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# The Systemic Implications of the Supranational Legal Order for the Practice of the Rule of Law

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## Abstract

The article presents the main rule of law guarantees and the critique of the rule of law as it is applied in the European Union. Analysis is supplemented with the results of the European Parliament election survey which was conducted as a part of RECONNECT project. Despite the fact that rule of law topics reach the European media headlines on a regular basis, the rule of law was not perceived as the most important one by the respondents. Meanwhile Treaty-based mechanisms aimed at protecting EU fundamental values, such as Article 7 TEU and the infringement procedure, reflect the dual legal as well as political nature of the rule of law. The article analyses how the EU constitutional structure affects the practices of the rule of law—both at the supranational and domestic level—and offers some key recommendations on how to tackle deficiencies in the field of the rule of law.

## 1 Introduction

The European Union (EU) legal order constitutes an important challenge to traditional thinking about the rule of law. Even though the rule of law is a fundamental value in the EU, its practical implementation might differ from the rule of law applied by the Member States. In recent years, the ‘the rule of law crisis’ diagnosed in numerous Member States<sup>1</sup> enhanced the discussion about the place of the rule of law principle in the EU legal order,<sup>2</sup> especially in the context of the EU’s role

<sup>1</sup> L. Pech, K.L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’, *Cambridge Yearbook of European Legal Studies* (2017), 3.

<sup>2</sup> See 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 University Press 2016), 36–58.

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to secure it at the domestic level.<sup>3</sup> Legal studies research has already shown and explained the meaning and scope of the EU's understanding of the rule of law<sup>4</sup> and its practical meaning.<sup>5</sup> This article deals with the specificity of the EU rule of law guarantees and obstacles existing in the context of the supranational legal order.<sup>6</sup> Despite existing mechanisms (such as the Article 7 TEU procedure), rule of law backsliding in at least two Member States still has not been eradicated, which raises questions about whether the EU is even able to guarantee its fundamental value.<sup>7</sup>

The article discusses how the EU constitutional structure affects the practices of the rule of law—both at the supranational and domestic level. It highlights the main rule of law guarantees, the critique of the rule of law as it is applied and the main obstacles in its full implementation. Finally, the article presents some key suggestions on how to tackle outstanding deficiencies in the field of the rule of law.

## 2 The EU's Specificity in the Rule of Law Context

The European Economic Community (EEC) was not primarily designed as a project aimed at upholding and promoting fundamental values (such as democracy, human rights or rule of law), but mainly at economic cooperation between the Member States<sup>8</sup> that was about to bring peace in Europe.<sup>9</sup> Since cooperation was based on the Treaties binding at that time, and secured with the possibility to seek judicial review before the Court of Justice<sup>10</sup> (the Court or CJEU), the rule of law was de facto inscribed into functioning of this supranational entity.<sup>11</sup> That is why the Communities began to be described as a 'community of law',<sup>12</sup> where courts have the final say in whether the law was violated.<sup>13</sup> The Court of Justice in its famous *Les*

<sup>3</sup> D. Kochenov, L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', *European Constitutional Law Review* (2015) 11(3), 512–540.

<sup>4</sup> L. Pech, The Rule of Law as a Constitutional Principle of the European Union, *The Jean Monnet Working Paper* 4/09.

<sup>5</sup> B. Grabowska-Moroz, 'Understanding the Best Practices in the Area of the Rule of Law', RECONNECT Working Paper D.8.1., April 2020.

<sup>6</sup> A. Jakab, D. Kochenov, 'Introductory Remarks' in: A. Jakab and D. Kochenov (eds.) *The Enforcement of EU Law and Values Ensuring Member States' Compliance*, OUP 2017, 1–6.

<sup>7</sup> For the most exhaustive overview of the EU rule of law toolbox, see L. Pech, P. Bárd, *The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values*, EPRS: European Parliamentary Research Service, PE 727.551, February 2022.

<sup>8</sup> 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 University Press 2016), 313–326.

<sup>9</sup> G. de Búrca, 'Europe's raison d'Être' [in:] D. Kochenov and F. Amtenbrink (eds.) *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2013), 21–37.

<sup>10</sup> For a critical analysis of this claim see G. Davies, 'Legislative Control of the European Court of Justice', *Common Market Law Review* (2014) 51, 1579–1608.

<sup>11</sup> L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* 04/09.

<sup>12</sup> See speech of W. Hallstein of 1962 translated by T. von Danwitz (T. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ', *Fordham International Law Journal* (2014) 37, 1313).

<sup>13</sup> K. Leanaerts, 'New Horizons for the Rule of Law Within the EU', *German Law Journal* (2020) 21, 29.

*Verts* ruling went even further and described the EEC as a ‘community based on the rule of law’.<sup>14</sup> With the establishment of the EU and following the introduction of direct references to values and fundamental rights in its Treaties, it became obvious that without them the European project would be incomplete and unstable, since it is based, as the Court clarified in Opinion 2/13, on a ‘structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other’.<sup>15</sup> Under the EU Treaties in force, the rule of law is listed among the fundamental values and membership of the EU is restricted to States that respect them.<sup>16</sup>

The rule of law, often described as an ‘umbrella principle’,<sup>17</sup> consists of numerous independent rules and principles (such as legality, judicial review, separation of powers or principle of equality) developed by the case-law of the Court of Justice<sup>18</sup> and by the expert bodies of the Council of Europe.<sup>19</sup> The ‘limitation aspect’ of the rule of law has been underlined in the EU’s first annual Rule of Law Report published in September 2020, which found that ‘under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts’.<sup>20</sup> Rule of law is not only a political ideal, but also a legal principle ‘of constitutional value’,<sup>21</sup> however ‘respect for rule of law in Member States has become (...) an EU legal policy matter’.<sup>22</sup> Such a duality—political and legal nature of the rule of law—constitutes one of the main challenges for its effective protection.

The way the core principles of the rule of law are being applied—both at a domestic and supranational level—amount to rule of law practices (institutional, procedural and political ones).<sup>23</sup> The fact that rule of law is a practical concept has been confirmed by the 2019 Eurobarometer survey, where each of the rule of law principles was considered by the vast majority of the respondents (from 86 to 94%)

<sup>14</sup> Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* (1986) ECLI:EU:C:1986:166, para 23.

