



The Rule of Law as a Well-Established and Well-Defined Principle of EU Law

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Abstract

Against increasing rule of law backsliding within the EU, the European Commission has presented the rule of law as a well-established and well-defined principle whose core meaning is furthermore shared as a common value among all Member States. In refute, the national governments of the two EU countries, which are both subject to special EU procedures on account of the systemic threat to the rule of law their repeated actions have caused, have claimed that the rule of law is neither defined in EU law, nor could it be defined in EU law. This article's primary aim is to assess these conflicting assertions. It does so by first offering an overview of the EU legal framework on the basis of which it is shown that the rule of law, as asserted by the Commission, is a well-established constitutional principle of EU law. It furthermore 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. This article furthermore contends that the EU's understanding of the rule of law reflects what may be presented as a broad consensus in the European legal space on its core meaning and components; its legal use as a primary principle of judicial interpretation and a source from which standards of judicial review may be derived; and how the rule of law relates to other fundamental values. Finally, this article concludes by examining the reality of a potentially emerging East-West dissensus as regards the rule of law. In light of evidence of strong and widespread support for the rule of law in every single EU Member State in the face of top-down attempts to systemically undermine it, it is however submitted that there is no meaningful East-West divide but an authoritarian-liberal divide at elite level.

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1 Introduction

In a context of increasing rule of law backsliding within the EU itself,¹ the European Commission presented the rule of law in 2019 as ‘a well-established principle’, ‘well-defined in its core meaning’ which is furthermore ‘the same in all Member States.’² This article’s primary aim is to assess the extent to which the European Commission is correct in asserting that the rule of law is a well-established and well-defined principle of EU law whose core legal meaning is shared across the EU.

A focus on the (legal) meaning and scope of the EU rule of law may appear to some as a rather academic exercise at best, and possibly futile exercise at worst. Indeed, the rule of law is regularly referred to as an ‘essentially contested concept’, a point first made by W.B. Gallie in 1956.³ Addressing this conceptual relativism is however more crucial than ever considering the increasingly open conceptual challenge originating from authorities subject to special EU procedures on account of the systemic threat to the rule of law their repeated actions have caused.⁴ As examples of this ‘illiberal’ conceptual criticism, one may quote Poland’s former Minister of Foreign Affairs who promised ‘a horse and saddle or box of Belgian chocolates for anyone who finds the definition of ‘the rule of law’ in the Treaty or any other legally binding EU document’.⁵ One may also refer to Hungary’s Minister of Justice who has presented the rule of law as a buzzword ‘allegedly lacking ‘well-defined rules’ and which would remain ‘the subject of much debate’.⁶ This *conceptual* challenge culminated in a *legal* challenge seeking the annulment of the EU’s Rule of Law Conditionality Regulation of 16 December 2020⁷ on the ground inter alia that the rule of law would neither be defined in EU law, nor could it be defined in EU

¹ L. Pech and K. L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

² Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, Brussels, COM(2019) 343 final, 17 July 2019, p. 1.

³ WB Gallie, ‘Essentially contested concepts’ (1956) *Proceedings of the Aristotelian Society* 167.

⁴ European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland. 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) 835 final; European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, OJ 2019/C 433/66. Most recently, the European Commission has activated for the first time Regulation 2020/2092 in respect of Hungary: See e.g. V. Maksimov, ‘Hungary: Commission officially launches procedure linking block funds to rule of law’, *Euractiv.com*, 27 April 2022, <https://www.euractiv.com/section/politics/news/hungary-commission-officially-launches-procedure-linking-bloc-funds-to-rule-of-law/>.

⁵ ‘Byty szef MSZ komentuje list Jourovej ‘Konia z rzedem, kto znajdzie w traktatach UE definicje praworzadnosci’’, *Niezalezna*, 27 December 2019, <http://niezalezna.pl/303625-byty-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-znajdzie-w-tractatach-ue-definicje-praworzadnosci>.

⁶ J. Varga, ‘Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask’, *Euronews*, 22 November 2019, www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view.

⁷ Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union Budget [2020] OJEU L 433 I/1.

law.⁸ It would follow that there is no such a thing as a binding and enforceable principle of the rule of law in EU law.

To address these claims, Sect. 2 of this article will examine the EU legal framework to show that the rule of law is on the contrary a well-established constitutional principle of EU law which is furthermore well-defined not least because of the Court of Justice's extensive case law and the European Commission's definitional codification efforts in the past decade. Section 3 will then address the consensual nature of the EU's legal understanding of the rule of law most recently codified in Regulation 2020/2092. This article will defend the view that this understanding reflects what may be presented as a broad consensus in the European legal space on the core meaning and components of the rule of law; the legal use of the rule of law as a primary principle of judicial interpretation and a source from which standards of judicial review may be derived; and lastly, how the rule of law relates to other fundamental values such as democracy and respect for human rights. In light of growing conceptual or otherwise challenges originating from officials of EU countries facing unprecedented autocratisation,⁹ Sect. 4 will examine the reality of a potentially emerging dissensus as regards the rule of law considering that sustained attacks on the rule of law both of a rhetorical and practical nature are particularly noticeable in Central and Eastern European countries.¹⁰ In light of evidence of strong and widespread support for the rule of law in every single EU Member State in the face of top-down attempts to undermine the rule of law, it will be argued that there is no meaningful East–West divide but an authoritarian-liberal divide at elite level.

2 The Rule of Law in the EU Legal Framework

Not only have the Polish and Hungarian governments argued before the Court of Justice that the rule of law is allegedly not defined in the EU Treaties, they have also claimed that the EU has no competence to define it. However, as will be shown below, while the Treaties do not indeed include a provision offering a single, comprehensive or exhaustive definition, this is in fact the norm from a comparative law point of view. Furthermore, the Treaties do include several provisions guaranteeing the core components of the rule of law, with these core components having been in addition the subject of extensive case-law and multiple references in EU secondary legislation culminating in the adoption of a codifying definition by the EU's legislature in Regulation 2020/2092. And as the Court of Justice powerfully held in its

⁸ See ground (iii) of Hungary's annulment application in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2022:97 and ground (vi) of Poland's annulment application in Case C-157/21, *Poland v European Parliament and Council*, EU:C:2022:98.

⁹ See V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, March 2020, p. 16: 'The countries that have autocratized the most over the last 10 years are Hungary, Turkey, Poland, Serbia, Brazil and India' with Hungary described in the same report as the EU's first non-democratic member state and classified as an electoral autocracy.

¹⁰ M Claes, 'Editorial Note: How Common are the Values of the European Union?' (2019) 15 *CYELP* VII, pp. IX–X.

twin judgments in relation to this Regulation, not only do the Treaties empower the EU institutions to *define* the rule of law, the EU must be able to *defend* it.

2.1 The Rule of Law in EU Primary and Secondary Law

With respect to EU primary law, one may first observe the absence of any reference to the rule of law or its core meaning in the original founding treaties, with one exception: the provisions describing the jurisdiction of the European Court of Justice, originally written in French, which arguably already encapsulated the core legal meaning of the rule of law, i.e., ‘the reviewability of decisions of public authorities by independent courts.’¹¹

Following the first significant reference in the case law of the Court of Justice to the rule of law in the 1986 *Les Verts* judgment,¹² wherein the Court first referred to the then EEC as a community based on the rule of law, EU primary law has seen an increasing number of Treaty provisions referring explicitly and implicitly (via references to the ‘values’ of the EU) to the rule of law. In the continuing absence of a single and comprehensive Treaty definition, one may also note the introduction of Treaty provisions of EU primary law requiring compliance with the core components of the rule of law such as effective legal protection or the right to an effective remedy.

The table below contrasts the situation in 1957 at the time of the signature of the EEC Treaty and the situation when the Lisbon Treaty was signed fifty years later in 2007 to demonstrate the ‘widening’ (in the sense of the increasing number of references in multiple areas) and ‘deepening’ (in the sense of the adoption of new mechanisms and explicit guaranteeing of core components) of the EU primary law framework in respect of the rule of law which, one may note, tends to be systematically referred to alongside democracy and respect for human rights:

¹¹ F. Jacobs, *The sovereignty of law: The European way* (The Hamlyn Lectures 2006, CUP 2007), p. 35.

¹² Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, EU:C:1986:166.

1957

Article 164 EEC: 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed' (see Article 19(1) TEU (first subparagraph) post Lisbon)

2007

Preamble to the TEU: 'DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'; 'CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'

Article 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...'

