weakness of democracies, the concept of "militant democracy"[26] was introduced, which refers to the capacity of modern constitutional democracies to defend themselves against domestic political challenges to their existence as democracies.[27] In a militant democracy, societal norms are based on the rule of law, and *built-in correction mechanisms compensate for the deficiencies* of a majoritarian government: in the first scenario it makes good the consequences of departing from identity politics, whereas in the second it compensates for the weaknesses of identity politics, either by granting participation to those groups who have been excluded from "we the people" or by representing their interests while being excluded.[28] In this sense international correction mechanisms can be seen as a *means of militant democracy*, operating along the logic of constitutional law by inserting precautionary measures into democratic systems to protect them against a future potential government acquiring and retaining power at all costs, i.e. by superseding constitutional government through populism and emotional politics.[29]

If militant democracy fails in the domestic arena, it means that all elements of a constitutional rule of law are jeopardized, whichever understanding of the term one adheres to.[30] Even the thinnest understanding of the rule of law, requiring only that democratic elections are regularly held, is hampered. In a country where domestic checks fail, the only thing left is the control mechanism of international law, including international courts protecting the rule of law.[31] Accordingly we regard international and EU norms

[24] A. Sajó is arguing about the need for the representatives to be responsive to popular demands. H. F. Pitkin, *The Concept of Representation*, University of California Press, Los Angeles: 1967.

[25] Cited by S. Holmes in his review of A. Sajó (ed.), *Militant Democracy,* Eleven International Publishing, 2004. p. 262 (4(3) International Journal of Constitutional Law 586 (2006)).

[26] For a full description, *see* K. Loewenstein, *Militant Democracy and Fundamental Rights,* 31 American Political Science Review 417 (1937).

[27] A. Sajó (ed.), *Militant Democracy*, Eleven International Publishing, Utrecht: 2004.

[28] Sajó, *supra* note 23.

[29] For more on international mechanisms correcting the failure of domestic law to protect minorities, *see e.g.* A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, Mohr, Tübingen: 1923.

[30] *See e.g.* Z. Fleck, *A bizonytalan jövő*, *(The uncertain future)*, Norman, 15 July 2013, available at: http://www.galamuscsoport.hu/tartalom/cikk/315230_a_bizonytalan_jovo (accessed 30 May 2017).

[31] *Cf.* In contemporary Europe, some of the most important institutional checks on power are those exercised by the EU and the broader international community, rather than anything within Hungary itself. F. Fukuyama, *Do Institutions Really Matter? The American Interest*, 23 January 2012, available at: http://blogs.the-american-interest.com/fukuyama/2012/01/23/do-institutions-really-matter/#sthash.DOa5ys3f.dpuf (accessed 30 May 2017).

and enforcement mechanisms as external tools of militant democracy whereby the unrepresented – whether an unrepresented majority or an oppressed minority – are granted protection against their substandard representatives when all domestic channels of criticism have been effectively silenced and all domestic safeguards of democracy have become inoperative – in short, when the rule of law has been effectively deconstructed in the national setting.

1.2. Upholding the specificities of the EU and EU law

For the first time in EU history, the Lisbon Treaty expressly referred to Union values, replacing the previous, less extensive principles. Article 2 TEU makes clear – this time via means of positive law – that the EU is a *Wertegemeinschaft*,[32] a community based on common values. The EU views the rule of law as one of its raisons d'être, and recognizes the rule of law as being one of the interrelated trinity of concepts already referred to above. These values were reinforced with the entry into force of the Charter of Fundamental Rights.

When asked about the values that characterize the European Union the best, peace, human rights, democracy and the rule of law are placed at the top of the list by EU citizens. For individual Europeans personally, peace, human rights and respect for human life are the values that matter most.[33]

However, the EU lacks an enforcement mechanism to ensure that these fundamental values are respected. The challenge underlying enforcement lies at the heart of the debates about the conferral of powers and national sovereignty, and subsidiarity and proportionality, i.e., about the vertical separation of powers between the EU and its constitutive elements. Member States, with special concern for purely internal affairs, repeatedly question the legitimacy of EU interference into domestic affairs. But there would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law, and asking it to ignore serious breaches of its basic values in areas subject to national jurisdiction. If a Member State breaches the EU's fundamental values, this is likely to undermine the very foundations of the Union and the trust between its Member States, regardless of the field in which the breach occurs.[34]

Beyond harming the nationals of a Member State, Union citizens residing in that state will also be detrimentally affected. A lack of limitations on "illiberal practices"[35]

[32] *See e.g.* K. Adenauer's address on 7 December 1951 at the Foreign Press Association in London, in: Bulletin des Presse- und Informationsamtes der Bundesregierung No. 19/51, p. 314.

[33] See Eurobarometer 82 for autumn 2014.

[34] European Commission (2003*), Communication 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, 15 October 2003, p. 5.

[35] The term "illiberal democracy: was coined long ago, but it gained practical relevance in the EU after Hungarian Prime Minister praised it in his speech given in Tusnádfürdő on 25 July 2014. The original speech is accessible in video format via https://www.youtube.com/watch?v=PXP-6n1G8ls (accessed 30 May 2017).

