The Supranational Interpretation of the Rule of Law

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The Supranational Interpretation of the Rule of Law

Edited by

János Bóka

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Contents

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The Authors contributed to the following Chapters to this Volume:

János Bóka and Enikő Krajnyák:
Introduction to the Supranational Interpretation of the Notion of the Rule of Law,
Introduction to the Interpretation of the Rule of Law in the European Union,
Introduction to the Control Mechanisms related to the Rule of Law,
Introduction to the Related Control Mechanisms of the European Union,
Introduction to the Sanctions related to Control Mechanisms,
Introduction to the Related Sanctions of the European Union,
Chapters I.5.4, II.5.4, III.5.4,
Part IV

Vanja-Ivan Savić: Chapters I.1.1, II.1.1, III.1.1

Marta Dragičević Prtenjača: Chapters I.1.2, II.1.2, III.1.2

Vladan Petrov: Chapters I.1.3, II.1.3, III.1.3

Maja Lukić Radović: Chapters I.2, II.2, III.2

Katarína Šmigová: Chapters I.3, II.3, III.3

Benjamin Flander: Chapters I.4, II.4, III.4

David Sehnalek: Chapters I.5.1, II.5.1, III.5.1

Bartosz Majchrzak: Chapters I.5.2, II.5.2, III.5.2

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Foreword

The supranationalisation of the concept of the rule of law is embedded in the process of creating constitutional federalism in Europe with the instruments of soft and hard law. The current – institutional and normative – framework of the European Union (EU) enables the pursuit of the accelerating constitutional federation of the EU. This process necessarily entails certain limitations to national sovereignty, and its continuation could reasonably be expected in the future, as the interpretation of the rule of law is increasingly being transferred to the supranational level. Parallel to this process, the question of how such an interpretation could be enforced and sanctioned in different Member States is being raised, with special regard to those where the interpretation and practice of the rule of law do not correspond with the supranational understanding.

The present book addresses the challenges of the process of the supranationalisation of the rule of law in different supranational institutions from the perspective of selected Central European countries. Thus, the book presents and analyses the experiences and approaches of Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia in relation to the different processes within supranational institutions. Given the Central European perspective on the supranationalisation of the rule of law, the research examines supranational institutions that are particularly relevant to them on two levels: the universal and the European levels. The examined supranational institutions include the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN), the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe, and the European Union. The developments within the Council of Europe are separately addressed in the context of the European Court of Human Rights (ECtHR) and the Venice Commission (VC), given their outstanding role in the interpretation of the rule of law through the evolving case law in the case of the Court, and the development of standards by the Venice Commission. Particular attention is dedicated to the EU and the issues of EU competencies in the context of national sovereignty and the hierarchy of the institutions controlling the rule of law. Therefore, the supranationalisation of the rule of law is examined individually in different procedures and mechanisms, such as the rule of law review cycle, the EU justice scoreboard, the Article 7 procedure, the European Semester, the Conditionality Regulation, and the Cooperation and Verification Mechanism.

The book also aims to contribute to the scientific discussions on the supranationalisation of the rule of law from a Central European point of view by offering a

unique approach to such processes in various supranational entities by Authors from the region. In addition to the critical analysis of the process of supranationalisation, the volume also attempts to give a comparative perspective on the development of the interpretation, enforcement, and sanctioning regime of the supranationalising concept of the rule of law by highlighting recent trends and development directions of such processes in the region.

Budapest, June 2024

János Bóka

Part I

THE SUPRANATIONAL INTERPRETATION OF THE NOTION OF THE RULE OF LAW

Introduction to the Supranational Interpretation of the Notion of the Rule of Law

This section examines the development of the interpretation and legal basis for the interpretation of the rule of law in the selected supranational entities, outlining the historical development of these institutions and the processes through which they have embraced the rule of law. The Authors contrast the supranational interpretation of the rule of law with the different Central European national concepts developed in the context of domestic laws.

The rule of law has been a core value of the Council of Europe since its establishment in 1949. Notably, the Authors point out that the rule of law does not have a precise definition in the normative framework of the Council of Europe. Therefore, the role of the ECtHR is outstanding in the development of the interpretation of the concept, which shows the intrinsic interrelation of the rule of law with human rights issues. In its judgments, the Court may explicitly or implicitly rely on the standards developed by the Venice Commission, which elaborated on the benchmarks of the rule of law in its Checklist; which include legality, legal certainty, prevention of abuse or misuse of powers, equality before the law and non-discrimination, and access to justice. The standards developed by the Venice Commission are also relevant for the OECD. Although the organisation is primarily dedicated to economic co-operation and development, some of its initiatives address the role of the rule of law within the governance of the policy cycle, for which the OECD builds on the Venice Commission's assessment to compare the political and institutional frameworks of the governments of OECD countries, and in the fight against corruption worldwide. Given the organisation's standard-setting role in the field of good governance and anti-corruption, the principal legal instruments enshrining such standards are soft law documents.

The soft law nature of the standards of the rule of law is also tangible within the UN. Considering that the UN is a global-level organisation, it could be concluded that the uniform application of the rule of law is challenging, particularly in the absence of any explicit norm on the rule of law as a general principle of international law. Nonetheless, the rule of law plays a significant role in the work of Charter-based bodies and human rights monitoring bodies. While the definition of the rule of law embraced by the UN builds on the standard elements, such as legality, legal certainty, avoidance of arbitrariness, and procedural and legal transparency, it

is not codified in any binding UN instrument but could rather be summarised on the basis of soft law documents and the work of treaty bodies and special rapporteurs. Furthermore, the human rights aspect of the rule of law is embraced by the OSCE. Within this organisation, decision-making is fundamentally a political endeavour; accordingly, it produces politically binding documents rather than legally binding norms or principles. Within the OSCE, the ODIHR plays a major role in promoting the rule of law, democracy, human rights, non-discrimination, and tolerance. The essential elements of the OSCE's understanding of the rule of law are elaborated in various legally non-binding documents, primarily declarations.

The supranationalisation of the rule of law could be observed in the examined organisations at various levels. First, it is remarkable that the definition of the rule of law is not explicitly provided in legally binding documents. Instead, the sources are rather of a politically binding nature or of a soft law nature and serve the purpose of standard-setting. Furthermore, one can observe growing attention to the rule of law in the examined organisations even where the promotion of the rule of law was not on the initial agenda at the time of the establishment of the organisation. In the absence of a clear definition embraced by binding documents of the examined supranational institutions, cross-references to the standards developed by other institutions are frequent, particularly in the European context. The following subchapters are dedicated to outlining the development of the interpretation of the rule of law within the context of the examined supranational entities, with a particular emphasis on the actual content of the rule of law and the nature of the legal sources contributing to the evolving interpretation thereof.

I.1 The Interpretation of the Rule of Law in the Council of Europe

I.1.1 General Overview of the Interpretation of the Rule of Law in the Council of Europe

A. General Overview of the Council of Europe

The Council of Europe (CoE) is the oldest European association in the world, dating back to 1949. Founded just after World War II, it today boasts 46 Member States, but this was not always the case; its foundation was accomplished by only a few countries, namely Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. After three months of its foundation, two other states joined, which were Turkey and Greece. The legal foundation of the CoE took place in the Treaty of London, signed on 5 May 1949, which also enacted the Statute of the Council of Europe[1] based on the following grounds: pursuit of peace based upon justice and international cooperation; devotion to the spiritual and moral values that are the common heritage of the European peoples; individual freedom; political liberty; the rule of law; the economic and social progress interests of European states; the desire to bring European states into a closer association. It is important to hold these preliminary definitions in mind as the text goes on and the analyses of each contemporary concept relevant for the CoE, including the rule of law, unfold. Indeed, each concept should be observed together with the other aims of the Statute, and thus not be interpreted in isolation. The rule of law concept must also be considered along with all other proclamations in the Preamble of the Statute of the Council of Europe, as not doing so would render the interpretation *contra legem*.[2]

1 Statute of the Council of Europe, 1949.

2 '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 and the rule of law, principles which form the basis of all genuine democracy'. The Preamble of the Statute of the Council of Europe.

In this chapter, I will explain the concepts of the common heritage, individual freedom, political liberty, and rule of law in Europe, as these are key concepts at the foundation of the CoE and all related law. Their importance is so clear that it is not possible to consider any law in the CoE, nor any subsequent judgement derived from that law, which does not follow those important principles.

The concept of the common heritage of humankind was developed in the field of international law, although its history is not without controversies; there are major reasons for it not to be applicable in reality, and its use tends to be of a theoretical or conceptual nature related with 'good wishes'.[3] Regardless, in international law, this concept is often used in environment-related contexts oriented towards the care for natural resources, which are to be used by generations to come.[4] From a contemporary perspective, when we discuss problems that pertain to our common heritage, some of the greatest concerns that emerge relate to the use of nuclear and military weapons and the pollution of the land, sea, and air. The general principles of the concept of common heritage are associated with a few core elements, as follows:

> 'a) no state or person can own common heritage spaces or resources (the principle of non-appropriation). They can be used but not owned, as they are a part of the international heritage (patrimony) and therefore belong to all humankind, b) The use of common heritage shall be carried out in accordance with a system of cooperative management for the benefit of all humankind, i.e., for the common good, c) shall be reserved for peaceful purposes (preventing military uses), d) shall be transmitted to future generations in substantially unimpaired condition (protection of ecological integrity and inter-generational equity between present and future generations of humans)'.[5]

The excerpt above defines the concept of common heritage, and it is on this conceptualisation that rests the more politically-oriented concept of the common heritage of Europe. While the latter concept is somewhat different in scope (i.e., being narrower and concretely related to the CoE), it shares with the concept of common heritage the necessity for the preservation of values and material assets from past

3 Taylor, 2023.

4 'Legal discussion of CHM generally begins with the speech of the Maltese ambassador Arvid Pardo (1914–1999) to the United Nations in 1967. In this speech he proposed that the seabed and ocean floor beyond national jurisdiction be considered the CHM. This was an important event that triggered the later negotiation of the 1982 Law of the Sea Convention (UNCLOS III) and other legal developments that subsequently earned Arvid Pardo the title "father of the law of the sea". But CHM has a much longer history, and Pardo drew upon this in developing CHM as a legal concept for the oceans. Other people, including the writer and environmentalist Elisabeth Mann Borgese (1918 – 2002) considered CHM an ethical concept central to a new world order, based on new forms of cooperation, economic theory and philosophy. This history is important to elucidating the ethical core of CHM: the responsibility of humans to care for and protect the environment, of which we are a part, for present and future generations'. Taylor, 2023.

5 Ibid.; Baslar, 1997.

generations to future generations. The beginnings of the concept of the common heritage of Europe can be traced back to the Florence Convention,[6] of which the Preamble the Florence Convention (Recital 3) provides that Member States are 'aware that the landscape contributes to the formation of local cultures and that it is a basic component of the European natural and cultural heritage, contributing to human well-being and consolidation of the European identity'.[7] As of 1 January 2020, 40 states had ratified this Convention: Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Republic of Moldova, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. Meanwhile, Malta did not ratify it, and Albania, Austria, Germany, Liechtenstein, Monaco, and the Russian Federation did not even sign it.[8]

There have been and there are many attempts to define the common heritage of Europe, but they have yet to provide a clear definition. Regardless of the lack of consensus, these attempts showcase two major concerns: the protection of natural resources, and securing the transfer of cultural resources to younger generations. Three other concepts that accompany the narrative in the Florence Convention and the Faro Convention[9] are cultural heritage, the common heritage of Europe, and the concept of a heritage community. I will briefly explain the concepts of cultural heritage and heritage community to provide a clearer and complete framework for the concept of common heritage in the context of the CoE's legal environment. The concept of cultural heritage is associated with the notion of cultural rights, as defined by the Fribourg Declaration on Cultural Rights:[10]

> right to identity and cultural heritage; right to identification with the cultural community of his choice (reference to cultural communities); right to access and participation in cultural life; Right to education and training; Right to communication and Information; right to participation in the cultural policies and cooperation (right to cultural cooperation).[11]

The Fribourg Declaration on Cultural Rights thus describes the notions of cultural heritage and the right of identification, which are all important to understand the

6 The European Landscape Convention, 2000.
7 Zegato, 2015, pp. 141–168. See also: The European Landscape Convention, 2000.
8 The European Landscape Convention, 2000.
9 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS no. 199), 2005.
10 Heritage and Beyond, 2009.
11 Heritage and Beyond, footnote 11; see also: Fribourg Declaration on Cultural Rights.

cultural heritage of Europe.[12] Regarding the concept of a heritage community, it is defined in the Florence Convention as follows: 'a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations'.[13] Another key part of this Convention is the declaration that the people's 'exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others'.[14] To conclude, the concepts of cultural rights and cultural heritage are so important to every nation and for a potential community of united nations that the only justification for imposing restrictions on these rights relates to ensuring the protection of other public interests, rights, and freedoms. This is very important to mention, as these provisions should be treated both as soft law and as pillar concepts for understanding the meaning of the notions of Europe, European values, and legal heritage.

The concept of individual freedoms, sometimes referred to as individual civil liberties, is one of the notions that characterise liberal democracies, and comprises both individual rights and responsibilities. These rights and responsibilities are essential for democratic societies, but exercising those rights does not entail that a person can do whatever he/she wants. The CoE's European Convention on Human Rights (ECHR) primarily focuses on these individual freedoms and liberties, entailing that understanding the nature of those rights is key for grasping how the European Court of Human Rights (ECtHR) operates and what it protects. Upon examining the ECHR, it becomes clear that individual freedoms are one of its cornerstones. Importantly, these individual freedoms are present not only in one of the most important conventions of the CoE but also in the constitutions of all European states, as well as in some specific documents which have constitutional value (e.g. documents in the Czech Republic[15] and the United Kingdom).[16]

As Britannica describes, the rule of law is the main concept of modern democratic states:

> Rule of law, the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government,

12 'That means the rights (Fribourg Declaration, Art. 3): a. To choose and to have one's cultural identity respected, in the variety of its different means of expression. This right is exercised in the inter-connection with, in particular, the freedoms of thought, conscience, religion, opinion and expression; b. To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage; c. To access, notably through the enjoyment of the rights to education and information, cultural heritages that constitute the expression of different cultures as well as resources for both present and future generations'. Fribourg Declaration on Cultural Rights, Art. 3

13 Ibid. See also: The European Landscape Convention, Art. 2b.

14 Fribourg Declaration on Cultural Rights, Art. 2d.

15 *Listina základních práv a svobod* [Charter of Fundamental Rights and Freedoms].

16 Magna Carta Libertatum.

> and more generally prevents the arbitrary use of power. Arbitrariness is typical of various forms of despotism, absolutism, authoritarianism, and totalitarianism. Despotic governments include even highly institutionalized forms of rule in which the entity at the apex of the power structure (such as a king, a junta, or a party committee) is capable of acting without the constraint of law when it wishes to do so.[17]

The rule of law concept basically means that everyone is subjected to the law, even those who are producing it (e.g. legislative bodies and other law producing factors part of Montesquieu's division of powers). The rule of law is thus important within Europe and is a prerequisite in the whole democratic world for a society to achieve justice and peace.[18] In other words, the concept describes that nobody is above the law, and that the law is equally observed by all members of society, including its leaders and government agencies. Of course, there are situations where there might be some conflicting interests between legal norms, and cases in which constitutional provisions can be useful in determining if the state holds corrective and protective rights that protect the foundational principles of the (democratic) state. Some philosophers, like Kelsen,[19] argued that there should be only positive law and a normative legal order, one in which laws are to be followed if produced in the due process; however, a problem arises when those laws produce serious inequalities, which implies a situation where the rule of law is no longer applied and ceases to exist.

If we do not talk about the lack of the basic elements of humanity and freedom in the legal norms of a particular society, as provided by German philosopher Radbruch,[20] which is something that would require fighting against said law owing to its

17 For more information, see: Britannica.

18 'The rule of law is fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect people's rights and fundamental freedoms. It is foundational to people's access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state'. See: What is the Rule of Law?

19 Kelsen, 2005.

20 'Radbruch argued that when laws do not contain an elementary desire for justice or when, most importantly, equality, which should be the heart of justice, is renounced in the process of legislating, then the law is not just flawed (erroneous), it is illegal in nature because law needs to serve justice'. Savić, 2023, p. 151.
'*Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als 'unrichtiges Recht' der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den trotz unrichtigen Inhalts dennoch geltenden Gesetzen; eine andere Grenzziehung aber kann mit aller Schärfe vorgenommen werden: wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur 'unrichtiges' Recht, vielmehr entbehrt es überhaupt der Rechtsnatur. Denn man kann Recht, auch positives Recht, gar nicht anders definieren als eine Ordnung und Satzung, die ihrem Sinne nach bestimmt ist, der Gerechtigkeit zu dienen*'. Radbruch, 1946, p. 107.

lack of justice (i.e. then rendering it no longer a law; this is also accepted by Kelsen[21]), then state order must prevail and should be protected and respected. Accordingly, in the CoE's legal landscape, the concept of the rule of law is a fundamental standard that must be applied in all circumstances.

In this chapter, I will analyse general substantive laws (material) connected with the concept of justice, and common standards and policies (as well as threats) of the rule of law as it is set up in the organisational chart of the CoE. The analyses will unfold as I synthesise all relevant elements, including the efficiency of justice from the viewpoint of the European Commission for the Efficiency of Justice (CEPEJ), and the roles of the Consultative Council of European Judges (CCJE), and Consultative Council of European Prosecutors (also known as CCPE).

The institutions responsible for developing common standards of the CoE include the Venice Commission (i.e. the European Commission for Democracy through Law), the European Committee on Crime Problems (also known as CDPC), the European Committee on Legal Co-operation (also known as CDCJ), Committee of Legal Advisers on Public International Law (also known as CAHDI). They also cover a variety of topics and areas, such as prisons and community sanctions and measures, data protection, freedom of expression, Internet governance, biological safety, use of animals, and the surveillance of audio and video materials emitted in the CoE.

The bodies and Conventions that deal with threats to the rule of law in the CoE include the Group of States against Corruption (GRECO), the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), Criminal Asset Recovery Convention, the Division for Cooperation in Police and Deprivation of Liberty, Action Against Economic Crime and Corruption, Committee on Counter-Terrorism (also known as CDCT), Cybercrime Issues, Counter fighting of Medical Products (MEDICRIME), and Pompidou Group (Council of Europe International Cooperation Group on Drugs and Addictions).

This chapter will provide a general overview of all the institutions listed above, with a special focus on CEPEJ and GRECO as the institutional bodies with a specific influence on the work of the CoE and the ECtHR. As will be seen in the following paragraphs, this chapter connects closely with two other chapters, as the topics it explores are within the scope of general research on procedural and control mechanisms of the ECtHR. These mechanisms and procedures, in turn, are embodied through various recommendations present in the judgements of the ECtHR, serving as soft law that must be applied and which, according to the judgements of the ECtHR, must be legally and politically implemented, as well as serve as recommendations for policy change in particular countries.

A major problem about the application of the rule of law principle lies in its jurisprudential dimension, as it does not have a precise definition, albeit we know what it means or should encompass. Still, a problem that appears with all legal standards, and the rule of law is no exception to this, lies in its interpretation and those who are

21 Radbruch, 1946, p. 150.

interpreting the standard. The process of interpretation is related to interpretation techniques and governed by the different aims and prospects of those who want that law to work (e.g. they may want that law to work according to their schemes, cultural conceptions, and religious beliefs). For the legal systems of national states, which are legally-homogenous entities, explaining the way by which a legal standard is meant to be used in society usually does not prove a complex task. However, when using concepts such as the rule of law in supranational entities, like the CoE, some challenges may emerge. These difficulties can, notwithstanding, be resolved through the use of common legal reasoning combined with the margin of appreciation doctrine, which is extensively used by the ECtHR. In that respect, I often use quotations from Fallon:[22]

> First the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.[23]

I also cite Nachbar's definition of the rule of law problem,[24] which is simplified as follows: 'the purpose of law is to provide a government of security, predictability, and reason'.[25] Considering these descriptions, it becomes clear that we must work with and for the rule of law, something that can be done if we understand both the national and supranational characteristics of the states preserving and respecting the common heritage of Europe.

B. The History of the Council of Europe

First and foremost, some words must be probed regarding the historical context of the development of the CoE. Here, I will concentrate on the data provided by the Luxembourg Centre for Contemporary and Digital History, summarising it to provide a clear outlook of the development of the CoE and its activities, which span various mechanisms, agencies, and, of course, documents.

The CoE was founded after World War II with strong support from the United States of America, and as a consequence of political discussions that unfolded at the International Committee of the Movements for European Unity (in The Hague, the Netherlands, on 10 May 1948. Currently). This makes it Europe's oldest political organisation today. After its foundation, the French government was at the forefront of its planning, something that made the British government doubtful and reserved. Furthermore, the International Committee of the Movements for European Unity drew up specific

22 Fallon, 1996, pp. 1–56.
23 Ibid.
24 Nachbar, 2009, pp. 303–318.
25 Ibid.

proposals and presented them to the governments concerned on 18 August 1948 in the form of a memorandum, which was approved by the French government. The French government then referred the plan, while being supported by the Belgian Government, to the Standing Committee of the Treaty of Brussels on 2 September 1948.

The first body, formed by France, Belgium, the Netherlands, the United Kingdom, and Luxembourg through the Treaty of Brussels, had only consultative powers. In the beginning, it was planned that the body would comprise representatives appointed by various national parliaments and adopt resolutions by a majority. Because of the history of the legal position related to the traditional doctrine of parliamentary sovereignty, the British rejected the idea of an international institution whose members were not appointed by their government and were instead in favour of a ministerial committee which would be accompanied primarily by parliamentary delegations. A middle-ground solution was eventually found, leading the Consultative Council of the Brussels Treaty to establish a Committee for the Study of European Unity, which had Édouard Herriot as its first president. Then, the British government submitted a new proposal on 29 January 1949, with the foreign ministers of the five Brussels Treaty countries reaching a compromise at a meeting of the Consultative Council of the Brussels Treaty. This led to the founding of the ministerial committee, which had the power to make decisions, was a consultative assembly, and its members were to be appointed in accordance with the procedures of their own governments. Subsequently, the countries of Ireland, Italy, Denmark, Norway, and Sweden were asked to join a Conference on the establishment of a Council of Europe, which was to be held at St James's Palace in London from 3–5 May 1949. Following its signature on 5 May 1949, the CoE's Statute entered into force on 3 August 1949.[26]

Today, the CoE is an enormous international organisation comprising 46 Member States, some which are not even geographically part of the European territory, like Armenia, Azerbaijan, and Georgia, Malta (in Africa) and Cyprus (in the Middle East), but are clearly European from a cultural and political perspective. The most important document of the CoE is obviously the ECHR, which remains evolving, with amendments having been presented on 1 August 2021.[27] The ECHR is actually said to

26 See: Historical Overview of the CoE.

27 'The text of the Convention is presented as amended by the provisions of Protocol No. 15 (CETS No. 213) as from its entry into force on 1 August 2021 and of Protocol No. 14 (CETS No. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Art. 5 para. 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS No. 146) lost its purpose'. See: the European Convention on Human Rights [Online]. Available at: https://www.echr.coe.int/documents/d/echr/convention_eng (Accessed: 14 August 2023).

be at the very core of the CoE and all its activities,[28] covering all basic human rights and, as such, constituting an amalgam of documents that were historically key for Europe, like the English *Bill of Rights*, the French *Declaration of the Rights of the Man and of the Citizen*, the *German Basic Law*, and the *Universal Declaration of Human Rights*. More specifically, the ECHR protects the following human rights: right to life; prohibition of torture; prohibition of slavery and forced labour; right to liberty and security; right to a fair trial; no punishment without law; right to respect for private and family life; freedom of thought, conscience, and religion; freedom of expression; freedom of assembly and association; right to marry; right to an effective remedy; prohibition of discrimination; provisions of the derogation in time of emergency.[29] On one hand, the ECHR represents a synthesis of the statements related to the humanity and culture of the European peoples; on the other, it provides clear mechanisms for securing the political execution of people's rights across Member States. Raimondi says the following on this:

> The European system of protection of human rights with its Court would be inconceivable untied from democracy. In fact, we have a bond that is not only regional or geographic: a State cannot be party to the European Convention on Human Rights if it is not a member of the Council of Europe; it cannot be a member State of the Council of Europe if it does not respect pluralist democracy, the rule of law and human rights. So a non-democratic State could not participate in the ECHR system: the protection of democracy goes hand in hand with the protection of rights.[30]

The ECHR was signed on 4 November 1950 and came into force on 3 September 1953, but without the ECtHR and its crucial role in determining the responsibilities of Member States, the ECHR would likely be impossible to establish. The ECHR also establishes the roles of the ECtHR,[31] and includes 16 signed protocols. The major victory for individual human rights lies in the fact that, through the ECtHR, individual citizens can file an application where they may describe the concrete violations of

28 The European Convention on Human Rights.

29 Ibid.

30 Raimondi, 2016, pp. 2–7.

31 'The European Court of Human Rights is an International court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998 it has sat as a full-time court and individuals can apply to it directly. The Court examined hundreds of thousands of applications since it was set up. Its judgments are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas. The Court's case-law makes the Convention a modern and powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe. The Court is based in Strasbourg, in the Human Rights Building designed by the British architect Lord Richard Rogers in 1995 – a building whose image is known worldwide. From here, the Court monitors respect for the human rights of 700 million Europeans in the 46 Council of Europe'. The European Court of Human Rights [Online]. Available at: https://www.echr.coe.int/ (Accessed: 14 August 2023).

their rights and freedoms under the ECHR system by Member States, and the victim also needs not be a citizen of the Member State. The judgements of the ECtHR are specific case law that has the power to change, amend, and instruct the legal systems of the Member States, making the Convention a very powerful body that *de facto* has both judicial and legislative powers, and produces law-changing consequences. The ECtHR has its seat in Strasbourg, France, a city which symbolically connects the French and German culture, was historically a place of division between these countries, and now serves as a symbol of peace in Europe.

When we talk about the landscape of conventions under the CoE that pertain to the topics of justice, common standards and policies, and potential threats to the rule of law, we must mention dozens of other conventions in force in the CoE that, together with the ECHR, make up a wide spectrum of legal sources that cover the CoE's activities. Those conventions are the following: Convention on Action against Trafficking in Human Beings, Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Convention on preventing and combating violence against women and domestic violence, Convention on Cybercrime, Convention on the Prevention of Terrorism, Conventions against Corruption and Organized Crime, Convention on Human Rights and Biomedicine, European Charter of Local Self-Government, European Charter for Regional or Minority Languages, and Framework Convention for the Protection of National Minorities. The wide net of CoE activities are thus performed and developed by these conventions along with the bodies of the CoE, which are the Secretary General, Committee of Ministers, Parliamentary Assembly of the Council of Europe (PACE), Congress of the Council of Europe, Commissioner for Human Rights and Joint Council on Youth (CMJ). By engaging in these activities and having these bodies and conventions, the CoE upholds the post as the most important European organisation in the current world.

C. Justice, Common Standards and Policies, and Threats to the Rule of Law: Special Attention to the CEPEJ and GRECO

At this point, we reach the topic of the organisational structure of the CoE, which had been elaborated during its foundation. Accordingly, this section will dedicate itself to exploring the three major components of the CoE's activities as presented in the organisational chart of the CoE (i.e. concepts of justice, common standards and policies, and the threats to the rule of law), which interconnect without clear, sharp lines dividing them. The focus here regarding the justice component will be placed primarily on the CEPEJ, while the component of threats to the rule of law will be mainly explored through the GRECO. Nonetheless, it is important to emphasise that there are other mechanisms and bodies for dealing with the efficiency of justice and which are explored in this section, including the CCJE and the Consultative Council of European Prosecutors. Regarding the establishment of common standards and

policies, the focus will be placed on the Venice Commission, albeit other institutions will be mentioned.

Regarding the justice component, there is the CEPEJ, which has as its major goal to ensure the effective monitoring and evaluation of the efficiency of the judicial systems of the Member States, and developing the quality of justice, judicial time management, cyber justice, and artificial management and mediation through working groups.[32] The CoE describes the following about the CEPEJ:

> The aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member States, and the development of the implementation of the instruments adopted by the Council of Europe to this end. In order to carry out these different tasks, the CEPEJ prepares benchmarks, collects and analyses data, defines instruments of measure and means of evaluation, adopts documents (reports, advices, guidelines, action plans, etc.), develops contacts with qualified personalities, non-governmental Organisations, research institutes and information centers, organizes hearings, promotes networks of legal professionals. Its tasks are: to analyze the results of the judicial systems, to identify the difficulties they meet, to define concrete ways to improve, on the one hand, the evaluation of their results, and, on the other hand, the functioning of these systems to provide assistance to member States, at their request, to propose to the competent instances of the Council of Europe the fields where it would be desirable to elaborate a new legal instrument.[33]

The CCJE is 'an advisory body of the Council of Europe on issues relating to the independence, impartiality and competence of judges',[34] while the Consultative Council of European Prosecutors is:

> composed of high level prosecutors of all member States has in particular the task to prepare opinions for the Committee of Ministers on issues related to the prosecution service, to promote the implementation of Recommendation Rec(2000)19 and Recommendation Rec(2012)11 on the role of public prosecution in the criminal justice system, and to collect information about the functioning of prosecution services in Europe.[35]

32 CEPEJ [Online]. Available at: https://www.coe.int/en/web/cepej/home/ (Accessed: 17 August 2023).

33 About CEPEJ [Online]. Available at: www.coe.int/en/web/cepej/about-cepej (Accessed: 18 August 2023).

34 Consultative body of the European Judges [Online]. Available at: https://www.coe.int/en/web/ccje/home (Accessed: 17 August 2023).

35 Consultative Council of European Prosecutors [Online]. Available at: https://www.coe.int/en/web/ccpe/home (Accessed: 17 August 2023).

Regarding common standards and policies, various subdivisions of the CoE work on this component, with the Venice Commission – having numerous activities related to the development of human rights, democracy, and the rule of law, and being organised through its Secretary of the Commission, Committee of Ministers, Parliamentary Assembly, the ECtHR, Congress of Local and Regional Authorities, Commissioner for Human Rights, and the Conference of INGOs – being a prominent Commission on this matter. Most bodies are organised within the CoE's Secretariat through various directorates, for which the main task is set up through the following main objectives:

> to ensure implementation by the Secretariat of the policy and management priorities of the Secretary General and Deputy Secretary General; to co-ordinate the activities of the different parts of the Secretariat with a view to promoting transversality, co-operation, efficiency and focus on priorities; to co-ordinate the preparation of official visits of the Secretary General and the Deputy Secretary General, of their meetings and of their participation in internal and external events, and to ensure follow-up including feedback to the services involved in such events; to communicate and represent the Council of Europe in matters concerning the Private Office; to provide secretariat support to the governance structures of senior management (Senior Management Group and General Affairs Team); to ensure the preparation and smooth implementation of the Secretary General's reform policy.[36]

More specifically, the Venice Commission deals with constitutional reforms, fundamental rights, democratic institutions, the rule of law, judicial reforms, attempts to strengthen the ombudsman office under the jurisdiction of the Member States, supervises electoral processes and referendums in Member States, and helps judicial reforms in non-member states (e.g. Kyrgyzstan, Central Asia).[37] Meanwhile, the bodies that cover activities regarding data protection, prisons, freedom of expression, internet governance, biosecurity issues, and use of animals are those related with the Political and Security Committee (PSC), as described herein: the European Committee on Crime Problems (also known as CDPC), European Committee on Legal Co-operation (also known as CDCJ), and Committee of Legal Advisers on International Law (also known as CAHDI).[38]

36 Administrative entities [Online]. Available at: https://www.coe.int/en/web/portal/organisation (Accessed: 17 August 2023).

37 Venice Commission [Online]. Available at: https://www.venice.coe.int/webforms/events/ (Accessed: 18 August 2023).

38 Rule of Law [Online]. Available at: https://www.coe.int/hr/web/portal/rule-of-law (Accessed: 18 August 2023).

Regarding the threats to the rule of law component, a major organisational unit is the GRECO,[39] which has the following objective:

> […] to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.[40]

There are other activities in the CoE connected with issues that can be a threat to the rule of law, like those related to money laundering (MONEYVAL), Criminal Assets Recovery Convention, Cooperation in Police and Deprivation of Liberty, Action against Corruption and Economic Crime, Committee on Counter-Terrorism (also known as CDCT), Cybercrime, Counter fighting of Medical Products (MEDICRIME), and the Pompidou Group, which is CoE's group for International Cooperation on Drugs and Addictions.

39 'Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards. GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption. Membership in GRECO, which is an enlarged agreement, is not limited to Council of Europe member States. Any State which took part in the elaboration of the enlarged partial agreement, may join by notifying the Secretary General of the Council of Europe. Moreover, any State which becomes Party to the Criminal or Civil Law Conventions on Corruption automatically accedes to GRECO and its evaluation procedures. GRECO is open to Council of Europe member and non-member States. The functioning of GRECO is governed by its Statute and Rules of Procedure. Each member State appoints up to two representatives who participate in GRECO plenary meetings with a right to vote; each member also provides GRECO with a list of experts available for taking part in GRECO's evaluations. Other Council of Europe bodies may also appoint representatives (e.g. the Parliamentary Assembly of the Council of Europe). GRECO has granted observer status to the Organisation for Economic Cooperation and Development (OECD) and the United Nations – represented by the United Nations Office on Drugs and Crime (UNODC). GRECO elects its President, Vice-President and members of its Bureau who play an important role in designing GRECO's work programme and supervising the evaluation procedures. GRECO's Statutory Committee is composed of representatives on the Committee of Ministers of member States which have joined GRECO and of representatives specifically designated by other members of GRECO. It is competent for adopting GRECO's budget. It is also empowered to issue a public statement if it considers that a member takes insufficient action in respect of the recommendations addressed to it. GRECO's Statute defines a master-type procedure, which can be adapted to the different legal instruments under review'. GRECO [Online]. Available at: https://www.coe.int/en/web/greco/about-greco/what-is-greco (Accessed: 18 August 2023).

40 Ibid.

I.1.2 The Interpretation of the Rule of Law by the European Court of Human Rights

A. The Rule of Law in the Context of the European Court of Human Rights

The overarching narrative concerning the interplay between the rule of law and the European Court of Human Rights (ECtHR) centres on the intersection of the former with human rights.[41] The establishment of the European Convention on Human Rights (hereafter Convention or ECHR) system, which aims to safeguard human rights, has played a pivotal role in promoting a broader acceptance of judicial control over matter pertaining to human rights.[42] This Convention system has significantly influenced the national constitutional landscape by promoting the judicial review of governmental acts.[43] Considering the rule of law in the context of the Convention entails an individual application procedure before the ECtHR, which then plays a central role in safeguarding Convention rights within national legal systems.[44] Despite its central position in European developments towards increased acceptance of constitutional review, the ECtHR does not assert its authority under the rule of law; instead, its effectiveness relies on Member States' acceptance.[45] It could be argued that understanding the rule of law as a demand for states to accept the supervision of the ECtHR aligns with the legal developments.[46] The ECtHR's hesitance on this matter is nonetheless reasonable, considering that its authority still relies on cooperation from domestic authorities.[47]

According to Lautenbach, the ECtHR cannot act as a fourth-instance court, and the responsibility for interpreting national law lies primarily with national authorities.[48] Specifically, national authorities are responsible for interpreting and applying national law, while the Convention requires that interferences with Convention rights adhere to domestic law.[49] Hence, the ECtHR faces the challenge of striking a delicate balance between effectively reviewing and recognising the primary role of national courts in interpreting national law.[50] This entails that effective human rights protection may require the ECtHR to review how national authorities apply national

41 For more see: Follesdal, 2021, pp. 118–138. However, this interplay of the human rights and the rule of law is not an issue exclusive to ECtHR, but rather one that has global ramifications. For more see: Brown, 2018, p. 1417.
42 Lautenbach, 2013, p. 189.
43 Lautenbach, 2013, p. 190.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid.
49 Lautenbach, 2013, p. 85.
50 Ibid.

law.[51] The ECtHR has already shown an active role in examining issues of domestic law through the principle of *jura novit curia*.[52] Additionally, the review of the quality of the law allows the ECtHR to independently and actively assess domestic laws.[53] Thus, through the review of the quality of the law, the ECtHR effectively and autonomously reviews domestic law while still maintaining the notion that national authorities are primarily responsible for interpreting national law.[54] Notably, the ECtHR demonstrates respect for the principle of the separation of powers and the role of national authorities by exercising a cautious review of the existence of national law. Moreover, the significant variations between legal systems make it appropriate for the ECtHR to refrain from independently interpreting national law or rectifying legal errors, as this falls within the domain of national authorities.[55]

This fact aligns with the democratic ideals underpinning the Convention and fosters the broader acceptance of judicial oversight as a means to ensure adherence to human rights standards among Member States. Moreover, the Convention has gained significant importance within the national legal systems of Member States, empowering judges and bolstering their position in the overall balance of power. As a result, the judicial review of governmental actions concerning human rights standards has become the prevailing norm in Member States, reinforcing the fundamental connection between the rule of law, human rights, and democratic principles. Regarding democracy and its principles, Zand described:

> the Strasbourg organs have emphasised the point that "democracy does not simply mean that the views of the majority must always prevail" but, "a balance must be achieved which ensures fair and proper treatment of minorities and avoid abuse of a dominant position".[56]

This perspective aligns with the rule of law principle upheld by the ECtHR, emphasising the protection of minority rights and commitment to justice, equality, and prevention of arbitrary power. Hence, all aforementioned elements – i.e. the rule of law, human rights, and democratic principles – must be effectively interconnected to ensure the rule of law. The rule of law, especially its essence – that is, 'government by laws and not by men', originally attributed to Aristotle, as noted by Stein[57] – is crucial and must be the guiding principle of all aspects of the ECtHR. This is particularly so when the topics are safeguarding Convention rights and deciding on violations.

Concerning the scope and impact of the rule of law principle, Deinhammer additionally posits that it necessitates political authority and governance to operate

51 Lautenbach, 2013, pp. 85–86.
52 Ibid.
53 Ibid.
54 Ibid.
55 Lautenbach, 2013, p. 85.
56 Zand, 2017, p. 200.
57 Stein, 2019.

within established laws, specifically within the structure of a legal and constitutional framework.[58] One of the core principles inherent in the rule of law is its objective to minimise the use of capricious authority and the resulting harm, aligning with the purpose of the ECtHR.[59] No wonder Meierhenrich highlights that the post-World War II *Rechtsstaat* tradition in Germany, designed to hold elites accountable and prevent a recurrence of dictatorship, stands as a remarkable example of rule governed by law, and that it aligns with the principles upheld by the ECtHR.[60] Additionally, Omejec reports that Radbuch's formula from 1946 can be summarised in the rule that when a legal norm is inconsistent with the requirements of justice to an intolerable degree or is intentionally shaped to deny equality (i.e. the core of justice), such a legal norm must be abolished.[61] This reasoning resonates with the values upheld by the ECtHR, which prioritises justice and equality in its decisions and interpretations of human rights law. Building on this, Varga raises a pivotal question about the adaptability of longstanding legal values to contemporary challenges,[62] and goes on to explore the shortcomings of the traditional rule of law in addressing modern issues (e.g. the influence of media, pressure from large organisations, and financial coercion by global entities). Bearing in mind the rule of law principle, it can be very dangerous when entities can tailor laws according to their interests. However, there is always the principle of checks and balances, as well as key essential elements that should reduce the possibility of abusing the process of passing laws in one's interest. These factors are considered by the ECtHR when deciding upon law quality.

Therefore, Lauc highlights three criteria for determining law (regulation) quality: (i) *the manner*, and *how* the law is enacted;[63] (ii) *the quality of legal solutions*;[64] (iii) *the stability of the law*.[65] Two crucial aspects of the rule of law must also be respected: first, control over the discretionary powers of the executive in applying the law to prevent arbitrariness; second, the quality of the law itself should be emphasised.[66] Interestingly, Bóka notes that the rule of law principle can serve as a compelling argument when incorporating alternative modes of reasoning (e.g.

58 Deinhammer, 2019, pp. 33–36.
59 Ibid.
60 Meierhenrich, 2021, p. 40.
61 Omejec, 2013, p. 1086.
62 Varga, 2021, pp. 95–99.
63 The manner of law enactment refers to its timely adoption, the possibility of influence of all interest groups on the adoption of legal solutions, the availability of the proposed law to the public and the holding of a public debate on the proposal, leaving enough time from the passing of the law to its application, so that citizens can become familiar with the content of the law, and the preparation of detailed explanations of proposals for better interpretation. Lauc, 2016, p. 58.
64 The quality of the legal solutions should ensure that provisions are written in a clear language that everyone can understand, that they are specific and do not limit the freedom of citizens to an excessive extent, that they do not leave legal gaps, that the laws are harmonised with each other, that adequate means are provided for the application of the law and to foresee the control mechanisms of its implementation as well as sanctions for non-implementation. Lauc, 2016, p. 58.
65 This is a requirement that laws do not change often. See: Lauc, 2016, p. 58.
66 Lauc, 2016, p. 57.

the comparative method) into the national constitutional law system and during the enactment of the legal framework, such as the Constitution.[67] Such a practice can be beneficial, but can also be dangerous if the arguments stem from interest groups that have influenced the tailoring of laws. However, there is ECtHR, which can delve into the law's quality as one aspect of the principle of legality and decide whether the law is truly in line with the rule of law principle.

It is important to emphasise that there is not a singular comprehensive definition for the rule of law according to the ECtHR. Lautenbach points out that, in ECtHR's case law, there is a notable absence of a comprehensive description encompassing its various applications by the Court,[68] and the ECtHR generally does not provide extensive definitions of concepts within its judgments.[69] While the Court does, in some rulings, enumerate general principles to clarify the interpretation of Convention rights, it has not explicitly listed the distinct components and attributes of the rule of law within these general principles.[70] This is not completely unexpected, given that the rule of law is not a specific rule of decision but rather a broader concept that the Court invokes to justify a particular interpretation of a Convention right. Nonetheless, the ECtHR frequently refers to the concept of the rule of law across various topics,[71] sometimes having even expanded the Convention's scope by using the rule of law as a basis to more effectively enhance the protection of human rights.[72]

The ECtHR exemplifies the rule of law as the adoption of a broad and flexible perspective on law, along with the avoidance of rigid formalist approaches.[73] This flexibility allows the ECtHR to accommodate differences between legal systems, such as those between continental and common law systems.[74] Additionally, this adaptable stance from ECtHR reflects the rule of law principle of legal certainty, which requires laws to be clear, predictable, and accessible, even in diverse legal contexts.[75] It is also the case that considering varying approaches to legal sources in different legal systems allows the ECtHR to uphold the rule of law principle of equality before the law.[76] More specifically, the fair treatment of different legal systems and adapting to their specificities ensures that all individuals have equal access to justice, regardless of their national legal framework.[77] Nagy also highlights that the ECHR and the ECtHR are tailored to benefit a broad range of countries.[78]

67 Bóka, 2014, p. 103. See also: Bóka, 2002.
68 Lautenbach, 2013, p. 17.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
73 Lautenbach, 2013, p. 85.
74 Ibid.
75 Ibid.
76 Ibid.
77 Ibid.
78 Nagy, 2020, p. 842.

According to Stein, the principles constituting the rule of law encompass both procedural and substantive aspects.[79] Regarding the procedural aspect, the laws must hold the status of the supreme law of the land, be publicly announced, and applied impartially,[80] and procedural rules mandate the fair and equal application of the laws and strict adherence to the separation of powers during the enactment and adjudication processes.[81] These principles of the rule of law have substantive implications.[82] For example, they mean that laws must be just and in harmony with the norms and standards of international human rights law.[83] An essential requirement of the rule of law is the avoidance of any form of arbitrariness in law application and interpretation.[84] Bearing this in mind, Sicilianos gave a speech about the rule of law and the ECtHR with special reference to the independence of the judiciary,[85] which led to the empowerment of the judiciary and an increased acceptance of judicial review. An independent judiciary should be able to carry out the adjudication process.

In connection with this, there is a notable occurrence in the context of the *Grzęda v. Poland* case;[86] on 20 December 2017, the European Commission took a significant stride by initiating the process delineated in Art. 7 para. 1 of the Treaty on the European Union (TEU),[87] marking the first instance of such action being taken.[88] The Commission put forth a detailed proposal to the Council of the European Union, urging it to acknowledge a distinct and substantial risk of a serious breach of the rule of law by Poland.[89] The basis for this proposal included concerns regarding the independence of the ordinary judiciary.[90] Highlighting the situation, the Commission noted that Poland had witnessed the enactment of more than 13 consecutive laws over a span of two years,[91] and that these laws consistently and collectively impacted the entire judicial system's structure in Poland.[92] The laws systematically granted

79 Stein, 2019.
80 Ibid.
81 Ibid.
82 Ibid.
83 Ibid.
84 Ibid.
85 The Council of Europe's Parliamentary Assembly has addressed rule of law issues, including the independence of the judiciary, in its 2017 Resolution on New threats to the rule of law in Council of Europe Member States. There was a special focus on the rule of law in Bulgaria, the Republic of Moldova, Poland, Romania, and Turkey. The Venice Commission has tackled these issues in its opinions on Bulgaria (2016), Poland (two in 2016 and two in 2017), Turkey (two in 2017), Romania (2018 and 2019), Malta (2018) and Serbia (2018) Speech by Linos-Alexandre Sicilianos (2020), The Rule of Law and the European Court of Human Rights: the independence of the judiciary.
86 *Grzęda v. Poland* (App. no. 43572/18), 15 March 2022, § 24.
87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid.

the executive and legislative branches of the government significant authority to interfere with the composition, power, administration, and overall operation of various judicial authorities/bodies.[93]

Importantly, for the rule of law, the adherence to 'rigid regulation' alone is insufficient.[94] As Lauc has noted, the ECtHR emphasised the importance of considering the preamble as an integral part of the context when interpreting international treaties in the case *Golder v. United Kingdom*.[95] This statement highlights a legal principle established in this case. It underscores the importance of not overlooking the preamble when interpreting international treaties, as it provides valuable context into the treaty's objectives and principles.

In summary, the ECtHR's approach to law aligns with several rule of law elements, including legal certainty, equality before the law, legality, due process, and respect for the role of national authorities. By adhering to these principles, the ECtHR ensures effective human rights protection within the framework of different legal systems across Europe and the world.[96]

B. The Rule of Law and Ensuring Legal Consistency: A Closer Look at the ECtHR's Legality Issues

Legality is considered a fundamental component in theoretical discussions concerning the rule of law.[97] Close examination renders evident that the rule of law (concerning legality) is integral to the ECtHR's case law and that the rule of law is largely interpreted in relation to legality.[98] Therefore, within the context of the ECHR, legality emerges as the central element of the rule of law, making it crucial to comprehend legality's meaning, scope, and function for understanding the related rule of law.[99] Lautenbach states that legality, as a concept within the Convention, requires the government to act based on law, establishing several quality requirements to which law must adhere (e.g. generality and clarity).[100] He further notes that the quality requirements of legality and procedural guarantees are crucial for all Convention rights cases, including those involving positive social obligations by the state.[101] Therefore, the rule of law does not establish a hierarchy of norms directly, but rather indirectly as it requires national law to comply with it.[102] This implies that if national law includes a hierarchy of norms, the concept of legality in case law

93 Ibid.
94 Lauc, 2016, p. 58.
95 *Golder v. United Kingdom* (App. no. 4451/70), 21 February 1975, § 34.; Lauc, 2016, p. 58.
96 Lautenbach, 2013, p. 85.
97 Lautenbach, 2013, p. 70.
98 Ibid.
99 Ibid.
100 Lautenbach, 2013, p. 42.
101 Lautenbach, 2013, p. 192.
102 Ibid.

demands adherence of this hierarchy to the rule of law.[103] Here, legality presents not only the law but also the main principle of the rule of law and the modern state, hence guaranteeing the security of people's rights from the arbitrary interference of the state. In addition, legality promotes individual autonomy because it allows people to plan their lives,[104] and thus legality is present in all rule of law definitions.[105]

In the ECtHR's case law, legality demands that any infringement upon the rights enshrined in the ECHR must be grounded in national law, and that this law must meet certain quality standards.[106] Meanwhile, in the context of the Convention, 'legality' is not concerned with the substance of domestic law[107] and does not prescribe what laws should contain, but rather focuses on the quality of national law and on the imposition of Convention standards.[108] In addition, the requirement of the existence of national law is not strictly formal, showcasing the adoption of a material view of law to accommodate differences between legal systems.[109] The quality requirements of legality allow the ECtHR to maintain some distance from domestic law while ensuring effective scrutiny.[110] Therefore, legality here is semi-autonomous, combining national legal norms while maintaining some distance to assess its effects and quality.[111]

The ECtHR respects the separation between legal systems and the primary role of national courts.[112] In the context of the Convention, legality involves two aspects: *the existence of national law* and its *sufficient quality*.[113] The ECtHR uses specific requirements to assess national law quality, namely *accessibility, foreseeability*, and the provision of *judicial safeguards* when granting wide discretionary powers to governmental authorities.[114] Foreseeability here demands that the law is not applied retroactively and is consistent, precise, and general. The concept of legality finds expression through these quality requirements,[115] allowing the ECtHR to autonomously evaluate the quality of national laws concerning Convention rights. Furthermore, the application of this independent standard of quality helps the Court ensure the effective protection of Convention rights within national legal systems.[116] The ECtHR's decisions can also influence Member States other than the one where the legal proceedings originated, rendering the Convention system a supra-constitutional

103 Ibid.
104 Lautenbach, 2013, p. 67.
105 Lautenbach, 2013, p. 21.
106 Lautenbach, 2013, p. 189.
107 Lautenbach, 2013, p. 122.
108 Ibid.
109 Ibid.
110 Ibid.
111 Ibid.
112 Ibid.
113 Lautenbach, 2013, p. 86.
114 Ibid.
115 Ibid.
116 Lautenbach, 2013, p. 87.

framework.[117] By thoroughly assessing the impacts of the law in specific cases, the ECtHR ensures that the rights of individuals are protected and that decisions are made based on just and fair procedures.[118]

The concept of 'legality' is well-suited to the subsidiary role of the ECtHR. While the Convention provides a minimum guarantee, states bear the primary responsibility for safeguarding human rights.[119] At the same time, the quality requirements of legality empower the ECtHR to independently and rigorously review national law,[120] which in turn is a crucial process for effective human rights protection, establishing an autonomous standard for domestic law. Legality thus prevents states from hiding behind procedural rules and formalities.[121] The independence of this review is also essential, as states could otherwise easily manipulate their laws to avoid scrutiny.[122] Moreover, limiting the review of legality to the mere determination of whether national law was breached would render domestic law a shield, and consequently undermine effective human rights protection.[123] This showcases how the quality requirements of legality act as checks on government power and set boundaries. By conducting autonomous reviews, the Convention also aims to achieve greater unity among Member States and, as aforementioned, develop a general standard of human rights.[124] The detailed scrutiny of national law would limit the impact of judgments on the state involved, while an autonomous review would secure equal protection for individuals across the Convention area.[125] Hence, an autonomous review of legality is preferred over one based solely on national law.[126]

Legality is a unified concept that generally applies to all Convention articles and relates to the rule of law.[127] Legality predominantly exists in Art. 5 and 7 of the Convention, as these Arts. are frequently implicated in cases involving legality.[128] In the context of these two Arts. of the Convention, legality primarily requires the existence of a national law as the basis for deprivation of liberty or punishment, and imposes quality standards on the law governing interferences with Convention rights.[129] Therefore, the Court first determines whether a national law exists, and then evaluates its quality.[130] However, the legality in this case law can be questioned,

117 Lautenbach, 2013, p. 189.
118 Lautenbach, 2013, p. 85.
119 Lautenbach, 2013, p. 124.
120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid.
124 Ibid.
125 Ibid.
126 Ibid.
127 Lautenbach, 2013, p. 70.
128 Ibid.
129 Ibid.
130 Ibid.

as there are limitation clauses in Convention provisions.[131] These limitations stipulate that any interference with a Convention right must be lawful.[132] Accordingly, Lautenbach notes that legality encompasses both national and international criminal law.[133] Several articles in the Convention – including Arts. 8, 9, 10, and 11 – and Art. 2 of Protocol 4 contain limitation clauses that determine the circumstances under which interferences with certain human rights are permissible.[134] This also occurs in other important articles like Art. 3 of Protocol 1 (i.e. allows derogation),[135] and Art. 1 of Protocol 1 contains a limitation clause that is worded differently from Arts. 8, 9, 10, and 11, but that is implemented by ECtHR using the same criteria as those for Arts. 8, 9, 10, and 11.[136] As aforementioned, interferences with Convention rights that include a limitation clause are only permissible if they are lawful, but they must also have a 'legitimate aim' and be 'necessary in a democratic society'.[137] In examining the conditions for legitimate interference with a Convention right, three distinct requirements come into play, namely *legality,* the *existence of a legitimate aim,* and *proportionality*.[138]

Although there are some exceptions, the ECtHR generally refrains from challenging the aims pursued by governments.[139] In situations where a specific Convention article does not specify the permissible aims (e.g. in Art. 3 of Protocol 1), the ECtHR evaluates whether the aim pursued by the state aligns with the principles of the rule of law.[140] The 'necessity' requirement is another crucial aspect for interference with a Convention right, such that the interference must correspond to a 'pressing social need' and be proportionate to the legitimate aim being pursued.[141] When the ECtHR assesses national law and whether it provides for a justified interference with an individual's rights, it considers both aspects of legality (i.e. law quality and proportionality).[142]

Interestingly, Lautenbach emphasises that Convention articles do not explicitly mention the term 'legality', nor do the rulings made by the ECtHR.[143] Instead, they refer to different variations of the term 'lawfulness' found in the Convention's articles.[144] However, the current study uses the term 'legality' instead of 'lawfulness' be-

131 Ibid.
132 Lautenbach, 2013, p. 71.
133 Ibid. See also: Krapac et al., 2013.
134 Lautenbach, 2013, p. 72.
135 Ibid.
136 Ibid.
137 Ibid.
138 Lautenbach, 2013, p. 73.
139 Ibid.
140 Ibid.
141 Ibid.
142 Ibid.
143 Ibid.
144 Ibid. See also: Krapac et al., 2013.

cause of its broader connotation.[145] While 'lawfulness' mainly emphasises strict compliance with laws and procedures, 'legality' goes beyond, demanding the law to align with external requirements such as generality and certainty of the law.[146] Therefore, the term 'legality' better reflects how the ECtHR examines compliance with national laws and procedures and the overall quality of those laws.[147] More specifically, the use of the term 'legality' gives rise to the characterisation of a broader assessment, one that goes beyond mere compliance to consider the external requirements and principles associated with the rule of law.[148] In summary, ensuring legality in interferences with Convention rights involves two key aspects: firstly, the interference must be based on national law; secondly, the law must meet specific quality criteria.[149] However, the strict application of the first requirement is not always upheld, as the ECtHR does not function as a fourth instance court, but rather follows a material concept of domestic law.[150]

According to Lautenbach, the ECtHR has strengthened the procedural aspects of the Convention, aligning it with the rule of law.[151] Procedural rights, mentioned in Art. 5, 6, 7, and 13, differ from substantive rights (e.g. right to life and the prohibition of torture), which *primarily* address human conditions rather than the organisation of the legal system.[152] Lautenbach also mentions that Arts. 5, 6, 7, and 13 can be considered part of the rule of law, emphasising the necessity of fair and effective procedures in national law without arbitrary limitations.[153]

When reviewing the legality of interferences with Convention rights, the ECtHR initially examines compliance with national laws and procedures, and then assesses whether domestic law adheres to the Convention's standard of quality.[154] Legality is a significant concern in the case law related to Art. 5, particularly its paras. 1, 3, and 4.[155] Art. 5 para. 1 of the Convention states that any deprivation of liberty must be based on specific grounds mentioned in the article, and must be in accordance with legality.[156] Legality here also implies that the law must meet certain quality criteria, such as accessibility and foreseeability.[157] The aim of the mention of legality in Art. 5 para. 1 is to prevent arbitrariness and ensure legal certainty, which aligns with that of Art. 5 (i.e. protect individuals from arbitrariness).[158] Additionally, national

145 Lautenbach, 2013, p. 73.
146 Ibid.
147 Ibid.
148 Ibid.
149 Ibid.
150 Ibid.
151 Lautenbach, 2013, p. 191.
152 Ibid.
153 Ibid.
154 Lautenbach, 2013, p. 71.
155 Ibid.
156 Ibid.
157 Ibid.
158 Ibid.

laws that authorise deprivations of liberty must be consistent with the principles and standards of the Convention, and be sufficiently accessible, precise, and foreseeable in their application.[159] This requirement is essential to avoid any possibility of arbitrariness in the implementation of such laws.[160]

However, the author of this study would like to underscore the significance of legality in an important context related to some articles of the Convention, including Arts. 2 (Right to life), 3 (Prohibition of torture), 4 (Prohibition of slavery and forced labour), 5 (Right to liberty and security), 7 (No punishment without law), 8, 9 (Freedom of thought, conscience, and religion), 10, 11 (Freedom of assembly and association), 12 (Right to marry), and 14 (Prohibition of discrimination). It is worth noting that these articles, despite their substantive nature, also incorporate procedural aspects. Conversely, Arts. 6 (Right to a fair trial) and 13 (Right to an effective remedy) are primarily concerned with procedural matters. The analysis here sheds light on the fact that, aside from Arts. 6 and 13, all aforementioned Convention articles possess a combined or hybrid nature; that is to say, albeit they primarily establish substantive rights for individuals, their execution and application encompass procedural dimensions. This hybrid characteristic stems from the fact that while the articles establish the rights themselves, the procedures designed to ensure and safeguard these rights necessitate strict adherence to due process and procedural safeguards. At this point, it is wise to remember and recognise that the existence of national laws and procedures of sufficient quality is crucial for the effective protection of all Convention articles – not just those that explicitly refer to legality.[161]

The ECtHR examines law quality through the lens of legality, with foreseeability being the prominent factor.[162] *Foreseeability* encompasses various elements, such as the prohibition of retroactive application, consistency, sufficient precision, and generality of the law.[163] Additionally, legality demands the law to be accessible and accompanied by adequate judicial safeguards, especially when national authorities possess broad discretionary powers.[164] Therefore, the concept of legality requires the accessibility an foreseeability of domestic laws.[165] These quality requirements of legality are derived from the concept of the rule of law.[166]

Accessibility is crucial when the ECtHR evaluates the quality of national law. The ECtHR requires law to be adequately accessible, in that the individuals affected by specific legislation or administrative practices must be sufficiently aware of their contents. This, however, does not necessarily demand publication, and the ECtHR instead examines the circumstances of each case. For instance, in the *Groppera Radio*

159 Lautenbach, 2013, pp. 71–72.
160 Lautenbach, 2013, p. 72.
161 Lautenbach, 2013, p. 73.
162 Ibid.
163 Ibid.
164 Ibid.
165 Ibid.
166 Ibid.

Ag and Others v. Switzerland case,[167] where the applicable law was highly technical and intended for specialists, the ECtHR ruled that accessibility was satisfied, although the regulations were not published. However, this exception was due to the extraordinary nature of the case.[168] Indeed, the test of accessibility of the ECtHR is less rigorous for professional and technical areas of the law,[169] confirming that this is an open principle assessed based on case circumstances.[170] Instructions and administrative practices of a lower rank may also be relevant to evaluate the quality of the law, as long as those concerned are sufficiently aware of their contents.[171]

The ECtHR also considers accessibility when customary rules of international law are concerned. For instance, in the *Kononov v. Latvia* case,[172] the ECtHR found that the applicant, a former member of the Soviet army, was expected to be aware of the fundamental customary rules of *jus in bello*.[173] The fact that international laws and customs of war were not published did not affect the ECtHR's decision.[174] The Grand Chamber later emphasised that the applicant, as a commanding military officer, should have been aware of the unlawfulness of ill-treatment and killing of civilians under the laws and customs of war.[175] Overall, accessibility is an important principle in the context of the rule of law, and the ECtHR evaluates it carefully while considering each case's circumstances.[176]

The concept mentioned earlier of *foreseeability* is comprehensive, encompassing various elements such as generality, precision, non-retroactivity, and consistency.[177] In the context of the Convention, legality emphasises law precision rather than generality,[178] a shift that can be attributed to the evolving role of law in society, as governments are now having to increasingly more actively regulate various aspects of society through legislation.[179] *Foreseeability* appears here as a significant aspect of legality, demanding that national law be sufficiently clear and precise for individuals to understand the consequences of their actions and when their rights may be affected by government measures.[180] The ECtHR considers two elements in foreseeability, namely precision and generality, and describes that the law should strike a balance between clarity and flexibility.[181] Precision is particularly vital in

167 *Groppera Radio Ag and Others v. Switzerland* (App. no. 10890/84), 28 March 1990, §§ 68 and 75.
168 Lautenbach, 2013, p. 87.
169 Lautenbach, 2013, p. 88.
170 Ibid.
171 Ibid.
172 *Kononov v. Latvia* (App. no. 36376/04), 17 May 2010, §§ 245–246.
173 Lautenbach, 2013, p. 88.
174 *Kononov v. Latvia*, §§ 245–246.
175 Lautenbach, 2013, p. 88.
176 *Kononov v. Latvia*, §§ 185–187, 235–244; see also: Lautenbach, 2013, p. 88.
177 Lautenbach, 2013, p. 121.
178 Ibid.
179 Ibid.
180 Lautenbach, 2013, p. 88.
181 Ibid.

cases involving discretionary powers, where the scope of such discretion must be indicated.[182] Meanwhile, inconsistency in the law renders it unforeseeable, giving then way for breaches of the Convention.[183] Still, the ECtHR's review of foreseeability tends to be lenient, only really becoming relevant when the poor quality of the law tangibly affects an applicant's substantive Convention rights.[184] The retroactive application of the law is opposed, especially for criminal cases, albeit non-retroactivity does apply to other contexts, such as the right to a fair trial.[185] In general, foreseeability is not an abstract requirement, but rather focuses on the individual applicant's ability to understand the consequences of the law and its impact on their rights.[186] Importantly, it does not necessarily require individuals to understand the law without legal advice, nor does it demand a provision to have only one possible interpretation to meet the foreseeability requirement.[187]

The rule of law is most valuable in safeguarding individuals from extensive government interference, as seen in ECtHR's stringent guidelines for privacy rights and criminal cases.[188] Still, the rule of law's focus is on ensuring the proper form of national law, not on dictating its content.[189] In summary, legality in the ECtHR's case law necessitates the existence of a law in the national legal system and its compliance with certain quality standards.[190]

B.1 Preserving Justice: Examining Judicial Safeguards within the 'Legality' of the ECtHR

According to Lautenbach, the ECtHR does not consistently mention the requirement of judicial safeguards as a part of legality,[191] even if legality inherently demands the implementation of judicial safeguards.[192] Nevertheless, the inclusion of judicial safeguards, as an essential element of legality across all instances, is not a consistent practice by the ECtHR.[193] Instead, this stipulation is selectively applied as a unique facet of legality.[194] Despite the non-consistent practice, the ECtHR generally emphasises the significance of judicial safeguards, particularly in cases where national governmental authorities wield extensive discretionary powers.[195] Meanwhile,

182 Ibid.
183 Ibid.
184 Lautenbach, 2013, 89.
185 Ibid.
186 Ibid.
187 Ibid.
188 Lautenbach, 2013, p. 191.
189 Ibid.
190 Lautenbach, 2013, p. 70.
191 Lautenbach, 2013, p. 101.
192 Ibid.
193 Ibid.
194 Ibid.
195 Ibid.

Lautenbach contends that judicial safeguards are imperative within various provisions of the Convention, such as Art. 5 paras. 1, 8, and 10 and Art. 1 of Protocol 1, which pertains to the Protection of property.[196] Indeed, the demand for effective judicial safeguards is rooted in the rule of law. In the case *Klass and Others v. Germany*,[197] Lautenbach notes that the ECtHR assessed whether German laws regarding secret surveillance methods violated the applicant's right to privacy.[198] A critical question was whether Art. 8 necessitated judicial control over the use of secret surveillance methods.[199]

The availability of a fair judicial process is pivotal in resolving conflicts and ensuring that laws are not merely abstract concepts.[200] Judicial safeguards play a pivotal role in this midst, constraining governmental actions within the limits prescribed by law.[201] Indeed, the effectiveness of law hinges on the independence of the judiciary from other government branches – a principle underscored by the ECtHR in its legal precedents.[202] It remains that while judicial safeguards hold significance for all rights safeguarded by the ECHR, they bear particular weight for certain rights.[203] Specifically, Art. 6 assumes a central role in relation to judicial safeguards and upholding the rule of law within the Convention.[204] Art. 13 also frequently interrelates with Art. 6, reinforcing its significance. Some of the Convention rights intricately tied to the presence of judicial safeguards are the entitlement to access a court, the right to an efficacious remedy, and the preservation of liberty.[205] The rule of law mandates the existence of judicial safeguards across all articles of the Convention to secure the efficacious safeguarding of human rights. The existence of judicial safeguards is also deemed a prerequisite for legality when we consider the limitation clauses, along with Arts. 5(1) and 7 of the Convention.[206] Furthermore, nearly all articles of the Convention encompass both substantive and procedural dimensions; nonetheless, Arts. 6 and 13 are exclusively of a procedural nature.

In some cases, the necessity of judicial safeguards can be inferred from the application of the accessibility and foreseeability principles to the case's facts.[207] For instance, in the *Amuur v. France*[208] case concerning administrative detention, the ECtHR emphasised the demand for national law to have sufficient quality and adhere

196 Ibid.
197 *Klass and Others v. Germany* (App. no. 5029/71), 6 September 1978, §§ 37–38, 39–60;
198 Lautenbach, 2013, p. 101.
199 Ibid.
200 Ibid.
201 Ibid.
202 Ibid.
203 Ibid.
204 Ibid.
205 Ibid.
206 Ibid.
207 Ibid.
208 *Amuur v. France* (App. no. 19776/92), 25 June 1996, §§ 28 and 63.

to the rule of law.[209] As ordinary courts could not review the conditions nor impose time limits for the applicants' detention, the ECtHR found French law inadequate and that it breached the right to liberty.[210] In such cases, the existence of judicial safeguards is not explicitly mentioned, but is implied from the foreseeability of the law.[211] Therefore, while the ECtHR does not require a specific form of judicial review, it demands the presence of a review procedure regarding time limits and conditions of administrative detention.[212] The requirement of judicial safeguards as part of legality creates an overlap of legality with the right to a fair trial (Art. 6) and the right to an effective remedy (Art. 13). Some find this overlap problematic, as it blurs the distinction between these provisions and legality in the context of limitation clauses. However, the overlap should not be regarded as a difficulty; Art. 6 continues to play a primary role in ensuring the adequacy legal procedures because it contains detailed requirements which judicial proceedings should follow.[213]

B.2 Judicial Safeguards within 'Legality' and Convention Art. 5

Distinguishing between judicial safeguards, as an element of legality, and those protected by Art. 5 is not always a straightforward process. For instance, in the case of *Baranowski v. Poland*,[214] the applicant's detention lacked a judicial decision, and Polish criminal legislation lacked clear rules for detainees in court proceedings after the expiration of the detention term. The ECtHR found this to violate legal certainty and the rule of law, leading to a breach of Art. 5(1).[215] Similarly, in the case of *Nevmerzhitsky v. Ukraine*,[216] the national law was unclear about the time allowed for the applicant to review the case file. As required by Art. 5(3), while the applicant was studying the case file, it was kept in custody for an indefinite period without judicial authorisation. This created a statutory loophole and was deemed to contravene the principle of legal certainty and the right to be promptly brought before a judge.[217] Paras. 3 and 4 of Art. 5 primarily address judicial safeguards, while para. 1 mainly focuses on the requirement for the lawful deprivation of liberty.[218] However, para. 1 also highlights that such deprivation must follow a fair and proper procedure prescribed by law. The applicability of this rule was demonstrated in *the Winterwerp v. the Netherlands* case,[219] where the ECtHR defined the term 'procedure prescribed by

209 Lautenbach, 2013, p. 101.
210 Ibid.
211 Lautenbach, 2013, p. 102.
212 Ibid.
213 Ibid.
214 *Baranowski v. Poland* (App. no. 28358/95), 28 March 2000, §§ 48, 53, 56–58.
215 Lautenbach, 2013, p. 103.
216 *Nevmerzhitsky v. Ukraine* (App. no. 54825/00), 5 April 2005 (Final 12 October 2005), §§ 78, 123–124, and 126–129.
217 Lautenbach, 2013, p. 103.
218 Lautenbach, 2013, p. 102.
219 *Winterwerp v. the Netherlands* (App. no. 6301/73), 24 October 1979, §§ 45–46.

law' to imply a non-arbitrary, fair, and appropriate process for depriving a person of liberty. [220]

Moreover, when examining legality concerning Art. 5(1), there are additional requirements linked to the right to liberty itself.[221] This makes it imperative that any detention falls within one of the categories listed in Art. 5.[222] Furthermore, Art. 5(3) necessitates that an arrested individual be presented promptly before a judge or a judicial officer authorised by law,[223] while Art. 5(4) grants an arrested or detained person the right to challenge the lawfulness of their deprivation of liberty in a court.[224] The term 'lawfulness' here carries the same meaning as in para 1. Meanwhile, Art. 7 of the Convention forbids the retrospective application of criminal law to the disadvantage of an accused, and embodies the broader principle that only the law can define a crime and prescribe a penalty (i.e. *nullum crimen, nulla poena sine lege*).[225] Consequently, as Lauc states, the ECtHR asserts that the requirement of 'legality' under Art. 5 of the Convention goes beyond mere compliance with domestic law,[226] but rather necessitates domestic law to align with the general principles of the Convention, particularly the principle of the rule of law and legal equality – as articulated in the Convention's preamble.[227]

In the case of *Khlaifia and Others v. Italy*,[228] which centres on immigration issues, the concept of 'lawfulness' in relation to deprivation of liberty took the centre of the stage. When deliberating the legality of detention and the adherence to prescribed procedures, the Convention primarily references national law. It obliges conformity with both the substantive and procedural rules of that law, while also emphasising that any deprivation of liberty must align with Art. 5's purpose – to safeguard individuals from arbitrary actions[229] – as established by the ECtHR in the cases named *Del Río Prada v. Spain,*[230] *Herczegfalvy v. Austria,*[231] and *L.M. v. Slovenia*.[232]

Art. 5 § 1 also stipulates that deprivation of liberty must occur 'in accordance with a procedure prescribed by law', hence implying that it necessitates a legal basis in domestic law. However, this phrase extends beyond mere domestic legality, also encompassing the quality of the law and requiring compatibility with the rule of law. This is an inherent concept throughout the Convention,[233] which is clearly demon-

220 Lautenbach, 2013, p. 102.
221 Lautenbach, 2013, p. 72.
222 Ibid.
223 Ibid.
224 Ibid.
225 Ibid.
226 Lauc, 2016, p. 58.
227 Ibid.
228 *Khlaifia and Others v. Italy* (App. no. 16483/12), 15 December 2016.
229 Ibid., § 91.
230 *Del Río Prada v. Spain* (App. no. 42750/09), 21 October 2013, § 125.
231 *Herczegfalvy v. Austria* (App. no. 10533/83), 24 September 1992, § 63.
232 *L.M. v. Slovenia* (App. no. 32863/05), 12 June 2014 (Final 12 September 2014), § 121.
233 *Khlaifia and Others v. Italy*, § 91.

strated in the case of *Abdolkhani and Karimnia v. Turkey*.[234] In the case *Khlaifia and Others v. Italy*, the ECtHR underscored, especially concerning deprivation of liberty, the significance of the principle of legal certainty,[235] describing that the conditions for deprivation of liberty must be distinctly defined in domestic law, and the law itself must be predictable in its application.[236] This adherence to the 'lawfulness' standard set by the Convention necessitates that the law's precision enables individuals, with or without appropriate advice, to reasonably foresee the potential consequences of their actions.[237] In the *Khlaifia and Others v. Italy* case, the ECtHR identified violations of Art. 5 § 1, § 2, and § 4, as well as of Art. 3 of the Convention due to the conditions of the detention at Contrada Imbriacola CSPA.[238] There was also the establishment of a violation of Art. 13 of the Convention in conjunction with Art. 3.[239] However, the ECtHR did not find violations in relation to the conditions aboard the ships Vincent and Audace, Art. 4 of Protocol No. 4 to the Convention, and Art. 13 of the Convention combined with Art. 4 of Protocol No. 4.[240]

B.3 Judicial Safeguards within 'Legality' and Convention Art. 6

In the context of legality, judicial safeguards do not adhere to the same standards present in the right to a fair trial, which is protected by Art. 6. Legality requires some form of adversarial proceedings before an independent authority or a competent court to address the legality of measures that interfere with Convention rights.[241] Adversarial proceedings imply compliance with the principle of equality of arms and the ability to present arguments,[242] and the applicant must have had a reasonable opportunity to present their case.[243] The proceedings must involve meaningful and independent scrutiny of the original measure, as a formalistic approach may be inadequate.[244]

Furthermore, as Lautenbach notes, judicial safeguards must originate from an impartial body that remains independent of the executive and other interested parties.[245] Particularly in cases involving discretionary powers, the judiciary should supervise at least in the last resort.[246] In the *Rotaru v. Romania* case,[247] the ECtHR

234 *Abdolkhani and Karimnia v. Turkey* (App. no. 30471/08), 22 September 2009 (Final 1 March 2010), § 130.
235 *Khlaifia and Others v. Italy*, § 91.
236 Ibid.
237 *Khlaifia and Others v. Italy*, § 92.
238 *Khlaifia and Others v. Italy*, § 289.
239 Ibid.
240 Ibid.
241 Lautenbach, 2013, p. 103.
242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.
247 *Rotaru v. Romania* (App. no. 28341/95), 4 May 2000, § 59.

emphasised primarily the judiciary, highlighting that ensuring independence, impartiality, and adherence to a proper procedure should enable the effective supervision of any interference by executive authorities with an individual's rights.[248]

In the context of Art. 6, the emphasis shifts to the requirement of enforcing prior decisions, highlighting the intricate balance between the rule of law, fair trial principles, and institutional integrity.[249] Concerning the automatic inadmissibility of appeals on points of law by appellants who have evaded custody despite issued arrest warrants, several nuanced considerations emerge. For example, a declaration of inadmissibility rooted in an appellant's absconding constitutes a disproportionate response, emphasising the rule of law's significance within democratic societies for safeguarding defence rights.[250] The cases of *Poitrimol v. France,*[251] *Guérin v. France,*[252] and *Omar v. France*[253] echo this viewpoint.[254] Declaring an appeal inadmissible solely because an appellant has not surrendered to custody before challenging a judicial decision places an undue burden on the appellant, disrupting the balance between enforcing judicial decisions and safeguarding one's access to the Court of Cassation and defence rights.[255] This dynamic underscores the rule of law's role in ensuring due process and equitable proceedings, as illustrated in cases[256] like *Poitrimol v. France*[257] and *Guérin v. France.*[258]

In the case of *Gillow v. United Kingdom*,[259] the applicants claimed that housing laws were vague and granted excessive discretion to the authorities.[260] The ECtHR disagreed, stating that the scope of discretion and its exercise were sufficiently clear and subject to judicial control through an appeal procedure.[261] Similarly, in the case of *Kopp v. Switzerland*,[262] the ECtHR found it surprising that an executive member, rather than an independent judge, supervised secret surveillance methods.[263] It further described that when a judicial body has only an advisory role in supervision, it is insufficient to meet the requirement of judicial safeguards.[264] In the case of

248 Lautenbach, 2013, p. 103.
249 Guide on Art. 6 of the ECHR – Right to a fair trial (criminal limb), Updated on 30 April 2022, § 67.
250 Guide on Art. 6, § 67.
251 *Poitrimol v. France* (App. no. 14032/88), 23 November 1993, § 38.
252 *Guérin v. France* (App. no. 51/1997/835/1041), 29 July 1998, §§ 40–47.
253 *Omar v. France* (App. no. 43/1997/827/1033), 29 July 1998, §§ 42–44.
254 Guide on Art. 6, § 67.
255 Guide on Art. 6, § 67.
256 Ibid.
257 *Poitrimol v. France*, §§ 40–41.
258 *Guérin v. France*, §§ 43–44.
259 *Gillow v. United Kingdom* (App. no. 9063/80), 24 November 1986, §§ 29–34.
260 Lautenbach, 2013, p. 104.
261 *Gillow v. United Kingdom* (App. no. 9063/80), 24 November 1986, §§ 69–74; see also: Lautenbach, 2013, p. 104.
262 *Kopp v. Switzerland* (App. no. 13/1997/797/1000), 25 March 1998, § 64.
263 See also: Lautenbach, 2013, p. 104.
264 Ibid.

Sanoma Uitgevers BV v. Netherlands,[265] the ECtHR emphasised that decision-making powers must rest with the body providing the procedural safeguards.[266] Additionally, the criteria for decision-making should be clear, including considering whether a less intrusive measure can suffice to serve the overriding public interests established.[267]

Legality also entails the execution of legal rulings.[268] In the case of *Hasan and Chaush v. Bulgaria*,[269] which concerned the freedom of religion,[270] the ECtHR emphasised that the rule of law requires state authorities to abide by judicial orders or decisions against them.[271] The ECtHR found that the law did not prescribe the state's interference with the internal organisation of the Muslim community and the applicants' freedom of religion.[272] This was due to the law granting unfettered discretion to the executive without appropriate safeguards, such as an adversarial procedure before an independent body, to challenge the arbitrary exercise of these discretionary powers.[273] Another critical factor leading to the ECtHR's ruling was the state authorities' refusal to comply with the judgments of the Supreme Court.[274] The ECtHR considered this refusal to be a clear unlawful act of significant gravity, contravening the rule of law.[275]

B.4 Judicial Safeguards within 'Legality' and Convention Art. 13

The stipulations in Art. 13 of the Convention, along with various Convention provisions, adopt the form of a guarantee rather than a mere expression of intent

265 *Sanoma Uitgevers BV v. Netherlands* (App. no. 38224/03), 14 September 2010, §§ 90, 93.
The case was about an illicit street race that occurred in an industrial area near Hoorn on 12 January 2002. Autoweek journalists attended, invited by the organisers, and were allowed to capture photos of the race and its participants on the condition of keeping their identities secret. The government disputes any such agreement beyond a few organisers. Police, present at the race, eventually intervened to halt it, making no arrests. Autoweek intended to publish an Art. about illegal car races in its 6 February 2002 issue (no. 7/2002), accompanied by anonymised photos from the January 12 race. The original photos were stored on a CD-ROM in the editorial office of one of the other magazines of the company, not in that of Autoweek. Subsequently, law enforcement suspected one of the vehicles present in the race to having had been used in a robbery on 1 February 2001. On the morning of 1 February 2002, a police officer called Autoweek's office, requesting the surrender of photographs from a street race on 12 January 2002. The features chief editor explained that they could not comply owing to the journalists' promise of anonymity to race participants. Later that day, two detectives visited and issued a summons demanding the photos for a criminal investigation, but Autoweek's editor-in-chief, Mr. Broekhuijsen, refused, citing the journalists' commitment to anonymity. See also §§ 10–16.
266 See also: Lautenbach, 2013, p. 104.
267 Ibid.
268 Ibid.
269 *Hasan and Chaush v. Bulgaria* (App. no. 30985/96), 26 October 2000.
270 Lautenbach, 2013, p. 104.
271 *Hasan and Chaush v. Bulgaria*, § 87.
272 Lautenbach, 2013, p. 104.
273 Ibid.
274 Ibid.
275 Ibid.

or a practical arrangement.[276] This is an inherent consequence of the rule of law that permeates all Convention articles[277] and is expounded in cases such as *Čonka v. Belgium*,[278] *Gebremedhin [Gaberamadhien] v. France*,[279] *Singh and Others v. Belgium*,[280] *A.C. and Others v. Spain*,[281] and *Allanazarova v. Russia*.[282] This is an inherent consequence of the rule of law, permeating throughout all Convention articles.

Art. 13 obligates states to provide effective remedies for all Convention rights.[283] Judicial review is also vital as a requirement of legality, one which ensures that governmental actions adhere to the boundaries set by the law.[284] This makes regarding judicial safeguards as a requirement of legality consistent with the theoretical conceptions of legality.[285] Judicial review is commonly regarded as the most effective means to ensure governmental adherence to the law.[286] Considering this common perception, it is somewhat surprising that the ECtHR does not consistently require judicial review, but rather focuses on situations where the government possesses extensive discretionary powers.[287] Within this framework, it becomes imperative that the exercise of remedies is not unjustly obstructed by actions/inactions on the part of the respondent state, as seen in *Aksoy v. Turkey*,[288] *Aydın v. Turkey*,[289] and *Paul and Audrey Edwards v. the United Kingdom*.[290] In this context, when a litigant, represented by legal counsel, freely initiates legal proceedings, presents arguments before the court, and files appropriate appeals against its judgments,[291] a hindrance to access to a tribunal does not arise. The mere fact that the proceedings are taking a long time also does not concern access to a tribunal, thus configuring no violation of Art. 13, as exemplified in case *Matos e Silva, Lda., and Others v. Portugal*.[292] However, the ECtHR took a different standpoint in the case *Kaić and Others v. Croatia*,[293] in which the excessive length of the proceedings, among other reasons, led the ECtHR to find a violation of Art. 13 and Art. 6 (1).[294]

276 Guide on Art. 13 of the ECHR – Right to an effective remedy, Updated on 30 April 2022, § 9, p. 8.
277 Guide on Art. 13, § 9, p. 8.
278 *Čonka v. Belgium* (App. no. 51564/99), 5 February 2002 (Final 5 February 2002), § 83.
279 *Gebremedhin [Gaberamadhien] v. France* (App. no. 25389/05), 26 April 2007 (Final 26 July 2007), § 66.
280 *Singh and Others v. Belgium* (App. no. 33210/11), 2 Octobre 2012 (Final 2 January 2013), § 98.
281 *A.C. and Others v. Spain* (App. no. 6528/11), 22 April 2014 (Final 22 July 2014), § 95.
282 *Allanazarova v. Russia* (App. no. 46721/15), 14 February 2017 (Final 3 July 2017), § 97.
283 See also: Lautenbach, 2013, p. 102.
284 Ibid.
285 Ibid.
286 See also: Lautenbach, 2013, p. 122.
287 Ibid.
288 *Aksoy v. Turkey* (App. no. 21987/93), 18 December 1996, §§ 95–100.
289 *Aydın v. Turkey* (App. no. 57/1996/676/866), 25 September 1997, §§ 103–109.
290 *Paul and Audrey Edwards v. the United Kingdom* (App. no. 46477/99), 14 March 2002 (Final 14 June 2002), §§ 96–102.
291 Guide on Art. 13, § 45, p. 17.
292 *Matos e Silva, Lda., and Others v. Portugal* (App. no. 15777/89), 16 September 1996, § 64.
293 *Kaić and Others v. Croatia* (App. no. 22014/04), 17 July 2008 (Final 17 October 2008), § 44.
294 *Kaić and Others v. Croatia* §§ 27, and 38–44.

The obligation placed upon states by Art. 13 encompasses thus the duty to ensure the enforcement of remedies once granted.[295] It would be inconceivable if Art. 13 was to secure the right to a remedy and prescribe its effectiveness, yet fail to guarantee the actual implementation of remedies that have proven successful.[296] To hold such a contrary view would lead to circumstances incompatible with the fundamental tenets of the rule of law, a principle to which the Contracting States committed when ratifying the Convention.[297] These delineations are evident in cases *Kenedi v. Hungary*[298] and *Kaić and Others v. Croatia*,[299] wherein the ECtHR found a violation of Art. 13.[300] The interplay between Art. 13, remedies, and the rule of law underscores the essence of a democratic society built upon justice, accountability, and the protection of individual rights.[301]

C. Other Aspects of the Rule of Law in Different Convention Articles

As shown thus far, the concept of the rule of law, encompassing substantive and procedural dimensions, holds a vital place within the framework of the Convention. As we delve into the articles of the Convention, the significant role of the rule of law's substantive aspect becomes evident, particularly in safeguarding fundamental rights (e.g. right to life, prohibition of torture, and right to liberty and security). Given the extensive volume of cases, the majority of articles within the Convention will only encompass a select few, particularly focusing on well-established case law. The following explorations will shed light on how the rule of law intersects with these articles, delineating the intricate balance between ensuring individuals' substantive rights and upholding procedural fairness.

C.1 Some Aspects of the Rule of Law in Convention Arts. 2 and 3

In the context of Art. 2 (Right to life), the ECtHR acknowledges the potential obstacles that might impede investigations, recognising the importance of overcoming challenges that might arise during the investigative process.[302] Despite such challenges, the ECtHR places a strong emphasis on the necessity of swift and thorough investigations, particularly in cases involving the use of lethal force.[303] Proactive responses from authorities in such instances not only uphold public trust in their

295 Guide on Art. 13, § 45, p. 17.
296 Ibid.
297 Ibid.
298 *Kenedi v. Hungary* (App. no. 31475/05), 26 May 2009 (Final 26 August 2009), § 47.
299 *Kaić and Others v. Croatia*, § 40.
300 *Kenedi v. Hungary*, § 48; and Kaić and Others v. Croatia, § 44.
301 Guide on Art. 13, § 45, p. 17.
302 Guide on Art. 2 of the ECHR – Right to life, Updated on 30 April 2022, § 168; see also: Josifović and Kambovski, 2021, pp. 447–461.
303 Guide on Art. 2, § 168; Josifović and Kambovski, 2021, pp. 447–461.

commitment to the rule of law, but also prevent any perception of collusion or tolerance toward unlawful actions.[304] This is exemplified in cases like *Armani Da Silva v. the United Kingdom,*[305] *Al-Skeini and Others v. the United Kingdom*[306] case, and *Tahsin Acar v. Turkey* case,[307] where:

> there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.[308]

Moving on to Art. 3 (Prohibition of torture), the ECtHR showcases the pivotal role played by authorities in conducting comprehensive investigations when facing allegations of ill-treatment perpetrated by law enforcement or state agents.[309] These investigations must adhere to the established standards outlined in Art. 3, and aim to uphold public trust in the authorities' dedication to the rule of law and prevent any appearance of collusion or tolerance toward unlawful activities[310] – as stated by the ECtHR in the case *Lyapin v. Russia*.[311] Art. 3 also underlines the importance of promptness and reasonable expedition in these investigations.[312] Although certain situations might pose challenges to investigations, initiating inquiries promptly remains crucial.[313] This proactive approach reinforces public trust in the authorities' unwavering commitment to the principles of the rule of law,[314] and concomitantly acts as a deterrent against any potential perception of collusion or acceptance of unlawful conduct, as noted in the case *Bouyid v. Belgium.*[315]

C.2 Convention Art. 4 and the Rule of Law

Art. 4 of the Convention (Prohibition of slavery and forced labour) establishes one of the fundamental values inherent to democratic societies, and underscores the significance of the rule of law. [316] In its case law, the ECtHR, while interpreting the Convention, customarily necessitates the interpretation and application of its

304 Guide on Art. 2, § 168.
305 *Armani Da Silva v. the United Kingdom* (App. no. 5878/08), 30 March 2016, §§ 237–238.
306 *Al-Skeini and Others v. the United Kingdom* (App. no. 55721/07), 7 July 2011, § 167.
307 *Al-Skeini and Others v. the United Kingdom*, § 167 and *Tahsin Acar v. Turkey* (App. no. 26307/95), 8 April 2004, § 224.
308 *Tahsin Acar v. Turkey*, § 225.
309 Guide on Art. 3 of the ECHR – Prohibition of torture – First edition – 30 April 2022, § 132.
310 Guide on Art. 3, § 132.
311 *Lyapin v. Russia* (App. no. 46956/09), 24 July 2014 (Final 24 October 2014), § 139.
312 Guide on Art. 3, § 132.
313 Ibid.
314 Ibid.
315 *Bouyid v. Belgium* (App. no. 23380/09), 28 September 2015, § 121.
316 Guide on Art. 4 of the ECHR – Prohibition of slavery and forced labour, Updated on 31 August 2022, § 1, p. 5.

provisions in a manner that ensures the practicality and effectiveness of its safeguards. In the context of Art. 4, the ECtHR draws upon international instruments for such purposes, including the 1926 Slavery Convention,[317] the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,[318] ILO Convention No. 29 (Forced Labor Convention),[319] the Council of Europe Convention on Action against Trafficking in Human Beings (the Anti-Trafficking Convention),[320] and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women, and Children – the latter which supplements the United Nations Convention against Transnational Organized Crime (the 'Palermo Protocol') of 2000.[321] This is established[322] in case *Rantsev v. Cyprus and Russia*,[323] where the ECtHR concluded that trafficking human begins falls within the scope of the Art. 4. of the Convention:

> There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention,

317 The Slavery Convention, 1926.

318 The United Nations' Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956.

319 ILO's Forced Labor Convention, No. 29, 1930.

320 Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

321 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women, and Children, which supplements the United Nations Convention against Transnational Organized Crime (also called the 'Palermo Protocol') of 2000.

322 Guide on Art. 4, §§ 5–6, p. 6.

323 *Rantsev v. Cyprus and Russia* (App. no. 25965/04), 7 January 2010 (Final 10 May 2010), §§ 273–275. For more about that case, see also Derenčinović, 2021a, pp. 97–120.
In cases involving cross-border trafficking, such offenses can occur both in the victim's home country and the destination country. In the context of Cyprus, it was highlighted that victim recruitment is often a collaborative effort between agents in Cyprus and other countries. Neglecting to investigate recruitment allows a significant part of the trafficking network to operate with impunity, and the Court stressed that the definition of trafficking in the Palermo Protocol and the Anti-Trafficking Convention includes recruitment. Therefore, a comprehensive investigation covering all aspects of trafficking, from recruitment to exploitation, was essential. The Russian authorities were obligated to investigate whether individual agents or networks in Russia were involved in trafficking Ms. Rantseva to Cyprus. However, the Court noted that the Russian authorities failed to investigate the circumstances of Ms. Rantseva's recruitment, including those responsible and the methods used. Given that the recruitment occurred in Russia, the authorities were best positioned to conduct a thorough inquiry. This omission is particularly serious, especially considering Ms. Rantseva's subsequent death and the uncertainty surrounding her departure from Russia. *Rantsev v. Cyprus and Russia*, §§ 307–308.

> falls within the scope of Article 4 of the Convention. The Russian Government's objection of incompatibility *ratione materiae* is accordingly dismissed.[324]

However, and importantly, the ECtHR's jurisdiction is confined to matters pertaining to the Convention,[325] hence lacking the authority to interpret provisions of international instruments, such as the Anti-Trafficking Convention. It also cannot evaluate the compliance of respondent states with the standards outlined in these instruments,[326] as described in case *V.C.L. and A.N. v. the United Kingdom*.[327] For a more comprehensive analysis of Art. 4(1), it should be emphasised that it mandates that 'no individual shall be subject to slavery or servitude', lacks provisions for exceptions, and does not permit any derogations, even in circumstances of a public emergency endangering the life of the nation. Accordingly, Art 4.(1) highlights the centrality of the rule of law,[328] as affirmed in cases *C.N. v. the United Kingdom*,[329] *Stummer v. Austria,*[330] and *Siliadin v. France*.[331]

> The Court reiterates that Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation… [332]

Furthermore, Art. 4(2) prohibits 'forced or compulsory labor', a notion that encompasses safeguards against instances of severe exploitation, irrespective of whether they pertain to the specific context of human trafficking. This once more underscores the importance of the rule of law,[333] as elucidated in cases *S.M. v. Croatia*[334]

324 *Rantsev v. Cyprus and Russia*, §§ 282.
325 Guide on Art. 4, § 7, p. 6.
326 Ibid.
327 *V.C.L. and A.N. v. the United Kingdom* (App. nos. 77587/12 and 74603/12), 16 February 2021 (Final 5 July 2021), § 113.
328 Guide on Art. 4, §§ 1–2, p. 5.
329 *C.N. v. the United Kingdom* (App. no. 4239/08), 13 November 2012 (Final 13 February 2013), § 65.
330 *Stummer v. Austria* (App. no. 37452/02), 7 July 2011, § 116.
331 *Siliadin v. France* (App. no. 73316/01), 26 July 2005 (Final 26 October 2005).
332 *Siliadin v. France*, § 112.
333 Guide on Art. 4, § 3, p. 5.
334 *S.M. v. Croatia* (App. no. 60561/14), 25 June 2020, § 300.
In this case, the applicant alleged that a former police officer, T.M., had coerced her into prostitution, and she received administrative recognition as a potential victim of human trafficking. However, the Court clarified that this recognition did not establish the elements of human trafficking as a criminal offense, which needed to be determined in subsequent criminal proceedings. The Court examined the case in light of the three key elements of human trafficking, namely recruitment, use of force, and potential involvement in harbouring and debt bondage. Additionally, it considered T.M.'s abuse of the applicant's vulnerability. As a result, the Court found that the applicant presented a plausible claim supported by initial evidence of being a victim of human trafficking or forced prostitution. However, the procedural response to this claim exhibited significant shortcomings,

and *Zoletic and Others v. Azerbaijan*.[335] Such conduct may encompass elements that categorise it as 'slavery' or 'servitude', or give rise to concerns under other provisions of the Convention, as highlighted in the *S.M. v. Croatia* case,[336] as follows:

> In conclusion, having regard to the above considerations, the Court finds the following:
> (i) Human trafficking falls within the scope of Article 4 of the Convention. This, however, does not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct related to human trafficking may raise an issue under another provision of the Convention (see paragraph 297 above);
> (ii) It is not possible to characterise conduct or a situation as an issue of human trafficking under Article 4 of the Convention unless the constituent elements of the international definition of trafficking (action, means, purpose), under the Anti-Trafficking Convention and the Palermo Protocol, are present. In this connection, from the perspective of Article 4 of the Convention, the concept of human trafficking relates to both national and transnational trafficking in human beings, irrespective of whether or not connected with organised crime (see paragraph 296 above);
> (iii) The notion of "forced or compulsory labour" under Article 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context. Any such conduct may have elements qualifying it as "slavery" or "servitude" under Article 4, or may raise an issue under another provision of the Convention (see paragraphs 300-01 above);
> (iv) The question whether a particular situation involved all the constituent elements of "human trafficking" and/or gives rise to a separate issue of forced prostitution is a factual question which must be examined in the light of all the relevant circumstances of a case (see paragraph 302 above).[337]

Additionally, Art. 4(3) is designed not to restrict the exercise of the right guaranteed by para. 2, but to delineate the precise scope of that right and underline the rule of law.[338] It constitutes an integral component of para. 2, elucidating what falls outside the purview of the term 'forced or compulsory labor',[339] as noted in the *S.M. v. Croatia* case, which is shown below:

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including a failure to pursue obvious lines of inquiry to ascertain the true nature of the relationship between the parties, and overreliance on the applicant's testimony without considering the potential impact of psychological trauma on her ability to provide a consistent and clear account of her exploitation.

335 *Zoletic and Others v. Azerbaijan* (App. no. 20116/12), 7 October 2021 (Final 7 January 2022), § 148.
336 *S.M. v. Croatia* (App. no. 60561/14), 25 June 2020.
337 *S.M. v. Croatia*, § 303.
338 Guide on Art. 4, § 4, p. 5.
339 Ibid.

> Relying on the above analysis of its case-law under Article 4 of the Convention (see paragraphs 281-85 above), the Court finds that the notion of "forced or compulsory labour" under Article 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context. Moreover, any such conduct may have elements qualifying it as "servitude" or "slavery" under Article 4, or may raise an issue under another provision of the Convention (see paragraphs 241 and 280 above).[340]

Of importance, this chapter focuses on a limited selection of significant cases owing to their importance, even if numerous other crucial cases exist. Unfortunately, they are beyond the scope of this chapter due to space constraints.

C.3 Aspects of the Rule of Law in Convention Art. 5

In the realm of liberty and deprivation, the boundaries are defined within the context of the right to liberty and security, namely in the context of Art. 5(1).[341] This provision stipulates the permissible grounds for lawful deprivation of liberty, encompassing subparagraphs (a) to (f). It is underscored in pivotal cases[342] like *Khlaifia and Others v. Italy,*[343] and more recent instances such as *Aftanache v. Romania*[344] and *I.S. v. Switzerland*.[345] In these cases, the ECtHR found that Art. 5(1) was violated.[346]

These judicial tenets are reinforced by three interconnected strands of reasoning, which in turn are elucidated in the ECtHR's jurisprudence.[347] First, the exclusivity of the exceptions, demanding a stringent interpretation that precludes the expansive range of justifications found under other Convention provisions (notably Arts. 8–11).[348] Second, the significance of the detention's lawfulness, both procedurally and substantively, necessitating an unwavering adherence to the rule of law.[349] Third, the timeliness of judicial oversight, particularly within the purview of Art. 5(3, 4),[350] which is made evident in seminal cases like *Selahattin Demirtaş v. Turkey (no. 2),*[351] *S., V. and A. v. Denmark*,[352] and *Buzadji v. the Republic of Moldova*.[353]

340 *S.M. v. Croatia*, § 300.
341 Guide on Art. 5 of the ECHR – Right to liberty and security, Updated on 30 April 2022, § 25.
342 Guide on Art. 5, § 25.
343 *Khlaifia and Others v. Italy* (App. no. 16483/12), 15 December 2016, § 88.
344 *Aftanache v. Romania* (App. no. 999/19), 26 May 2020 (Final 26 August 2020), §§ 92–100.
345 *I.S. v. Switzerland (*App. no. 60202/15), 6 October 2020 (Final 6 January 2021), §§ 46–60.
346 *Aftanache v. Romania*, § 100 and I.S. v. Switzerland, § 61.
347 Guide on Art. 5, § 26.
348 Ibid.
349 Ibid.
350 Ibid.
351 *Selahattin Demirtaş v. Turkey* (no. 2) (App. no. 14305/17), 22 December 2020, §§ 312–313.
352 *S., V. and A. v. Denmark* (App. nos. 35553/12, 36678/12 and 36711/12), 22 October 2018, § 73.
353 *Buzadji v. the Republic of Moldova* (App. no. 23755/07), 5 July 2016, § 84.

It remains that compliance with domestic law alone does not satisfy the requirement of lawfulness. Instead, domestic law must align with the Convention's parameters, encompassing its implicit or explicit general principles.[354] These principles comprise the rule of law and its corollaries, including legal certainty, proportionality, and protection against arbitrariness, which harmonise with the very essence of Art. 5.[355]

The imperatives of prompt action present in Art. 5 become very evident in the context of release order execution.[356] While the rule of law mandates prompt compliance with court release orders, the ECtHR acknowledges that some delays are inevitable.[357] Nevertheless, the authorities are obliged to minimise such delays, as stipulated in cases like *Assanidze v. Georgia*[358] and *Giulia Manzoni v. Italy.*[359] The emphasis here is that administrative procedures linked to release cannot substantiate delays exceeding a few hours, as demonstrated in cases such as *Ruslan Yakovenko v. Ukraine*[360] and *Quinn v. France.*[361]

Considering these delineations, in instances where an individual's detention persists despite the absence of grounds, a violation of Art. 5 becomes apparent.[362] Even brief periods of wrongful detention arising from administrative lapses, as illustrated in *Kerem Çiftçi v. Turkey*,[363] run afoul of the Convention's provisions.[364] This establishes a compelling jurisprudential framework that underscores the sanctity of liberty, the primacy of the rule of law, and the imperativeness of timely and just action in matters of detention and release.[365]

The second limb of Art. 5(1b) has the function to ensure the 'fulfillment of an obligation prescribed by law'[366] in line with the rule of law, something exemplified in the *Vasileva v. Denmark* case.[367] Under this provision, detention is permissible only when it serves the purpose of securing the satisfaction of an outstanding obligation, and should avoid any punitive intent.[368] Upon the fulfilment of the relevant obligation, the basis for detention under this provision expires, as noted in the case *S., V. and A. v. Denmark*.[369] Domestic law is the reference point for both the content

354 Guide on Art. 5, § 32.
355 Ibid.
356 Guide on Art. 5, § 50.
357 Ibid.
358 *Assanidze v. Georgia* (App. no. 71503/01), 8 April 2004, § 173.
359 *Giulia Manzoni v. Italy* (App. no. 19218/91), 1 July 1997, § 25.
360 *Ruslan Yakovenko v. Ukraine* (App. no. 5425/11), 4 June 2015 (Final 4 September 2015), § 68.
361 *Quinn v. France* (App. no. 18580/91), 22 March 1995, §§ 39–43.
362 Guide on Art. 5, § 50.
363 *Kerem Çiftçi v. Turkey* (App. no. 35205/09), 21 September 2021 (Final 21 December 2021), §§ 32–34.
364 Guide on Art. 5, § 50.
365 Ibid.
366 Guide on Art. 5, § 71.
367 *Vasileva v. Denmark* (App. no. 52792/99), 25 September 2003 (Final 25 December 2003), § 36.
368 Guide on Art. 5, § 71.
369 *S., V. and A. v. Denmark*, §§ 80–81.

of the obligation and the procedure for its imposition and adherence,[370] as shown in the case *Rozhkov v. Russia (no. 2)*.[371] The specified obligation must possess a specific and tangible character, as its broad interpretation would conflict with the principles of the rule of law, as stated in cases[372] *S., V. and A. v. Denmark,*[373] *Engel and Others v. the Netherlands,*[374] and *Iliya Stefanov v. Bulgaria*.[375]

The aim of Art. 5(3) is to safeguard individuals detained under suspicion of criminal activity from arbitrary or unwarranted deprivation of liberty,[376] as established in cases *Aquilina v. Malta*[377] and *Stephens v. Malta (no. 2)*.[378] This provision crucially focuses on judicial control as a bulwark against encroachments on personal liberty by the executive and for promptness, as noted in *Brogan and Others v. the United Kingdom,*[379] *Pantea v. Romania,*[380] and *Assenov and Others v. Bulgaria*.[381] This judicial oversight is rooted in the rule of law, which, as mentioned before in this study and highlighted in *Brogan and Others v. the United Kingdom*,[382] is a fundamental principle of democratic societies explicitly enshrined in the Convention's preamble and that serves as its inspirational cornerstone.[383]

Such judicial control stands as a bulwark against ill-treatment especially during the initial stages of detention, a period when vulnerabilities are most pronounced.[384] It particularly acts as a check against potential abuses of power vested in law enforcement entities and other authorities, which should be constrained within narrowly-defined boundaries and meticulously executed in accordance with established protocols,[385] as noted in the *Ladent v. Poland*[386] case, as follows:

> the ECtHR case law establishes that there must be the protection of an individual arrested or detained on suspicion of having committed a criminal offense through judicial control. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against

370 Guide on Art. 5, § 72.
371 *Rozhkov v. Russia* (no. 2) (App. no. 38898/04), 31 January 2017 (Final 29 May 2017), § 89.
372 Guide on Art. 5, § 73.
373 *S., V. and A. v. Denmark*, § 83.
374 *Engel and Others v. the Netherlands* (App. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 8 June 1976, § 69.
375 *Iliya Stefanov v. Bulgaria* (App. no. 65755/01), 22 May 2008 (Final 22 August 2008), § 72.
376 Guide on Art. 5, § 173.
377 *Aquilina v. Malta* (App. no. 25642/94), 29 April 1999, § 47.
378 *Stephens v. Malta* (no. 2) (App. no. 33740/06), 21 April 2009 (Final 14 September 2009) § 52.
379 *Brogan and Others v. the United Kingdom* (App. nos. 11209/84; 11234/84; 11266/84; 11386/85), 29 November 1988, § 58.
380 *Pantea v. Romania* (App. no. 33343/96), 3 June 2003 (Final 3 September 2003), § 236.
381 *Assenov and Others v. Bulgaria* (App. no. 90/1997/874/1086), 28 October 1998, § 146.
382 *Brogan and Others v. the United Kingdom*, § 58.
383 Guide on Art. 5, § 174.
384 Guide on Art. 5, § 175.
385 Ibid.
386 *Ladent v. Poland* (App. no. 11036/03), 18 March 2008 (Final 18 June 2008), § 72.

> the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the requirements of promptness and be automatic.[387]

This interplay between detention and judicial control represents a multifaceted safeguard mechanism embedded within the Convention's framework, aimed at upholding the integrity of individual liberty within a democratic legal order.

C.4 Other Aspects of the Rule of Law and Art. 6

Analysing the scope of Art. 6 (Right to a fair trial), an intricate interplay appears among the principles that collectively shape the essence of the Convention's safeguards, exerting a profound impact on the rule of law and the legitimacy of judicial systems.[388] Indeed, at the heart of a tribunal's credibility and of the phrase 'a tribunal established by law' lies its establishment 'in accordance with the law', which in turn is enshrined in Art. 6(1).[389] This fundamental principle resonates with the core values of the rule of law, which are integral to the Convention's protective framework and its Protocols,[390] as shown in the *Richert v. Poland,*[391] *Jorgic v. Germany,*[392] *Lavents v. Latvia,*[393] *Gorgiladze v. Georgia,*[394] and *Kontalexis v. Greece*[395] cases. These descriptions echo that a tribunal devoid of this legal underpinning would lack the essential legitimacy required to address individual grievances within a democratic society, and in so doing, they underline the rule of law's pivotal role in maintaining the integrity of judicial processes.[396] The term 'law', as defined in Art. 6(1), encompasses legislative provisions that not only govern the establishment and competence of judicial entities – as exemplified in cases *Lavents v. Latvia,*[397] *Richert v. Poland,*[398] and *Jorgic v. Germany*[399] – but also extend to address any breach of domestic law that renders the involvement of judges in a case unlawful.[400] The latter is noted by the ECtHR in cases *Gorgiladze v. Georgia*[401]

387 *Ladent v. Poland*, § 72.
388 Guide on Art. 6, § 77.
389 Ibid.
390 Ibid.
391 *Richert v. Poland* (App. no. 54809/07), 25 October 2011 (Final 25 January 2012), § 41.
392 *Jorgic v. Germany* (App. no. 74613/01), 12 July 2007 (Final 12 October 2007), §§ 64–65.
393 *Lavents v. Latvia (*App. no. 58442/00), 28 November 2002 (Final 28 February 2003), § 114.
394 *Gorgiladze v. Georgia* (App. no. 4313/04), 20 October 2009 (Final 20 January 2010) § 67.
395 *Kontalexis v. Greece* (App. no. 59000/08), 31 May 2011 (Final 28 November 2011) §§ 38–39.
396 Guide on Art. 6, § 77.
397 *Lavents v. Latvia*, § 114.
398 *Richert v. Poland*, § 41.
399 *Jorgic v. Germany*, § 64.
400 Guide on Art. 6, § 78.
401 *Gorgiladze v. Georgia* (App. no. 4313/04), 20 October 2009 (Final 20/01/2010), § 68.

and *Pandjikidze and Others v. Georgia.*[402] In the latter case, the ECtHR noted the following:

> the "law" referred to in Article 6 § 1 is not only the legislation relating to the establishment and competence of judicial bodies but also any other provision of domestic law the non-compliance with which renders the participation of one or several judges to examine the case. These include provisions relating to mandates, incompatibilities, and the disqualification of magistrates… Furthermore, the phrase "established by law" concerns not only the legal basis for the very existence of the "court" but also the composition of the seat in each case… [403]

Afterwards, the ECtHR continues with the description below:

> according to case law, the introduction of the term "established by law" in Article 6 of the Convention is intended to prevent the organisation of the judicial system from being left to the discretion of the executive and ensure that this matter is governed by an Act of Parliament. In countries with codified law, the organisation of the judicial system cannot be left to the discretion of the judicial authorities, which does not, however, exclude granting them a certain power of interpretation of the national legislation in this area… However, in principle, a court that exceeds its jurisdictional powers clearly devolved to it by law cannot be considered a "court established by law". [404]

This concept of being 'established by law' goes beyond mere legality in tribunal existence to encompass adherence to specific rules in the composition of the bench.[405] This has been stated by the ECtHR in cases *Fatullayev v. Azerbaijan,*[406] *Posokhov v. Russia,*[407] and *Kontalexis v. Greece.*[408] This was described even during the judicial appointment process, as established by the Grand Chamber, in a key case, namely *Guðmundur Andri Ástráðsson v. Iceland.*[409]

Nevertheless, the ECtHR acknowledges that balancing these principles is an intricate task.[410] While a court's non-compliance with the requirement of being a 'tribunal established by law' may compromise legal certainty and judge irremovability, the unwavering adherence to these principles at the expense of foundational aspects

402 *Pandjikidze and Others v. Georgia* (App. no. 30323/02), 27 October 2009 (Final 27 January 2010), § 104.
403 *Pandjikidze and Others v. Georgia*, § 104.
404 *Pandjikidze and Others v. Georgia*, § 105.
405 Guide on Art. 6, § 78.
406 *Fatullayev v. Azerbaijan* (App. no. 40984/07), 22 April 2010 (Final 4 October 2010), § 144.
407 *Posokhov v. Russia* (App. no. 63486/00), 4 March 2003 (Final 4 June 2003), § 39.
408 *Kontalexis v. Greece*, § 42.
409 *Andri Ástráðsson v. Iceland* (App. no. 26374/18), 1 December 2020, §§ 226–228.
410 Guide on Art. 6, § 83.

might – in specific instances – undermine the rule of law and erode public trust in the judiciary.[411] Achieving equilibrium here hence necessitates evaluating whether a substantial and compelling need justifies deviating from legal certainty, *res judicata*, and judge irremovability, as exemplified[412] in *Guðmundur Andri Ástráðsson v. Iceland*.[413]

One highly interesting case was the *Advance Pharma SP. z o.o v. Poland*,[414] where Justice Kennedy compared the rule of law and the historical phrase '*per legem terrae*', dating back to the Magna Carta, which reflects the call for the preservation of fairness and justice. Stein described that the rule of law highlights the importance of these principles.[415] Furthermore, under the theme of the Magna Carta's influence on judges, the Consultative Council of European Judges (CCJE) introduced the Magna Carta of Judges (Fundamental Principles) in November 2010.[416] Pertinent passages state that the judiciary serves as a cornerstone of a democratic state, bring entrusted with ensuring the rule of law's existence and upholding law impartially, justly, fairly, and efficiently.[417] Examining Poland's situation, the Commission observed that more than 13 consecutive laws had been enacted over a period of two years, affecting the entire justice system's structure. These changes systematically empowered the executive and/or legislative powers to significantly interfere with various judicial bodies, endangering judicial independence and the separation of powers, both which are crucial facets of the rule of law.[418] The ongoing procedure under Art. 7(1) of the TEU is still being deliberated within the Council of the European Union.[419] To evaluate the severity of irregularities within a judicial appointment process and the potential violations of the 'tribunal established by law' principle, a threshold test comprising three cumulative criteria has been developed by the ECtHR[420] in the Grand Chamber case *Guðmundur Andri Ástráðsson v. Iceland*.[421] These three criteria are explored hereinafter.

First, a clear breach of domestic law must be objectively identifiable. However, violations of the right to a tribunal established by law can still occur even in the absence of such a breach; for example, if a procedure compliant with domestic rules

411 Ibid.
412 Ibid.
413 *Andri Ástráðsson v. Iceland*, § 240.
414 *Advance Pharma SP. z o.o v. Poland* (App. no. 1469/20), 3 February 2022 (Final 3 May 2022).
415 Justice Kennedy compared the rule of law to the phrase, 'Per Legem Terrae, or Law of the Land', dating back to the Magna Carta: 'It was an appeal to a general civic understanding that principles of fairness and justice must be respected.' Stein, 2019, [Online]. Available at: https://houstonlawreview.org/article/10858-what-exactly-is-the-rule-of-law (Accessed: 29 October 2023).
416 Consultative Council of European Judges, Magna Carta of judges [Online]. Available at: https://rm.coe.int/16807482c6 (Accessed: 29 October 2023).
417 *Advance Pharma SP. z o.o v. Poland*, § 185.
418 *Advance Pharma SP. z o.o v. Poland*, § 200.
419 Ibid.
420 *Advance Pharma SP. z o.o v. Poland*, §§ 252–267.
421 *Andri Ástráðsson v. Iceland*, §§ 243–252.

produces outcomes contrary to the principle's purpose.[422] Second, the significance of the breach of domestic law is measured against the requirement's purpose, ensuring an independent judiciary, the rule of law, and the separation of powers. Technical breaches with no bearing on legitimacy fall below the threshold, while fundamental rule violations or breaches undermining the purpose are considered violations.[423] Third, the assessment by national courts of the legal consequences of a breach forms a crucial part of the test, in that their evaluation should align with relevant Convention case law and principles.[424]

The conclusion in the case of *Advance Pharma SP. z o.o v. Poland* was that the ECtHR found a violation of Art. 6(1) of the Convention concerning the applicant company's right to an independent and impartial tribunal established by law.[425] As ECtHR noted in light of the overall assessment under the three-step test from *Guðmundur Andri Ástráðsson v. Iceland*, the formation of the Civil Chamber of the Supreme Court, which examined the applicant company's case, was not a 'tribunal established by law', configuring a violation of Art. 6(1) of the Convention.[426]

This case holds particular interest due to its relevance to the warnings provided by Sillen,[427] who emphasised the need for 'institutional stability ensuring the rule of law', and indicated a shift toward judicial self-governance, something that has become the norm in many Eastern and Central European nations and that reinforces overall judicial independence.[428] However, he further notes that while this approach enhances judicial independence, it may also pose challenges in countries lacking a strong culture of individual judge autonomy.[429] The conclusion is that the absence of external oversight in such systems can potentially compromise judges' autonomy.[430]

Additionally, the ECtHR has underscored that a judicial body lacking independence, particularly from the executive, cannot be classified as a 'tribunal' under Art. 6(1), emphasising the rule of law's fundamental role in ensuring impartiality and justice.[431] Similarly, determining the 'established by law' status of a 'tribunal' incorporates compliance with domestic law, again underscoring the rule of law's influence in shaping the foundational elements of a fair legal system, including the provisions safeguarding judicial independence.[432] Furthermore, breaches can render the participation of judges in a case 'irregular', highlighting the rule of law's significance in upholding due process and equitable proceedings.[433] Under Art. 6(1),

422 *Andri Ástráðsson v. Iceland*, §§ 244–245; see also: *Advance Pharma SP. z o.o v. Poland*, § 300.
423 *Andri Ástráðsson v. Iceland*, §§ 246–247; see also: *Advance Pharma SP. z o.o v. Poland*, § 301.
424 *Andri Ástráðsson v. Iceland*, §§ 248–252; see also: *Advance Pharma SP. z o.o v. Poland*, § 302.
425 *Advance Pharma SP. z o.o v. Poland*, §§ 350–352.
426 Ibid.
427 Sillen, 2019, p. 107.
428 Ibid.
429 Ibid.
430 Ibid.
431 Guide on Art. 6, § 73.
432 Ibid.
433 Ibid.

the assessment of a court's 'independence' considers factors like the appointment process of its members, demonstrating how the rule of law guides the formation of judiciaries.[434] While distinct in focus, these institutional demands within Art. 6(1) converge around the central objective of upholding the rule of law and the separation of powers, showcasing the rule of law's integral role in preserving democratic principles.[435] This essence permeates through cases like *Guðmundur Andri Ástráðsson v. Iceland*,[436] encapsulating the overarching ethos that binds the diverse aspects of fair trial guarantees and the rule of law's pervasive influence.[437]

The forfeiture of the right to appeal on points of law due to non-compliance with custody obligation aligns with the same principles, highlighting the rule of law's role in maintaining the integrity of legal processes. This is demonstrated[438] in cases *Khalfaoui v. France*[439] and *Papon v. France (no. 2)*.[440] Meanwhile, in the *Vayiç v. Turkey* case,[441] the ECtHR established that if an accused flees from a rule-of-law state, it is assumed that he surrenders the right to complain about post-flight proceeding duration, unless he provides compelling reasons to counter this presumption.[442]

The principle of legal certainty upholds stability in legal contexts and fosters public trust in the courts,[443] while contradictory court decisions chip away at this legal trust, thereby jeopardising the rule of law. [444] Although legal certainty and public trust are pivotal, they do not guarantee the unchanging right to consistency in case law.[445]

C.5 The Aspects of the Rule of Law in Convention Art. 7

The guarantee or principle enshrined in Art. 7 (No punishment without law), or the principle of legality (in criminal substantive law),[446] is an essential element of the rule of law, which holds a significant place in the Convention protection system.[447] This is underlined by the fact that no derogation from it is permissible under Art. 15, even in times of war or public emergency,[448] as stated in the *S.W. v. the United*

434 Ibid.
435 Ibid.
436 *Andri Ástráðsson v. Iceland*, §§ 232–233.
437 Guide on Art. 6, § 73.
438 Guide on Art. 6, § 67.
439 *Khalfaoui v. France* (App. no. 34791/97), 14 December 1999 (Final 14 March 2000), § 46.
440 *Papon v. France* (no. 2) (App. no. 54210/00), 25 July 2002 (Final 25 October 2002), § 100.
441 *Vayiç v. Turkey* (App. no. 18078/02), 20 June 2006 (Final 20 September 2006), § 44.
442 Guide on Art. 6, § 335.
443 Guide on Art. 6, § 265.
444 Ibid.
445 Ibid.
446 Krstulović Dragičević, 2016, pp. 403–433.
447 Guide on Art. 7 of the ECHR – No punishment without law, Updated on 30 April 2022, § 1.
448 Ibid.

Kingdom,[449] *Del Río Prada v. Spain,*[450] and *Vasiliauskas v. Lithuania*[451] cases. It should be interpreted and applied to provide effective safeguards against arbitrary prosecution, conviction, and punishment, aligning with its object and purpose.[452]

Furthermore, Art. 7 requires that criminal law should not be interpreted extensively to the detriment of an accused, such as by using analogies.[453] As mentioned many times thus far, the principle of legality, which pertains to criminal law, is a fundamental aspect of the Convention's rule of law concept.[454] The ECtHR interprets non-retroactivity and the principle of *nulla poena sine lege* to mean that an offense must be clearly defined in the law, and that the law must be sufficiently *accessible* and *foreseeable*.[455]

In the case *Yüksel Yalçinkaya v. Turkey*,[456] the ECtHR noted that the guarantee established in Art. 7 of the Convention, as a fundamental component of the rule of law, holds a prominent position within the Convention's protective framework. The interpretation and application of this guarantee should align with its intended purpose (i.e. provide robust safeguards against arbitrary prosecution, conviction, and punishment).[457] The ECtHR also acknowledged in the mentioned case the difficulties in combating terrorism, particularly given the evolving tactics,[458] along with the exceptional challenges faced by Turkish authorities in dealing with the FETÖ/PDY, as the organisation uses covert methods.[459] The ECtHR has previously deemed the post-coup situation as a 'public emergency threatening the nation's life' under the Convention.[460] However, it should be stressed that even in terrorism-related cases, the core safeguards in Art. 7 of the Convention are non-derogable rights central to the rule of law principle, and thus they must be upheld.[461] That is, states should adapt their anti-terrorism laws while respecting legal principles.[462] In this case, Turkish law required specific intent for membership in an armed terrorist organisation, but domestic courts applied an expansive interpretation that effectively imposed strict liability, which deviated from domestic law and the Convention's purpose.[463] The conclusion was that the ECtHR found a violation of Art. 7.[464]

449 *S.W. v. the United Kingdom* (App. no. 20166/92), 22 November 1995, § 34.
450 *Del Río Prada v. Spain*, § 77.
451 *Vasiliauskas v. Lithuania* (App. no. 35343/05), 20 October 2015, § 153.
452 Guide on Art. 7, § 1.
453 Lautenbach, 2013, p. 72.
454 Ibid. See also: Murphy, 2010, p. 192.
455 Ibid. See also: Murphy, 2010, p. 192.
456 *Yüksel Yalçinkaya v. Turkey* (App. no. 15669/20), 26 September 2023.
457 As indicated in the following cases: *Scoppola v. Italy* (no. 2) (App. no. 10249/03), 17 September 2009, § 92; *Del Río Prada v. Spain*, § 77; *Yüksel Yalçinkaya v. Turkey*, § 237.
458 *Yüksel Yalçinkaya v. Turkey*, § 269.
459 Ibid.
460 Ibid.
461 Ibid., § 270.
462 Ibid., § 271.
463 Ibid.
464 *Yüksel Yalçinkaya v. Turkey*, § 272.

Art. 7 also allows punishment based on international criminal law.[465] This principle holds true particularly with matters concerning the right to life, a fundamental value in both the Convention and the international hierarchy of human rights.[466] The contracting parties have a primary obligation to protect this right, as established in the case *Kononov v. Latvia*.[467] Furthermore, and as ECtHR established in the *Streletz, Kessler, and Krenz v. Germany*[468] and *Vasiliauskas v. Lithuania*[469] cases, the practice of tolerating or encouraging acts considered criminal under national or international legal instruments, along with the sense of impunity it fosters among perpetrators, should not prevent their prosecution and punishment.[470]

Still on the topic of punishment, there is yet another interesting case concerning preventive detention. In the case *M. v. Germany*,[471] M had been in preventive detention for nearly 18 years since 1991, which was the year when the prison sentence ended, hence amounting to nearly 18 years of prison after the sentence's ending.[472] In Germany, preventive detention was extended after amendments to the German Penal Code in 1998. The conclusion of the ECtHR was, as Derenčinović elaborates, that there is no causal link between the initial conviction and the extended detention of 10 years, which was possible only because of the amendments to the German Penal code in 1998.[473] The justification for his continued detention was the perceived threat he posed to the public, and M's attempts to challenge this perception in his country's courts were unsuccessful.[474] He then appealed to the ECtHR, which overturned the German Federal Constitutional Court's ruling on the legality of the preventive detention; the ECtHR also examined the nature of the preventive detention, looking beyond the domestic classification of whether it was punitive or not.[475] The determination was that the detention amounted to a form of punishment, especially since it was applied exclusively to individuals convicted of serious crimes.[476] The ECtHR also acknowledged that national systems could employ preventive detention, provided certain conditions were met,[477] including the use of such detention as a last

465 Lautenbach, 2013, p. 72.
466 Guide on Art. 7, § 44.
467 *Kononov v. Latvia*, § 241; see also: Krstulović Dragičević and Sokanović, 2017, pp. 25–45.
468 *Streletz, Kessler and Krenz v. Germany* (App. nos. 34044/96, 35532/97 and 44801/98), 22 March 2001, §§ 77–89; see also: Derenčinović, 2021b, pp. 21–41. Zupancic has an interesting standpoint regarding this case, highlighting that when constitutional courts are criticised for supposedly exceeding their narrow 'concretising' role and venturing into the 'abstract' realm of legislative authority, it is paradoxically done in the name of upholding the very 'rule of law' they undermine. Zupancic, 2001, p. 4, § 9.
469 *Vasiliauskas v. Lithuania*, §§ 158–162 and 191.
470 Guide on Art. 7, § 44; see also: Krstulović Dragičević and Sokanović, 2017, pp. 25–45.
471 *M. v. Germany* (App. no. 19359/04) 17 December 2009 (Final 10 May 2010).
472 *M. v. Germany* §§ 7–16; see also: Derenčinović, 2021c, pp. 174–177.
473 Derenčinović, 2021c, p. 176.
474 Farmer, 2021, p. 455.
475 Ibid.
476 *M. v. Germany*, § 133.
477 Farmer, 2021, p. 455.

resort and ensuring the presence of treatment measures.[478] Despite this, the ECtHR found a violation of Art. 7 (1) of the Convention[479] regarding the principle of legality and the prohibition of retroactivity.[480]

The concept of judicial interpretation extends to the gradual development of case law within democratic states governed by the rule of law.[481] And remains relevant even in the context of state succession.[482] When there is a change in state sovereignty or a political regime on national territory, it is legitimate for the state to initiate criminal proceedings against individuals who committed crimes under a former regime.[483] Similarly, as stated in the *Streletz, Kessler, and Krenz v. Germany*[484] and *Vasiliauskas v. Lithuania*[485] cases, the new courts of the successor state, having taken over from their predecessors, are justified in interpreting and applying the legal provisions in force at the relevant time in line with the principles of a state subject to the rule of law.[486] For instance, the ECtHR found foreseeable the convictions, in the *Streletz, Kessler, and Krenz v. Germany*[487] case, of German Democratic Republic (GDR) political leaders and a border guard for the murders of East Germans attempting to leave the GDR between 1971 and 1989. These convictions were pronounced by German courts after reunification[488] based on GDR legislation. A similar conclusion was reached in the *Kononov v. Latvia*[489] case regarding the conviction of a commanding officer of the Soviet army for war crimes during World War II, as pronounced by Latvian courts after Latvia declared independence in 1990 and 1991.[490]

C.6 Some Aspects of the Rule of Law and Art. 8

In Art. 8, the ECtHR delves into the realm of negative obligations and scrutinises whether an interference is carried out 'in accordance with the law'.[491] The ECtHR stance has been consistent on this matter: any intervention by a public authority impacting an individual's right to private life, family life, home, and correspondence must adhere to the requirements of being 'in accordance with the law'.

478 Ibid.
479 *M. v. Germany*, § 137.
480 Ibid., § 133–135; Derenčinović, 2021c, p. 176.
481 Guide on Art. 7, § 44.
482 Ibid.
483 Ibid.
484 *Streletz, Kessler and Krenz v. Germany*, §§ 77–84; see: Derenčinović, 2021b, pp. 21–41.
485 *Vasiliauskas v. Lithuania*, § 159.
486 Guide on Art. 7, § 44.
487 *Streletz, Kessler and Krenz v. Germany*, §§ 77–89.
488 Guide on Art. 7, § 44.
489 *Kononov v. Latvia*, §§ 240–244.
490 Guide on Art. 7, § 44.
491 Guide on Art. 8 of the ECHR – Right to respect for private and family life, home and correspondence, Updated on 31 August 2021, § 15.

This is exemplified in the case *Vavřička and Others v. the Czech Republic*,[492] which emphasises the notion of 'law' under the Convention, as follows:

> an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable those to whom it applies to regulate their conduct and, if need be with appropriate advice, to foresee, a degree that is reasonable in the circumstances, the consequences which a given action may entail.[493]

There has been a similar conclusion[494] in the case *Klaus Müller v. Germany*,[495] through which the ECtHR, as it assessed whether a measure complied with the requirement of being 'in accordance with the law', established certain principles. First, any measure must have a basis in domestic law, particularly within the scope of statutory law, and must align with how competent courts have interpreted it.[496] Furthermore, the 'in accordance with the law' principle also encompasses the quality of the law itself, demanding that the law adheres to the rule of law and is accessible to individuals, allowing them to foresee its implications.[497] Foreseeability, in turn, requires the law to be sufficiently precise such as to enable individuals to regulate their conduct, even with appropriate guidance.[498] However, in lawmaking, absolute certainty is often unattainable and some vagueness is accepted, albeit while being subject to interpretation and practical application.[499] The ECtHR has acknowledged the issue of conflicting decisions by domestic courts, highlighting the importance of legal certainty as a fundamental aspect of the rule of law.[500] Persistent conflicting decisions can undermine public trust, a key component of a law-based state, in the judicial system.[501] Still, legal certainty also does not guarantee consistency in case law.[502] Additionally, the ECtHR has clarified that legal professional privilege only covers the relationship between lawyers and their clients. The law should clearly specify the matters related to a lawyer's work protected by this privilege.[503]

492 *Vavřička and Others v. the Czech Republic* (App. nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, §§ 266–269: see also: *Vavřička and Others v. the Czech Republic* [GC], 8 April 2021, Information Note on the Court's case-law, 250.
493 *Vavřička and Others v. the Czech Republic*, § 266.
494 Guide on Art. 8, § 15.
495 *Klaus Müller v. Germany* (App. no. 24173/18), 19 November 2020 (Final 19 February 2021), §§ 48–51.
496 *Klaus Müller v. Germany*, §§ 48–51.
497 Ibid.
498 Ibid.
499 Ibid.
500 Ibid.
501 Ibid.
502 Ibid.
503 Ibid.