Article 19(1) TEU (first subparagraph): 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed'

Article 19(1) TEU (second subparagraph): 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'

Article 21(1) TEU: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law [...]'

Article 21(2) TEU: 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] consolidate and support democracy, the rule of law, human rights and the principles of international law'

Preamble to the Charter of Fundamental Rights of the EU: 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'

Article 47 CFR (right to an effective remedy and to a fair trial)

See also the additional and multiple indirect references to the rule of law via the notion of EU values, e.g

Article 3 TEU: 'The Union's aim is to promote [...] its values'

Article 7 TEU: 'the Council [...] may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2'

Article 8 TEU: 'The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union'

Article 49 TEU: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union'

In addition to the Treaty provisions listed above, increasing awareness of the threat posed by rule of law backsliding at EU Member State level has resulted in a rapid evolution of the EU's rule of law 'toolbox' with the aim of addressing threats to

the EU values.¹³ Some of the instruments developed thus far are closely connected to some of the provisions of EU primary law listed above. This trend arguably began with the adoption in 2006 of a specific primary law based mechanism to oversee Bulgaria and Romania and which entered into force on 1 January 2007. Known as the Cooperation and Verification Mechanism, the CVM was set up in order to monitor the countries' progress in addressing specific benchmarks in inter alia the area of judicial reform.¹⁴ In this context, the Commission defined the rule of law as a principle requiring 'the existence of an impartial, independent and effective judicial and administrative system'.¹⁵ In its first ever judgment on the legal nature of the CVM issued on 18 May 2021 in answer to a set of national references for a preliminary ruling originating from Romanian courts, the Court of Justice confirmed that the CVM falls within the scope of the country's Treaty of Accession and that the associated benchmarks aim to ensure that Romania complies with the Article 2 TEU value of the rule of law and must be considered binding on Romania.¹⁶

Instruments of a more general scope were subsequently adopted. One may in particular mention the Rule of Law Framework adopted by the European Commission in 2014 and which has been commonly presented as a pre-Article 7 TEU procedure. The adoption of this instrument is noteworthy conceptually speaking as this was the first time the Commission sensibly attempted to offer a working and comprehensive definition of the notion of the rule of law in an internal context.¹⁷ Building primarily on the findings of a study previously adopted by the Venice Commission, the European Commission's Communication reflects the view according to which there is a consensus on the core (legal) meaning of the rule of law and that this concept essentially entails compliance with the following six legal principles: (1) legality; (2) legal certainty; (3) prohibition of arbitrariness of the executive powers; (4) independent and impartial courts; (5) effective judicial review including respect for fundamental rights and (6) equality before the law. While the European Commission did accept that the precise content of rule of law related principles and standards 'may vary at national level, depending on each Member State's constitutional system',¹⁸ it also suggested, rightly in our view, that the six elements previously listed stem from the constitutional traditions common to most European legal systems and may be said to define the core meaning of the rule of law within the context of the EU legal order. Two additional important points were then also made by the European Commission: the rule of law must be understood as a 'constitutional principle with both formal

¹³ See generally L. Pech, 'The Rule of Law in the EU' in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (Oxford University Press, 3rd edition, 2021), 307.

¹⁴ See Commission Decision 2006/928/EC of 13 December 2006, OJEU 2006 L 354/56 and Commission Decision 2006/929/EC of 13 December 2006, OJ 2006 L 354/58. Both CVM decisions were adopted on the basis of Articles 37 and 38 of the 2005 Treaty on the accession of Bulgaria and Romania.

¹⁵ Recital 3 of both Commission decisions cited above.

¹⁶ Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România*, EU:C:2021:393.

¹⁷ See L. Pech, 'The Rule of Law in the EU', op. cit., pp. 324–325.

¹⁸ European Commission, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, p. 4.

and substantive components' which 'is intrinsically linked to respect for democracy and for fundamental rights.'¹⁹

In addition to the Commission's 2014 Rule of Law Framework, one should also highlight the Commission's Annual Rule of Law Report,²⁰ first launched in 2020, which was also justified in the name of *inter alia* guaranteeing better compliance with the EU Treaties and in particular Article 2 TEU.²¹ One of the positive features of this recent addition to the EU's rule of law toolbox is that it closely builds on the Commission's 2014 definitional efforts and offers a compelling definition of the core elements of the rule of law by codifying the key legal principles laid down in the EU Treaties, EU secondary legislation, the case-law of the Court of Justice as well as the case law of the European Court of Human Rights. As a final example of soft law instruments implementing EU primary law provisions, one may mention the so-called European Semester which has increasingly become more intensely occupied with issues relating to national judiciaries and judicial independence, is closely linked to Title VIII of the TFEU (economic and monetary policy) and the secondary legislation adopted on this basis.

Speaking of EU secondary legislation, one must stress that the great majority of EU legislative instruments referring to the rule of law have been instruments dedicated to the *external* promotion of the EU's foundational values as required *inter alia* by Article 21 TEU which provides that the EU's action on the international scene shall be guided *inter alia* by the rule of law. One may give the example of Regulation 2021/947 establishing the Neighbourhood, Development and International Cooperation Instrument—Global Europe which refers to the rule of law no less than 35 times.²² Regulation 2021/947 does not however provide any comprehensive definition, nor any detailed description of how the rule of law is understood although some key aspects relating to it are mentioned such as independent judiciary and affordable access to justice for all. This lack of a comprehensive definition or detailed description is far from unusual.

This is not to say that the EU has sought to 'export' a vague or incoherent ideal. Rather, the EU has primarily sought to promote compliance with a number of sub-components of the rule of law selected on the basis of specific aims and priorities to be pursued in different external contexts. Furthermore, when examined transversally, externally oriented EU legal instruments may be said to illustrate an understanding of the rule of law which requires 'compliance with a number of core principles in order to guarantee *inter alia* that governments are subject to the law.'²³ A study focusing on the Commission's policy documents, decisions, and annual assessments

¹⁹ *Ibid.*, p. 4.

²⁰ See generally L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022.

²¹ European Commission, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final.

²² Regulation 2021/947 of 9 June 2021, OJ L 209/1.

²³ L. Pech, 'Promoting The Rule of Law Abroad: On the EU's limited contribution to the shaping of an international understanding of the rule of law' in F. Amtenbrink and D. Kochenov (eds), *The EU's Shaping of the International Legal Order* (Cambridge University Press, 2013), p. 117.

of EU candidate countries from 1997 to 2004 similarly demonstrated that ‘while the Commission’s work was far from flawless, it articulated a clear vision on the core meaning of the political accession criteria *before* Poland, Hungary, and the other countries from Central and Eastern Europe acceded’.²⁴ In this context, the Commission has always defended the view that the core meaning of the rule of law means first and foremost ‘that the powers of the government and its officials and agents are circumscribed by law and exercised in accordance with law’.²⁵ Additional core elements such as the need for an independent and impartial judiciary have also been consistently mentioned. One may therefore conclude that ‘the Commission’s conceptualisation of the rule of law’ since the TEU has always gone ‘beyond a minimalist understanding of the rule of law’ with democracy, rule of law, and human rights systematically understood as a set of interrelated foundational principles.²⁶

Internally oriented but considerably fewer EU legislative instruments also refer to the rule of law. A similar lack of definitional interest characterise them. This fundamentally changed with Regulation 2020/2092 which provides the first comprehensive all-encompassing definition of the rule of law adopted by the EU legislator while also further reiterating an approach first made clear in the context of EU external relations law as outlined above: the rule of law is to be understood as intrinsically linked with democracy and respect for human rights.²⁷

At the very least, the above developments show that those arguing like the current Polish government that ‘the organisation of the national justice system constitutes a competence reserved exclusively to the Member States’²⁸ have failed to take stock of the multiple EU provisions and associated instruments which have made clear over and over again that EU membership implies—to borrow from the previously mentioned EU Commission decisions establishing a CVM in respect of Bulgaria and Romania—‘the existence of an impartial, independent and effective judicial and administrative system’. Since then, the European Court of Justice has furthermore made explicitly clear what was previously implicitly accepted as obvious following the first set of infringement actions launched by the Commission on the basis of the second subparagraph of Article 19(1) TEU in respect of Poland’s rule of law crisis: while ‘the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law [...] by requiring the Member States thus to comply with those obligations, the

²⁴ R. Janse, ‘Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement’ (2019) 17(1) *ICON* 43, p. 46.