Cf. Frans Timmermans' speech: "There is no such thing as an illiberal democracy". Frans Timmermans, *EU framework for democracy, rule of law and fundamental rights*, Speech to the European Parliament, Strasbourg, Speech/15/4402, 12 February 2015.

may encourage other Member States' governments to follow suit, and subject other countries' citizens to an abuse of their rights. In other words, violations of the rule of law may, if there are no consequences, become contagious.[36] Moreover, all EU citizens will to some extent suffer due to the given state's participation in the EU's decision-making mechanisms, or at the very least the legitimacy of the Union's decision-making process will be jeopardized. Thus a state's departure from the rule of law standards and the European consensus will ultimately hamper the exercise of rights of individuals EU-wide.

Here one should also address an important specificity of EU law, namely the nature and future faith of instruments covering the AFSJ. As long as fundamental rights are not enforced in a uniform manner throughout the Union, and for as long as a Member State cannot take the judicial independence of another Member State for granted, mutual trust and mutual recognition based on instruments in the AFSJ will be jeopardized.[37] As long as certain Member States are worried about their citizens' basic rights and respect for their procedural guarantees due to different fundamental rights standards, they leave short-cuts in their legislation so as not to enforce EU law, and at the same time will interpret EU law in a restrictive way.[38] And as long as the Member States – with or without good reason – have no faith in each others' human rights protection mechanisms, the administration of EU criminal justice will remain cumbersome[39] and the Member States may invoke the protection of basic human rights in order to permit exemptions from the principle of the primacy of EU law, which could potentially have fatal consequences to the EU legal system.[40]

The CJEU has accepted that the presumption of EU Member States' compliance with fundamental rights may be rebuttable.[41] If EU Member States cannot properly

[36] V. Orbán: *The conservative subversive*, Politico 28, 2015, pp. 12–15, 15.

[37] As the CJEU has recently stated "…the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law." Opinion 2/13 on the compatibility of the draft agreement on the EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with the EU and TFEU Treaties of 13 December 2014, CJEU, para. 191.

[38] G. Vermeulen, W. De Bondt, Ch. Ryckman (eds.), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Maklu, Antwerpen, Apeldoorn, Portland: 2012, 269–270.

[39] W. Van Ballegooij, P. Bárd, *Mutual Recognition and Individual Rights: Did the Court Get It Right?* 7 New Journal of European Criminal Law 439 (2016).

[40] See the seminal Solange cases of the German Federal Constitutional Court: *Solange I*, BvL 52/71, BVerfGE 37, 271, 29 May 1974; *Solange II*, 2 BvR 197/83, BVerfGE 73, 339, 22 October 1986.

[41] The Court of Justice of the European Union, in Joined Cases C-411/10 and C-493/10, N.S. and M.E., 21 December 2011, para. 80, states that: "it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR", and para. 104 states, "[i]n those circumstances, the presumption underlying the relevant

ensure an efficient, human rights-compliant and independent judiciary to carry out the task of ensuring compliance, how could the principle of mutual recognition possibly stand in EU JHA law?[42] The establishment of a uniform EU human rights regime might be the answer to this problem.

The heads of states and governments reached the same conclusion in the Stockholm program, which is surprisingly candid regarding the principle of mutual recognition. The Stockholm program expresses a straightforward criticism that mutual trust, which was the alleged cornerstone of several third pillar documents adopted after 11 September 2001, was in reality absent, and offers a program aimed at establishing it. In order to remedy the problem and create trust, the multi-annual program proposes legal harmonisation. "The approximation, where necessary, of substantive and procedural law should facilitate mutual recognition."[43] By 2012 several important EU laws were passed to this effect, for instance on the right to interpretation and translation in criminal proceedings, the right to information in criminal proceedings, and the establishment of minimum standards on the rights, support and protection of victims of crime – issues all covered in the Justice chapter of the Charter of Fundamental Rights.[44]

The development of judicial cooperation as illustrated above supports the neo-functionalist explanation of the evolution of European integration. At the early stage of integration, Members States declined each and every rudimentary formal criminal cooperation. The free movement of persons within the area of freedom, security and justice, in addition to the formation of subjects of legal protection at the Community level, necessitated common criminal investigations and cooperation in European decision-making (the first spill-over effect).[45] The initially stalling of criminal cooperation and the Member States' fear of losing a considerable part of their national criminal sovereignty resulted in the formation of norms that were highly influenced by politics, difficult to

legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable", and para. 106 reads, "Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."

[42] S. Carrera, E. Guild, *Implementing the Lisbon Treaty Improving the Functioning of the EU on Justice and Home Affairs*, European Parliament, Brussels: 2015.

[43] Stockholm Programme, Section 3.1.1.

[44] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council framework decision 2001/220/JHA.

[45] E. B Haas, *Beyond the Nation-state*, Stanford University Press, Stanford: 1964; P. C. Schmitter, *Three Neo-functional Hypotheses About International Integration*, 23(2) International Organization 161 (1969).

enforce, and represented lower levels of cooperation: instead of legal harmonisation the adopted provisions complied with the principle of mutual recognition.

However, in the face of a lack of adequate, communautarised, enforceable minimum procedural guarantees and human rights mechanism, such provisions were unable to operate effectively. Currently we are witnessing how due process guarantees complement existing provisions, and how an EU criminal procedural law system evolves, as a second spill-over effect, in order to maintain and promote effective cooperation in criminal matters. This is how a minimum harmonisation of due process guarantees or, in other words making fundamental rights justiciable, permits mutual recognition-based laws to survive.

