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THE CONCEPT OF THE RULE OF LAW IN EU LAW

Master Thesis

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Poděkování

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Introduction

When thinking of a concept, a value, or a principle that defines the law and the legal order of contemporary western, democratic constitutionalism, the rule of law must come to mind. Together with democracy and fundamental rights, the rule of law may describe the form of governance in a state. The rule of law is generally seen as the guiding principle on a stable state as defined by Francis Fukuyama.[1] Hence, the fragility of democracy without the rule of law is often reminded. As Timothy D. Snyder stated: *"Democracy only has a substance, if there is the rule of law."*[2] This legal tradition that comes from the Roman democracy and ancient scholars has evolved over time, however its basic message should prevail – "*No one is above the law."*[3]

Following the European continental traditions, the European Union incorporated the rule of law into its foundations.[4] During decades of the European integration, the concept has been interpreted by the Court of Justice of the EU, national courts, national governments, EU institutions, and scholars. It is constantly referred to as one of the leading criterions for a country that wishes to join the Union[5] and is considered indispensable for the functioning of the Union. It appeared that the principle had been dormant until political reality in selected Member States changed in the second decade of the 21st century. "*Our Union is not a State, but it must be a community of law."*[6] said Jean-Claude Junker in the State of the Union speech in 2017, referring to political actions taken by the Polish and Hungarian governments that triggered a new debate over the rule of law in the EU. Frans Timmermans, vice-president of the European Commission, underlined the importance of the rule of law by stating: *"The rule of law is a necessary condition for effective cooperation between Member States."*[7] Furthermore, Von der Leyen Commission put special attention to the rule of law in its

[1] FUKUYAMA, Francis. Origins of political order: from prehuman times to the French revolution.
[2] SNYDER, Timorhy, D. On Tyranny: Twenty Lessons from the Twentieth Century.
[3] The famour referrece used often to demonstrate the supremacy of the law, a statement attributed to, among others, T. Roosevelt.
[4] Founding treaties of Euroatom, European Comunity of Coal and Steel and European Economic Comunity did not explicitely mention rule of law in the text, however legal traditions of European countries are based on the rule of law. The rule of law was later definied by the Court of Justice of the EU as the principle of EU law.
[5] See th rule of law reference in PRESIDENCY CONCLUSIONS Copenhagen European Council - 21-22 June 1993.
[6] JUNKER, Jean-Claude. State of the Union Address 2017. 13 September 2017.
[7] TIMMERMANS. F. Opening remarks of First Vice-President Frans Timmermans, Readout of the European Commission discussion on the Rule of Law in Poland.

political priorities. In the last few years, we may observe the European Union strengthening initiatives to protect the rule of law.

The importance of the rule of law is widely acknowledged among EU Member States; there is no dispute about whether the EU is built on the rule of law. One could say there is unusual consensus in the EU that the rule of law is a shared value however, we can still observe rising tensions on the adherence to the rule of law between the European Commission and some Member States. Such conflict raises the question if the European legal tradition of the rule of law is genuinely shared among the EU Member States or if differences may be identified in Member States' conditional traditions. It may be the case that a different understanding of the concept causes the disputes. On the other hand, the Treaty on the European Union clearly states that the rule of law is a shared value. In other words, 27 countries signed up for the rule of law, but still, legal and political disputes over the rule of law are the reality in the EU.

Various reasons can be found for studying the rule of law. First and foremost, the ongoing debate on the rule of law in the EU makes the topic more relevant than ever before. United Nations included the rule of law in Sustainable Development Goals.[8] As a result, it seems to be the right time to go back through European legal history to find the link to the current state of the rule of law in the EU. The consequences from not adhering to the rule of law principle may be harmful. If a pillar falls, the whole temple may fall. Second, a theoretical debate is reflected in new EU legislation and non-legislative initiatives. Finally, it is the personal motivation of the author to study and understand the concept of the rule of law that named the thesis: *"The concept of the rule of law in EU law."*

The main objective of the thesis is to identify the role of the legal concept of the rule of law in EU law, focusing mainly on the understanding of the concept by EU institutions and Member States. Regarding the latest development in some Member States, the question of a legal mechanism for the protection should be discussed as well. The thesis shall also include a discussion on Poland's case to demonstrate the critical misunderstanding between the EU and the Member States. For the sake of structure and methodology, the thesis will be divided into chapters, while a specific objective for each chapter shall be defined.

In order to meet the main objective of the thesis, the author set research questions to find the answer:

[8] See Appendix 3.

(a) Can the rule of law principle be defined as the shared constitutional principle among all 27 EU Member States?

(b) What are legal instruments for the protection of the rule of law in the EU?

(c) Which legal instrument in the EU law seems to be the most efficient for the rule of law protection based on the case of Poland?

The thesis shall discuss how the rule of law is defined in the EU law, the enforcement tools under the EU law, with a special focus on the recent case of Poland. By answering research questions, the author aims to meet the objective of the thesis.

Reflecting the complexity of the topic of the research, the author is going to employ various research methods. Standard methods of interpretation used in legal science are going to be applied, namely the linguistic, logical, systematic, and teleological methods. The thesis is based on the analysis of a text, including the legislative and non-legislative text, case law, research articles, opinions, and reports by respected authorities and scholars. The discussion shall include a literature review of recent academic papers, books, and research articles. Legal analysis of EU legal acts and case law of the Court of Justice of the EU shall be the core method in the thesis. The synthetic argumentation and the deduction are going to be applied to find the conclusion. The thesis is split into the introduction, six chapters, and the conclusion.

The author intends to progress from the general to the specific. The thesis, therefore, combines an analysis of the applicable law (legislation) and an analysis of a case study of Poland (case law). Although we can find disputes on the interpretation of the rule of law with the several Member States, the author will limit the research scope to the analysis of the case of Poland only. The intention is to reflect on the development of the long-running dispute between Poland and the European Commission to demonstrate the legal development of the concept of the rule of law in the EU over time.

The first chapter shall provide the theoretical background for the legal analysis conducted in the following chapters. Thus, the opening of the thesis will provide a literature review of relevant scholars, authorities, and international institutions to briefly present the understanding of the concept of the rule of law in Europe. The chapter shall also show its role during the European integration process and possibly discuss whether the Union's understanding follows the constitutional traditions of Member States. The main objective shall be to identify the common ground for the rule of law among 27 Member States.

The second chapter is focused on EU law in the big picture. The author would like to find references to the rule of law concept in EU law. The second chapter aims specifically to provide a brief overview regarding the rule of law and identify references to the “rule of law” in the primary law with some links to the secondary law.

The following chapter aims to discuss article 7 TEU in more depth. The rule of law procedure as a key legal instrument for the rule of law protection shall be analysed. Thus, the specific objective of the third chapter shall be the legal analysis of the rule of law procedure and the follow-up rule of law framework defined by the European Commission. The analysis of Poland’s rule of law case shall also be included.

In the fourth chapter, the author will legally analysed the infringement procedure under art. 258 TFEU as the alternative way for the rule of law protection. Specifically, the objective of this chapter is to discuss the judicial proceedings with respect to the breach of rule of law by a Member State. Relevant case law of the Court of Justice concerning Poland shall be included as well.

Thereafter, the fifth chapter aims to briefly discuss Regulation 2020/2092 as a new tool for the rule of law protection adopted in 2020. The specific objective is to analyse the legal act with a special focus on the reasons for its adoption and its role in the rule of law in EU law. The action for annulment brought by Poland will also be discussed.

The author’s discussion will be provided in the sixth chapter in order to bring opinions and views on the discussed issues.

Lastly, the thesis will be concluded by answering research questions as defined above, and the author’s discussion on the rule of law in EU law will be provided.

The topic of the rule of law has been discussed widely in recent years by both lawmakers and academics. The rule of law can be often seen in headlines of mainstream media. Many international organizations, expert panels and committees have addressed the rule of law. It is often the subject of research papers, thesis and university courses. Traditionally, the literature offers plenty of sources on the legal-philosophical understanding of the rule of law, historical perspective and implications, whereas the area of the rule of law in the context of the European Union is relatively less clear. However, the debate over the rule of law in the EU is very fragmented, therefore the thesis aims to provide a comprehensive view of the rule of law in EU law in terms of means of enforcement.

The added value is of the thesis the discussion on the development of the rule of law situation in Poland. The analysis of applicable law together with the analysis of the development in Poland may highlight certain aspects that are not addressed by the contemporary discourse. The author believes the thesis can contribute to the debate on the rule of law in the EU by demonstrating how law reacts to politics using the case of Poland case. Moreover, the author's personal motivation is to learn more about the rule of law. The public debate is often separated from legal and factual facts, and one might have often wondered why there were disputes between the EU and Member States while all EU Member States subscribed to the rule of law principles. Simply put, the topic of the rule of law in EU law raises many questions. This thesis is a great opportunity to set out ambitious questions and to try to find satisfactory answers within a limited research scope.

1 The rule of law as a legal concept in Europe

The concept of the rule of law has a long tradition in Europe, however its development has met different fates in different parts of the continent due to historical developments. In order to find a common European interpretation, it is necessary to look at major legal doctrines that have contributed to the current conception of the rule of law: the United Kingdom, France, and Germany. Contemporary theoretical approaches to the definition rely on these doctrines, as do constitutionalists in the Member States. This chapter shall analyse the rule of law as a principle common to European countries, consisting of legal history and development in Europe, European integration and the definition.

The historical formation of the concept of the rule of law in Europe took place in two directions: bottom-up and top-down.[9] The first approach is understood as the gradual shaping of the interpretation by the courts in individual cases. Thus, the content of the rule of law was defined gradually and become generally accepted. Subsequently written down in the historical texts as the declaration of already existing rights that constitute the British (unwritten) constitution. The British concept of *'the rule of law'* is to some extent unique and different from continental conceptions. The legality is at the centre of interest in British doctrine, we may refer to it as rule-by-law. Under UK constitutional tradition, no fundamental right can be enacted into British law without the explicit approval of the UK Parliament. In relation to the EU, this has meant that any new fundamental rights arising from EU law (even being superior to the national law) must have been approved at the national level. Although the UK is already a former Member State of the EU, the UK's rule of law doctrine, built on a strong tradition of rule by law, is still inspiring for the interpretation of the rule of law.[10]

Unlike the British bottom-up approach, French and German legal doctrine are typically top-down. The concept of *"État de droit"* in France is characterised by the strong influence of political power. Historically, its roots go back to the pre-revolutionary era, during which the parliament partially fulfilled the role of the judiciary and the monarch represented the ultimate guarantee of justice in the review of court decisions. The French Revolution subsequently elevated sovereign political power above the law: "*The law is the expression of the general*

[9] DICEY A. V. Introduction to the study of the law of the constitution, p. 96.
[10] SUR E. Od nejistého k implicitnímu (Význam principu právního státu a jeho ochrana ve Smlouvě o Evropské Unii. In: TICHÝ L. (ed.) Evropský delikt. Porušení základních hodnot Evropské unie členské státem a unijní sankční mechanismus, p. 45 – 47.

will."[11] as stated in the 1789 Declaration of the Rights of Man and of the Citizen. The gradual introduction of checks and balances against a strong position of the parliament leads after the Second World War to the creation of a semi-presidential system and establishment of the "*Conseil Constitutionel"* (Constitutional Council), whose remit is to control laws, later certain constitutional laws. Anyway, the review shall be carried out on a voluntary basis. Therefore, the review mechanism is seen as a political instrument and, in terms of changes in the nature of the state, the French concept of *"État de Droit*" is characterised by the dominant role of politics. EU affaires and the status of EU law are at the end of the day the result of a legitimate political decision. According to the French concept of rule of law, politics has the last word.[12]

In Germany, a top-down approach has gradually developed the concept of the "*rechtsstaat*". German doctrine sees the rule of law as setting up the relationship between government and citizens. "*Rechtsstaat"* in the 19th century included three basic requirements for governance: the form of the law, parliamentary approval for interference into individual liberty and property rights, and administrative intrusion into individual rights only as a second legem. As late as the early 20th century, the constitution was regarded as the immanent will of the people. The historical experience of the Nazi state takeover through the will of the people led to a reorientation of the concept. The Basic Law of 1949[13] puts the individual at the centre, to whom the legal order guarantees the inviolability of certain principles and to whom the constitutional institutions are subordinate. In contrast to the French approach, the influence of politics is radically limited. It can be said that no category of law (not even constitutional law) must abide by the Constitution. Thus, "*rechtsstaat*" is said to be based on a protectionist principle.[14]

In conclusion, the rule of law is accepted as a fundamental building block in the United Kingdom, France, and Germany, but their interpretation varies from doctrine to doctrine. Although they share the same foundations, the British "*rule of law"*, the French "*État de droit" a*nd the German "*rechtsstaat"* represent three distinct concepts. This raises the question of if definitional features shared among the EU Member States can be found.

[11] Art. 6, Declaration of the Rights of Man and of the Citizen, 1789

[12] LUISIN B. Le mythe de l'État de droit, L'État de droit, rétrospectivement..., p. 155-182.

[13] See Art. 1 – Art. 19 (Basic rights), Basic Law for the Federal Republic of Germany, 1949.

[14] SUR E. Od nejistého k implicitnímu (Význam principu právního státu a jeho ochrana ve Smlouvě o Evropské Unii. In: TICHÝ L. (ed.) Evropský delikt. Porušení základních hodnot Evropské unie členské státem a unijní sankční mechanismus, p. 50 – 52.

1.1 Foundations of the rule of law

The academic debate over the rule of law is highly inspired by its classic origins. The roots thus go back to ancient Greece. The idea that government should be bound by law was yet expressed by Plato. Followed by Aristotle, interpreted the 'rule of law' as opposed to the 'rule of man'. He clearly expressed the benefits of the rule of law in *Politics*[15]: *"It is more proper that law should govern than any one of the citizens."* We can observe a significant influence from his legacy to the modern concept of rule of law in Europe. Interestingly, we may identify a tension between law as a restraint on democracy and law as a product of self-government (democracy). The difference between the idea of the rule of law on the one hand and the idea of democracy on the other may be found in the general scepticism of scholars as both Plato and Aristotle were aware of the threat to the democracy of the majority.[16] Later Roman scholars assumed the general justice of laws as, see Cicero: *"the supremacy of law hinges on its consistency with justice"*[17] It can be summarized, however, that the idea of government being bound by law was already laid down by ancient philosophers.

Medieval roots are generally limited. The dominance of Christianity in Europe meant the supremacy of the Church over secular law, as the coronations of monarchs by the Pope well demonstrate. According to Thomas Aquinas, positive law is subject to divine law.[18] Despite the strong influence of religion, certain elements of the primacy of law can be identified. Magna Carta declares: *"No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no one will we sell or deny or delay right or justice."*[19]

The most significant contribution to contemporary perceptions of the rule of law and governance theory can be attributed to the period of liberalism in the 17th and 18th centuries. Philosophers, in many variations, created basic foundations of the rule of law that are still valid today. Although the ideas contradicted each other, all ideas can be used to extract the foundations of the rule of law. *"Where-ever law ends, tyranny begins."*[20] – as *'Social Contract'* was presented by John Locke in 1689. Notwithstanding the idea of the prerogative

[15] ARISTOTLE. *Aristotle's Politics.* 1905.
[16] Socrates, Plato's teacher was condemned to death.
[17] CICERO, The Laws, Book Two, 13, p. 126
[18] LEVERING, M. Thomas Aquinas on Law and Love. Angelicum, 94(2), 413–442.
[19] SUMMERSON et al. *The 1215 Magna Carta: The Magna Carta Project.*
[20] LOCKE J. and P. LASLETT. Two treatises of government. 1963.

right of monarchs was still respected, Locke understood the rule of law as a barrier to oppression, thus he suggested its supremacy. Montesquieu later developed the thought of the separation of powers to the concept which is still valid in modern systems. The trinity system distributes the power in the state among *"a legislature, an execution, and a judiciary."*[21] Further, the emphasis on individual liberty was then advocated by J. S. Mill. Subsequently, in 1787, *the Federalist Papers*[22] introduced a comprehensive system of rule of law involving representative democracy, vertical and horizontal separation of powers, and judicial review of laws.

The rule of law fundamentals can thus be summarized by the following features based on liberal philosophers: democratic law-making, the limitation of government by a valid law, respect for individual liberties, and separation of powers within the state.

1.2 The definition of the rule of law

So far, the historical development and different approaches of legal doctrine have been discussed. On the basis of the given facts, we are able to distinguish different theoretical formulations of the rule of law. Although legal doctrine contains innumerable competing theories, the formal and substantive versions of the concept of the rule of law can be considered the basic and traditional divisions. On the one hand, the formal definition focuses on the way in which the legal norm is enacted and what qualitative features it exhibits. In particular, whether it was adopted by an authorized person, in a prescribed manner, whether it is sufficiently clear, or whether it is not directed by its effect to the past. The formal approach resigns itself to an assessment of the value content of the adopted law. A substantive definition, on the other hand, goes beyond form. According to the substantive concept, there are certain attributes associated with the concept of the rule of law without which the law is not consistent with the rule of law. Thus, a law passed without formal deficiencies according to the formal version may be found to be contrary to the rule of law if the substantive version is upheld. The substantive version traditionally operates with concepts such as morality or justice.[23]

In addition to the formal – substantive dichotomy, we may distinguish three forms as defined by Tamanaha[24]:

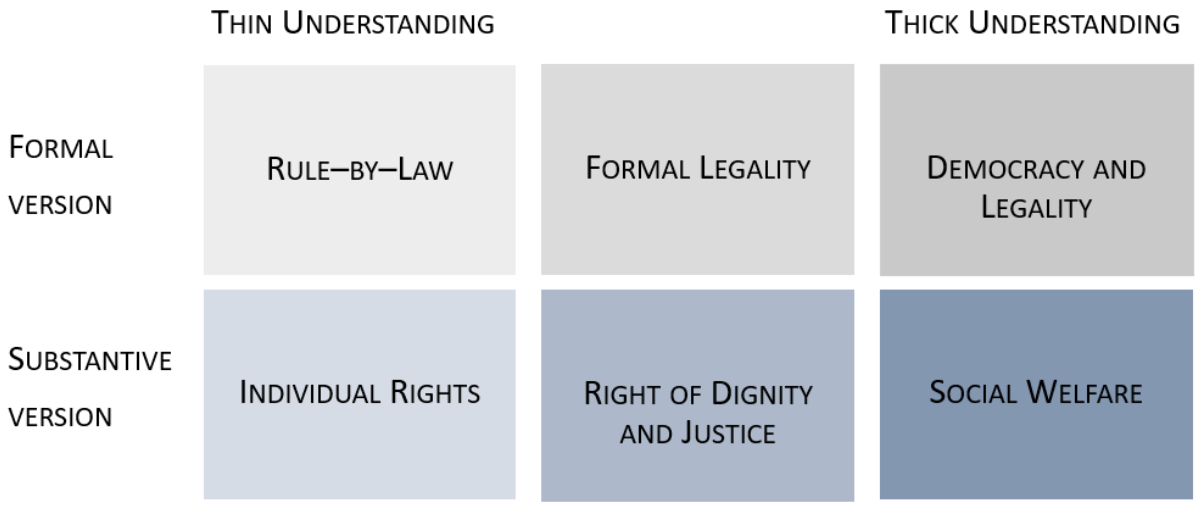
[21] MONTESQUIEU C. de S., baron de. *The Spirit of Laws.*

[22] HAMILTON, A. The federalist papers.. 2012.