²⁵ *Ibid.*, p. 57.

²⁶ *Ibid.*, p. 58 and p. 60.

²⁷ See Recital 6: ‘While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded [...] Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.’.

²⁸ Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531, para. 38.

European Union is not in any way claiming to exercise that competence itself nor is it, therefore [...] arrogating that competence.’²⁹

As will be further detailed below, the conflict-prone adoption of Regulation 2020/2092 has similarly provided the Court of Justice with an unprecedented opportunity to address fundamental conceptual issues in relation to the EU rule of law following the annulment actions brought against the EU’s Rule of Law Conditionality Regulation by the Polish and Hungarian governments.

2.2 The Rule of Law in the Court of Justice’s Case Law

Ever since its ruling in the 1986 case of *Les Verts*, in which the Court of Justice primarily equated the rule of law with the ‘traditional and interrelated legal principles of legality, judicial protection and judicial review’³⁰ and which the Court of Justice has also guaranteed as general principles of EU law,³¹ numerous rulings have clarified both the meaning and the extent to which additional principles can also be viewed as core components of the rule of law. This subsequently enabled the European Commission, as previously outlined, to define the rule of law as a set of core legal principles with reference *inter alia* to the Court of Justice’s case law whose recent exponential growth must be emphasised. Indeed, starting with the so-called ‘Portuguese judges’ judgment of 27 February 2018,³² the Court has issued multiple rulings which directly or indirectly address national measures undermining judicial independence.³³ In this context, the Court has developed what has been labelled an ‘existential jurisprudence’³⁴ so as to defend the fundamental and foundational values underlying the EU legal order against rule of law backsliding.

A silver lining of the EU’s rule of law crisis is arguably the numerous opportunities it has given the Court of Justice to develop this extremely comprehensive body of case law. Similarly, one may possibly be grateful for the conceptual challenge originating from national authorities engaged in backsliding strategies as these have

²⁹ *Ibid.*, para. 52.

³⁰ L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, *Jean Monnet Working Paper* 04/09, p. 16, <https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/>.

³¹ See T. Tridimas, *General Principles of EU law* (Oxford University Press, 3rd edition, 2022).

³² Case C-64/16, *Associação Sindical dos Juízes Portugueses* (Portuguese Judges), EU:C:2018:117. A recent paper compellingly shows how the ECJ strategically exploited the suitable characteristics of this arguably inconspicuous case to produce a landmark ruling that enabled unprecedented enforcement action against democratic backsliding in Poland and Hungary, see M. Ovádek, ‘The making of landmark rulings in the European Union: the case of national judicial independence’ (2022) *Journal of European Public Policy*, <https://doi.org/10.1080/13501763.2022.2066156>

³³ See generally L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*, *SIEPS* 2021:3, <https://www.sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/>.

³⁴ T.T. Konciewicz, ‘The existential jurisprudence of the Court of Justice of the European Union’ in K. Szczepanowska-Kozłowska (ed.), *Profesor Marek Safjan znany i nieznan. Księga jubileuszowa z okazji siedemdziesiątych urodzin* (Księgarnia Beck, Warszawa, 2019), 223.

led the EU's main political institutions to engage more forcefully than ever before with definitional issues culminating in the inclusion of a detailed and enforceable definition of the rule of law in Regulation 2020/2092. Most recently, by challenging the legality of Regulation 2020/2092 and arguing that the rule of law 'cannot be the subject of a uniform definition in EU law and must be specifically defined by the legal systems of each Member State' (Hungarian government) and that a budgetary-related EU regulation cannot, in any event, 'define the concept of the rule of law' (Polish government),³⁵ these two 'authoritarian governments'³⁶ have provided a unique opportunity to the Court of Justice to enter the conceptual fray.

In reply to these claims—which manifestly ignored the EU's legal framework, the multiple references if not definitions one can find in EU legislative and non-legislative instruments and the Court of Justice's well established case-law—EU Advocate General Campos Sánchez-Bordona helpfully recalled that:

272. Although the concept of the rule of law as a value of the European Union enshrined in Article 2 TEU is broad, there is nothing to prevent the EU legislature from defining it more precisely in a specific area of application, such as implementation of the budget, for the purposes of establishing a financial conditionality mechanism.

273. The concept of the rule of law has an autonomous meaning within the EU legal system. It cannot be left to the national law of the Member States to determine its parameters, because of the risk this would pose to its uniform application [...]

274. As I noted earlier, the Court's case-law has helped to develop the value of the rule of law as regards its implications for effective judicial protection or the independence of the judiciary. That case-law can provide the EU legislature with guidelines to help in defining that value in secondary legislation. That is what has happened with Regulation 2020/2092.³⁷

Accordingly, for the Advocate General, the Hungarian and Polish's claims alleging inter alia a violation of legal certainty must be rejected. Indeed, the EU's co-legislators merely developed the value of the rule of law by specifying the core legal principles this value embodies and which are all based on the Court of Justice's own case law in addition to being also guaranteed by the European Court of Human Rights. As regards the indicative list of areas where breaches of the principles of the rule of law may arise and the examples provided by the EU legislature in Regulation 2020/2092, they show that the EU legislature is actually endeavouring to increase legal certainty.

³⁵ Opinions of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, para. 267 and Case C-157/21, *Poland v European Parliament and Council*, EU:C:2021:978, para. 17.

³⁶ See G. de Búrca, 'Poland and Hungary's EU membership: On not confronting authoritarian governments' (2022) *International Journal of Constitutional Law* 1.

³⁷ Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974.

The Court of Justice, exceptionally sitting as a full court, confirmed the validity of the Advocate General's approach.³⁸ As stressed by the Court, while Article 2 of Regulation 2020/2092 does not set out in detail the principles of the rule of law that it mentions, these principles have not only 'been the subject of extensive case-law', they have 'their source in common values which are also recognised and applied by the Member States in their own legal systems'.³⁹ This means that no Member State can (seriously) claim not to be 'in a position to determine with sufficient precision' the core content and the legal requirements flowing from each of rule of law principles listed in the Regulation.⁴⁰

For the Court, the EU legislator is furthermore entitled to adopt a specific definition of the rule of law on account of the specific aims and subject matter of the relevant piece of legislation. In this context, the Court has emphatically and powerfully reiterated that 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 Union as a common legal order' and 'are given concrete expression in principles containing legally binding obligations for the Member States'.⁴¹ The claim that the EU rule of law principles are 'of a purely political nature and that an assessment of whether they have been respected cannot be the subject of a strictly legal analysis'⁴² must therefore be rejected.

Finally, in response to the (evidence-free) claim that the EU definition of the rule of law would allegedly not be compatible with the Hungarian and Polish national identity, the Court of Justice helpfully recalled the obvious: while national authorities have 'a certain degree of discretion'⁴³ when it comes to implementing rule of law principles in light of the specific features of each national legal system, this cannot be construed as *carte blanche* not to respect EU rule of law principles or backsliding post accession, and a serious argument to deny the EU the power to impose uniform assessment criteria as it did under Regulation 2020/2092. Indeed, while Member States 'have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States 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.'⁴⁴ Looking beyond the rule of law, the Court of Justice could not have been clearer: Compliance with the values contained in Article 2 TEU 'cannot

³⁸ See the Court's two judgments of 16 February 2022 in Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98. For further analysis, see L. Pech, 'No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism', *VerfBlog*, 16 February 2022, <https://verfassungsblog.de/no-more-excuses/>.

³⁹ Court's judgment in C-156/21, *op. cit.*, paras 236–237.

⁴⁰ *Ibid.*, para. 240.

⁴¹ *Ibid.*, para. 232.

⁴² *Ibid.*, para. 240.

⁴³ *Ibid.*, para. 265.