Beyond the political costs of the democracy, rule of law, and fundamental rights deficits, the social and economic costs should also be mentioned. When discussing social costs, the point of departure must be the deficiency of democracies, which results in the depreciation of the other two values. Namely, the elected legislative branch suffers from some shortcomings concerning representativeness. They might turn against those who elected them, not fulfilling their promises in the electoral campaign, but also – and for our purposes more importantly – they may exclude certain groups of people from representation. On the one hand these might be those groups which voted against the representatives, but on the other might include those who are excluded altogether from any political representation. They are denied even the most fundamental, first generation human right, namely the right to vote. These are the groups that are traditionally called – depending on the jurisdiction in question – insular or vulnerable minorities, such as children, individuals living with mental disabilities, and certain groups of foreigners. Lacking political rights, they are typically protected by the judiciary, first and foremost by the apex courts.[46] Depreciation of the rule of law thus hits these individuals much harder than those capable of influencing electoral processes to some extent.

Finally, a state based on democracy, the rule of law, and fundamental rights creates an institutional climate that is a determinant for economic performance. Especially in times of financial and economic crises, solid state institutions based on commonly shared values play a key role in creating or restoring confidence and fostering economic growth. The impact of national justice systems on the economy has been demonstrated in many cases by the International Monetary Fund, the European Central Bank, the OECD, the World Economic Forum and the World Bank.[47]

[46] A Sajó, *supra* note 23.

[47] *The 2015 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 116 final; Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *The 2014 EU Justice Scoreboard*, COM/2014/0155 final; *cf. also* European Commission, *The Economic Impact of Civil Justice Reforms*, Economic Papers 530, September 2014; *What makes civil justice effective?*, OECD Economics Department Policy Notes, No. 18 June 2013 and *The Economics of Civil Justice: New Cross-Country Data and Empirics*, OECD Economics Department Working Papers, No. 1060.

2. EU ATTEMPTS AT MONITORING AND ENFORCING THE RULE OF LAW

History and recent events have proven that the Copenhagen dilemma is currently a very vivid one in the EU. It exists despite the fact that the EU, under the current treaty configurations, is already a rule-of-law actor, relying on a set of policy and legal instruments, assessing (to varying degrees) Member States' compliance with democracy, the rule of law, and fundamental rights.[48] The dilemma exists because these mechanisms constitute a scattered and patchwork set of Member States' EU surveillance systems as regards their obligations enshrined in Article 2 TEU and the Charter of Fundamental Rights.

The only "hard law" with a treaty basis is Article 7 TEU. Article 7 consists of a preventive arm (determining a clear risk of a breach), and a corrective arm (determining a serious and persistent breach). The scope of its application is remarkably broad and has the clear advantage that, as compared to other mechanisms, it is not only limited to Member States' actions when implementing EU law, but also covers breaches in areas where they act autonomously. It also provides for more or less clear sanctions: if there is a serious and persistent breach by a Member State of the values referred to in Article 2, this Member State might be sanctioned and even be suspended from voting at the Council level. However, Article 7 has never been activated in practice due to a number of political and legal obstacles.

There are other EU-level instruments for evaluating and monitoring (yet not directly supervising) Article 2-related principles at the Member-State level. These include, for instance, the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania, the EU Justice Scoreboard, the EU Anti-Corruption Report, as well as the European Semester, Annual Reports on Fundamental Rights published periodically by the European Commission, the European Parliament and the Fundamental Rights Agency (FRA), Commission infringement procedures (Articles 258 and 259 of the Treaty on the Functioning of the European Union, TFEU), peer reviews in accordance with Article 70 TFEU, and European Parliament resolutions. One should also take into account UN processes and procedures, and the Council of Europe, including the Venice Commission reports. Furthermore, there are ample available data from other sources as well.

But all these mechanisms present a number of methodological challenges. First, they constitute 'soft policy', because they are not legally binding, relying on the use of benchmarking techniques, exchanges of "good practices", and mutual learning processes between Member States. Second, they are strongly affected by politicisation, and as a consequence make use of non-neutral and subjective evaluation methodologies. Third, many of these mechanisms are characterized by a lack of democratic accountability and judicial control gaps, with a limited or even nonexistent role for the European Parliament and the Court of Justice of the European Union.[49]

[48] *Ibidem.*

[49] J. Mortensen, *Economic Policy Coordination in the Economic and Monetary Union: From Maastricht via the SGP to the Fiscal Pact*, CEPS Working Document No. 381 (2013), Centre for European Policy Studies, Brussels.

In response to these deficiencies, European institutions have called for reforms. The European Parliament initiated the establishment of a clear and detailed EU mechanism on democracy, the rule of law, and fundamental rights:[50] it called for an EU mechanism for compliance with and enforcement of the Charter of Fundamental Rights and the Treaties – embracing all the values protected by Article 2 TEU – relying on common and objective indicators; and for carrying out regular assessments on the situation of fundamental rights, democracy and the rule of law in all Member States.[51] It was proposed to establish a scoreboard on the basis of common and objective indicators by which democracy, the rule of law and fundamental rights could be measured. Its indicators should reflect the Copenhagen political criteria governing accession and the values and rights laid down in Article 2 of the Treaties and the Charter of Fundamental Rights, and be drawn up on the basis of existing standards.