[23] CRAIG P. Formal and Substantive Conceptions of the Rule of Law. Public Law. 1997.

[24] TAMANAHA B. Z. On the Rule of law. History, Politics, Theory,.p. 91-92.

Scheme 1: Rule of law versions, thin and thick understanding



Source: Own elaboration based on TAMANAHA B.Z.: Rule of law, History, Politics, Theory.

The graphic demonstrates two distinct sets of theorists defining the rule of law, with both versions graded from the thinnest understanding to the thickest. This shall represent a cumulative scheme, with the next tier subsuming the previous one. On this basis, one can distinguish (a.1) Rule by Law, (a.2) Formal legality and (a.3) Democracy and Legality as stages of formal definition, and (b.1) Individual rights, (b.2) Right of Dignity and Justice and (b.3) Social Welfare as stages of substantive definition. The different approaches will be briefly discussed.

Applying a strictly formalist approach, the rule of law is formally defined as "the rule by law." The narrowest understanding of the rule of law is thus limited to the requirement of a form of law for acts of governance. While it is undeniable that a similar understanding has been surpassed in the European legal tradition (Asian legal culture still considers a similar interpretation of the rule of law as one of the applicable versions), the principle that only the form of law is authorized to govern in the rule of law can be accepted as an absolute minimum, however insufficient.[25]

While rule-by-law is more or less overcome in Western legal doctrine, formal legality can be considered as the strongest conception of formal theory. Legality represents the totality of the requirements of law-making and governance, in particular, the generality of legal rules, their clarity and public promulgation, relative stability prohibiting abrupt and unpredictable changes, consistency between written rules and the actual conduct of state actors, the

[25] RAZ, J., The Rule of Law and Its Virtue, In: The Authority of Law. Oxford: Clarendon Press. 1979 p.212–13.

prohibition of retroactivity, and the prohibition of demanding the impossible from the addressees. Some legal theorists also add mechanisms that ensure these requirements, such as an independent judiciary, transparency with fair hearings, oversight, and prohibition of arbitrariness by state officials. Thus, legality reflects Montesquieu's idea of "*freedom to do what the law permits.*"[26] This theory imposes purely neutral procedural requirements, with no claims to the content of legal norms. In other words, formal legality can be considered strictly neutral. Legal neutrality is a strong argument for the proponents of the theory, supporters of such a definition can be found regardless of political affiliations. For the same reason, formal legality is still recommended for defining the rule of law for universal or global acceptance. On the other hand, the fact that it is content indifferent carries with it the threat of legitimizing authoritarian governance. For example, a duly enacted law establishing slavery would pass the test of formal legality. It can be summarized that the rule of law in the concept of formal legality is represented by a set of rules to which certain demands are made.[27]

The third formal understanding of the rule of law is formal legality supplemented by democracy. Although the concept of democracy may create a reference to value standards, it is a rather technical concept and therefore still a formal definition of the rule of law. Democracy does not interfere with the content of the law but creates a decision-making principle with rules determining who determines what the law looks like. The formal legality reinforced by democracy is to ensure that those bound by the rules in effect co-create them. According to Jurgen Habermas, *"the modern legal order can draw its legitimacy only from the idea of self-determination".*[28] The thickest understanding of the formal version thus works with the element of the legitimacy of norms, which is derived from the right of an individual who forms the majority to change the rules. Simply adding democracy as an additional ingredient does not make the cocktail called 'rule of law' perfect. Let us take the historical experience of Germany between world wars. It was the will of the people, based on norms that met the requirements of formal legality, that created one of the most pernicious regimes of governance in human history. At the same time, it is worth nothing that democracy is often in opposition to one of the key requirements of formal legality - the predictability of the law. For instance, the unfolding of democracy often leads to precipitous changes in laws based on new political majorities. Although democracy alone will not guarantee the morality or other

[26] SUMMERS, R. S. A Formal Theory of the Rule of Law, Ratio Juris 127, 1993.
[27] RAZ, J., The Rule of Law and Its Virtue, In: The Authority of Law. Oxford: Clarendon Press. 1979 p.212–13.
[28] HABERMAS J. Beyond Facts and Norms, translated by William Rehg. Cambridge: MIT Press. 1996. p.449.

value quality of the rules adopted, the reinforcement of legality by legitimacy is so essential that we must agree with W. Churchill's statement, "*Democracy is the worst form of government, except for all the others.*"[29] [30]

Let us now move from the formal to the substantive version, highlighting that all substantive conceptions contain a formal version, but they build up an additional layer. Roughly speaking, the shift from a system of "*rules*" to a system of "*rights*" can be identified within the definition of the rule of law in terms of individual rights. The idea is based on citizens being endowed with individual rights which must be recognized in positive law in order to be enforceable. Rights and freedoms such as equal treatment, property rights, freedom of contract, or the right to privacy are thus to be included in the concept of the rule of law. Although individual rights are not created by positive law, they must be still recognized by the state. Recognized rights can enjoy judicial protection. Dworkin[31] traditionally appealed to the moral rights of the individual, in favor of which the judge should always rule. Substantive theories thus presuppose certain shared moral principles that lead to a general interpretation by courts of the content of individual rights. The biggest pitfall of the theory is the vagueness of the terms. At the end of the day, it is always the person of a judge who interprets the content of the law in each case.[32]

In contemporary discourse, the rule of law, democracy, and human rights are considered the trinity of inseparable features of a developed country. Legality in the sense of formal legality, as the formal definition of the rule of law discussed above, together with democratic mechanisms and respect for individual rights are defining features of '*liberal democracy*'[33] typical for Western Europe. Moreover, the trinity can be considered as a magic triangle where all three vertices are complementary. The idea is based, among other things, on the fact that formal (procedural) and substantive (based on values) justice cannot be easily distinguished. On the other hand, justice itself is a relative category indeed. Nevertheless, when looking for a

[29] CHURCHILL W. Speeach in the House of Commons. 11 November 1947.

[30] TAMANAHA B. Z. On the Rule of law. History, Politics, Theory. Cambridge University Press. 2004. P. 99-101.

[31] DWORKIN, R. Political Judges and the Rule of Law, 64 Proceedings of the British Academy 259, 1978, p. 262.

[32] TAMANAHA B. Z. On the Rule of law. History, Politics, Theory. Cambridge University Press. 2004. p.105-107

[33] *"Liberal democracy" is defined as a democracy based on the recognition of individual rights and freedoms, in which decisionsfrom direct or representative processes prevail in many policy areas.* See COLLINS DICTIONARY. *"Liberal democracy"* [cit. 10. 6. 2022] Available at: https://www.collinsdictionary.com/dictionary/english/liberal-democracy

common understanding of the rule of law in Western societies, Europe included, the combination of formal legality, democracy, and individual rights is probably the most accurate description.[34]

When discussing the right to dignity and justice to focus in particular on Germany after the Second World War is needed. Whereas the "*rechtsstaat*" traditionally followed formal legality, the constitutional system in post-war Germany was being revised in response to the atrocities of the Nazi regime to prevent a recurrence of similar social patterns. The protection of the dignity of the human being is recognized as the supreme value of the constitutional order, while at the same time human rights are proclaimed as the universal basis of any community.[35] Further, we may find a clear substantive approach in the "*eternity clause"*, which prohibits certain changes to the German Constitution, even if adopted by a constitutional law. In addition, a constitutional court with strong powers has been created to ensure the protection of individual rights, despite limiting the legislative power. The understanding of the rule of law already goes further in terms of the substance. These tendencies are often referred to as the "*judicialization of politics*" and do not only apply to Germany, but also to Central and Eastern European countries with a strong constitutional court[36]. The practice of using the judicial review as a tool to decide on issues that traditionally belonged to legitimately elected legislators should be viewed critically. The question remains whether political power should be in the hands of a judge.[37]

Finally, the thickest understanding of the substantive definition of the rule of law may be referred to as "*welfare rights*". The understanding of the rule of law as such a dynamic concept is based on the idea that the rights of an individual in a free society include obligations of the state to create cultural, economic, and social conditions for the individual to reach his/her aspirations. We may also link it to the right to self-determination. Despite being attractive to read, the new wave of human rights under the concept of the rule of law is highly disputable. The question is whether the strengthening of the welfare state should be a matter of political debate and therefore whether the rule of law label is not being misused as a weapon in ideological debate. Although contemporary Germany, with its notion of

[34] MARSH N. S., The Rule of Law as a Supra-National Concept, In: Guest, A. G. ed.:,Oxford Essays in Jurisprudence. Oxford University Press, 1961. p.244.
[35] Art. 1, Basic Law for the Federal Republic of Germany.
[36] *For instance, the Czech Republic or Slovenia.*
[37] TAMANAHA B. Z. On the Rule of law. History, Politics, Theory. Cambridge University Press. 2004. p. 108-110.

'rechtsstaat' and human dignity recognition, may seem to fit the concept, the notion of the rule of law as a synonym for the welfare state is rather marginal in the legal doctrine.[38]

In conclusion, no widely accepted definition of the rule of law can be identified, while many different approaches to the concept can be observed. If we understand the definitions discussed above as a scale, then the prevailing definition would be oriented between formal legality and individual rights.

1.3 European integration process and the rule of law

Historically, the rule of law was not explicitly included in the Treaties of the European Communities.[39] However, it can be argued that it was implicitly included by the very nature of the European project to secure peace on the continent. In order to achieve the objective following *"Make Trade Not War"*[40] idea, economic exchange between states was enhanced. Therefore, for trade and economic rules, the Member States did not find it necessary to mention the rule of law. Since the beginning of European integration, we can observe the flowering of the rule of law in the EU.

The Court of Justice of the EU has played a key role in gradually strengthening the importance of the rule of law in EU law through its extensive interpretation favoring European integration. First, the history-making judgments *Van Gend en Loos*[41] and *Costa v. ENEL*[42] separated a set of rules of European Communities from the international law. In *Van Gend en Loos* case, the Court of Justice ruled that the Treaty is not just an international treaty; a *sui generis* legal order was created.[43] We can ask how the EU differs from international law. Among other answers, one must conclude it is the status of an individual that is subject to legal acts and requires legal protection at the EU level. The Court of Justice ruled that: *"The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights..."* and that *"Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which*

[38] RAZ, J., The Rule of Law and Its Virtue, In: The Authority of Law. Oxford: Clarendon Press. 1979 p.211.

[39] European Coal and Steel Community was established in 1951, followed by European Atomic Energy Community in 1952 and European Economic Community in 1952, later marged and from 1965 referred to as European Communities.

[40] MARTIN P., MAYER T. and THOENIG M., Make Trade Not War?, *The Review of Economic Studies*, Volume 75, Issue 3, July 2008, Pages 865–900,.

[41] Case 26-62, Van Gend en Loos.

[42] Case 6-64, Costa v E.N.E.L.

[43] TOMÁŠEK M. a kolektiv. Právo Evropské unie. 3. aktualizované vydání. Leges. 2021, p. 63

become part of their legal heritage…" [44] The doctrine of direct effect requires the legal protection of an individual, which forms a ground for the rule of law. Further, Costa vs ENEL established the principle of supremacy in EU law meaning that EU rule cannot be overridden by national law. The Court ruled that "*Member States have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves."*[45] In other words, in areas where the Member States have transferred powers to the Union, they are bound by EU law, which takes precedence where it conflicts with national law.

Second, Les Verts[46] may be considered the most important case for the rule of law. For the first time ever, the Court of Justice has explicitly declared that the Community is based on the rule of law. The decision thus de facto activated a latent principle present in EU law: *"It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."*[47] In later case law, the Court reiterates that the EC (EU) is founded on the rule of law.[48]

Third, since the Court of Justice explicitly declared that the EU has been established on the rule of law principle, the case law has tended to clarify this vague concept. In order to provide a more specific meaning, the Court has gradually refined the defining features of the rule of law of the Union in individual cases. The following can thus be considered as basic features[49]:

- legal certainty

"This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it."[50]

- the prohibition of abuse of the power conferred,

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[44] See part B - on the substance of the case, Case 26-62, Van Gend en Loos.

[45] See para 3, Case 6-64, Costa v E.N.E.L.

[46] Case 294/83, "Les Verts" v European Parliament.

[47] See para 23, *Ibid.*

[48] See for instance: para 63, C-496/99 P, CAS Succhi di Frutta; paras. 38-39, C-50/00 P - Unión de Pequeños Agricultores v. Council; para 316, Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat; para 41, C-64/16; Associação Sindical dos Juízes Portugueses v Tribunal de Contas

[49] *Referenced to those principles are included in recitals of the Regulation 2020/2092.*

[50] See para 10, Joined cases 212 to 217/80, Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato.

"Legal systems in Member States provide, albeit in different forms,protection against arbitrary or disproportionate intervention."[51]

- the principle of legality,

"In a community governed by the rule of law, adherence to legality must be properly ensured."[52]

- the separation of powers, and

"Legislative, administrative and judicial are exercised in compliance with the principle of the separation of powers which characterises the operation of the rule of law."[53]

- independent judicial review

"The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision."

"Maintaining a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter." [54]

In response to the Court of Justice's judicial activism and the establishment of the rule of law doctrine not explicitly set out in the Treaties, Member States have reacted with some delay in each revision of the Treaties. Like the Court of Justice, they have followed the strengthening of the importance of the rule of law. However, it can be argued that they have rather straightened out the state of written primary law in response to case law. The first reference was incorporated by the Maastricht Treaty in 1992. The Treaty of Amsterdam in 1997 also responded by referring to the rule of law as an EU's common principle [Art. 6 (1)], and further by enshrining a mechanism for breaking the rule of law (Art. 7) in response to the entry of a radical party into government in Austria. The European Community was also vigilant in preparing for the accession of new Member States and enshrined mandatory respect for the rule of law as a condition of the accession presumably out of fear of the state of the democracies in former Eastern post-communist countries. The Nice Treaty in 2001

[51] See para 19, Joined cases 46/87 and 227/88, Hoechst,

[52] See para 63, C-496/99 P, CAS Succhi di Frutta,

[53] para 58, C-279/09, DEB v Germany

[54] paras 31 and 41, C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas

amended the rule of law procedure by establishing the preventive mechanism.[55] [56]. The situation after Lisbon, and after the non-adoption of the Constitution (proposed Art. 49) and Art. 7 TEU will be discussed in Chapter 2.

1.4 The rule of law in contemporary discourse

Although the problem of a missing definition was demonstrated, the concept of rule of law has become through centuries a widely accepted part of democratic constitutionalism internationally. When reading a variety of international treaties, conventions, or any legal acts adopted in democratic countries, the term "rule of law" will be easily found in most of them. Let us then focus on the perception of NGOs and authorities in international law to come closer to the contemporary definition.

United Nations generally interconnect the rule of law primarily with human rights. For instance, the Universal Declaration of Human Rights claims in the preamble:[57]

> *"All human beings are born free and equal in dignity and rights… Everyone is entitled to all the rights and freedoms set forth in this Declaration"*

> *"Whereas it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*

The United Nations participates in rule of law protections by a variety of activities through the Office of the UN High Commissioner for Human Rights[58], but there is no definition introduced by United Nations.

Guidance on how to benchmark rule of law has been developed by the Council of Europe, the rule of law is established as one of three core values in the founding treaty together with democracy and human rights. The preamble refers to the rule of law followingly:[59]

> *"Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty*

[55] BONELLI M., CLAES M. Hledání standard právního státu. In: TICHÝ L. (ed.) Evropský delikt. Porušení základních hodnot Evropské unie členské státem a unijní sankční mechanismus, p. 67-68.

[56] *See Appendix 5*

[57] UNITED NATIONS. Universal Declaration of Human Rights. 10 December 1948.

[58] UNITED NATIONS. Draft plan of action for the fourth phase (2020- 2024) of the World Programme for Human Rights Eduction, 2019.

[59] COUNCIL OF EUROPE: *Statute of the Council of Europe,* 5 May 1949.

and the rule of law, principles which form the basis of all genuine democracy." In Article 3 the rule of law is set out as the condition for membership: "*Every member of the Council of Europe must accept the principles of the rule of law."*

From bodies of the Council of Europe the area of the rule of law is affected mainly by the European Commission for Democracy through Law, widely referred to as Venice Commission[60], which regularly publishes reports on the rule of law. Concerning works by Venice Commission on the report, the need for further specification of the vague term "rule of law" has been acknowledged.[61] In order to avoid formalistic concepts requiring state action, a substantial concept incorporating human and fundamental rights within the rule of law was selected as preferred. Thus, a new tool for assessing the rule of law was adopted in 2016 - The Rule of Law Checklist. The rule of law is defined by three parts:

i. the purpose and scope;
ii. benchmarks (including the legality, legal certainty, prevention of abuse of power, equality before the law, and access to justice); and
iii. standards relating to benchmarks on the hard and soft law basis.[62]

Global monitoring of the level of the rule of law in most countries is also being carried out by the World Justice Project, an international non-governmental organization.[63] The rule of law is defined by World Justice Project as such:

"*the government and its officials and agents are accountable under the law; the laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; the process by which laws are enacted, administered and enforced is accessible, efficient and fair; justice is delivered by competent, ethical, and independent representatives and neutrals, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve."*[64]

The definition comes out from the OECD's comprehensive and systematic approaches. Arising from this definition World Justice Project developed a set of 8 criteria making together the rule of law. The list of criteria in 2020 includes Constraints on Government

[60] *The European Commission for Democracy through Law is an advisory body on constitutional matter shaving 62 member states. In: VENICE COMMISSION. The Commission – About us [online]. [cit. 10. 5. 2022]*

[61] BINGHAM T. *Rule of Law*, 2010.

[62] VENICE COMMISSION. *Rule of Law Checklist*. 2016.

[63] WORLD JUSTICE PROJECT. About us [online]

[64] OECD, *Government at a Glance 2013*. 2013

Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice.[65] Based on the assessment of those factors the Rule of Law Index has been created and each country on the list out of 128 is ranked according to findings made by the organization. Countries are scored from 0 to 1, while the EU Member States generally show a high score. (Denmark is the best-ranked country reaching 0,9, and Hungary is the country with the worst score in the EU, reaching 0,63).[66] [67]

Despite all efforts to define the rule of law, we still lack a generally accepted definition; however, outlines can be deduced from legal theory. A country following the rule of law standards puts laws before any person, including state officials. That is managed through the separation of powers. Thus, checks and balances in a state, such as an independent judiciary system, is essential. At the same time, we understand the rule of law to be inseparable from respect to fundamental rights. It can be stated that European countries generally fulfil rule of law requirements. Nevertheless, deterioration of the rule of law standards can be observed in the last few years in some EU Member States. Perhaps, the question of whether the EU law is ready to face the deterioration of the rule of law is to be more valid than ever before.