⁴⁴ *Ibid.*, para. 266.

be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.’⁴⁵

The Court’s twin judgments are as detailed as they are compelling. If one were to identify a possible shortcoming, the Court’s reliance on the concept of (constitutional) identity may be viewed as unnecessary and possibly unwise. Rather than presenting Article 2 values as defining ‘the very identity’⁴⁶ of the EU, the Court could have merely outlined that ‘compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State’ and that the rule of law ‘forms part of the very foundations of the European Union and its legal order’.⁴⁷ This would have sufficed to justify the Court’s fundamental point that the EU ‘must be able to defend’ the values on which it is based within the limits of its powers as laid down by the Treaties.⁴⁸ There was arguably no imperative need for the Court to rely on the concept of constitutional/national identity which, while mentioned in the Treaties in relation to both the EU and its Member States and increasingly used by constitutional courts (independent or otherwise), is arguably excessively subjective while also being easily open to misuse and abuse by those implementing rule of law backsliding agendas.⁴⁹ Having however decided to make use of the concept – for better or worse – one may only but welcome the Court’s clarification that ‘the EU protects national constitutional identities’ but ‘does not protect national unconstitutional identities’ when they turn ‘into a violation of the constitutional identity of the EU’.⁵⁰

2.3 Definitional Consolidation

In light of the multiple and more rarely, detailed references to the rule of law one could find in EU primary and secondary law instruments as well as in EU policy documents prior to the adoption of Regulation 2020/2092, one could argue that the main issue has never been the lack of a definition but rather the multiplication of references and adoption of documents emphasising different components of the rule of law.⁵¹ This could give the wrong impression of an à la carte understanding while simultaneously making it difficult to rapidly understand what the rule of law means. To address this criticism, as detailed above, the European Commission helpfully

⁴⁵ Ibid., para. 144.

⁴⁶ Ibid., para. 127.

⁴⁷ Ibid., para. 126 and para. 128.

⁴⁸ Ibid., para. 127.

⁴⁹ See R.D. Kelemen and L. Pech, ‘The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 59.

⁵⁰ P. Faraguna, T. Drinóczy, ‘Constitutional Identity in and on EU Terms’, *VerfBlog*, 21 February 2022, <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>.

⁵¹ This proliferation of references to the rule of law and variable emphasis on its different components has been particularly noticeable in the area of EU external relations law and policy. See L. Pech ‘The EU as a Global ‘Rule of Law Promoter’: The Consistency and Effectiveness Challenges’ (2016) 14(1) *Europe-Asia Journal* 7.

sought to comprehensively clarify the core meaning and purpose of the EU rule of law starting in 2014 when it adopted a pre-Article 7 TEU procedure.

The Commission has since made one addition to the definition offered in 2014 by including the principle of separation of power at the time of the launch of its Annual Rule of Law Report. This addition was neither surprising nor unwarranted. Indeed, the Commission's 2014 Communication already explicitly referred to the separation of powers when explaining that its pre-Article 7 procedure aims to address threats to the rule of law of a systemic nature, including threats to the separation of powers in any Member State. The subsequent explicit inclusion of the principle of separation of powers in the Commission's definition seems to have been motivated by the increasing references to this principle in the post 2014 case law of the Court of Justice,⁵² the nature of the attacks on the rule of law the Commission identified in respect of the situation in Poland⁵³ as well as the growing importance of separation of powers in the European Court of Human Rights' case law.⁵⁴ This, in turn, led the European Parliament and the Council to include separation of powers in their definition of the rule of law when they adopted Regulation 2020/2092 which itself refers to three judgments issued by the Court of Justice, one in 2010 and two in 2016.⁵⁵

In light of the above, one may view as misguided the definitional critique levelled at the EU and at the European Commission, in particular in the context of its ongoing (but manifestly belated and insufficient⁵⁶) efforts to uphold and defend judicial independence. The mocking criticism expressed by Poland's former Minister of Foreign Affairs when he promised in December 2019 'a horse and saddle or box of Belgian chocolates'⁵⁷ for anyone able to find a definition of the rule of law in any legally binding EU document, similarly lacks substance. As previously shown, several core components of the rule of law are explicitly mentioned and guaranteed in the EU

⁵² See C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, para 36: The judiciary must 'be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive.' See also C-452/16 PPU, *Poltorak*, EU:C:2016:858, para 35.

⁵³ See European Commission reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017, para. 100: 'The refusal to publish the judgment denies the automatic legal and operational effect of a binding and final judgment, and breaches the rule of law principles of legality and separation of powers'.

⁵⁴ See e.g. *Baka v. Hungary* [GC], CE:ECHR:2016:0623JUD002026112, para. 165. One may however note that the European Court of Human Rights has, at times, seemingly distinguished 'the fundamental principles of the rule of law and the separation of powers' rather than including the former in the latter. Yet the Court does also sometimes suggest the opposite: 'the right to "a tribunal established by law" is a reflection of [the] very principle of the rule of law and, as such, it plays an important role in upholding the separation of powers and the independence and legitimacy of the judiciary as required in a democratic society. That said, the principle of the rule of law also encompasses a number of other equally important principles'. See *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, paras 233 and 237.

⁵⁵ See footnote 7 of Regulation 2020/2092 referring to the Court's judgments in Case C-279/09, *DEB*, EU:C:2010:811 and C-477/16 PPU, *Kovalkovas* and C-452/16 PPU, *Poltorak*, op. cit. Post Regulation 2020/2092, additional judgments have presented the principle of the separation of powers as a characteristic of the operation of the rule of law. See e.g. Case C-896/19, *Repubblika*, EU:C:2021:311, para 54.

⁵⁶ See most recently R.D. Kelemen, 'Appeasement, ad infinitum' (2022) 29(2) *Maastricht Journal of European and Comparative Law* 177.

⁵⁷ 'Były szef MSZ komentuje list Jourovej', op. cit.

Treaties. If one understands ‘definition’ as requiring a single, detailed provision exhaustively defining the meaning and scope of the rule of law then one may raise a similar criticism as regards the Polish Constitution. Does this mean the rule of law does not underlie the whole Polish legal system? A negative answer is of course warranted. As made clear by Article 2 of the Polish Constitution: ‘The Republic of Poland shall be a democratic state ruled by law’. In other words, ‘this provision enacts a constitutional principle equivalent to the rule of law or Rechtsstaat’⁵⁸ on the basis of which Poland’s Constitutional Tribunal (before its unconstitutional capture in December 2016⁵⁹) ‘has derived a number of general principles of law such as legal certainty, protection of acquired rights, protection of legitimate expectations, proportionality, non-retroactivity of law and sufficient *vacatio legis*.’⁶⁰

As a matter of fact, a shared legal trait in Europe is that the rule of law is almost never precisely defined by national constitutions.⁶¹ The usual lack of a constitutional definition (or of a detailed one) of the rule of law has led, in turn, national constitutional/supreme courts to define its specific contours on a case-by-case basis. This lack of definition and the need for a case-by-case ‘discovery’ and application of the key components of the concept is, however, far from unique to the rule of law. As observed by Professor Scheppele and the present author:

many important principles of law have solid cores that can be legally enforced even if there is disagreement about where the boundary is at the margins. The right to ‘free speech’ surely includes the idea that the state may not punish the political opposition for criticising the government even if there is no unanimity about whether hate speech may be legally prohibited. The right to data privacy surely includes the requirement that the state may not as a general matter indiscriminately collect private information even if there is no unanimity about how far this right gives way in the immediate aftermath of a terrorist attack. Most general principles have clear cores and contestable margins, and it is no argument against the existence of the clear core that one can imagine cases at the margins over which one can reasonably argue.⁶²

⁵⁸ S. Biernat and M. Kawczyńska, ‘The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context’ in A. Albi and S. Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 745, p. 762.

⁵⁹ See W. Sadurski, ‘Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler’ (2019) 11 *Hague Journal on the Rule of Law* 63.

⁶⁰ Biernat and Kawczyńska, op. cit., p. 759.

⁶¹ With the arguable exception of Spain as the Spanish Constitution offers a list of the formal components at the heart of the *Estado de Derecho*. For further analysis and ample references, see L. Pech and J. Grogan (eds), *Unity and Diversity in National Understandings of the Rule of Law in the EU*, RECONNECT, Deliverable 7.1, 30 April 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1-1.pdf>.

⁶² KL Scheppele and L Pech, ‘Is the Rule of Law Too Vague a Notion?’, *VerfBlog*, 1 March 2018, <https://verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers>.

One may conclude that regardless of the national legal system, it has been commonly left to legislators, lawyers, judges and scholars to flesh out the meaning and implications of this principle on a subject-matter by subject-matter basis and/or on a case-by-case basis.