The previous European Commission published a Communication in March 2014 on a New EU Framework to Strengthen the Rule of Law.[52] According to this document, the purpose of this new EU Framework would be to enable the Commission to find a solution with a given Member State in order to prevent the emergence of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched. The EU Framework would be triggered in situations where EU Member States are adopting measures or tolerating situations which could be expected to systematically and adversely affect, or constitute a threat to, the integrity, stability and proper functioning of their institutions in securing the rule of law. This would include issues related to constitutional structures and separation of powers, the independence or impartiality of the judiciary, or the system of judicial review.[53]

In those cases where there would be clear indications that there is a "systematic threat" to the rule of law in one Member State, the EU Framework would allow for the initiation of a formal "structured exchange" between the Commission and the given Member State. This exchange would be organized in three stages: first, a Commission assessment, where it would issue a "rule of law opinion" substantiating its concerns and granting the EU Member State the possibility to respond; second, a Commission "rule of law recommendation", would be issued in cases where the controversy is not resolved, and which would provide a fixed time limit for addressing the concerns and specific indications on ways and measures to address them; and third, a follow-up or monitoring of the rule of law recommendation which, if not satisfactorily addressed, could create the possibility for activating the Article 7 TEU mechanism. As regards the

[50] P8_TA-PROV(2015)0227.

[51] *Ibidem*, para. 12.

[52] European Commission, *Communication, A New EU Framework to Strengthen the Rule of Law*, COM(2014)158, 11.3.2014.

[53] *Ibidem*, p. 7. The Communication states: "[t]he Framework will be activated when national 'rule of law safeguards' do not seem capable of effectively addressing those threats."

role of the Parliament and the Council, the Communication highlights that they would be kept "regularly and closely informed of progress made in each of the phases."

While the EU Framework to Strengthen the Rule of Law can be seen as a step in the right direction, it has a number of limitations. First, the monitoring dimension is rather weak in nature. It does not provide for a comparative and regular/periodic assessment, by relevant thematic area (corresponding with the fundamental rights enshrined in the EU Charter), for each individual EU Member State so as to have a country-by-country assessment on the state of the rule of law in each Member State.[54] Second, the ways in which the Commission would use existing information and knowledge on specific EU Member States' practices, and whether it would launch a "rule of law opinion" or a "rule of law recommendation" remains rather discretionary. The assessment would not be carried out by fully independent academic experts who would ensure the full impartiality of the findings. Nor does it provide for any judicial and democratic accountability method (i.e. there are no specific roles for the Parliament or the CJEU) in order for the Commission to take further steps in any of these stages. Third, the EU Framework does not propose any specific model, internal strategy, or policy cycle[55] for EU inter-institutional coordination of the findings resulting from the Commission's rule of law assessment and those from other EU monitoring or evaluation processes of EU Member States' performances, such as the European semester cycle and soft economic governance.[56]

The Communication was acknowledged at the General Affairs Council meeting of 18 March 2014.[57] But since then it has not been followed up on by the Council. Instead, EU Member States' representatives have raised several institutional and procedural questions regarding the Commission's initiative, which were examined and addressed by the Council Legal Service (CLS) in an Opinion issued in May 2014.[58] The CLS emphasized that "respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described in Article 7 TEU." It concluded that Article 7 TEU cannot constitute the appropriate basis to amend this procedure, and that the Commission's initiative was not compatible with the principle of conferral. It also stated that there is no legal basis in the Treaties empowering the institutions to create a new supervisory mechanism additional to what is laid down in Article 7 TEU with respect to the rule of law in the Member States, nor to amend, modify, or supple-

[54] *See* Carrera, Guild & Hernanz (*The Triangular Relationship…*), *supra* note 9.

[55] As proposed by European Parliament, *Resolution on the situation of fundamental rights in the EU (2010-2011)*, P7_TA(2012)0500, Rapporteur: Monika Flašíková Beňová, 22 November 2012.

[56] *See also* European Parliament, *Draft Report on the situation of fundamental rights in the European Union (2013-2014)*, (2014) 2254 (INI), Rapporteur: L. Ferrara, 6 March 2015.

[57] Press Release, Council meeting, General Affairs, 3306th, Brussels, 18 March 2014.

[58] Council of the EU, *Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties*, 10296/14, Brussels, 27 May 2014.

ment the procedure set forth in Article 7. "Were the Council to act along such lines, it would run the risk of being found to have abased its powers by deciding without a legal basis."

The CLS suggested as an alternative the conclusion of an intergovernmental international agreement designed to supplement EU law and to ensure the respect of Article 2 TEU values. This agreement could envisage the participation of European institutions, and the actual ways by which EU Member States would commit to drawing appropriate conclusions from a 'review system'.

Kochenov and Pech have expressed concerns about the CLS Opinion and rightly argued that

> … since the Commission is one of the institutions empowered, under Article 7 TEU, to trigger the procedure contained therein, it should in fact be commended for establishing clear guidelines on how such triggering is to function in practice. In other words, a strong and convincing argument can no doubt be made that Article 7(1) TEU already and necessarily implicitly empowers the Commission to investigate any potential risk of a serious breach of the EU's values by giving it the competence to submit a reasoned proposal to the Council, should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. Moreover, given the overwhelming level of interdependence between the EU Member States, and the blatant disregard for EU values in at least one EU country, the Commission fulfilled its duty as Guardian of the Treaties by putting forward a framework that would make Article 2 TEU operational in practice.[59]

The General Affairs Council of 16 December 2014 adopted Conclusions on ensuring respect for the rule of law.[60] The Council committed itself to establishing a dialogue among all EU Member States to promote and safeguard the rule of law "in the framework of the Treaties". The Conclusions underline that this "dialogue" will be based on the principles of objectivity, equality and non-discrimination between EU Member States, and it will be driven by an evidence-based and non-partisan approach. The Council also agreed that this dialogue will take place once a year in the Council General Affairs configuration and be prepared by COREPER (Presidency), and consideration is given to launching debates on thematic subject areas. By the end of 2016, the General Affairs Council was to evaluate the experience.[61]

It is not clear what actual outputs such a dialogue will produce or the ways in which the principles of objectivity, an evidence-based approach, and non-politicisation will be guaranteed in practice. Such an inter-governmental framework of cooperation cannot be conducive to effectively addressing the current rule of law challenges across the Union.