A closer look at the constitutions of individual EU Member States can be useful for assessing the current perception of the rule of law in the EU context.[68] The question of whether each Member State explicitly subscribes to the rule of law in the adopted constitution is certainly relevant. A close review reveals that the constitutions of newer member states (sometimes referred to as former Eastern Bloc or new states of the Union) are much more likely to make explicit reference to the rule of law. A direct reference to the "rule of law" can be found in a total of 12 EU Member States. On the other hand, the traditional states of the Union (or Western democracies) much more often choose a form of indirect recognition of the rule of law principle through the recognition of individual rights. Total of 15 Member States do not refer explicitly to the "rule of law" in constitution. In the brief study of the constitutions, the author has focused on the idea of equality before the law as one of the foundations of the rule of law.[69] Narrowing the rule of law down to the "equality before the law" as one of the

[65] WORLD JUSTICE PROJECT. *Rule of Law Index 2021 Insights*

[66] See Appendix 4.

[67] WORLD JUSTICE PROJECT. *Rule of Law Index 202 Insights*

[68] In order to support the research, the author compared constitutions of all 27 Member States to find a reference to the rule of law and the principle of equality before the law. See comparative table of selected provisions in Appendix 6.

[69] See Appendix 6.

minimum conditions, it can be stated that all EU Member States either explicitly subscribe to the rule of law or to the idea of equality of people before the law.

In conclusion, the rule of law has been an immanent part of democracy since the classical philosophers. Although the concept of the rule of law can be described as a shared in Europe, its interpretation varies among different legal doctrines. When trying to define the rule of law, we encounter heterogeneous views ranging from the thin formal conception of legality to an understanding of the rule of law in conjunction with human rights. Thus, rather than a single definition, contemporary legal discourse is more concerned with capturing the key characteristics of the rule of law. The rule of law is interpreted mainly through legal principles such as separation of powers, legal certainty, prohibition of abuse of entrusted powers or independent judicial protection. In addition to the legal-historical traditions of the Member States, each EU Member State adheres to the rule of law within its own constitution. Therefore, the rule of law can be seen as a value common and shared among EU Member States.

2 The rule of law in the EU law

The EU law has undergone legal development reaching the current state while the rule of law became a *"key common value"*.[70] This chapter aims to briefly present the legal basis in Treaties regarding references to the rule of law and briefly present important references in other EU legal sources.

2.1 The rule of law in primary law

If we look for an explicit reference to the "rule of law" in the Treaties, we can find it twice in the preamble, first as one of the universal values of "inviolable and inalienable rights of the human person" and second as an affirmation that the Member States subscribe to the principles of democracy and fundamental freedom.[71]

Article 2 TEU presents the values of the Union, including the rule of law, as follows:

> *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minority"*[72]

Such values enumerated in Art. 2 TEU are per se declared by EU primary law to be *"values on which the Union is founded,"* i.e. values which the Treaties declare to be common to all Member States and shared among Member States. We may simplify by stating that they are supposed to be rules of the club that the members of this club wish to follow. The rule of law is enumerated along with other values, but on its own it plays a key role as ruled by the Court of Justice.[73] It can be argued that Article 2 TEU is declaratory provision and constitutes the core of EU law. The relationship of values under Article 2 TEU can be found in EU law by further references.

In the event of a serious violation of values by a Member State, EU law provides in Article 7 TEU for a procedure for establishing such a violation and for the sanction of suspending certain rights of the Member State. The article 7 will be discussed in detail below. In fact, the

[70] EUROPEAN COMMISSION. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final. p. 6

[71] Preamble of the Treaty on the European Union.

[72] Article 2 TEU

[73] *See cases discussed above.*

infringement procedure has been used for the protection of the rule of law by the Commission, so will be discussed in Chapter 4.

In addition, an important link to the rule of law can be found in Article 49 TEU by stating that

> *"Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."*[74]

It is therefore common knowledge that the rule of law is one of the prerequisites for joining the EU. Art. 49 TEU was included into the primary law by Amsterdam Treaty. Moreover, the rule of law is explicitly stated to be a guiding principle for the Union's external action under Article 21 TEU.

> *"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms… "*[75]

While the Treaty on European Union refers to the rule of law as a *'value'* in its preamble, the Charter of Fundamental Rights of the European Union uses *'principle'* instead. The only mention of a rule in the Charter links the rule of law to democracy with a *"spiritual and moral heritage,"*[76] Although one could attach a deeper significance to the different wording of Article 2 TEU, i.e. '*the rule of law as a value'* vs. '*the rule of law as a principle'* in the preamble of the Charter, majority of scholars did not see any significance as there was probably no intention by lawmakers to distinguish these references in any way.[77]

2.2 The condition for candidate countries

Recognition of the rule of law principle by a candidate country is a prerequisite for membership of the European Union as defined in the Copenhagen criteria[78] of 1993:

> *"Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection*

[74] Article 49 TEU.
[75] Article 21 TEU.
[76] Preamble of the Charter of Fundamental Rights of the European Union.
[77] SYLLOVÁ. J., PÍTROVÁ L. a PALDUSOVÁ H. a kol. Lisabonská smlouva. Komentář. 1. vydání.
[78] EUROPEAN COUNCIL. PRESIDENCY CONCLUSIONS. (Copenhagen European Council). 21-22 June 1993.

of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union."

During the accession talks in 2004 and 2007, the declaration was specified using references to respected international organizations discussed in previous chapter, such as the Council of Europe, the United Nations, the Venice Commission, and decisions of the European Court of Human Rights. The European Commission assesses the rule of law as part of accession talks along with the quality of democracy. Also, the Commission has not adopted a full list of standards required of a candidate country. Aiming to bring more certainty and better quality to the assessment of candidates for EU membership, the Commission presented the EU Enlargement Strategy in 2015.[79] Within the Communication, the Commission devotes less than a page of text to the rule of law in Part II(a). The document associates the rule of law with functional institutions, an independent judiciary or the fight against corruption. The Commission's intention is to use more careful and objective due diligence on the state of the rule of law in the candidate country.[80]

2.3 The rule of law in other sources of EU law

Growing problems associated with the rule of law in some Member States have prompted reflection on new solutions. As a result, in March 2014, the European Commission adopted the Communication "*A New EU Approach to Strengthening the Rule of Law*"[81]. Building on existing case law of the Court of Justice, the Commission further defined the principles associated with the rule of law. The soft law document will be presented in chapter three. Another source of soft law is also the "*Rule of Law Dialogue*"[82] organised by the Council. In response to the Commission's efforts, the Council has set up a different platform to be included annually in the Council's general affairs agenda. The conclusions of the meetings are often not formalised in any way, so the real use case of the instrument is questionable.

Beyond non-legislative initiatives and soft law, the growing importance of the concept of the rule of law can also be observed in the secondary law. For instance, the important recent

[79] EUROPEAN COMMISION. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC ANDE SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. EU Enlargement Strategy. COM(2015) 611 final. 10. 11. 2015, Brussels.

[80] *Ibid.*

[81] EUROPEAN COMMISSION. *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL from 11 March 2014.*

[82] COUNCIL OF THE EU. Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law. 16 December 2014.

legislative step was the adoption of Regulation 2020/2092[83] making the EU budget conditional on compliance with the rule of law. Thus, we see a projection of primary law values into an act of secondary EU law.[84] The Regulation will be discussed in detail in Chapter 5.

In conclusion, references to the rule of law can be found not only in primary law, but permeate the secondary law. The rule of law is the focus of soft law documents issued within the EU. Key references to the rule of law represent Article 2 TEU declaring the values of the Union, Article 7 TEU enshrining the rule of law procedure, and Article 49 TEU establishing the rule of law as a condition for a candidate country to join the Union.

[83] Regulation 2020/2092.

[84] See for instance: *Regulation 230/2014* and *Regulation No 234/2014.*

3 The enforcement under the Article 7 TEU

Respecting the scope of the research, this chapter shall discuss the rule of law procedure under Art. 7 TEU, the very first legal instrument to protect the rule of law in EU law. Article 7 TEU has been mentioned by academics, EU officials, and media more and more often referring to recent constitutional changes in some Member States. Moreover, the Art. 7 (1) TEU was activated by the Commission against Poland.

3.1 The Article 7 TEU

This article represents a specific type of liability by a Member State in case of breaching any of the fundamental values of the EU listed in Article 2 TEU. The purpose shall be the protection of the ideological nature of the European Union and preserve basic fundaments of the EU law. Thus, some authors refer to this provision as *"European delict"*[85].

The origin of article 7 is connected to the largest enlargement of the EU in 2004, while Copenhagen European Council included the rule of law for a candidate country as one of the criteria to fulfill, which later led to the amendment of Art. 49 TEU by Treaty of Amsterdam.[86] Post-communist countries from central Europe and Balkan states have not been perceived as well-established democracies by members of European Communities. Complementary provisions ensuring that the Member States follow this criterion after the accession was needed. Therefore, the original wording was designed as a mandate for the Council to assess if a severe and persistent breach does exist and to apply suspending rights sanctions potentially. Moreover, the entrance of far-right party into the Austrian government in 2000 raised some concerns as well. Followingly, the Treaty of Nice amended the original text by enabling the Council to start the procedure by the sole determination of the existence of a clear risk of a severe breach and to address the appropriate recommendation. Such article change provided the option to avoid remedial action after a few severe breaches. The latest amendment by the Treaty of Lisbon modified Art. 7 and Art. 49 TEU accordingly following the insert of new Article 2 TEU, which had adopted reference to EU values initially stipulated in article 6 para. 1 TEU.[87]

[85] MAGNUS, U. Wrongfulness and Fault as Requirements of the European Delict under Art. 7 TEU? 2018.
[86] PECH, L. A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law'. 2010.
[87] LARION, I. M. *PROTECTING EU VALUES. A JURIDICAL LOOK AT ARTICLE 7 TEU.* 2018.

Article 7 covers two possible ways of how EU values can be protected; for each, a specific procedure has been established: (a) a "softer" one-step measure for determining the existence of a clear risk of a serious breach of EU values; (b) a "heavier" two-steps mechanism for determining the existence of a serious and persistent breach of EU values with possibility of a sanction of suspension certain rights of a Member State.

First from the above-mentioned procedure (a) is provided in paragraph 1:

> "*On a reasoned proposal by one-third of the Member States, by the European Parliament, or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting by the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.*"[88]

The Council is entitled, on the basis of a reasoned proposal, to decide by a majority of four-fifths of its members on making recommendations or declaring a clear risk of a serious breach of EU values. The reasoned proposal may come from the European Commission, the European Parliament of one-third or the Member States. In addition to that, before the adoption of such proposal, the Member State, which should have infringed EU values, must be heard. The Council's discretion lies in assessing whether a breach shall be declared or whether recommendations shall suffice. However, the first procedural step can be made only by one of the mentioned subjects. The Council has no power to initiate the process ex officio. Once the process has been initiated by the Commission, the Parliament, or one-third of Member states, the Council then needs the consent of the Parliament given by an absolute majority of two-thirds of its members. The last procedural condition is represented by the hearing with the Member State in question. Finally, the procedure ends up with the recommendation or the declaration of a clear risk as already described. While there is no clear limitation, it should be legally possible to adopt recommendations and if those are not followed, re-initiate the same procedure again to declare the existence of a clear risk.[89]

Continuing by the second procedure (b), paragraphs 2 and 3 states:

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[88] *Article 7 para. 1 of the Treaty on the European Union.*
[89] KOCHENOV, D. *Busting the Myths Nuclear: A Commentary on Article 7 TEU*. 2017.

"*The European Council, acting by unanimity on a proposal by one-third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations."*

"*Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.*

The obligations of the Member State in question under the Treaties shall, in any case, continue to be binding on that State."[90]

Contrary to the first measure, procedures arising from para. 2 and para. 3 represent a two-phase process. Furthermore, in this case, the discretion is granted to the European Council, not the Council, which shall assess if more than one of values have been breached or if the breach has a required level of seriousness. Regarding the unclarity of what is considered to be more values or enough seriousness, the Commission explained that systematic individual breaches or, for instance, repeated condemnations by the European Court of Human Rights do not fulfill the intention to take remedial action.[91]

The procedure under paragraph 2 can be initiated by the European Commission or one-third of the Member States. As opposed to the previous mechanism, the European Parliament is restricted from starting the process; however, its consent to the process is necessary. The decision by the European Council on "the *existence of a serious and persistent breach"* must be taken unanimously. In contrast, the vote of the representative from the Member State in question is not taken into account. By (non)declaring the breach first phase ends. The following phase is governed by paragraph 3. The sanction is set as a discretion of the Council, which has the right, but not the obligation, to suspend certain rights of the Member State in question. Such a decision must be adopted by the qualified majority when considering all possible consequences of the potential suspension. The decision by the Council can be modified or revoked under paragraph 4. It should be stated that the whole procedure is not

[90] *Article 7 para. 2 and para. 3 of the Treaty on the European Union.*
[91] LARION, I. M. *PROTECTING EU VALUES. A JURIDICAL LOOK AT ARTICLE 7 TEU.* 2018

necessarily terminated by the sanction, though the second step of rights suspension can only follow the previous declaration of the breach in the first step.[92]

Moreover, there is an independent relation between mechanism under paragraph 1 and mechanism under paragraphs 2 and 3. That means the second procedure (para. 2-3) does not require the first procedure to be held before the second is initiated. The same rules apply for the eventuality of simultaneous application of both.[93]

The purpose of art. 7 TEU shall not be the punishment of a Member State, though the function is to be rather preventive. In other words, the *ultima ratio* sanction should serve as a threat for Member States to avoid any disrespect for the values of the Union and a motivation to act in accordance with the EU law. On top of that, the use of sanctions under Art. 7 TEU is quite problematic, even difficult to imagine when considering the political aspects. In practice, a vote of all EU Member States against one would probably trigger the political conflict.[94]

When discussing possible consequences of Art. 7 application the answer has two levels: proceedings and sanctions. The legal effect of the procedure is of declaratory character. In other words, paragraphs 1 and 2 serve notably as the expression of views and concerns by the EU, respectively, other Member States. Undoubtedly, a declaratory effect also evokes a warning toward the Member State in question and may worsen the position of the Member State in international and diplomatic relations. Sanctions, however, might be imposed only in case of a breach in a persistent and serious manner. Contrary to the declaratory effect, paragraph 3 does constitute a real impact on a Member State' right. Using a linguistic interpretation, we find out the text lacks further specification on what kind of rights might be suspended. According to the wording, voting rights in Council are only one possibility for a sanction. The discretion of the Council on how a sanction for a Member State shall look derives from the text of the provision. Apart from voting rights, denial of access to the EU funds has been broadly discussed as a strong political weapon for the Member States facing the procedure under Art. 7 TEU.[95] [96]

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[92] LARION, I. M. *PROTECTING EU VALUES. A JURIDICAL LOOK AT ARTICLE 7 TEU.* 2018

[93] *Ibid.*

[94] KOCHENOV, D. *Busting the Myths Nuclear: A Commentary on Article 7 TEU*. 2017.

[95] HEINEMANN F. *Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework*. 2018.

[96] *The rule of law was set as the condition for EU funds for Multiannual Financial Framework by the conclusion of the European Council at the end of 2020.* In: EUROPEAN COUNCIL. *Conclusion EUCO 22/20.* 11 December 2020.The Regulation 2020/2092 will be discussed in Chapter 5.

Regarding limits of the provision, the abstract nature could be one of them. The definition of values such as democracy and the rule of law is missing, so it is pretty difficult to say if a specific action by a Member State should be deemed a violation of such value. The line between breaching and non-breaching is thin, while the final qualification remains in the power of the Council in para. 1 and European Council in para. 2. No one could argue that the assessment can be non-political.[97] Contrary to the previous statement, one could perceive the abstract notion of EU values as a guarantee of flexibility, as the legal ground allows capturing a wide range of possible threats. Additionally, values may change over time.

Another limitation arises from the hight requirements for sanctions to be adopted. European Council must decide unanimously, while the Member State in question cannot vote. In other words, to suspend the rights of one of 27 Member States, 26 must vote in favor. Recent development has uncovered the weakness of this condition. In case more than one Member State has different view from Union's position on how the democracy and the rule of law shall be perceived, a blocking coalition might be easily formed to disable the use of Art. 7 (2 - 3). In this context, some authors bring dissent interpretations on the Art. 7 using *the "effet utile"* principle. In this light, if Art. 7 was triggered against two or more Member States, both (or all of them) should lose their veto right.[98] However, regarding the text of the provision referring to a Member State and using the singular form, the situation in every Member State shall be discussed separately according to the prevailing interpretation.[99]

The last of the limits to be mentioned should be the political aspect. We can often come across strong expressions when discussing Article 7 TEU, such as *"nuclear option"*[100] or even "*nuclear bomb*"[101]. In my opinion, that is the reflection on which institutions are involved in the process. The European Commission with its unique right to trigger the process is often seen as the bureaucratic political body of the EU standing against Member States representatives, while both the European Council and the Council of the EU are composed of Members States representatives, politicians. Lastly, the European Parliament, having the right to give or refuse consent is also a political body. Thus, there is high political pressure and every single step in the process could be regarded as a political struggle, which often discourages actors from taking any further action in the process, e.g. voting on sanctions.

[97] BÁRD P. *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*. 2016.
[98] PECH, L. and SCHEPPELE, K. L.. *Illiberalism Within: Rule of Law Backsliding in the EU*. 2017.
[99] LARION, I. M.. *PROTECTING EU VALUES. A JURIDICAL LOOK AT ARTICLE 7 TEU.* 2018
[100] SCHEPPELE K. L. and PECH L.: *Is Article 7 Really the EU's "Nuclear Option"?* 2018.
[101] ORBÁN E.. *Article 7 TEU is a nuclear bomb – with all its consequences*? 2015.

Compared to the judiciary ruling before the Court of Justice, while the decision-making is provided by an "independent third party", the proceeding pursuant At. 7 TEU will always suffer from its pollical nature.

In conclusion, EU law is endowed with an enforcing mechanism for the rule of law. Article 7 TEU is constructed as a process toward a declaration about a violation of rule of law or other EU value by a Member State. In the next phase, a sanction might be adopted if all other Member States vote in favour. The proceedings under the Art. 7 TEU have been a dormant instrument since the development in some Member States reversed the direction of constitutionalism. We lack full experience in applying such a mechanism, as voting on a sanction has never been reached before. The reason lies in the substance of the provision being politically sensitive and often referred to as a "nuclear option." For the sake of smoother procedures, the Commission decided to develop a soft law mechanism for rule of law protection. That will be briefly introduced in the following chapter.

3.2 Commission's *Rule of Law Framework*

As it has been demonstrated in the previous chapter current legal basis for the rule of law protection provided in Treaties does not serve its purpose. Although, the substance of Art. 7 TEU shall be the protection of all values of the EU enshrined in Art. 2 TEU; it was the rule of law that received special attention from the Commission in the last decade, probably as a response to rising of illiberal democratic tendencies in Europe. Moreover, the rule of law is regarded as the constitutional value of the EU as ruled by the Court of Justice.[102] The Commission stated in its Communication that: *"There are situations where threats relating to the rule of law cannot be effectively addressed by existing instruments"*.[103]

The adoption of the framework shall serve to fill the gap in the primary law and to provide a transparent specification and an objective approach towards all Member States that shall precede triggering Art. 7 TEU. It should be stated that the framework was adopted in the form of communication, which respects the Art. 288 TFEU. It means that such a legal act shall have no binding force. Therefore, no obligations or sanctions could be established in the Rule of Law Framework given its soft law nature.