<sup>15</sup> Opinion 2/13 of the Court of Justice of 18 December 2014, ECLI:EU:C:2014:2454, para 167.

<sup>16</sup> Consolidated Version of the Treaty on European Union (2008) OJ C115/13, Article 49.

<sup>17</sup> L. Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’, *Jean Monnet Working Paper* 04/09, 55.

<sup>18</sup> Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166; See also T. von Danwitz, ‘The Rule of Law in the Recent Jurisprudence of the ECJ’, *Fordham International Law Journal* (2014) 37, 1340; T. von Danwitz, ‘Values and the Rule of Law: Foundations of the European Union—An Inside Perspective from the ECJ’, *Potchefstroom Electronic Law Journal* (2018) 21, 2.

<sup>19</sup> Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)007-ar.

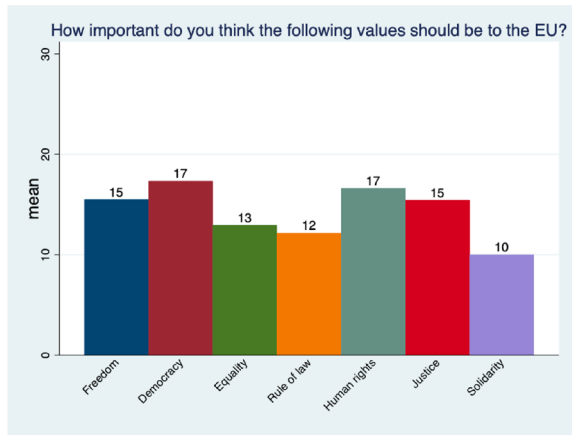
<sup>20</sup> European Commission ‘2020 Rule of Law Report. The rule of law situation in the European Union’ (Communication) COM(2020) 580 final.

<sup>21</sup> L. Pech, ‘The Rule of Law as a Well-Established and Well-Defined Principle of EU Law’, *Hague Journal on the Rule of Law* (2022).

<sup>22</sup> E. Crabit, N. Bel, ‘The EU Rule of Law Framework’ in W. Schroeder (ed.) *Strengthening the Rule of Law in Europe From a Common Concept to Mechanisms of Implementation* (Bloomsbury, 2015), 206.

<sup>23</sup> B. Grabowska-Moroz, ‘Understanding the Best Practices in the Area of the Rule of Law’, RECONNECT Working Paper D.8.1., April 2020, 10.

**Fig. 1** The mean score across all respondents by value



as essential or important.<sup>24</sup> The importance of the rule of law among other EU values does not seem, however, to be that obvious. As part of the RECONNECT project, the European Parliament election survey was conducted.<sup>25</sup> The survey asked the respondents how important the following seven EU fundamental values are to them; they were asked to distribute a total of 100 points between: freedom, democracy, equality, rule of law, human rights, justice and solidarity. The more important the value, the more points were assigned (Figs. 1 and 2).

The rule of law was not assigned the highest importance compared to other values, e.g. democracy (with the highest score in Denmark). In all respondents states, solidarity was marked with low level of importance, except France and Italy where rule of law was marked as the least important one. However in general the differences between each value are relatively minor. These findings confirm that the basic EU values are understood as closely interlinked. On the other hand, however, one might ask whether promotion of EU values among EU citizens is adequately effective and whether the EU's institutional framework responds to EU citizens' expectations regarding the rule of law.

Despite the fact that rule of law topics reach the European media headlines on a regular basis, the rule of law was not perceived as the most important one. The way how the EU institutions and officials discuss the rule of law problems which occurred at domestic level is of major significance how the ongoing debate about the rule of law is perceived—as a topic of another political storm or an existential discussion relevant for EU citizens. Since domestic narrative may go the opposite way and try undermine the importance of the EU debate on fundamental values, the

<sup>24</sup> Report – Rule of Law (July 2019) Special Eurobarometer 489, 5.

<sup>25</sup> C. Plescia, J. Wilhelm, S. Kritzing, T. Schüberl, J. Partheymüller, 'RECONNECT 2019 European Parliament Election Panel Survey (SUF edition)' (2020). <<https://doi.org/10.11587/MOV0EZ.AUS-SDA>>, V1.

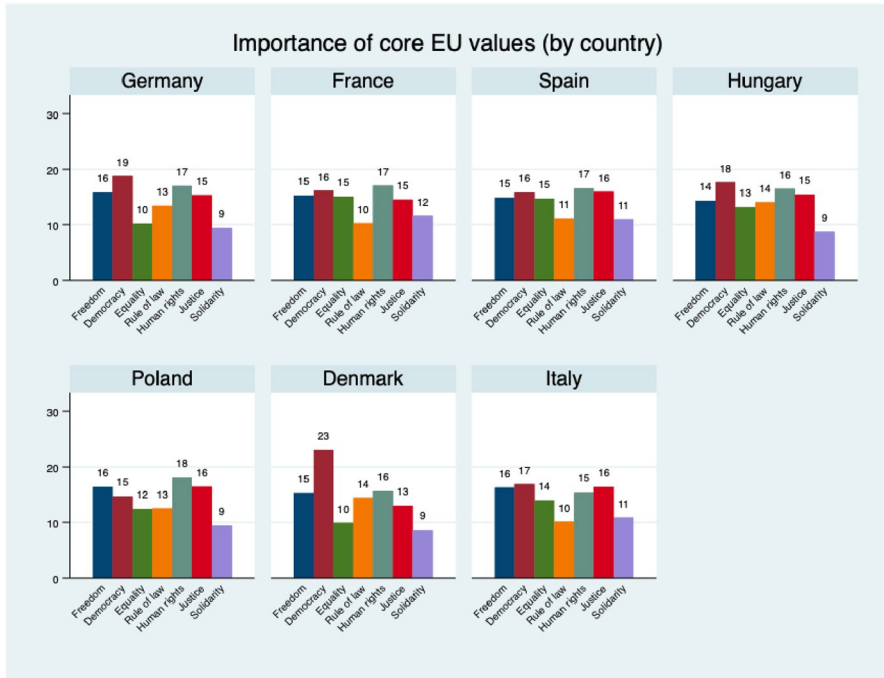


Fig. 2 Importance of the core EU values (by country)

EU institutions need to have a coherent strategy on discussing values and reaching the people directly.