In any case, without the Council ever expressing its approval, the Commission's initiative for an EU Framework to Strengthen the Rule of Law is being tested at the

[59] *See* D. Kochenov and L. Pech, *Upholding the Rule of Law in the EU: On the Commission's Pre-Article 7 Procedure as a Timid Step towards the Right Direction*, EUI Working Papers, RSCAS 2015/24, Florence, p. 11.

[60] *See* www.consilium.europa.eu/en/meetings/gac/2014/12/16.

[61] Council of the European Union, *Rule of Law: Evaluation of mechanism*, 13980/16, Brussels, 9 November 2016.

time of writing the present article. The EU Framework – commonly known as the pre-Article 7 procedure – was triggered against Poland.[62]

The application of the pre-Article 7 EU Framework procedure raises numerous questions. The triggering of the EU Rule of Law Framework against one Member State, i.e. Poland, but not another, namely Hungary – where constitutional capture happened much earlier – may call into question the objectivity and impartiality of the EU rule of law system, and the principle of equal treatment of all Member States.[63] The case for criticising EU institutions is particularly strong because the problems in Hungary and Poland are very similar and closely interrelated; in fact, it seems as if the latter was mimicking the former. Thus it seems as if the Commission acted arbitrarily and in an unequal manner, or worse, as if it was influenced by political bias, i.e. the Hungarian governing party Fidesz, belonging to the large party family of the European Peoples' Party, seems to have been given more leeway in departing from EU values than the Polish Law and Justice Party, which is affiliated with the less influential group of European Conservatives and Reformists.[64]

Apart from the issues surrounding the objectivity of the process and the equal treatment of Member States, the actual use of the EU Rule of Law Framework vis-à-vis Poland also raises numerous questions concerning the procedure's effectiveness. Upholding and promoting European values may follow a "'sunshine policy', which engages and involves rather than paralyses and excludes", or a "value-control which is owned equally by all actors"[65] – but only if the Member State in question is playing by the rules, i.e. if it accepts the validity of European norms and values and the power of European institutions to supervise these. "Since the success of such a positive approach is very much dependent on the willingness of the recipients to adhere to the concept of cooperative constitutionalism, it will not work when a state systematically undermines democracy, deconstructs the rule of law and/or engages in massive human right violations. There is no reason to presume the good intentions of those in power to engage in a sunshine approach involving a dialogue and soft measures to make the entity return to the concept of limited government – a notion that those in power wished to abandon in the first

[62] *See* http://ec.europa.eu/news/2016/01/20160113_en.htm where it is stated that "[t]he College agreed to come back to the matter by mid-March, in close cooperation with the Venice Commission of the Council of Europe. Echoing what President Juncker said last week, First Vice-President Timmermans underlined after the College meeting that this is not about accusations and polemics, but about finding solutions in a spirit of dialogue. He underlined his readiness to go to Warsaw in this context." *See also* http://europa.eu/rapid/press-release_MEMO-16-62_en.htm.

[63] For immediate criticism, *see* D. Kochenov, *The Commission vs. Poland: The Sovereign State Is Winning 1-0*, 25 January 2016, available at: http://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/; G. Gotev, *Tavares: Discussing rule of law in Poland separately from Hungary will lead 'nowhere'*, 13 January 2016, available at: http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead (both accessed 30 May 2017).

[64] Gotev, *supra* note 63.

[65] G.N. Toggenburg and J. Grimheden, *The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers*, in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge: 2016.

place."[66] Indeed, instead of deliberation and discourse, the procedure vis-à-vis Poland has turned into a "dialogue of the deaf".[67]

Inasmuch as the negotiations between the Commission and the Polish government remained fruitless, the Commission formalised its concerns in its Opinion of 1 June 2016.[68] These again remained without echo, so the Commission went on to issue its Rule of Law Recommendation of 27 July 2016 with regard to the decisions and constellation of the Polish Constitutional Tribunal, with a deadline set to expire on 27 October 2016.[69] Knowing the stance of the Polish government, it was unsurprising that the Recommendation did not have any effects. Instead the governing Law and Justice party (known as PiS, the Polish acronym for Prawo i Sprawiedliwość) called into question the power of the Commission to issue such a recommendation,[70] and continued to systematically limit the independence of and worsen the overall situation within the Constitutional Tribunal of Poland.[71] Even European Commission President Jean-Claude Juncker became ever more skeptical about the effectiveness of the EU Rule of Law Framework.[72] Nevertheless, instead of launching an Article 7 TEU procedure, in a pathetic attempt to gain more time a complementary recommendation was adopted

[66] P. Bárd, S. Carrera, E. Guild, D. Kochenov, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights,* Center for European Policy Studies (CEPS), Brussels: 2016, p. 41. *See also* D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11(3) European Constitutional Law Review 512 (2015).