When analysing the legal basis, an authority of the Commission is arising from Art.13 (2) TEU: *"Each institution shall act within the limits of the powers conferred on it in the*

[102] PECH L. *The Rule of Law as a Constitutional Principle of the European Union*. 2009.
[103] EUROPEAN COMMISSION: *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL from 11 March 2014.*

Treaties." The European Commission often called the guardian of Treaties is implicitly empowered to monitor or investigate any potential risk of a serious breach. On the other hand, any legal basis for the adoption of a completely new mechanism is not established in Treaties, as it has been reported in the opinion of the Legal Service of the Council.[104]

The Commission declared that the aim is to define a level playing field for triggering the Art. 7 TEU guarantees equal treatment to all Member States and establishes a dialogue with a Member State in question. The aim was also to find a suitable solution for both a Member State and the European Union, represented by the Commission. Expected benefits shall be to avoid escalation and activating Art. 7 if possible. The framework shall also provide a tool for a swift reaction to any emerging issues.

Rule of Law Framework was founded as a process composed of three steps: (a) Commission assessment, (b) Commission recommendation, and (c) Follow-up to the recommendation. The process was designed to be started by collecting relevant information and evaluating indicators of a systematic threat, meeting with relevant authorities, and exchange of information with the Member State in question. When enough information is collected, the Commission shall publicly present its opinion. If the problem has not been resolved, the second stage follows. Provided the Member State has not reacted to improve the situation of the rule of law yet, recommendations by the Commission shall indicate problematic issues and recommend actions to solve identified issues. During the process, the right of the Member State to be heard is guaranteed in the dialogue. Moreover, conclusions by the Commission shall reflect evidence provided by a Member State. At the end of this phase the Commission will make its opinion public. Next, the steps taken by the Member State are to be observed based on further exchanges between the Commission and the Member State. If concerns still occur and no follow-up to the recommendations within the time limit set by the Commission has happened, the activation of the Article 7 TEU will be put on table.[105] [106]

The Rule of Law Framework has been criticised by variety of stakeholders early after its adoption. Besides some Member States and EU bodies pointing out controversial mandate of the Commission to take such steps, a number of academics questioned the divisive approach within the EU.[107] Regardless of any criticism, the framework has not been challenged before

[104] COUNCIL OF THE EU: *Opinion of the legal service. 10296/14 from 27 May 2014.*
[105] EUROPEAN COMMISSION. *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL from 11 March 2014.*
[106] See Appendix 7.
[107] ARGYROPOULOU V.. *Enforcing the Rule of Law in European Union, Quo Vadis?* 2019.

the Court of Justice – contrariwise this soft law legal instrument for rule of protection has been used for the first time in 2016 against Poland. The Commission aimed to define a level playing field. How much the Framework fits its purpose can be assessed according to the case of Poland.

3.3 Rule of law procedure against Poland

The issue of breaking the rule of law principle as one of EU values in Poland had been raised for the first time in 2015, after a judicial reform was introduced by the government following the general election in October 2015. A right-wing conservative party Law and Justice (*Prawo i Sprawiedliwość, PiS*), won by 37,58 %. Therefore, with a parliamentary majority of 235 out of 460 total seats in Sejm (the lower house of the Parliament), the majority government was formed by PiS. Considering creating the monochrome government, the unlimited power to change even the basis of a democratic system was vested into one political party. Shortly after the election, an act amending the Constitutional Tribunal Act was introduced.[108]

The legislative proposal that contained a provision amending conditions for undertaking the mandate of a judge of the Constitutional Tribunal allowed the new government to nominate all five judges that should have taken the order in 2015, including three judges previously nominated by the precedent government before the election. Nominations of judges nominated before the election were rejected by Andrzej Duda, the president of Poland and a member of PiS. At the same time, the original term of the President of the Constitutional Tribunal was proposed to be shortened. As a result, the incumbent president would have to leave office in 3 months. When discussing the decision-making of the Tribunal, a new requirement of a two-thirds majority was also part of the proposal. The constitutional change newly required the presence of 13 out of 15 judges on hearings of all cases.[109] The law was brought to the Constitutional Tribunal for a constitutional conformity review. The Constitutional Tribunal did not approve such constitutional changes, and the appointment of 2 judges from 5 was not accepted as constitutional.[110]

Besides the constitutional crises, other threats to the rule of law were identified in Poland, such as steps aiming to control public media by the government, strict regulation on NGOs,

[108] POLITICO: *Poland's ‚overnight court' breaks all the rules*. 8 December 2015.
[109] *Some requirements were softened later: the requirement for 11 out of 15 judges to be present at the hearing two-third majority was replaced by the simple majority for adopting a decision.*
[110] THE GUARDIAN: *Poland dets official warning from EU over constitutional court changes.* 1 June 2016.

and the political interest of the change of electoral laws might have been observed as well. The legislative proposal aiming to change the decision-making process of the Constitutional Tribunal was not the only action in the area of judiciary system legislation. A law amending the Act on Supreme Court lowered the age limit for judges' retirement, powers of the Polish President were strengthened, and decisive competence on the selection of members of the Judicial Council entrusted in Sejm. Moreover, the Minister of Justice obtained under another adopted legislation full control over the appointment or calling off presidents and vice-presidents of all municipal, district, and regional courts. All changes by the government have been performed through laws without a constitutional majority in the Parliament.[111]

The political development in Poland provoked a response from several NGOs protecting the rule of law and the democracy and EU authorities. An immediate action, as expected, had been launched by the European Commission directly after the controversial judiciary reform. In the early stage, the Commission was using its tools for rule of law protection introduced in the Rule of Law Framework. Accordingly, Frans Timmermans, First Vice President of the European Commission, had sent a letter addressed to the Polish government asking for further information and an explanation of the adopted measures.[112] A second letter from December 2015 demanded more detailed information on reforms focusing on public media. The Polish government was also asked to reflect on relevant EU law.[113] As there was no sufficient response, Poland became the first Member State to face measures described in Article 7 (1) TEU while the Commission initiated the procedure on 13th January 2016.[114]

When starting the dialogue between the Commission and Poland under the Rule of Law Framework, the assessment of possible jeopardy of the rule of law was entrusted to Venice Commission, which should have brought an independent view on the issue.[115]

Its First Opinion No. 833/2015 was published on 11 March 2016. Authors made comments on amending proposals on the Constitutional Tribunal and judiciary system and rejected an explanation from the Polish government about the need for more pluralism in the Tribunal.

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[111] REUTERS: *Polish parliament passes contentious amendment to top court law*. 22 December 2015.
[112] POLITICO: *EU launches the , rule of law' probe of Poland.* 13 January 2016.
[113] EUROPEAN COMMISSION: *Statement by First Vice-President Frans Timmermans and Commissioner Günther Oettinger – EP Plenary Session – Situation in Poland.* 19 January 2016.
[114] MOKRÁ L. JUCHNIEWICZ Piotr and Arkadiusz MODRZEJEWSKI. *RULE OF LAW IN POLAND - INTEGRATION OR FRAGMENTATION OF COMMON VALUES?* 2019.
[115] EUROPEAN COMMISSION. *Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers.* 2016.

The constitutional crisis and threat to the rule of law were declared to be proven.[116] The following Opinion 860/2016 from 14 October 2016 welcomes, on the one hand, certain changes modifying the original proposal, e.g., a simple majority instead of a two-thirds majority of judges to decide a case. On the other hand, strong criticism of the absence of a necessary majority in the Parliament for such changes is discussed in the opinion. Furthermore, the issue of non-accepting judgments by the Constitutional Tribunal on the non-conformity of adopted law with the Constitution is pointed out as a serious problem. The Venice Commission concluded that actions constitute an *"arrogation of the power of constitutional review by the legislature."*[117] The third opinion No. 904/2017 was released on 11 December 2017 on the National Council of the Judiciary, The Supreme Court, and the organization of ordinary courts. Commission repeated the previous idea and called the government to withdraw proposals. On top of that, a set of recommendations was presented.[118]

A reasoned proposal in accordance with article 7 (1) TEU regarding the rule of law in Poland has been presented. The Council has declared in Art. 1 of the proposal: "*There is a clear risk of serious breach…*" and consequently, the Republic of Poland was recommended to take several actions listed in Act. 2 (para. a – para. b). For instance, the independence and legitimacy of the Constitutional Tribunal were called to be restored, ignored judgments by the Constitutional Tribunal on legislative changes in the Polish judiciary system were to be published and all valid decisions implemented. Additionally, laws amending the judiciary system were to be, as stated in the proposal, adopted in accordance with the requirement of separation of powers, and close cooperation with the Venice Commission on justice reform was to be ensured. Finally, the Council called to refrain from actions undermining the legitimacy of judiciary institutions.[119] Triggering the Art. 7 (1) TEU was supported by the European Parliament on 1 March 2018 by a clear majority (422 in favor, 147 against) the resolution on the Commission's decision to activate Article 7 (1) TEU, and with regards to the situation in Poland, consent by the Parliament was given.[120]

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[116] VENICE COMMISSION. Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland. 12 March 2016

[117] VENICE COMMISSION: Opinion on the Act on the Constitutional Tribunal. 15 October 2016.

[118] VENICE COMMISSION. Opinion on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organization of Ordinary Courts. 9 December 2017.

[119] EUROPEAN COMMISSION. *REASONED PROPOSAL IN ACCORDANCE WITH ARTICLE 7(1) OF THE TREATY ON EUROPEAN UNION REGARDING THE RULE OF LAW IN POLAND 2017/0360 (NLE).* 20 December 2017.

[120] EUROPEAN PARLIAMENT. *European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland* (2018/2541(RSP)).

As of today, the proceeding pursuant to Art. 7 TEU has not reached a desired objective as Poland has still not remedied the situation. However, the voting in the Council on the suspension of rights of Poland has not been laid out so far. It is expected that Hungary, which is facing similar or even more serious criticism by the Commission, would use its veto right against this vote. On top of that, sanctions are principally regarded as a political threat to the stability of the Union.[121] Therefore, the Commission tends to use infringement proceedings before the Court of Justice of the EU under Article 258 TFEU instead. The infringement procedure will be discussed in Chapter 4.

In conclusion, as the case study of Poland shows, the proceeding by the European Commission may be evaluated by finding out the low effectiveness of the mechanism under Art. 7 TEU and Rule of Law Framework. Commission's tools were applied in Poland's case with low effect as the pre-stage of the process pursuant to Art. 7 TEU. Triggering Art. 7(1) TEU did not prevent Poland from adopting law Moreover, the entrance of far-right party into the Austrian government in 2000 raised some concerns as well. s breaching the rule of law. In the case of Poland, Art. 7. (2 – 3) has not been triggered, as a strict requirement of unanimity of all Member States to vote in favour of the sanction could be easily blocked by Hungary. This kind of coalition of countries sharing facing criticism from the EU institutions makes efficient protection of the rule of law by the Art. 7 TFEU is questionable.

[121] COLI M. *Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool?* 2018.

4 The infringement procedure under Art. 258 TFEU

The infringement procedure is besides individual actions before national courts an instrument to enforce obligations under EU law. As already demonstrated, the rule of law shall be deemed as a core value under Article 2 TEU which each Member State must follow. In other words, compliance with the rule of law can be seen as one of many obligations and a breach of which can be enforced through infringement procedure. Although the infringement procedure is designed to enforce any obligation arising from EU law, typically the failure to conduct a transposition of a directive or an adoption of a law conflicting with EU law, the protection of the rule of law is one of the important functions of proceedings before the Court of Justice. In fact, the infringement action under Article 258 TFEU is the only institutionalized mechanism that provides practical legal support for many sectors of EU law. The Commission, exercising its role as the guardian of the Treaties, is typically the initiator of the infringement procedure. Actions can only be admissible if national law is contrary to EU law or if there is an administrative practice in a Member State that persistently infringes EU law.

Admittedly, the primary law does not explicitly link infringement proceedings to the securing of the rule of law, but practice demonstrates the importance of the judicial route to enforce the rule of law. The chapter will thus briefly discuss the general approach to the mechanism of the infringement procedure as a judicial instrument of the European procedural law, as well as the infringement procedure concerning the rule of law. After a legal analysis, the case law of the Court of Justice on the violation of the rule of law by Poland will be analysed, focusing on the case of judicial reform in Poland.

4.1 The Article 258 TFEU

The Article 258 TFEU has not been changed dramatically over Treaty revisions and the procedure may therefore be considered an established remedy in EU law. The aim of the infringement procedure is to ensure that Member States comply with their obligations under EU law. The article is not a punitive action and aims to a finding by the Court of Justice as to whether an obligation has or has not been breached. Eventually, a sanction is permissible if the Court of Justice finds an infringement only at the following stage under Art. 260 (1)

TFEU. Furthermore, the interpretative function should be underlined as the judgment is binding, and the Court of Justice thus interprets the obligations under EU law.[122]

The wording of the article in two paragraphs is rather short and vague. The paragraph 1 states:

> *"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations."*

This is followed by the second paragraph:

> *"If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."*[123]

As is clear from the wording of the provision, the procedure can be divided into two main phases: (i) the pre-judicial phase (administrative phase) and (ii) the judicial phase, since Article 258(1) TFEU requires the delivery of a "reasoned opinion" before an action can be brought before the Court of Justice. In the event that the Member State concerned fails to remedy the defective status in response to the reasoned opinion, the Commission is entitled to initiate the judicial phase. The pre-judicial phase, which is formalised under the provision in question, can be further distinguished from the 'pre-infringement', i.e. the Commission's investigation before Article 258 TFEU is invoked.

With regard to the brevity of the primary law text, the need to specify the process has arisen. In addition to the gradual refinement of the procedural rules by the case-law of the Court of Justice, the Commission created a consular mechanism between the Commission and the Member States, called the "EU Pilot," following a call by the European Parliament. The information obtained can serve as a basis for a decision to initiate proceedings or to refrain from the intention to initiate proceedings. The Member State is queried through a central contact point via an online database, with a deadline for comments (usually 10 weeks).

To better illustrate the proceeding, this sub-chapter will follow a stage-by-stage interpretation. Thus, the infringement procedure can be best seen as a serie of phases that comprise:

- informal letter
- letter of formal notice (formal letter) and observation by Member State
- reasoned opinion

[122] CHALMERS. European Union Law, Cambridge University Press. 2019. p. 325
[123] Art. 258 TFEU

- period to comply and submit observations
- referral to the Court of Justice
- judgement by the Court of Justice[124]

There are two ways in which the Commission may become aware of a breach of a Member State's obligation, either through its own investigations or through a complaint by a third party, typically an individual from the Member State concerned. The Commission informs the Member State concerned of its suspicion of an infringement. The Member State then has the opportunity to respond to the letter and, where appropriate, provide evidence that no infringement has occurred. Often, the ground for initiation is the failure to notify the transposition of a directive. Most proceedings are successfully concluded at the informal letter stage.

The issuing of the letter of formal notice is a key stage for any court proceedings. In case of no resolution at the informal stage, the Commission is obliged to inform the Member State concerned by a letter of formal notice, giving the Member State the opportunity to respond by submitting observations. The role of "formal letter" may be described as a framing of the dispute; meaning that an action going beyond the Commission's complaints set out in the letter of formal notice shall not be accepted for the judicial phase. The Court of Justice has ruled[125] that the Letter must contain legal complaints and anything the Commission fails to mention will be found inadmissible. However, the Commission may subsequently provide new evidence to support its claim, not altering the subject-matter of the dispute.[126] The letter of formal notice initiates the pre-litigation phase under Article 258(1) TFEU.

After the Member State sends the Commission the observations based on the "formal letter", either an agreement can be reached between the Member State and the Commission, or the Commission shall be entitled to issue a reasoned opinion under Art. 258 (1) TFEU. In terms of the scope of the reasoned opinion, the Commission is rather limited by the way the scope has been defined by the letter of formal notice. In any event, the subject-matter cannot be modified. The reasoned opinion shall be a coherent and detailed statement of reasons which lead the Commission to the complaint. The reasoned opinion must be supported by legal and factual arguments, take account of any resolution already taken by the Member State, and lastly, contain a period with the deadline for the Member State to comply.[127]

[124] CHALMERS. European Union Law, Cambridge University Press. 2019., p. 332
[125] C-211/81, Commission v Italy and C-371/04, Commission v Italy
[126] CHALMERS. European Union Law, Cambridge University Press. 2019. p.335
[127] *Ibid*., p. 336

Once the reasoned opinion has been issued, the period of time set by the Commission in the reasoned opinion begins to run. The Member State must be guaranteed sufficient time to react to the opinion and to take the desired steps. The Court of Justice ruled that the time set by the Commission should reflect the urgency of the infringement in question.[128] During the time limit, an exchange of letters may take place between the Member State and the Commission over the recommendations proposed by the Commission. During the period, the Member State may comply with the obligation to avoid triggering the judicial phase. Only after the expiry of the time limit and in the event of non-compliance may the Commission bring an action, and the extent of the action will be bound by the reasoned opinion.[129]

By bringing an action before the Court of Justice, the pre-litigation phase ends and the dispute moves to the judicial phase under Article 258 (2) TFEU. Once the case has been brought before the Court of Justice, the compliance by the Member State after the deadline does not prevent the Court of Justice from ruling that the Member State has acted illegally. However, the proceedings are governed by the dispositional principle and the Commission may therefore withdraw the action.[130]

The litigation phase has the usual characteristics of a court proceeding. The proceedings are governed by the principles of due process, in particular legitimate expectations, the rights of the defence, equality of arms, adversarial proceedings, and confidentiality. Importantly, the principle of imputability shall apply, in other words, only actions or omissions of a public authority may be imputed to a Member State. [131] First, the Court of Justice examines the admissibility of the action and the procedural requirements. The action must be based on the pleas in law raised by the Commission against the Member State in its reasoned opinion; the subject-matter of the proceedings must also be extended as it was defined in the formal letter. However, the Commission is entitled to narrow the subject-matter when bringing an action. Second, the action must fulfill the requirements of clarity and intelligibility otherwise the Court of Justice will find it inadmissible. Third, in the context of the merits, the Court of Justice examines whether the Commission has sustained the burden of proof and whether the alleged infringement of obligations under EU law has been sufficiently demonstrated.[132]

[128] C-293/85, Commission v Belgium
[129] CRAIG, Paul, DE BÚRCA, Gráinne. EU law: Text, cases and materials, 2020, p. 418.
[130] C-446/01, Commission v Spain
[131] TOMÁŠEK M. a kolektiv. Právo Evropské unie. 3. aktualizované vydání, p. 423-424.
[132] CRAIG P. and DE BÚRCA, G.. EU law: Text, cases and materials, 2020 p. 415-420.

The outcome of the proceedings is either a dismissal of the action or a conviction. In the event of a dismissal or a partial dismissal, the Court of Justice concludes that the Member State has not been proven to have breached any obligation. The judgment of conviction constitutes a simple declaration by the Court of Justice that an infringement has been committed. Even if the Court of Justice finds a contradictory national rule to be in breach of EU law, it has no power to annul or amend it. Nor does the sanction-imposed form part of the proceedings under Article 258(2) TFEU.