Moreover, for the expression 'in accordance with the law' to be valid, it is necessary to not only comply with domestic law but also evaluate the quality of that law, hence requiring compatibility with the rule of law.[504] This is reinforced by the ECtHR's assertions in the *Big Brother Watch and Others v. the United Kingdom* case,[505] wherein the concept of 'foreseeability' was described to vary in the context of secret surveillance.[506] The significance given to protecting lawyer–client confidentiality further reinforces this principle, which has been shown in the case *Saber v. Norway*.[507] This principle also means that the actions taken, the quality of the law, and any safeguards must be in accordance with the law.[508]

The principle of clarity regarding the notion 'in accordance with the law' extends to the realm of discretion exercised by public authorities.[509] Domestic law must outline, in a reasonably clear manner, the scope and manner of the exercise of relevant discretion, ensuring that individuals receive the minimum protection warranted under the rule of law within a democratic society. This is shown in the *Piechowicz v. Poland* case.[510]

The case *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*[511] was one of the first of its kind, which involved the notion that seeking guidance from the Court of Justice of the European Union on interpreting relevant European law does not render the domestic courts' interpretation arbitrary or unpredictable.[512] In this specific case, the uniqueness of the applicant companies' case under the Personal Data Act did not make the domestic courts' interpretation of the journalistic exemption arbitrary or unpredictable.[513] Furthermore, seeking guidance from the Court of Justice of the European Union by the Supreme Administrative Court is a part of the judicial dialogue among Member States.[514] As media professionals, the applicant companies should have known that mass data collection and dissemination involving one-third of Finnish taxpayers might not qualify as 'solely' for journalistic purposes under Finnish and EU law.[515] They also avoided providing the additional information requested by the Data Protection Ombudsman, indicating anticipation of difficulties in relying on the journalistic exemption.[516] The ECtHR further stated that the Guidelines for Journalists from 1992 and its subsequent

504 Guide on Art. 8, § 15.
505 *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15), 25 May 2021, §§ 332–334.
506 *Big Brother Watch and Others v. the United Kingdom*, §§ 332–334.
507 *Saber v. Norway* (App. no. 459/18), 17 December 2020 (Final 17 March 2021), § 51.
508 *Saber v. Norway*, §§ 48–58.
509 Guide on Art. 8, § 17.
510 *Piechowicz v. Poland* (App. no. 20071/07), 17 April 2012 (Final: 17 July 2012), § 212.
511 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13), 27 June 2017, § 150.
512 Guide on Art. 8, § 17.
513 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, §§ 150–154.
514 Ibid.
515 Ibid.
516 Ibid.

versions made it clear that principles protecting individuals applied to information from public sources, and that accessibility to relevant data did not mean unrestricted publishability.[517] These guidelines are aimed at promoting self-regulation by Finnish journalists.[518]

The ECtHR actually has a significant and rich case law regarding secret surveillance that illustrates the principle of 'in accordance with the law'.[519] In the case of *Zoltán Varga v. Slovakia*,[520] the ECtHR made interesting claims as it assessed secret surveillance implementation by the national intelligence service.[521] It highlighted a lack of clarity in jurisdictional rules, procedures, and application flaws, leading to intelligence services exercising a practically-unchecked discretion, which in turn is incompatible with the protection against arbitrary interference mandated by the rule of law. The ECtHR stated as described below:

> in sum, given the lack of clarity of the applicable jurisdictional rules, the lack of procedures for the implementation of the existing rules and flaws in their application, when implementing the three warrants the SIS practically enjoyed a discretion amounting to unfettered power, not being accompanied by a measure of protection against arbitrary interference as required by the rule of law (see paragraph 151 above). Accordingly, it was not "in accordance with the law" for Article 8 § 2 of the Convention.[522]

This surveillance measure is rooted in domestic law and aligns with the principles of the rule of law,[523] and thus the law must meet quality benchmarks, namely be accessible to the individuals concerned and foreseeable regarding its ramifications.[524] In the *Kennedy v. the United Kingdom* case,[525] the ECtHR set some requirements that must be fulfilled so that the interference is 'in accordance with the law' under Art. 8(2).[526] Specifically, three conditions must be satisfied:[527]

> First, the impugned measure must have some basis in domestic law.
> Second, the domestic law must be compatible with the rule of law and accessible to the person concerned.

517 Ibid.
518 Ibid.
519 Guide on Art. 8, § 214.
520 *Zoltán Varga v. Slovakia* (App. nos. 58361/12, 25592/16 and 27176/16), 20 July 2021 (Final 22 November 2021), § 162.
521 Guide on Art. 8, § 214.
522 *Zoltán Varga v. Slovakia*, § 150.
523 Guide on Art. 8, § 622.
524 Ibid.
525 *Kennedy v. the United Kingdom* (App. no. 26839/05), 18 May 2010 (Final 18 August 2010).
526 *Kennedy v. the United Kingdom*, § 151.
527 Ibid.

> Third, the person affected must be able to foresee the consequences of the domestic law for him.[528]

Furthermore, in the context of communication interception and telecommunication surveillance within a criminal context,[529] the requirements stipulated in Art. 8(2) must unquestionably be met, as established in cases *Kruslin v. France*[530] and *Huvig v. France*.[531] Surveillance, even if primarily aimed at unveiling the truth, entails a significant intrusion into the right to respect for correspondence,[532] and hence must be grounded in a particularly precise 'law' forming an integral part of a legislative framework that guarantees ample legal certainty.[533] These regulations should be not only clear and detailed, considering the ever-advancing technology, but also accessible and foreseeable, enabling individuals to anticipate potential consequences.[534] The necessity for sufficiently clear rules extends to both the circumstances and conditions under which surveillance is sanctioned and conducted.[535] Given that the execution of covert surveillance measures eludes scrutiny by the affected individuals and the general public, granting to the executive or to a judge the possibility of an unfettered exercise of legal discretion would be at odds with the rule of law,[536] something that is exemplified in the *Karabeyoğlu v. Turkey*[537] case. Moreover, the interception of telephone conversations should not be based on overly broad and vague decisions, such as merely authorising secret surveillance of a stabbing victim and their 'contacts'[538] – something that occurred in the *Azer Ahmadov v. Azerbaijan* case[539] – because it is not in line with the rule of law. In the latter case, the ECtHR established a violation of Art. 8,[540] while it took a different stance in the *Bosak and Others v. Croatia* case,[541] determining that there was no breach of the article.[542]

528 Ibid.
529 Guide on Art. 8, § 608.
530 *Kruslin v. France* (App. no. 11801/85), 24 April 1990, §§ 26–36.
531 *Huvig v. France* (App. no. 11105/84), 24 April 1990, §§ 25–35.
532 Guide on Art. 8, § 608.
533 *Huvig v. France*, § 25–35; see also: Guide on Art. 8, § 608.
534 Guide on Art. 8, § 608.
535 Ibid.
536 Ibid.
537 *Karabeyoğlu v. Turkey* (App. no. 30083/10), 7 June 2016 (Final 17 October 2016), §§ 67–69.
538 Guide on Art. 8, § 608.
539 *Azer Ahmadov v. Azerbaijan* (App. no. 3409/10), 22 July 2021 (Final 22 October 2021), §§ 67-76.
540 *Azer Ahmadov v. Azerbaijan*, § 76 (8 September 2023).
541 *Bosak and Others v. Croatia* (App. nos. 40429/14, 41536/14, 42804/14 and 58379/14), 6 June 2019 (Final 7 October 2019), §§ 62–68.
542 The second and third applicants' complaint about secret surveillance while abroad and the use of surveillance results in their criminal case was addressed. In this case, the ECtHR had already found the surveillance of the first applicant to be lawful and necessary under Art. 8. Importantly, the second and third applicants had the chance to challenge the surveillance against them, and their complaints were dismissed by domestic courts. Notably, Croatian authorities did not issue surveillance orders against the second and third applicants in the Netherlands; their conversations were intercepted due to their involvement in the first applicant's criminal activities. This adhered

Furthermore, the ECtHR identified violations of Art. 8 when telephone conversations were intercepted or monitored, contrary to the law, in cases *Malone v. the United Kingdom*[543] and *Halford v. the United Kingdom*.[544] This highlights that the phrase 'in accordance with the law' pertains to both compliance with domestic law and the quality of that law in relation to the rule of law. In the context of covert surveillance, domestic law must guard against arbitrary interference with Art. 8 rights,[545] and must be clear in defining the circumstances and conditions wherein public authorities can use covert measures, as concluded in the *Khan v. the United Kingdom* case.[546] In particular, domestic laws must be explicit enough to inform citizens about the circumstances and conditions under which authorities can employ such measures.[547] Hence, the 'law' should delineate the extent of this discretion and its application in a manner that offers ample clarity,[548] thereby safeguarding individuals against arbitrary interference.[549] The presence of any potential for arbitrariness during implementation renders the law incompatible with the requirement of lawfulness.[550] In a sensitive domain such as secret surveillance, the competent authority must provide compelling reasons justifying such an invasive measure while adhering to applicable legal norms,[551] as stated in the *Dragojević v. Croatia* case,[552] in which the ECtHR found a violation of Art. 8.

In the context of secret surveillance, the notion of 'foreseeability' diverges from its interpretation in other fields,[553] as foreseeability here cannot imply that individuals should predict when authorities might intercept their communications to adjust their behaviour accordingly. This is described in the *Roman Zakharov v. Russia*,[554] *Weber and Saravia v. Germany*,[555] *and Karabeyoğlu v. Turkey*.[556] At the same time, when executive powers are covertly used, the risk of arbitrariness becomes high, which is why clear and detailed rules for communication interception are crucial, especially given the advancing technology.[557] Accordingly, the rules must specify under what circum-

to domestic law and 'accidental findings' practice. Considering these facts, the complaint regarding secret surveillance abroad without international legal assistance and the use of surveillance results in their criminal proceedings was dismissed. Thus, there was no violation of Art. 8 of the Convention in this case.

543 *Malone v. the United Kingdom* (App. no. 8691/79), 2 August 1984.
544 *Halford v. the United Kingdom* (App. no. 20605/92), 25 June 1997, § 49.
545 Guide on Art. 8, § 221.
546 *Khan v. the United Kingdom* (App. no. 35394/97), 12 May 2000 (Final 4 October 2000), §§ 26–28.
547 *Roman Zakharov v. Russia*, § 229.
548 Guide on Art. 8, § 608.
549 *Roman Zakharov v. Russia*, §§ 229–230.
550 Guide on Art. 8, § 608.
551 Ibid.
552 *Dragojević v. Croatia* (App. no. 68955/11), 15 January 2015 (Final 15 April 2015), §§ 94–98.
553 Guide on Art. 8, § 622.
554 *Roman Zakharov v. Russia* (App. no. 47143/06), 4 December 2015, §§ 229.
555 *Weber and Saravia v. Germany* (App. no. 54934/00), 29 June 2006, § 93.
556 *Karabeyoğlu v. Turkey*, §§ 67–69.
557 *Roman Zakharov v. Russia*, § 229.

stances and conditions public authorities can employ secret measures.[558] Moreover, since secret surveillance measures are beyond public and individual control, the law should not grant unlimited discretion to the executive or judges,[559] but rather unambiguously define the scope and procedures for exercising such power to protect individuals against arbitrariness.[560] Therefore, the ECtHR outlines minimum safeguards that such laws must include, as follows: specifying the types of offenses warranting interception; the categories of individuals subject to wiretapping; limits on surveillance duration; procedures for data examination, use, and retention; precautions for data sharing; conditions for data erasure or destruction.[561]

In conclusion, to prevent arbitrary intrusion, it is imperative to have well-defined, comprehensive rules governing telephone conversation interception. The law must provide sufficient clarity to offer citizens a reasonable understanding of the situations and terms under which public authorities can engage in such covert measures.[562] Furthermore, the law should define the scope of discretion granted to the executive or a judge, along with the manner of its exercise, in such a way that individuals are shielded against arbitrary interference.[563]

C.7 The Rule of Law and Art. 9

In the context of Art. 9 (Freedom of thought, conscience, and religion), there is an interesting case involving a prohibition on a medical student at a Turkish State University from wearing the Islamic headscarf in the classroom.[564] The ECtHR recognised Turkey's unique context and constitutional framework, supporting the principle of secularism, which aligns with Convention values, the rule of law, and human rights. The regulations aimed at fostering diversity in universities, reflecting a delicate balance between religious freedom and societal context, in line with the ECtHR's commitment to democratic values and human rights under the rule of law, as evidenced in the case *Leyla Şahin v. Turkey*.[565] The ECtHR found no violations or manifestly unfounded claims in the referent case.[566]

There was another interesting case regarding Art. 9 and the right to religion. In the *Pitkevich v. Russia* (dec.) case,[567] a Russian judge was dismissed for her actions as a judge that aligned with her religious community's interests. Her use of

558 *Karabeyoğlu v. Turkey*, §§ 67–69.
559 Ibid.
560 Ibid.
561 *Karabeyoğlu v. Turkey*, §§ 67–69.
562 Guide on Art. 8, § 622.
563 Ibid.
564 Ibid.
565 *Leyla Şahin v. Turkey* (App. no. 44774/98), 10 November 2005, §§ 152–162; See also: *Leyla Şahin v. Turkey* [GC]. Guide on Art. 9 of the ECHR – Freedom of thought, conscience and religion, Updated on 30 April 2022, § 104, p. 37.
566 Guide on Art. 9, § 104, p. 37.
567 *Pitkevich v. Russia* (dec.) (App. no. 47936/99), 8 February 2001.

her judicial position to promote her religious community and intimidate parties in court proceedings led to her dismissal, not her religious affiliation.[568] The ECtHR acknowledged an interference with her rights under Arts. 10 and 9, but found the interference proportionate to the legitimate aims pursued in the case, and declared the case inadmissible.[569] These cases exemplify the ECtHR's intricate balancing of religious freedom, state interests, and the rule of law within the democratic framework of the Convention.

C.8 Aspects of the Rule of Law and Art. 10

Addressing the context of Art. 10 (Freedom of expression), the case of *Handzhiyski v. Bulgaria*[570] provides an illustrative example. The applicant faced charges of minor hooliganism and consequent fines for his act of disguising a historical public monument by placing a hat and a bag beside it.[571] The ECtHR recognises the unique physical and cultural significance of public monuments, and deems measures, including proportionate penalties, to deter their destruction or harm as potentially 'necessary in a democratic society'.[572] In a democratic society governed by the rule of law, debates about public monuments should be resolved through legal means, not covert or violent actions.[573] However, the penalty imposed on the applicant was considered unnecessary, as his non-violent protest during a national demonstration did not involve physical harm to the monument, and was rather aimed at expressing dissent against the government.[574]

A central tenet of the rule of law is the empowerment of citizens to report irregular or unlawful conduct by civil servants to competent state officials, as exemplified in the *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* case.[575] The ECtHR noted the significant approach taken by the Constitutional Court of Bosnia and Herzegovina in this case, drawing on Convention case law that emphasised the importance of protecting the right to report alleged irregularities in the conduct of state officials, even if it meant limiting the freedom of the press or open discussion of public matters.[576] This line of case law highlighted that citizens should be able to notify competent state officials about irregular or unlawful conduct, in line with the rule of law.[577] In the *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* cases, the ECtHR was prepared to assess an applicant's good faith

568 Guide on Art. 9, § 259, p. 88.
569 *Pitkevich v. Russia*, 2001.
570 *Handzhiyski v. Bulgaria* (App. no. 10783/14), 6 April 2021 (Final 6 July 2021).
571 Guide on Art. 10 of the ECHR – Freedom of expression, Updated on 30 April 2021, § 93, p. 24.
572 *Handzhiyski v. Bulgaria*, §§ 53–59.
573 Ibid.
574 Ibid.
575 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11), 27 June 2017.
576 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, §§ 82–84.
577 Ibid.

and efforts to uncover the truth in a more subjective and lenient manner compared to other types of cases.[578] This approach aimed to strike a balance between protecting individuals who reported misconduct by state officials, and safeguarding the reputation and rights of those implicated.[579] Crucially, the ECTHR's proportionality assessment in the aforementioned cases considered that the defamatory statements had typically been made in private correspondence, often to hierarchical superiors or state officials.[580] Some allegations stemmed from the applicant's direct personal experience, while others were submitted by individuals not directly involved in the matters of the complaint.[581] The common thread was the intent to expose alleged wrongdoing within the state apparatus.[582] In summary, the ECtHR recognised the importance of protecting the right to report irregularities in state officials' conduct, even at the expense of limiting the freedom of the press or open discussion.[583]

Additionally, the ECtHR came to a similar conclusion in cases *Zakharov v. Russia*,[584] *Kazakov v. Russia*,[585] and *Siryk v. Ukraine*,[586] bearing in mind the intent of fostering trust in public administration, as in the *Shahanov and Palfreeman v. Bulgaria* case.[587] This right holds particular significance for those under authority,[588] such as prisoners, even if the allegations could challenge the authority of prison wardens.[589]

The ECtHR also accentuated the vital importance of maintaining the authority of the judiciary within a state founded on the rule of law and a democratic society.[590] This necessitates fostering relations built on respect and consideration between the various participants in the justice system, with judges and lawyers at the forefront.[591] An example of this can be seen in the *Morice v. France* case,[592] wherein the ECtHR underpinned that, contrary to the government's arguments, it found that the applicant's remarks did not have the potential to disrupt the proper conduct of judicial proceedings.[593] This is evident from the fact that the higher court had already withdrawn the case from the two investigating judges criticised by the applicant.[594] Importantly, the

578 Ibid.
579 Ibid.
580 Ibid.
581 Ibid.
582 Ibid.
583 Ibid.
584 *Zakharov v. Russia* (App. no. 14881/03), 5 October 2006 (Final 5 January 2007), § 26.
585 *Kazakov v. Russia* (App. no. 1758/02), 18 December 2008 (Final 5 June 2009), § 28.
586 *Siryk v. Ukraine* (App. no. 6428/07), 31 March 2011 (Final 30 June 2011), § 42.
587 *Shahanov and Palfreeman v. Bulgaria* (App. nos. 35365/12 and 69125/12), 21 July 2016 (Final 21 October 2016), § 63.
588 Guide on Art. 10, § 396, p. 69.
589 *Shahanov and Palfreeman v. Bulgaria*, § 64.
590 Guide on Art. 10, § 396, p. 69.
591 Guide on Art. 10, § 441, p. 76.
592 *Morice v. France* (App. no. 29369/10), 23 April 2015, § 170.
593 *Morice v. France*, §§ 169–170.
594 Ibid.

remarks did not target the new investigating judge or the higher courts in any way.[595] Furthermore, it cannot be argued that the applicant's conviction served to uphold the authority of the judiciary, considering the above reasons and the context.[596] Importantly, in this case, the ECtHR described the significance of maintaining judicial authority in a democratic state governed by the rule of law,[597] and that the effective functioning of the courts relies on relationships built on consideration and mutual respect among various actors within the justice system.[598] In this midst, lawyers also play a crucial role in the administration of justice, being intermediaries between the public and the courts.[599] Their pivotal position ensures public trust in the court's mission, which is foundational in a state founded on the rule of law, something exemplified in cases *Morice v. France*,[600] *Schöpfer v. Switzerland*,[601] *Nikula v. Finland*,[602] and *Kyprianou v. Cyprus*.[603]

One of the most important parts of conceptualising Art. 10 is journalistic freedom.[604] The ECtHR consistently evaluates the scope of the 'duties and responsibilities' within the context of the vital role of the press in a state rooted in the rule of law, as shown in the *Thorgeir Thorgeirson v. Iceland*[605] case. This assessment underscores that journalistic activities not only contribute to the functioning of a democratic society but also bear the responsibility of adhering to the rule of law's tenets.[606] Thus, while journalistic freedom is upheld, it is equally essential to maintain a balance in journalism that respects legal limits and societal norms, reflecting the underlying principles of the rule of law.[607]

In the context of a democratic society guided by the rule of law, political ideas that challenge the established order and are pursued through peaceful means must be granted an appropriate avenue for expression,[608] as shown in the case *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*.[609] This case underscores the delicate balance between dissent, expression, and the foundational principles of democracy upheld within the rule of law.

In a democratic society, the correlation between freedom of expression and the right to free elections is a recurring theme emphasised by the ECtHR in relation to

595 Ibid.
596 Ibid.
597 Ibid.
598 Ibid.
599 Guide on Art. 10, § 442, p. 76.
600 *Morice v. France*, §§ 132–139.
601 *Schöpfer v. Switzerland* (App. nos. 56/1997/840/1046), 20 May 1998, §§ 29–34.
602 *Nikula v. Finland* (App. no. 31611/96), 21 March 2002 (Final 21 June 2002), §§ 45–46.
603 *Kyprianou v. Cyprus* (App. no. 73797/01), 15 December 2005, § 173–175.
604 Guide on Art. 10, § 441, p. 76.
605 *Thorgeir Thorgeirson v. Iceland* (App. no. 13778/88), 25 June 1992, §§ 63–70.
606 Guide on Art. 10, § 441, p. 76.
607 Ibid.
608 Guide on Art. 10, § 518, p. 86.
609 *Eğitim ve Bilim Emekçileri Sendikası v. Turkey* (App. no. 20641/05), 25 September 2012 (Final 25 December 2012), §§ 69–70.

Art. 3 of Protocol No. 1.[610] In the *Orlovskaya Iskra v. Russia* case,[611] the ECtHR articulates the profound significance of viewing the applicant's freedom of expression through the lens of the right to free elections, which is safeguarded by Art. 3 of Protocol No. 1.[612] This intrinsic connection between the two rights underpins the democratic fabric, and reinforces the rule of law's foundational principles,[613] and the connection aligns with the ECtHR's earlier stance in *Hirst v. the United Kingdom (no. 2)* [614] [*GC*]. In this case, the ECtHR underlined the indispensable nature of free and fair elections in upholding democratic governance and the rule of law.[615] The inseparable interplay between freedom of expression and the right to free elections underscores the complex tapestry of democratic values and legal principles that together form the bedrock of a just and equitable society deeply rooted in the rule of law.[616] This interconnectedness amplifies the significance of safeguarding both rights, ensuring both the voice of the people and the sanctity of democratic processes as they intertwine with the rule of law principle.[617]

C.9 Art. 11 in the Context of the Rule of Law

In the context of Art. 11 (Freedom of assembly and association) and of a democratic society founded on the principles of the rule of law, certain foundational aspects ensure the safeguarding of fundamental rights against arbitrary intrusions by public authorities. For domestic legislation to adhere to the necessary qualitative standards, it must establish a degree of legal protection against capricious interventions by governmental bodies that may infringe upon the rights enshrined in the Convention.[618] When dealing with matters about fundamental rights, it would run counter to the very essence of a democratic society that upholds the rule of law as a core principle, which in turn is enshrined in the Convention, to grant the executive branch unfettered discretion without defined limitations.[619] Hence, it is imperative, as the ECtHR concluded in the *Navalnyy v. Russia* case,[620] that the law delineates, with a satisfactory level of clarity, that domestic law must provide legal protection against arbitrary interferences by public authorities with the rights guaranteed by

610 Guide on Art. 10, § 698, p. 114.
611 *Orlovskaya Iskra v. Russia* (App. no. 42911/08), 21 February 2017 (Final 3 July 2017).
612 Guide on Art. 10, § 698, p. 114.
613 *Orlovskaya Iskra v. Russia*, §§ 110–111.
614 *Hirst v. the United Kingdom* (no. 2) (App. no. 74025/01), 6 October 2005.
615 *Hirst v. the United Kingdom* (no. 2), §§ 57–62.
616 Guide on Art. 10, § 698, p. 114.
617 Ibid.
618 Guide on Art. 11 of the ECHR – Freedom of assembly and association, Updated on 31 August 2022, § 56, p. 15.
619 Guide on Art. 11, § 56, p. 15.
620 *Navalnyy v. Russia* (App. nos. nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14), 15 November 2018.

the Convention.[621] The law must also clearly define the extent of the government's discretion and how it is to be exercised.[622]

Furthermore, within the framework of a democratic society that adheres to the rule of law, the promotion of ideas that challenge the existing order and are pursued through peaceful means must be allowed ample room for expression.[623] This expression finds outlets not only through the exercise of the right of assembly but also through other lawful methods. In that regard, the ECtHR interestingly concluded the following in the *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* case:[624]

> the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security. Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made maybe – do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, political ideas that challenge the existing order and whose realization is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means. [625]

Further, the ECtHR came to a similar conclusion in the *Sergey Kuznetsov v. Russia* case,[626] describing that the purpose of the picket was to draw attention to perceived issues within the judicial system in the Sverdlovsk Region, which was a matter of significant public concern and part of a political debate.[627] The ECtHR reiterated its longstanding approach of requiring compelling reasons to justify restrictions on political speech or issues of public interest, such as judicial corruption, and emphasised that broad restrictions in individual cases could undermine freedom

621 *Navalnyy v. Russia*, § 115.
622 Ibid.
623 Guide on Art. 11, § 71, p. 17.
624 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (App. nos. 29221/95 and 29225/95), 2 October 2001 (Final 2 January 2002).
625 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, § 97.
626 *Sergey Kuznetsov v. Russia* (App. no. 10877/04), 23 October 2008 (Final 23 January 2009).
627 *Sergey Kuznetsov v. Russia*, § 47.

of expression in the entire state.[628] Therefore, the ECtHR notes that, in this case, neither the domestic courts nor the government provided any compelling reasons to justify the interference with the applicant's rights to freedom of expression and assembly.[629] Despite the relatively small fine imposed, the interference was not deemed 'necessary in a democratic society'.[630]

In contrast, the case of *Ignatencu and the Romanian Communist Party v. Romania*[631] reveals a different scenario.[632] Here, the denial of registration for the applicant party was deemed justifiable.[633] Given the party's claim of being a successor to the Communist Party that had governed the nation during a period of totalitarian communism, the authorities sought to preempt potential abuse of power by the party,[634] and to uphold the rule of law and the foundational principles of democracy.[635] In this context, the ECtHR concluded that the reasons provided by the authorities for the refusal were pertinent and adequate, with the measure proportionate to the legitimate objective of safeguarding national security and the rights of others.[636]

Importantly, the mere advocacy of autonomy or even secession of a part of a country's territory by a political party does not, on its own, suffice as grounds to justify dissolution based on national security concerns.[637] Once more, it must be emphasised that in a democratic society that upholds the rule of law, political ideas that challenge the *status quo* without undermining the core democratic principles and are pursued through peaceful means should be granted a proper avenue for expression, notably through participation in the political process.[638]

C.10 Art. 14 and the Rule of Law

Art. 14 of the Convention (Prohibition of discrimination) assumes a pivotal role in safeguarding individuals against discrimination in the enjoyment of the rights outlined within the Convention. The ECtHR jurisprudence has established the principle of non-discrimination as fundamental for and deeply intertwined with the Convention's core foundations – namely, the rule of law, tolerance, and social harmony. This is made evident in the *S.A.S. v. France* case,[639] in which:

628 Ibid.
629 *Sergey Kuznetsov v. Russia*, § 48.
630 Ibid.
631 *Ignatencu and the Romanian Communist Party v. Romania* (App. no. 78635/13), 5 May 2020 (Final 5 August 2020).
632 Guide on Art. 11, § 185, pp. 33–34.
633 Ibid.
634 Ibid.
635 Ibid.
636 Ibid.
637 Guide on Art. 11, § 189, p. 34.
638 Ibid.
639 *S.A.S. v. France* (App. no. 43835/11), 1 July 2014, § 149.

> the ECtHR reiterates that statements constituting a general and vehement attack against a group identified by religion or ethnic origin are incompatible with the values of tolerance, social peace, and non-discrimination which underlie the Convention and do not fall not the right to freedom of expression which it enshrines.[640]

Further, in the *Străin and Others v. Romania* case,[641] the ECtHR concluded that:

> consequently, in view of the fact that the deprivation in question infringed the fundamental principles of non-discrimination and the rule of law which underlie the Convention, the total lack of compensation caused the applicants to bear a disproportionate and excessive burden in breach of their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1. Accordingly, there has been a violation of that Article in the present case.[642]

This protective framework is further bolstered by the provisions under Art. 1 of Protocol No. 12 to the Convention, which expansively prohibits discrimination in the exercise of any right conferred by law.[643] A striking illustration of this principle emerges in the case of *Virabyan v. Armenia*,[644] where the ECtHR examined an instance of the applicant's alleged mistreatment, ostensibly driven by his political convictions, by state agents. The ECtHR held that the authorities bear an obligation to utilise all available means to counteract racism and racist violence, a responsibility that extends to situations where treatment contrary to Art. 3 of the Convention is claimed to have been inflicted for political reasons.[645] In emphasising the significance of political pluralism, which underscores the peaceful coexistence of diverse political viewpoints and movements, the ECtHR underscored its critical role in nurturing and sustaining a democratic society firmly rooted in the principles of the rule of law.[646] In this context, acts of violence perpetrated by state agents with the intent to quell, eradicate, or discourage political dissent, or to penalise individuals who hold or express dissenting political opinions, posed a distinctive and substantial threat to the ideals and values that constitute the essence of such a society.[647] The case highlighted the intricate link between political convictions, protection against discrimination, and the broader framework of a democratic society built upon the rule of law and respect for fundamental rights.[648]

640 Ibid.
641 *Străin and Others v. Romania* (App. no. 57001/00), 21 July 2005 (Final 30 November 2005).
642 *Străin and Others v. Romania*, § 59.
643 Guide on Art. 14 of the ECHR and on Art. 1 of Protocol No. 12 to the Convention – Prohibition of discrimination, Updated on 30 April 2022, § 1, p. 6.
644 *Virabyan v. Armenia* (App. no. 40094/05), 2 October 2012 (Final 2 January 2013).
645 Guide on Art. 14, § 131, p. 32.
646 Ibid.
647 *Virabyan v. Armenia*, §§ 199–200.
648 Guide on Art. 14, § 131, p. 32.

I.1.3 The Interpretation of the Rule of Law by the Venice Commission

A. The Venice Commission's Origin, Role, and Evolution

A.1 Where is the Venice Commission?

Let us begin with a short tourist guide. Imagine for a moment that you are in the Metropolitan City of Venice, do not have access to the Internet, cannot use Google Maps, but want to reach Scuola Grande San Giovanni Evangelista (i.e. the seat of the European Commission for Democracy through Law, better known as the Venice Commission; hereinafter, VC or Commission). You are somewhere in Piazzale Roma, the square with large car garages, a bus, and a train station. The easiest way by foot to your destination leads across the Santa Chiara Bridge, via Fondamenta del Monastero street, which is at the entrance to the Grand Canal. After about a 100 meters, right after the Carlton Hotel, you turn right into a street called Calle Nova De S. Simon, go straight again for about a hundred meters, turn right, then immediately left, and afterwards straight forward. Thereafter, you cross a small bridge, follow the road, and do not turn into the alleys offered to you on the right. After about a 100 meters, you will find your destination on the left. This trip takes a maximum of 10 minutes walking.

Scuola Grande San Giovanni Evangelista is well-known in the world of international law, constitutional law, and politics, but this name will not be of much avail to you if you refer to it when asking for directions from Venetians the local population. Especially if your English is too good and your Italian too bad, they will most likely direct you to one of the surrounding buildings, which are probably more famous tourist sites (e.g. the Scuola Grande di San Rocco). There are also other paths in the magical Venetian 'labyrinth' that lead to 'our' school. For example, if you are located somewhere in or around Piazza San Marco, the most famous tourist location in Venice, you will have to cross the well-known Rialto Bridge, requiring a half-hour walk at a relatively fast pace to reach the destination.

The Scuola (School in English) is tucked away in a passage, and from the outside, it does not quite correspond, at least at first glance, to the sonorous name of the institution it garrisons and its reputation as the 'constitutional and legal adviser' of all the states of the Council of Europe (hereinafter just CoE) and beyond. When you come for the first time, you will certainly not catch a glimpse of several local police officers (carabinieri) who secure the entrance to the building four times a year for two specific days – the periods during which the plenary session of the Commission takes place. It can be noted, however, that the location of the school and its external appearance have a certain correlation with the position and role of the VC. That role, with all possible reservations that even a completely objective observer may have, is highly important for modern democracy and the rule of law. On the one hand,

this role is far more complex than many sceptics and critics of the Commission are ready to accept, challenging its professional legitimacy and pointing to its quasi-political role. On the other hand, that role is essentially advisory. The Commission does not regulate, impose, nor order, but rather advises and affords recommendations to states in their constitutional/legal reforms. Nevertheless, and inevitably, competent and wise advisers often become creators whose words metamorphose into key references. Over time, that surely happened to the VC.

A.2 'Venetian Magic'

Upon entry into the School's interior, especially its hall, full of medieval frescoes on which dim light rests – coming mostly from the outside through the bars on the windows until noon, and from interior lighting during the afternoon – it is but a matter of time for an overwhelming sensation to take place, as the locale offers the visitor the special atmosphere in which the work of the Commission takes place. At first, it may seem that you can hardly see the faces of the members of the Commission who are opposite you, mostly owing to the antique chairs, too hard and uncomfortable, and the tables, arranged in a large rectangle to create space. Everything appears arranged to create an (un)necessary distance between the speakers. There is also the entire vaulted space and the building's high ceiling creating the impression of coldness, albeit this is typical of most Catholic buildings of the type and era. Later, that 'coldness' turns into a warm feeling of belonging to the same legal and cultural family, one that goes beyond the specific individuals in the room, no matter how professional and experienced they may be, and which incessantly reminds you of the irresistible force of duration. There is some special magic in that atmosphere, of which you become an integral part, regardless of own wanting. Like all magic, it can benefit or harm depending on how you treat it, what intentions you possess, and which goals accompany you.

Democracy, human rights, and the rule of law, the three pillars not only of the VC but also of the CoE and the modern legal world, make this magic happen. That magic can be 'white' or 'black'; that is, if it is in the hands of politics and serves exclusively to achieve and legitimise selfish national, regional, or global political goals, then it will be 'black' for sure. In this scenario, it factually becomes the greatest possible normative and verbal 'hypocrisy'. However, it can be, and often is, in the hands of prominent lawyers, most of which are in the VC. Ideally, the 'magic' should be white, and it can be, provided that it is transferred to the representatives of the states who come in search of opinions, who should not be 'blind followers' nor simple 'political merchants', should focus on caring for the dignity and the national constitutional and political identity of their states, and be sincerely respectful of the rule of law and democracy. This setting gives way for the 'magic' to create true 'miracles'. The interactions between the Commission and the state authorities bestow upon us the best constitutional and legal solutions – not ideally but in reality – considerate of national legal, political, and cultural peculiarities.

The magic of Venice, and inevitably of the VC, not accidentally 'homed' in that very 'city-state', is that it does not recognise sharp and sudden transitions. It is all in shades of blue and dull, the ones that mostly rule the Venetian labyrinths in the evening, at dusk. In this continuous game of shadows and tones, every kind of life takes place, even legal and state life. Such life implies a constant struggle, both institutional and extra-institutional, between law and anti-law, the rule of the people and the rule by the people, justice and injustice, freedom and unfreedom, equality and discrimination, legal certainty and arbitrariness, power and impotence, transparency and behind-the-scenes action, and Others. Over the more than three decades of its work, the VC has been an important player in that game on 'the border' law and politics. The Commission does not play that game flawlessly, but it surely plays the game in a way that makes it an indispensably important 'factor'. The influence of the Commission on national legal systems of countries worldwide is indeterminable, but, like Venice, it is also especially 'irresistible'.

A.3 The Creation of the Commission

Starting from simplified statements – for example, that the creator of the theory of separation of powers is a Frenchman, Charles Montesquieu; that the first modern written constitution, the US Constitution of 1787, is the work of three 'founding fathers' (Hamilton, Madison, Jay); that the modern concept of the rule of law was founded by a British, Albert V. Dicey – it is possible to draw a conclusion that the idea of creating an international body of distinguished experts, who were to primarily perform the role of constitutional assistants to the states of Central and Eastern Europe in transition, came from an Italian, Antonio La Pergola. Behind great ideas are undoubtedly great people, but behind their realisations is also always serious organisations and hard work.

The VC was undoubtedly created as an international, well-designed project that, despite some resistance, was 'doomed to success' in the years of great legal and sociopolitical changes that came with the fall of the real-socialist bloc. States with authoritarian socialist constitutionalism systems had no alternative in that period, and their transitions could only go in one direction; that led to their acceptance of, or rather to their reintegration into, liberal democratic constitutionalism. This transition, nonetheless, could not be made 'overnight', nor could it happen exclusively 'from within', because the forces of the old order had neither the capacity nor the legitimacy to do so. 'Direct intervention' by the developed West was also out of the question. This pointed to the need for an institutional 'mediator', which would not issue 'orders', but rather, and especially in the most sensitive years, represent a direct 'blow' to national and state sovereignty. The institutional 'mediator' also had to have legitimacy, albeit such legitimacy could not come from politics, but from professionalism. Those were the main criteria and parameters for the formation of the VC. Still, something else was also extremely important, as the body had to be as neutral and impartial as possible. To achieve this, it would need to establish a certain amount

of independence, one which had to stem from a unique position and very delicate role that no international body had had up until then: initially, it was to assist in the adoption of the constitutions of the so-called new or young democracies; more specifically, countries that had yet to become democratic according to the Western European pattern. Practically speaking, this implied a constitutional–legal unification of Europe, which was to be carried out according to the principle of 'unity in diversity', well-known in the old federations.

One of the Commission's original tasks was to find a 'common constitutional denominator' for practically all European states that had or aspired to have a democratic political order according to the 'European pattern'. Thus, the VC established and began to develop the concept of European constitutional heritage, which rests on democracy, human rights, and the rule of law. Such concept soon became 'narrow' European frameworks, and eventually 'spilled over' to many other countries worldwide stretching far beyond the CoE.

Therefore, the VC, in its origin, was a regional project – even if not all the countries of the CoE immediately supported it[649] – that initially mostly concerned the countries of Eastern and Central Europe in the process of their governmental transitions. However, already in the first, and especially in the second decade of its existence, it became a global phenomenon, one of the creators of transnational constitutional law,[650] and therefore of the concept of international and supranational rule of law.

A.4 The Venice Commission on Several Levels

The analysis of an institution such as the VC, which has undoubtedly left a mark in the past and is still functioning at full capacity by equally influencing national legal systems and international legal flows, requires a multi-level perspective that encompasses, for example, the views described herein: socio–historical, philosophical–legal, institutional and inter-institutional, normative, geopolitical and practical.

The observer's subjective perception is also quite important in such analysis. For example, the analysis can be made by a former member, a current one, an expert who was engaged by it, or even a professor who did not have the opportunity to attend even one plenary session of the Commission. There is, however, no doubt that those most familiar with the daily processes occurring in this body are prominent, long-term members of its administration.[651] Although it cannot be said that the

649 The 18 initial members of the Venice Commission (hereinafter, VC or the Commission) were as follows: Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, Spain, San Marino, Sweden, Switzerland, and Turkey.

650 Craig, 2017, pp. 57–86.

651 It is our opinion that the texts of prominent, long-term members of the VC's administration are the most useful for understanding different aspects of the Commission's complex activities. For a textbook with a relatively concise and comprehensive overview of the Commission's activities and roles, see: Shnutz Dürr, 2010, pp. 151–163.

number of works (including several monographs) on the Commission has not grown significantly in the last two decades, the impression remains that all the aforementioned views of the VC have not yet been explored in their totality.

A.4.1 Analysis at the Socio-Historical Level

The socio-historical momentum that brought forth the idea of a supranational body of experts (or at least should be) maximally independent[652] and which deals with (constitutional) legal issues of importance for democracy, human rights and the rule of law, is perhaps best evidenced by the words of the founder and first president of the Commission, Antonio La Pergola, at the second Venice Conference in January 1990:

> Europe is rebuilding itself, knocking down, one after another, the barriers which, especially now, no longer have any reason to exist. We cannot, however, and must not limit ourselves to a free movement which is the free movement of goods, services and capital alone. 'Europe-as-market' which we are currently building in the European Community, will not suffice. If such, and such alone, it is a barren Community. Rather, 'Europe-as-Civilization', Europe as our cultural heritage whose natural center is to be found in the Council of Europe…the Italian delegation is firmly of the view that to set up this new body and permit the countries of East Europe to participate in its work would be a solid proof of our spirit of Europeanism, of our sense of community which we find awakened in us and the fulfilment of a wish has a noble cogency and a moral mandate.[653]

Therefore, the end of the 1980s not only marked the collapse of real-socialism, symbolically expressed through the fall of the Berlin Wall, but also a new positive wave of 'Euro-optimism', namely the idea of a unified Europe that goes way beyond an ordinary free movement of goods, labour, and capital. In fact, the idea of Europe configuring a political community included attempts to constitutionally constitute that community, and hence it came as no surprise that an experienced and respected politician, lawyer, and above all a scientist of elegant style and eloquence, together with his associates and like-minded people, put a lot of effort into justifying the idea and then putting it into practice. The concepts of 'Democracy through Law' were 'intellectually appealing but politically suspicious', because 'constitutional law was – and still is – regarded as a State's reserved domain *par excellence*, and giving an expert body the task, hence the power, to criticise and perhaps influence domestic constitutional choices must have seemed, from a national perspective, dangerous'.[654]

652 The members of the VC should be independent not only from the states that appoint them but also from all other organisations, including the Council of Europe itself.

653 La Pergola, 2009, p. 43.

654 Buquicchio and Granata-Menghini, 2013, p. 241.

Thus, the installation of the VC required an adequate socio-historical moment. In this given moment, the idea of a common constitutional heritage of the 'two Europes' – the liberal-democratic and real-socialist portions – which had been divided for more than half a century, received its symbolic and legal expression in the VC.

So, although it is true that the Commission was primarily created out of the need to help the countries of Eastern and Central Europe, it became an almost equal need in the so-called stable western democracies not only for the promotion of democracy through law, but also for finding the unifying principles of the future European political community.[655]

A.4.2 Analysis at the Philosophical-Legal Level

It is impossible not to notice the dialectical dimension of the very name of the Commission, which is The European Commission for Democracy through Law. This name embodies the modern definition of the relationship between democracy and law. It is certainly not possible to put a sign of equality between them, but one cannot exist without the other in a modern community, whether a state or a supranational creation (e.g. the European Union, hereinafter EU[656]), as modern democracy presupposes a legal order. Specifically, a democracy that functions arbitrarily and not according to the principles, standards, and norms of objective law is an apparent or false democracy; essentially, this describes either some form of autocracy or anarchy. Meanwhile, modern law must be democratic, legitimate (i.e. not imposed), an expression of national (civic) sovereignty, and understood in the broadest sense of the word. Regarding the latter, it means that it must represent not only the sovereign will of voters in elections and through national representatives but also that which is manifested in all forms of civil society.

Even today, one can hardly question the words of well-known ex-member of the VC, Professor Sergio Bartole, who a quarter of a century ago summarised the role of the Commission with the following words:

> […] One cannot have democracy without law: law is not a precondition for democracy, or indeed a facilitating factor in carrying out democracy. Law is democracy (we do not understand these words as a literal identification of law and democracy, but as a necessary dialectical relationship between the two phenomena, *author's note*). By this, I mean that one cannot have a true democracy without a suitable legal framework providing rules for the correct functioning of democratic institutions. It should be also noted that democracy is only true if the will of the

655 Buquicchio, 2009, pp. 29–34.

656 It has long been identified that the main deficits of the European Union (EU) are the expression of national sovereignty, the alienation of European institutions from citizens (democratic deficit), and the absence of a suprema lex in the form of a constitution (legal deficit).

> people is properly expressed in the form of law. The adoption of legal form provides a guarantee against the arbitrariness of the exercise of power.[657]

Bartole, in fact, gives a minimalist definition of the rule of law, which is constantly enriched with new content and, in this way, expands and grows despite new challenges.

Therefore, the very name of the Commission reflects its essence: it is the rule of law itself, or, better to say, it embodies the ideal of the rule of law in all its activities. Importantly, the term 'European Commission' should not mislead the reader, as the institution refers not to some European rule of law that is the same and applies to every European country without differences, nor is it exclusively 'European' in the sense that it belongs only to European countries and citizens. Rather, it is supranational as it is legally and culturally based on principles and values that originally arose in the former Europe, but which spread and became acceptable beyond its geographical borders. Another factor that makes this a supranational rule of law is that it is not unifactorial, in that it does not seek artificial unity but a 'unity of common values in national diversities'.

> This is a unity at root alone – and indeed it could not be otherwise – which will enrich other aggregating tendencies, leaving intact our individuality, our freedom and sovereignty, the richness of our differences of which Europe is so justly proud …Democracy through law is a phenomenon which calls the interest of a Europe, not so much as a system of States, as, rather, let us say it clearly, a common home built fit for man.[658]

The work of the Commission, with its efforts to stabilise and strengthen Europe as a legal, cultural, and political community, can make sense and give long-term positive effects only if it is based on the concept of the supranational rule of law as understood by La Pergola.

For the philosophical–legal aspect of the VC, perhaps the most relevant is 'a specific and unique philosophy' which characterises the practical work of this body as flexible and dialogical. In this way, the impressions of independence, impartiality, professional expertise, and prudence of the Commission are strengthened.[659]

A.4.3 Institutional Level

Although the VC of the CoE is often referred to as 'an independent consultative body' or 'an advisory body of the CoE on constitutional matters', the Commission has a specific legal status (i.e. a kind of 'substantial autonomy') in relation to the CoE. That was indeed the original idea of La Pergola: 'The Commission has a most useful,

657 Bartole, 2000, p. 351.
658 La Pergola, 2009, pp. 43–44.
659 Buquicchio and Granata-Menghini, 2013, p. 242.

but independent, creative role to play, separate from that of any other political organ or other technical bodies of the Council of Europe'.[660] Therefore, from the beginning, the emphasis was on its functional and not on its institutional independence in relation to the CoE.

The Commission was formed by the decision of the Committee of Ministers of the Council of Europe in 1990, which was in turn preceded by a partial agreement, which served as a legal instrument that allowed only those Member States of the CoE who wished to enter into this specific institutional arrangement. The Commission, as a body of the CoE, adopted its first statute in 1990 and then revised it in 2002.[661] This revised statute, which is still in force today, is a consequence of the 'geographical expansion' of the Commission beyond the borders of Europe. That is one of the important characteristics of the legal status of the VC, as it is a body of the CoE that has an almost global role in the area of achieving and improving the rule of law and democracy. Another specificity of the VC is its seat (Venice, Italy), as the other bodies of the CoE have their seats in Strasbourg (France). On this topic, Schnutz Dürr described the following:

> Nevertheless, the Venice Commission is fully part and parcel of the Council of Europe as is witnessed by the high number of requests for opinion or studies from the organs of the Council. As the legal expert body, the Commission is well embedded in the context of the political organs of the Council of Europe, notably the Parliamentary Assembly and the Committee of Ministers, which regularly use it as a tool to obtain a firm legal basis on which they can build their political activity.[662]

However, in order to understand what the 'substantial autonomy' of the VC means in relation to the CoE, it is necessary to return to the matter it deals with, which is, first and foremost, constitutional law. This is the 'material source' from which the Commission originated, namely supporting the 'dissemination and consolidation of a common constitutional heritage' and providing 'emergency constitutional aid' to states in transition.

Dealing with issues related to the constitutional power, whether of specific states or in general, means creating the capacity and *modus operandi* for performing that work, which necessarily makes the institution as independent as possible. Over time, it becomes an authoritative 'point of reference', and inevitably starts to operate at the 'intersection of law and politics'. It also becomes authentic, such as in expression, argumentation, methodology and even in the mistakes made. That is the case of the VC.

660 La Pergola, 2009, pp. 41–42.

661 The Statute of the European Commission for Democracy through Law was adopted by Resolution (90)6 of the Committee of Ministers of the Council of Europe on 10 May 1990. It was superseded by the Revised Statute, adopted by the Resolution Res (2002)3.

662 Schnutz Dürr, 2010, p. 151.

Its inter-institutional cooperation, which is highly rich, also confirms its relative independence and authenticity. From its very beginnings, the Commission cooperates with national constitutional courts and other equivalent bodies, and in cooperating also with several international associations of constitutional courts worldwide, it founded the World Conference on Constitutional Justice (also known as WCCJ) in 2009. Working in electoral matters and defining European electoral standards, the Commission prepares joint reports with the Organisation for Security and Co-operation in Europe (also known as OSCE) and The OSCE Office for Democratic Institutions and Human Rights (also known as ODIHR). In addition to these respectable international organisations, the EU also has the status of a participating international organisation.[663]

A.4.4 Normative Level

The normative regulation of the status, organisation, and functioning of the VC is key for understanding this institution as a legal body. The Commission follows its own 2002 Revised Statute and two other important legal documents (adopted by the Commission itself), which are the Rules of Procedure (last amended in March 2023)[664] and Principles of Conduct from 2023.[665] A detailed presentation of these documents deserves attention, but also a separate article. Here, we will selectively analyse a few issues of importance for the work of the Commission and its legal formulation, especially those regarding the independence of the Commission and the independence and impartiality of its members. In another, and more appropriate, portion of this text, there are some discussions about issues primarily concerning the activities, working methods, and documents of the Commission.

The Revised Statute, the constitutive act of the Commission adopted by the Committee of Ministers, is a rather small text that begins with the Preamble, in which it particularly importantly underlines 'welcoming the interest expressed by many non member states of the Council of Europe in the work of the Commission', along with the principle of equality of these countries in the work of the Commission ('wishing to give to these states the possibility to take part in the work of the Commission on an equal footing'). Still in the Preamble, the Commission's 'independent character' (not 'independent status', *author's note*) and 'flexible methods' are emphasised, and described as 'the key to its success'. Art. 1 contains the definition of the VC, which reads as follows:

> The European Commission for Democracy through Law shall be an independent consultative body which co-operates with the member states of the Council of Europe, as well as with interested non-member states and interested international

663 See the VC's cooperation with its partners outside Europe, VC, CDL-PI (2021)017.
664 VC, CDL-AD (2023)013.
665 VC, CDL-AD (2023)012.

> organisations and bodies. Its own specific filed of action shall be the guarantees offered by law in the service of democracy.

Then, the goals and priorities of the Commission's work are determined (this is discussed below in this text in greater depth). The rule of law is the 'light motive' not only of this article, but also of the entire Statute.

Art. 2 of the Statute regulates the mandate of members and deputy members of the Commission. Commission members must be 'independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science'. That is, they should be 'prominent', but need not be a lawyer. This prominence is, in fact, manifested in three aspects, as described herein: expertise; practical institutional experience and personal qualities; independence and impartiality, which the first two should in turn guarantee. Only a member who combines all three aspects can have 'the capacity and availability to serve on the Commission'. Furthermore, while Commission members are appointed by Member States (i.e. member in respect of each Member State of the Enlarged Agreement), their appointment renders them no longer 'belonging' to the state nor representatives of the state – in the legal sense of the words. Instead, they start to 'serve' the Commission in a personal capacity. The free mandate of a Commission member is also guaranteed, as he/she must not 'receive or accept any instructions'; namely, in the first place, a member must not receive instructions from his/her country. Recent years have seen greater emphasis being placed on the independence and impartiality of members. Accordingly, Art. 3a of the Rules of Procedure (last amended in March 2023), for example, now stipulates that 'members shall act in manner that is, and is seen to be, independent, impartial and objective with respect to any issue examined by the Commission'. In order to comply with these requirements, the obligation to take an oath was introduced, which entails the moral and legal responsibility of the member of the Commission.[666]

It is important to prevent the possibility of a conflict of interest among Commission members, especially when it comes to matters that can affect their impartiality and objectivity. Therefore, there is the following:

> […] members shall notify the President (of the Commission, *author's note*) through the Secretary of any potential conflict of interest, i.e. any circumstance which might appear to influence their impartial and objective consideration of any issue examined by the Commission, in particular but not limited to any task, remunerated or not, entrusted to them by a government.[667]

666 'Upon taking their duties, members shall commit to abide by the Venice Commission's Principles of Conduct', as in Art. 3a 1bis of the VC, CDL-AD(2023)012.

667 Art. 3a of the VC, CDL-AD(2023)013.

In case of potential conflict of interest, the President shall announce to the Commission that the member shall not take part in the vote. Furthermore, while a member shall not take part in the debate on opinions relating to the state having appointed him/her or in which he/she holds citizenship, he/she may provide information and clarification concerning the constitutional and legal system of that country. This possibility, which is left to the member of the Commission, gives him/her a certain 'manoeuvring room' to influence, even if indirectly and factually, the content of opinions concerning the country from which he/she comes. This is a good example showing how the principle of independence and impartiality for Commission members is 'corrected' by the body's flexible working methods. The goal of such flexibility is for the Commission to learn as fully and accurately as possible about the specifics of the national legal system of the respective country. It can indeed be very useful if the information and explanations provided stem from an expert who both serves the Commission and comes from that country.

The mandate of Commission members lasts four years, they can be re-elected, and there is no limit on the number of mandates. Still, two grounds for early termination of their mandate are expressly prescribed. These are resignation and a kind of dismissal, when 'the Commission notes that the members concerned is no longer able or qualified to exercise his or her function'.[668] Those are strong guarantees of the independence of Commission members, as they exclude, for instance, the possibility of a member being 'punished' by dismissal from his/her own country because, for any reason, he/she fell out of favour with a holder of a high function in that state.

Art. 3 of the Statute regulates when the Commission works on its own initiative, and when and who can initiate the drafting of opinions by the Commission. The issue of cooperation with constitutional courts and courts of equivalent jurisdiction is specifically regulated, and foresees the establishment of a special body, the Joint Council of Constitutional Justice (also known as JCCJ).

Art. 4 regulates the basic contours of the internal organisation of the Commission, its plenary sessions (as a rule, four times a year), and determines the two working languages of the Commission, which are English and French. Art. 6 regulates financial issues related to the work of the Commission and covers the expenses of Commission members, borne by 'an Enlarged Agreement budget funded by the member states of the Enlarged Agreement', while 'travel and subsistence expenses of each member of the Commission shall be borne by the State concerned'. Furthermore, 'the Regione Veneto shall put a seat at the disposal of the Commission free of charge', but it is also interesting that 'expenditure relating to the local secretariat

668 Art. 2 of the Revised Statute. We use the term 'dismissal'. Otherwise, in the spirit of the Commission's diplomatic vocabulary, the Rules of Procedure say that 'the term of office of a member … shall expire … c. the day the Commission notes, on the proposal of the Bureau, by a majority of two-thirds of its members that the member concerned is no longer able or qualified to exercise his or her functions, including on account of serious breaches of the duties set out in the Commission's Principle of Conduct'.

and the operation of the seat of the Commission shall be borne by the Regione Veneto and the Italian Government, under terms to be agreed between these authorities'.

Meanwhile, Art. 7 predicts the following: 'Once a year the Commission shall present to the Committee of Ministers a report on its activities containing also an outline of its future activities'. Art. 8. determines that 'the seat of the Commission shall be based in Venice'. Art. 9, the last of the Statute, regulates the manner in which amendments to the Statute will be adopted, while the decision on their adoption is made by the Committee of Ministers 'after consulting the Commission'. The Committee has the right to 'propose amendments' to the Statute to the Committee of Ministers.

A.4.5 Geopolitical Level

In the prior pages, we already highlighted how much a certain geopolitical context had a favourable and stimulating effect on the establishment of the VC. At the same time, certain reservations towards the idea of an 'international constitutional and legal advisory body' persisted for a shorter or longer time in some respectable countries with a serious state–legal tradition.[669]

In order for a large, especially international, organisation to survive and be relevant for a long period, it must have good adaptability, meaning the capacity to 'spread' and transpose its ideas and activities to practically all continents. In this sense, it must wisely follow and perceive geopolitical changes, which, conditionally speaking, will function easier and better if it 'grabs' a larger part of modern legal civilization. La Pergola and his closest associates were well aware of that, and thence the original ideas of the VC were of such content that they could take on a transnational character in just a few years. With the accession of the Russian Federation on 1 January 2002, all members of the CoE became members of the Commission. By that time, many non-European countries had observer status (e.g. Argentina, Canada, Republic of Korea, Mexico, United States of America, and Uruguay).[670] This created the conditions for the partial agreement to converge to an enlarged agreement, which in turn enabled the accession of non-European states as full members of the Commission. The first non-European state to take advantage of that opportunity was Kyrgyzstan in 2004,[671] and the next two decades saw many non-European countries gain full member status.[672] This undoubtedly contributed to the activities of the VC, especially in the field of constitutional justice, affording it an almost global character.

669 For example, Germany, Hungary, Poland, and the Netherlands joined the Commission in 1992, and the United Kingdom only in 1999. Among the former Yugoslav republics, the first to join was Slovenia (1994), followed by North Macedonia (1996), Croatia (1997), Bosnia and Herzegovina (2002), Serbia (2003) and finally Montenegro (2006).

670 Schnutz Dürr, 2010, p. 154.

671 Certain countries hold an observer status even today, namely Argentina (1995), Holy See (1992), Japan (1993), and Uruguay (1995).

672 For example, Republic of Korea (2006), Brazil (2009), Mexico (2010), USA (2013), Canada (2019).

The Commission is not only 'probably one of the Council of Europe's most successful achievements',[673] but also an outstanding example of the institutionalisation of the phenomenon of transnational constitutional law.

All this, notwithstanding, does not mean that, after more than three decades of its existence, the Commission does not face new challenges; quite the contrary, there are challenges, which in turn are largely induced by the current complex and demanding geopolitical situation worldwide. The answers to those challenges have not yet been defined, nor are they to be found, for the most part, in the hands of the Commission itself. Its expansion was predominantly the merit of an idea affirmed in the 1990s based on the 20th century in Europe, which hoped for a stronger political unity and a world in which one superpower still ruled sovereignly. The future of the Commission will be largely determined by its ability to find a way out of the political and all-encompassing crisis of the European Community, and of a global crisis of the international and supranational rule of law.

A.4.6 Practical Level

The gap between what is proclaimed and what is real is usually well-known to lawyers who deal with public law, a branch that has always been 'something between' law and politics. That discrepancy between how the VC is perceived in the international legal community and what it really is, between what is written in its legal documents and how it functions 'on the ground', is a necessary consequence of the nature of this body and its basic – and until today unchanged – advisory role in the field of constitutional and para-constitutional law.

That gap goes in two directions. First, it manifests through the flexible working methods of the Commission, allowing it to often demonstrate a high degree of operability and dynamism, something that cannot not be easily assumed by simply looking at its regulations (although these are constantly amended in order to eliminate all observed practical shortcomings and challenges to the work of the Commission). The notion of some kind of 'Venetian diplomatic conference' where experts of different legal, cultural, and political profiles discuss and give guidelines and recommendations is thus incorrect, and as inaccurate as the thesis about the VC as a 'quasi-political body' that decides when adopting its opinions according to the deceptive criteria of division on old (stable) and new (perpetually unstable) democracies. The VC, despite its deficits (of which it is often aware), represents an expert body that can react unimaginably quickly and efficiently without harming either the target country or its own principles and methods of work. No wonder the predominantly positive experiences of state representatives who come before the Commission with the aim of receiving professional assistance in finding constitutional and legal solutions, which will be complementary to the requirements of both European and national constitutional identity. More precisely, there is one important prerequisite that

673 Schnutz Dürr, 2010, p. 151.

makes such experiences positive, which is the professionalism and readiness of the Commission for engaging in open and professional cooperation with reformers in the specific country.

Second, the gap manifests through the sometimes apparent and sometimes real 'meanderings' of the Commission in drafting opinions on the same issues in different countries. Sometimes it seems that the Commission does not act consistently in the application of its standards, but rather interprets them depending on the country in question. This is perhaps the strongest accusation levelled against the Commission by its critics. The accusation boils down to the question: 'why is something tolerated in one country and not in other in the same matter?' or 'why does it seem that there is one rule for one country and another rule for another country?' It is not possible to give answers in the abstract to such questions. Here we will only remind that the Commission checks the conformity of its standards in relation to the specificities of the national legal systems involved, which are usually only superficially similar. After all, equal application of law is possible only in legally- and factually-identical situations; thus, when there is no such identical situation, it is not possible to talk about equal application of law (i.e. legal standards). It remains that the standards defined and developed by the Commission aim for universal reach, even if this does not entail an identical content in every specific case. This is precisely why legal standards are at stake, and not specific imperative legal norms. One is soft law, or even 'softer' than soft law, and the other is hard law with its mandatory regulations. After all, legal standards are not static categories, but instead are developed, enriched, and evolved in the practice of the Commission, and thus change. Importantly, they do not change *in abstracto* nor on the basis of doctrinal discussions, but on the basis of the experience that the rapporteurs and other members of the Commission gain 'on the ground', in specific countries.

A.4.7 Subjective Level

Someone once said that the famous British constitution is the personal creation of the author who describes it; cannot the same be said for all other phenomena in the field of law and social life in general? Certainly, subjective perceptions in judicial, professional, and scientific contemplation must not overcome objective law and objectively-based arguments. However, in the understanding of the VC, the institution simply cannot avoid nor exclude a distinctly personal note, especially of those who participated in any way in its work. Therefore, in addition to possible direct and personal experience, when it comes to the VC, the recommendation is for works to be titled, for example, with 'A Personal Testimony', 'A Personal Recollection', 'A Source of Inspiration' and similar.[674] This applies even to those works written by the skilful hand of the chief administrators in the Commission, because their role often goes

674 See, for example, Baricová, 2020, pp. 67–69; Closa, 2020, pp. 191–198; Hajiyev, 2020, pp. 299–301.

far beyond technical–professional assistance and represents the key to the success of this body.[675]

A.5 The Role of the Venice Commission

Determining the basic and main role of the VC – bearing in mind its diverse and fruitful activities in constitutional and para-constitutional matters, as well as the influence it exerts on individual states and numerous international organisations/institutions – is perhaps as ungrateful as it is to say with certainty which is the most convenient path to Scuola Grande San Giovanni Evangelista. If, however, we start from its main activity, its role is advisory.

The main activity of the VC can be defined as the preparation and adoption of opinions on constitutional and legal texts (e.g. drafts, proposals, and acts that have already entered into force), whether at the request of the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional authorities of Europe, the Secretary General, a state, an international organisation, or a body that participates in the work of the Commission (Art. 3 of the Statute). The fact that the role is advisory does not owe, nonetheless, to its opinions not being legally binding nor to the Commission being 'only' a technical expert body; instead, it owes to the 'philosophy' of its work, which is to understand the rule of law as a process of legal–cultural development and upliftment of the community. The rule of law and democracy are not established 'from above', by imperative legal regulations, nor strict orders, but rather are built in the process of the institutional dialogue among all relevant stakeholders. That is why the Commission makes suggestions, recommendations, establishes very flexible standards, and almost never offers concrete solutions. Sometimes the Commission will declare what is the ideal model for it, but it will always leave enough 'room for manoeuvre' for a state to choose the solution that best suits the specific society within the standards in a certain legal field. Even when the text is submitted to it for an opinion later, since the text has already entered into force,[676] the Commission 'retains the role of advisor'.[677] Imperative address, not only in the formal but also in the essential sense, is hence not 'a language' of the Commission.

Regarding the advisory role of the Commission, it is also important to point out that when the opinion is not requested by the state but by the Committee of Ministers or the Parliamentary Assembly, 'the Venice Commission is not an advisor to them: they are political bodies, and the Commission is not a political but a technical body, and its aim is always to provide constructive advice to the country in question'.[678] Another basic activity of the Commission is to:

675 Those works from the second category represent the backbone of the whole chapter.

676 For example, such was the case with the Constitution of Serbia from 2006. The Commission adopted the Opinion on the Constitution almost a year later. See VC, CDL-AD(2007)004.

677 Buquicchio and Granata-Menghini, 2013, pp. 249–252.

678 Buquicchio and Granata-Menghini, 2013, p. 251.

> carry out research on its own initiative and, where, appropriate, may prepare studies and draft guidelines, laws and international agreements. Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe (Art. 3 of the Statute).

This activity can be also subsumed under the advisory role of the Commission because it does not involve the preparation of documents *in abstracto*, but, among other things, based on the material obtained in the preparation of concrete opinions. Therefore, there are two inseparable activities that make up the totality of the Commission's role as an international legal adviser. After all, a good example is precisely its work on the concept of the rule of law, because the Rule of Law Checklist (which will be discussed on the following pages) was preceded by another document – the Report on the Rule of Law from 2011. Both documents, especially the Checklist, are not based on theoretical – dogmatic reflections, but are the dynamic result of the diverse and rich practice of the rule of law in the states that are members of or have any other institutional relationship with the VC. Twenty years ago, Bartole correctly warned: 'In the exercise of its mandate, the Commission has to avoid putting itself in the position of working in an abstract dimension: legal modesty, not legal hubris has, therefore, to be its main standard of action'.[679]

B. The Venice Commission's Concept of the Rule of Law: Substantive Aspect

B.1 In Search of an 'Operative' Definition of the Rule of Law

It is clear from the previous paragraphs that, practically speaking, all the activities of the Commission, whether it is the sessions of its subcommittees, plenary sessions, missions and visits to countries, round tables, and conferences, are aimed at building, promoting, and continuously improving the rule of law.[680] Therefore, dealing with the contribution of the VC in the field of the rule of law means encompassing the work of the Commission as a whole, and that, we believe, is an almost impossible task even for a group of authors who are legal and political experts of different profiles. Therefore, our focus, not only and exclusively, will be directed towards the document which certainly represents a synthesis of the rich contribution of the Commission to the rule of law, especially its functioning, and an assessment of its current achievement in every national state. This document is the Rule of Law Checklist, which can be freely called the 'identity card' and a constitutive document

679 Bartole, 2000, p. 363.

680 'Promoting the rule of law and democracy' is one of three main objectives of the Commission listed in the Art. 1 of its Statute in which it is also emphasized that 'the Commission shall give priority to work concerning: a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law'.

for the feasibility assessment of the contemporary rule of law at the international, supranational, and national level.

The Rule of Law Checklist is neither a 'spontaneous' creation nor is it a mere compilation of the results of the VC's research in that area. In fact, it arose owing to the 'lack' of a functional definition of the principle of the rule of law, which has long since become a global phenomenon. The real need to define a fundamental principle does not arise in the offices of professors nor in faculty amphitheatres, and much less in the minds of politicians, legislators, or administrators. Instead, it emerges in everyday legal life, when the realisation of that principle is faced with serious trials in practice.

The second half of the 20th century is characterised by two important features in the field of constitutional law. The first is the internationalisation of constitutional law, especially human rights, by the development of numerous international documents, starting with the UN Charter and the Universal Declaration of Human Rights. The second is the so-called new constitutionalism, characterised by the absolute supremacy of law, formally firm constitutions, and judicial review. In that period, there was apparently no strong need for a normative definition of the principle of the rule of law.[681] The fundamental nature of this principle, at the national and international level, was not questioned, and the question of its more comprehensive definition was therefore not raised, except in theoretical discussions. More precisely, the question was not raised as to what are the core elements of the rule of law according to which the quality of the implementation of the rule of law is assessed in each individual country. At the end of the 1980s, the collapse of real-socialism in the countries of Central and Eastern Europe only strengthened the trend of the 'prosperity' of the rule of law as a normative principle.

The first years of the 21st century then led to a gradual 'sobering' from the misconception that the rule of law is a universal principle of universal content. The rule of law is a fundamental principle, but it must be effective, implying that it is not enough just to proclaim it in constitutions and declarations, international conventions, and treaties, nor to just refer to it, as is generally done in the practice of the European Court of Human Rights (also known as ECtHR) and other courts. It is also not enough to tie the rule of law to human rights and democracy, with which it is undoubtedly inextricably linked, but with which it cannot be equated. The old dilemma between the rule of law (Anglo-Saxon theory) and *Rechtsstat* (German legal theory), which dates back to the second half of the 19th century, was 'solved' by adding values to both concepts and, consequently, their essential equalisation. Whichever

681 'The principle of the law governed state and the rule of law after World War II are founded on the premise of international law, on the binding force and direct application of international treaties into domestic law and on the compliance of domestic legal order with the generally acknowledged norms and principle of international law. Constitutions and constitutional legislation are designed in consonance with international and European standards established in the international hard and soft law based on the common democratic European constitutional heritage'. Tanchev, 2008, p. 8.

name you choose, 'rule of law' or *Rechtsstat* ('legal state' or 'state governed by law'), the concept is both formal and legal because in that case it easily turns into 'rule of the law' or 'rule by the law'.

Therefore, a key challenge eventually became the effective implementation and protection of the rule of law. The first step to be taken was to find an 'operational' or 'functional' definition. That definition, however, could not be 'hermetic' and 'imperialist', but rather be open to addition and modernisation *in abstracto* and *in concreto*, considering the circumstances of the actual society and national legal order. At the same time, it could not be 'imposed' on national states by any external authority, no matter how much that authority, apparently or actually, has democratic characteristics and rests on the consent of the Member States (for example, the EU). Accordingly, 'if it is true that its importance (the rule of law*, author's note*) has increasingly been stressed at both national and international levels, its actual implementation has somewhat escaped a systematic and coherent approach based on international standards'.[682]

Finding such an 'operational' and 'functional' definition of the rule of law was not a task for the VC alone, but it seems that it, as a body with the aforementioned characteristics, was among the most called upon to respond to such a task. Thus, the VC was, in a certain sense, 'called out' by the Parliamentary Assembly of the CoE when, in the Resolution from 2007 on the principle of the rule of law, it was assessed that 'the subject merits further reflection with assistance of the European Commission for Democracy through Law (Venice Commission)'.[683] In the report 'Rule of Law and State Governed by Law' from 2008, the author of which was Evgeni Tanchev, then a member of the Commission from Bulgaria, several challenges faced by the rule of law in that period were highlighted. The first challenge regarded the so-called 'underdeveloped legal culture on the part of the rulers and ruled', which was present in the new democracies and a consequence of the absence of a developed civil society and concepts such as legal nihilism and fetishism. In legal practice, it produced 'unenforceable provisions and ineffective law enforcement'.[684] The second challenge was reflected in the emergence of multi-level constitutionalism, as described herein: 'Constitutional monism of the nation states is supplemented with supranational constitutional dimension by gradual constitutionalization through establishing international and European standards of constitutional democracy'.[685] This supranational constitutionalism is not homogeneous, as, for example, it consists, on the one hand, of the system of standards of the CoE, the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights, and the so-called constitutional order of the EU on the other hand. Meanwhile, the relations between these levels are far from perfectly harmonious and sincerely mutually

682 Granata-Menghini, 2017, p. 3.
683 Resolution 1594(2007), 'The principle of the Rule of Law'.
684 Tanchev, 2008, p. 8.
685 Tanchev, 2008, p. 8.

respectful. Therefore, supranational constitutionalism certainly cannot rest on the supremacy of the written constitution, which is a constitutive feature of the new constitutionalism after World War II, and the question arises as to whether any kind of European legal order can be based on a consensual and not on a hierarchical principle.[686] Tanchev says the following about the topic:

> Primacy of the EU law and validity of EU standards will be guaranteed by (…) contrapunctual constitutionalism where conflicts between the constitutional orders and harmony is achieved by the same democratic constitutional values and principles shaped by the common European constitutional heritage after the Westphalian peace treaty.[687]

This, for now, represents an extremely optimistic forecast. The third challenge is terrorism and transnational crime. When it comes to the first two challenges, a flexible approach, dialogue, implementation, and monitoring of soft international standards are necessary methods. Here, the role of the VC, with all possible reservations, is unavoidable and crucial.

B.2 The Report on the Rule of Law

The first significant step toward the definition of the rule of law was made by the VC with the adoption of the Report on the Rule of Law from 2011.[688] This document, according to the honorary president of the VC, Professor Hanna Suchocka, was created as a direct response to the 'misunderstanding of the Rule of Law in individual countries' and 'clearly dangerous symptoms […] of weakening the Rule of Law', which began to manifest themselves more clearly since 2010.[689] This document identifies common features of the rule of law, *Rechtsstaat*, and *état de droit*, as well as shows the position of the Commission according to which it is impossible to define

686 The so-called consensual federalism was one of the main causes of the collapse of the Socialist Federal Republic of Yugoslavia, so it can hardly be expected that its implementation, mutatis mutandis, will achieve long-term positive effects in the EU.

687 Tanchev, 2008, p. 9.

688 CDL-AD(2011)003rev.

689 Suchocka, 2020, p. 645. At this point, Suchocka cites the example of amendments to the Basic Law of Hungary, although many authors cite Poland in an even more negative sense. See, for example, Clayton, 2019, pp. 455–459.
In fact, configuring a more objective approach to the challenges of the rule of law, these individual cases could not be treated as the examples of the crisis of the rule of law, but rather as the consequent responses of states with a strong national constitutional tradition; these states, in a time of general institutional confusion that has undoubtedly engulfed the EU, are trying to find their own constitutional answers, which, however much they deviate from the usual practice, are not completely inconsistent with the concept of the European constitutional heritage. The second decade of the 21st century puts very high on the agenda the point concerning the relationship between European versus national constitutional identity. See, for example, Petrov, 2022, pp. 177–200.

the rule of law in terms of a 'traditional definition' that would be 'totally acceptable in both continental Europe and in common-law countries'.[690]

The VC assumed that the rule of law should be determined as a practical concept, and that 'this definition should therefore be of a nature that allows for practical application'.[691] It is important to point out that the Commission understands the rule of law as a concept that is originally and primarily linked to the national state–legal order, and that has an increasingly pronounced international and supranational character, scope, and importance, as described herein:

> The rule of law in its proper sense is an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent courts for their unlawfulness, where they are accorded fair procedures. The rule of law thus addresses the exercise of power and the relationship between the individual and the state. However, it is important to recognise that during recent years due to globalisation and deregulation there are international and transnational public actors as well as hybrid and private actors with great power over state authorities as well as private citizens.[692]

The Commission determined, in the Report on the Rule of Law, six 'necessary' or 'core' elements of the rule of law, considering it a substantial or material as well as a formal concept, as follows: 1) legality, including a transparent, accountable, and democratic process for law enactment; 2) legal certainty; 3) prohibition of arbitrariness; 4) access to justice before independent and impartial courts, including the judicial review of administrative acts; 5) respect for human rights; 6) non-discrimination and equality before the law. At this point, it is important to underline one more time: this document specifically emphasises that the rule of law is a global concept, 'influenced by and linked to new modes of governance'.[693] Just as it is wrong and too narrow to define the rule of law exclusively as a fundamental national constitutional principle, it is not entirely true to talk about an international rule of law, which refers exclusively to international organisations. Accordingly, the description below is found in the Report on the Rule of Law:

> The substance of the rule of law as a guiding principle for the future has to be extended not only to the area of cooperation between state and private actors but also to activities of private actors whose power to infringe individual rights has a weight comparable to state power. Government actors at the national, transnational and

690 Granata-Menghini, 2017, p. 4.
691 VC, CDL-AD(2011)003rev, p. 3.
692 VC, CDL-AD(2011)003rev, p. 5.
693 VC, CDL-AD(2011)003rev, p. 13.

> international level all have to act as guarantors of the fundamental principles and elements of the traditional rule of law in these areas.[694]

At its end, the Report contains the 'core' of what became the Rule of Law Checklist, specifically an annex with a checklist for evaluation of the status of the rule of law in single states. Each element of the rule of law (called 'benchmark' in the main Checklist) is determined in more detail through a list of questions.

B.3 The Rule of Law Checklist

Bearing in mind the dynamic nature of the concept of the rule of law, the Commission decided to improve the Report to make it more 'vivid' and provide it with more of the practical character. This was the 'second step' that represented the 'bringing to life' of this definition through parameters. Those parameters, on the one hand, had to be formulated in a such way as to be sufficiently concrete, clear, and understandable for application (i.e. for use in assessing the degree of achievement of the rule of law in a specific country). On the other hand, they had to be sufficiently abstract to refer to an indefinite number of cases in different state and sociopolitical contexts. That is how a comprehensive document such as The Rule of Law Checklist was created. It was then adopted by the Commission at its 106th Plenary Session in March 2016.[695] In the Introduction part of the document, the Commission explains the purpose and scope of the Checklist:

> The present Checklist is intended […] to provide a tool for assessing the Rule of Law in a given country from the view point of its constitutional and legal structures, the legislation in force and the existing case-law. The checklist aims at enabling an objective, thorough, transparent and equal assessment.[696]

In order for the concept to be 'alive', the Checklist was created such that it is not a closed structure, 'neither exhaustive nor final: it aims to cover the core elements of the Rule of Law', and 'the Venice Commission will therefore provide for a regular updating of the Checklist'.[697]

Although the Checklist mainly consists of legal guarantees, the rule of law depends equally, if not more, on the legal and political culture of a country. Therefore, the Checklist is valid to the extent that it is used in the context of a specific country, and it should be used not as a formula, but as an open system of parameters that a

694 Ibid.
695 VC, CDL-AD(2016)007.
696 Ibid., p. 12.
697 Ibid., p. 13.

country satisfies at a specific moment to be able to assess how much, in a qualitative sense, legal the state is.[698]

In the second part of the Checklist, the 'benchmarks' of the rule of law are elaborated. This is done methodologically by first defining each specific element that makes up the 'benchmark' content through a list of questions, and then describing the key features of each element in more detail. At this point, we will only show the essential elements of each benchmark.[699] The first benchmark is legality, the elements of which are the following: 1) supremacy of the law; 2) compliance with the law; 3) relationship between international and domestic law; 4) law-making powers of the executive; 5) law-making procedure; 6) exceptions in emergency situations; 7) duty to implement the law; 8) private actors in charge of public tasks.

The second benchmark is legal certainty, the elements of which are the following: 1) accessibility of legislation; 2) accessibility of court decisions; 3) foreseeability of the laws; 4) stability and consistency of the law; 5) legitimate expectations; 6) non-retroactivity; 7) *nullum crimen sine lege* and *nulla poena sine lege* principles; 8) *res judicata*.

The third benchmark is prevention of abuse (misuse) of powers, which is defined as a whole. The fourth benchmark is equality before the law and non-discrimination, and apart from the principle itself ('Does the Constitution enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination?') and the brief definition of the main aspects of non-discrimination, this benchmark is also determined by equality in law and equality before the law.

The fifth benchmark is access to justice, the elements of which are the following: 1) independence and impartiality; 2) fair trail; 3) constitutional justice (if applicable). The sixth benchmark is determined through the examples of particular challenges to the rule of law, which are 1) corruption and conflict of interest, and 2) collection of data and surveillance.

The third part of the Checklist deals with selected standards, that is, the most important instruments of hard and soft law addressing the concept of the rule of law. These instruments are very important points of reference; 'through them, the benchmarks stop being abstract and become real'.[700]

698 'The contextual elements of the Rule of Law are not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law (…) It is important that in every State a robust political and legal culture supports particular Rule of Law mechanisms and procedures, which should be constantly checked, adapted and improved'. VC, CDL-AD(2016)007, p. 16.

699 This chapter explores, further down, one example benchmark – access to justice – in the Republic of Serbia after the constitutional and legal reform of the judiciary (2021–2023), and answers most of the questions from the Checklist related to that benchmark.

700 Granata-Menghini, 2017, p. 5.

The Rule of Law Checklist is an attempt to provide a comprehensive, current, operative definition of the rule of law. However, it is not a document of a purely academic and doctrinal character, but rather, as it rightly points out, 'a tool that is available to all stakeholders, including international Organisation, national authorities and civil society'.[701] Thus, if one tries to find a single definition of the rule of law in the Checklist, one will be disappointed. He/she will not find it explicitly nor by carefully reading between the lines, and will be equally disappointed if he/she is 'in love with' the theory of the rule of law. In such a situation, it is certain that he/she will not enrich his/her theoretical knowledge. Accordingly, from a rule of law theory perspective, this is a rather boring read. However, it was not created as a contribution to theory, and as a part of that, nor to the theoretical definition of the rule of law. Instead, the Checklist is an expression of awareness that the rule of law is not definable in the proper sense, but may be measurable. As Granatha-Mengini says:

> […] the Checklist aims to enable an assessment which is
> • *thorough*, by dealing with all the core dimensions of the rule of law;
> • *objective* and *transparent*, referring explicitly to the national and international standards, including the case-law of the European Court of Human Rights, which are to be used for the assessment;
> • *equal:* the same benchmarks and standards are applied in every situation, to any country.[702]

Granatha-Mengini also warns that the 'Checklist should not be applied mechanically. The assessment should not merely consist of counting the right answers; it should not be arithmetic sum of ticked boxes',[703] and that 'the rule of law is not all or nothing'. There can also hardly be countries where it is fully realised and countries where it does not exist at all. Instead, the rule of law is achieved through successive levels, in a progressive manner, and its full achievement remains an ideal, as well as an ongoing task even in well-established democracies. It remains that the lower the level of compliance with the rule of law, the greater the demand and the need for it. Compliance with the rule of law is a priority of our times, and should be pursued and enhanced on structural matters or on matters of institutional functioning.[704]

In any case, the great and systematic intellectual effort of the VC to 'measure the immeasurable', to make 'an open book' and a practicum of the rule of law, is in itself an indisputable contribution to the realisation of the rule of law at the national, international, and supranational levels.

701 VC, CDL-AD(2016)007.
702 Granata-Menghini, 2017, p. 6.
703 Ibid.
704 Ibid.

I.2 The Interpretation of the Rule of Law in the Organisation for Economic Co-operation and Development

A. Introduction

The Organisation for Economic Co-operation and Development (OECD) is an international organisation representing a unique forum where the governments of nearly 40 democracies work together to address the economic, social, and environmental challenges of globalisation. In this forum, they can also compare policy experiences, seek answers to common problems, identify good practices, and work to coordinate domestic and international policies.[705] As reaffirmed and highlighted in the OECD's 60th Anniversary Vision Statement, it 'form[s] a like-minded community, committed to the preservation of individual liberty, the values of democracy, the rule of law, and the defence of human rights'.[706]

Pursuant to Article 1 of the Convention on the OECD, signed in Paris on 14 December 1960 and came into force on 30 September 1961, the OECD shall promote policies designed according to the following: to achieve the highest sustainable economic growth and employment and a rising standard of living in Member Countries, while maintaining financial stability, and thus to contribute to the development of the world economy; to contribute to sound economic expansion in Member and non-member countries in the process of economic development; to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations. The OECD Members[707] re-asserted their core values and founding goals in the OECD 60th Anniversary Vision Statement.[708]

705 OECD, 2005, p. 56.

706 OECD, 2021a.

707 The original member countries of the OECD were Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Eighteen other countries have become members subsequently through accession. Full list of OECD members [Online]. Available at https://www.oecd.org/about/members-and-partners (Accessed: 15 March 2024).

708 OECD, 2021a.

The OECD Secretary-General's High-Level Advisory Group on Anti-Corruption and Integrity, in its Report to the OECD Secretary-General on Combating Corruption and Fostering Integrity,[709] underlined that 'the "rule of law" is an overarching challenge, fundamental to ensuring integrity and successfully combating corruption in all jurisdictions'. Just as other institutions, the rule of law is a dynamic category comprising a set of political arrangements, and is constantly under transformation.[710] Accordingly, the High-Level Advisory Group emphasised in the report both 'the need for the OECD to take bold leadership on anti-corruption' and 'the overarching importance of advancing transparency, accountability and rule of law institutions across the globe.'[711] As emphasised here, some of the particular elements of these three key governance areas – transparency, accountability, and rule of law – for promoting integrity and combating corruption[712] 'may not fall within the core competencies of the OECD's work'.[713] Considering this, the current research focused on the areas which have been considered as particularly relevant for the OECD's mission. Nonetheless, it should be underlined that certain critical reviews,[714] while examining the commitment of OECD Member Countries to the rule of law, admit that 'even among OECD member countries with the rule of law recession, we can find efforts to uphold the values of the rule of law'.[715]

The OECD was one of the first international organisations to have worked on issues regarding anti-corruption fight and public integrity promotion. Corruption has been continuously recognised as a major obstacle for the achievement of the rule of law, national and global security, economic growth, fair competition, development, and good governance. It has been also recognised that 'corruption has a snowball effect: it undermines the rule of law and the lack of rule of law is a fertile ground for corruption'.[716] In fact, the OECD, as an international organisation set up to facilitate trade and economic development, having developed (since its establishment in 1961) over 270 international instruments, a significant number of which describe international standards for anti-corruption fight and integrity and good governance promotion, 'implies an understanding on the part of Organisation's members and stakeholders of the link between combating corruption

709 The OECD Secretary-General's High-Level Advisory Group on Anti-Corruption and Integrity, comprising nine experts on anti-corruption and integrity, was created after the OECD Integrity Forum in 2015. This Advisory Group produced and delivered to the Secretary-General, in 2017, a Report containing recommendations on ways the OECD can strengthen its work on combating bribery and promoting integrity.

710 North, 1990, pp. 3–4.

711 High-Level Advisory Group, 2017, p. 6.

712 Ibid.

713 Ibid.

714 Balmori de la Miyar, 2021.

715 Ibid., p. 24.

716 Doc. 13228, Report of the Committee on Legal Affairs and Human Rights, Corruption as a threat to the Rule of Law. Rapporteur: Ms Reps, Parliamentary Assembly of the Council of Europe.

and economic growth'.[717] According to the assessment by the OECD in one of its more recent strategic documents, 'the OECD's work has been instrumental to the global anti-corruption movement in three complementary directions: fighting against transnational bribery and other forms of unfair competition; promotion of integrity and transparency; and good governance in the public and private sectors'.[718]

As pointed out by many authors, the notion of corruption still escapes precise delineation. Accordingly, there is no single, universally-accepted definition for the concept, and the ones most referred to are those adopted by the World Bank and Transparency International. These are focused on the abuse of public or entrusted power for private or personal gain:[719] 'Corruption is a serious international problem that hinders sustainable economic development, good governance, rule of law in many countries, and erodes other important social and democratic values'.[720] In general, it is a complex phenomenon that diversely impacts resource allocation and state activities, and is often closely related to other economic crimes (e.g. tax evasion and money laundering). Corruption thus discourages business dynamism, reduces investment and innovation, and erodes trust in government and public institutions.

The experience of OECD Member Countries seems to show that the traditional approach to tackling corruption (i.e. based on rules, stricter compliance, and tougher enforcement) has achieved limited success in decreasing corruption – unless combined with other strategies.[721] This has also been noted by Jin, as follows:

> Corruption is induced or exacerbated by deficiencies in specific policy areas, in association with a broader context such as the rule of law and social norms. Therefore, successfully combatting corrupt behaviour requires a comprehensive approach, addressing a wide range of policy areas.[722]

Therefore, the OECD has broadened its policy advice provision on public sector integrity, which in turn is considered by various authors as a synonym of anti-corruption policies. This resulted in a broadening of the focus of law enforcement and criminal acts, which is at the core of usual anti-corruption policies, by way of inclusion of preventive measures, integrity violations (not necessarily criminal offences), and administrative offences.[723]

717 OECD, 2018a, p. 13.
718 Ibid., p. 11.
719 OECD, DAC, 2009, p. 6.
720 Dimitrijević, 2022, p. 147.
721 Lambsdorff, 2009, pp. 389–415.
722 Jin, 2021, p. 3.
723 Smidova, Cavaciuti and Johnsøn, 2022, p. 5.

As has been noted, the OECD has been recognised as an international standard-setter in the area of anti-corruption fight and public integrity promotion, such that 'many of the world's largest economies – accounting for nearly three-fourths of global trade and investment – have committed themselves to implementing and enforcing these standards'.[724] The following five main characteristics have been identified as distinguishing the OECD as a standard-setter, as well as generating its capacity to contribute to the reaching of an agreement on standards: having Member Countries that are like-minded, enabling the OECD to reach agreements on new standards faster; its multidisciplinary nature and broad technical expertise, allowing the OECD to address the increasing number of challenges intersecting different policy areas; the 'bottom-up', evidence-based approach of its expert committees, ensuring that the standards are technically well-founded and that agreement is built progressively as the standards move through different stages of the process; its consensus-based decision-making, meaning that each OECD Member engages strongly in the process throughout all its stages and commits to implementing the standards.[725] The OECD's mechanisms supporting the monitoring and implementation of standards have been particularly regarded as added value, enabling the wide recognition and respect of the agreed-upon standards.

For this chapter, it is important to keep in mind the integral work of the OECD in the area of anti-corruption fight and good governance, the author's view that setting the international standards in this area and ensuring their implementation and enforcement constitute the core of OECD's work of relevance for the current paper, and the general consensus that corruption is one of the major threats to the rule of law. Accordingly, after examining the notion of the 'OECD standard' and analysing the process leading to its development, the author's focus shall pass to probing into the role of the OECD in strengthening the rule of law by setting the international standards in the areas of the fight against transitional bribery (i.e. the cornerstone of OECD anti-corruption expertise) public integrity, and public governance.

B. Supranational Interpretation by the OECD of the Elements of the Rule of Law in the Area of Anti-Corruption Fight and Good Governance

B.1 The OECD's Standard-Setting Role in the Area of Anti-Corruption Fight and Good Governance

Perhaps the best way to introduce the OECD's role as a standard-setter in the area of anti-corruption fight and good governance is to quote the conclusions of the latest 2023 Annual Update on OECD Standard-Setting Welcomed by Ministers at the OECD Council at Ministerial Level on 8 June 2023:

724 OECD, 2018a, p. 26.
725 OECD, 2021b, p. 4.

> OECD standards are one of the most visible ways in which Members and, in many cases, partner countries, present a common view on pressing policy issues and ensure co-ordinated action to tackle global challenges in our interconnected and digitalised world. (…) The OECD's work on standards remains firmly at the centre of how the OECD helps countries address the policy challenges they are facing. The unique evidence-based and consensus-building approach to developing standards at the OECD, coupled with the trademark OECD peer review and other implementation mechanisms, are key drivers in the successful take-up and impact of OECD standards.[726]

Thus, it is clear that the OECD has been globally recognised as an international standard-setter in the area of anti-corruption fight and good governance. Internationally-agreed standards have been viewed as 'the glue that holds the community of States together to ensure coordination, share responsibility and prevent disputes on issues where action is required on a global scale for the benefit of citizens'.[727] As it has been underlined in the document issued as the outcome of the Meeting of the Council at Ministerial Level, 31 May-1 June 2021, Standard-Setting Review: Five-Year Report (2016-2021)[728] within the OECD, the term 'standards' is used as the broadest category, encompassing all OECD legal instruments and other types of policy principles and guidelines developed within the OECD framework. Many, but not all, OECD standards have been embodied in substantive OECD legal instruments.[729] All OECD legal instruments are available in the online Compendium,[730] which is regularly updated to include additional information (e.g. unofficial translations produced by countries for the purpose of supporting domestic dissemination). The term 'OECD standard' is defined as 'the OECD legal instruments, as well as other sets of policy principles or guidelines developed within the OECD framework, setting out a collective agreement among the Members about what they shall do, should do, or intend to do'.[731]

Considering the statistics of OECD legal instruments, one may note that out of the approximately 270 legal instruments developed within OECD framework since its establishment to the drafting of this paper, around 20 legal instruments were dedicated to fighting corruption, bribery, and to public integrity promotion, both in the public

726 OECD, 2023a, p. 6.
727 OECD, 2021b, p. 4.
728 Ibid., p. 7.
729 All substantive OECD Acts adopted pursuant to Art. 5 of the OECD Convention (decisions and recommendations), and other types of legal instruments developed within the OECD framework (principally declarations and treaties).
730 For more information, see: Anti-corruption and integrity [Online]. Available at: https://www.oecd.org/corruption-integrity/explore/oecd-standards/ (Accessed: 30 October 2023).
731 For more information, see: OECD Legal Instruments [Online]. Available at: https://legalinstruments.oecd.org/en/about (Accessed: 10 August 2023).

and private sectors. Pursuant to Article 5 of the Convention on the OECD,[732] in order to achieve its aims,[733] the OECD may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; (c) enter into agreements with Members, non-member countries, and international organisations. Consequently, legal instruments developed by the OECD encompass the OECD acts which are adopted by the OECD Council (i.e. decisions and recommendations), and other legal instruments developed within the OECD framework (i.e. declarations, international agreements, and substantive outcome documents). It is important to emphasise that international agreements and decisions are legally binding, while recommendations and substantive outcome documents are not.

While the notion of an 'international agreement' is commonly known and the notion of 'recommendation' seems rather familiar, having been defined as 'political commitment to the principles they contain and entail an expectation that Adherents will do their best to implement them',[734] the notion of substantive outcome documents seems to require some additional clarification. Rather than by an OECD body, substantive outcome documents are adopted by the individually-listed adherents as the outcome of a ministerial, high-level, or other meeting within the framework of the OECD. They usually set general principles or long-term goals and have a solemn character.[735]

A significant number of the OECD bodies is involved in its work on anti-corruption and integrity issues. A non-exhaustive list of OECD such bodies is provided herein: the Development Assistance Committee (also known as DAC); the Public Governance Committee (also known as PGC); the Task Force on Tax Crimes and Other Crimes; the Working Group on Bribery (WGB); the Working Party on Responsible Business Conduct (also known as WPRBC); the Working Party of Senior Public Integrity Officials (also known as WPSPIO). The work of these bodies often complements or is undertaken in conjunction with that of a number of additional OECD bodies.[736] These bodies are sup-

732 Text of the Convention on the OECD signed in Paris on 14 December 1960 [Online]. Available at: https://www.oecd.org/about/document/oecd-convention.htm#Text (Accessed: 30 October 2023). See also Jovanović, 2019, pp. 47–48.

733 This is defined in Art. 1 of the Convention on the OECD, as follows: 'The aims of the Organisation for Economic Co-operation and Development shall be to promote policies designed: (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations'.

734 For more information, see: OECD Legal Instruments.

735 Ibid.

736 These include: the Competition Committee (also known as CC); the Committee on Fiscal Affairs (also known as CFA); the Corporate Governance Committee (also known as CGC); the Global Forum on Transparency and Exchange of Information for Tax Purposes; the Working Party on Exchange of Information and Tax Compliance; the Working Party on Export Credits and Credit Guarantees (also known as ECG); the Working Party on State Ownership and Privatisation Practices (also known as WPSOPP); the Financial Action Task Force (FATF), an inter-governmental body whose supporting secretariat is based in the OECD.

ported by the OECD Secretariat, primarily through an overseeing role performed by the Office of the Secretary-General, with the support of the Legal Directorate and the OECD Sherpa Office. The following directorates are also working on anti-corruption issues: the Centre for Tax Policy and Administration (also known as CTP); the Directorate for Financial and Enterprise Affairs (also known as DAF); the Development Co-operation Directorate (also known as DCD); the Development Centre (also known as DEV); the Economics Department (also known as ECO); the Public Governance Directorate (GOV); the Trade and Agriculture Directorate (also known as TAD).[737]

In view of the great number and diversity of bodies involved in the OECD's work in the area of anti-corruption fight and public integrity promotion, it has been observed[738] that such work, especially regarding anti-bribery issues, could run the risk of not attaining its fullest potential. This is because of the fragmentation of the efforts among various OECD bodies focusing on various facets of the same problem. Therefore, the High-Level Advisory Group recommended the following:

> the creation of a mechanism to require internal coordination, collaboration and knowledge sharing across the OECD's many locations and areas of relevant work (e.g., concerning public sector integrity, foreign bribery and corruption, financial transparency, development assistance, export credit, competition, public procurement and extractives governance) to ensure consistent and coherent action regarding existing and future instruments and initiatives.[739]

Another recommendation was 'to maximise the impact of the OECD's work in this area'.[740]

B.2 The OECD's Standard-Setting Work in the Area of the Fight against Transnational Bribery: Overview

With the integral work of the OECD in the area of anti-corruption fight and public integrity promotion in mind, this section is dedicated to examining its role in setting the international standards for the fight against transnational bribery, which has been viewed as a cornerstone of the OECD anti-corruption expertise.[741]

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the 'Anti-Bribery Convention', which will also sometimes be referred to just as 'the Convention') has to be singled out as the most notable OECD standard in the area of fight against transnational bribery. As has been underlined by the High-Level Advisory Group in its Report to the OECD Secretary-General

737 OECD, 2018a, p. 8.
738 Ibid., p. 7.
739 High-Level Advisory Group, 2017, p. 37.
740 OECD, 2018a, p. 7.
741 Smidova, 2020, p. 15.

on Combating Corruption and Fostering Integrity, 'the OECD has played a leading role in establishing international standards for combating the supply side of foreign bribery[742] through the Anti-Bribery Convention'.[743] This legal instrument, which was adopted in 1997 and entered into force in 1999, remained throughout the years the only international instrument in the area of fight against corruption focused on the supply-side of bribery transactions, creating legally binding obligations to criminalise bribery of foreign public officials in international business transactions. By adopting this instrument, the parties thereto demonstrated their willingness to fight a very specific form of corruption, namely the supply of bribes by their nationals (individuals and companies) to foreign public officials. These officials also include those operating in countries which are not parties to the Anti-Bribery Convention (also referred to as 'supply-side' bribery or 'active' bribery). The aim here is to limit unfair competition in international business transactions and support international development.[744]

The Anti-Bribery Convention is open to accession by any country that becomes a full participant of the WGB. On the date of the adoption of the OECD Working Group on Bribery on International Transactions 2022 Annual Report,[745] all 38 OECD Member Countries and six non-member countries[746] ratified or acceded to this convention. This convention is deemed to be 'a cornerstone of the OECD efforts to tackle corruption and build a stronger, fairer global economy'.[747] Besides joining together the efforts of 44 countries that are parties to this convention, the Convention provides for different implementation measures, including a peer-driven monitoring mechanism carried out by the WGB.[748]

The adoption of this Convention was preceded by the adoption of non-legally binding instruments that allowed the parties to formulate their observations, statements, and intentions without being immediately legally bound to take action. The first policy instrument in the area of anti-corruption fight goes back to 1994, when the Recommendation of the Council on Bribery in International Business Transactions of 27 May 1994[749] was adopted. Its successor, the Revised Recommendation of the Council on Bribery in International Business Transactions of 23 May 1997,[750] took

742 It has been noted in the official commentary of the Anti-Bribery Convention that 'the convention deals with "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe'.
743 High-Level Advisory Group, 2017, p. 13.
744 Ehlermann-Cache, 2008.
745 OECD, 2023b.
746 Namely Argentina, Brazil, Bulgaria, Peru, Russia, and South Africa.
747 OECD, 2023b, p. 5.
748 See the next section for a more detailed description.
749 C(94)75/FINAL.
750 C(97)123/FINAL.

one step forward and included a follow-up procedure for allowing the monitoring by Member Countries of the progress of recommendation implementation.[751]

The act of going from 'soft law' instruments to undertaking obligations in the form of an international convention marks a significant turning point, demonstrating the consensus of Member Countries on making radical changes in the anti-corruption fight by criminalising bribery in international business transactions. This form of corruption, which is 'a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions',[752] had been considered up to that point as an ordinary business practice in certain parts of the world. After the more than two decades since the Anti-Bribery Convention has entered into force, the bribery of foreign public officials in international business transactions has been criminalised in all Convention parties, the legislation regulating the liability of legal persons has been strengthened or adopted, and various other measures (as required by this Convention) have been undertaken to fight against this form of corruption.

The principle of 'functional equivalence' might be one of the elements that both enabled the rapid progress towards the creation of legally binding obligations and contributed to the success of Convention implementation. The Anti-Bribery Convention Commentary describes that it:

> seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system (…) establishing a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws.[753]

Importantly, the 'rule of law considerations are enshrined into Article 5 of the Anti-Bribery Convention',[754] which regulates convention enforcement. Pursuant to this Article, investigation and prosecution of the bribery of a foreign public official 'shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved'.

751 The Revised Recommendation called for effective measures to deter, prevent, and combat the bribery of foreign public officials in connection with international business transactions, particularly the prompt criminalisation of such bribery in an effective and coordinated manner, in conformity with the agreed common elements set out in that Recommendation, and with the jurisdictional and other basic legal principles of each country.

752 OECD, 1997, Preamble.

753 Ibid.

754 High-Level Advisory Group, 2017, p. 42.

In addition, and to complement the Anti-Bribery Convention, a significant body of standards has been developed by the OECD in the form of recommendations – as politically, but not legally, binding instruments – which may as well lead to the conclusion that the agreement on only certain aspects of the relevant issues in the area of transnational bribery amounted to a level that led to their embodiment in legally binding instruments. Meanwhile, other aspects of this phenomenon remained lingering in the sphere of recommendations.

Among the non-legally binding standards in this area, a special place is dedicated to the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which provides a set of measures intended to reinforce efforts to prevent, detect, and investigate foreign bribery. Adopted in 2021, this Recommendation complemented the Anti-Bribery Convention, strengthened and supported its implementation, and amended and updated the Anti-Bribery Recommendation adopted in 2009 through acknowledging new trends, addressing new challenges, and including good practices that emerged since its adoption. It is important to emphasise here as well that the 2009 Recommendation, in its own period, also strengthened the monitoring and enforcement of the Anti-Bribery Convention by providing new measures to reinforce efforts to prevent, detect, and investigate foreign bribery.

Some other OECD instruments also relevant for the fight against transnational bribery are highlighted hereinafter: (i) Recommendation of the Council on Bribery and Officially Supported Export Credits adopted in 2019;[755] (ii) Recommendation for Development Co-operation Actors on Managing Risks of Corruption adopted in 2016,[756] promoting measures to prevent, detect, sanction, and manage corruption and develop cooperation among the relevant actors; (iii) Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which was adopted in 2009.[757] It remains that the standards enshrined in these instruments, despite their strength and unanimous expression of the will of OECD Members and of their general obligation to abide by the polices that they developed, do not create legally binding obligations. The possibility of the elevation of certain standards set forth in these recommendations into binding obligations should therefore be a point for further reflexion and/or action, as this would contribute to further strengthening the rule of law.

755 Replacing 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits, C(2006)163.

756 Replacing DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement, DCD/DAC(96)11/FINAL.

757 Succeeding the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, C(96)27/FINAL.

C. The OECD's Standard-Setting Work regarding Public Integrity

The following sections focus on the second area considered particularly relevant in the OECD's work, public integrity promotion. This is one of the three complementary directions in which the OECD's work has been instrumental to the global anti-corruption movement, the other two being the fight against transnational bribery and the promotion of good governance in the public and private sectors,[758] 'recognising that integrity is vital to public governance, safeguarding the public interest ad reinforcing such fundamental values as the commitment to a pluralistic democracy based upon the rule of law and respect of human rights'.[759]

C.1 Overview of the Major OECD Public Integrity Standards

To strengthen the effectiveness of its anti-corruption fight, the OECD addressed both the supply- and demand- sides of foreign bribery. The Anti-Bribery Convention, directed towards the supply-side of foreign bribery, was complemented by a substantial body of policies, guidelines, and standards addressing particularly the issues of public integrity, conflict of interest, lobbying, political finance, and public investments.[760] Public integrity is a powerful tool in the fight against corruption to the extent that its promotion is considered to encourage behaviours towards the interest of the public over self-serving ones (e.g. corrupt and unethical practices).[761] The OECD described as follows on integrity:

> Integrity is one of the pillars of political, economic and social structures, and thus essential to the economic and social well-being and prosperity of individuals and societies as a whole. As such integrity has been viewed a cornerstone of the overall system of good governance.[762]

Public sector integrity is essential to maintaining trust in the government, as well as reducing the risk of misconduct, fraud, and corruption.[763] Furthermore, the OECD expressed its position that unethical interactions between public and private actors can violate public integrity at all stages of the public policy process across all levels and branches of the government.[764] Addressing this challenge requires a whole-of-society and whole-of-government approach, and the 'OECD Recommendation of the Council on Public Integrity is the blueprint for this approach'.[765]

758 OECD, 2018a, p. 11.
759 Preamble of the OECD, 2017.
760 High-Level Advisory Group, 2017, p. 13.
761 OECD, 2018b.
762 Preamble of the OECD, 2017.
763 Jin, 2021, p. 21
764 OECD, 2020, p. 1.
765 Ibid.

Configuring an attempt to provide a non-exhaustive inventory of the OECD's public integrity instruments that set the standards in this particular segment, the OECD Recommendation of the Council on Public Integrity[766] has to be singled out as the cornerstone of the OECD's work in this area. The experience of Member Countries has showed that addressing corruption requires a comprehensive policy approach, which has led to the adoption of the OECD Recommendation of the Council on Public Integrity[767] in 2017. This document replaced the Recommendation of the Council on Improving Ethical Conduct in the Public Service including Principles for Managing Ethics in the Public Service of 1998, which was the first international instrument in the area of managing ethics and enhancing public integrity. The 2017 instrument contains recommendations for a comprehensive public integrity strategy aimed at reducing opportunities for corrupt behaviour, creating a culture where corruption is socially unacceptable, and ensuring accountability. It is not futile to note that this recommendation – requiring that adherents define, support, control, and enforce public sector integrity while considering different historical, legal, and public service traditions – is a non-binding legal instrument adopted by the OECD Council. It is thus referred to as a political commitment to the principles comprised therein, entailing an expectation that adherents will do their best to implement said principles.[768]

The OECD Recommendation of the Council on Public Integrity provides policy-makers with a vision of a public integrity strategy.[769] It shifts the focus from ad hoc integrity policies to a context-dependent, behavioural, risk-based approach that emphasises cultivating a culture of integrity across the whole of society.[770] Specifically, it recognises that national practices on promoting integrity vary widely across countries owing to the specific nature of public integrity risks and their distinct legal, institutional, and cultural contexts. The recommendation underlines that enhancing public integrity is a shared mission and responsibility of all levels of government through their different mandates and levels of autonomy in the national legal and institutional frameworks.[771]

The notion of public integrity is often understood erroneously in its narrow sense, as referring to the mere absence of corruption. A significantly broader definition of public integrity has been adopted by the OECD Recommendation of the Council on Public Integrity, viewing it as the 'consistent alignment of, and adherence to, shared ethical values, principles and norms for upholding and prioritising the public interest over private interests in the public sector'. The OECD Recommendation of the Council on Public Integrity builds on three pillars, which are described herein: system, in that there should be a coherent and comprehensive integrity system to reduce opportunities for corrupt behaviour; culture, in that there should be a culture

766 OECD, 2017.
767 Smidova, Cavaciuti, and Johnsøn, 2022, p. 5.
768 For more information, see: OECD Legal Instruments.
769 Jin, 2021, p. 21.
770 The Recommendation of the Council on Public Integrity at a Glance.
771 OECD, 2017.

of public integrity to make corruption unacceptable socially; accountability, in that there should be effective accountability of individuals for their actions.[772] It also contains 13 principles.[773]

The OECD Public Integrity Handbook provides guidance on the practical implementation of the principles contained in the OECD Recommendation of the Council on Public Integrity, and is intended for use by governments, businesses, and the civil society.[774] It is a part of the OECD's efforts to effectively tackle corruption, raise citizens' confidence in public institutions, and ultimately increase respect for the rule of law.

C.2 The OECD's Standard-Setting Work in the Area of Corruption Prevention in Public Governance

Another relevant segment, according to the author, of the OECD's work in the area of anti-corruption fight and good governance and that contributes to strengthening respect for rule of law relates to the OECD standards of conduct by public officials.

772 Jin, 2021, p. 21.

773 The first four principles within the first pillar require a demonstration of commitment, at the highest political and management levels within the public sector, to enhancing public integrity and reducing corruption through: ensuring that appropriate legislative and institutional frameworks are in place (principle 1); clarifying the institutional responsibilities across the public sector to strengthen the effectiveness of the public integrity system (principle 2); developing a strategic approach for the public sector based on evidence and aimed at mitigating public integrity risks, in particular through developing benchmarks, indicators, and gathering credible and relevant data on the level of implementation, performance, and overall effectiveness of the public integrity system (principle 3); setting high standards of conduct for public officials, in particular through setting clear and proportionate procedures to help prevent violations of public integrity standards, and to manage that actual or potential conflicts of interest are effectively communicated (principle 4).
The principles enshrined in the second pillar concern the promotion of a whole-of-society culture of public integrity where: businesses, individuals, and non-governmental actors uphold public integrity and do not tolerate corruption (principle 5); there is investment in leadership with integrity in public sector organisations (principle 6); the promotion of a merit-based and professional public sector dedicated to public service values and good governance (principle 7); there is capacity building for the timely training of public officials to apply public integrity standards in the workplace (principle 8); there is support to an open organisational culture within the public sector, one where integrity concerns are openly and freely discussed in the workplace and it is safe to report suspected violations of integrity (principle 9).
The third pillar contains recommendations to the adherents to enable effective accountability through: applying internal control and risk management in public sector organisations (principle 10); ensuring the enforcement of mechanisms that deliver appropriate responses to all suspected violations of public integrity standards by public officials and all others involved in the violations (principle 11); reinforcing the role of external oversight and control within the public integrity system (principle 12); encouraging transparency and stakeholders' engagement at all stages of the political process and policy cycle to promote accountability and the public interest (principle 13).

774 OECD, 2020.

C.2.1 The OECD Standards of Conduct for Public Officials: Conflicts of Interest in the Public Sector

Conflicts of interest in both the public and private sectors have been identified as a major governance issue and matter of public concern worldwide. Identifying and resolving conflict of interest situations is critical to secure good governance and maintain the people's trust in public institutions,[775] and hence to uphold the standards of the rule of law. The occurrence of these phenomena in the public sector is particularly important because, if not recognised and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, agencies, and governments.[776] The OECD described the following on the matter: 'While a conflict of interest is not ipso facto corruption, there is increasing recognition that conflicts between the private interests and public duties of public officials, if inadequately managed, can result in corruption'.[777]

When it comes to the OECD standards regarding public official conduct, both the OECD Recommendation of the Council on Public Integrity and the OECD Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service of 2003 are of major importance. These Guidelines have been considered as the first international benchmark in this field, hence being useful to assist the efforts of OECD Member Countries in reviewing and modernising their conflict-of-interest policies in the public sector, and in setting principles in this crucial dimension for the securing of good public governance.[778] It has been recognised in the Guidelines that:

> serving the public interest is the fundamental mission of governments and public institutions. Citizens expect individual public officials to perform their duties with integrity, in a fair and unbiased way. Governments are increasingly expected to ensure that public officials do not allow their private interests and affiliations to compromise official decision-making and public management. In an increasingly demanding society, inadequately managed conflicts of interest on the part of public officials have the potential to weaken citizens' trust in public institutions.

A consensus has been reached on the position that an excessively strict approach to controlling private interests may get in conflict with other rights, be unworkable, potentially counter-productive in practice, and may deter some people from seeking the public office altogether.[779] For this reason, a position has been taken that modern

775 OECD, 2005, p. 3.
776 OECD, 2005, p. 7.
777 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, OECD/LEGAL/0316.
778 OECD, 2004, p. 14.
779 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, OECD/LEGAL/0316.

conflict-of-interest policies should be built around striking a balance between these two sets of interests, identifying risks to the integrity of public organisations and public officials, prohibiting unacceptable forms of conflict of interest, and ensuring that effective procedures are deployed for the identification, disclosure, management, and promotion of the resolution of conflict-of-interest situations.[780]

The primary aim of the aforementioned Guidelines is helping OECD Member Countries review existing policies and practices related to conflicts of interest by public officials, in order to facilitate their modernisation in line with good practices proven effective in OECD Member Countries; the hope is that this helps countries in developing policies that foster public confidence in the integrity of government officials. The Guidelines set forth core principles and standards that work as a practical reference framework for the design and implementation of conflict-of-interest policies, with the goal being 'to promote a public service culture where conflicts of interest are properly identified and resolved or managed, in an appropriately transparent and timely way, without unduly inhibiting the effectiveness and efficiency of the public organisations concerned'.[781]

C.2.2. OECD Standards in the Area of Public Procurement

Public procurement, referring to the purchase (i.e. by governments and state-owned enterprises) of goods, services, and works, is a crucial component of public services delivery, good governance, and sustainable economies with inclusive growth.[782] Owing to the size of the financial flows involved, public procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud, and corruption.[783] The strengthening of the public procurement systems is thus central for achieving concrete and sustainable results in the fight against corruption, to build effective institutions,[784] and foster the trust of citizens in the government.

The OECD supports governments in reforming their public procurement systems, aiming to ensure long-term sustainable and inclusive growth along with public trust in the government.[785] The OECD does so by establishing international standards of public procurement, undertaking peer reviews that assess public procurement systems, providing proposals for improvements, and developing frameworks and indicators to assess public procurement systems. An example of such

780 OECD, 2005, p. 96.
781 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service OECD/LEGAL/0316.
782 Methodology For Assessing Procurement Systems, 2018, p. 1.
783 Preamble of the OECD Recommendation of the Council on Public Procurement.
784 Foreword to the OECD Recommendation of the Council on Public Procurement.
785 See: Public Procurement [Online]. Available at: https://www.oecd.org/gov/public-procurement/support/ (Accessed: 13 October 2023).

systems is the Methodology for Assessing Procurement Systems (MAPS),[786] which the following paragraphs expound upon.

As just mentioned, the OECD gives support to governments in reforming their public procurement systems by providing international standards of public procurement, among which some notable ones are described herein: the Development Assistance Committee Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement,[787] the Recommendation of the Council on Improving the Environmental Performance of Public Procurement,[788] the 2008 Recommendation of the Council on Enhancing Integrity in Public Procurement,[789] the Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships,[790] and the Recommendation of the Council on Fighting Bid Rigging in Public Procurement.[791]

The Recommendation of the Council on Public Procurement of 2015[792] updates and replaces the 2008 Recommendation of the Council on Enhancing Integrity in Public Procurement. Specifically, the 2015 one builds upon the basic principles of the Recommendation from 2008, expanding them to reflect the critical role that the governance of public procurement must play in achieving efficiency, advancing public policy objectives, integrating public procurement with other elements of good governance, including adequately managing public finances.[793] The Recommendation is a result of a collaboration across relevant policy communities at the OECD, demonstrating the multi-disciplinary nature of procurement, and has served as a source of inspiration[794] for a number of other international standards.[795] Therefore, it should be understood that it complements and provides a specific context for the application of other OECD policy guidelines and tools in the area of public governance, competition, and anti-corruption, highlighting procurement-specific issues.[796]

786 MAPS was developed in 2003/2004 by a joint initiative of the World Bank and the Development Assistance Committee to assess and improve public procurement systems in developing countries by providing a common tool to analyse information on key aspects of any procurement system. For more information, see: Methodology for Assessing Procurement Systems [Online]. Available at: https://www.oecd.org/gov/public-procurement/methodology-assessing-procurement/ (Accessed: 13 October 2023).

787 DCD/DAC(96)11/FINAL.

788 C (2002)3.

789 OECD/LEGAL/0369.

790 C (2012)86.

791 C (2012)115.

792 OECD/LEGAL/0411.

793 Council Draft Recommendation of the Council on Public Procurement (Note by the Secretary-General), C(2015)2.

794 Highlights: Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation.

795 Such as the Methodology for Assessing Procurement Systems, 2018; the European Recommendation 2017/1805; G20 Principles for Promoting Integrity in Public Procurement, 2015; the Compendium of Good Practices on the Use of Open Data for Anti-corruption Across G20 Countries.

796 Council Draft Recommendation of the Council on Public Procurement (Note by the Secretary-General), C(2015)2.

D. OECD Principles for Transparency and Integrity in Lobbying

Lobbying has been globally perceived as a fact of public life and a natural element of democratic governance. By sharing expertise, legitimate needs, and evidence about policy problems and how to address them, different interest groups can provide governments with valuable insights and data on which to base public policies.[797] Nevertheless, sometimes public policies may be influenced only by specific interest groups or through covert and deceptive evidence, resulting in suboptimal outcomes and undermining citizens' trust in democratic processes.[798] Experience shows that without the necessary safeguards, the abuse of lobbying practices[799] can result in decisions on essential public policies with hidden harmful impacts.[800] Bearing in mind the link between lobbying and corruption, and that lobbying is another area meriting attention when attempting to strengthen the rule of law through the anti-corruption fight, the OECD's line of work regarding lobbying is also considered by the author as relevant for the current study.

The OECD adopted, in 2010, the Recommendation of the Council on Principles for Transparency and Integrity in Lobbying, which is considered as the first and the only international instrument addressing lobbying-related risks in the public decision-making process. Although this Recommendation recognised that lobbying may support informed decision-making by providing valuable data and insights, it was also underlined that public officials and lobbyists share responsibility to apply the principles of good governance (particularly transparency and integrity), to mitigate the risks related to lobbying, and maintain confidence in public decisions.[801] The Recommendation provides directions and guidance for decision-makers in the executive and legislative branches on how to foster transparency and integrity in lobbying, and to promote equal access to policy discussions for all concerned parties. More specifically, it comprises 10 principles and four main objectives: (1) building an effective and fair framework for equal access to policy discussions for all parties concerned; (2) enhancing transparency; (3) fostering a culture of integrity; (4) creating mechanisms for effective implementation, compliance, and review.

797 OECD, 2021b.
798 Ibid.
799 Such as the monopoly of influence by special interest groups, undue influence through covert or deceptive evidence, and the manipulation of public opinion.
800 OECD, 2023c, p. 8.
801 Preamble of the Recommendation of the Council on Principles for Transparency and Integrity in Lobbying, OECD/LEGAL/0379.

I.3 The Interpretation of the Rule of Law in the United Nations

A. Defining the Rule of Law as regards the UN as Such

The United Nations (UN) was established in the aftermath of World War II as a universal international intergovernmental organisation. It stands as a symbol of hope for global cooperation, peace, and justice. The principle of the rule of law is a cornerstone of the UN mission – it upholds the values of justice, accountability, and equal treatment under the law. The UN's commitment to the rule of law underpins its efforts to build a world characterized by stability, human rights, and the peaceful resolution of conflicts. This chapter delves into the significance of the rule of law within the framework of the UN, focusing in particular on human rights protections and, accordingly, relevant human rights committees and special rapporteurs; put differently, this chapter explores the UN's Charter-based and treaty-based human rights protection system, which is considered universally acceptable.

As a foundational concept, the rule of law underpins the principles of justice, equality, and accountability within societies. It is a framework through which laws are applied fairly and consistently and in which no one is above the law and individuals are protected from arbitrary actions by governments or other entities. At its essence, the rule of law embodies the idea that laws should be known, predictable, and consistently applied.[802] It prevents the abuse of power by ensuring that laws are applied equally to all individuals, regardless of their status or influence.[803] Along these lines, the rule of law, as suggested above, protects against arbitrary decisions and promotes a just society.

To analyse the rule of law, it is advisable and more effective to analyse its key components; such as: equality before the law, legal certainty, the prohibition of arbitrariness, accountability and transparency, or access to justice.[804] Moreover, the protection of human rights is considered one of the most relevant elements of the

802 For more details see e.g. Krošlák, Balog and Surmajová, 2020, p. 139.
803 See e.g. Varga, 2021, p. 281. (Arbitrariness is challenged by caring for the common advancement and destiny of a people).
804 Krošlák, 2022, p. 40. et seq.

rule of law, both at the national and international levels.[805] And it is this element that we aims to analyse in more details in this study.

To detail these key elements of the rule of law, we may begin with equality before the law. This requirement is embodied in the statement that all individuals, regardless of their background, must be treated equally under the law. This principle both prohibits and prevents discrimination and ensures that justice is blind to factors such as race, gender, and social status.[806] Meanwhile, legal certainty establishes that laws should be clear, understandable, and accessible to all individuals.[807] People should be able to anticipate the legal consequences of their actions. Crucially, this fosters a stable environment.[808] Moreover, the prohibition of arbitrariness restricts the exercise of power by requiring actions to be based on established laws rather than personal discretion.[809] This limits the potential for the abuse of authority. The elements of accountability and transparency perform a similar function, situating government officials and institutions as accountable under the law. Transparent processes ensure that decisions are made openly and can be reviewed for fairness. Furthermore, if there is any mistake in the system or its functioning, the rule of law guarantees that individuals have the right to seek legal remedies if their rights are violated. This includes access to fair and impartial courts. Access to justice is a very specific feature of the rule of law – something like an entrance to the above listed other elements of the rule of law, especially the protection of human rights.[810] More specifically, the rule of law provides the legal framework within which human rights are protected and promoted[811] by defending freedom of expression, preventing torture, ensuring due process, and promoting equality at the international level. Of course, there are also challenges related to the rule of law, such as weak institutions. Specifically, in some regions, the institutions responsible for upholding the rule of law may be under-resourced or subject to political interference. This weakens the ability to enforce laws fairly. Moreover, as opposed to access to justice, a lack of access to justice threatens the rule of law.[812]

805 At the international level, this comprises human rights protections together with peace and sustainable development. See Alvarez, 2018, p. 258.

806 For more information on equality and non-discrimination see e.g. The principle of Equality and Non-discrimination, Analysis of Case-Law, UNDP, 2021.

807 Elbert, 2015, p. 114. et seq.

808 Ibid.

809 This principle of the rule of law is particularly important in case of developing economies and transitional countries, see e.g. Taylor, 2018, p. 259. et seq.

810 See the Preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, UNTS 213, p. 221.

811 Ibid.

812 Compare with the United Nations Human Rights Committee, General Comment No. 32 (2007).

B. The Rule of Law at the International Level

When we move towards the international dimensions of the rule of law, it is very important to point out that the rule of law is not limited to individual countries, but also has international dimensions. International organisations are designed to promote adherence to the rule of law. In particular, the UN plays a significant role in this area by fostering the rule of law universally through its bodies and initiatives.

The rule of law is more than a legal principle; it is a cornerstone of just societies. It provides the framework within which human rights are protected, economic development is nurtured, and governance is stable. Upholding the rule of law requires a collective commitment to fairness, accountability, and justice, both within individual countries and on the global stage. As societies continue to evolve, the rule of law remains a guiding principle for progress and the pursuit of a just world. It is therefore possible to submit that the rule of law is a foundation for international relations. In the legal context, this is confirmed within one of the oldest international law principles; namely, *pacta sunt servanda*, which maintains that every treaty in force is binding upon its parties and must be performed by its parties in good faith.[813]

At the heart of the UN's efforts lies the belief that the rule of law is essential for maintaining peaceful relations between nations. The UN Charter, signed in 1945, recognizes the importance of the rule of law in preventing conflicts and establishing a just and orderly international system. Art. 2 para. 3 of the UN Charter specifically requires Member States to settle their international disputes through peaceful means, guided by the principles of justice and international law.

The UN's commitment to the rule of law extends to its dedication to human rights. Indeed, the establishment of the UN was a milestone in the international protection of human rights. The importance of the designation and the development of international human rights protections after the founding of the UN have resulted in the integration of international *ad-hoc* responses to issues such as the status of aliens, the slave trade, and the status of workers and other groups. In other words, the UN has given rise to a coherent universal system that affects every individual, not only selected groups, and supports human dignity itself. However, the internationalization of this system does not change the fact that the essential actor in the protection of human rights – whether at the international, regional, or national level – remains the state. Put differently, national authorities are primarily responsible for the protection of human rights; the UN and other organisations play secondary and subsidiary – although nevertheless important – roles in this regard.

According to the Preamble to the UN Charter, the protection of human rights is both an end and a means to achieve other ends. At the same time, the new concept of human rights after World War II emphasized the belief that respect for human rights is closely linked to the maintenance of international peace and security. Therefore,

813 Art. 26 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS vol. 1155, p. 331.

it can be concluded that the objective stated in the UN Charter Preamble is a kind of 'constitutive' principle for the actions of every UN body:

> We the peoples of the United Nations determined…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained…[814]

Moreover, the UN's role in maintaining international peace and security, conflict resolution approach, and peacekeeping operations are closely tied to the rule of law. Through its peacekeeping missions, the UN strives to establish stability in conflict-ridden regions, often focusing on rebuilding legal systems, providing security, and fostering reconciliation. These missions work to ensure that the rule of law prevails over the chaos of conflict, laying the foundation for lasting peace and development.[815]

To conclude this general introduction to the UN system and the rule of law, we may summarise the various aspects of the rule of law at the UN level based on the following definition provided Kofi Annan in 2004 during his time a UN Secretary General. Specifically, in his Report upon the rule of law, Annan stated that

> for the United Nations, the rule of law refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[816]

As for the international level, this approach may be considered a political ideal depending on political will of members of international community. Moreover, it could be argued that applicability of the rule of law to the international level will depend on that ideal being seen as a means rather than an end – that is, as serving a function rather than defining a status.[817] However, it is important nevertheless.

814 See the Preamble of the UN Charter.

815 For more specific information see e.g. Building Rule of Law and Security Institutions [Online]. Available at: https://peacekeeping.un.org/en/building-rule-of-law-and-security-institutions (Accessed: 27 October 2023).

816 Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, adopted on 23 August 2004, UN Doc. S/2004/616.

817 Compare with Chesterman, 2018, p. 345.

Building on these means, the institutional background to promote the application of the rule of law has notably been created in the area of human rights protection.

B.1 The Rule of Law as a General Principle of International Law (According to Art. 38 of the ICJ Statute)?

It is a challenge to consider the rule of law as a general principle of international law; nevertheless, it is very important to do so as the rule of law refers to sources of international law (i.e. the legally binding duties of relevant legal actors).[818] When talking about sources of international law and the rule of law, it follows from the inclusion of general principles of law into the Statute of the International Court of Justice and its diction that these are formal sources of law, even fundamental.[819] However, the subsequent jurisprudence of the International Court of Justice did not significantly further the analysis of these principles. Specifically, the International Court of Justice only mentioned these principles under different terms in several cases. However, none of these cases explicitly mentioned Art. 38 para. 1 c) and the general legal principles did not form the basis of the International Court of Justice's decision, since contractual and customary rules were sufficient for the decision in these cases. Therefore, several academics have suggested that these are auxiliary rather than principal sources of law.[820] However, it follows from the *travaux préparatoires* of the Statute of the International Court of Justice that the principle of good faith or *res iudicata* (the matter already decided) could be provided as an example.[821] Along these lines, could the rule of law principle also be considered a general principle of law?

The matter of sources of law is perhaps the most important area in international law. This is because the fundamental subjects of international law independently decide which international law norm is legally binding for them. Notably, the general legal principles recognized by (civilized) nations were included in Art. 38 of the Statute of the International Court of Justice to prevent a situation in which the International Court of Justice would conclude that no rule of international law is applicable.[822] However, despite this general concern, it is very difficult to agree upon the definition of the rule of law. Nevertheless, there is no doubt that the diction itself is:

- based on unwritten sources of law,
- recognized by the national laws of several states, and
- reflected in international law or transferred to international law.

818 See e.g. Thirlway, 2006, p. 115.
819 See Art. 38 of the Statute of the International Court of Justice.
820 Mráz, Poredoš and Vršanský, 2003, p. 28.
821 Pellet, 2002, p. 769.
822 Ibid., p. 765.