### 3 Supranational Rule of Law Guarantees

The EU’s pre-accession process was perceived by the EU leaders as an effective procedure, allowing for verification of the rule of law guarantees in candidate countries.<sup>26</sup> That is why it was argued that a similar framework should have been adopted for after the accession—one that would allow to verify whether the Copenhagen criteria (including the political ones) continue to be fulfilled by the Member States.<sup>27</sup> The signs of the ‘rule of law crisis’<sup>28</sup> and the process of rule of

<sup>26</sup> F. Erlbacher, ‘Article 49’ in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights—A Commentary* (OUP, 2019). But see D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2007).

<sup>27</sup> J.-W. Müller, ‘Protecting the Rule of Law (and Democracy!) in the EU. The Idea of Copenhagen Commission’ [in:] C. Closa, D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 206.

<sup>28</sup> V. Reding, ‘The EU and the Rule of Law—What next?’ (Brussels, 4 September 2013) European Commission, SPEECH/13/677.

law backsliding<sup>29</sup> diagnosed in several Member States, while posing an existential threat to the EU project,<sup>30</sup> also puts institutional and procedural rule of law guarantees into question, since the dismantling of checks and balances at the domestic level<sup>31</sup> was not followed by a direct EU response.<sup>32</sup> The above situation inclined the European Commission to start the discussion about strengthening the rule of law in the EU in April 2019. The introduction<sup>33</sup> to the consultations and their outcome<sup>34</sup> showed that the EU can in fact avail of numerous tools aimed to guarantee respect for the rule of law at EU Member State level.<sup>35</sup> It confirms that the slow and gradual evolution of the Treaty framework contrasts with the intensive development of the EU's non-Treaty rule of law toolbox.<sup>36</sup>

Treaty-based mechanisms such as Article 7 TEU and the infringement procedure (Articles 258–260 TFEU) reflect the dual legal as well as political nature of the rule of law.<sup>37</sup> Article 7 TEU embodies a political mechanism which is incorrectly perceived as the main tool aimed at protecting the values under Article 2 TEU.<sup>38</sup> The

<sup>29</sup> L. Pech, K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', *Cambridge Yearbook of European Legal Studies* (2017), 10.

<sup>30</sup> L. Pech, 'The Rule of Law', [in:] P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, 3rd ed (Oxford, 2021), 337.

<sup>31</sup> G. Palombella, 'Illiberal, Democratic and Non-Arbitrary? Epicentre and Circumstances of a Rule of Law Crisis', *Hague Journal on the Rule of Law* (2018) 10, 6.

<sup>32</sup> With respect to Poland, the main tool of protecting the rule of law—the procedure under Article 7 (1) TEU—was launched in December 2017 and since then the Council has not reached any conclusions regarding the situation of the rule of law in Poland.

<sup>33</sup> European Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM(2019) 163 final.

<sup>34</sup> European Commission, 'Strengthening the Rule of Law within the Union. A blueprint for action' (Communication) COM(2019) 343 final. For the analysis of the consultations, see B. Grabowska-Moroz, D. Kochenov, 'EU Rule of Law: The State of Play Following the Debates Surrounding the 2019 Commission's Communication', G. Amato, B. Barbisan, C. Pinelli, *Rule of Law vs Majoritarian Democracy*, Hart Publishing 2021, 63–80; D. Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law', *Hague Journal on the Rule of Law* (2019)11, 423–438.

<sup>35</sup> L. Pech, P. Bárd, *The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values*, EPRS: European Parliamentary Research Service, PE 727.551, February 2022.

<sup>36</sup> L. Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', 6.

<sup>37</sup> W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', *Columbia Journal of European Law* (2009–2010)16, 385; L. Besselink, 'The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives' [in:] A. Jakab, D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017), 128–144.

<sup>38</sup> This was underlined on numerous occasions by the Council Legal Service when new tools were discussed, i.a. the 'Rule of Law Framework' (See, Opinion of the Legal Service, Commission's Communication on a new EU Framework to strengthen the Rule of Law—compatibility with the Treaties, Brussels, 27 May 2014, 10296 <<http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>>) and the mechanism of the rule of law conditionality (See, K.L. Scheppele, L. Pech, R. Kelemen, 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism', *VerfBlog* 12 November 2018, <<https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>>). Such reading of Article 7 TEU was however dismissed by the Court of Justice in judgements of 16 February 2022 in Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 (para. 168), and Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98 (para. 207).

political nature of the decisions to be taken under Article 7(1)-(2) TEU (preventive stage) or Article 7(3) TEU (sanctions) implies a significant degree of discretion for the Member States acting via the European Council or the Council.<sup>39</sup> As a result, Article 7(1) TEU hearings are held irregularly and national governments' involvement in the procedure varies significantly.<sup>40</sup> This has led the European Commission to rethink the use of infringement action (Article 258 TFEU) whenever a violation of EU law occurred. Even though Article 2 TEU (expressing the fundamental values, such as rule of law) is a part of the Treaty, it is frequently but wrongly perceived as non-justiciable.<sup>41</sup> The first attempts, e.g. in cases regarding the retirement of the Hungarian judges, brought a very limited outcome—a ruling in a discrimination case,<sup>42</sup> which was unable to tackle systemic rule of law deficiencies. The 're-invention' of Article 19(1) TEU in *Associação Sindical dos Juizes Portugueses (ASJP)*<sup>43</sup> was rightly understood as a milestone in the development of the EU's rule of law protection.<sup>44</sup> Despite three successful infringement actions to date in relation to Poland's rule of law crisis and several applications for interim measures granted by the Court, the European Commission continues to refuse to put forward systemic infringement actions that would identify a pattern of state practices that constitute a serious violation of EU fundamental values and not only a single element of EU law.<sup>45</sup> As Kim Scheppele puts it, the Commission's strategy results in 'losing through winning'<sup>46</sup> small, particular cases, without winning the whole battle.

<sup>39</sup> R. Uitz, 'Towards an EU Cast in the Hungarian and Polish Mould: Why the December 2020 Compromise Matters', *VerfBlog* 14 December 2020, <<https://verfassungsblog.de/towards-an-eu-cast-in-the-hungarian-and-polish-mold/>>.