Sanctions procedure under Article 260 TFEU can be considered as a further stage of the proceedings. The Commission is empowered to take the non-compliant Member State back to Court of Justice, bound by the complaints contained in the original formal letter. A distinction can be made between sanction proceedings for non-notification of transposition of a directive and other breaches of EU law, such as breaches of the rule of law. The process is similar to infringement procedure, meaning that it may be divided into a pre-judicial stage and a judicial stage. Unlike Article 258 TFEU, the Commission does not issue a reasoned opinion. Ergo, the subject of the procedure is not whether an infringement has occurred (it has already been decided), but whether and how much the Member State will be fined. Given the typical length of judicial proceedings, the sanction procedure under Article 260 TFEU following Article 258 TFEU is very limited in its efficiency.[133] Article 260 (3) TFEU distinguishes between two types of sanctions: the lump sum and the penalty payment. First, the lump sum is a payment of a specified amount representing a penalty for an earlier breach of an obligation. The second type of penalty is based on the incentive principle, as the fine is applied every day from which the Member State did non-comply, calculated according to a daily rate. Thus, the earlier the Member State complies with the obligation, the less it pays in total. In imposing the fine, the Court of Justice is partly bound by the Commission's action. The fine may not exceed the Commission’s sum, but the Court of Justice may impose a lower fine. The Court of Justice has also ruled that both types of sanctions could be imposed at the same time.[134] The determination of the amount of the fine is subject to several criteria such as the economic level of the Member State, the votes in the Council, or the importance of the obligation infringed.[135] [136]

[133] CHALMERS. European Union Law, Cambridge University Press. 2019, p. 337

[134] Case C-64/88, Commission v French Republic

[135] EUROPEAN COMMISSION. Communication - Application of Article 228 of the EC Treaty. SEC/2005/1658

[136] *See Appendix 9.*

In addition to the Commission under Article 258 TFEU, similar proceedings can also be initiated by a Member State against another Member State which infringes obligations under EU law under Article 259 TFEU. Therefore, we may speak of two subjects with the right to initiate: The Commission under Art. 258 TFEU and a Member State under 259 TFEU. The proceedings initiated by a Member State may represent a similar legal instrument for rule of law protection, however, such proceedings are rare and only a few cases were brought before the Court of Justice during the history of the EU (European Communities). Unlike the Member State, an individual does not have the right to bring an action, however, the Commission's annual reports cite the individual's complaints as a significant source of findings of infringement. It must be stated that there is no legal entitlement to initiate proceedings if a complaint is lodged with the Commission.[137]

4.2 Commission v. Poland

As described above, constitutional changes violating the rule of law in Poland began after the 2015 general elections. The European Commission has acted immediately in response to the events in Poland. The selected legal instrument was the "*Rule of Law Framework*" and subsequently Commission's Opinions[138] in accordance with the Rule of Law procedure under Art. 7 (1) TEU. Article 7 (1) TEU was triggered in July 2017, upon which a Recommendation was adopted by the Council.[139] Poland's reluctance to follow recommendations led to considerations on how to proceed. The blocking coalition of Hungary and Poland in the Council effectively made it difficult to successfully use the procedure under paragraph 2, while at the same time the instrument appeared politically sensitive. In order to ensure respect for the rule of law in Poland, the Commission decided to use the infringement procedure.[140]

The infringement procedure was used to enforce a specific obligation under EU law against Poland. The first pre-judicial proceeding was initiated on 2nd July 2018. The Commission initiated a various infringement procedures regarding the rule of law against Poland. The following subsection shall summarize the content of the proceedings before the Court of Justice between Poland and the Commission in the following cases (i) the independence of the

[137] CRAIG P. and DE BÚRCA, G.. EU law: Text, cases and materials, 2020, p. 429.
[138] EUROPEAN COMMISSION. Press Release: *Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers.* 2016; and EUROPEAN COMMISSION. Press Release: Commission issues recommendation to Poland. 27 July 2016
[139] EUROPEAN COMMISSION. Press Release. European Commission acts to preserve the rule of law in Poland. 26 July 2017
[140] EUROPEAN COMMISSION. Press Release. Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal. 22 December 2017.

Supreme Court and the conditions of retirement and extension of the mandate of the judges of the Supreme Court of Poland, C-619/18[141]; (ii) the independence of the general courts and the conditions of retirement of general court judges, C-192/18[142]; (iii) the disciplinary procedure of the judges of the Supreme Court and the general courts and the requirements imposed on the persons of judges, C-791/19.[143]

First, Poland has been alleged by the Commission of failing to comply with the obligation to ensure equal pay under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 and of failing to comply with the obligation to ensure effective judicial protection under the second paragraph of Article 19(1) TEU and Article 47 of the Charter. By its first complaint, the Commission disputes the adoption of the amendment creating a different regime for men and women regarding the retirement age for judges and public prosecutors.[144] During the proceedings before the Court of Justice, the provisions relating to the age limit have been modified. The second complaint alleges infringement of the right to effective judicial protection. Poland adopted an amendment to the Law on the ordinary courts, which empowered the National Council of the Judiciary to decide on the extension of a judge's term of office beyond the age of 65, the criteria based on which the term might be extended were modified too. The formal letter that launched the pre-judicial phase of the infringement procedure was sent on 28 July 2017. Poland responded by denying the allegations in a letter dated 31 August 2017. A reasoned opinion was issued on 12 September 2017. The Commission continued to insist on its allegations that the provisions of the Polish law infringe obligations under EU law. Poland did not take any measures to comply with EU law during the one-month period set and again denied the allegations by letter on 12 November 2017. The judicial phase of the infringement proceedings was initiated by filing of the application on 15 March 2018.[145]

In the present case, Poland argued in particular that the organisation of the national judicial system is an exclusive competence of the Member State, in which the EU is not entitled to interfere.[146]

[141] C-619/18, Commission v Poland.
[142] C-192/18, Commission v Poland.
[143] C-791/19, Commission v Poland.
[144] According to the new law woman shall retire upon reaching 60 years, while men reaching 65 years of age.
[145] paras 31-33 and 41-43, C-192/18, Commission v Poland.
[146] paras 25-26, Ibid

On 5 November 2019, the Court of Justice ruled in favour of the action, declaring that Poland had failed to comply with its obligation to ensure equal treatment for men and women in employment, as well as its obligation to ensure effective judicial protection. Primary, the Court emphasised that Article 19 TEU expresses the value of the rule of law as confirmed in Article 2 TEU. National courts and the Court of Justice are charged with ensuring the application of Union law in all Member States. The principle of effective legal protection of individual rights is one of the fundamental principles of EU law, which derives from the constitutional traditions of the EU Member States. The Court of Justice also recalled the principles of the independent exercise of judicial powers, protection from external pressures, and impartiality. In response to Poland's arguments, the Court of Justice held that, although the organisation of the judiciary is a competence of the Member States, in exercising that competence they must be guided by the obligations arising from EU law. The Court found the combination of the reduction of the retirement age for women to 60 and for men to 65 and the discretionary powers given to the Minister of Justice to be contrary to the principles of judicial removability.[147] In the matter of setting a different retirement age, the Court of Justice found the new Polish regulation to be discriminatory. It also rejected Poland's argument that the earlier retirement for women was to compensate for previous disadvantages in professional life.[148]

Second, the Commission put forward another action concerning two complaints alleging breach of the obligation under the provision of subparagraph of Art. 19 (1) TEU: "*to ensure effective legal protection in the fields covered by Union law;"* and the obligation to ensure the right to an effective remedy under Art. 47 of the Charter. Similarly to the previous procedure, the first complaint alleged that the New Law on Supreme Court adopted in Poland breached the principle of judicial independence and the principle of the irremovability of judges. Poland amended the law by lowering the retirement age which applied to judges appointed before the law came into force. The second complaint alleged a breach of the principle of judicial independence by creating a discretionary power for the President to extend the term of office of a Supreme Court judge beyond the newly established retirement age. The Commission launched the pre-judicial phase of the infringement procedure by sending a formal letter on 2 July 2018. In its reply dated 2 August 2018, Poland contested all the allegations. The Commission issued a reasoned opinion on 14 August 2018 and Poland was invited to remedy the situation within one month of receiving it. In its reply on 14 September

[147] paras 98-100, 102 and 130-131, C-192/18, Commission v Poland.
[148] paras 80-82, Ibid

2018, Poland rejected the alleged infringement. By an action brought on 2 October 2018, the Commission initiated the judicial phase.[149]

Following Commission's application, the Court of Justice adopted an interim measure ordering Poland to suspend the implementation of the provisions in question, to allow judges whose functions have been terminated by the lowering of the retirement age to continue to exercise their mandate and to refrain from taking any steps towards the appointment of Supreme Court judges. [150] On 24 June 2019, the Court of Justice issued a decision in which it determined that Poland had failed to fulfill its obligations under the second subparagraph of Art. 19(1) TEU. The Court of Justice recalled that the requirements of an independent judiciary include the freedom of judges concerning any external interference or pressure and the possibility to hold office until the mandatory retirement age. According to the Court of Justice, the real objective of the judicial reform raises doubts, as the lowering of the retirement age has led to the replacement of almost a third of the judges. The early termination of judges' functions due to the lowering of the retirement age was found to be contrary to the legitimate expectation of judges to exercise their mandate. Poland's attempt to standardize the retirement age by terminating judges' functions was declared disproportionate. The discretionary power of the President to extend the term of office was then found by the Court of Justice to be inconsistent with the requirement of non-interference with judicial power.[151]

Third, the Commission's action in response to the establishment of a disciplinary proceeding for judges is (like the previous applications) based on the Member State's obligation to ensure effective judicial protection under Article 19(1) TEU, and the Commission argues that the CJEU has jurisdiction under Article 267 TFEU. The action is structured in five pleas in law, of which the first four relate to Article 19(1) TEU. The Commission's first four claims allege a failure to comply with the obligation to ensure effective judicial protection: (a) the disciplinary liability of the Polish courts may be invoked by the political power in violation of the principle of the independence of the judiciary for the content of judicial decisions, (b) the Disciplinary Chamber does not meet the requirements of impartiality and independence, (c) the discretionary power of the president of the Disciplinary Chamber to determine the court having jurisdiction conflicts with the requirement that disciplinary proceedings must be heard by a court established by law, (d) the right to a trial within a reasonable time and the right to a

[149] paras 15-16 and 25-26, C-192/18, Commission v Poland.
[150] Case C-619/18 R (interim measure), Commission v Poland.
[151] paras 75-77, 84-87 and 116-118, C-192/18, Commission v Poland.

defence are not guaranteed. In respect of Art. 267 TFEU, the Commission then refers to the fact that a judge may be subject to disciplinary proceedings if he or she decides to refer a preliminary ruling proceedings to the Court of Justice. The pre-judicial phase of the infringement procedure was opened on 3 April 2019. The Commission sent a formal letter due to the allegation that the new rules of the disciplinary regime are in breach of EU law. Poland denied the infringement of EU law in its reply on 1 June 2019. The Commission issued a reasoned opinion on 17 July 2019, in which it invited Poland to take the necessary measures within two months. In response, Poland deemed the Commission's criticisms unfounded. The case was referred to the Court on 25 October 2019.[152]

The judgment was delivered on 15 July 2021. The Court of Justice upheld the Commission's application and declared that Poland had violated Art. 19(1) TEU by failing to ensure the independence and impartiality of the Disciplinary Chamber, by allowing disciplinary proceedings to be initiated on the basis of the content of the decision issued by courts, by granting the President of the Disciplinary Chamber the power to decide on the jurisdiction of specific courts for disciplinary proceedings and by failing to guarantee the right of defence and to ensure that the proceedings were decided within a reasonable time. Furthermore, the Court of Justice declared a breach of the obligation under the second and third paragraphs of Art. 267 TFEU by limiting the right of the ordinary courts to refer questions to the CJEU for a preliminary ruling. The Court of Justice emphasised, inter alia, that Member States had freely and voluntarily subscribed to the common values set out in Art. 2 TEU.[153] The Court of Justice stated that Member States could not change their legislation in such a way as to reduce the level of protection of the value of the rule of law as expressed in Art. 19 TEU. Member States are therefore required to refrain from adopting rules which would compromise the independence of judges. The disciplinary regime for judges must respect the requirement of independence, as the risk of its misuse as an instrument of political control over the judiciary must be minimised. Thus, disciplinary proceedings must include a clearly defined participation of an independent body, including ensuring the right to a defence and the right to a timely review. Regarding the alleged infringement of Art. 267 TFEU, the Court of Justice stated that the preliminary ruling procedure was designed as a central point of the judicial system established by EU primary law to ensure a uniform interpretation of the EU law. The obligations imposed on a Member State under Art. 267 TFEU apply to all national authorities.

[152] paras 27-28 and 45-49., C-791/19, Commission v Poland.
[153] para 50, C-791/19, Commission v Poland

The Court of Justice ruled that the risk of pressures and disincentives towards judges has been proven, thereby undermining the independence of judges.[154]

In conclusion, infringement proceedings allow the Court of Justice to decide whether a Member State, in this case, Poland, has breached a specific obligation under EU law. In the event of a breach of the rule of law principle, the application must be based on an allegation of breach of a specific obligation with a relevant legal basis. The proceedings brought by the Commission against Poland show that the judicial route appears to be more effective compared to Article 7 TEU. The Commission's action forced Poland to amend certain provisions, and in the case of the proceedings C-204/21 (Disciplinary Chamber), a decision under Article 260 TFEU to impose a penalty payment was adopted by the CJEU. Often, the Court of Justice grounds its ruling on the principle of the rule of law as an irremovable constitutional minimum to which the Member States have voluntarily subscribed. As of today, there are still infringement procedures ongoing.[155]

[154] paras 51-60 and paras 228 – 233, Ibid.
[155] *See Appendix 8.*

5 Rule of Law Conditionality under Regulation 2020/2092

The most recent legislative step adopted towards the protection of the rule of law in the EU is the regulation adopted in December 2020 linking the EU budget spending to the adherence to the rule of law principle by the Member States. The Regulation 2020/2092[156], often referred to as "Conditionality Regulation," is going to be discussed in this chapter.

Reflecting the inability of the EU to enforce the rule of law in long-lasting disputes between the Commission and Poland, including the activation of Art. 7 TEU and a set of infringement proceeding cases before the Court of Justice, the debate over a new, more efficient tool began inside of the Union in 2018. Hence, the "*A new EU Framework to strengthen the Rule of Law"* as a soft law mechanism adopted in 2014 did not strengthen the efficient enforcement of the rule of law in the EU; the Commission presented in its press release "*A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020"*[157] in February 2018. The initiative was justified by the need to ensure the full potential of EU funds by compliance with the rule of law principles. The effective enforcement of the rule of law is considered vital for confidence in the EU spending in the Member States by EU citizens.[158] The legislation aimed to link any disbursement to a Member State from Multilateral Financial Framework (MFF) 2021 – 2027 to the rule of law enforcement in this Member State.

The proposal for the regulation was published in May 2018.[159] The Explanatory Memorandum acknowledged the strength of judicial systems in the Member States, stating that is "*in principle well designed to ensure the rule of law"*[160]. Nevertheless, "*recent events in some Member States*"[161] are brought to justify the Commission's legislative initiative. Although the

[156] The Regulation 2020/2092

[157] EUROPEAN COMMISSION. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020 The European Commission's contribution to the Informal Leaders' meeting on 23 February 2018. COM. (2018) 98 final

[158] *Ibid.*

[159] The Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. COM/2018/324 final.

[160] Explanatory Memorandum, p. 1, *Ibid.*

[161] Explanatory Memorandum, p. 2 The Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States. COM/2018/324 final

situation in Poland and Hungary has not been presented as the driver for the proposal, it is more than clear that, in reality, those countries shall be primarily addressed by the Conditionality Regulation. The proposal has been using a declaration by the European Parliament or findings by the Council of Europe to demonstrate the legitimacy of the initiative's objective.

European Parliament adopted its position on the proposal in April 2019, while the proposal has been generally regarded as the right step in the rule of law protection in the EU.[162] The Council, on the other hand, was struggling to adopt a position because of the strong disagreement between Poland and Hungary.[163] Although the Council might have adopted a general approach with a qualified majority[164], the issue became politically highly sensitive. The cooperation between Hungary and Poland over the rule of law conditionality threatened the adoption of the European Union budget that requires unanimity in the Council.[165] Regarding the Covid-19 global pandemic, the European Council agreed on huge public spending and joint borrowing for EU post-pandemic recovery. Thus, the Council decision on the EU Budget that defines the MFF 2021 – 2027 and the EU Next Gen recovery plan got highest political importance. German presidency in the Council finally found a ground for a compromise by adopting a declaration on implementation and interpretation of the Rule of Law Conditionality Regulation by the European Council decision in December 2020. Consequently, the Council adopted the regulation on 14 December 2020, followed by the European Parliament on 16 December 2020.[166] As a result, the regulation was adopted in accordance with the ordinary legislative procedure under Art. 322 (1) (a) TFEU.

The regulation consists of 10 articles and creates a power for the Commission to propose measures against a Member State that violates the principles of the rule of law based on the procedure defined in the regulation.

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[162] EUROPEAN PARLIAMENT. RESOLUTION. Protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States. 2018/0136(COD).

[163] *Referring to the Art. 16 TEU, the qualified majority for voting in the Council of the EU, regarding the EU budget, the reference in Art. 269 TFEU.*

[164] *Qualitied majority is reached when two conditions are met:*

- *55% of member states vote in favour - in practice this means 15 out of 27*
- *the proposal is supported by member states representing at least 65% of the total EU population.*

See. COUNCIL OF THE EU. Voting system – Qualified majority. [online] [cit. 05 March 2022].

[165] EURACTIV. Hungary and Poland veto stimulus against pandemic. 16 November 2020.

[166] EUROPEAN PARLIAMENT. PRESS RELEASE: Parliament approves the rule of law conditionality for access to EU funds. 12 December 2020.

Importantly, the regulation brought a definition of "the rule of law" in Art. 2 (a). Based on the values enshrined in Art. 2 TEU, the definition in the Art. 2 (a) is designed by references to key legal principles:

> *"The Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU."*[167]

Using the concept of key principles widely accepted among legal doctrine, lawmakers tried to tackle the key issues that the EU was facing with regard to the rule of law enforcement. The ongoing conflict between Poland and the Commission showed that the enforcement without a clear definition has low efficiency. Bearing in mind that Poland constantly argued that the rule of law is followed by the Polish government, but the understanding of the rule of law by Poland and the Commission is different; the Commission aiming to avoid dispute on this, created a legal definition. Though far from perfect, the definition states key components that make the interpretation easier. On the other hand, there is still a lot of room for interpretation given to the Court of Justice. Interestingly, the regulation makes it clear that those principles related to the rule of law shall be shared among the EU Member States.[168]

Furthermore, the regulation contains references to values defined in the Charter, the Art. 2, and the other references existing in EU law such as the Rule of Law Mechanism and EU Justice Scoreboard.[169] In order to identify breaches of the rule of law and practices in the Member States that may affect the EU funds, the proposal aims to use relevant findings by other EU institutions, such as the Court of Justice, Court of Auditors, European Public Prosecutor Office, European Anti-Fraud Office (OLAF) and also non-EU authorities, such as Venice Commission and Council of Europe Group fo State against Corruption (GRECO). The Commission shall consult the European Union Agency for Fundamental Rights (FRA).[170]

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[167] Art. 2 (a), Regulation 2020/2092

[168] In line with the case-law of the Court of Justice of the EU.