Rosalyn Higgins considered these requirements in a speech delivered during her time as President of the International Court of Justice.[823] Specifically, in this speech, Higgins used the Dicey definition of the rule of law[824] and argued that the national model of the rule of law is not easy to transpose into contemporary international relations[825] – specifically, it would be necessary for there to be an executive that reflects the popular choice and makes non-arbitrary decisions applicable to all that are generally judicially reviewable for constitutionality; laws known to and applied equally to all; and independent courts to resolve legal disputes, hold violators of criminal law accountable, and apply the governing legal rules in a consistent manner.[826] Despite the doubts surrounding the application of such a concept in international law, Higgins pointed out not only that the term of the rule of law has become vogue in international relations[827] but also that various commitments and reports have already been adopted to promote and realize this term in practice.[828] Finally, she stressed that the rule of law is closely linked to human rights.[829]

B.2 The Rule of Law within the UN System

It is not easy to apply the rule of law at the international level; however, it is very important to support and proceed with the application of some of its aspects across all possible international levels. This is especially true in the case of universal organisations, such as the UN. Although the UN is a political organisation, it considers the rule of law principle in all its decisions (comparable to the human rights issue). By universally applying the rule of law, the UN aims to overcome fragmentation. Here, it is helpful to note that the UN focuses its work in this regard on four thematic areas; namely: security, justice, human rights and gender, and emerging challenges.

First, since security is one of the UN's main priorities – together with international peace[830] – the UN organises collective measures to prevent and eradicate threats to peace and acts of aggression. The rule of law ensures that international law and the principles of justice apply equally to all States, even if the rule of law is

823 Higgins, R.: The ICJ and the Rule of Law, Speech given at the United Nations University on 11 April 2007 [Online]. Available at: https://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf (Accessed: 19 November 2023).

824 See e. g. Dicey explained in the European Commission for Democracy through Law (Venice Commission), Draft Report on the Rule of Law, Study No. 512/2009, paras. 9–10 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2010)141-e (Accessed: 19 November 2023).

825 Higgins Speech, p. 3.

826 Ibid., pp. 22–23.

827 Ibid., p. 7.

828 Ibid., p. 8 et seq.

829 Ibid., p. 11.

830 See Art. 1 para. 1 of the UN Charter.

not always respected.[831] Nevertheless, respect for the rule of law generates an enabling environment for achieving the purposes of the Charter. Moreover, when situations of armed conflict occur, the protection of civilians – both legal and physical – is a UN priority.[832] Second, the UN applies the rule of law in the interest of justice to create good and strong governance. In particular, it focuses on building effective, accountable, and transparent institutions. Institutional cooperation at different levels and the reconstruction of communities are key components of the rule of law in this area.[833] Third, the UN supports the promotion of human rights and rights related to gender at the international level through the rule of law. Specifically, its work in this thematic area is supported by the UN Charter and a corpus of international treaties and justice mechanisms adopted under the UN umbrella. Given the focus of this chapter, this is analysed in more detail in the following subchapter. In the context of international human rights law, the rule of law requires that legal processes, institutions, and substantive norms are consistent with human rights. The advancement of the rule of law at the national and international levels is thus essential for the protection of human rights and all fundamental freedoms.[834] Finally, the UN is also working to advance States' capacities to address emerging challenges to international peace, security, and human rights. Examples of such challenges include the proliferation of hate speech and incitement to violence, the impact of climate change on security and livelihood, the complexities of artificial intelligence and cybercrime, and transnational organised crime and terrorism.[835] The UN is eagerly helping to advance States' capacities to address these issues.[836]

B.3 Rule of Law and the UN System and Its Institutional Background

Specific bodies have been established to coordinate and improve the applicability of the rule of law at the UN level. First, the Global Focal Point for the Rule of Law (GFP) is a coordination platform created by the UN Secretary-General to enhance the predictability, coherence, accountability, and effectiveness of the UN delivery in the rule of law. At Headquarters, the GFP is co-chaired by the Department of Peace Operations (DPO) and the UN Development Programme (UNDP). Its partners include, for example, the UN High Commissioner for Refugees (UNHCR) and the Office of the High Commissioner for Human Rights

831 For example, the issue of the execution of judgments as legally binding decisions adopted by the International Court of Justice is still a challenge.

832 For more information see: Rule of Law and Security [Online]. Available at: https://www.un.org/ruleoflaw/thematic-areas/security/ (Accessed: 27 October 2023).

833 For more information see: Rule of Law and Justice [Online]. Available at: https://www.un.org/ruleoflaw/thematic-areas/justice-2/ (Accessed: 27 October 2023).

834 For more information, see: Rule of Law and Gender [Online]. Available at: https://www.un.org/ruleoflaw/thematic-areas/human-rights-and-gender/ (Accessed: 27 October 2023).

835 For more information: Rule of Law and Emerging Threats [Online]. Available at: https://www.un.org/ruleoflaw/thematic-areas/emerging-threats/ (Accessed: 27 October 2023).

836 Ibid.

(OHCHR). At the field level, the senior UN official in-country is responsible for the implementation of GFP arrangements.[837] Second, at the Senior Executive level, the Rule of Law Coordination and Resource Group (RoLCRG) is chaired by the Deputy Secretary-General. The body was established to advance UN efforts on the rule of law in a coordinated and collaborative manner. The RoLCRG brings together entities across the UN on a range of key issues that impact peace, security, and human rights.[838] Finally, while the UN's efforts to uphold the rule of law are commendable, challenges and critiques persist. One notable challenge is the uneven implementation of international law among Member States. The UN's authority is limited by the sovereignty of its Member States, which may lead to different levels of commitment to international legal obligations. Additionally, allegations of bias and political interference have been raised, particularly in cases involving the Security Council´s decisions on matters of peace and security.[839] Nevertheless, to address these challenges, the UN has implemented various initiatives to strengthen the rule of law globally. One such initiative is the provision of technical assistance to Member States, particularly those emerging from conflict, to help them develop legal institutions, draft legislation, and promote human rights education. Additionally, the UN supports the establishment of national human rights institutions, which play a crucial role in monitoring and ensuring the rule of law at the national level.

B.4 The institutional background of the rule of law within the UN System with a focus on the UN Human Rights Committees and Special Rapporteurs

The universal system of human rights protection under the auspices of the UN has several levels and dimensions. It consists of both institutions and mechanisms based on the UN Charter itself and institutions and mechanisms established by human rights treaties adopted under its umbrella.

B.4.1 The UN Charter's Human Rights Protection System

Regarding systematics, this subchapter will deal shortly with the principal organs of the UN and specialised organisations explicitly referred to in the UN Charter; in particular, the subchapter will consider the UN Human Rights Council (HCR), the existence of which can be directly inferred from the UN Charter. Each of the main organs of the UN (the General Assembly, Security Council, Economic and Social Council, Secretariat, Trusteeship Council, and International Court of

837 For more information see: The UN and the Rule of Law [Online]. Available at: https://www.un.org/ruleoflaw/un-and-the-rule-of-law/ (Accessed: 27 October 2023).

838 Ibid.

839 Evans, 2016, p. 129. et seq.

Justice) plays an indispensable role in the UN's goal of promoting respect for human rights.[840]

Despite its political challenges, the UN General Assembly serves as a forum for human rights debate. It has coordinated human rights activities in relation to, for example, decolonisation, apartheid policies, and dictatorial regimes in Africa and enforced disappearances in Latin America. The UN General Assembly cooperates with the other principal organs of the UN as well as with specialised organisations and the UN HRC. It is also the body to which the human rights committees send their annual reports. Art. 13 of the UN Charter explicitly gives the UN General Assembly the task, in relation to human rights, of initiating studies and making recommendations with a view to facilitating the realization of human rights and fundamental freedoms for all without distinction of race, sex, language, or religion.

The UN Security Council, which is primarily responsible for the maintenance of international peace and security, deals with the issue of human rights protection in a rather reactive manner in relation to the most serious human rights violations. This is evidenced by its resolutions on situations in, for example, South Africa, Namibia, Syria, Somalia, and the Middle East. A particular step in relation to the protection of human rights by the UN Security Council was the creation of *ad-hoc* international criminal tribunals for the former Yugoslavia and Rwanda.

Under the UN Charter, the UN Economic and Social Council was envisaged as the operational centre for human rights matters. This is evidenced by as many as three articles of the UN Charter (out of a total of seven articles within the UN Charter that relate to human rights), which are found in the chapter on the status of the UN Economic and Social Council. Notably, the UN Economic and Social Council is empowered to 'make or initiate studies and reports…'.[841] From this mandate, the UN Economic and Social Council created the UN Commission on Human Rights to implement the UN Human Rights Strategy. Today, the direct involvement of the UN Economic and Social Council in the implementation of the UN's human rights policy has been radically reduced, as the Commission on Human Rights has been replaced by the UN HRC, which reports directly to the UN General Assembly.

The UN Secretariat is involved in human rights issues through the OHCHR, which is part of the UN Secretariat. The OHCHR is the personification of the UN's human rights policy and primarily provides administrative support to the Human Rights Committees and the HRC. It focuses on conducting good offices for governments to focus on fulfilling their human rights obligations.

840 In its Advisory opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), the International Court of Justice has explicitly stated that the UN Charter imposes legal obligations on Member States regarding human rights. Therefore, in relation to Art. 2(7) of the UN Charter on the issue of interference in matters which are essentially within the domestic jurisdiction of States, the UN bodies reject States' claims of interference in their domestic affairs when the matter concerns the protection of human rights.

841 Art. 62 of the UN Charter.

Although the International Court of Justice only resolves disputes between states and its opinion can only be requested by UN bodies and UN specialized agencies, it has also addressed human rights issues in its decisions; for example, it has done so in its advisory opinions, Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory[842] and Legal Consequences for States in the Matter of the Continued Presence of South Africa in Namibia Despite the Relevant UN Security Council Resolution 276,[843] and Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[844] Examples of judgments include those for the Barcelona Traction case[845] and the LaGrand,[846] Avena[847] and Diallo[848] cases concerning diplomatic protection.

Since the establishment of the UN, several professional organisations have joined the universal organisation through cooperation agreements. Their focus is narrower than the general human rights protection of the UN as such. The areas of focus of these expert organisations include, for example, health (World Health Organisation, WHO), culture (United Nations Educational, Scientific and Cultural Organisation, UNESCO), agriculture (Food and Agriculture Organisation, FAO), working conditions (International Labour Organisation, ILO), and children's welfare (United Nations Children's Fund, known until 1953 as the United Nations International Children's Emergency Fund, UNICEF). On the part of the UN, space for such cooperation with specialised agencies has been created by Arts. 57 and 63 of the UN Charter. While the primary role of these specialized human rights organisations may be questioned in relation to their institutional system or material focus, their activities nevertheless form part of an integral system of human rights protection.

It would be incomplete to list the expert organisations affiliated with the UN without mentioning the International Monetary Fund and the World Bank Group. The mandates of these institutions do not cover the issue of an effective strategy for the protection of human rights; rather, they focus on the economic sphere.[849] However, over time, both institutions have had to recognise the importance of human rights in the exercise of their functions. As a result, both institutions now emphasise the

842 ICJ, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, advisory opinion, 9 July 2004, ICJ Reports, p. 136.

843 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion, 21 June 1971, ICJ Reports 1971, p. 16.

844 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, 28 May 1951, ICJ Reports 1951, p. 15.

845 ICJ, *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, judgment, 5 February 1970, ICJ Reports 1970, p. 3.

846 ICJ, *LaGrand* (Germany v. United States of America), judgment, 27 June 2001, ICJ Reports 2001, p. 466.

847 ICJ, *Avena and Other Mexican Nationals* (Mexico v. United States of America), judgment, 31 March 2004, ICJ Reports 2004, p. 12.

848 ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), judgment, 30 November 2010, ICJ Reports 2010, p. 639.

849 Skogly, 1999, p. 231.

importance of poverty reduction in their programmes and call for the implementation of the principles of good governance. For example, the World Bank has set up an independent panel of experts to review complaints about the human rights implications of its projects.[850]

Judging by the year of its establishment in 2010, the HRC is a relatively young body in the UN system for the promotion and protection of human rights. However, the Council did not start out on so-called 'green grass'. The establishment of the UN apparently signified for many individuals the notion that they would finally be able to claim their rights.[851] Nevertheless, this interstate political organisation was not empowered by its Member States to address complaints of human rights violations.

However, the Commission on Human Rights was established in 1946 under Art. 68 of the UN Charter, which empowered the UN Economic and Social Council to set up commissions for the promotion of human rights. The Commission was originally tasked with drawing up a catalogue of human rights and a proposal for a mechanism for their protection. It accomplished this by drafting the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights and the Optional Protocol thereto (both adopted in 1966), and the International Covenant on Economic, Cultural and Social Rights (adopted in 1966).

Over time, however, the Commission has acquired broader powers through the resolutions of the Economic and Social Council. For example, the abovementioned ECOSOC Resolution 1235 of 1967 allowed the Commission to address situations of gross and systematic human rights violations through public inquiries. Meanwhile, ECOSOC Resolution 1503 of 1970 empowered the Commission to deal with complaints by individuals or groups against systematic and massive human rights violations through a private and confidential procedure conducted in writing. In addition to these procedures, the Commission also created thematic mechanisms – namely, Special Rapporteurs and Working Groups – which either dealt with a specific area, such as torture or child trafficking, or were responsible for a specific state, such as North Korea.

The powers of the Commission on Human Rights were reinforced by the so-called 'Namibia Advisory Opinion of the International Court of Justice', which held that the UN Charter does not establish programmatic obligations of States in relation to human rights, but actual legal obligations. However, the Commission only generated sufficient pressure on selected states and gradually gained a reputation as an ineffective human rights body, resulting in its replacement in 2006. Notably, the replacement of the Commission was linked to the establishment of the aforementioned

850 See e.g. the mandate of the Panel of Independent Experts on its 10th anniversary, 1 October 2012. Doing Business Reports (DBR) were by succeeded by Business Ready Reports (B-Ready), presented in December 2022.

851 Compare Jankuv, 2006, p. 51.

HRC, which, unlike the Commission, falls directly under the UN General Assembly.[852] In its initial year, the Council was mandated, *inter alia*, to evaluate and, where necessary, improve and rationalise the tasks of the previous Commission, including the complaints and investigation mechanism and the special mechanisms. On 18 June 2007, the Council issued a resolution overhauling the entire monitoring system under its supervision.[853] The biggest change was the introduction of the so-called 'Universal Periodic Review' (UPR).

The UPR is a routine that does not go in depth in monitoring human rights protections. Instead, it aims to give each State a minimum level of attention rather than only considering the so-called 'problem countries'. The rationale here is that no State can completely and absolutely protect human rights. On the other hand, because different countries have different attitudes regarding the protection of human rights, it remains to pay more attention to certain countries. The HRC has therefore maintained the essence of the mechanism under resolution 1503. As in the previous system, the decisive criterion is systematic gross and reliably documented violations of rights occurring in any part of the world in any circumstances.[854]

The HRC has also maintained the existence of specific independent experts, whether appointed to monitor a specific topic (46 mandates) or the situation in a specific country (14 seats).[855] For example, the Council has appointed independent experts on torture, violence against women, the right to education, a healthy environment, and trafficking in human beings. The Council receives reports on the situations in various countries, including Belarus, Cambodia, Côte d'Ivoire, Eritrea, North Korea, Haiti, Iran, Myanmar, Somalia, Sudan, and Syria. All the reports provide the HRC with a useful basis for its further work. Although the HRC is an intergovernmental body, it should be a forum of experts rather than State representatives – this would allow it to avoid the mistakes most often attributed to its predecessor, the Commission on Human Rights. Broadly, it should serve as a forum for real solutions from within the UN for the protection of human rights.

As mentioned above, several special rapporteurs are nominated to monitor human rights protections either in selected countries or based on concrete topics. Based on this chapter's focus on the rule of law and human rights protections, this part reviews the work of the UN Special Rapporteur on the Independence of Judges and Lawyers, which is considered an important mechanism within the UN human rights system. Here, it is helpful to note that the Special Rapporteur is an independent expert tasked with monitoring and reporting on the state of the rule of law

852 The UN General Assembly created the UN Human Rights Council by its resolution 60/251 in 2006.

853 UN Human Rights Council resolution No. 5/1 (2007).

854 See UN General Assembly resolution 60/251 of 15 March 2006; the UPR system was created by the same UN General Assembly resolution that established the UN Human Rights Council.

855 For more information, see: Special Procedures of the Human Rights Council [Online]. Available at: https://www.ohchr.org/en/special-procedures-human-rights-council (Accessed: 23 November 2023).

globally.[856] The Special Rapporteur investigates, and addresses issues related to the independence of the judiciary, the legal profession, and the administration of justice. The independence of judges and lawyers is considered an important aspect of the rule of law as it ensures impartiality and fairness in legal proceedings. The Special Rapporteur conducts country visits to assess the situation on the ground, engaging with governments, legal professionals, and civil society. Its annual thematic reports provide valuable insights and recommendations to enhance the rule of law in specific countries.[857] The Special Rapporteur's mandate includes addressing threats, attacks, and harassment against judges, lawyers, and legal professionals. Since receiving this mandate in 1995, the Special Rapporteur has contributed to the development of international standards and norms related to the rule of law that require transparent, predictable, and consistent legal frameworks, which provide the foundation for a just and orderly society.

Generally, Special Rapporteurs may collaborate with other UN bodies, NGOs, and governments to advance the principles of the rule of law. The reports of the Special Rapporteur on the Independence of Judges and Lawyers often emphasise the importance of ensuring access to justice for all, irrespective of socioeconomic status.[858] The chosen Special Rapporteur also addresses issues of legal aid and assistance, recognizing the importance of ensuring access to justice for marginalised populations.[859] This Special Rapporteur may even intervene in cases where the independence of the judiciary is at risk, advocating for necessary reforms. Moreover, he or she may contribute to the prevention of arbitrary detention and support efforts to establish fair and transparent legal systems.

Notably, the rule of law is especially crucial in post-conflict situations, where its application supports the rebuilding of societies and the establishment of mechanisms for transitional justice. In these situations, several Special Rapporteurs contribute to the promotion of legal education and training, strengthening institutions responsible for upholding the rule of law.[860] Moreover, they contribute to the development of guidelines and recommendations for promoting the rule of law. Furthermore, the Special Rapporteur on the Independence of Judges and Lawyers may investigate issues related to access to information and freedom of expression – essential elements of the rule of law. To conclude, the Special Rapporteurs' role generally

856 For more detailed information, see: Independence of Judges and Lawyers [Online]. Available at: https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers (Accessed: 25 November 2023).

857 For more detailed information, see: Annual Thematic Reports [Online]. Available at: https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/annual-thematic-reports (Accessed: 25 November 2023).

858 See the annual report from 15 March 2013 [Online]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement (Accessed: 23 November 2023).

859 Ibid.

860 See the annual report from 20 June 2012 [Online]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/142/88/PDF/G1214288.pdf?OpenElement (Accessed: 23 November 2023).

includes engaging with civil society and non-governmental organisations to gather information and to provide support.

B.4.2 Treaty-Based Human Rights Protection System under the UN Umbrella

It was the adoption of the Universal Declaration of Human Rights by the General Assembly in 1948[861] that is considered a starting point for the treaty-based human rights protection system since for the first time at the international level, it enshrined the principles of dignity, equality, and freedom under law for all individuals. Although it was adopted in a form of a declaration, i.e. not legally binding document at the time of adoption, some of the articles might be considered customary norms nowadays.[862] Here, the rule of law ensures that governments and institutions are held accountable for human rights violations, fostering an environment where individuals can seek justice without fear of reprisal. This element of the rule of law at the international level will be analysed in more detail below in light of an individual's agency to submit a complaint to the international body.

The very nature of the Universal Declaration of Human Rights and the international community's focus on creating a real system of human rights protections presupposed the adoption of legally binding standards. However, due to growing tensions between the Eastern and Western blocs, this was only realized in 1966, even though the Human Rights Commission had already fulfilled this role in 1954 with its submission of the proposed Pacts to the UN General Assembly. In addition to the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), which entered into force in 1976, the following international treaties form the basis of the treaty system for the protection of human rights within the UN:

- Convention on the Elimination of All Forms of Racial Discrimination (hereafter CERD, adopted in 1965, in force since 1969),
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT, adopted in 1984, in force since 1987),
- Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW, adopted in 1979, in force since 1981),
- Convention on the Rights of the Child (hereinafter CRC, adopted in 1989, in force since 1990),
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter also CMW, adopted in 1990, in force since 2003),

861 Belarus, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, USSR, and Yugoslavia abstained at the sunrise of the bipolar world.

862 See Shaw, 2008, p. 260.

- Convention on the Rights of Persons with Disabilities (hereinafter referred to as CRPD, adopted in 2006, in force since 2008), and
- Convention for the Protection of All Persons from Enforced Disappearance (hereinafter also CED, adopted in 2006, in force since 2010).

The choice of these treaties is justified by the existence of the bodies (committees) they establish. These committees supervise the implementation of the obligations arising from these treaties for individual States. They also adopt monitoring recommendations, general recommendations, and recommendations regarding decisions on individual complaints.

In addition to these treaties, some other international treaties are also important for the protection of human rights (although no special committees have been created based on these treaties). Namely, these treaties include:

- Convention on the Prevention and Punishment of the Crime of Genocide (1948, in force since 1951),
- Convention on the Suppression and Punishment of the Crime of Apartheid (1973, in force since 1976),
- conventions related to slavery, such as the Additional Protocol on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956.

Nevertheless, these conventions are also specific in that they regulate *jus cogens* norms.[863] They represent a special form of human rights protection in that they require states to prosecute persons suspected of committing genocide or apartheid.

Although the aforementioned treaties, on the basis of which the special committees have been established, overlap in many ways (along these lines, human rights are notably indivisible), each focuses on a specific range of rights or group of protected subjects. Notably, the issues within the Pacts, such as the prohibition of torture; racial discrimination; the rights of women, children, migrant workers, and people with disabilities; and rights in general, are monitored by expert control bodies. The number of members in these committees varies from 10 to 23 experts, who are nominated and elected by the contracting parties, but are supposed to perform their functions as independent experts.[864]

863 Jus cogens type; e.g. the prohibition of genocide has been confirmed in ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, advisory opinion, 28 May 1951, ICJ Reports 1951, p. 15. et seq.

864 Human Rights Committee, Committee against Torture, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women, Committee on the Rights of the Child, Committee on Persons with Disabilities, Committee on the Protection of the Rights of Migrant Workers and Members of Their Families, Committee on Enforced Disappearances. Only the Committee on Economic, Social and Cultural Rights was created, not by the Covenant itself, but by Economic and Social Council resolution 1985/17 of 28 May 1985.

Within the UN framework, human rights committees play a vital role in promoting and protecting the rule of law globally. Broadly, UN Human Rights Committees oversee the implementation of international human rights treaties. The rule of law is integral to the functioning of these committees, which ensure that legal norms and standards are upheld in reviews of State reports. Human rights committees assess and make recommendations on States' adherence to international human rights instruments, contributing to the development of a global culture of respect for human rights. The committees' work involves evaluating the legal frameworks and practices of Member States to ensure alignment with international human rights norms. Upholding the rule of law within the human rights context requires impartiality, fairness, and adherence to legal procedures in the examination of State parties' reports.[865] The committees' review process emphasizes the importance of transparency, accountability, and procedural fairness – that is, of the key elements of the rule of law. Rule of law principles thus guide the committees in assessing the adequacy of legal frameworks for the protection of individuals.[866]

865 The periodicity of reporting varies depending on the specific convention.

866 For the special position of the human rights protection principle as an essential principle of the rule of law, see e.g. Elbert, 2015, p. 199. et seq.

I.4 The Interpretation of the Rule of Law in the Organisation for Security and Co-operation in Europe

A. Introduction

The Organisation for Security and Co-operation in Europe (OSCE) was established in 1975 as a result of the Helsinki Final Act,[867] which was signed by 35 countries. As a new regional security organisation, the OSCE aimed to promote confidence-building measures among participating States and prevent conflicts by addressing issues related to security, human rights, and democracy. Over the years, the OSCE has expanded its structure and activities and now serves as a platform for dialogue and cooperation among its 57 participating States.[868] Co-operative security is the underlying principle of the OSCE. This principle is based on the assumption that security is indivisible and that the co-operation of all parties is required to guarantee security, peace, and stability.[869] Accordingly, the OSCE's approach to security encompasses politico-military, economic, environmental, and human aspects and focuses on various areas, including conflict prevention and resolution, arms control, democratization, the rule of law, human rights, and economic and environmental security. All participating States enjoy equal status.

Reflecting its broad mandate and diverse membership, the OSCE's unique organisational structure includes its main political body, main decision-making and governing body, and main forum for day-to-day decision-making and coordination among participating States and several other autonomous decision-making bodies. The decisions made by these decision-making bodies are politically binding. These decisions are adopted by consensus by the participating States and reflect their shared views. The OSCE also has several autonomous institutions that support its activities and carry out its so-called 'field operations', by which it helps home countries put their commitments into practice. The most important of these institutions is the Office for Democratic Institutions and Human Rights (ODIHR).

867 The Helsinki Final Act, Organisation for Security and Co-operation in Europe, Summit, 1 August 1975.

868 The OSCE has 57 participating States from Europe, Central Asia, and North America. Among these are, inter alia, all EU member states, Switzerland, the United States of America, and the United Kingdom. In addition to the participating States, six Mediterranean and five Asian countries serve as the OSCE's Partners for Cooperation.

869 Borchert and Zellner, 2003, pp. 5–6.

The OSCE situates the rule of law as a cornerstone of its human rights and democratization activities. As such, it not only encompasses formal legal frameworks, but also aims at justice based on a full acceptance of human dignity and respect for the fundamental rights and freedoms of every individual in a fair and independent manner. Moreover, the OSCE/ODIHR approaches the rule of law as essential for the development of societies based on pluralistic democracy and as a prerequisite for a lasting order of peace, security, justice, and co-operation in Europe.

This chapter closely analyses the structure, organisation, and activities of the OSCE, focusing on how its decision-making and executive bodies and autonomous institutions understand, contextualize, and implement the rule of law. This chapter also addresses the OSCE's control mechanisms for enforcing the principle of the rule of law, which are determined and interpreted per its documents and sanctions for Member States that fail to implement the principle of rule of law in accordance with the expectations of the OSCE's decision-making and executive bodies.

B. An Overview of the Institutional Structure, Decision-Making Processes, and Activities of the OSCE

This section provides an overview of the structure and organisation of the OSCE and its activities. After detailing the decision-making bodies and autonomous institutions of the OSCE, the section presents the OSCE's wide range of activities. The structure of and decision-making processes within the OSCE's bodies and institutions are governed by the Rules of Procedure of the Organisation for Security and Co-operation in Europe[870] ('the Rules of Procedure').

B.1 The Institutional/Organisational Structure

The OSCE is a unique and complex international organisation with a broad mandate and a diverse membership. The Rules of Procedure establish the organisational structure of the OSCE; notably, they differentiate between decision-making bodies (some of which may form informal subsidiary bodies) and other structures and institutions (i.e. executive structures and OSCE-related bodies). While the OSCE's main decision-making bodies and administrative structures are based in Vienna, two institutions are based in Warsaw and The Hague.

The OSCE's orientation, priorities, and decisions are made at its highest political level at the Summit of Heads of State or Government of OSCE participating States.[871] In addition to the Helsinki Final Act (1975), the documents adopted by the Summit (i.e. the Summit documents) include the 1990 Charter of Paris for a New Europe, the 1992 CSCE Helsinki Document, the 1994 Budapest Document, the 1996 Lisbon

870 The Rules of Procedure of the Organisation for Security and Co-operation in Europe (Rules of Procedure), Organisation for Security and Co-operation in Europe, Ministerial Council, 1 November 2006.

871 Rules of Procedure, para. II(B)2. See also OSCE, 2023.

Document, the 1998 Istanbul Document, the 2010 Astana Commemorative Document and several other documents. Since the adoption of the Charter of Paris,[872] the institutional structure of the OSCE has matured gradually. Today, the OSCE operates with a complex but rather light structure.[873] The central decision-making and governing body of the OSCE between Summits is the Ministerial Council, which meets annually and consists of foreign ministers or their representatives from all participating states. The Ministerial Council is also the central forum for political consultations within the OSCE and may consider and make decisions on any relevant issue. It also implements tasks defined and decisions made by the Meetings of the Heads of State or Government. The participating States may decide to convene regular or ad hoc meetings of other ministers with decision-making capacity as specified in the Rules of Procedure.[874] Adopted at the annual meetings of foreign ministers from OSCE States, the Ministerial Council's final documents contain statements and declarations by the Ministerial Council, decisions by the Ministerial Council, statements by the Chairperson, and delegations and reports by the Ministerial Council.

The Permanent Council is the principal decision-making body for regular political consultations and the governance of the OSCE's day-to-day operational work between meetings of the Ministerial Council. It implements, within its area of competence, tasks defined and decisions taken by the Meetings of Heads of State or Government and the Ministerial Council. It may convene reinforced meetings at the level of political directors or other senior officials from capitals in order to consider issues requiring such a level of representation and to adopt decisions. The Permanent Council may also convene special meetings in order to discuss matters of non-compliance with OSCE commitments and to decide on appropriate courses of action. Special meetings may also be convened for other purposes during periods when the Permanent Council's regular meetings are not normally held or to consider a particular issue or topic. Decisions adopted at reinforced or special meetings shall have the same force as other decisions by the Permanent Council.[875] The Permanent Council meets weekly in Vienna and is chaired by the *OSCE Chairperson-in-Office* (the *OSCE Chair*), who is appointed annually by the Ministerial Council. As the most important operational institution responsible for executive action, it coordinates decision-making and sets the OSCE's priorities during its year in office. The Chairperson-in-Office nominates his or her Personal Representatives, who are responsible for ensuring coordination in

872 The Charter of Paris for a New Europe, Organisation for Security and Co-operation in Europe, Summit, 21 November 1990.

873 Borchert and Zellner, 2003, p. 6.

874 Rules of Procedure, II(B)3.

875 Ibid., II(B)4-6. See also OSCE, 2023. Para. II(C)1 of the Rules of Procedure specifies that the Permanent Council shall have the following informal structural bodies (ISBs): the Preparatory Committee (PrepComm) as its highest-level informal structural body, the Advisory Committee on Management and Finance (ACMF), the Economic and Environmental Subcommittee (EESC), the Contact Group with the Mediterranean Partners for Co-operation and the Contact Group with the Asian Partners for Co-operation. The latter two bodies are also referred to as Contact Groups with the Partners for Co-operation.

specific areas (e.g. gender and youth issues), promoting tolerance and non-discrimination, and preventing and managing conflicts in the OSCE's regions.[876] In addition, the OSCE Chair can also take recourse to the Secretary General and the Secretariat, which provide administrative support (as detailed below). Representatives of the current, preceding, and future OSCE Chairs constitute a body named the *Troika*.[877]

Meanwhile, the *Forum for Security Cooperation* is an autonomous decision-making body with a mandate set by relevant decisions of the Meetings of Heads of State or Government and the Ministerial Council. It shall implement, within its area of competence, tasks defined and decisions taken by the Meetings of Heads of State or Government and the Ministerial Council. The Forum for Security Cooperation may convene special meetings for the consideration of a particular issue/topic or for other purposes during periods when regular meetings are not normally held. Decisions adopted at special meetings shall have the same force as other decisions. The Permanent Council and the Forum for Security Cooperation may convene joint meetings to consider issues related to the competence of both bodies and adopt their decisions.[878]

It is also useful to mention the *Senior Council* here. The Senior Council was originally established as a periodic high-level meeting of political directors. While initially designed as an opportunity to prepare for Ministerial Council meetings, this organ has lost importance over time. Since 1997, the Senior Council has only met at the annual Economic Forum.[879]

Another autonomous body within the OSCE is the *OSCE Parliamentary Assembly*. This body is composed of members of the parliaments of States within the OSCE and maintains close relationships with other OSCE structures. It determines its own rules of procedure and working methods. The Rules of Procedure guide how the OSCE Parliamentary Assembly participates in the work of the OSCE's decision-making and informal bodies and OSCE meetings.[880] The Parliamentary Assembly's status within the institutional structure of the OSCE is not entirely clear; specifically, it is referred to only as an 'autonomous body' – the Rules of Procedure do not place it among the OSCE's decision-making bodies, but instead among 'other structures and institutions'. However, the graphic representations of the institutional structure of the OSCE suggest that the Parliamentary Assembly is indeed one of its decision-making bodies.

The executive structure of the OSCE consists of several autonomous institutions that support its activities. The *Secretary General* heads the OSCE Secretariat, acting under the guidance of the Chairperson-in-Office. The Secretariat, which includes the

876 OSCE, 2023.

877 Ibid. See also Borchert and Zellner, 2003, p. 8.

878 Rules of Procedure, para. II(B)7-9. See also OSCE, 2023. Para. II(C)2 of the Rules of Procedure provides that the Forum for Security Cooperation shall have the following informal subsidiary bodies: Working Group A, Working Group B, and the OSCE Communications Group.

879 Borchert and Zellner, 2003, p. 7.

880 Ibid., II(C)3. See also OSCE, 2023.

Conflict Prevention Centre,[881] assists the OSCE Chair in his or her activities and provides operational and administrative support in field operations and, as appropriate, to other institutions. The roles of the Secretary General and Secretariat are rather limited since they have no political mandate. Meanwhile, the *High Commissioner on National Minorities*' is based in The Hague, Netherlands. This commissioner provides early warnings and takes appropriate early actions to prevent ethnic tensions from developing into conflict. Based in Vienna, the *Representative on Freedom of the Media* observes media developments in all 57 OSCE participating states and provides early warnings of violations of free expression and media freedom. As the most important executive body in the field of human rights and the rule of law, the *Office for Democratic Institutions and Human Rights* (ODIHR) provides support, assistance, and expertise to participating states and civil society to promote democratic elections, respect for human rights, the rule of law, tolerance and non-discrimination, and the rights of the Roma and Sinti communities. The headquarters of the ODIHR are in Warsaw.[882]

The OSCE's institutions also include three so-called 'OSCE-related' bodies. The *Joint Consultative Group* is a Vienna-based body which deals with questions relating to compliance with the provisions of the Treaty on Conventional Armed Forces in Europe. The *Open Skies Consultative Commission* consists of representatives of the state signatories of the Open Skies Treaty and meets regularly in Vienna. Finally, the Geneva-based *Court of Conciliation and Arbitration* facilitates the peaceful settlement of disputes in accordance with international law and OSCE commitments by means of conciliation and, where appropriate, arbitration.[883]

Last but not least, it is also useful to note that the OSCE carries out so-called 'field operations'. These operations consist of *missions* to and *presence* in countries across different regions (e.g. South-Eastern Europe, Eastern Europe, South Caucasus, Central Asia).[884] Through these missions, the OSCE assists home countries in putting their commitments into practice, tackles crises as they arise, and plays a critical role in the post-conflict period by restoring trust among affected parties.

The OSCE is funded by contributions from its 57 participating States. Between 1994 and 2000, the OSCE's annual budget notably increased tenfold from EUR 21 million to EUR 207.9 million. Approximately EUR 180 million are needed to cover the OSCE's missions and field activities.[885] In the last decade, this cost has decreased significantly. On 18 August 2021, after almost a year of budget negotiations, the OSCE Permanent Council adopted the Organisation's Unified Budget for 2021, which totalled EUR 138.2 million. While a higher unified budget was proposed during

881 The Conflict Prevention Centre runs the Operation Center, and the OSCE Coordinator on Economic and Environmental Activities. See: Borchert and Zellner, 2003, p. 8.

882 OSCE, 2023. For a detailed presentation of the ODIHR and its role in promoting the rule of law see below.

883 Ibid. The Court was established with the Convention on Conciliation and Arbitration within the CSCE, which was adopted by CSCE Council at Stockholm on 15 December 1992.

884 Ibid.

885 Borchert and Zellner, 2003, p. 7.

these negotiations, no consensus was reached – final reductions were necessary to secure the support of all participating States and preserve the full operational continuity of the OSCE.[886]

The OSCE employs approximately 550 people across its various institutions and approximately 2,330 in its field operations. Locally-contracted employees outnumber international seconded employees by roughly three to one. Seconded staff members are funded by their national administrations. To strengthen transparency and accountability within the OSCE and prevent waste, fraud, and mismanagement, a team of independent internal and external auditors regularly examines and evaluates the OSCE's activities. In cases of alleged or suspected financial impropriety affecting the organisation, an investigation is launched to establish the facts and the findings are reported to the Secretary General. All audits, evaluations, and investigations are performed in line with international standards.[887]

B.2 Decision-Making Processes

OSCE commitments generally take the form of documents adopted at OSCE summits or ministerial meetings.[888] The Rules of Procedure provide that decisions on documents by OSCE decision-making bodies shall be adopted by consensus by the participating States through the application of a silence procedure.[889] Proposals for draft decisions may be initiated by the OSCE Chair, the Forum for Security Cooperation Chairmanship, or any participating State or group of participating States.[890] The Chairperson shall ensure that draft decisions are considered in an appropriate informal working group, informal subsidiary body, and/or subordinate decision-making body of the decision-making body to which the draft decision has been submitted or otherwise discussed by all the participating States prior to the submission of the draft decision for

886 OSCE, 2023. See also Permanent Council Decision no. 1413 on Approval of the 2021 Unified Budget. In the Interpretative Statement Under Para. IV.1(A)6 of the Rules of Procedure of the OSCE, the delegation of Slovenia asserted that the latest reduction of the budget proposal significantly affected the OIDHR and the Secretariat. The Slovenian delegation recalled that the human dimension is at the core of the OSCE's mandate and that it is of the utmost importance to ensure adequate funding for the entire organisation. According to them, the Organisation must be able to count on solid resources to fulfil its mandate, and it must also undertake all the necessary reforms to improve its effectiveness and efficiency, in line with the expectations of the participating States and the guidance of the Chairperson-in-Office.

887 OSCE, 2023. For more information on staffing and employment, see the OSCE Annual Report 2021.

888 Whereas some meetings, in particular in the early 1990s, created a large set of important new norms, others restricted themselves to making minor changes and additions. See OSCE Human Dimension Commitments, 2022, p. XI.

889 Rules of Procedure, para. IV(A)1. The Rules of Procedure also determine the modalities for the application of a silence procedure by the individual decision-making bodies.

890 Ibid. Proposals of participating States or groups of participating States shall be submitted in writing to the Chairperson of the relevant decision-making body and circulated as soon as possible to all participating States.

adoption.[891] Each decision enters into force on the date of its adoption unless otherwise specified in the text of the decision. If a decision has been adopted through a silence procedure, the date of the expiration of the period of silence shall be regarded as the date of adoption of the decision.[892] Any decision may be amended or overruled by the same decision-making body that has adopted the decision unless this decision-making body specifies that a lower-level decision-making body may amend or overrule it. Any decision may be amended or overruled by a higher-level decision-making body.[893]

The proceedings of the meetings of decision-making bodies shall be recorded in the journals of the meetings. These journals are issued both in paper and electronic formats in all working languages and shall be made public.[894] At the meetings of decision-making bodies, the European Commission (EC) shall have one seat next to the participating state holding the European Union (EU) Presidency.[895] Representatives of the OSCE Parliamentary Assembly and of executive structures may also attend the meetings of decision-making bodies. They may make oral contributions at the invitation of the Chairperson of a meeting under an item on the agenda. They shall not participate in the drafting of documents, but may comment on drafts that directly concern them at the invitation of the Chairperson.[896] The Partners for Co-operation and international organisations, institutions, and initiatives may be invited by participating States on a regular or case-by-case basis to attend meetings of decision-making bodies and make oral and/or written contributions; however, they do not a right to participate in the drafting of documents.[897]

The Partners for Co-operation may attend and make both oral and written contributions at the Meetings of Heads of State or Government and Ministerial Council meetings. Upon invitation by the respective Chairperson, they may also attend and make both oral and written contributions at certain meetings of the Permanent Council and the Forum for Security Cooperation; however, they do not have a right to participate in the drafting of documents in these cases. Representatives of international organisations, institutions, and initiatives; non-governmental organisations (NGOs); academic organisations; and businesses may be invited by participating States on a case-by-case basis to attend certain meetings of decision-making bodies and make oral and/or written contributions.

The texts of decisions (to which interpretative statements and formal reservations shall be attached) are circulated to participating States in all working languages.[898]

891 Ibid., para. IV(A)2. Representatives of the participating States may ask for their formal reservations or interpretative statements concerning given decisions, including those through a silence procedure, to be duly registered by the Secretariat and circulated to the participating States. Ibid., para. IV(A)6.
892 Ibid., para. IV(A)7.
893 Ibid., para. IV(A)9.
894 Ibid., para. IV(B)4.
895 Ibid., para. IV(C)114.
896 Ibid., para. IV(D)2.
897 Ibid., para. IV(D)4.
898 Ibid., paras. IV(B)1 and 4. The working languages of the OSCE are: English, French, German, Italian, Russian and Spanish.

These texts shall be appended to the journal of the meeting at which the relevant decision was adopted and made public. Further, the texts of decisions adopted by a decision-making body through a silence procedure shall be appended to the journal of the first meeting of that body following the expiration of the silence period. The journals shall be issued by the Secretariat as soon as possible upon approval of their contents by the Chairperson(s) of the meeting in question.

The final document of each Ministerial Council meeting or Meeting of Heads of State or Government shall be compiled in a standard OSCE format as a separate volume. The contents and structure of each volume shall be defined by the Chairmanship with the assistance of the Secretariat. The final document shall contain the texts of all documents adopted at the meeting, the texts of other documents annexed to its journal(s), and the texts of selected reports and letters submitted at that meeting. The final document shall be printed and issued in an electronic format in all working languages.[899]

In general, deliberations on international legal documents usually take considerable time before agreement on a final text is reached and the final documents are subject to ratification and reservations. However, this does not apply to OSCE documents. Given their political nature, decisions enter into force as soon as States reach a consensus and, in principle, are binding for all OSCE States.[900] Helpful to note here is that the consensus process by which all OSCE bodies make decisions means that, in principle, no party raises objections. Deviations from the consensus principle are foreseen in cases of 'clear, gross, and uncorrected' violations of OSCE commitments. In such cases, the so-called 'Prague mechanism' of 'consensus minus one' can be activated against a participating state. Similarly, the Ministerial Council can decide by 'consensus minus two' in cases where two States cannot agree on how to resolve a dispute.[901]

A large number of OSCE documents adopted by OSCE decision-making bodies form the existing framework of the OSCE. These documents build on each other and constitute what could be called 'the OSCE acquis'. Accordingly, participating States are advised not to solely rely on a single document; instead, they should examine the entire spectrum of existing documents to grasp the complete extent of commitments related to a particular right or fundamental freedom. Frequently, an initial document outlines only a broad principle, which is subsequently detailed in later documents. Nevertheless, because these commitments and documents build upon one another, an early document's commitment remains valid even if a later document merely provides a general reference to the same right. Simultaneously, each document, taken as a whole, reflects a distinct historical context and is structured by a specific logic that

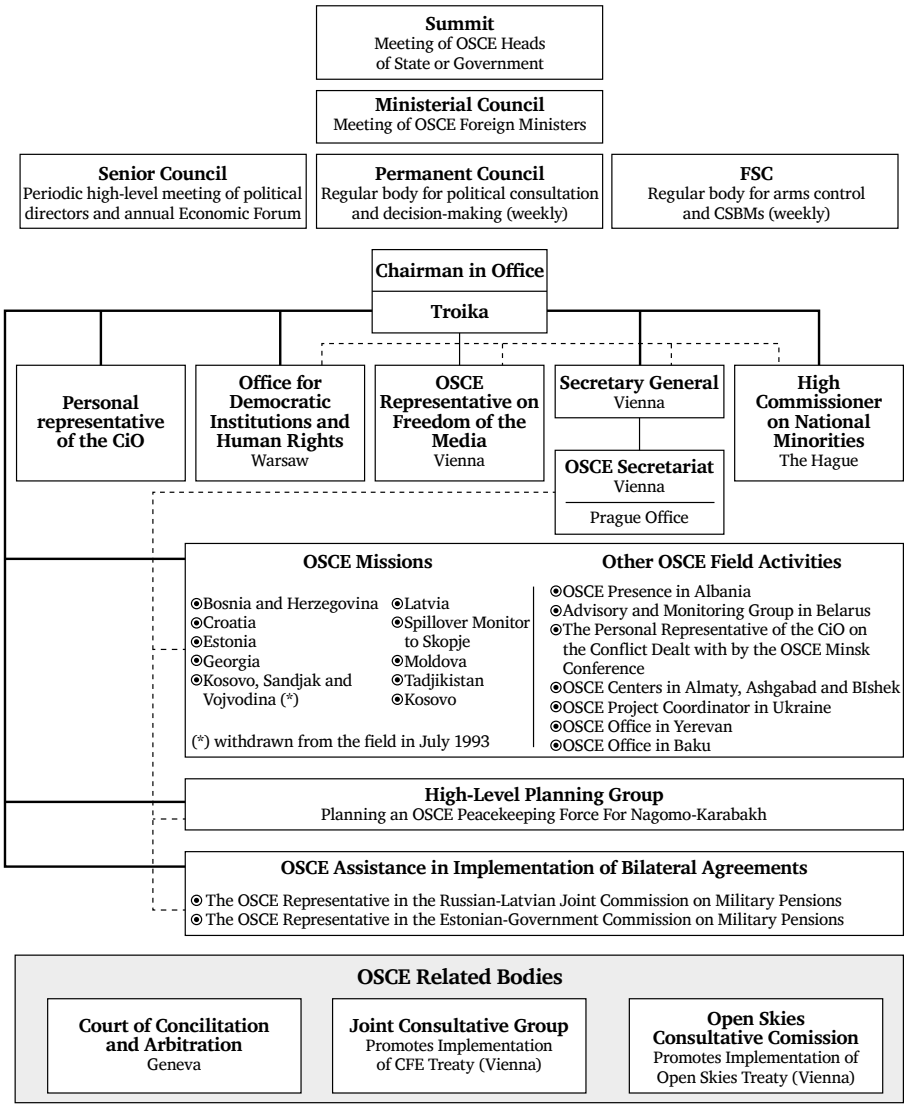
899 Ibid., para. IV(B)10.

900 See OSCE Human Dimension Commitments, 2022, p. XIII. This so-called 'universality principle' allows the OSCE to react quickly to new needs. For example, when human rights violations in regard to minorities increased in the beginning of the 1990s, it was the OSCE that reacted first and drafted a comprehensive set of standards in the field of minority protection. Later, these political standards served as the basis for the legally binding Council of Europe Framework Convention on the Protection of National Minorities (ibid.).

901 Borchert and Zellner, 2003, pp. 8–9.

situates the document's various sections within a broader context. Therefore, comprehensive reading of a document can yield valuable insights into understandings and interpretations of relevant norms.[902]

Picture 1: The Structure of the OSCE[903]



902 See OSCE Human Dimension Commitments, 2022, p. XII.

903 The Structure of the OSCE [Online]. Available at: http://www.osce.org/general/gen_info_pics/organigram.pdf (Accessed: 12 October 2023).

B.3 The Activities

Aimed at conflict prevention and resolution, the OSCE plays an important role in preventing and resolving conflicts in its regions. It has facilitated negotiations and implemented peace agreements in several conflicts, including those in Nagorno-Karabakh, Transdniestria, and Bosnia and Herzegovina. Further, the OSCE works to prevent the proliferation of weapons and promote arms control and disarmament. It monitors and verifies compliance with arms control agreements and assists in the destruction of surplus weapons. Meanwhile, through its activities in the field of economic and environmental security, the OSCE promotes economic cooperation and sustainable development in its regions, addressing issues related to energy security, border management, and the environment. A wide range of the activities of OSCE bodies, especially those of the ODIHR, are aimed at strengthening democratic institutions, human rights, and the rule of law. Established in 1990, the ODIHR operates in all 57 OSCE participating States. Its mandate includes election observation, human rights monitoring, support for democratic institutions and civil society, and the promotion of tolerance and non-discrimination, which, inter alia, includes advocating for the rights of vulnerable groups, minorities, and refugees. The ODIHR reports on its activities in annual and thematic reports and in other publications. This chapter addresses these activities of the ODIHR in a separate section (see below).

B.4 The OSCE's 'Human Dimension'

Beginning with the Helsinki Final Act in 1975, the States of the OSCE have adopted a large number of politically binding commitments relating to what has become known as the 'human dimension' of the OSCE's comprehensive concept of security. As it is used today, this term encompasses all aspects related to human rights and fundamental freedoms; democracy, including democratic elections, governance, and institutions; tolerance and non-discrimination; the rule of law; national minorities; human contacts; and international humanitarian law.[904]

The first Conference on Human Dimension took place in Paris in the spring of 1989, marking a change in the geopolitical situation in Europe and stressing the universal applicability of the norms and values of the human dimension of the OSCE (which was then called the Conference for Security and Co-operation in Europe [CSCE]). A second such conference followed in Copenhagen in the summer of 1990 and a third in Moscow in the autumn of 1991. According to Merino, these conferences can be seen as codifications of the human dimension of the OSCE in its post-Cold War form. Throughout the following decades, the OSCE community recognized its human dimension as a cornerstone of lasting peace and security in Europe and accordingly stuck to its commitment to foster and further develop its related obligations. However, this process has not always been smooth and

904 OSCE, 2023.

successful: the Old Continent endured crisis after crisis and frequently turned to the OSCE for support in crisis management and conflict resolution. While broad experience has been gained by trial and error, temporary setbacks have not stagnated the process.[905]

Following the notion that the OSCE is not simply an organisation of 57 States but a 'community of values' that develops practices and normative customs, the OSCE's human dimension commitments go far beyond the level provided for in 'traditional' legally binding human rights instruments. Specifically, its commitments in this regard notably link human rights with the institutional and political state systems.[906] Through their human dimension commitments, OSCE States agree that pluralistic democracy based on the rule of law – as a concept based on the dignity of the human person and a system of rights through laws and legal structures – is the only system of government that can effectively guarantee human rights.

C. The Office for Democratic Institutions and Human Rights and its Role in Promoting the Rule of Law

C.1 The Structure and Functions

As the primary OSCE institution in the field of the human dimension, the ODIHR was established in 1990 as the *Office for Free Elections* and renamed the ODIHR in 1992. Since its conception (its normative basis can be traced back to the basic principles of the 1975 Helsinki Final Act), the ODIHR has taken on many tasks. Notably, these tasks have brought the ODIHR a long way from where its founding fathers intended it to be. Along with its new name, the ODIHR was given expanded functions and, through a structural re-organisation during the 1990s, developed into the most important OSCE institution in the area of human rights.[907]

During its first years of activity from 1992 to early 1997, ODIHR faced structural limitations. While election monitoring became an appropriate and reliable instrument, other activities in the human dimension suffered because they were unfocused, hard to implement, and disconnected from current events. Furthermore, the ODIHR was suffering from an acute personnel shortage. However, during the

905 Merino, 1999, p. 383. Merino maintains that the OSCE has developed from a meeting place for all countries involved in Europe's security and a forum for norm-setting with regard to the relationships between States and the relationships within States between authorities and citizens, to an operational entity responsible not only for the further elaboration of norms but, first and foremost, for the implementation of what has been agreed upon by all participating States.

906 In traditional human rights treaties, individual (or group) rights are formulated, and the State Party has the obligation to respect and/or guarantee those rights. How to implement these obligations, however, is most often left to the discretion of the States. See OSCE Human Dimension Commitments, 2022, p. XII.

907 Oberschmidt, 2002, p. 388; Merino, 1999, pp. 384–385. See also Election Observation Handbook, 2020.

summer of 1997, the ODIHR was reorganized. The structures introduced during this time are still valid today, albeit in a slightly modified form.[908]

Today, the ODIHR assists new democracies in building institutions, facilitates co-operation in training, and enables co-operation between the Council of Europe and NGOs. More specifically, it provides support, assistance, and expertise to participating States and civil society to promote democracy, the rule of law, human rights, and tolerance and non-discrimination. The ODIHR also observes elections, reviews legislation, and advises governments on how to develop and sustain democratic institutions. Further, the Office conducts training programs for government and law-enforcement officials and NGOs on how to uphold, promote, and monitor human rights.[909]

Aside from its management, the ODIHR is divided in four main sections. The *Election Section* promotes democratic elections by monitoring elections, providing trainings related to elections, assisting in drafting legislation, and by providing technical assistance in the preparation and execution of elections. In observing elections, the ODIHR closely co-operates with the parliamentary assemblies of both the OSCE and the Council of Europe. Given that helping a country hold a free and fair election goes way beyond merely monitoring voters' access to the ballot box on Election Day, it is notable that the ODIHR has increasingly co-operated with authorities in this area since the early 1990s. More specifically, in doing so, the ODIHR has assisted in matters related to the development of consistent election legislation, the preparation of a comprehensive voter register implementation of election results, and the development of technical assistance programs targeted at creating or solidifying a constitutional and administrative framework for future elections.[910] The ODIHR's long-term approach and standardized methodology have been widely accepted by participating States.

The *Democratization Section* runs programs to strengthen democratic institutions and the rule of law; promote human rights, civil society, and gender equality; and fight trafficking in human beings.[911] Since the 1990s, this section has been developing tailor-made packages of democratization projects, human rights projects, and projects in the field of election preparation in Central Asian and Caucasian states in the form of memorandums of understanding (MOUs). The guiding principle of these projects has been the concrete implementation of the ODIHR's responsibility for assisting countries in transition. The conclusion of MOUs with countries such as Uzbekistan, Kazakhstan, Kyrgyzstan, Georgia, Armenia, and Azerbaijan has clearly demonstrated the existence of a lively interest in taking concrete steps towards implementing the commitments of the OSCE's framework – not only on the ODIHR, but by the governments of the abovementioned countries. The ODIHR also carries

908 Oberschmidt, 2002, p. 388.
909 OSCE, 2023.
910 Merino, 1999, pp. 385–386.
911 Borchert and Zellner, 2003, p. 9.

out joint missions with representatives of the EC, the UN High Commissioner for Refugees, the Council of Europe, and other international organisations. Specifically, these missions aim to assess the assistance needs of the countries in the human dimension field and take stock of the assistance programs already provided by the international community. Several OSCE participating States have given generous financial contributions to the ODIHR to enable its implementation of a wide variety of projects. In addition, through its Democratization Section, the ODIHR stands ready to assist the OSCE's missions and other OSCE groups in the field.[912]

The *Monitoring Section* follows human rights developments as well as participating States' compliance with the OSCE's human dimension commitments. In doing so, it fulfils an early-warning function.[913] Central to the implementation of the OSCE's human dimension commitments are the biennial implementation meetings on human dimension issues. Open to representatives of NGOs, these implementation meetings take a close look at existing issues in the field of human rights and fundamental freedoms in participating States, including issues related to the rights of persons belonging to national minorities, the rule of law, and democracy. Following the implementation meeting in November 1997 and the decision by the Ministerial Council of Copenhagen in December 1997, the ODIHR changed the format of the implementation reviews to make them more results-oriented. The new modalities include increased activities in Vienna and increased NGO participation.[914]

Finally, the *Contact Point for Roma and Sinti Issues*, established in 1994, serves as a clearing-house for the exchange of information and assistance for Roma- and Sinti-related policies, including information on the implementation of Roma-related commitments by OSCE States.[915] Following the 1998 OSCE Oslo Ministerial Council Decision on Enhancement of the OSCE's Capabilities Regarding Roma and Sinti Issues, the Contact Point works to promote the 'full integration of Roma and Sinti communities into the societies they live in, while preserving their identity'. To realize this goal, a work program is being implemented. This program focuses on the advancement of the political rights of Roma and Sinti in the OSCE area, acute crisis prevention and crisis management in post-conflict areas of South Eastern Europe, and fostering and supporting the development of civil society among Roma communities in the Balkans. In addition, the Contact Point section provides policy advice to OSCE governments; enhances interaction between OSCE structures, governments, and international organisations and Roma or Roma-related NGOs to develop synergies and common approaches; collects information from OSCE countries on legislative and other measures related to the situation of Roma and Sinti; and makes this information available to the OSCE community and other international organisations.[916]

912 Merino, 1999, pp. 387–388.
913 Borchert and Zellner, 2003, p. 9.
914 Merino, 1999, p. 388.
915 Borchert and Zellner, 2003, p. 9; Oberschmidt, 2002, p. 388.
916 ODIHR, 2023, p. 4. See also the Final Document of the Seventh Meeting of the OSCE Ministerial Council, Oslo, 2–3 December 1998, p. 17.

As has already been mentioned, the ODIHR represents the central OSCE institution for the area of the human dimension. However, given that the ODIHR's seat is in Warsaw, it is relatively far removed from central OSCE decision-making processes. On the one hand, Oberschmidt notes that this unfortunately means that the ODIHR's participation in these processes is not always guaranteed to the extent necessary for it to introduce its own concepts and interests. On the other hand, the ODIHR can conduct its activities relatively independently – especially since the OSCE has rather weak and discontinuous management organs (e.g. the Chairman-in-Office changes yearly). Because the participating States, which 'possess' the OSCE, barely notice its daily institutional business, the OSCE's sub-institutions and their management personnel have a high degree of autonomy in making decisions.[917]

C.2 The ODIHR's Role in Promoting the Rule of Law

The ODIHR plays an important role in promoting the rule of law by providing assistance and expertise to countries seeking to strengthen their legal systems. This includes monitoring elections and human rights violations; supporting legal reform; and providing technical assistance to governments, civil society organisations, and other stakeholders. By monitoring elections, the ODIHR can ensure that they are conducted in accordance with the law and international standards. This includes monitoring the election process, ensuring that all eligible voters have access to the polls, and ensuring that the results are transparent and free from fraud. Notably, the ODIHR monitors human rights violations to ensure that they are investigated and prosecuted in accordance with the law. The ODIHR also promotes the rule of law by assisting countries undergoing legislative reforms to ensure that their laws are consistent with international human rights standards and, accordingly, protect the rights and freedoms of all individuals. In this regard, the ODIHR works with parliaments, governments, civil society organisations, and other stakeholders to provide technical assistance in reviewing and implementing human rights legislation; drafting other laws and regulations; training judges, prosecutors, and practicing lawyers; and strengthening public administration. In the area of justice, the ODIHR assists OSCE States in developing justice systems that guarantee respect for fundamental rights and freedoms in a fair and independent manner in all areas of the system. Its activities include providing support to independent judiciaries to ensure that they operate free from undue influence), strengthening fair trial guarantees, and enabling key actors in the criminal justice chain to perform their duties transparently and in compliance with human rights obligations. In order to strengthen fair trial guarantees, the ODIHR uses trial monitoring as an assessment tool to promote reforms based on rule of law principles in the areas of criminal, civil, and administrative justice.

The ODIHR also assists participating States in living up to their rule of law commitments in relation to the OSCE's security and conflict prevention mandate. This

917 Oberschmidt, 2002, p. 390.

work is exemplified by the ODIHR's participation in the completion of the EU-funded War Crimes Justice Project in 2011. To complete this project, the ODIHR partnered with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the UN Interregional Crime and Justice Research Institute, with support from OSCE field operations. The project consolidated the capacity of national jurisdictions in South-Eastern Europe to deal with war crimes.

In 2022, the ODIHR redoubled its efforts to support stronger democratic institutions based on genuinely democratic elections; respect for human rights and fundamental freedoms, including the freedom to peacefully protest, the right to freedom of religion or belief, and the development of inclusive societies; and the rule of law. The Office provided advice and expertise to strengthen the institutions and processes that ensure the rule of law, respect for human rights, and accountability by organizing, *inter alia*, expert meetings on judicial independence and the rule of law and roundtable discussions on challenges and good practices related to the rule of law in OSCE States.[918]

D. The Interpretation of the Rule of Law

D.1 General Principles and Aspects of the Rule of Law as Referred to, Understood, and Contextualized by the OSCE

As the key structural component of a democratic society and a cornerstone of the OSCE's 'human dimension' commitments, the rule of law is referred to in almost all documents adopted by the main OSCE decision-making bodies. Essentially, the OSCE situates the rule of law as a concept that is crucial for the development of

918 See Democracy and Human Rights in the OSCE: OSCE Office for Democratic Institutions and Human Rights Annual Report 2022, p. 5. Among a number of activities in 2022, the ODIHR worked across the Western Balkans to make election processes more inclusive for women and people with disabilities, especially those from minority ethnic groups. It also organized its first ever moot court competition on the rights of people with disabilities. The ODIHR has also closely monitored respect for the freedom of peaceful assembly, because it is valuable for minority and marginalized groups as a means of giving voice to those with limited access to power. To support National Human Rights Institutions in countering threats to their independence and ability to protect human rights, the ODIHR has developed a guidance tool focused on strengthening their resilience. The ODIHR has responded to the increasingly hostile attitude towards the work of the human rights defenders around the OSCE region by creating the FreedomLab website, an e-learning platform for human rights defenders. Migration continued to be a core area of the ODIHR's work as the numbers of people forced to flee their countries grew, compounded by the war in Ukraine and ongoing conflicts worldwide, as well as global trends such as climate change. The ODIHR created a toolkit to tackle violence against women in politics containing recommendations for legislators, governments, parliaments, and political parties as well as guidance for civil society and female politicians affected by violence. In line with the ODIHR's mandate to monitor the situation of Roma and Sinti women across the OSCE region and help ensure Roma and Sinti girls have equal opportunities for education and social inclusion, the Office also organized self-advocacy training courses in 2022. Last but not least, the ODIHR began working on an update of the OSCE's Human Dimension Commitments, to be launched in 2023.

societies based on pluralistic democracy and a prerequisite for a lasting order of peace, security, justice, and co-operation in Europe. The notion of the rule of law, as defined by the OSCE, requires that all persons, institutions, and entities, including States themselves, are accountable to laws that are equally enforced, independently adjudicated, and consistent with international human rights norms and standards.

For example, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE[919] (Copenhagen Document 1990) outlines a number of human rights and fundamental freedoms and contains several explicit references to the rule of law. The participating States express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for establishing the lasting order of peace, security, justice, and co-operation that they seek to establish in Europe. Regarding human rights, the Copenhagen Document explicitly refers to the right to peaceful assembly and demonstration, the right to enjoy one's property peacefully, and the rights of the child. In addition, it introduces provisions regarding national minorities and broadens the scope of human rights matters to include election commitments. With regard to the latter, it stipulates, *inter alia*, that all OSCE States are determined to build democratic societies based on free elections and the rule of law and that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms, the development of human contacts, and the resolution of other issues of a related humanitarian character.[920]

Another document that explicitly references the general principles and aspects of the rule of law is the CSCE Budapest Document 1994 Towards a Genuine Partnership in a New Era[921] (Budapest Document 1994). In this document, the participating States define the rule of law as a tool for guaranteeing legal security for the individual. Specifically, they maintain that all action by public authorities must be consistent with the rule of law to guarantee legal security for the individual. They also emphasize the need to protect human rights defenders and look forward to the completion and adoption, in the framework of the United Nations (UN), of the draft declaration thereon.[922]

Additionally, in Decision No. 12/05 Upholding Human Rights and the Rule of Law in Criminal Justice Systems[923] (Ljubljana Decision 2005), the Ministerial Council

919 The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE), Organisation for Security and Co-operation in Europe, 29 June 1990.

920 Copenhagen Document, 1990, pp. 1–2.

921 The CSCE Budapest Document 1994 Towards a Genuine Partnership in a New Era, Organisation for Security and Co-operation in Europe, 21 December 1994 (Corrected version).

922 Budapest Document, 1994, Decisions VIII The Human Dimension, Point 18.

923 Decision No. 12/05 Upholding Human Rights and the Rule of Law in Criminal Justice Systems, Organisation for Security and Co-operation in Europe, Ministerial Council, Ljubljana, 6 December 2005.

recalls that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law is a prerequisite for achieving a lasting peace, security, justice, and stability. It also reaffirms that the rule of law must be based on respect for internationally recognized human rights and that it does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but instead justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions that provide a framework for its fullest expression.[924]

Further, in the Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and Financing of Terrorism[925] (Dublin Declaration 2012), the Ministerial Council points to transparency in public affairs as an essential condition for State accountability and for the active participation of civil society and the private sector in economic and development processes (see below). Transparency increases the predictability of and confidence in institutions and economies, which functioning on the basis of adequate legislation and with full respect for the rule of law.[926]

Meanwhile, Decision No. 7/09 on Women's Participation in Political and Public Life[927] (Athens Decision 2009) does not explicitly refer to the rule of law but instead to its general principles. Adopted at the 17th OSCE Ministerial Council in Athens, this document addresses the continued underrepresentation of women in the OSCE area in all levels of political and public life, with special emphasis on decision-making structures within the legislative, executive, and judicial branches and the security services, including the armed forces, where relevant. Concerned that widespread discrimination against women continues to undermine their effective participation in political and public life, the Athens Decision 2009 calls on the participating States to establish, where appropriate, effective national mechanisms for measuring women's equal participation and representation.[928]

In the Astana Commemorative Declaration Towards a Security Community,[929] dated 1 December 2010 (Astana Commemorative Declaration 2010), the participating States emphasize that the OSCE's comprehensive and co-operative approach to security addresses the human, economic, environmental, political, and military dimensions of security as an integral whole. Convinced that the inherent dignity of

924 Ljubljana Decision, 2005.

925 The Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and Financing of Terrorism, Organisation for Security and Co-operation in Europe, Dublin, 7 September 2012.

926 Dublin Declaration, 2012.

927 Decision No. 7/09 on Women's Participation in Political and Public Life, Organisation for Security and Co-operation in Europe, Ministerial Council, Athens, 4 December 2009.

928 Athens Decision, 2009.

929 The Astana Commemorative Declaration Towards a Security Community, Organisation for Security and Co-operation in Europe, Summit Meeting, Astana, 1 December 2010.

the individual is at the core of comprehensive security, they reiterate that human rights and fundamental freedoms are inalienable, and that their protection and promotion is our first responsibility. Without explicitly mentioning the rule of law, but in clear connection with it, they reaffirm that the commitments undertaken in the field of the human dimension are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the state concerned.[930]

However, OSCE States also situate the rule of law as more than just a formal legality, which assures regularity and consistency in the achievement and enforcement of democratic order; specifically, they locate it as a form of 'justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression'.[931] They recognize that democracy and the rule of law depend on the existence of democratic values and practices as well as an extensive range of democratic institutions. This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all legitimate interests and aspirations, political pluralism, social tolerance, and the implementation of legal rules that place effective restraints on the abuse of governmental power. The participating States agree that they should promote a climate of mutual respect, understanding, co-operation, and solidarity among all persons living within their territories, without distinction as to ethnic or national origin or religion; further, they agree that problems that may occur can be best resolved through dialogue based on the principles of the rule of law.[932]

D.2 Independent and Impartial Operation of the Public Judicial Service and Legal Practitioners

In the OSCE's interpretation and understanding of the rule of law, an impartial and independent judiciary and impartial operation of the public judicial service plays a vital role in ensuring due process and protecting human rights. The idea is not to give judges special privileges, but to recognize the separation of powers as a main pillar of democracy and, ultimately, the rule of law. The legislative, executive, and judicial branches should hold each other in check and no individual branch should amass too much power. As such, judicial independence is a prerequisite to the rule of law and acts as a fundamental guarantee of a fair trial and respect for human rights. As interpreted and understood by the OSCE, the rule of law requires a guarantee that every individual will be treated equally before the courts and have equal access to effective legal remedies.

930 Astana Commemorative Declaration, 2010, Point 6.
931 OSCE, 2023. See also Copenhagen Document, 1990, Section I, Points 2–3.
932 Copenhagen Document, 1990, Sections III and IV, Points 26–36.

The OSCE's understanding of the rule of law and its contextualization in the realm of criminal justice is demonstrated in more detail in the Brussels Declaration on Criminal Justice Systems[933] (Brussels Declaration on Criminal Justice Systems 2006). Recalling certain previous political documents (e.g. the Ministerial Council decisions, seminar proceedings), relevant UN instruments (e.g. the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and the commitment of the participating States to ensure the independence of the judiciary, the Brussels Declaration stipulates the following: (a) judicial independence is a prerequisite to the rule of law and acts as a fundamental guarantee of a fair trial; (b) impartiality and integrity is essential to the proper discharge of the judicial office; (c) propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge; and (d) competence, diligence, and a guarantee of equal treatment to all before the courts are prerequisites to the due performance of the judicial office.[934]

In the OSCE's view, in criminal justice, the integrity of all actors is essential to their performance. Judges play a crucial role in ensuring the right to a fair trial, the right to an effective remedy, the right not to be subjected to arbitrary arrest or detention, and furthering and protecting other human rights in the criminal justice system. Judges must be able to make decisions independently and objectively based on the law. They must not treat anybody differently; for example, an influential politician or a wealthy businessperson should not receive special treatment. Only an independent judge can address abuses of power by other branches of the state and hold offenders to account. With regard to prosecutors, particular importance is given to their functional and institutional independence. Prosecutors should constantly maintain the honour and dignity of their profession and respect the rule of law. The office of the prosecutor should be strictly separated from judicial functions, and prosecutors should respect judges' independence and impartiality. Further, prosecutors should, in accordance with the law, perform their duties fairly, consistently, and expeditiously; respect and protect human dignity; and uphold human rights. By doing so, they ensure due process and the smooth functioning of the criminal justice system. With regard to defence lawyers, the OSCE recognizes that defence lawyers play a critical role in ensuring the rights to a fair trial, an effective remedy, and not to be subjected to arbitrary arrest or detention and in furthering and protecting other human rights in the criminal justice system. All necessary measures should be taken to respect, protect, and promote the freedom of exercise of their profession. They should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.[935]

933 The Brussels Declaration on Criminal Justice Systems, Organisation for Security and Co-operation in Europe, Ministerial Council, Brussels, 5 December 2006.

934 Brussels Declaration on Criminal Justice Systems, 2006.

935 Ibid. See also Ljubljana Decision, 2005.

In criminal justice, the rule of law also concerns custodial sentences and the treatment of prisoners. The requirements of safety, security, and discipline must be considered. Further, prison conditions should not violate human dignity, and prisoners should be offered meaningful occupational activities and appropriate treatment programs to support their reintegration into society.[936]

The OSCE also recognises the independence of the judiciary and the improvement of criminal justice systems as part of its overall security agenda in co-ordination with the UN and other multilateral forums. Notably, the Ministerial Council emphasizes that an independent, efficient, and effective criminal justice system plays a key role in upholding public safety and security. The Ministerial Council also urges participating States to pay due attention to the integrity and professionalism of law enforcement agencies and prosecution authorities. Further, it calls upon the participating States to focus on the efficient administration of justice and proper management of the court system, the proper functioning of the penitentiary system, and new alternatives to imprisonment. The Ministerial Council recognizes that efficient and effective criminal justice systems can only be developed on the basis of the rule of law and the protection of human rights and, moreover, that the rule of law itself requires the protection of such a criminal justice system.[937]

Further references to the rule of law (in and beyond the area of criminal justice) can be found in Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area[938] (Helsinki Decision 2008). The Ministerial Council encourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures, to continuously enhance their efforts to share information and best practices and to strengthen the rule of law in the areas of the independence of the judiciary, effective administration of justice, right to a fair trial, access to courts, the accountability of State institutions and officials, public administration, the right to legal assistance, and the respect for the human rights of persons in detention.[939]

In the above document, the Ministerial Council also reconfirms the interlinkage between human rights, the rule of law, and democracy and recalls the OSCE documents adopted in Vienna in 1989, Copenhagen in 1990, Moscow in 1991, Budapest in 1994, and Istanbul in 1999 as well as the Ljubljana Ministerial Council Decision No. 12/05 on Upholding human rights and the rule of law in criminal justice systems.[940] Last but not least, the Ministerial Council decision calls for increased awareness for issues related to the rule of law in courts, law enforcement agencies, and police and penitentiary systems; training for legal professionals; education on the rule of law; interaction and exchange opportunities for legal professionals, academics, and law

936 Brussels Declaration on Criminal Justice Systems, 2006.

937 Decision No. 5/06 on Organized Crime, Organisation for Security and Co-operation in Europe, Ministerial Council, Brussels on 5 December 2006.

938 Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area, Organisation for Security and Co-operation in Europe, Ministerial Council, Helsinki, 5 December 2008.

939 Ibid.

940 Ibid.

students from different participating States in the OSCE region; strengthening the role of constitutional courts or comparable institutions of participating States to ensure that the principles of the rule of law, democracy, and human rights are observed in all state institutions; the provision of effective legal remedies, where appropriate, and access thereto; and adherence to the principle of the peaceful settlement of disputes.[941]

Another relevant document with regard to the OSCE's understanding of the rule of law and its relation to the justice system is the Dublin Declaration 2012. In this document, the Ministerial Council recognizes, *inter alia*, the central role that judicial institutions play in guaranteeing the rule of law, underlines the critical importance of safeguarding the judiciary's independence in order to enable it to fulfil this function, and the need to intensify efforts in this regard.[942]

D.3 Lawful Operation of Law Enforcement Agencies

With regard to the operation of law enforcement agencies, the OSCE considers the principles of the rule of law the core framework and guideline based on which these agencies should carry out their duties. In order to act in line with the rule of law, when enforcing public order, law enforcement personnel shall pursue a legitimate aim and use force only to the extent necessary and appropriate to accomplish their mission and ensure public safety.[943]

The OSCE expresses its participating States' commitment to strengthening the protection against new risks and challenges and their determination to co-operate more actively and closely with each other and other international organisations in creating political and legal frameworks within which the police can perform their tasks in accordance with democratic principles and the rule of law. While effective policing is crucial to uphold the rule of law and defend democratic institutions, law

941 Ibid. In addition to the above, the Ministerial Council tasks the relevant OSCE executive structures, in close consultation and co-operation with participating States, to organize seminars focusing on rule of law which could serve as a platform for exchanging best practices between the participating States on issues related to the rule of law.

942 Dublin Declaration, 2012. The Ministerial Council also acknowledges the importance of, and the need to ensure adequate resources for, such institutions.

943 See the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Organisation for Security and Co-operation in Europe (Moscow Document 1991), Ministerial Council, Moscow, 3 October 1991. The participating States confirm that they will take all necessary measures to ensure that law enforcement agencies will carry out their duties in accordance with the principles of the rule of law, proportionate and in the public interest. They ensure, inter alia, that (1) law enforcement personnel, when enforcing public order, will act in the public interest, respond to a specific need and pursue a legitimate aim, and use ways and means commensurate with the circumstances, which will not exceed the needs of enforcement; (2) law enforcement acts are subject to judicial control, that law enforcement personnel are held accountable for such acts, and that due compensation may be sought, according to domestic law, by the victims of acts found to be in violation of the above commitments; and (3) education and information regarding the prohibition of excess force by law enforcement personnel as well as relevant international and domestic codes of conduct are included in the training of such personnel.

enforcement officials should respect and protect human dignity and maintain and uphold the human rights of all persons when performing their duties.[944]

The rule of law in the area of law enforcement, as understood by the OSCE, also implies judicial control of law enforcement acts, accountability of law enforcement personnel for such acts, and the possibility to seek due compensation by the victims of acts found to violate the above commitments.[945] The Ministerial Council recognizes, *inter alia*, the central role that law enforcement agencies and judicial institutions play in guaranteeing the rule of law and underlines the critical importance of safeguarding the judiciary's independence, which enables it to fulfil this function, and the need to intensify efforts in this regard.[946]

OSCE States point out that, *inter alia*, law enforcement officials should at all times fulfil the duty imposed upon them by law by serving the public and protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession. In performing their duties, law enforcement officials should respect and protect human dignity and maintain and uphold the human rights of all persons. Law enforcement officials should use force only to the extent necessary and appropriate to accomplish their mission and ensure public safety. As persons acting in an official capacity, they should not inflict, instigate, encourage, or tolerate any act of torture or other cruel, inhuman, or degrading treatment or punishment. They should be cognizant and attentive to the health of persons in their custody and, in particular, should take immediate action to secure medical attention whenever required. Law enforcement officials should not be punished for not obeying orders to commit or conceal acts amounting to torture or other cruel, inhuman, or degrading treatment or punishment.[947] More broadly, the OSCE recognizes the rule of law in the area of law enforcement as related to raising awareness of issues related to the rule of law in law enforcement agencies and police (as well as courts and penitentiary systems) and in training for legal professionals.[948]

D.4 Fulfilment of International Obligations

Another key element of the rule of law recognized by OSCE decision-making and executive structures is the States' fulfilment of international obligations enshrined in the legal and other documents of other international organisations. Recalling the 1975 Helsinki Final Act, the Ministerial Council points to the OSCE States' commitment to

944 Ibid.

945 Decision No. 9 on Police-related Activities, Organisation for Security and Co-operation in Europe (Bucharest Decision 2001), Ministerial Council, Bucharest, 4 December 2001. See also the Brussels Declaration on Criminal Justice Systems, 2006.

946 Dublin Declaration, 2012. The Ministerial Council also acknowledges the importance of, and the need to ensure adequate resources for, such institutions.

947 Ibid. See also Brussels Declaration on Criminal Justice Systems, 2006 and Brussels Declaration on Organized Crime, 2006.

948 Helsinki Decision, 2008.

the fulfilment in good faith of obligations under international law, the Universal Declaration of Human Rights, and other relevant UN documents, affirming the need for the universal adherence to and implementation of the rule of law at both the national and international levels. It recalls relevant UN documents by affirming, *inter alia*, the commitment to an international order based on the rule of law and international law.[949]

Considering the important contribution of international instruments in the field of human rights to the rule of law at a national level, OSCE States reaffirm that they will consider acceding to the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and other relevant international instruments if they have not yet done so.[950]

D.5 Protection of National Minorities' Rights and Civil Society

OSCE States emphasize that questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law. Further, they also stress that NGOs can perform a vital role in the promotion of human rights, democracy, and the rule of law. Since the latter are integral components of a strong civil society, the participating States pledge to enhance the ability of NGOs to make their full contribution to the further development of civil society and respect human rights and fundamental freedoms.[951] In addition to focusing on the protection of human rights, they recognize the important role of NGOs, such as political parties, trade unions, and religious groups, in promoting tolerance, cultural diversity, and the resolution of questions relating to national minorities.[952] The participating States also value the important role played by free media in ensuring full respect for human rights, fundamental freedoms, democracy (including free and fair elections), and the rule of law.[953]

D.6 Economic Liberty, Social Justice, and Environmental Responsibility

Respect for the rule of law is understood by the OSCE as an indispensable companion to economic liberty, social justice, and environmental responsibility. The link between security, democracy, and prosperity has become increasingly evident in the OSCE, as has the risk to security from environmental degradation and the depletion of natural resources. On the basis of these linkages, OSCE States ensure that issues related to economic liberty, social justice, and environmental responsibility – which are indispensable for prosperity – receive appropriate attention. They do so, *inter alia*, to promote the integration of economies in transition into the world economy

949 See Helsinki Decision, 2008.
950 Copenhagen Document, 1990, Section I, Point 5(20).
951 Istanbul Document, 1991.
952 Copenhagen Document, 1990, Section IV, Point 30.
953 Astana Commemorative Declaration 2010, Point 6.

and to ensure the rule of law and the development of a transparent and stable legal system in the economic sphere.[954] Participating States also underline the importance of the rule of law as a basis for their political, economic, social, and environmental development and for ensuring security and stability; good governance; mutual economic and trade relations; investment security; and a favourable business climate.[955] The Ministerial Council has acknowledged the importance of the rule of law for strong institutions and good public and corporate governance for a sound economy, which can enable States to reduce poverty and inequality, increase social integration and opportunities for all, attract investment, and protect the environment.[956]

D.7 Fight against Corruption

Reaffirming their commitment to the rule of law, the participating States recognize that corruption poses a great threat to the OSCE's shared values. Given that it generates instability and reaches into many aspects of the security, economic, and human dimensions, the participating States pledge to strengthen their efforts to combat corruption and the conditions that foster it and to promote a positive framework for good government practices and public integrity. Further, they look forward to making better use of existing international instruments and assisting each other in their fight against corruption.[957] As mentioned above, the Ministerial Council recognizes, *inter alia*, the central role that law enforcement bodies and judicial institutions play in fighting against corruption and guaranteeing the rule of law. It underlines the critical importance of safeguarding the judiciary's independence in order to enable it to fulfil this function and the need to intensify efforts in this regard.[958] As part of its work to promote the rule of law, the OSCE also works with NGOs committed to a strong public and business consensus against corrupt practices.[959]

D.8 Terrorism, Organised Crime, Drug Trafficking and Accumulation, and Other Risks and Challenges

Last but not least, the OSCE recognises an important linkage between the rule of law and the fight against terrorism, violent extremism, organized crime, drug

954 Ibid.
955 Helsinki Decision, 2009.
956 Astana Commemorative Declaration 2010, Point 6.
957 Ibid. States participating in the OSCE view a public sector based on integrity, openness, transparency, and accountability as crucial to the rule of law and recognize that such a public sector constitutes an important element for fostering citizens' trust in public institutions and government. Thus, they underline the importance of providing education and training on ethical behaviour for public officials, establishing and enforcing relevant codes of conduct and conflict-of-interest legislation, and adopting and implementing comprehensive income- and asset-disclosure systems for relevant officials.
958 Dublin Declaration, 2012. The Ministerial Council also acknowledges the importance of, and the need to ensure adequate resources for, such institutions.
959 Astana Commemorative Declaration 2010.

trafficking, and other major threats and challenges to the modern world. Participating States consider that international terrorism, violent extremism, organized crime and drug trafficking, and the excessive accumulation and uncontrolled spread of small arms and light weapons represent growing challenges to security. They are committed to strengthening their protections against these new risks and challenges. Notably, they have determined that strong democratic institutions and the rule of law are the foundation for this protection. More specifically, they recognize that efficient and effective criminal justice systems based on the rule of law are a prerequisite for combating organized crime, trafficking in human beings, illicit drugs and weapons, terrorism, corruption and other forms of transnational and domestic criminal activity, and that specialist responses to these security challenges must take place within the overall framework of a criminal justice system. They also look forward to co-operating more actively and closely with each other to meet their challenges.[960]

D.9 Synthesis: The OSCE and the Rule of Law

References to the rule of law in OSCE documents and decisions are by their nature very general. OSCE decision-making and executive bodies understand and contextualise the rule of law in a similar vein as other inter-governmental international organisations.[961] Basically, the OSCE perceives the rule of law as implying general provisions and aspects which are characteristic of both the concept of the rule of law, which was formed in the constitutional traditions of European countries, as well as of the international and supranational version of the concept promoted by the UN, the Council of Europe and the EU.[962] However, with regard to the case law of international courts, review revealed that there are no direct references to the rule of law in OSCE documents and decisions.

The OSCE views the rule of law as essential for ensuring respect for all human rights and fundamental freedoms. The framework promoted by the OSCE guarantees

960 Ibid. See also the Istanbul Document, 1999 (the Charter for European Security); Brussels Declaration on Organized Crime, 2006; and the Helsinki Decision, 2009. The latter underlines the importance of the rule of law as a basis for political, economic, social, and environmental development in the participating States and an efficient fight against corruption, organized crime, and all kinds of illegal trafficking (including trafficking in human beings).

961 While there has been no consensus on a universal definition of the 'international rule of law', the majority of international Organisations and institutions seem to agree on its delineation and define its principles and elements in a similar (albeit not identical) vein.

962 For example, similar to the OSCE, the UN defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, and the avoidance of arbitrariness. The rule of law is integrated into the three pillars of the UN: to support the rule of law in domestic settings to establish peace and security, to secure human rights, and to enforce sustainable development. See United Nations, 2023.

equal human rights and status for all citizens, the free expression of all their legitimate interests and aspirations, political pluralism, social tolerance, and the implementation of legal rules that place effective restraints on the abuse of governmental power. It aims at building a climate of mutual respect, understanding, co-operation, and solidarity among all persons living in OSCE States, without distinction as to ethnic or national origin or religion. Further, OSCE decision-making and executive bodies view the rule of law as implying that all action by public authorities must be consistent with it, which guarantees legal security for the individual. The rule of law is also related to transparency and confidence in public institutions, women's equal participation and representation, and the inherent dignity of the individual. The OSCE views the rule of law as inseparably connected to, *inter alia*, an independent and impartial operation of the public judicial service, lawful operation of the law enforcement agencies, fulfilment of international obligations, protection of national minorities' rights and civil society, economic liberty, social justice, environmental responsibility, and the fight against corruption, terrorism, violent extremism, organized crime, and drug trafficking.

I.5 The Interpretation of the Rule of Law in the European Union

Introduction to the Interpretation of the Rule of Law in the European Union

The rule of law is one of the founding values of the EU, which is essential to its functioning and the application of EU law in the Member States. Parallel to endeavours to create constitutional federalism in Europe, the EU developed several tools and instruments to monitor and uphold the rule of law in Member States, including the Article 7 procedure, the rule of law review cycle, and the EU justice scoreboard. Meanwhile, the process of connecting the rule of law to other instruments – primarily non-rule-of-law-related instruments – could also be observed, such as the growing importance of the rule of law in the European Semester framework, the conditionality mechanism aiming to protect the EU budget, along with country-specific instruments, such as the Cooperation and Verification Mechanism.

This section examines the interpretation of the concept of the rule of law in the mentioned instruments in the EU's rule of law toolbox with a particular emphasis on the role and competencies of different EU institutions. This analysis of the different instruments suggests that EU institutions, particularly the European Commission and the European Parliament, play a growing role in the interpretation of the rule of law, which could be characterised as a stealthy transfer of powers and decisions to the supranational level, which is certainly beyond the political control of the Member States.

An underlying problem with the supranationalisation of the interpretation of the rule of law is that the concept was first developed in the Member States and subsequently raised to the EU level, while there is no uniform interpretation of the rule of law within the Member States. Against this background, the endeavours analysed in this section aim to establish a standardised understanding of the rule of law as interpreted by EU institutions, principally the European Commission. The Authors point out that the first attempt to provide an EU-specific understanding of the rule of law as set out in Article 2 was marked by the European Commission in 2014, which significantly built on the standards developed by the Venice Commission, which was later incorporated in various other instruments related to the rule of law.

The tendency of the strengthening role of non-binding soft law documents may raise concerns from the perspective of the legitimacy of such processes as such documents are not adopted by Member States, yet they are enforceable through the instruments presented below. The following chapter also seeks to answer the questions of whether there is a standard interpretation of the rule of law in the different mechanisms and instruments of the EU's rule of law toolbox, and to what extent the 'common constitutional traditions' of the Member States are taken into account in these processes.

I.5.1 The Interpretation of the Rule of Law in the Rule of Law Review Cycle and the EU Justice Scoreboard

The rule of law appears in several provisions of the founding treaties of the European Union (EU). It is mentioned in Art. 2 of the TEU as a value on which the functioning of the European Union is based and which is common to all EU Member States.[963] The fact that the EU is an 'Organisation governed by the rule of law' is further emphasized in the preamble to the Charter of Fundamental Rights and Freedoms. The rule of law is further enshrined in Art. 21 of the TEU as the value basis for the external action of the EU and all its external relations policies. According to Art. 49 of the TEU, the functioning of a candidate country as a rule of law is a prerequisite for membership in the EU. According to Art. 7 of the TEU, the EU may take measures against a Member State that does not respect the values of the rule of law. Finally, Art. 19 of the TEU is also closely related to the functioning of the rule of law, expressing the value of the rule of law confirmed in Art. 2 of the TEU and entrusting judicial review in the EU legal order not only to the Court of Justice but also to the national courts.[964]

The above summary reveals that:

1. the rule of law is an inherent value of both Member States and the EU;
2. the founding Treaties do not contain a definition of the rule of law – therefore, the concept is open to judicial interpretation;
3. the founding Treaties explicitly require the candidate country to be a State governed by the rule of law and tacitly assume that this status will be automatically maintained for the duration of its membership of the EU;
4. the founding Treaties contain a mechanism for verifying whether a Member State is governed by the rule of law – this mechanism is administrative (i.e.

963 This thus represents a manifestation of common 'European identity'. See Kopa Bončková, 2022, p. 1195.

964 *Associação Sindical dos Juízes Portugueses*, para. 32.

not judicial) in nature, provides for the involvement of EU institutions, and leaves decision-making power to Member States;[965] and
5. surprisingly, there is no mechanism in the founding Treaties to verify whether the EU is indeed a 'state' governed by the rule of law.

What is the reason for emphasizing the importance of the rule of law in the case of the EU? This publication analyses the concept of the rule of law in the case of the supranational international organisations of the Council of Europe, the OECD, the UN, and the OSCE. However, none of these organisations exhibit comprehensive features of supranationality to the same extent as the EU, which conducts federal operations in many areas. Moreover, European law mediates interactions between Member States. They therefore depend on each other as a result of European law; accordingly, they must trust each other and respect each other's decisions. This is true in a number of areas beyond the judiciary, such as the field of administrative law. It follows that the EU must necessarily function as a 'state' governed by the rule of law. In many areas, the EU has a status and powers similar to those of a federal state. However, at the same time, the EU's high degree of integration and interdependence make it necessary for States to respect the rule of law and for the EU to ensure it.

Given the quite understandable absence of a definition of the rule of law in the founding Treaties, including the protocols and declarations of the Member States, this concept is open to judicial interpretation. According to Art. 19 of the TEU, the Court of Justice determines the binding and correct interpretation of EU law.[966] Therefore, the Court's case law provides real content to the concept. In doing so, the Court must reflect the reality of the rule of law as it is established at the level of the Member States in their national law. This is because Art. 2 of the TEU makes it clear that the rule of law is a value common to all Member States. Further, the concept of the rule of law within the Council of Europe is also common to all Member States. This makes clear that the interpretation of the concept of the rule of law, although carried out autonomously by the Court of Justice, is not entirely autonomous and separate from the concept of the institution in national legal systems and in public international law.

Member States encounter the concept of the rule of law in three ways. First, it is defined by their national law.[967] The EU concept of the rule of law is relatively independent of the national one. Furthermore, the national concept of the rule of law is influenced by international legal instruments, especially the work of the Council of Europe and its bodies.[968] It therefore exists within the limits of these international instruments. The national concept of the rule of law is the basis for the existence of the EU concept of the institution. However, the EU rule of law is neither the sum of

965 Procedures according to Art. 7 of the TEU.
966 Sehnálek, 2020, pp. 125–153.
967 Mostly through the jurisprudence of national constitutional courts.
968 Sehnálek, 2021, pp. 253–255.

national institutions nor the result of their intersection. Instead, it is an autonomous concept defined by the Court of Justice in light of the specificities of the EU and its autonomous legal order. The Court of Justice therefore relies on national legal systems, although it is not strictly limited by them.

These three concepts represent relatively separate concepts, which in the European area mainly materialize in the decisions of three courts: the constitutional court of each EU Member State, the European Court of Human Rights, and the Court of Justice. The interrelationship between these concepts therefore corresponds to the interrelationship between these courts and the legal orders to which they are bound in their decisions. It follows from the above that the decisions of the ECtHR bind EU Member States only in cases addressed to them individually. Meanwhile, the other judgments dealing with the concept of the rule of law have only an informative value with considerable scope for deviation with regard to the institution of the margin of appreciation. The decisions of the Court of Justice, in those areas in which the Court interprets the content of the concept of the rule of law, generally bind Member States (i.e. they even affect States to which a specific decision is not addressed.[969]

The wording of the founding Treaties suggests that the rule of law is an institution that applies equally to the EU and the Member States. This means that EU law does not distinguish in its requirements whether the addressee is the EU or a Member State. However, this does not prevent certain expressions from affecting the Member States in a way that is not possible for the EU because of its nature as an international organisation.

It follows from the above that Member States have only very limited possibilities to influence the content of the concept of the rule of law as used in EU law.[970] A solution in the form of an interpretative declaration or a specific protocol annexed to the founding Treaties has not been adopted. This would have been possible and rationally justified in light of the developments that followed the enshrinement of the rule of law. However, unsurprisingly, the definition is missing from the founding Treaties. Notably, it would probably be difficult to reach a consensus among all Member States – and even more difficult for Member States to agree on a specific and concrete definition of the concept. The concept of the rule of law varies considerably between Member States, even after the United Kingdom's withdrawal from the EU. Nevertheless, the absence of a definition in EU law is not a problem. On the contrary, abstract concepts of principles or values are better left to judicial interpretation over the long run.

However, in the case of the EU, the judicial structure is somewhat problematic. The Court of Justice is completely separate from national judicial systems. On the one hand, this positively contributes to the supranational functioning of the EU and promotes integration within the organisation. On the other hand, this arrangement

969 Sehnálek, 2020, pp. 125–153.

970 While this possibility exists, it is only through the text of the founding Treaties and their protocols. Apparently, there has been no common will to utilise this possibility in practice.

can be problematic if national courts, especially constitutional ones, have a different understanding of the rule of law than the Court of Justice. In the case of a federal state, this arrangement would be normal and effective, and indeed the only possible one. In the case of the EU, it fails because of its weak and dependent position in relation to Member States. Similarly, the increased involvement of structures that do not have direct democratic legitimacy, such as the European Commission (EC), can be counterproductive.

This difference between the EU and national conceptions of the rule of law can manifest in two ways. First, the EU's concept of the rule of law and the EU's follow-up to it will not be sufficient to meet the national standard. Although this situation has not yet occurred, there will be a problem if it arises. Notably, EU law does not address this possibility. On the contrary, in view of the principle of primacy, it assumes that States will adapt their national laws and adopt the lower EU standard of the rule of law. Member States have only limited opportunities to defend themselves against such a situation. This is by no means trivial: the rule of law is closely linked to what States define as the inviolable (material) core of the constitution. The possibilities of enforcement are limited because only general and therefore in the area of the rule of law limited actions are available (e.g. under Art. 263 of the TFEU [action for annulment] or Art. 265 of the TFEU [action for failure to act]).

Second, the national approach will not meet the higher EU standard. From the EU perspective, this situation can be addressed in two ways: 1) through the mechanism of the judicial enforcement of EU law contained in Art. 258 et seq. of the TFEU and 2) through the mechanism of the political enforcement of EU law contained in Art. 7 of the TEU. The first mechanism is impractical because it requires a breach of EU law. However, the functioning of the rule of law by a Member State can also manifest in areas that are not directly affected by EU law. However, the case law of the Court of Justice seems to suggest that the Court has no difficulty with this limitation. Otherwise, it would hardly be in a position to rule on judges' salaries or on the functioning of national judicial systems in general. The Court's jurisprudence thus shows a broad conception of its own powers, of the scope of EU law, and, thus, of the scope of the EU concept of the rule of law. Meanwhile, the second mechanism is often described as a nuclear solution for emergency situations; therefore, the possibilities for its use are very limited.[971]

Ultimately, both mechanisms are means of last resort. The Treaties quite deliberately do not provide for the enforcement of ordinary breaches of the rule of law by either the EU or Member States. Personally, I think this is right. Indeed, putting too much pressure on Member States may cast doubt on the usefulness of membership in the EU. It may also play into the hands of national movements or political parties that are populist in their opposition to EU membership. On the other hand, it is not possible to abandon the rule of law altogether. The level of integration within the EU is so high that it necessarily implies a certain degree of agreement on the basic

971 Kopa Bončková, 2022, p. 1196.

principles and rules of operation of Member States. Moreover, the chosen mechanism of mutual control guarantees that Member States will solve any perceived problems among themselves. However, the EC's activities suggest that it does not intend to accept this deliberately limited set-up; notably, this may result in the adoption of new mechanisms for the control of the rule of law provided by the EC.

However, the rational and minimalist solution contained in the founding Treaties clashes with the reality of the functioning of the EU. It is notable that the EU is a very specific international organisation – it is one of a kind in the world. Why? Personally, I would compare a standard intergovernmental international organisation, with some exaggeration, to the equivalent of a limited liability company in national private law. The founders of such a company decide to join together, create a new legal entity (a new person), and achieve common goals through this entity. However, these founders have full control over the functioning of the company, and its management and decision-making are the result of their common will, which shapes the organs of the company. In contrast, the EU is the child of Member States rather than the equivalent of a limited liability company. A child is notably a consequence of the very close 'integration' of its parents and is a new person under the law (and, moreover, *de facto*). However, unlike a legal person, a child has its own will, which is independent of that of its parents/founders. As such a child, the EU expresses its will towards its 'parents' – the Member States, often in ways that are difficult for Member States to accept.

In the area of the rule of law, this setting of the EU has been manifested by its efforts to define the rule of law and, at the same time, enforce the values that constitute this institution against Member States. The concept and content of the rule of law are defined both in the decisions of the Court of Justice (i.e. ad hoc in the partial manifestations of this institution) and in the materials prepared in the framework of the EC's activities. In doing so, the EC draws inspiration from a number of external sources, especially the Council of Europe.

This brings us to the lack of definition of the rule of law. In the Czech Republic, the courts, especially the Constitutional Court, approach the rule of law by defining the values and principles that together (but also separately) constitute it. These include guarantees of fundamental rights and freedoms, constitutionality and legality, legal certainty, the sovereignty of the people, the separation and control of powers, limited government, legitimate state power, and democratic state institutions. From this point of view, it is a kind of meta-standard that is concretely manifested in the sub-aspects of the functioning of the state (the EU) and its law. It directs the functioning of the state (the EU) towards justice, legality, and the protection of the individual.

I mentioned that the very concept of the rule of law as such in EU law should be set in the same way for both the EU and the Member States. However, this institution allows for a dynamic and plastic subsequent application. In doing so, I would assume that the approach to the content of the rule of law concept would be as follows:

1. maximalist at the national level, in the sense of achieving the maximum of what is required by the national constitution;

2. minimalist at the EU level in relation to the Member States, in the sense of defining limits that are unassailable from the point of view of the EU and other Member States;
3. maximalist at the EU level in relation to a candidate State, in the sense of defining the conditions that this State must meet in order to join the European Union; and
4. maximalist approach at the EU level in relation to the EU in the sense of ensuring that the Union actually functions as an effective rule of law.

Unfortunately, this division is not explicitly supported by the founding Treaties, which, as already mentioned, do not explicitly make this distinction. The reason for the minimalist approach to monitoring the state of the rule of law in the Member States is that the Member States have robust processes involving both judicial and democratic control by their citizens. In contrast, the EU is notorious for being an administrative structure that has a significant democratic deficit and that is far removed from the citizen. The argument for such a minimalist approach is further supported by the generality of the definition of the concept of the rule of law in written EU law, the role of this mechanism in EU law (nuclear character), and the fact that this instrument replaces the absence of the institution of expulsion of a Member State of the EU from this organisation in the primary law of the EU. There are no other protections for the EU, Member States, and, above all, the individuals living in them unless we rely entirely on the mechanisms of the Council of Europe. However, these mechanisms are only available to individuals in specific cases, not to the EU and its Member States. Therefore, they do not allow for systemic or even preventive solutions to potential problems.

The EU has not yet paid much attention to itself in the area of the rule of law. Inspired by the mechanisms used in the international environment, it has therefore defined its own processes for assessing whether or not Member States comply with the rule of law. These processes include the Rule of Law Review Cycle and the EU Justice Scoreboard. However, this situation and these activities raise a number of questions. The overview of the basic provisions in the introduction to this subchapter shows that the founding Treaties of the EU do not provide for an assessment of the state of the rule of law in the Member States. Therefore, the question of whether the EU can undertake such activities is controversial – notably, this is not an insignificant question. According to Art. 5(2) of the TEU, the EU shall act only within the limits of the powers conferred upon it by the Treaties; powers not conferred upon the Union shall remain with the Member States. As noted above, none of the provisions of the founding Treaties provide for or regulate the process of assessing the state of the rule of law. Thus, the activities carried out by the EU in the framework of the Rule of Law Review Cycle and the EU Justice Scoreboard have no direct basis in primary law. A potential opponent may argue that receiving an extra benefit beyond what is reasonable and appropriate may not be a problem; however, from a strictly legal perspective, the opposite is true.

It is difficult to find support for any action in the general objectives of the EU. The EU is an international organisation that was not created with the primary purpose of protecting the values listed in Art. 2 of the EU Treaty, especially the rule of law. This function is already performed by other institutions, particularly the Council of Europe.

The argument that the Rule of Law Review Cycle and the EU Justice Scoreboard are soft law instruments does not fully justify their existence.[972] They are therefore not binding and there are no direct negative obligations or consequences for Member States that do not comply with them. This is because they are activities that the EU undertakes in addition to and beyond the scope of the Treaties and that use financial resources. Thus, the EU's essentially unsolicited activity, carried out without the necessary and required legal basis, has tangible and quantifiable budgetary consequences. At the same time, these resources could be used differently and more effectively and in line with the objectives of the founding Treaties. On the contrary, as pointed out by Dori, 'At the same time, the Scoreboard marks a significant transition in the Commission's policy towards EU justice from supranational harmonisation to softer methods of policy coordination through monitoring and evaluating mechanisms'.[973]

The EU justifies the existence and implementation of the EU Justice Scoreboard by its power to act through the internal market competence (i.e. on the basis of Art. 114 of the TFEU).[974] A functioning rule of law and, consequently, a functioning and efficient judiciary are indeed prerequisites for the proper functioning of an economy. This impacts the functioning of trade and investment within the internal market, where the EU does indeed have competence. However, this is a very expedient and extensive justification. In fact, it would be possible to infer the competence of the EU virtually anywhere, in any activity or policy, including, for example, health protection. After all, a healthy workforce or business force is essential for the effective functioning of a national economy. Obviously, such an approach is utilitarian and far-reaching.

In particular, in the case of the EU Justice Scoreboard (the content of which will be discussed below), which assesses the performance of the judiciary in the Member States, it is clear that the EU is entering through the back door into an area where it has no competence. Indeed, the organisation of the judiciary and its rules are the exclusive domain of the Member States. EU law minimally influences procedural institutions related to its judicial enforcement. The EU Justice Scoreboard,

972 They are not legally binding acts, but mere communications.

973 Dori, 2015, pp. 8–9.

974 A very extensive overview of the 'legal bases' for EU action in the field of the rule of law is provided by the European Parliament, which derives the need for action from many provisions of primary law as well as external documents that are not directly part of EU law. See the preamble of European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL).

however, allows this exclusively national domain to be significantly influenced by its assessment. My assertion here can be relativised by a counter-argument based on the function performed by national courts. Undeniably, national courts have a dual function as both domestic courts and EU courts ('*dédoublement fonctionnel*').[975] The EU therefore has a vested interest in how they function.

Doubts about the rationality of the justification under Art. 114 of the TFEU are further supported by the fact that the EU Justice Scoreboard is also reflected in the channelling of EU funds to Member States. This is not a small amount (e.g. the Justice program had a total budget of EUR 305 million for the period 2021–2027). Through financial resources (originating from national budgets), the EU has a significant impact on the national set-up and functioning of justice systems.

It is clear that the Rule of Law Review Cycle and the EU Justice Scoreboard are primarily political projects of the supranational bodies of the EU and, by their very nature, generally do no harm. However, we may rightly object to a certain arbitrariness on the part of the EU and its institutions. The precondition for their adoption should have explicit support in primary law.

On the other hand, it can be said that EU Member States do not actively oppose these activities, and even actively cooperate in their implementation. In doing so, they *de facto* politically legitimize them. My perhaps over-emphasized need to have things in order and according to the rules clearly clashes here with the factuality of the functioning of the EU – certain things simply happen without any direct legal basis. Perhaps this is ultimately a good thing. The truth is, some Member States call for this type of activity at the EU level and explicitly welcome it.[976] Nevertheless, the fact that something is demanded by national governments, or even just by ministers of these governments, does not legitimize the actions of EU institutions. Such actions must have the proper legal basis in the founding Treaties.

I have not yet addressed the actual content of the rule of law in EU law. As I have already indicated above, it would be more appropriate to speak of a *Rechtsstaat* rather than a rule of law, since the German concept is closer to the EU rule of law than both the British concept of the rule of law and the French *État de droit*. The emphasis on formal and substantive concepts of the rule of law, legality, and the independent and effective functioning of the judiciary is evident.

According to the Court of Justice, the substantive concept of the rule of law is linked to the fact that we live in a society characterized, *inter alia*, by justice. It is clear from the foregoing that the focus of this concept is not the state, society, or formally applicable law, but the individual and his fair treatment. In my opinion, the factual manifestation of this fact is that, from the point of view of the authorities applying the law (both EU and national), it is not sufficient to rely formally on the

975 Halberstam, 2021, p. 136.

976 Butler notes that in March 2013, the foreign ministers of Germany, the Netherlands, Finland, and Denmark called on the European Commission to establish a 'new and more effective mechanism to safeguard' the EU's 'fundamental values'. Butler, 2013, p. 1.

grammatical method of interpreting the law – it is also necessary to take into account a certain framework of values contained in the meta-layer above the written formal law.

From a formal point of view, it is significant that the Court of Justice understands the rule of law not only as respect for fundamental rights and freedoms (e.g. as per the French concept of the rule of law). According to the Court, the rule of law includes being bound by the entire body of law of the EU, including unwritten law. The rule of law therefore includes respect for primary law, secondary law, and EU standards for the protection of human rights as well as unwritten general principles of law.[977]

The rule of law in the EU is also characterized by its orientation on the scope of the legal order as a whole, and the values behind it. On the contrary, the position of the rule-making bodies is not of the primary object of interest – this is the main way in which the EU concept of the rule of law differs from the British one. This difference with the British concept is quite understandable. The European Parliament (EP) is not the EU's supreme and sole lawmaker, and it would clearly be unwise to tie this institution, even partially, to the work of the Council, the EU's other (co-)legislative body. Indeed, if the ultimate beneficiary of the rule of law is the individual, it would be illogical and wrong to tie this institution to a bureaucratic structure as remote from the individual as the Council. While this chapter's goal is not to closely examine the content of the rule of law in EU law, this conceptual delineation notably indicates the directions of the main activities of the EU institutions enforcing the rule of law.

In the absence of evaluation and control mechanisms in primary law, the EU has defined and adopted its own mechanisms for evaluating the rule of law in the Member States. In doing so, it has chosen the seemingly unproblematic route (see my explanation of its competences above) of annual interim assessments of Member States.

While, as I state above, the EU has adopted evaluation mechanisms, it remains a conglomerate of bodies which effectively represent the interests of its Member States (see the limited company analogy above) as well as bodies over whose activities its Member States have virtually no control (see the child analogy above). Therefore, I think it is fair to point out that the activities of the EU in the area of the assessment of the rule of law are the result of the activities of other bodies independent of the Member States. President von der Leyen of the EC has played a key role in this area.

A. The Scope of the Rule of Law Review Cycle

The Rule of Law Review Cycle is a relatively new instrument that includes an annual report on the rule of law in all Member States and a follow-up on this report with the EP and the Council. Its purpose is to ensure the early detection of emerging rule of law problems in Member States. Thus, the Commission serves as the 'guardian

977 From this perspective, the rule of law is a two-dimensional legal concept/construct. It is a part of not only positive law but also natural law.

of the treaties'. In this role, the Commission monitors developments in the rule of law through mutual exchanges of information and dialogues, including through a network of national contact persons.[978]

If the rule of law is to be protected, it is necessary to define what is meant by it. This definition must be exact and precise. Thus, there needs to be a benchmark against which developments in the Member States can be measured. The Commission has done so in a general way, referring to the standards adopted by the European Court of Human Rights. According to the Commission,

> [u]nder the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.[979]

Unfortunately, this is a very general definition through principles that are each very general in themselves and may have different meanings in different countries. The very fact that we understand democracy to include both states in which government is provided to the people through parliament and states characterised by some form of monarchy suggests that the concept of the rule of law can vary widely. However, we probably have nothing better than this general definition at present. Helpfully, the European Court of Human Rights brings some stability to this definition. I consider this approach to be reasonable. Specifically, this approach is about setting an appropriate benchmark through an institution that has the enforcement of this legal agenda 'in its genes' and which can formulate standards that are commonly shared in the European legal area. I consider it necessary to stress that this concept binds the Commission itself, not the Court of Justice.[980] The Court of Justice defines the rule of law itself in its case law, which of course binds the EC as well as the Member States.[981]

Member States are in a different position than these authorities. They are bound by the standards adopted by the ECtHR by virtue of their simple membership in the Council of Europe and also because they are party to the European Convention and have declared their willingness to respect fundamental rights in Art. 6(3) of the TEU.

978 See: The European Commission strengthens the Rule of Law [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4169 (Accessed: 28 October 2023).

979 Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps COM/2019/163 final.

980 See: Opinion 2/13 Accession to the ECHR, paras. 245–246.

981 Sehnálek, 2020, pp. 125–153.

This is to be the case to the extent that they are protected by the ECtHR – not on the basis of public international law, but rather directly on the basis of EU law.

All definitions of the rule of law share a certain vagueness. This must necessarily be reflected in the EC's evaluation work. Given the generality of the definition of the rule of law, I believe that Member States have a great deal of discretion. It follows from the above that the Commission should deal only with significant excesses and should not, in contrast, seek to standardize the functioning of the Member State or its public administration.[982] Indeed, the Commission itself states in its documents that only the core concept of the rule of law is clear. However, this also means that the position of those Member States which argue that the EU is not capable of regulating and enforcing the rule of law at all is incorrect.[983]

At the same time, I am not sure the Member States really considered the consequences of making Art. 2 of the TFEU part of the founding Treaties. Given that the values contained therein are very general, the Member States may have only intended to declare commonly shared values in general terms. I am not sure whether the enshrinement of these values was also intended to enshrine the power of the EC to define and enforce them, albeit through soft law or interim evaluation reports. That said, I am aware of the importance of the values expressed in Art. 2. However, I try to reflect the intention behind the legislation of those who drafted and adopted it.

In order to narrow the broad concept of the rule of law, the Commission clarified that it will assess the rule of law against EU law requirements and well established European standards, including:

i. relevant obligations under EU law and European Court of Justice case law (e.g. Art. 2 TEU, 19 (1) TEU, 47 Charter of Fundamental Rights of the European Union, 325 TFEU on the Protection of the EU's financial interests), rule of law-relevant EU secondary legislation such as EU criminal law, Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) or the Audiovisual Media Services Directive (AVMSD)4;
ii. European Court of Human Rights case law;
iii. Council of Europe standards such as the Recommendation of the Committee of Minister on judges: independence, efficiency and responsibilities, the Recommendation of the Committee of Ministers on the role of public prosecution

982 This conclusion is also confirmed by the European Parliament, which in its resolution states 'Whereas Member States are primarily responsible for upholding common standards but, when they fail to do so, the Union has a duty to intervene to protect its constitutional core and ensure that the values laid down in Art. 2 TEU and in the Charter are guaranteed for all Union citizens and residents, throughout the territory of the Union.' See European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)). Similarly, the Commission states 'the primary responsibility for respecting the rule of law at national level lies with the Member States'. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Rule of Law within the Union, COM(2019) 343 final.

983 Cf. Pech, 2020a; Kelemen et al., 2019, cited in Pech, 2020a.

> in the criminal justice system, Criminal Law Convention on Corruption, Civil Law Convention on Corruption, Resolution of the Committee of Minister on the twenty guiding principles for the fight against corruption, the Recommendation of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, the Recommendation of the Committee of Ministers on media pluralism and transparency of media ownership, the Recommendation of the Committee of Ministers on public service media governance.[984]

In addition, the Commission pays particular importance to the checklist developed by The European Commission for Democracy through Law, known as the Venice Commission, for identifying risks and weaknesses. The Rule of Law Checklist[985] prepared by the Venice Commission includes five core values; namely: legality; legal certainty; prevention of abuse or misuse of powers; equality before the law and non-discrimination; and access to justice.[986] Such an evaluation of the rule of law especially if it is to be carried out the Commission and other actors dully on an annual basis is a rather ambitious goal. The reference framework above can therefore be seen more as a framework, with the understanding that the evaluation itself is not truly in-depth.

The EP was the first to introduce a material initiative for the regular annual evaluation of Member States in relation to the rule of law. In its 2016 resolution, the EP formulated a list of recommendations to the EC.[987] Specifically, the EP called for the introduction of an annual assessment of the state of democracy, the rule of law, and fundamental rights in Member States. Further, the EP recommended that the Commission prepare the report. The EP also proposed the content of the evaluation, the process for identifying experts, and the evaluation methods.

In its Communication of 3 April 2019, the EC summarized the EU's existing mechanisms for upholding the rule of law.[988] Subsequently, in its Communication of 17 July 2019, the EC stated that it would be necessary to extend the monitoring of Member States' development of the rule of law in the form of a Rule of Law Review Cycle.[989] The

984 European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report [Online]. Available at: https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf (Accessed: 28 October 2023).

985 Rule of Law Checklist [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e (Accessed: 28 October 2023).

986 For their detailed explanation see: Qerimi, 2020, pp. 59–94.

987 European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

988 Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the rule of law within the Union – State of play and possible next steps (COM(2019) 163 final).

989 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Rule of Law within the Union, COM(2019) 343 final.

Commission's work should result in an annual State of the Rule of Law Report summarizing the situation in each Member State. In the Communication of 17 July 2019, the EC presented a rather ambitious plan to assess particular elements, such as systemic problems in the adoption of legislation; shortcomings on the part of the judiciary and its impartiality and independence; breaches of the rules on the separation of powers; the level of the fight against corruption; certain cases concerning media pluralism or electoral freedom; and the effectiveness of the enforcement of EU law in the broadest sense (important to note here is that this of concerns is not, in the Commission's view, exhaustive). Subsequently, the Rule of Law Review Cycle was renamed the Rule of Law Mechanism due to the internal changes.[990]

The EC evaluates Member States on an annual basis in four areas: *justice systems, anti-corruption framework, media pluralism and media freedom, and other institutional issues related to checks and balances*.[991] The evaluation process itself will be discussed in a separate chapter, so I will limit myself here to stating that the EC monitors some of the basic and generally accepted parameters that the expert community, including the courts, considers indicators of the functional rule of law.

In the case of justice systems, several factors are addressed. Firstly, it is assessed how the independence of the judiciary is perceived. Here, the existence of a Council for the Judiciary in the concerned Member State is crucial. This point is a consequence of the case law of the Court of Justice and its reflection by the European Commission. The case law of the Court of Justice highlights the importance of the Council for the Judiciary for the independence of the judiciary from the executive and the legislature.[992] Secondly, EC monitors processes in the Member States and legal or constitutional changes in the area of the judiciary. In particular, the perceived impact of these changes on judicial independence is examined. Another key indicator of functioning rule of law is the way judges are appointed; again, what matters is here is the judges' independence and how their disciplinary offences are dealt with.[993]

Just as the independence of the judiciary is essential, ensuring the autonomy and independence of the public prosecutor's office is also important from the perspective

990 Priebus, 2022, p. 1684.

991 European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report [Online]. Available at: https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf (Accessed: 28 October 2023).

992 *A.B. and Others*, para. 127.

993 'Independence' implies independence from the external environment as well as internal independence. The emphasis is on structural independence, that is, the internal relations within the courts relating to the conditions of appointment of judges, the length of their service, and the methods of their removal. This concept corresponds to the requirements arising from the case law of the CJEU, which has stated that '[t]he concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.' *Associação Sindical dos Juízes Portugueses*, para. 44.

of the European Commission's assessment. Specifically, the public prosecutor's office needs autonomy and independence to effectively perform its functions. Here, too, the emphasis is on the institutional set-up, including issues of the appointment of prosecutors, dismissal, and accountability in terms of disciplinary offences.

A few other matters are worth nothing. For example, assessments of whether a State is functioning as it should also look at the material and personnel equipment of courts and judges. This evaluation indeed makes sense as adequate material equipment and staffing can make judicial decision-making faster and more efficient, facilitate evidence, and, where appropriate, make cross-border court cooperation more effective.[994] Finally, the functioning of lawyers and the regulation of their relations with their clients is also significant. The focus of this element of an assessment is ensuring the confidentiality of mutual communication.

In the case of the anti-corruption framework, the Commission again draws on the perception of the conditions of corruption in the EU. To do so, it turns to external sources (e.g. the Corruption Perceptions Index)[995] and its own sources (e.g. the Eurobarometer survey on corruption). The focus is on how legislation is set up in the area of criminal law. The Commission is concerned not only with the existence of relevant offences, but also with ensuring that law enforcement authorities have the necessary capacity to investigate and prosecute these offences.

Equally important is the ability to prosecute corruption at all, as the immunity of senior civil servants can be a problem. However, the framework governing lobbying and the regulation of 'revolving doors',[996] asset declarations, declarations of interest, and whistle-blower protection is monitored. Further, the Commission is working to distinguish areas of life, business, or public services for which the risk of corruption is higher, and which should accordingly be subject to special oversight. One such area is the granting of so-called investment 'citizenship'.[997] Monitoring this area partly addresses a serious systemic problem in the EU. Although the granting of citizenship is naturally a matter for each State to decide, becoming an EU citizen by acquiring citizenship in a particular State opens up opportunities to live or conduct business in other Member States and entitlement to services or benefits comparable

994 I am more reserved when it comes to the material security of judges as such. I understand the need for them to be sufficiently financially secure. But the question is the degree of such financial security compared with other professions in the state. Personally, I do not think that there is a direct proportion between the quality of a judge's work and their independence, on the one hand, and the size of their monthly salary, on the other. However, a deeper solution and justification is for a separate study and is beyond the scope and subject matter of this publication.

995 Transparency International (2023) [Online]. Available at: https://www.transparency.org/en/cpi/2022 (Accessed: 28 October 2023).

996 'The 'revolving doors' phenomenon is the name given to the movement of individuals from public office to private companies and vice versa. It is believed that this phenomenon impacts the decision-making process to the detriment of the public interest'. Pons-Hernandéz, 2022, p. 305.

997 I am referring to the possibility of acquiring citizenship of a certain state, usually in an accelerated procedure and without examining the actual connection of the future citizen to the state and its society. Citizenship is obtained as a form of reward for making a larger-scale investment.

to those provided by such other States to their own citizens. In such a case, the host State is unable to influence or benefit from the citizen of the other State living or working within it. This host State thus finds itself in the drag of the first state, which illegitimately benefits from the situation.[998]

Assessments also cover pluralism and freedom of the media, which are seen as the fourth or fifth power[999] because of the media's role as a watchdog of democracy. Attention is paid to media regulatory bodies, the transparency of media ownership, and protection from the influence of politicians and political parties. The public's ability to access information from public bodies is monitored, as well as threats to physical security, online attacks, smear campaigns, legal threats, and censorship that affect the safety of journalists.

In another notably area of assessment, other institutional issues linked to checks and balances are addressed. In particular, this area of assessment covers the quality of the legislative process, adequate stakeholder and civil society involvement, the functionality of constitutional courts and their status and role within national checks and balances, the implementation of ECtHR judgments, the legal framework for the functioning of civil society and its friendliness, and the situation regarding the illegal use of spyware against journalists, lawyers and politicians.

The evaluations cannot be overestimated. While they reveal changes in Member States, trends, and current issues, the evaluation reports for individual Member States are, in my opinion, too general to give a truly accurate and comprehensive picture of each country. However, increasing their level of detail may make it impossible to carry them out on an annual basis; the administrative burden would be too great. Last, before closing this section, it is also useful to note that evaluations of Member States also include a list of recommendations, which is annexed to the Commission Communication (Rule of Law Report). These recommendations are very general and set out a trend or a general objective for the concerned Member State to achieve.

B. The Scope of the EU Justice Scoreboard

Compared to the Rule of Law Review Cycle, the EU Justice Scoreboard – launched in 2013 – is an older rule of law enforcement mechanism.[1000] Unlike the rule of review cycle, the justification for the existence of the EU Justice Scoreboard is much more strongly and explicitly linked to economic factors, economic policies, and growth. From this perspective, a working rule of law with functioning and effective courts is a prerequisite for economic development. What both mechanisms have in

998 Sehnálek and Říčka, 2015, pp. 331–341.

999 The number depends on how we perceive the role of the Judicial Councils; that is, whether we consider them as the fourth power in the state. On this see the study by Šipulová et al., 2022, pp. 22–42.

1000 See: Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee of the Regions EU Justice Scoreboard A tool to promote effective justice and growth.

common is an annual assessment. This assessment frequency makes particular sense for the EU Justice Scoreboard, which works with statistics that allow for such a yearly comparison. As for the relationship between the EU Justice Scoreboard and the Rule of Law Review Cycle, the former forms the basis of and supplies the data for the annual Rule of Law Report.

The EU Justice Scoreboard does not deal directly with all individual definitional elements of the rule of law in its complexity. It focuses exclusively on the judiciary and its functioning. It does so through a combination of quantitative and qualitative criteria as well as subjective perceptions of the courts and their independence in society. In particular, it assesses the efficiency, quality, and independence of the judiciary in Member States. This comparative tool is complemented by country-specific assessments, presented in the country reports (country chapters),[1001] which enable a deeper analysis based on national legal and institutional contexts.[1002]

The EU has very limited powers in the area of justice. Instead, the courts of Member States have to function effectively in this context – when they enforce EU law, they are functionally the courts of the EU. Given that Member States have autonomy over the actual organisation of their judiciaries, the EU should primarily evaluate the outputs of the courts. However, the EU does not comprehensively assess the work of national courts. The EU Justice Scoreboard focuses primarily on indicators relating to civil, commercial, and administrative litigation. Criminal matters are therefore outside the scope of this mechanism, with the exception of disputes relating to money laundering at first instance courts.[1003]

The efficiency of the justice system is assessed by developments in caseload, with reports focusing on the number of incoming cases. Thus, the initial phase of court proceedings is monitored. However, the last phase – the phase in which the court decision is enforced – is not monitored even though it may be the best indicator of the efficiency of the court system. Nevertheless, the Commission does monitor the ease of proceedings, clearance rate, and number of pending cases. This is done at a general level; that is, it is done for all court proceedings. Selected court proceedings of higher political importance (from the EU perspective) are subject to separate monitoring. Data is collected in this way in the areas of EU competition regulation, electronic communications, EU trademark, consumer law, and anti-money laundering.

There are certain factors that are generally accepted as indicators of quality of justice. Based on these criteria the EC collects data in four main areas. These are: first, the accessibility of justice for citizens and businesses; second, adequate financial

1001 2023 Rule of Law Report [Online]. Available at: https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en#related-links (Accessed: 28 October 2023).

1002 Communication from the Commission to the European Parliament, the European Council and the Council Further strengthening the Rule of Law within the Union State of play and possible next steps COM/2019/163 final.

1003 This represents a shift from the original concept from 2013 in which criminal cases were excluded entirely.

and human resources; third, the assessment tools; and fourth, digitalisation. Specifically, the accessibility of justice for citizens and businesses focuses on legal aid, court and legal fees, the possibility of alternative dispute resolution,[1004] tools that enable justice for persons with disabilities (including persons at risk of discrimination, older persons, and victims of violence against women or domestic violence), and a survey on the powers of equality bodies that help victims of discrimination access justice. The Commission also monitors legal safeguards regarding decisions or inaction by administrative authorities; specific arrangements for child-friendly proceedings that involve children as victims, suspect, or accused persons; the general government total expenditures of law courts and the ratio of the annual salaries of judges and prosecutors with annual average gross national salary; the number of judges; the proportion of female professional Supreme Court judges; the number of lawyers; the availability of training in communication for judges; the availability of online information about the judicial system for the general public; procedural rules allowing digital technology in courts in civil/commercial, administrative, and criminal cases; the use of digital technology by courts and prosecution services; the availability of secure electronic communication; digital solutions for initiating, conducting, and following proceedings (including court proceedings in criminal cases); online access to published judgments for the general public; and arrangements for producing machine-readable judicial decisions.

The literature is rather reticent about the EU Justice Scoreboard mechanism. For example, Butler calls for a more detailed evaluation mechanism, stating that the EU Justice Scoreboard

> examines only the technical functioning of courts, such as the length of court proceedings, the availability of training for judges, the availability of alternative dispute resolution mechanisms, and the use of information and communications technologies in judicial proceedings. These criteria tell us very little about how effectively courts uphold the rule of law in terms of keeping governments' powers in check – a vital function for which the principal criteria would include judicial independence, how easily individuals can access the courts for judicial review, and the scope of the judiciary's authority to review and remedy violations by national authorities.[1005]

The current relevance of Butler's conclusions is partly relativised by the changes the Commission has made to the evaluation since 2013. However, the technical nature of the evaluation remains.

1004 However, the situation in previous years of the Czech Republic shows that data should always be seen in context. For example, the expansion of ADR use is not necessarily associated only with positive consequences. In fact, arbitration in the Czech Republic has been implemented in a significant number of cases in a way that did not guarantee the independence and impartiality of the arbitrator. Kolářová, 2019.

1005 Butler, 2013, p. 2.

Similarly, Jakab and Kirchmair state that the EU Justice Scoreboard 'is currently too concerned with the financial guarantees and the infrastructure of the judicial system, instead of a holistic analysis of the rule of law'.[1006] Further,

> as it stands, only measures whether a justice system is generally capable of delivering justice. It does not measure, however, whether it is actually working as an independent judiciary. Consequently, the outcome of the EUJS for a specific Member State might well be a high justice score, as the justice system is well equipped with staff and computers, despite actually not guaranteeing the rule of law due to arbitrary and biased results. Therefore, the EUJS cannot detect whether a Member State actually does not want to guarantee an independent rule of law. Or to put it directly, bad justice can be very effective.[1007]

In addition, data cannot be overestimated as they work with how the public subjectively perceives certain phenomena. What do I see as the problem? Is it that different peoples (i.e. nations) have different perceptions of satisfaction and different levels of trust in institutions in general? Therefore, without additional data, it cannot be easily or simply inferred that the justice system is not or might not be independent just because people do not have confidence in it. Certainly, this cannot be done when people have little trust in the State in general for cultural or historical reasons. In other words, while overall trust in the justice system may be an indicator with some predictive value within a given State (especially over time), it is not truly suitable for making comparisons between States because it does not say much about the actual state of their justice systems.[1008] It seems to me that it is much more indicative of how the executive branch and the media report on the work of the judiciary.

C. Summary and Conclusions

The EU currently uses two main mechanisms to assess the functioning of the rule of law in the Member States. The first is the Rule of Law Mechanism (Rule of Law Review Cycle), which serves as a basis for inter-institutional dialogue within the EU and between EU and Member State authorities. This is done through an annual report on the state of the rule of law and recommendations to Member States. The second is the EU Justice Scoreboard, which assesses the a) efficiency, b) quality, and c) independence of the different parts of national justice systems.

A characteristic feature of the EU's evaluation is its aim of objectifying and quantifying the qualitative functioning of national justice systems. It does so on the basis of generally accepted, yet somewhat questionable, criteria. More specifically,

1006 Jakab and Kirchmair, 2021, p. 937.
1007 Jakab and Kirchmair, 2021, p. 950.
1008 Urbániková and Šipulová come to a similar conclusion. See: Urbániková and Šipulová, 2018, p. 2115.

most of the criteria pursued by the EU are not indicative of the actual state of the rule of law, but only of the preconditions for its functioning. This can be demonstrated by the EU Justice Scoreboard, for which one of the criteria is the speed of judicial decision-making. Is this criterion appropriate? Notably, this criterion does not address how courts actually make decisions and how well they justify these decisions – indeed, the collected data may not be comprehensive and fully indicative since it is purely formal. Indeed, they do provide some informative value. Their advantage is that they are easy to collect and simple to process. Analysing formal criteria is the simplest way to make comparisons and evaluations. Paradoxically, however, reducing the emphasis on the proper reasoning of a judgment in a Member State may quicken court proceedings and make the respective State look better at the table. However, such a change does not mean that the justice system in the given State functions better than others, even if it appears to do so based on purely numerical data.