The EU has followed a broadly similar approach with the EU Treaties not offering a single, comprehensive or exhaustive definition of the rule of law. The Treaties do however contain multiple references to different core aspects of the rule of law. One may for instance mention Title IV of EU Charter of Fundamental Rights entitled 'Justice' which guarantees rights such as the right to an effective remedy and the right to a fair trial, and the second subparagraph of Article 19(1) TEU which, as the Court of Justice itself explained, 'gives concrete expression to the value of the rule of law stated in Article 2 TEU' to the extent that it imposes on Member States a (justiciable) obligation to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.⁶³

The lack of a Treaty provision offering an all-encompassing definition does not therefore necessarily imply that the rule of law is inevitably vague and cannot be enforced. Many important binding principles of law have solid cores that can be legally enforced even if there is room for disagreement about where their boundaries lie. One may recall for instance that many other fundamental concepts are not defined by the EU Treaties. For instance, there could be no EU internal market without a prohibition on customs duties and yet the concept of customs duties is left undefined by the Treaties. Similarly, the EU Treaties guarantee many rights to EU workers, yet the notion of worker is also not defined in EU primary law. Does this mean that there is no EU binding prohibition on customs duties and no competence for the EU in this area? Of course not. The Masters of the Treaties have deliberately left it to EU institutions, and in particular the Court of Justice, to define and apply multiple key concepts and fundamental principles, which the Court has done and continues to do regularly in respect of the rule of law. It is primarily on the basis of the Court of Justice's case law that the European Commission was able to offer a comprehensive and compelling working definition of the core components of the rule of law which was subsequently embraced by the EU's co-legislators when they adopted Regulation 2020/2092. Arguing that the rule of law in the EU legal order is allegedly excessively vague or would lack a legally binding nature because the EU Treaties would lack a detailed definition does not therefore survive close scrutiny. Similarly, as will be shown below, the EU's understanding is in line with national understandings of the rule of law.

⁶³ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 32.

3 A Consensual EU Definition⁶⁴

As asserted by the Venice Commission and the European Commission subsequently, ‘a consensus on the core meaning of the rule of law and the elements contained within it’⁶⁵ has progressively crystallised as far as the European legal space is concerned. However, consensus should not be confused with uniformity as ‘common approaches, standards and norms do not entail their implementation in an identical manner’⁶⁶ and neither should they. As recently stressed by the Court of Justice, EU law does *not* require ‘Member States to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State [...] Indeed, under Article 4(2) TEU, the European Union must respect the national identities of the Member States, inherent in their fundamental political and constitutional structures.’⁶⁷ Conversely, however, the existence of different constitutional traditions in Europe and the persistence of some significant differences between national legal systems primarily when it comes to ‘institutionalising’ the rule of law (for instance, not every EU Member State has deemed it necessary to organise the constitutional review of legislation via a constitutional court), does not necessarily imply the lack of a dominant common core understanding and other shared traits notwithstanding ‘different national identities and legal systems and traditions’.⁶⁸

3.1 The Crystallisation of a Consensual Core Meaning

As the Council of Europe’s Committee of Ministers explained in 2008, ‘adherence of all Council of Europe member states to the ECHR and their being subject to the jurisdiction of the European Court of Human Rights was highly instrumental in creating a common European core of rule of law requirements which is still developing further’.⁶⁹ Membership of the EU has similarly reinforced the crystallisation of a common European core of rule of law requirements for the EU Member States, all of them also parties to the ECHR. These core rule of law requirements have been codified by both the Venice Commission and the European Commission in the last decade, in part, to answer unprecedented and spreading authoritarian developments within both the EU and Council of Europe. As the table below shows, the core meaning and elements of the rule of law outlined first by the Venice Commission in

⁶⁴ This section is primarily based on L. Pech and J. Grogan (eds), *Meaning and Scope of the EU Rule of Law*, RECONNECT Deliverable 7.2, 30 April 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf>.

⁶⁵ Venice Commission, *Report on the Rule of Law*, Study 512/2009, 4 April 2011, para. 35. For a similar diagnosis, see also L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, *Jean Monnet Working Paper* 04/09, p. 16, <https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/>.

⁶⁶ European Commission, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, COM(2019) 163 final, p. 11.

⁶⁷ Case C-430/21, EU:C:2022:99, para 43.

⁶⁸ Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final, 17 July 2019, p. 1.

⁶⁹ *The Council of Europe and the Rule of Law – An Overview*, CM(2008)170, para. 33.

2011 and subsequently by the European Commission in 2014 before being embraced by the European Parliament and the Council acting in a legislative capacity in 2020 are virtually identical. This should not come as a surprise since the EU and Council of Europe have long been promoting a similar conception of the rule of law.⁷⁰ And while the principle of separation of powers is not explicitly mentioned by the Venice Commission, the Venice Commission did present judicial independence as being ‘an integral part of the fundamental democratic principle of the separation of powers’.⁷¹

Venice Commission/Council of Europe’s definition ^a	European Commission’s definition ^b	European Parliament and Council’s definition ^c
<p>Core meaning: ‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’^d</p> <p>Core elements: ‘(1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.’</p>	<p>Core meaning: ‘Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.’</p> <p>Core elements: ‘The rule of law includes 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.’</p>	<p>Core meaning: ‘The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights ... under the control of independent and impartial courts.’</p> <p>Core elements: The rule of law ‘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.’</p>

^aIbid., para. 41. See also Venice Commission, Rule of Law Checklist, Study No. 711/2013, 18 March 2016, para. 18 et seq

^bEuropean Commission, 2020 Rule of Law Report. The rule of law situation in the European Union, COM(2020) 580 final, p. 1

^cSee Recital 3 and Article 2 (Definitions) of Regulation 2020/2092

^dThe Venice Commission adopted here the definition proposed by Lord Bingham in *The Rule of Law* (Allen Lane, 2010)

A number of core elements are arguably missing such as the principle of accessibility of the law, the principle of the protection of legitimate expectations and the principle of proportionality. That said, ‘the principle of legality may however be understood as encompassing the requirement that the law must be accessible and the protection of legitimate expectations is closely linked to the principle of legal

⁷⁰ See L. Pech, ‘Promoting The Rule of Law Abroad’, op. cit.

⁷¹ Venice Commission, *Report on the Rule of Law*, op. cit., para 55.

certainty. As for the principle of proportionality, its limited use in English administrative law ... may have thought to justify its exclusion from what have been presented as consensual lists.⁷² One may also wonder whether it makes conceptual sense to distinguish the principles of non-discrimination and equality before the law from the broader notion of fundamental rights. As for the claim that fundamental rights and/or non-discrimination cannot be considered core elements of the rule of law—a submission made by the Hungarian and Polish governments when they challenged the legality of Regulation 2020/2092—the Court of Justice has since held that

the reference to the protection of fundamental rights is made only by way of illustration of the requirements of the principle of effective judicial protection, which is also guaranteed in Article 19 TEU and which Hungary itself acknowledges to be part of that concept. The same is true of the reference to the principle of non-discrimination. Although Article 2 TEU refers separately to the rule of law as a value common to the Member States and to the principle of non-discrimination, it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value.⁷³

The minor criticism expressed above aside, the core meaning and elements of the rule of law identified by both the Venice Commission and the main EU political institutions do accurately reflect the core meaning and components one may draw from Europe's national legal orders.⁷⁴ Indeed, and to put it concisely, the rule of law has progressively become a dominant organisational paradigm of modern constitutional law in all the EU Member States. Even in countries where the rule of law is not explicitly guaranteed in the national constitution, the rule of law is normally recognised by legislators, lawyers, judges and scholars as one of the foundational principles undergirding the relevant national constitutional system. Another shared trait is the dominant legal understanding of the rule of law 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 use of such public power.

The legal and policy documents produced by the EU and the Council of Europe similarly promote a broad, substantive and holistic understanding of the rule of law.⁷⁵ In other words, the rule of law is generally understood as a principle that includes substantive components (e.g. equality before the law) as well as formal/

⁷² D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11(3) *European Constitutional Law Review* 512, p. 523.

⁷³ C-156/21, op. cit., para. 229 and C-157/21, op. cit., para. 324.

⁷⁴ For a detailed account, see L. Pech and J. Grogan (eds), *Unity and Diversity in National Understandings of the Rule of Law in the EU*, RECONNECT, Deliverable 7.1, 30 April 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>.