[169] See recitals 3, 12, 14, Regulation 2020/2092

[170] See recital 16, *Ibid.*

Breaches of the principle of the rule of law that may justify the adoption of a measure against a Member State are listed in the Art. 3:

"(a) endangering the independence of the judiciary;

(b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities…

(c) limiting the availability and effectiveness of legal remedies…."[171]

The procedure is laid down in Art. 6. The Commission may launch the procedure in the case of the fulfilment of conditions under Art. 4. The provision in Art. 4 (2) provides the list of events that may be qualified as a breach of the principle of the rule of law (litera (a) – (h)). If a Member State violates rule of law values that will have a direct negative impact on the EU budget, the Commission may issue a proposal. In case the Commission finds that there is a reasonable ground for consideration that one or more conditions for a breach under Art. 4 were fulfilled, a written notification shall be sent to a Member State concerned. The notification should include specific grounds for Commission findings. The European Parliament and the Council shall be informed.[172] Based on the information received from the Commission, the Parliament may invite the Commission to a structured dialogue on its findings.[173] Finally, it should be stated that Regulation 2020/2092 is explicitly defined as an *ultima ratio* instrument used only if other instruments fail.

After the Member State concerned is notified, it could be requested to provide more information by the Commission or may itself propose the adoption of remedial measures to address the Commission's findings.[174] Before any adoption, the Commission is obliged to assess the proportionality of envisaged measures.[175] If remedial measures proposed by the Member States are not sufficient, the Commission shall submit the proposal for an implementing decision to the Council.[176] The Council may amend and adopt an implementing decision by a qualified majority.[177] This decision shall be adopted within one month after receiving the Commission's proposal.[178]

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[171] Art. 3, *Ibid.*
[172] Art. 6 (1), *Ibid.*
[173] Art. 6 (2), *Ibid.*
[174] Art. 6 (5), Regulation 2020/2092
[175] Art. 6 (7), *Ibid.*
[176] Art. 6 (9), *Ibid.*
[177] Art. 6 (11), *Ibid.*
[178] Art. 6 (10) *Ibid.*

Regarding the measures, the Regulation differs in Art. 6 between situations of direct and indirect financial regulation under Art. 62 (1) (a) and Art. 62 (1) (c) of the Financial Regulation and shared management with the Member States under Art. 62 (1) (b) of the Financial Regulation.[179] Measures for the protection of the Union budget represent a suspension of payments, disbursement or commitments, reduction of commitments, pre-financing, prohibition on entering into new legal commitments, new agreements, or an interruption of payment deadlines.[180] Any measures adopted in accordance with the procedure must be proportionate[181] and should not, unless the decision provides otherwise, affect the obligation of governments in the Member States towards final recipients and beneficiaries.[182] The Commission is obliged to publish information and guidance for final recipients of beneficiaries that may be affected on websites.[183] Adopted measures may be lifted based on a request by a Member State concerned and Commission's reassessment.[184]

The regulation became applicable on 1 January 2021; Poland and Hungary jointly criticized the adoption, arguing that it was designed as a political tool without a legal basis in Treaties. In March 2021, both Member States brought an action separately for the annulment of Regulation 2020/2092 before the Court of Justice. Poland and Hungary[185] submitted two separate actions. However, the argumentation is similar. Moreover, both countries supported each other in proceeding before the Court of Justice. Respecting the focus of the thesis, only the case Poland v. Parliament and Council C-157/21 will be analysed.[186] In both proceedings Poland and Hungary supported each other before the Court of Justice.

5.1 Poland v. Parliament and Council

The action for annulment was built upon seven main arguments, and Poland put forward 11 pleas in law in total. First, Poland claimed that the European Union lacked the competence to adopt the contested regulation. Poland was arguing that the EU unlawfully extended competencies conferred upon the Union by the Treaties. The new mechanism under Regulation 2020/2092 does not fall within the competencies under Art. 322 (1) (a) TEU. By

[179] EUROPEAN COMMISSION. Directorate-General for Budget, Financial regulation applicable to the general budget of the Union : July 2018, Publications Office, 2019.
[180] Art. 5 (1), Regulation 2020/2092
[181] Art. 5 (3), *Ibid.*
[182] Art. 5 (2), *Ibid.*
[183] Art. 5 (4), *ibid.*
[184] Art. 7, *Ibid.*
[185] C-156/21, Hungary v Parliament and Council
[186] C-157/21, Poland v. Parliament and Council

defining the concept of the rule of law in Art. 2 (a) of the Conditionality Regulation, the EU broadened the scope of values contained in Art. 2 TEU.[187] Poland claimed the contested regulation has aimed to circumvent Art. 7 TEU. Second, the principle of subsidiarity should not have been followed when the contested regulation was adopted. In the areas where the Union does not have exclusive competence, the EU may intervene only if, and so far as, the objectives may not be achieved by the Member States. Protocol 2[188] ensures that national parliaments are consulted, while Poland pointed out that only the initial draft was sent to national legislators, while the proposal was altered and redrafted significantly. By doing so, the Union should have breached the principle of subsidiarity.[189] Third, the legal act did not clearly state whether being adopted pursuant to the exclusive competence of the EU or a competence shared with the Member States.[190] Fourth, conferred competence principle was alleged as no competence in Treaties can be found to adopt contested regulation. Thus, Poland claimed the infringement of the principle of conferred powers laid down in Art. 4 (1) and Art. 5 (2) TEU. Further, Poland highlighted the "spillover effect". The legitimate objective to protect the Union budget, and the financial interests of the EU were used to create a Union's competence to conduct an investigation. However, there is no legal basis in Treaties, and investigation and public prosecution represent essential functions of a sovereign state.[191] Fifth, the principle of equality of Member States under Art. 4 (2) TEU was said to be alleged by the adoption of the contested regulation. Poland argued that using recommendations by Venice Commission that historically distinguished between "older and new democracies" creates room for a different treatment with the Member States. The qualified majority required for an adoption of a measure under the conferred regulation favors large Member States over small and medium-size Member States. Such disposition when adoption of a normative act is not in accordance with Art. 4 (2) TEU.[192] Sixth, the infringement of the principle of legal certainty was brought by Poland. It was argued that the regulation did not meet the requirements of clarity as rules were not defined clearly. The definition of the rule of law principle in Art. 2 (a) cannot be accepted in the view of Poland, as the rule of law contains a non-exhaustive number of principles. Moreover, Poland claimed that the definition extended the scope of the

[187] paras 64 – 69, *Ibid.*
[188] Treaty on the Functioning of the European Union - Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
[189] paras 231 – 233, Poland v. Parliament and Council
[190] paras 238 – 240, *Ibid.*
[191] para 243, para 245, *Ibid.*
[192] paras 254 – 255, C-157/21 *Ibid.*

rule of law as the value of the EU defined in Art. 2 TEU.[193] Seventh, the regulation alleged the infringement of the principle of proportionality. In the argumentation by Poland, EU lawmakers did not explain why the existing mechanism for the rule of law protection was not sufficient and failed to demonstrate the added value of the mechanism established by the contested regulation.[194]

The Court of Justice dismissed the action on 16 February 2022 by not accepting the argumentation of Poland. On the same day, the Court of Justice dismissed the action brought by Hungary. The Court of Justice's ruling confirmed the legality of the Regulation. As a result, the Commission was called for immediate action by the EP.[195]

First, the Court of justice ruled that the objective of the contested regulation was to protect the Union budget from adverse effects, which is consistent with the requirements of the principle of sound financial management.[196] Court of Justice emphasized values contained in Art. 2 TEU are shared among Member States and defined the identity of the European Union as a common legal order. Thus, the rule of law can constitute the financial rule to protect the Union budget.[197] The Court of Justice also reiterates that the situation of rule law in the Member States shall be assessed by the Commission only in so far as they are relevant to the Union budget.[198] The Court of Justice also ruled that the Conditionality mechanism did not circumvent Art. 7 TEU as they served different purposes.[199] Second, the Court of Justice rejected the argument of subsidiarity as conditions for the Union budget could not be adopted at the level of Member States.[200] Third, the Court found that the requirement on clear and unequivocal reasoning related to the proposal, not on the contested regulation. The plea was found irrelevant.[201] Fourth, the plea of the conferred competences were rejected as unfounded. The Court of Justice stated that by requiring compliance with obligations from the EU law, the Union did not claim to exercise such competencies itself nor arrogate them.[202] Fifth, the Court of Justice dismissed the plea of inequality of Member States highlighting that Poland could not bring the lack of precision in the criteria of the rule law as Poland was bound by

[193] para 274 and para 276, *Ibid.*
[194] paras 312 – 313, *Ibid*
[195] EUROPEAN PARLIAMENT. Press Release: Rule of Law Conditionality: MEPs call on the Commission to act immediately. 6 February 2022.
[196] para 138, C-157/21 Poland v. Parliament and Council
[197] para 146, *Ibid.*
[198] para 162, *Ibid.*
[199] para 211, *Ibid.*
[200] para 240, *Ibid*
[201] para 250, *Ibid*
[202] paras 270 – 272, *Ibid*

such criterion since its accession to the European Union. Further, the Court of Justice rejected the argument of a qualified majority because the voting rule is provided in the Treaties.[203] Sixth, breaching of legal certainty was not accepted by the Court. The Commission is responsible for the sources to use as the evidence and inputs of relevant information by EU institutions and respected international organizations.[204] Finally, the Court of Justice reminded that the Commission assessment is subject to EU judicial review.[205] Seventh, the Court of Justice ruled that proportionality was ensured by guarantees in the regulation, such as the requirement to assess the impact of the adopted measure and a clear requirement for any measure to be "proportionate."[206] Therefore, the Court of Justice dismissed the action.

Although the Court of Justice's ruling allowed the Commission to use the conditionality mechanism against Poland and Hungary, the invasion of Ukraine by Russia on 24 February 2022 may be seen as the game-changer in Commission's strategy against Poland. As of today, no steps have been made by the Commission. On the contrary, after the landslide election victory by Fidesz in Hungary, the Commission launched the Rule of Law Conditionality procedure in April 2022 but remained silent regarding the procedure against Poland. Moreover, no action against Poland is interpreted as a gesture acknowledging Poland's strong position in support of Ukraine.[207] Although the Commission is not willing to initiate proceedings, the situation may be frozen or unresolved for a period of time future proceedings with Poland cannot be ruled out.[208]

[203] paras 288 and 308, *Ibid*
[204] paras 342 – 343, *Ibid*
[205] *Member State may bring an action for annulement under Art. 263 TFEU.*
[206] paras 360 – 362, *Ibid*
[207] *On June 2022 European Commission endorsed Poland's recovery and resilience spending. This symbolic step may be a confirmation that the Commission does not intend to open proceedings as long as Poland is "good". On the other hand, the Commission has set the stage for a possible escalation of the situation, as a large amount of money will be at stake if the "Conditionality Regulation" is invoked*. See EUROPEAN COMMISSION. Press Release. NextGenerationEU: European Commission endorses Poland's €35.4 billion recovery and resilience plan. 1 June 2022.
[208] BÁRD, P. and KOCHENOV, D. V. War as a pretext to wave the rule of law goodbye? The case for an EU constitutional awakening. European Law Journal. 14 June 2022

6 Discussion

The concept of the rule of law and its position in EU law has been subjected to a discussion of the philosophic-legal perspective, the applicable law and the facts on the case of Poland. The focus of the thesis was on the EU law instruments for the protection of the rule of law and the thesis also followed the developments concerning the European Commission's disputes with Poland. In this chapter, the author intends to elaborate his reflections and opinions. It is appropriate to evaluate the anchoring of the concept of the rule of law in EU law, to reflect comprehensively on the procedure under Article 7 TEU, the infringement procedure and the procedure under the Conditionality Regulation and finally to reflect critically on recent decisions of the Court of Justice of the EU.

First, let's come back briefly to the theoretical background. Based on the analysis carried out in Chapter 1, the author believes that there is no doubt that the rule of law is a value shared among all EU Member States. Historical arguments, applicable EU law and national constitutional laws can be brought to support this statement. It seems to the author to be indisputable that the rule of law, at least in the context of legality, is a shared value of European democracies. A far more interesting question here is if any of Tamanaha's definitions that go beyond formal legality can be accepted. The shift towards a substantive definition and the strengthening of the position of an individual is largely due to the Court of Justice's extensive interpretation. However, the consolidated version of the Treaties also enumerates the rule of law along with the values of democracy and human rights. It can thus be concluded that we do not have a purely formal definition in the EU context. At the same time, a broader acceptance of the current concept of rechtsstaat within the EU can apparently be ruled out. The author considers that the German tradition goes the furthermost in defining the rule of law, but remains solitary within the EU. Interestingly, the French concept accepts a relatively higher degree of political power in, for instance, the administration of justice, which is the subject of the Commission's dispute in Poland, albeit within different parameters. Next strong argument on the EU side is the adoption of the Lisbon Treaty. Every Member State has accepted the current wording of the Treaties, which reflects the case law of the Court of Justice, so the argument that Member States "did not know what they were signing" can hardly be accepted. And even though individual constitutions vary in the degree to which they guarantee individual rights and understand the rule of law, if we understand the Union as a club whose members play by the rules they make, it is unacceptable to contradict those rules

after joining the club and accepting the rules. The author concludes, therefore, that the concept of the rule of law in EU law is probably understood by a (thin) substantive definition involving individual rights.

Second, the thesis analysed three major instruments of EU law for the protection of the rule of law, so it is appropriate at this stage to reflect on them. While the procedure under Article 7 TEU was created directly to protect EU values, including the rule of law in response to developments in Member States, the infringement procedure is a general instrument to ensure the uniform application of EU law. The Commission has also started to use it widely to protect sub-obligations linked to the rule of law. The Conditionality Regulation, on the other hand, is a piece of legislation whose primary purpose was declared to be the protection of the EU budget, with the possible sanction for a breach of the rule of law being a secondary effect. It is beyond dispute that the Commission was in fact responding to a long-standing problem with the enforcement of the rule of law, as the case of Poland demonstrates. Article 7 TEU has turned out to be too cumbersome, the infringement procedure too granular, and the Commission needed to strengthen its arsenal. Metaphorically speaking, by 2020 the Commission had a rule of law arsenal that included a nuclear bomb and a long-range homing missile. The author is of the opinion that the Commission has come to the conclusion that the use of Article 7 (2-3) TEU is too dangerous (analogy of the nuclear bomb) which, although it would have an effect, could harm the Union itself. The Commission has therefore decided to abandon its use, sticking only to paragraph 1, which can be analogised to the threat of a nuclear attack. Conditionality regulation has been intended to be a relatively simple instrument with greater effectiveness. It is cynical to say that money comes first, but it seems to be the case. But if we understand the battle for the rule of law as a fight against the politics of illiberal democracy or autocratic tendencies, then the question is whether funds are the right weapon. If the fight is for principles, money can go by the wayside. It is easy to imagine that the dispute between the Commission and a Member State could escalate to the point where the interruption of the flow of money from the Union budget is interpreted in the Member State as a further injustice done by Brussels. Despite of all those arguments, the author is of the opinion that, in terms of all three instruments, this particular regulation is still likely to be the most effective in terms of achieving the objective, particularly because of the relatively swift procedure and the lower quorum. At the end of the day, all three are political battles instruments since it is in practice the Commission that decides whether or not to take the first shot.

Third, the important stream of the thesis is the evolution of the dispute over changes in the Polish judiciary between the Commission and Poland. In view of the recent developments, the author would like to discuss the recent decisions of the Court of Justice. The order for daily penalty imposed on Poland can be considered as significant. This is a decision since the first infringement action. Although the sanction itself is severe, the author considers the ongoing review of the decision by the Constitutional Tribunal of Poland to be much more compelling. Although we do not yet know the outcome of the proceedings, the simple fact that the review is under way is unprecedented. The idea that a Member State could use its own judiciary to overturn an obligation to pay a fine for a breach of EU law decided by the CJEU is hardly acceptable. A possible ruling that the fine imposed on Poland is unconstitutional would further reinforce doubts about the independence of the Polish judiciary from the government. However, it seems that the Solange[209] doctrine, which allows a ruling on the unconstitutionality of a decision of an EU body in borderline cases, may become a powerful weapon for Member States against the European Commission. The most recent decision of the Court of Justice is the rejection of an action for annulment of Regulation 2020/2092. Although the author considers most of Poland's arguments unconvincing, some of its arguments, although rejected by the Court of Justice, reflect reality. For instance, the legal basis on which the Commission justified its adoption (Article 322 TFEU) is a norm aimed to specify financial standards, therefore it is questionable whether it can give rise to a control of the Union's values under Article 2 TEU. Although the Court of Justice upheld the legal basis, the author sees the Commission's practice of using technical norms to create new instruments as detrimental. Furthermore, the Polish argument should be partially accepted that primary law gives the exclusive power to find a breach of the rule of law to the European Council in Article 7(2) TEU, by adopting the Conditionality Regulation the Commission has de facto extended the powers of the Council, which can also rule on a breach of the rule of law under the Conditionality Regulation. It is a practice whereby, in the case of a dysfunctional instrument, a similar instrument is adopted in disguise, the use of which is more functional in view of the political reality. The Court of Justice correctly reasoned that Article 7 TEU is more general and does not target the budget, and thus it is acceptable to create a specific instrument to protect the budget. The author believes that this is a partial diminishing of significance of Art. 7 TEU. Indeed, the circumstances indicate that the Commission's proposal was a response to the need to find a new way to take action against these Member States.

[209] *See Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*

Neither the explanatory memorandum nor the recitals of the regulation explicitly mention the cases of Poland and Hungary, and the regulation applies to any Member State that would violate the rule of law. Therefore, it can be just stated that the adoption of the regulation nicely demonstrates that law is a means of politics. In general, it can be concluded that the Court of Justice's decision to uphold the Conditionality Regulation was highly predictable, given the Court of Justice's tendency to rule in favour of European integration. The new weapon in Commission's arsenal has been approved and it ready to be used.

The author's discussion concludes that the dispute over the rule of law within the EU is largely a political battle and the solution will have to be political too.

Conclusion

The European Union was created on the basis of economic and trade cooperation between European countries. The practicalities of integration have shown over time that purely economic rules without substantive values and principles can bring only limited benefits. At the end of the day, it is the trust between Member States that is essential to the original idea of a united Europe. It is a bit of an exaggeration to say that even a French vegetable seller needs to be sure that the courts will apply the law in the same way in other countries in order to sell his vegetables outside of France. The buzzword *'trust'* can be subsumed in law under the "*rule of law*". A centuries-tested concept that ensures equality, predictable rules, and respect for liberties. Therefore, the rule of law is undoubtedly essential to the European project, however, the question remains what exactly is behind the label "*rule of law."*

The rule of law as a legal-philosophical concept has a strong tradition in continental Europe. Rooted in Aristotle, it developed strongly in Europe thanks to philosophers of the 17th and 18th centuries. Current EU law thus builds on the doctrines of "*État de droit"* in France, "*rechtsstaat*" in Germany, and possibly the British interpretation of the rule of law. Although the original treaties establishing the European Communities omitted any mention of the rule of law, over time, European integration has clearly come into its own, both through the case law of the Court of Justice and through recasts to the Treaties. There is thus no doubt that the rule of law is the pillar on which the Union's legal order stands. However, the question remains as to the same interpretation of the concept that gives rise to the current disputes between the European Commission and the Member States. A glance at the Member States' constitutions shows that the idea that the law is above every citizen and that all citizens are equal before the law is shared across Europe; moreover, modern constitutions explicitly subscribe to the notion of the 'rule of law,' often without further definition. The theory offers different interpretations, from the purely formal to the substantive version, and thick and thin understandings. We may define a virtual range from purely formal rule-by-law to social welfare. The absence of a single definition naturally gives rise to the disputes of interpretation witnessed in the EU by Poland and Hungary in particular. Three research questions were set out in the introduction of the thesis. Using standard methods of legal research involving analysis of legal sources, legislation, case law, and academic articles, the author sought to find satisfactory answers to the set questions.