<sup>40</sup> L. Pech, 'Article 7 TEU: From 'Nuclear Option' to 'Sisyphean Procedure'?', in U. Belavusau, A. Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (OUP 2020), 167–174; D. Kochenov, 'Article 7 TEU' [in:] M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights—A Commentary* (OUP, 2019).

<sup>41</sup> L. Gormley, 'Infringement Proceedings', A. Jakab and D. Kochenov (eds.) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017), 75.

<sup>42</sup> Case C-286/12, *Commission v Hungary* [2012] ECLI:EU:C:2012:687; U. Belavusau On age discrimination and beating dead dogs: *Commission v. Hungary*, *Common Market Law Review* (2013) 50, 1145–1160.

<sup>43</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117; L. Pech, D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, *SIEPS* 2021.

<sup>44</sup> L. Pech, S. Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case', *Common Market Law Review* (2018), 1827–1854; M. Bonelli, M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', *European Constitutional Law Review* (2018) 14(3), 622–643; J. Barcik: 'Niezwistość sędziowska jako wartość konstytucyjna Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 27.02.2018 r., C-64/16, Associação Sindical dos Juizes Portugueses' *Europejski Przegląd Sądowy* (2018)5, 23–29.

<sup>45</sup> K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' *Yearbook of European Law* (2020) 39, 3–121.

<sup>46</sup> *Ibidem*.



In addition to Treaty mechanisms, numerous non-binding instruments dealing with the rule of law (such as the annual rule of law dialogue in the Council,<sup>47</sup> the European Semester,<sup>48</sup> or Justice Scoreboard<sup>49</sup>) theoretically allow for a regular overview and discussion of the existing situation at Member State level, as well as underlining the main challenges and formulating recommendations. One of the latest ‘soft’ instruments—the EU’s annual Rule of Law Report, a part of the ‘European Rule of Law Mechanism’—provides up-to-date information on four aspects of the rule of law (justice system, anti-corruption framework, media pluralism, and other institutional checks and balances).<sup>50</sup> It was criticized for, i.a., excessively soft language, lack of context, and foreseeing no remedies for diagnosed problems.<sup>51</sup>

This quite broad spectrum of tools available for the EU institutions to respond to the rule of law crisis was supplemented in 2020 with the regulation on a general regime of conditionality for the protection of the Union budget.<sup>52</sup> After passing the constitutional muster before the Court of Justice in February 2022, the so-called rule of law conditionality mechanism is becoming slowly implemented against Hungary. The process takes a form of negotiating milestones set by the European Commission in order to get access to ‘recovery funds’ under the Recovery and Resilience Facility. The procedure is slightly more transparent than the Council’s hearings under Article 7 TEU procedure, however still time-consuming and most probably at current stage it is not enough to reverse the democratic backsliding in Hungary.<sup>53</sup>

#### 4 Critique of Supranational Rule of Law as Applied

Ineffectiveness and narrow interpretation of the multiple rule of law enforcement tools in EU law are not, however, the only point of critique expressed regarding the rule of law in the EU. First of all, there were numerous attempts to challenge the rule of law as an undefined concept.<sup>54</sup> Such opinions were expressed by governments of

<sup>47</sup> P. Oliver, J. Stefanelli, ‘Strengthening the Rule of Law in the EU: The Council’s Inaction’, *Journal of Common Market Studies* (2016)54, 1075–1084.

<sup>48</sup> According to the official press release it ‘provides a framework for the coordination of economic policies across the European Union’, See, European Semester at: <[https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en)>.

<sup>49</sup> E.g. 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, 2020 EU Justice Scoreboard, COM(2020) 306.

<sup>50</sup> 2020 Rule of Law Report. The rule of law situation in the European Union, 4.

<sup>51</sup> For comprehensive analysis of the rule of law report, see: L. Pech, P. Bárd, *The Commission’s Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values*, EPRS: European Parliamentary Research Service, PE 727.551, February 2022.

<sup>52</sup> Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, 1–10.

<sup>53</sup> Z. Végh, Mind the gaps: The pending suspension of Hungary’s EU funds, *ECFR* 5 October 2022—<<https://ecfr.eu/article/mind-the-gaps-the-pending-suspension-of-hungarys-eu-funds/>>.

<sup>54</sup> M. Broniatowski, ‘Morawiecki: nie ma uzależnienia funduszy UE od praworządności. Von der Leyen: jest, i to mocne’ (22 July 2020) *Onet* <<https://wiadomosci.onet.pl/politico/fundusze-ue-i-uzaleznienie-od-praworzadnosci-morawiecki-i-von-der-leyen-komentuja/5sm01np>>

Poland and Hungary in a time of their facing Article 7 TEU procedures,<sup>55</sup> despite the fact that the definitional framework was provided by the Council of Europe<sup>56</sup> and further applied by the European Commission.<sup>57</sup> The definition of the rule of law has been also introduced into the Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget. Such a legislative development was accepted by the Court of Justice<sup>58</sup> and further enhanced by a finding that Article 2 TEU values are ‘an integral part of the very identity of the European Union’.<sup>59</sup> Critique of the rule of law as lacking clear meaning is baseless in the less of the above definitional consolidation in the EU legal order.<sup>60</sup>

The second type of critique deals with the perceived limited competences of the EU institutions. It has been argued that the EU lacks the powers to monitor and address rule of law problems in Member States<sup>61</sup>—for instance that the Court of Justice is not entitled to review the judicial ‘reforms’ adopted by Polish authorities since the end of 2015. Such a claim was quashed by the Court of Justice which stressed that ‘the organisation of justice in the Member States falls within the competence of (...) Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (...) in particular, from the second subparagraph of Article 19(1) TEU’.<sup>62</sup> Another aspect of these ‘limited competences’ in the rule of law field deals with the institutions which have powers relevant for the protection of the rule of law, but which are not in practice employed to do so. Fundamental Rights Agency (FRA)

<sup>55</sup> J. Varga, ‘Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask’ (22 November 2019) *Euronews* <[www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view](http://www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view)>; Były szef MSZ komentuje list Jourovej. ‘Konia z rzedem, kto znajdzie w traktatach UE definicję praworządności’ (27 December 2019) *Niezalezna.pl* <<http://niezalezna.pl/303625-byly-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-znajdzie-w-traktatach-ue-definicje-praworzadnosci>>.