[67] K. L. Scheppele, L. Pech, *Poland and the European Commission, Part I: A Dialogue of the Deaf?*, 3 January 2017, available at: http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/ (accessed 30 May 2017).

[68] *See* http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm, for the full text and its analysis *see* L. Pech, *Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland: Full text now available*, 19 August 2016, available at: http://eulawanalysis.blogspot.de/2016/08/commission-opinion-of-1-june-2016.html (both accessed 30 May 2017).

[69] Commission Recommendation regarding the rule of law in Poland, 27 July 2016, C(2016) 5703 final

[70] "If the Commission continues to press its unprecedented rule of law procedure against Poland, the country could issue a challenge to the European Court of Justice 'at any time,' warned Jarosław Kaczyński, leader of the ruling Law and Justice party and Poland's most powerful politician, adding that the inquiry was 'dreamed up' and went beyond what is allowed by EU treaties." Jan Cienski and Maïa de La Baume, *Poland and Commission plan crisis talks. Warsaw warns it could challenge the Brussels rule of law probe in the EU's highest court*, 30 May 2016, available at: http://www.politico.eu/article/poland-and-commission-plan-crisis-talks/ (accessed 30 May 2017).

[71] *See e.g* T. Koncewicz, *Constitutional justice in Handcuffs? Gloves are off in the Polish Constitutional Conflict*, 3 September 2016, available at: http://verfassungsblog.de/constitutional-justice-in-handcuffs-gloves-are-off-in-the-polish-constitutional-conflict/; T. Koncewicz, *Constitutional Capture in Poland* 2016 and Beyond: What is Next?, 19 December 2016, available at: http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next (both accessed 30 May 2017).

[72] J. Kuczkiewicz, *Juncker au «Soir»: «Il y a un sérieux problème de gouvernance en Europe»*, Le Soir, 5 November 2016, available at: http://www.lesoir.be/1360084/article/actualite/union-europeenne/2016-11-04/juncker-au-soir-il-y-un-serieux-probleme-gouvernance-en-europe. For an assessment of Mr. Juncker's statement, *see* L. Pech, K. L. Scheppele, *The EU and Poland: Giving up on the Rule of Law?*, 15 November 2015, available at: http://verfassungsblog.de/the-eu-and-poland-giving-up-on-the-rule-of-law/ (both accessed 30 May 2017).

by the Commission on 21 December 2016,[73] giving the Polish government another two months to comply with the recommendation. That deadline will soon expire, and one does not need an oracle to foresee that the PiS government will fail to comply. What is more, the postponement of the deadline allowed the PiS government sufficient time to entirely capture the Constitutional Tribunal. As Professors Scheppele and Pech put it: "The Commission's new Recommendation was therefore dead on arrival, since the events it tried to forestall had already come to pass. The Commission's delay and continued reluctance to start the sanctions process will make it harder for any external pressure to undo the damage."[74] As the Polish Human Rights Commissioner Adam Bodnar laconically put it: "The struggle for the independence of the Tribunal is lost."[75] As a result, the Commission is increasingly losing face and credibility in the eyes of the public by its investment of time and energy into avoiding the launch of Article 7 TEU. The fact that the Parliament and the Council are continuing with their own rule of law agendas, often in conflict with the Commission's positions, can be seen as further evidence proving that the Commission is incapable of fulfilling its function and enforcing the Treaty provisions on EU values or representing the European interest. The Commission could, however, benefit from these debates by giving thoughtful consideration to other European institutions' responses. The European Parliament initiated a Legislative Own-Initiative Report on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights (EU Rule of Law mechanism). Building on several past EP resolutions,[76] but mainly on the Resolution of 10 June 2015 on the situation in Hungary,[77] the Legislative Own-Initiative Report was initiated based on the attempts to establish an EU mechanism on democracy, the rule of law and fundamental rights in order to present recommendations to the Commission as regards an EU mechanism as a tool for compliance with and enforcement of the Charter of Fundamental Rights and the Treaties, relying on common and objective indicators.

In its Resolution adopted in a Plenary session on 8 September 2015,[78] the Parliament called on the Commission to draft an internal strategy on the rule of law

[73] Commission Recommendation regarding the rule of law in Poland, complementary to Commission Recommendation (EU) 2016/1374, Brussels, 21 December 2016, C(2016) 8950 final.

[74] K. L. Scheppele, L. Pech, Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law, 6 January 2017, available at: http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/ (accessed 30 May 2017).

[75] M. Steinbeis, *Is the EU Commission's Rule of Law Fight about Poland already lost?*, 17 October 2016, available at: http://verfassungsblog.de/is-the-eu-commissions-rule-of-law-fight-about-poland-already-lost/ (accessed 30 May 2017).

[76] *See e.g.* European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012), European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law.

[77] P8_TA-PROV(2015)0227, para. 12.

[78] P8_TA-PROV(2015)0286.

accompanied by a clear and detailed new mechanism, soundly based on international and European law and embracing all the values protected by Article 2 TEU, in order to ensure coherence with the Strategic Framework on Human Rights and Democracy already applied in EU external relations and render the European institutions and Member States accountable for their actions and omissions with regard to fundamental rights.