Can the rule of law principle be defined as the shared constitutional principle among all 27 EU Member States?

Before the legal status of the rule of law concept in EU law can be analysed, it is necessary to take a step back and ask whether the rule of law is indeed a value with a constitutional character shared among all Member States. First, the constitutional strength of the rule of law can be historically inferred. A look at the development of legal doctrine in Europe leads to the conclusion that the rule of law appears in various forms in European legal theories. Second, a definition is required. If a single publicly accepted definition cannot be provided, we may use defining features and characteristics from the EU legal order but also from legal doctrine in Europe and international institutions. The rule of law can be approached definitively by means of sub-features such as legal certainty, equality, non-discrimination, separation of powers, respect for human rights, judicial protection, etc. It must be noted that this is undoubtedly an open-ended list, which weakens the argumentative force of such a "definition." Third, the argumentation can be based on integration within the EU and the steps taken by EU institutions. In particular, the case-law of the Court of Justice clearly tends to understand the rule of law as a value on which the Union is founded. Alternatively, if we consider the primary law in light of the conception of EU law being norms sui generis, as norms with constitutional force, however never explicitly granted, the provisions relating to the rule of law serve as the evidence for the constitutional relevance of the principle for the whole Union. Fourth, it is possible to use the individual constitutions of the Member States and ask whether they constitutionally subscribe to the rule of law. It must be stated that modern constitutions do so explicitly, while other older constitutional sources usually make individual references to fundamental defining features of the rule of law, such as equality before the law, the right to a fair trial, or the separation of powers. In conclusion, the question of whether the rule of law can be understood as a constitutional principle on which the Union is founded and which is common to the Member States must therefore be answered affirmatively.

What are the legal instruments to protect the rule of law in the EU?

EU law has several means of protecting the rule of law. Legal instruments differ in their legal basis, binding force, and means. Three levels can be distinguished which EU law allows being used to protect the rule of law in the Member States: political, judicial, and budgetary. We can also find soft law tools.

Article 7 TEU can be considered the purely political instrument, which is also the most powerful means of protecting the rule of law. It can be also regarded as a constitutional instrument. The first stage under Article 7 (1) TEU entitles the Commission, a third of the Member States or the European Parliament, to decide on a proposal that a "*clear risk of a serious breach"* occurred. The European Parliament and the Council must agree to the decision by a two-thirds majority in the Parliament and four-fifths majority in the Council. Although this is a strong political gesture, it results in a declaration that a threat to the rule of law has occurred in a Member State and a recommendation(s) is/are addressed to this Member State. Article 7 (2) TEU then represents a strong weapon where a procedure initiated by the Commission or a third of the Member States may lead to a decision to suspend a Member State's exercise of a right, such as voting rights. The sanction may be adopted because of the determination of the *"existence of a serious and persistent breach."* Following the declaration, a sanction can be adopted under Art. 7 (3) TEU. This is the strongest instrument and, in terms of impact, the greatest interference with the rights of a Member State in protecting the rule of law that EU law allows. The European Parliament and the European Council must agree to the decision, while the European Council must decide unanimously. The unanimity requirement makes the procedure under paragraph 2 and 3 politically difficult to apply, as all EU heads of state must vote, except for the president or the prime minister from the Member State against which the procedure is being conducted.

Judicial protection of the rule of law is represented by the infringement procedure. Under this standard instrument, the European Commission or a Member State[210] is entitled to bring an action against a Member State that breaches a specific obligation under EU law. Such an obligation may also represent a breach of specific requirements arising from the rule of law. The legal basis for the review of compliance with the rule of law by the Court of Justice is Article 258 TFEU. Infringement procedure can lead to a lump sum or penalty payment sanction under Art. 260 TFEU if the defective situation is not remedied by the Member State.

The third means of protecting the rule of law is the EU budget. Based on Regulation 2020/2092, i.e., secondary law, effective from January 2021, EU budget payments are linked to compliance with the rule of law in the Member State. In the event of a reasonable suspicion that a Member State is not respecting the rule of law, the Commission is entitled to initiate a procedure at the end of which a binding decision may be taken to suspend payments or

[210] European Commission is entitled to initiate the procedure under Art. 258 TFEU, a Member State is entitled under Art. 259 TFEU.

prevent the Member State from entering into new commitments. The decision is subject to a qualified majority Council decision. The decision is also subject to the Court of Justice's review. In terms of impact, this may be a sensitive instrument, but has not yet been used.

A set of non-binding rules and procedures developed by the European Commission, particularly the '*New Framework for the Protection of the Rule of Law'*, can be considered a separate means for rule of law protection. The Commission's Communication is a non-binding legal document. The limited legal force thus also defines the possible remedies, which are limited to recommendations by the Commission to the Member State. Soft law mechanisms should therefore be considered rather complementary, in particular to Article 7 TEU.

Which legal instrument in the EU law seems to be the most efficient for the rule of law protection based on the case of Poland?

The thesis follows and describes the development of the situation of the rule of law in Poland in order to discuss the efficiency of various legal instruments. In the case of Poland, we can see the use of various instruments to protect the rule of law. The problems with Poland's approach to the rule of law began in the second half of 2015. The European Commission, as guardian of the Treaties, was obliged to protect the rule of law as a value on which the Union was built. The first instrument the Commission decided to use to address the deteriorating rule of law was the *New Framework*. Following a structured dialogue between the European Commission and the Polish government through an exchange of written letters in 2015, no action was taken by Poland. The European Commission decided to proceed with the use of Article 7 TEU and initiated proceedings under paragraph 1. With the consent of the Parliament and the Council, the Commission issued several declarations and recommendations toward Poland in 2016 and 2017. The recommendations included steps to be taken by the Polish government, particularly in the area of judicial reform, to remove doubts about respect for the rule of law. Given Poland's reluctance to comply with the recommendations and with Hungary's support, the Commission did not achieve the desired objective through Article 7 TEU. Activating paragraph 2 was not a politically realistic solution in view of the unanimity requirement and the so-called "Poland-Hungary coalition."

The stalled situation and further actions by the Polish government undermining the rule of law led the European Commission to bring the case before the Court of Justice. In the proceedings

before the Court of Justice, the European Commission, based on the principle of loyal cooperation and arguing the rule of law as a shared value among the Member States, demanded the Court of Justice to have ruled that Poland's adoption of judicial reform violated EU law. The first action was filed in 2018 on the independence of judges. In 2019, the Commission filed another separate action on the retirement age of Supreme Court judges and later another action on the independence and impartiality of the Disciplinary Chamber. The Court of Justice successively found a violation by Poland, and in the case of the independence and impartiality of the Disciplinary Chamber, in view of the Polish Government's disregard of the judgment, the Court of Justice decided to impose a pecuniary penalty. The judicial route appears to be a means that, at the cost of a time-consuming procedure, leads to a real sanction. Nevertheless, despite the fine, Poland has not taken steps to fully restore the judiciary system. As early as 2018, the Commission started preparing a budgetary instrument to link EU budget payments to the rule of law compliance. The regulation passed the judicial conformity test and opened new possibilities for the Commission to enforce the rule of law.

The cases of Poland can therefore be used to assess the effectiveness of each instrument. While the non-binding procedures created by the Commission can hardly be considered effective in forcing any Member State to take specific action against its will. Article 7 TEU, on the other hand, is a powerful instrument with regard to the severity of the sanction under paragraph 2. The political instrument, as Article 7 is called, is only effective in the case of one rebellious Member State. The requirement of unanimity in the European Council makes it difficult to be applied. Politically, it is a dispute of 26 Member States against one, we may speak of the political isolation of a Member State. In contrast, the judicial route through an infringement action is a tool to cut away from politics. Decisions taken by the Court of Justice are generally more respected than those of the Commission or other EU institutions. However, the proceedings target specific, individual breaches of obligations, not the deterioration of the rule of law in general. It can be considered more effective than the procedure under Article 7 TEU. Finally, the budgetary instrument through Regulation 2020/2092 can be a very efficient and quick instrument given the "mere" qualified majority in the Council. On the other hand, the Commission's own decision not to initiate the procedure with Poland yet, unlike Hungary, shows that it is a political instrument like Art. 7 TEU. Having less intensity, the procedure under Regulation 2020/2092 is a political instrument, which reduces its credibility in the Member States. It can thus be concluded that, in terms of effectiveness, the Conditionality Regulation may be the quickest way to "fine" a Member State that does not respect the rule of

law standards. On the other hand, the judicial route of infringement proceedings remains an instrument separate from politics and thus more objective.[211]

The thesis *entitled "The concept of the rule of law in the EU law"* deals in six chapters with the status of the rule of law as a legal principle in EU law, including recent developments in disputes between the European Commission and Poland. The first chapter discusses the rule of law as a theoretical concept in Europe from a historical perspective. The second chapter examines the rule of law in EU law, both primary and secondary. The third chapter analyses the procedure under Article 7 TEU to protect the rule of law, including the New Rule of Law Framework developed by the European Commission. The fourth chapter focuses on infringement procedure against a Member State as one of the means used to address breaches of the rule of law in Member States. The fifth chapter then introduces a new regulation linking the implementation of the EU budget to comply with the rule of law and the associated new procedure by which the implementation of the EU budget can be suspended. The author also presents his opinions in the discussion in chapter six.

In conclusion, the rule of law in EU law is undoubtedly a somewhat inexhaustible topic. It is worth nothing that the rule of law is defined by the United Nations as one of the sustainable goals. In the EU, the topic of strengthening the rule of law has been gaining importance in recent years, especially in the context of the deteriorating political and constitutional situation in Central and Eastern Europe. It appears that EU law is not sufficiently equipped to protect the rule of law. The protracted disputes with Poland demonstrate that an effective instrument to stop a Member State's departure from the values of the Union is absent in the legal order. Unfortunately, the European Commission's actions are moving the EU's perception of the rule of law closer to a political issue, not a legal one. The fact that the Commission traded the failure to non-initiation of proceedings under Conditionality Regulation for Poland's firm stance in assisting Ukraine during the Russian invasion undermines the nature of the rule of law, as the law should apply to everyone. Although developments around the rule of law are difficult to predict, it is indisputable that the European Union is seeking to strengthen the means to protect the rule of law.

Looking to the future, legal battles over the rule of law in the EU are certainly not over. Given that the rule of law can hardly be assumed to be defined in a unified way, disputes will be a political reality in the Union. Although Poland and Hungary are most often brought up, the problems in other Member States must also be acknowledged. It was the far-right government

[211] *See Appendix 10.*

in Austria that historically prompted the incorporation of Article 7 TEU into the Treaties. At present, disturbing trends can be observed in Romania. Tendencies against the rule of law have existed historically and can be expected in the future, so it is important to prepare EU law for it. The author sees potential future steps in two directions: de-politicisation and effective enforcement. The solution may be, for example, greater involvement of existing independent international organisations in the process of assessing compliance with the rule of law. The approach of the Venice Commission or the United Nations appears to be more technical and expertise-based than the Commission's approaches and may cool down the political heat. A much more objective approach towards Member States is also a necessary component. The Commission should have targeted not just some, but all Member States that show even minor deficiencies in the rule of law. The intention should be to demonstrate the importance of the rule of law. Secondly, effective enforcement, which has already been partly set up by the adoption of the Conditionality Regulation. Future developments will reveal how useful this means actually is. The more flexible activation and lower quorum already promise higher efficiency. While the primary recommendation is to de-politicise, it must be recognised that in disputes over the rule of law that go beyond a certain point, there is no option but to come to the negotiating table within the Union as 26 Member States and ask a Member State that is not complying with the rule of law whether it is still interested in membership in the Union.

List of abbreviations

art.	Article
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Commission	European Commission
Conditionality Regulation	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
Council	Council of the European Union
Court of Justice	Court of Justice of the European Union
DG	Directorate General
EC	European Commission
EEC	European Economic Community
EP	European Parliament
EU	European Union
GRECO	Group of State against Corruption, Council of Europe
MFF	Multilateral Financial Framework
MS	Member State
OECD	Organisation for Economic Cooperation and Development
para	paragraph
Parliament	European Parliament
PiS	Prawo i Sprawiedliwość
OLAF	European Anti-Fraud Office
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	Treaty of the European Union and Treaty on the Functioning of the European Union
UN	United Nations

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Appendix 1: Treaty on European Union – selected provisions

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

…

Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommen dations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Func tioning of the European Union.

…

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

…

Article 49

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Source: Treaty on European Union (Consolidated version 2016) – Official Journal of the European Union. C 202.

Appendix 2: Treaty on the functioning of the European Union – selected provisions

Article 258

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

…

Article 260

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

…

Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

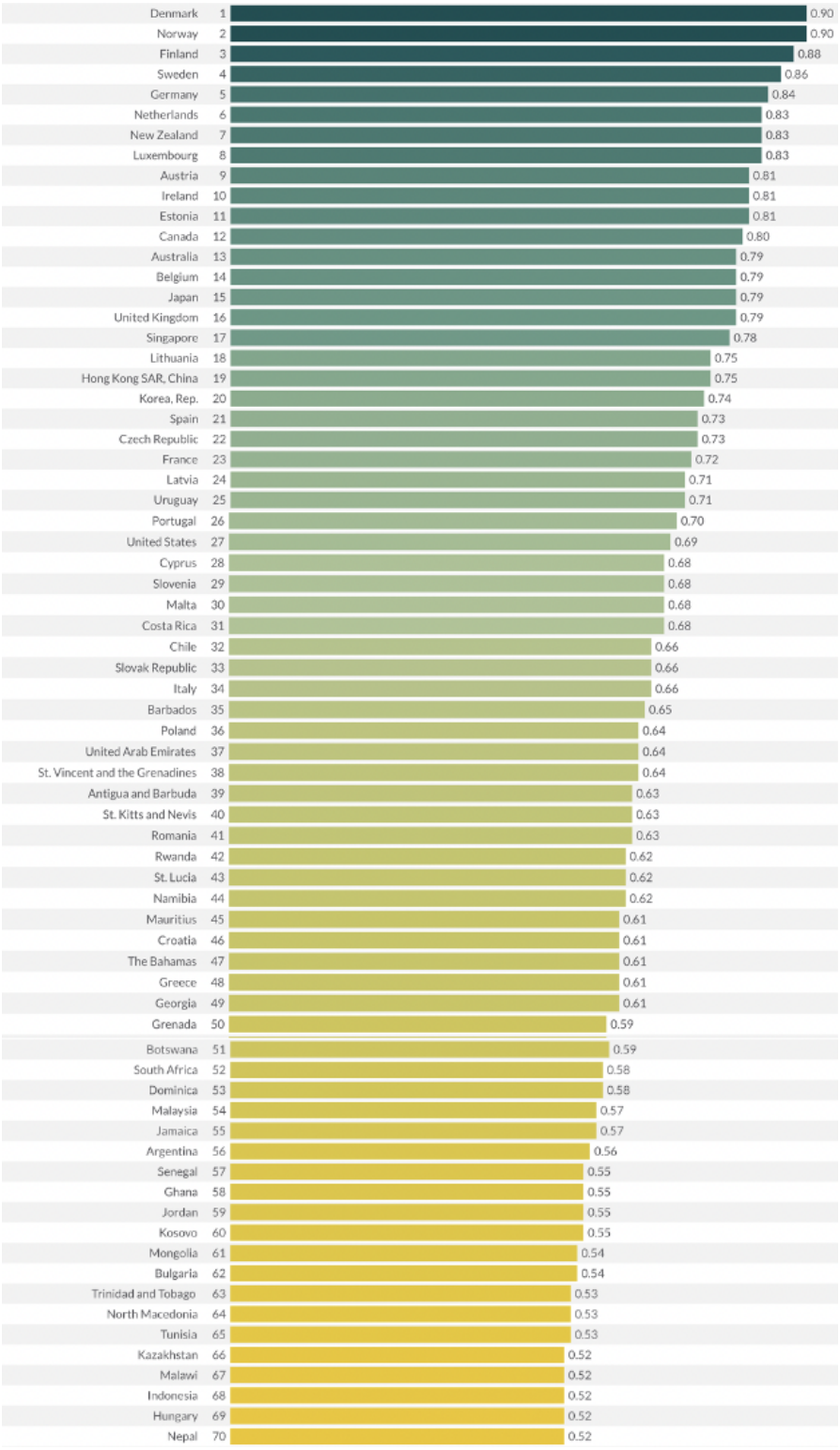
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Source: Treaty on the Functioning of the European Union (Consolidated version 2016) – Official Journal of the European Union, C 202

Appendix 3: UN Sustainable Development Goals

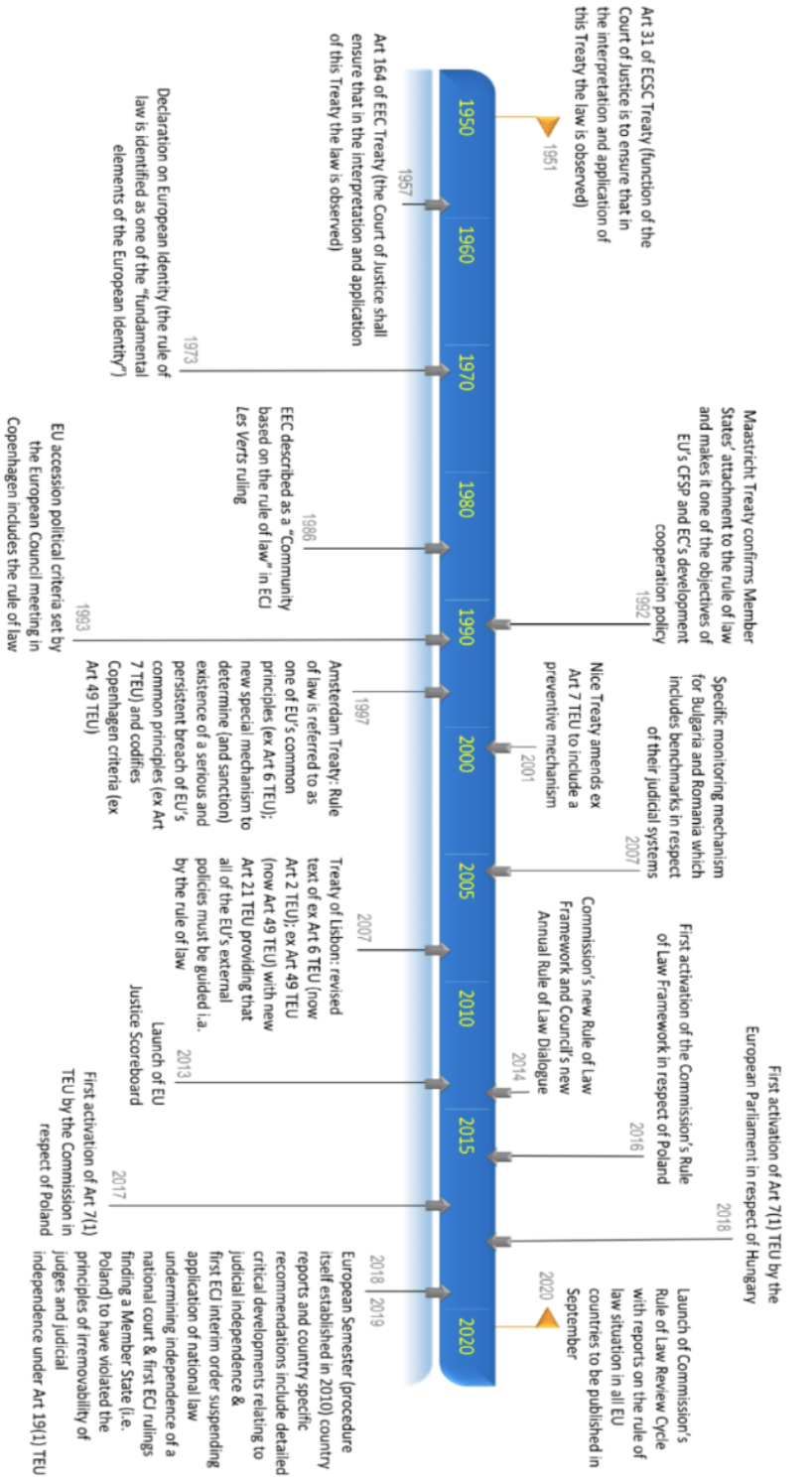
Source: UNITED NATION. Sustainable Development Goals. [online] Available at: https://sdgs.un.org/goals