<sup>56</sup> Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)007-ar.

<sup>57</sup> European Commission, ‘A new EU Framework to strengthen the Rule of Law’ (Communication) COM (2014) 158 final; European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final; European Commission, ‘Further strengthening the Rule of Law within the Union State of play and possible next steps’ (Communication) COM (2019) 163 final.

<sup>58</sup> See judgements of 16 February 2022 in Case C-156/21, *Hungary v Parliament and Council*, and Case C-157/21, *Poland v Parliament and Council*.

<sup>59</sup> Case C-156/21, *Hungary v Parliament and Council*, para. 127 and 232; C-157/21, *Poland v Parliament and Council*, para. 145 and 264. See, F. Weber, ‘The pluralism of values in an identity-framed Verbund: federal belonging in the European Union after the rule of law conditionality judgments: Hungary v European Parliament (C-156/21)’, *European Law Review* (2022), 514–533.

<sup>60</sup> L. Pech, ‘The Rule of Law as a Well-Established and Well-Defined Principle of EU Law’, *Hague Journal on the Rule of Law* (2022).

<sup>61</sup> Prime Minister Viktor Orbán’s speech at the launch of the Judicial Handbook on 5 March 2018, Budapest <[www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-launch-of-the-judicial-handbook](http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-launch-of-the-judicial-handbook)>

<sup>62</sup> Case C-619/18, *Commission v Poland* [2019] ECLI:EU:C:2019:531, para. 52.

is probably the main example here.<sup>63</sup> Its main task is to provide the EU institutions with assistance and expertise relating to fundamental rights. Close link between the fundamental EU values (democracy, rule of law and fundamental rights) places FRA in a good position to conduct research on connection between the rule of law standards and protection of fundamental rights. Meanwhile the FRA does not use its competence fully to investigate the situation of the rule of law in the Member States. Partially it results from its dependence on the European Commission, which decided not to involve FRA in this topic to a greater extent. It should be nevertheless reconsidered to broaden the powers of FRA in order to task it with conducting a research on implementation of the EU fundamental values in context of the human rights protection in the EU Member States.<sup>64</sup>

Thirdly, a ‘double standards critique’ is often expressed.<sup>65</sup> Its ‘horizontal’ version is usually oriented at other Member States’ legal systems and existing institutional solutions that are not under scrutiny of the EU institutions (e.g. suggestions that regulation of the Polish National Council for the Judiciary was inspired with the Spanish law). Such ‘abusive comparativism’<sup>66</sup> allows their authors to formulate an argument about the EU institutions being biased against Central and Eastern European Member States.<sup>67</sup> The role of the annual Rule of Law Report was to fight with the double standards criticism and provide data on relevant rule of law issues with respect to all Member States. The ‘vertical’ version of such arguments are addressed to the EU institutions. Polish government for instance formulated them regarding the way the judges of CJEU are selected and nominated in the Polish Supreme Court

<sup>63</sup> G. Toggenburg, J. Grimheden, *The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers* [in:] C. Closa, D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 147–171.

<sup>64</sup> See L. Pech and J. Grogan, ‘Upholding the Rule of Law in the EU. What role for FRA?’ in B. Rosemary and H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency* (Routledge 2019); J. Wouters and M. Ovádek, ‘What political role for the EU’s Fundamental Rights Agency?’ (2019) *KU Leuven Working Paper* No 209.

<sup>65</sup> L. Pech, P. Bárd, *The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values*, EPRS: European Parliamentary Research Service, PE 727.551, February 2022; D. Kochenov, ‘Rule of Law as a Tool to Claim Supremacy’ [in:] J. Urbanik, A. Bodnar (eds.) *Περμμένοντας τους Βαρβάρους. Law in a time of Constitutional Crisis. Studies Offered to Miroslaw Wyrzykowski*, C.H. Beck 2021, 323–335.

<sup>66</sup> R. Uitz, ‘Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary’, *International Journal of Constitutional Law* (2015) 13, 279–300; K.L. Scheppele, ‘The Rule of Law and the Frankenstein: Why Governance Checklists Do Not Work’, *Governance* (2013) 26, 559–562; C. Tecimer, ‘Abusive comparativism: “Pseudo-comparativist” political discourse as a means to legitimizing constitutional change in Turkey’, *VerfBlog* 15 May 2017 <<https://verfassungsblog.de/abusive-comparativism-pseudo-comparativist-political-discourse-as-a-means-to-legitimizing-constitutional-change-in-turkey/>>; M. Ziółkowski, B. Grabowska-Moroz, *Enforcement of EU Values and the Tyranny of National Identity – Polish Examples and Excuses*, *VerfBlog* 26 November 2019 <<https://verfassungsblog.de/enforcement-of-eu-values-and-the-tyranny-of-national-identity-polish-examples-and-excuses/>>.

<sup>67</sup> L. Gehrke, ‘Poland, Hungary to set up rule of law institute to counter Brussels’, *Politico* 29 September 2020, <<https://www.politico.eu/article/poland-and-hungary-charge-brussels-with-double-standards-on-rule-of-law/>>.

case.<sup>68</sup> The Court refused both types of such a comparative arguments. First, the Court found that ‘Member State cannot rely on a possible infringement of EU law by another Member State to justify its own default’<sup>69</sup> and secondly, that rules on judicial appointments to the Court of Justice established under the Treaties ‘cannot modify the scope of the obligations imposed on the Member States pursuant to the second subparagraph of Article 19(1) TEU’.<sup>70</sup> Threat of ‘double standards’ in the EU is still present, especially after rulings in *Sharpston* case,<sup>71</sup> where the Court of Justice did not apply the same standard of a ‘court established by law’ as applicable to domestic courts in the light of Article 6 of the European Convention on Human Rights.<sup>72</sup>

Fourthly, the EU rule of law was often defined through the lens of ‘legality’,<sup>73</sup> which heavily limited its scope and its functionality. Meanwhile the rule of law aims at ‘securing against abuse of public power’ and ‘requires subordination to the law, which remains outside the scope of reach by any public authority’.<sup>74</sup> Such a functional understanding of the rule of law allows to secure other EU basic values, such as fundamental rights or justice. As suggested by A. Williams ‘it should always be an essential task vis-à-vis any regime exercising powers of governance, to measure that regime in terms of standards of justice’.<sup>75</sup> Despite that the EU institutional specificity gave rise to questions regarding the ‘justice deficit’ in the EU, especially in the context of the EU ability to deal with its major crises.<sup>76</sup> The fact that ‘the idea of justice is not the centerpiece of the European project’<sup>77</sup> or ‘Europe’s signifier’<sup>78</sup> might cause serious problems from the rule of law perspective, which requires access to justice,<sup>79</sup> whereas numerous tools employed to deal with Eurozone and migration crises most probably did not meet this requirement fully.<sup>80</sup>

<sup>68</sup> Case C-619/18, *Commission v Poland* (2019) ECLI:EU:C:2019:531, para 119.