⁷⁵ For further analysis, see J. Grogan and L. Pech (eds), *The crystallisation of a core EU meaning of the rule of law and its (limited) normative influence beyond the EU*, RECONNECT, Deliverable 7.3, 30 April 2021, <https://reconnect-europe.eu/wp-content/uploads/2021/04/D7.3.pdf>.

procedural elements (e.g. legal certainty, judicial review), and which requires a democratic and liberal constitutional order giving full effect to human rights. This also explains why the principle of the rule of law is commonly viewed as not justiciable in itself. This means that the rule of law is not traditionally used as *a rule* of law. This is not to say, however, that the rule of law, as a legal principle, lacks normative effect and merely fulfils a descriptive function. On the contrary, the highest courts tend to rely on the rule of law both as a ‘transversal’ principle that must guide the interpretation of all legal norms, and a basis from which a set of ‘hard’ legal principles, formal as well as substantive, can be derived to help the judiciary in their day-to-day mission to interpret and scrutinise the validity of public authorities’ measures. The case law of the European Court of Justice and the European Court of Human Rights similarly reveals an understanding of the rule of law as a structuring principle which these courts must always take into account in their day-to-day adjudicative role with a view of strengthening concrete compliance with it, and as an ‘umbrella principle’⁷⁶ from which judges may derive formal and substantive components or sub-principles. While the case law in some national legal systems may not always be as straightforward and plentiful when it comes to recognising the normative impact of the rule of law, there is no doubt this principle has shaped the legal developments and implicitly or explicitly led to the recognition of new and justiciable principles in most legal systems in Europe.

Finally, multiple primary materials could be cited to evidence the dominant understanding of the rule of law as a foundational principle which shares a consubstantial and mutually reinforcing relationship with democracy and respect for human rights. To merely give two recent examples, one may refer to a resolution from the Parliamentary Assembly of the Council of Europe in relation to Poland adopted in January 2020 and the Rule of Law Conditionality Regulation adopted by the European Parliament and the Council of the EU in December of the same year:

The Assembly reiterates that democracy, the rule of law and respect for human rights are interlinked and cannot exist without one another.⁷⁷

Respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.⁷⁸

In light of the above, the understanding and approach promoted by both the Council of European and the EU may be said therefore to amount to a thick/substantive conception of the rule of law rather than a thin/formal one.⁷⁹

⁷⁶ To borrow the expression used by G Marshall, ‘The Rule of Law. Its Meaning, Scope and Problems’ (1993) 24 *Cahiers de philosophie politique et juridique* 43.

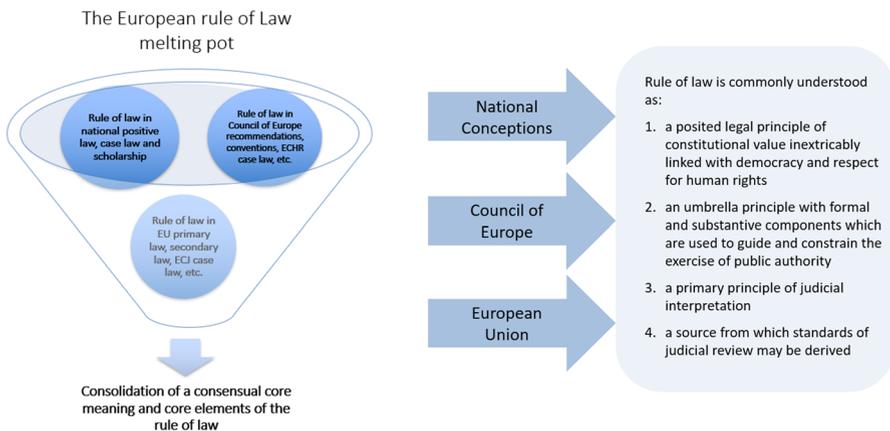
⁷⁷ PACE, *The functioning of democratic institutions in Poland*, Resolution 2316 (2020), para. 1.

⁷⁸ Regulation 2020/2092, op. cit., recital 6.

⁷⁹ For a recent overview of thin and substantive understandings of the rule of law, see R. Coman, *The Politics of the Rule of Law in the EU Polity* (Palgrave, 2022), p. 45 et seq.

3.2 The 'Norm-Diffusion' Dynamics Underlying the Process of Crystallisation of a Consensual Core Meaning

The Council of Europe and EU experiences suggest that the migration of the rule of law from the national to the regional level in Europe has subsequently led to a process that may be described as 'downstream retroaction', that is, a process whereby regional legal developments have, in turn, affected national legal systems. It would be wrong however to think of the relationship between national and European understandings of the rule of law as being one-dimensional and static. On the contrary, one may reasonably contend that EU legal developments as well as the case law of the European Court of Human Rights have led to a reappraisal of national understandings. In other words, after assimilating the values and principles which the rule of law encompasses in various legal traditions, legal developments at the European level have shaped national understandings and in particular, the judicial interpretation and application of the different sub-components of the rule of law. In turn, national legal developments, influenced by membership of the EU and the Council of Europe, have revealed some innovative features which could then be 're-exported', so much so that one can perhaps speak of constitutional ping-pong in this area, or, to use a less trivial expression, of intertwined constitutionalism.⁸⁰ Based on previous research,⁸¹ one may argue that the impact or outcome of these processes of vertical and horizontal norm-diffusion has led to the emergence and subsequent solidification of four main shared traits between the dominant European and national legal understandings of the rule of law which are summarised in the figure below.



⁸⁰ J. Ziller, 'National Constitutional Concepts in the New Constitution for Europe' (2005) 1 *European Constitutional Law Review* 452, p. 480.

⁸¹ See Pech and Grogan, *Unity and Diversity in National Understandings of the Rule of Law in the EU*, op. cit.

The four shared traits outlined above should not lead one to think that national or supranational understandings of the rule of law are static in nature. On the contrary, each legal system has naturally demonstrated a dynamic, evolving understanding of this principle. The ‘institutionalisation’ of the rule of law has also led to the creation and implementation of different arrangements and mechanisms. This is not in the least surprising. Indeed, as aptly explained by the Venice Commission, the existence of a common understanding of the core meaning and component of the rule of law does not have to ‘mean that its implementation has to be identical regardless of the concrete juridical, historical, political, social or geographical context’.⁸² In this respect, the European Parliament was right to observe that the definition of the Union’s set of core values such as the rule of law ‘is a living and permanent process’⁸³ with these values and principles evolving over time.

This diversity and dynamic evolution notwithstanding, the rule of law ought to be considered a fundamental and consensual element of Europe’s constitutional heritage, which has firmly established itself as an essential transnational principle of what may be referred to as ‘European constitutional law’—the body of principles common to the national constitutional orders and the EU and ECHR legal frameworks—whose core meaning and components are widely accepted across European legal systems or should we say, used to be widely accepted considering for instance the conceptual challenge originating from the current authorities of Hungary and Poland? This question will be addressed below.

4 Towards More Dissensus and a New East–West Divide?

The scholarly argument that the rule of law is a vague and/or must be understood as an essentially contested concept is not new.⁸⁴ What is new, at least within the EU, is that the very concept of the rule of law and/or the EU’s definition of it have been openly challenged, not least by two national governments as previously shown. At the same time, populist actors across the EU are keen to invoke the ‘will of the people’ to claim that legitimisation through elections and/or referenda gives a licence to disregard *inter alia* the rule of law,⁸⁵ with some politicians going as far as to say that ‘the law has to follow politics and not politics the law’.⁸⁶ This has raised the

⁸² Venice Commission, *Report on the Rule of Law*, op. cit., para 34.

⁸³ 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)), recital J.

⁸⁴ For a recent account, see J. Waldron, ‘The Rule of Law as an Essentially Contested Concept’ in J. Meierhenrich and M. Loughlin (ed.), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021), 121.

⁸⁵ See N. Lacey, ‘Populism and the Rule of Law’ in Meierhenrich and Loughlin, *ibid.*, 458.