After all, the rule of law is not about how quickly the court decides (however unreasonably long a court proceeding undoubtedly is against the rule of law). It is about the correctness of the court's decision. The word 'correct' can have many meanings. For example, it can mean whether the decision is fair, whether it was reached by standard methods of legal reasoning and interpretation, whether all relevant evidence was correctly taken, and whether the whole trial was fair. In this sense, 'correctness', can also be understood as the way in which the decision is written. If a decision can only be understood by experts – and even then only with difficulty – it does not matter if it is available online. More specifically, we see this with publications of decisions characterised by sentences that so long they take up whole paragraphs, facts described in an incomprehensible way, and legal assessments limited to listing legal rules without actually explaining them or transparently applying them to the case. For whom is such a style of writing in reporting court decisions actually intended? And is it not important from the point of view of the rule of law whether courts break the limits set for their interpretation of the law? For example, do they do so with arguments based on EU law or public international law, but in a way that is not required by those bodies of law?

On the other hand, tracking digitalisation is also important. The connection between digitisation and the rule of law is questionable if not non-existent. Digitisation itself is not about content (judicial decision-making as such) but form. Nonetheless, comparisons between states make sense, all the more so because this is a new and developing field. Indeed, such comparisons can lead to greater efficiency in the decision-making process. Thus, there is no direct link between digitalisation and the rule of law; the relationship is mediated. Similarly, we could conclude that it is necessary to set standards at the EU level for teaching law in law schools in Member States. Such faculties educate future judges, who will have a major impact on the state of the rule of law. Monitoring the educational content and methods used in law schools in Member States could be justified by analogy.

The literature is also rather sceptical about the EU's rule of law monitoring rankings and points to their shortcomings. According to Pech,[1009] these may be related to false expectations, where the reports themselves cannot prevent violations of the rule of law and the statistical data contained in them can be used against positive reforms. Further, the euphemistic language is also problematic, as demonstrated by the example of the 'reform' of the justice system in Poland – although the word 'reform' usually has a positive connotation, this is not the case in this particular situation according to the majority of EU Member States. The denial of reality and autocratic reality are also criticised, because the language of the reports and evaluations denies the fact that developments in the rule of law are not positive in some countries. Pech also points to the failure to see the wood for the trees, as evaluations take place on an annual basis; category error in that different categories are often situated as comparable when in fact they are not; and, finally, the opportunity cost and distracting effect related to the fact that producing reports necessarily involves costs and means missing out on opportunities that could have been realised in another area that would have better contributed to the development of the rule of law.

In doing so, Pech points to shortcomings in the functioning of the rule of law in Poland and Hungary. However, he does not distinguish between the preconditions for the functioning of the rule of law, which are indeed threatened by the changes and processes taking place in these states, and their consequences. More precisely, he does not clarify whether the consequences have actually occurred or whether they are even possible.

Personally, I believe that the rule of law is threatened both by a situation in which the executive power unduly interferes with the functioning of the judiciary, which might be the case in Poland, as well as by a situation in which the judiciary is not subject to any external control at all. Thus, by its activism, particularly at constitutional level, such judiciary restricts the functioning of those bodies which directly represent the people (i.e. parliaments). I would like to stress that, apart from partial excesses in some cases of the highest courts, this is not the case in the Czech Republic. I do not dare to assess other countries due to a lack of relevant information.

The limits of empirical evaluation are also demonstrated by Uzelac, a renowned expert whose work on the efficiency of European justice systems is mostly limited to a comparison of statistical data between countries over time. However, Uzelac does not comprehensively evaluate the actual impact on the functioning of the rule of law. In this respect, the comparisons do not say much about whether the rule of law exists and works; they focus only on the potential preconditions for its functioning. Uzelac's most significant finding is that 'European justice systems are, apparently, even more different than one would expect.'[1010] This is not a surprising conclusion. Further evaluation and comparison of empirical data gives me the impression that, despite the same names, the data actually differ very substantially in terms of input

1009 Cf. Pech, 2020a; Kelemen et al., 2019, cited in Pech, 2020a.
1010 Uzelac, 2011, p. 134.

and that national justice systems can function very differently or very similarly when certain criteria are set comparably, even when the empirical data differ substantially. Unfortunately, a deeper explanation for this phenomenon in his article is lacking because it simply cannot be obtained/detected by a simple comparative method.

There is certainly no shortage of sources of information for evaluating the functional rule of law. However, their quality varies and, as they often comprise only raw data, their processing is very important. However, the emphasis is on ensuring that these sources are diverse, independent, and include sources on actors located within Member States. These actors are the ones who can be expected to catch a potential problem early on. Further, it is important that such information has a way of reaching the EC.

Sources of information can therefore be external (e.g. existing mechanisms for assessing the rule of law, usually within other international organisations) or internal. Internal information can be further divided into information from EU institutions and Member States in the broadest sense. Information can come from both state and non-state (and thus independent) actors.

I.5.2 The Interpretation of the Rule of Law in the Article 7 TEU Procedure

A. Introduction

This study focuses on the concept of the rule of law, interpreted through the prism of Art. 7 of the Treaty on European Union[1011] ('TEU'). This provision is a source of sanctioning norms that authorize certain public bodies to determine the negative consequences of failures to implement ('breaching') the orders contained in the sanctioned norm.[1012] In the context of Art. 7 of the TEU, the content of the latter norm results primarily from Art. 2 of the TEU, according to which:

> 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.

1011 Official Journal of the European Union of June 7, 2016, C 202, pp. 13–88.
1012 Cf. Ziembiński, 1994, p. 82.

Therefore, it may be assumed that Art. 7 of the TEU has a subordinate function to Art. 2 of the TEU[1013] and codifies a public law's construction of the constitutional liability of a Member State that has committed a 'delict' (wrongful act) against the ideological foundations of the European Union (hereinafter the 'EU') community. Therefore Art. 7 of the TEU protects the substance of the EU, which is expressed in the fundamental values enshrined in Art. 2 of the TEU.[1014]

As for the title of the study, it refers directly to only one of the values listed in Art. 2 of the TEU; namely, the 'rule of law' (although 'there is an unbreakable link between [all] those founding values'[1015]). Its importance has been noted by, for example, K. Lenaerts, who stated that the EU in particular stands for 'integration through the rule of law'; that is, European integration can only take place when both EU institutions and Member States respect the 'rules of the game'.[1016] Hence, the EU is also a 'community of law which depends on mutual recognition and mutual trust'. States are bound to recognize each other's legal structures or to presume that each of them is at least as good as any other in terms of the standards of the rule of law. Behind this 'mutual recognition' lies 'mutual trust': recognition (of laws, regulations, etc.) is possible as Member States trust each other and their respective legal systems.[1017] Thus,

> [w]ithin the EU, the rule of law is of particular importance. Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as 'an area of freedom, security and justice without internal frontiers.'[1018]

Despite the significance of the indicated value, one may observe the absence – with respect to EU primary law – of any explicit reference to the rule of law or its core meaning in the original founding treaties.[1019] This is understandable due to the fact that the objectives and means of operation originally agreed upon by the Member States of the Community were primarily of an economic and social nature, with the 'Common Market' and 'market freedoms' at the heart of this economic order.[1020]

1013 Cf. ibid.
1014 Tichý, 2018, p. 89.
1015 Lenaerts, 2023a, p. 26.
1016 Lenaerts, 2020, p. 29.
1017 Closa, 2016, pp. 15–16.
1018 Communication from the Commission to the European Parliament and the Council of March 11, 2014, 'A new EU Framework to strengthen the Rule of Law', COM(2014) 158 final, p. 4 [Online]. Available at: https://bit.ly/477CHLq (Accessed: 27 July 2023) (the 'Communication 2014').
1019 Pech, 2022, p. 110.
1020 Schroeder, 2021, p. 108.

There was arguably one exception: the concept was very much encapsulated in the first Treaty provision describing the role of the European Court of Justice. Indeed, in some early English translations of Art. 31 of the Treaty establishing the European Coal and Steel Community,[1021] originally written in French, the English label 'rule of law' was used to translate '*respect du droit*' (i.e. 'the function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations').[1022] Additionally, it is claimed that the values of Art. 2 of the TEU were in fact implied from the start of the integration process, assuming that it was only open to democratic European states adhering to the rule of law and human rights protections (which has been reconfirmed by developments like the Declaration on the European Identity published by the Nine Foreign Ministers of Member States of the European Community on 14 December 1973 in Copenhagen[1023]).[1024]

Subsequently, the concept of 'rule of law' in the context of the Community was endorsed by the Court of Justice in its famous *Les Verts* v. Parliament Judgment of 23 April 1986.[1025] The Court stated: 'the European Economic Community is a Community based on the rule of law', which requires reference in particular to 'the basic constitutional charter, the Treaty'.[1026]

The first Union treaty which included the above-mentioned notion as the 'principle' and in other contexts (e.g. as a general objective of the Community policy in the sphere of development co-operation) was the Treaty of 7 February 1992 on European Union[1027] (the 'Maastricht Treaty').[1028] The constitutional principle of rule of law was also mentioned in the Conclusions of the European Council in Copenhagen of 21–22 June 1993,[1029] committing the candidate countries for EU membership to 'stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities'.[1030] Subsequently, the Treaty of Amsterdam of 2 October 1997 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts[1031] (hereinafter the 'Amsterdam Treaty') notably amended the wording of Art. F.1 of the TEU as follows: '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member

1021 Treaty establishing the European Coal and Steel Community [Online]. Available at: https://bit.ly/3rKBvO2 (Accessed: 27 July 2023).
1022 Pech, 2020b, p. 5.
1023 Declaration on European Identity [Online]. Available at: https://bit.ly/451fngD (Accessed: 27 July 2023).
1024 Klamert and Kochenov, 2019, p. 23.
1025 Case ref. 294/83 [Online]. Available at: https://bit.ly/3q7qAxo (Accessed: 28 July 2023).
1026 Schroeder, 2021, p. 107.
1027 Official Journal of the European Union of July 29, 1992, C 191, pp. 1–110.
1028 Cf. Barcik, 2022, p. 93; Kida, 2023, p. 145.
1029 European Council in Copenhagen [Online]. Available at: https://bit.ly/44L9CUt (Accessed: 28 July 2023).
1030 Schroeder, 2021, p. 108.
1031 Official Journal of the European Union of November 10, 1997, C 340, pp. 1–144.

States'. Furthermore, in Art. I-2 of the Treaty of 29 October 2004 establishing a Constitution for Europe,[1032] which has not entered into force, the above-mentioned principles were re-baptized as 'values'. This very term is also used in the identically worded Art. 2 of the TEU,[1033] as determined by the Treaty of Lisbon of 13 December 2007 amending the Treaty on European Union and the Treaty establishing the European Community (hereinafter the 'Lisbon Treaty').[1034]

Against the background of the presented legal evolution, we observe a shift from an indefinite 'notion' of rule of law to its constitutional indication as a 'principle' and, subsequently, a 'value'. Ultimately, this is explicitly confirmed by Art. 2 of the TEU – although the rule of law 'principle' still appears in the preamble of the TEU. The protection of this 'value' is to be ensured *inter alia* in Art. 7 of the TEU, which is the subject of the below analysis.

B. Meaning of the Notion

Determining the normative meaning of the notion of the 'rule of law' based on Art. 2 of the TEU plays a key role in the application of Art. 7 of the TEU. Specifically, it enables the identification of one of the substantive prerequisites for applying the mechanisms resulting from the latter provision. Unfortunately, the Treaties do not include a definition of this fundamental concept. At the same time, many representatives of the legal doctrine draw attention to serious problems related to explaining the actual meaning of the rule of law,[1035] the 'value' of which is sometimes referred to as 'quite abstract and vague'.[1036] The extreme point of view states: '[s]o much doubt exists as to what the rule of law involves that some very eminent jurisprudes have gone so far as to doubt whether the "rule of law" is useful as concept at all'.[1037]

The bodies and institutions of the EU have repeatedly attempted to clarify the above-mentioned concept.[1038] From the point of view of the application of Art. 7 of the TEU, the most important definitions are those formulated by the Union's institutions empowered to act under the mechanisms arising from this provision, especially those by the European Commission (the 'EC' or the 'Commission') and the European Parliament (the 'EP').

In particular, the Communication from the Commission to the Council and the European Parliament of 15 October 2003 'on Article 7 of the Treaty on European

1032 Official Journal of the European Union of December 16, 2004, C 310, pp. 1–474.
1033 Schroeder, 2021, p. 108.
1034 Official Journal of the European Union of December 17, 2007, C 306, pp. 1–271.
1035 E.g. Barret, 2018, pp. 24–26; von Bogdandy and Ioannidis, 2014, pp. 62–63; Grabowska, 2020, pp. 51–52; Pastuszko, 2020, pp. 193–195, 202–206; Pastuszko, 2023, pp. 311–313; Sur, 2018, p. 40; Szymanek, 2020a, pp. 117–119.
1036 Potacs, 2018, pp. 159, 161. See also Kochenov, 2009, p. 19.
1037 Barret, 2018, p. 25.
1038 Cf. e.g. Szymanek, 2020b, pp. 360–368.

Union – Respect for and promotion of the values on which the Union is based'[1039] (the 'Communication 2003') is directly related to the analysed regulation. In particular, the document emphasizes that 'the European Union is first and foremost a Union of values and of the rule of law'.[1040] This could suggest that the latter notion does not fit into the category of EU values. However, an earlier passage from the Communication 2003 clearly includes the rule of law in both the scope of 'common principles' and 'common values' on which the Union is based.[1041] At the same time, the Communication 2003 does not explain the meaning of a 'principle', a 'value', or a 'rule of law'.

Undoubtedly, the Communication 2014[1042] is of greater explanatory importance. This document situates the rule of law as 'one of the main values upon which the Union is based'[1043] and a 'constitutional principle with both formal and substantive components'.[1044] As a principle, the rule of law regulates the exercise of public powers within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.[1045] Furthermore, the Communication 2014 indicates the rule of law's 'core meaning', which stems from a non-exhaustive list of 'principles' identified in the case law of the Court of Justice of the European Union (hereinafter the 'CJEU') and of the European Court of Human Rights as well as in documents drawn up by the Council of Europe, especially those based on the expertise of the European Commission for Democracy through Law (the Venice Commission). These constituent principles include legality (which implies a transparent, accountable, democratic, and pluralistic process for enacting laws), legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law.[1046] More detailed explanations are provided in Annex I to the Communication 2014;[1047] notably, these explanations specify that the rule of law is a 'legally binding constitutional principle', 'unanimously recognized as one of the founding principles inherent in all the constitutional systems of the Member States of the EU and the Council of Europe'.[1048] In other passages, Annex I refers to the case law of the CJEU to clarify the content of the abovementioned principles stemming from the rule of law.[1049] Moreover, Annex I further specifies the separation of powers principle, pointing out its connection with the right to a fair

1039 COM(2003) 606 final [Online]. Available at: https://bit.ly/3qafpnt (Accessed: 31 July 2023).
1040 Ibid., p. 12.
1041 Ibid., p. 3.
1042 See above.
1043 Communication 2014, p. 2.
1044 Ibid., p. 4.
1045 Ibid., pp. 3–4.
1046 Ibid., p. 4.
1047 COM (2014) 158 final – Annexes 1 to 2 [Online]. Available at: https://bit.ly/3QmRVGE (Accessed: 31 July 2023).
1048 Ibid., p. 1.
1049 See: ibid., pp. 1–2.

trial arising from the principle of effective judicial review.[1050] The interpretation of the catalogue of principles constituting the rule of law, adopted in the Communication 2014 (together with Annex I), was subsequently confirmed by the EC in the 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland' (December 20, 2017).[1051] At the same time, the EC underlines that where a constitutional justice system has been established, its effectiveness (including an independent and legitimate constitutional review) is a key component of the rule of law.[1052]

The EC slightly refined the definition presented in Communication 2014 in another document adopted in 2019, the 'Communication 2019'.[1053] Firstly, this document situated the rule of law as one of the founding values of the EU and 'a well-established principle, well-defined in its core meaning' which can be objectively assessed so that shortcomings can be identified on a sound and stable basis.[1054] Secondly, the Communication 2019 explicitly recognizes one additional core component of the rule of law: the principle of separation of powers.[1055] In the subsequent Communication 'Strengthening the rule of law within the Union. A blueprint for action', the EC again referred to a 'well-established principle, well-defined in its core meaning', while pointing out that the 'rule of law covers how accountably laws are set, how fairly they are applied, and how effectively they work (…) [I]t also covers institutional issues such as independent and impartial courts, and the separation of powers'.[1056] Furthermore, the EC particularly emphasised effective judicial protection by independent courts, which is required by Art. 19.1 of the TEU as a concrete expression of the 'value of the rule of law'.[1057]

The EP notably referred to the importance of the rule of law in the resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254[INL]).[1058] This was done by collectively clarifying the elements that

1050 Ibid., p. 2.

1051 COM(2017) 835 final, p. 1 [Online]. Available at: https://bit.ly/3DD71QI (Accessed: 31 July 2023) (the 'Proposal'). See also e.g. the Commission Recommendation (EU) 2016/1374 of July 27, 2016 regarding the rule of law in Poland (Official Journal of the European Union of September 12, 2016, L 217, pp. 53–68).

1052 The Proposal, p. 16.

1053 Communication from the Commission to the European Parliament, the European Council and the Council of April 3, 2019 'Further strengthening the Rule of Law within the Union State of play and possible next steps', COM(2019) 163 final [Online]. Available at: https://bit.ly/459Ni6U (Accessed: 1 August 2023) (the 'Communication 2019').

1054 Ibid., p. 1.

1055 Cf. Ibid., p. 1; Pech et al., 2020, p. 22.

1056 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of July 17, 2019 'Strengthening the rule of law within the Union. A blueprint for action', COM(2019) 343 final, p. 1 [Online]. Available at: https://bit.ly/3OkGtso (Accessed: 1 August 2023).

1057 Ibid., p. 4.

1058 Official Journal of the European Union of June 19, 2018, C 215, pp. 162–177.

make up the 'core values and founding principles' of the EU, including democracy, the rule of law, and fundamental rights. In particular, the collection included: a) the separation of powers; b) the impartial nature of the State; c) the reversibility of political decisions after elections; d) the existence of institutional checks and balances which ensure that the impartiality of the State is not called into question; e) the permanence of the State and institutions, based on the immutability of the constitution; f) the freedom and pluralism of the media; g) freedom of expression and freedom of assembly; h) promotion of civic space and effective mechanisms for civil dialogue; i) the right to active and passive democratic participation in elections and participatory democracy; j) integrity and absence of corruption; k) transparency and accountability; l) legality; m) legal certainty; n) the prevention of abuse or misuse of powers; o) equality before the law and non-discrimination; p) access to justice, including independence and impartiality, fair trial, constitutional justice, and, where applicable, an independent legal profession; q) particular challenges to the rule of law, including corruption, conflicts of interest, the collection of personal data, and surveillance; and r) elements enumerated in Titles I to VI of the Charter of Fundamental Rights of the European Union[1059] (the 'CFREU') and in the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 14 November 1950.[1060] A similar 'collective' formula was used in the EP resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).[1061] Meanwhile, the EP also pointed out the elements comprising the values of democracy, the rule of law, and human rights, such as the functioning of the constitutional and electoral system; the independence of the judiciary and other institutions; the rights of judges; absence of corruption and conflicts of interest; privacy and data protection; freedom of expression, academic freedom; freedom of religion, freedom of association; the right to equal treatment; the rights of persons belonging to minorities; protection against hateful statements towards such minorities; the fundamental rights of migrants, asylum seekers, and refugees; and economic and social rights.

When considering the interpretation of the concept of 'rule of law' on the grounds of Art. 2 of the TEU, it is impossible not to mention the definition contained in Art. 2 of the regulation (EU, Euratom) 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 (hereinafter the 'Regulation'):[1062]

> 'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and

1059 Official Journal of the European Union of June 7, 2016, C 202, pp. 389–405.
1060 The European Convention on Human Rights.
1061 Official Journal of the European Union of December 23, 2019, C 433, pp. 66–85.
1062 Official Journal of the European Union of December 22, 2020, L 433 I, pp. 1–10.

> 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.

Thus, it represents a slightly modified approach from that presented in the Communication 2014. Notably, the essential elements of the rule of law are indicated only in the preamble of the Regulation, which stipulates *inter alia* that all public powers act within the constraints set out by law and under the control of independent and impartial courts or specifies the conditions of the independence of the judiciary.

It is appropriate to supplement the above findings with a brief characterization of the case law of the CJEU related to the concept of the rule of law. In this context, however, it should be noted that the controlling competence of the Court in the application of Art. 7 of the TEU has been limited solely to the procedural stipulations covered by that Article (see Art. 269 of the Treaty on the Functioning of the European Union,[1063] the 'TFEU'). This means that the CJEU does not verify whether the assessment made by the Council or the European Council regarding the breach of the rule of law by a Member State corresponds to the Court's jurisprudence against the background of Art. 2 of the TEU. This raises the question of the binding force of the rule of law definition derived from this jurisprudence in the procedure stipulated in Art. 7 of the TEU.[1064] Let us assume, with some caution, that both EU institutions and Member States are bound in this regard by the case law of the CJEU (however, compliance with this case law is not subject to review by this Court). Since the CJEU shall ensure that the law is observed in the interpretation and application of the Treaties (Art. 19.1 of the TEU), the interpretation of Art. 2 of the TEU belongs to this Court. Pursuant to the principle of sincere co-operation (Art. 4.3 of the TEU), the EU (its organs and institutions) and the Member States shall assist each other in carrying out tasks imposed by the Treaties.[1065]

The CJEU referred to the concept of the 'rule of law' long before the introduction of Art. 2 of the TEU. Indeed, its case law is the source of a number of general principles of EU law that make up the current understanding of the above concept at the EU level.[1066] The analysis of this jurisprudence has been carried out by many prominent representatives of the doctrine of European law,[1067] making it unnecessary to

1063 Official Journal of the European Union of June 7, 2016, C 202, pp. 1–388.
1064 Taborowski, 2019, p. 66.
1065 Cf. ibid., pp. 63, 66.
1066 Cf. Pech, 2022, p. 115. See also Annex I of the Communication 2014.
1067 E.g. Canor, 2021, pp. 190–192; Lenaerts, 2023a, pp. 27–32; Kochenov and Pech, 2021, passim; Pech et al., 2020, pp. 16–21; Schroeder, 2021, pp. 120–122; Szymanek, 2020b, pp. 368–371; Taborowski, 2019, pp. 67–75.

review it again. As a summary of the views of the CJEU, it can be said that the EU rule of law is construed by this Court as

> a 'meta-principle' which provides the foundation for an independent and effective judiciary and essentially describes and justifies the subjection of public power to formal and substantive legal constraints with a view to guaranteeing the primacy of the individual and its protection against the arbitrary or unlawful exercise of public power.[1068]

In addition, it is worth recalling that the state of the jurisprudence of the CJEU is reflected in the list of sub-principles contained in the Communication 2014 and the Communication 2019 and therefore also in the Regulation. The conclusion regarding the jurisprudential source of the principles indicated in these documents was also confirmed by the Court in the Judgments of 16 February 2022, case ref. C-156/21[1069] and case ref. C-157/21.[1070] Nevertheless, the abovementioned list already needs to be supplemented, if only by the obligation of the effective application of EU law, which the CJEU has since recognized as an element of the rule of law in the Order of 20 November 2017, case ref. C-441/17.[1071] According to the Court, the abovementioned principles, recognized and specified in the legal order of the EU, 'have their source in common values which are also recognized and applied by the Member States in their own legal systems'.[1072]

Therefore, in the jurisprudence of the CJEU, the rule of law appears not only in terms of the 'principle', but also as one of the 'values' that 'have been identified and are shared by the Member States' and 'define the very identity of the European Union as a common legal order'.[1073] Moreover, the value of the 'rule of law' may also be defined based on the other values and principles enshrined in Art. 2 of the TEU[1074] (e.g. 'a Member State whose society is characterized by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value'[1075]).

In the view of the CJEU, Art. 2 of the TEU stipulates the obligation relating to respect for the rule of law attached to State membership in the EU.[1076] Importantly,

> Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which (…) are an integral part of the very identity of the European

1068 Pech, 2010, p. 373.
1069 ECLI:EU:C:2022:97, para. 236.
1070 ECLI:EU:C:2022:98, para. 290. See also Pech et al., 2020, pp. 16–18.
1071 ECLI:EU:C:2017:877, para. 102; Toborowski, 2019, pp. 64–65.
1072 Case ref. C-156/21, para. 237.
1073 Ibid., para. 127.
1074 Ibid., para. 136.
1075 Ibid., para. 229.
1076 Ibid., para. 231.

> Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.[1077]

Both EU documents and the jurisprudence of the CJEU identify the rule of law as a 'value' as well as a 'principle'. This reflects the terminological convention used in EU primary law (cf. the preamble, Arts. 2 and 21.1 of the TEU, and the preamble of the CFREU). In order to determine whether this is appropriate, it is first necessary to delineate a 'value in law' and a 'legal principle'. Unfortunately, these terms have not been defined by the EU legislator, and the related views expressed in the CJEU jurisprudence and legal literature do not suggest common meanings or coherent concepts.[1078] Therefore, for generalization purposes, R. Alexy's concept can be accepted as theoretically and practically useful; specifically, this concept situates principles as legal norms commanding the realization of something (an 'ideal ought') to the highest degree actually and legally possible. Thus, principles are optimization commands, which can be fulfilled to different degrees.[1079] The 'ideal ought' represents a certain positive state of affairs approved by the legislator and thus also protected by it through relevant legal norms. Therefore, the abovementioned 'ideal ought' is simply a value – something valued and desired by the legislator. In summary, the principles of law can be defined as legal norms of an optimizing nature that prescribe the realization of certain values.[1080]

In applying the adopted assumptions to the EU rule of law, it can be assumed that its double qualification to 'values in law' and 'legal principles' is correct. Art. 2 of the TEU declares a certain approved state of affairs identified as the state of respect for the rule of law (expressed in particular states of affairs encoded in 'sub-principles' of rule of law). The following articles establish the legally binding nature of the rule of law: 1) Art. 3.1 of the TEU points out the Union's primary goal to promote its values; 2) Art. 13.1 of the TEU locates the promotion of values as the reference point of the 'institutional framework' of the Union; 3) Art. 7 of the TEU stipulates the sanctioning mechanisms; and 4) Art. 49 of the TEU introduces prerequisites for the EU accession.[1081] Thus, based on quoted provisions, it is possible to derive an imperative for the realization of the rule of law as a value, the fulfilment of which can occur to varying degrees. The rule of law principle should be fulfilled to the highest degree possible in terms of the number of sub-principles applied and the scope of their application. The addressees of this obligation are the EU and its institutions as well as the Member States and their institutions.[1082] However, for these addressees to experience negative legal consequences, the rule of law must implemented to a sufficiently low degree (see Art. 7 of the TEU). Only in this context can one accept A. von Bogdandy's

1077 Ibid., para. 232.
1078 Cf. Crego, 2020a, pp. 8–9; Miąsik, 2022, pp. 3–4; Mik, 2000, p. 518; Sozański, 2012, pp. 94, 137.
1079 Alexy, 2000, p. 295, 300.
1080 Kordela, 2012, p. 102; Miąsik, 2022, p. 2.
1081 Schroeder, 2021, p. 113. See also von Bogdandy, 2010, p. 50.
1082 Streinz, 2018, p. 18.

view that European values should be interpreted minimalistically – not as optimization commands but as 'red lines'.[1083] Regardless of these sanctioning premises, obligated entities should treat the rule of law 'maximally' as a general principle of EU law. The rule of law should be recognized as conditioning the realization of all other general principles and specific legal rights and obligations, including the protection of individuals in the European legal space. More broadly, obligated entities should treat the rule of law primarily as constitutive of very nature of the Community, the common European identity,[1084] and the moral conviction of Member States' citizens[1085] ('the moral compass that helps Europeans navigate through unchartered waters'[1086]). This approach is fitting because the rule of law value is not the result of a 'top down approach'; instead, because it stems from the constitutional traditions common to the Member States, it aligns with 'a bottom-up' dynamic.[1087]

Due to the fact that the rule of law concept included in Art. 2 of the TEU is understood through the prism of its individual sub-principles, the application of this provision (especially in connection with Art. 7 of the TEU) requires a more specific reference to at least one of these detailed elements of the rule of law (e.g. legal certainty or effective judicial review).[1088] Thus, a breach of the 'rule of law value' may be related to a breach of other provisions of the TEU, the TFEU, the CFREU, or other EU law norms. Such a breach can also have a certain 'self-contained' character. In conjunction with Art. 7 of the TEU, this autonomous legal meaning of Art. 2 of the TEU provides for the acceptance of violations of all elements of the rule of law by this first provision (regardless of whether the element in question is simultaneously expressed in another provision of EU law) and beyond areas covered by EU law; that is, where Member States act autonomously.[1089] The reason behind this is as follows:

> If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.[1090]

Further:

> The rationale behind is clear: if complying with EU values is a pre-condition for full EU membership, respect for those values extends to any area, including those not covered by EU competences.[1091]

1083 von Bogdandy, 2019, p. 4.
1084 Lenaerts, 2023, p. 12.
1085 von Bogdandy, 2021, p. 79.
1086 Lenaerts, 2023, p. 12.
1087 Ibid., p. 13.
1088 Cf. Schroeder, 2021, pp. 116–117; Taborowski, 2019, pp. 61, 75.
1089 The Communication 2014, p. 5.
1090 The Communication 2003, p. 5.
1091 Crego, Mańko and Ballegooij, 2020, p. 2.

However, an objection can be raised to the above widely accepted interpretation of the EC regarding the scope of Art. 2 of the TEU.[1092] This objection is related to doubt around how the values of Art. 2 of the TEU to which Member States are bound in all situations interact with elements of the rule of law resulting from the general principles of EU law or the CFREU, the application of which is limited to Member States 'acting in the scope of Union law'.[1093]

The broader scope of the rule of law with regard to the element of effective judicial protection before an independent court (Art.19.1 in conjunction with Art. 2 of the TEU) has also been confirmed by the CJEU in the seminal Judgment of 27 February 2018, case ref. C-64/16.[1094] In the Court's view, if only a national court can potentially decide cases with an EU element (i.e. cases in which the application or interpretation of EU law may occur), then it is not necessary to refer to another EU element in the given case or to show that this case falls within the scope of the principle of conferral.[1095]

There is another aspect related to the independent meaning of Art. 2 of the TEU in the context of the rule of law that has been highlighted in the literature. This provision mandates a specific interpretation of the sub-principles of the rule of law and the premise of threats to them (breaches). This guiding factor is the assumption that the analysed concept is the foundational principle of the Union legal order and the EU itself. In other words, Art. 2 of the TEU protects the EU legal order as a supranational and autonomous order, the functioning of the entire EU, the effectiveness of EU law in the internal legal orders of the Member States, an effective judiciary, individual rights derived from EU law, and the legal systems of Member States (other than those of States that have violated the rule of law within the meaning of Art. 2 of the TEU).[1096] This meaning of the analysed concept should especially be taken into account when interpreting the premises for applying the mechanisms of Art. 7 of the TEU, which should only cover threats (breaches) of a systemic nature.

In concluding this discussion of the concept of the rule of law, it is worth mentioning the problematic relationship between Arts. 2 and 4.2 of the TEU. According to the latter, the EU shall respect the 'national identities' of Member States inherent in their fundamental political and constitutional structures, including those of self-governing regions and localities. This commitment applies both to situations in which EU institutions or bodies adopt legislation and other legally binding acts as well as those in which they interpret or apply EU law.[1097] While national identity is

1092 Kochenov and Pech, 2015a, p. 520; Kochenov and Pech, 2015b, p. 4; Kochenov, 2021, p. 137; Larion, 2018, p. 163; Mangiameli and Saputelli, 2013, p. 351.
1093 Hillion, 2016a, pp. 7–8.
1094 ECLI:EU:C:2018:117.
1095 Cf. Taborowski, 2019, p. 43.
1096 Taborowski, 2019, pp. 76, 81–82. See also Pech, 2010, pp. 375–376.
1097 Opinion of Advocate General Nicholas Emiliou of March 8, 2022, case ref. C–391/20, ECLI:EU:C:2022:166 (the 'Opinion of Advocate case ref. C–391/20'), para. 83.

not subject to absolute protection under EU law, it must be balanced according to the proportionality test.[1098]

Despite clarifications of 'national identity' in the text of Art. 4.2 of the TEU as well as in a number of CJEU judgments,[1099] the notion remains largely vague and ambiguous.[1100] It seems quite convincing that 'the identity clause protects the features that make a national community what it is (…), and without which the community would no longer be the same, in so far as those features are mirrored in fundamental domestic structures, most notably constitutional law'.[1101] More specifically, these distinguishing features can be categorized into political (e.g. the constitutional form of state and state government, including the organisation of public authorities at the national, regional, and local levels) and cultural (e.g. traditions, history, culture, state symbols[1102] and language)[1103] groups. Further, Art. 4.2 of the TEU notably links national constitutional law and EU law; in a concrete situation of conflict, the notion of national identity needs to be interpreted in the light of domestic constitutional law.[1104] Therefore, the provision implies the mutual duty of co-operation between the national constitutional courts and the CJEU. Although the CJEU has jurisdiction over the interpretation of Art. 4.2 of the TEU (cf. Art. 19.1 of the TEU), it is not in a position to determine what is and is not part of a Member State's constitutional identity. Accordingly, considering the lack of a clear hierarchy between these courts,[1105] the CJEU's interpretation must be coordinated with the interpretations of the national constitutional courts.[1106]

Against the above background, it is possible to formulate the view that 'having regard to the obligation to "protect" the national identity of the Member States, it must be possible for the rule of law and the principles of the rule of law to be assessed differently in each of the Member States'[1107] since these concepts may be understood differently under different national orders (especially constitutional ones).[1108] In other words, the national identity clause (Art. 4.2 of the TEU) can serve as a basis on which to argue that EU institutions are unable to interfere with key elements of the national legal order from the perspective of the rule of law (Art. 2 of the TEU).[1109] However, the CJEU has not approved this interpretation. According to the Court, pursuant to Art. 4.2 of the TEU, Member States 'enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows

1098 von Bogdandy and Schill, 2011, pp. 1420, 1441–1442; Drinóczi, 2020, pp. 107–108.
1099 Cf. e.g. Ochmański, 2023, pp. 59–64; Taborowski, 2019, pp. 86–90.
1100 Cloots, 2016, p. 86.
1101 Ibid., pp. 90–91.
1102 Syryt, 2022, p. 179.
1103 Draganov, 2022, pp. 73–74.
1104 von Bogdandy and Schill, 2011, pp. 1431.
1105 Cf. Sehnálek, 2022, p. 204.
1106 Ibid., pp. 1447–1453; Besselink, 2010, pp. 44–45.
1107 Case ref. C–156/21, para. 211.
1108 Cf. Syryt, 2023, p. 90.
1109 Cf. Taborowski, 2019, p. 94.

that that obligation as to the result to be achieved may vary from one Member State to another'.[1110] While States have separate national identities, they adhere to 'a concept of "the rule of law" which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times'.[1111] Along these lines, the core elements of States' national identities must necessarily be compatible with the EU's constitutional framework and, more specifically, founding values (Art. 2 of the TEU).[1112]

> Article 4(2) TEU lays down the key principles governing the relationship between the European Union and the Member States, and cannot be construed as re-defining what the European Union is and what it stands for. In particular, as far as the founding values are concerned, the Member States themselves have – again, with the Treaty of Lisbon – accepted them as being values that are also 'common' to them. Consequently, Article 4(2) TEU cannot be considered to derogate from Articles 2 and 3 TEU.[1113]

The view that precludes the legitimization of a breach of the rule of law value (Art. 2 of the TEU) by invoking Art. 4.2 of the TEU is also widely accepted in the legal literature.[1114] This seems to be confirmed by K. Lenaerts, who stated that in order for the European integration project to succeed, pluralism cannot be absolute. In spite of their differences, Europeans agreed that the EU must be founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity as well as on the principles of democracy and the rule of law. Ultimately, complying with these founding pan-European values may sometimes mean setting aside certain aspects of national diversity.[1115]

C. Conclusions

The above quotes from EU institutions (including the CJEU) evidence varied degrees of precision in defining the rule of law. On the one hand, it is pointed out that EU documents often define the principle 'in a circuitous and labile manner and following a pattern of *ignotum per ignotum*' – as notably exemplified by the Communication 2014.[1116] In particular, the EP 'has not even attempted to adopt a single,

1110 Case ref. C–156/21, para. 233; case ref. C–157/21, para. 265.
1111 Case ref. C–156/21, para. 234; case ref. C–157/21, para. 266.
1112 Opinion of Advocate case ref. C–391/20, para. 87.
1113 Ibid.
1114 E.g. von Bogdandy and Schill, 2011, pp. 1430; Dunaj, 2020, pp. 178–180; Hillion, 2015, pp. 627–628; Holocher and Naleziński, 2022, p. 334; Lenaerts and Nuffel, 2021, pp. 108–109; Lenaerts, 2023b, p. 13; Ochmański, 2023, p. 59; Półtorak, 2022, pp. 204–205; Streinz, 2018, p. 16; Taborowski, 2019, pp. 95–96.
1115 Lenaerts, 2014, p. 136.
1116 Szymanek, 2020b, p. 360.

coherent definition of the rule of law (…) even a minimal range of meaning (…). It also did not determine which content should be considered necessary for the rule of law and which should be considered coexisting'.[1117] In contrast, there is also the thesis that

> the rule of law (…) is a well-established constitutional principle of EU law. It (…) shows that it is well-defined, not least because of the Court of Justice's extensive case law, the European Commission's definitional codification of it and most recently, the adoption of the Rule of Law Conditionality Regulation 2020/2092 which provides the first comprehensive all-encompassing internal-oriented definition of the rule of law adopted by the EU co-legislators.[1118]

Notably, in light of such interpretations by EU institutions, a broad, substantive, and holistic understanding of the rule of law is promoted. More specifically, this understanding includes substantive components (e.g. respect for fundamental rights) as well as formal (procedural) elements (e.g. judicial review).[1119] That is so-called 'thick conception' of the rule of law.[1120]

In view of the fact that the Treaties do not define the concept of the rule of law, attempts to clarify it using the formally adopted documents of the EC and the EP as well as – indeed, above all – the CJEU's jurisprudence, deserve approval. It follows that the concept under analysis constitutes an 'umbrella',[1121] 'multifaceted',[1122] or 'meta-'[1123] principle, comprising a certain set of elements constituting a fixed 'core meaning' (in the sense of sub-principles repeated in all documents, legal acts, and judicature by EU institutions). As a rule, this set corresponds to the constitutional regulations of Member States (although in relation to some legal orders, like the Polish legal order, differences can be seen in comparison with the sub-principles of the 'democratic state ruled by law', which include, for example, the principle of non-retroactivity of the law[1124] or *ne bis in idem*[1125] and which do not take into account the principle of equality[1126]).

Evaluating the above situation while taking into account purely legal criteria highlights some disadvantages of the solutions adopted at the EU level. First of all,

1117 Ibid., pp. 363–364. See also case ref. C–156/21, paras. 199–201.
1118 Pech, 2022, p. 107.
1119 Cf. ibid., pp. 124–125; Schroeder, 2021, pp. 118, 120, 122.
1120 Pech, 2022, p. 125.
1121 Pech, 2010, p. 369.
1122 Ibid., pp. 361, 372.
1123 Schroeder, 2021, p. 122; Szymanek, 2020a, p. 118.
1124 E.g. Judgment of the Constitutional Tribunal of July 22, 2020, case ref. K 4/19 (OTK ZU no. A/2020, item 33).
1125 E.g. Judgment of the Constitutional Tribunal of October 21, 2015, case ref. P 32/12 (OTK ZU no. 9/A/2015, item 148).
1126 Cf. Ordinance of the Constitutional Tribunal of November 3, 1992, case ref. K12/92 (OTK ZU 1992, item 24).

EC and EP documents are formally non-binding for Member States – even the issue of them being 'self-binding' for the EU institutions listed in Art. 7 of the TEU is not subject to judicial review (cf. Art. 269 of the TFEU), which may reduce the importance of the documents' 'declarations' and thus the diligence with which they are observed. A similar effect may arise in connection with the principles of EU law constituting the rule of law based on CJEU jurisprudence; specifically, this effect may arise if the application of these principles under Art. 7 of the TEU is not controlled by this Court. As for the Regulation, the definition presented in its Art. 2 should be treated with caution in order to clarify the concept used in Art. 2 of the TEU; the rules of systemic interpretation suggest that terms used in EU primary law should not be equated with their definitions in sources of secondary law given the hierarchically prominent position of the Treaties.

What also raises doubts is the definition of the 'core meaning' of the analysed concept in the context of only an exemplary catalogue of the rule of law elements indicated by the EC and their joint listing by the EP (i.e. together with democratic and fundamental rights elements). It is also unclear whether any new sub-principles included by EU institutions in the rule of law but not 'originally' assigned to it would also create this 'core meaning'. In addition, the presented catalogues lack certain elements that usually – from the perspective of the EU law doctrine and domestic constitutional law – fall within the requirements of the rule of law. In particular, this applies to the principle of proportionality,[1127] which is also derived from a 'democratic state ruled by law'[1128] pursuant to the Constitution of the Republic of Poland of 2 April 1997.[1129] This situation of a certain lack of precision in the content of the 'legal principle' is acceptable from the perspective of the obligations of its addressee and the optimizing nature of such a principle (i.e. the rule of law principle must be implemented to the maximum possible extent,[1130] measured by the highest possible number of completed sub-principles;[1131] thus, any doubts about the components need to be resolved in favour of their inclusion in a meta-principle). When dealing with a sanctioning norm focused on 'breaching the rule of law value' (Art. 7 of the TEU), it is necessary to engage this premise with high precision when imposing sanctions; rather than engaging it at the level of non-binding explanatory documents, it should be engaged at the level of universally-binding legal acts. This follows from the case law of the CJEU, according to which

> the principle of legal certainty (…) requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular where they may have adverse consequences.

1127 Cf. Mik, 2000, pp. 461–462; Pech, 2022, pp. 123–124; Schroeder, 2021, p. 123.
1128 E.g. Judgment of the Constitutional Tribunal of February 11, 2014, case ref. P 24/12 (OTK ZU no. 2/A/2014, item 9).
1129 Journal of Laws No. 78, item 483, as amended.
1130 Cf. Alexy, 2000, p. 295.
1131 Cf. McCorquodale, 2016, p. 291.

That principle constitutes an essential element of the rule of law, which is identified in Article 2 TEU.[1132]

I.5.3 The Interpretation of the Rule of Law in the European Semester

A. The European Semester as a Part of the European Union's Economic Governance Framework

The European Semester (ES) was introduced in 2011 following the financial and banking crisis that swept across Europe and the world at the end of the first decade of the 20th century. It grew out of a belief in Brussels decision-making circles that Member States do not have sufficient resistance to emerging global economic threats and that strong tools are therefore needed at the EU level to monitor national progress in economic and fiscal policies. Put simply, the European Semester was intended as a new mechanism to prevent – or at least mitigate – the effects of similar shocks in the future.

The ES is an annual cycle of macroeconomic, budgetary, and structural policy coordination and surveillance at the EU level. The ES was adopted in 2010 and launched in 2011. 'The Semester brings (…) together and synchronized several procedures into an integrated annual framework to surveil and coordinate fiscal, macroeconomic and structural policies across the Economic and Monetary Union (EMU)'.[1133] Further, it '(…) aims to tackle economic imbalances by giving European Union (EU) member states country-specific recommendations (CSRs) regarding their public budgets as well as their wider economic and social policies with a view to enabling better policy coordination among Euro Area member states'[1134]. Essentially, during the implementation of this procedure, Member States '(…) align their budgetary and economic policies with the rules agreed at EU level'.[1135] This makes economic supervision by authorized EU institutions possible, which (as the literature emphasises) '(…) aims not only to ensure the financial stability of the EU but also to stimulate growth (…)'.[1136] Naturally, the use of the indicated procedure has specific objectives designed to benefit both individual Member States and the Union

1132 Judgment of the CJEU of July 24, 2023, case ref. C–107/23, ECLI:EU:C:2023:606, para. 114.
1133 Mollet, 2021.
1134 D'Erman et al., 2019, p. 194.
1135 European Semester in 2022, European Council/Council of the European Union [Online]. Available at: https://www.consilium.europa.eu/en/policies/european-semester/previous-semesters/2022/ (Accessed: 10 September 2023).
1136 Delors, Fernandes and Mermet, 2011, p. 2.

as a broader community. More specifically, these objectives include: '(…) to ensure sound public finances, prevent excessive economic imbalances, boost investments and support structural reforms for jobs and growth'[1137] – or, as another source puts it '(…) to contribute to ensuring convergence and stability in the EU, contribute to ensuring sound public finances, foster economic growth, prevent excessive macroeconomic imbalances in the EU, monitor the implementation of national recovery and resilience plans, coordinate and monitor employment and social policies'.[1138]

The literature on the subject emphasizes that the ES '(…) represents a combination of supranational and intergovernmental components. It is neither consistent with the Community method nor with the intergovernmental method but incorporates elements of both. The combination manifests itself in a distinct type of decision-making-system that Mark Dawson has termed the Coordinative Method: EU economic decision-making is coordinate in that it is formed as a policy cycle based on a constant "back and forth" between the EU and national levels…decision-making never crystallises into a "once and for all" agreement but is ongoing and revisable with the possibility of norms being adapted to changed actual circumstances'.[1139]

Let us remember that the procedure conceived in this way fits very clearly into the existing architecture of the EU economic governance framework and has become one of its important institutional components. Notably, this procedure gave the EU yet another level of intervention in national economies and further competences for shaping the economic processes taking place in its territory in a transnational dimension. Along these lines, this tool certainly extended the legal instruments that already existed in the field of economic governance.

It is worth recalling here that the first solutions in the field of economic governance were introduced under the provisions of the Maastricht Treaty of 1992. This treaty

> (…) established the architecture of the Economic and Monetary Union as a prelude to the creation of the "euro", accepting on the one hand the creation of the monetary union with the centralized monetary policy and euro as the single currency, and on the other hand leaving the implementation of the economic policy within the competence of the Member States of the EU.[1140]

Understood in this way, economic governance refers to '(….) the system of institutions and procedures established to coordinate economic policies to achieve Union objectives in the economic field' and comprises '(…) an elaborate system of policy coordination and surveillance of member states' economic policies'.[1141] By default,

1137 Hauptman, 2017, p. 22.
1138 The European Semester explained.
1139 Fossum, 2006, p. 8; Dawson, 2015, p. 23.
1140 Economic governance framework, European Council/Council of the European Union.
1141 Ibid.

the purpose of its establishment was related to the creation of '(…) the principles of monitoring, prevention and the correction of imbalances that could pose risks for member states' economies'.[1142]

However, the Maastricht Treaty was only a starting point in the process of the further development of instruments in this area. Its provisions only laid the normative foundations for the economic and monetary union created at that time and motivated the further expansion of the authority of EU institutions in economic policy. Thus, the Maastricht Treaty opened the door for the adoption of further economic governance solutions and, therefore, further tools in the later stages of European integration.[1143] Some of these tools were located at the level of primary law while others were located at the level of secondary law. Generally, the tools are arranged under four different pillars of the Union's operations: the fiscal pillar, the macroeconomic supervision pillar, the socioeconomic coordination pillar, and the financial solidarity pillar.[1144] Notable tools include the Stability and Growth Pact, which has preventive and corrective arms; the Treaty on Stability, Coordination and Governance in EMU;[1145] the Treaty on the Functioning of the EU, which sets thresholds that require government deficits to remain below 3% of gross domestic product (GDP) and public debt levels below 60% of GDP; the Stability and Growth Pact, which 'comprises a set of rules and procedures adopted in 1997 to strengthen the coordination of national fiscal and economic policies in the EU and the (…) the six-pack and two-pack legislative reforms: additional rules and procedures to strengthen the stability and growth pact, adopted in 2011 and 2013';[1146] the Broad Economic Policy Guidelines, the European Employment Strategy; the Lisbon Strategy; and the Social Open Method of Coordination.[1147]

Currently, the legal basis for the ES can be found in several acts. In addition to the treaty regulations defining the normative framework of economic governance[1148] (*inter alia* Art. 5 TFEU which refers to the coordination of national economic policies by the EU; Art. 121 TFEU, which declares the economic policies of Member States to be a subject of EU coordination; and Art. 136 TFEU, which strengthens

1142 Ibid.

1143 On the genesis and the evolution of economic governance since the establishing the Maastricht Treaty in 1992 see: Degryse, 2012, pp. 7–18.

1144 De Streel, 2013b, pp. 340–349; The author writes in another study: 'The first pillar relates to the multilateral monitoring of budgetary (the Stability and Growth Pact) and macroeconomic imbalances between Member States. The second pillar relates to the coordination of the socio-economic policies of Member States to stimulate growth and employment (in particular the Europe 2020 Strategy). The third pillar relates to the regulation and supervision of the banking and financial sector (in particular the Banking Union). The fourth pillar relates to crisis management and solidarity instruments in the event of jeopardy of the financial stability of a Member State whose currency is the euro (the European Stability Mechanism)'; De Streel, 2013a, p. 14.

1145 Delivorias, 2021, p. 1.

1146 Economic governance framework, European Council/Council of the European Union.

1147 This is mentioned in: Verdun and Zeitlin, 2018, pp. 138–139.

1148 See: De Streel, 2013a, p. 15.

coordination among Eurozone countries), the legal basis of the ES constitutes the acts adopted under the so-called 'six-pack', a package of six acts – five regulations and one directive – established in 2011 to reduce macroeconomic imbalances and ensure the proper functioning of national finances through preventive or corrective action.[1149] These acts define the implementation mechanism of the ES and its basic assumptions. Their provisions include, '(…) for example, the transmission to the European Commission of national reform programs and national stability programs as well as the issuing by the Commission of country-specific recommendations and the common timeline'.[1150]

Moreover, two additional acts comprise the so-called 'two-pack', which was introduced in 2013 with the intention of completing the '(…) budgetary surveillance cycle and further improving economic governance for the euro area'.[1151] 'The two-pack (…) represents the second step in building up the European Semester, as it mostly focuses on the second half of the financial year, and is addressed only to Eurozone countries' as far as it '(…) strengthens the fiscal and budgetary requirements for the States of the Euro area, for both the so-called preventive and corrective arms on excessive deficits and macroeconomic imbalances'.[1152]

B. The European Semester as a Part of the European Union's Social Policy

The ES is not only a tool for influencing economic matters, but also an instrument for shaping social policy in the EU. This profile is determined by the elements of such policies within program agendas, which concern various issues and shape various

1149 Regulation (EU) no 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Official Journal of the European Union L 306/1; Regulation (EU) no 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, Official Journal of the European Union L 306/8; Regulation (EU) no 1175/2011 of the European Parliament and of the COUNCIL of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Official Journal of the European Union L 306/12; Regulation (EU) no 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, Official Journal of the European Union L 306/25; Council Regulation (EU) no 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit, Official Journal of the European Union L 306/33; Council Directive 2011/85/eu of 8 November 2011 on requirements for budgetary frameworks of the Member States, Official Journal of the European Union L 306/41.

1150 Fasone, 2017.

1151 Two-Pack enters into force, completing budgetary surveillance cycle and further improving economic governance for the euro area, European Commission, Brussels, 27 May 2013 [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_457 (Accessed: 15 September 2023).

1152 Fasone, 2017.

aspects of social life. In particular, issues related to youth employment,[1153] poverty, social exclusion[1154] and, in recent years, climate protection and green transformation have been highlighted.[1155]

It should be emphasized that Member States use of the tool and the tool's resulting influence on these States social policies have evolved and intensified over the years'. This process was the result of growing ambitions among EU institutions to interfere in this sphere and of widespread criticism of the ES by researchers. Specifically, researchers have pointed out that the ES overly emphasized the importance of mechanisms for increasing the competitiveness and strength of European economies while marginalizing social issues, especially in the early days of the instrument's use.[1156] For example, Amandine Crespa analysed the trends emerging with the implementation of the ES process and concluded that 'With the reduction of deficits and cuts in public spending being the primary focus of the ES (and the six pack, the two pack, and the fiscal treaty) and the new broad framework for macroeconomic coordination, little is left of a social policy agenda. The achievement of EU social policy targets, such as the reduction of poverty, hardly appear realistic as Member States are rushing to enforce dramatic cuts to their own national social policy programs. Although stemming from intergovernmental talks, the decisions which have been made throughout the crisis and the new emerging institutional setting have ultimately reinforced the powers of the Commission (…), especially its most liberal components.[1157] However, at the same time, there has been no shortage of voices noticing positive changes in this area; in particular, these voices emphasise that the importance of social policies within the ES cannot be underestimated. Christophe Degryse, M. Jepsen, and P. Pochet accordingly pointed out that '(…) the three consecutive years of the "European Semester" (2011-2012-2013) have been shown, so far, that this is and the system is in progress. There are ongoing struggles among actors and conceptions, even if there is no doubt as to which are the dominant messages for the moment. There is a stronger normative direction than previously, aimed at

1153 See: Child and Youth Policy Is Cross-Sectoral Policy! Considering Young People in Economic and Fiscal Policy Instruments at EU Level. Position Paper by the Child and Youth Welfare Association – AGJ1 on the European Semester, Arbeitsgemeinschaft für Kinder- und Jugendhilfe, Board of the Child and Youth Welfare Association – AGJ, Berlin, 22/23 September 2022, p. 1.

1154 This is mentioned in, among other publications: the program document 'Europe 2020' adopted in 2010 and correlated with the European Semester Communication from the Commission Europe 2020 strategy for smart, sustainable and inclusive growth, Brussels, 3/03/2010, kom (2010) 2020 final version, p. 6. This announcement details 'A program for new skills and jobs'—a project to modernize labour markets and strengthen the position of citizens through the development of qualifications throughout life in order to increase the professional activity rate and better match demand and supply in the labour market, among other things, thanks to the mobility of the labor force. It also presents the 'European program against poverty'—a project to ensure social and territorial cohesion so that the benefits of economic growth and employment are widely available and the poor and socially excluded can live with dignity and actively participate in the life of society'.

1155 Pomykała and Raczyński, 2020, p. 8.

1156 See: Vanhercke et al., 2020, p. 9.

1157 Crespy and Menz, 2015, p. 756.

increasing the sensitivity of social policies to market forces'.[1158] A similar position was taken by Jonathan Zeitlin and Bart Vanhercke, who argued that '(…) since 2011, there has been a partial but progressive "socialization" of the content and procedures of the European Semester, in terms of an increasing emphasis on social objectives in the EU's priorities and CSRs; an intensification of social monitoring, multilateral surveillance, and peer review; and an enhanced role for social and employment policy actors, especially the EU Employment and Social Protection Committees (EMCO and SPC)'.[1159] Finally, this line of thinking was also presented by Sonja Bekker, who emphasized that

> (…) the introduction of the European Semester not only integrates policy fields by expecting member states to write the national reports for the Stability and Growth Pact and the Europe 2020 Strategy in joint cooperation. It also link separate coordination methods by introducing a joint evaluation of financial, economic, employment and social policies into one set of CSRs (…). Although the signs of mixing coordination methods and policy domains in such a far-reaching manner may be rather recent and still too vague, this section shows that EU documents contain interest in steering employment and social policies in a more forceful manner while also discussing the distinct dilemmas this brings along, especially regarding the autonomy of member states and national social partners. The ambiguity concerning which coordination method applies to what policy items has thus not been reduced by the economic governance initiatives.[1160]

Recalling these opinions, it is indeed difficult to question the fact that the role of the social factor was clearly growing during the use of the ES, which meant that it had an increasing influence on shaping the scope of activities. Given increasingly stronger trends in this direction, the predominance of economic goals over social ones in the ES's agenda was decreasing, and at the same time States' activities in this area were slowly shrinking. This trend was reflected in 'social' recommendations addressed to national authorities, the number of which gradually increased from year to year and covered an increasingly larger list of issues.[1161] Against this background, it was clear that the EU had strong aspirations to implement the social agenda within the ES and to enter the sphere of tasks previously reserved for States. This direction of activity was announced in the Commission Communication 'Europe 2020 – Strategy for smart, sustainable and inclusive growth', which was issued in 2010.[1162]

1158 Degryse, Jepsen and Pochet, 2013, p. 74.
1159 Zeitlin and Vanhercke, 2014, p. 13.
1160 Bekker, 2013, p. 9.
1161 Regarding the recommendations in question, see: Wronkowska, Rosiek and Witoń, 2021, p. 60.
1162 Communication from the Commission Europe 2020 'A strategy for smart, sustainable and inclusive growth', Brussels, 3/03/2010, COM(2010) 2020 final version.

C. The European Semester as a Tool for Disseminating the EU Concept of the Rule of Law in the Member States

The past use of the ES by EU institutions shows that it can also serve as an instrument to influence Member State functions with very loose or no connections to their economic or social policies. Although this work is not mentioned in any applicable EU document, it is easy to see a similar phenomenon in actual actions taken by EU institutions. It is clear that the ES procedure has a much more substantive scope than that which would result from the adopted EU documents and thus provides wider opportunities for putting pressure on national decision-makers.

In this regard, attention may be given to the EU's attempts to formulate assessments and suggestions that have been observed for several years (specifically, since 2019) regarding the issue of the rule of law in Member States – or, more exactly, the system of judicial authorities. The content of some documents (so-called 'specific national recommendations', which will be discussed in subsequent parts of this text) clearly shows that the competent EU bodies deem it appropriate to point out problems related to the rule of law in a given country and – as a result – emphasize expectations regarding the repair of the existing state of affairs. In this way, the ES becomes yet another procedure that allows the rule of law agenda to be imposed on national authorities (even though its intended purpose is economic and social). Notably, this takes place even though the applicable legal provisions, especially treaty provisions, do not provide for such an option *expressis verbis*. As one may assume, the activities undertaken within it are a manifestation of the political ambitions of the EU's centres of power rather than an expression of the strict application and implementation of legal regulations. For this reason, they must be combined with long-standing efforts at the Community level to consolidate and federalize the political system of the EU.

It should be emphasized that threads related to the rule of law appear in specific country recommendation actions addressed only to those countries where EU institutions identify problems in this area. This is shown by an analysis of the documents in question, which clearly indicates that the 'targets' of EU institutions are usually countries that have been previously subjected to other procedures aimed at strengthening the internal mechanisms of the rule of law. The main addressees of such recommendations are Hungary, Poland, Romania, and Bulgaria.

Undoubtedly, the most visible example in this respect is Hungary, which has already been the recipient of such comments in CSRs several times. When formulating them, the EC and the European Council have pointed to what they believe are problems with the rule of law in Hungary. They presented examples of specific legal solutions that raised doubts and that they believed weakened the mechanisms of the rule of law. Thus, referring to examples, the recommendation issued on 9 July 2019 (containing similar comments for the first time) includes a mention of institutional solutions regarding judicial independence:

> The independence, efficiency and quality of the justice system are crucial to attracting business and enabling economic growth. Checks and balances, which are crucial to ensuring judicial independence, are seen to be under further pressure within the ordinary courts system. The National Judicial Council faces increasing challenges in counter-balancing the powers of the President of the National Office for the Judiciary. Questions have been raised regarding the consequences of this for judicial independence. With regard to the Administrative Courts Law, it is noted that the government tabled a bill withdrawing the Act on the entry into force and transitional rules for the administrative courts on 30 May 2019.[1163]

A similar phrase was included in a similar way in the recommendation of 23 May 2022, which also touched upon issues related to judicial independence:

> The independence, efficiency and quality of the justice system are crucial to attracting business and enabling economic growth. Concerns regarding judicial independence persist. The National Judicial Council continues to face difficulties in counter-balancing the powers of the President of the National Office for the Judiciary. The rules on electing the President of the Supreme Court create risks of political influence over the top court of the country. The lack of transparency of the case allocation scheme does not allow parties to verify whether any undue discretion has been applied. Questions have been raised regarding the role of the Constitutional Court, composed of members elected by Parliament without the involvement of the judiciary, in reviewing judgments of the ordinary courts.[1164]

In turn, in the recommendation of 24 May 2023, he expressed a passus regarding the need to implement the so-called 'milestones' in the judicial area by the Hungarian state:

> (…) Due to its late adoption in December 2022, the implementation of Hungary's recovery and resilience plan has been significantly delayed. A swift and steady implementation of the plan would require the fulfilment of 27 milestones related to strengthening judicial independence and safeguarding the protection of the financial interests of the Union. No payment under the plan is possible until these milestones are fully and correctly implemented. Hungary's REPowerEU grant

1163 Council Recommendation of 9 July 2019 on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary (2019/C 301/17), p. 5.

1164 Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, Brussels, 23/5/2022 COM(2022) 614 final, (2022/C 334/17), p. 9.

> allocation amounts to EUR 701.6 million. Hungary plans to use the REPowerEU grant and additional loan on energy related investments.[1165]

Recommendations regarding Poland – a country that the EU has accused of violating the EU rule of law since 2017 in connection with the reforms of the judiciary carried out in 2017 and 2018 – are more reserved in this respect. The comments contained therein are limited to pointing out general problems perceived by the EU and do not present specific institutional solutions. For example, it is worth quoting the content of the recommendation of 9 July 2019, which states:

> (…) Guaranteeing the rule of law and the independence of the judiciary are also essential in this context. It is recalled that in December 2017, the Commission presented to the Council a reasoned proposal to determine that there is a clear risk of a serious breach by Poland of the rule of law. These concerns are the subject of a judgement and on-going procedures which are pending before the Court of Justice of the European Union. Legal certainty and trust in the quality and predictability of regulatory, tax and other policies and institutions are important factors for the investment environment.[1166]

We can also quote the content of the recommendation of 23 May 2022, which emphasizes that

> A stable and predictable business environment and a friendly investment climate play an important role in both the post-pandemic economic recovery and a sustainable economic growth over the medium to long term. The independence, efficiency and quality of the justice system are essential components in this respect. In Poland, the rule of law has deteriorated, and judicial independence remains a serious concern, as follows from several rulings of the Court of Justice of the European Union and the European Court of Human Rights. In addition, in 2021 the Commission launched an infringement procedure against Poland following certain rulings from the Polish Constitutional Tribunal, which challenged notably the primacy of EU law, putting at risk the functioning of the Polish and the Union's legal order.[1167]

Finally, it is worth mentioning the recommendation of 25 May 2023, which references the latest case law of the Court of Justice of the European Union and the

1165 Recommendation for a Council Recommendation on the 2023 National Reform Programme of Hungary and delivering a Council opinion on the 2023 Convergence Programme of Hungary, Brussels, 24.5.2023 COM(2023) 617 final, p. 10.

1166 Council Recommendation of 9 July 2019 on the 2019 National Reform Programme of Poland and delivering a Council opinion on the 2019. Convergence Programme of Poland, (2019/C 301/21), p. 5.

1167 Council Recommendation on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland, Brussels, 23.5.2022, COM(2022) 622 final, p. 9.

European Court of Human Rights in the field of reforms of the Polish judiciary. According to this recommendation:

> The independence, efficiency and quality of the justice system are essential for a stable and predictable business environment as well as a friendly investment climate. These play an important role in achieving sustainable economic growth over the medium to long term. The investment climate in Poland continues to be impaired by serious concerns related to the rule of law, including the independence of the judiciary, as identified in rulings by the Court of Justice of the European Union and the European Court of Human Rights. Furthermore, on 15 February 2023, the Commission referred Poland to the Court of Justice for violations of EU law by the Polish Constitutional Tribunal and its case law, violations that particularly challenge the primacy of EU law.[1168]

Another case, which deserves to be stressed, involves the recommendations made to Romania. These recommendations contain a number of critical comments from EU institutions relating to Romanian legislation in the field of the functioning of the judiciary. For example, the recommendation of 9 July 2019 includes a long passage devoted to Romania's compliance with the standards of the EU rule of law. Its authors write:

> Developments throughout the past year have raised concerns with regard to the rule of law and strengthened previous serious concerns regarding the irreversibility and sustainability of Romania's earlier progress on reforming its judicial system and tackling high-level corruption. These issues are the subject of monitoring under the Cooperation and Verification Mechanism. Amendments to three justice laws are now in force and contain a number of measures weakening the legal guarantees for judicial independence. These are likely to undermine both the effectiveness of daily work by judges and prosecutors and public confidence in the judiciary. Pressure is being put on judicial institutions and on individual magistrates, including by setting up a specialised prosecution section for crimes allegedly committed by magistrates. Ongoing steps to amend the criminal code and the criminal procedure code would have a negative impact on the effectiveness of criminal investigations and trials and also reduce the scope of corruption as an offence. Further concerns relate to the processes for dismissing and appointing high-level magistrates. Recent announcements suggest that measures related to the reform of the justice system may be reconsidered.[1169]

1168 Recommendation for a Council Recommendation on the 2023 National Reform Programme of Poland and delivering a Council opinion on the 2023 Convergence Programme of Poland, SWD(2023) 621 final, Brussels, 24.5.2023 COM(2023) 621 final, p. 9.

1169 Council Recommendation of 9 July 2019 on the 2019 National Reform Programme of Romania and delivering a Council opinion on the 2019. Convergence Programme of Romania, (2019/C 301/23), p. 7.

Another example is the recommendation of 12 July, 2022. According to this text:

> By strengthening the independence and increasing the efficiency of the judiciary, improving access to justice, and stepping up the fight against corruption, the recovery and resilience plan aims to address significant issues related to the rule of law in Romania in accordance with the relevant case law of the Court of Justice of the European Union and taking into account recommendations made in the Cooperation and Verification Mechanism reports, the reports by the Group of States against Corruption (GRECO), the opinions of the Venice Commission, and the Rule of Law Reports. Key reforms on minimum wage setting and minimum inclusion income, on strengthening corporate governance of state-owned enterprises and on social dialogue also address long-standing country-specific recommendations.[1170]

There is only one mention of the judiciary in the existing recommendations for Bulgaria. Specifically, this mention can be found in the recommendation of 12 July 2022, which generally talks about strengthening the Bulgarian judicial system:

> In addition, the plan contains far-reaching measures to improve the efficiency of the public administration and justice system, prevent, detect and correct corruption, improve the business environment, Foster investment, and improve the research and innovation system. This will also contribute to supporting Bulgaria in addressing the concerns and observations under the Rule of Law Mechanism.[1171]

D. The European Semester as a Factor Strengthening the Federalisation Tendencies of the European Union System

In the analysis devoted to the ES, we cannot lose sight of the fact that this procedure should be perceived as one of the factors contributing to the federalization of the EU system. Becoming aware of this fact allows us to look at the ES from an appropriately broad perspective and thus obtain a full picture of its political and systemic importance. It is no secret that the ES, which expands the scope of economic supervision of EU institutions,[1172] has a negative impact on the position of Member States in relation to the Union and changes the balance of power established in the Treaties. Against the background of this tendency, the triumph of thinking in terms

1170 Council Recommendation of 12 July 2022 on the 2022 National Reform Programme of Romania and delivering a Council opinion on the 2022. Convergence Programme of Romania, (2022/C 334/23), p. 5.

1171 Council Recommendation of 12 July 2022 on the 2022 National Reform Programme of Bulgaria and delivering a Council opinion on the 2022 Convergence Programme of Bulgaria, (2022/C 334/02), p. 6.

1172 This extension of authority actually means a transfer of supervisory competences. For a counter to this opinion, see: Crum, 2018, p. 269.

of the primacy of intergovernmental activities over national ones[1173] is clearly visible, enhancing the political power of the EU and significantly weakening the political integrity of the national bodies responsible for conducting economic state policy.

When recognizing this dimension of impact on the European integration process of the discussed procedure, we should, of course, remember that efforts to give the Union the character of a federal system have been undertaken since its very beginnings and concern various areas of its functioning. Supporters of this direction use a number of different instruments for this purpose with the goal of successively integrating subsequent areas of interstate cooperation and relatedly expanding the powers of EU institutions – both through and outside of treaties. In this way, the Union created by the States is being united sectorally and demonstrating an increasingly integrated formula. The result, of course, is the growing subjectivity of Brussels – this became evident first in the EC and European Council but is now approaching a point at which the centre of gravity of power will shift to the central EU institutions.[1174]

In the case of the ES, this phenomenon is made possible by the operating mechanism adopted under this procedure, which puts EU bodies in a privileged position. Although it is based on the assumption of '(…) close policy dialogue between EU institutions and Member States, including drafting, approving and adopting country reports, recommendations and National Reform Programs (NRPs)',[1175] it actually shifts '(…) the balance substantially towards the European Commission in an attempt to strengthen its mandate as a supervisory and corrective agent, particularly in the eurozone'.[1176] Therefore, we are dealing here with another version of an increase in the power of EU institutions within the framework of economic governance and thus with a further element of deepening the process of the federalization of the Union. Let us recall that also earlier instruments in the field of economic governance that these developments, which were

> (…) intergovernmental means, with the European Council playing a central role (the so-called Union method) through measures such as intergovernmental treaties (cf. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) and informal intergovernmental bargains (notably between Germany and France) [were] (…) seen as giving rise to an executive-dominated federalism that is quite impervious to parliamentary oversight and control.[1177]

Such a system of institutional dependencies gives the EU additional ways of putting pressure on national authorities. While the EU may strive to impose its own concepts and solutions in this context, its agency in this respect is limited due to the

1173 Bickerton, Hodson and Puetter, 2015, pp. 703–722.
1174 I will not consider here what EU federalism is and what it could be. The doubts surrounding this issue are widely known. See. Fabbrini, 2004, p. 3.
1175 Zillmer et al., 2023, p. 6.
1176 Schweiger, 2021, p. 125.
1177 Habermas, 2013, pp. 614–630; Crum, 2013, pp. 614–630.

non-binding nature of the recommendations; however, it cannot be assumed that it does not exist at all. Numerous studies show that Member States implement the instruments used at the EU level to a certain extent (i.e. CSRs).[1178] If this is the case, it is probably impossible to talk about maintaining full national sovereignty in the field of economic policy.[1179] However, on the contrary, the statement about strong interference in this sovereignty is justified. This is especially true given that these recommendations have no clearly defined subject boundaries and can relate to basically any issue in the area of economic and social policy.

Sasha Garben writes eloquently about this – she is not fooled by the non-binding nature of the recommendations in question. Specifically, Garben states:

> The CSRs are, technically speaking, not legally binding. Nevertheless, they are issued in the context of a structured framework-work, which features an ultimate possibility of financial sanctions in case of non-compliance. While sanctions are only possible under the macroeconomic imbalance procedure and excessive deficit procedure, the yearly package of CSRs is presented integrally and it is difficult to specify the legal basis of each CSR, meaning that all CSRs operate under the shadow official sanctions. [Furthermore], soft norms construct narrative and influence institutional actor's behavior in subtler ways.

She further claims:

> The CSRs, adopted by the European Council on the proposal of the Commission, are non-binding and thus formally leave the final decision to the national level. Nevertheless, the political pressure they exert on national standards should not be underestimated, especially as they take place in a structured framework with an eventual possibility for sanctions. Admittedly, CSRs are followed only in a minority of cases perhaps because national parliaments can indeed refuse to legally implement them. Nevertheless, governments can play into a lack of transparency and sense of urgency to (selectively) push through the implementation of the reforms, arguing that 'international obligations' have to be met, perhaps pointing at the threat of sanctions or reduced EU-level funding.[1180]

It is clear from this that the mechanism of the ES leads to a profound distortion of the decision-making mechanisms regulated in national constitutions and thus limits the ability of individual Member States to act independently. Therefore, its use has clearly harmful constitutional consequences and is another element that allows for the

1178 Wronkowska, Rosiek and Witoń, 2021, pp. 67–70.

1179 The problem of limiting the sovereignty of Member States resulting from the adoption of economic governance instruments was noticed in science in the past, even before the introduction of the European Semester: Deroose, Hodson and Kuhlmann, 2005, p. 1.

1180 Garber, 2017, p. 217.

deregulation and weakening of national constitutional systems. Interestingly, however, it in no way means that EU institutions are responsible for proposed economic and social policies; on the contrary, it is related to the responsibility of domestic institutions. The situation cannot be otherwise since the ES does not combine any means of democratic control implemented in relation to the EU and is based solely on traditional procedures operating at the national level, such as democratic elections and government procedures of parliamentary control. In such conditions, citizens of a given country cannot react in any way to the negative consequences of the EU's actions in this area.

In light of the above comments, it is clearly visible that the creators of the ES relied on the authority of the institutions, especially the EC, recognizing their full capabilities to verify national policies and, in this way, force Member States to listen. At the same time, when specifying the scope of permissible means of exerting influence by these institutions, they adopted the formula of a multi-stage dialogue as the basis for action. In this formula, the views and opinions expressed at both the central and domestic levels of EU decision-making clash. In such a situation, there is no possibility for the central authority to directly and unlimitedly impose its will. At most there is an opportunity to partially fill national policies with the content of the recommendations submitted from year to year. The advantage of EU institutions is therefore evolving in this area, thus gradually creating space for the EU to interfere more deeply in domestic affairs. This provides a good starting point for further and bolder instruments of economic and social integration for the entire community – especially those that may serve to equalize the legal situation in the field of economics and taxes across Member States.[1181]

Such a mechanism, very typical of the process of systemic consolidation of the Union, clearly fits into the pro-federal ambitions of EU decision-makers. In fact, there can be no doubt that its application is clearly related to aspirations to transform the EU into a federal structure. This is certainly a classic tool for EU institutions seeking to realise this type of transformation.

The specificity of the ES indicated here allows it to be included in the group of instruments that create conditions for building three specific types of federalism. First: 'cooperative federalism'. This type of federalism is characterised by the tendency of central and local decision-making centres to undertake multidimensional, effective cooperation. In this case, there is a relationship between the federal and state governments in which both '(…) have interrelated policy goals and administrative duties'.[1182] Notably, cooperative federalism clearly contrasts with '(…) the model of dual federalism, which maintains that the national and state governments have distinct and separate government functions'.[1183] This type of federalism remains determined by

1181 Solutions for equalization are obvious in federal systems: see. Börzel, 2003, p. 5.

1182 See: Mary Hallock Morris, Definition in the encyclopedia: Marble Cake Federalism, Center for the Study of Federalism.

1183 See: ibid. Robert Schütze says that the cooperative model of federalism was being created intentionally for years. In his opinion: 'In the last twenty years, the European Union has even constitutionalised the philosophy of cooperative federalism by means of two novel constitutional devises: the principle of subsidiarity and complementary competences'. Schütze, 2009.

> (…) a functional division of powers among different levels of government: while the central level makes the laws, the federal units are responsible for implementing them. In this system, the vast majority of competences are 'concurrent' or 'shared'. This functional division of labor requires a strong representation of the interests of the federal units at the central level, not only in order to ensure an efficient implementation of federal policies, but also in order to prevent federal units from being reduced to mere 'administrative agents' of the federal government.[1184]

Second: so-called 'hidden federalism'. This style is characterised by a lack of pro-federalist intentions by the elites promoting it and a lack of citizen participation in the process of its creation. As noted in the literature on the subject, this style of federalism is '(…) developed as a process, is driven and dominated by elites in the absence of a demos and is legitimized by the system's output – economic growth, peace, and stability'.[1185] Finally, there is also 'asymmetric federalism'. This style of federalism leads to an asymmetry of power between high-importance and peripheral countries in the EU. This issue is well explained by Tomasz Grosse, who notes the following:

> Because European institutions are increasingly subject to the will of the largest euro zone countries, a specific hierarchy of power of individual member states is developing. Larger countries have not only a growing political influence in Europe, but also increasingly strong temptations to use European instruments to influence the economic situation and public policies pursued in weaker or peripheral countries.[1186]

I.5.4 The Interpretation of the Rule of Law in the Conditionality Regulation

Conditionality as a policy tool of the European Union (EU), was primarily developed in the context of its external policy. Originally, it referred to an expected behaviour by non-EU members as a condition to gain promised benefits from the EU, especially financial ones.[1187] Human rights conditionality has been gradually applied and developed since the 1990s, primarily in the contexts of international trade agreements and humanitarian aid to third countries.[1188] The roots of human rights

1184 Börzel, 2003, p. 5.
1185 Kovacevic, 2017, p. 15.
1186 Grosse, 2013.
1187 Viţă, 2017, pp. 116–117.
1188 See: Bartels, 2005, pp. 7–31.

conditionality reach back to the Lomé Conventions, one of the most significant EU instruments of development cooperation with States in Africa, the Caribbean, and the Pacific. Lomé IV, signed in 1989 and covering the period between 1990 and 1999, introduced the first human rights clause in the main text of the Convention. The addition of this clause explicitly linked human rights and development and situated the Convention as contributing to the promotion of human rights.[1189]

The politicised nature of this practice came to the surface during the negotiations of the Comprehensive Economic and Trade Agreement (CETA). During these negotiations, Canada, a country with a recognised human rights record, unsuccessfully opposed the inclusion of a conditionality clause, arguing that it was not necessary to include binding human rights obligations in a trade agreement. Nevertheless, due to the high political relevance of the trade agreement for Canada and, presumably, the strong role of the European Parliament (EP) in the negotiation process, the conditionality clause was included in the CETA.[1190] While the EU argued that the absence of such a clause would have created a risky precedent for future trade agreements with countries like China or India,[1191] scholars pointed out that human rights concerns had never been breaking points in trade agreement negotiations, including with countries less compliant with fundamental rights than Canada.[1192] The EU's human rights conditionality in its external relations could be regarded as an example of how EU institutions, particularly the EP, contribute to the expanding politicisation of issues without strictly political origins, such as international trade. Notably, primary sources contain few provisions that expressly serve as a foundation for developing such strict conditionality: for instance, Arts. 3(5)[1193] and 21(1) of the Treaty of the European Union (TEU)[1194] lay down the fundaments of the EU's external actions, yet they may not create explicit obligations to formulate a coherent policy of human rights conditionality in its external trade relations.

1189 Arts and Byron, 1997, p. 83.

1190 See: Meissner and McKenzie, 2019, pp. 1273–1291.

1191 European Parliamentary Research Service, 2019, pp. 9–10.

1192 Van den Putte, de Ville and Orbie, 2015, p. 64.

1193 Art. 3(5) TEU reads as follows: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

1194 Art. 21(1) TEU reads as follows: '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, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations'.

Furthermore, the EU developed a different set of conditionalities for European countries wishing to become Member States, the so-called 'Copenhagen criteria'.[1195] These criteria include economic, legal, and institutional guarantees of respect for the EU's core values. The conditions laid down at the Copenhagen European Council in 1993 require that the candidate country must achieve, among other criteria, 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.[1196] Although EU accession has been primarily based on the Copenhagen criteria since its establishment in 1993, EU institutions have not offered a precise definition of the rule of law itself. In light of the development of the EU's rule of law toolbox, as also addressed in this volume, it may be concluded that there is a growing emphasis on the requirement of respect for the rule of law for the current candidate States, and, consequently, that these States may face more elaborate rule-of-law conditions for accession than States who gained membership in the 1990s and 2000s.

This tendency could be observed in the development of the Instrument for Pre-accession Assistance (IPA), through which the EU has been supporting reforms in the enlargement region with financial and technical assistance since 2007. While IPA for the period 2007–13 was designed to provide financial assistance to candidate countries and potential candidates through five channels, namely transition assistance and institution building, cross-border cooperation, regional development, human resource development, and rural development,[1197] IPA II for the period 2014–20 introduced an explicit focus on the rule of law. Annex II of the IPA II Regulation[1198] mentions the rule of law as one of the thematic priorities, and provides that interventions in this area shall aim at establishing independent, accountable and efficient judicial systems, including transparent and merit-based recruitment, evaluation and promotion systems and effective disciplinary procedures in cases of wrongdoing; ensuring the establishment of robust systems to protect the borders, manage migration flows and provide asylum to those in need; developing effective tools to prevent and fight organised crime and corruption; promoting and protecting

1195 The 'Copenhagen criteria', agreed upon by the European Council in 1993, encompasses the accession criteria with which is a State required to comply in order to become a Member of the Union. The criteria has three pillars: (I) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (II) the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU; and (III) the ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union. See: Copenhagen European Council, 1993, 7 A iii.

1196 Copenhagen European Council, 1993, 7 A iii.

1197 Overview – Instrument for Pre-accession Assistance [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/overview-instrument-pre-accession-assistance_en (Accessed: 27 December 2023).

1198 Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II). The beneficiaries of IPA II are listed in Annex I of the Regulation, namely Albania, Bosnia and Herzegovina, Iceland, Kosovo, Montenegro, Serbia, Turkey, and the former Yugoslav Republic of Macedonia.

human rights, rights of persons belonging to minorities, and fundamental freedoms, including freedom of the media.[1199] Article 14 of IPA II also established the performance reward mechanism, which linked the financial benefits to the progress made in the thematic priorities for assistance, also including the rule of law. The currently applicable pre-accession framework, IPA III for the period 2021–27 significantly built on the thematic priorities set out in IPA II, and elaborated on the required interventions in the area of the rule of law, particularly under the requirement to develop effective tools to prevent and fight organised crime, supporting engagement with the EU on counter-terrorism and radicalisation, and promoting and protecting human rights, also including the rights of the child, and fundamental freedoms, including freedom of expression, freedom of assembly and association and data protection.[1200] Thus, it could be concluded that the rule of law enforcement has become a crucial element in the EU enlargement procedure in the past decade, as the allocation of pre-accession funds to the beneficiaries is subordinated to the performance in the field of the rule of law. However, the performance-based approach also implies that the rule of law is also used for political and economic purposes, and a potential sanction is envisaged for non-compliance with these requirements in the form of not benefitting from these pre-accession funds.

Furthermore, apart from using conditionality in their external relations, EU institutions have also increasingly relied on conditionality tools in their internal relations with Member States, particularly regarding EU spending conditionality. The EU's Multiannual Financial Framework (MFF) for the 2014–20 period introduced *ex-ante* conditionality and *ex-post* macroeconomic conditionality, which Member States had to fulfil to access EU funding. Ex-ante conditionalities were designed as prerequisites for the efficient use of EU funding and had to be fulfilled before receiving the cohesion funds. Such conditionalities required, for instance, that country-specific recommendations under the European Semester are met at an early stage of programme implementation.[1201]

Explicit demands for respect for the rule of law as a precondition for the receipt of EU funds arose in connection with the adoption of the MFF 2021–27.[1202] In parallel with the negotiation process, the possibility emerged of developing a new instrument for the suspension of EU funds in the case of problems related to the rule of law in a

1199 Ibid., Annex II (b).

1200 Regulation (EU) 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession assistance (IPA III), Annex II (a).

1201 See: Heinemann, 2018.

1202 During the negotiation of the MFF 2021–27, Germany and Italy explicitly proposed linking EU funds to the respect for the rule of law in the MFF in their position papers for the cohesion policy. See: Federal Government of Germany, 2017 [Online]. Available at: https://www.bmwk.de/Redaktion/EN/Downloads/S-T/stellungnahme-bund-laneder-kohaesionspolitik.pdf?_blob=publicationFile&v=2 (Accessed: 27 December 2023); Italian Government, 2017 [Online]. Available at: https://www.ifelcampania.it/il-quadro-finanziario-pluriennale-uno-strumento-strategico-al-servizio-degli-obiettivi-dellunione-europea/ (Accessed: 27 December 2023). Such demands were also articulated by scholars; see: Kochenov and Pech, 2019.

Member State. Ex-ante conditionalities have been replaced by the so-called 'enabling conditions', with a stronger emphasis on strategic and planning frameworks. There are four horizontal enabling conditions in the areas of public procurement, state aid, the application of the EU Charter for Fundamental Rights, and the implementation of the United Nations Convention on Persons with Disabilities;[1203] and sixteen thematic enabling conditions linked to a specific objective.[1204] The fulfilment of these conditions is a prerequisite to access funds under MFF 2021–27, as, in the absence of compliance, the EU may suspend the payments for the Member State.[1205] Therefore, it could be seen that conditionality requirements significantly strengthened since 2014, and non-economic factors, including the rule of law, increasingly play a crucial role in the disbursement of EU funds.[1206]

Against this background, the concept of the conditionality mechanism as a tool to protect the EU's budget was proposed by the European Commission in 2018 in the Proposal for the Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States ('the Proposal').[1207] According to the Explanatory Memorandum of the Proposal, the EU should be allowed to adopt appropriate measures in order to protect its financial interests from the risk of financial loss due to generalised deficiencies regarding the rule of law in a Member State. The Proposal reflects the ambiguity in the goal of the new instrument, that is, whether it was introduced for the protection of the EU budget and the sound financial management of EU resources or rather for ensuring respect for the rule of law.[1208] While the Commission justified the introduction of the new mechanism with the aim of taking action to protect the rule of law,[1209] it has to be noted that the EU has limited competencies in the field of the rule of law, with the sole exception of the Art. 7 TEU procedure. The question of the Commission's competence in supervising the rule of law in a Member State first arose in connection with the establishment of the rule of law framework in 2014,[1210] which was intended to complement the EU's instruments for monitoring the rule of law in Member States, especially the Art. 7 procedure. The Commission's competence in further developing or amending the Art. 7 procedure received criticism from the Legal Service of the Council of the EU, which concluded that

1203 Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, Annex III.
1204 Ibid., Annex IV.
1205 Ibid., Recital 8.
1206 See: Kölling, 2022.
1207 European Commission, 2018.
1208 Baraggia and Bonelli, 2022, p. 134.
1209 European Commission, 2018, Reasons and objectives.
1210 See: European Commission, 2014.

> there was no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law in the Member States, addition to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Where the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis.[1211]

In the absence of competence to supervise the rule of law, the Commission found the legal basis for the establishment of the conditionality mechanism in Art. 322(1)(a) TFEU, which allows the Parliament and the Council to adopt 'the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts'.[1212] The Opinion of the Legal Service of the Council also emphasised its findings in the context of the conditionality mechanism before its adoption and affirmed that secondary legislation may not amend, supplement, or have the effect of circumventing the Art. 7 procedure.[1213] The questions of legal basis and the new mechanism's compatibility with the Art. 7 procedure were tackled by introducing the 'direct link' criterion,[1214] as requested by the Legal Service of the Council: according to the abovementioned Opinion, the Commission must establish a sufficiently direct link between a potential infringement of the rule of law and the risk for the specific operation for which financing is suspended.[1215]

Furthermore, the Legal Service also pointed out that the Proposal operates with a vague concept of the rule of law, which may be problematic for establishing the direct link with the financial interests of the Union.[1216] In Art. 2(a) of the Proposal, 'rule of law' refers to the Union value enshrined in Art. 2 TEU, which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; the prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including the protection of fundamental rights; the separation of powers; and equality before the law. Art. 2(b) provides that 'generalised deficiency as regards the rule of law' means a widespread or recurrent practice, omission, or measure by public authorities which affects the rule of law.

An exemplificative list of what may be considered such generalised deficiencies is given in Art. 3 under the title 'Measures'. These are, inter alia, endangering the

1211 Council of the European Union, 2014, 24. See also: Kochenov and Pech, 2015a, p. 525.

1212 European Commission, 2018, Legal basis. It is worth mentioning that the legal basis of the conditionality mechanism in Art. 322(1)(a) TFEU was also contested in case C-156/21, addressed further in this volume in the discussion of the control mechanisms of the conditionality mechanism. See: *Hungary v European Parliament and Council of the European Union*, Case C-156/21.

1213 Council of the European Union, 2018, 13–14.

1214 Baraggia and Bonelli, 2022, p. 147.

1215 Council of the European Union, 2018, 24.

1216 Council of the European Union, 2018, 26–27.

independence of judiciary; failing to prevent, correct, and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities; withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest; and limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, failing to implement judgments, or limiting the effective investigation, prosecution, or sanctioning of breaches of law.

During the first reading of the Proposal in the EP, which produced the EP legislative resolution of 4 April 2019, the concept of generalised deficiencies was somewhat amended with further examples. First, the content of 'endangering the independence of judiciary' was elaborated with examples, such as setting limitations on the ability to exercise judicial functions autonomously by externally intervening in guarantees of independence, constraining judgment under external order, arbitrarily revising rules on the appointment or terms of service of judicial personnel, influencing judicial staff in any way that jeopardises their impartiality, or interfering with the independence of attorneyship.[1217] In addition, two more examples of 'general deficiencies' were introduced; namely: endangering the administrative capacity of a Member State to respect the obligations of Union membership, including the capacity to effectively implement the rules, standards, and policies that make up the body of Union law, and measures that weaken the protection of confidential communication between lawyer and client.[1218] These amendment proposals, however, were not taken into consideration for the adoption of the final text of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget ('the Regulation' or 'the Conditionality Regulation').[1219]

The Regulation operates with the same definition of the rule of law as the Proposal – the Union value enshrined in Art. 2 TEU[1220] – but leaves the concept of the 'generalised deficiency as regards the rule of law', which does not appear in the text of the adopted Regulation. The missing reference to the generalised deficiency at the same time implies that such systemic or common conduct of public authorities is not required for the initiation of the conditionality mechanism. Alternatively, the elements of the definition of the generalised deficiency appear in Recital 15 of the Regulation as a more serious breach of the rule of law in comparison to the individual

1217 European Parliament, 2019, Art. 2a.

1218 European Parliament, 2019, Art. 2a (a), (d) and (e).

1219 Regulation (EU, Euratom) 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. The Regulation was adopted on 16 December 2020 and entered into force on 1 January 2021.

1220 Regulation 2020/2092, Art. 2 (a): '"the rule of law" refers to the Union value enshrined in Art. 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 Art. 2 TEU'.

breaches of the principles of the rule of law.[1221] The notion of individual breaches is not mentioned in the Proposal, nor is its content defined in the Regulation, which creates significant legal uncertainty about the conditions for applying the conditionality mechanism. The change in terminology from 'generalised deficiencies as regards the rule of law' to 'breaches of the principles of the rule of law' was introduced during the first reading of the legislative procedure of adopting the Conditionality Regulation as a result of the political agreement between the EP and the Council on 5 November 2020. This change was also supported by the Commission, which justified it by clarifying that the mechanism may also be used to address systemic breaches that are widespread or due to recurrent practices or omissions by public authorities or due to general measures.[1222]

Hence, it could be concluded that the adopted Regulation allows for the application of the conditionality mechanism even in the event of an individual breach of the rule of law, yet, the scope of the mechanism was extended in order to be suitable to address systemic breaches as well.[1223] This change, however, is not merely a shift in terminology; it could also be regarded as a shift in the focus of the entire mechanism, given that the original intent of the Proposal was to address the systemic deficiencies of the functioning of the rule of law that could be characterised as general, structural, or essential, excluding isolated violations of fundamental rights or individual miscarriages of justice.[1224] Furthermore, the examples of 'generalised deficiencies' provided in Art. 3 of the Proposal are also listed in Art. 3 of the Regulation under the title 'Breaches of the principles of the rule of law'. This change is not justified in the preparatory documents, yet it is crucial for understanding the EU lawmaker's intention, considering the fact that such breaches under the Regulation encompass exactly the same factors as 'generalised deficiencies as regards the rule of law' under the Proposal; namely: endangering the independence of judiciary; failing to prevent, correct, and sanction arbitrary or unlawful decisions by public authorities; and limiting the availability and effectiveness of legal remedies. In the authors' view, this fundamental change is symbolic and implies the EU's intention to open the door for an interpretation that allows for sanctioning individual actions rather than only generalised practices, as initially envisioned by the Proposal. On the other hand, the new terminology may also suggest that the threshold of launching the conditionality mechanism shall presuppose a breach of the rule of law by the Member State and not a mere deficiency that is less tangible than an existing breach.

1221 'Breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities'. See: Regulation 2020/2092, Recital 15.

1222 European Commission, 2020, 3.

1223 Łacny, 2021a, p. 89.

1224 von Bogdandy, 2019, pp. 15–17.

The Regulation does not offer a coherent system of understanding the rule of law and the breaches thereof. First, as set out in Art. 2(a), the Regulation understands the concept of rule of law as enshrined in Art. 2 TEU. However, the interpretation of the rule of law fundamentally differs in the Member (and former Member) States: the English concept of *rule of law*, the German *Rechtstaat* and the French *État de droit* are illustrative examples of the different perceptions of the concept.[1225] Nevertheless, the Court of Justice of the European Union ('the CJEU') attempts the interpretation of the rule of law in the context of the EU, which, according to László Blutman, shall develop a 'minimalist concept' of the rule of law, the content of which could be generally recognised among the Member States.[1226] In line with the case law of the CJEU and Blutman's categorisation, such cornerstones of the rule of law in EU law may include legality, legal certainty, the prohibition of the arbitrary use of executive power, the independence and impartiality of the judiciary, effective judicial remedies, equality before the law, and the separation of powers.[1227]

Second, considering the vagueness of the content of the rule of law based on the case law of the CJEU, it is equally – if not more – difficult to determine what could be regarded as its breach(es). In the absence of a generally accepted understanding of the rule of law, explicitly naming its breaches may create inconsistency. The Regulation does not provide a holistic approach to determining the threshold of the breach(es) that would indicate whether an individual violation of one of the principles of the rule of law or a violation of more principles of a lesser extent would constitute a breach of the rule of law. In addition, if more principles are violated, further clarification is needed to objectively compare such violations, which also raises the question of to what extent such isolated cases could be assessed jointly as 'breaches of the principles of the rule of law'.

Notwithstanding the problems of conceptual delineation, in Art. 4, the Regulation provides certain specific examples of breaches that affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union. These include, inter alia, (a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures; (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems; (c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption, or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union; (d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b), and (c);

1225 For an overview of the interpretation of the above concepts, see Szaniszló, 2017, pp. 421–434.
1226 Blutman, 2021, pp. 261–270.
1227 Ibid.

(e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or administrative authorities; (f) the recovery of funds unduly paid; (g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation; and (h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.[1228]

It shall be noted that the EP proposed further areas that may pose risks to the financial interests of the Union; in particular, these areas concerned the breach of the Copenhagen criteria and fundamental rights.[1229] These amendment proposals are embedded in the discourse labelled the 'Copenhagen dilemma', which refers to the lack of competencies with which to monitor compatibility with accession criteria once a State has become an EU Member.[1230] In addition to Art. 49 TEU, which incorporated the Copenhagen criteria, the expectation to continue to abide by the accession criteria also stems from Art. 2 of TEU (providing that the values, including the rule of law and respect for human rights, are common to the Member States) and the non-regression principle recently laid down by the CJEU.[1231] Undoubtedly, Member States should continue to comply with the Copenhagen criteria after their accession to the EU; however, the mechanisms and consequences differ significantly for pre- and post-accession compliance. In the case of pre-accession assessment of compliance with the Copenhagen criteria, the EU has sophisticated procedures and relevant practical experience,[1232] with the consequence of admission or non-admission to the Union. On the other hand, there is no clear enforcement mechanism for the accession criteria once a State becomes a Member of the EU, especially not any hard legal mechanism with negative financial impacts for the State. In light of the amendment proposal, the EP presumably tried to extend the scope of the conditionality mechanism to post-accession control of the Copenhagen criteria.

Notwithstanding the fact that the *expressis verbis* proposal to take into account the criteria to identify deficiencies of the rule of law was not included in the Regulation, it could be concluded that the conditionality mechanism also serves as a tool

1228 Regulation 2020/2092, Art. 4 (2).

1229 European Parliament, 2019, Recital 12. See also: von Bogdandy and Łacny, 2020, p. 8.

1230 Mader, 2019, pp. 137–138.

1231 See: *Repubblika v Il-Prim Ministru*, Case C-896/19.

1232 It should be noted that the European Commission, which played a major role in helping Central and Eastern European countries prepare for EU membership, did not clarify its understanding of the rule of law in the context of the Copenhagen political criteria during the preparation period. It was only with the 2014 Rule of Law Framework that the Commission provided some understanding of the rule of law. In light of this, it seems contradictory that the EU started to enforce the rule of law nearly a decade after the 'Big Bang enlargement', without clearly defining its understanding of the rule of law before this enlargement. See: Janse, 2019, pp. 43–65.

for post-accession control in an implicit manner: Recitals 4 and 5 of the Regulation explicitly refer to the Copenhagen criteria and obligate Member States to share the common values of the Union, as stated in Art. 2 of the TEU. The influence of Parliament is clear in this regard, as the Commission's original proposal did not contain any reference to post-accession compatibility. In the authors' view, channelling the Copenhagen dilemma into the conditionality mechanism raises several problems. First, Art. 49 of the TEU laid down the accession criteria as agreed upon by the Copenhagen European Council in 1993, but it did not provide follow-up mechanisms to ensure post-accession satisfaction of the criteria. The problem is that incorporating the accession criteria into an EU treaty requires ratification from each Member State; however, there are no unanimously determined measures for enforcing the criteria on States after accession. Therefore, it would be logical to settle this issue with a primary law that requires unanimous support from all Member States. The only enforceable mechanism provided in primary law is the procedure set out in Art. 7 TEU, however, it only envisages sanctions for one pillar of the Copenhagen criteria – the values referred to in Art. 2 and, thus, the political conditions – and not the entirety of the accession criteria; consequently, this measure cannot be regarded as a post-accession assessment tool. Furthermore, the Regulation does not elaborate on the cause-effect relation between the respect for the Copenhagen criteria and the protection of the Union budget, especially considering the fact that the conditionality mechanism focuses on the political criteria (i.e. the rule of law) and not the economic or institutional aspects of the accession criteria. However, the rule of law should also apply to the EU itself and not only to Member States. Notably, regulating pre-accession criteria in primary law and their post-accession enforcement in secondary law leads to a significant imbalance – Member States are no longer entitled to make decisions on the latter issue; rather, control seems to be vested in EU institutions in the absence of the delegation of this power by Member States.

The second proposal concerning the protection of fundamental rights also raises questions from the rule-of-law point of view. Although the retrospectivity of regulating the protection of fundamental rights in the EU has also been subject to criticism,[1233] respect for human rights is now recognised as a general principle of the Union's law[1234] and was strengthened by the adoption of the Charter of Fundamental Rights of the European Union. The Charter – as laid down in Art. 6(1) TEU – shall have the same legal value as the Treaties, raising it to primary EU law. The rights guaranteed by the Charter strongly rely on the European Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights or ECHR),[1235] which provides sophisticated

1233 Although the Rome Treaty did not include any reference to fundamental rights, the EU has gradually developed fundamental rights narratives that retrospectively place fundamental rights as inherent to the EU. The Maastricht Treaty was the first Treaty to refer to fundamental rights as one of the foundational principles of the EU. See: Smismans, 2010, pp. 45–66.

1234 See Art. 2 and 6(2) of the TEU.

1235 Douglas-Scott, 2011, pp. 655–656.

mechanisms to monitor the respect of human rights (mainly through the European Court of Human Rights or ECtHR), and to which all EU Member States (and Candidate States) are States Parties.[1236] Furthermore, Art. 6(2) TEU also provides that the Union shall accede to the ECHR. However, the EU's accession to the ECHR would practically create a hierarchical situation between the ECtHR and the CJEU, as the former would be authorised to review the acts of EU institutions,[1237] given that the addressees of the Charter are not merely the Member States but the institutions, bodies, offices, and agencies of the Union.[1238] The Lisbon Treaty has been in force since 1 December 2009, and the EU's accession to the Convention is still under discussion and negotiation.[1239] In addition to the benefits of formally linking the EU and the ECHR, such as bringing legal certainty to human rights protection in the European continent,[1240] the EU's accession is also required by the TEU. The fact that as of 2023, fourteen years after the Treaty entered into force, the accession still does not seem to be arranged in the near future raises concern about whether the implementation of Art. 6(2) TEU complies with the rule of law. Considering that there are ongoing discussions within the EU in connection with the Copenhagen criteria and the respect of fundamental rights, as presented above, it may not be surprising that these two proposals of the EP were not included in the Regulation and the original list of areas was adopted with minor changes (e.g. the inclusion of tax fraud in Art. 4(2) c) and e) of the Regulation).

In light of the above, one may conclude that Regulation 2020/2092 does not provide a specific understanding of the concept of the rule of law, as it refers to Art. 2 of the TEU, which defines it as one of the Union values, and provides several principles which could be regarded as components of the rule of law. The Regulation, therefore, refers to the general interpretation of the rule of law in EU law without further clarification on how the rule of law should be interpreted specifically in the context of the conditionality mechanism, regardless of the fact that the rule of law may be understood in fundamentally different ways by Member States. On the other hand, the Regulation provides some examples of the breach of the principles of the rule of law, and further examples of which aspects of such breach(es) may affect the financial interests of the Union. However, in the absence of a clear definition of what exactly the rule of law encompasses in the conditionality mechanism, it seems conceptually impossible to define the breaches thereof.

1236 See: Principles, countries, history [Online]. Available at: https://european-union.europa.eu/principles-countries-history/joining-eu_en (Accessed: 1 August 2023) cf. States [Online]. Available at: https://www.coe.int/en/web/cpt/states (Accessed: 1 August 2023).

1237 See: Eckes, 2013, pp. 254–285.

1238 Art. 51(1) of the Charter of Fundamental Rights of the European Union.

1239 See: Kosta, Skoutaris and Tzevelekos, 2014.

1240 A consistent and coherent interpretation of human rights encompasses the elimination of double standards, minimising the danger of conflict between the ECtHR and the CJEU, and would provide a platform to remedy situations in which human rights obligations are violated by EU institutions. See: Douglas-Scott, 2011, pp. 658–659.

I.5.5 The Interpretation of the Rule of Law in the Cooperation and Verification Mechanism

The Mechanism for Cooperation and Verification (CVM) was a specific rule of law instrument designed for Romania and Bulgaria, two countries that joined the European Union (EU) in 2007, and which remained in force until 2023. The mechanism was introduced to address concerns about the progress these countries had made in the areas of judicial reform, corruption, and the fight against organised crime. Thus, it was a rule of law instrument and a mandatory tool of oversight and control enacted specifically for Romania and Bulgaria, with a targeted scope of investigation. From a policy viewpoint, the CVM was 'a tool to maintain the reform momentum in the two countries and prevent reversal of the rule of law reforms enacted during the EU accession negotiations'.[1241] It can be perceived as an instrument of anticipated trust,[1242] essentially implying a favour that made accession to the EU possible for Romania and Bulgaria.[1243] Alternatively, it can be interpreted as undisguised mistrust, which continues even today in the form of non-acceptance in the Schengen area of these two countries. The states, which had acceded to the EU in 2004, were not subjected to such control mechanisms; unlike the 2004 accession states, Romania and Bulgaria were fast-tracked into the EU at the cost of having their sovereignty restricted by the intensive monitoring associated with the CVM.

While both Romania and Bulgaria were subject to the CVM, the focus of the control mechanism varied based on the specific developments and challenges in each country. However, there were common themes that the control mechanism generally covered. Romania had the benchmarks mentioned herein:[1244]

1. Ensure a more transparent and efficient judicial process, notably by enhancing the capacity and accountability of the Superior Council of Magistracy (SCM). Report and monitor the impact of the new civil and penal procedures codes.
2. Establish, as foreseen, an integrity agency responsible for verifying assets, incompatibilities, and potential conflicts of interest, as well as for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
3. Building on the progress already made, conduct professional, non-partisan investigations into allegations of high-level corruption.
4. Take further measures to prevent and fight against corruption, in particular within the local government.

1241 Vachudova and Spendzharova, 2012, p. 2.
1242 The favour went both ways, as Romania and Bulgaria opened their markets.
1243 See below also the analysis regarding the Annex IX. to the Accession Treaty.
1244 Commission Decision 2006/928/EC of 13 December 2006, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569).

For Bulgaria, the CVM mechanism covered the following areas:[1245]

1. Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
2. Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase.
3. Continue the reform of the judiciary to enhance professionalism, accountability, and efficiency. Evaluate the impact of this reform and publish the results annually.
4. Conduct reports on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials.
5. Take further measures to prevent and fight corruption, in particular at the borders and within the local government.
6. Implement a strategy to fight organised crime, focusing on serious crime, money laundering, and on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments, and convictions in these areas.

What is very clear is that there is no attempt to define the rule of law in general nor to create an all-purpose interpretation framework of the rule of law, while both countries had benchmarks established for them that were in turn used to assess related developments or changes. Still, these benchmarks can be used to determine not the rule of law concept itself, but to identify some of the components of the rule of law as an idea. The selection of the issues was made in the context of the areas which were perceived as problematic in the case of the two countries. It is interesting that the Commission retained the right to unilaterally amend or adjust the benchmarks if and as it considered necessary;[1246] that is, the Commission reserved the possibility, in principle, to extend the scope of the control in case needed, and to include issues, areas, and problems not covered by the original focus of the mechanism.

If we compare the two countries from the point of view of 'rule of law' requirements, we can observe that there were common and different elements, and that there were differences in the depth of the similarity between comparable elements. A first clear point of commonality was the judicial reform (i.e. benchmark points 1–3 for Bulgaria and point 1 for Romania), and involved evaluating the independence, efficiency, and effectiveness of the judicial system. This included issues such as the

1245 Commission Decision 2006/929/EC of 13 December 2006, establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (notified under document number C(2006) 6570).

1246 Recitals 9 from the Mechanism for Cooperation and Verification (CVM) decisions.

appointment and dismissal of judges, the fight against corruption within the judiciary, and the overall functionality of the legal system. Meanwhile, Bulgaria also required a constitutional reform. The second common nominator was the fight against corruption (i.e. benchmark points 2–4 for Romania and 4–5 for Bulgaria), which included activities such as reporting assessments regarding the efforts to combat corruption at various governmental and societal levels, implementing anti-corruption measures, examining the effectiveness of institutions responsible for combating corruption, and prosecuting high-level corruption cases.

Moreover, while it is clear that there are two similar themes (i.e. judicial reform and fight against corruption) across the two countries, the specific focuses and recommendations in the reports differed according to each country's unique challenges and developments. The last benchmark category (organised crime, point 6) was relevant only for Bulgaria, involving reports on the measures taken to address organised crime like efforts to dismantle criminal networks, improve law enforcement capabilities, and strengthen cooperation with other EU Member States.

Considering a broader and analytical view, these benchmarks can be regarded as inadequate to define the concept of the rule of law owing to their partiality in at least two respects. First, they cover only part of the issues that can be included in the concept of the rule of law. The specific control mechanisms used addressed issues that were perceived to be unresolved and problematic in the cases of Romania and Bulgaria during the accession to the EU procedure, and therefore can cover only in part the rule of law concept. Second, the benchmarks do not exclusively raise issues that fall strictly within the scope of the rule of law, but rather also sometimes probe into topics that can be seen more as policy objectives. In such cases, there are several possible, alternative ways of achieving the objective. It is also clear that the legal reforms and public policy expectations were intertwined, that there was no clear criteria for measuring success, and, in principle, the margin of appreciation was considerable and not without subjectivity on the side of the Commission, especially on the question of how well expectations were congregated. The requirements also do not at all indicate when an expectation is actually met.

The CVM legal basis is found in the primary legislation of the EU, the Treaty of Accession of the Republic of Bulgaria and Romania,[1247] signed on 31 March 2005. In a general and vague formulation, the Treaty states the following in Art. 37:

1247 Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union), and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. OJ L 157, 21 June 2005, pp. 11–395.

> If Bulgaria or Romania fail to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative, adopt European regulations or decisions establishing appropriate measures.
>
> Art. 37 also contains some criteria for the measures:
> a) proportionality;
> b) measures which least disturb the functioning of the internal market shall be prioritised;
> c) such safeguard measures shall not be invoked as a means of arbitrary discrimination or disguised restrictions on trade between Member States;
> d) the measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant commitment is implemented;
> e) the Commission may adapt the measures as appropriate in response to the progress made by the new Member State concerned in fulfilling its commitments.[1248]

As a matter of fact, the origins of the CVM lie in the accession negotiations between the EU and Romania and Bulgaria. During these negotiations, it became apparent that both countries faced significant challenges in the judicial reform and fight against corruption areas, as well as in the fight against organised crime in the case of Bulgaria. Accordingly, the EU Member States expressed concerns about the potential impact of these challenges on the functioning of the EU and on the integrity of its institutions. To address these concerns, the CVM was included as a transitional measure, vaguely based on Art. 37 from the Accession Treaty of Romania and Bulgaria. It was seen as a way to support and monitor the progress of the two states in fulfilling the commitments they made during the accession process.

Still, a fundamental question has been raised about the temporary nature of such measures. The primary EU law cited above states that the Commission could, 'until the end of a period of up to three years after accession', adopt the appropriate safeguard measures. Does this mean that the Commission has a three-year period to introduce the measure? Or was the maximum duration of the measure (also) three years from the date of accession (1 January 2007)? The answer is provided by Art. 37 of the Accession Treaty, which states that the measures 'may however be applied beyond the period specified', namely the initial three years, 'as long as the relevant commitments have not been fulfilled'. Consequently, the Commission had three years

1248 Moreover, the Commission shall inform the Council in good time before revoking the European regulations and decisions establishing the safeguard measures, and it shall duly consider any observations of the Council in this respect.

to implement such a safeguard measure, which could in turn be maintained beyond the three-year period. In practice, such a safeguard measure was never introduced.

Instead, based on the analysed general legal text and on the commitments undertaken by Romania in the Annex IX to the Accession Treaty (related to the problems 'not solved' during the negotiations),[1249] the CVM was introduced by means of *Decision 2006/928/EC*[1250] to address specific benchmarks in the areas of judicial reform and the fight against corruption. Therefore, and as aforementioned, the two interconnected fields where the Commission considered that further supervision was required, in the case of Romania, were the judiciary and corruption. This can be perceived as a rule of law instrument if we consider the clear descriptions in the preamble of *Decision 2006/928/EC*, which states that 'the European Union is founded on the rule of law'. The area of freedom, security, and justice and the internal market requires mutual confidence 'that the administrative and judicial decisions and practices of all Member States fully respect the rule of law'.[1251] The primary rule of law criterion is the existence of an impartial, independent, and effective judicial and administrative system properly equipped, *inter alia*, to combat corruption. Meanwhile, Bulgaria engaged in no such commitments in the Accession Treaty as Romania. Still, *Decision 2006/929/EC*[1252] enforced the CVM on Bulgaria, obliging it to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime.

What follows is that there is a seemingly lack of a firm legal foundation for the CVM within the EU Treaties, whereas such a mechanism should be established based on a specific legal provision, rather than being created as a transitional measure. This lack of a clear legal basis could actually lead to potential inconsistencies and challenges in the application of the CVM. Indeed, questions have been raised about the scope, duration, and decision-making procedures of the CVM, while a void exists regarding a specific legal framework that can be used to guide these aspects. Specifically, the Decisions that established the CVM indicated Art. 37 of the Accession Treaty as the legal basis, quoting reasons like 'remaining issues in the accountability

1249 Further, Art. 39 (2) of the 'Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union' provided that the date of accession can be postponed by one year, until 1 January 2008, in the case of Romania (separately from Bulgaria) if it does not comply with the requirements of Annex IX.

1250 Commission Decision of 13 December 2006, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569). OJ L 354, 14 December 2006, pp. 56–57. See also the Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC.

1251 Recital 1 and 2 of the Decision 2006/928/EC.

1252 Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (notified under document number C(2006) 6570). OJ L 354, 14 December 2006, pp. 58–60. See also: Commission Decision (EU) 2023/1785 of 15 September 2023 repealing Decision 2006/929/EC.

and efficiency of the judicial system'. In fact, the link between the CVM and Art. 37 of the Accession Treaty is made in the simplest possible way: if Romania or Bulgaria failed to address the above analysed benchmarks adequately, the Commission could apply the safeguard measures based on Arts. 37 and 38 of the Act of Accession, including the suspension of the Member States' obligation to recognise and execute, under the conditions laid down in EU law, judgments and judicial decisions, such as European arrest warrants.[1253] As aforementioned, the Commission had three years to implement the measure, could have maintained it beyond a three-year period, and the safeguard measure was never introduced. It is a clear conclusion that the CVM monitoring, having its basis in Art. 37 of the Accession Treaty, could last three years, as it is a necessary period to give the basis for the implementation of a safeguard measure by the Commission. After the initial three years, only an existing safeguard measure can be prolonged, and a new one cannot be introduced. Since there was no safeguard measure introduced within three years, the existential foundation of the CVM ceased after the expiry of this period. It remains that it could have been extended beyond the three-year period if such a safeguard measure had been imposed during the three-year period, and the monitoring had provided the data for a decision on whether to maintain or terminate the measure.

In general, it is not the most uncommon phenomenon for theory to not agree with practice, but in the cases of Romania and Bulgaria, the situation is very far from agreement; in fact, from the initial theoretical three years, the CVM remained in force and in use until 8 October 2023,[1254] for a 'mere' 16 years after accession. Besides the complex problems associated with the aforementioned legal interpretations, this also means that the Commission considered for a long time that Romania and Bulgaria had yet to fulfil the commitments they had undertaken one and a half decade before the cessation of the CVM. This also entails most certainly that, at the moment of accession, Romania and Bulgaria 'did not entirely fulfil the accession criteria'.[1255]

It also remains an open question whether and how the objectives of the CVM have been achieved, as a comprehensive, substantive retrospective evaluation has yet to be carried out. Another topic that can be questioned is how the results can be measured, and actually even if such measurement is possible. European Commission President Ursula von der Leyen declared at the moment when the CVM was discharged (September 2023):

1253 See below for details.

1254 See Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption C/2023/5653. OJ L 229, 18 September 2023, pp. 94–96. In force from 8 October 2023.
For Bulgaria, Commission Decision (EU) 2023/1785 of 15 September 2023 repealing Decision 2006/929/EC establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, OJ L 229, 18 September 2023, pp. 91–93. In force from 8 October 2023.

1255 Vassileva, 2020, p. 742. See also: Carp, 2014, p. 6.

> I would like to congratulate Bulgaria and Romania for the significant progress they made since their accession to the EU. The rule of law is one of our fundamental common values as a Union and both Member States have delivered on important reforms in these past years. Today we recognize these efforts by putting an end to the CVM. Work can now continue under the annual rule of law cycle as for all Member States.

In reality, this was not a fundamental assessment of the 16 years of the Romanian and Bulgarian efforts to comply with the given benchmarks, but a transformation of the CVM into a new rule of law mechanism, by broadening the scope both in terms of focus and subjects (as all member states are now emphasising the new system). On the same occasion, Věra Jourová, Vice-President for Values and Transparency, affirmed that she is:

> […] pleased that today we can officially say: Bulgaria and Romania have satisfied the benchmarks set in the Cooperation and Verification Mechanism. Their commitment and close work with the Commission over the years has paid off. It will be important to keep the momentum and continue the efforts under the annual rule of law cycle. This is a good day not only for Bulgaria and Romania but for the European Union as a whole.

However, as a precise assessment was missing, and we are in the presence of the transformation of the CVM into something much broader instead of the closing of this procedure, we cannot be sure how and to what extent the benchmarks were fulfilled. Ultimately, it is the political, not the legal, nature of the reports and the mechanism that dominates.

Regarding its content, the CVM practically overlapped with broader rule of law reports introduced in 2020; still, the alignment of the two instruments appeared increasingly necessary. The solution was discontinuing the CVM and applying a new, less-discriminatory system for Romania and Bulgaria. Thus, a reporting system covering all Member States was implemented and is ongoing. Specifically, in July 2023, Vice-President Jourová announced that the Commission intended to discontinue the CVM for Romania and Bulgaria in the autumn of 2023, albeit the monitoring of the progress in the field of justice would continue, now exclusively through the EU's rule of law mechanism. Thus, the CVM, apparently relegated to legal history, continues to exist in a transformed form. It becomes questionable once more whether and how the conditions were fulfilled if the monitoring of the functioning of the judiciary is to continue. Therefore, even if now the CVM is defunct (in name at least), this does not mean that the expectations it was meant to uphold have been met.[1256] Rather,

1256 'The evolution of the Union's rule of law landscape has given a new context for the Commission's cooperation with Romania. In particular, the annual Rule of Law cycle, launched by the Commission Communication of July 2019 on "Strengthening the rule of law within the Union" (10) and in

this means that the Commission considers it unjustified to maintain a tool parallel to the new rule of law mechanism. The transformation of the process itself does not preclude an assessment of the reform and the state of the Romanian or Bulgarian justice system under the new mechanism.

At the same time, we cannot deny that the CVM had an impact in Romania and Bulgaria. Just as an example, we can observe the evolution of the judicial reform in Romania, as it was reflected in the CVM reports issued by the European Commission. Over the years, the CVM reports highlighted both positive developments and remaining challenges in Romania's judicial reform efforts. The reports generally provided a comprehensive overview of the reforms undertaken and their impact on the judiciary, while omitting a clear analysis of some real crises in the justice system.

As mentioned before in this chapter, the benchmarks (justice reforms and the fight against corruption measures) were interconnected, and in its first 2007 CVM report on Romania, the Commission stated:[1257]

> […] it is important to see these benchmarks as representing more than a checklist of individual actions that can be ticked off one by one. They are all interlinked. Progress on one has an impact on others. Each benchmark is a building block in the construction of an independent, impartial judicial and administrative system. Creating and sustaining such a system is a long term process. It involves fundamental changes of a systemic dimension. The benchmarks cannot therefore be taken in isolation. They need to be seen together as part of a broad reform of the judicial system and fight against corruption for which a long term political commitment is needed. Greater evidence of implementation on the ground is needed in order to demonstrate that change is irreversible.

The Romanian Government (Cabinet) issued its own *Decision No. 1346/2007* on the approval of the Action Plan for the fulfilment of conditions set forth under the CVM, based on the progress made by Romania in the area of judicial reform and the fight against corruption.[1258] This Action Plan included Romania's commitment to programmatically reform the judiciary. To achieve the objectives set out in the European Commission's monitoring reports, and in the reports of the peer review missions conducted by experts from the Member States, the areas that showed

the "Political Guidelines of President von der Leyen", provides an ongoing framework with a long-term perspective to accompany sustainable reform, with Romania as with other Member States. As part of that cycle, the Commission's annual Rule of Law Report, which since 2022 also includes recommendations to the Member States, stimulates a positive direction on rule of law issues, deepening dialogue and joint awareness and preventing challenges from emerging or deepening. It will enable the monitoring of the implementation of Romania's agreed reforms'. Recital (10) of Commission Decision (EU) 2023/1786.

1257 Key findings of the progress report on the Cooperation and Verification Mechanism with Bulgaria, MEMO/07/261.

1258 Published in the Official Journal of Romania no. 765 of 12 November 2007.

shortcomings in these reports were considered when drawing up the Action Plan. This led the primary lines of action for the fulfilment of the first benchmark to be the following: adoption of new codes of civil and criminal procedures; unification of case law; strengthen the institutional capacity of the Superior Council of Magistracy (the high administrative council of judges and prosecutors, hereinafter: SCM); make SCM members more accountable; increase the transparency of the judicial process; improve human resources policy; increase the efficiency of the judicial system by improving infrastructure and court management. Romania considered the CVM seriously; this was emphasised by the fact that the former Prosecutor General of the Anti-Corruption Prosecutor's Office, in his memoirs, stated that the secret services had requested the wiretapping of certain individuals be authorised, 'on the grounds that the persons proposed to be monitored were making negative statements about Romania in the context of the EU verification mechanism, which would have had European repercussions'.[1259] This seems a strange and unproportionate restriction of the right to opinion.

Beginning in 2007, the CVM constituted an indicator of Romania's incessantly disputed judiciary reforms. In this context, the adoption of the four new codes (civil, criminal, civil procedure, and criminal procedure) was a priority for the Ministry of Justice regarding legislative matters, as they were indispensable for systematising the rules, simplifying judicial procedures, reducing the duration of litigations, and the number of appeals for certain categories of cases. Indeed, a number of reform measures, in particular in the field of human resources and unification of judicial practice, was considered to depend on the adoption of the new codes. In reality, we cannot consider the introduction of these new codes as a resounding success story from a rule of law perspective. Still, the early codes worked relatively well in both civil and criminal matters, thanks to a number of reforms, and in no way were these two codes the cause of the objections to the system of justice. A civil or criminal law reform was certainly possible, but the real impact on the rule of law was negligible.[1260]

Meanwhile, the absence of a uniform practice (case law) of the courts was generally considered a problem that undermined the rule of law. In order to remedy this problem, the Romanian government adopted a plan which provided for measures like regular meetings between judges of different levels of jurisdiction to discuss problems of non-uniform practice, and a plan for the future involvement of attorneys such that they could identify and report on cases of non-uniform practice. Activities to ensure judges' access to case law were also to continue, in addition to the permanent updating of the courts' website through the publication of relevant case law, as well as the publication of the case law in booklets or volumes to be distributed to courts throughout the country. Training seminars for judges and prosecutors on the unification of jurisprudence was set to continue, with priority to the restitution of nationalised property.

1259 Morar, 2022, p. 611.
1260 For the Romanian Civil Code, see Veress, 2021, pp. 387–401.

The SCM, in the vision of the Romanian Constitution, has its role as patron of the independence of justice.[1261] It was initially set up in 1909 to reduce the high influence of the Minister of Justice and abolished in 1947. It was then re-established by the Romanian Constitution of 1991 and reformed in 2003. After the 2003 constitutional reform, the SCM consists of 19 members, 14 of which are elected in the general meetings of the magistrates and validated by the Senate. They belong to two sections, one for judges (nine judges[1262]) and one for public prosecutors (five public prosecutors). In addition, two representatives of the civil society are also members of the SCM and were included in order 'to avoid the danger of corporatism';[1263] they must be specialists in law, enjoy a good professional and moral reputation, and must be elected by the Senate. According to the Constitutional Court, the election of civil society representatives to the SCM must be based on prior verification that the legal conditions for occupying that office have been met.[1264] They can only participate in plenary proceedings of the SCM, which is critical, since the most important competences of the institution belong to the sections, implying that the dialogue with civil society seems more formal than effective. There was a proposition for increasing the number of civil society representatives in the SCM, unsuccessfully, and even the Constitutional Court gave the opinion that 'increasing the number of members representing civil society, i.e. persons from outside the judiciary, and changing the proportion of representation on the Council, has negative consequences for the work of the judiciary', because 'these members acquire an important role in the area of disciplinary liability of judges and prosecutors, which represents interference by politics in the judiciary, a circumstance that is likely to undermine the constitutional guarantee of the independence of justice'.[1265] What is important is that in the view of the Constitutional Court, the (over)representation of civil society in the SCM is a political representation that undermines the independence of justice.

Other members of the SCM include the Minister of Justice, the President of the High Court of Cassation and Justice, and the Prosecutor General of the Public Prosecutor's Office attached to the High Court of Cassation and Justice. The President of the High Court of Cassation and Justice attends the judges' section, while the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice attends the prosecutors' section and partake in plenary meetings. The President of the SCM is elected for a one-year term, which cannot be renewed, from among the magistrates (judges or prosecutors). The law specifies that a Vice-President is also elected for a non-renewable one-year term, and that the two heads must belong to different sections. The one-year term as President justifies the question as to whether such a duration is sufficient to achieve a specific programme. A short

1261 Arts. 133 and 134 from the Romanian Constitution.

1262 Two judges from the High Court of Cassation and Justice, three judges from courts of appeal, two judges from tribunals, and two judges from local courts.

1263 Government Decision No 1052/2003 (Official Journal of Romania no. 649/2003).

1264 CC Decision No 54/2011 (Official Journal of Romania no. 90/2011).

1265 CC Decision No 799/2011 (Official Journal of Romania no. 440/2011).

term of office can reduce the role of President to a mere administrator, albeit this may perhaps be the purpose of the regulation.

The length of the term of office of the SCM members is 6 years. The Constitutional Court has stated that the duration is set by a mandatory (imperative) constitutional rule, and that it does not allow the Parliament to shorten the term of office of elected members either by an explicit provision or by a provision whose application would have such an effect.[1266] The initial regulation in Act 317/2004 provided for causes for the early termination of the mandate, among them the possibility of revocation of elected members. The Constitutional Court declared unconstitutional this provision, as it offered the possibility of revocation of elected members at the request of a majority of the general assemblies of the courts or prosecutor's in the event of failure to perform, or even improper performance of the duties entrusted to them by their election as a member of the SCM.[1267] Another discussion was related to the fact that, in some cases, the mandate of a certain member ended prematurely, and the elections for the replacement should give a six years mandate or just for the remaining part of the (unfinished) mandate for which the replacement is made. The issue was solved also by the Constitutional Court, which gave precedence to the institutional character of the SCM, stating that the filling of a vacancy in the SCM is constitutional only to the extent that the person thus elected exercises his/her membership for the remaining term of an initial six-year term.[1268]

The SCM makes decisions by secret vote, and the President of Romania presides over the proceedings of the SCM he takes part in. Albeit not a member of the SCM, the President of Romania, as it follows from the constitutional text, can participate in SCM meetings without the right to vote. Decisions by the SCM shall be final and irrevocable, except for those taken in disciplinary proceedings.

Regarding its powers, the SCM proposes to the President of Romania the appointment of judges and public prosecutors, except for trainees. This is a power limited by the relevant legislation, the career of magistrates being then object of a detailed regulation. The SCM is thus performing the role of a court of law, by means of its sections, as regards the disciplinary liability of judges and public prosecutors, and based on the procedures set up by its organic law. In such cases, the Minister of Justice, the President of the High Court of Cassation and Justice, and the general Public Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice shall not be entitled to vote. Since 2012, the Judicial Inspection, an autonomous authority, has been the holder of the disciplinary action. Decisions by the SCM regarding discipline may be contested before the High Court of Cassation and Justice.

In order to make SCM members more accountable and to solve ethical problems, it was envisaged to improve their communication, as well as that of magistrates

1266 CC Decision No 375/2005 (Official Journal of Romania no. 591/2005).
1267 CC Decision No 196/2013 (Official Journal of Romania no. 231/2013).
1268 CC Decision No 374/2016 (Official Journal of Romania no. 504/2016).

and civil society, through the conduction of regular meetings to discuss the work of SCM members during the reporting period and their priorities for the next period. Candidates for the posts of President and Vice-President of the SCM must present a programme of activities for the period of their mandate, the implementation of which can be followed by interested parties (e.g. judges, prosecutors, and the civil society).

In the years following Romania's accession to the EU, the CVM reports acknowledged the establishment of key anti-corruption institutions, such as the National Anticorruption Directorate (also known as DNA) and the National Integrity Agency (also known as ANI). The aforementioned reports also highlighted positive developments in Romania's anti-corruption efforts, such as an increase in the number of corruption investigations, successful prosecutions, and high-level convictions. The reports recognised the role of the National Anticorruption Directorate and National Integrity Agency in these achievements, and while they have played a crucial role in the fight against corruption, they have also faced criticism and allegations of misconduct.

The CVM reports have undoubtedly provided a structure for the reforms, while the continuous monitoring gave the reform some impetus. Still, it is not the purpose of this brief analysis to review all the problems that have arisen.

Part II

THE CONTROL MECHANISMS RELATED TO THE RULE OF LAW

Introduction to the Control Mechanisms Related to the Rule of Law

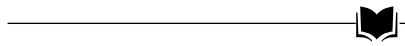
Parallel to the supranationalisation of the concept of the rule of law, as presented in the previous chapter, endeavours to enforce such interpretations in different States also increase at the level of the examined supranational entities. Different interpretations of the rule of law are enforced through the so-called control mechanisms. The strength of these mechanisms certainly depends on the nature of the instruments provided or developed by the given supranational entity. The analysis suggests that the majority of the examined control mechanisms are of a soft legal nature; hard mechanisms could rarely be found in the analysed institutions.