<sup>69</sup> *Ibidem*, para. 120.

<sup>70</sup> *Ibidem*, para. 122.

<sup>71</sup> Order of the Court (First Chamber) of 16 June 2021, *Eleanor Sharpston v Council of the European Union*, Case C-684/20 P, ECLI:EU:C:2021:486; Order of the Court (First Chamber) of 16 June 2021, *Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States*, Case C-685/20 P, ECLI:EU:C:2021:485.

<sup>72</sup> D. Kochenov, G. Butler, ‘Independence of the Court of Justice of the European Union: Unchecked Member States power after the Sharpston Affair’, *European Law Journal* (2021) 27, 291.

<sup>73</sup> L.F.M. Besselink, F. Pennings, S.Prechal (eds.), *The eclipse of legality in the European Union* (Kluwer, 2010).

<sup>74</sup> D. Kochenov, ‘The Missing EU Rule of Law? [in:] C. Closa and D. Kochenov (eds), ‘Reinforcing Rule of Law Oversight in the European Union’ (Cambridge University Press 2016), 297.

<sup>75</sup> A. Williams, ‘The Problem(s) of Injustice in the European Union’, D. Kochenov, G. de Búrca, A. Williams (eds.), *Europe’s Justice Deficit?* (Hart Publishing, 2015), 49.

<sup>76</sup> D. Kochenov, G. de Búrca, A. Williams (eds.), *Europe’s Justice Deficit?* (Hart Publishing, 2015).

<sup>77</sup> D. Kochenov, ‘The Ought of Justice’, D. Kochenov, G. de Búrca, A. Williams (eds.), *Europe’s Justice Deficit?* (Hart Publishing, 2015), 27.

<sup>78</sup> S. Roy, ‘Justice as Europe’s Signifier’ [in:] D. Kochenov, G. de Búrca, A. Williams (eds.), *Europe’s Justice Deficit?* (Hart Publishing, 2015), 79.

<sup>79</sup> See Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)007-ar.

<sup>80</sup> See S. Douglas-Scott, ‘Justice, Injustice and the Rule of Law in the EU’ [in:] D. Kochenov, G. de Búrca, A. Williams (eds.), *Europe’s Justice Deficit?* (Hart Publishing, 2015), 27; C. O’Brien, *Unity in Adversity. EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Bloomsbury Hart Publishing 2017).

## 5 Supranational Structural Obstacles to Rule of Law Compliance

Lisbon Treaty improved the legal framework regarding the principle of the rule of law and answered the main concerns regarding the ‘rule of law deficit’.<sup>81</sup> However the practical application of those EU tasks rises criticism. The main Treaty-based tool which allows to sanction the rule of law violations in the Member States depends on political decisions taken by national governments acting in the Council. Difficulties in reaching high qualified majority (let alone unanimity) made Article 7 TEU to be perceived as a ‘nuclear option’,<sup>82</sup> meaning something one cannot use in normal state of affairs.<sup>83</sup> Defending the rule of law should not be perceived as a matter of political courage. It proves a ‘normative asymmetry’ understood as an insufficient tool-kit of value enforcement.<sup>84</sup> The other side of the ‘enforcement coin’, however, deals with the nature of the values, which are more difficult to enforce than the law.<sup>85</sup> Inability to adopt a final decision under Article 7 TEU procedure might undermine the fundamental nature of the rule of law. Furthermore, the way how the European Commission frame the infringement actions regarding rule of law issues do not give enough of an opportunity to capture systemic problems via judicial procedures.<sup>86</sup> Additionally, combating rule of law backsliding usually means that the European Commission will be two steps behind the rogue Member State.<sup>87</sup> When the EU is busy dealing with rule of law violations that transpired, new ones may meanwhile be occurring.<sup>88</sup> As the legal situation becomes more complicated, the EU reactions might become even more difficult and limited.<sup>89</sup>

Internal rule of law backsliding poses a challenge to its external dimension<sup>90</sup> and to the EU’s credibility. According to the TEU, the rule of law is an important factor

<sup>81</sup> 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’, *European Constitutional Law Review* (2010) 6, 396.

<sup>82</sup> J. M. Barroso, State of the Union 2012 Address, Plenary session of the European Parliament (Strasbourg, 12 September 2012) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_12\\_596](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596)>.

<sup>83</sup> D. Kochenov, ‘Article 7 TEU: A Commentary on a Much Talked-About ‘Dead’ Provision’, *Polish Yearbook of International Law* (2018) 38, 165–187.

<sup>84</sup> T.T. Konciewicz, ‘The Democratic Backsliding and the European constitutional design in error. When will HOW meet WHY?’, *VerfBlog 18 December 2018* <<https://verfassungsblog.de/the-democratic-backsliding-and-the-european-constitutional-design-in-error-when-how-meets-why/>>.

<sup>85</sup> D. Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’, *Yearbook of European Law* (2015) 34, 82.

<sup>86</sup> K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, ‘EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ *Yearbook of European Law* (2020) 39, 3–121.

<sup>87</sup> J. Sargentini, A. Dimitrov, ‘The European Parliament’s Role: Towards New Copenhagen Criteria for Existing Member States?’, *Journal of Common Market Studies* (2016) 54, 1085–1092.

<sup>88</sup> A. Batory, ‘Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU’, *Public Administration* (2016) 94(3), 696.

<sup>89</sup> K. Kovacs, K.L. Scheppele, ‘The fragility of an independent judiciary: Lessons from Hungary and Poland and the European Union’, *Communist and Post-Communist Studies* (2018) 51, 198.