⁸⁶ H. Kickl, then Federal Minister of the Interior of the Republic of Austria, quoted by M. Steinbeis, ‘Minister of Civil Resistance’, *Verfassungsblog*, 26 January 2019, <https://verfassungsblog.de/minister-of-civil-resistance>.

question of whether ‘the common European values really common?’⁸⁷ as the rule of law is primarily decried by representatives of governments and ruling parties from central and eastern European countries. However, as will be shown below, this does not mean that one could claim the emergence of a new ‘East–West divide’ with respect to the rule of law. Rather, it can be shown that there is evidence of a widely shared support for it in the face of top-down attempts to undermine the rule of law and in particular, national judiciaries.⁸⁸

4.1 An East–West Rhetorical Divide?

Rhetorically speaking, there is ample evidence of repeated critical statements originating from central and eastern European politicians with respect to the rule of law as a whole or some of its core—until now extremely consensual—components such as judicial independence. For instance, some strong criticism can be regularly heard from members of Hungary’s ruling party. To give only but a few examples, the rule of law was described as a ‘buzzword’ by the country’s justice minister⁸⁹; a fiction by a Fidesz MEP⁹⁰; and a ‘magic word’ by the Fidesz-KDNP Delegation to the European Parliament.⁹¹ Not to be undone, a judge from Hungary’s (captured) constitutional court, has presented the rule of law ‘as a normative yardstick’ which ‘is little more than an empty nineteenth century ideal and a political joker for all purposes.’⁹² More sophisticatedly, the Hungarian prime minister has not denied the fundamental importance of the rule of law but challenged the EU’s authority to enforce it:

I speak as a member of the generation which, when young [...] dreamt that in Hungary one day there would be freedom, democracy and the rule of law [...] The rule of law means that people do not rule other people: in contrast with people – who are often biased – it is the law which rules supreme, according to a single standard applied equally to all, making no distinctions between individuals. As a new concept, I could also add that neither does it make any distinction between countries. The Member States have never transferred control

⁸⁷ M. Claes, op. cit., p. VII.

⁸⁸ As observed by the Secretary General of the Council of Europe, undermining the judiciary is always ‘on page one of the populist playbook’ as judges are viewed ‘an obstruction to populism [...] as a result of their refusal to bow to political whims’ and ‘their willingness to assert the rule of law against political agendas which would otherwise trample it’, Council of Europe (Annual report by the Secretary General), *State of Democracy, Human Rights and the Rule of Law: Populism – How strong are Europe’s checks and balances?*, April 2017, p. 15.

⁸⁹ J. Varga, ‘Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask’, *Euronews*, 22 November 2019, www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view.

⁹⁰ Quoted in K Zoltán, ‘Fidesz MEP issues apology after claiming Spain holds political prisoners’, *Index.hu*, 5 December 2019, https://index.hu/english/2019/12/05/jozsef_szajer_fidesz_spain_political_prisoners_apology/.

⁹¹ Press Release by the Fidesz-KDNP Delegation to the European Parliament, 5 September 2019, <https://fidesz-eu.hu/en/with-timmermans-at-the-forefront-pro-migration-forces-prepare-once-more-for-revenge/>.

⁹² Quoted in M. Steinbeis, ‘Piercing the Hull’, *Verfassungsblog*, 12 January 2019, <https://verfassungsblog.de/piercing-the-hull/>.

over enforcement of the rule of law to the institutions of the EU. The remit of the EU institutions refers solely to the enforcement of EU law.⁹³

It is however difficult to fully understand what the Hungarian prime minister means when he refers to the law ‘making no distinctions between individuals’ considering a number of legal measures specifically pushed forward by his government in relation to George Soros or named after him.⁹⁴ It is also not clear what he means by ‘new concept’ considering for instance that the rule of law is mentioned in the Preamble of the 1948 Universal Declaration of Human Rights and referred to no less than five times in the 1949 Statute of the Council of Europe.

Be that as it may, a broadly similar critical case was made by the Hungarian government in its submission to the European Commission in reply to the Commission’s call for feedback on how to strengthen the EU’s rule of law toolbox in April 2019.⁹⁵ While there is no direct challenge as regards the identification of the rule of law as a value which is common to the Member States as stated by Article 2 TEU, the consensual core meaning previously identified is openly contested so as to preempt any EU intervention in situations where the rule of law is violated by national authorities:

It is common ground that the Union is founded on the value of respect for the rule of law; a value that is common to the Member States [...] The principle of rule of law has been subject to an extensive constitutional dialogue with the participation of international organisations, national constitutional organs, academia and civil society. Nevertheless, this dialogue hasn’t changed the nature of rule of law as a constitutional principle that is constantly being tested and reshaped by the dialogue itself. Therefore, the starting point of the Commission that intends to portray rule of law as a set of well-defined rules and suggests that compliance can be objectively assessed is a clear misrepresentation of the rule of law concept and a misunderstanding of the related constitutional dialogue.⁹⁶

A broadly similar position has been defended by current Polish authorities, which are similarly subject to the exceptional procedure laid down in Article 7(1) TEU since December 2017 and, unlike Hungary, also subject to the Council of Europe’s special monitoring procedure since January 2020 on account of their repeated undermining of the rule of law and in particular judicial independence.⁹⁷ During the

⁹³ Prime Minister V Orbán, Speech at the launch of the Judicial Handbook on 5 March 2018, Budapest: www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-launch-of-the-judicial-handbook.

⁹⁴ See most recently ‘EU court slams Hungary’s ‘Stop Soros’ law’, *Deutsche Welle*, 16 November 2021, <https://p.dw.com/p/433eh> (infringement case is known as C-821/19).

⁹⁵ European Commission, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, COM(2019) 163 final, p. 15.

⁹⁶ European Commission, Stakeholder contribution on rule of law from Hungary, 17 July 2019, p. 1, https://ec.europa.eu/info/publications/stakeholder-contributions_en.

⁹⁷ Council of Europe (Parliamentary Assembly), ‘PACE decides to open monitoring of Poland over rule of law’, 28 January 2020, <https://pace.coe.int/en/news/7766>.

second Article 7(1) TEU hearing held in respect of Poland, the Polish government concisely expressed its understanding as follows: ‘The EU’s values [are] common but their implementation [is] in the hands of the Member States.’⁹⁸ In other words, current Polish authorities do not object to the rule of law as such but are of the view that we would not yet have an agreed common definition of the rule of law in the EU and that any eventual common definition must first and foremost reflect the ‘national legal systems and traditions of all Member States.’⁹⁹ In addition, the Polish government has denied the existence of standards which would be ‘universally applied in practice in the area of justice systems’.¹⁰⁰ While the Polish government did not clarify what it meant by universal ‘standards’ in this context, one must assume it does not believe there are universal or even European standards when it comes for instance to the right to an independent tribunal established by law.¹⁰¹

This line of reasoning led the President of the CJEU to observe, writing extrajudicially, that ‘given that the principle of judicial independence stems from the constitutional traditions common to the Member States as one of the founding tenets of any democratic system of governance, it was assumed that national governments would not threaten it [...] Recent developments show that this assumption cannot simply be taken for granted.’¹⁰² While the President of the CJEU did not of course explicitly name anyone, it is not too difficult to guess what he meant by ‘recent developments’ and the countries he must have had in mind. Subsequently, the European Court of Justice has authoritatively dealt with the claims made above in its twin rulings regarding the EU’s Rule of Law Conditionality Regulation and held *inter alia* that the rule of law embodies a number of principles which have been extensively developed in the case-law of the Court on the basis of the EU Treaties and have their source in common values which are also recognised and applied by the Member States in their own legal systems.¹⁰³ Furthermore, and contrary to the submissions made by the Hungarian and Polish governments, the principles derived from the rule of law cannot be said to be principles of a purely political nature but are legal principles with specific substantive content and which can be the subject of a strictly legal analysis.

⁹⁸ Council of the EU, Report of the Hearing held by the Council on 18 September 2018, Doc No 12970/18, 5 November 2018, p. 8.

⁹⁹ See European Commission, Stakeholder contribution on rule of law from Poland, 17 July 2019, p. 3, https://ec.europa.eu/info/publications/stakeholder-contributions_en.

¹⁰⁰ *Ibid.*

¹⁰¹ This position may be viewed as a convenient one considering the repeated and systemic violation of this fundamental right organised by current Polish authorities. For a recent example, see judgment of 3 March 2022 in the case of *Advance Pharma sp. z o.o v. Poland*, CE:ECHR:2022:0203JUD000146920, in which the European Court of Human Rights held that the civil chamber of Poland’s Supreme Court, when consisting of newly appointed judges, is not an independent court established by law.

¹⁰² K Lenaerts, ‘New Horizons for the Rule of Law Within the EU’ (2020) 21 *German Law Journal* 29, pp. 30–31.

¹⁰³ See *supra* Sect. 2.2.

4.2 An East–West Practical Divide?

Moving beyond the rhetoric, is there evidence of an East–West practical divide as far as the rule of law is concerned? To briefly assess the reality of this seemingly East–West divide, the results of different rule of law rankings and the data collected in respect to the multiple Article 7(1) TEU hearings to date will be presented below.