The control mechanisms of the Council of Europe include the adoption of recommendations and reports, (country-specific) opinions, studies, or amici curiae, which – although soft law in nature – may have an impact on the jurisprudence of the ECtHR in case the Court takes them into account as relevant legal materials in a given case. The Committee of Ministers is at the forefront of supervising the execution of the judgments adopted by the ECtHR, which is remarkable from the perspective of the political nature of the entity: namely, the Committee of Ministers is the decision-making body of the Council of Europe, composed of the Ministers of Foreign Affairs of the Member States. Nonetheless, the mechanism connected to the ECtHR is remarkably strong as it is based on the binding judgments adopted by a supranational human rights court.

The diverse control mechanisms of the OECD are entirely soft-law based, as they include exchanges of information and experiences on the implementation of the standards, collection of best practices, self-assessment procedures, and country reviews that result in recommendations for participating countries. The enforcement mechanisms of the rule of law are also of a soft legal nature within the UN. Human rights treaty bodies may contribute to the interpretation of the rule of law in their reports, recommendations, general comments, or, where applicable, decisions in individual complaints; however, their implementation is politically rather than legally binding. Furthermore, while the OSCE's tools also include monitoring mechanisms, they are entirely of a political nature since the OSCE's decision-making is fundamentally a political endeavour.

This section addresses the supranationalisation process of enforcing the rule of law in different States, the methods and procedures developed by the analysed institutions, and the legitimacy of these institutions to monitor the rule of law in their Member States. In this context, the Authors also examine the transformation of the subsidiary nature of the supranational institutions in light of increasing endeavours to enforce the institutions' interpretation of the rule of law at the States' level.

II.1 The Related Control Mechanisms of Rule of Law in the Council of Europe



II.1.1 General Overview of the Control Mechanisms in the Council of Europe

Can the rule of law have many interpretations? As aforementioned, although we have much awareness of what the rule of law is, it is still a legal standard which affords much room for interpretation, and there are at least two possible trends regarding its interpretation. First, unification through the scope of international (and European) law and the law of international organisations; second, the application of law through the legal cultures in domestic legal systems, in which different standards may be applicable. For that reason, supranational law, and this is the nature of supranational law, tends to shape and direct the application of law even in national jurisdictions, something operationalised through international conventions and bodies comprising representatives of national Member Countries. Accordingly, law application procedures may differ across nations, but are constantly evolving towards unification. Of course, the reverse direction here is also possible, even if it less likely or occurs less frequently; for example, the reverse might happen if the application and interpretation of a specific legal instrument is based on different legal argumentations across various Member Countries of the CoE.

Although it may seem unclear at first, it is a fact that the ECtHR acknowledges differences between states in their cultural and legal heritage.[1269] A typical example of such acknowledgement can be seen in the margin of appreciation doctrine used by the Court; this is an ancient British doctrine that allows judges to use specific legal and cultural aspects of a county in order to provide different conclusions on the same fact depending on the county. On this, Savić describes the following:

> The Court sought to draw this line by using the "margin of appreciation" doctrine (or "range of discretion" doctrine). This doctrine is defined by the ECtHR and widely used for cases where specific protective elements are found in the laws. Under interpretative opinions of the Council of Europe and ECtHR, "the term

1269 Florence Convention, Heritage of Peoples, Part One.

> 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights." This establishes that even in the most democratic countries where the freedom of expression standard is enviable, law leaves a special place for the peculiarities of specific countries. Article 10.2 of the Convention mentions using "public morals" for setting standards. Thus, state law, viewed as an intrinsically normative phenomena, is based on judgments of social reality and incorporates the statistical factors which require that the majority principle be protected; factors which make up the cultural environment of a particular state. It is important to realize that public morals also make law. In that sense, the decision in the Lautsi case – by using the margin of appreciation doctrine when the Court decided that the presence of the cross cannot be disturbing to non-believers – re-affirmed the cultural element of public morals, which are also responsible for the formation of law.[1270]

This means that the ECtHR makes use of this doctrine to treat similar cases differently depending on the country related to the occurrence. Accordingly, the ECtHR considers various sociological, historical, and ontological perspectives when discussing cases from various countries, which is important for preserving the legal (moral) values of the particular countries. For example, cases from Central and Southeastern Europe bear different substance than those from the North or West of Europe. In fact, family law is deeply rooted in the values and traditions of the particular country.[1271] Therefore, even if the rule of law is a well-respected concept, its applications diverge. Fallon describes the rule of law as follows:

> First the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.

In Nachbar's *Defining the Rule of Law Problem*, this was simplified by saying 'the purpose of law is to provide a government of security, predictability, and reason'. Nachbar also argues towards how context is key for the rule of law, and even if he writes in the context of military law, the following descriptions about the 'purpose of law' are valid for the current discussion: 'When dealing with a term used in as many different contexts as 'the rule of law', it is important not only to identify the purpose

1270 Savić, 2015, pp. 694–695. See also: Council of Europe, The Margin of Appreciation [Online]. Available at: http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf (Accessed: 4 September 2015). See also: *Handyside v. United Kingdom* (App. no. 5493/72), 7 December 1976. The European Court justified the limitation of freedom of expression over the protection of public morals. See also: Yourow, 1996.

1271 Savić, 2023b, p. 63.

of law, it is important to identify the purpose of the definition'. All this is important for the procedural aspects of the application of the rule of law within the CoE. Thus, the rule of law is an essential legal standard/institute/value of the contemporary free and democratic word, and anyone who opposes this notion but calls himself/herself a supporter of the free world and human rights should reconsider his/her own definition.

It remains that a unanimous and precise definition of the rule of law does not exist. This owes to the historical and legal cultural and tradition differences across nations, which in turn directly and/or indirectly influence the development of the law, as well as the values and foundations that serve as the basis for the law. States and societies emerging from different legal traditions will, at least to some extent, have different approaches to dealing with various legal issues and definitions, and must thus to find a way to operate within the same framework without applying completely different standards.

Law, in and of itself, is a reflection of the values, needs, and aspirations of a particular society, and it is very important that it does not show a picture of abuse. On this, Bault writes that the rule of law is sometimes used as an excuse for some to address their ideological issues,[1272] and he is right in such assertion. In fact, this brings to the fore the fact that an unclear definition of the rule of law may create serious cracks in the legal system, and hence impede the creation of a just (European) society where all legal traditions and worldviews, as representatives of the rich and valuable fibre of the European continent, coexist. Thus, while we must be aware that we do share common values, their particular interpretations might diverge by country.

A typical example lies in the application of Art. 9 of the ECHR,[1273] which deals with freedom of thought, conscience, and religion. In applying the margin of appreciation doctrine for this article, the ECtHR often comes to different related solutions for different countries. Indeed, the ECtHR is quite sensitive to these differences, and a quick examination of the outcomes of the application of Art. 9 in different countries might lead to the conclusion that the laws being used are different; still, a more in-depth investigation unveils that the ECtHR actually implements the exact same law, but within the boundaries of the margin of appreciation doctrine.

For instance, in the famous case of *Lautsi v. Italy,*[1274] the ECtHR decided that a crucifix could remain in the classroom because its existence did not harm anyone,

1272 Bault, 2019.

1273 'Freedom of thought, conscience and religion 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

1274 *Lautsi v. Italy* (App. no. 30814/06), 18 March 2011, p. 47.

and its positioning on the wall of the Italian classroom was in line with the Italian history and legal culture. Meanwhile, in the *SAS v. France* case,[1275] the ECtHR decided that the wearing of religious garments or attires is not to be expected in French classrooms, and that these classrooms often do not include religious symbols on their walls. This decision was according to the fact that the French Republic is based on the principles of the French Revolution. The cases of *Dhalab v. Switzerland*[1276] and *Eweida v. United Kingdom*[1277] share similarities with the French case. At this point, some might ask: how is this possible? Is this not a form of inequality? Is this not contrary to the application of the rule of law, which describes that the same rule applies for everyone and everywhere? The answer to all of these questions is a resounding no, as these decisions do not produce any form of inequality in the European legal landscape, but rather recognise that the interpretation of the same legal standard differs across societies. This showcases the importance of understanding the constitutional frameworks of each country and considering them within the context of supranational organisations. These international organisations are not and should not be places where the opinions of specific groups matter more than the opinion of others, but rather dynamic places where discussions and the common good find space and give way for applications that may be satisfying for all.[1278]

Regarding the general framework of the CoE's control mechanisms for the components of justice, common standards and policies, and threats to the rule of law, it is clear that it features various conventions, mechanisms, committees, and bodies with specific rules and procedures that secure the achievement of the CoE's goals. A potential summary of these different mechanisms is that they are methods and procedures serving to maintain the major task of the CoE, which is enforcing human rights and strengthening democratic institutions and the rule of law. Here it becomes impossible to avoid mentioning the Venice Commission and its Rule of Law Checklist,[1279] acting as a guide for checking the level of democratic development in Member States and countries that cooperate with the CoE and its bodies. The Checklist focuses on five areas of the rule of law, and the Commission conducts its evaluation of each country based on these areas, which are the following: legality,[1280]

1275 *S.A.S. v. France* (App. no. 43835/11), 1 July 2014, § 22.

1276 *Dahlab v. Switzerland* (App. no. 42393/98), 15 February 2001, p. 449.

1277 *Eweida v. United Kingdom* (App. no 48420/10), 15 January 2013, p. 275; Savić, 2015, pp. 692–698.

1278 For more about the constitutional impact on the Council of Europe, and specially to the judicature of the European Court of Human Rights, Savić, 2020, pp. 260–282.

1279 Checklist of the Rule of Law, see above.

1280 'The principle of legality is at the basis of every established and functional democracy. It includes supremacy of the law: State action must be in accordance and authorized by the law. The law must define the relationship between international law and national law and provide for the cases in which exceptional measures may be adopted in derogation of the normal regime of human rights protection'. Ibid.

legal certainty,[1281] prevention of abuse/misuse of powers,[1282] equality before the law and non-discrimination,[1283] and access to justice.[1284] The Checklist is a massive document that covers all pertinent areas of investigation pertaining to the rule of law, including if the state follows basic and less-basic principles of law from the area of constitutional presence and provisions, if there is the existence of relevant bodies, access to justice, retroactivity, legality principle, independence of the judiciary, fair trial, corruption, collection of data, and hard and soft law.

Other institutions that accompany the Venice Commission and its control-related work are the CEPEJ and the GRECO, which also boast relevant documents and control mechanisms. The CEPEJ is perhaps the most relevant Commission when it comes to the evaluation and monitoring of developments in national judicial systems, as it has a special section dedicated to their evaluation. A major part of the work of the CEPEJ includes the publishing of the European Legal Systems CEPEJ Evaluation Report, which contains data on the judicial system of a country and its counties presented across different tables, graphs, and analyses.[1285] The CEPEJ-STAT database is another unique tool from the CEPEJ, being useful for judicial experts, scientists, and researchers interested in the development of the rule of law and democracy in Member States and other relevant countries.

Regarding the GRECO, its evaluation mechanisms are based on various objectives, and the related data are collected through the application of various questionnaires, regular country visits, and meetings with relevant actors in the particular country. After an in-depth investigation, the GRECO teams produce reports – containing recommendations for the evaluated countries on how to improve their level of compliance with the examined provisions – that must then be adopted by GRECO. Sometimes, the GRECO takes some measures to implement those recommendations,

1281 'Legal certainty involves the accessibility of the law. The law must be certain, foreseeable and easy to understand. Basic principles such as nullum crimen sine lege/nulla poena sine lege, or the non-retroactivity of the criminal law are bulwarks of the legal certainty' [Online]. Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (Accessed: 2 September 2023).

1282 'Preventing the abuses of powers means having in the legal system safeguards against arbitrariness; providing that the discretionary power of the officials is not unlimited, and it is regulated by law' [Online]. Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (Accessed: 2 September 2023).

1283 'Equality before the law is probably the principle that most embodies the concept of Rule of Law. It is paramount that the law guarantees the absence of any discrimination on grounds such as race, colour, sex, language, religion, political opinion, national or social origin, birth etc. Similar situations must be treated equally and different situations differently. Positive measures could be allowed as long as they are proportionate and necessary' [Online]. Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (Accessed: 2 September 2023).

1284 'Access to justice implicates the presence of an independent and impartial judiciary and the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of the justice and thus to the achievement of the classical formula: "justice must not only be done, it must also be seen to be done"' [Online]. Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (Accessed: 2 September 2023).

1285 See the complete report at: CEPEJ.

which are communicated by GRECO to the specific country under a separate compliance procedure.[1286] Those recommendations and instructions are both of legal and quasi-political character, are often conducted in so-called evaluation rounds, and contain:

> […] independence, specialization and means available to national bodies engaged in the prevention and fight against corruption, extent and scope of immunities, identification, seizure and confiscation of corruption proceeds, public administration and corruption (auditing systems; conflicts of interest), efficiency and transparency with regard to corruption, prevention of legal persons being used as shields for corruption, tax and financial legislation to counter corruption, links between corruption, organized crime and money laundering, the incriminations provided for in the Criminal Law Convention on Corruption, its Additional Protocol and Guiding Principle 2, the transparency of party funding as understood by reference to the Committee of Ministers' Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Rec(2003)4).[1287]

Furthermore, to prevent corruption by the members of legislative authorities, judges, and public prosecutors, the GRECO recommendations contain 'ethical principles and rules of conduct, conflicts of interest, prohibition or restriction of certain activities, declaration of assets, income, liabilities and interests, enforcement of the rules regarding conflicts of interest and awareness'.[1288]

II.1.2 The Related Control Mechanisms of the European Court of Human Rights

The ECtHR[1289] employs several control mechanisms to ensure the effective implementation and enforcement of its judgments by Member States. These mechanisms are designed to uphold human rights standards, promote compliance with the ECHR, and provide a safeguard against violations.[1290] Some of them ECtHR employs on its own, and other control mechanisms are taken by the Committee of Ministers.

The Convention on Human Rights stands as a testament to the collective commitment of the Council of Europe Member States to safeguard fundamental rights

1286 Data available at: GRECO.
1287 Ibid.
1288 Ibid.
1289 The ECtHR.
1290 For more information, see: Monitoring Mechanisms [Online]. Available at: https://www.coe.int/en/web/human-rights-rule-of-law/monitoring-mechanism (Accessed: 11 August 2023).

and individual liberties. Anchored within the Convention's framework are an array of control mechanisms meticulously designed to not only articulate these rights but also ensure their robust enforcement. These mechanisms, which embody the essence of the rule of law, collectively exemplify the practical implementation of the ECHR's provisions, standing as a testament to the commitment of the Council of Europe Member States to articulating fundamental rights and resolutely enforcing them.[1291] At the forefront of this is the Committee of Ministers,[1292] the political entity that represents Member States, which is imbued with the crucial responsibility of overseeing the execution of judgments issued by the ECtHR, hence going beyond passive observation.[1293] Instead, it is an active participant engaging with the concerned state, garnering insights from diverse quarters, and crafting resolutions and recommendations to forge a seamless alignment between domestic laws and the ECHR's tenets. This orchestrated process underscores the collaborative fabric that buttresses human rights enforcement, deftly merging political discourse with a steadfast commitment to upholding the essence of human rights norms.[1294] The Committee of Ministers is also a crucial component of the Council of Europe, playing a significant role in the control mechanisms of the ECtHR.[1295]

When the ECtHR issues a judgment identifying a violation, it forwards the case to the Committee of Ministers of the Council of Europe.[1296] The Committee then engages in discussions with the relevant country and the department responsible for implementing judgments.[1297] Furthermore, as the political body responsible for supervising the execution of judgments issued by the ECtHR, the Committee ensures that Member States effectively implement the ECtHR's decisions and adhere to their obligations under the Convention.[1298]

Upon receiving a judgment from the ECtHR, the Committee of Ministers engages in a process known as 'supervision of execution'.[1299] The aim is to determine how the judgment should be carried out and how to prevent future violations of the

1291 There is an interesting ambiguity in the enforcement of the ECtHR judgment regarding the Art. 3 (prohibition of torture) and Art. 7 (nullum crimen sine lege) in Italian criminal law. Polacchini, 2017, pp. 377–389.

1292 See: Supervision of the execution of judgments of the European Court of Human Rights 2022 – 16th Annual Report of the Committee of Ministers (2023).

1293 For more see: Madsen et al., 2022, pp. 419–438.

1294 See also: Burić, 2013, pp. 109–124.

1295 For more information, see: Implementation of ECHR judgments – Latest decisions by the Committee of Ministers [Online]. Available at: https://www.coe.int/en/web/human-rights-rule-of-law/-/implementation-of-judgments-from-the-european-court-of-human-rights-latest-decisions-by-the-committee-of-ministers (Accessed: 11 August 2023).

1296 European Court of Human Rights: The ECHR in 50 questions, p. 10.

1297 See also: Chlebny, 2014, p. 240.

1298 For more information, see: Implementation of ECHR judgments – Latest decisions by the Committee of Ministers [Online]. Available at: https://www.coe.int/en/web/human-rights-rule-of-law/-/implementation-of-judgments-from-the-european-court-of-human-rights-latest-decisions-by-the-committee-of-ministers (Accessed: 11 August 2023).

1299 Ibid.

Convention.[1300] a process that typically leads to the implementation of both general (e.g. legislation changes) and individual measures when they are required to address specific cases.[1301] This involves overseeing the steps taken by the concerned Member State to rectify any human rights violations highlighted by the ECtHR's ruling.[1302] The Committee monitors the state's compliance with the judgment, which may involve implementing legal, administrative, and systemic reforms to address the issues at hand.[1303] The Committee's supervision process involves interactions with various stakeholders, including national authorities, non-governmental organisations, National Human Rights Institutions, and other interested parties,[1304] which provide information on the measures taken by the state to fulfil its obligations under the ECHR.[1305]

During its sessions, the Committee adopts resolutions and decisions that reflect the progress made by the Member State in executing ECtHR judgments.[1306] These resolutions can take various forms, such as Interim Resolutions and Final Resolutions.[1307] The Committee assesses the adequacy of the measures taken and, when necessary, may issue recommendations to ensure full compliance with the ECtHR's rulings.[1308] The Committee of Ministers possesses the authority to intervene[1309] in Member States persistently failing to adhere to ECtHR judgments, albeit it uses such authority only sparingly. Leloup emphasises that Art. 46 of the ECHR indicates that states must adhere to the final judgments of the ECtHR only in cases to which they are parties, essentially suggesting that the ECtHR's judgments are binding only between the involved parties.[1310] This standpoint was indeed relevant at the time the Convention was enacted, though it changed over time.[1311] The ECtHR's own statements suggest that its case law has a practical binding effect on everyone (*erga*

1300 European Court of Human Rights: The ECHR in 50 questions, p. 10.
1301 Ibid.
1302 For more information, see: Implementation of ECHR judgments – Latest decisions by the Committee of Ministers.
1303 Ibid.
1304 Ibid.
1305 Ibid.
1306 Ibid.
1307 Ibid.
1308 Ibid.
1309 'According to the CM working methods, when the six-month deadline for States to submit an action plan / report has expired and no such document has been transmitted to the Committee of Ministers, the Department for the Execution of Judgments sends a reminder letter to the delegation concerned. If a member State has not submitted an action plan/report within three months after the reminder, and no explanation of this situation is given to the Committee of Ministers, the Secretariat is responsible for proposing the case for detailed consideration by the Committee of Ministers under the enhanced procedure (see: CM/Inf/DH(2010)45final, item IV)'. Quote extracted from fn. 20 of the Supervision of the execution of judgments of the European Court of Human Rights 2022 – 16th Annual Report of the Committee of Ministers, 2023, p. 104.
1310 Leloup, 2020, p. 6. The ECtHR judgement binds the courts of that country, as shown in Abdelgawad, 2008, p. 8; see also: Villiger, 2014, p. 34.
1311 Bonačić and Tomašić, 2017, p. 385.

omnes)[1312] due to the principle of *res interpretata*.[1313] This means that the ECtHR's interpretation and application of the Convention remain consistent when addressing similar issues in different cases.[1314] Consequently, individuals in identical or similar situations as a previous applicant who experienced a violation can also claim a Convention violation.[1315] This principle applies not only to people from different states but also, and even more so, to individuals within the same state that is a party to the Convention.[1316]

The Committee of Ministers holds thematic meetings dedicated to the execution of judgments and to discuss cases in depth,[1317] allowing for a more comprehensive examination of implementation efforts and challenges faced by Member States. The decisions taken during these meetings contribute to the effective functioning of control mechanisms and the advancement of human rights protection across Europe.[1318] Overall, the role of the Committee of Ministers in supervising the execution of ECtHR judgments exemplifies the Council of Europe's commitment to upholding the rule of law, protecting human rights, and fostering accountability among its Member States.[1319]

Additionally, the ECtHR, as a bulwark against immediate infringements, commands the power to issue interim measures[1320] under Rule 39[1321] of its Rules of Court.[1322] Designed to preempt irreparable harm to individuals or groups during the ongoing adjudication of a case, these provisional injunctions carry the force of binding mandates. Imposing an immediate obligation upon Member States to comply, they coexist with the unfolding examination of the case. This mechanism amplifies the ECtHR's role as a swift responder, staunchly guarding against immediate violations and being proactively responsive.

Another control mechanism of the ECHR is that of friendly settlements.[1323] This avenue of dispute resolution fosters an alternative path to amicably resolve conflicts. Encouraging the state and the applicant to collaborate in fashioning a mutually agreed-upon solution to address alleged violations, this mechanism carries the potential to transcend adversarial paradigms. Upon ECtHR endorsement, this

1312 Krapac et al., 2013, p. 5.
1313 Leloup, 2020, p. 6; see also: Gerards, 2014, pp. 22–23.
1314 Gerards and Fleuren, 2014, pp. 350–351.
1315 Leloup, 2020, p. 6; see also: Gerards, 2014, pp. 22–23.
1316 Ibid.
1317 See: Supervision of the execution of judgments of the European Court of Human Rights 2022 – 16th Annual Report of the Committee of Ministers (2023); for more information, see: Implementation of ECHR judgments – Latest decisions by the Committee of Ministers.
1318 Ibid.
1319 Ibid.
1320 For more information, see: Interim Measures [Online]. Available at: https://www.echr.coe.int/documents/d/echr/fs_interim_measures_eng (Accessed: 27 October 2023).
1321 See Rule 39 of Rules of the Court, from 23 June 2023, p. 20.
For more information, see: Interim Measures.
1322 Rules of the Court.
1323 See Art. 39 ECHR and Rule 62 of Rules of the Court.

negotiated settlement metamorphoses into a binding agreement, signifying a closure to the case. It elegantly underscores the prospect of enforcing human rights through harmonious collaboration and solution-oriented approaches.

In the realm of systemic deficiencies, the ECtHR may wield its authority to issue pilot judgments.[1324] Addressing foundational structural issues, these judgments lay out overarching principles that Member States must adhere to in analogous cases.[1325] Playing a crucial role in overseeing the application of these principles is the Committee of Ministers.[1326] The Committee's involvement ensures a unified approach to rectifying systemic shortcomings, thus safeguarding the consistency and integrity of the Convention's execution. O'Boyle suggests that the pilot judgment procedure, as endorsed by states in the Interlaken Declaration, holds great potential for addressing the issue of repetitive complaints, which can make up a substantial portion of the ECtHR's workload; sometimes, they account for up to 70% of its judgments.[1327] Furthermore, it is not ideal for the ECtHR to primarily function as a Compensation Claims Commission, repeatedly awarding damages based on well-established case law.[1328] Instead, the focus should be on identifying the systemic or structural causes of these problems and using the pilot procedure to compel states to implement effective national remedies.[1329] This is the most appropriate role for the ECtHR.[1330] Once a violation of the Convention is established, it becomes the state's duty to provide appropriate redress for all similarly-affected individuals.[1331] The pilot procedure offers the best opportunity for achieving this in a way that encourages national reform.[1332] Fyrnys further observes that the expansion of the pilot judgment procedure, which extends the impact of the ECtHR's judgments, has consequences for the distribution of powers within the multi-level Convention system.[1333] It affects vertically the balance of authority between the ECtHR and the state parties, and horizontally between the ECtHR and the Committee of Ministers.[1334] This judicialisation of politics, at various levels within the Convention system, as Fyrnys suggests, is an intriguing example within the broader context of the project on 'International Judicial Institutions as Lawmakers'.[1335]

1324 See Rule 61 (Pilot judgements procedure) of Rules of the Court, p. 32; see also: O'Boyle, 2011, pp. 1862–1877, 1873.
1325 Ibid.
1326 Ibid.
1327 O'Boyle, 2011, p. 1873.
1328 Ibid.
1329 Ibid.
1330 Ibid.
1331 Ibid.
1332 Ibid.
1333 Fyrnys, 2011, p. 1233.
1334 Ibid.
1335 Ibid.

Transparency and accountability take centre stage in the publication of ECtHR judgments.[1336] The ECtHR accordingly mandates Member States to disseminate these judgments to pertinent authorities, aiming to bring to light cases necessitating remediation and foster public accountability. This element of transparency serves as a potent deterrent against non-compliance, spotlighting instances where states fall short of fulfilling their Convention-based obligations.

Collectively, these control mechanisms, intricately interwoven, give life to the principles embedded in the ECHR. They manifest the transition from abstract ideals to tangible safeguards, diligently ensuring the protection and promotion of human rights across the European landscape. In essence, the ECHR's control mechanisms transform human rights from theoretical concepts to lived principles. By converging cooperation, accountability, and a commitment to the rule of law, these mechanisms bridge the divide between the proclamation of rights and their tangible protection. This orchestration stands as a testament to the ECHR's commitment to preserving the inherent dignity and freedoms of individuals across the European landscape.

II.1.3 The Related Control Mechanisms of the Venice Commission

A. The Venice Commission's Activities, Working Methods, And Procedures

A.1 The Classification of the Venice Commission's Activities

The activities of the VC are diverse, such that each of their classifications is relative and conditional. Accordingly, for example, Paul Craig, a well-known British constitutionalist and former member of the Commission, first classified the Commission's activities according to the broadest areas, as follows: 1) democratic institutions and fundamental rights; 2) constitutional justice; 3) elections, referendums, and political parties.[1337] From the point of view of scope, the Commission deals with specific and general topics. Conditionally speaking, the first refer to recommendations to specific countries, and the second to the preparation of comparative studies and guidelines, as well as the determination and development of standards in the aforementioned areas.

The key activity of the VC is drafting opinions related to constitutional and legal reforms in specific countries (country-specific opinions). In the literature, the

1336 See HUDOC.
1337 Craig, 2017, pp. 61–63.

term 'constitutional first aid' has become common, although it is not entirely adequate when it comes to this type of activity of the Commission.[1338] Rather, one could describe that the Commission plays the role of a moderator between different internal factors in the reform process of a state, as well as that of an evaluator of the conformity of (draft) normative solutions in the national legal order with international (particularly European) legal standards in the fields of rule of law and democracy.

A.2. Country-Specific Opinions

Opinions are usually given at the invitation of the bodies of the states whose acts are being analysed, but the initiative for their drafting can also be submitted by the bodies of the CoE and other international organisations.[1339] When the state addresses the Commission, it may do so for various reasons, such as to seek an expert opinion on the quality of its proposed solutions; to invoke the authority of the opinion of the Commission as an instrument for solving internal political dilemmas and conflicts; to harmonise national legislation in the most adequate possible way with international standards in some area (which is of particular importance for countries in the process of EU accession).

Regardless of the specific reasoning, even when they are of a distinctly political nature, the sincere willingness of the state to cooperate with the Commission (i.e. to accept its 'dialogue based non-directive approach') is the most important factor. This is so not only because the final effects can only be seen in the implementation of new legislative solutions, but also because of the effective 'help' or 'assistance' of the Commission. This means that the content quality of the specific opinions depends largely on the openness of the state towards the Commission, and the latter's unique working methods.

When it comes to other initiators of opinions, it is most often the Parliamentary Assembly of CoE. Such opinions are usually made against the will of the specific state, or at least not with its voluntary consent. Craig reports the following on the matter: 'There are inevitable differences in the "tone and feel" of an opinion that has not been requested by the state, especially where it does not want such scrutiny, and the relationship between the Commission and the state can be more adversarial in such instances'.[1340]

1338 In a figurative sense, that expression could be adequate for the first period of the Commission's work at the end of the 20th and the beginning of the 21st century; then, the opinions were adopted mainly at the initiative of a state of the former communist bloc, aiming towards their fastest possible approximation to the normative standards and frameworks of Western democracies.

1339 'The Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission'. Art. 3, VC, CDL(2002)27.

1340 Craig, 2017, pp. 65–66.

Opinions are prepared by one or more rapporteurs (i.e. working group) appointed by the Secretariat. Formally, the criteria for the choice of the rapporteurs may include substantive expertise, knowledge of a specific country, linguistic skills, political autonomy and sensitivity, gender balance, and availability.[1341] These criteria are indeed considered in practice, but it is also noticeable that certain long-standing members of the Commission are hired for the largest number of opinions, implying a disparity in the engagement of Commission members that cannot always be justified by these criteria. Shortly after rapporteur appointment, the Secretariat provides them with an 'information sheet' containing background information on the request, the relevant national legislation, an indication of the applicable standards and Commission's previous documents on that topic, and the timeframe and conditions for the preparation of opinions.[1342] This sheet thus provides important input that represents the basis for working on the opinion. An equally important segment of the opinion drafting procedure, precisely bearing in mind the special methodology of the Commission's work, is the visit to the specific country.

> The site visit serves two related purposes. It provides an opportunity for the state to have a 'voice' and proffer observations in response to questions posed by the working groups…The site visit also enables the working group to make contact with civil society and other interested stakeholders.[1343]

Importantly, the draft opinion often 'revives' precisely after these visits, and many dilemmas are resolved, which, as a rule, should be in the interest of all stakeholders in the specific country. Of course, no matter how high-quality and meaningful the visits were, the finalisation of the draft opinion depends on the expertise and experience of the rapporteurs, and on their previous experience in cooperation with the concerned country. Specifically, it is essential for the development of quality opinions (i.e. those that cooperate with internal sociopolitical factors to lead to the adoption and later application of truly better normative solutions) that there is continuity in the open and professional cooperation of the Commission with all relevant actors in the country, as well as a legal and political environment in which the true spirit of tolerance, dialogue, and respect for human rights and democratic values reigns. Furthermore, and undoubtedly, we should never lose sight of the Secretariat, whose role is not only to 'serve' the rapporteurs but also to coordinate their work and harmonise different personality profiles and attitudes, as well as different abilities to identify and consider the same legal and legal–political problems through the prism of standards. In the end, the Secretariat also compiles a 'mosaic' of the contributions of several rapporteurs and 'wraps it up with a bow'

1341 Art. 14, VC, CDL (2002)27.
1342 VC, CDL-AD(2010)034, 5.
1343 Craig, 2017, p. 67.

in the final draft of the opinion. Anyone who at least once had the opportunity to be a rapporteur knows how much the task of the Secretariat goes beyond the 'technical–operational' dimension of work in the process of the drafting and adopting of opinions.

Before the plenary session, the draft opinion is being discussed in the corresponding subcommittee, where certain amendments can be proposed. State representatives and rapporteurs can also meet the day before the plenary session in order to agree on some details in the draft opinion. The opinion is adopted at the plenary session by the votes of the majority of the members, provided that the majority of the members of the Commission are present. However, the rule is that opinions are adopted by consensus, which does not mean that there is never any discussion at the plenary sessions, nor that certain objections cannot be adopted at the session itself. It is important to emphasise here that this rule of deciding by consensus is not an indicator of uniformity in the views of the members of the Commission, but again a consequence of its peculiar work methodology, wherein there is the possibility that all interested members and rapporteurs get involved and contribute even well before the session. Once adopted by the Commission, all opinions (and reports) shall be published,[1344] and the publicity of the work of the VC is also achieved by session reports.[1345]

It is also possible that the opinions that are going to be adopted at the plenary session are made in cooperation with other bodies of the CoE or with other international organisations. This is most often the case when the issues subjected to evaluation in a draft opinion are such that they should be viewed comprehensively, from several angles, and consider the standards of the VC and those of other reference bodies, some of which are specialised for a certain matter (e.g. Organisation for Security and Co-operation in Europe and The OSCE Office for Democratic Institutions and Human Rights).[1346]

1344 Art. 9. para. 2, VC, CDL (2002)27.

1345 'A session report shall be drawn up and circulated by the Secretariat after each Plenary Session; the participants in the relevant session my request amendments within 7 days of circulation of the report'. Art. 16, VC, CDL (2002)27.

1346 That is, for example, the case with the last adopted opinion related to Serbia, the Joint Opinion of the Venice Commission and the Organisation for Security and Co-operation in Europe/The OSCE Office for Democratic Institutions and Human Rights on the constitutional and legal framework governing the functioning of democratic institutions in Serbia – Electoral law and electoral administration. This opinion was approved by the Council for Democratic Elections at its 75th meeting (Venice, 15 December 2022) and adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16–17 December 2022), CDL-AD(2022)046-e. The joint opinion was drafted at the request of the Parliamentary Assembly of the CoE, which was submitted at the beginning of 2021. Since the VC estimated that the adoption of such an opinion before the completion of the process of constitutional reforms in the judiciary (in which it was actively involved) would be, in a certain sense, premature, the work on the drafting of that opinion was postponed until the end of 2021; this is because it became certain in this specific period that the constitutional reforms in Serbia would pass. In other words, instead of working in parallel on the opinion on constitutional amendments and on the opinion on the constitutional and legal framework concerning

A.3 Urgent Opinions

The VC's operability and flexibility, as important features of its work methodology, created the need for a special type of opinion somewhat different from (ordinary country-specific) opinions. These are urgent opinions, which were first created in practice and got their place in the Statute of the Commission a little later.[1347] As the name suggests, these are opinions to be issued in exceptional cases, although the numbers of such opinion type have increased such that they no longer represent an exception in the work of the Commission. Their common denominator is the necessity for the Commission to declare and publish its views and recommendations regarding a text without waiting for the next plenary session where the regular opinion will be discussed and adopted. In other words, the necessity for the Commission to react urgently.

Urgent opinions, unlike ordinary opinions, are not adopted, unless it is decided that they should become 'ordinary'. In order for such an opinion to be issued and published, the following statutory conditions must be met: 1) the requesting authorities and body may justify that waiting for the next plenary session would not be appropriate; 2) the authorisation of the Commission or of the Bureau, in consultation with the rapporteurs.[1348] Furthermore, any urgent opinion shall be submitted to the Commission at its next session, when the Commission may then: 1) take note of the urgent opinion; 2) endorse the urgent opinion; 3) adopt an (ordinary) opinion based on the urgent opinion; 4) decide to postpone consideration of the opinion to a forthcoming session.[1349]

Issuing urgent opinions can sometimes be justified from the point of view of the implementation of wider processes of importance for the realisation of the rule of law in a country. Some exemplars include two urgent opinions on the Law on the Referendum and the People's Initiative of the Republic of Serbia, which were necessary in order to effectuate the constitutional reform of the judiciary in a timely

the functioning of democratic institutions, the Commission decided to follow a logical sequence: first the opinion on constitutional amendments, then the opinion on the constitutional and legal framework. The Commission showed a high degree of sensitivity, and thus encouraged Serbia to bring the process of the important constitutional reforms for the rule of law to a high-quality end. When that process was successfully completed, the VC, together with the Organisation for Security and Co-operation in Europe and The OSCE Office for Democratic Institutions and Human Rights, drafted an opinion that focused on the matter of electoral laws and laws on the financing of political parties.

1347 Art. 14a of the Revised Statute, which deals with urgent opinions, was added at the 53rd Plenary Sessions of the Commission and amended at the 96th, 116th and 134th Plenary Sessions of the Commission.

1348 The Bureau is a body of the VC comprising the President, three vice-presidents, and four other members. The mandate of Bureau members is two years. The President directs the work of the Commission, making decisions on behalf of the Commission, outside of plenary sessions, and whenever necessary in consultation with the Bureau.

1349 Art. 14a, para. 3, VC, CDL (2002)27.

manner.[1350] That is, there was the need for the Commission to react urgently to the law for its adoption before constitutional amendments on the judiciary enabled that constitutional change to be carried out on time, and in compliance with the European (i.e. the VC's) standards regarding the constitutional referendum. If the Commission could not or did not want to intervene through urgent opinions, the constitution-making process would not have been evaluated from the point of view of international standards of the rule of law, and the content-quality constitutional amendments would likely not have achieved the expected political results in the process of European integration.

A.4 Follow-Up Opinions

Another type of opinion that has been used in practice for many years, but became a statutory category only recently,[1351] are follow-up opinions. Schnutz Dürr reports the following about such opinions: 'Whenever there are new developments concerning an adopted opinion, the Secretariat will report to the Plenary Session under the agenda item "Follow up to previous opinions"'.[1352] The Statute defines only a variant of follow-up opinions that has crystallized in the work of the Commission, namely opinions on a legal issue connected with another topic about which the Commission has already given earlier opinions. The Commission may also prepare a follow-up opinion considering its previous analysis and recommendations. One such opinion was issued after the adoption of an ordinary opinion on a set of judicial laws in the Republic of Serbia in the fall of 2022.[1353] In this concrete case, the follow-up opinion made possible to fine-tune some important legal solutions in a relatively short period of time, before the legislative proposals entered the parliamentary procedure.

1350 For the constitutional review of the judiciary part of the Serbian Constitution to be carried out in a legitimate manner, it was necessary to pass a new Law on Referendum and People's Initiative. Competent authorities were late in preparing the law, and since the process of drafting constitutional amendments advanced far in a positive direction, there emerged an urgent need for the Commission's opinion on the draft of that law. According to the letter of 2 August 2021, the Minister of Public Administration and Local Self-Government of Serbia requested an urgent opinion of the VC on the draft law on the referendum and the people's initiative. On 5 August 2021, the Bureau of the VC authorised the preparation of an urgent opinion on this matter, reasoning such urgency on the fact that the constitutional amendments on the judiciary in preparation would have to be submitted to referendum, most probably before the end of the year. This urgent opinion was endorsed by the VC at its 128th Plenary Session (Venice and online, 15–16 October 2021). The Ministry of Public Administration and Local Self-Government of Serbia reacted promptly on that urgent opinion, adopting some changes in the draft law, so the amended text was able to be the object of a new urgent evaluation by the VC. This opinion was drafted based on comments by the rapporteurs and the results of the virtual meetings, including the written comments submitted by the authorities following these meetings, on 22 October 2021. It was issued on 9 November 2021, pursuant to the VC's Protocol on the preparation of urgent opinions (CDL-AD(2018)019).

1351 Art. 14b was added recently at the 134th Plenary Session of the Commission (10–11 March 2023).

1352 Schnutz Dürr, 2010, p. 159.

1353 VC, CDL-AD(2022)043.

This, as in the case of the urgent opinion a year earlier, gave Serbia the opportunity to 'earn' a few more positive political points in the European integration process.

An opinion of the Commission can have the characteristics of the aforementioned, namely to be urgent, a follow-up, and joint.[1354] An ordinary opinion, which must always be adopted at the plenary session, can be joint, but it cannot be urgent and a follow-up opinion at the same time.

A.5 Interim Opinions

In a variety of opinions for specific countries, the practice of the Commission has also produced interim opinions 'when the Commission considers that its assessment of the topic requires further developments'.[1355] These documents, which do not express sweeping conclusions nor express final recommendations, also reflect extremely well the Commission's work methodology. Sometimes the Commission is expected to react urgently and evaluate a certain situation, question, or text. Bearing in mind that the process is ongoing, the Commission should not take final positions. A good recent example is the urgent (also interim) opinion on constitutional reforms in Belarus which, after the entry into force, was amended and adopted as an ordinary opinion.[1356] When it comes to Serbia (former Yugoslavia), the first document that the Commission issued for the then Federal Republic of Yugoslavia concerned the analysis of the constitutional situation in that country. Since it was clear that the situation was of a transitory nature, the Commission issued an Interim Report in 2001.[1357]

Opinions do not formally and legally bind the concerned state. In fact, they have remained unchanged in terms of their formal and legal effect for all those years, something that 'therefore affects the way the Commission is perceived. And that affects the way the Commission perceives itself and its role'.[1358]

A.6 Studies

The second key activity of the Commission is the preparation of studies on certain issues, which it deems to be of special importance, within its scope of work. It is customary for there to be issues that have proven controversial in practice and deserve special analysis and comparative legal research. Within this activity, the Commission prepares a compilation of its opinions and reports through which it singles out best practices and European standards in certain areas.

Apart from scope, which is usually of a general nature, studies and reports differ from specific opinions in that the research that precedes their preparation is

1354 Art. 14c, VC, CDL (2002)27.
1355 Art. 14c, VC, CDL (2002)27.
1356 VC, CDL-PI(2022)002 and CDL-AD(2022)035.
1357 VC, CDL-INF (2001) 23.
1358 Granata-Menghini and Kuijer, 2020, p. 284.

undertaken by the Commission on its own initiative, and hence not at the request of other authorities or bodies. Much like country-specific opinions, studies (e.g. reports or guidelines) are first discussed in subcommittees, with the possibility of participation of not only subcommittee members but also other interested members of the Commission.[1359] They are then discussed and adopted at the plenary session of the Commission. The predominantly general character of these studies allows them to have a relevant comparative–legal, historical–legal, and theoretical–legal aspect.

These small scientific-research studies are important for multiple reasons. First, they allow for the creation of standards of the Commission in various areas of constitutional law. Precisely those standards constitute one great constitutional–legal 'treasure', which the Commission 'discovers' and 'selflessly presents' to all its members and other interested countries worldwide – it is the common constitutional heritage.[1360] Second, and directly related to the first, they are important as points of reference. When drawing up opinions for specific countries, the Commission first refers to these studies, and while working on the opinions, the Commission checks the correctness and immediate applicability of the standards, develops and expands them, and then incorporates these achievements into revised reports and studies, or even some new ones. The reports and general studies also serve as points of reference for other international bodies and organisations, and in general for all participants in the process of building and strengthening the rule of law, democracy, and human rights at the national, international, and supranational level. It is difficult to select the most representative examples of these documents from the 'library' of the VC created over several decades, but it is also quite appropriate to mention those that are relevant to this chapter – the Report on the Rule of Law and the Rule of Law Checklist. Since the constitutional judiciary is one of the fundamental guarantors of the rule of law, the Study on the Individual access to constitutional justice (2009) certainly belongs here.[1361]

In addition to studies and reports, the Commission has regularly published, in the last 10 years, compilations of opinions on certain issues or in certain areas. These are carefully-selected collections of point of views, recommendations, and conclusions on normative solutions in different countries, which the Commission also regularly revises. Their importance is reflected in the fact that these compilations are useful reading for an overview of how the Commission evaluates the application of its standards in different national frameworks. They also showcase how concrete states, in different circumstances and periods, were guided and advised by the Commission to reach solutions that correspond to international standards in a certain area. The Commission's shaping and adjustments of its own standards to fit the specific state peculiarities in concrete cases are also depicted in these studies. Therefore, these

1359 All draft documents should, as a general rule, be made available to the members, associate members, observers, and substitutes at least two weeks before the opening of the plenary session. Art. 9 para. 1. VC, CDL (2002)27.

1360 Schnutz Dürr, 2010, p. 160.

1361 VC, CDL-AD(2010)039rev.

compilations can often be more worthwhile to writers of constitutional amendments and laws in a concrete state than full studies and general reports. Good examples of compilations of special relevance for the rule of law are the Compilation of VC opinions, reports, and studies on constitutional justice (updated 2022), Compilation of VC opinions and reports on states of emergency (2020), and Compilation of VC opinions and reports concerning judges (2023).[1362]

A.7 Amicus Curiae

The third key of activity, which does not occur as often as drafting opinions, studies, and reports, is the preparation of *amicus curiae* opinions at the request of the ECtHR or the constitutional court of a Member State when the Commission's opinion on a particular legal issue is needed as a point of reference in the argumentation of the court decision.[1363] In this case, the position of the VC is stronger than when the ECtHR incidentally quotes a certain Commission's opinion, or when some other *amicus curiae* does so before the Court. Therefore, through an *amicus curiae* opinion, the Commission can significantly influence the legal argumentation of the Court. That can be especially seen when the Court consistently quotes the words of the Commission.[1364]

However, the Commission's *amicus curiae* opinions do not refer to the potential unconstitutionality of the legal acts in question, but serve as rules to deal with certain issues of comparative constitutional law and international public law. Although this type of activity of the Commission is not nearly as represented as the other two analysed activities, it is important for at least two reasons. First, these opinions enable a regular, albeit not too frequent, institutional dialogue between two *par excellence* (at least it should be) legal institutions of the CoE, namely the one whose decisions represent the most important source of hard law, and the other whose opinions represent an equally important source of soft law – and not only for Member States of the CoE. Second, these opinions further confirm the Commission's prevailing legal influence, which can be very concrete and visible in the resolution of court disputes – not only in giving opinions on constitutional reforms and legislation.

Therefore, it can be claimed that, in a broad sense, the VC is a co-legislator and co-constitution maker in the countries for which the Commission issues opinions, and that in this way it performs a quasi-normative function. Conditionally speaking, it cannot be neglected either the Commission's quasi-judicial function when issuing *amicus curiae* opinions.

In addition to these basic key activities, the Commission also deals with educational activities. By organising a large number of seminars and conferences, the

1362 VC, CDL-PI(2022)050, CDL-PI(2020)003, and CDL-PI(2023)019.

1363 The ECtHR may invite the VC under Art. 36 para. 2 of the European Convention of Human Rights to submit comments as a 'third party' (i.e. as amicus curiae).

1364 Hoffmannn-Riem, 2014, p. 586.

Commission is concomitantly working on the promotion of democratic principles and standards, and on further connecting legal experts to create opportunities for them to incorporate these standards into the legal systems of their own countries.

Buquicchio, now the honorary president of the VC and a man who decisively influenced its evolution – at the beginning as a first associate of La Pergola and after his death as a president – sublimated the Commission's activities, as follows:

> During 30 years of its existence, The Venice Commission:
> – Played a major role in drafting the constitutions of new democracies in Central and Eastern Europe, ensuring their compliance with international standards;
> – Monitors these and many other countries during their constitutional and legislative reforms;
> – It has become a major reference for the development of international standards of the rule of law, democracy and respect for human rights;
> – has achieved great trust in many societies, making its support key to public confidence in reforms;
> – assisted a large number of countries in fulfilling the conditions for membership in the Council of Europe and the European Union;
> – contributed to the establishment of constitutional courts in many countries and established a worldwide network of constitutional courts with 117 member courts;
> – assessed a large number of laws, ensuring their compliance with international standards and, in particular, with the European Convention on Human Rights;
> – developed standards for holding democratic elections and contributed to electoral reforms;
> – became a partner to the countries of the South Mediterranean and Central Asia in their constitutional and legal reforms…[1365]

B. The Venice Commission's Standards of the Rule of Law and the judiciary Reform in Serbia: A Short Overview

B.1 The Independence of the Judiciary

In a separate chapter within this book, the contribution of the VC in monitoring the implementation of international standards of the rule of law in the judiciary field of the Republic of Serbia is thoroughly discussed.[1366] Thus, the current chapter provides only a short overview focused on developing a clear conclusion about the influence of the VC's concept of the rule of law on the main directions of the reform of the judiciary in Serbia.

1365 Buquichhio, 2020, pp. 13–14.
1366 Petrov, 2023, cited ahead of publishing.

The constitutional amendments from 2022 in Serbia completely replace the part of the Constitution from 2006 concerning the judiciary. These amendments are essentially an attempt to find a balance between the political and the judicial authorities, and specifically determined that the judicial power belongs to courts that are independent.[1367] The establishment, abolition, types, jurisdiction, areas and headquarters of courts, and the composition of courts and proceedings before courts are regulated by law. Furthermore, the establishment of immediate, temporary, or extraordinary courts is prohibited. The highest court in the Republic of Serbia is the Supreme Court,[1368] and the independence of the judiciary is an explicitly proclaimed constitutional principle: 'Judicial power belongs to courts that are independent'.[1369] In this context, the personal independence of judges is defined as described herein:

> A judge is independent and judges on the basis of the Constitution, confirmed international treaties, laws, generally accepted rules of international law and other general acts adopted in accordance with the law. – Any undue influence on a judge in the performance of his judicial function is prohibited.[1370]

It is important that the phrase 'undue influence on a judge' remained because not every influence is inappropriate and therefore prohibited. The VC also reacted in this sense, so this wording is mostly to its credit.[1371]

B.2 The Permanence of the Judicial Tenure

The Constitution proclaimed the permanence of the judicial tenure without exception: 'The judicial office shall be permanent'.[1372] This describes that the judicial office shall last from the election of a judge until the judge reaches the working age. The so-called probationary mandate of persons who are elected to the position of judge for the first time is also excluded, which is also in accordance with the long-expressed views of the VC.[1373]

Furthermore, the grounds for the termination of a judicial office before the end of the working life are now also determined in the Constitution. The judge will have

1367 Amendment IV to the Constitution of Serbia ('Official Gazette of the RS', No. 16/2022).
1368 Amendment V to the Constitution of Serbia.
1369 Amendment IV to the Constitution of Serbia.
1370 Amendment VI to the Constitution of Serbia.
1371 'The second para. of draft Amendment VI reads: 'Any influence on a judge while performing judicial function is prohibited' [emphasis added]. Consideration should be given to adding the word 'improper' or 'undue' before the word 'influence', otherwise it might be wrongly argued that, for instance, news coverages during a trial potentially influence a judge. Adding the word 'improper' or 'undue' before the word 'influence' would clarify that the material scope of the provision does not extend to such situations'. VC, CDL-AD(2021)032, p. 7.
1372 Amendment VIII to the Constitution of Serbia.
1373 See on the probationary mandate of judges; VC, CDL(2010)006 *, p. 9.

his or her permanent tenure terminated only in case of (a) retirement, (b) personal request by the judge, (c) permanent loss of ability to exercise the judicial function, (d) loss of Serbian citizenship, and (e) dismissal in case of a criminal conviction of at least six months imprisonment or a disciplinary sanction, if the High Council of the Judiciary (HJC) considers that the disciplinary offence seriously damages the reputation of judicial office or public confidence in the courts.

A component of the permanency of the judicial function is the immovability of the judge, which implies that the judge performs the judicial function in the court to which he was elected. Additionally, only with his/her consent can he/she be permanently transferred or temporarily referred to another court. The Constitution foresees cases in which it is allowed even without the consent of the judge, which is also in accordance with the position of the VC.[1374]

B.3 The Powers and the Mode of Election of HJC Members

Judges are elected to a permanent position, and that is the competence of the HJC.[1375] There is the following in Amendment XII to the Constitution of Serbia, 'The High Council of the Judiciary is an independent state body that ensures and guarantees the independence of courts, judges, presidents of courts and lay judges'.[1376] The HJC belongs to the category of independent state bodies. This fulfils another standard of the VC, which is the independence of the body responsible for status issues of judges. The powers of the HJC are not exclusively a constitutional category. In principle, the competences related to deciding on the status of judges, presidents of courts, and lay judges are specified in the Constitution, while other competences of the HJC are prescribed by the law.[1377]

The HJC has 11 members, namely six judges elected by the judges, four prominent lawyers elected by the National Assembly, and the President of the Supreme Court.[1378] The Constitution leaves to the law the regulation of the method of selection of HJC members from the ranks of judges, but mandates that during their election to the HJC, the broadest representation of judges is considered. Any judge can be a candidate for a member of the HJC from among judges.

When it comes to the members of the HJC from among prominent lawyers, they are elected by the National Assembly from among eight candidates proposed by the competent committee of the National Assembly after a public competition, with the votes of two-thirds of all deputies, and in accordance with the law. The Constitution

1374 'Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it could also be used as a kind of a politically motivated tool under the disguise of a sanction. Such transfer is however justified in principle in cases of legitimate institutional reorganisation'. VC, 2016, p. 35.

1375 Amendments VIII and XII to the Constitution of Serbia.

1376 Amendment XII to the Constitution of Serbia.

1377 Art. 17 of the Law on the High Council of the Judiciary (HJC).

1378 Amendment XIII to the Constitution of Serbia.

adds that a prominent lawyer must have at least 10 years of experience in the legal profession, that he/she must be worthy of that position, and that he/she cannot be a member of a political party. The Constitution provides that 'other conditions for election and incompatibility with the function of a member of the High Council of the Judiciary elected by the National Assembly shall be regulated by law'.[1379] The standard of the VC on the balanced composition of the judicial council, which will not be composed only of judges, but in which 'judges as well as lawyers and the public will be adequately represented',[1380] is completely fulfilled. If the National Assembly does not elect all four prominent lawyer members within the deadline specified by law, after the expiration of the deadline specified by law, the remaining members are selected by a commission from among all other candidates who meet the conditions for election. That commission comprises the President of the National Assembly, the President of the Constitutional Court (CC), the President of the Supreme Court, the Supreme Public Prosecutor, and the Protector of Citizens (Ombudsman), by majority vote. The so-called antideadlock mechanism does not represent the defined standard of the VC, because there is no mention of it in the earlier reference documents, nor in the Rule of Law Checklist itself. Nevertheless, the Commission insisted on such a mechanism.[1381]

The elected member of the HJC is elected for five years, and the same person cannot be re-elected to the HJC. The HJC issues a decision on the termination of the office of an elected member of the HJC, against which a member of the Council can lodge an appeal with the CC, which excludes the right to submit a constitutional complaint.

The HJC has a president and a vice president. The President is elected by the judge members of the HJC, and the Vice President by the members elected by the National Assembly, both for five years. The Constitution expressly prohibits the President of the Supreme Court from being elected as the President of the HJC.[1382]

The HJC makes decisions by majority vote of all members, provided that at least eight members of the Council are present. This means that no decision can

1379 Art. 44 of the Law on the HJC.

1380 VC, 2016, pp. 34 and 36.

1381 The establishment of an 'anti-deadlock' mechanism for the selection of prominent lawyers in the HJC was criticised by many in the domestic professional public, but it was one of the 'concessions' made to the VC, as it insisted on the existence of such a mechanism. The Commission was not overly satisfied with the composition of the five-member Commission, but it did not itself propose a specific different solution. VC, CDL-PI(2021)019rev.

1382 The VC recommended that the President of the Supreme Court be omitted from the composition of the HJC as an official, so that there would be six judges and five prominent lawyers. The solution adopted by the Serbian constitution maker was, nevertheless, an acceptable option for the Commission. The argument of the Serbian authorities was that the President of the Supreme Court traditionally personifies the judicial power in Serbia, and that it is difficult to imagine the HJC without him in its composition. On the other hand, a concession was made in the sense that the President of the Supreme Court will not be the President of the HJC, which is the standard of the VC.

be made without the participation of at least one member of the Council elected by the National Assembly. Exceptionally, the decision on the election of the President and Vice-president of the Council, the decision on the election of the president of the Supreme Court and the president of other courts, the decision on the dismissal of the president of the Supreme Court and the president of other courts, and the decision on the dismissal of a judge, are all made by a majority of eight votes. The Constitution provides for constitutional protection against the decisions of the HJC. An appeal to the CC is allowed against the decision of the HJC, in cases prescribed by the Constitution and the law. A declared appeal excludes the right to file a constitutional appeal. The Rule of Law Checklist requires that judges can appeal against the decisions of the judicial council to protect their independence, which is ensured in principle by this solution.

B.4 'Measuring the Immeasurable'

We can conclude from the previous paragraphs that the amendments to the Constitution of Serbia in the judiciary field from 2022, as well as the legislation on the judiciary adopted a year later, have met the standards of the rule of law according to the VC. Whether quality cooperation with the VC will become the rule is going to be seen in the next years, when Serbia, on the way to strengthening its institutions and mechanisms of the rule of law, will constantly be referred to the Commission. The responsible approach of the authorities, but also of civil society, will determine the content of future relations, and consequently the quality of the legal reforms in Serbia. That approach must be, as the Commission itself underlines, holistic, which means avoiding all extremes, including one that would imply uncritical acceptance of everything that comes from the VC as axiomatic postulates that are not to be questioned.

When it comes to the Rule of Law Checklist, the document will be much more influential for the judicial reform in Serbia in the phase ahead, the so-called implementation of the normative framework. Thanks to this document, which is constantly evolving and is gaining even more importance with the crises of the rule of law at the global, regional, and national levels, every country, including Serbia, will be able to 'measure what cannot be measured'.[1383] That is, they will be able to check specific normative solutions (especially by-laws) and their implementation (individual administrative acts and court decisions) from the point of view of individual elements that make up the benchmarks of the rule of law. It is a process with uncertain outcomes, but it is precisely the Checklist that gives each state the opportunity to 'check' itself in the process. That self-evaluation must not be such that the form replaces the content, that is, the essence. In other words, one should not 'tailor' normative solutions according to the Checklist but use it as a practice; to emphasise

1383 Granata-Menghini, 2017, p. 1.

once again, it should be used as a system of open and flexible guidelines and instructions for the application of the rule of law.

National in its origin, the concept of the rule of law as such dictates that its strengthening in a specific state depends predominantly on national, and first of all, legal–cultural and economic conditions. If this is ignored, all previously well-done 'steps' will be nullified by the hypocritical need for 'Venetian', 'EU', or similar mimicry. The very concept of 'European constitutional heritage', highly respected by the VC, is completely opposite to such political pragmatism which can easily destroy even the best normative structure.

II.2 The Related Control Mechanisms of the Organisation for Economic Co-operation and Development

A. Standard-Setting Process: Preference for 'Soft Law' Instruments

The process of setting OECD standards differs depending on the instruments in which the standards are enshrined in. Nonetheless, the adoption of a particular instrument is preceded, as a general rule, by discussions within one of the OECD's technical bodies, and is based on the information collected and analysis performed by the OECD Secretariat and in the course of either public or targeted stakeholder consultation. The process of developing the standards has been increasingly fostering the active engagement of other key stakeholders, such as businesses and civil society, and considering their input.[1384]

In the framework of the OECD, legal instruments are adopted unanimously,[1385] as opposed to the framework of many other international organisations in which decisions are adopted by the majority. It would be reasonable to expect that the consensus may reinforce the commitment of the countries bound by a particular instrument.

Considering the breakdown of OECD legal instruments by their legal effect,[1386] one can only agree with the remark of professor Mark Pieth, that 'the OECD is particularly experienced as an organisation in the area of soft law'.[1387] Namely, out of a total of 273 presented legal instruments, the majority (i.e. 185 instruments) constitutes politically – but not legally – binding recommendations. Meanwhile, a minority (i.e. 11 instruments) of the adopted legal instruments is in the form of international agreements, while 23 decisions, 37 substantive outcome documents, and 17 instruments referred to as 'others' have been adopted.[1388] The described distribution of

1384 OECD, 2021b, p. 4.

1385 Pursuant to Art. 6 of the Convention to the OECD signed in in Paris on 14 December 1960, 'unless the Organisation otherwise agrees unanimously for special cases, decisions shall be taken and recommendations shall be made by mutual agreement of all the Members'.

1386 Statistics [Online]. Available at: https://legalinstruments.oecd.org/en/stats (Accessed: 30 October 2023).

1387 Pieth, 2020.

1388 The so-called 'other' instruments include recommendations adopted by the Development Assistance Committee, the Arrangement of Export Credits, and several sectoral understandings.

legal instruments per type of legal effect sets the tone both for the possible control mechanisms for their implementation and the related sanctions in the event of their improper implementation.

B. Monitoring the Implementation of the OECD Anti-Bribery Standards

In order to achieve the goals set out by the OECD anti-bribery standards and secure their effectiveness, the legal instruments setting these standards must be fully and duly implemented by the countries bound by them. Accordingly, a wide array of different measures has been developed by the OECD to ensure compliance and support standard implementation, ranging from regular exchanges of information and experiences on implementation through to the collection of best practices on various modalities of self-assessment of countries in relation to the implementation of the standards. One of such instruments that has received widespread recognition is the country review (including peer review), resulting in the recommendation for countries to be reviewed in order to secure improvements in their implementation of instruments and (further) alignment with OECD standards in a particular area.[1389]

The OECD's peer-review mechanism, often labelled as its hallmark, has received widespread recognition and was the object of various analyses, being considered an exemplar working method for systematic evaluations, by other states, of the performance of a state when it comes to the implementation of various OECD standards.[1390] On this, the High-Level Advisory Group described the following: 'The OECD has successfully used peer-review monitoring mechanisms to promote transparency, learning and collaboration in identifying shortcomings in their governance systems and anti-corruption efforts as well as solutions to these challenges'.[1391] The OECD's peer reviews 'involve the discussion of countries' performance or practices in a particular area, with the ultimate goal of helping the reviewed state or group of states to improve policy-making, adopt best practices, and comply with established standards and principles'.[1392]

The evaluation process is led by the representatives of all parties to the relevant instrument, the implementation of which is then reviewed and subsequently results in a report on the level of implementation; the evaluation also accompanies recommendations for improvements to said implementation. One of the particularly important advantages of the OECD peer-review method is the state under review not having the possibility to block the adoption of the report, and another is that the report drafted as the outcome of the review process is rendered public. Besides the

1389 OECD implementation toolbox [Online]. Available at: https://legalinstruments.oecd.org/en/about#:~:text=committee%20mandate% (Accessed: 12 August 2023).
1390 See Jongen, 2021, pp. 331–352; see also Agani, 2002, pp. 15–24.
1391 High-Level Advisory Group, 2017, p. 14.
1392 OECD, 2018a, p. 20.

very important function of the public availability of the report in increasing transparency, both towards peer countries and the public, this publishing process plays an important role in triggering one of the significant features related to peer reviews, namely peer pressure. The latter has been considered by certain authors as a 'means of soft persuasion which can become an important driving force to stimulate the state to change, achieve goals and meet standards'.[1393]

Moreover, the review process for the assessment of the implementation of certain standards may be on a voluntary basis, while the monitoring process of the implementation of certain OECD instruments is compulsory for all parties. The most relevant example of the mandatory peer-review monitoring system is the monitoring of the countries' implementation and enforcement of the Anti-Bribery Convention by the WGB in International Business Transactions, which has been repeatedly referred to as the 'golden standard of monitoring'.[1394] The WGB comprises experts (i.e. representatives of the parties to the Anti-Bribery Convention) acting in the capacity of examiners of other countries in the peer-review process. The OECD describes this as follows: 'As custodian of the Convention, the OECD Working Group on Bribery leads global efforts in the fight against foreign bribery by ensuring member countries uphold their obligations to prevent, detect and prosecute this crime';[1395] and 'by monitoring countries' implementation of this convention and ensuring they uphold their obligations, the OECD WGB is leading global efforts to fight bribery of foreign public officials in international trade and investment'.[1396]

B.1 The Legal Basis for Monitoring

The Convention provides the monitoring mechanism that ensures the thorough implementation of the international obligations that countries have undertaken by becoming parties to the Anti-Bribery Convention. Pursuant to Article 12 of the Anti-Bribery Convention, its parties:

> shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of [the] Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference.

1393 Agani, 2002, p. 16.
1394 In particular by the Transparency International, the world's leading anti-corruption non-governmental organisation.
1395 Agani, 2002, p. 5.
1396 OECD, 2023b, p. 2.

B.2 Assessment Scope

The WGB is mandated to monitor the implementation of the Anti-Bribery Convention and related anti-bribery legal instruments. These 'Related legal instruments' include the following: Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,[1397] Recommendation of the Council on Bribery and Officially Supported Export Credits,[1398] Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions,[1399] and Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption,[1400] and any subsequent additions, revisions, or replacements thereto.[1401]

B.3 The Monitoring Process

The monitoring process of the WGB is intergovernmental, such that the civil society and the private sector are formally not involved in the evaluation process. However, following a call for expression of interest, relevant civil society and private sector representatives may take part and be consulted during the visit to the country under review.[1402]

The monitoring process for every country includes specific evaluation procedures and is undertaken in four phases 'addressing a particular stage of compliance with the Convention and progressively placing more stringent demands on member states'.[1403] Each evaluation phase has a specific objective and results in the adoption of a report with recommendations. According to the general principles on country monitoring agreed upon by the WGB in 1998 and revised in 2009, the purpose of monitoring is to ensure compliance with the Convention and the related instruments. Monitoring also provides an opportunity for consultation consult on difficulties in implementation and to learn from the experiences of other countries.[1404] As the outcome of the monitoring process, the country monitoring reports containing the WGB's evaluation and recommendations to the country under review are made public on the WGB's website, together with a press release. The reports are adopted unanimously by all members of the WGB. The reviewed country does not have the right to vote, and therefore cannot block the adoption of the report containing

1397 OECD, 2009a.
1398 OECD, 2006.
1399 OECD, 2009b.
1400 OECD, 2016a.
1401 Phase 4 Monitoring Guide, p. 7.
1402 Fighting foreign bribery [Online]. Available at: https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-phase-4.htm (Accessed: 13 August 2023).
1403 Jongen, 2021, p. 340.
1404 Anti corruption and integrity [Online]. Available at: https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/countrymonitoringprinciplesfortheoecdanti-briberyconvention.htm (Accessed: 12 August 2023).

conclusions and recommendations, which has been considered as a particularly strong point of this monitoring process by many authors.

Phase 1 of the monitoring process includes, beside the elements of mutual evaluation, the elements of self-evaluation, since the country under review provides responses to a questionnaire that constitutes the base for assessing the implementation of the Convention and related instruments. The aim of Phase 1 is to establish whether the legislation of the country under review meets the standards set by the Convention and related instruments. The review process is led by two countries acting as examiners, whose selected experts prepare a preliminary report on their assessment of the progress of the implementation of the standards, which is being evaluated and adopted by the WGB. The objective of Phase 2 is the evaluation of the implementation of legislation. The objective of Phase 3 is to review the unimplemented recommendations from Phase 2, and deal with enforcement and cross-cutting issues. The review conducted under Phase 3 includes the replies to questionnaires (as a form of initial self-assessment) and on-site visits and meetings with the representatives of authorities responsible for applying the law, all for the purpose of obtaining information on enforcement and prosecution. Pursuant to the Phase 4 Monitoring guide, 'phase 4 focuses on key group-wide cross-cutting issues; the progress made by Parties on weaknesses identified in previous evaluations; enforcement efforts and results; and any issues raised by changes in the domestic legislation or institutional framework of the Parties'.[1405] In Phase 4, particular attention is to be dedicated to the specificities of the country under scrutiny, including its situation, challenges, and achievements, with the aim being 'to assist the country in addressing challenges in a way that is suitable and feasible within its legal system, in accordance with the principles of functional equivalence[1406] and equal treatment'.[1407]

Following the adoption of a country monitoring report after each stage of the review process, the WGB monitors the evaluated country's efforts to implement its recommendations.[1408] The country that underwent the review is continuously reminded of its obligation to comply with standards and can move to the next phase of the evaluation 'only after their performance is considered satisfactory, meaning that they have sufficiently addressed the review recommendations'.[1409]

B.4 Results of Monitoring Countries' Compliance with the Anti-Bribery Convention

The annual reports from the WGB are an important source of information on implementation and enforcement of the Anti-Bribery Convention. Since 2010, the

1405 For more information, see: Fighting foreign bribery.
1406 As defined under Commentary 2 to the OECD Anti-Bribery Convention.
1407 Phase 4 Monitoring Guide.
1408 OECD, 2023b, p. 12. Working Group on Bribery in International Business Transactions: 2022 Annual Report, p. 12.
1409 Jongen, 2018, p. 915.

WGB has annually published enforcement data[1410] related to the number of criminal, administrative, and civil cases of foreign bribery that have resulted in a final disposition (e.g. a criminal conviction or acquittal) or similar findings under an administrative or civil procedure. These publications show that, over time, WGB members' law enforcement authority has significantly increased their efforts to investigate, prosecute, and sanction foreign bribery.[1411] According to publicly-available enforcement data of the Anti-Bribery Convention, from the entry into force of the said Convention on 15 February 1999 until 31 December 2021:

> 25 Parties reported having convicted or sanctioned, collectively, at least 687 natural and 264 legal persons for foreign bribery through criminal proceedings and 7 Parties reported having sanctioned, collectively, at least 88 natural and 121 legal persons for foreign bribery through administrative or civil proceedings.[1412]

Regardless of the importance of these statistics on compliance with the Anti-Bribery Convention, an assessment of the effectiveness of OECD standards solely based on these statistics runs the risk of becoming oversimplified. On the one hand, the focus may be put on efforts of the 25 (out of 44 parties) to enforce the legislation; on the other hand, the focus may be directed towards the fact that 19 states, for more than 20 years since the implementation of the Convention, have not had a single conviction for foreign bribery. Either way, in our view, the said data regarding enforcement does not cast a shadow on the quality of the OECD anti-bribery standards, and we are hopeful that the thorough monitoring process, which has been improved by the latest revisions, may and will reveal causes of enforcement deficiencies in each specific situation, bearing in mind particularly the difference between compliance with the standards and their effectiveness. As has been noted by Simmons,[1413] 'while compliance may be necessary for the effectiveness, there is no reason to consider it sufficient'.

1410 For more information, see: Fighting foreign bribery [Online]. Available at: https://www.oecd.org/daf/anti-bribery/data-on-enforcement-of-the-anti-bribery-convention.htm (Accessed: 12 August 2023).

1411 For more detailed information on the WGB's views on enforcement, see its publication entitled Enforcement is the Key!, submitted to the United Nations Office on Drugs and Crime for the 2021 U.N. Special session of the General Assembly against corruption [Online]. Available at: https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/OECD_Working-Group-on-Bribery-Contribution-UNGASS-2021.pdf (Accessed: 12 August 2023).

1412 For more information, see: Anti-corruption and integrity [Online]. Available at: https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2022.pdf (Accessed: 12 August 2023).

1413 Simmons, 1998, p. 78

C. Monitoring the Implementation of Public Integrity Standards

Given its crucial role in standard-setting, monitoring, and dissemination processes of good practices for countries, the OECD is well placed to examine the impact of reforms to fight corruption and foster public integrity.[1414] Its Public Governance Committee[1415] is instructed under the OECD Recommendation of the Council on Public Integrity to monitor (through its Working Party of Senior Public Integrity Officials) the implementation of this Recommendation, to report to the Council no later than five years following its adoption, and regularly thereafter.

Based on the OECD Recommendation of the Council on Public Integrity, the OECD conducts Integrity Reviews[1416] to help policy-makers improve policies, adopt good practices, and implement established principles and standards. The OECD Integrity Reviews compare experiences and good practices from both OECD Members and non-members. These reviews contain proposals for action to governments designed to enhance their public integrity systems based on a comprehensive analysis of their structures, instruments, and processes. Particular attention is directed to the evaluation of the effectiveness of a country's public integrity management systems. During the review process, the OECD Secretariat organises workshops and policy discussions with experts and officials from peer institutions in OECD Members, as well as in the OECD Public Governance Committee and its affiliated networks.[1417]

C.1 The OECD Public Integrity Indicators: Providing Publicly-Available Information on the Level of Implementation of Public Integrity Standards

To monitor the progress made in the implementation of the OECD Recommendation of the Council on Public Integrity and provide a tool for measuring public integrity, the OECD Member Countries have agreed on introducing Public Integrity Indicators (also known as OECD PII). These characterise the first set of internationally-agreed indicators and the OECD's first-ever standard indicators on public integrity and anti-corruption, developed for and with governments, based on the OECD Recommendation of the Council on Public Integrity,[1418] validated by the OECD, and approved by all OECD Member Countries. As aforementioned, the indicators were

1414 Smidova, 2020, p. 5.

1415 Whose mandate has been revised by the Resolution of the Council [C(2021)61, Annex II and C/M(2021)10, item 104], conferring to the Committee the ability to assist Members and Partners in developing and implementing evidence-based and innovative policies that strengthen public sector institutions' ability to promote systemic change. This should, in turn, serve as way to respond to economic, social, and environmental challenges, thereby improving the outcomes for citizens and strengthening democracy.

1416 OECD Integrity Reviews and other reports on integrity [Online]. Available at: www.oecd.org/gov/ethics/integrity-publications/ (Accessed: 15 March 2024).

1417 OECD, 2017.

1418 For more information, see: OECD Public Integrity Indicators [Online]. Available at: https://oecd-public-integrity-indicators.org/about (Accessed: 12 September 2023).

developed by a Task Force,[1419] comprising nine members of the Working Party of Senior Public Integrity Officials, to measure the success of the implementation of the OECD Recommendation of the Council on Public Integrity. These standardised indicators of public integrity were presented by the OECD on 24 March 2021, during a meeting of the OECD Global Anti-Corruption & Integrity Forum,[1420] and the first set of indicators on the quality of public integrity and anti-corruption strategies was launched on 9 December 2021, to be followed by five more sets of indicators over the course of the next 18 months.

The Recommendation of the Council on Public Integrity requires data collection from various actors across the executive, legislative, and judiciary branches. The OECD Public Integrity Indicators were designed to cover the following six areas: the quality of anti-corruption and integrity strategic framework; accountability of public policy-making; strength of external oversight and control; effectiveness of internal control and risk management; fairness; timeliness; openness of enforcement mechanisms and meritocracy of the public sector. The indicators combine sub-indicators that establish the minimum legal, procedural, and institutional safeguards for the independence, mandate, and operational capability of essential actors of the public integrity system.[1421] On this, Smidova, Cavaciutim, and Johnsøn described:

> Public Integrity Indicators have already been positively assessed as offering a credible alternative to corruption-related indices, as they are based directly on data from member countries instead of expert views. The indicators unpack the general notion of corruption into specific integrity risks and measure the strength of regulations, institutions and practices.[1422]

The first dataset published on 36 countries on the quality of the strategic framework may be used as basis for assessment of the level of implementation of the OECD standards in the area of anti-corruption fight. The detailed country-specific information is publicly-available on a dedicated webpage,[1423] which provides an overview of performance for each country in comparison with the OECD average and top performers, aiming at identifying best practices in each policy area. This broad set of indicators aim at ensuring the preparedness and resilience of the public integrity system at the national level to prevent corruption, mismanagement, and waste of public funds, the assessment of the likelihood of detecting and mitigating various corruption risks and are based on an agreed international legal instrument.

1419 Task Force members came from Austria, Brazil, France, Germany, Italy, the Netherlands, Poland, the Slovak Republic, and the United Kingdom.

1420 For more information, see: Integrity Indicators [Online]. Available at: https://www.oecd.org/governance/ethics/integrity-indicators-launch.htm (Accessed: 10 September 2023).

1421 Ibid.

1422 Smidova, Cavaciuti, and Johnsøn, 2022, p. 3.

1423 For more information, see: OECD Public Integrity Indicators.

These indicators also adhere to the same high statistical standards relevant for other OECD indicators and are validated by OECD Member Countries. Their introduction is considered as a significant milestone for the integrity-promotion and anti-corruption community.[1424] We believe that the public disclosure of a detailed overview of the indicators on the level of implementation of the agreed-upon standards in the area of public integrity, despite the non-binding character of the relevant standards, has the potential to exert pressure towards increased implementation of such standards by their adherents. The hope is that this contributes to strengthening the rule of law.

C.2 Supporting and Monitoring the Implementation of OECD Standards of Conduct for Public Officials

The OECD provides various modalities of support to countries for strengthening their conflict-of-interest frameworks. A Toolkit has been developed in co-operation with OECD Member and non-member countries, providing a set of practical solutions for developing and implementing policies for managing conflicts of interest in accordance with the OECD Guidelines for Managing Conflict of Interest in the Public Service.[1425] This Toolkit delivers practical assistance to officials in respect of recognising problematic situations, and are based on examples of conflict-of-interest prevention policies and practices in various OECD Member and non-member countries. It was also designed to enable adaptation to the specificities of the respective legal system.

The OECD is also engaged in the assessment of countries' existing conflict-of-interest polices and their implementation. For instance, at least one section of the Integrity reviews performed by the OECD are dedicated to this issue. Finally, the report titled 'Managing Conflict of Interest in the Public Service – OECD Guidelines and Country Experiences'[1426] highlights trends, approaches, and models across OECD Member Countries through a comparative overview. Furthermore, the selected country case studies[1427] provide details on the implementation of policies in national contexts, and on key elements of legal and institutional frameworks. Although such reviews are intended primarily for assessing the situation of, and assisting Member Countries, in the process of implementation of relevant standards, it may be argued that the publicity of the reports and reviews may have some bearing on increasing the efforts of the adherents towards proper implementation of the agreed-upon, non-binding standards.

1424 For more information, see: Events [Online]. Available at: https://www.oecd-events.org/gacif2021/session/72b2f15a-c871-eb11-9889-000d3a20eda5 (Accessed: 10 September 2023).

1425 OECD, 2005.

1426 OECD, 2004.

1427 The countries covered are Australia, Canada, France, Germany, New Zealand, Poland, Portugal, and the United States of America.

C.3 Supporting and Monitoring the Implementation of OECD Standards in the Area of Public Procurement

A number of supporting guidance materials has been developed for the purpose supporting the implementation of the 2015 OECD Recommendation of the Council on Public Procurement. One example is as the Checklist for Supporting the Implementation of the 2015 OECD Recommendation of the Council on Public Procurement,[1428] designed to guide and support public procurement practitioners in reviewing, developing, and updating their procurement framework according to the 12 principles of the Recommendation. This Checklist aims at encouraging self-assessment. In addition, the Public Procurement Toolbox has been developed as an online resource (i.e. a web-based platform) that supports public procurement practitioners in reviewing, developing, and updating their procurement framework according to the 12 principles of the Recommendation. The Toolbox provides policy tools, specific country examples, and indicators to measure public procurement systems.[1429]

The OECD's support has been additionally provided through developing frameworks and indicators to assess public procurement systems, such as the MAPS. The latter has been viewed as an international standard and a universal tool to evaluate any public procurement system, at any government level, anywhere in the world, and regardless of the level of development of the respective country. The methodology is designed to enable a country, with or without the support of external partners, to assess its procurement system to determine its strengths and weaknesses. MAPS assessments, carried in a number of countries worldwide by their respective governments, with or without external assistance of certified MAPS assessors, highlight the areas in need of reforms and indicate the best way to undertake such reforms.

The area of public procurement is also a domain in which the OECD is undertaking peer reviews to assess public procurement systems and provide proposals for improvements, the implementation of which is thereby assisted by the practical experience of leading experts from OECD Member Countries who share and assist in the implementation of international good practices.[1430] Here, as for the other areas in which the OECD peer-review process is used, the author is of the view that peer pressure and public scrutiny may contribute to the enforcement of the recommendations and standards enshrined therein. Jongen can be quoted at this point, who claims that despite the fact that peer review 'cannot force states to heed their recommendations',

1428 For more information, see: Public Procurement Recommendation [Online]. Available at: https://www.oecd.org/gov/public-procurement/recommendation/ (Accessed: 12 October 2023).

1429 For more information, see: Procurement toolbox [Online]. Available at: www.oecd.org/governance/procurement/toolbox/ (Accessed: 10 October 2023).

1430 The OECD has been invited to conduct public procurement reviews of both its Members (e.g. Greece, Korea, Mexico and the United States of America) and non-members (e.g. Brazil, Colombia, and Morocco). List of country reports [Online]. Available at: https://www.oecd.org/gov/public-procurement/publications (Accessed: 25 October 2023).

it may 'instead seek to advance policy reform by stimulating policy learning, by providing technical assistance, and by organizing peer and public pressure'.[1431]

Finally, a note must be made about the survey on the implementation of the Recommendation carried out in 2018 by the OECD in 34 countries.[1432] The report, published in 2019[1433] and based on the results of this survey and on insights resulting from various sources (i.e. OECD peer reviews of procurement systems, good practice compendiums, data from previous OECD surveys on public procurement, Government at a Glance, and experiences shared by country delegates), presents the progress made across OECD Member and non-member countries in implementing reforms of their procurement systems. This report can thus be considered a valuable source of information on the level of implementation of OECD standards in this area within a country.

D. Supporting and Monitoring the Implementation of OECD Principles for Transparency and Integrity in Lobbying

The OECD Council requested the Public Governance Committee to report back on the progress made in implementing the Recommendation within three years of its adoption, and regularly thereafter.[1434] The first report, the 2014 Report on the implementation of the Recommendation,[1435] reviewed the progress made thus far. The processes related to this report included consulting stakeholders and benchmarking based on comparative evidence and lessons learned in the contexts of specific countries. The assessment showed that although most OECD Members have not regulated lobbying, they 'are increasingly opting to introduce rules on lobbying'.[1436] It was also noted that regulation of lobbying had been reactive instead of forward-looking, as although there was emerging consensus on the need for transparency to shed light on lobbying, changes were often driven by scandals instead of being forward-looking.[1437] This report encouraged adherents to focus their efforts on the implementation of the Recommendation, in order to strengthen confidence in the public decision-making process and restore trust in the government.

In its Standard-Setting Action Plan, the Public Governance Committee confirmed that the Recommendation 'still remains the sole global legal instrument to provide

1431 Jongen, 2018, p. 910.
1432 31 OECD countries, Costa Rica, Morocco, and Peru.
1433 OECD, 2019.
1434 Report by the Public Governance Committee on the Implementation of the Recommendation of the Council on Principles for Transparency and Integrity in Lobbying [C(2010)16], C(2014)7 [Online]. Available at: https://www.oecd.org/gov/lobbyists-governments-and-public-trust-volume-3-9789264214224-en.htm (Accessed: 25 October 2023).
1435 Ibid.
1436 Report by the Public Governance Committee on the Implementation of the Recommendation of the Council on Principles for Transparency and Integrity in Lobbying [C(2010)16], C(2014)7, p. 3.
1437 Ibid.

guidance on how to ensure transparency and integrity in lobbying activities',[1438] and scheduled the second report to the Council. More than 10 years after the adoption of the Recommendation, the 2021 Report on the implementation[1439] responded to the Council's request after having evaluated the progress made in the implementation of the Recommendation, highlighting the main related trends and developments.[1440] The Report described that there had been improvements in transparency and integrity, and concluded that lobbying should be interpreted in a broader sense owing to its complexity, to avoid loopholes, prevent opaque practices, and increase trust in the policy-making process. It was also concluded that a comprehensive approach to defining lobbying was necessary to cover the influence of the policy-making process in all its forms.[1441] The Report proposed a review and update to the Recommendation by the Public Governance Committee, through the Working Party of Senior Public Integrity Officials, within two years; the aim of this review and update would be to reflect the evolving lobbying and influence landscape, and to guide the efforts by all actors (i.e. across governments, businesses, and civil society) in reinforcing the frameworks for transparency and integrity in policy-making.[1442]

E. OECD Supporting Anti-Corruption, Integrity, and Governance Tools: Sui Generis Control Mechanisms?

E.1 OECD Country-Specific Public Governance Reviews

The OECD Public Governance Reviews were launched in 2007, aiming to provide governments with an assessment of their performance and possibilities for its improvement, 'in order to strengthen countries' potential for sustainable growth and to improve the well-being of citizens'.[1443] These country-specific reviews, mostly focused on topics such as open government, corruption prevention, public integrity promotion, risk management, illicit trade, audit institutions, and civil service reform, assess the public administrations' ability to achieve government objectives, and its preparedness to address current and future challenges.[1444] These reviews also yield recommendations on the capacities of a country's central public administration,

1438 GOV/PGC(2017)4/FINAL.

1439 Report on the Implementation of the OECD Recommendation of the Council on Principles for Transparency and Integrity in Lobbying [OECD/LEGAL/0379], Lobbying in the 21st Century: Transparency, Integrity and Access, C(2021)74.

1440 Brazil, Costa Rica, and Romania.

1441 Report on the Implementation of the OECD Recommendation of the Council on Principles for Transparency and Integrity in Lobbying.

1442 Ibid.

1443 Public governance reviews [Online]. Available at: https://www.oecd.org/gov/publicgovernancereviews.htm (Accessed: 14 October 2023).

1444 For more information, see: OECD Public governance reviews [Online]. Available at: https://www.oecd-ilibrary.org/governance/oecd-public-governance-reviews_22190414 (Accessed: 14 October 2023).

highlight its governance strengths and successes to date, analyse governance challenges as a country seeks to address its public policy issues, offer a strengthened evidence-base in support of well-targeted reforms to help the government make the case for reform, and discuss implementation strategies to drive the governance reform agenda to a successful conclusion.[1445]

In general, a public governance review consists of a peer-reviewed assessment to generate recommendations for the improvement of a country's performance and is coupled up with OECD's support for the implementation of the recommendations. The public dimension of these reviews (i.e. all publications containing international studies and country-specific reviews of government efforts to make the public sector more efficient, effective, innovative, and responsive to citizens' needs and expectations are made publicly available) and the associated peer pressure may certainly have an impact when it comes to the choice of recommendations that a country wishes to implement.[1446]

E.2 OECD's Initiative Names 'Government at a Glance': Measuring the Rule of Law?

Published every two years, the publication Government at a Glance provides relevant indicators on government activities and their results among OECD Member Countries, comparing the political and institutional frameworks of governments across the OECD Member Countries, as well as government revenues, expenditures, employment, and compensation.[1447] Each indicator in the publication is presented by graphs and/or charts illustrating variations across countries and over time; the publication also provides brief descriptive analyses highlighting the major findings resulting from the presented data, and a methodological section on the definition of the indicator and any limitations in data comparability.[1448] Therefore, the Government at a Glance publication allows for cross-country comparisons and helps identify trends, best practices, and areas for improvement in the public sector.[1449]

Within a chapter dedicated to the governance of the policy cycle, one section is dedicated to the rule of law, wherein the OECD explores perceptions of public governance using nationally-representative data from the OECD Trust Survey conducted

1445 For more information, see: Ibid.

1446 For more information, see: OECD Public Governance Reviews [Online]. Available at: https://www.oecd-ilibrary.org/governance/oecd-public-governance-reviews_22190414 (Accessed: 14 October 2023).

1447 For more information, see: Government at a Glance [Online]. Available at: https://www.oecd-ilibrary.org/governance/government-at-a-glance-2023_3d5c5d31-en (Accessed: 14 October 2023). It also includes indicators describing government policies and practices on integrity, e-government and open government, and introduces several composite indexes summarising key aspects of public management practices in human resources management, budgeting, procurement, and regulatory management.

1448 For more information, see: Government at a Glance.

1449 OECD, 2023c, p. 232.

across 22 countries.[1450] Building on the Venice Commission's assessment,[1451] this publication identifies the rule of law as one of the foundations of democratic governance, ensuring that the same rules, standards, and principles apply to all individuals and organisations, including governments.[1452] The OECD described the following on this:

> The rule of law requires that everyone is treated equally in accordance with the law and receives fair treatment from independent and impartial courts. Strengthening the rule of law is an essential prerequisite for ensuring the effective provision of public goods and services, for promoting economic development, maintaining peace and order, and ensuring accountability in the case of integrity breaches and corruption.[1453]

The OECD Trust surveys serve as the primary data source, and is accompanied by the World Justice Project (also known as WJP) Rule of Law Index as an additional data source, the latter being used for the purpose of obtaining a more comprehensive picture. The World Justice Project[1454] Rule of Law Index is a quantitative assessment tool designed to offer a comprehensive picture of the extent to which countries adhere to the rule of law in practice.[1455] It evaluates eight dimensions of the rule of law, as described hereinafter: 1) constraints on government powers; 2) absence of corruption; 3) open government; 4) fundamental rights; 5) order and security; 6) regulatory enforcement; 7) civil justice; and 8) criminal justice.[1456] The World Justice Project conducts surveys and interviews with local experts and nationally-representative samples, and has available data on 36 OECD Member Countries, one accession country (Brazil), and four strategic partners.[1457] Data on each dimension of the rule of law, except for the ninth dimension (i.e. informal justice), is available on the World Justice Project website.[1458] Importantly, the World Justice Project Rule of Law Index 'measures adherence to the rule of law by looking at policy outcomes'.[1459] The authors of the methodology behind this Index admit that 'societies have different rules and institutions to establish the rule of law', and that comparing those institutions 'is not meaningful unless we evaluate their merits or failures across a range of assessment criteria removed from contextual factors'.[1460]

1450 OECD, 2023c, p. 92.
1451 Venice Commission, 2011, Report on the Rule of Law.
1452 OECD, 2023c, p. 92.
1453 OECD, 2023, Government at a Glance 2023, p. 92.
1454 World Justice Project Rule of Law Index [Online]. Available at: https://worldjusticeproject.org/rule-of-law-index/ (Accessed: 14 October 2023).
1455 Botero and Ponce, 2010, p. 27.
1456 OECD, 2023a, p. 92.
1457 Ibid.
1458 World Justice Project Rule of Law Index [Online]. Available at: https://worldjusticeproject.org/rule-of-law-index/ (Accessed: 14 October 2023).
1459 WJP, 2019, Rule of Law Index 2019, p. 8.
1460 Botero and Ponce, 2010, p. 16.

One of the manifestations of the OECD's interest in the practical aspects of the rule of law lies in its efforts to measure the concept and good governance. Furthermore, as a result of the biannual analysis of the World Justice Project's quantitative indicators, the OECD produces a comprehensive overview of public governance and public administration practices in OECD Member and partner countries. For illustration purposes, it is worth noting that the eighth edition of the Government at a Glance (2023) includes indicators on trust in public institutions and satisfaction with public services, as well as evidence on good governance practices in areas such as policy cycle, budgeting, public procurement, infrastructure planning and delivery, regulatory governance, digital government, and open government data. Finally, it provides information on what resources public institutions use and how they are managed, including public finances, public employment, and human resources management.[1461]

E.3 OECD Survey on the Drivers of Trust in Public Institutions: Trust Survey

The OECD Survey on the Drivers of Trust in Public Institutions is a relatively new measurement tool for public governance and democratic governments seeking to improve public confidence in government reliability, responsiveness, integrity, fairness, and openness.[1462] It measures government performance across five drivers of trust (i.e. reliability, responsiveness, integrity, openness, and fairness), providing insights for future policy reforms.

The first Trust Survey, a cross-national investigation dedicated to identifying the drivers of trust in the government across different government levels and institutions, has been approved and declassified by the Public Governance Committee in June 2022,[1463] and run in 22 countries that voluntarily accepted to be evaluated. As agreed in the 2022 OECD Ministerial meeting on 'Building Trust and Reinforcing Democracy', this trust survey will be repeated every two years.

The OECD members and accession countries also launched the OECD's Reinforcing Democracy Initiative (also known as RDI) at the meeting of the OECD Public Governance Committee at Ministerial Level on 'Building Trust and Reinforcing Democracy', held in November 2022. Through this initiative, countries committed to a broad set of actions to respond to some of the key governance challenges to democracy and public trust, including combatting dis/mis information; strengthening representation, participation, and openness in public life; gearing up the government to deliver on climate; transforming public governance for a digital democracy; embracing the global responsibilities of governments; building resilience to foreign influence. The OECD's Reinforcing Democracy Initiative provides evidence-based

1461 For more information, see: Government at a Glance.
1462 OECD, 2022.
1463 Ibid.

guidance and describes good international practices to assist countries in reinforcing democratic values and institutions.[1464]

The Luxembourg Declaration on Building Trust and Reinforcing Democracy was adopted as the outcome of the Ministerial meeting of the OECD Public Governance Committee held in November 2022, which had the goal to propose concrete actions to address the pressing challenges facing democracies today. This Declaration restates the commitment to and support for a range of concrete actions made previously by OECD Member States,[1465] and establishes the OECD's agenda on reinforcing democracy and strengthening trust in public institutions. To this aim, Ministers welcomed three OECD Action Plans, as follows: Action Plan on Public Governance for Combating Mis-information and Dis-information,[1466] Action Plan on Participation and Representation[1467] and its Annex on Gender Equality, and Action Plan on Governing Green.[1468] The Ministers also invited the OECD, through the Public Governance Committee, to support their implementation efforts, welcomed the transformation of the Global Forum on Public Governance into the OECD Global Forum on Building Trust and Reinforcing Democracy, as well as welcomed the launch of the OECD DIS/MIS Information Resource Hub.[1469] Ministers also called on the OECD to continue to monitor and analyse the drivers of trust in public institutions through the biennial OECD Survey on the Drivers of Trust in Public Institutions; develop the Gateway to Reinforcing Trust; introduce the OECD Public Governance Monitor; develop an OECD recommendation on the design of government services to effectively improve people's experiences, including through life events.

1464 Reinforcing Democracy [Online]. Available at: https://www.oecd.org/governance/reinforcing-democracy/ (Accessed: 10 October 2023).
1465 OECD, 2023c, p. 3.
1466 Approved by the Public Governance Committee on 5 October 2022 [GOV/PGC(2022)27/REV1].
1467 Approved by the Public Governance Committee on 5 October 2022 [GOV/PGC(2022)27/REV1].
1468 Approved by the Public Governance Committee on 5 October 2022 [GOV/PGC(2022)27/REV1].
1469 For more information, see: Mis- and disinformation [Online]. Available at: https://www.oecd.org/stories/dis-misinformation-hub/ (Accessed: 15 March 2024).

II.3 The Related Control Mechanisms of the United Nations

The evaluations of the submitted reports involves an open, constructive dialogue, which, although not the ideal means of overseeing the implementation of the specific convention, is the responsibility of any committee set up by the abovementioned Treaty. The evaluation provides an exceptional opportunity to examine and evaluate national legislation, policy, and practice in the relevant areas of human rights protection. The whole procedure has now reached a level which at first only appeared to be a possible interpretation of the relevant convention articles, and which the specific committees have progressively modified in their rules of procedure.[1470]

In view of the sometimes initially one-sided reports, all the committees have issued recommendations in which they have provided guidance to states on how the reports should look; specifically, after a general section on the legal framework of the State concerned, including its judicial system, the report should address the State's implementation of its obligations under the individual articles and indicate the factors that prevent it from fully implementing the article in question.[1471] Prior to the actual review, the State is given a list of issues that a specific committee would like to address in more detail to ensure that the planned dialogue is sufficiently meaningful, including in terms of personal representation of the State.[1472] After the presentation of the report by the State, the individual committee members are given space to ask their questions. Recently, the committees have appointed 4–6 members for each report, who are prepared thoroughly for the discussion with the State. These members are substantially assisted by NGOs, which have started to prepare and submit shadow reports in some areas.[1473] In some cases, questions are not answered for days or answers raise further questions. The meeting is concluded

1470 See e.g. Art. 40 of the International Covenant on Civil and Political Rights. This Art. does not envisage the participation of States in the meetings of the Committee nor the preparation of recommendations of the Human Rights Committee.

1471 For the guidelines for specific Committees, see: Guidelines and tools for treaty body reporting [Online]. Available at: https://www.ohchr.org/en/treaty-bodies/guidelines-and-tools-treaty-body-reporting (Accessed: 25 November 2023).

1472 The Committees require States Parties not to be represented by their diplomatic representatives currently based in New York or Geneva, where the Committees usually meet, but to send representatives who have expertise on the topic.

1473 For an example of a shadow report, see [Online]. Available at: https://www.right-to-education.org/node/171 (Accessed: 27 November 2023).

with the adoption of the committee's final recommendations, views, or comments,[1474] which usually consist of an appreciation of the positive aspects of the State party's implementation of the Convention, the naming of factors that impede the full implementation of the Convention, specific areas of concern, and the committee's suggestions for the State party.

The committees also request States to disseminate their recommendations not only formally within their own authorities, but especially in civil society. In addition, in recent years, some committees have begun to require States not only to address their recommendations in the next report, but also to provide them with specific reports on how they have managed to incorporate the committee's specific comments within the specified time (that is, before the due date of their next report). A few committees also have the option of requesting the submission of a supplementary report outside the regular reports in the event of compelling circumstances. However, the committees rarely use this option as it could be seen as biased.

Another problem encountered in the system is the late submission of regular reports or the absence of even the first report. Initially, the position of the committees on this problem was that in the absence of a report, they could not actually assess anything; consequently, there was *de facto* no monitoring of the fulfilment of the obligations of the parties to the contract. Gradually, however, the committees began to assess the situation of human rights protections in countries that did not submit reports. They regulate this procedure in their rules of procedure, which also stipulate that States will be informed both of these committees' deliberations *in absentia* and of the documents that form the basis of their deliberations.[1475] Notably, some States renew their contacts with the relevant committee after such negotiations without their presence. A State's failure to fulfil such basic obligations arising from the ratification of human rights conventions can be seen as a failure to govern in a responsible manner following the rule of law.[1476] On the other hand, it is important to recognise the amount of professional official work that needs to be done if a State wishes to demonstrate its attitude towards the protection of human rights by ratifying most of the abovementioned human rights conventions, which impose not only an obligation to actively protect human rights, but also an obligation to demonstrate such achievements.

In addition to the recommendations adopted at the end of an evaluation of individual reports (which are analysed below), the committees also adopt general recommendations or general comments on various aspects of their work or on the interpretations of the articles of the treaties on which their recommendations are based. Although the Human Rights Committee is not expressly granted this power in the International Covenant on Civil and Political Rights, it has arrived at it through its

1474 Each committee uses different terminology for its conclusions.

1475 These are mainly documents prepared by other UN bodies, such as the Office of the High Commissioner for Human Rights or NGOs.

1476 Compare with Tomuschat, 2003, p. 187.

interpretative procedure. Meanwhile, other committees have been expressly granted the power to adopt general recommendations under their establishing treaties. Although these recommendations are not as extensive as those of individual reports for individual States, and are sometimes more idealistic than realistic, they generally provide a very good guide not only for the implementation of State obligations, but also for anyone concerned with the protection of human rights.[1477]

One of the mechanisms available to the committees is the possibility of complaints filed by individuals.[1478] Notably, the UN prefers the term 'communication' over 'complaint', as 'communication' was a more acceptable terminology for States when these treaties adopted. Meanwhile, an individual's ability to file a notification in the field of the protection of human rights represents a fundamental turning point in the scale of the activities of international bodies and, at the same time, has a major impact on the actual protection of human rights at the national level. Although, the decisions of the committees as quasi-judicial bodies are not generally legally binding, their recommendations place considerable political pressure on States. In addition, most States try to reach an amicable settlement with the complainant as a precaution – the preference here is to avoid a decision and delete the case from the list of cases dealt with by an international body.

First, individual committees decide whether a notification is admissible. A notification can be submitted by individuals or groups of individuals who object to the violation of their rights protected by the relevant convention – that is, by those who are victims of human rights violations (CCPR, CERD, CAT, CEDAW, CRPD, and CED notably allow the submission of a notification not by the victim himself, but by a person close to him on his behalf). Control authorities will reject the notification if it is clearly unfounded or insufficiently justified (CEDAW and OP-CRPD state this explicitly while other committees establish this in their rules of procedure). Another question that the committees examine for the admissibility of the notice is the question of *litipendency* or *res iudicata*, which means that most committees will reject a notification if the same matter has already been decided by another judicial or quasi-judicial international body or is pending in such a forum. This approach reflects the efforts of states not to overload the human rights protection system at the UN and to prevent one committee from becoming an appeals body for another.[1479]

A fundamental question in the decision on the admissibility of the notification is the decision on the exhaustion of national remedies. The rationale for this condition is obvious: States have the option before their actions will be evaluated in an international

1477 For more information, see: General Comments [Online]. Available at: https://www.ohchr.org/en/treaty-bodies/general-comments (Accessed: 27 November 2023).

1478 Some Committees have this authority under a specific Convention or their Optional Protocols (CAT, Art. 21, ICCPR, Art. 41, CERD, Art. 11, CRMW Art. 76, CPPFD, Art. 32, 3. Optional Protocol to the CRC, Art. 12). They may receive inter-state complaints, which often subject to a special declaration from both potential disputing parties. However, States prefer more informal diplomatic negotiations to the formal procedure before the relevant committee when necessary.

1479 Tomuschat, 2003, p. 213.

forum to correct the violation of their international obligations themselves. However, the committees do not insist on the requirement that national remedies have been exhausted, unless this would make the proceedings too long or there would be no real possibility of actually securing a relevant remedy for the injured party. National remedies must therefore be effective and accessible to victims of human rights violations.

In the UN system, individual reports reach the committees through the OHCHR, which may invite complainants to complete the report. When the Committee decides that the communication is admissible, it will ask for a statement from the concerned State. The proceedings take place exclusively in written form and are closed to the public. Therefore, this process does not include any witnesses or experts.

In the case of the ICCPR, the legal basis for the mechanism for receiving individual communications is the Optional Protocol, which has existed alongside the ICCPR since its adoption in 1966. In the case of the Convention on the Elimination of Racial Discrimination, the competence of the Committee on the Elimination of Racial Discrimination to receive and decide on individual communications from individuals or groups of individuals is established by a special declaration by a State party under Art. 14 of the CERD. Interestingly, a very small number of State parties have made such a declaration. It is particularly interesting to note that, since its inception over 50 years ago, the Committee on the Elimination of Racial Discrimination has issued a decision on a case concerning communications from individuals in only 59 cases.[1480] However, it is often the case that communications submitted are not admissible because they concern, for example, religious or ethnic discrimination, which is not covered by the Convention on the Elimination of Racial Discrimination.

Further, in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 22 of the CAT requires a specific declaration by the State party to recognise the competence of the committee. Even in the case of this committee, most State Parties have not made such a declaration. However, unlike the Committee on the Elimination of Racial Discrimination, the Committee against Torture has already adopted a decision on the substantive merit in over 450 cases.[1481]

The Convention on the Elimination of All Forms of Discrimination against Women does not contain a provision establishing the possibility for the Committee on the Rights of Women to receive complaints from individuals concerning violations of their rights under the Convention. However, 20 years after the Convention's adoption, its Optional Protocol was adopted with the aim of creating such a mechanism.[1482] This international treaty received a great deal of attention from the international community and entered into force just one year after its adoption.

1480 For more details, see: Juris OHCHR [Online]. Available at: https://juris.ohchr.org/SearchResult (Accessed: 27 November 2023).

1481 Ibid.

1482 This Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was adopted by UN General Assembly resolution 54/4 of 6 October 1999.

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families had a very different fate. First, it did not enter into force until 13 years after its adoption. Second, it has not been ratified by the States known as recipients of migrant workers. The Convention also allows the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to receive individual complaints, but it has made this competence of the committee conditional not only on an optional declaration by the State Parties themselves, but also on a minimum number of such declarations. The Committee on the Rights of Migrant Workers thus only acquired this competence in 2007 and has not yet ruled on any communication.[1483]

While the Convention on the Rights of Persons with Disabilities does not allow its committee to receive individual complaints, similarly to the ICCPR, its Optional Protocol was adopted at the same time as the Convention itself and established this competence for the committee. Despite being a younger committee than in the previous cases, it has already ruled on the merits in 40 communications.[1484] Such an achievement, however, cannot be claimed by the Committee on Enforced Disappearances.

Meanwhile, the Convention on the Rights of the Child already had two Optional Protocols[1485] before the competence of the Committee on the Rights of the Child to receive complaints from individuals was established; that is, this competence was only established with its third Optional Protocol.[1486]

The last convention forming the framework of the human rights treaty system established under the auspices of the UN is the Covenant on Economic, Social and Cultural Rights. This convention is specific in many of its provisions, which are conceived in programmatic terms. Despite the difficulties that may arise with the possibility of adjudicating individual complaints, the Optional Protocol was finally adopted in the case of this Covenant as well.[1487]

The last type of mechanism that some committees may use is an on-site review of the situation being assessed. One example of this approach may be seen in Art. 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. In the event of reliable information, this article empowers the Committee against Torture to invite the State Party to cooperate with its investigation, which may include a visit to the concerned State. Such an examination of the situation, which is

1483 See: UN Treaty Body database [Online]. Available at: tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en (Accessed: 27 November 2023).

1484 For more details, see: https://juris.ohchr.org/SearchResult (Accessed: 27 November 2023).

1485 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, both adopted on 25 May 2000.

1486 The Third Optional Protocol to the Convention on the Rights of the Child on the Communications Procedure was adopted by the UN General Assembly on 19 December 2011.

1487 The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly on 10 December 2008.

carried out in private, may only be carried out with the consent of the State Party. This mandate is complemented by the Optional Protocol to the CAT, which established a system of periodic visits to places where individuals are deprived of liberty. Similarly, the Optional Protocol described in Art. 8 of the CEDAW allows that in the event of reliable information of serious and systematic human rights violations, the Committee on the Rights of Women may request the State Party's cooperation in reviewing such information, and such review may include a closed investigation. Such a mechanism may also be applied under the CRPD, CRC, or ICESCR control systems. In this regard, the CED is an exception as the competence to conduct inquiries is not subject to acceptance by State Parties.[1488]

1488 For more information, see, for instance: Individual complaints [Online]. Available at: https://www.ohchr.org/en/treaty-bodies/complaints-about-human-rights-violations#individual (Accessed: 27 November 2023).

II.4 The Related Control Mechanisms of the Organisation for Security and Co-operation in Europe

The control mechanisms used by the OSCE to ensure that its States implement the rule of law as determined and interpreted in the documents of OSCE decision-making and executive bodies are unique. Notably, they differ from those established within international organisations, such as the UN and the Council of Europe.

As an integral part of the OSCE human dimension commitments, the human rights and rule of law framework exists for the benefit of all people living in the OSCE area. The OSCE human dimension commitments are addressed to the participating States' governments, whose first responsibility is to provide and enforce them.[1489] However, from the beginning, it was clear that formulating duties and standards is not, alone, always sufficient for the effective implementation of human dimension commitments. Consequently, the OSCE has created a set of procedures, conferences, and bodies to monitor and assist with the implementation of these commitments. These include, *inter alia*, the OSCE Parliamentary Assembly efforts to promote respect for the rule of law in the OSCE area; the ODIHR's monitoring and reporting on human rights issues and observing elections throughout the OSCE region; the ODIHR and other OSCE institutions' field operations; and the participating states' ongoing and envisaged bilateral activities regarding the rule of law.[1490]

Given that the OSCE decision-making process is fundamentally a political endeavour, it does not establish legally enforceable norms or principles. Unlike numerous other international instruments, OSCE documents and decisions on human dimension commitments are politically rather than legally binding. This distinction is significant because it restricts the legal enforceability of OSCE standards. In simpler terms, the implementation of OSCE commitments by States is not controlled and cannot be enforced by a court of law. Nonetheless, this should not be misinterpreted as suggesting that the commitments lack a binding nature. The key distinction lies in whether they are legally or politically binding, not in whether they possess a binding force. This means that OSCE commitments go beyond being a mere expression of

1489 Charter of Paris, 1990.
1490 OSCE Human Dimension Commitments, 2022, p. XIV.

good intentions; instead, they represent a political commitment to adhere to these standards.[1491]

According to the OSCE's founding documents, all States participating in the OSCE are sovereign and independent. Decisions by the OSCE's decision-making bodies shall be taken by consensus. Once consensus among the States has been achieved, decisions enter into force immediately and as noted, are politically binding for the participating States. These decisions can vary widely. Some examples include adopting resolutions or declarations on specific issues, approving budgets and work plans, appointing senior officials, launching new programs or initiatives, and responding to crises or conflicts in the region. Based on such decisions, the OSCE plays an important role in promoting the rule of law by providing political guidance as well as assistance and expertise to participating countries. In this regard, the Ministerial Council, as the OSCE central decision-making and executive body, recognizes in various documents that nothing written in them shall undermine or diverge from participating States' existing commitments or obligations under international law, while also acknowledging that each participating State, consistent with its legal tradition, determines the appropriate ways to implement them in its national legislation.

A fundamental aspect of the OSCE's human dimension is that human rights and pluralistic democracy are not considered the internal affairs of a state. The participating States have stressed that issues relating to human rights, fundamental freedoms, democracy, and the rule of law are of international concern, as respect for these rights and principles constitutes one of the foundations of the international order.[1492] In order to discuss matters of non-compliance with OSCE commitments and decide on appropriate courses of action, the Permanent Council – the principal decision-making body for regular political consultations and the body that governs the OSCE's day-to-day operational work between Ministerial Council meets – may convene special meetings.[1493] Therefore, participating States cannot invoke the non-intervention principle to avoid discussions about human rights and related issues (e.g. the rule of law) within their countries. This explains why the OSCE is not only a community of values but also a community of responsibility – the latter focuses not only on the right to criticise other States in relation to violations of human dimension commitments but also on the duty to assist each other in solving specific problems.

The Permanent Council, the regular body for political consultations and decision-making, addresses the full range of conceptual issues as well as the day-to-day operational work of the OSCE. To assist the Permanent Council in its deliberations and decision-making, the participating States established a Preparatory Committee under its direction. This open-ended Committee normally meets in an

1491 Ibid., p. XII.
1492 OSCE Human Dimension Commitments, 2022, p. XIII.
1493 Rules of Procedure, Section 2, General Provisions, Point 6.

informal format. The Committee is tasked by the Council, or its Chairman, to deliberate and report back to the Council on a variety of issues. Among other things, the Preparatory Committee brings together representatives of the OSCE and concerned States to address questions regarding compliance with OSCE commitments.[1494] Normally, deliberations on matters regarding compliance with OSCE commitments take place at OSCE review meetings and conferences and in the Economic Forum. Such matters are then submitted for consideration to the Permanent Council on the basis of the facts found by Personal Representatives of the Chairman-in-Office and recommendations by the OSCE institutions. The Permanent Council meets in a special or reinforced format to discuss matters of non-compliance with OSCE commitments and decide on appropriate courses of action.[1495]

Given that participating States have declared that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern,[1496] the 1992 Stockholm Convention[1497] based Court of Conciliation and Arbitration may also serve as a control and implementation mechanism with regard to the respect of the participating States for the rule of law. While the Court was established to settle, by means of conciliation and, where appropriate, arbitration, disputes between participating States, the latter recall that the full implementation of all OSCE principles and commitments constitutes in itself an essential element in preventing disputes between OSCE States. Hence, their disputes and disagreements, which could arise before the Court of Conciliation and Arbitration, may also be the result of the non-respect and non-enforcement of OSCE commitments by participating States. However, in the three decades since the Court was created, no cases have been brought before it.[1498]

1494 See Moscow Document, 1991. In addition, the Permanent Council's Preparatory Committee organizes training programs aimed at improving standards and practices, inter alia, within the fields of human rights, democratization and the rule of law; establishes field operations with the consent of the state concerned; and performs several other tasks and duties.

1495 Ibid.

1496 In the Moscow Document of 1991, the participating States 'categorically and irrevocably' declared that the 'commitments undertaken in the field of the human dimension of the OSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned'. OSCE Human Dimension Commitments, 2022, p. XIII.

1497 The Convention on Conciliation and Arbitration within the CSCE, Organisation for Security and Co-operation in Europe CSCE Council, Stockholm, 15 December 1992.

1498 See Periodic Report 2017–2019 to the States parties to the Convention on Conciliation and Arbitration within the OSCE, p. 1. Given the international prestige of its first President, the former French Minister of Justice Robert Badinter, it was hoped that the new body for the settlement of international disputes would soon be entrusted by OSCE States. So far, these hopes have not been realized.

II.5 The Related Control Mechanisms of the European Union

Introduction to the Related Control Mechanisms of the European Union

The control mechanisms of the EU's rule of law toolbox aim at promoting, preventing, or responding to rule of law issues through various soft and hard procedures established either in primary law, secondary law, or soft legal sources. These mechanisms can be applied in different stages of the alleged breaches of the rule of law. Thus, preventive tools may be used before the possibility of a violation of the rule of law arises or when the possibility of a breach of the rule of law has already emerged without the occurrence of an actual breach. In such cases, the applicable tools are primarily the rule of law review cycle and the EU justice scoreboard, which both aim to identify risks or negative trends and share good practices among the Member States. In addition, the Cooperation and Verification Mechanism also served as a preventive tool with respect to Romania and Bulgaria, which involved regular monitoring, reporting, and dialogue between the European Commission and the two monitored States.

The supranationalisation of the rule of law could be observed also on the example of the European Semester. This mechanism was originally developed as a framework for the coordination and surveillance of economic and social policies and thus was not connected to the rule of law. However, as pointed out in this section, the scope of the European Semester also extends to address the rule of law in the Member States. Nonetheless, these mechanisms were developed on the basis of soft law, as they are not established in primary or secondary sources of EU law.

The rule of law toolbox also addresses the occurrence of a clear risk of a breach and the alleged breach of the rule of law through hard mechanisms, also codified in primary and secondary law. Namely, according to Art. 7(1) TEU, the Council may determine that there is a clear risk of a serious breach of the rule of law by a Member State, and, according to Art. 7(2) TEU, the European Council may determine the existence of a serious and persistent breach of the rule of law by a Member State that

may result in the suspension of voting rights in the Council. Furthermore, the recently developed, regulation-based conditionality mechanism envisages a procedure to suspend, reduce, or restrict access to EU funding in case of breaches of the rule of law that have an impact on the financial interests of the EU. The power struggle between EU institutions, especially between the European Commission and the European Parliament is particularly tangible in the practical application of these two mechanisms. On the one hand, the Art. 7 procedure was proposed by the European Commission for Poland, and by the European Parliament for Hungary, while on the other hand, the Commission played a major role in the application of the conditionality mechanism in the case of Hungary. Although the two mechanisms are formally independent, the substantive arguments for launching the procedures in practice raise the question of whether the EU has the legitimacy to enforce the supranational interpretation of the rule of law in the same Member States through different parallel procedures.

In addition to presenting the procedural aspect of the instruments of the EU's rule of law toolbox, the chapter aims to shed light on how instruments directly or indirectly connected to the rule of law are increasingly used as tools to enforce the supranational interpretation of the rule of law in the Member States, and reflects on the role of EU institutions in these mechanisms.

II.5.1 Control Mechanisms in the Rule of Law Review Cycle and the EU Justice Scoreboard

The EC (or the EU) has a number of instruments at its disposal to promote the rule of law. Some are codified by primary law,[1499] others are regulated exclusively by secondary law,[1500] and Others are not regulated at all because they are captured in soft law. The Rule of Law Review Cycle and the EU Justice Scoreboard fall into the latter category.

These tools can be further subdivided according to the stage of the rule of law breach at which they are applied. They can therefore be preventive in nature. In such a case, they may be applied:

1. before there is even the possibility of a violation of the rule of law,
2. in a situation where the possibility of a breach of the rule of law arises, but the actual breach has not yet occurred,

1499 Infringement proceeding according to Art. 258 of the TFEU or the two rule of law proceedings according Art. 7 of the TEU.

1500 Regulation (EU, Euratom) 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.

3. in a situation where there is already a clear risk of a serious breach by a Member State,
4. at the moment when a qualified violation of the rule of law has already occurred, and
5. after a breach of the rule of law has been remedied.

Preventive tools are of great importance. Certain systemic distortions cannot be undone or corrected once they have occurred. Let us imagine that a court is flawed as its composition was determined by a procedure that is not in accordance with the rule of law. What are we to do with the decisions of that court after it has been corrected? Should they remain valid? We cannot simply say that the court's judgments are not true and enforceable because they were not made by persons entitled to make them. In such a situation, only serious breaches on the part of such a court will be dealt with; otherwise, there would be a risk of a fundamental erosion of legal certainty and of confidence in law, justice, and the functioning of the democratic rule of law by the concerned individuals. Here, any solution that comes *ex post* is wrong and, on the contrary, the only reasonable alternative is to prevent this situation from arising.

This is where there is room for preventive tools like the Rule of Law Review Cycle and the EU Justice Scoreboard. In particular, these tools apply mainly to Phases 1 and 2 in the list above. From this perspective, they are tools to prevent the use of Art. 7 of the TFEU or Art. 258 of the TFEU and ideally to avoid the need to use these mechanisms at all.

In addition to preventing risks or negative trends in Member States through early identification, both instruments also serve as mechanisms for sharing good practices among Member States and are a means of mutual inspiration and enrichment. In particular, they are extremely valuable because they provide data for a given country in a time series. They therefore make it possible to evaluate and anticipate developments in a given country depending on the measures that have been taken.

In this respect, their role is unquestionable and probably irreplaceable, although there are many international indices and mechanisms for assessing the rule of law, justice, and democracy in general. The added value lies in the fact that the data of all Member States (if supplied) are monitored with their involvement and with the involvement of the EC and other EU institutions. These entities know the reality of the functioning of the EU, EU law, and the situation in the Member States better than other international organisations. In the case of the Rule of Law Review Cycle, these reports provide States with useful feedback on its own rule of law activities and suggestions for improvement from the Commission – a body that is independent, impartial, and has a good general knowledge of the relevant issues.

Elsewhere in this study I have questioned the EU's competence to evaluate the functioning of the rule of law in its current form. I think it is fair to add here that the supra-state nature of the EU simply requires that certain values be centrally

protected by a power above the level of the States. Simple coordination between Member States – that is, between equals – cannot work fully and effectively.

However, the EU's rule of law activities can also be seen as not actually reflecting its supranational nature, but in fact demonstrating the continued dominance of the Member States. From the perspective of integration theories, the EU Justice Scoreboard is a manifestation of (new) intergovernmentalism and an affirmation of intergovernmental principles in the functioning of the EU. Strelkov comments, 'member states are "gatekeepers" of the EU Justice Scoreboard, any changes in its scope or competences have to be agreed by them'.[1501] Further, Strelkov notes, 'Member states also remain "gatekeepers" in the process of information provision.'[1502]

It can be noted that the reports prepared in the framework of the Rule of Law Review Cycle and the EU Justice Scoreboard are primarily of political importance. In this respect, they may manifest in the following ways:

- in use by the media or the opposition to pressure Member States and national governments to make changes that will lead to better results in the comparative parts of the reports or that will meet the proposed requirements,
- in forming the basis for academia, which actively works with the EU Justice Scoreboard and the reports prepared within the rule of law review mechanism, and
- as incentives for national governments and other State bodies to implement necessary reforms and legitimise and justify these activities.

The benefits of both mechanisms are obvious. However, there are also risks. I have suggested that the data are difficult to interpret, even for experts; consequently, the media or the opposition may unwittingly or deliberately interpret them to promote their own particular interests.

Given the nature of the recommendations that the Commission makes to Member States in these soft law instruments, the question is what the consequences of not following them could be. I believe that there are not actually any consequences of doing so at the EU level. As this is soft law, there is no possibility of direct enforcement by the Court of Justice or the EU. This makes sense as this is not their purpose.

Both instruments – the Rule of Law Review Cycle and the EU Justice Scoreboard – belong to the soft law category. The EU Justice Scoreboard is primarily a comparative information tool. It allows for a very good comparison of how countries perform year over year in the area of justice. It also allows comparisons between Member States. While the different methodologies for collecting data on Member States, as well as possible missing data, are potentially a problem, EC Communications show that the situation is improving. In 2013 the Commission stated in its Communication that 'Data comparability is a challenge as national judicial systems and practices vary considerably and some Member States do not use standard definitions

1501 Strelkov, 2019, p. 19.
1502 Strelkov, 2019, p. 19.

for tracking data'.[1503] Meanwhile, the 2023 Communication states, much more positively, 'Data availability, in particular as regards indicators of the effectiveness of justice systems, continues to improve. Indeed, many Member States have invested in their capacity to produce better judicial statistics.'[1504] Yet, even this year, the Commission notes that some problems remain and therefore do not allow for fair comparisons. Here again, it is likely that the reason, with a few exceptions, is not the reluctance of Member States to provide data, which they are not legally obligated to do. Rather, this issue is likely due to different methodologies or insufficient capacities to collect the required data.

The Rule of Law Review Cycle offers insight into the internal workings of States in a number of areas and on an annual basis. It allows for the identification of risks in the functioning of the rule of law and areas in which institutional or legislative changes are needed for the rule of law to function properly.

As both of these mechanisms are soft law mechanisms, they are not enforceable by the EU or national authorities. However, they have tangible consequences for the concerned Member States – they can inspire, motivate, and prevent problems from arising. Notably, their impact on the interpretation of the rule of law in Member States is indirect or mediated. They serve as political instruments for implementing reforms rather than as tools for judicial interpretations of the rule of law.

II.5.2 Control Mechanisms in the Article 7 TEU Procedure

A. Introduction

The initial design created by the original founding treaties drew an 'unbalanced picture' in which the compliance of the Member State's conduct with the rules of EU law was strictly enforced *via* what are now Arts. 258 and 259 of the TFEU. Meanwhile, the enforcement of the core EU principles (values) remained seemingly out of reach for supranational institutions.[1505] The situation has changed with the entry into force the Amsterdam Treaty, which introduced Art. F.1. This provision was adopted in direct anticipation of the Eastern enlargement of the EU and was linked to the regulation of the Amsterdam Treaty, which listed the 'principles' (*inter alia* the rule of

1503 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee of the Regions EU Justice Scoreboard A tool to promote effective justice and growth.

1504 COM(2023) 309 final Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and Committee of the Regions EU Justice Scoreboard 2023.

1505 Kochenov, 2021, p. 133.

law) on which the Union is built.[1506] The above mentioned forerunner of the current Art. 7 of the TEU set forth a procedure composed only of two main phases: 1) the determination of the existence of a serious and persistent breach by a Member State of principles mentioned in Art. F.1 of the Amsterdam Treaty (cf. Art. F.1.1.) and 2) the imposition of sanctions – that is, the suspension of certain rights deriving from the application of this Treaty to the Member State in question, including voting rights in the Council (Art. F.1.2.). The preventive mechanism (cf. current Art. 7.1 of the TEU) was later introduced by the Treaty of Nice of 26 February 2001 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts[1507] (hereinafter the 'Nice Treaty'). This amendment provided the EU with an instrument for dealing with serious and persistent threats of a breach of basic principles. The main reason for the abovementioned upgrading of the EU mechanisms was the so-called 'FPÖ crisis' (the 'Haider Affair'[1508]). After elections in Austria, the extreme-right FPÖ-party was likely to join the government coalition in 2000.[1509] The current version of Art. 7 of the TEU was established by the Lisbon Treaty, which has not substantially changed the mechanisms (it has only switched 'principles' into 'values' and identified the procedures and voting rules with 'reference' to Art. 354 of the TEU instead of incorporating them into Art. 7 of the TEU).[1510]

As currently provided for by the analysed provision, it covers the three following procedures, which can be deployed to safeguard the values of Art. 2 of the TEU (especially the rule of law): 1) a procedure to declare the existence of a 'clear risk of a serious breach' of the values referred to in Art. 2 of the TEU and to address recommendations of how to remedy the situation of the Member State committing the breach (Art. 7.1 of the TEU); 2) a procedure to state the existence of a 'serious and persistent breach' of the values (Art. 7.2 of the TEU); and 3) a procedure to impose sanctions in the strict sense in light of a serious and persistent breach of values (Art. 7.3 of the TEU). At the same time, it is worth noting that Art. 7 of the TEU does not exclude the initiation of the procedure stipulated in Art. 7.2 of the TEU directly; that is, all three paragraphs of Art. 7 do not constitute one procedure with three steps.[1511]

The EC underlined the political nature of the mechanisms of Art. 7 of the TEU. According to the Commission, this nature is a consequence of the 'discretionary power' given 'to the Council' (this currently refers to the Council and the European Council) to determine whether there is a 'clear threat of a serious breach' or a 'serious and persistent breach' and to act as appropriate pursuant to a proposal by the European Parliament, one third of all Member States, or the Commission. 'However, the Council's hands are not tied'; likewise, it may decide to apply penalties but is not

1506 Ibid., p. 135.
1507 Official Journal of the European Union of March 10, 2001, C 80, pp. 1–87.
1508 Sadurski, 2010, p. 396.
1509 Kochenov, 2021, pp. 135–136. For more on this, see, in particular, Sadurski, 2010, pp. 396–414.
1510 Cf. Mangiameli and Saputelli, 2013, p. 359.
1511 Kochenov, 2021, p. 136. See also e.g. Mik, 2005, p. 95.

obliged to do so. Moreover, the political nature of the mechanism stems from the fact that the Union Treaties do not give the CJEU the power to conduct a judicial review of the Council's decisions[1512] (cf. Art. 269 of the TFEU which does not provide for the Court's competence to assess the merits of acts taken by the EU institutions[1513]). Notably, the above procedure is highly political in terms of its main actors;[1514] that is, in terms of the EU institutions that are most involved in the day-to-day political process (e.g. the Council, the EC, the EP, and the European Council).[1515]

Art. 7 of the TEU has several functions, including preventive, repressive, isolating,[1516] and restorative ones. Firstly, the very establishment of the analysed mechanisms should discourage violations and encourage respect for EU values.[1517] Secondly, the implementation of procedures arising from Art. 7 of the TEU may lead to severe negative legal consequences for the Member State. Thirdly, applying this provision isolates a 'wrongdoer' and protects other Member States from the effects of violating the value of Art. 2 of the TEU.[1518] Fourthly, the above mechanisms are primarily intended to restore compliance with the values on which the EU is based.[1519]

B. The Pre-Art. 7 Procedure of the TEU

The 'pre-Article 7 procedure'[1520] is provided for in the Communication 2014. This procedure is aimed at protecting the EU's founding values and advancing mutual trust and integration. The Communication 2014 procedure increases the clarity and predictability of the EC's actions and ensures Member States are treated equally. It also enables the Commission to work with a Member State to prevent a 'systemic threat' to the rule of law in that State that would require the mechanisms provided for in Art. 7 of the TEU to be launched.[1521] Thus, in the case of the analysed procedure, we are dealing with a mechanism separate from Art. 7 of the TEU; specifically, we are considering a way of monitoring the rule of law in Member States and preventing the need to implement the Treaty mechanisms.[1522]

At the same time, it should be noted that there is no clear legal basis in EU law authorizing the EC to issue the Communication 2014 (the Commission itself does not refer to such a basis in the content of the indicated document). Reservations on

1512 The Communication 2003, pp. 5–6. See also Kochenov, 2019a, p. 93; Mangiameli and Saputelli, 2013, p. 370.
1513 Jaskulski, 2016, p. 233.
1514 Crego, 2020c, p. 42.
1515 Jaskulski, 2016, p. 231.
1516 Taborowski, 2019, p. 158.
1517 Tichý, 2018, p. 89.
1518 Taborowski, 2019, p. 158. See also Barcz, 2019, pp. 10–12; Marcisz and Taborowski, 2017, p. 105.
1519 Cf. Barcz, 2019, p. 10; Marcisz and Taborowski, 2017, p. 105.
1520 Kochenov and Pech, 2015a, p. 524.
1521 The Communication 2014, p. 6.
1522 Taborowski, 2019, pp. 104–105.

this issue were expressed in particular by the Legal Service of the Council of the European Union. According to its Opinion:

> there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article (…). [T]he new EU Framework for the Rule of Law as set out in the Commission's communication is not compatible with the principle of conferral which governs the competences of the institutions of the Union.[1523]

However, the EC's actions should not be judged so radically. The admissibility of issuing the Communication 2014 can be justified primarily by the use of the 'soft law'[1524] which is not intended to produce binding legal effects (and at the same time may positively impact the clarity and predictability of the EC's actions and equal treatment for all Member States). Only the Commission, but not the Member State against which the proceedings are being conducted, is '(self-)bound' by the Communication 2014.[1525] Therefore, a Member State's failure to enter into dialogue with the EC or withdraw from it will not result in any sanctions.[1526] Furthermore, pursuant to Art. 17.1 of the TEU and Art. 292 of the TFEU, the EC shall ensure the application of the Treaties (including Art. 2 of the TEU) and adopt recommendations without having to demonstrate a specific treaty basis. Since the Commission can supervise the application of the Treaties and initiate the procedure specified in Art. 7 of the TEU, it should also have preparatory powers to apply to initiate this procedure (e.g. collecting information, exchanging it with a Member State, making recommendations). Therefore, the Communication 2014 only specifies how the EC intends to exercise these powers, which increases the transparency of its activities.[1527]

The Communication 2014 indicates several conditions for activating the mechanism, which should occur together. Firstly, there must be 'clear indications'[1528] of an emerging systemic threat to the rule of law in a Member State that could develop into a 'clear risk of a serious breach' (as defined in Art. 7 of the TEU). According to the Communication 2014, this may include situations in which a Member State's authorities take measures or tolerate conditions which are likely to systematically and adversely affect the integrity, stability, or proper functioning of the institutions

1523 Opinion of the Legal Service of the Council of the European Union of May 27, 2014, paras. 24 and 28. (https://bit.ly/3Yu2edS) (Accessed: 10 August 2023). This view was supported by e.g. Würtenberger and Tkaczyński, 2017, pp. 26–27.