<sup>90</sup> A. Magen, L. Pech, ‘The rule of law and the European Union’ Ch. May and A. Winchester (eds.) *Handbook on the Rule of Law* (Elgar 2018), 248; C. Closa, ‘Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations’ [in:] C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 15–35.

in the EU external policies. The Union's actions on the international scene shall be guided by the principles which have inspired its own creation. Furthermore, the EU should develop its relations with entities sharing these principles. One of the major aspects of the external dimension of the rule of law deals with the accession to the European Convention on the Human Rights,<sup>91</sup> framed as an EU obligation. The idea of accession aims at guaranteeing that the EU meets the Strasbourg human rights standards.<sup>92</sup> The Opinion 2/13 of the Court of Justice makes the accession highly unlikely due to the scope and nature of EU autonomy as interpreted by the Court. The situation when the Court's opinion makes the Treaty obligation almost impossible to implement, already rises fundamental questions regarding the rule of law. The Court's interpretation of the rule of law was criticized in this respect as 'instrumental'—aimed at ensuring 'the primacy of EU law and the primacy of the CJEU' and the CJEU's 'supremacy' in long term.<sup>93</sup> The current 'debate' between the Council of Europe and the European Union also looks like debating over the 'supremacy' in the field of rule of law.<sup>94</sup>

Negotiations on the EU's accession to the European Convention on Human Rights have been reopened and their main aim is to address concerns expressed in Opinion 2/13.<sup>95</sup> Its wording, however, does not leave much room for optimism when it comes to the outcome of the new negotiations round.<sup>96</sup> The Courts' reasoning was to a great extent based on the principle of autonomy of the EU law, which as a result makes almost impossible to review the EU law by any outside 'actor', e.g. European Court of Human Rights. In broader sense it does not allow to tame EU law through

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<sup>91</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5.

<sup>92</sup> W. Sadurski, *Poland's Constitutional Breakdown* (OUP 2019).

<sup>93</sup> M. Smith, 'Staring into the abyss: A crisis of the rule of law in the EU' (2019) 25 *European Law Journal* 561, 567.

<sup>94</sup> In April 2019 PACE adopted a resolution in which it recommended that 'any European Union rule of law mechanism shall ensure that the assessment or action of the European Union will not affect existing procedures arising from Council of Europe advisory or monitoring mechanisms. ('Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights', PACE Resolution 2273 (2019), para. 9.4.). It further stated that it is 'essential to maintain the primacy of the Council of Europe in the assessment of the respect by European Union member States' ('Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights', Recommendation 2151 (2019), para. 13). Furthermore, it was underlined that 'It would, however, be preferable if the European Union, when assessing whether the rule of law deficiency has been remedied or has ceased to exist, liaises with the relevant Council of Europe body/ies which issued the opinion or the recommendation to ensure consistency of views and avoid double-standards.' ('Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights', Recommendation 2151 (2019), para. 77). Everything in order to avoid 'institutional fatigue' (para. 15).

<sup>95</sup> Opinion 2/13 of the Court of 18 December 2014 ECLI:EU:C:2014:2454, para. 179–200.

<sup>96</sup> F. Korenica, 'Negotiations on EU Accession to the ECHR Restart after Five Years: Between Unlikely and Doable' (14 October 2020) *ECHRblog* <<http://echrblog.blogspot.com/2020/10/guest-post-negotiations-on-eu-accession.html>>.

any other (higher) law<sup>97</sup> which poses a great challenge from the rule of law perspective.<sup>98</sup> In context of the ongoing rule of law backsliding the EU cannot allow itself to be oversee the Member States about rule of law, while at the same time remaining outside Strasbourg system of human rights protection due to blank use of principle of autonomy of EU legal order. It may cause a dangerous criticism that ‘the CJEU uses the ‘values’ version of the rule of law to camouflage the capture of the rule of law as a device for asserting legal supremacy.’<sup>99</sup>

## 6 Recommendations

Deficiencies to the EU rule of law protection present diverse challenges: from formal (lack of definition of the rule of law in the Treaty) to practical ones (inability to take a political decision under Article 7 TEU). The fundamental nature of rule of law leads the discussion about the EU problems in this field to question the credibility of the EU in respect to values—internally and externally.<sup>100</sup> The main principle of the possible responses is that EU institutions, and the European Commission in particular, should first of all use tools which are already available. In July 2019 the European Commission presented its ‘Blueprint for Action’<sup>101</sup> which offered a list of such short-term responses to the rule of law crisis in EU Member States. However even some of those existing may require some improvement.

First of all, the European Commission should reconsider their policy regarding the scope and shape of infringement actions regarding the rule of law cases and frame them as systemic infringement actions.<sup>102</sup> When the Commission avoids action, Member States should make use of the procedure under Article 259 TFEU.<sup>103</sup> In such cases the decision-making process at domestic level should be as transparent and inclusive as possible. It will allow to avoid seeing litigation under Article 259

<sup>97</sup> D. Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ *Yearbook of European Law* (2015) 34, 82. D. Kochenov referred in his research to findings of Gianluigi Palombella and distinction between *jurisdictio* (the law untouchable by the day-to-day rules running the legal system and removed from the ambit of the purview of the sovereign) and *gubernaculum* (the general rule-making power) understood as a measure to protect rule of law (G. Palombella, ‘The Rule of Law as an Institutional Ideal’ in L. Morlino and G. Palombella (eds.) *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill, 2010), 3).

<sup>98</sup> B. de Witte, Š. Imamović, ‘Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court’, *European Law Review* (2015) 40, 683–705.

<sup>99</sup> M. Smith, ‘Staring into the abyss: A crisis of the rule of law in the EU’, 566.

<sup>100</sup> A. Jakab, ‘The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member State’, 189.

<sup>101</sup> European Commission, ‘Strengthening the Rule of Law within the Union. A blueprint for action’ (Communication) COM (2019) 343 final.

<sup>102</sup> K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, ‘EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ *Yearbook of European Law* (2020) 39, 3–121.

<sup>103</sup> *Ibidem*; D. Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool’, *Hague Journal on the Rule of Law* (2015) 7, 153–174.

TFEU as a ‘mechanism of attack’, but rather a ‘rule of law protection mechanism’, if the Commission does not fulfil their obligation as the guardian of Treaties.