The tools mentioned include the establishment of a scoreboard on the basis of common and objective indicators by which democracy, the rule of law and fundamental rights will be measured; constant monitoring, based on the established scoreboard and a system of annual country assessment; empowering the Fundamental Rights Agency to monitor the rule of law situation in Member States; issuing a formal warning if the indicators show that Member States are violating the rule of law or fundamental rights; and improvement of coordination between the EU institutions and agencies, Member States, the Council of Europe, the United Nations and civil society organizations.[79] The European Parliament in October 2016 passed a Resolution calling upon the Commission to initiate legislation on a comprehensive rule of law, democracy, and fundamental rights Scoreboard.[80]

2.1. The Scoreboard

As a first step, the EU could monitor the situation of the rule of law, democracy and fundamental rights by taking into account the many assessments, country-reports, checklists, and indicators developed to measure and monitor countries' adherence to democracy, the rule of law and fundamental rights outside the EU framework, while simultaneously developing its own Scoreboard. These assessments and instruments include, but are not limited to: the Worldwide Governance Indicators (WGI) project,[81] the United Nations Rule of Law Indicators,[82] the World Justice Project Rule of Law Index,[83] and the Venice Commission's checklist for evaluating the state of the rule of law in individual states.[84] Country reports and monitoring provided by actors such

[79] *Ibidem*, para. 10.

[80] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV(2016)0409; W. van Ballegooij, T. Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report* (Rapporteur Sophie in 't Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex I, L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova, *Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights*; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, *Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights*.

[81] *See* http://info.worldbank.org/governance/wgi/#home (accessed 30 May 2017).

[82] *See.* http://www.unrol.org/doc.aspx?d=3061 (accessed 30 May 2017).

[83] *See* http://worldjusticeproject.org/rule-of-law-index/ (accessed 30 May 2017).

[84] *See* http://www.eods.eu/library/VC.Report%20on%20the%20rule%20of%20law%20english.pdf (accessed 30 May 2017).

as the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the CoE, and other relevant UN human rights bodies and rapporteurs also constitute fundamental sources on the state of play of the triangular relationship between fundamental rights, democracy, and the rule of law in EU Member States. Additionally, case law from the European Court of Human Rights, together with its implementation, provides us with a first-hand assessment of rule of law deficits. Points of potential reference for monitoring purposes by the EU should be highlighted. The current and future role of the FRA should also be carefully considered.

The *sine qua non* of any Scoreboard is its efficiency. In this regard the mechanism suggested should put an emphasis on a contextual understanding of the problem, instead of only quantifying it. A one-size-fits-all approach with rigid numerical indicators might well result – due to the methodological deficits inherent in existing indicator-based methodologies – in substandard outcomes. It should be closely scrutinized what these indicators indicate in reality, and whether that corresponds to the objectives foreseen. The narrow focus and one-dimensional approach of many of the indicators calls into question their consideration with respect to the triangular relationship of EU values, and it is doubtful whether the militant democracy approach is reflected in the normative evaluation. Qualitative and context-specific evaluations are difficult to automate, and therefore there should be a heavy reliance on expert knowledge. This should go hand-in-hand with issues of their objectivity, academic excellence, and the question concerning how the scientific rigour, transparency and accountability of the Scoreboard will be enforced.

2.2. Procedure

As a second step, a procedure for a rule of law scrutiny should be considered. Transparency and accountability should be enforced, while EU principles such as conferral of powers, subsidiarity and proportionality, as well as inter-institutional arrangements must all be respected. Criminal lawyers and criminologists are well aware of the fact[85] that it is not the gravity of the (criminal) sanction, but its inevitability and proximity to the crime committed that has a deterrent effect. The same applies to sanctions against states. Transferring this wisdom to the situation at hand, it is regrettable that the EU has used such a relatively slow mechanism to respond to violations of its own fundamental principles. The often irreversible and severe harms done in the meantime should also be taken into account with regard to the speed of the response.

A range of potential solutions have been offered by individual politicians, scholars, authors, and other experts to strengthen the rule of law and its enforcement across the EU – with or without Treaty amendments.[86] They include an extension of the scope

[85] At least since C. Beccaria wrote his famous work 250 years ago. For an English language version, *see* C. Beccaria, *On crimes and punishments*, Bobbs-Merrill, Indianapolis: 1963

[86] For a recent overview the EPRS briefing *Member States and the rule of law Dealing with a breach of EU values*, available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf (accessed 30 May 2017).

of Article 7 TEU and/or abolishing Article 51 of the Charter of Fundamental Rights, so that all Charter rights become directly applicable and justiciable in the Member States.[87] Other suggestions, such as the Heidelberg proposal on a rescue package for EU fundamental rights,[88] the numerous scholarly responses to that attempt,[89] a "swift and independent monitoring mechanism and an early-warning system",[90] and a systemic infringement action[91] are all options worthy of consideration. Some scholars have argued that it is possible to establish a binding rule of law mechanism, which they have called the "Copenhagen mechanism", within the current Treaty framework, by an inter-institutional agreement with the contribution of independent academic experts in the process of monitoring Member States' compliance with Article 2 TEU.[92]

2.3. Sanctions

Promotion of the rule of law, as foreseen in the Treaties with respect to current[93] and prospective Member States,[94] is closely correlated with the possibility to effectively sanction "rule of law" violations – especially if they are systemic, persistent or serious.[95] As is apparent from the state of the art and the depreciation of rule of law values, enforcement is the weak side of the existing legal framework for overseeing European values – including the Article 7 mechanism or general infringement procedures according to Articles 258–260 TFEU. A lack of enforcement with effective sanctions is also the weak side of suggestions by EU institutions and academic proposals.[96] The highly probable failure of both "naming and shaming" as well at the more positive discursive approach

[87] Reding (*The EU and…*), *supra* note 1.