1524 Cf. Jaskulski, 2016, pp. 233–234.

1525 Taborowski, 2019, p. 103. See also Nowak-Far, 2021, pp. 320–321.

1526 Jaskulski, 2016, pp. 233–234.

1527 Cf. Taborowski, 2019, pp. 108–109. For a broader argumentation see Taborowski, 2019, pp. 107–111; Marcisz and Taborowski, 2017, pp. 101–104.

1528 The Communication 2014, p. 7.

and the mechanisms established at the national level to secure the rule of law (individual breaches of fundamental rights or miscarriages of justice will not trigger these mechanisms).[1529] Secondly, the abovementioned systemic threat should concern the rule of law in the sense adopted in the Communication 2014.[1530] Thirdly, the mechanisms established at the national level to secure the rule of law must cease to operate effectively.[1531] Lastly, it must be impossible to effectively address threats relating to the rule of law by EU-level instruments (especially Art. 7 of the TEU and Art. 258 of the TFEU).[1532] Here, it should be assumed that, according to the EC, proceedings under the Communication 2014 are not conditional upon whether a Member State's violation of the rule of law falls within the areas covered by EU law (the EC's reaction may also refer to the sphere where Member States act autonomously).[1533]

The rationale for initiating the 'pre-Article 7 procedure' presented in the Communication 2014 deserves some criticism. In particular, the EC has failed to clearly define the concept of a 'systemic threat' of the rule of law. Along these lines, it has failed to clearly distinguish between a 'systemic threat' and a 'systemic violation' and between a 'systemic' and an 'individual' ('isolated') threat (violation).[1534] This 'suggests that the Commission is keen to preserve an absolute discretionary power to decide when any particular member state ought to be assessed'.[1535] Moreover, the definition of the rule of law – as modified in relation to the Communication 2014 – cannot be ruled out as a verification criterion. Here, it is useful to remember that the Communication 2014 includes a list of sub-principles constituting this concept (resulting from the evolution of the approach of the Commission or the CJEU), which can be supplemented. Notably, the application of different definitions of the rule of law in this case may lead to the unequal treatment of the Member States in question.

Procedurally, the mechanism of the Communication 2014 was designed as a tool to address threats to the rule of law through a 'structured dialogue' that allows the EC to address recommendations to a Member State after an assessment of the situation. Therefore, the 'host' of the analysed procedure is the Commission. In this role, the Commission must update the Council and the EP regularly on progress and rely, when needed, on the external expertise of other EU bodies, such as the EU Agency on Fundamental Rights, or non-EU bodies, such as the Council of Europe, Venice Commission, or European judicial networks.[1536]

Pursuant to the Communication 2014, the process is composed 'as a rule' of three stages:[1537] 1) a Commission assessment (including collecting, examining, and

1529 Ibid., p. 6.
1530 Cf. ibid., p. 4.
1531 Ibid., p. 5.
1532 Ibid., p. 6.
1533 Cf. Ibid., p. 5; Taborowski, 2019, p. 115.
1534 Cf. Kochenov and Pech, 2015a, pp. 532–533.
1535 Ibid., p. 533.
1536 Crego, 2020b, p. 29; The Communication 2014, pp. 8–9.
1537 The Communication 2014, p. 7.

assessing all relevant information received from available sources and recognized institutions and, when identifying a systemic threat to the rule of law, initiating a dialogue with the concerned Member State by sending a 'rule of law opinion' that substantiates the concerns of the EC and allowing the Member State to respond[1538]); 2) a Commission recommendation indicating the reasons behind the EC's concerns and advising that the Member State solve the identified problems within a fixed time limit and inform the EC of the steps taken (the recommendation may also specify ways to resolve the situation) – notably, a recommendation should not be issued if the matter has already been satisfactorily resolved; 3) a follow-up to the recommendation (i.e. monitoring the Member State's follow-up to the recommendation). If there are no satisfactory results in the third stage, the Commission should assess the possibility of activating one of the mechanisms set out in Art. 7 of the TEU.[1539] The EC will make the most important information regarding the above procedure available to the public, including the launch of its assessment, its submission of its rule of law opinion and recommendation, and the main content of its recommendation.[1540]

The EC is not obligated to follow through on all stages of the procedure, especially if the concerned Member State has done nothing to redress the situation. The Communication 2014 does not set clear time limits for the different stages of the procedure (although the Commission may impose deadlines on the Member State). Therefore, the EC seems to be free to extend any of the stages; for example, it may submit several recommendations (as opposed to just one) to a Member State.[1541] Despite this generally flexible procedural framework, the EC should adhere to its own strict rules (in particular, it should not issue recommendations on problems that have not previously been the subject of a 'rule of law opinion'[1542]). If the EC does not comply with these rules, it exposes itself to charges of violating the 'duty of sincere cooperation' as highlighted in the Communication 2014.[1543]

By definition, the abovementioned 'opinions', 'recommendations', and other activities of the Commission are of a non-binding nature.[1544] However, they may be 'problematic from the media perspective' for their recipients.[1545] Nevertheless, it cannot be said that they are completely legally indifferent. Firstly, they can constitute evidence in various legal procedures,[1546] especially in those arising from Art. 7 of the TEU or Arts 258–259 of the TFEU. Secondly, the Communication 2014 stipulates that a Member State's failure to co-operate in the 'pre-Article 7 procedure' or obstruction of the procedure will be considered when assessing the severity of

1538 Ibid.
1539 Ibid., p. 8.
1540 Ibid.
1541 Crego, 2020b, p. 30.
1542 Such a situation occurred in relation to Poland – see: Taborowski, 2019, p. 124.
1543 Cf. The Communication 2014, p. 8.
1544 Taborowski, 2019, p. 130.
1545 Würtenberger and Tkaczyński, 2017, p. 28.
1546 Nowak-Far, 2021, p. 322; Taborowski, 2019, p. 136.

the threat to the rule of law.[1547] Thirdly, according to the Communication 2014, the Member State's failure to satisfactorily follow up on the recommendation will trigger the Commission to assess whether there is a possibility of activating one of the mechanisms set out in Art. 7 of the TEU. In other words, the Communication 2014 tries to force the concerned Member State to react to the actions of the EC, which can be considered a manifestation of the normative value of these actions (especially of the recommendation).

Despite the above observations, it should be concluded that the EC's 'opinions', 'recommendations', and other actions under the 'pre-Article 7 procedure' are not subject to appeals to the CJEU.[1548] Bringing them under the control of the Court would be questionable due to Art. 263 of the TFEU, which expressly excludes this jurisdiction in relation to the Commission's 'recommendations and opinions'. Moreover, this Article generally covers EU acts 'intended to produce legal effects vis-à-vis third parties', but only if they represent a final measure ('acts' within the 'pre-Article 7 procedure' are rather pre-steps in the Treaty procedure of Art. 7 of the TEU involving challengeable legal acts).[1549] Finally, the admissibility of applying Art. 263 of the TFEU in the analysed case would unjustifiably privilege the procedure according to the Communication 2014 over the mechanisms under Art. 7 of the TEU, within the scope of which the jurisdiction of the Court is limited according to Art. 269 of the TEU (similar limitations are not provided for in Art. 263 of the TFEU).

As the analysis has so far shown, the procedure based on Communication 2014 prepares the Commission for the possible initiation of the mechanism of Art. 7.1 or Art. 7.2 of the TEU (which is preparatory in this respect). Applying this procedure may have evidentiary significance for other mechanisms of protection of the rule of law, especially Arts. 257 and 258 of the TFEU. However, it should be recognized that the 'pendency' of the 'pre-Article 7 procedure' does not preclude judicial proceedings in situations within the scope of EU law.[1550]

C. Scope of Art. 7 of the TEU

The provision 'dedicated' to the protection of the rule of law value is, above all, Art. 7 of the TEU. The mechanisms resulting from it may be applied, on an equal basis (cf. Art. 4.2 of the TEU), to all Member States,[1551] including those that acceded to the Community before the entry into force of Art. 7 of the TEU (i.e. before the entry into force of the Lisbon Treaty).[1552] However, the provision does not apply to countries that are candidates for membership in the EU, including those that have signed an accession agreement that has not entered into force. Further, the sanctions

1547 The Communication 2014, p. 8.
1548 Nowak-Far, 2021, p. 321; Wilms, 2017, p. 82.
1549 Nowak-Far, 2021, p. 321.
1550 Taborowski, 2019, pp. 139–140.
1551 Ibid., p. 163.
1552 Cf. Kochenov, 2019a, p. 90.

do not apply to violations committed by institutions or other bodies of the Union. A country belonging to the EU – the addressee of Art. 7 of the TEU – is understood broadly as including all public authorities (central, regional, local, governmental, self-governmental, and Others with state authority, including national and foreign ones). The State's liability covers not only its 'own' acts in the strict sense (i.e. the acts of the State's apparatus), but also the State's failure to prevent or punish the acts of private entities that violate Art. 2 of the TEU. Notably, the provision only provides for the assessment of the behaviour of one country (i.e. group assessment is excluded).[1553]

The scope of Art. 7 of the TEU is not confined to areas covered by EU law, but empowers the EU to intervene to protect the rule of law also in areas where Member States act autonomously.[1554] Reasonably, for articles designed to secure respect for the conditions of the EU's membership (cf. Art. 49 of the TEU), '[t]here would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction'.[1555]

Liability under Art. 7 of the TEU refers to any activity of a Member State in the fields of legislature, administration, or the judiciary. It is irrelevant whether the respective conduct took the form of an act, implementing legislation, court judgment, administrative decision, factual activity, or an omission.[1556] Such wrongful conduct may occur as a violation of EU, national, or international law; that is, it may occur in all legal regimes governed by the rule of law value contained in Art. 2 of the TEU.[1557]

Pursuant to Art. 7 of the TEU, the protected object is *inter alia* the value of the rule of law per the meaning established in Art. 2 of the TEU. At the same time, from the perspective of protective mechanisms, it is sufficient to violate only one of the founding values of the EU – although a literal interpretation of Art. 2 of the TEU could suggest otherwise.[1558] Both para. 1. and para. 2. of Art. 7 of the TEU indicate the respective gravity of the violation of this value (i.e. a 'serious breach'). According to the EC, this 'breach identified' must go beyond specific situations (an 'individual breach') and concern a more systematic problem.[1559]

> To determine the seriousness of the breach, a variety of criteria will have to be taken into account, including the purpose and the result of the breach. Regarding the purpose of the breach, for instance, one might consider the social classes affected by the offending national measures. The analysis could be influenced by the

1553 Mik, 2005, pp. 97–98.
1554 The Communication 2014, p. 5; the Communication 2003, p. 5; Hillion, 2016a, pp. 4–5; Larion, 2018, p. 163; Mangiameli and Saputelli, 2013, p. 351; Wilms, 2017, p. 68.
1555 The Communication 2003, p. 5.
1556 Tichý, 2018, pp. 95–96.
1557 Ibid., p. 97.
1558 Cf. Taborowski, 2019, p. 166;
1559 The Communication 2003, p. 7.

> fact that they are vulnerable, as in the case of national, ethnic or religious minorities or immigrants (…). Even if it is enough for one of the common values to be violated or risk being violated for Article 7 to be activated, a simultaneous breach of several values could be evidence of the seriousness of the breach.[1560]

Of course, the determination of such a 'serious breach' involves a wide margin of assessment.[1561] The legal literature claims that the activation of Art. 7 of the TEU is limited to shortcomings of a structural nature with implications so profound that national institutions themselves are either unable or unwilling to address the situation. Therefore, if a given Member State's institutional framework can respond to the threat, the EU should not act.[1562]

The assessment of such a 'systemic violation' of the value of the rule of law should be made from the perspective of the violation of its components (sub-principles).[1563] To determine the grounds for the application of Art. 7 of the TEU, a quantitative criterion may be relevant. This criterion may be expressed as the number of elements of the abovementioned value that have been violated. Further, a violation (risk of violation) of only one of the sub-principles may be of a systemic nature[1564] if it threatens the supranational and autonomous status of the EU legal system; that is, if it threatens the functioning of the EU, the effectiveness of EU law in the internal legal orders of Member States, effective judicial protection, or the protection of individual rights derived from EU law.[1565]

C.1 The Mechanism of Art. 7.1 of the TEU

Pursuant to abovementioned provision,

> [o]n 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 in accordance with the same procedure.

The material premise for activating the so-called 'prevention mechanism' is the occurrence of a 'clear risk of a serious breach' of the values contained in Art. 2 of the TEU, *inter alia* the rule of law value. According to the Communication 2003, a risk

1560 Ibid., p. 8.
1561 Potacs, 2018, p. 162.
1562 Crego, 2020c, p. 41.
1563 Taborowski, 2019, p. 75.
1564 Ibid., p. 78.
1565 Ibid., p. 76.

of a serious breach remains potential, with a qualification: it must be 'clear' (e.g. the adoption of legislation allowing procedural guarantees to be abolished in wartime); that is, the prevention mechanism does not cover purely contingent risks.[1566] A 'clear risk' is easily noticeable, highly probable, based on specific evidence, and an imminent threat to the common values of the EU. It may (but does not have to) turn into a violation in a short time.[1567] Further, the risk must relate to the 'systemic breach' of values mentioned above.

The formal premise for the application of Art. 7.1 of the TEU was defined as a 'reasoned proposal' by one-third of the Member States, the EP, or the EC. The content of the justification is not subject to verification since the admissibility of the application is not examined.[1568] Once submitted, the Council gives the Member State the opportunity to comment on the allegations. Therefore, the justification for the application should be reliable and comprehensive in order to guarantee the potential infringer's rights of defence to the greatest extent possible.[1569] The determination of a clear risk of a serious breach by a Member State of the values referred to in Art. 2 of the TEU requires obtaining a majority of four-fifths of the members of the Council and the consent of the EP. Before making this statement, the Council may send appropriate recommendations to the Member State for adoption after meeting the same formal requirements.

In the abovementioned cases, pursuant to Art. 354 para. 1 of the TFEU, the member of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one-third or four-fifths of Member States referred to in Art. 7.1 of the TEU. Abstentions by members present in person or represented shall prevent the adoption of the Council decision (i.e. abstentions are recognised as votes of opposition).[1570] The EP consent and the EP reasoned proposal, as provided for in Art. 7.1 of the TEU, are adopted when there is a two-thirds majority of the votes cast, which represents the majority of component Members of the EP (Art. 354 para. 4 of the TFEU). According to the CJEU, it must be interpreted in step with the idea that it is not necessary to take into account abstentions in the calculation of a two-thirds majority of the 'votes cast'.[1571] The usual meaning of the concept of 'votes cast' covers only a positive or negative vote on a given proposal (abstention must be understood in its usual sense as a refusal to adopt a position on a given proposal).[1572]

> Thus, while (…) account cannot be taken of abstentions for the purpose of determining whether a majority of two thirds of the votes cast has been attained in favour of the adoption of such an act, such abstentions are, on the other hand,

1566 The Communication 2003, p. 7.
1567 Cf. Mik, 2005, p. 96.
1568 Ibid.
1569 Cf. Taborowski, 2019, p. 172.
1570 Ibid., p. 173.
1571 Judgment of the CJEU of June 3, 2021, case ref. C-650/18, ECLI:EU:C:2021:426, para. 88.
1572 Ibid., para. 84.

> taken into account in order to ascertain, as required by the fourth paragraph of Article 354 TFEU, that the votes in favour represent the majority of the component Members of Parliament.[1573]

Pursuant to Art. 7.1 para. 2 of the TEU, the 'Council shall regularly verify that the grounds on which such a determination was made continue to apply'. This requirement applies both to the period before and after the statement 'that there is a clear risk of a serious breach by a Member State of the values'. Unfortunately, the analysed provision does not clearly indicate the consequences of the situation in which, after such a 'determination', the reasons for taking this act cease. However, this should be reflected in the Council's specific actions (e.g. the Council's formal statements that the risk of violating the rule of law value has ceased).[1574]

Referring to the forms of the Council's actions under Art. 7.1 of the TEU, it should be assumed that 'recommendations' are legal acts of the EU as defined in Art. 288 of the TFEU. These acts are different from 'decisions' (even when they are combined with specifying a deadline for implementing recommendations). A recommendation is intended to encourage, not oblige, action (it is a non-binding act). The TEU does not specify the form of 'determination of a clear risk'. Additionally, in this case, the 'decision' form does not seem appropriate; only Art. 7.3 and Art. 7.4 of the TEU expressly refer to 'deciding', and Art. 269 of the TFEU calls the action of the Council under Art. 7 of the TEU an 'act'. At the same time, it should be noted that 'recommendations' and the 'determination of a clear risk' are two separate acts of the Council, with 'recommendations' preceding a 'determination'. The latter act should only contain the determination of the existence of a clear risk (threat) and its justification. It cannot simultaneously contain 'recommendations'.[1575]

C.2 The Mechanism of Art. 7.2 of the TEU

In accordance with the indicated provision,

> [t]he 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.

The condition for implementing the procedure resulting from the above provision is a 'serious' and 'persistent' breach of EU values, especially the rule of law. As shown above, this applies to violations of a systemic nature which have already taken

1573 Ibid., para. 87.
1574 Taborowski, 2019, p. 174.
1575 Mik, 2018, pp. 108–110.

place, and which have lasted for some time.[1576] A 'persistent' breach persists for a relatively long time or is continuous. Further, a persistent breach occurs throughout the entire period – from the start of the first stage of the procedure of Art. 7.2 of the TEU through the EC's invitation to submit observations and the remaining stages until the procedure has been completed.[1577] Additionally, the existence of a serious and persistent breach is also based on whether the Member State has been repeatedly condemned for the same type of breach over a period of time by an international court (e.g. the European Court of Human Rights) or non-judicial international bodies (e.g., the Parliamentary Assembly of the Council of Europe or the United Nations Commission on Human Rights) and has not demonstrated any intention of taking practical remedial action.[1578] A similar assessment may be justified by the CJEU's confirmation of several separate cases of violations under Art. 258 of the TFEU (especially if the Court's judgments were not implemented).

An application to initiate the procedure may be submitted by one-third of Member States or the EC. It should indicate specific actions or omissions that, in the applicant's opinion, constitute a violation of the rule of law. The determination of the existence of a serious and persistent breach of values rests with the EC and requires its unanimity and the prior consent of the EP. If an application is submitted, the EC will ask the EP to consent to further processing and call on the Member State to submit comments. Different views are expressed in the literature as to the sequence of the above activities.[1579] It seems that it would be right for the EP to have the opportunity to familiarize itself with the position of the Member State in question before the vote in the EP.[1580]

Recall that the voting arrangements applying to the EP and the EC stem from Art. 354 of the TFEU (Art. 7.5 of the TEU). Specifically, within these arrangements, the member of the EC representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one-third of Member States referred to in Art. 7.2 of the TEU. At the same time, abstentions by members present in person or represented shall not prevent the adoption of a unanimous decision under the above provision. Meanwhile, the EP shall act by a two-thirds majority of the 'votes cast',[1581] representing the majority of its component Members.

A significant barrier to the effectiveness of the mechanism of Art. 7.2 of the TEU (which also conditions the imposition of sanctions specified in Art. 7.3 of the TEU) is the requirement of unanimity for the EC, especially when more than one Member State is suspected of a 'serious breach' of EU values. In such a situation, it is proposed to interpret the above provisions in connection with Art. 354 para. 1 of the TFEU,

1576 The Communication 2003, p. 8.
1577 Cf. Jaskulski, 2016, p. 232.
1578 The Communication 2003, p. 8.
1579 Cf. e.g. Grzeszczak, 2019, p. 44; Taborowski, 2019, p. 183.
1580 Taborowski, 2019, p. 183.
1581 Cf. case ref. C–650/18, paras. 84–88.

in the light of the *effet utile* principle. This would exclude all 'backsliding Member States' for which Art. 7.1 or Art. 7.2 of the TEU procedure has been initiated from the vote on the existence of a serious and persistent breach of values. Otherwise, the procedure of Art. 7.2 of the TEU becomes illusory – a 'coalition of lawless' states will probably block the procedure through 'mutual' votes.[1582] However, the results of the linguistic interpretation trouble this understanding of the issue. Both Art. 7.2 of the TEU and Art. 354 of the TFEU use the singular when referring to a Member State; thus 'there is nothing in the text to suggest the European Council could do anything else than deal with the situation in each state separately'.[1583]

Article 7.2 of the TEU does not clearly determine the legal nature of the action by which the EC may 'determine the existence of a serious and persistent breach'. On the one hand, C. Mik indicates that this may take the form of a formal decision.[1584] On the other hand, the author argues that this should be read not as a 'decision' (cf. Arts 7.3 and 7.4 of the TEU) but instead as an 'act'; specifically, a 'statement' (cf. Art. 269 of the TFEU) or even a 'resolution'.[1585]

C.3 The Mechanism of Art. 7.3 of the TEU

This provision stipulates that

> [w]here 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.

The *sine qua non* condition for initiating the procedure specified in Art. 7.3 of the TEU is the prior determination by the EC of the existence of a serious and persistent breach by a Member State of the values contained in Art. 2 of the TEU (especially the rule of law value). However, its occurrence does not oblige the Council to act pursuant to Art. 7.3 of the TEU, but only creates an opportunity for it to do so. Notably, the latter provision does not indicate a body authorized to submit an application in this regard; therefore, the Council can impose sanctions on its own initiative.[1586] Such sanctioning decisions may subsequently be amended or revoked *ex officio* in response to changes in the situation that led to their issuance (Art. 7.4 of the TEU).

In both of the above situations (i.e. imposing sanctions and amending them), the Council shall act by a qualified majority. Pursuant to Art. 354 of the TFEU, the

1582 Barcz, 2019, pp. 11–12; Kochenov, 2021, p. 143; Kochenov, 2019b, pp. 2081–2082; Taborowski, 2019, pp. 183–186.
1583 Cf. Larion, 2018, p. 167. See also Dumbrovsky, 2018, p. 205.
1584 Mik, 2005, p. 99.
1585 Mik, 2018, pp. 108–109.
1586 Cf. Mik, 2005, p. 99.

member of the Council representing the Member State in question shall not take part in the vote. Furthermore, for the adoption of the decisions referred to in Arts. 7.3 and 7.4 of the TEU, a qualified majority shall be defined in accordance with Art. 238.3.(b) of the TFEU; that is, the qualified majority shall be defined as at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States. Abstentions by members present in person or represented shall prevent the adoption of the Council decisions (*a contrario* Art. 354, para. 1 of the TFEU); therefore, abstentions qualify as votes of opposition.

In the context of the provisions regarding voting arrangements, a problem arises in that Art. 354 of the TFEU provides only for the exclusion of a member of the Council representing the Member State in question from voting. It does not address whether the population of that State is to be taken into account or disregarded in the calculation of a qualified majority under Art. 238.3(b) of the TFEU.[1587] In the view of D. Kochenov,

> [g]iven that no reference is made to such an exclusion expressly in Article 354 TFEU, argument can be made to include the population while excluding the MS, while the contrary reading (exclusion of both the MS and its population from the count) is more consistent with the raison d'être of the special procedure in question (…). Article 354 TFEU thus potentially requires the strictest QMV threshold available in the Treaties.[1588]

It should be assumed that the acts adopted by the Council pursuant to Arts. 7.3 and 7.4 of the TEU are decisions within the meaning of Art. 288 TFEU.

D. The Relationship between Different Mechanisms for the Protection of the Rule of Law

As the expression 'pre-Article 7 procedure' suggests, the use of this procedure may precede the launch of the mechanisms of Arts. 7.1 or 7.2. of the TEU. For reasons of expediency, this procedure should be carried out if the EC intends to submit the application specified in the above Treaty provisions. However, the 'pre-Article 7 procedure' is not a necessary condition for the implementation of the mechanism of Arts. 7.1 or 7.2 of the TEU, which may be activated directly.[1589]

The relationship between the procedures arising from Art. 7 of the TEU is quite clearly defined by this provision itself. Namely, the use of Art. 7.1 of the TEU shall not constitute a precondition for the use of the procedural steps of Art. 7.2 of the

1587 Kochenov, 2019b, p. 2082.
1588 Ibid.
1589 The Communication 2014, p. 7.

TEU.[1590] Depending on specific circumstances, these two provisions can be applied sequentially, or – if the gravity of the situation commends it – Art. 7.2 of the TEU can be applied directly.[1591] It is rather difficult to imagine both procedures being conducted in parallel; the premise of a 'systemic breach' of the rule of law lends itself to a holistic approach to the situation of a given Member State rather than to specifying two groups of violations at different stages as described in Arts 7.1 and 7.2 of the TEU.[1592] As for the sanction indicated in Art. 7.3 of the TEU, in order to impose it, it is necessary to first establish the 'existence of a serious and persistent breach' of the rule of law value by a Member State.

Regarding the relationship of the mechanisms of Art. 7 of the TEU and 'pre-Article 7' to other procedures for the protection of the rule of law, it should be assumed that the possible problem of inadmissibility of activating these 'other procedures' due to the use of the above 'mechanisms' (or *vice versa*) would arise only if both groups of legal instruments had essentially the same subject matter, scope, and purpose and allowed identical remedies. In such a case, it would be undesirable to allow two instruments to be applied in parallel due to the risk of adopting different and mutually exclusive assessments and effects for the same factual state.

In this context, it is worth noting that the convergence of legal mechanisms for the protection of the rule of law can only occur in the sphere of application of EU law. Outside this scope, the Member State can be held liable for breaching EU values only on the basis of Art. 7 of the TEU[1593] or as a result of carrying out the 'pre-Article 7 procedure'. In the areas covered by EU law, these latter mechanisms do not constitute an obstacle to launching Arts. 258–260 of the TFEU procedure,[1594] as it has a fundamentally different subject, purpose, and set of effects. Similarly, these mechanisms do not generally exclude the possibility (necessity) of examining respect for the rule of law in a given Member State by the judicial authorities of another country, actions that may be taken, for example, to execute a European arrest warrant ('EAW').[1595]

At the intersection of Art. 7 of the TEU and Arts. 258–260 of the TFEU, it is worth mentioning the doubts raised in the legal literature regarding whether the CJEU can directly verify an allegation of a violation of Art. 2 of the TEU[1596] (a specific sub-principle of the rule of law derived from this provision). This is important because a negative answer would limit the scope of permissible overlap between the analysed procedures. Some authors negate the Court's ability to directly control the breach of Art. 2 of the TEU, treating Art. 7 of the TEU as a *lex specialis*.[1597] However, several arguments support a broader cognition of the CJEU and parallel procedures

1590 Mangiameli and Saputelli, 2013, p. 364.
1591 Kochenov, 2019a, p. 91; Nowak-Far, 2021, p. 309.
1592 Cf. Larion, 2018, p. 165.
1593 Cf. Taborowski, 2019, p. 204.
1594 The Communication 2014, pp. 3, 5. See also, for instance, von Bogdandy, 2021, p. 86.
1595 Cf. Judgment of the CJEU of 25 July 2018, case ref. C–216/18, ECLI:EU:C:2018:586, para. 61.
1596 Taborowski, 2019, p. 205.
1597 Dawson, Muir and Claes, 2014, p. 117.

under Art. 7 of the TEU and Arts. 258–260 of the TFEU, which directly connect to Art. 2 of the TEU.[1598] Primarily, there seems to be no convincing argument against the view that the expression 'a Member State has failed to fulfil an obligation under the Treaties' (Arts 258 and 259) also covers breaches of Art. 2 of the TEU (which is a source of such obligations). At the same time, no provisions in the Treaties explicitly exclude the CJEU's jurisdiction in this regard.

The relationship between the procedures of Art. 7 of the TEU and the so-called 'conditionality mechanism' provided for in the Regulation is also problematic. Notably, these elements can be treated as interdependent; that is, the suspension of EU funds under the conditionality mechanism would constitute a 'measure' per Art. 7.3 of the TEU (the suspension of EU funds would have to be first imposed under Art. 7.3 of the TEU and only then under the conditionality mechanism). The second solution is to assume that the procedure of Art. 7 of the TEU and the conditionality mechanism are parallel and independent of each other because their legal nature is different.[1599] Taking into account the argumentation presented in Judgments case ref. C-156/21 and C-157/21, it can be presumed that the CJEU resolves the above doubt in favour of the independence of both mechanisms and allows for their parallel use. The rationale for this interpretation of the Court is that the procedure under Art. 7 of the TEU and the conditionality mechanism differ in terms of their purpose, subject matter, and scope of application; the conditions for their initiation; the nature of the measures that may be adopted; and the conditions for the measures' variation or revocation.[1600]

E. Conclusions

The concept of the mechanisms resulting from Art. 7 of the TEU supports the thesis that this provision 'was not designed to be an effective tool to prevent the rule of law backsliding'.[1601] A complex, multi-stage, and long-lasting procedure was created to promote consensual solutions to breaches of the rule of law and to compel the Member State in question to correct the alleged breach.[1602] This, in turn, results in the fundamental incompatibility of these mechanisms with cases of intentionally illegal actions by a 'wrongdoer'.[1603] However, because such conduct presents at least a serious threat of interference in the very axiological foundations of the EU, it should authorize EU institutions to take decisive action.

1598 See Dunaj, 2020, pp. 185–186; Hillion, 2016a, pp. 8–9; Hillion, 2016b, pp. 71–73; Kochenov, 2021, p. 138; Małobęcka and Porzeżyńska, 2018, pp. 189–190; Marcisz and Taborowski, 2017, pp. 105–106; Pech, 2020b, pp. 29–30; Potacs, 2018, pp. 160–161; Taborowski, 2019, pp. 290–296; Tichý, 2018, pp. 107–108.; Wilms, 2017, p. 81.

1599 Łacny, 2021, pp. 294–296. See also Piwoński, 2021, p. 155.

1600 Case ref. C–156/21, paras. 169–179; case ref. C–157/21, paras. 208–218.

1601 Kelemen, 2023, p. 22.

1602 Cf. Barcik, 2022, p. 100.

1603 Cf. Jaskulski, 2016, p. 239.

Another disadvantage of the adopted solutions is that the conditions for activating both the 'pre-Article 7 procedure' and the mechanisms of Art. 7 of TEU have not been precisely defined. Therefore, they are based on the discretionary assessment of EU institutions,[1604] the initiation of the procedures is devoid of automation, and the acts undertaken within them are discretionary. Moreover, the adopted assessments of the occurrence of these premises are not subject to judicial review. Therefore, it remains unclear whether this situation aligns with the key elements of the rule of law, such as those listed in the Communication 2014 (e.g. the prohibition of arbitrariness of the executive powers, effective judicial review). Additionally, the key mechanism of Art. 7.2 of the TEU and the unanimity requirement contained therein cannot be adapted to a situation in which more than one Member State meets the conditions for activating procedures to protect the rule of law.

Fortunately, neither the 'pre-Article 7 procedure' nor the mechanisms of Art. 7 of the TEU exclude the possibility of using other more effective legal instruments, especially Arts. 258–260 of the TFEU and the conditionality mechanism provided for in the Regulation. The Union should place the burden of protecting one of its founding values – the rule of law on these instruments. However, it is notable that the scope of this protection is relatively narrow because it extends only to areas covered by EU law.

II.5.3 Control Mechanisms in the European Semester

The ES involves a procedure that is implemented *ex ante* (and not *ex post*, as was the case with the coordination procedures used before 2010[1605]) in several stages and that lasts for several months a year. It involves EU institutions, Member State governments and parliaments, and national non-governmental organisations.[1606] The scope of activity includes coordination in the use of a number of instruments in the field of economic governance. Undoubtedly, we are dealing here with a complex process of activities that involves various entities and is carried out in various thematic areas.

The ES starts in the autumn – that is, at the end of the year – when the Commission adopts the annual economic growth analysis and considers the EU's priorities for the coming year, which include guaranteeing economic growth, contributing to employment development, and increasing the competitiveness of the EU economy. As a first step, the EC also adopts the Annual Growth Survey, the Alert Mechanism Report, the proposal for a Joint Employment Report, the proposal for recommendations for the euro area, and the Commission's opinions on the draft budgetary plans

1604 Cf. Grzeszczak, 2019, p. 45.
1605 Delors, 2011, p. 2.
1606 Wronkowska, Rosiek and Witoń, 2021, p. 56.

of euro area Member States.[1607] All these instruments, covered by the coordination mechanism, are aimed at implementing a specific agenda. More specifically, the Annual Growth Survey '(…) sets out general economic and social priorities for the EU and provides Member States with policy guidance for the following year'. Meanwhile, 'The Alert Mechanism Report is the starting point of the annual Macroeconomic Imbalance Procedure (…)'.[1608] The Macroeconomic Imbalance Procedure

> (…) aims to identify potential risks early on, prevent the emergence of harmful macroeconomic imbalances and correct the imbalances that have already materialized. The recommendation for the euro area addresses key issues for the functioning of the euro area and provides orientation on concrete actions for their implementation, which are later reflected in the country-specific recommendations where appropriate. The euro area recommendation allows for better integration of the euro area and national dimensions of EU economic governance and therefore strengthens the surveillance and coordination process. It is accompanied by the report on the euro area, a Commission staff working document (…) The proposal for a Joint Employment Report analyzes the employment and social situation in the EU, related challenges and the policy responses by Member States.[1609]

Until the end of November, the EC assesses and gives opinions on the draft budget laws of the Member States, while retaining the right to present necessary amendments. By 31 December, the national authorities adopt the final versions of the laws.[1610]

In January of the following year, the Council of the European Union adopts conclusions regarding the annual sustainable growth survey and the alert mechanism report. At the same time, the European Parliament (EP) may debate the first document mentioned and then draw up a report on it. This includes the right to invite the President of the Council, the Commission, and, if necessary, the President of the European Council or the President of the Eurogroup to discuss issues related to the European Semester.[1611]

In February, the European Commission prepares a special recommendation, on the basis of which the Council adopts the euro area recommendation in March. At the same time, the Council assesses the Annual Sustainable Growth Strategy, the Alert Mechanism Report, the euro area recommendation, and the proposal for a Joint Employment Report. During this same month, the Council adopts the joint employment report and approves conclusions, and the Commission issues guidance to Member States on their stability or convergence programs and national reform

1607 The European Semester explained.
1608 Ibid.
1609 Ibid.
1610 Wronkowska, Rosiek and Witoń, 2021, p. 56.
1611 Ibid. How the European Semester works.

programs. Finally, the European Council discusses the economic and employment situations of the Member States and endorses the draft Council recommendation on the economic policy of the euro area.[1612] In April, the initiative passes to the Member States, which, guided by the abovementioned guidelines, present their national structural reforms, fiscal policy plans, and stability or convergence programs to the EC. At the same time, they also submit '(…) their specific objectives, priorities and plans at national level (…)'[1613] to the EC.

In May, the Commission prepares and presents reports to Member States that 'take stock of the implementation of the recovery and resilience plans, analyse the economic and social developments and challenges facing Member States and provide a forward-looking analysis of their resilience'.[1614] Meanwhile, it also formulates proposals for recommendations aimed at encouraging Member States to modify their economic and social policies. These recommendations are approved and, if necessary, amended by the Council before being sent to the appropriate recipients (which takes place in July).[1615] They may cover various issues and are intended to be non-binding. Member States may include them in their budgets over the next 6 months (during the so-called 'National Semester'). The scope of implementation of the content contained therein depends on the authorities of a specific Member State. As Joshua Cova rightly points out, 'While the implementation of the recommendations varies from country to country and from year to year, CSRs provide an indication not only of the policies the EU would like member states to adopt on a national level, but also provide an insight as to what is needed to strengthen macroeconomic and fiscal coordination between member states'.[1616] In this respect, implementation varies – it all depends on how far a given Member State wants to take into account the EU's guidelines.

Although this procedure undoubtedly significantly facilitates the process of surveillance of the economic policies of the Member States by the institutions of the EU, it has clear shortcomings. It is not possible to speak of it only in superlatives.[1617]

In the literature, Elżbieta Kawecka-Wyrzykowska points out some of the disadvantages of the ES. Firstly, she states that 'The disadvantage of the Semester mechanism is (…) the long cycle of preparing and discussing the documents covered. Conclusions and recommendations are based on indicators from two years ago', which, as the author stresses, does not take into account the current economic situation. Secondly, she advises that there is also the disadvantage

> (…) that in the course of it the EU institutions as well as the Member States prepare many documents. This hinders an efficient flow of information and quick reactions to the conclusions of these documents. A similar effect occurs when the monitoring

1612 Ibid.
1613 Wronkowska, Rosiek and Witoń, 2021, p. 56.
1614 How the European Semester works.
1615 Ibid.
1616 Cova, 2022, p. 644; Efstathiou and Wolff, 2018, p. 4.
1617 See: Dębniak, 2016, pp. 190–193.

> of activities undertaken under the European Semester is based on a large number of indicators and recommendations that are difficult to analyse, compare and predict.[1618]

However, the biggest shortcoming of the ES procedure must be considered to be the almost total lack of democratic legitimacy of the activities undertaken within its framework. This problem has long been signalled in the academic literature and met with much criticism. It stems from the EP's and national parliaments' far limited involvement in the ES decision-making process. As Cristina Fassone points out,

> The new institutional framework of EU economic governance seems affected by a serious lack of legitimacy. Indeed, those who have been elected to represent the citizens at national and EU level do not have any chance to bind or to concur directly in European decisions, for instance, on the macroeconomic imbalances or on the excessive deficit procedure. Likewise, because of the lack of transparency and democratic accountability for the decisions taken mainly by the Commission and the European Law Journal Volume intergovernmental institutions, the EP and national parliaments being marginalised, the European citizens are not able to follow and to understand fully the reasons for the adoption of measures inspired by fiscal austerity.[1619]

The undervaluation of the EP within the decision-making mechanisms of the ES has been mentioned by Mark Hallerberg, Benedicta Marzinotto, and Guntram B. Wolff, who argue, *inter alia*, that

> (…) the European Parliament plays a minor role in the European Semester process. On the basis of Article 121 TFEU and Article 148 TFEU, the Council informs the European Parliament of the country-specific recommendations adopted around July. In this report, we consider whether greater involvement and a more active role for the Parliament are desirable to increase legitimacy and, if so, how this should be achieved.[1620]

Cristina Fasone also spoke in similar terms, arguing that the role of this body pales in comparison to the involvement of other EU institutions, especially the European Commission. As she pointed out in one of her studies,

> Compared to the strengthening of the Commission's position by the 'six-pack' (and, to some extent, also by the TSCG, as if it were a European treaty), the EP seems to be very weak: it has to be informed and consulted on certain occasions, it can

1618 Kawecka-Wyrzykowska, 2014, p. 14.
1619 Fasone, 2014, pp. 165–166.
1620 Hallerberg, Marzinotto and Wolff, 2011, p. 10.

> organise hearings and cooperate with national parliaments, but it is not entitled to take any decisions within the framework of European economic governance.[1621]

The sense of inadequacy that persists here has given rise to a number of initiatives by the EP itself to increase its participation in the ES system and, consequently, to strengthen its decision-making position in the economic policy coordination process. Hence, in past resolutions, it has insisted on being involved in setting recommendations for Member States, formulating the final evaluation of the ES results (it is now informed of the guidelines), bringing the analysis of economic growth under the ordinary legislative procedure rather than presenting it – as is currently the case – in the form of a Commission communication, and creating procedures to allow national parliaments to participate in the debate on reform and budget plans before they are presented to the EU.[1622] For this reason, it has also endeavoured to create inter-parliamentary channels of communication and dialogue with national parliaments on economic governance issues by organising inter-parliamentary committee meetings between the committees of the EP and national parliaments with responsibility for the ES, both before and after the Spring European Council, to discuss the Commission's proposed CSRs.[1623]

Separate attention has been paid to the problem of the limiting power of national parliaments, as a consequence of the application of the European Semester. Scholars writing on the subject have stressed that the ES almost completely disregards the will of these institutions and that the decision-making mechanism adopted within its framework, which involves above all specific EU bodies and national governments, creates '(…) a formal and complex game whereby governments decide the policy, the EU formulates the CSRs and governments have to implement them'.[1624] This suggests that the prerogatives of the Member State's parliaments in the field of economic and social policy are too restricted and thus that the whole system lacks democratic legitimacy (at national level).

The fact that the use of the ES causes both a formal and an actual reduction in the competences of national parliaments has been addressed on many occasions in the literature on the subject. This fact was drawn by Yannis Papadopoulos and, who pointed out that

> One of the more questionable aspects of this mainly budgetary procedure, apart from its complicated geometry, is the marginalization of many national parliaments, a problem that is now well documented by empirical studies. The National Semester is ostensibly meant to allow national parliaments to process the guidelines and recommendations elaborated during the European Semester, but the role

1621 Fasone, 2014, pp. 177–178.
1622 Kawecka-Wyrzykowska, 2014, pp. 14–15.
1623 Fasone, 2014, pp. 177–178.
1624 Alcidi and Gros, 2017, p. 26.

> of many of them (and that of the European Parliament) is fairly passive. The fact that parliaments are sidelined in this crucial democratic process is particularly problematic, as it also precludes the possibility for MPs to engage in those communicative discourses that are the essence of democratic representation.[1625]

The problem was also signalled by Valentin Krelinger, who stated that

> (…) even though national parliaments try to exercise influence and to develop ownership over the European Semester (…), they face difficulties to review decisions that are taken as a consequence of the European Semester. It is difficult to locate political responsibility in a 'never-ending cycle of budgetary monitoring' (…), because 'at every stage it is possible for the actors involved to refer to the preceding step as conditioning their actions' (…). National parliaments have only to some extent been able to 'fight back' (…) and adapt their functioning and behaviour.[1626]

Christopher Lord also commented on this issue, stating that

> (…) even if the semester did little to constrain national policy choices in practice, that would only create a possibility of national parliaments controlling national policy adjustments to the Semester through their own governments. It guarantees neither a) that all national parliaments would actually have that opportunity; nor b) that any parliament would have adequate control over the semester as a system of relations between democracies sharing an EMU.[1627]

Amy Verdun and Johnatan Zeitlin presented a bitter statement on the above-mentioned matter, emphasizing the limited possibilities of national parliaments to control the ES procedure, even with the existence of high-quality legal solutions. Specifically, these authors concluded that '(…) given limitations of time and expertise, as well as the electoral incentives facing their members, it seems unrealistic to expect most national parliaments to play a more active part in scrutinizing the Semester process'.[1628] Meanwhile, Valentin Kreilinger wrote about the fragile nature of control exercised by national parliaments, noting the different approaches to the problem of individual legislatures. He specifically pointed out that

> Despite prerogatives to scrutinise, some national parliaments are inactive: Although some of them could, for example, amend the Stability or Convergence Program or the National Reform Program, they do not exercise that kind of influence, and over time, they often do not pursue consistent preferences related to

1625 Papadopoulosand and Piatton, 2019, p. 63.
1626 Kreilinger, 2019, p. 65.
1627 Lord, 2017, p. 684.
1628 Verdun and Zeitlin, 2018, p. 145.

> the European Semester. But many national parliaments have become involved at least to some extent; they follow their distinct scrutiny procedures and practices for the European Semester.[1629]

Ben Crum also spoke on this subject, bluntly stating that '(…) this system, taken as a whole, undermines parliamentary scrutiny and control'.[1630] Finally, Claudia Hefftler and Wolfgang Wessels expressed a similar opinion, concluding,

> (…) regardless of the attempts by some national parliaments to become involved in the new measures of EU economic governance, only to a limited degree to national parliaments provide input legitimacy in an EU wide approach. The different motivation and capability of national parliaments to control their head of government question whether this can be an adequate balance to the power of the European Council.[1631]

The above reflections are accompanied in more than one case by a consideration of the extent of the existing powers of the national parliaments within the framework of the European Semester. These findings are important: undoubtedly, ascertaining the extent to which the latter are authorised to undertake control activities and what resources they have at their disposal in this regard makes it possible to determine (in individual cases) the scale of the systemic involvement of the legislature in the indicated process; at the same time, it gives an idea of the degree of democratic legitimacy of the EU's activities in this regard. This is particularly important if we take into account the need to fulfil the provisions of the Lisbon Treaty aimed at activating national legislatures in EU decision-making processes and thus limiting the phenomenon of the so-called 'democratic deficit'. It is common knowledge that 'In the wake of the Lisbon Treaty, the most encompassing task of national parliaments is to "contribute actively to the good functioning of the Union", which itself, as we have seen, shall be based on representative democracy Parliamentarians are to do so above all by policing EU institutions' respect for this principle by sending them reasoned opinions on incoming EU legislation that violates subsidiarity and, if necessary, by seizing the Court of Justice'.[1632]

Mechanisms involving national parliaments in the ES procedure are regulated by legal provisions applicable at the domestic level. In this respect, we are dealing with various legal solutions, the content of which is shaped by individual legislators at their own discretion. The latter decide how national parliaments can control government policies conducted within the ES and thus influence their shape. Generally

1629 Kreilinger, 2019, p. 69.
1630 Crum, 2018, p. 269.
1631 Heffler and Wessels, 2013, p. 12.
1632 Jančić, 2012, p. 233.

speaking, the regulations they create allow for control activities to be undertaken in subsequent stages of the ES. More precisely:

> Three major stages of the European Semester offer opportunities for national parliaments to exercise scrutiny: firstly, the Annual Growth Survey; secondly, national governments' preparation and drafting of Stability or Convergence Programs and National Reform Programs; and thirdly, the Country-Specific Recommendations.[1633]

The literature on the subject emphasizes that there are basically three models of control performed by national parliaments under the ES procedure. Their existence makes us aware of the differences in this field and shows possible variants of the legislator's approach to the problem. It is also an expression of the adaptation of the adopted legal structures to the local political conditions. Thus,

> The first comprises parliaments in which no specific oversight institutions have been created. The second category captures selective reforms, such as when parliaments are entitled to receive National Stability and Reform Programs before submission to the EU, but no further rights or procedures exist. (…) The third group encompasses parliaments that have created detailed oversight procedures and rights.[1634]

The differences in the way the control system is shaped are well demonstrated by Valentin Kreilinger, who distinguishes the nature of the control activity of individual national parliaments depending on the applicable normative solutions and the political practices used. As he emphasizes in one of his studies, from this perspective, national parliaments can be divided into: 'governmental watchdogs' (who focus *ex-post* on government executive accountability by controlling politics instead of policy in parliament and scrutinizing CSRs), 'policy shapers' (who influence policies through *ex-ante* scrutiny of the ES, Stability Programs and National Reform Programs and who have strong formal powers), 'public forums' (which emphasise issues under debate connected to the ES and may publicly contest the works and effects of this process), 'experts' (who concentrate on producing independent assessments and reports related to the early activities of the ES), 'European players' (who act directly at the EU level via formal and informal ways of engaging with the European Commission, other national parliaments and the EP).[1635]

At the end of these considerations, it is worth noting that, as a rule, national parliaments use traditional control instruments granted to them by constitutions, laws, parliamentary regulations, and other legal acts in the process of controlling activities

1633 Constitutional Affairs. The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges. Study for the AFCO Committee, PE 583.126, p. 43.
1634 Winzen, 2021, p. 104. For a more detailed analysis see: Raimla, 2016, pp. 1–42.
1635 Kreilinger, 2019, pp. 72–73.

related to the ES. Their *modus operandi* in this respect is determined by political system practice, which is not always stable in individual countries. In a few cases, however, it is possible to use procedural mechanisms specifically designed to actively involve the legislature in the implementation of the ES process. We are talking here primarily about Denmark, where this type of legislation is most developed (Danish lawmakers created a separate 'National Semester', which mirrors the ES[1636] and put the different stages of the ES under debates in joint committee meetings, opening in a space for monitoring government policy actions), but also about Belgium, Czech Republic, Hungary, Luxembourg, Slovakia, and Slovenia, where we also deal with similar regulations, although to a more limited extent.[1637]

II.5.4 Control Mechanisms in the Conditionality Regulation

The enforcement procedure of the conditionality mechanism is laid down in Art. 6 of the Regulation.[1638] According to this provision, where the Commission finds that it has reasonable grounds to consider that the conditions set out in Art. 4 are fulfilled (the breaches of the principles of the rule of law affect or seriously risk affecting the sound financial management of the Union budget or the financial interests of the Union in a sufficiently direct way), it shall – unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively – send a written notification to the concerned Member State setting out the factual elements and specific grounds on which it based its findings. The concerned Member State shall provide the required information and may make observations on the findings set out in the notification within the time limit extending between one month and three months from the date of the notification of the findings. The Member State may propose the adoption of remedial measures to address the findings set out in the Commission's notification. The Commission shall assess within one month of the receipt of any information (or observations) from the Member State. If the Commission finds that the conditions of Art. 4 are fulfilled and that the remedial measures proposed by the Member State do not adequately address the findings in the Commission's notification, it shall submit a proposal for an implementing decision on the appropriate measures to the Council within one month, or, in the event that no observations are made, without undue delay. The Council shall adopt the implementing decision within one month of receiving the Commission's

1636 Winzen, 2021, p. 104.

1637 Constitutional Affairs. The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges, Study for the AFCO Committee, PE 583.126, p. 46.

1638 Regulation (EU, Euratom) 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.

proposal; however, if exceptional circumstances arise, the period for the adoption of the implementing decision may be extended by a maximum of two months. The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text by means of an implementing decision.[1639]

The above-presented final text underwent significant changes, which may affect the practical application of the mechanism. First, in comparison to Art. 6(1) of the Regulation, Art. 5 of the Proposal does not set out the possibility that the Commission may consider that other procedures would allow it to more effectively protect the Union budget. The Regulation gives some examples of such measures which could be adopted in the event of breaches of the rule of law; namely: the suspension of payments and commitments, the suspension of the disbursement of instalments or the early repayment of loans, a reduction of funding under existing commitments, and a prohibition on entering into new commitments with recipients or new agreements on loans or other instruments guaranteed by the Union budget.[1640] In light of the fact that the possibility of considering other mechanisms of protecting the Union budget was introduced by the Regulation, the question arises why the Commission did not opt for a financial mechanism but a rule of law mechanism when it triggered the conditionality mechanism for the first – and, to date, the only – time against Hungary in 2021.

In its Proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary ('Proposal for a Council implementing decision'), the Commission considers that no other procedure under Union law would allow it to protect the Union budget more effectively than the procedure set out by the Conditionality Regulation. According to the Commission, the application of other budget protection mechanisms would not be as effective as the conditionality mechanism, given that the former procedures are not of a preventive nature and may not relate to systemic issues, in contrast to the latter.[1641] Furthermore, the Commission suggests that certain measures – specifically, agreements, action plans, and other instruments targeting breaches of Union law or criminal offences affecting the Union's financial interests – cannot protect against serious risks to the sound financial management of the Union budget and the financial interests of the Union because there is no evidence of their effective implementation.[1642] Similarly, there is also no evidence of the effective implementation of the conditionality mechanism: as mentioned above, the Regulation was adopted in December 2020, and has only been triggered by the Commission once in November 2021,[1643] less than a year later after its adoption. The procedure is still ongoing and, as of the finalisation of this manuscript in December 2023, the effectiveness of the mechanism was not yet measurable.

1639 Regulation 2020/2092, Art. 6.
1640 Regulation 2020/2092, Recital 17.
1641 European Commission, 2020a, p. 17.
1642 Ibid., p. 18.
1643 Ibid., p. 1.

Moreover, in the Proposal for a Council implementing decision, the Commission does not justify how the alleged breaches of the rule of law would explain the application of a financial mechanism, considering that the conditionality mechanism is explicitly aimed at protecting the Union's budget and financial interests rather than the rule of law itself. According to the Regulation, the conditionality mechanism complements the other instruments promoting the rule of law and its application, such as the European Rule of Law Mechanism, the EU Justice Scoreboard, and the procedure provided in Art. 7 TEU.[1644] However, in the authors' view, there is a clear distinction between these instruments and the conditionality mechanism on the grounds of their legal basis: while the former are directly connected to the rule of law, the latter does not aim to restore the rule of law but to protect the financial interests of the EU against alleged breaches of the rule of law, as implicitly confirmed by the CJEU in the judgment presented below.[1645]

The sharp difference between the two legal bases (i.e. restoring the rule of law on the one hand, and protecting the financial interests of the EU on the other), however, could not necessarily be deduced from the structure of the Regulation, as it does not clearly draw a line between the breaches of the principles of the rule of law and the financial interests of the Union. Moreover, the Regulation does not require the actual breach of the financial interests of the Union budget but instead suggests that a hypothetical breach thereof would be sufficient to launch the procedure. The Union may therefore be seen as seeking to tackle the same issue – the question of the rule of law – from different perspectives and, thus, besides the application of procedures inherently connected to the rule of law, it uses other mechanisms for this purpose (e.g. the European Semester) or introduces new ones with an indirect connection to the rule of law, such as the conditionality mechanism.

The simultaneous application of different rule of law procedures raises several questions, which were contested by Hungary before the CJEU in Case C-156/21. Namely, Hungary submitted that the clear risk of a serious breach of the values referred to in Art. 2, including the rule of law, could only be determined on the basis of Art. 7 TEU. The EP triggered the Art. 7 procedure for Hungary in September 2018[1646] and, as of December 2023, the discussions are still ongoing. Therefore, in the absence of the determination of the existence of breaches of the principles of the rule of law under Art. 7, Hungary submitted that EU institutions did not have power by other legislative measures to determine such breaches, even though this was required by Art. 6(1) of the Conditionality Regulation. Additionally, it should be noted that the newer rule of law mechanisms and frameworks (such as the European Semester, the EU Justice Scoreboard, and the conditionality mechanism) were introduced with the intent of helping to address rule of law issues in Member States before it becomes

1644 Regulation 2020/2092, Recital 14.
1645 *Hungary v European Parliament and Council of the European Union*, Case C-156/21, para. 110.
1646 European Parliament, 2018.

necessary to have recourse to Art. 7.[1647] Nevertheless, the CJEU concluded that the EU legislature may establish other procedures relating to the values contained in Art. 2 parallel to the procedure set out in Art. 7, provided that those procedures are different in terms of their aim and subject matter, as is the case for the Art. 7 procedure and the conditionality mechanism, according to the Court.[1648]

Furthermore, the Court highlighted that the aim of the conditionality mechanism is not to penalise breaches of the principles of the rule of law in a Member State but to protect the Union budget.[1649] This statement is based on Article 7 of the Conditionality Regulation, which provides the lifting of measures in case the conditions for the adoption of measures are no longer fulfilled, i.e. the breaches of the principles of the rule of law no longer affect or seriously risk of affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. Therefore, the measures envisaged in the conditionality mechanism must be lifted where the impact of the implementation of the budget ceases, even if the breaches of the principles of the rule of law may persist,[1650] which implies that the mere breach of the principles of the rule of law shall not condition the adoption of measures, only when the breaches impact the financial interests of the Union. In contrast, the Art. 7 procedure does not presuppose that the breach of the values provided in Art. 2, also including the rule of law, has an impact on any other area relevant to the functioning of the Union. However, the fact that the conditionality mechanism is explicitly aimed at protecting the Union budget renders it a financial instrument rather than a rule of law instrument and, therefore, leads back to the question of why other budget protection mechanisms were not considered effective in the concrete case.

The subsidiary nature of the application of the conditionality mechanism was also highlighted by the European Council in the conclusions of 11 December 2020.[1651] Remarkably, the conclusions were adopted a few days before the Conditionality Regulation on 16 December 2020. Although European Council conclusions are non-binding, the abovementioned one provides instructions to the European Commission by emphasising that the Commission intends to develop and adopt guidelines on the application of the Regulation. The conclusions provided that these guidelines would be developed in close consultation with Member States after the finalisation of the aforementioned judgment of the Court of Justice.[1652] The European Council explicitly concluded that the application of the conditionality mechanism would respect its subsidiary character, meaning that measures would be considered 'only where other procedures set out in Union law, including under the Common

1647 European Commission, 2019, pp. 3–6.
1648 *Hungary v European Parliament and Council of the European Union*, Case C-156/21, paras. 167 and 168.
1649 Ibid., para 115.
1650 Ibid., para 113.
1651 European Council, 2020, para. I.2.d).
1652 Ibid., paras. I.2.c–d).

Provisions Regulation, the Financial Regulation or infringement procedures under the Treaty, would not allow to protect the Union budget more effectively'.[1653] This statement implies that the European Council perceived the conditionality mechanism primarily as a financial instrument rather than a rule-of-law instrument. This implication is also supported by the conclusion that 'the mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism', but a sufficiently direct causal link between such breaches and the negative impact on the Union's financial interests should be established.[1654] Regrettably, the subsidiary character of the conditionality mechanism is not emphasised in the Regulation, nor in the guidelines adopted by the Commission[1655] as suggested by the European Council in its aforementioned conclusions. As mentioned above, the Regulation introduced certain changes to the original proposal in its procedural aspect as well – the first one being the possibility of considering other procedures allowing more effective protection of the Union budget – which raised several questions connected to whether the conditionality mechanism is perceived as a financial instrument or a rule of law instrument. Second, in contrast with the Proposal, the Regulation provides in Art. 6(1) that the Commission shall inform the EP and the Council without delay of the notification sent to the concerned Member State, as requested by the EP in the abovementioned legislative resolution. The growing importance of the EP aligns with the recent tendency of the so-called 'stealthy transfer of powers'[1656] and has extended the EP's powers beyond those conferred upon it by the Member States in the Founding Treaties. The EP had a major role in the Art. 7 procedure against Hungary by proposing the Council to determine the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded in its resolution of 12 September 2018.[1657] Furthermore, even though the legislative resolution does not refer to it, Art. 6(2) of the Regulation provides that the EP may invite the Commission for a structured dialogue on its findings, which also shows the growing importance of the EP in the procedure.

The evolution of the draft texts of the Regulation is also remarkable from the perspective of the ongoing power struggles between EU institutions, in particular between the Commission and the Parliament. While both institutions agreed on the idea of launching the conditionality mechanism, their standpoints significantly differed on the EU institution that would adopt a decision initiating the procedure.[1658] The Parliament proposed the establishment of an advisory panel of independent experts, one to be appointed by the national parliament of each Member State and five experts to be appointed by the EP itself. The panel would have had the tasks of assisting the Commission in identifying generalised deficiencies as regards the

1653 Ibid., para. I.2. e).
1654 Ibid., paras. I.2.e–f).
1655 See: European Commission, 2022b.
1656 See: Bóka, 2022, pp. 73–83.
1657 European Parliament, 2018. See also: Varga Zs., 2019, p. 19.
1658 von Bogdandy, 2019, p. 5.

rule of law in a given Member State and assessing the situation in all Member States annually. The Commission would have had the obligation to take into account relevant opinions expressed by the panel.[1659] Therefore, in case the above proposal had been adopted, the Parliament would have had a more significant role in the procedure. First, it would have had an impact on the composition of the panel through the five members appointed by the institution; therefore, its opinion would have influenced the decision-making process to a certain extent. Second, its legislative proposal also suggested the Commission submit the Parliament and the Council a proposal to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted. The Parliament – and the Council – could have amended or rejected the transfer proposal within four weeks of its receipt.[1660] On the other hand, the Commission intended to conduct the rule of law inquiry by itself. According to the adopted Regulation, the Commission shall immediately inform the Parliament of any measures proposed, adopted, or lifted in connection with the procedure,[1661] and the Parliament may invite the Commission for a structural dialogue on its findings,[1662] however, the Commission shall submit the proposal for an implementing decision to the Council. Therefore, despite the Parliament's endeavours to extend its control over the conditionality mechanism, the Commission and the Council remained the key actors of the procedure.[1663]

The Commission's role in the conditionality mechanism is even more outstanding in light of its discretionary power to determine whether the conditions to launch the procedure are fulfilled and which sources of guidance to consider in making its quantitative assessment regarding the situation of the rule of law in the concerned Member State. According to Art. 6 of the Regulation, the Commission may decide to launch the procedure only if it has 'reasonable grounds' to consider that the conditions are met. However, as highlighted by the Court of Auditors, the Committee of the Regions, and the Economic and Social Committee in their opinions concerning the Proposal of the Commission, the criteria for launching the procedure were not clearly defined in the Proposal. As a result, the Commission was assigned more discretionary power in the process than it had under the existing rules to counter any breach against one of the fundamental values set out in Art. 2 TEU.[1664] The inclusion of detailed criteria would have been necessary in order to ensure that the legitimacy of the Commission's decision is not undermined by allegations of bias or lack of objectivity.[1665] Despite the explicit recommendations from the three bodies, the Commission did not introduce transparent criteria for the evaluation of the situation of the rule of law pursuant to Art. 4 of the Regulation.

1659 European Parliament, 2019, Art. 3a.
1660 European Parliament, 2019, Art. 5 (6a–6b).
1661 Regulation 2020/2092, Art. 8.
1662 Regulation 2020/2092, Art. 6 (2).
1663 Cf. Regulation 2020/2092, Art. 6 (9–10) and European Commission, 2018, Art. 5 (6–8).
1664 Court of Auditors, 2018, 12. See also: Committee of the Regions, 2018, 21.
1665 European Economic and Social Committee, 2019, 4.3.

The limitation of the scope of the relevant documents to be assessed by the Commission is also worth noting: while the Proposal and the legislative resolution of the EP respectively provide that the Commission may or shall take into account *all* relevant information, including the decisions of the CJEU, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations, Art. 6(3) of the Regulation refers to relevant information, including the decisions, conclusions, and recommendations of Union institutions, other relevant institutional organisations and other recognised institutions. The fact that the adopted rule does not require the Commission to consider *all* relevant information could raise the question of on what basis the sources are selected to assess the situation of the rule of law in the concerned Member State. In addition, the Regulation gives examples of such sources, including judgments of the CJEU, reports of the Court of Auditors, the annual Rule of Law Report and the EU Justice Scoreboard, and reports of the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO), as well as documents of the bodies of the Council of Europe, such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary.[1666] The EP also recommended taking into account the accession criteria, especially the chapters of the acquis on the judiciary and fundamental rights, justice, freedom and security, and financial control and taxation as well as the guidelines used in the context of the Cooperation and Verification Mechanism.[1667] In the abovementioned Proposal for a Council implementing decision, the Commission found that it had reasonable grounds to consider that the conditions set out in Art. 4 of the Conditionality Regulation were fulfilled for finding systemic irregularities, deficiencies, and weaknesses in public procurement procedures in Hungary. The Commission based its findings on audits by Commission services and OLAF investigations;[1668] however, it does not refer to further sources of guidance it used in making its qualitative assessment to identify breaches of the rule of law, as referred to above.

The adopted Regulation introduced a significant change in the procedure compared to the original proposal. As pointed out above, Art. 6(11) provides that the Council may adopt an implementing decision upon the Commission's proposal by a qualified majority voting (hereinafter: QMV). However, the Commission originally proposed a reversed QMV for the Council,[1669] which differs from the standard legislative procedure provided by the EU Treaties, primarily by Art. 294 TFEU, which lays down the ordinary legislative procedure in which the Council acts by a qualified

1666 Regulation 2020/2092, Recital 16.
1667 European Parliament, 2019, Art. 5(2).
1668 European Commission, 2022a, 2.1.1. (11).
1669 European Commission, 2018, Explanatory Memorandum 5.

majority.[1670] Meanwhile, the Treaties do not foresee a reversed qualified majority; instead, this majority is based on a different logic, meaning that the legislative act is deemed to be adopted under this procedure unless the Council explicitly rejects or amends it with a standard QMV.[1671] Notably, it would have been easier to adopt an implementing decision under a reversed QMV than under an ordinary QMV, as this would have required that the Council would not reject it within one month, which also requires Council members to explicitly vote against the proposal for implementation and come to an agreement within one month. The Commission justified the introduction of the reversed QMV in the conditionality mechanism with the necessity to protect the financial interests of the Union.[1672] However, the Treaties do not include a provision that authorises the Council to apply the reversed QMV.

The problems of the legality of the reversed QMV in the conditionality mechanism received criticism from various sources, including the Legal Service of the Council and the Court of Auditors. In its Opinion on the Commission's Proposal, the Legal Service of the Council expressed its concern about the application of the reversed QMV in the conditionality mechanism and suggested the Commission justify the rule.[1673] While the Legal Service of the Council emphasised the absence of justification in the Commission's Proposal, the Court of Auditors pointed out that the introduction of the reversed QMV was an expression of the Commission's broad discretionary power, as also highlighted in connection with launching the procedure itself.[1674] Interestingly, the European Economic and Social Committee approved the use of reverse QMV as an appropriate measure in the case of generalised deficiencies in a Member State without referring to the legal feasibility of such a procedural rule in the new mechanism.[1675] The idea of switching to an ordinary QMV instead of the reversed procedure arose in the Council during the legislative procedure in 2020,[1676] presumably as a compromise solution, primarily based on the legal arguments of the Legal Service of the Council. The idea of the reversed QMV was dropped from this point and the adopted Regulation, as pointed out above, requires an ordinary reversed majority.

As the last part of the procedure of the conditionality mechanism, the Regulation provides rules on the lifting of measures in Art. 7, according to which the Member State may adopt new remedial measures and submit a written notification to the Commission showing that the conditions for the adoption of measures are

1670 Qualified majority voting requires at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States. The blocking minority includes at least found Council members representing more than 35% of the EU population. See: Art. 238 of the TFEU.
1671 Łacny, 2021b, pp. 285–288.
1672 European Commission, 2018, Recital 15.
1673 Council of the European Union, 2018, 50.
1674 Court of Auditors, 2018, Recommendation 16.
1675 European Economic and Social Committee, 2019, 4.2.
1676 European Council, 2020.

no longer fulfilled. In light of the evidence submitted by the Member State and the adoption of the new remedial measures, the Commission shall reassess the situation at the request of the Member State or by its own initiative within one year of the Council's adoption of the measures. The Commission may find that the conditions for adopting the measures are no longer fulfilled and submit a proposal to the Council for an implementing decision lifting the adopted measures. If the Commission finds that the situation leading to the adoption of the measures has been partly remedied, it shall submit a proposal to the Council for an implementing decision adapting the adopted measures. The Commission may also find that the situation has not been remedied; in this case, it shall address a reasoned decision to the Member State and inform the Council thereof.[1677] Similar to the evaluation of the conditions for launching the conditionality mechanism, the rules on lifting the measures give the Commission significant discretionary power – the Regulation does not provide any clear criteria on how to assess the adequacy of the new remedial measures adopted by the Member State and the evidence that the conditions for the adoption of the measures are no longer fulfilled.

Therefore, it could be concluded that the absence of a clarification of the concept of the rule of law causes serious problems in the practical application of the conditionality mechanism throughout the whole procedure, which is exacerbated by its contested relationship to other rule of law procedures, especially the procedure set out in Art. 7 TEU, and its efficiency as opposed to other *financial* mechanisms set out in Union legislation.

II.5.5 Control Mechanisms in the Cooperation and Verification Mechanism

The content of the former CVM may be summarised as follows:

a) Romania and Bulgaria were to submit reports by 31 March each year, and for the first time by 31 March 2007, to the Commission on the progress made in addressing each of the benchmarks provided in the Annex of Decisions 2006/928/EC and 2006/929/EC.[1678]

b) The Commission could, at any time, provide technical assistance through different activities, or gather and exchange information on the benchmarks. The Commission could, at any time, organise expert missions to Romania. Romanian authorities would provide the necessary support in this context.[1679]

1677 Regulation 2020/2092, Art. 7.
1678 These benchmarks are analysed above.
1679 Art. 1.

> c) The Commission would communicate to the European Parliament and the Council its own comments and findings on Romania's report for the first time in June 2007. Thereafter, the Commission would report again, as and when required, at least every six months.[1680]

Beginning from 2008, the Commission drafted two types of reports, namely a progress report and a technical report. The two types of reports served different purposes and focused on different aspects of the countries' progress. Progress reports were comprehensive documents that provided an overview of the progress made by Romania and Bulgaria in addressing the specific benchmarks, and recommendations set out by the European Commission. These reports typically covered a wide range of issues, including legislative reforms, institutional changes, and the practical implementation of measures related to judicial reform, corruption, and organised crime. Progress reports were usually published annually and more accessible to the general public and policymakers, as they synthesised the overall progress and challenges faced by the countries under the CVM.

Technical reports were more detailed and in-depth assessments conducted by experts from the European Commission and other relevant bodies, summarising the information which the Commission had used as the basis for its assessment of the countries' progress under the CVM. These reports focused on specific technical aspects of the countries' compliance with the CVM benchmarks, such as legal analysis, institutional capacity building, and the implementation of specific measures. Technical reports could delve into complex legal and administrative issues, providing detailed insights into the challenges and progress made in specific areas. While progress reports offered a broader perspective on the overall progress, technical reports provided a more specialised analysis of specific aspects of the countries' compliance with the CVM requirements. Both types of reports contributed to the European Commission's monitoring and evaluation of the countries' efforts to address the issues covered by the CVM. The frequency of these reports varied by the progress made by each country and the assessment timelines set by the European Commission. The number of progress reports was higher than the number of technical reports (Table 1).

Table 1. Number of CVM reports (data and table compiled by the author)

	Romania	**Bulgaria**	**Total number**
Number of progress reports	21	18	39
Number of technical reports	12	12	24

1680 Art. 2.

For Romania, the last CVM report was published in 2022,[1681] and for Bulgaria in 2019.[1682] In other words, the CVM is a high-intensity monitoring and cooperation procedure comprising two Commission reports a year, which in turn can directly influence and steer reforms.

Practically speaking, the CVM involved regular monitoring and reporting by the European Commission with support from other relevant EU bodies (e.g. the European Parliament and the Council of the European Union). The reports assessed the progress made by Romania and Bulgaria in fulfilling specific benchmarks and commitments, providing recommendations for further action when necessary. Whether this control was really necessary or excessive is a matter of political choice. In principle, I consider this type of control and (ultimately from top to bottom) policy management disproportionate, but justifiable in the given context. This was the price of the fast-tracked EU accession of Romania and Bulgaria, the cost of closing accession negotiations before all the raised problems were solved. Strangely enough, as already indicated, the accession treaty did not give a real legal mandate for the introduction of such a mechanism, nor for its significant time extension (for more than one and half decade). Still, the two controlled states did not object because they also really 'felt' that not all required reforms had been introduced before 1 of January 2007 (i.e. the accession date). That was indeed true, as not all problems had been solved, or in the preparation for accession these reforms were not, or could not yet be, organic. This is why Romania and Bulgaria accepted the CVM without any particular opposition.

It is important to note again that the CVM was a tailored mechanism designed specifically for these two states. Therefore, while it shares some similarities with other EU monitoring mechanisms (e.g. the new rule of law framework), the CVM is distinct in its focus on these two countries and their accession commitments. It followed a structured procedure that involved monitoring, reporting, and dialogue between the European Commission and the two monitored states.

The European Commission used various sources to evaluate the progress of these two countries, and the national authorities of Romania and Bulgaria were required to provide self-assessment reports on the progress made in implementing the recommendations and reforms outlined in the previous CVM report. The Commission also consulted with other EU institutions, including the European Parliament, the Council of the European Union, and the European Court of Justice, to gather information and opinions on the progress of Romania and Bulgaria. The Commission further considered the opinions of civil society organisations, independent experts, and other stakeholders in Romania, and made use of various statistical and data sources to assess the progress made. The Commission also had the right to conduct on-site visits, and the EU Delegations in the country provided regular updates on the political, economic, and social situation, and could provide input on progress or setbacks.

1681 COM(2022) 664 final.
1682 COM(2019) 498.

The Commission's reports were shared with Romania and Bulgaria, and dialogue was constant between the EU and the national authorities. This dialogue provided an opportunity for the parties to discuss the findings of the reports and address any concerns or recommendations raised by the Commission. Based on the dialogues and assessments, the Commission had the chance to provide recommendations on further actions needed to address the identified shortcomings and meet the established benchmarks. These recommendations served as a guidance for the national authorities in their reform efforts. The Commission during this period continued to monitor the progress made by Romania and Bulgaria, which included assessing the legislative changes, institutional reforms, and the practical implementation of the reforms. The Commission in subsequent reports periodically updated the assessment of Romania's progress. These reports highlighted any improvements, remaining challenges, and additional steps required to fulfil the benchmarks set by the CVM.[1683]

The CVM procedure continued until the country under assessment made sufficient progress in meeting the established benchmarks. The European Commission, in cooperation with other EU institutions, determined when the CVM could be concluded for a particular country. As aforementioned, there was no specific and clear duration set for the CVM for Romania and Bulgaria, which was eventually terminated in 2023. According to the official position of the Commission, the two states have met the benchmarks adequately, but were immediately brought under the new rule of law mechanism. This gives way for the inference that the primary reason for the abolition of the CVM may have been to avoid the duplication of monitoring procedures and to make the new rule of law procedure less discriminatory, as it is supposed to cover all Member States.

1683 For an assessment of the reports, see also below.

Part III

SANCTIONS RELATED TO CONTROL MECHANISMS

Introduction to the Sanctions Related to Control Mechanisms

The enforcement of the supranational interpretation of the rule of law may result in different types of sanctions, depending on the soft or hard nature of the analysed mechanisms. The aim of sanctions, in general, is to force States to comply with their legal obligations. however, as highlighted in the previous chapters, many of the examined mechanisms are soft-law-based, which could imply that the supranationalisation of the rule of law also entails the process of hardening soft legal norms.

Hard sanctions are primarily provided by the ECtHR as its judgments are legally binding for the Contracting States and may include pecuniary or non-pecuniary damages, costs, and expenses with which States must comply if the Court finds a violation. Meanwhile, other mechanisms of the Council of Europe, particularly the Venice Commission, rather adopt non-binding recommendations that cannot have a direct legal effect. Thus, the system of an effective monitoring compliance mechanism does not allow the Venice Commission to impose sanctions on States for non-compliance with their recommendations. Nonetheless, its work certainly has a significant and measurable impact on the development of the legislation within the States.

The monitoring process may not lead to the adoption of hard sanctions on OECD Member States. The determination of non-compliance with the OECD's findings cannot be strictly qualified as sanctions; however, soft pressure may be applied to the given State through the peer review procedure. Similarly, the recommendations adopted by UN bodies, particularly human rights treaty bodies, cannot be considered legally binding even by the committees themselves who adopt the comments or recommendations. Consequently, their implementation cannot be directly enforced in UN Member States either. Furthermore, compliance with the decisions and commitments adopted by OSCE bodies is not controlled and cannot be directly sanctioned by a court.

Therefore, the next chapter analyses the possible responses of supranational entities to their Member States' non-compliance with the different supranational interpretations of the rule of law. Given the political nature of certain organisations (particularly the OSCE), the aims pursued (e.g. economic development in the OECD, or maintenance of peace and security in the UN), or the role of these entities (such as the advisory role of the Venice Commission), these entities did not or have not developed legally enforceable sanction systems for their Members. The strongest

enforcement mechanism is connected to the ECtHR, which was originally established to interpret human rights based on the European Convention on Human Rights, also incorporating the rule of law standards of the Venice Commission.

The absence of clear and enforceable sanctions regarding the rule of law in the majority of the presented entities may underpin the subsidiary nature of international or supranational organisations that consider States the primary entities responsible for interpreting and implementing the rule of law. However, endeavours to develop stronger mechanisms to enforce the supranational understanding of the rule of law may point to the direction of the envisaged supranationalisation of the concept of the rule of law.

III.1 The Related Sanctions in the Council of Europe

III.1.1 General Overview of the Related Sanctions in the Council of Europe

Regarding CoE sanctions, some key points come immediately to the forefront of related discussions, namely the fact that the CoE is a supranational organisation, and that rules which apply to it are governed also by international law and the law of treaties. The major Convention relevant at this point is obviously the ECHR, wherein all features of international law apply, the first of which is the *pacta sunt servanda*. This well-established international law principle implies that all parties entering into an agreement must keep it and are bound to it. In fact, this principle comes from contract law agreements, as follows:

> Few rules of the ordering of Society have such a deep moral and religious influence as the principle of the sanctity of contracts: Pacta sunt servanda. In ancient times, this principle was developed in the past by the Chaldeans, the Egyptians and the Chinese in a noteworthy way. According to the view of these peoples, the national gods of each party took part of the formation of the contract. The gods were, so to speak, the guarantors of the contract and threatened to intervene against the party guilty of a breach of contract. So it came to be that the making of a contract was bound up in solemn religious formulas and that a cult of contracts actually developed.[1684]

The quote above is generally very much applicable in today's world, perhaps with exception to the topic of 'gods', and especially in respect to the guarantors issue. Who are those guarantors in the current world? In private civil and common law, the guarantors are still the courts, which are responsible for keeping the contracts working. Still, when it comes to international and conventional law, the figure somewhat changes; a major critique placed towards international law is that it is not really a law, in that it does not feature any form of sanction mechanism, implying

1684 Wehberg, 1959, pp. 775–786.

that the guarantor of contracts and agreements in supranational law is the state itself or a community of states, which in turn can impose sanctions. These sanctions are, nonetheless, often of a political nature. The principle of the sanctity of contracts is connected with the intent of doing business in a good faith, and it is one of the cornerstones of law in general.

The second key point regarding sanctions in the CoE is connected with its own policy of promoting more humane and socially-effective penal sanctions for individuals.[1685] The third key point is that CoE sanctions are mostly concentrated on developments of the judgements of the ECtHR, and on particular reports and measures recommended by the functional bodies of the CoE, specifically the CEPEJ an GRECO. Accordingly, how these sanctions work within the framework of the documents and practices of the CoE depends on the juridical and political pressure of the organisation itself. In today's Europe, a major issue that permeates Member States is the image of a particular country, as no country wants to leave a negative impression on other community members (e.g., other Member States and international organisations). This can be achieved by the ECtHR, which is a major tool in this respect. In its judgements, the ECtHR makes decisions with broad implications both to the country under scrutiny and other Member States, applying the margin of appreciation doctrine to ensure respect for the specific characteristics of each state while attempting to retain its actions within the framework of the general jurisprudence of the Court.

A major problem here is if the country does not follow the judgements and recommendations of the CoE. It is important to underline that the ECtHR makes extensive use of documents and findings from both the CEPEJ and GRECO to analyse and justify its decisions, as can be seen in the cases discussed in this chapter. However, the decisions of the court also have, in the end, their political dimension. A typical example is the very well-known case of *Sejdić and Finci v. Bosnia and Herzegovina*, where the decision of the ECtHR remains unimplemented even after all these years. This case is discussed further below because it shows that CoE decisions, in this case the ECtHR's decisions, and procedures can be insufficient to secure the implementation of the decision in a Member State that is a signatory to the Convention.

1685 'To this end a number of important legal instruments have been adopted, namely the European Prison Rules, the Council of Europe Probation Rules, the European Rules on community sanctions or measures, the European Rules for juvenile offenders subject to sanctions or measures and recommendations on remand in custody, education in prison, prison and probation staff, health care in prison, foreign prisoners, long-term sentences, prison overcrowding and conditional release. These legal instruments have been brought together in one regularly updated publication, the Compendium of conventions, recommendations and resolutions relating to penitentiary questions. These instruments have been prepared by either the Council for Penological Cooperation (PC-CP), which is an advisory sub-committee to the European Committee on Crime Problems (CDPC), or by ad hoc committees organizes. The Council of Europe also organizes regular Conferences of directors of prison and probation services. It publishes Annual penal statistics on the prison population and on non-custodial sanctions and measures (SPACE)'.

Bosnia and Herzegovina is a very complicated country; a house much divided. Even after more than 15 years of the bloody war that torn this country apart, it remains separated, and so does its entities, which in turn are torn by fragmented territorial structures, which in turn comprise territorial pockets with their own local, and often very inefficient, administrations. Thus, while Bosnia and Herzegovina has hundreds of local administrators across its various entities, cantons, and districts, they continuously try to work in a structure that is completely unstructured. This massive and complicated system, with its different layers of distribution of political power, can cause real headaches to even the most prominent of political scientists and lawyers, and showcases that the country generally does not work properly. No wonder many Bosnian people find its country to be very non-stimulating and depressing.

Bosnia and Herzegovina is a country home to three major ethnic groups, namely the Bosnians, Croats, and Serbs,[1686] all of which feel that they belong to that land and that land belongs to them. The major problem here is how to convince these different ethnic groups that the land belongs to all of them. In fact, the number of Croats in Bosnia and Herzegovina has been falling rapidly because many of them feel 'squeezed out' of political power, and sense that they are put on the margins of the country as the minor of the three major ethnic groups that constitute the country. Nonetheless, all three ethnic groups report similar problems regarding emigration and exodus.

Now, what about the other 'non-listed and non-significant ethnic groups' in the country? As aforementioned, a key problem in the country is convincing all, especially those more radical, that Bosnia and Herzegovina must survive as a country 'of many', and not as a country 'with many'. Furthermore, the separation of Bosnia and Herzegovina would likely mean war, and one with unpredictable consequences. Aside from the three main ethnic groups mentioned above, the country is also home to Jews, the Roma, Czechs, Hungarians, Montenegrins, Austrians, among others, and is a CoE Member State that is a signatory to the ECHR.[1687] This means that this country signed one of the most beautiful conventions of the contemporary world, a piece of paper that affords to every citizen of signatory countries the same basic human rights, which in turn are comparable to the amendments to the Constitution of the United States of America. Thus, Member States are 'controlled' by the ECtHR, as its citizens can submit complaints (actions) against Member States for violating their Convention rights. Until recently, there had not been any judgment, domestic or foreign, that shook the swampy legal atmosphere of Bosnia and Herzegovina more than the decision of

1686 The majority of Bosniacs are Muslims; the majority of Croats are Catholics; the majority of Serbs are Orthodox.

1687 Jacobs, White and Ovey, 2010.

the Grand Chamber of the ECtHR.[1688] In legal traditions of civil law,[1689] the legal theory puts conventions above laws but under constitutions, a disposition that is called the hierarchy of norms. This case showed that the results of the Dayton Agreement – even if just, noble, and necessary for ending the bloodiest war on European soil since World War II – are unjust and unfair both for the major national groups and other national minorities.

It is also important to mention that there are mechanisms of execution of ordinary judgements, which are explained on the ECHR website, as follows:

> In accordance with Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, the Committee of Ministers supervises the execution of judgments of the European Court of Human Rights. This work is carried out mainly at four regular meetings (DH meetings) every year. The Committee of Ministers' essential function is to ensure that member states comply with the judgments and certain decisions of the European Court of Human Rights. The Committee completes each case by adopting a final resolution. In some cases, interim resolutions may prove appropriate. Both kinds of Resolutions are public. Applicants can access the Resolutions adopted concerning their case.[1690]

There is also the possibility, pursuant to Arts. 46/4 and 5 of the ECHR, of infringement proceedings for cases where the judgement of the Court is not executed by the respondent State. A vote of two-thirds of the Committee of Ministers is needed to start the process.[1691]

The ECtHR, in its decision from 22 December 2009, ruled that the provisions of the Constitution of Bosnia and Herzegovina and the provisions of the Law on Elections were contrary to the provisions of the Convention, which was signed and ratified by the country. A Jewish citizen of Bosnia and Herzegovina, Jakob Finci, was denied fighting for the position in the three-member presidency of the Republic and for a place in the House of Peoples, because those positions were reserved for

1688 For those unfamiliar with European Law and its state controls which exist on the European continent, I will just mention that most countries located in the European continent are signatories to the European Convention on Human Rights and also members of the Council of Europe – the latter which is not to be confused with the European Union. The judicial body of the Council of Europe is the European Court of Human Rights, which has its seat in Strasbourg, France, and all Member States appoint their judges there. This means that, technically, any case in which a party believes that a Member State violated any of the rights of the Convention can approach that Court and search for protection. That Court is higher than the supreme courts of the Member States, and all organs, judicial and administrative, of any of the Member States are subordinated to its power.

1689 Those based on Roman law. All countries located in the European continent are civil law countries, except the United Kingdom of Great Britain, Northern Ireland, and the Republic of Ireland.

1690 For more information, see: Execution of judgments [Online]. Available at: https://www.coe.int/en/web/cm/execution-judgments#{%2217738959%22:[0]} (Accessed: 19 February 2024).

1691 For more information, see: Infringement Procedure [Online]. Available at: https://www.echr.coe.int/documents/d/echr/Press Q A Infringement Procedure ENG (Accessed: 19 February 2024).

members of the three major ethnic groups (i.e. Bosnians, Croats, and Serbs).[1692] Eventually, another case from a Roma citizen named Dervo Sejdić merged with the Finci case, leading to what would become known as the *Sejdić & Finci v. Bosnia and Herzegovina* case.[1693] Just before reaching the decision, the Cardozo Holocaust Program noted that:

> The Grand Chamber's decision to accept the case-the first to be heard under Protocol 12, which provides for a robust right to non-discrimination – gives Europe's highest judicial body the opportunity to make clear that radical discrimination no longer has a place in the political agreements of any of the continent countries.[1694]

The decision was translated to BCS,[1695] and became a platform for major legal and political debates that last to this very day and remain largely unchanged.[1696] Without entering into a complicated legal analysis, it is still necessary to explain that the current Constitution of the Republic of Bosnia and Herzegovina is a product of the Peace Agreement made in the US Wright-Patterson Air Force Base near Dayton on 21 November and signed on 14 December of 1995 in Paris, France. The Constitution was an Annex to the Dayton Peace Agreement, and as such it was not brought before the parliament, country representatives, or the people, and none of these interested stakeholders could vote in favour or against it. It is thus a product of the political will of the parties involved at the time, and although it brought a much- and long-wanted peace, the consequences of the existence of this document bring forward concerns about the potential for violations of human rights of not just the involved parties, but those of others. The core issue here is that the Constitution prescribes that, on the state level, all decisions are made by the mutual cooperation of three-constitutive ethnic groups, namely the Bosnians, Croats, and Serbs, even if this does not work at all many times.[1697] As is clear here, the members of other ethnic groups in the country were completely excluded.

The applicants Sejdić and Finci argued that they are victims of ethnic discrimination, and their appeals were grounded on Art. 1. of the Protocol 12 to the Convention, which guarantees that all citizens will enjoy all rights prescribed by the law regardless of gender, race, colour of skin, language, religion, political or other opinion, ethnic or social inheritance, belonging to a national minority, assets, and

1692 For more information, see: Cardozo's Program in Holocaust and Human Rights Studies, The Jakob Finci Case/News on the Jakob Finci Case.

1693 Ibid.

1694 Ibid.

1695 Bosnian/Croatian/Serbian. Although those three languages differ and often have different grammatical and semantical constructions and shapes, members of all three ethnic groups can communicate and understand each other with a very high level of understanding.

1696 Available at: www.gov.ba/ured_zastupnika/novosti/?id=1008 (Accessed: 13 September 2023).

1697 We witnessed a situation where Bosnia and Herzegovina did not have a government for almost a year because members of the three constitutive nations could not find a solution for establishing it.

birth or other status. It also describes that public bodies and institutions must not discriminate on any grounds.[1698] This raised many different, and to some extent complicated, legal questions, with the most important of all being whether the State can be held responsible, seeing that its Constitution has provisions that differ from those of the ECHR regarding the possibility of including other ethnic groups into the political process. Sejdić and Finci had to describe themselves as Bosnians, Croats, or Serbs in order to be able to be passively legitimated in the electoral process. In the conventional legal circle, international conventions are lower in the hierarchy compared with national constitutions, rendering the aforementioned problem in Bosnia and Herzegovina an important legal issue with theoretical and very practical implications. The ECtHR eventually ruled that Bosnia and Herzegovina can be held responsible for the mere fact that the provisions of the Constitution, although at the time opportune for helping end the bloody war, remained in force. In relation to this matter, the fact that the national constitution, which is domestically on a higher level as a legal source than the Convention, has provisions contrary to the Convention is rendered irrelevant. For Bosnia and Herzegovina, this was a revolutionary legal opinion.[1699]

The ECtHR decided, with 16 votes for and 1 against, that there was violation of Art. 1 of the Protocol 12 regarding the possibility of applicants to be candidates on the elections for the presidency of Bosnia and Herzegovina.[1700] There is no doubt that this decision is human, moral, and necessary. Interesting is a dissent opinion from Maltese judge Giovanni Bonello, who wrote that by principle and in theory, he shares the opinion of the other 16 judges, but that he cannot:

> imagine any convention which would allow to the applicants to be candidates at elections by any means. Candidates at elections even by the price of Armageddon…I would shout first that the most precious are values of equality and non-discrimination-but at least equally valuable are peace and reconciliation in the State… with due respect to the Court, this judgment looks to me like building the tower in the air, not taking into account that those towers can collapse in the river of blood from which Dayton Constitution arose. It prefers its sterile ignorance more than the open meeting with pathetic outer world…the Court felt forced to throw into abyss the Dayton Agreement but did not feel morally obligated to put something else there, something what can secure peace. In traumatic revolutionary happenings it is not a task of the Court to decide when some transitional period ends and if dangerous situation ended, and that everything is normal again…I personally doubt that any state has to be driven into legal or ethical situation to sabots

1698 Art. 1 paras. 1 and 2 of the Protocol. Applicants also argued to be victims on the basis of violations to Art. 14 of the Convention and Art. of the Protocol 1 (general prohibition of discrimination and electoral rule on elections and freedom of voting).

1699 *Rekvényi v. Hungary* (App. no. 25390/94), 20 May 1999.

1700 See above.

> the system which saved its political existence…I cannot support the Court which plant ideals into soil and harvest bloodshed.[1701]

> What I realized is that I still have to support the decision of the Court as a moral and ethical person and as a person who believes in the future and wants to build the better one. For me decision of the Court was only one which I would consider just-but dramatic words of good judge Bonello made me think even more. If we just could do the changes on the ground, with the people-and we could build a society which would like to have norms which are recognized as just in the contemporary World, world without making anyone felt like was forced into the "equality". *I believe that in one thing judge Bonello has right: we have to meet "outer pathetic world" and change it*. I am not a prophet-I am not sure how this has to be done. In one thing judge Bonello has right and that is that something else has to be found in order to secure peace.[1702]

The major issues connected with the practical implications of Court decisions involve the fact that the various Member States have different internal issues, and that, sometimes, even a maximal political will does not ensure that things work out as required. In this extreme example, what I tried to show is that there are still various internal issues which prevent the full application of the Convention and the decisions of the Court. What is possible to underline at this point is that the level of organisation of a Member State reflects its capacity to follow the *pacta sunt servanda* principle, and that there is always space for the application of the margin of appreciation doctrine. Dragging Bosnia and Herzegovina out of the CoE is not considered as a proper solution, but one solution must be somehow found. Similar cases can be found related to other jurisdictions who struggle to implement the decisions of the ECtHR. While the CoE does not have a police force at its command to enforce the decisions, it has a specific form of authority to ensure so.[1703]

In the cases below, the CEPEJ's and GRECO's analyses and documents importantly influenced the judgements and reasoning of the ECtHR. In fact, the acceptance of the CEPEJ and GRECO documents make them a type of soft law of the CoE. The *Cocchiarella v. Italy*[1704] case is one good example where CEPEJ documents were con-

1701 Judge Bonello, translated by the author of this text, see above.

1702 For more information, see the Bosnian web page: www.jabiheu.ba/Vijest.aspx?newsid=531 (Accessed: 14 August 2023). In it, an agent of the Council of Ministers of the Bosnia and Herzegovina, Mrs. Monika Mijić, argues that the decision it the case *Sejdić & Finci v. Bosnia and Herzegovina* is unstoppable and pushed towards constitutional changes in the country. *Sejdić and Finci v. Bosnia and Herzegovina* (App. nos. 27996/06 and 34836/06), 22 December 2009.

1703 Derenčinović, 2021d.

1704 'The Court refers in this regard to the contents of the Recommendations of the Committee of Ministers on the publication and dissemination in the member States of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights (Rec(2002)13 of 18 December 2002) and on the European Convention on Human Rights in university education and professional training (Rec(2004)4 of 12 May 2004), not forgetting the Resolution of the Committee

sidered when there was a violation of Art. 6 of the Convention regarding the right to fair trial, as follows:

> In the meantime, also on 29 July 1997, Mrs. P. died. According to information provided by the applicant's lawyer on 18 March 1998, when he attempted to file with the court registry the document stating his client's intention to continue the proceedings as heir, an employee of the Naples District Court registry told him to come back in the year 2000. His reason for this was that the hearing would not be until 2001 and he would otherwise have to waste hours looking in hundreds of cases listed for April. 001. On 25 January 2000 the applicant lodged a document declaring his intention to continue the proceedings as heir. A hearing was listed for 14 February 2002.[1705]

Another case where CEPEJ documents were accepted was *Vlad and Others v. Romania*,[1706] where there was a violation of Art. 8 of the Convention and which was lengthy process. More on it is described below:

> Moreover, except for seeking penalties for non-enforcement (see paragraph 7 above) the bailiff failed to have recourse to other measures of gradual increasing intensity destined at enforcing the contact orders, including, as relevant, specific measures for cases of refusal of contact between the child and the estranged parent, which were available in particular under Articles 910-13 of the Romanian Code of Civil Procedure (see Niţă v. Romania [Committee], no. 30305/16, §§ 28-30, 3 July 2018 and Voica v. Romania, no. 9256/19, § 37, 7 July 2020), such as the imposition of a fine to the mother for blocking the proceedings, putting in place a psychological counselling programme for the benefit of the child, or assistance by police and child-protection experts. The Government did not provide any justification for such inaction which ran counter to the authorities' obligation to take, without

of Ministers (Res(2002)12) setting up the CEPEJ (see paras. 34–35 above) and the fact that at the Warsaw Summit in May 2005 the heads of State and government of the member States decided to develop the evaluation and assistance functions of the CEPEJ'. *Cocchiarella v. Italy* (App. no. 64886/01), 10 November 2004, §§ 39–40.

1705 Available at: HUDOC.

1706 'The European Commission for Efficiency of Justice (CEPEJ) 91. The European Commission for the Efficiency of Justice was set up at the Council of Europe by Resolution Res (2002)12 with the aim of (a) improving the efficiency and the functioning of the justice systems of Member States with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively, thereby generating increased confidence of the citizens in the justice system, and (b) enabling a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice. 92. In its framework programme (CEPEJ (2004) 19 Rev 2 § 6), the CEPEJ observed that mechanisms which are limited to compensation are too weak and do not adequately incite the States to modify their operational procedures and provide compensation only a posteriori in the event of a proven violation instead of trying to find a solution to the problem of delays'. The Judgement, p. 17.

> delay, useful measures aimed at ensuring effective contact between the applicant and his child.[1707]

Regarding cases where GRECO documents were accepted, they include the *Grzęda v. Poland*[1708] case, where there was violation of Art. 6 of the Convention regarding arbitrary removal from office. In this case, there was the following:

> […] ruling came in response to a case brought by Jan Grzęda, a judge who sits on Poland's Supreme Administrative Court. From 2016-18, he had also served as a member of the National Council of the Judiciary (KRS), the body responsible for nominating judges as well as for upholding their independence. In that year, he was one of a number of judges removed from the KRS before their four-year terms had ended under a law that reconfigured the KRS – a body previously mostly made up of judges – to have a majority of its members appointed by parliament. Grzęda argued that the fact there was no legal avenue for contesting the decision to prematurely remove him from the KRS had violated his right to a fair trial (under Article 6 of the ECHR) and right to an effective remedy (under Article 13).[1709]

Another case was that of *Andri Ástráðsson v. Iceland*,[1710] which also involved a violation to Art. 6 of the Convention regarding fairness of judicial appointment, and in which there was the following:

1707 *Vlad and Others v. Romania* (App. nos. 40756/06, 41508/07 and 50806/07), 26 November 2013.

1708 'Following considerable amendments to legislation affecting the judiciary in Poland in 2016/2017, GRECO decided at its 78th Plenary Meeting (4-8 December 2017) to apply an ad hoc procedure in respect of Poland. This procedure can be triggered in exceptional circumstances, such as when GRECO receives reliable information concerning institutional reforms, legislative initiatives or procedural changes that may result in serious violations of anti-corruption standards of the Council of Europe' [Online]. Available at: https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-216400%22]%7D (Accessed: 12 September 2023).

1709 *Grzęda v. Poland* (App. no. 43572/18), 15 March 2022.

1710 'At its 59th plenary meeting held from 18 to 22 March 2013 in Strasbourg, the Council of Europe Group of States Against Corruption (GRECO) adopted its Fourth Evaluation Report on Iceland, concerning corruption prevention in respect of members of parliament, judges and prosecutors (Greco Eval IV Rep (2012)8E). The report published on 28 March 2013 made the following relevant remarks on the appointment of judges: "Generally speaking, the GET [GRECO evaluation team] found the judiciary in Iceland to be of a high standard. Steps have been taken to address public criticism as regards appointment and recruitment to the judiciary, an area where misgivings have been expressed in the past as to appointments to office being politically motivated rather than based on merit … The GET wishes to highlight that judges must not only be independent, but also seen to be independent. This is of particular relevance in Iceland where opinion polls in recent years have shown that only about 30% of the public expresses confidence in the judicial system as a whole. Governance Indicators (SGI) (2011) Iceland Report by Bertelsmann Stiftung] – a striking figure, all the more so since the professionalism and competence of judges do not appear to be questioned by the population. Further consideration could be paid by the judiciary to the additional measures which could be developed to tackle this negative public perception and thereby strengthen public trust and confidence in this sector'. In: *Andri Ástráðsson v. Iceland* (App. no. 26374/18), 1 December 2020.

> The process by which the impugned judge had been appointed had amounted to a flagrant breach of the applicable rules at the material time. The process was one in which the executive branch had exerted undue discretion, not envisaged by the legislation in force, on the choice of four judges to the new Court of Appeal, coupled with Parliament's failure to adhere to the legislative scheme previously enacted to secure an adequate balance between the executive and legislative branches in the appointment process. The Minister of Justice had acted in manifest disregard of the applicable rules. The process had therefore been to the detriment of the confidence that the judiciary in a democratic society had to inspire in the public and contravened the very essence of the principle that a tribunal had to be established by law, one of the fundamental principles of the rule of law.[1711]

As can be seen, most of the mentioned cases pertain to violations of Art. 6 of the Convention and involved the ECtHR directly considering the rules and practices of the CEPEJ and GRECO. These cases underpin how integral the CEPEJ and GRECO rules and practices are to contemporary judgements, and that they act under the power of the CoE's credibility and convictable character. Furthermore, the ECtHR has some area for discretion by using the margin of appreciation doctrine, which might bring different results even with the application of CEPEJ and GRECO standards. Meanwhile, various political factors within Member States may produce from slightly to moderately different outcomes.

The CoE has a strong reputation and history of change, but we must be aware that the impact of its rules and of the various (different) groups and committees it encompasses depends on the capacity of internal domestic factors, which may differ, thus rendering CoE law homogenous and concomitantly accompanied by various specific alterations for each Member State. Without entering into the details of the reasoning of the ECtHR, it becomes quite clear here that the CEPEJ and GRECO standards are key in such reasoning, hence leading to judgements that provide an extensive reach for soft law, something that supports the work of the Court but also definitely requires more elaboration and normative predictability, and, therefore, consistency.

III.1.2 The Related Sanctions of the European Court of Human Rights

Sanctions, particularly in the form of just satisfaction, play a crucial role within the control mechanisms of the ECtHR concerning the rule of law. These mechanisms are designed to ensure that the fundamental principles of justice, fairness, and the rule of law are upheld by the Member States of the Council of Europe. The ECtHR, as a

1711 Ibid.

guardian of human rights in Europe, employs sanctions, including just satisfaction, to enforce its judgments and decisions. This chapter explores the various aspects of these sanctions, including their nature, scope, and the way they are utilised to maintain the integrity of the rule of law and provide just satisfaction across the continent.

Concerning the fundamental principles associated with claims for just satisfaction,[1712] in cases of a repetitive nature, the ECtHR may determine just satisfaction awards (e.g. pecuniary damage, non-pecuniary damage, and costs and expenses) by referring to the amounts granted in the corresponding leading or pilot cases, while also considering a simplified and standardised approach for follow-up cases.[1713] Just satisfaction awards should not exceed what the applicant has claimed, adhering to the *ne ultra petita* principle.[1714]

A. Pecuniary Damage

The primary objective in cases of pecuniary damage is to restore the applicant to the position they would have been in had the violation not occurred (*restitutio in integrum*).[1715] Compensation for pecuniary damage may encompass both actual losses (*damnum emergens*) and losses or diminished gains expected in the future (*lucrum cessans*).[1716] It is the responsibility of the applicant to establish a direct causal link between the violation and the damage by providing relevant evidence.[1717] Typically, the ECtHR's award corresponds to the full calculated amount of damage, unless equity justifies a lesser amount.[1718] If the exact damage cannot be precisely calculated, or if there are significant differences in the parties' calculations, the ECtHR will provide an estimate based on the available facts.[1719]

B. Non-Pecuniary Damage

Compensation for non-pecuniary damage acknowledges the mental or physical suffering resulting from a breach of fundamental human rights.[1720] Applicants are not required to quantify or substantiate claims for non-pecuniary damage; the determination of the amount rests at the discretion of the ECtHR.[1721] When monetary

1712 Art. 41 of the ECHR; see also Rule 60 of the Rule of the Court, p. 32.
1713 Rules of the Court, pp. 66–67.
1714 Rules of the Court, pp. 66–67. Ne ultra petita 'is the principle according to which an adjudicative body may not decide on issues other than those that are submitted to it' according to the Oxford Public International Law [Online]. Available at: https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2239.013.2239/law-mpeipro-e2239 (Accessed: 27 October 2023)
1715 Rules of the Court, p. 67.
1716 Ibid.
1717 Ibid.
1718 Ibid.
1719 Ibid.
1720 Rules of the Court, pp. 67–68.
1721 Ibid.

awards are necessary, the ECtHR assesses them on an equitable basis, considering flexibility and an objective evaluation of fairness in the specific circumstances of the case.[1722] The ECtHR establishes internal principles based on its practice in cases with similar violations, considering factors like violation nature, gravity, duration, and effects, as well as the presence of multiple violations, domestic awards, and any unique case-specific circumstances.[1723] It also considers the economic conditions in the respondent states by relying on publicly-available data (e.g. published by the International Monetary Fund).[1724] These principles serve as a framework for the ECtHR to determine just satisfaction awards in cases of human rights violations, encompassing both pecuniary and non-pecuniary damages, with an emphasis on fairness and the unique context of each case.

C. Costs and Expenses

The ECtHR has the authority to order the reimbursement of necessary and unavoidable costs and expenses incurred by the applicant.[1725] They typically include expenses at the domestic level, related to the proceedings before the ECtHR,[1726] postal expenses, the cost of legal assistance, and court registration and translation fees;[1727] travel and subsistence expenses, especially related to attending a ECtHR hearing, may also be covered.[1728] When the applicant is represented by someone other than an 'advocate authorised to practice', reimbursement of fees is contingent upon obtaining prior authorisation for such representation (as per Rule 36 § 2 and 4 (a) of the Rules of Court).[1729]

The ECtHR will approve claims for costs and expenses only if they are directly related to the violations it has identified.[1730] Claims pertaining to complaints that did not result in a violation or were deemed inadmissible will be rejected.[1731] To facilitate this, applicants may want to associate specific claim items with particular complaints.[1732] Moreover, for costs and expenses to be considered, they must have been genuinely incurred,[1733] in that the applicant must have paid them or be legally obligated to do so.[1734] Documentation demonstrating payment or a binding obligation

1722 Ibid.
1723 Ibid.
1724 Ibid.
1725 Rules of the Court, p. 68.
1726 Ibid.
1727 Ibid.
1728 Ibid.
1729 Ibid.
1730 Ibid.
1731 Ibid.
1732 Ibid.
1733 Ibid.
1734 Ibid.

should be provided.[1735] Any funds received or due from domestic authorities or the Council of Europe in the form of legal aid will be deducted.[1736] Costs and expenses must also be reasonable in terms of their amount,[1737] and if the ECtHR deems them excessive, it will award a sum it considers reasonable.[1738] To determine what is reasonable, the ECtHR may consider the fees charged by lawyers in different countries, the claims and awards in similar cases against the same country, and whether the violation falls into the category of 'well-established case law'.[1739]

III.1.3 The Related Sanctions of the Venice Commission

A. 'At the Intersection of Law and Politics'

Granata-Menghini and Kuijer said the following about the Commission: 'Formally speaking the Commission is an advisory body and the recommendations expressed in its opinions are just that: recommendations which are not legally binding upon authorities to which they are addressed'.[1740] The absence of legal sanctions (no direct legal effect possible), of any kind and in any form, is the first 'soft spot' in the complete methodology of the Commission's work. Another 'soft spot' is the absence of a monitoring system or effective monitoring mechanisms for compliance (i.e. the implementation of its opinions for specific countries; no real follow-up). The third 'soft spot' stems from the previous one and concerns the impossibility to 'measure', with sufficient certainty, the impact of the Commission's opinions.

In fact, all these 'sensitive spots' in the work of the Commission are, for the most part, a consequence of its unchanged nature and basic role from the very beginning until today. As aforementioned, although the activities of the Commission have multiplied over time, its essential role remains the same, being an 'independent advisory body' that, in fact, 'brings technical/legal argumentation to the political debate', but remains, to the greatest extent possible, outside the 'political forum'.[1741]

However, it cannot be said that the VC has always successfully and consistently managed to stay outside the 'political forum', or has been immune to the influence of such 'forum'. Actually, flexibility, as a basic feature of the body's work methodology,

1735 Ibid.
1736 Ibid.
1737 Ibid.
1738 Ibid.
1739 Ibid.
1740 Granata-Menghini and Kuijer, 2020, p. 282.
1741 See: Granata-Menghini and Kuijer, 'Advisory or de facto binding? Follow up to Venice Commission's opinions: between reality and perception', Venice Commission Thirty Years of the Quest for Democracy through Law 1990-2020, Lund 2020.

allowed many of its opinions to be 'the result of the mutual relationship between the work of the Commission and the relevant political forces at play'.[1742] This 'flexibility' is thus both a main advantage and a major limitation of the influence of the body 'in addressing rule of law issues' and 'in maintaining constitutional standards and fundamental norms'.[1743]

However, in a general way, it could be said that the VC, like national constitutional courts, is somewhere 'at the intersection of law and politics'.[1744] It differs from constitutional courts in that it is not a power, does not make decisions, and its decisions are not legally binding. Meanwhile, factors that bring the Commission and constitutional courts very close together include the width and depth of their legal reasoning; focus on practical and not so much on theoretical issues; the measured and targeted comparative legal methodology; the quasi-political consequences of the Commission's opinion (i.e. the decisions of the constitutional courts). Moreover, although the decisions of the constitutional courts are legally binding and, in principle, must be enforced, and the opinions, that is, the recommendations of the Commission are not, something else brings them closer together: the implementation of the decisions of the constitutional courts and the recommendations of the VC do not depend, or to the greatest extent do not depend, on them alone.

Therefore, one should be very careful when concluding that the Commission cannot influence or even carry out a systematic supervision over the implementation of its recommendations. That is not and should not be in the 'narrowest description' of its duties and, above all, its mission. Accordingly, in general, we may agree with Hoffmann-Riem's assessment, who says that the Commission is still 'relative effective in providing guidance where politics and law converge'.[1745]

B. The Binding Effects of the Venice Commission's Opinions

Regarding the nature of the opinions of the Commission, they remain unchanged in terms of their formal–legal effect. The recommendations, which these opinions always contain, are not, strictly speaking, legally binding for the state, and this can be partly inferred from their name (i.e. recommendations). However, they are binding in a very specific way. This is especially true for 'key recommendations', which are also not formulated in an imperative manner, but refer to key solutions in the constitutional or legal text. Those solutions should be revised either according to the instructions from the opinion or should be reconsidered, as they are not completely or not fully in accordance with the standards of the Commission

1742 Granata-Menghini and Kuijer, 2020, pp. 283–284.
1743 Clayton, 2019, p. 460.
1744 About the concept of constitutional justice at the intersection of law and politics, see Vučić and Stojanović, 2009, pp. 89–109.
1745 Hoffman-Riem, 2014, pp. 579–597.

at the moment of assessment. Other recommendations, more or less technical, that refer to individual details do not a crucial weight, so even when the state acts on them after the adoption of the opinion, it is still not a guarantee that it reacted positively to the opinion itself.[1746]

A distinction should also be made regarding the style in which the recommendations are formulated. Their style shows how 'advisory' or facultative, and how imperative and binding they are (i.e., how much the Commission, in its specific way, insists on them). On this matter, Granata-Menghini and Kuijer posit as follows, 'Further, recommendations may be straightforward ('this provision should be removed from the law') or more general ('these provision should be reconsidered to make them compatible with European standards').[1747] It follows that it is important who reads the opinions and if he/she can read them at all. Clayton further states on related topics:

> Although its opinions are generally reflected in the adopted legislation, the Commission does not impose its solutions, but adopts a non-directive approach based on dialogue …The power of the Commission is, therefore, the power to persuade although it seems that, where the state, itself, requests an opinion, it is normally implemented. It is therefore very difficult to access the Commission's effectiveness in shaping constitutional and human rights standards.[1748]

No matter how accurate and oft-repeated the assessment is that the Commission's influence cannot be measured, 'measuring' that effectiveness does not mean engaging in futile work. As we have seen, the rule of law, however elusive it may be to define, can, in a certain sense, be 'measured'. This is actually what the Rule of Law Checklist is for, if used correctly. Can that 'measurement' be mathematically precise? Of course it cannot, because the object of mathematic measurement is specific, whereas constitutional and legal solutions and Commission recommendations are all dynamic, alive, and depend on many concrete and relative factors. The success certainly mostly depends on the relationship between the country whose legal system is being assessed and the Commission itself. Experience and continuity in professional cooperation with the Commission undoubtedly puts the state in a better position, both to understand what the Commission tells it and to implement the recommendations. This enables states to not always give up, due to short-term and strictly political goals, strategically-good solutions for the national legal order and the rule of law.

It cannot be disputed that the basic idea of constitutional law as a 'prohibition' for the excessive influence of any international, legal, or political factor in the

1746 'Cherry-picking some recommendations to be followed disregarding the others does not ensure that the end result is standard-compliant…'. Granata-Menghini and Kuijer, 2020, p. 290.
1747 Granata-Menghini and Kuijer, 2020, p. 285.
1748 Clayton, 2019, pp. 452–453.

constitutional (re)design of a nation state was and remains one of the 'guidelines' for the work of the Commission.

> […] Constitutional law was – and still is – regarded as a State's reserved domain *par excellence*, and giving an expert body the task, hence the power, to criticise and perhaps influence domestic constitutional choices must have seemed, from a national perspective that such a body, if it refrained from entering into the domestic constitutional debates in order to remain politically neutral, would become just one of the many expert groups producing abstract assessments which often remain largely ignored by the authorities of the country concerned.[1749]

This is always the starting point when looking at the influence of the Commission on a specific country.

Another important, but not key, factor is the legal quality of the opinion.[1750] The opinions of the Commission are not, or for the most part are not, political documents. They are drafted using legal methodology and legal argumentation. In this sense, it is also important to ensure the selection of rapporteurs who are competent and specialised not only in the legal issues treated in the opinion but also have certain knowledge of the wider legal and sociopolitical framework of the state. The period is also relevant, and often does not favour the quality of opinions. However, the Commission (especially its Secretariat) got used to that. After all, that is why the different techniques of interim opinions and urgent opinions have been developed through practice. On the one hand, not having the character of final conclusions and recommendations 'relaxes' the Commission and enables it to react, and revise earlier positions later, through in-depth research of the issue and communication with the state. On the other hand, such opinions can be 'signals' for the state, if it is interested, to react in time by correcting some of the proposed solutions.

The opinions of the VC are neither abstract nor general documents. They will be applied only if the Commission's standards in a certain area (e.g. judiciary, constitutional judiciary, and elections) are adapted to specific national, sociopolitical circumstances, and if the proposed solutions are in accordance with national circumstances and VC standards. Sometimes, however, it is necessary to undertake certain comparative research.[1751] All this, as a rule, should not burden the state in question,

1749 Granata-Menghini and Buqucchio, 2013, p. 241.

1750 'The authority of the work of the VC as an advisory body with no political or judicial power of its own depends in the end on the quality of its argumentation, on its consistency and on whether it adopts a constructive attitude offering where possible alternative solutions to the measures taken by national authorities and considered problematic by the Commission'. Granata-Menghini and Kuijer, 2020, p. 295.

1751 Such a case happened relatively recently, when the Commission adopted an interim opinion on Art. 49 para. 3 of the Constitution of France. It was concluded that a comparative study should be made before the Commission takes a final position on the analysed Art. of the Constitution. VC, CDL-AD(2023)024.

but rather provide it with a broader framework and even a suitable 'manoeuvring space' for justifying certain proposed solutions in front of its public opinion.[1752]

However, the legal methodology and legal argumentation used in drafting an opinion are far from sufficient for it to be implemented satisfactorily. Hoffman-Riem writes about this, stating that 'the degree to which the VC opinions are effective by no means depends only on the persuasiveness of the VC's arguments', but rightly adds that 'development of the rule of law and democracy is also about interests and power. Therefore, arguments alone are generally insufficient to bring about lasting changes'.[1753] Hoffman-Riem points out a number of additional relevant factors on which the quality and effectiveness of the opinions depends. One such factor is the system in the country. If there are still signs of totalitarianism and disinterest in the rule of law and democratic discourse, the effectiveness of such opinions is practically non-existent.[1754]

C. A State and the Venice Commission – a Two-Way Influence

It is certainly better for the state when it asks for the Commission's opinion on its legal reforms, than when it asks for the opinion of another authorised body or international organisation (e.g. the Council of Ministers or the Parliamentary Assembly of the Council of Europe). It is, in fact, better for the Commission itself, because there is an assumption – although in practice the opposite can be proven – that it is in the real interest of the state to cooperate with the Commission, which can enable open dialogue and joint work to find the best solutions. The Commission's influence then, as a rule, comes to the fore, not only because the interested country adopts most recommendations from the opinion but also cooperates across all procedure stages, from submitting a request for an opinion, through dialogue with stakeholders, to the stage of the so-called 'follow-up'. In that process, in which there is almost daily communication, potential and actual obstacles on the way to the adoption of a constitutional or legal text are easily and quickly removed, and the 'fine tuning' of certain solutions is achieved so that they meet European standards and enjoy the support of almost of all relevant factors in the national order. It is also possible to expect the Commission

1752 It happens that part of the public opinion is 'hostile', because the impression is created that the Commission is 'imposing' some of its 'own' solutions. When the opinion contains an adequate comparative legal review of the regulation of the same issue in other countries, it is easier for the current holders of power to justify the proposed solutions by applying legal argumentation and to later implement them.

1753 Here, it should be emphasised that the importance of argumentation must be put first, especially when we look at different opinions on the same or similar legal issues in different countries. The inconsistency levelled at the Commission by its critics is, in our view, rarely politically induced, but rather the result of the selection of rapporteurs, sometimes extremely short deadlines, the 'hostile attitude' of the given country towards the Commission, among others. Therefore, they are not always of uniform quality, but as Paul Craig rightly points out: 'The opinions are not, and are not intended to be, doctoral theses'. Craig, 2017, p. 76.

1754 Hoffman-Riem, 2014, p. 591.

to react, during this process, more quickly and somewhat with more feeling (not to mention favouritism) for the state's position, the latter which is generally in a great hurry. At this point, a dynamic relationship of cooperation is established, in which it is no longer so important who proposes the changes (the state or the Commission), but what their final content is and when it will come into force.[1755]

Concerning the impact of the Commission and its opinions, we must not forget that it is a two-way impact. It is not unimportant to the Commission how the state reacts because good cooperation with the state strengthens the Commission's authority, serving to show to other international bodies that its work is respected and that some of its proposed models are adopted. The opinions of the Commission and their practical implementation (follow-up) are also particularly significant if the country is on the so-called European path (i.e. a candidate for EU membership), because the influence of the Commission on the competent EU bodies (e.g. the European Commission) is not negligible at all.[1756] Granata-Menghini and Kuijer say the following on this issue: 'Likewise, a member state of the European Union will no longer perceive the work of the Venice Commission as being truly advisory if the opinions are subsequently used by EU institutions to voice rule of law concerns, as a basis of infringement procedures, or as a basis for so called Art. 7 proceeding'.[1757]

In a certain sense, we are talking about a *circulus vitiosus*, in that the Commission's opinions are not legally binding but sometimes have a specific factual weight greater than any imperative legal norm. The implementation of the opinion is important for the state owing to its political needs, but it is certainly not much less important for the Commission itself, as such implementation strengthens the Commission's expert legitimacy and continuously confirms its mission. At this point, we return to the initial thesis: the influence of the opinions depends less on the legal argumentation that must prevail in its document, and more on the real interests and, above all, needs of the state itself. When we talk about interests here, we also inevitably find ourselves in the field of politics. No wonder even the best connoisseurs of the Commission's work admit that:

> In that sense it has to be acknowledged that the advice offered by the Commission has always been – at least to a certain degree – more than purely advisory and that the level of observance of opinions by the Commission cannot be explained by the

1755 For example, the Commission adopted the Opinion on constitutional amendments in Serbia on 15 October 2021. The state authorities in Serbia promptly responded to most of the recommendations given in the opinion, sent their response to the Commission, and the Commission came out with a new urgent opinion the very next month, welcoming the state's reaction.

1756 'The (effects of the) work of the Commission cannot be viewed in isolation but can be only understood properly when looked at in a more holistic manner…An opinion adopted by the Commission in respect of a state which is also a candidate member State of the European Union will – almost without exception – impact its accession negotiations and is therefore perceived by the state authorities concerned (and may result in being) de facto binding'. Granata-Menghini and Kuijer, 2020, p. 284.

1757 Granata-Menghini and Kuijer, 2020, p. 284.

> quality of advice offered and its independence. The observance of the opinion of the Commission is also – at least in part – the result of the interplay between the work of the Commission and the political forces in play.[1758]

D. Three Dimensions of the Venice Commission's Impact

In summary, it is possible to talk about three dimensions of the Commission's impact on the legal order of the country in question. The first is quantitative, the second is qualitative, and the third concerns a 'follow-up' in the true sense.[1759] The quantitative dimension refers to the volume of adopted recommendations, and ultimately to the question of 'if legislation has been changed at all'.[1760] The qualitative dimension of the impact refers to the quality of the amendments, and more precisely, to the extent and the way the recommendations from the opinion are implemented in the final text of the constitution or the law. In connection with this influence, the Commission can at least have information and then present that information as a classic 'follow-up' at the next plenary session. That 'follow-up' is, in fact, a summary report about which recommendations from the opinion have been followed (i.e. have become an integral part of the applicable law of the concerned state). The third dimension of the impact refers to the question of whether the adopted legal amendments are implemented and applied. This dimension of the impact almost never exists because the Commission is not even in charge of dealing with it. As Granata-Menghini and Kuije discuss:

> The assessment of the follow-up given to an opinion should however remain outside the realm of the Commission …The Commission's assessments are meant to contribute to the domestic discussions, not to replace them. Ownership of the constitutional and institutional design of a country is a fundamental feature of its accountability towards its citizens; states should not be given the pretext of blaming an external advisory body for possible mistakes or lack of success.[1761]

Therefore, by trying to enter that domain of the state, the Commission would completely lose its hitherto unchanged nature and role, and also lose a lot of the legitimacy and credibility of an advisory expert body. This is the rule almost without exception.

There are, however, two possible exceptions. The first is when the first phase of the legal reform is completed (e.g. when constitutional amendments are adopted).

1758 Granata-Menghini and Kuijer, 2020, pp. 282–283.

1759 Peters, 2021, p. 2.

1760 It may happen that the state requests and receives the opinion of the Commission, as was the case with the constitutional amendments on the judiciary field in Serbia in 2018, and does not adopt the draft legal act at all for some internal political reasons. The Commission cannot influence such a 'sovereign' decision of the state in any way.

1761 Granata-Menghini and Kuijer, 2020, p. 297.

The second phase is the implementation of those constitutional amendments, which entails the drafting and adoption of certain constitutional laws (e.g. judicial laws and laws on the constitutional court), and once more requires the expert consultation of the Commission. In giving opinions at this time, the Commission then practically participates in the implementation of previously-adopted constitutional amendments. Another exception, also of a conditional nature, refers to the case when the Commission, in order to prepare a new opinion, evaluates the state's implementation of its recommendations from an earlier period (i.e. from the opinion that preceded the one it is currently working on). However, here the Commission acts *post facto*, and does not have an impact on the implementation in the true and direct sense.

E. The New Challenges

In any case, the question of 'follow-up' remains, even if not exclusively, for discussion on the future position and role of the VC. Somewhat related to it is the central question of whether the Commission can and will maintain its professional relevance, referentiality, and operability in a world that will, one day, be 'born' again, when cataclysmic attacks on the traditional concept of international legal order and the rule of law go to an end. Particularly, because we should not forget that the VC was created as an institutional realisation of a humanistic, at the time very useful, and (perhaps above all) feasible idea of national legal orders that rest on common, supranational, even universal principles of the rule of law.

At this point, we would be going too far if we analysed in more detail the challenges facing the VC. Therefore, at the end, we would like to mention only one that the Commission should pay special attention to in the coming period. It pertains to a re-examination of one of its 'traditional' views, specifically the division into old (stable) and new (young) democracies based on the original idea of the Commission (i.e. an expert advisory body for providing constitutional assistance to former real-socialist states). That division, apparently justified in the 1990s, is today, objectively speaking, quite far from the reality of most member states of the CoE. In general, many of these once new democracies have become stable, established themselves, and are functioning on generally-accepted European standards. Meanwhile, many of the so-called old democracies are not stable as they once were (or as it was presented before). The rule of law is facing new challenges everywhere, and they do not recognise the difference between 'old' and 'new' democracies. This means that such differentiation may not prove a 'fertile ground' for the further development of the Commission in 'the complex political – national and international – context in which Venice Commission member States nowadays function'.[1762]

1762 Granata-Menghini and Kuier, 2020, pp. 293–294.

III.2 The Related Sanctions of the Organisation for Economic Co-operation and Development

A. Measures in the Event of Detected Non-Compliance with the Anti-Bribery Convention

Pursuant to the Phase 4 evaluation procedures,[1763] in cases where a country has inadequately implemented the Anti-Bribery Convention, WGB may consider conducting a 'Phase 4bis evaluation'.[1764] Such repeated evaluation may also be conducted if the on-site visit has not been arranged in a satisfactory way.

In line with the WGB's practice, and pursuant to the revised evaluation procedures regarding Phase 4, in the event of 'continued failure to adequately implement the Convention following a Phase 4 evaluation, Phase 4bis evaluation or any follow-up to the Phase 4 or 4bis evaluation', the WGB may consider one of the measures from the non-exhaustive list provided in the Phase 4 Monitoring guide,[1765] so as 'to encourage the evaluated country to correct any deficiency in the implementation of the OECD Anti-Bribery Convention or related legal instruments, including insufficient enforcement of the offences set forth in the OECD Anti-Bribery Convention'.

The measures that may be considered include those that follows: a request of the WGB to provide an expedited report on the countries' progress in the implementation of the Convention or related legal instruments; the formation of monitoring subgroups from WGB members to follow the progress of the evaluated country; an invitation for the evaluated country to develop an action plan addressing deficiencies in the implementation of the Convention and its related instruments; the WGB setting forth specific, non-implemented recommendations as high-priority requirements, putting them under particular evaluation focus. The WGB may also organise a technical mission to the evaluated country to discuss concerns and possibilities for facilitation of the implementation and enforcement of the Convention or related legal instruments by the evaluated country, or even a high-level mission[1766] and/or a

1763 Reissued in December 2018 following revisions approved by the Working Group on Bribery at its October 2018 plenary.

1764 Phase 4 Monitoring guide.

1765 Ibid.

1766 Usually composed of the Chair of the WGB, the Head of the Anti-Corruption Division, and several Heads of Delegation of WGB members.

meeting with Ministers and senior officials of the evaluated country to express the WGB's concerns.

Some of the explicitly-provided measures to be deployed by the WGB include some that focus on increasing public pressure, such as issuing a formal public statement expressing concerns about the evaluated country's insufficient compliance with the Convention or related legal instruments, and requesting their expeditious implementation. The WGB may also issue a so-called 'due diligence warning', which is a public statement advising that the evaluated country's inadequate implementation of the Convention or related legal instruments may justify enhanced due diligence on companies from that country.[1767]

The possibilities to exert pressure on the implementation of the relevant standards do not end there. In addition, the WGB Chair can send a letter to the relevant Minister(s) of the evaluated country, drawing attention to the WGB's concerns about the country's failure to adequately implement the Convention or the related legal instruments. The Chair may also do the following:

> invite the evaluated country to arrange for its ambassador or other diplomatic representative to attend an upcoming plenary to discuss the Working Group's concerns and possible solutions for better implementing the Convention or related legal instruments, with the aim of fostering political will and conveying the Working Group's concerns to all relevant national authorities.[1768]

In recent years, such high-level missions have been sent to Argentina, Brazil, Japan, Russia and Sweden, to name a few.[1769] Finally, in case of country's continuous or repeated failure to adequately implement the Convention or related legal instruments, the WGB could publicly suspend the evaluated country's advancement to the next monitoring phase, while continuing the monitoring of the relevant country within the context of its last monitoring phase.

This vast array of different measures to put pressure on the non-compliant state is not limited in scope. According to the Phase 4 Monitoring guide, the WGB may as well develop measures it deems appropriate on an ad hoc basis. This wide range of possibilities for addressing the 'implementation deficit' and exerting pressure towards non-compliant states denotes the OECD's commitment to convincingly contribute both to global efforts to fight against transnational bribery and, in a larger context, to contribute to the anti-corruption fight, which is posing a serious threat to the rule of law and must be tackled proprietarily and effectively.

1767 The evaluated country should first receive a confidential warning during a WGB plenary before this measure is applied.

1768 Phase 4 Monitoring Guide.

1769 Jongen, 2021, p. 343

B. Efficiencies and Deficiencies of the WGB Monitoring System

Regarding the efficiency and effectiveness of the peer-review process for the monitoring performed by the WGB, we may note various different opinions from a number of actors and authors. The lack of sanctioning tools within the monitoring mechanism can indeed be regarded as a shortcoming, considering that the object of the assessment is compliance with a legally binding multilateral instrument. We may note, however, the possibility of the implementation of various measures that can be considered by the WGB in the event of non-compliance with the Anti-Bribery Convention, albeit some of these may not be qualified as sanctions *stricto sensu*. The fact that these measures are not limited in scope, coupled with several other features of the monitoring system in place, lead us to agree with the general statement that the 'peer review does hold potential to raise the compliance level in the states'.[1770] Despite the fact that the peer review 'cannot force states to heed their recommendations', it may 'instead seek to advance policy reform by stimulating policy learning, by providing technical assistance, and by organizing peer and public pressure'.[1771] Creating transparency on the level of compliance of states is, in our view, a particularly important feature of the WGB's monitoring process. This process, in turn, comprises not only 'the chance for the reviewed country to present an clarify national rules, practices and procedure and to explain their rationale'[1772] and the means for the reviewed country to share the experiences of other countries regarding the fight against foreign bribery,[1773] but also may influence an increase in compliance with the targeted standards, to the extent that 'an empowered civil society with access to relevant information enhances capacity to hold governments accountable'.[1774]

In addition, peer reviews and monitoring reports contain a significant amount of qualitative and quantitative information potentially useful for the measuring the impact and effectiveness of anti-corruption policies. On this matter, the OECD described the following:

> In the anti-corruption and integrity context, this information includes country – or region-specific assessments of processes, procedures, cases, and risk areas. There is vast potential for tapping the information contained in these peer reviews to gain new insights into common challenges and possible good practices for combating corruption and promoting integrity.[1775]

1770 Jongen, 2021, p. 331.
1771 Jongen, 2018, p. 921.
1772 Agani, 2002, p. 21.
1773 Jongen, 2021, p. 341.
1774 OECD, 2018a, p. 36.
1775 OECD, 2018a, p. 20.