Secondly, discussion should not be perceived as a main tool to tackle rule of law backsliding in EU Member States. Discussing rule of law in Member State by peers suggests that the rule of law can be negotiated, which is against fundamental nature of this value.<sup>104</sup> The key aspect of the rule of law is that it implies a need for an adequate—well established, not only presumed—protection.<sup>105</sup> Instead of insisting on meaningless discussions, EU institutions and Member States should fulfil their obligations according to the Treaties.<sup>106</sup> This implies a need to e.g. assess whether there is a ‘clear risk of a serious breach’ in a Member State and to take a decision under Article 7 TEU within a reasonable time frame.

Thirdly, EU institutions should be able to communicate with the EU citizens about the rule of law more effectively. Explaining why certain rule of law related actions were taken by the EU (especially by the Commission) and what were the main sources of information.<sup>107</sup> It will allow to avoid (or at least minimize) blame shifting attempts by the government involved in the dispute.<sup>108</sup> Undermining the rule of law may bring legal uncertainty and in the long run it might trigger social frustration.<sup>109</sup> Misconceptions regarding content and nature of the rule of law constitute a threat to this value. In providing accurate information on all that, free media at a domestic level and vibrant civil society organisations (CSOs) are essential.<sup>110</sup> Civil society assistance might be also of crucial importance to make the EU voice be better heard.<sup>111</sup>

Possible responses to the rule of law backsliding should avoid however ideas concentrated on establishing new institutions. They usually result from two factors: first of all, from the misconception that the European Commission was not granted clear competences to protect EU values and that their content is not precise; secondly, from the fact that rule of law conditionality at pre-accession stage did not

<sup>104</sup> M. Pardavi, ‘The rule of law in Europe is not negotiable’ (15 October 2020) *IPS* <<https://www.ips-journal.eu/topics/european-union/the-rule-of-law-in-europe-is-not-negotiable-4727/>>.

<sup>105</sup> D. Kochenov, ‘The EU and the Rule of Law – Naïveté or a Grand Design?’ in M. Adams et al. (eds.) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017), 419–444.

<sup>106</sup> 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) 5, 1072.

<sup>107</sup> N. Inman, ‘Europeans have a lot to say. Brussels needs to listen’ (4 July 2019) *Politico.eu* <<https://www.politico.eu/article/brussels-should-listen-to-european-citizens/>>.

<sup>108</sup> B. Schlipphak, O. Treib, ‘Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding’, *Journal of European Public Policy* (2017) 24, 361.

<sup>109</sup> M. Mazzini, ‘For Central Europe’s Illiberal Democracies, the Worst is yet to Come’ *VerfBlog* 16 July 2017 <<https://verfassungsblog.de/for-central-europes-illiberal-democracies-the-worst-is-yet-to-come/>, <https://doi.org/10.17176/20170717-085741>>.

<sup>110</sup> A. Schout, M. Luining, ‘The missing dimension in rule of law policy From EU policies to multilevel capacity building’ *Clingendael Report* (January 2018).

<sup>111</sup> M. Kmezić and F. Bieber, ‘Protecting the rule of law in EU Member States and Candidate Countries’ (October 2020) *SIEPS European Policy Analysis*, 13.



assess effectively the guarantees of the rule of law in candidate states,<sup>112</sup> since it does not seem that the outcome of the pre-accession review has any impact on post-accession EC actions regarding the rule of law in the Member States.<sup>113</sup> Instead of establishing new bodies, institutional improvements at the EU level should cover the Fundamental Rights Agency—its mandate should be strengthened and the Agency shall become a fully independent rule of law actor in the EU. Laurent Pech and Joelle Grogan suggest that the Fundamental Rights Agency should be transformed into a ‘Copenhagen Commission’—the EU version of the Venice Commission<sup>114</sup>—assigned with powers to provide assistance and expertise on EU values and fundamental rights, monitoring of the EU Member States and candidate states and the power to trigger Article 7 TEU.<sup>115</sup> Independently from internal institutional improvements, the EU should complete the process of accession to the European Convention on Human Rights in order to establish the external guarantee of the rule of law protection in the EU.

The long-term response to the rule of law crisis should involve Treaty amendments,<sup>116</sup> that will e.g. transform Article 7 TEU into an effective tool and not a ‘nuclear’ one. That might involve lowering of the required majority of votes, strengthening the European Parliament in the procedure, expanding the list of possible sanctions (including expulsion of a Member State).<sup>117</sup> Furthermore, the role of the Charter of Fundamental Rights in context of the rule of law protection needs to be reassessed,<sup>118</sup> together with providing the access of individuals to the Court of Justice in case of violation of fundamental rights.<sup>119</sup>

<sup>112</sup> D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, 2008).

<sup>113</sup> Manfred Weber’s proposal of March 2019 to establish a committee of independent experts is an example of a quite common belief that the establishment of a new institution will solve problems which are still in place despite the existing instruments; see M. Weber, U. di Fabio, ‘My plan for defending rule of law in EU’ (18 March 2019) *EU Observer* <<https://euobserver.com/opinion/144429>>.

<sup>114</sup> K. Tuori, ‘From Copenhagen to Venice’ [in:] C. Closa, D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 225–246.

<sup>115</sup> L. Pech, J. Grogan, ‘Upholding the Rule of Law in the EU. What role for FRA?’ in B. Rosemary and H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency* (Routledge 2019); L. Pech, ‘The EU as a global rule of law promoter: the consistency and effectiveness challenges’ *Asia Europe Journal* (2016) 14, 21.

<sup>116</sup> J. Wouters et al. (eds.), ‘Report addressed to the European Parliament and the Commission on policy recommendations and on Treaty changes and amendments to the EU Charter of Fundamental Rights’, RECONNECT Working Paper 15.2, March 2022.

<sup>117</sup> See T. Theuns, ‘The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7’, *Res Publica* (2022).

<sup>118</sup> D. Kochenov, J. Morijn, ‘Strengthening the Charter’s Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing’, *European Public Law* (2021) 27, 759–780.

<sup>119</sup> J. Wouters et al. (eds.), ‘Report addressed to the European Parliament and the Commission on policy recommendations and on Treaty changes and amendments to the EU Charter of Fundamental Rights’, 43.

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