Appendix 4: Rule of Law Index Scoreboard



Source: WORLD JUSTICE PROJECT. Rule of Law Scoreboard. 2021. Available at: https://worldjusticeproject.org/rule-of-law-index/global

Appendix 5: EU Rule of law Timeline



Source: PECH L. and GROGAN J. Meaning and Scope of the EU Rule of Law. RECONNECT. 2020, p. 9. Available: https://ec.europa.eu/research/participants/documents/downloadPublic?documentIds=080166e5d313601b&appId=PPGMS

Appendix 6: Comparative table of constitutional provisions

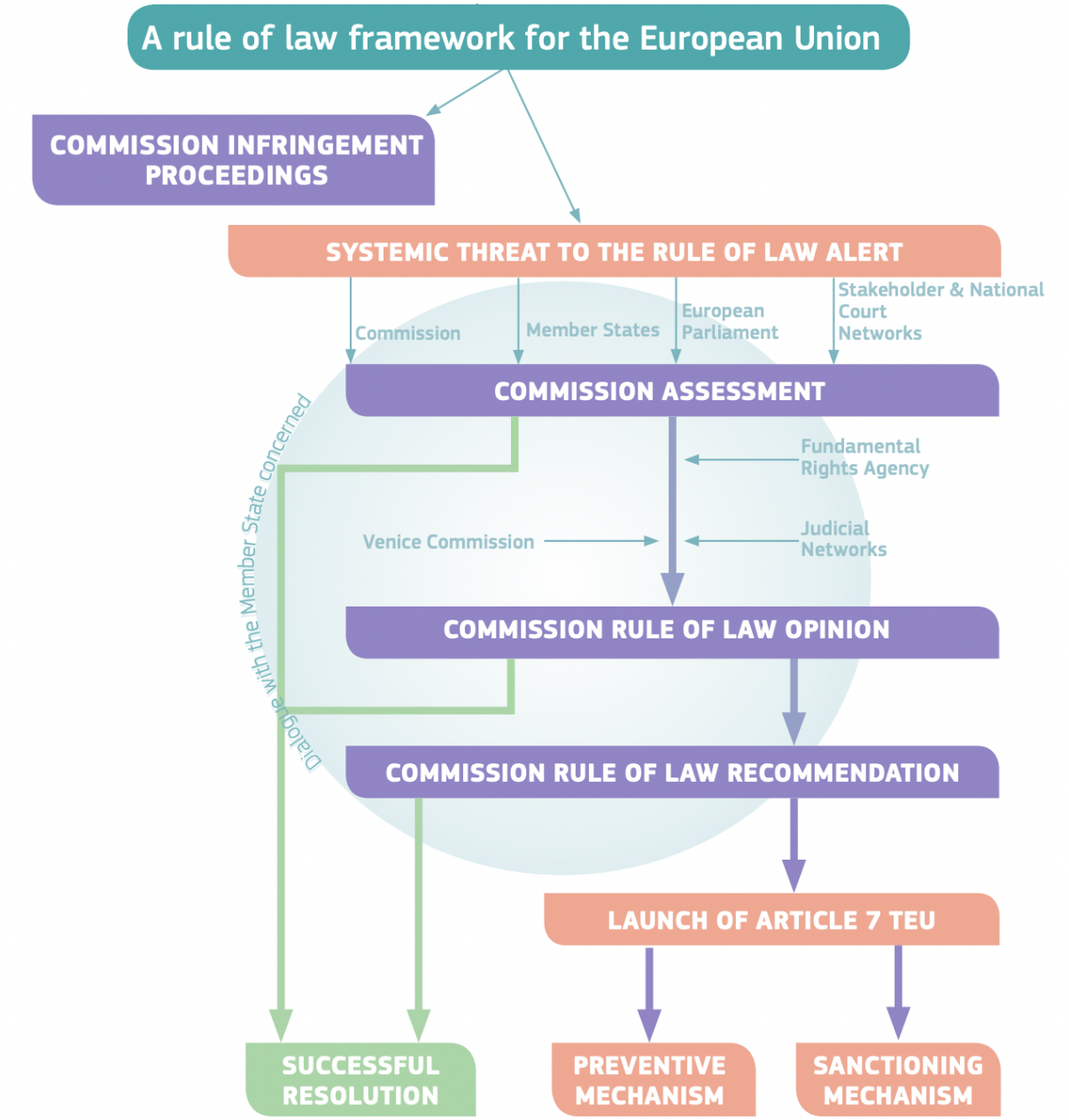
Member State	Constitutional provision
Austria	Art. 7(1)
	All nationals **are equal before the law**. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability…
Belgium	Art. 10
	No class distinctions exist in the State. Belgians are **equal before the law**…
Bulgaria	Art. 4(1)
	The Republic of Bulgaria shall be a State **governed by the rule of law**. It shall be governed by the Constitution and the laws of the country
Croatia	Art. 3
	Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, **the rule of law,** and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution.
Cyprus	Art. 23
	All persons **are equal before the law**, the administration and justice and are entitled to equal protection thereof and treatment thereby.
Czechia	Art. 1
	The Czech Republic is a sovereign, unitary, and democratic state **governed by the rule of law,** founded on respect for the rights and freedoms of man and of citizens
Denmark	Art. 70
	No person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty
Estonia	Art. 3
	The state authority shall be **exercised solely pursuant to the Constitution and laws** which are in conformity therewith. Generally recognized principles and rules of international law are an inseparable part of the Estonian legal system.
Finland	Section 2: Democracy and **rule of law**
	The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.
France	Art. 1
	France shall be an indivisible, secular, democratic and social Republic. It shall ensure the **equality of all citizens before the law**, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.
Germany	Art. 3
	All persons shall **be equal before the law**.
Greece	Art. 4

	All Greeks **are equal before the law.**
Hungary	Art. B
	Hungary shall be an independent, **democratic rule-of-law State**.
Ireland	Art. 40
	All citizens shall, as human persons, be held **equal before the law**.
Italy	Art. 3
	All citizens have equal social dignity and are **equal before the law**, without distinction of sex, race, language, religion, political opinion, personal and social conditions.
Latvia	Art. 91
	All human beings in Latvia shall **be equal before the law** and the courts.
Lithuania	Art. 29
	All persons shall **be equal before the law**, the court, and other State institutions and officials.
Luxembourg	Art. 10bis
	Luxembourgers are **equal before the law**.
Malta	Art. 32
	Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, opinions, colour, creed, sex, sexual orientation or gender identity but subject to that is to say, the right, whatever his race, place of origin, political respect for the rights and freedoms of others and for the public interest
Netherlands	Art. 1
	All persons in the Netherlands shall be t**reated equally in equal circumstances.**
Poland	Art. 2
	The Republic of Poland shall be a democratic state **ruled by law** and implementing the principles of social justice.
Portugal	Art. 2 Democratic state based on **the rule of law**
	The Portuguese Republic shall be a democratic state **based on the rule of law,** the sovereignty of the people, plural democratic expression and organisation, respect for and the guarantee of the effective implementation of fundamental rights and freedoms, and the separation and interdependence of powers, all with a view to achieving economic, social and cultural democracy and deepening participatory democracy
Romania	Art. 1 (2) Romanian State
	Romania is a democratic and social state, **governed by the rule of law,** in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed
Slovakia	Art. 1(1)
	The Slovak Republic is a sovereign, democratic state **governed by the rule of law**. It is not linked to any ideology, nor religion.
Slovenia	Art. 2
	Slovenia is a state **governed by the rule of law** and a social state.
Spain	Art. 1(1)

	Spain is hereby established as a social and democratic State, **subject to the rule of law,** which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism
Sweden	Art. 2
	The public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded.
	Part 3: **Rule of law**, Art. 9
	If a public authority other than a court of law has deprived an individual of his or her liberty on liberty examined before a court of law without undue delay. committed such an act, the individual shall be entitled to have the deprivation of account of a criminal act or because he or she is suspected of having

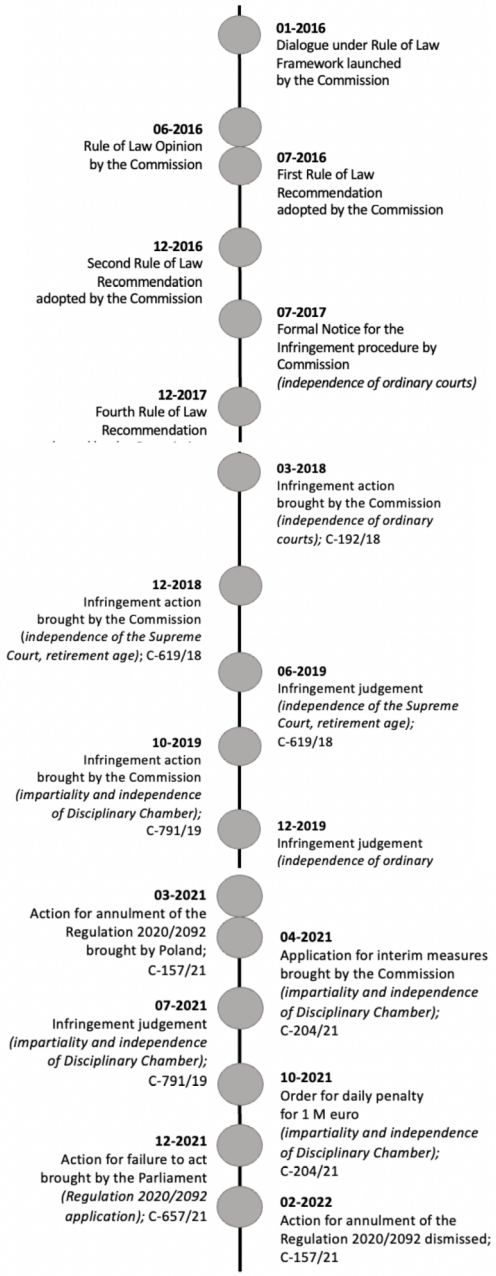
Own elaboration based on Constitutions of EU Member States. Constitutional laws listed in List of Sources.

Appendix 7: The Rule of Law Framework developed by EC



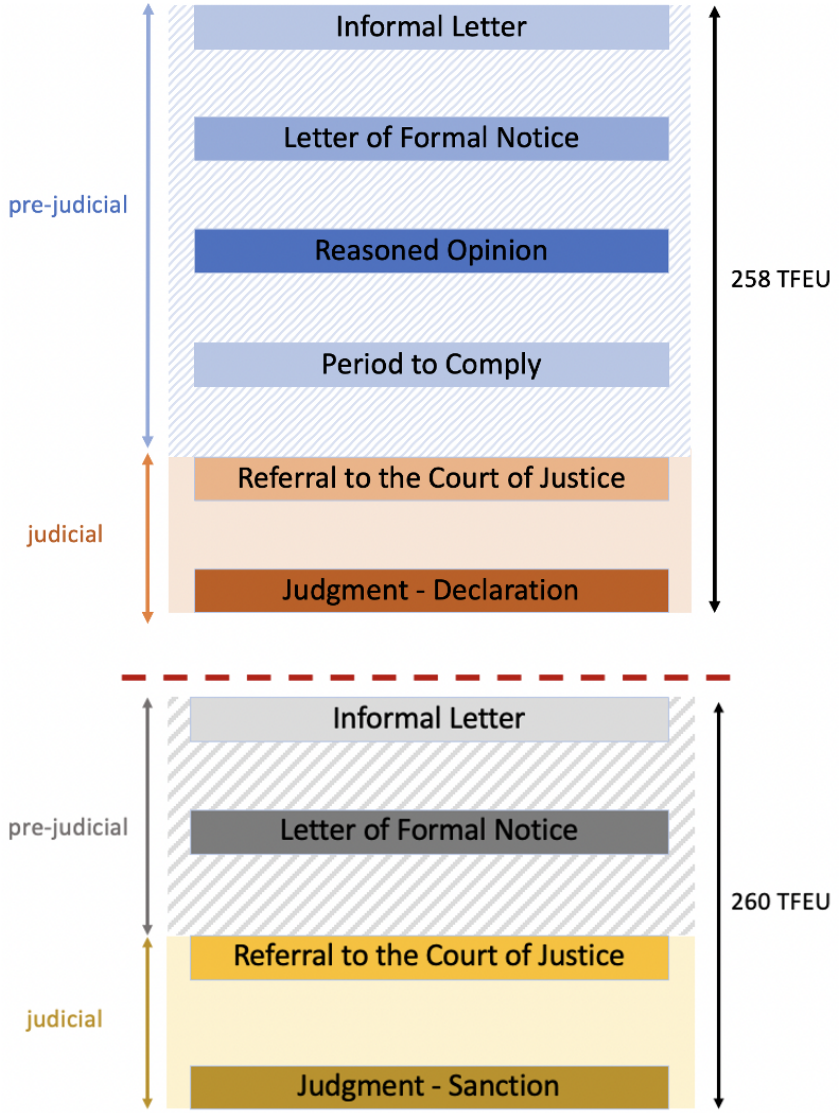
EUROPEAN COMMISSION. PRESS RELEASE. European Commission acts to preserve the rule of law in Poland. 26 July 2017.
Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2161

Appendix 8 Poland v Commission disputes development timeline



Own elaboration.

Appendix 9: Infringement Procedure graphics



Own elaboration.

Appendix 10: Comparative graphics of rule of law enforcement tools

Enforcement Tool	Legal Basis	Right to Initiate	Procedure, Decision	Consequence
SOFT LAW TOOL	*Rule of Law Framework*	European Commission	Dialogue with Member State	Non-binding Recommendations
POLITICAL TOOL	art. 7 (1) TEU	European Commission 1/3 of Member States European Parliament (2/3)	European Parliament (2/3) + Council (4/5)	Declaration of the risk, Recommendations
	art. 7 (2-3) TEU	European Commission 1/3 of Member States	European Parliament (2/3) + European Council (*unanimity*)	Declaration of the existence Member State's right suspension
JUDICIAR TOOL	art. 258 TFEU art. 259 TFEU	European Commission Member State (1)	(i) Non-judicial phase – European Commission	Declaratory judgment
	art. 260 TFEU	European Commission	(ii) Judicial phase – Court of Justice of the EU	Financial sanction
BUDGETARY TOOL	Regulation 2020/2092	European Commission	Council (qualified majority)	EU funds inflow suspension

Own elaboration.

Pojetí právního státu v právu EU

Abstrakt

Právní stát je právně-filosofický koncept definující vztah člověka státu. Různé právní doktríny jej pojímají odlišně, v posledních dekádách otázka právního státu v Evropské Unii nabývá na důležitosti. Autor diskutuje nejprve právně-teoretická východiska právního státu v Evropě, následně rozebírá platné právo EU se zaměřením na prostředky k ochraně. Primární právo pracuje s pojmem právní stát již v čl. 2 SEU coby jednou z hodnot, na níž je Unie založena. Rovněž je právní stát podmínkou kandidátské země pro vstup do EU.

Stěžejní část práce diskutuje prostředky ochrany právního státu v právu EU. V první řade jde o čl. 7 SEU. Tzv. mechanismus čl. 7 představuje prostředek, na základě kterého lze přijmout deklaraci, že existuje riziko, že členský stát poruší unijní hodnoty, včetně právního státu, nebo dokonce rozhodnout, že k závažnému porušení hodnot došlo a přijmout sankci.

Častějším prostředkem k ochraně právního je v praxi řízení pro nesplnění povinnosti podle čl. 258 SFEU. Komise může zahájit řízení proti členskému státu, který neplní povinnosti vyplývající z práva EU. V případě Polska vedla Komise několik řízení pro konkrétní porušení na základě přijetí polského zákona odporujícího pravidlům EU

Již delší dobu lze navíc pozorovat snahy Komise zavádět postupy pro ochranu právního státu, jako je např. *Nový postup EU pro posílení právního státu*. Coby prostředek soft law je založen na dialogu s členským státem a nezávazných doporučeních. Za nový prostředek lze považovat Nařízení 2020/2092, coby sekundární pramen práva EU, které zavádí postup pro pozastavení příjmů z rozpočtu EU států, které porušují principy právního státu.

Klíčová slova:

Právní stát, Čl. 7 SEU, řízení o nesplnění povinnosti, podmíněnost právního státu

The concept of the rule of law in EU law

Abstract

The rule of law is a philosophical concept in law defining the relationship between a man and the government. Different legal doctrines approach it in different ways, but in principle the

issue of the rule of law in the European Union has become increasingly important in recent decades. The author discusses jurisprudential and theoretical foundations of the rule of law in Europe, then analyses the applicable EU law with a focus on the legal instruments for protection. Primary law refers to the concept of the rule of law already in Article 2 TEU as one of the values on which the Union is founded. Also, the rule of law is a condition for a candidate country to join the EU.

The core part of the thesis addresses the instruments for the protection of the rule of law in EU law. First, Article 7 TEU, so-called 'rule of law procedure' is a mechanism by which a declaration that a Member State is at risk of violating EU values, including the rule of law, or perhaps a decision that a serious breach of values has occurred and a sanction can be adopted.

The infringement procedure under Article 258 TFEU is often used to the rule of law protection. The Commission can initiate a procedure against a Member State that fails to comply with its obligations under EU law. In case of Poland, the Commission has initiated several proceedings for specific infringements based on the adoption of a Polish law being in conflict with EU rules.

Finally, the Commission's efforts to introduce new approaches to rule of law protection, such as the *Rule of Law framework,* can be observed for some time. As soft law, it is based on dialogue with the Member State and non-binding recommendations. Conditionality Regulation, as a secondary source of EU law, which introduces a procedure for the suspension of EU budget funds to the states that violate the rule of law, can be considered as a new tool in EU law.

Keywords:

rule of law, Art. 7 TEU, infringement procedure, Rule of Law Conditionality