Moreover, as it has been underlined, in the High-Level Advisory Group's Report to the OECD Secretary-General on Combating Corruption and Fostering Integrity, that:

> in order to enter into a "new era of enforcement", as promised by the Parties in their 2016 Ministerial Declaration, the OECD must further prioritise the WGB's monitoring programme. This is the most effective way to exert pressure on the Parties to address weaknesses in laws on corporate liability, insufficient law enforcement resources, inadequate cooperation among Parties' law enforcement authorities, and other enforcement challenges.[1776]

C. Conclusions

When assessing the contribution of the OECD to addressing rule of law concerns, it may be argued that the efforts of the OECD have been concentrated on building uncontested blocks of law promoting the rule of law. This has been done by establishing international standards and monitoring, influencing their proper implementation, and measuring their practical results. Although a globally-accepted and -recognised definition of the rule of law has yet to be reached, certain elements of said definition have been indisputably accepted by the international community. The OECD's work covers, on the one hand, only part of these elements, and touches upon, on the other hand, on a much wider array of topics indirectly relevant for the rule of law.

Considering the extent and volume of the OECD's activities, the sheer breadth of areas that the said activities pertain to, the resulting international standards, and the endeavours to assess and strengthen their implementation, the overview provided in this chapter had to be narrowed down to only certain aspects of the OECD's work. The chosen aspects were those considered to be the most relevant examples of the significant role that the OECD has been playing in strengthening the rule of law, revolving particularly around anti-corruption fight and good governance. A vast array of internationally-recognised standards have been set by the OECD as benchmarks for certain elements of the rule of law to which both OECD Member and non-member countries strive – or at least should be striving for. Most of these standards are contained in non-mandatory legal instruments, which do not allow for more stringent enforcement pressure and the deployment of sanctions in the event of inadequate implementation. The OECD has developed, however, impactful review mechanisms that hold the potential to exert pressure – particularly peer and/or public pressure – on countries to implement the standards contained in these non-binding instruments, and to undertake the reforms necessary for the increased implementation of the internationally-recognised rule of law standards.

As it has been demonstrated in the analysis of the most relevant OECD standards, their implementation, even when they are contained in non-legally binding OECD

1776 High-Level Advisory Group, 2017, p. 12.

instruments, is thoroughly controlled, monitored, and reviewed by the OECD. In most cases, implementation monitoring for such standards takes the form of peer review, which is even perceived as one of the OECD's hallmarks. In our opinion, peer review may exert pressure on countries to implement the standards owing to the resulting peer pressure and public availability from the implementation of OECD instruments, which may then lead to a more effective implementation. It may be argued that although the specific, *sui generis* control mechanisms presented in this study can increase the level of implementation of the internationally agreed-upon OECD standards in the area of anti-corruption fight and good governance, the OECD needs to devote more attention and effort to increasing the nuance and strengthening the key dimensions of the rule of law further.

III.3 The Related Sanctions of the United Nations

Recommendations issued by the UN Human Rights committees are generally considered politically persuasive rather than legally binding. They provide guidance and suggestions to Member States based on their assessments of compliance with the relevant international human rights treaties. While recommendations carry significant moral and political weight, they do not have the force of law in the way that treaties themselves do. UN Human Rights committees often express their recommendations using terms such as 'urges', 'encourages', or 'recommends', signalling the non-binding nature of their advice. Notably, the legally non-binding nature of the recommendations gives States the flexibility to implement them according to their specific circumstances. When the relationship between international and relevant national law permits it, some 'views' or 'decisions' may be considered quasi-legal or legally persuasive; however, they still differ from legally binding judgments. However, Member States commit to reporting on their progress and dealing with the committees' recommendations in a spirit of cooperation when ratifying international human rights treaties. Along these lines, although recommendations are not legally binding, they still shape national laws, policies, and practices – in particular, their influence lies in their potential to mobilize civil society, media, and international actors to advocate for human rights improvements.

Some committees explicitly state that their recommendations are not legally binding, emphasizing their persuasive and advisory nature; however, states are encouraged to respond to the committees' recommendations and explain the steps they have taken to implement the suggested measures. Notably, the non-binding character of recommendations respects the sovereignty of States while fostering a cooperative environment for human rights development. Along these lines, the committees aim to ensure that recommendations are realistic, context-specific, and tailored to the unique circumstances of each Member State.

The committees' recommendations are an essential component of the UN's broader strategy to promote and protect human rights globally. States often take into account the reputational impact of not implementing recommendations, recognizing the potential diplomatic consequences. However, international[1777] and national[1778] ac-

1777 See, for instance, Shaw, 2008, p. 320.
1778 See, for instance, Jankuv et al., 2016.

ademic papers demonstrate a consistent understanding of the non-legally binding character of UN human rights committees. Most comments have emphasised interpretation of international treaties as such. According to the general rule of interpretation of Art. 31 of the Vienna Convention on the Law of Treaties,[1779] a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in a particular context and in light of its object and purpose. Moreover, the Vienna Convention specifies that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text (including its preamble and annexes), any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Furthermore, together with the context, consideration shall also be given to any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties. In particular, the subsequent practice is especially relevant for the present issue.

The Vienna Convention also determines supplementary means of interpretation, including the preparatory work of the treaty[1780] and the circumstances of its conclusion, to confirm the meaning resulting from the application of Art. 31 or to determine the meaning when the interpretation according to Art. 31 results in ambiguity or a manifestly absurd or unreasonable reading.[1781]

Finally, the Vienna Convention allows a special meaning to be given to a term if it is established that this was intended by the Parties. It is important to interpret the term of a recommendation since it is the subject of the research of this article. Nevertheless, it is submitted that the State Parties have not intended to give a special meaning to this term. Both the State Parties and the committees themselves understand the term in its ordinary meaning.

To be clear, based on the above-mentioned UN human rights conventions that authorize established committees to give decisions on accepted complains, committees present these decisions to States as recommendations. A recommendation is a suggestion that something is good or suitable for a particular purpose or job and thus can also be seen as a form of advice.[1782] Nevertheless, there is no specific understanding of the term 'recommendation' in any legal framework. If one refers to the Vienna Convention on the Law of Treaties for the general rule of interpretation and the term 'recommendation' is interpreted in good faith in accordance with its

1779 For more details, see, for instance, Aust, 2007, p. 234.

1780 Travaux préparatoires (preparatory works) were important in *Johnston and Others v. Ireland*, 18 December 1986, No. 9697/82, § 52.

1781 Art. 32 of the Vienna Convention on the Law of Treaties.

1782 Compare with the Cambridge Dictionary [Online]. Available at: https://dictionary.cambridge.org/dictionary/english/recommendation (Accessed: 31 July 2023).

ordinary meaning, then there is no other ordinary meaning of this term even if interpreted in the context and in light of the object and purpose of such a committee recommendation or a concerned treaty. However, as for individual states and their constitutional frameworks, the situation may differ.

More precisely, one decision of the Supreme Tribunal of the Kingdom of Spain has triggered much attention from both academics and practitioners. Specifically, the Tribunal ruled that once an international human rights treaty is ratified by the State, there should be a mechanism within the State for the enforcement of a result adopted by a body established by that treaty.[1783] Nevertheless, this decision is largely dependent on the Spanish Constitution and the relationship between international and Spanish law.

Notably, the Spanish Supreme Court upheld that the Spanish authorities were required to act in accordance with the CEDAW recommendations that had been adopted in the form of so-called 'views'. The Supreme Court pointed out Art. 24 of the CEDAW Convention according to which all ratifying States must adopt necessary means to protect the fundamental rights outlined in the Convention. According to the Supreme Court, these views of the CEDAW committee have an obligatory character for the State Party that ratified the Convention and the Protocol. Moreover, consideration must also be given to Art. 7 para. 4 of the Optional Protocol, which provides that the State Party shall give due consideration to the views and recommendations of the committee and shall submit to the committee a written response within six months of receiving its recommendations. Furthermore, according to the Supreme Court, the State Party will give express recognition to the competence of the committee under Art. 1 of the Protocol.[1784]

Moreover, moving to domestic law, the Supreme Court explained that the international treaty that provides the basis for the CEDAW committee and its views forms a part of the Spanish legal order under Art. 96 of the Spanish Constitution. Furthermore, under Art. 10 para. 2 of the Spanish Constitution, fundamental rights ought to be interpreted in accordance with the Universal Declaration of Human Rights[1785] and the international human rights treaties ratified by Spain. In addition, Art. 9 para. 3 of the Spanish Constitution provides the principle of legality and the normative hierarchy; specifically, according to the Spanish Supreme Court, international obligations relating to the execution of the decisions of the CEDAW committee are a part of the Spanish legal order and enjoy a hierarchical position over ordinary domestic law.[1786]

1783 Contentious-Administrative Chamber, Spanish Supreme Court's Judgment of 17 July 2018 (STS 1263/2018).

1784 STS 1263/2018, p. 11.

1785 The understanding of the Universal Declaration of Human Rights is completely different in Slovakia if compared to its character as a tool to interpret fundamental rights. See e.g. Jaichand and Suksi, 2009.

1786 See e.g. Kanetake, 2019.

Nevertheless, the crucial point is not whether Spain has violated its international legal obligations deriving from the CEDAW Convention as such. Spain ratified the CEDAW Convention and recognized the competence of the CEDAW committee to adopt its views in an individual communication. Furthermore, for an international responsibility to be established for a State, only two requirements must be met. First, the State must have violated an international legal obligation. Second, this violation must be attributed to this particular State. Both these conditions have been fulfilled in the present case. Thus, Spain has been under the obligation to make full reparations for the injury caused by its internationally wrongful act[1787] in a possible and acceptable form.[1788] However, the issue in this case lies in the disagreement over the status of the recommendations of the UN human rights committees, whether they are legally binding, and, consequently, whether the State is responsible for implementing these recommendations as a result of committing an internationally wrongful act. Nevertheless, although the CEDAW committee itself drafted its General recommendation No. 33 on women's access to justice in a way that obligated the State Parties to the CEDAW to respect the CEDAW committee's views (i.e. to consider them legally binding), several State Parties disagreed with this draft; in response, the CEDAW committee omitted this obligation in the final version of its General recommendation No. 33.[1789]

Comparatively, in Slovakia, similar court submissions have already been made for which the Ministry of Foreign and European Affairs of the Slovak Republic has had to provide its legal opinion. The Ministry of Foreign and European Affairs has reasoned that the recommendation as such is not legally binding. The basis for this interpretation is its assessment that the CEDAW committee was established by an international treaty and its authority to assess the notifications of individuals who complain that they have become victims of a violation of one of the rights of the Convention was established by another international treaty, the Optional Protocol to the Convention; notably, both were ratified by the Slovak Republic. Nevertheless, there is no provision in the CEDAW Convention or in the Optional Protocol that would regulate the legally binding nature of the output, which ends the process of assessing notifications received from individuals.

On the one hand, it is expressly stated that the CEDAW committee is obligated to inform the affected State of the receipt of a notification directed against it. Meanwhile, the State is obligated to provide information and cooperate with the CEDAW committee in processing this notification. Further, Arts. 1, 2, and 6 of the Optional Protocol to the Convention, which are formulated categorically, directly and unambiguously state the obligation of the contracting state. Consequently, Art. 7 para. 1 of the Optional Protocol to the Convention stipulates that the CEDAW committee

1787 Art. 31 of the Articles on Responsibility of States for Internationally Wrongful Acts.

1788 Ibid., Art. 34. et seq.

1789 See e.g. Report of the International Law Commission, UN GAOR, 73rd Sess., Supp. No. 10, at 110–12, paras. 9–15, UN Doc. A/73/10 (2018).

shall consider all information available to it submitted by individuals or groups or on their behalf and the relevant State and shall forward its opinion on it together with recommendations, if any, to the concerned Parties.

As pointed out above, giving the ordinary meaning to the terms of the treaty in their context and in light of the object and purpose of the CEDAW Convention, as noted in Art. 7 para. 3 of the Optional Protocol to the Convention, establishes that the process before the CEDAW committee does not end with a legally binding act. This conclusion is also confirmed by a comparison with the abovementioned articles of the Optional Protocol to the Convention (Arts. 1, 2, and 6), which clearly formulate the obligations of the contracting State, as well as with relevant articles of other international treaties that establish mechanisms for the resolution of individual complaints completed by a legally binding act. Such an example is the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter also the ECHR) to which the Slovak Republic is a contracting party in connection with its membership in the Council of Europe, and pursuant to which the European Court of Human Rights was established to ensure the fulfilment of the obligations assumed by the ECHR. Art. 46 of the ECHR expressly provides for 'Binding force and execution of judgments' and clearly states that 'the High contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

Moreover, regarding Slovakia's national judiciary, the Constitutional Court of the Slovak Republic has already openly dealt with[1790] the nature of the opinions of UN committees in its resolution on Czech jurisprudence.[1791] In this resolution, it identified the UN Human Rights Committee (which is here analogous to the CEDAW committee) as an example of the so-called 'quasi-judicial international body'.[1792] According to the Constitutional Court of the Slovak Republic, these bodies differ from judicial-type ones primarily in that their opinions are legally non-binding (though factually respected).[1793]

In addition to substantive legal differences and the absence of a legal basis for binding decisions, procedural differences must also be taken into account; namely, that the members of the CEDAW committee are 23 global experts in women's rights. Therefore, their election is not based on their completion of legal education, as in the case of judges of the European Court of Human Rights, where legal experience is required. Moreover, the opinions of the UN human rights committees do not contain a provision on the possibility of an appeal per the rules of a fair trial.[1794]

1790 Nevertheless, it is true that the Spanish Supreme Court has already also analysed the status of the UN human rights committees' recommendations and concluded that they are not legally binding. The 2018 decision has been chosen because it was a turning point in general practice and, second, it has been referred to in various submissions (not only in Slovakia).

1791 Judgment of the Supreme Administrative Court of the Czech Republic, file no.: III. ÚS 296/14.

1792 III. ÚS 319/2018 from 30 of 7 August 2018.

1793 Ibid.

1794 For further information upon the right to appeal, see, for instance, Marshall, 2011, p. 2.

A. UN Sanctions, the Rule of Law, and Humanitarian Exceptions

As has just been pointed out, since the human rights committees' recommendations are not considered legally binding, there are no legal sanctions if relevant states do not comply with applicable recommendations – only political pressure. However, sanctions have still been imposed in the sphere of the UN that have influenced the rule of law.

Generally, critics argue that UN sanctions have been considered human rights violations when they disproportionately impact civilian populations.[1795] It has been claimed that sanctions, which are intended to target specific entities, can inadvertently harm vulnerable groups, leading to allegations of human rights abuses.[1796] Some rightly argue that comprehensive sanctions that affect entire economies can result in widespread poverty, food insecurity, and inadequate access to healthcare, constituting violations of economic and social rights.[1797] Regarding the rule of law, it is important to mention that critics maintain that targeted sanctions, including travel bans and asset freezes, can undermine due process and violate the right to a fair trial.[1798]

The impact of UN sanctions has been known for several decades; however, a paradigm shift only occurred formally in UN sanctions when a Security Council resolution was adopted at the end of 2022.[1799] Humanitarian exceptions in the context of UN sanctions are provisions designed to ensure the delivery of essential aid to civilian populations in sanctioned regions. These exceptions recognize the importance of addressing the basic needs of vulnerable populations, such as access to food, medical care, and other humanitarian assistance. Humanitarian exceptions thus aim to strike a balance between achieving political objectives through sanctions and preventing unnecessary harm to civilians. It is exactly this approach that situates the UN as a political organisation for the maintenance or restoration of international peace and security. However, UN sanction measures often lead to the scarcity of essential goods, such as food and medicine, creating dire humanitarian conditions and violating the basic right to life. Moreover, the economic impact of sanctions usually results in widespread unemployment, further exacerbating poverty. Additionally, asset freezes and financial restrictions often hinder access to basic services and may thus empower even more oppressive regimes, as leaders use the sanctions

1795 See, for instance, Humanitarian exceptions [Online]. Available at: https://www.chathamhouse.org/2022/12/humanitarian-exceptions-turning-point-un-sanctions (Accessed: 29 November 2023).

1796 For specific examples see, for instance, Precedents for the Carve-Out [Online]. Available at: https://carnegieendowment.org/2023/03/20/landmark-un-humanitarian-sanctions-exemption-is-massive-win-but-needs-more-support-pub-89311 (Accessed: 29 November 2023).

1797 Ibid.

1798 For more details, see, for instance, Sanction and Security [Online]. Available at: https://sanctionsandsecurity.nd.edu/assets/110262/falling_short.pdf (Accessed: 29 November 2023).

1799 Security Council resolution 2664 adopted on 9 December 2022, S/RES/2664 (2022).

as a pretext to tighten control, suppress dissent, and violate rights to freedom of expression and assembly. The international community has therefore been invited to reconsider the unintended consequences of sanctions, including proliferation of the black market and increased corruption, since such an environment contributes to conditions in which human rights are routinely violated.

It has finally been acknowledged that sanctions have already caused serious human rights violations and that, in their work to combat authoritative non-democratic or even terrorist regimes, they have allowed for violations of fundamental freedoms on a large scale. Finally, since gross violations of human rights are considered to be a threat to international peace and security, a circle of continuing human rights violations has emerged that must be stopped.

It is true that the previous resolutions of the UN Security Council that have imposed sanctions have responded to threats to international peace and security, the maintenance of which is the primary responsibility of the UN Security Council. When the UN Security Council has imposed such sanctions, it has reaffirmed the need to combat threats to international peace and security by all means, in accordance with the UN Charter and international law, including applicable international human rights law, international refugee law, and international humanitarian law; in particular, the UN Security Council has stressed the important role the UN plays in leading and coordinating such efforts, including through use of sanctions. However, given that this body is responsible for the maintenance of international peace and security, it has to take into account the evolution of the situation on the ground, the need to minimize the unintended adverse humanitarian effects of sanctions, and the fact that sanctions are intended to be temporary.

To summarize, although it is a political organisation, the UN plays a crucial role in promoting and upholding the rule of law at the international level by providing a framework for international cooperation and fostering respect for legal norms. The UN Charter serves as the foundational document that establishes the principles of international law, emphasizing the peaceful resolution of disputes and the sovereign equality of states. UN efforts in conflict resolution and peacekeeping operations aim to restore and maintain the rule of law to protect international peace and security (especially in areas affected by armed conflicts), stability, and human rights. All UN bodies are called to strengthen legal institutions in Member States, promoting good governance and the rule of law at the national level.

Through conventions, treaties, resolutions, and even sanction mechanisms, the UN provides a platform for Member States to collaborate on global challenges. Further, it emphasizes the principle of humanity while acknowledging the imperative to prevent and alleviate human suffering. Ultimately, the UN thus underscores the shared responsibility of the international community to protect individuals and uphold the principles of the rule of law – one of which, notably, is the protection of human rights.

III.4 The Related Sanctions of the Organisation for Security and Co-operation in Europe

The OSCE documents do not explicitly define any consequences or sanctions for cases of non-compliance by the participating States with OSCE documents, decisions, and commitments, including with the rule of law as interpreted and understood by OSCE decision-making and executive bodies.[1800] This seems to reflect the key characteristics of the OSCE as a primarily political organisation, as well as the nature of its control and implementation mechanisms.

As pointed out in with regard to the control mechanisms, the States' implementation of OSCE commitments is not controlled and cannot be enforced or sanctioned by a court of law. Nonetheless, this should not be misunderstood as suggesting that the commitments (e.g. strengthening of the rule of law) are not binding in nature. They are politically binding and OSCE States cannot invoke the non-intervention principle to avoid political discussions about human rights and related issues (e.g. the rule of law) within their territories. The Permanent Council, the OSCE's principal decision-making body, may convene special meetings in order to discuss matters of non-compliance with OSCE commitments (including those pertaining to the rule of law) and to decide on appropriate courses of action. To assist the Permanent Council in its deliberations and decision-making, the participating States established a Preparatory Committee under its direction. Among other things, the Preparatory Committee brings together representatives of the OSCE and concerned States in order to address questions regarding compliance with OSCE commitments. Such matters are then submitted for consideration to the Permanent Council.

Nevertheless, neither the Rules of Procedure nor any other document contain provisions on the possible initiation of a procedure and imposition of sanctions in the event of non-compliance with commitments arising from OSCE documents and decisions. Rather than imposing sanctions, the OSCE discusses matters of non-compliance with participating States and searches for appropriate solutions. In this context, it promotes the rule of law by providing expertise, political guidance, and assistance; developing training programs and organizing capacity building events;

1800 The Rules of Procedure do not contain provisions on the possible initiation of a procedure and imposition of sanctions in the event of non-compliance with commitments arising from OSCE documents and decisions.

and establishing field operations aimed at strengthening human rights, democracy, and rule of law standards and practices.

By adopting the Paris Charter in 1990, the OSCE States paved the way for the recognition of democracy and the rule of law as the only legitimate principles of governance within the OSCE area. With this, these states have directly linked the quality of interstate order to their ability to organize internal sovereignty along liberal democratic lines. Although this consensus has opened the door for constructive intervention within the system of each state (by political means), the OSCE cannot enforce actions against the will of a participating State.[1801]

A. Conclusions

The OSCE was created as a security organisation; specifically, the participating States wanted to create a comprehensive framework for peace and stability in Europe. However, based on a broad concept of security, it considers security to be more than merely the absence of war. According to the OSCE, a free society in which everyone can fully participate in public life safeguards against conflict and instability. Hence, the OSCE does not deal exclusively with issues of military security, disarmament, or border issues, but equally with what it calls the 'human dimension'. Specifically, the OSCE uses this term to describe the set of norms and activities related to human rights, democracy, and the rule of law. Within the OSCE, the human dimension is one of the three dimensions of security, together with the politico-military and the economic and environmental dimensions. The term also indicates that the OSCE norms and commitments in this field cover a wider area than traditional international human rights law.[1802]

Signed in 1975, the Helsinki Final Act acknowledges the 'respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief' as one of its ten guiding principles. The Act constituted a milestone in the history of human rights protection: for the first time, human rights and rule of law principles were included as an explicit and integral element of a regional international security framework on the same basis as politico-military and economic issues.[1803] This acknowledgement has been reinforced by numerous follow-up OSCE documents. Therefore, this concept is now well established and should be beyond question. There is no hierarchy among these principles, and no government can claim that it has to establish political or economic security before addressing human rights and democracy.

With its comprehensive security agenda, primarily civilian focus, and light institutional structure, the OSCE plays a central – albeit underestimated – role in expanding the zone of stability from Western Europe to the former communist

1801 See: Borchert and Zellner, 2003, p. 6.
1802 OSCE Human Dimension Commitments, 2022, p. XI.
1803 Ibid.

regions.[1804] While this Vienna-based organisation and its forerunner, the CSCE, have been instrumental in laying the normative foundation for Europe's security architecture, they have also launched important field activities aimed at building up democratic institutions and strengthening the rule of law in Member States. However, given that the OSCE's decision-making process is fundamentally a political endeavour, it does not establish legally enforceable norms or principles. This reflects the fact that all OSCE States are sovereign and independent. Decisions of OSCE decision-making bodies shall be made by consensus. Once consensus among the States has been achieved, decisions enter into force immediately and shall have a politically binding character for the participating States. As such, the OSCE's human dimension and other commitments go beyond being mere expressions of good intentions; instead, they represent the political commitment of the participating States to adhere to these standards.

The rule of law concerns most of the OSCE human dimension commitments and represents a cornerstone of the OSCE's human rights and democratization activities. The OSCE situates the rule of law as a paramount concept for the development of societies based on pluralistic democracy and a prerequisite for peace, security, justice, and co-operation. The 'internationalization' of the rule of law by the OSCE is manifested through the adoption of documents and decisions by its decision-making and executive bodies and via its projects and programs referring to and supporting the rule of law.

Our review has shown that that references to the rule of law in OSCE documents and decisions are by their nature very general. Further, we revealed that they are not fundamentally different from references in international human rights declarations, conventions, and other documents promulgated by the UN and the Council of Europe. Of course, this does not come as a surprise. While the rule of law is the founding principle of most international and supranational organisations, on a large scale, the vast majority of international political and legal documents associate this international concept with respect for human rights and fundamental freedoms, protection from the arbitrary use of public power, good governance, and broader notions of justice. However, with regard to the case law of international courts, our review revealed that there are no direct references to it in OSCE documents and decisions.

OSCE bodies and institutions conduct a variety of activities to help the participating States enhance their rule of law capacities. Notable examples of such activities include the OSCE Parliamentary Assembly's efforts to promote respect for the rule of law in the OSCE area; the ODIHR's monitoring and reporting on human rights issues and observing elections throughout the OSCE region; the ODIHR and other OSCE institutions' field operations; and the participating States' ongoing and envisaged bilateral activities regarding the rule of law. Since OSCE bodies and institutions are authorized to make decisions and adopt documents with a politically binding character and on the basis of agreement among all the participating States,

1804 Borchert and Zellner, 2003, p. 2.

these processes should be understood as consensual and voluntary in nature. To be sure, initiatives, reports, and calls for participating States are legally non-binding.

Unlike the UN and the Council of Europe, the OSCE does not contain courts, quasi-judicial bodies, or other forms of control, enforcement, and sanctioning mechanisms in its organisational structure. The Geneva Court of Conciliation and Arbitration, established in 1992, does not serve as an implementation mechanism; however, it serves to settle, by means of conciliation and, where appropriate, arbitration, disputes between participating States. Although participating States are not formally legally obligated to perform their OSCE commitments to strengthen the rule of law, their work in this regard should inform their credibility and integrity. If a State routinely fails to realise its commitments to strengthening the principles of the rule of law, it may hold bad faith attitude towards its membership in the OSCE and its political obligations. Assuming that States care what other States think about their rule of law record, OSCE States may address the Geneva Court as an enforcement mechanism. However, to date, no participating country has turned to the court.

To conclude, the OSCE's decision-making and executive bodies recognize that nothing written in OSCE declarations and decisions shall undermine or diverge from participating States' existing commitments or obligations under international law. Further, they also acknowledge that each participating State, consistent with its legal tradition, determines the appropriate ways of implementing these elements in its national legislation.

III.5 The Related Sanctions of the European Union

Introduction to the Related Sanctions of the European Union

The sanctions of the different rule of law procedures of the EU's toolbox play an important role in enforcing the rule of law in the Member States. The characteristics of these sanctions significantly vary depending on the soft or hard nature of the mechanisms. Soft-law-based tools, such as the rule of law review cycle, the EU justice scoreboard, the European Semester, or the Cooperation and Verification Mechanism, do not practically involve the application of sanctions against the Member States, they rather serve as a tool for political persuasion and build on the dialogue between the States and EU institutions, principally the European Commission. This tendency could be observed, for instance, in the process of accessing EU funds under the Recovery and Resilience Facility, where compliance with country-specific recommendations of the European Semester plays a critical role in shaping Member States' prospects of securing such financial support.

In addition, the mentioned soft-law mechanisms may also be useful to support harder mechanisms, such as the Art. 7 procedure or the conditionality mechanism. The sanctions of these two mechanisms may produce serious implications for the affected Member State. Art. 7 TEU envisages the suspension of certain rights deriving from the application of the Treaties to the Member State, in particular, the voting rights of the representative of the government in the Council. Furthermore, various sanctions may be applied in the conditionality mechanism, which could result in the suspension, reduction, or restriction of access to EU funding for the Member State in question.

The specificity of the sanctions envisaged in the Art. 7 procedure and the conditionality mechanism are also worth examining from the perspective of the role and legitimacy of EU institutions in imposing the sanctions on the Member State. In the former procedure, the European Council has the power to determine the existence of a serious and persistent breach of the rule of law, and the Council may decide on the suspension of the rights deriving from the Treaty, while in the former procedure, the conditionality mechanism, the European Commission plays a key role. It could

be argued that these EU institutions also have a strong discretionary power to decide on the imposition of the sanctions, which could be problematic since their scope of action is not clearly defined in these procedures but rather shaped by the practice. Questions may also arise regarding the role of the CJEU in these processes given that the Court played an important role in fostering integration, sometimes anticipating the Member States' intention. While the Court also has certain competencies with respect to the Art. 7 procedure and the conditionality mechanism, however, such jurisdiction is rather limited to the procedural aspects of the matter, and not the substantive scope of the rule of law in these mechanisms. Thus, the envisaged sanctions shall be interpreted in their broader contexts, particularly in the context of the power struggle between EU institutions, their discretionary power in imposing the sanctions, and the (inter)relationship of the different soft and hard mechanisms developed within the European Union.

III.5.1 Sanctions in the Rule of Law Review Cycle and the EU Justice Scoreboard

The Rule of Law Review Cycle and the EU Justice Scoreboard are soft law mechanisms. They therefore do not impose any legal obligations on Member States or anyone else. Thus, there is nothing that can be enforced or sanctioned.[1805]

The fact is that the Commission does not *de jure* have any sanctioning power. *De facto*, however, it 'sanctions' States simply by pointing out their shortcomings in a report. This can have serious political and economic consequences. A state so labelled gains a stigma that can be felt in the fields of foreign direct investment and scientific cooperation (e.g. certain state research or state-funded institutions may be wrongly perceived by the public *a priori*[1806] as toxic without actually being so). It is therefore useful to also ask whether States can defend themselves against reports published by the Commission and, if so, with what instruments.

Nevertheless, given the nature of the rule of law report and its content, it can be concluded that they can benefit Member States (and thus the EU). In particular, they enable the horizontal transfer of information and exemplify good practice. Thus, individual Member States do not have to 'reinvent the wheel' but can draw inspiration from abroad. This is made possible by the nature of the reports, which provide concrete advice to Member States. However, these reports still have their limits, which are linked to the limited possibilities for comparison between Member States. The possibility of making a truly objective assessment based on the same parameters is

1805 Priebus states that 'the Commission's approach is mostly one of managing instead of enforcing the EU's fundamental values'. Priebus, 2022, p. 1693.

1806 Strelkov, 2019, p. 17.

weak; national systems (and not just judicial ones) perform the same functions, but often in different ways that are difficult to define and compare.

Finally, the aim must not be to impose sanctions, but to find solutions that protect the rule of law based on cooperation and mutual support. While such solutions do not exclude an effective, proportionate, and dissuasive response as a last resort,[1807] other EU law instruments, discussed elsewhere in this study, serve to provide such a solution.

In the case of the Rule of Law Review Cycle and the EU Justice Scoreboard, there is no question of sanctions in the true sense of the word. This is not what these instruments are for, nor are they intended to be. Their purpose is not to punish, but to monitor, inform, motivate, and prevent violations. However, they can be a valuable source of information – and therefore a starting point – for other mechanisms for enforcing the rule of law or EU law.

III.5.2 Sanctions in the Art. 7 TEU Procedure

A. Introduction: The Limits of Discretionary Powers

According to L. Tichý's view, Art. 7 of the TEU stipulates a constitutional law liability with a specific sanctional nature.[1808] Legal liability in the broad sense means attributing to an entity the negative legal consequences of events or states of affairs subject to negative legal qualification.[1809] The concept of liability in law is closely related to the concept of legal sanction, which refers to negative legal consequences (inconveniences) resulting from the addressee's failure to comply with an order or prohibition established in a legal provision.[1810]

At the outset, it should be clarified that the following analysis will not only refer to 'sanctions' that reflect the commonly accepted terminological convention under Art. 7 of the TEU. While the 'sanctioning mechanism' and the sanctions themselves result only from Art. 7.3 of the TEU,[1811] the assumption is that the negative legal consequences for a Member State that breaches the value of the rule of law may also constitute an indirect legal consequence of declaring a 'clear risk of a serious breach' (Art. 7.1 TEU) or a 'serious and persistent breach' of the values (Art. 7.2 of the TEU). It seems that this supposition was also taken into account by the EU legislator, who

1807 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Rule of Law within the Union, COM(2019) 343 final.
1808 Tichý, 2018, pp. 89, 107.
1809 Lang, 1986, p. 385.
1810 Wincenciak, 2008, p. 17.
1811 E.g. Kochenov, 2019a, p. 91; Mik, 2005, p. 95.

authorized the Council and the EC to determine the above circumstances (and to impose sanctions under Art. 7.3 of the TEU) as part of the discretionary power vested in these institutions[1812] (expressed in the words 'may determine' and 'may decide'). If these 'declarations' did not cause any negative consequences that would require consideration during the application of Arts 7.1 and 7.2 of the TEU, then the action of the Council and the EC should be automatic and 'related' since it only involves stating a certain state of affairs.

The granting of discretionary power usually raises the question of its legally defined limits. It is therefore worth considering what additional factors shall delimit the choices the Council and the EC make under Art. 7 of the TEU.[1813] Of course, it is primarily about the general principles of EU law, especially the principle of proportionality.[1814] If we take into account the adopted definition of 'legal principles',[1815] the basic limitation in the application of the mechanisms resulting from the above provision is the need to identify the catalogue of values 'involved' in the case, determine the fields of their collision, and balance and resolve the conflict of values according to the rules of the principle of proportionality (i.e. requirements of suitability, necessity, and proportionality in a narrow sense[1816]). The indicated values include the rule of law (its individual elements), loyal (sincere) co-operation and mutual trust between Member States and the EU, the primacy of EU law,[1817] subsidiarity[1818] (in the sense of treating Art. 7 of the TEU as the final option), national identity,[1819] and the effectiveness of law.[1820] The EP drew attention to another group of values that deserve to be taken into account when applying the Art. 7 TEU mechanism and also called on the EC and the Council to respect them. Specifically, these values include EU confidence (in the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles); plurality of ideologies, political objectives, and values and the democratic competition between them (the procedures under Art. 7 of the TEU of the EU shall not be treated as instruments of political opposition); strict equality of treatment of all Member States; credibility of the decisions taken by EU institutions; and transparent procedures.[1821] The next set of values is identified by Art. 7.3 of the TEU and obligates the Council to consider the possible consequences

1812 Cf. the Communication 2003, p. 5; Potacs, 2018, pp. 166–167.
1813 Cf. Mendes, 2016, p. 421.
1814 Nowak-Far, 2021, p. 310. See also Dumbrovsky, 2018, p. 217; Niedobitek, 2018, p. 238.
1815 They are legal norms of an optimizing nature that prescribe the realization of certain values. Kordela, 2012, p. 102; Miąsik, 2022, p. 2.
1816 E.g. Tichý, 2018, p. 90.
1817 Ibid., p. 91; Potacs, 2018, pp. 163–164, 167.
1818 Tichý, 2018, p. 92.
1819 Niedobitek, 2018, p. 238.
1820 Dumbrovsky, 2018, p. 216.
1821 Report of the European Parliament of April 1, 2004 on the Commission communication on Art. 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), A5-0227/2004 final, pp. 7–8.

on the rights and obligations of natural and legal persons when deciding to suspend certain rights deriving from the application of the Treaties to a Member State. In other words, in balancing values (in accordance with the principle of proportionality), values underpinning these rights and obligations must also be taken into account.[1822] Notably, such work relates not only to the mechanism of Art. 7.3 of TEU but also to other instruments resulting from Art. 7 of the TEU.[1823] The abovementioned catalogue of values is, of course, of a general nature and is subject to specification (supplementation, limitation) on the basis of specific facts related to a given Member State, which will be the addressee of the mechanisms of Art. 7 of the TEU.

From the point of view of the liability of the Member State under Art. 7 of the TEU, fault is irrelevant[1824] (it is an 'objective liability'[1825]). 'Fault elements', however, may be relevant for the selection of the appropriate sanction for which this provision allows. The more a Member State can be 'blamed' for breaching the rule of law, the stricter the sanction will be.[1826] At the same time, it is difficult to provide circumstances that could free the state from liability, apart from proving that it was not the state that committed the violation or that the violation was neither serious nor persistent.[1827] Additionally, the rule of law and other values of Art. 2 of the TEU 'are so fundamental that their violation cannot and should not be justified even in a state of necessity or emergency'.[1828]

B. The Negative Consequences of Implementing Art. 7.1 or Art. 7.2 of the TEU and determining a 'Clear Risk of a Serious Breach' or a 'Serious and Persistent Breach' of the Rule of Law

The basic consequence of implementing the mechanisms of Arts 7.1 and 7.2 of the TEU is the so-called 'naming and shaming' of the Member State in question.[1829] This 'naming and shaming' may impact the State's political, diplomatic, and economic relations with other Member States of the EU. Further, if a declaratory act pursuant to Art. 7.2 of the TEU is adopted, these effects may be more far-reaching and occur with greater intensity than in the situation specified in Art. 7.1 of the TEU.[1830] The mechanisms also differ in that Art. 7.2 of the TEU, unlike the former one, opens onto the possibility of triggering Art. 7.3 of the TEU and thus 'real sanctions'.[1831]

1822 Cf. Dumbrovsky, 2018, p. 208; Potacs, 2018, p. 167; Taborowski, 2019, pp. 195–196.
1823 Cf. Barcz, 2019, p. 11.
1824 Mik, 2005, p. 99; Tichý, 2018, p. 106.
1825 Mik, 2005, p. 99.
1826 Magnus, 2018, p. 158.
1827 Mik, 2005, p. 99.
1828 Magnus, 2018, p. 155. See also Mik, 2005, p. 99.
1829 Kochenov, 2019a, p. 96.
1830 Taborowski, 2019, pp. 174–175, 187. See also Barcz, 2019, p. 11.
1831 Kochenov, 2019a, p. 96.

Additionally, it should be noted that sometimes the EU law directly or indirectly refers to the issue of the consequences of applying Art. 7.1 or Art. 7.2 of the TEU to a given Member State. The first example is provided by the TFEU Protocol no. 24 on Asylum for Nationals of Member States of the European Union. Pursuant to its Sole Article, all Member States, as a rule, shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Therefore, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in exceptional cases. Among them, the Protocol mentions a situation in which: 1) the procedure referred to Art. 7.1 of the TEU has been initiated and until the Council, or, where appropriate, the EC, takes a decision in respect thereof with regard to the Member State of which the applicant is a national and 2) the Council has adopted a decision in accordance with Art. 7.1 of the TEU in respect of the Member State of which the applicant is a national or if the EC has adopted a decision under Art. 7.2 of the TEU in respect of the Member State of which the applicant is a national.

Another example follows from the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[1832] (the 'CFD'). From the perspective of the impact of Art. 7 of the TEU, the key regulations are as follows: Recital 10 CFD (according to which the implementation of the EAW 'may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Art. 6(1) [of the TEU; now, after amendment, Art. 2 of the TEU], determined by the [European] Council pursuant to Article 7(1) [of the TEU; now, after amendment, Art. 7.2 of the TEU,] with the consequences set out in Article 7(2) thereof [now, after amendment, Art. 7.3 of the TEU]'[1833]) and Art. 1.3 CFD (stating, '[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'). Against this background, the effects of the application of Art. 7 of the TEU were clarified by the CJEU in the seminal Judgment case ref. C-216/18. In the Court's view, the judicial authority executing EAW is only required to automatically refuse to execute this warrant[1834] if the EC identifies a serious and persistent breach of the value of Art. 2 of the TEU (especially the rule of law) in the Member State issuing the EAW (Art. 7.2 of the TEU) and the Council subsequently suspended the application of the CFD for that State (in accordance with Art. 7.3 of the TEU[1835]). In other cases, the judicial authority executing the EAW should treat it only as information indicating that there is a risk of a breach of the fundamental right to a fair trial. Such cases may occur when initiating the procedure under Art. 7.1 of the TEU and ending it with a

1832 Official Journal of the European Union of July 18, 2002, L 190, pp. 1–20.
1833 Case ref. C–216/18, para. 7.
1834 Case ref. C–216/18, para. 72.
1835 Taborowski, 2019, p. 188.

statement of a 'clear risk of a serious breach' of the values and when initiating the procedure under Art. 7.2 of the TEU and ending it with a statement of a 'serious and persistent breach' of the values. The authority should then independently examine and assess: 1) the existence of a real risk of violation of the fundamental right to a fair trial due to systemic or general shortcomings in relation to the judicial authority of the concerned Member State and 2) whether, in the circumstances of the case at hand, there are serious and proven grounds for considering that the pursued person will be exposed to that risk following his or her surrender to the issuing Member State.[1836] Only after making such determinations and assessments may the executing judicial authority refrain, pursuant to Art. 1.3 CFD, to give effect to an EAW. Of course, from the point of view of this verification, the information collected during Arts 7.1 and 7.2 of the TEU procedures will be important; however, it is in no way decisive for the body executing the EAW.

An additional legal obligation resulting from the application of Art. 7.1 of the TEU was imposed on the Council, which was obliged to regularly verify that the grounds on which it was determined that a clear risk of a serious breach of EU values occurred continue to apply. Although a similar obligation does not result from Art. 7.2 of the TEU, the validity of the basis for a declaration of a serious and persistent breach of the values should be verified, given the need to constantly keep under review the existence of grounds for a possible sanction decision under Art. 7.3 of the TEU.

C. The Legal Consequences of Suspending 'certain of the rights deriving from the application of the Treaties to the Member State' (Art. 7.3 of the TEU)

Pursuant to Art. 7.3 of the TEU, the Council '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'. Therefore, this provision expressly rules that the suspension may concern the 'voting rights' of a Member State in the Council exercised on the basis of the TEU or TFEU.[1837] The consequences are specified in Art. 354 para. 3 of the TFEU. When the Council acts by a qualified majority, this majority is determined in one of two ways based on the entity initiating the decision. When the Council acts on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, a qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States. In this case, a blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States plus one member – failing this, a qualified majority shall be deemed to have been

1836 Ibid., paras. 61, 68; Taborowski, 2019, pp. 187–188.
1837 Cf. Taborowski, 2019, p. 191.

attained (Art. 238.3.(a) of the TFEU). In other cases of the Council's actions, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States (Art. 238.3.(b) of the TFEU).

Article 7.3 TEU does not indicate what other rights may be subject to suspension. However, this only applies to 'certain of the rights deriving from the application of the Treaties to the Member State in question'. Therefore, this regulation does not allow for the suspension of all rights of a Member State or exclude this State from the EU[1838] (the admissibility of deprivation of membership as a sanction for violating the fundamental values of the EU is considered solely on the basis of the general norms of international law and Art. 60 of the Vienna Convention of 23 May 1969 on the Law of Treaties[1839]). Moreover, rights can only be suspended – that is, rights must be restorable. Additionally, suspended rights must result from the application of the Treaties; put differently, only rights created through EU membership are subject to Art. 7.3 of the TEU. From the general definition of the 'application of the Treaties' (in connection to structural features of EU law), it can be assumed that this refers not only to rights related to primary law (the TEU and TFEU), but also to rights granted by secondary EU law (i.e. all binding sources of EU law) authorized by the Treaties.[1840] Further, the wording of the analysed provision suggests that the suspension of rights may apply not only to Member States, but also to the legal sphere of natural or legal persons.[1841] At the same time, Art. 7.3 of the TEU does not allow for the imposition of additional obligations since it refers to 'rights'.[1842]

In other respects, the subject of the rights subject to suspension is undefined. Therefore, a broad interpretation of these rights is proposed.[1843] Examples include rights of a political, economic, or other nature,[1844] such as the rights to participation in the functions of EU institutions (e.g. the right to vote or participate in the meetings of EU bodies and institutions, submit applications to them, suggest candidates, nominate members),[1845] receive payments from EU funds,[1846] obtain loans and guarantees from the European Investment Bank,[1847] benefit from freedoms of the internal market,[1848] automatic recognition of judicial decisions in other Member States or of

1838 Besselink, 2016, p. 6; Dumbrovsky, 2018, p. 208; Mik, 2005, p. 99; Kochenov, 2021, p. 142; Mangiameli and Saputelli, 2013, p. 367; Potacs, 2018, pp. 160, 165; Taborowski, 2019, p. 190.
1839 Barcz, 2019, pp. 17–20; Dunaj, 2020, pp. 184–185; Jaskulski, 2016, p. 231; Kozłowski, 2022, pp. 19–26.
1840 Dumbrovsky, 2018, pp. 208–209. See also Besselink, 2016, p. 8; Taborowski, 2019, pp. 190–191.
1841 Dumbrovsky, 2018, p. 208; Potacs, 2018, p. 165; Taborowski, 2019, p. 191.
1842 Jaskulski, 2016, pp. 232–233.
1843 Potacs, 2018, p. 165.
1844 Dumbrovsky, 2018, pp. 222–227.
1845 Ibid., pp. 222–223; Potacs, 2018, p. 166; Taborowski, 2019, p. 193.
1846 Dumbrovsky, 2018, pp. 225–226; Taborowski, 2019, p. 192.
1847 Dumbrovsky, 2018, p. 227; Taborowski, 2019, p. 192.
1848 Dumbrovsky, 2018, pp. 226–227; Potacs, 2018, p. 166; Taborowski, 2019, p. 193.

educational qualifications,[1849] and participate in the mechanism of the EAW.[1850] In particular, one of the sanctions resulting from Art. 7.3 of the TEU is the suspension of the right to bring an action against an act of the EU before the CJEU.[1851] This falls *prima facie* within the scope of application of Art. 7.3 of the TEU. However, this is a fundamental right protected under primary law as a general principle of EU law and the rule of law element (Art. 2 TEU). Therefore, it is difficult to accept the imposition of a sanction that is in clear contradiction with the founding value of the EU, and which is intended precisely to realize this value. It should therefore be assumed that the limit for determining negative consequences under Art. 7.3 TEU (their type, intensity and scope) is the Council's respect for the EU values listed in Art. 2 TEU.[1852]

Despite the imposition of sanctions on a Member State, its obligations under the Treaties (TEU, TFEU) shall in any case continue to be binding on that State (Art. 7.3 TEU). Therefore the sanctioned state in particular cannot stop paying its share into the EU budget[1853] or applying EU law on its territory.[1854]

The consequence of the application of Art. 7.3 TEU and subsequent circumstances (i.e. a change in the situation that led to the application of this provision) may be the need to vary or revoke measures taken. The Council has appropriate response flexibility granted by Art. 7.4 TEU in this respect.[1855]

D. The CJEU's control of acts adopted pursuant to Art. 7 of the TEU

The CJEU's control competences in relation to the rule of law protection mechanisms arising from Art. 7 of the TEU are determined primarily by Art. 269 of the TFEU. According to this provision:

> [t]he Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.
> Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Hence, the legal remedy appears as a special type of annulment action with a specific object: the acts adopted by the Council and the EC on the basis of Art. 7 of the TEU. The parties to the court's procedure may only be the Member State in

1849 Dumbrovsky, 2018, p. 227.
1850 Cf. case ref. C–216/18, para. 72.
1851 Potacs, 2018, p. 166.
1852 Taborowski, 2019, p. 194.
1853 Dumbrovsky, 2018, p. 208.
1854 Taborowski, 2019, p. 197.
1855 Cf. Kochenov, 2019a, p. 97.

question and the institution which adopted the act.[1856] According to Art. 269 para. 2 of the TFEU, the Member State must make a request within one month from the date of the 'determination'. However, taking into account that the subject of the CJEU's jurisdiction are also acts other than the 'determination', the one-month time limit starts from the date of the 'determination', 'decision', or other act referred to in Art. 7 of the TEU.[1857] The reasons for their annulment are confined only to procedural aspects (e.g. the Council made a decision without the consent of the EP[1858] or the voting rules laid down in Art. 354 TFEU were violated[1859]) and do not cover the material aspects of the controlled acts (e.g. selection of the type of sanctions or other negative consequences, application of the principle of proportionality, assessment of the fulfilment of the conditions for the application of Art. 7 of the TEU,[1860] including the adopted definition of the rule of law). The CJEU does not have the jurisdiction to replace the Council or the EC and make a different decision on the matter and cannot apply different, lesser, or harsher sanctions.[1861]

As indicated above, the material scope of Art. 269 of the TFEU and therefore the jurisdiction of the CJEU only cover 'acts' by the EC and the Council. These acts include the Council's recommendations (Art. 7.1 TEU, despite some doubts regarding their appealability[1862]), the Council's determination that there is a clear risk of a serious breach of the rule of law (Art. 7.1 of the TEU), the EC's determination of a serious and persistent breach of the rule of law (Art. 7.2 of the TEU), the Council's decision to suspend certain of the rights deriving from the application of the Treaties (Art. 7.3 of the TEU), and the Council's decision to vary or revoke the latter sanction (Art. 7.4 of the TEU). There is no doubt that, in relation to the indicated acts, Art. 269 of the TFEU excludes the application of Art. 263 of the TFEU (an action for annulment) and Art. 267 of the TFEU in the scope of a request for a preliminary ruling concerning the validity of an act. At the same time, it seems justified to allow for the possibility of submitting requests for a preliminary ruling concerning the interpretation of the acts listed in Art. 269 of the TFEU.[1863]

The above findings do not exhaust the problem of the relationship between Arts. 269 and 263 of the TFEU – it still remains unclear whether this first provision exhaustively determines the jurisdiction of the CJEU in the context of Art. 7 of the TEU or whether it only provides for derogations from Art. 263 of the TFEU, which also applies in this respect (i.e. in relation to acts arising from Art. 7 of the TEU and not listed in Art. 269 of the TFEU). In particular, this applies to the '(reasoned) proposal' of the EP or the EC to initiate proceedings under Arts 7.1 and 7.2 of the

1856 Larion, 2018, p. 167.
1857 Schima, 2019, p. 1846.
1858 Larion, 2018, p. 167.
1859 Schima, 2019, p. 1846.
1860 Cf. Taborowski, 2019, p. 197.
1861 Larion, 2018, p. 167.
1862 Cf. Taborowski, 2019, pp. 201–202.
1863 Ibid., pp. 202–203.

TEU. This issue was resolved by the CJEU in its Judgment of 3 June 2021, case ref. C-650/18, with respect to the 'European Parliament resolution on a proposal calling on the Council of the European Union to determine the existence of a clear risk of a serious breach of the values on which the European Union is founded' (the 'EP resolution'; Art. 7.1 of the TEU). In the Court's opinion, it can be inferred from the wording of Art. 269 of the TFEU that the authors of the Treaties did not intend to exclude an act such as the EP resolution from the general jurisdiction conferred on the CJEU by Art. 263 of the TFEU.[1864] This interpretation of Art. 269 of the TFEU contributes to the observance of the principle that the EU is a union based on the rule of law which has established a complete system of legal remedies and procedures designed to enable the CJEU to review the legality of the acts of EU institutions.[1865] Moreover, the Court stated that the contested EP resolution is a challengeable act in view of Art. 263 para. 1 TFEU.[1866] This resolution produces binding legal effects (including, notably, the adoption of the EP resolution has the immediate effect of lifting the prohibition, which is in principle imposed on Member States, on taking into consideration or declaring an asylum application made by an EU citizen admissible for examination[1867]).[1868] Further, this resolution cannot be regarded as expressing a provisional position of the EP.[1869] Moreover, the possible success of an action for annulment brought against a subsequent determination made by the Council under Art. 7.1 of the TEU would not, in any event, make it possible to eliminate all binding legal effects produced by the EP resolution.[1870] On this basis, it should be assumed that acts adopted by EU institutions under Art. 7 of the TEU – other than those listed in Art. 269 of the TFEU – may be subject to the action for annulment provided for in Art. 263 of the TFEU. The condition is that these acts: 1) are intended to have binding legal effects;[1871] 2) are not intermediate measures designed merely to prepare the final decision; 3) do not only express a provisional opinion of the institution concerned;[1872] 4) bring independent legal effects (even if they represent intermediate measures); and 5) their illegality cannot be remedied in an action brought against the final decision for which they represent a preparatory step.[1873] These features can *prima facie* be seen in all acts of EU institutions initiating the mechanisms of Arts 7.1 and 7.2 of the TEU. A complaint under Art. 263 of the TFEU is unlikely to be available against the EP 'consent' expressed on the basis of both provisions of Art. 7 of the TEU.

1864 Case ref. C–650/18, para. 33.
1865 Ibid., para. 34.
1866 Ibid., para. 49.
1867 Cf. the sole Art. of the TFEU Protocol no. 24.
1868 Case ref. C–650/18, paras. 40–41.
1869 Ibid., para. 45.
1870 Ibid., para. 48.
1871 Cf. Ibid., para. 37.
1872 Cf. Ibid., paras. 43–44.
1873 Cf. Ibid., para. 46.

In Judgment case ref. C-650/18, the CJEU also decided on the consequences of the 'co-application' of Arts. 263 and 269 of the TFEU in connection with Art. 7 of the TEU. In its opinion, the general jurisdiction conferred on the Court by Art. 263 TFEU cannot be interpreted in such a way as to deprive the limitation on that general jurisdiction provided for in Art. 269 of the TFEU of practical effect (i.e. Art. 263 of the TFEU cannot be applied independently, but must be interpreted in light of Art. 269 of the TFEU to preserve the effectiveness (*effet utile*) of the latter provision).[1874] Thus, an action for annulment under Art. 263 of the TFEU against a 'reasoned proposal' adopted by the EP under Art. 7 of the TEU may be brought only by the Member State which is the subject of that proposal (cf. Art. 269 para. 1 of the TFEU) within two months of its adoption (cf. Art. 263 para. 6 of the TFEU). In addition, the grounds for annulment relied on in support of an action under Art. 263 of the TFEU can only be based on infringement of the procedural rules referred to in Art. 7 of the TEU (cf. Art. 269 para. 1 *in fine* of the TFEU).[1875]

E. Conclusions

Based on the legal criteria for assessing the above regulations, certain critical remarks can be formulated regarding the legal consequences of Art. 7 of the TEU for Member States that threaten to seriously breach or violate the rule of law. Firstly, the problem is that the full extent and nature of sanctions under Art. 7.3 of the TEU is not clear. It is regrettable that the provision concerning the rule of law leaves such an apparently wide scope of discretion to a political body (i.e. a body that is not a court), with no clear boundaries drawn by the legislation itself.[1876] Secondly, the legal consequences determined by this body (which may seriously interfere with the legal situation of the state and individuals) are subject only to a narrow scope of control by the CJEU, which only covers procedural issues (cf. Art. 269 of the TFEU). Issues beyond judicial control include the selection of the type and severity of sanctions, the correct application of the principle of proportionality, and even the existence of substantive premises for establishing a negative legal effect. This quite obviously conflicts with the principle of effective judicial review – an element of the rule of law (cf. e.g. the Communication 2014). In this context, there may, of course, be an argument that we are dealing with political mechanisms to which strictly legal assessments do not fully apply. Should compliance with the rule of law be the subject of political debates, free assessments by bodies other than courts, or a differentiated approach to a 'wrongdoer' based on the concerned Member State?

1874 Ibid., paras. 51–52, 54, 58.
1875 Ibid., para. 59.
1876 Cf. Grzeszczak and Terret, 2018, p. 357.

III.5.3 Sanctions in the European Semester

The coordination of economic governance instruments carried out within the framework of the ES procedure does not, in principle, involve the application of any sanctions against its addressees, the Member States. The EU institutions engaged in this process, which act as actors seeking to impose their ideas and concepts, can above all use the tools of political persuasion and thus convince national authorities to shape their economic and social policies in a certain way. In general, therefore, what we are dealing with here is a mechanism that is free from the possibility of effectively coercing obedience from Member States. This mechanism is based on the concept of inter-institutional dialogue and its essence is expressed in the concept of the 'master-student relationship'.

An exception in this respect are the instruments used in the ES's framework to assess the budgetary and macroeconomic balance policies of the euro area Member States, which reinforce the financial surveillance of Brussels and are a direct consequence of the experience caused by the 2008 crisis. Only in their case do the EU institutions retain the right to trigger sanctions against countries in breach of the applicable financial rules.

It should be noted that mechanisms to strengthen the national budget preparation process are contained in the Six Pack, the Two Pack, and the 2013 Treaty on Stability, Coordination and Governance in the 25 signatory countries. By design, they reinforce the Stability and Growth Pact, which '(…) is a set of rules designed to ensure that the countries of the European Union pursue sound public finances and coordinate their fiscal policies'.[1877] According to them,

> Member States are assessed on the basis of whether they achieve their medium-term budgetary objectives. These are set in April each year by euro area Member States in stability programmes and by non-euro area Member States in convergence programmes. These programmes are published and analysed by the Commission and the EU Council of Ministers, and form the basis of the Commission's country-specific recommendations each spring.[1878]

Further, they suggest

> If there is a 'significant deviation' from the medium-term target or the adjustment path towards it, the Commission addresses a warning to the Member State, which must be endorsed by EU Finance Ministers, and which can be made public. The situation is then monitored throughout the year. If a euro area Member State fails to rectify the situation, the Commission can propose a sanction in the form of a deposit of up to 0.2% of GDP to be paid into an interest-bearing account. Any such

1877 European Comission, Stability and Growth Pact.
1878 The EU's economic governance explained.

sanction must be approved by the EU Council of Ministers and can be reversed if the Member State corrects the deviation.[1879]

Moreover,

If Member States breach either the deficit criterion or the debt criterion, the Commission prepares a report to consider whether or not an Excessive Deficit Procedure (EDP) should be launched. Member States in EDP are subject to extra monitoring (usually every three or six months) and have a deadline for correcting the situation. The Commission checks compliance throughout the year, based on regular economic forecasts and Eurostat data. The Commission can request more information or recommend further action from those at risk of missing their deficit deadlines.[1880]

Additionally,

For euro area Member States under the Excessive Deficit Procedure, financial penalties kick in earlier and can be gradually stepped up. Failure to reduce the deficit can result in fines of up to 0.2% of GDP. These can rise to a maximum of 0.5% if statistical fraud is detected. Penalties can include a suspension of the European Structural and Investment Funds (even for non-Euro area countries, except the United Kingdom).[1881]

Last,

Decisions on most sanctions under the Excessive Deficit Procedure are taken by Reverse Qualified Majority Voting (RQMV), which means that fines are deemed to be approved by the EU Council of Ministers unless a qualified majority of Member States overturns them. This was not possible before the Six Pack entered into force. In addition, the 25 Member States that signed the Treaty on Stability, Coordination and Governance have agreed to apply the RQMV mechanism earlier in the process as well, for example, when deciding whether to place a Member State under the Excessive Deficit Procedure.[1882]

In turn, mechanisms to strengthen control of the area of macroeconomic imbalance are set out in two pieces of legislation belonging to the so-called 'six-pack'.[1883]

1879 Ibid.
1880 Ibid.
1881 Ibid.
1882 Ibid.
1883 Regulation (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances sets out the MIP procedure and applies to all EU countries covered by the MIP, Regulation (EU) 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances specifies a sanction mechanism to enforce MIP recommendations for euro area countries.

They introduce regulations that aim '(…) to identify, prevent and address the emergence of potentially harmful macroeconomic imbalances that could adversely affect economic stability in a particular Member State, the euro area, or the EU as a whole'.[1884] Their application entails specific actions to be taken by the EC and the Council of the European Union. These actions are of course part of the ES cycle and remain determined by the timetable of this procedure. Alessandro Turrini and Jean-Charles Bricongne describe this process well in the literature. Namely, the authors argue that 'Cross-country analysis carried out in an Alert Mechanism Report provides the basis for selecting a number of countries that also would be analysed in in-depth-reviews by the Commission, with a view to assess the existence of imbalances that are harmful for macroeconomic stability and evaluate their severity'.[1885] Further, they specify,

> The in-depth reviews may result in the identification of no imbalances, imbalances, or excessive imbalances. Countries identified as having imbalances or excessive imbalances receive Country-Specific Recommendations (CSRs) by the Commission and the EU Council in the context of the 'European semester'. For the countries identified with excessive imbalances, the Excessive Imbalance Procedure (EIP) may also be activated, which comprises of the delivery of a corrective action plan with a set of policy measures to be carried out within a pre-determined time frame. The repeated delivery of an insufficient corrective action plan or repeated lack of compliance with the policy measures detailed in the plan may imply sanctions for the countries that belong to the Eurozone.[1886]

However, the ES system, in its core principles, primarily serves to act in such a way as to exert pressure on Member States in the field of economic governance without using coercive measures. In its essence, it facilitates an economic dialogue between the institutions and jointly develops a position on specific issues. Undoubtedly, therefore, it is a procedure that fits very clearly into the mechanism of loyal cooperation between the Union and the Member States regulated by the provisions of the Treaty. To recall Art. 4 of the Treaty on European Union, this presupposes mutual respect and mutual support in carrying out tasks arising from the Treaties by both parties. It is another matter that in the course of implementing the recommendations, misunderstandings and tensions may arise in relations between the EU and the addressees of its recommendations. It all depends on the political circumstances underlying the decision-making process underway. Obviously, the instrument that creates the possibility for this kind of interaction between the EU institutions and the national authorities comprises the recommendations formulated within the framework of the ES, which – as we know – ' (…) may thus be

1884 Macroeconomic Imbalance Procedure.
1885 Turrini and Bricongne, 2017.
1886 Turrini and Bricongne, 2017.

underpinned by various coordination instruments with different legal bases: the Stability and Growth Pact (SGP), the Macroeconomic Imbalance Procedure (…) and the employment policy coordination'.[1887] These elements are used by EU institutions to influence the direction of policies in the Member States and provide an opportunity to look at economic processes underway in Europe from a broader perspective.

However, EU institutions can never be sure whether, or to what extent, a given Member State will want to implement their recommendations. Formally speaking, Member States have complete freedom in this respect – they have the option to accept or reject the rationale put forward by the EU. Legally, there is nothing to constrain national decision-makers in this field. However, it is also not the case that they do not have to take into account what the EU points out. Indeed, as emphasised in the literature,

> non-compliance with even non-binding recommendations can nevertheless be costly, as it exposes the state to criticism from EU institutions and may reduce the credibility of such a partner in the eyes of investors. Hence, even if countries find some recommendations too difficult or inconvenient to implement, they try to implement them as far as possible.[1888]

Incidentally, it is worth mentioning that the only recommendations of an exceptional nature in this context are those '(…) resulting from the six-pack and the two-pack, which mainly concern the observance of fiscal thresholds (in terms of budget deficit and public debt) established for the countries of the Economic and Monetary Union'.[1889] In this case '(…) the requirements are very precise and quantified and their non-fulfilment is threatened by specific penalties'.[1890]

It should be recalled at this point that the legal nature of these instruments determines the discretion of Member States when implementing recommendations. Being part of the so-called 'soft law' of EU law, they exhibit certain characteristics. Namely, they

> (…) are not legally binding and are adopted by the Union institutions in cases where the Treaty does not confer on them the competence to adopt legally binding acts or where they consider it inappropriate to enact additional binding provisions. A recommendation is an act that is not intended to have a legal effect (…).[1891]

Obviously, the choice of soft law, rather than hard law, for the decision-making mechanism of the ES, at least at this stage of European integration, is not accidental

1887 Bekker, 2021, p. 115.
1888 Kawecka-Wyrzykowska, 2017, p. 124.
1889 Kawecka-Wyrzykowska, 2017, p. 124.
1890 Ibid.
1891 Staszczyk, 2020, p. 1100.

and there are specific reasons behind it. Namely, one may suspect that the legislator wishes to avoid conflicts and tensions between the EU and the Member States and thus create an atmosphere of mutual cooperation rather than confrontation. Kenneth W. Abbott and Duncan Snidal are undoubtedly right when they stress that 'Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own'.[1892]

The available analyses clearly show that the extent of implementation of the recommendations addressed to the Member States in the ES process is quite modest. These states often approach the proposals of the EC and the Commission with detachment and tend to show reluctance to no small extent. Researchers examining this phenomenon over a broader timeframe have reported that it demonstrates a patchy, partly downward trend. The overall average activities of Member States in this area may therefore be unsatisfactory from the EU's point of view.[1893]

Obviously, the reasons for a conservative attitude to the recommendations presented vary and are a result of the particular circumstances prevailing in the respective Member State. In general, however, we can divide these reasons into three groups: economic (or social), political, and legal-institutional.

Economic (social) causes relate to divergent views on specific economic problems between the European Council and the EC and the national authorities of Member States. Their occurrence, therefore, refers to a situation in which Member States take a different view of the possibilities of shaping their own economic (social) policies and do not share the solutions suggested by EU institutions on a given issue. The reluctance of the latter is thus determined by the recognition that the EU is wrong or that what it proposes is uncertain.

Political reasons, on the other hand, originate from political calculations made by national decision-makers who consider the recommendations made by the European Council and the EC. They are therefore determined by the political reality of the Member State concerned and the problems that emerge against this background. For example, national authorities may be reluctant to implement recommendations because of the expected reaction from the public and the consequent drop in support (e.g. in relation to suggested social spending, which is perceived negatively by the public in Europe in particular[1894]). Such a scenario is highly likely – especially in an election year.[1895] However, it also cannot be ruled out in the earlier stages of the course of the term. In the same way, national authorities may find it difficult to agree on the changes suggested by the EU due to the political fragmentation of the ruling camp.[1896] This is conceivable in a situation where the political formations that make up this camp present divergent positions on an issue, which may prevent certain

1892 Abbott and Snidal, 2000, p. 422.
1893 See: Efstathiou and Wolff, 2019, p. 8.
1894 Alesina, Perotti and Tavares, 1998, p. 212.
1895 Duval and Elmeskov, 2006, p. 35.
1896 Roubini and Sachs, 1989, pp. 903–933; Høj et al., 2006, p. 130.

solutions from being accepted.[1897] Hence, greater favourability for similar moves can be expected from politically cohesive governments, especially single-party and majority ones.[1898] Finally, national authorities may distance themselves from EU recommendations for ideological reasons. Such a risk arises when Brussels' proposals clash with the ideological agendas of those in power; that is, when such proposals are incompatible with the economic or social visions of the State in question.[1899] Certainly, mutual approval and cooperation between the two sides is not easy to realise under such conditions.

Legal-institutional reasons, on the other hand, are connected with a negative assessment of recommendations by the EC and the European Council, dictated by the conviction that there are counter-indications of a legal nature. Politicians of a given Member State may be guided by various reasons and decide on this basis whether the implementation of a given recommendation will have negative consequences from the point of view of the applicable law. For example, they may argue that a solution suggested in a given recommendation will conflict with the domestic legal order or will be redundant in view of hitherto existing institutions and normative mechanisms.[1900]

III.5.4 Sanctions in the Conditionality Regulation

The possible sanctions of the conditionality mechanism are laid down in Art. 5 of the Regulation ('Measures for the protection of the Union budget'). The placement of the provisions on the sanctions is worth noting, as they are preceded by the provisions on the conditions for the adoption of measures (Art. 4) and followed by the rules for the Procedure (Art. 6) and the Lifting of measures (Art. 7), which, according to the authors, may reflect the lawmaker's intention; specifically, the placement of the rules on sanctions before the procedural rules suggests that these measures do not seem to be adopted as a result of a lengthy procedure based on a dialogue between the Commission and the Member State concerned, as would logically be expected. Instead, the Regulation directly connects breaches of the rule of law with the possible measures (sanctions) and then provides the rules of procedure, followed by the lifting of such measures. Given that the conditionality mechanism itself is a procedure, it would have been more fortunate to provide the procedural rules first, which may (or may not) result in the adoption of measures, and finally, the lifting of measures.

Nevertheless, if the conditions set out in Art. 4 are fulfilled, the Regulation provides a long list of sanctions of which one or more may be adopted in accordance

1897 Duval, 2008, pp. 491–502.
1898 Similarly see: Dias da Silva, Givone and Sondermann, 2017, p. 2.
1899 Høj et al., 2006, p. 130.
1900 Kawecka-Wyrzykowska, 2017, p. 125.

with the procedure set out in Art. 6. The Regulation distinguishes between two categories: (a) where the Commission implements the Union budget in direct or indirect management pursuant to points (a) and (c) of Art. 62(1) of the Financial Regulation and where a government entity is the recipient; and (b) where the Commission implements the Union budget under shared management with Member States pursuant to point (b) of Art. 62(1) of the Financial Regulation. In the first case, five measures could be adopted; namely: (i) a suspension of payments or the implementation of the legal commitment, or a termination of the legal commitment pursuant to Art. 131(3) of the Financial Regulation; (ii) a prohibition on entering into new legal commitments; (iii) a suspension of the disbursement of instalments in full or in part or an early repayment of loans guaranteed by the Union budget; (iv) a suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget; and (v) a prohibition on entering into new agreements on loans or other instruments guaranteed by the Union budget.[1901]

Furthermore, in the second case, pursuant to Art. 5(1)(b), the Regulation envisages six measures: (i) a suspension of the approval of one or more programmes or an amendment thereof; (ii) a suspension of commitments; (iii) a reduction of commitments, including through financial corrections or transfers to other spending programmes; (iv) a reduction of pre-financing; (v) an interruption of payment deadlines; and (vi) a suspension of payments.[1902]

Art. 5 further provides that the measures taken shall be proportionate and determined in light of the potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The measures shall be taken in light of the nature, duration, gravity and scope of the breaches of the principles of the rule of law and shall aim at targeting Union actions affected by the breaches.[1903] Upon the request of the EP during the first reading of the Proposal, additional provisions were adopted concerning the obligations of Member States. According to the general rule, the imposition of the measures shall not affect the obligations of government entities or Member States to implement the programme or fund affected by the measure, especially their obligations towards final recipients or beneficiaries, including their obligation to make payments.[1904] The Regulation establishes that the Commission shall provide information and guidance for the benefit of final recipients and beneficiaries and do its utmost to ensure that any amount due from government entities or Member States is effectively paid to final recipients or beneficiaries.[1905]

These provisions were included in order to reinforce the protection of final beneficiaries through obligations for the Commission to provide information and

1901 Regulation 2020/2092, Art. 5(1) (a). It is worth noting that the measures listed in (iii)–(v) were not included in the Proposal. See: European Commission, 2018, Art. 4 (Content of measures) (1) (a).
1902 Regulation 2020/2092, Art. 5(1) (b).
1903 Ibid., Art. 5 (3).
1904 Ibid., Art. 5 (2).
1905 Ibid., Art. 5 (4)–(5).

guidance, as pointed out by the Commission after the first reading of the Proposal.[1906] Given that the aim of the mechanism is to protect the Union budget, the Commission tries to protect non-state or non-governmental final beneficiaries by substituting the suspended or reduced EU funds with national funds (as the Member State is still obliged to implement the affected programmes). Yet, despite the recommendations of the Court of Auditors and the Committee of the Regions, the Regulation did not introduce a requirement for an impact assessment on the national budget. The Court of Auditors highlighted the necessity to assess the possible budgetary implications in the EU funding for the national budget of the Member State with due regard to the principle of proportionality and non-discrimination.[1907] Furthermore, the Committee of the Regions also recommended the Commission provide a sufficient assessment of compliance with the subsidiary principle and the potential impact of the measures on the financial situation of local and regional authorities.[1908]

Notwithstanding these explicit recommendations, the Commission did not conduct an impact assessment of the proposed measures on the Hungarian national budget in its Proposal for a Council implementing decision. The Commission proposed the suspension of 65% of the commitments in three operational programmes for the period 2021–2027 pursuant to Art. 5(1)(b)(ii) and the prohibition on entering into new legal commitments with any public interest trust and any entity maintained by them under Art. 5(1)(a)(ii).[1909] However, the Commission only examined the potential impact of the breaches of the principles of the rule of law on the Union budget.[1910] It is regrettable that the Commission did not consider the budgetary implications on the national budget of the proposed measures from the perspective of both the State and the final beneficiaries of the obligations. In the absence of any precedent of the practical implementation of the conditionality mechanism, the suspension of financial commitments for an undefined timeframe and without any impact assessment on the national budget may question the proportionality and the justifiability of the measures, especially if one takes into account that the Commission could also not quantify the 'significant potential impact' of the identified breaches on the Union budget in the Explanatory Memorandum of the mentioned Proposal.[1911] On the other hand, an impact assessment on the national budget would also serve the interest of the final beneficiaries of the obligations. The preparatory documents all emphasise that the consequences of the measures shall have a sufficient connection with the aim of the funding; therefore, EU institutions shall ensure that the consequences do not fall on those who are responsible for the breaches. It is worth noting, however, that while the Commission's Proposal, the Opinion of the Court of Auditors, and the Opinion of the Economic and Social Committee expressly mention Erasmus students,

1906 European Commission, 2020, 3.
1907 Court of Auditors, 2018, Recommendation 4.
1908 Committee of the Regions, 2018, Amendment 4.
1909 European Commission, 2022a, Art. 2.
1910 Ibid., Explanatory Memorandum, 8.
1911 Ibid., Explanatory Memorandum, 8.3.

researchers, or civil society organisations,[1912] the Regulation does not specify final beneficiaries; moreover, only Recital 19 provides that the Commission shall *take into account* the potential impact of the adoption of measures on final recipients. However, the suspension of the Erasmus and Horizon Europe programmes in connection with certain Hungarian universities, as proposed by the Commission in early 2023 stands in stark contrast with the considerations suggested by the aforementioned opinions, particularly because the suspension of these programmes directly and disproportionately affects the final beneficiaries, especially students and researchers.

Furthermore, the Legal Service of the Council also expressed its concerns in its Opinion on the Commission's original proposal. The Legal Service stressed that the Treaties shall provide an exhaustive list of remedies and sanctions that could be imposed on the Member States. Such measures are laid down in Arts. 258 to 260 TFEU (actions for infringement before the CJEU) and Art. 7 TEU.[1913] As for the infringement procedures, the Legal Service pointed out that the conditionality mechanism did not circumvent the procedure laid down in Article 258, provided that each of the procedures were independent from each other because they pursued different aims and were governed by different rules.[1914] Regarding the Art. 7 procedure, the problem arises in connection with the pursued aims. The Legal Service pointed out that both the Art. 7 procedure and the conditionality mechanism 'may lead to common results'; that is, to introduce sanctions that result in the suspension of certain of the rights of the Member State concerned, also including the right to benefitting from EU funds.[1915] This problem was addressed in the aforementioned CJEU decision in Case C-156/21, in which the Court confirmed that the two procedures pursued different aims, provided that the sanctions envisaged in the conditionality mechanism are conditional to the impact of the breaches of the rule of law on the Union's budget.[1916]

Concerning the sanctions envisaged by the Conditionality Regulation, it could be concluded from the legislative process and the Opinion of the Legal Service that the proposed conditionality could not be used as a way to introduce alternative forms of sanctions where the Treaties provide specific mechanisms.[1917] As presented above, the opinions significantly differ in connection with the legitimacy of the sanctions provided by the conditionality mechanism, also considering the width of the Commission's discretionary power in the procedure. The issue of the pursued aim should also be observed from the point of view of the affected countries. While there were ongoing Art. 7 procedures against Poland[1918] and Hungary,[1919] the conditionality

1912 European Commission, 2018, Explanatory Memorandum, 1; Court of Auditors, 2018 28; European Economic and Social Committee, 2019, 4.9.
1913 Council of the European Union, 2018, 10.
1914 Council of the European Union, 2018, 16.
1915 Council of the European Union, 2018, 19–32.
1916 *Hungary v European Parliament and Council of the European Union*, Case C-156/21, para. 178.
1917 Baraggia and Bonelli, 2022, p. 150.
1918 See: European Commission, 2017.
1919 See: European Parliament, 2018.

mechanism was supposedly developed to address these Member States – although, for obvious reasons, it is not mentioned in the preparatory documents. Remarkably, these two States brought actions for annulment on the legality of the Regulation on 11 March 2021, which resulted in the adoption of the abovementioned case C-156/21 (Hungary v Parliament and Council) and case C-157/21 (Poland v Parliament and Council). Against this background, the mechanism was triggered against Hungary on 18 September 2022, as analysed above.[1920] On the other hand, the Regulation formally respects the principle of equality as it applies to all Member States and does not explicitly address any State. However, considering that this mechanism and the Art. 7 procedure is triggered against the same Member State, Hungary, the question arises as to whether it was developed as another tool to tackle the same problem through a different mechanism.[1921] The impact of the practical implementation of the mechanism is yet to be seen, however, at this moment it could be concluded that it certainly bolsters divisions between different parts of the European Union, primarily between Western and Eastern Member States.[1922]

Therefore, it could be concluded that the questions arising during the legislative procedure of the conditionality mechanism were not reassuringly answered by the final text of the adopted Regulation, and the practical implementation of the mechanism in the case of Hungary also raises further concerns. The absence of any clear criteria for the choice and extent of measures questions the proportionality and transparency of the mechanism, which stems from the problem of whether the Commission is assigned too much discretionary power in the procedure. The problems of the choice of measures are exacerbated by the fact that the Regulation does not require any impact assessment of the proposed measures on the national budget. Additionally, the facts that the Commission could not quantify the impact of the breaches of the rule of law by the Member State on the Union budget, and it did not even try to assess the impact of the proposed measures on the national and subnational budgets also leads to the question of whether and how the legitimate interests of the final recipients are be safeguarded in the procedure.

III.5.5 Sanctions in the Cooperation and Verification Mechanism

The state was obliged to carry out its own assessment, while the Commission carried out its own evaluation, checked the self-assessment, and, informed by its own sources, made findings. Therefore, the mildest form of sanction was the Commission's

1920 See: European Commission, 2022.
1921 See: Halmai, 2018, pp. 171–172.
1922 Baraggia and Bonelli, 2022, p. 153.

own reports,[1923] which could be critical, highlighting shortcomings or inadequacies of the solution chosen by Romania or Bulgaria, or even the failure to find a solution. In other words, the Commission reports were also a means of accountability, in which no clear correction of the shortcomings was ordered, but the critical findings undoubtedly had a certain coercive effect.

Some celebrate the reports and the process as an important tool for the Europeanisation of Romania, but there have been debates about the objectivity and consistency of the CVM reports. The reports may have sometimes been influenced by political considerations or biases, leading to a proven selective approach in assessing progress and shortcomings. The CVM reports selectively focused on certain aspects or cases, which sometimes potentially led to an incomplete or skewed picture of the overall progress or regress made by Romania or Bulgaria. Important crises in the judiciary were also analysed, sometimes, superficially or treated unilaterally, implying that the reports not always provided a fully-accurate or comprehensive assessment of the situation in the country under evaluation. Furthermore, the reports did not always adequately capture the complexities and nuances of the situation on the ground, and the European Commission did not always have a deep understanding of the specific context and challenges of Romania and Bulgaria. Therefore, the methodology used by the European Commission to assess progress may also be subject to criticism. In general, there is space for this methodology to be more transparent, consistent, and inclusive to ensure accuracy and fairness in the evaluation process. As aforementioned, concerns have been raised that the CVM reports could be subject to political influence or biases, potentially affecting the accuracy and objectivity of the assessments.

The reports were used as tools of political dialogue, generally urging Romania and Bulgaria to take the necessary steps to address the identified issues. They were also made public, such that they could be considered as public statements expressing concerns and calling for specific actions to be taken, influencing internal political processes and being reflected by the press and public opinion.

The articles of the CVM decisions for Romania and Bulgaria did not contain an effective sanction apparatus other the reporting, but the recitals of the preamble did. For example, in case of Romania, it was stated that:

> If Romania should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Arts. 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Romanian judgements, and judicial decisions, such as European arrest warrants.[1924]

1923 See above.
1924 Recital 7.

Moreover, the decision did not preclude the adoption of safeguard measures 'at any time',[1925] and the duration of the measures was indefinite, and should only be repealed when all benchmarks had been satisfactorily fulfilled.[1926] Therefore, it was up to the Commission to decide when to end the CVM, which it finally committed to doing on 15 September 2023. This was in contradiction with Art. 37 of the Accession Treaty, which made possible the initiation of safeguard measures for three years after the accession (1st January 2007).[1927] Therefore, the sanction apparatus of the CVM practically included the following:

> a) safeguard measures based on Arts. 37 and 38 of the Act of Accession. Practically the Commission could – in case of failure in the implementation of the commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach – adopt European regulations or decisions establishing appropriate measures, which is a very broad category that placed extraordinary powers in the hands of the Commission, and which the Commission ultimately did not use;
> b) from a procedural point of view, such safeguard measures could be adopted by the Commission upon the motivated request of a Member State or on its own initiative.
> c) the CVM decisions detailed these safeguard measures with a focus on justice reforms, and included the suspension of the Member States' obligation to recognise and execute, under the conditions laid down in Community law, Romanian or Bulgarian judgements, and judicial decisions, such as European arrest warrants.[1928]

As it was stated before, although the Commission has criticised the two states in several reports, it has not felt the need to take such drastic safeguard measures. The aim of the Commission was to work collaboratively with the countries under the CVM to support their efforts in achieving the required reforms.

1925 Recital 8, in a formulation contrary to the primary EU law (see the analysis of Art. 37 from the Accession Treaty in section 1).
1926 Recital 9.
1927 For details, see above.
1928 Recital 7 from both CVM decisions.

Part IV

THE SUPRANATIONAL INTERPRETATION OF THE RULE OF LAW: TRENDS AND CONCLUSIONS FROM A CENTRAL EUROPEAN PERSPECTIVE

Introduction to Trends and Conclusions From a Central European Perspective

This chapter analyses the current trends and tendencies regarding the development of the supranational interpretation of the rule of law in the European Union (EU). The supranationalisation of the concept of the rule of law is embedded in the process of creating constitutional federalism in Europe with the instruments of soft and hard law. The research hypothesises that the current – normative and institutional – framework enables the pursuit of the accelerating constitutional federation of the EU. Meanwhile, this process should also be examined from the Member States' perspective, particularly in light of their constitutional identity, which, according to the Treaties, should be considered by European institutions in the legislative processes. The chapter analyses the role of national constitutional identities of Central European countries in the process of supranationalisation from the perspective of the relationship between national legal systems and EU law, as well as between institutions controlling the rule of law, namely the CJEU and national constitutional or supreme courts.

IV.1 Normative Framework: The Relationship Between the Legal Systems of the Member States and EU Law

IV.1.1 The Principle of Primacy in Light of the Constitutional Identity of Member States

The relationship between European Union (EU) law and the national legal systems of Member States is primarily governed by the principle of primacy, as laid down by the Court of Justice of the EU (CJEU) in the *Costa v. ENEL* case in 1964.[1929] This judgment is particularly important for the interpretation of the relationship between EU law and domestic laws because the primacy or the supremacy of EU law does not explicitly appear in the Treaties; thus, in the absence of an explicit reference to it in primary law, the principle essentially remained judge-made law.[1930] The European Convention of 2002–2003 attempted to codify the principle in the draft Constitutional Treaty of 2004, providing that '[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'.[1931] However, as it is well-known, the Constitutional Treaty did not enter into force due to its rejection in France and the Netherlands in 2005.

The question of codifying the principle of primacy also emerged during the negotiation process of the Lisbon Treaty in 2007. The European Council tried to find a compromise solution to codify the primacy of EU law in order to avoid any misunderstanding, namely that the absence of it should not be understood as Member States' rejection, considering that Member States by that time had implicitly accepted the case law of the CJEU, including the principle of primacy. On the other hand, several Member States expressed their concerns that the codification of the principle risked

1929 *Costa v. ENEL*, Case C-6/64.
1930 Claes, 2015, p. 179.
1931 Draft Treaty establishing a Constitution for Europe, 2004, Art. I-6.

the development of a federal state in place of the European Community.[1932] The compromise solution was the inclusion of Declaration 17 to the Treaty on European Union (TEU), which provides that:

> […] in accordance with well-settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Opinion of the Council Legal Service is also attached to the Declaration, which essentially pronounces that the principle is inherent to the specific nature of the European Community, as established by the CJEU's case law, particularly the *Costa v. ENEL* case.[1933] Although the declaration as such is not binding, its applicability was confirmed by the CJEU in *RS (Effet des arrêts d'une cour constitutionnelle)*.[1934]

Therefore, while the primacy of EU law over ordinary national legislation is by now generally accepted,[1935] there is a growing discussion about its primacy over national constitutional law. While the CJEU laid down that primacy also applied to national constitutional provisions in the *Internationale Handelsgesellschaft* case in 1970,[1936] the question of whether it also applies to constitutional identity as a whole, and not to selected constitutional provisions that regulate fields where Member States have ceded sovereignty to the EU, is more difficult to determine. In Art. 4(2), the TEU introduced the duty to respect the national identities of Member States 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'.[1937] Importantly, the TEU does not use the term 'constitutional identity', but operates with 'national identity'. Considering that the CJEU has avoided directly addressing the relation or equivalence between the two terms, and that certain domestic court decisions of Member States and most scientific literature tend to consider them equal,[1938] it could be assumed that the two concepts do not differ significantly.[1939]

Art. 4(2) TEU builds on Art. 6(3) of the Amsterdam Treaty and the earlier Art. F(1) of the Maastricht Treaty, which expressed a narrower concept of national identity, as they did not refer to the 'fundamental political and constitutional structures'. The explicit reference to these structures may also imply that the Lisbon Treaty distances

1932 Barber, Cahill, and Ekins, 2019. See also: Davis Cross, 2017.
1933 Treaty on European Union (TEU), Declaration 17.
1934 RS (Effet des arrêts d'une cour constitutionnelle), C-430/21, para. 49.
1935 Claes, 2015, p. 194.
1936 *Internationale Handelsgesellschaft*, C-11/70.
1937 Art. 4(2) of the TEU.
1938 Orbán, 2022, p. 145.
1939 von Bogdandy and Schill, 2011, pp. 1427–1429.

itself from the cultural and linguistic aspect of national identity, and rather focuses on its constitutional dimension.[1940] The importance of the new 'identity clause' of the Lisbon Treaty is also shown by the increasing number of cases before the CJEU referring to it. These cases, however, rather tend to address culture-related issues[1941] – including the use of language[1942] and the right to a name[1943] – in which the Court generally concluded that the enjoyment of these rights may not hinder the effective implementation of EU law, while also taking into account the constitutional identity of the given Member States. Despite the increasing number of cases referring to Art. 4(2) TEU, it could be concluded that in most of such judgments, references to issues concerning national identity only played a secondary role.[1944] Therefore, the CJEU's practice on the question of national identity or constitutional identity is relatively narrow, and does not provide a comprehensive understanding of its interpretation nor of its role in defining the relationship between national constitutional law and EU law.

IV.1.2 Constitutional Courts' Approaches to the Relationship Between EU Law and the Constitutional Law of the Member States

A. Constitutional Doctrines Regarding the Primacy of EU Law and the National Constitutional Order

Member States' constitutional courts or supreme courts (in countries where no constitutional court exists) tend to position themselves in the discussion about the primacy of EU law vis-à-vis national constitutional law and develop certain conditions on the primacy of EU law. The need, at this point, to define national constitutional law in the context of the primacy of EU law stems from the sovereignty of Member States. Although the Treaties do not mention the sovereignty of Member States, Art. 5 TEU provides that the EU shall act only within the limits of the competences conferred upon it by the Member States, while competences not conferred upon the Union remain with the Member States.[1945]

Therefore, the Member States did not confer their sovereignty to the Union, which also implies that EU law is not superior nor hierarchically above domestic law,

1940 Murphy, 2017, pp. 98–99.
1941 *European Commission v. Grand Duchy of Luxembourg*, C-51/08.
1942 *Anton Las v. PSA Antwerp NV*, C-202/11.
1943 *Ilonka Sayn Wittgenstein and Landeshauptmann von Wien*, C-208/09; Vardyn and Wardyn, C-391/09.
1944 Orbán, 2022, pp. 160–166.
1945 Art. 5(1) and (2) TEU.

as would be the case in federal states.[1946] This implies that the aforementioned principle of primacy does not affect the validity of the conflicting domestic provision, but its applicability vis-à-vis the EU norm. Consequently, as long as Member States are sovereign, domestic mechanisms shall be provided for the enforcement of domestic laws, as developed by the practice of several constitutional courts. The earliest examples of using 'constitutional identity' in the context of EU law include the practices of the French and German constitutional courts.[1947] The forthcoming paragraphs will be dedicated to a brief presentation of these doctrines, and to some parallel examples from the case laws of other constitutional courts.

Since 2006, the French Constitutional Council (*Conseil Constitutionnel*) has referred to the 'constitutional identity of France' ('*identité constitutionnelle de la France*'), and concluded that 'the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto'.[1948] Furthermore, in 2021, the Constitutional Council specified the content of the term for the first time, providing that the prohibition of delegating the exercise of public power to private persons was a principle inherent to constitutional identity.[1949] The French legal system differentiates between 'conventionality' ('*conventionnalité*') and 'constitutionality' ('*constitutionalité*'), the former referring to consistency with treaty provisions and the latter referring to consistency with the constitution.[1950] Based on this distinction, ensuring the primacy of EU law is primarily the responsibility of the ordinary courts, while the Constitutional Council reviews, when there is a manifest inconsistency with an underlying directive, the compatibility with EU law of a parliamentary act implementing a directive.[1951] Thus, the notion of constitutional identity in the French legal system may also limit the application of the principle of primacy of EU law.[1952]

Furthermore, the constitutional identity review developed by the German Constitutional Court (*Bundesverfassungsgericht, BVerfG*) also introduces conditions on the primacy of EU law. In 2009, the BVerfG was asked to clarify the compatibility of

1946 See, for instance, Art. 31 of the German Basic Law or Art. 6 of the Constitution of the United States.

1947 While the focus of the present study is on the approach of Central European constitutional courts to constitutional identity, it shall briefly be mentioned that Grabenwarter differentiates between three distinct groups of Member States. Some Member States, such as the Netherlands, fully recognise the primacy of EU law as not derived from the constitution, but as a given doctrine derived from EU law, which excludes the possibility of conflicts of laws between EU law and the national constitution. Second, certain Member States recognise the limited supremacy of EU law over constitutional law, which is the case of the Italian *controlimiti* doctrine, and the Spanish and the German doctrines. The third group of Member States affirm the primacy of the constitution, including France. See: Grabenwarter, 2010, pp. 85–91.

1948 Decision no 2006-540DC of 27 July 2006, Conseil Constitutionnel, para 19.

1949 Decision n8 2021-940 QPC, 15 October 2021, Conseil Constitutionnel.

1950 Simon, 2011.

1951 Claes, 2015, pp. 189–190.

1952 Mathieu, 2022.

the Lisbon Treaty with Art. 23 of the German Basic Law,[1953] and imposed limitations on future integration, primarily by determining the limits to the transfer of competencies to the EU. The BVerfG examined the Lisbon Treaty from the perspective of the principle of conferral and sovereignty of the Member States, in light of the fact that the Member States transferred certain rights to the Union in the new treaty. Considering that European unification is based on the treaty union of sovereign states, the BVerfG carefully assessed whether the treaty provisions satisfy the requirements of ensuring the democratic legitimacy of the transfer of sovereign rights.[1954] The Court concluded that the Lisbon Treaty is compatible with the constitutional provisions of Germany, and therefore, it does not pose a threat to the inalienable state sovereignty and the national identity of the German state. In addition, it defined the scope of core state functions, particularly the role of the democratically-elected parliament, the Bundestag, which – as opposed to the EU decisions adopted by the European Parliament – provides the necessary democratic legitimacy.[1955]

The Court's argumentation in the Lisbon ruling was based on the BVerfG's prior case law on the matter, particularly on the Maastricht decision,[1956] in which the Court assessed the compatibility of the Maastricht Treaty with Art. 23 of the German Basic Law. The BVerfG, similarly to the Lisbon ruling, emphasised that the transfer of sovereign rights to a community of states shall be legitimated through the national parliaments. However, at that time, the BVerfG did not elaborate on the nature of such responsibilities at the national level.[1957] Furthermore, the Lisbon ruling also assessed the development of political integration in the EU, which was not addressed in the Maastricht decision, where the BVerfG pointed out that the Union's competencies were primarily limited to the economic field. The Lisbon Treaty, which was adopted after the failed constitutional project (i.e. the draft Constitutional Treaty), introduced significant changes in the structure of exercising powers by including three types of competences (exclusive, shared, and supporting competence).[1958] In light of the politicisation of the Union, the BVerfG noted that the participation of Germany in the development of the EU also comprises a political union, in addition to the formerly developed economic and monetary union.[1959] Therefore, the careful assessment provided by the BVerfG in connection with the entry into force of the

1953 Art. 23 of the German Basic Law defines the relationship of the Federal Republic of Germany to the European Union, providing that '[…] the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat'.

1954 Steinbach, 2010, pp. 369–370.

1955 Case 2 BvE 2/08, Judgment of 30 June 2009, German Federal Constitutional Court.

1956 Cases 2 BvR 2134/92, 2 BvR 2159/92, Judgment of October 12, 1993, German Federal Constitutional Court.

1957 Steinbach, 2010, pp. 373–374.

1958 Reh, 2009, pp. 631–639.

1959 Steinbach, 2010, pp. 370–371.

Maastricht Treaty and the Lisbon Treaty shows that constitutional identity plays an important role in safeguarding the development of the integration of the Union.

The French and German constitutional doctrines are not isolated examples of efforts to define the limits of the principle of primacy. Other constitutional or supreme courts also articulated certain exceptions to the primacy of EU law if it interferes with the fundamental principles of the national constitution. For instance, owing to the absence of any clear constitutional provision on the principle of primacy, the Italian Constitutional Court (*Corte Costituzionale*) pronounced, in the Frontini decision in 1973, the primacy of EU law over ordinary legislation, provided that EU law does not violate the fundamental principles of the Italian constitutional order and the inalienable rights of a human.[1960] Since the adoption of the Frontini decision, the Italian Constitutional Court developed the doctrine of '*controlimiti*' in the Taricco judgments,[1961] according to which the fundamental order of the Constitution, the protection of human rights, and constitutional identity may also appear as a counterbalance to the application of EU law.[1962]

Furthermore, the Spanish Constitutional Court (*Tribunal Constitucional)* assessed the primacy clause of the draft Constitutional Treaty and its compatibility with the Spanish constitutional order in Declaration 1/2004. The Court pronounced that there was no contradiction between the Spanish Constitution and the primacy of EU law as laid down in Art. I-6 of the Constitutional Treaty, but reserved the right of ultimately safeguarding the supremacy of the Spanish Constitution to the Constitutional Court in the unlikely case where EU law is considered irreconcilable with the constitution.[1963] The Declaration of the Court did not interpret national identity in the context of the principle of primacy, yet remains remarkable for acknowledging the ultimate supremacy of the national constitution over any other EU norm, including the Constitutional Treaty.[1964]

Similarly to the BVerfG, the Danish Supreme Court (*Højesteret*) adopted a Lisbon decision in 2012[1965] that examined the adoption of the Lisbon Treaty from the perspective of Danish procedural rules and touched upon the issue of constitutional identity. The Court also addressed the role of the aforementioned Declaration 17 attached to the Lisbon Treaty, concluding that the fact that the Opinion of the Council Legal Service regarding the primacy of EU law was attached to the Treaty did not change the Danish court's role in testing the constitutionality of EU acts.[1966] Although the role of the Danish Supreme Court in defining constitutional identity is limited compared to the role of the BVerfG,[1967] its Lisbon decision significantly

1960 Judgment n. 183/1973 of 27 December 1973, Italian Constitutional Court.
1961 Judgment n. 24/2017 of 26 January 2017, Italian Constitutional Court.
1962 Traser et al., 2020, pp. 161–162.
1963 Declaration 1/2004 of the Spanish Constitutional Tribunal.
1964 García, 2005, p. 1024.
1965 Decision n. 199/2021 of 20 February 2013, Danish Supreme Court.
1966 Supreme Court judgment of 20 Feb. 2013, Case No. 199/2012, p. 13.
1967 Krunke, 2014, pp. 568–569.

contributes to defining the limits of the principle of primacy in light of the national identity.

These examples underpin that national constitutional courts tend to define the theoretical limits of the primacy of EU law and develop their interpretation of the principle of primacy in light of their constitutional identity. While the CJEU has limited practice on Art. 4(2) TEU providing the equality of Member States and respect for their national identities, it is left to Member States' courts to define the content of their national or constitutional identity, and how much room for manoeuvre it provides to the state to practice part of its sovereignty through the EU. Although the aforementioned constitutional doctrines pose limitations to the application of the primacy of EU law, these doctrines are generally acknowledged as they constructively take part in the dialogue with the CJEU.[1968] On the other hand, the use of constitutional identity claims to limit the scope of the principle of primacy is a delicate issue, as it divides Member States' approaches. Scientific literature warns that constitutional identity may be used either constructively or destructively, or in other words, as a 'shield or a sword'.[1969] In light of the limited CJEU practice in this regard, the limits of the use of constitutional identity are not defined, and therefore, it is particularly difficult to assess whether a Member State's constitutional doctrine constructively contributes to this dialogue.

B. The Concept of Constitutional Identity in the Case Law of Selected Central European Countries

Central European countries may equally participate in the dialogue between their national constitutional courts and the CJEU. However, given the leading role of the BVerfG, they may receive limited attention in the scientific literature. Therefore, this section is dedicated to the evaluation and comparison of the constitutional identity doctrines developed by selected Central European countries, including Hungary, Poland, Romania, the Czech Republic, Slovakia, Croatia, and Slovenia.

Based on the analysis of related case law of the constitutional courts regarding the relationship between EU law and national constitutional law, it could be concluded that the constitutional courts of the selected Central European countries, inspired by the leading example of the BVerfG, also reflected on the question of the primacy of EU law vis-à-vis the national constitutional provisions. Importantly, an extensive analysis of the case law of the respective constitutional courts would exceed the limits of this study, therefore, only those aspects of the selected judgments will be highlighted that are relevant for the purposes of this research.

First, the compatibility of the Lisbon Treaty with the domestic constitutional order was remarkably assessed by the Czech, Polish, and Hungarian constitutional courts. In 2006, the Czech Constitutional Court (*Ústavní soud*) pronounced that it

1968 Bárd, Chronowski and Fleck, 2023, pp. 11–15. See also: Scholtes, 2023.
1969 Faraguna, 2017.

would not recognise the primacy of EU law if the foundations of state sovereignty or essential state attributes of democracy and the rule of law were at risk.[1970] Furthermore, the same court examined the Lisbon Treaty in two decisions: in the first case, in 2008, the Court conducted an *ex-ante* review of the Treaty against the core of the constitution, concluding that it did not contradict the Czech constitutional order.[1971] However, this ruling did not assess the entirety of the Treaty, and left several questions unanswered, therefore, the Court was asked for the second time to review the Treaty after its ratification by the Czech Parliament. In the second Lisbon ruling in 2009, the Court, also considering the ruling of the BVerfG, pronounced that the Treaty complies with the constitutional order of the Czech Republic, and reserved the right to review EU law against the essential core of the constitution.[1972] This reservation, similar to what was done regarding the concept of the Czech constitutional identity, was not elaborated further in the jurisprudence of the Czech Constitutional Court. Nonetheless, the attempt to identify certain limits to the primacy of EU law also contributes to the debate on the constitutionalisation of the Union.

The Polish Constitutional Tribunal (*Trybunał Konstytucyjny*) has extensive case law on constitutional identity and the primacy of EU law. Owing to study limitations, we may only focus on the decisions that could be compared with the rulings of other constitutional courts, primarily those relating to the constitutional review of the Lisbon Treaty and the development of the interpretation of the primacy of EU law in the Polish constitutional doctrine. The Tribunal defined constitutional identity in *Case K 32/09,* which assessed the constitutionality of the Lisbon Treaty.[1973] The Tribunal pronounced that constitutional identity blocks the possibility of conferring authority on the EU over the fundamental principles of the Polish Constitution or the provisions on the rights of the individual. It also affirmed that constitutional identity, as laid down in Art. 90 of the Constitution, is also applicable in case of an amendment to Treaty provisions, and if amendments result in the conferral of competences on the EU.[1974] The ruling also established the limits of conforming to the interpretation of EU norms, stating that such an interpretation may not lead to '[…] results contrary to the explicit wording of constitutional norms and are impossible to reconcile with the minimum guarantee functions fulfilled by the Constitution'.[1975] Therefore, the limits of implementing the primacy of EU law were justified by the principle of preserving sovereignty in the integration process that stems from the Polish Constitution.[1976]

1970 Case Pl. ÚS 50/04, Judgment of 8 March 2006; Case Pl. ÚS 66/04, Judgment of 3 May 2006, Czech Constitutional Court, para. 53.
1971 Rovná, 2011, pp. 112–121.
1972 Case Pl. ÚS 29/09, Judgment of 3 November 2009, Czech Constitutional Court.
1973 Case K 32/09, Judgment of 24 November 2010, Polish Constitutional Tribunal.
1974 Muszyński, 2023, pp. 195–196.
1975 Case K 32/09, Judgment of 24 November 2010, Polish Constitutional Tribunal, p. 28.
1976 Sołtys, 2017, pp. 54–56.

Since the adoption of the Lisbon Treaty, the Polish Constitutional Tribunal significantly developed its jurisprudence on the limits of the principle of primacy of EU law. Notably, in 2021, the Polish Constitutional Tribunal adopted judgment *K 3/21*, which examined the constitutionality of certain provisions of the Lisbon Treaty. The case concerned the appointment of judges and was initiated after the adoption of a CJEU decision on the matter which concluded that the principle of primacy was binding on all bodies of a Member State, setting aside the prior ruling of the Constitutional Tribunal.[1977] In *K 3/21*, the Polish court interpreted Arts. 1, 2, and 19 TEU from the perspective of the Polish Constitution, and concluded them to be partially unconstitutional.[1978] As for Art. 1 TEU, which provides that the Treaty contributes to creating an 'ever closer Union among the peoples of Europe', the Tribunal held that such a process allows for a new stage of European integration in which: (a) the EU authorities '[…] act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties', (b) 'the Constitution is not the supreme law of the Republic of Poland […]', and (c) 'the Republic of Poland may not function as a sovereign and democratic state'.[1979] In light of the CJEU judgment mentioned above, the Polish court considered that the CJEU's competences go beyond those conferred on the EU, which consequently leads to the loss of sovereignty of Poland. As concluded in the Polish Lisbon judgment, the principle of sovereignty is of key importance in the development of the integration process, which, therefore, is formulated here as a limit to the principle of primacy of EU law.

Furthermore, the Tribunal also pronounced the unconstitutionality of Arts. 2 and 19 TEU. The second subparagraph of Art. 19(1) TEU lays down that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', which, according to the Tribunal, allows national courts to set aside the Constitution and the rulings of the Constitutional Tribunal, and to review the legality of the procedure for appointing a judge, which is also contrary to the Polish constitutional provisions. The Tribunal further argued that Art. 2 TEU – which declares the values upon which the EU is founded – does not set clear rules on the functioning of the judiciary, and that, therefore, the aforementioned competences may not be derived from it.[1980]

The clear limits on the principle of primacy posed by the Polish Tribunal received heavy criticism in the scientific literature for allegedly overstepping its competences and even halting the integration process.[1981] However, the judgment arguably does not represent an outright and unconditional rejection of the supremacy of EU law, but rather a conditional restriction of it by finding certain CJEU interpretations of the Treaties incompatible with the Polish Constitution.[1982] The contested

1977 *A.B. and Others (Nomination des juges à la Cour suprême)*, C-824/18.
1978 Case K 3/21, Judgment of 7 October 2021, Polish Constitutional Tribunal.
1979 Ibid., 1–3.
1980 Ibid., 1–3.
1981 See: Scholtes, 2023; Gliszczyńska-Grabias and Sadurski, 2023; Blanke and Sander, 2023.
1982 Polański, 2022, p. 346; Janusz-Pohl, 2023, p. 94.

judgment also highlights the vagueness of the Treaties,[1983] and consequently, implies the need that the CJEU's interpretation of such vague provisions shall be based on the interpretation of national courts.[1984]

Furthermore, the Hungarian constitutional doctrine is particularly noteworthy, as the Constitutional Court of Hungary (*Magyarország Alkotmánybírósága*) also developed its own interpretation of constitutional identity in light of the Hungarian constitution, the Fundamental Law that was adopted in 2011,[1985] after the Lisbon Treaty entered into force. In its ruling, the Hungarian Constitutional Court emphasised that the acceptance of the binding nature of the Treaty does not pose a threat to the independence of the Hungarian state nor the prevalence of the rule of law. However, the ruling did not address the issue of constitutional identity in the integration process, even if it referred to the then-recent discussions about the role of constitutional identity in European integration in the practice of other constitutional courts, namely the aforementioned German, Czech, and Polish jurisprudence.[1986] The concept of constitutional identity was elaborated in further decisions, including *Decision 22/2016 (XII.5.)*, which interpreted the 'integration clause' of the Fundamental Law. According to the Hungarian Constitutional Court, the scope of constitutional identity can only be considered on a case-by-case basis, 'based on the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of the historical constitution'. The Constitutional Court considered this concept as a bridge between Member States and European integration and recognised the importance of the constitutional dialogue between the CJEU and the national courts. From the perspective of this analysis, perhaps the most significant finding of the Court in this decision is that it pronounces that the joint exercise of powers shall not result in the violation of human dignity or the essential content of fundamental rights.[1987]

The Constitutional Court approached the relationship between the European legal order and the national constitution from the perspective of the integration clause of the Fundamental Law in *Decision 2/2019 (III.5.)*. The Court primarily addressed the relationship between the Fundamental Law and the legal order of the EU in connection with the constitutionality of the obligation of awarding refugee status. The decision pointed out that Art. E (the integration clause) contains the constitutional basis upon which Hungary participates in the EU as a Member State, and noted that this participation is not self-serving, as it should serve the purpose of expanding human rights, well-being, and security.[1988] The Court, while expressly accepting the principle of primacy,[1989] also noted that EU law does not fit in the hierarchy of the

1983 Syryt, 2023, pp. 101–102.
1984 Walczuk, 2023.
1985 See: The Fundamental Law of Hungary.
1986 Decision 143/2010. (VII. 14.), Hungarian Constitutional Court, III.1.
1987 Decision 22/2016 (XII.5.), Hungarian Constitutional Court, I. 49.
1988 Decision 2/2019 (III.5.), Hungarian Constitutional Court, III.15.
1989 Decision 2/2019 (III.5.), Hungarian Constitutional Court, III.21 and III.25.

domestic sources of law, and therefore, the Hungarian court does not have the competence to annul EU law. However, as for domestic laws, the Court pronounced that it is the authentic interpreter of the Hungarian Fundamental Law, which shall not be derogated by any interpretation provided by other organs and shall be respected by everyone.[1990] The Court also stated that, when interpreting the Fundamental Law, it shall take into account the obligations that arise from Hungary's EU membership and other international treaties.[1991]

In *Decision 32/2021 (XII.20.)*, the Court also examined a constitutional aspect of migration, but from the perspective of constitutional identity. The Court examined the question of whether the implementation of the CJEU judgment in *Case C-808/18*[1992] would be compatible with the Hungarian Fundamental Law, particularly in light of the integration clause and the provision on constitutional identity. The Court extensively interpreted the role of constitutional identity in the Hungarian constitutional order, concluding that the inalienable right of Hungary to determine its territorial unity, population, form of government, and state structure shall be part of its constitutional identity.[1993] The Constitutional Court also pronounced that constitutional identity and sovereignty are not complementary, but rather are connected to each other because sovereignty safeguards the protection of Hungary's constitutional identity. Furthermore, considering the historical struggles of Hungary, the ambition to maintain the sovereign decision-making power is part of the country's national identity and, through constitutional interpretation, constitutional identity.[1994] In this decision, the Constitutional Court laid down the criteria that render it possible for national authorities to temporarily 'take back' certain fields from the EU that are generally transferred competencies.[1995] However, a clarification of key notions, such as the inefficient or deficient application of the joint exercise of powers,[1996] will be necessary in the future.

The doctrine of the Romanian Constitutional Court (*Curtea Constituțională a României*) is comparable to its Polish and Hungarian counterparts.[1997] *Decision 390/2021* is particularly remarkable from this perspective, as it assessed the limits of the principle of primacy of EU law in light of the national constitution. The Constitutional Court concluded that, although the accession clause to the EU requires that all national bodies of the State are obliged to implement and apply EU law, this obligation must not be interpreted by the Constitutional Court as disregarding the national constitutional identity, as Art. 148 of the Romanian Constitution empowers

1990 Decision 2/2019 (III.5.), Hungarian Constitutional Court, III.35.
1991 Decision 2/2019 (III.5.), Hungarian Constitutional Court, III. 37.
1992 Commission v. Hungary, C-808/18.
1993 Decision 32/2021 (XII.20.), Hungarian Constitutional Court, IV.109.
1994 Decision 32/2021 (XII.20.), Hungarian Constitutional Court, IV.99.
1995 Orbán and Szabó, 2022, p. 107.
1996 Blutman, 2022, p. 12.
1997 For an overview of the evolution of the Romanian Constitutional Court's jurisprudence vis-à-vis the CJEU, see: Benke, 2023.

the Constitutional Court to guarantee the supremacy of the national constitution. Therefore, the Court held that the primacy of EU law applies only in relation to national legal acts that do not have constitutional status.[1998] The adoption of the decision was embedded in a lengthy dialogue between the Constitutional Court and the CJEU about the establishment of a special tribunal for judges (Section for Investigation of Offences within the Judiciary, also known as SIOJ), which was also addressed by the CJEU in *Case C-430/21*. In this case, it essentially overruled the Constitutional Court's decision by pronouncing that the primacy of EU law precludes national rules even in cases where ordinary courts have no jurisdiction to examine the compatibility with EU law.[1999] The tense dialogue that unfolded between the Romanian Constitutional Court and the CJEU is a recent phenomenon, and thus it could be too early to draw definite conclusions about the development directions of the Romanian court's approach to constitutional identity. Nevertheless, the mentioned case certainly fits in the tendency of the constitutional courts' attempts to articulate their position on the primacy of EU law in light of the national constitutional identity.

Based on the comparison of the relevant findings of the Czech, Polish, Hungarian, and Romanian constitutional courts, one may draw the partial conclusion that all of them significantly contributed to interpreting the relationship between the national constitution and EU law in light of the principle of primacy. The mentioned courts drew significant inspiration from the German constitutional doctrine, which defines the limits of the primacy of EU law vis-à-vis the national constitution and attempted to define the role of national constitutional identity in the context of the dialogue between constitutional courts and the CJEU. Notwithstanding, the constitutional courts of other Central European countries may not have explicitly addressed the problem in their jurisprudence yet can provide valuable findings on the issue.

The Slovak Constitutional Court (*Ústavný súd*), for instance, identified the TEU and the Treaty on the Functioning of the European Union (TFEU) as part of a specific subcategory of international treaties, which have specific and distinguishing features as they are '[…] treaties by which the Slovak Republic has conferred the exercise of part of its powers on the European Communities and the European Union'.[2000] Furthermore, the Constitutional Court repeatedly refers to the 'material core of the Constitution' even in the absence of an explicit constitutional provision on the concept. The Court also held that the core of the Constitution, which essentially embraces the principles of a democratic state and the rule of law, also poses limitations to the revision and legislative processes.[2001] Although the Court did not refer

1998 Decision 390/2021 of 8 June 2021, Romanian Constitutional Court, para. 72.
1999 *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, para. 19.
2000 Karpat, 2023, pp. 101–103.
2001 Case PL. ÚS 21/2014, Judgment of 30 January 2019, Constitutional Court of the Slovak Republic, cited in Karpat, 2023, p. 103.

to it explicitly, this limitation may, *mutatis mutandis*, apply to legislative processes within the EU.[2002]

The Slovenian Constitutional Court (*Ustavno Sodišče*) embraces a rather restrained approach to the primacy of EU law. The concept of constitutional identity does not appear in the Slovenian Constitution, nor does it appear in the jurisprudence of the Constitutional Court. The Court pronounced the supremacy of EU law in *Decision U-I-295/13*,[2003] but did not address the question of whether it implies unconditional primacy or whether EU law could be subordinated to the Constitution.[2004] Defining the limits to the applicability of Art. 3a, the Europe clause of the Constitution remains within the frames of scientific discussion, but the constitutional provision may imply that the supremacy of EU law is applicable as long as the EU respects the principles of democracy, the rule of law, and human rights.[2005]

The Croatian Constitutional Court (*Ustavni Sud*) defined the core of constitutional identity as embracing the following values: the highest values of the constitutional order, the constitutional guarantees of fundamental rights, and the historical foundation of the constitution.[2006] However, the Court did not connect constitutional identity with the question of the primacy of EU law. Similar to Slovenia, defining the limits of the application of the principle of primacy remains a rather theoretical question, but the hypothetical derogation from this principle could arise in case human rights and fundamental freedoms were violated by a CJEU judgment.[2007]

In light of the evaluation of the relevant case law of the selected Central European countries' constitutional courts, one may clearly observe a tendency to address constitutional identity and its role in the relationship between national law and EU law certainly be observed. Some constitutional courts, including the Czech, Polish, and Hungarian courts, examined the compatibility of the Lisbon Treaty with the national constitutional order, and, similar to the BVerfG's findings, concluded that the Treaty was compatible with the domestic constitution, and reserved the right to assess the integration process for the future. While certain courts – especially the Polish, Hungarian, and Romanian constitutional courts – attempt to define the limits of the application of the principle of primacy more boldly, other courts are rather reserved. Nonetheless, as we could see, this does not necessarily imply the absolute and unconditional supremacy of EU law.

2002 Ibid.
2003 Decision U-I-295/13 of 19 October 2016, Slovenian Constitutional Court.
2004 Novak, 2023, pp. 209–2011.
2005 Avbelj, 2020a; Avbelj, 2020b; cited in Novak, 2023, pp. 208–209.
2006 Blagojević, 2017, p. 227.
2007 Sokanović, 2023, pp. 312–313.

IV.1.3 The Primacy of EU Law and the Interpretation of the Rule of Law

The comparative overview of the selected constitutional courts' approaches to the relationship between national constitutional law and EU law shows that the latter cannot automatically be considered as a hierarchically superior set of laws compared to national constitutions. However, the formulation of rule-of-law-related principles at the EU level could only be based on a consensus on the supremacy of the rule of law, even vis-à-vis the constitutional identity of the Member States. That is why the development of different soft and hard instruments points to the direction of supranationalising the rule of law in the EU; the current – institutional and normative – framework of the EU enables the pursuit of the accelerating constitutional federation of the EU. This process necessarily entails certain limitations to national sovereignty, which, as could be concluded from the above analysis, may not be compatible with the constitutional identity of the Member States in some cases.

Member States may have a different interpretation of the rule of law; for example, the core of the concept of the English *rule of law*, the German *Rechtsstaat*, the French *état de droit*, or the Polish *Praworządność* and the Hungarian *jogállamiság* derives from Montesquieu's doctrine, yet the focus of each concept may be on different aspects of the principle.[2008] The rule of law as a principle,[2009] or, since the adoption of the Lisbon Treaty, as a value, was raised from the national constitutional level to the level of the EU. Therefore, the values declared in Art. 2 TEU were not developed during the integration process, but rather were deeply rooted in the constitutional traditions of the Member States. Consequently, it could be argued that its interpretation shall also be based on the constitutional interpretation of the Member States, and not developed independently from them. However, based on the different soft and hard legal instruments in the EU's toolbox to enforce the rule of law as examined in this volume, it could be seen that the EU developed its own interpretation of the rule of law, which in turn may not be consistent with the national interpretation in all cases.

Importantly, the concept of the rule of law was not referred to in any of the original founding treaties, as the aim of the integration was primarily of an economic nature. The CJEU had a major role in the development of the supranational concept of the rule of law; in its early judgment of the case named *Les Verts v. European Parliament (Case 294/83)*, it pronounced that '[…] the European Economic

2008 On the development of the different concepts of the rule of law, see: Varga, 2021, pp. 327–348.

2009 '[…] Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law'. Preamble of the Maastricht Treaty. 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. Cf. Art. 1(8) of the Amsterdam Treaty.

Community is a community based on the rule of law'.[2010] However, the idea of embracing the rule of law as a common principle first appeared in the Preamble of the Maastricht Treaty, and was later confirmed in the Preamble of the Amsterdam Treaty. The Lisbon Treaty, as mentioned in this volume several times, in Art. 2 provides that '[t]he Union is founded on the values of […] the rule of law'. Although the reason behind the linguistic turn is not clarified, it did not introduce a significant change in the interpretation of the rule of law as a fundamental value in the EU. However, the use of 'value' instead of 'principle' certainly reflects the meta-legal character of the concept, which also embraces an ethical dimension.[2011] This change may also raise the discussion on the legal nature of the rule of law from the political to an ethical level, which may be problematic for legal doctrine. Consequently, if it is not merely a legal concept, the question arises as to who should be entitled to interpret it and enforce it, and whether a value could be subject to judicial control. The problem is exacerbated by the fact that the Treaty does not define the rule of law, as it presupposes the existence of it. However, the transfer of the concept of the rule of law from the national constitutional level to the EU level would also presuppose a consensus on its interpretation among the Member States.

The process, however, is quite the opposite. It could be observed that the interpretation of the rule of law is increasingly being transferred to EU institutions, even without the Member States' consensus on its content. It is particularly remarkable that the first time that EU institutions, namely, the Commission attempted to give a comprehensive definition of the rule of law came in 2014, with the adoption of the rule of law framework.[2012] The framework, which was primarily shaped as a preventive mechanism (i.e. a new preventive step before the application of Art. 7 TEU[2013]), drew significant inspiration from the case law of the CJEU, the European Court of Human Rights (ECtHR), and the documents of the Council of Europe, particularly the Venice Commission.[2014] Despite its soft law nature, the framework significantly contributes to the process of supranationalisation of the rule of law in the EU, as it has an important role in different rule-of-law-related mechanisms described in this volume.

However, the supranationalisation of the concept of the rule of law is not the only field where the interpretation and enforcement of a concept is being transferred from the national level to the EU. A similar tendency could be observed in the development of the fundamental rights protection framework of the EU.[2015] Fundamental rights were not addressed in the founding treaties. Still, the need to develop fundamental rights protection within the community was recognised by the CJEU after the BVerfG, in the *Solange I* decision, did not deem the level of fundamental rights

2010 *Parti écologiste 'Les Verts' v. European Parliament*, Case 294/83, para. 23.
2011 Schroeder, 2021, pp. 110–112.
2012 Janse, 2019, p. 45.
2013 European Commission, 2014, 3. See also: Kochenov and Pech, 2015b.
2014 European Commission, 2014, 2.
2015 Spaventa, 2023.

protection of the EU sufficient compared to the level guaranteed by the German Constitution, and thus reserved the right not to relinquish jurisdiction in this field to the CJEU 'as long as' ('*solange*' in German) the EU's level of protection would substantially be equal to the domestic level.[2016] Fundamental rights first appeared as general principles of community law,[2017] inspired by the constitutional traditions common to the Member States,[2018] and international treaties for the protection of human rights.[2019] Then, the need to codify the fundamental rights doctrine of the CJEU was significantly put forward during the German presidency of the Council in 1999,[2020] and, in 2000, the Charter of Fundamental Rights was proclaimed in Nice, France.

The recognition of the Charter as a primary source of EU law came only with the adoption of the Lisbon Treaty, which, in Art. 6(1), pronounced the binding nature of the Charter. Art. 6(3) further provides that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. The explicit mention of the European Convention on Human Rights (ECHR) is remarkable, as the Treaty, in Art. 6(2) pronounces that the EU shall accede to the Convention. The problems of such an accession from an institutional perspective will be addressed in the next section, but at this point, it should be noted that as of December 2023, the EU still has not acceded to the ECHR. Thus, the ECHR is not part of EU law, but rather serves as a source of inspiration for the interpretation of EU law, namely, the Charter.

Similar to the supranationalisation of the rule of law, fundamental rights protection shall also be based on the common constitutional traditions of the Member States. However, the role of fundamental rights protection significantly changed during the integration process: as the abovementioned *Solange* case shows, the need to develop fundamental rights protection at the EU level stemmed from domestic courts' concerns about whether EU institutions respect fundamental rights. This is precisely why the primary addressees of the Charter are EU institutions.[2021] However, the development of the EU's fundamental rights protection has currently reached a stage where the EU may express its concern about the level of fundamental rights protection in the Member States, and monitor the compatibility of their fundamental rights protection with EU law.[2022] Such a competence also necessarily entails monitoring the rule of law. In fact, both values (i.e. the rule of law and respect for

2016 BverfGE 37, 271 – Solange I, Judgment of 29 May 1974, German Federal Constitutional Court.
2017 Erich Stauder v. City of Ulm, Case 29-69, para. 7.
2018 *Internationale Handelsgesellschaft*, C-11/70, para. 4.
2019 *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, Case 4-73, para. 2.13.
2020 Cologne European Council, 3–4 June 1999, Conclusions of the Presidency.
2021 Charter for Fundamental Rights, Art. 51(1).
2022 Gát, 2020, p. 87.

human rights) are phrased in Art. 2 TEU as values upon which the EU is based, and (as expressed by the aforementioned rule of law framework) which define the core meaning of the rule of law through the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review (including respect for fundamental rights), and equality before the law.[2023]

Thus, a certain parallel could be drawn between the development of the EU's approach to the rule of law and fundamental rights, namely the supranationalisation of these two concepts. This process entails that the interpretation and enforcement of these values are increasingly being transferred from the Member State level to the EU level. The supranationalisation of the rule of law – which could be concluded from the analysis of various rule-of-law-related mechanisms examined in this volume – is an ongoing process that also depends on how the courts of Member States position their role in the European constitutional dialogue.

2023 European Commission, 2014, 2.

IV.2 Institutional Framework: The Relationship between National Constitutional Courts and the CJEU

The CJEU has a prominent role in the process of the constitutionalisation of the EU,[2024] primarily through creating a legal structure of European law that resembles a constitution rather than individual pieces of law. This also institutionalises the hierarchy of EU law above domestic law of the Member States.[2025] The constitutionalisation of the EU is a tool of the integration process and is also expressed in Art. 1 of the Lisbon Treaty, which describes that it 'marks a new stage in the process of creating an ever closer union among the peoples of Europe […]'.[2026] However, at this point, it is necessary to emphasise once more that the Lisbon Treaty was adopted as a compromise solution after the failure of the constitutional project, thus it could be inferred that the constitutionalisation of the EU would go beyond the limits of the Member States' intention when they adopted of the Lisbon Treaty.

The constitutionalisation of the EU is particularly apparent in the above analysed two fields, namely the interpretation of the rule of law and the protection of fundamental rights at the EU level.[2027] The different rule-of-law-related mechanisms analysed in this volume, and the consequent process of the supranationalisation of the rule of law, bolster the constitutionalisation of the EU. For instance, the abovementioned rule of law framework (2014), in which the Commission attempted to provide an understanding of the EU's concept of the rule of law for the first time, also pronounced the rule of law as a constitutional principle that governs modern constitutional law and international organisations, including the United Nations and the Council of Europe.[2028] Thus, the rule of law appears here as a principle that stems from the national constitutional traditions of the Member States, that became a common value for the EU as well, and accordingly would be enforceable by the CJEU on the Member States.

2024 The CJEU had significantly contributed to European integration; the jurisprudence of the Court shows that the CJEU has often pushed the integration beyond a state of political indecision. This judicial activism has been controversial, as the Court is not a political decision-maker and may not, in all cases, reflect the political consensus of the Member States. See: Bóka, 2022, p. 81.
2025 Peters, 2006, p. 35; Weiler, 1991, p. 2407.
2026 Art. 1 TEU.
2027 Varga Zs., 2020, p. 703.
2028 European Commission, 2014, 2.

Furthermore, the communication from the Commission on strengthening the rule of law within the Union (2019) expressly promoted building a common rule of law culture. While acknowledging that the EU respects the political and constitutional structures of the Member States, it also provides that the obligations stemming from the membership mean that 'national rules and structures must reflect EU standards and norms on the rule of law as a common value of the EU and comply with the rule of law guarantees in EU primary and secondary law'.[2029] This interpretation marks the process of constitutionalisation in the EU: the explicit confession that the Member States shall reflect the EU's concept of the rule of law – irrespective of their constitutional structures – implies that the construction of the rule of law in the body of EU law develops independently from the national interpretation of the rule of law, although it originally stems from the constitutional traditions of the Member States. However, constitutionalisation would, at the same time, require the de-politicisation of the European Treaties, which implies that the constitutionalised Treaties shall not be subject to political decision-making anymore, for the reason of remaining within the confines of democratic legitimacy.[2030]

Against this background, the constitutionalisation of the rule of law would therefore imply that its interpretation and enforcement would remain at the constitutional level, and thus no longer be open for political discussions.[2031] The politicisation of rule of law discussions in the EU could be concluded from the examination of the different soft legal procedures used for addressing the rule of law in the Member States, including the Art. 7 TEU procedure, the rule of law review cycle, and procedures that are indirectly connected to the rule of law, such as the conditionality mechanism.[2032] Therefore, based on the ongoing processes concerning the politicisation of the rule of law in the EU, it can be concluded that the constitutionalisation of the EU, which was primarily developed by the CJEU, may not have democratic legitimacy, especially in light of the failed constitutional project.[2033]

Furthermore, the constitutionalisation of the rule of law also entails that the difference between binding and soft law is fading.[2034] The EU's rule of law toolbox encompasses both soft law and hard law instruments.[2035] In addition to Treaty-based hard law instruments, such as the Art. 7 procedure or even the infringement procedures provided for in Art. 258 TFEU, parallel processes involving the re-interpretation

2029 European Commission, 2019, V.
2030 Grimm, 2015, pp. 460–461.
2031 Ibid.
2032 The process of extending the rule of law from a legal to a political level was referred by Varga Zs. as the transformation of the rule of law from an ideal to an idol. The author points out that the concept of the rule of law became an idol in European politics for the purposes of creating a constitutional federation in the continent and may be used arbitrarily in this process. See: Varga Zs., 2019.
2033 Grimm, 2015, pp. 471–473.
2034 Varga Zs., 2020, pp. 705–706.
2035 Kochenov and Pech, 2019, pp. 3–9.

of already existing soft law tools and the creation of new instruments could be observed.[2036] In 2013, the Commission published its first annual justice scoreboard; in 2014, the same institution introduced the rule of law framework; and, at the end of the year 2014, the Council adopted the annual rule of law dialogue. Parallel to the development of the new soft law instruments, the European Semester process – established in 2013 with the justice scoreboard – has been increasingly used by the Commission to address rule of law issues in Member States.[2037] Furthermore, in 2020, the EU legislator established the conditionality mechanism as a hard law instrument, which gained significant inspiration from the rule of law framework.[2038] At the same time, certain EU measures opened the possibility for other supranational organisations' soft law instruments to be upgraded to have binding force within the EU. For example, the aforementioned rule of law framework provides the possibility for channelling the Venice Commission's advice into rule of law discussions, which may be taken to the level of binding procedures before the CJEU or the European Parliament.[2039]

At the same time, the development of the fundamental rights framework is also a significant component in the constitutionalisation process within the EU.[2040] As pointed out above, the protection of fundamental rights in the EU developed during the integration process and was not part of the original agenda at the time of the adoption of the founding treaties. The CJEU had a major role in building the EU's fundamental rights protection, and by now has reached the stage where it does not accept limitations from domestic courts, but instead aims to enforce its interpretation of fundamental rights on domestic courts.[2041] The constitutional traditions of the Member States are only one source of inspiration for the EU Charter of Fundamental Rights. Art. 6(3) TEU also provides fundamental rights, as guaranteed by the ECHR, which constitute the general principles of the EU's law. The particular importance of the ECHR in interpreting EU fundamental rights is also supported by Art. 53 of the Charter, which provides that

> [n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised […] by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.[2042]

2036 Pech, 2020b, pp. 16–30.
2037 For instance, in connection with Slovakia, Poland, or Hungary. Pech, 2020b, p. 27.
2038 Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, Recital 3; Art. 2(a).
2039 Varga Zs., 2020, p. 706.
2040 Sadurski, 2003, p. 2.
2041 Gát, 2020, p. 87.
2042 Charter of Fundamental Rights, Art. 53.