[88] A. von Bogdandy, M. Kottmann, C. Antpoehler, J. Dickschen, S. Hentrei, M. Smrkolj, *A Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom*, 15 February 2012, available at: http://www.verfassungsblog.de/en/ein-rettungsschirm-fur-europaische-grundrechte-dargestellt-am-beispiel-der-medienfreiheit/#.Upqk2zmRjzJ (accessed 30 May 2017).

[89] See the online symposium at http://www.verfassungsblog.de/en (accessed 30 May 2017).

[90] Tavares Report, proposing a new mechanism to effectively enforce Article 2 TEU (*supra* note 6).

[91] K. L. Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions*, November 2013, available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf (accessed 30 May 2017).

[92] Carrera, Guild & Hernanz (*The Triangular Relationship…*), *supra* note 9; Carrera, Guild & Hernanz (*Rule of law…*), *supra* note 9.

[93] *See especially* Article 3(1) TEU: "The Union's aim is to promote peace, its values and the well-being of its peoples"; and Article 13(1) TEU: "The Union shall have an institutional framework which shall aim to promote its values."

[94] *See* Article 49(1) TEU.

[95] It should be clarified whether the different languages of Article 7 TEU referring to a "serious and persistent breach" and the Commission's proposal addressing instances of "systemic threat to the rule of law", as well as Barroso's reference to situations of "serious, systemic risks" to the rule of law are identical, and if not, the extent to which they overlap. (José Manuel Durão Barroso, *State of the Union Address 2013*, European Parliament, 11 September 2013, Speech/13/684).

[96] D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11(3) European Constitutional Law Review 512 (2015), p. 528.

should be acknowledged: an illiberal state is unlikely to be persuaded to return to EU values by means of diplomatic attacks, political criticism, discussions, and dialogue. Proposals for "adding bite to the bark"[97] thus typically start with quasi-economic sanctions, such as the suspension, withholding or deduction of EU funds.[98] Such an approach would also put an end to the paradox of building authoritarian regimes, in denial of EU values, using EU money.

CONCLUSIONS

One should not view the enforcement of fundamental EU values, particularly that of the rule of law, as a spill-over effect of market integration, nor accept the attempts to deconstruct the triad of democracy, the rule of law and human rights by disguising it as an alternative national constitutional identity. When a state is departing from the rule of law, it is not a case of clashes over constitutional identities. Deconstruction of the rule of law is typically a project of a governing elite, as opposed to mirroring the wish of the people. Such an attempt can become successful if all means of militant democracy fail in a nation state.

The dividing line is thus not between various constitutional identities, as is often contended by illiberal forces, but is still – as in 1941, when Altiero Spinelli authored his Manifesto – between

> those who conceive the essential purpose and goal of struggle as being the ancient one, the conquest of national political power, and who, albeit involuntarily, play into the hands of reactionary forces, letting the incandescent lava of popular passions set in the old moulds, and thus allowing old absurdities to arise once again; and those who see the main purpose as the creation of a solid international State, who will direct popular forces towards this goal, and who, even if they were to win national power, would use it first and foremost as an instrument for achieving international unity.[99]

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[97] W. Sadurski, *Adding Bite to the Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16 Columbia Journal of European Law 385 (2009).

[98] K. L. Scheppele, *Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures*, 2015, available at: http://www.law.nyu.edu/sites/default/files/upload_documents/Kim%20Lane%20Scheppele%20SIP%20revision%20clean.pdf; K. L. Scheppele, *The EU Commission v. Hungary: The Case for the "Systemic Infringement Action"*, Assizes de la Justice, European Commission, November 2013, available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf and K. L. Scheppele, *Making Infringement Procedures More Effective: A Comment on Commission v Hungary, Case C-288/12*, Eutopia, 29 April 2014, available at: http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/. Building on the above suggestions, *see also* J. Müller, *Why the EU Needs a Democracy and Rule of Law Watchdog*, Aspen Review 2015, available at: http://www.aspeninstitute.cz/en/article/2-2015-why-the-eu-needs-a-democracy-and-rule-of-law-watchdog/ (all accessed 30 May 2017).

[99] A. Spinelli, *For a Free and United Europe – A Draft Manifesto*, Ventotene (1941).

One should therefore bear in mind that attempts to undermine the rule of law typically go against the social consensus of the nation state in question.

In addition to intra-state concerns, rule of law backsliding[100] harms the nationals of the Member State in question, as well as EU citizens as a whole. It deconstructs the mutual trust on which instruments in the area of freedom, security and justice are based; it entails economic, social and political costs for the EU; and it diminishes EU credibility in external affairs, especially in terms of promoting the rule of law, democracy and human rights in third countries. The current initiatives by EU institutions should therefore be welcomed, for what is at stake is the rule of law, a foundational European value and the *sine qua non* of European integration. Without its safeguarding and enforcement, the EU as we currently know it would cease to exist.

[100] J. Müller, *Safeguarding democracy inside the EU. Brussels and the future of the liberal order*, Transatlantic Academy Paper Series, 2012-2013, No. 3, p. 9.