Thus, the ECHR has a prominent role among the various international human rights treaties for the interpretation of the Charter, which also implies that the CJEU shall consider the jurisprudence of the ECtHR. The relationship between these two courts was further strengthened by Art. 6(2) TEU, which – while raising the Charter to the level of the Treaties –provides that the EU shall accede to the Convention, which shall not affect the EU's competences as defined in the Treaties.[2043] However, as of December 2023, the accession did not happen, principally due to the CJEU's objection. In its Opinion 2/13 of 18 December 2014, the Court assessed the compatibility of the draft accession agreement and concluded that such an accession could endanger the autonomy of EU law. Given that the ECHR would form an integral part of EU law, the accession would enable the ECtHR to adopt binding decisions on the EU and its institutions, including the CJEU, which could adversely affect the specific characteristics of EU law.[2044] Meanwhile, the interpretation by the CJEU on the rights recognised by the ECHR would not be binding on the control mechanisms of the Convention, particularly the ECtHR.[2045] This finding certainly implies that the accession would create a hierarchy between the ECHR and EU norms and also between institutions, essentially between the ECtHR and the CJEU.

Opinion 2/13 also pointed out how the accession to the ECHR would practically erode the role of the CJEU on the example of the preliminary ruling procedure. Protocol No. 16 to the ECHR, drafted before the adoption of Opinion 2/13 and entered into force in 2018, opened the possibility for the highest courts and tribunals to request the Court to give advisory opinions on the interpretation or application of the rights and freedoms defined in the ECHR.[2046] The CJEU claimed that such a procedure would undermine the preliminary ruling procedure provided in Art. 267 TFEU, which has a pivotal role in securing uniform interpretation of EU law.[2047] The preliminary ruling procedure occupies a central position among other procedures before the Court,[2048] as it provides a platform for national courts to seek the CJEU's interpretation of EU law in a given litigation – in contrast to the other main procedure before the CJEU, and the direct actions brought by the Commission or a Member State.[2049] The preliminary ruling procedure is also important from the constitutional perspective because it creates a hierarchical relationship between national courts and the CJEU; in other words, the CJEU's conclusions drawn in a preliminary ruling procedure are binding on all courts in the Member States.[2050] In light of the strong position of the CJEU in the preliminary ruling procedure, and

2043 Art. 6 TEU. For an analysis prior to the adoption of Opinion 2/13, see: Eckes, 2013.
2044 Opinion 2/13, CJEU, 200.
2045 Opinion 2/13, CJEU, 185.
2046 Protocol No. 16. to the ECHR, Art. 1.
2047 Opinion 2/13, CJEU, 176.
2048 Baquero Cruz, 2018, p. 53.
2049 Carrubba and Murrah, 2005, pp. 400–401.
2050 Art. 267 TFEU; Rules of Procedure of the Court of Justice, Art. 91.

the Court's aversion from the potential preliminary procedure before the ECtHR, one may conclude that the CJEU's abovementioned Opinion also contributes to the development of the CJEU as an EU constitutional court.

However, it could be questioned whether the CJEU took an explicit position on institutional hierarchy,[2051] arguing that a categorical hierarchical relationship between national constitutional courts and international jurisdictions, such as the CJEU, does not exist either. Nonetheless, the CJEU's approach embraces a constitutional character[2052] by referring to the 'EU constitutional framework',[2053] 'the basic constitutional charter, the Treaties',[2054] and the 'constitutional structure of the EU',[2055] which thus implies that the CJEU considers itself a constitutional court of the EU, something that is, however, clearly beyond the intention of certain national constitutional courts, as pointed out above in this paper. Although the impact of Opinion 2/13 is primarily significant for the accession process, it also brings to the fore relevant findings for understanding the CJEU's role in the process of the constitutionalisation of the EU. The Court therefore does not accept limitations on its jurisdiction posed by national constitutional courts, nor does it seem to accept the institutional structure proposed in the draft accession agreement, which fits in the development direction of constitutionalising the EU.

Opinion 2/13 shows that national constitutional courts may be in a similar position to the ECtHR; considering that the CJEU did not support the draft accession agreement because it would undermine the autonomy of EU law, and would fundamentally change the nature of EU law, the Opinion implies that such accession is possible if the core of EU law is not violated. A similar argumentation could be observed in the jurisprudence of certain national constitutional courts vis-à-vis the CJEU. That is, the primacy of EU law is possible as long as it does not fundamentally change the nature of the national constitutional structure and the core of the constitution.[2056] Therefore, the transformation of the CJEU to a constitutional court is not unanimously supported by Member States' constitutional courts. As presented in the previous section, the CJEU's claim to become a constitutional court of the EU stems from the principle of primacy of EU law, which was primarily developed by the CJEU and is not explicitly phrased in the Treaties. Nonetheless, parallel to the attempts of national constitutional courts to define the position of national constitutions, in particular, the core constitutional values or constitutional identity vis-à-vis EU law to clarify constitutional courts' relationship to the CJEU also emerges. Constitutional courts developed different approaches to the constitutional dialogue with the CJEU[2057] based on the intensity

2051 Isiksel, 2016, p. 587; See also: Krisch, 2008, p. 183.
2052 Schill, 2015, pp. 380–382.
2053 Opinion 2/13, CJEU, para. 158.
2054 Ibid., 163.
2055 Opinion 2/13, CJEU, para. 165.
2056 Bóka, 2019, p. 191.
2057 For an extensive overview on constitutional conversations in Europe, see: Claes et al., 2012.

of cooperation. The analysis of the different approaches is based on Ernő Várnay's categorisation.[2058]

On one side of the scale, national constitutional courts support their argumentation by citing the case law of the CJEU. This approach presupposes an acceptance of the CJEU's findings, which are embraced by the domestic court. Furthermore, national courts and the CJEU may also refer to each other's jurisprudence, especially in connection with the division of competencies. The next step is when national courts and the CJEU take into account each other's decisions: this could be observed, for instance, on the example of the abovementioned *Solange I* judgment of the BVerfG and the CJEU's judgment in *Internationale Handelsgesellschaft*. Constitutional courts may also engage in a dialogue with the CJEU, particularly in the context of the preliminary ruling procedure, in which the CJEU's conclusions will be binding on Member States' domestic courts. Parallel to the different kinds of vertical relations, national courts may also refer to each other's jurisprudence horizontally. Member States' courts particularly tend to refer to the BVerfG's jurisprudence, as it developed a jurisprudence of strong constitutional guarantees. The aforementioned *Decision 22/2016 (XII.5.)* of the Hungarian Constitutional Court, for example, explicitly referred to the Czech, German, Danish, Italian, and French constitutional jurisprudence, among others.[2059]

Thus, it could be seen that constitutional courts are devoted to a constructive dialogue with the CJEU. The problem arises when a hierarchical relationship is enforced against the national courts and does not stem from a legitimate transfer of power, which, as such, indicates a decline in the rule of law from the CJEU's side.[2060] The loss of authority of constitutional courts in the European constitutional dialogue and their embeddedness in a hierarchical situation with the CJEU would, in the long run, undermine the European constitutional democracy as well. A European constitutional democracy implies that the constitutional structure of the Member States shall not be transferred to the European level but can be seen as a potential path to a unique European realisation of the ideal of constitutional democracy, in which constitutional courts would have the role to mediate between individual and public autonomy in the EU.[2061]

The tension between the CJEU and national courts is a complex issue that is embedded in the process of the federalisation of the EU, involving the constitutionalisation of the Treaties and the evolving role of the CJEU as a constitutional court. To this end, the supranationalisation of various – primarily (national) constitutional – values could be observed: the supranationalisation of the rule of law and fundamental rights shows that the constitutionalisation of the EU is an ongoing process, one in which Member States seem to have a limited role. One way to resolve such

2058 Várnay, 2019, pp. 75–77.
2059 Decision 22/2016 (XII.5.), III. 32–46.
2060 Kochenov and van Wolferen, 2018, p. 15.
2061 Komárek, 2014, pp. 536–537.

tensions could be through establishing a formal body that facilitates the dialogue between national constitutional courts and the CJEU, or the introduction of a reverse preliminary ruling process, where national courts could provide guidance to the CJEU in cases concerning constitutional identity.[2062] Such proposals may receive limited support from the EU, as constitutional courts would be in the majority as opposed to the CJEU. On the other hand, these solutions may receive limited support from certain constitutional courts, primarily the ones that do not have an elaborated and firm standpoint on national constitutional identity vis-à-vis the EU law. Nonetheless, the solution must be based on consensus; in any case, the future of the EU must be decided through legitimate procedures to ensure that the fundamental values of the Union, including democracy, equality, the rule of law, and human rights, are respected in the development process.

2062 Trócsányi, 2023, p. 262.

References

Bibliography

Abbott, K. W., Snidal, D. (2000) 'Hard and Soft Law in International Governance', *International Organization*, 54(3), pp. 421–456; https://doi.org/10.1162/002081800551280.

Agani, F. (2002) 'Peer Review as a Tool for Co-operation and Change. An Analysis of an OECD Working Method', *African Security Review*, 11(4), pp. 15–24; https://doi.org/10.1080/10246029.2002.9628141.

Alcidi, C., Gros, D. (2017) 'How to further strengthen the European Semester?', *IPOL–EGOV*, pp. 4–28.

Alesina, A., Tavares J., Perotti R. (1998) 'The Political Economy of Fiscal Adjustments', *Brookings Papers on Economic Activity*, 1998(1), pp. 197–266; https://doi.org/10.2307/2534672.

Alexy, R. (2000) 'On the Structure of Legal Principles', *Ratio Iuris*, (13)3, pp. 294–304; https://doi.org/10.1111/1467-9337.00157.

Alvarez, A.E. (2018) 'Trend Of Discussions On The Promotion Of The Rule Of Law In The Global Community/Sharing Information And Experiences: The Un Perspective' in Lovall, E. (ed.) *Proceedings of the ASIL Annual Meeting*. Cambridge: Cambridge University Press, pp. 258–259; https://doi.org/10.1017/amp.2019.54.

Arts, K., Byron, J. (1997) 'The Mid-term Review of the Lomé IV Convention: Heralding the Future?', *Third World Quarterly*, 18(1), pp. 71–91.

Aust, A. (2007) *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press.

Avbelj, M. (2020a) 'Revolucionarno dogajanje v Evropski uniji', *Ius-Info* [Online]. Available at: https://www.iusinfo.si/medijsko-sredisce/kolumne/265026 (Accessed: 9 February 2024).

Avbelj, M. (2020b) 'Slovenija pred Sodiščem Evropske unije', *Ius-Info* [Online]. Available at: https://www.iusinfo.si/medijsko-sredisce/kolumne/276609 (Accessed: 9 February 2024).

Balmori de la Miyar, J.R. (2021) *Are OECD Countries in a Rule of Law Recession?* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892847 (Accessed: 19 March 2021).

Baquero Cruz, J. (2018) 'The Preliminary Rulings Procedure: Cornerstone or Broken Atlas?' in *What's Left of the Law of Integration? Decay and Resistance in European Union Law*. Oxford: Oxford University Press, pp. 53–86; https://doi.org/10.1093/oso/9780198830610.003.0004.

Baraggia, A., Bonelli, M. (2022) 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges', *German Law Journal*, 23(2), pp. 131–156; https://doi.org/10.1017/glj.2022.17.

Barber, N.W., Cahill, M., Ekins, R. (2019) *The Rise and Fall of the European Constitution*. Oxford: Hart Publishing; https://doi.org/10.5040/9781509910977.

Barcik, J. (2022) 'Aksjologia i zasady ustrojowe Unii Europejskiej' in Barcik, J., Grzeszczak, R. (eds.) *Prawo Unii Europejskiej*. Warsaw: C.H. Beck, pp. 73–120.

Barcz, J. (2019) 'Unia Europejska wobec niepraworządnego państwa członkowskiego', *Państwo i Prawo*, 1/2019, pp. 3–23.

Bárd, P., Chronowski, N., Fleck, Z. (2023) 'Use, Misuse, and Abuse of Constitutional Identity in Europe', *CEU DI Working Papers*, 2023/06, pp. 1–44; https://doi.org/10.4337/9781839101649.00043.

Baricová, J. (2020) 'A Personal Testimony' in Granata-Menghini, S., Caga Tanyar, Z. (eds.) *Venice Commission thirty-year quest for democracy through law 1990 – 2020.* 2nd edn. Lund: Juristförlaget i Lund, pp. 67–69.

Barret, G. (2018) 'Reflections on What the Rule of Law Means and its Significance at EU Level' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht*, *supplement no 1*. 1st ed. Baden–Baden: Nomos, pp. 23–37; https://doi.org/10.5771/9783845293721-23.

Bartels, L. (2005) 'Evolution of Human Rights Clauses', in Bartels, L. (ed.) *Human Rights Conditionality in the EU's International Agreements*. Oxford Studies in European Law, Oxford: Oxford Academic, pp. 7–31; https://doi.org/10.1093/acprof:oso/9780199277193.003.0002.

Bartole, S. (2000) 'Final Remarks: The Role of the Venice Commission', *Review of Central and East European Law*, 26(3), pp. 351–363; https://doi.org/10.1163/157303500124667235.

Baslar, K. (1997) *The Concept of the Common Heritage of Mankind in International Law*. The Hague: Kluwer Law International; https://doi.org/10.1163/9789004635227.

Bault, O. (2019) *Linking EU funds to rule of law and 'European values': a move against Poland and Hungary* [Online]. Available at: https://kurier.plus/en/node/574 (Accessed: 14 August 2023).

Bekker, S. (2013) 'EU's stricter economic governance: a step towards more binding coordination of social policies?', *WZB Discussion Paper*, SP IV 2013-501, pp. 1–20.

Bekker, S. (2021) 'Hardening and softening of country-specific recommendations in the European Semester', *West European Politics*, 44(1), pp. 114–133; https://doi.org/10.1080/01402382.2020.1739407.

Benke, K. (2023) 'The Saga May Continue: On the Intricate Dialogue Between the Constitutional Court of Romania and the Court of Justice of the European Union', *Central European Journal of Comparative Law*, 4(2), pp. 9–40; https://doi.org/10.47078/2023.2.9-40.

Besselink, L. (2010) 'National and constitutional identity before and after Lisbon', *Utrecht Law Review*, (6)3, pp. 36–49; https://doi.org/10.18352/ulr.139.

Besselink, L. (2016) 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', *Amsterdam Centre for European Law and Governance Working Paper Series*, 2016/1, pp. 3–39.

Bickerton, C.J., Hodson, D., Puetter, U. (2015) 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', *Journal of Common Market Studies*, 53(4), pp. 703–722; https://doi.org/10.1111/jcms.12212.

Blagojević, A. (2017) 'Procedures Regarding National Identity Clause in the National Constitutional Court's and the CJEU's Case-law' in Duić, D., Petrašević, T. (eds.) *Procedural Aspects of EU Law, EU and Comparative Law Issues and Challenges Series (ECLIC).* Faculty of Law, Josip Juraj Strossmayer University of Osijek, pp. 210–237; https://doi.org/10.25234/eclic/6529.

Blanke, H.J., Sander, A. (2023) 'Enforcing the Rule of Law in the EU: The Case of Poland and Hungary', *ZEuS Zeitschrift für Europarechtliche Studien*, 26(2), pp. 239–276; https://doi.org/10.5771/1435-439x-2023-2-239.

Blutman, L. (2021) 'A jogállamiság követelménye az Európai Unió jogában: felújítás alatt', *Jogtudományi Közlöny*, 76(6), pp. 261–270.

Blutman, L. (2022) 'Az Alkotmánybíróság határozata arról, hogy egyes uniós jogi aktusok végrehajtása mellőzhető-e az alaptörvényre tekintettel: Az uniós jog elsőbbsége és az Alaptörvény', *Jogesetek Magyarázata*, 13(1), pp. 5–12.

Bóka, J. (2002) 'Forcible Measures Against International Terrorism and the Rule of Law', *European Integration Studies,* 1(1), pp. 65–73.

Bóka, J. (2014) 'Use of the Comparative Method by the Hungarian Constitutional Court-Conceptual and Methodological Framework for an Ongoing Research Project' in Badó, A., Detlev, W.B., Bóka, J., Mezei, P. (eds.) *Internationale Konferenz zum zehnjährigen Bestehen des Instituts für Rechtsvergleichung der Universität Szeged*. Potsdam: Acta Iuridica Universitatis Potsdamiensis, pp. 93–107.

Bóka, J. (2019) '„…nemzeti kultúránk gazdag hozzájárulás az európai egység sokszínűségéhez"' in Patyi, A. (ed.) *Rendhagyó kommentár egy rendhagyó preambulumból. Magyarország Alaptörvénye, Nemzeti Hitvallás*. Budapest: Dialóg Campus, pp. 185–196.

Bóka, J. (2022) 'De-mystifying the European Union. Reflections on the margins of the conference on the future of the European Union' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective*. Legal Studies on Central Europe. Miskolc, Budapest: Central European Academic Publishing, pp. 73–83; https://doi.org/10.54171/2022.aojb.poeucep_3.

Bonačić, M., Tomašić, T. (2017) 'Implementacija standarda Europskog suda za ljudska prava u hrvatskom prekršajnom pravu i praksi', *Hrvatski ljetopis za kaznene znanosti i praksu*, 24(2), pp. 381–411.

Borchert, H., Zellner, W. (2003) *Case study: The Organization for Security and Co-operation in Europe (OSCE) and its Contribution to the Stabilization of Central and Eastern European Countries* [Online]. Available at: https://www.researchgate.net/publication/228366170_The_Organization_for_Security_and_Co-operation_in_Europe_OSCE_and_its_Contribution_to_the_Stabilization_of_Central_and_Eastern_European_Countries (Accessed: 12 October 2023).

Börzel, T.A. (2003) 'What Can Federalism Teach Us About the European Union? The German Experience', *European Programmes*, pp. 1–13.

Brown, M. (2018) 'An Unqualified Human Good? On Rule of Law, Globalization, and Imperialism', *Law & Social Inquiry*, 43(4), pp. 1391–1426; https://doi.org/10.1111/lsi.12302.

Buqucchio, G. (2009) 'Vingt ans avec Antonio La Pergola pour le développment de la démocratie' in van Dijk, P., Granata-Menghini, S. (eds.) *Liber Amicorum Antonio La Pergola*. Lund: Juristförlaget i Lund, pp. 29–34.

Buqucchio, G. (2020) 'Statement by Gianni Buquicchio president of the Venice Commission on the occasion of the 30th Anniversary of the establishment of the Commission' in Granata-Menghini S., Caga Tanyar, Z. (eds.) *Venice Commission thirty-year quest for democracy through law 1990 – 2020.* Lund: Juristförlaget i Lund, pp. 13–14.

Buqucchio, G., Granata-Menghini, S. (2013) 'The Venice Commission Twenty Years on – Challenge Met but New Challenges Ahead' in van Roosmalen, M., Vermeulen, B., van Hoof, F., Oosting, M. (eds.) *Liber Amicorum Pieter van Dijk*. 1st. edn. Cambridge – Antwerp – Portland: Intersentia, pp. 241–254.

Burić, Z. (2013) 'Obveza izvršenja konačnih presuda Europskog suda za ljudska prava – u povodu odluke i rješenja Ustavnog suda Republike Hrvatske broj U-III/3304/2011 od 23. siječnja 2013.', *Zagrebačka pravna revija*, 2(1), pp. 109–124.

Butler, I. (2013) *How to monitor the rule of law, democracy and fundamental rights in the EU* [Online]. Available at: https://www.opensocietyfoundations.org/uploads/aad3f011-e848-4202-8c2b-2103219c31be/how-monitor-rule-law-democracy-and-fundamental-rights-eu.pdf (Accessed: 28 October 2023).

Canor, I. (2021) 'Suspending Horizontal *Solange*: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law' in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, Ch., Taborowski, M., Schmidt, M. (eds.) *Defending Checks and Balances in EU Member States*. Berlin: Springer, pp. 183–206; https://doi.org/10.1007/978-3-662-62317-6_8.

Carp, R. (2014) 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism', *Utrecht Law Review*, 10(1), pp. 1–16.

Carrubba, C.J., Murrah, L. (2005) 'Legal Integration and Use of the Preliminary Ruling Process in the European Union', *International Organization*, 59(2), pp. 399–418; https://doi.org/10.1017/s0020818305050137.

Chesterman, S. (2008) 'An International Rule of Law?', *American Journal of Comparative Law*, 56(2), pp. 331–361; https://doi.org/10.5131/ajcl.2007.0009.

Chlebny, J. (2014) 'How a National Judge Implements Judgments of Strasbourg Court' in Seibert-Fohr, A., and Villiger, M. E. (eds.) *Judgments of the European Court of Human Rights – Effects and Implementation*. Baden–Baden: Nomos, pp. 237–249; https://doi.org/10.5771/9783845259345_237.

Claes, M. (2015) 'The Primacy of EU Law in European and National Law' in Chalmers, D., Arnull, A. (eds.) *The Oxford Handbook of European Union Law*. Oxford: Oxford University Press, pp. 178–2011; https://doi.org/10.1093/oxfordhb/9780199672646.013.8.

Claes, M., de Visser, M., Popelier, P., Van de Heyning, C. (eds.) (2012) *Constitutional Conversations in Europe. Actors, Topics and Procedures.* Cambridge: Intersentia Publishing Ltd.

Clayton QC, R. (2019) 'The Venice Commission and the rule of law crisis', *Public Law,* 2019/3, pp. 450–460.

Cloots, E. (2016) 'National Identity, Constitutional Identity, and Sovereignty in the EU', *Netherlands Journal of Legal Philosophy*, 2(45), pp. 82–98; https://doi.org/10.5553/NJLP/.000049.

Closa, C. (2016) 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Closa, C., Kochenov, D. (eds.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge: Cambridge University Press, pp. 15–35; https://doi.org/10.1017/CBO9781316258774.003.

Closa, C. (2020) 'A Personal Recollection' in Granata-Menghini, S., Caga Tanyar, Z. (eds.) *Venice Commission thirty-year quest for democracy through law 1990–2020*. Lund: Juristförlaget i Lund, pp. 191–198.

Cova, J. (2022) 'Reconsidering the drivers of country-specific recommendations: The Commission's ideological preferences on wage policies', *European Union Politics*, 23(4), pp. 639–661; https://doi.org/10.1177/14651165221102696.

Craig, P. (2017) 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy', *UC Irvine Journal of International, Transnational, and Comparative Law*, 2017/2, pp. 57–86.

Crego, M.D. (2020a) 'The European Union as a community of values' in *Protecting EU common values within the Member States. An overview of monitoring, prevention and enforcement mechanisms at EU level*. Brussels: European Parliamentary Research Service, pp. 7–18.

Crego, M.D. (2020b) 'The European Commission's rule of law framework' in *Protecting EU common values within the Member States. An overview of monitoring, prevention and enforcement mechanisms at EU level*. Brussels: European Parliamentary Research Service, pp. 27–33.

Crego, M.D. (2020c) 'Article 7(1) TEU: The preventive arm' in *Protecting EU common values within the Member States. An overview of monitoring, prevention and enforcement mechanisms at EU level*. Brussels: European Parliamentary Research Service, pp. 37–47.

Crego, M. D., Mańko, R., van Ballegooij, W. (2020) 'Introduction' in *Protecting EU common values within the Member States. An overview of monitoring, prevention and enforcement mechanisms at EU level*. Brussels: European Parliamentary Research Service, pp. 1–6.

Crespy, A., Menz, G. (2015) 'Commission Entrepreneurship and the Debasing of Social Europe Before and After the Eurocrisis', *Journal of Common Market Studies*, 53(4), pp. 753–768; https://doi.org/10.1111/jcms.12241.

Crum, B. (2013) 'Saving the Euro at the Cost of Democracy?', *Journal of Common Market Studies*, 53(5), pp. 614–630; https://doi.org/10.1111/jcms.12019.

Crum, B. (2018) 'Parliamentary accountability in multilevel governance: what role for parliaments in postcrisis EU economic governance?', *Journal of European Public Policy*, 2(25), pp. 268–286; https://doi.org/10.1080/13501763.2017.1363270.

D'Erman, V., Haas, J., Shulz, D.F., Verdun, A. (2019) 'Measuring Economic Reform Recommendations under the European Semester: 'One Size Fits All' or Tailoring to Member States?', *Journal of Contemporary European Research*, 15(2), pp. 194–211; https://doi.org/10.30950/jcer.v15i2.999.

Davis Cross, M.K. (2017) 'The Constitutional Treaty Crisis' in Davis Cross, M.K. (ed.*) The Politics of Crisis in Europe*. Cambridge: Cambridge University Press, pp. 108–159; https://doi.org/10.1017/9781316556498.004.

Dawson, M. (2015) 'The Euro Crisis and Its Transformation of EU Law and Politics' in Anheier, H.K., List, R.A. (eds.) *The Governance Report 2015*. Oxford: Oxford University Press, pp. 41–68.

Dawson, M., Muir, E., Claes, M. (2014) 'A Tool-box for Legal and Political Mobilisation in European Equality Law' in Anagnostou, D. (ed.) *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*. London: Hart Publishing, pp. 105–128.

De Streel, A. (2013a) 'Les règles de la nouvelle gouvernance économique européenne', *Reflets et perspectives de la vie économique*, 2013/2-3, pp. 13–49; https://doi.org/10.3917/rpve.522.0013.

De Streel, A. (2013b) 'The Evolution of the EU Economic Governance since the Treaty of Maastricht: an Unfinished Task', *Sage Journals*, 3(20), pp. 336–362; https://doi.org/10.1177/1023263X1302000302.

Dębniak, P. (2016) 'Wady i zalety funkcjonowania semestru europejskiego jako elementu unijnego zarządzania gospodarczego', *Przedsiębiorczość i zarządzanie*, 17(8), pp. 187–196.

Degryse, C. (2012) 'The New European Economic Governance', *ETUI Working Paper,* 2012/14, pp. 3–84.

Degryse, C., Jepsen, M., Pochet, P. (2013) 'A worrying prospect: towards a more imbalanced European social governance?' in Natali, D. (ed.) *Social developments in the European Union.* Brussels: European Union Trade Institute, pp. 57–83.

Deinhammer, R. (2019), 'The Rule of Law: Its Virtues and Limits', *Obnovljeni život*, 74(1), pp. 33–44; https://doi.org/10.31337/oz.74.1.3.

Delivorias, A. (2021) 'Introduction to the fiscal framework of the EU. The Maastricht Treaty, the Treaty on Stability, Coordination and Governance, and the Stability and Growth Pact', *European Parliamentary Research Service*, pp. 1–51.

Delors, J., Fernandes, S., Mermet, E. (2011) 'The European Semester: only a first step', *Policy Brief*, 2011/22, pp. 1–6.

Derenčinović, D. (2021a) 'Nisu na prodaju – o pravima žrtava trgovanja ljudima nakon presude Europskog suda za ljudska prava u predmetu Ranstev protiv Cipra i Rusije' in Derenčinović, D. (ed.) *Ogledi o pravu i pravdi u dvije Europe – putovi i stranputice europskog kaznenog prava od Strasbourga do Bruxellesa*. Zagreb: Narodne novine, pp. 97 –120.

Derenčinović, D. (2021b) 'Povodom presude Europskog suda za ljudska prava u predmetu Streletz, Kessler i Krenz protiv Njemačke' in Derenčinović, D. (ed.) *Ogledi o pravu i pravdi u dvije Europe – putovi i stranputice europskog kaznenog prava od Strasbourga do Bruxellesa*. Zagreb: Narodne novine, pp. 21–41.

Derenčinović, D. (2021c) 'Sigurnosno zatvaranje 'opasnih' delinkvenata – podsjetnik iz Strasbourga' in Derenčinović, D. (ed.) *Ogledi o pravu i pravdi u dvije Europe- putovi i stranputice europskog kaznenog prava od Strasbourga do Bruxellesa*. Zagreb: Narodne novine, pp. 169–180.

Derenčinović, D. (2021d) *Ogledi o pravu i pravdi u dvije Europe – putovi i stramputice Europskog kaznenog prava od Strasbourga do Bruxellesa*. Zagreb: Narodne Novine.

Deroose, S., Hodson, D., Kuhlmann, J. (2005) 'The Broad Economic Policy Guidelines: Past, Present and Future, International Economics Programme', *IEP WP*, 05/02, pp. 1–18.

Dias Da Silva, A., Givone, A., Sondermann, D. (2017) 'When do countries implement structural reforms?', *ECB Working Paper Series*, 2017/2078, pp. 1–27; https://doi.org/10.2139/ssrn.2992485.

Dimitrijević, D. (2023) 'The International Legal Framework Against Corruption' in Kesić, T., Milojković, B., Mlađan, D., Marinković, D., Mićović, D., Nikač, Ž., Bjelovuk, I., Gnjatović, M., Bodrožić, I., Janković, R., Radović–Stojanović, J., Spasić, D., Koturević, B. (eds.) *XII International scientific conference "Archibald Reiss Days" – Investigating and Proving Contemporary Forms of Crime: Scientific Approaches*. Belgrade: University of Criminal Investigation and Police Studies, pp. 129–154.

Dori, A. (2015) 'The EU Justice Scoreboard – Judicial Evaluation as a New Governance Tool', *Max Plank Institute Luxembourg Working Paper Series,* 2015/2, pp. 5–35; http://dx.doi.org/10.2139/ssrn.2752571.

Douglas-Scott, S. (2011) 'The European Union and Human Rights after the Treaty of Lisbon', *Human Rights Law Review*, 11(4), pp. 645–682; https://doi.org/10.1093/hrlr/ngr038.

Draganov, J. (2022) 'National Identity and European Solidarity from a Bulgarian Perspective' in Pastuszko, G. (ed.) *Constitutional identity and European Union axiology – perspective of Central European States*. Warsaw: Wydawnictwo Szkoły Wyższej Wymiaru Sprawiedliwości, pp. 67–86.

Drinóczi, T. (2020) 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach', *German Law Journal*, 2020/21, pp. 105–130; https://doi.org/10.1017/glj.2020.1.

Dumbrovsky, T. (2018) 'Beyond Voting Rights Suspension. Tailored Sanctions as Democracy Catalyst under Article 7 TEU' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht*, *supplement no. 1*. Baden–Baden: Nomos, pp. 203–228; https://doi.org/10.5771/9783845293721-201.

Dunaj, K. (2020) 'O wartościach europejskich w wymiarze proceduralnym' in Romanowski, M. (ed.) *Wartości Unii Europejskiej a praworządność*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 175–189.

Duval, R. (2008) 'Is there a role for macroeconomic policy in fostering structural reforms? Panel evidence from OECD countries over the past two decades', *European Journal of Political Economy*, 24(2), pp. 491–502; https://doi.org/10.1016/j.ejpoleco.2007.09.003.

Duval, R., Elmeskov, J. (2006) 'The Effects of Emu on Structural Reforms in Labour and Product Markets, Proceedings of June 2005 Workshop on What Effects is Emu Having on the Euro Area and Its Member Countries?', *ECB Working paper series*, 2006/596, pp. 1–55; https://doi.org/10.2139/ssrn.887083.

Eckes, C. (2013) 'EU Accession to the ECHR: Between Autonomy and Adaptation', *The Modern Law Review*, 76(2), pp. 254–285; https://doi.org/10.1111/1468-2230.12012.

Efstathiou, K., Wolff, G. B. (2018) 'The European Semester effective and useful?', *Policy Contribution*, 9/2018, pp. 1–15.

Efstathiou, K., Wolff, G. B. (2019) 'What drives national implementation of EU policy recommendations?', *Working Paper*, 2019/4, pp. 1–28.

Ehlermann–Cache, N. (2008) *The impact of the OECD anti-bribery convention* [Online]. Available at: https://www.oecd.org/mena/competitiveness/39997682.pdf (Accessed: 15 March 2024).

Elbert, Ľ. (2015) *Rule of Law a medzinárodné právo*. Košice: Právnická fakulta UPJŠ v Košiciach.

Evans, C.M. (2016) 'Finding Obligation: Foundation for a More Accountable Security Council', *New Zealand Journal of Public and International Law,* 14(1), pp. 129–150.

Fabbrini, S. (2004) 'Is the EU exceptional? The EU and the US in comparative perspective' in Fabbrini, S. (ed.) *Democracy and Federalism in the European Union and the United States*. London and New York: Routlegde, pp. 1–22.

Fallon, R.H. (1997) 'The Rule of Law as a Concept in Constitutional Discourse', *Columbia Law Review*, 97(1), pp. 1–56; https://doi.org/10.2307/1123446.

Faraguna, P. (2017) 'Constitutional Identity in the EU – A Shield or Sword?', *German Law Journal*, 18(7), pp. 1617–1640; https://doi.org/10.1017/s207183220002246x.

Farmer, L. (2021) 'Punishment in the Rule of Law' in Meierhenrich, J., Loughlin, M. (eds.) *The Cambridge Companion to the Rule of Law.* Cambridge: Cambridge University Press, pp. 443–457; https://doi.org/10.1017/9781108600569.025.

Fasone, C. (2017) 'How are Parliaments involved in the European Semester?', *Revue de l'euro*, 29 June 2017 [Online]. Available at: how-are-parliaments-involved-in-the-european-semester – RESuME (uni.lu) (Accessed: 15 September 2023).

Follesdal, A. (2021) 'International human rights courts and the (international) rule of law: Part of the solution, part of the problem, or both?', *Global Constitutionalism*, 10(1), pp. 118–138; https://doi.org/10.1017/S2045381719000364.

Fossum, J.E. (2016) 'Democracy and Legitimacy in the EU: Challenges and Options', *ARENA Working Paper*, 1/2016, pp. 1–16.

Fyrnys, M. (2011) 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', *German Law Journal*, 12(05), pp. 1231–1260; https://doi.org/10.1017/S2071832200017284.

Garben, S. (2017) 'Competence Creep Revisited', *Journal of Common Market Studies*, 57(2), pp. 205–222; https://doi.org/10.1111/jcms.12643.

García, R.A. (2005) 'The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy', *German Law Journal*, 6(6), pp. 1001–1024; https://doi.org/10.1017/s2071832200014073.

Gát, Á.B. (2020) 'Az alapjogok és a jogállamiság szerepének változása az európai integrációban', *Acta Humana: Hungarian Centre for Human Rights Publications*, 8(1), pp. 83–95; https://doi.org/10.32566/ah.2020.1.4.

Gerards, J. (2014) 'The European Court of Human Rights and the national courts: giving shape to the notion of 'shared responsibility'' in Gerards, J., Fleuren, J. (eds.) *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law. A comparative analysis*. Cambridge-Antwerp-Portland: Intersentia, pp. 13–94.

Gerards, J., Fleuren, J. (2014) 'Comparative analysis' in Gerards, J., Fleuren, J. (eds.) *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law. A comparative analysis*, Cambridge-Antwerp-Portland: Intersentia, pp. 333–374.

Gliszczyńska-Grabias, A., Sadurski, W. (2023) 'Is it Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland', *European Constitutional Law Review*, 19(1), pp. 163–181; https://doi.org/10.1017/S1574019622000396.

Grabenwarter, C. (2010) 'National Constitutional Law relating to the European Union' in von Bogdandy, A., Bast, J. (eds.) *Principles of European Constitutional Law*. München: C.H. Beck, pp. 83–129.

Grabowska, G. (2020) 'Wartości w statutach organizacji międzynarodowych' in Romanowski, M. (ed.) *Wartości Unii Europejskiej a praworządność*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 29–56.

Granata-Menghini, S. (2017) 'Report: Measuring the Immeasurable: the Venice Commission's Rule of Law Checklist', *CDL-JU*, 2017/11, pp. 1–7.

Granata-Menghini, S., Kuier, M. (2020) 'Advisory or de facto binding? Follow up to Venice Commission's opinions: between reality and perception' in Granata-Menghini, S., Caga Tanyar, Z. (eds.) *Venice Commission thirty-year quest for democracy through law 1990 – 2020*. Lund: Juristförlaget i Lund, pp. 281–297.

Grimm, D. (2015) 'The Democratic Costs of Constitutionalisation: The European Case', *European Law Journal*, 21(4), pp. 460–473; https://doi.org/10.1111/eulj.12139.

Grosse, T.G. (2013) 'Semestr Europejski: poprawa zarządzania czy zmiana ustrojowa?', *Instytut Sobieskiego*, 5 November 2013 [Online]. Available at: https://sobieski.org.pl/semestr-europejski-analiza/ (Accessed: 20 September 2023).

Grzeszczak, R. (2019) 'Skuteczność unijnych procedur ochrony praworządności w stosunku do państw członkowskich', *Państwo i Prawo*, 5/2019, pp. 28–54.

Grzeszczak, R., Terrett, S. (2018) 'The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience', *Northern Ireland Legal Quarterly*, 3(69), pp. 347–366; https://doi.org/10.53386/nilq.v69i3.167.

Habermas, J. (2012) *The Crisis of the European Union: A Response*. Cambridge: Polity.

Hajiyev, K. (2020) 'Source of inspiration' in Granata-Menghini, S., Caga Tanyar, Z. (eds.) *Venice Commission thirty-year quest for democracy through law 1990–2020*. Lund: Juristförlaget i Lund, pp. 299–301.

Halberstam, D. (2021) 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach', *Cambridge Yearbook of European Legal Studies*, 2021/23, pp. 128–158; https://doi.org/10.1017/cel.2021.12.

Hallerberg, M., Marzinotto, B., Wolff, G. B. (2011) 'How Effective and Legitimate is the European Semester? Increasing the Role of the European Parliament', *Brugel Working Paper*, 2011/09, pp. 5–28.

Halmai, G. (2018) 'The Possibility and Desirability of Rule of Law Conditionality', *Hague Journal on the Rule of Law*, 11(1), pp. 171–188; https://doi.org/10.1007/s40803-018-0077-2.

Hauptman, M. (2017) 'European economic governance and the 2017 European Semester cycle', *Public Sector Economics*, 41(1), pp. 21–27; https://doi.org/10.3326/pse.41.1.4.

Hefftler, C., Wessels, W. (2013) 'The Democratic Legitimacy of the EU's Economic Governance and National Parliaments', *IAI Working Papers*, 2013/13, pp. 2–16.

Heinemann, F. (2018) 'Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework', *Intereconomics*, 53(6), pp. 297–301.

Hillion, C. (2015) 'Editorial Comments: Safeguarding EU values in the Member States – Is something finally happening?', *Common Market Law Review*, 52(3) pp. 619–628; https://doi.org/10.54648/COLA2015048.

Hillion, C. (2016a) 'Overseeing the rule of law in the European Union. Legal mandate and means', *European Policy Analysis. Swedish Institute for European Policy Studies*, 1/2016, pp. 1–16; https://doi.org/10.1017/CBO9781316258774.005.

Hillion, C. (2016b) 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Closa, C., Kochenov, D. (eds.) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge: Cambridge University Press, pp. 59–81; https://doi.org/10.1017/CBO9781316258774.005.

Hoffman-Riem, W. (2014) 'The Venice Commission of the Council of Europe – Standards and Impact', *The European Journal of International Law,* 25(2)*,* pp. 579–597.

Høj, J., Galasso V., Nicoletti G., Thai-Thann, D. (2006) 'An Empirical Investigaton of Political Economy Factors Behind Structural Reforms in OECD Countries', *OECD Economic Studies*, 2006/42, pp. 87–136; https://doi.org/10.1787/eco_studies-v2006-art3-en.

Holocher, J., Naleziński, B. (2022) 'Pojęcie praworządności we współczesnej debacie politycznoprawnej', *Rocznik Administracji Publicznej*, 2022/8, pp. 326–345; https://doi.org/10.4467/24497800RAP.22.018.16794.

Isiksel, T. (2016) 'European Exceptionalism and the EU's Accession to the ECHR', *European Journal of International Law*, 27(3), pp. 565–589; https://doi.org/10.1093/ejil/chw030.

Jacobs, F.G., White, R.C.A., Ovey, C. (2010) *The European Convention on Human Rights*. Oxford: Oxford University Press.

Jaichand, V., Suksi, M. (eds.) (2009) *60 Years of the Universal Declaration of Human Rights in Europe*. 1st edn. Antwerpen/Portland: Intersentia.

Jakab, A., Kirchmair, L. (2021) 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way', *German Law Journal*, 22(6), pp. 936–955; https://doi.org/10.1017/glj.2021.46.

Jančić, D. (2012) 'Representative democracy across levels? National parliaments and EU constitutionalism', *Croatian Yearbook of European Law & Policy*, 8(1), pp. 227–266; https://doi.org/10.3935/cyelp.08.2012.132.

Jankuv, J. (2006) *Medzinárodné a európske mechanizmy ochrany ľudských práv.* Bratislava: Wolters Kluwer (Iura Edition).

Jankuv, J., Lantajová, D., Blaškovič, K., Buchta, T., Arbet, D. (2016) *Medzinárodné právo verejné – Druhá časť.* Plzeň: Aleš Čeněk.

Janse, R. (2019) 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement', *International Journal of Constitutional Law,* 17(1), pp. 43–65; https://doi.org/10.1093/icon/moz009.

Janusz-Pohl, B. (2023) 'Mutual Recognition of Judicial Decisions in Criminal Matters in Relation to the Rule of Law Concepts – example of the EAW execution refusal' in Pastuszko, G. (ed.) *Rule of Law.* Warsaw: Instytut Wymiaru Sprawiedliwości, pp. 59–123.

Jaskulski, A. (2016) 'Procedury kontroli przestrzegania praworządności i zasad demokracji przez Unię Europejską na przykładzie Węgier i Polski', *Rocznik Integracji Europejskiej*, 2016/10, pp. 229–241; https://doi.org/10.14746/rie.2016.10.14.

Jin, Y. (2021) 'Framework to discuss corruption in OECD Economic Surveys', *OECD Economics Department Working Papers*, 2021/1666, pp. 6–64; https://doi.org/10.1787/d1e523ef-en.

Jongen, H. (2021) 'Peer review and compliance with international anti-corruption norms: Insights from the OECD Working Group on Bribery', *Review of International Studies*, 47(3), pp. 331–352; https://doi.org/10.1017/S0260210521000097.

Josifović, I., Kambovski, I. (2021) 'The Specificity of Article 2 of the ECHR and its Applicability in the Balkans: Case Studies' in Pavlović, Z. (ed.) *Yearbook – Human Rights Protection – Right to Life (Number 4)*. Belgrade: Provincial Protector of Citizens – Ombudsman, Institute of Criminological and Sociological Research in Belgrade, pp. 447–461.

Jovanović, M. (2019) *Materijalnopravni standardi tretmana stranih direktnih ulaganja*. Belgrade: Pravni fakultet Univerziteta u Beogradu.

Kanetake, M. (2019) 'María de los Ángeles González Carreño v. Ministry of Justice', *American Journal of International Law*, 113(3), pp. 586–592; https://doi.org/10.1017/ajil.2019.31.

Karpat, A. (2023) 'The Relationship of the Supreme Courts of the Slovak Republic with the Court of Justice of the European Union', *Central European Journal of Comparative Law*, 4(2), pp. 95–115; https://doi.org/10.47078/2023.2.95-115.

Kawecka-Wyrzykowska, E. (2017*)* 'Realizacja semestrów europejskich w Polsce: efekty dla koordynacji polityki gospodarczej w Unii Europejskiej', *Studia i Prace Wydziału Nauk Ekonomicznych i Zarządzania*, 49(2), pp. 117–126; https://doi.org/10.18276/sip.2017.49/2-09.

Kelemen, D., Pech, L., Alemanno, A. (2019) *Responding to Judit Varga: Separating facts from propaganda about the rule of law* [Online]. Available at: https://www.euronews.com/2019/11/25/responding-to-judit-varga-separating-facts-from-propaganda-about-the-rule-of-law-view (Accessed: 28 October 2023).

Kelemen, R.D. (2023) 'Article 7's Place in the EU Rule of Law Toolkit' in Södersten, A., Hercock, E. (eds.) *Rule of Law in the EU: Crisis and Solutions*. Stockholm: Swedish Institute for European Policy Studies, pp. 22–27.

Kelsen, H. (2005) *Pure Theory of Law*. New Jersey: The Law Book Exchange.

Kida, O. (2023) 'Państwo prawne' in Kotowski, A., Syryt, A. (eds.) *Wartości Unii Europejskiej w świetle art. 2 Traktatu o Unii Europejskiej*. Warsaw: Wydawnictwo Szkoły Wyższej Wymiaru Sprawiedliwości, pp. 143–166.

Klamert, M., Kochenov, D. (2019) 'Article 2 Commentary' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights. A Commentary*. Oxford: Oxford University Press, pp. 22–30; https://doi.org/10.1093/oso/9780198759393.003.5.

Kochenov, D. (2009) 'The EU Rule of Law: Cutting Paths through Confusion', *Erasmus Law Review*, 1(2), pp. 5–24.

Kochenov, D. (2019a) 'Article 7 TEU Commentary' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights. A Commentary*. Oxford: Oxford University Press, pp. 89–98; https://doi.org/10.1093/oso/9780198759393.003.10.

Kochenov, D. (2019b) 'Article 354 TFEU Commentary' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights. A Commentary*. Oxford: Oxford University Press, pp. 2081–2082; https://doi.org/10.1093/oso/9780198759393.003.512.

Kochenov, D. (2021) 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, Ch., Taborowski, M., Schmidt, M. (eds.) *Defending Checks and Balances in EU Member States*. Berlin: Springer, pp. 127–154; https://doi.org/10.1007/978-3-662-62317-6_6.

Kochenov, D., Pech, L. (2015a) 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', *European Constitutional Law Review*, 11(3), pp. 512–540; https://doi.org/10.1017/S1574019615000358.

Kochenov, D., Pech, L. (2015b) 'Upholding the Rule of Law in the EU: On the Commission's "Pre-Article 7 Procedure" as a Timid Step in the Right Direction', *EUI Working Paper RSCAS*, 2015/24, pp. 1–15.

Kochenov, D., van Wolferen, M. (2018) 'Dialogical Rule of Law and the Breakdown of Dialogue in the EU', *EUI Working Paper Law,* 2018/01, pp. 1–15.

Kochenov, D., Pech, L. (2019) 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid', *RECONNECT Policy Brief*, 2019 [Online]. Available at: https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf (Accessed: 27 December 2023).

Kochenov, D., Pech, L. (2021) *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*. Stockholm: Swedish Institute for European Policy Studies.

Kolářová, K. (2019) *Rozhodčí řízení má negativní pověst. Potřebujeme nový zákon, ne další záplaty, říká advokát* [Online]. Available at: https://www.lidovky.cz/byznys/rozhodci-rizeni-ma-negativni-povest-potrebujeme-novy-zakon-ne-dalsi-zaplaty-rika-advokat.A190302_170524_ln_byznys_pravo_ssu (Accessed: 28 October 2023).

Kölling, M. (2022) 'The role of (rule of law) conditionality in MFF 2021-2027 and Next Generation EU, or the stressed budget', *Journal of Contemporary European Studies*, pp. 1–14; https://doi.org/10.1080/14782804.2022.2059654.

Komárek, J. (2014) 'National Constitutional Courts in the European Constitutional Democracy', *International Journal of Constitutional Law*, 12(3), pp. 525–544; https://doi.org/10.1093/icon/mou048.

Kopa Bončková, H. (2022) 'Článek 2 (Smlouva o EU)' in Tomášek, M., Šmejkal, V. (eds.) *Smlouva o fungování EU; Smlouva o EU; Listina základních práv EU: komentář.* Prague: Wolters Kluwer, pp. 1195–1202.

Kordela, M. (2012) *Zasady prawa. Studium teoretyczno prawne*. Poznań: Wydawnictwo Naukowe UAM.

Kosta, V., Skoutaris, N., Tzevelekos, V.P. (2014) *The EU Accession to the ECHR*. Oxford: Hart Publishing.

Kovacevic, B. (2017) *Europe's Hidden Federalism: Federal Experiences of European Integration*. London, New York: Routledge.

Kozłowski, A. (2022) 'Wykluczenie państwa członkowskiego z Unii Europejskiej – zarys normatywnego modelu', *Europejski Przegląd Sądowy*, 9/2022, pp. 19–27.

Krapac, D., Đurđević, Z., Ivičević Karas, E., Bonačić, M., Burić, Z. (2013) *Presude Europskog suda za ljudska prava protiv Republike Hrvatske u kaznenim predmetima*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu.

Kreilinger, V. (2019) *National parliaments in Europe's post-crisis economic governance*. Berlin: Hertie School of Governance.

Krisch, N. (2008) 'The Open Architecture of European Human Rights Law', *The Modern Law Review*, 71(2), pp. 183–2016; https://doi.org/10.1111/j.1468-2230.2008.00688.x.

Krošlák, D. (2022) *Právny štát*. Praha: Wolters Kluwer.

Krošlák, D., Balog, B., Surmajová, Ž. (2020) *Teória štátu a práva*. Bratislava: Wolters Kluwer.
Krstulović Dragičević, A. (2016) 'Načelo zakonitosti u praksi Europskog suda za ljudska prava', *Hrvatski ljetopis za kaznene znanosti i praksu*, 23(2), pp. 403–433.
Krstulović Dragičević, A., Sokanović, L. (2017) 'Načelo zakonitosti pred izazovima Europskog kaznenog prava' in Kurtović Mišić, A., Pajčić, M., Korošec, D., Petrović, B. (eds.) *Zbornik radova s međunarodnog znanstvenog savjetovanja "Europeizacija kaznenog prava i zaštita ljudskih prava u kaznenom postupku i postupku izvršenja kaznenopravnih sankcija"*. Split: Pravni fakultet Sveučilišta u Splitu, pp. 25–45.
Krunke, H. (2014) 'The Danish Lisbon Judgment: Danish Supreme Court, Case 199/2012, Judgment of 20 February 2013', *European Constitutional Law Review*, 10(3), pp. 542–570; https://doi.org/10.1017/s1574019614001357.
La Pergola, A. (2009) 'Speech at the second Venice Commission' in Dijk, P. van, Granata-Menghini, S. (eds.) *Liber Amicorum Antonio La Pergola*. Lund: Juristförlaget i Lund, pp. 39–44.
Łacny, J. (2021a) 'The Rule of Law Conditionality Under Regulation No 2092/2020 – Is it all About the Money?', *Hague Journal on the Rule of Law*, 13(1), pp. 79–105; https://doi.org/10.1007/s40803-021-00154-6.
Łacny, J. (2021b) 'Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission's Proposal Legal' in von Bogdandy, A., Bodganowicz, P., Canor, I., Grabenwarter, C., Taborowski, M., Schmidt, M. (eds.) *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*. Heidelberg: Springer Berlin, pp. 269–303; https://doi.org/10.1007/978-3-662-62317-6_11.
Lambert Abdelgawad, E. (2008) *The execution of judgments of the European Court of Human Rights*. Strasbourg: Council of Europe Publishing.
Lambsdorff, J.G. (2009) 'The Organisation of Anti-Corruption: Getting Incentives Right' in Rotberg, R.I. (ed.) *Corruption, Global Security and World Order*. Washington: Harvard Kennedy School and the Brookings Institution Press, pp. 389–415.
Lang, W. (1986) 'Pojęcia prawne i prawnicze' in Lang, W., Wróblewski, J., Zawadzki, S. (eds.) *Teoria państwa i prawa*. Warsaw: Państwowe Wydawnictwo Naukowe, pp. 353–388.
Larion, I.M. (2018) 'Protecting EU Values: A Juridical Look at Article 7 TEU', *Lex ET Scientia International Journal*, (25)2, pp. 160–176.
Lauc, Z. (2016) 'Načelo vladavine prava u teoriji i praksi', *Pravni vjesnik*, 32(3–4), pp. 45–67.
Lautenbach, G. (2013) *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford University Press.
Leloup, M. (2020) 'The Concept of Structural Human Rights in the European Convention on Human Rights', *Human Rights Law Review*, 3(20), pp. 480–501; https://doi.org/10.1093/hrlr/ngaa024.
Lenaerts, K. (2014) 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection', *Polish Yearbook of International Law*, 34/2014, pp. 135–160.
Lenaerts, K. (2020) 'New Horizons for the Rule of Law within the EU', *German Law Journal*, 21(1), pp. 29–34; https://doi.org/10.1017/glj.2019.91.
Lenaerts, K. (2023a) 'On Checks and Balances: the Rule of Law within the EU', *Columbia Journal of European Law*, (29)2, pp. 25–63.
Lenaerts, K. (2023b) 'On Values and Structures: The Rule of Law and the Court of Justice of the European Union' in Södersten, A., Hercock, E. (eds.) *Rule of Law in the EU: Crisis and Solutions*. Stockholm: Swedish Institute for European Policy Studies, pp. 12–20.
Lenaerts, K., Nuffel, P. van (2021) *EU Constitutional Law*. Oxford: Oxford University Press.

Lord, C. (2017) 'How can parliaments contribute to the legitimacy of the European Semester?', *Parliamentary Affairs*, 70(4), pp. 673–690; https://doi.org/10.1093/pa/gsx017.

Mader, O. (2019) 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law', *Hague Journal on the Rule of Law*, 11(1), pp. 133–170; https://doi.org/10.1007/s40803-018-00083-x.

Madsen, M., Mayoral, J., Strezhnev, A., Voeten, E. (2022) 'Sovereignty, Substance, and Public Support for European Courts' Human Rights Rulings', *American Political Science Review*, 116(2), pp. 419–438; https://doi.org/10.1017/S0003055421001143.

Magnus, U. (2018) 'Wrongfulness and Fault as Requirements of the "European Delict" under Art. 7 TEU' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht*, *supplement no. 1.* Baden–Baden: Nomos, pp. 145–158; https://doi.org/10.5771/9783845293721-145.

Małobęcka, I., Porzeżyńska, M. (2018) 'Ochrona praworządności w Unii Europejskiej – węzłowe problemy', *Przegląd Europejski*, 2018/1, pp. 183–193; https://doi.org/10.5604/01.3001.0013.0043.

Mangiameli, S., Saputelli, G. (2013) 'Article 7 [The Principles of the Federal Coercion]' in Blanke, H. J., Mangiameli, S. (eds.) *The Treaty on European Union. A Commentary*. Berlin–Heidelberg: Springer–Verlag, pp. 349–373.

Marcisz, P., Taborowski, M. (2017) 'Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności. Krytyczna analiza analizy krytycznej (artykuł polemiczny)', *Państwo i Prawo*, 2017/12, pp. 100–109.

Marshall, P. D. (2011) 'A Comparative Analysis of the Right to Appeal', *Duke Journal of Comparative and International Law,* 22 (1), pp. 1–46.

Mathieu, B. (2022) 'Constitutional identity' in Raisz, A. (ed.) *International Law from a Central European Perspective*. Miskolc, Budapest: Central European Academic Publishing, pp. 21–39; https://doi.org/10.54171/2022.ar.ilfcec_2.

McCorquodale, R. (2016) 'Defining the International Rule of Law: Defying Gravity', *International and Comparative Law Quarterly*, 65(2), pp. 277–304; https://doi.org/10.1017/S0020589316000026.

Meierhenrich, J. (2021) 'Rechtsstaat versus the Rule of Law' in Meierhenrich, J., Loughlin, M. (eds.) *The Cambridge Companion to the Rule of Law*. Cambridge: Cambridge University Press, pp. 39–67; https://doi.org/10.1017/9781108600569.003.

Meissner, K.L., and McKenzie, L. (2019) 'The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes', *Journal of European Public Policy*, 26(9), pp. 1273–1291; https://doi.org/10.1080/13501763.2018.1526203.

Mendes, J. (2016) 'Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law', *Common Market Law Review*, (53)2, pp. 419–451; https://doi.org/10.54648/COLA2016036.

Merino, P. (1999) 'The Office for Democratic Institutions and Human Rights' in IFSH (ed.) *OSCE Yearbook 1998*. Baden-Baden: Nomos Verlagsgesellschaft, pp. 387–400.

Miąsik, D. (2022) *Zasady i prawa podstawowe. System Prawa Unii Europejskiej. Tom 2*. Warsaw: C.H. Beck.

Mik, C. (2000) *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*. Warsaw: C.H. Beck.

Mik, C. (2005) 'Komentarz do art. 7' in Mik, C., Czapliński, W. (eds.) *Traktat o Unii Europejskiej. Komentarz*. Warsaw: Dom Wydawniczy ABC, pp. 94–100.

Mik, C. (2018) 'Ocena uzasadnionego wniosku, zgodnie z art. 7 Traktatu o Unii Europejskiej, dotyczącego praworządności w Polsce, wraz z projektem decyzji Rady w sprawie stwierdzenia wyraźnego ryzyka poważnego naruszenia przez Rzeczpospolitą Polską zasady praworządności', *Zeszyty Prawnicze BAS*, 1(57), pp. 101–112; https://doi.org/10.31268/ZPBAS.2018.07.

Mollet, F. (2021) *Rethinking EU economic governance: The European Semester* [Online]. Available at: https://www.epc.eu/content/PDF/2021/EU-Governance_PB_v4.pdf (Accessed: 15 September 2023).

Morar, D. (2022) *Putea să fie altcumva. O istorie subiectivă a justiției după 1990*. Bucharest: Humanitas.

Mráz, S., Poredoš, F., Vršanský, P. (2003) *Medzinárodné verejné právo*. Bratislava: Vydavateľské oddelenie Právnickej fakulty Univerzity Komenského v Bratislave.

Murphy, C.C. (2010) 'The Principle of Legality in Criminal Law Under the ECHR', *European Human Rights Law Review*, 2010/2, pp. 192–207.

Murphy, M. (2017) 'Article 4(2) TEU: Blow to the Supremacy of Union Law', *Trinity College Law Review*, 2017/20, pp. 94–121.

Muszyński, M. (2023) 'Supremacy and Primacy: Hierarchical Relationships Between the Polish and EU Legal Systems and Their Guardians', *Central European Journal of Comparative Law*, 4(2), pp. 177–199; https://doi.org/10.47078/2023.2.177-199.

Nachbar, T.B. (2009) 'Defining the Rule of Law problem', *The Green Bag*, 6(2D), pp. 303–318.

Nagy, C.I. (2020) 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'européenne', *German Law Journal*, 21(5), pp. 838–866; https://doi.org/10.1017/glj.2020.44.

Niedobitek, M. (2018) 'Right and duty to pursue the "wrongdoer" and possible abuse of Art. 7 TEU' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht*, *supplement no. 1*. Baden–Baden: Nomos, pp. 233–242; https://doi.org/10.5771/9783845293721-233.

North, D.C. (1990) *Institutions, institutional change and economic performance*. Cambridge: Cambridge University Press.

Novak, M. (2023) 'Dialogue between the Slovenian Highest Courts and the Court of Justice of the European Union', *Central European Journal of Comparative Law*, 4(2), pp. 201–214; https://doi.org/10.47078/2023.2.201-214.

Nowak-Far, A. (2021) 'The Rule of Law Framework in the European Union: Its Rationale, Origins, Role and International Ramifications' in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, Ch., Taborowski, M., Schmidt, M. (eds.) *Defending Checks and Balances in EU Member States*. Berlin: Springer, pp. 305–331; https://doi.org/10.1007/978-3-662-62317-6_12.

O'Boyle, M. (2011) 'The Future of the European Court of Human Rights', *German Law Journal*, 12(10), pp. 1862–1877; https://doi.org/10.1017/S2071832200017594.

Oberschmidt, R. (2002) 'Ten Years of the Office for Democratic Institutions and Human Rights – An Interim Assessment' in IFSH (ed.) *OSCE Yearbook 2001*. Baden-Baden: Nomos, pp. 387–400.

Ochmański, J.W. (2023) *Spory o działania ultra vires w Unii Europejskiej*. Warsaw: Wolters Kluwer.

Omejec J. (2013) *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava – Strasbourški acquis*. Zagreb: Novi informator.

Orbán, E. (2022) 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union', *Hungarian Journal of Legal Studies*, 63(2), pp. 142–173; https://doi.org/10.1556/2052.2022.00374.

Orbán, E., Szabó, P. (2022) 'A „visszafoglalás elve". Az Alkotmánybíróság 32/2021 (XII.20.) AB határozata az uniós jog hazai érvényesüléséről', *Közjogi Szemle*, 2022/2, pp. 103–111.

Papadopoulosand, Y., Piatton, S. (2019) 'The European Semester: Democratic Weaknesses as Limits to Learning', *European Policy Analysis*, 5(1), pp. 58–79; https://doi.org/10.1002/epa2.1060.

Pastuszko, G. (2020) 'Możliwości ekstensywnej wykładni przepisu art. 2 TUE w kontekście procedury badania praworządności w państwach członkowskich i powiązania jej z budżetem Unii Europejskiej' in Romanowski, M. (ed.) *Wartości Unii Europejskiej a praworządność*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 191–216.

Pastuszko, G. (2023) 'Influence of the EU institutions on the Polish constitutional order in the context of the dispute over the rule of law' in Pastuszko, G. (ed.) *Rule of Law*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 307–355.

Pech, L. (2010) 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', *European Constitutional Law Review*, (6)3, pp. 359–396; https://doi.org/10.1017/S1574019610300034.

Pech, L. (2020a) *Doing more harm than good? A critical assessment of the European Commission's first Rule of Law Report* [Online]. Available at: https://eu.boell.org/en/2020/12/04/doing-more-harm-good-critical-assessment-european-commissions-first-rule-law-report (Accessed: 28 October 2023).

Pech, L. (2020b) 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', *RECONNECT–Working Paper*, 7/2020, pp. 3–33; https://doi.org/10.2139/ssrn.3608661.

Pech, L. (2022) 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', *Hague Journal on the Rule of Law*, 14/2022, pp. 107–138; https://doi.org/10.1007/s40803-022-00176-8.

Pech, L., Grogan, J., Bárd, P., Kochenov, D., Śniadach, O., Warylewska, K., Podolska, A., Beqiraj, J., Closa, C., Moxham, L., Wenton, A., Grabowska-Moroz, B., Pirjatanniemi, E., Koncewicz, T., Fernández-Albertos, J. (2020) 'Meaning and Scope of the EU Rule of Law', *RECONNECT* [Online]. Available at: https://bit.ly/3DzIoV0 (Accessed: 1 August 2023).

Pellet, A. (2002) 'Article 38' in Simma, B., Mosler, H., Randelzhofer, A., Tomuschat, C., Wolfrum, R., Paulus, A., Chaitobu, E. (eds.) *The Charter of the United Nations. A Commentary*. 2nd edn. Oxford: Oxford University Press.

Peters, A. (2006) 'The Constitutionalisation of the European Union – Without the Constitutional Treaty' in Puntscher Riekmann, S., Wessels, W. (eds) *The Making of a European Constitution*. Wiesbaden: VS Verlag für Sozialwissenschaften, pp. 35–67; https://doi.org/10.1007/978-3-531-90095-7_2.

Peters, A. (2021) *The Venice Commission as a facilitator of the implementation of international law in domestic law* [Online]. Available at: /https://www.mpil.de/files/pdf3/Handout_Venice_Commission.pdf (Accessed: 31 October 2023).

Petrov, V. (2022) 'European versus National Constitutional Identity in the Republic of Serbia: a Concurrence or Unity' in Pastuszko, G. (ed.) *Constitutional identity and European Union axiology – perspective of Central European States*. Warszawa: Szkoła Wyższa Wymiaru Sprawiedliwości, pp. 177–200.

Pieth, M. (2000) *Taking stock: making the OECD initiative against corruption work* [Online]. Available at: https://www.oas.org/juridico/english/pieth2000.htm (Accessed: 30 October 2023).

Piwoński, K. (2021) 'Pozycja i rola Komisji Europejskiej w procedurze ochrony budżetu UE w ramach ogólnego reżimu warunkowości', *Przegląd Europejski*, 2021/1, pp. 145–156; https://doi.org/10.31338/1641-2478pe.1.21.8.

Polacchini, F. (2017) 'The Relationship Between Positive Obligations of Incrimination Under the ECHR and the Constitutional Principle of Legality in Criminal Matters in the Italian Legal System' in Arnold, R., Martínez-Estay, J.I. (eds.) *Rule of Law, Human Rights and Judicial Control of Power (Ius Gentium: Comparative Perspectives on Law and Justice)*. Cham: Springer, pp. 377–389; https://doi.org/10.1007/978-3-319-55186-9_21.

Polański, O. (2022) 'Poland – Constitutional Tribunal Judgment K 3/21 – A continued assault on the integrity of the EU legal order', *Public Law*, EUI Research Repository, pp. 344–347.

Półtorak, N. (2022) 'Od zasad ogólnych do tożsamości Unii Europejskiej – normy konstytucyjne w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej', *Studia Prawnicz*e, 2(226), pp. 187–211; https://doi.org/10.37232/sp.2022m.

Pomykała, A., Raczyński, J. (2020) 'Europejski Zielony Ład dla Unii Europejskiej i jej mieszkańców', *Technika Transportu Szynowego*, 27(12), pp. 6–9.

Pons-Hernández, M. (2022) 'Power(ful) Connections: Exploring the Revolving Doors Phenomenon as a Form of State-Corporate Crime', *Critical Criminology*, 30(2), pp. 305–320; https://doi.org/10.1007/s10612-022-09626-z.

Potacs, M. (2018) 'Balancing Values and Interests in the Art. 7 TEU Procedure' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht*, *supplement no 1.* 1st edn. Baden–Baden: Nomos, pp. 159–167; https://doi.org/10.5771/9783845293721-159.

Priebus, S. (2022) 'The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values', *JCMS: Journal of Common Market Studies*, 60(1), pp. 1684–1700; https://doi.org/10.1111/jcms.13341.

Qerimi, Q. (2020) 'Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Venice Commission's Rule of Law Checklist', *Law and Development Review*, 13(1), pp. 59–94; https://doi.org/10.1515/ldr-2019-0010.

Radbruch, G. (1946) 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung,* 1946/1, pp. 105–108.

Raimla, E. (2016) 'Involvement of the National Parliaments in SCPs and NRPs – 2014, 2015 and 2016. European Parliament Directorate-General for Internal Policies', *Economic Governance Support Unit*, pp. 1–42.

Raimondi, G. (2016) 'Immunità parlamentari e diritti umani', *Diritto Pubblico Europeo*, 2016/1, pp. 2–7; https://doi.org/10.6092/2421-0528/6466.

Reh, C. (2009) 'The Lisbon Treaty: De-Constitutionalizing the European Union', *Journal of Common Market Studies*, 47(3), pp. 625–650; https://doi.org/10.1111/j.1468-5965.2009.01819.x.

Roubini, N., Sachs, J.D. (1989) 'Political and economic determinants of budget deficits in the industrial democracies', *European Economic Review*, 33(5), pp. 903–933; https://doi.org/10.1016/0014-2921(89)90002-0.

Rovná, L. (2011), 'Constitutionalizing the European Union: The Lisbon Treaty and the Czech Republic. A Complicated Story with an Open Ending…', *L'Europe en Formation*, 362(4), pp. 101–123; https://doi.org/10.3917/eufor.362.0101.

Sadurski, W. (2003) 'Constitutionalization of the EU and the Sovereignty Concerns of the New Accession States: The Role of the Charter of Rights', *Working Paper EUI Law*, 2003/11, pp. 1–33.

Sadurski, W. (2010) 'Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jorg Haider', *Columbia Journal of European Law*, 16(3), pp. 385–426.

Savić, V.I. (2015) 'Still Fighting God in the Public Arena: Does Europe Pursue the Separation of Religion and State Too Devoutly or Is It Saying It Does Without Really Meaning It?', *BYU Law Review,* 2016/679, pp. 679–726.

Savić, V.I. (2020) 'It works better if it is not too secularized: the Croatian constitutional model for regulating state-church relations' in Babie, P.T., Rochow, N., Scharffs, B. (eds.) *Freedom of Religion or Belief, Creating the Constitutional Space for Fundamental Freedoms*, Cheltenham: Edward Elgar Publishing, pp. 260–282; https://doi.org/10.4337/9781788977807.00019.

Savić, V.I. (2023a) 'Radbruch's formula and the conscience of a Saint: Cardinal Alojzije V. Stepinac', *Studia Z Prawa Wyznaniwego*, 2023/26, pp. 147–170; https://doi.org/10.31743/spw.14455.

Savić, V.I. (2023b) 'The right to privacy in the European Context: Insight into Fundamental Issues' in Marcin, W. (ed) *The Right to Privacy in the Digital Age, Perspectives on Analysis of Certain Central European Countries' Legislation and Practice*. Budapest–Miskolc: Central European Academy Publishing, pp. 47–75; https://doi.org/10.54237/profnet.2023.mwrtpida_2.

Schill, S.W. (2015) 'Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements', *The Journal of World Investment & Trade*, 16(3), pp. 379–388; https://doi.org/10.1163/22119000-01603000E.

Schima, B. (2019) 'Article 269 TFEU Commentary' in Kellerbauer, M., Klamert, M., Tomkin, J. (eds.) *The EU Treaties and the Charter of Fundamental Rights. A Commentary*. Oxford: Oxford University Press, pp. 1845–1846; https://doi.org/10.1093/oso/9780198759393.003.409.

Scholtes, J. (2023) *The Abuse of Constitutional Identity in the European Union*. Oxford: Oxford University Press.

Schroeder, W. (2021) 'The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, C., Taborowski, M., Schmidt, M. (eds) *Defending Checks and Balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 298*. Berlin, Heidelberg: Springer; pp. 105–126; https://doi.org/10.1007/978-3-662-62317-6_5.

Schütze, R. (2009) *From Dual to Cooperative Federalism: The Changing Structure of European Law.* Oxford, New York: Oxford Studies in European Law.

Schweiger, C. (2021) 'Parliamentary Scrutiny of the European Semester: The Case of Poland', *Politics and Governance*, 9(3), pp. 124–134; https://doi.org/10.17645/pag.v9i3.4250.

Sehnálek, D. (2020) 'The European Perspective on the Notion of Precedent – are EU and Czech Court Decisions Source of Law?', *European Studies – The Review of European Law, Economics and Politics*, 7(1), pp. 125–153; https://doi.org/10.2478/eustu-2022-0050.

Sehnálek, D. (2021) 'Interpretation of Fundamental Rights in the Czech Republic' in Tóth, Z. J. (ed.) *Constitutional Reasoning and Constitutional Interpretation: Analysis on Certain Central European Countries*. Miskolc: Ferenc Mádl Institute of Comparative Law & Central European Academic Publishing, pp. 245–299; https://doi.org/10.54237/profnet.2021.zjtcrci_4.

Sehnálek, D. (2022) 'Normative Approach to the Interplay between the CCC and the CJEU/ECTHR: Judicial Dialogue or a Dictate?', *Law, Identity and Values*, 2(1), pp. 203–223; https://doi.org/10.55073/2022.1.203-223.

Sehnálek, D., Říčka, R. (2015) 'Unresolved problems of EU citizenship regulation or Malta is angry', *Časopis pro právní vědu a praxi*, 23(4), pp. 331–341.

Shaw, M. (2008) *International Law*. Cambridge: Cambridge University Press.

Shnutz Dürr, R. (2010) 'The Venice Commission' in Kleinsorge, T.E. (ed.) *Council of Europe (CE)*. Alphen aan den Rijn, New York: Kluwer Law International, pp. 151–163.

Sillen, J. (2019) 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights', *European Constitutional Law Review*, 15(1), pp. 104–133; https://doi.org/10.1017/S1574019619000014.

Simon, D. (2011) 'Conventionnalité et constitutionnalité', *Pouvoirs. Revue Française d'études constitutionnelles et politiques*, 137(2), pp. 19–31; https://doi.org/10.3917/pouv.137.0019.

Šipulová, K., Spáč, S., Kosař, D., Papoušková, T., Derka, V. (2022) 'Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary', *Regulation & Governance*, 17(1), pp. 22–42; https://doi.org/10.1111/rego.12453.

Skogly, S.I. (1999) 'The Position of the World Bank and the International Monetary Fund in the Human Rights Field' in Hanski, R., Suksi, M. (eds.) *An Introduction to the International Protection of Human Rights*. 2nd edn. Turku/Åbo: Institute for Human Rights – Åbo Akademi University, pp. 195–205.

Smidova, Z. (2020) 'Building the evidence for OECD integrity and anti-corruption agenda: The current situation and avenues for future analysis', *OECD Economics Department Working Papers*, 2020/1614, pp. 5–51; https://doi.org/10.1787/80ebe6e6-en.

Smidova, Z., Cavaciuti, A., Johnsøn, J. (2022a) *OECD Public Integrity Indicators – New data on quality of anti-corruption and public integrity strategies* [Online]. Available at: https://oecdecoscope.blog/2022/08/26/oecd-public-integrity-indicators-new-data-on-quality-of-anti-corruption-and-public-integrity-strategies/?print=pdf (Accessed: 12 September 2023).

Smidova, Z., Cavaciuti, A., Johnsøn, J. (2022b) 'Anti-corruption and public integrity strategies – Insights from new OECD indicators', *OECD Economics Department Working Papers,* 1725/2022, pp. 5–50; https://doi.org/10.1787/a925c7fd-en.

Smismans, S. (2010) 'The European Union's Fundamental Rights Myth', *Journal of Common Market Studies,* 48(1), pp. 45–66; https://doi.org/10.1111/j.1468-5965.2009.02041.x.

Sokanović, L. (2023) 'The Relationship of the Croatian Constitutional Court and Supreme Court to the Court of Justice of the European Union in National Case Law', *Central European Journal of Comparative Law*, 4(2), pp. 295–316; https://doi.org/10.47078/2023.2.295-316.

Sołtys, A. (2017) 'The obligation to interpret national law in accordance with the European Union law in the jurisprudence of Polish Constitutional Court – focus on limits', *European Journal of Public Matters*, 2017/1, pp. 51–62; https://doi.org/10.1007/s40803-022-00186-6

Sozański, J. (2012) *Ogólne zasady prawa a wartości Unii Europejskiej (po traktacie lizbońskim) – studium prawno porównawcze*. Toruń: Wydawnictwo Adam Marszałek.

Spaventa, E. (2023) 'Fundamental Rights in the European Union' in Peers, S., Barnard, C. (eds.) *European Union Law*. 4th edn. Oxford: Oxford University Press, pp. 226–254; https://doi.org/10.1093/he/9780192863836.003.0009.

Staszczyk, P. (2020) 'Zalecenia, opinie, akty nienazwane, soft law' in Biernat, S. (ed.) *System prawa Unii Europejskiej. Podstawy i źródła Unii Europejskiej*. Warsaw: C.H. Beck, Instytut Nauk Prawnych PAN, pp. 1093–1126.

Stein, R. A. (2019) 'What Exactly Is the Rule of Law?', *Houston Law Review,* 17 October 2019. [Online]. Available at: https://houstonlawreview.org/article/10858-what-exactly-is-the-rule-of-law (Accessed: 29 October 2023).

Steinbach, A. (2010) 'The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration', *German Law Journal*, 11(4), pp. 367–390; https://doi.org/10.1017/s2071832200018587.

Streinz, R. (2018) 'Principles and values in the European Union' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht*, *supplement no 1*. Baden–Baden: Nomos, pp. 9–21; https://doi.org/10.5771/9783845293721-7.

Strelkov, A. (2019) 'EU Justice Scoreboard: a new policy tool for "deepening" European integration?' *Journal of Contemporary European Studies*, 27(1), pp. 15–27; https://doi.org/10.1080/14782804.2018.1534729.

Suchocka, H. (2020) 'Are Venice Commission's standard on the Rule of Law still valid?' in Granata-Menghini, S., Caga Tanyar, Z. (eds.) *Venice Commission thirty-year quest for democracy through law 1990–2020.* Lund: Juristförlaget i Lund, pp. 641–652.

Sur, E. (2018) 'From the uncertain to the implicit (passing by the problematic). Reflections on the reference to the rule of law and on its protection in the Treaty on European Union' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht*, *supplement no 1*. 1st edition. Baden–Baden: Nomos, pp. 39–57; https://doi.org/10.5771/9783845293721-39.

Syryt, A. (2022) 'Legal Protection of State, National and Community Symbols in Poland' in Tóth, Z. J. (ed.) *Constitutional and Legal Protection of State and National Symbols in Central Europe*. Miskolc–Budapest: Central European Academic Publishing, pp. 177–215; https://doi.org/10.54237/profnet.2022.ztclpsnsce_6.

Syryt, A. (2023) 'Impact of the European Integration Process on the amendments in the Constitutional System of Public Authorities: between integration and sovereignty. The role of the constitutional Identity' in Schanda, B. (ed.) *The Character of Legislative Process Adopted to Amend the Constitution in the Light of the European Integration and Constitutional Identity*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 49–109.

Szaniszló, K. (2017) 'Államszervezeti fogalmak útvesztőjében. Jogállamiság, népszuverenitás – egy lehetséges értelmezés', *JURA*, 2017/2, pp. 421–434.

Szymanek, J. (2020a) 'Możliwości ekstensywnej wykładni przepisów art. 2 TUE' in Romanowski, M. (ed.) *Wartości Unii Europejskiej a praworządność*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 115–138.

Szymanek, J. (2020b) 'Zamiast zakończenia: Rule of law jako wspólna wartość w prawie Unii Europejskiej' in Romanowski, M. (ed.) *Wartości Unii Europejskiej a praworządność*. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 353–375.

Taborowski, M. (2019) *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego.* Warsaw: Wolters Kluwer.

Tanchev, E. (2008) 'Report: Rule of Law and State Governed by Law', *CDL-JU*, (2008)036, pp. 1–10.

Taylor, P. (2023) *The common heritage of the mankind: a bold doctrine kept within strict boundaries* [Online]. Available at: https://wealthofthecommons.org/essay/common-heritage-mankind-bold-doctrine-kept-within-strict-boundaries (Accessed: 11 August 2023).

Taylor, V.L. (2018) 'The New Dilemmas of Rule of Law Assistance' in Lovall, E. (ed.) *Proceedings of the ASIL Annual Meeting.* Cambridge: Cambridge University Press, pp. 259–263; https://doi.org/10.1017/amp.2019.55.

Thirlway, H. (2006) 'The Sources of International Law' in Evans, M. D. (ed.) *International Law*. 2nd edn. Oxford: Oxford University Press.

Tichý, L. (2018) 'The nature and requirements for liability of a Member State under Article 7 TEU' in Hatje, A., Tichý, L. (eds.) *Liability of Member States for the Violation of Fundamental Values of the European Union*, *Europarecht supplement no. 1*. 1st edn. Baden–Baden: Nomos, pp. 87–108; https://doi.org/10.5771/9783845293721-85.

Tomuschat, Ch. (2003) *Human Rights. Between Idealism and Realism*. Oxford: Oxford University Press.

Traser, J., Béres, N., Marinkás, Gy., Pék, E. (2020) 'The Principle of the Primacy of EU Law in Light of the Case Law of the Constitutional Courts of Italy, Germany, France, and Austria', *Central European Journal of Comparative Law*, 1(2), pp. 151–175; https://doi.org/10.47078/2020.2.151-175.

Trócsányi, L. (2023) 'A nemzeti alkotmányok és az európai integráció' in Veress, E., Fegyveresi, Zs. (eds.) *Liber amicorum Attila Varga. Tisztelgő kötet Varga Attila 60. születésnapjára*. Cluj-Napoca: Forum Iuris, pp. 257–262.

Turrini, A., Bricongne, J. C. (2017) 'The EU Macroeconomic Imbalance Procedure: Some impact and no sanctions', Vox.eu., 22 June 2017. [Online]. Available at: https://cepr.org/voxeu/columns/eu-macroeconomic-imbalance-procedure-some-impact-and-no-sanctions (Accessed: 31 October 2023).

Urbániková, M., Šipulová, K. (2018) 'Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?', *German Law Journal*, 19(7), pp. 2105–2136; https://doi.org/10.1017/S2071832200023348.

Uzelac, A. (2011) 'Comparative Perspectives: Efficiency of European Justice Systems – the Strength and Weaknesses of the CEPEJ Evaluations', *International Journal of Procedural Law*, 2011/1, pp. 106–147.

Vachudova, M.A., Spendzharova, A. (2012) 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession', *SIEPS – European Policy Analysis*, 2012:1epa, pp. 1–20.

Van den Putte, L., de Ville, F., Orbie, J. (2015) 'The European Parliament as an international actor in trade: From power to impact', in Stavridis, S., Irrera, D. (eds.) *The European Parliament and its International Relations*. London: Routledge, pp. 52–69; https://doi.org/10.4324/9781315713984-4.

Vanhercke, B., Ghailani, D., Spasova, S., Pochet, P. (2020) 'Preface' in Vanhercke, B., Ghailani, D., Spasova, S., Pochet, P. (eds.) *Social policy in the European Union 1999-2019*: *the long and winding road*. Brussels: European Union Trade Institute, pp. 9–12.

Varga Zs., A. (2019) *From Ideal to Idol? The Concept of the Rule of Law*. Budapest: Dialóg Campus.

Varga Zs., A. (2020) 'Rule of Law and Constitutional Identities' in Granata-Menghini, S., Tanyar, Z.C. (eds.) *Venice Commission. Thirty-year Quest for Democracy through Law. 1990–2020*. Lund: Juristförlaget i Lund, pp. 703–716.

Varga, Cs. (2021) 'Rule of Law, Rechtsstaatlichkeit, État de Droit – Contesting and Contested' in Varga, Cs. (ed.) *Rule of Law: Contesting and Contested*. Budapest: Ferenc Mádl Institute of Comparative Law, pp. 317–348; https://doi.org/10.47079/2021.csv.rolcac.

Varga, Cs. (2021) *Rule of Law: Contesting and Contested*. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2021.csv.rolcac.

Várnay, E. (2019) 'Az Alkotmánybíróság és az Európai Bíróság. Együttműködő alkotmánybíráskodás?', *Állam-és Jogtudomány*, 60(2), pp. 63–91.

Vassileva, R. (2020) 'Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism', *European Public Law*, 26(3), pp. 741–768.

Verdun, A., Zeitlin, J. (2018) 'Introduction: the European Semester as a new architecture of EU socioeconomic governance in theory and practice', *Journal of European Public Policy*, 25(2), pp. 137–148; https://doi.org/10.1080/13501763.2017.1363807.

Veress, E. (2021) 'The Romanian Civil Code: Ten years of application', *Jahrbuch für Ostrecht*, 2021/62, pp. 387–401.

Villiger, M. E. (2014) 'Binding Effect and Declaratory Nature of the Judgments of the European Court of Human Rights: An Overview' in Seibert-Fohrand, A., Villiger, M. E. (eds.) *Judgments of the European Court of Human Rights – Effects and Implementation*. Baden–Baden: Nomos, pp. 33–38; https://doi.org/10.5771/9783845259345_33.

Viţă, V. (2017) 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality', *Cambridge Yearbook of European Legal Studies*, 2017/19, pp. 116–143; https://doi.org/10.1017/cel.2017.4.

von Bogdandy, A. (2010) 'Founding Principles of EU Law. A Theoretical and Doctrinal Sketch', *Revus*, 12/2010, pp. 35–56; https://doi.org/10.4000/revus.131.

von Bogdandy, A. (2019) 'Principles and challenges of a European doctrine of systemic deficiencies', *MPIL Research Paper Series*, No. 2019–14, Max Planck Institute, pp. 1–33.

von Bogdandy, A. (2019) 'Tyrania wartości? Problemy i drogi europejskiej ochrony praworządności krajowej', *Europejski Przegląd Sądowy*, 4/2019, pp. 4–11.

von Bogdandy, A. (2021) 'Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States' in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, Ch., Taborowski, M., Schmidt, M. (eds.) *Defending Checks and Balances in EU Member States*. Berlin: Springer, pp. 73–102; https://doi.org/10.1007/978-3-662-62317-6_4.

von Bogdandy, A., Ioannidis, M. (2014) 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done', *Common Market Law Review*, (51)1, pp. 59–96; https://doi.org/10.54648/COLA2014003.

von Bogdandy, A., Łacny, A. (2020) 'Suspension of EU funds for breaching the rule of law – a dose of tough love needed?', *European Policy Analysis*, Swedish Institute for European Policy Studies, 2020, No 2, pp. 1–15.

von Bogdandy, A., Schill, S. (2011) 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty', *Common Market Law Review*, 5(48), pp. 1417–1453; https://doi.org/10.54648/COLA2011057.

Vučić, O., Stojanović, D. (2009) 'Ustavno sudstvo na preseku prava i politike', *Anali Pravnog fakulteta u Beogradu,* 2009/2, pp. 89–109.

Walczuk, K. (2023) 'Analysis of the directions of changes in the constitutional system of the sources of law – between primacy of the constitution and the principle of supremacy of the law of the European Union' in Schanda, B. (ed.) *The Character of Legislative Process Adopted to Amend the Constitution in the light of the European Integration and Constitutional Identity*. Warsaw: Instytut Wymiaru Sprawiedliwości, pp. 185–211.

Wehberg, H. (1959) 'Pacta sunt servanda', *The American Journal of International Law*, 53(4), pp. 775–786; https://doi.org/10.2307/2195750.

Weiler, J.H.H. (1991) 'The Transformation of Europe, *The Yale Law Journal*, 100(8), pp. 2403–2483; https://doi.org/10.2307/796898.

Wilms, G. (2017) *Protecting Fundamental Values in the European Union through the Rule of Law: Articles 2 And 7 TEU from a Legal, Historical and Comparative Angle*. Florence: European University Institute, Robert Schuman Centre for Advanced Studies; https://doi.org/10.2870/083300.

Wincenciak, M. (2008) *Sankcje w prawie administracyjnym i procedura ich wymierzania*. Warsaw: Wolters Kluwer.

Winzen, T. (2021) 'The European Semester and Parliamentary Oversight Institutions Inside and Outside of the Euro Area', *Politics and Governance*, 9(3), pp. 100–111; https://doi.org/10.17645/pag.v9i3.4129.

Wronkowska, G., Rosiek, J., Witoń, A. (2021) *Semestr Europejski jako narzędzie kształtowania polityki społecznej w Unii Europejskiej. Analiza rekomendacji na przykładzie Polski w latach 2011-202*. Warsaw: Poltext.

Würtenberger, T., Tkaczyński, J.W. (2017), 'Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności (analiza krytyczna)', *Państwo i Prawo*, 2017/12, pp. 16–29.

Yourow, H.C. (1996) *The Margin of Appreciation Doctrine in the Dynamic of European Human Rights Jurisprudence*. Dordrecht: Martinus Nijhoff Publishers; https://doi.org/10.1163/9789004482265.

Zand, J. (2017) 'The Concept of Democracy and the European Convention on Human Rights', *University of Baltimore Journal of International Law*, 5(2), pp. 195–227; https://doi.org/10.18060/7909.0045.

Zegato, L. (2015) 'The Notion of "Heritage Community" in the Council of Europe's Faro Convention – Its Impact on the European Legal Framework' in Adell, N., Bendix, R. F., Bortolotto, C., Tauschek, M. (eds.) *Between Imagined Communities and Communities of Practice – Participation, Territory and the Making of Heritage*. Göttingen: Universitätsverlag Göttingen, pp. 141–168; https://doi.org/10.4000/books.gup.220.

Zeitlin, J., Vanhercke, B. (2014) 'Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020', *SIEPS*, 2014/7, pp. 11–79.

Ziembiński, Z. (1994) 'Normy postępowania' in Redelbach, A., Wronkowska, S., Ziembiński, Z. (eds.) *Zarys teorii państwa i prawa*. Warsaw: Wydawnictwo Naukowe PWN, pp. 73–93.

Zillmer, S., Gløersen, E., Alessandrini, M., Fratini, A., Ivanov, B., Hagemann, K., Mäder Furtado, M. (2023) 'Effective decentralisation in the context of the European Semester and beyond', *ECON*, pp. 7–84.

Zupancic, B. (2001) 'Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis', *German Law Journal*, 2(10), E:2; https://doi.org/10.1017/S2071832200003576.

Legal and Other Sources

A. Domestic Sources

Amendments to the Constitution of Serbia [Online]. Available at: https://www.mpravde.gov.rs/files/Draft%20Amendments%20to%20the%20Constitution%20of%20Republic%20of%20Serbia.pdf (Accessed: 21 July 2023).

BverfGE 37, 271 – Solange I, Judgment of 29 May 1974 of the German Federal Constitutional Court.

Case 2 BvE 2/08, Judgment of 30 June 2009, German Federal Constitutional Court.

Case K 3/21, Judgment of 7 October 2021, Polish Constitutional Tribunal.

Case K 32/09, Judgment of 24 November 2010, Polish Constitutional Tribunal.

Case Pl. ÚS 29/09, Judgment of 3 November 2009, Czech Constitutional Court.

Case Pl. ÚS 50/04, Judgment of 8 March 2006, Czech Constitutional Court.

Case Pl. ÚS 66/04, Judgment of 3 May 2006, Czech Constitutional Court.

Cases 2 BvR 2134/92, 2 BvR 2159/92, Judgment of October 12, 1993, German Federal Constitutional Court.

CC Decision No. 196/2013 (Official Journal of Romania no. 231/2013).

CC Decision No. 374/2016 (Official Journal of Romania no. 504/2016).

CC Decision No. 375/2005 (Official Journal of Romania no. 591/2005).

CC Decision No. 54/2011 (Official Journal of Romania no. 90/2011).

CC Decision No. 799/2011 (Official Journal of Romania no. 440/2011).

Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

Constitution of the United States [Online]. Available at: https://www.archives.gov/founding-docs/constitution-transcript (Accessed: 10 February 2024).

Contentious–Administrative Chamber, Spanish Supreme Court's Judgment of 17 July 2018 (STS 1263/2018).

Decision 143/2010. (VII. 14.) Hungarian Constitutional Court.

Decision 2/2019 (III.5.), Hungarian Constitutional Court.

Decision 22/2016 (XII.5.), Hungarian Constitutional Court.

Decision 32/2021 (XII.20.), Hungarian Constitutional Court.

Decision 390/2021 of 8 June 2021, Romanian Constitutional Court.

Decision n. 199/2021 of 20 February 2013, Danish Supreme Court.

Decision n8 2021-940 QPC of 15 October 2021, Conseil Constitutionnel.

Decision no. 2006-540 DC of 27 July 2006, Conseil Constitutionnel.

Decision U-I-295/13 of 19 October 2016, Slovenian Constitutional Court.

Declaration 1/2004 of the Spanish Constitutional Tribunal.

German Basic Law [Online]. Available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (Accessed: 10 February 2024).

Government Decision No. 1052/2003 (Official Journal of Romania no. 649/2003).

Italian Government, 'Il Quadro Finanziario Pluriennale: Uno Strumento Strategico al Servizio degli Obiettivi dell'Unione Europea', [Online]. Available at: https://www.ifelcampania.it/il-quadro-finanziario-pluriennale-uno-strumento-strategico-al-servizio-degli-obiettivi-dellunione-europea/ (Accessed: 27 December 2023).

Judgment n. 183/1973 of 27 December 1973, Italian Constitutional Court.

Judgment n. 24/2017 of 26 January 2017, Italian Constitutional Court.

Judgment of the Supreme Administrative Court of the Czech Republic, file no.: III. ÚS 296/14.

Judgment of the Supreme Administrative Court of the Czech Republic, file no.: III. ÚS 319/2018.
The Federal Government of Germany (2017) 'Joint statement by the German government and the German Länder on EU Cohesion Policy beyond 2020', [Online]. Available at: https://www.bmwk.de/Redaktion/EN/Downloads/S-T/stellungnahme-bund-laender-kohaesionspolitik.pdf?_blob=publicationFile&v=2 (Accessed: 27 December 2023).
The Fundamental Law of Hungary [Online]. Available at: https://hunconcourt.hu/fundamental-law/ (Accessed: 16 February 2024).
The Law on HJC (Zakon o Visokom savetu sudstva), "Sl. Glasnik RS" br. 10/2023 [Online]. Available at: https://www.paragraf.rs/propisi/zakon_o_visokom_savetu_sudstva.html. (Accessed: 21 July 2023).

B. EU Law

A.B. and Others (Nomination des juges à la Cour suprême), Judgment of the Court (Grand Chamber) of 2 March 2021, Case C-824/18, ECLI:EU:C:2021:153.
Anton Las v PSA Antwerp NV, Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, ECLI:EU:C:2013:239.
Associação Sindical dos Juízes Portugueses, Judgment of 27 February 2018, Case C-64/16, ECLI:EU:C:2018:117.
Charter of Fundamental Rights of the European Union (Official Journal of the European Union of June 7, 2016, C 202, pp. 389–405).
Cologne European Council, 3–4 June 1999, Conclusions of the Presidency [Online]. Available at: https://www.europarl.europa.eu/summits/kol2_en.htm#an4 (Accessed: 15 November 2023).
COM(2023) 309 final Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and Committee of the Regions EU Justice Scoreboard 2023.
Commission Decision (EU) 2023/1785 of 15 September 2023 repealing Decision 2006/929/EC establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime.
Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption C/2023/5653. OJ L 229.
Commission Decision 2006/928/EC of 13 December 2006, establishing a mechanism for co-operation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569).
Commission Decision 2006/929/EC of 13 December 2006, establishing a mechanism for co-operation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (notified under document number C(2006) 6570).
Commission Decision of 13 December 2006, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569). OJ L 354.
Commission Recommendation (EU) 2016/1374 of July 27, 2016 regarding the rule of law in Poland (Official Journal of the European Union of September 12, 2016, L 217, pp. 53–68).

Commission v Hungary (*Accueil des demandeurs de protection internationale*), Judgment of the Court (Grand Chamber) of 17 December 2020, Case C-808/18, ECLI:EU:C:2020:1029.

Committee of the Regions (2018) 'Opinion – The Multiannual Financial Framework package for the years 2021-2027', 2018/C 461/10.

Communication from the Commission Europe 2020 A strategy for smart, sustainable and inclusive growth, Brussels, 3/03/2010, COM(2010) 2020 final version.

Communication from the Commission to the European Parliament, the European Council and the Council Further strengthening the Rule of Law within the Union State of play and possible next steps COM/2019/163 final.

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Rule of Law within the Union, COM(2019) 343 final.

Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee of the Regions EU Justice Scoreboard A tool to promote effective justice and growth /* COM/2013/0160 final – 2013/ () */.

Constitutional Affairs. The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges. Study for the AFCO Committee, PE 583.126.

Copenhagen European Council (1993) Conclusions of the Presidency, SN 180/1/93 REV 1.

Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States (Official Journal of the European Union of July 18, 2002, L 190, pp. 1–20).

Council of the European Union (2014) 'Opinion of the Legal Service, Commission's Communication on a new EU Framework to strengthen the Rule of Law – Compatibility with the Treaties' 10296/14.

Council of the European Union (2018) 'Opinion of the Legal Service, 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', 13593/18.

Council of the European Union (2020) 'Special meeting of the European Council – Draft conclusions', 5846/20.

Court of Auditors (2018) 'Opinion No 1/2018 oncerning the proposal of 2 May 2018 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', 2018/C 291/01.

Decision 2006/928/EC, Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569).

Draft Treaty establishing a Constitution for Europe (2004) [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2004:310:FULL (Accessed: 18 February 2024).

Economic governance framework, European Council/Council of the European Union.

Erich Stauder v City of Ulm, Judgment of the Court of 12 November 1969, Case 29-69, ECLI:EU:C:1969:57.

European Commission (2014) '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 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158 (Accessed: 1 October 2023).

European Commission (2017) 'Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law', COM/2017/0835 final [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017PC0835 (Accessed: 20 December 2023).

European Commission (2018) 'Proposal for a Regulation 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 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0324 (Accessed: 1 October 2023).

European Commission (2019) 'Communication from the Commission to the European Parliament, the European Council and the Council Further strengthening the Rule of Law within the Union State of play and possible next steps', COM/2019/163 final [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0163 (Accessed: 16 December 2023).

European Commission (2020) 'Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget', COM(2020) 843 final [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0843 (Accessed: 10 September 2023).

European Commission (2022a) 'Proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary', COM(2022) 485 final [Online]. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0485 (Accessed: 15 September 2023).

European Commission (2022b) 'Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget', Brussels, 2 March 2022, C(2022)1382 final.

European Commission for Democracy through Law (Venice Commission), European Committee on Legal Co-operation (CDCJ), Public International Law–Committee of Legal Advisers (CAHDI), European Audiovisual Observatory, Internet governance, and Biological safety and use of animals– Information.

European Commission v Grand Duchy of Luxembourg, Judgment of the Court (Grand Chamber) of 24 May 2011, Case C-51/08, ECLI:EU:C:2011:336.

European Council (2020) – Conclusions, 11 December 2020, EUCO 22/20.

European Economic and Social Committee (2019) 'Opinion of the European Economic and Social Committee on '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', 2019/C 62/28.

European Parliament (2018) 'Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded', 2017/2131(INL) [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018IP0340 (Accessed: 15 December 2023).

European Parliament (2019) 'European Parliament legislative resolution of 4 April 2019 on 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)0324 – C8-0178/2018 – 2018/0136(COD) [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP%3AP8_TA%282019%290349 (Accessed: 27 December 2023).

European Parliament resolution of October 25, 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)) (Official Journal of the European Union of June 19, 2018, C 215, pp. 162–177).

European Parliament resolution of September 12, 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) (Official Journal of the European Union of December 23, 2019, C 433, pp. 66–85).

European Parliamentary Research Service (2019) 'Human Rights in EU trade agreements. The human rights clause and its application', *Briefing,* July 2019.

Flaminio Costa v E.N.E.L., Judgment of the Court of 15 July 1964, Case C-06/64, ECLI:EU:C:1964:66.

Hungary v European Parliament and Council of the European Union, Judgment of the Court of 16 February 2022, Case C-156/21, ECLI:EU:C:2022:97.

Ilonka Sayn Wittgenstein and Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, ECLI:EU:C:2010:806.

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Judgment of the Court of 17 December 1970, Case C-11/70, ECLI:EU:C:1970:114.

J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Judgment of the Court of 14 May 1974, Case 4-73, ECLI:EU:C:1974:51.

Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, ECLI:EU:C:2011:291.

Opinion of the Court (Full Court) 2/13 of 18 December 2014; ECLI:EU:C:2014:2454.

Parti écologiste "Les Verts" v European Parliament, Judgment of the Court of 23 April 1986, Case 294/83, ECLI:EU:C:1986:166.

Preamble of European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL).

Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union.

Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [Online]. Available at: http://data.europa.eu/eli/reg/2021/1060/oj (Accessed: 10 September 2023).

Regulation (EU) 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession assistance (IPA III) [Online]. Available at: http://data.europa.eu/eli/reg/2021/1529/oj (Accessed: 27 December 2023).

Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II) [Online]. Available at: http://data.europa.eu/eli/reg/2014/231/oj (Accessed: 27 December 2023).

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of December 16, 2020 on a general regime of conditionality for the protection of the Union budget (Official Journal of the European Union of December 22, 2020, L 433 I, pp. 1–10).

Repubblika v Il-Prim Ministru, Judgment of the Court (Grand Chamber) of 20 April 2021, Case C-896/19, ECLI:EU:C:2021:311.

RS (Effet des arrêts d'une cour constitutionnelle), Judgment of the Court (Grand Chamber) of 22 February 2022, Case C-430/21, ECLI:EU:C:2022:99.

Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union), and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. OJ L 157.

Treaty of Amsterdam of October 2, 1997 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Official Journal of the European Union of November 10, 1997, C 340, pp. 1–144).

Treaty of February 7, 1992 on European Union (Official Journal of the European Union of July 29, 1992, C 191, pp. 1–110).

Treaty of Lisbon of December 13, 2007 amending the Treaty on European Union and the Treaty establishing the European Community (Official Journal of the European Union of December 17, 2007, C 306, pp. 1–271).

Treaty of Nice of February 26, 2001 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Official Journal of the European Union of March 10, 2001, C 80, pp. 1–87).

Treaty of October 29, 2004 establishing a Constitution for Europe (Official Journal of the European Union of December 16, 2004, C 310, pp. 1–474).

Treaty on European Union (Official Journal of the European Union of June 7, 2016, C 202, pp. 1–388).

Treaty on the Functioning of the European Union (Official Journal of the European Union of June 7, 2016, C 202, pp. 1–388).

C. Sources of Other Supranational Organisations

Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 21 June 1971 (ICJ).

Advisory Opinion on Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 9 July 2004 (ICJ).

Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 28 May 1951 (ICJ).

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), judgment, 30 November 2010 (ICJ).

Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

Avena and Other Mexican Nationals (Mexico v. United States of America), judgment, 31 March 2004 (ICJ).

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), judgment, 5 February 1970 (ICJ).

Belarus Final opinion on the constitutional reform, CDL-AD(2022)035 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)035-e (Accessed: 29 October 2023).

Belarus Urgent interim opinion on the constitutional reform, CDL-PI(2022)002 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2022)002-e (Accessed: 29 October 2023).

Charter of the United Nations, 1945.

Child and Youth Policy is Cross-Sectoral Policy! Considering Young People in Economic and Fiscal Policy Instruments at EU Level. Position Paper by the Child and Youth Welfare Association – AGJ on the European Semester, Arbeitsgemeinschaft für Kinder- und Jugendhilfe, Board of the Child and Youth Welfare Association – AGJ, Berlin, 22/23 September 2022 [Online]. Available at: https://eurochild.org/uploads/2023/02/Position_Paper_European_Semester_en.pdf (Accessed: 15 September 2023).

Compilation of VC opinions and reports concerning judges, CDL-PI(2023)019 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2023)019-e (Accessed 29 October 2023).

Compilation of VC opinions and reports on emergency state, CDL-PI(2020)003 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)003-e (Accessed: 29 October 2023).

Compilation of VC opinions, studies and reports on constitutional justice, CDL-PI(2022)050 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)050-e (Accessed 29 October 2023).

Co-operation between the Venice Commission and its partners outside Europe, CDL-PI(2021)017 [Online]. Available at: /https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2021)017-e (Accessed: 31 October 2023).

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 1950.

European Landscape Convention (Florence Convention), 2000.

Follow-up Opinion to the Opinion on the three draft laws implementing the constitutional amendments on the judiciary (CDL-AD(2022)030), CDL-AD(2022)043 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)043-e (Accessed: 29 October 2023).

France Interim opinion on the Article 49.3 of the Constitution, CDL-AD(2023)024 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)024-e (Accessed: 31 October 2023).

Fribourg Declaration on Cultural Rights, 2007.

Guide on Article 10 of the European Convention on Human Rights – Freedom of expression, updated on 30 April 2021.

Guide on Article 11 of the European Convention on Human Rights – Freedom of assembly and association, updated on 31 August 2022.

Guide on Article 13 of the European Convention on Human Rights – Right to an effective remedy, updated on 30 April 2022.

Guide on Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention – Prohibition of discrimination, updated on 30 April 2022.

Guide on Article 2 of the European Convention on Human Rights – Right to life, updated on 30 April 2022.

Guide on Article 3 of the European Convention on Human Rights – Prohibition of torture– First edition, 30 April 2022.

Guide on Article 4 of the European Convention on Human Rights – Prohibition of slavery and forced labour, updated on 31 August 2022.

Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security, updated on 30 April 2022.

Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb), updated on 30 April 2022.

Guide on Article 7 of the European Convention on Human Rights – No punishment without law: the principle that only the law can define a crime and prescribe a penalty, updated on 30 April 2022.

Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, updated on 31 August 2021.

Guide on Article 9 of the European Convention on Human Rights – Freedom of thought, conscience, and religion, updated on 30 April 2022.

Guidelines relating to the working methods of the Venice Commission, CDL-AD(2010)034 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)034-e (Accessed: 2 October 2023).

Higgins, R.: The ICJ and the Rule of Law, Speech given at the United Nations University on 11 April 2007 [Online]. Available at: https://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf (Accessed: 19 November 2023).

High-Level Advisory Group (2017), Report to the OECD Secretary-General on Combating Corruption and Fostering Integrity.

Interim report on the constitutional situation of the Federal Republic of Yugoslavia, CDL-INF (2001) 23 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)023-e (Accessed: 28 October 2023).

International Covenant on Civil and Political Rights, 1966.

Joint Opinion of the Venice Commission and the OSCE/ODIHR on the constitutional and legal framework governing the functioning of democratic institutions in Serbia–Electoral law and electoral administration, CDL-AD(2022)046-e [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)046-e (Accessed: 31 October 2023).

LaGrand (Germany v. United States of America), judgment, 27 June 2001 (ICJ).

OECD (1997) 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', OECD Publishing, Paris.
OECD (2004) 'Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences', OECD Publishing, Paris.
OECD (2005) 'Managing Conflict of Interest in the Public Sector: A Toolkit', OECD Publishing, Paris.
OECD (2006) 'Recommendation of the Council on Bribery and Officially Supported Export Credits'.
OECD (2009a) 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions'.
OECD (2009b) 'Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions'.
OECD (2012) 'Lobbyists, Governments and Public Trust, Volume 2: Promoting Integrity through Self-regulation', OECD Publishing, Paris.
OECD (2013) 'Transparency and Integrity in Lobbying – a brochure', OECD Publishing, Paris.
OECD (2014) 'Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying', OECD Publishing, Paris.
OECD (2016) 'Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture, OECD Public Governance Reviews', OECD Publishing, Paris.
OECD (2017) 'Recommendation of the Council on Public Integrity', OECD Publishing, Paris.
OECD (2018a) 'Strategic Approach to Combating Corruption and Promoting Integrity', OECD Publishing, Paris.
OECD (2018b) 'Behavioural Insights for Public Integrity: Harnessing the Human Factor to Counter Corruption', OECD Public Governance Reviews, OECD Publishing, Paris.
OECD (2019) 'Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation', OECD Public Governance Reviews, OECD Publishing, Paris.
OECD (2020) 'OECD Public Integrity Handbook', OECD Publishing, Paris.
OECD (2021a) 'Trust in global cooperation – the vision for the OECD for the next decade', OECD Publishing, Paris.
OECD (2021b) Meeting of the Council at Ministerial Level, 5-6 October 2021, OECD.
OECD (2021c) 'Lobbying in the 21st Century: Transparency, Integrity and Access', OECD Publishing, Paris.
OECD (2022) 'Building Trust to Reinforce Democracy: Main Findings from the 2021 OECD Survey on Drivers of Trust in Public Institutions, Building Trust in Public Institutions', OECD Publishing, Paris.
OECD (2023a) 2023 Annual Update on OECD Standard-Setting Welcomed by Ministers at the OECD Council at Ministerial Level on 8 June 2023 [C/MIN(2023)5/FINAL].
OECD (2023b) 'The OECD Working Group on Bribery in International Business Transactions: 2022 Annual Report', OECD Publishing, Paris.
OECD (2023c) 'Government at a Glance 2023', OECD Publishing, Paris.
OECD, DAC Network on Governance – Anti-Corruption Task Team (2009), 'Integrity in Statebuilding: Anti-Corruption with a Statebuilding Lens', prepared by Karen Hussmann (Independent Researcher) and Martin Tisné (Tiri) in association with Harald Mathisen (U4/Chr. Michelsen Institute).
Opinion of the Constitution of Serbia CDL-AD(2007)004 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e (Accessed: 30 October 2023).

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999.
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000.
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000.
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008.
OSCE (1975) The Helsinki Final Act.
OSCE (1990) Charter of Paris for a New Europe.
OSCE (1990) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.
OSCE (1991) Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE.
OSCE (1992) Convention on Conciliation and Arbitration within the CSCE.
OSCE (1994) CSCE Budapest Document 1994 Towards a Genuine Partnership in a New Era.
OSCE (1998) The Final Document of the Seventh Meeting of the OSCE.
OSCE (1999) The Istanbul Document.
OSCE (2001) Decision No. 9 on Police-related Activities.
OSCE (2005) Decision No. 12/05 Upholding Human Rights and the Rule of law in Criminal Justice Systems.
OSCE (2006) Brussels Declaration on Criminal Justice Systems.
OSCE (2006) The Rules of Procedure of the Organization for Security and Co-operation in Europe.
OSCE (2008) Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area.
OSCE (2009) Decision No. 7/09 on Women's Participation in Political and Public Life.
OSCE (2010) Astana Commemorative Declaration Towards a Security Community.
OSCE (2012) Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and Financing of Terrorism.
OSCE (2019) 'Periodic Report 2017–2019 to the States Parties to the Convention on Conciliation and Arbitration within the OSCE', *OSCE*, 27 November. [Online]. Available at: https://www.osce.org/files/f/documents/d/c/440369.pdf (Accessed: 17 October 2023).
OSCE (2022) 'OSCE Annual Report 2021', *OSCE*, 21 June. [Online]. Available at: https://www.osce.org/files/f/documents/a/4/520912.pdf (Accessed: 6 October 2023).
OSCE ODIHR (2001) 'ODIHR Contact Point for Roma and Sinti Issues – An Overview', *OSCE ODIHR*, 22 January. [Online]. Available at: https://www.osce.org/files/f/documents/e/1/13996.pdf (Accessed: 26 October 2023).
OSCE ODIHR (2010) 'Election Observation Handbook (Sixth Edition)', *OSCE ODIHR,* 11 June. [Online]. Available at: https://www.osce.org/files/f/documents/5/e/68439.pdf (Accessed: 2 November 2023).
OSCE ODIHR (2023) 'Democracy and Human Rights in the OSCE: OSCE Office for Democratic Institutions and Human Rights Annual Report 2022', *OSCE ODIHR,* 16 March. [Online]. Available at: https://www.osce.org/files/f/documents/d/5/536774_1.pdf (Accessed: 18 October 2023).
OSCE ODIHR (2023) 'OSCE Human Dimension Commitments (Volume 1, Thematic Compilation, 4th Edition)', *OSCE ODIHR*, 27 April. [Online]. Available at: https://www.osce.org/files/f/documents/f/d/16363.pdf (Accessed: 4 November 2023).

Principles of Conduct for Members, Substitute Members and Experts of the European Commission for Democracy through Law (Venice Commission), CDL-AD(2023)012 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)012-e (Accessed: 30 October 2023).

Protocol No. 16. to the ECHR [Online]. Available at: https://www.echr.coe.int/advisory-opinions (Accessed: 20 February 2024).

Protocol on the preparation of urgent opinions, CDL-AD(2018)019 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)019-e (Accessed: 30 October 2023).

Report of the Committee on Legal Affairs and Human Rights, Corruption as a threat to the Rule of Law, rapporteur: Ms Reps, Parliamentary Assembly of the Council of Europe, Doc. 13228.

Report of the International Law Commission, UN GAOR, 73rd Sess., Supp. No. 10, UN Doc. A/73/10 (2018).

Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, adopted on 23 August 2004, UN Doc. S/2004/616.

Report on the Rule of Law, European Commission for Democracy through Law (Venice Commission) 86th plenary session (Venice, 25–26 March 2011), Study 512/2009, CDL-AD(2011)003rev. Strasbourg, 4 April 2011.

Resolution 1594 (2007), the principle of the Rule of Law [Online]. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17613&lang=en (Accessed: 1 October 2023).

Resolution RES (2002) 3 adopting the Revised Statute of the European Commission for Democracy through Law, CDL (2002) 27 [Online]. Available at: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL(2002)027-e (Accessed: 30 October 2023).

Revised Rules of Procedure, CDL-AD(2023)013 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)013-e (Accessed: 30 October 2023)

Rules of Procedure of the Court of Justice [Online]. Available at: http://data.europa.eu/eli/proc_rules/2012/929/oj (Accessed: 20 February 2024).

Rules of the Court, 23 June 2023 (ECtHR).

Serbia Opinion on the Draft constitutional amendments on the judiciary and on the Draft constitutional law for the implementation of the constitutional amendments CDL-AD(2021)032 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)032-e (Accessed: 21 July 2023).

Serbia Urgent opinion on the revised Draft constitutional amendments on the judiciary, CDL-PI(2021)019 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2021)019-e (Accessed: 21 July 2023).

Serbia Urgent opinion on the revised Draft constitutional amendments on the judiciary CDL-AD(2021)048 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)048-e# (Accessed: 21 July 2023).

Statute of the Council of Europe, 1949.

Statute of the International Court of Justice, 1945.

Study on individual access to constitutional justice, CDL-AD(2010)039rev. [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)039rev-e (Accessed: 30 October 2023).

Supervision of the execution of judgments of the European Court of Human Rights 2022 – 16th Annual Report of the Committee of Ministers (2023).
The principle of Equality and Non-discrimination, Analysis of Case-Law, UNDP, 2021.
Third Optional Protocol to the Convention on the Rights of the Child on the Communications Procedure, 2011.
UN General Assembly Resolution 60/251 of 15 March 2006.
UN Human Rights Council Resolution No. 5/1 (2007).
UN Security Council Resolution 2664, S/RES/2664.
United Nations Human Rights Committee, General Comment No. 32 (2007).
Urgent opinion on the Draft law on the Referendum and People's initiative, CDL-AD(2021)033 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)033-e (Accessed: 29 October 2023).
Urgent opinion on the Revised draft law on the Referendum and the People's initiative, CDL-AD(2021)052 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)052-e (Accessed: 30 October 2023).
Venice Commission (2009) Draft Report on the Rule of Law, Study No. 512/2009.
Venice Commission Events [Online]. Available at: https://www.venice.coe.int/webforms/events/ (Accessed: 18 August 2023).
Venice Commission, Basic Principles, nullum crimen, nulla poena [Online]. Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (Accessed: 2 September 2023).
Venice Commission, Checklist (Rule of Law) [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e (Accessed: 19 August 2023).\
Vienna Convention on the Law of Treaties, 1969.
Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS vol. 1155.
WJP (2022) Rule of Law Index 2022, World Justice Project, Washington, Dc.

C.1 ECtHR Judgments

A.C. and Others v. Spain (App. no. 6528/11), 22 April 2014.
Abdolkhani and Karimnia v. Turkey (App. no. 30471/08), 22 September 2009.
Advance Pharma SP. z o.o v. Poland (App. no. 1469/20), 3 February 2022.
Aftanache v. Romania (App. no. 999/19), 26 May 2020.
Aksoy v. Turkey (App. no. 21987/93), 18 December 1996.
Allanazarova v. Russia (App. no. 46721/15), 14 February 2017.
Al-Skeini and Others v. the United Kingdom (App. no. 55721/07), 7 July 2011.
Amuur v. France (App. no. 19776/92), 25 June 1996.
Andri Ástráðsson v. Iceland (App. no. 26374/18), 1 December 2020.
Aquilina v. Malta (App. no. 25642/94), 29 April 1999.
Armani Da Silva v. the United Kingdom (App. no. 5878/08), 30 March 2016.
Assanidze v. Georgia (App. no. 71503/01), 8 April 2004.
Assenov and Others v. Bulgaria (App. no. 90/1997/874/1086), 28 October 1998.
Aydın v. Turkey (App. no. 57/1996/676/866), 25 September 1997.
Azer Ahmadov v. Azerbaijan (App. no. 3409/10), 22 July 2021.
Baranowski v. Poland (App. no. 28358/95), 28 March 2000.
Big Brother Watch and Others v. the United Kingdom (App. nos. 58170/13, 62322/14 and 24960/15), 25 May 2021.
Bosak and Others v. Croatia (App. nos. 40429/14, 41536/14, 42804/14 and 58379/14), 6 June 2019.

Bouyid v. Belgium (App. no. 23380/09), 28 September 2015.
Brogan and Others v. the United Kingdom (App. nos. 11209/84; 11234/84; 11266/84; 11386/85), 29 November 1988.
Buzadji v. the Republic of Moldova (App. no. 23755/07), 5 July 2016.
C.N. v. the United Kingdom (App. no. 4239/08), 13 November 2012.
Cocchiarella v. Italy (App. no. 64886/01), 10 November 2004.
Čonka v. Belgium (App. no. 51564/99), 5 February 2002.
Dahlab v. Switzerland (App. no. 42393/98) 15 February 2001.
Del Río Prada v. Spain (App. no. 42750/09), 21 October 2013.
Dragojević v. Croatia (App. no. 68955/11), 15 January 2015.
Eğitim ve Bilim Emekçileri Sendikası v. Turkey (App. no. 20641/05), 25 September 2012.
Engel and Others v. the Netherlands (App. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), 8 June 1976.
Eweida v. U.K. (App. no 48420/10) 15 January 2013.
Fatullayev v. Azerbaijan (App. no. 40984/07), 22 April 2010.
Gebremedhin [Gaberamadhien] v. France (App. no. 25389/05), 26 April 2007.
Gillow v United Kingdom (App. no. 9063/80), 24 November 1986.
Giulia Manzoni v. Italy (App. no. 19218/91), 1 July 1997.
Golder v. United Kingdom (App. no. 4451/70), 21 February 1975.
Gorgiladze v. Georgia (App. no. 4313/04), 20 October 2009.
Groppera Radio Ag and Others v. Switzerland (App. no. 10890/84), 28 March 1990.
Grzęda v. Poland (App. no. 43572/18) 15 March 2022.
Guérin v. France (App. no. 51/1997/835/1041), 29 July 1998.
Halford v. the United Kingdom (App. no. 20605/92), 25 June 1997.
Handzhiyski v. Bulgaria (App. no. 10783/14), 6 April 2021.
Hasan and Chaush v. Bulgaria (App. no. 30985/96), 26 October 2000.
Herczegfalvy v. Austria (App. no. 10533/83), 24 September 1992.
Hirst v. the United Kingdom (no. 2) (App. no. 74025/01), 6 October 2005.
Huvig v. France (App. no. 11105/84), 24 April 1990.
I.S. v. Switzerland (App. no. 60202/15), 6 October 2020.
Ignatencu and the Romanian Communist Party v. Romania (App. no. 78635/13), 5 May 2020.
Iliya Stefanov v. Bulgaria (App. no. 65755/01), 22 May 2008.
Jorgic v. Germany (App. no. 74613/01), 12 July 2007.
Kaić and Others v. Croatia (App. no. 22014/04), 17 July 2008.
Karabeyoğlu v. Turkey (App. no. 30083/10), 7 June 2016.
Kazakov v. Russia (App. no. 1758/02), 18 December 2008.
Kenedi v. Hungary (App. no. 31475/05), 26 May 2009.
Kennedy v. the United Kingdom (App. no. 26839/05), 18 May 2010.
Kerem Çiftçi v. Turkey (App. no. 35205/09), 21 September 2021.
Khalfaoui v. France (App. no. 34791/97), 14 December 1999.
Khan v. the United Kingdom (App. no. 35394/97), 12 May 2000.
Khlaifia and Others v. Italy (App. no. 16483/12), 15 December 2016.
Klass and Others v. Germany (App. no. 5029/71), 6 September 1978.
Klaus Müller v. Germany (App. no. 24173/18), 19 November 2020.
Kononov v. Latvia (App. no. 36376/04), 17 May 2010.
Kontalexis v. Greece (App. no. 59000/08), 31 May 2011.
Kopp v. Switzerland (App. no. 13/1997/797/1000), 25 March 1998.
Kruslin v. France (App. no. 11801/85), 24 April 1990.

Kyprianou v. Cyprus (App. no. 73797/01), 15 December 2005.
L.M. v. Slovenia (App. no. 32863/05), 12 June 2014.
Ladent v. Poland (App. no. 11036/03), 18 March 2008.
Lautsi v. Italy (App. no. 30814/06), 18 March 2011.
Lavents v. Latvia (App. no. 58442/00), 28 November 2002.
Leyla Şahin v. Turkey (App. no. 44774/98), 10 November 2005.
Lyapin v. Russia (App. no 46956/09), 24 July 2014.
M. v. Germany (App. no. 19359/04) 17 December 2009.
Malone v. the United Kingdom (App. no. 8691/79), 2 August 1984.
Matos e Silva, Lda., and Others v. Portugal (App. no. 15777/89), 16 September 1996.
Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina (App. no. 17224/11), 27 June 2017.
Morice v. France (App. no. 29369/10), 23 April 2015.
Navalnyy v. Russia (App. nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14), 15 November 2018.
Nevmerzhitsky v. Ukraine (App. no. 54825/00), 5 April 2005.
Nikula v. Finland (App. no. 31611/96), 21 March 2002.
Omar v. France (App. no. 43/1997/827/1033), 29 July 1998.
Orlovskaya Iskra v. Russia (App. no. 42911/08), 21 February 2017.
Pandjikidze and Others v. Georgia (App. no. 30323/02), 27 October 2009.
Pantea v. Romania (App. no. 33343/96), 3 June 2003.
Papon v. France (no. 2) (App. no. 54210/00), 25 July 2002.
Paul and Audrey Edwards v. the United Kingdom (App. no. 46477/99), 14 March 2002.
Piechowicz v. Poland (App. no. 20071/07), 17 April 2012.
Pitkevich v. Russia (dec.) (App. no. 47936/99), 8 February 2001.
Poitrimol v. France (App. no. 14032/88), 23 November 1993.
Posokhov v. Russia (App. no. 63486/00), 4 March 2003.
Quinn v. France (App. no. 18580/91), 22 March 1995.
Rantsev v. Cyprus and Russia (App. no. 25965/04), 7 January 2010.
Rekvényi v. Hungary (App. no. 25390/94), 20 May 1999.
Richert v. Poland (App. no. 54809/07), 25 October 2011.
Roman Zakharov v. Russia (App. no. 47143/06), 4 December 2015.
Rotaru v. Romania (App. no. 28341/95), 4 May 2000.
Rozhkov v. Russia (no. 2) (App. no. 38898/04), 31 January 2017.
Ruslan Yakovenko v. Ukraine (App. no. 5425/11), 4 June 2015.
S., V. and A. v. Denmark (App. nos. 35553/12, 36678/12 and 36711/12), 22 October 2018.
S.A.S. v. France (App. no. 43835/11), 1 July 2014.
S.M. v. Croatia (App. no. 60561/14), 25 June 2020.
S.W. v. the United Kingdom (App. no. 20166/92), 22 November 1995.
Saber v. Norway (App. no. 459/18), 17 December 2020.
Sanoma Uitgevers BV v. Netherlands (App. no. 38224/03), 14 September 2010.
Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland (App. no. 931/13), 27 June 2017.
*Schöpfer v. Swit*zerland (App. nos. 56/1997/840/1046), 20 May 1998.
Sejdić and Finci v. Bosnia and Herzegovina (App. nos. 27996/06 and 34836/06), 22 December 2009.
Selahattin Demirtaş v. Turkey (no. 2) (App. no. 14305/17), 22 December 2020.
Sergey Kuznetsov v. Russia (App. no. 10877/04), 23 October 2008.
Shahanov and Palfreeman v. Bulgaria (App. nos. 35365/12 and 69125/12), 21 July 2016.

Siliadin v. France (App. no. 73316/01), 26 July 2005.
Singh and Others v. Belgium (App. no. 33210/11), 2 October 2012.
Siryk v. Ukraine (App. no. 6428/07), 31 March 2011.
Stankov and the United Macedonian Organisation Ilinden v. Bulgaria (App. nos.. 29221/95 and 29225/95), 2 October 2001.
Stephens v. Malta (no. 2) (App. no. 33740/06), 21 April 2009.
Străin and Others v. Romania (App. no. 57001/00), 21 July 2005.
Streletz, Kessler and Krenz v. Germany (App. nos. 34044/96, 35532/97 and 44801/98), 22 March 2001.
Stummer v. Austria (App. no. 37452/02), 7 July 2011.
Tahsin Acar v. Turkey (App. no. 26307/95), 8 April 2004.
Thorgeir Thorgeirson v. Iceland (App. no. 13778/88), 25 June 1992.
V.C.L. and A.N. v. the United Kingdom (App. nos. 77587/12 and 74603/12), 16 February 2021.
Vasileva v. Denmark (App. no. 52792/99), 25 September 2003.
Vasiliauskas v. Lithuania (App. no. 35343/05), 20 October 2015.
Vavřička and Others v. the Czech Republic (App. nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021.
Vayiç v. Turkey (App. no. 18078/02), 20 June 2006.
Virabyan v. Armenia (App. no. 40094/05), 2 October 2012.
Vlad and Others v. Romania (App. nos. 40756/06, 41508/07 and 50806/07), 26 November 2013.
Weber and Saravia v. Germany (App. no. 54934/00), 29 June 2006.
Winterwerp v. the Netherlands (App. no. 6301/73), 24 October 1979.
Yüksel Yalçinkaya v. Turkey (App. no. 15669/20), 26 September 2023.
*Zakharov v. Russia (*App. no. 14881/03), 5 October 2006.
Zoletic and Others v. Azerbaijan (App. no. 20116/12), 7 October 2021.
Zoltán Varga v. Slovakia (App. nos. 58361/12, 25592/16 and 27176/16), 20 July 2021.

D. Other Online Sources

46 Member States, Council of Europe [Online]. Available at: https://www.coe.int/en/web/portal/46-members-states (Accessed: 1 August 2023).
Britannica [Online]. Available at: https://www.britannica.com/topic/rule-of-law (Accessed: 13 August 2023).
Cardozo Program in Holocaust and Human Rights Studies [Online]. Available at: www.cardozo.yu.edu (Accessed: 12 September 2023).
Council of Europe Library [Online]. Available at: http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17 (2000).pdf (Accessed: 4 September 2015).
Council of Europe, Rule of Law [Online]. Available at: https://www.coe.int/hr/web/portal/rule-of-law (Accessed: 9 September 2023).
Council of Europe: Prisons [Online]. Available at: https://www.coe.int/en/web/prison/promoting-more-humane-and-socially-effective-penal-sanctions (Accessed: 9 September 2023).
EU enlargement, Candidate countries, Potential candidates, European Union [Online]. Available at: https://european-union.europa.eu/principles-countries-history/eu-enlargement_en (Accessed: 1 August 2023)
Historical Overview of the CoE [Online]. Available at: https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/13839cdf-3e7e-4985-995f-2b6d9b534633 (Accessed: 14 August 2023).

How the European Semester works [Online]. Available at: https://www.consilium.europa.eu/en/policies/european-semester/how-european-semester-works/#timeline, European Council and Council of the European Union. (Accessed: 15 September 2023).

Macroeconomic Imbalance Procedure [Online]. Available at: https://economy-finance.ec.europa.eu/economic-and-fiscal-governance/macroeconomic-imbalance-procedure_en (Accessed: 31 October 2023).

Mary Hallock Morris (2006) 'Cooperative Federalism' [Online]. Available at: https://encyclopedia.federalism.org/index.php/Cooperative_Federalism (Accessed: 30 October 2023).

MEMO/07/261 [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_261.

Organisation of CoE [Online]. Available at: https://www.coe.int/en/web/portal/organisation (Accessed: on 17 August 2023).

Overview – Instrument for Pre-accession Assistance [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/overview-instrument-pre-accession-assistance_en (Accessed: 27 December 2023).

The EU's economic governance explained [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_2180 (Accessed: 31 October 2023).

The European Semester explained. An explanation of the EU's economic governance [Online]. Available at: https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester/framework/european-semester-explained_en (Accessed: 10 September 2023)

The European Semester in 2022 [Online]. Available at: https://www.consilium.europa.eu/en/policies/european-semester/previous-semesters/2022/ (Accessed: 10 September 2023).

Transparency International (2023) [Online]. Available at: https://www.transparency.org/en/cpi/2022 (Accessed: 28 October 2023).

What is the Rule of Law? [Online]. Available at: https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (Accessed: 14 August 2023).