With respect to rule of law rankings, space preclude an examination of every single one of them but they appear to confirm that the rule of law is indeed under more intense threat in Eastern than Western Europe. To begin with, one may refer to the Rule of Law Index produced by the World Justice Project. Over the years, this index has highlighted the intense deterioration of the situation in EU Member States such as Poland and Hungary and EU candidate countries such as Serbia, especially when it comes to ‘constraints on government powers’,¹⁰⁴ which the WJP identifies as a sign ‘suggesting rising authoritarianism’ in a broader context however where 60% of the countries assessed by the WJP ‘show a decline over the last four years’ in this dimension of the rule of law.¹⁰⁵ The 2020 edition confirms previous tendencies and rankings with Hungary highlighted as one of the countries which experienced the largest average annual percentage drop in the rule of law over the past five years and Poland highlighted as one of the two countries (the other one being Egypt) having experienced the single biggest decline by factor over the past five years when it comes to constraints on government powers.¹⁰⁶ The most recent edition of the WJP Rule of Law Index show the prevalence of these *tendances lourdes* with Poland continuing to experience a sustained decline when it comes to constraints on government powers (-6.4%), with the same country and Hungary also experiencing the biggest declines of all EU countries when it comes to equal treatment and absence of discrimination.¹⁰⁷ The bottom six countries in the EU/EFTA/North America grouping remain the same in 2021 as in the previous year: Poland; Romania; Croatia; Greece; Bulgaria and Hungary.

Based on a narrower understanding of the rule of law,¹⁰⁸ the ranking produced by Bertelsmann Stiftung gives a virtually identical list with the six EU Member States with the lowest scores being Malta; Croatia; Bulgaria; Romania; Poland and Hungary.¹⁰⁹ Hungary is also the EU country which the same organisation no longer

¹⁰⁴ World Justice Project, *Rule of Law Index 2019 Insights*, p. 7.

¹⁰⁵ *Ibid.*, p. 18.

¹⁰⁶ World Justice Project, *WJP Rule of Law Index 2020: Global Press Release*, 11 March 2020: <<https://worldjusticeproject.org/news/wjp-rule-law-index-2020-global-press-release>>.

¹⁰⁷ World Justice Project, *Rule of Law Index 2021 Insights*, 2021: <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021>.

¹⁰⁸ The following four are used: (i) Legal certainty; (ii) judicial review; (iii) appointment of justices and (iv) corruption prevention. By contrast, the WJP Rule of Law Index relies on four broader principles: (i) accountability; (ii) just laws; (ii) open government and (iv) accessible and impartial dispute resolution. These four principles are further developed in eight factors such as constraints on government powers.

¹⁰⁹ SGI Network, ‘Quality of Democracy: Rule of Law’, https://www.sgi-network.org/2020/Robust_Democracy/Quality_of_Democracy/Rule_of_Law.

considers a ‘consolidated democracy’.¹¹⁰ This is also the assessment of the V-DEM Institute which identified Hungary as the EU’s first electoral autocracy in their 2020 democracy report,¹¹¹ and Poland as the world’s most autocratising country in the last decade in their 2021 democracy report.¹¹² In their latest report, an additional number of EU countries are furthermore identified as experiencing a process of autocratisation:

Among the union members, Hungary and Poland are among the top autocratizers in the world over the last decade. Hungary turned into an electoral autocracy in 2018. Autocratization is now also affecting Slovenia, which is one of the top autocratizers in the world over the last three years. Croatia, Czech Republic, and Greece are also newly autocratizing countries. In addition, the EU’s neighbors on the eastern flank are becoming increasingly autocratic. Three of them have been autocratizing in the last decade. Turkey is still one of the top autocratizers, although it was already classified as an electoral autocracy by 2013. Serbia is a top autocratizer.¹¹³

Lastly, one may briefly refer to the annual Global State of Democracy produced by the International IDEA which has similarly been warning about accelerating democratic backsliding in Europe, a process engineered by ruling political parties showing autocratic tendencies which while noticeable in several countries in Europe has been particularly discernible ‘in Central and Eastern Europe.’¹¹⁴ In its latest annual report to date, Hungary, Poland, Slovenia and Serbia are identified as belonging to the number of countries which experienced the greatest process of democratic backsliding since 2010.¹¹⁵

A seemingly strong East–West divide appears when one looks at the national governments asking questions as part of the hearings organised within the framework of ongoing Article 7(1) TEU procedures in respect of Poland and Hungary. When presented in the form of a map, it is difficult not to be struck by the geographical concentration of questions and comments in Western/Nordic European countries.¹¹⁶

¹¹⁰ Bertelsmann Stiftung, *Policy Performance and Governance Capacities in the OECD and EU. Sustainable Governance Indicators 2018*, p. 8.

¹¹¹ V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, pp. 4 and 13.

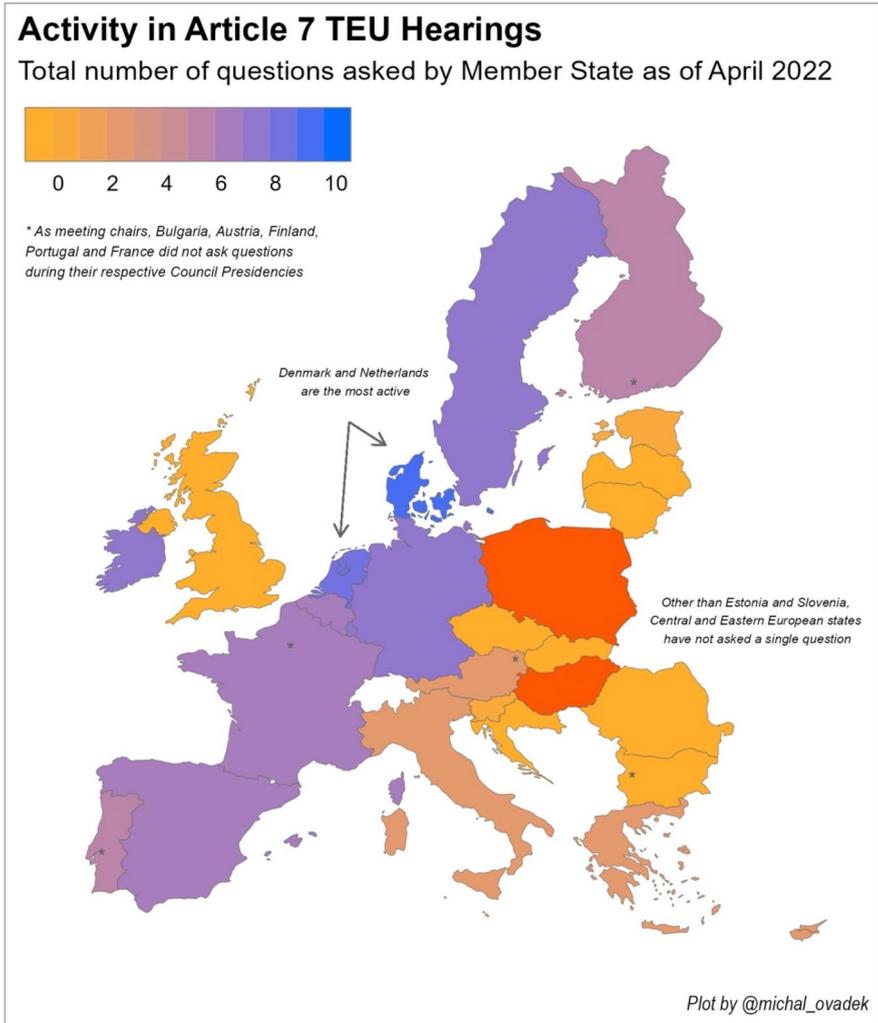
¹¹² V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 19.

¹¹³ V-Dem Institute, *Autocratization Changing Nature. Democracy Report 2022*, March 2022, p. 25.

¹¹⁴ International IDEA, *The Global State of Democracy 2019. Addressing the Ills, Reviving the Promise*, 19 November 2019, p. 214.

¹¹⁵ International IDEA, *The Global State of Democracy 2021. Building Resilience in a Pandemic Era*, 22 November 2021, p. 6.

¹¹⁶ This Article 7(1) hearings map reflects the following reports compiled by the Council and which the present author has obtained following multiple access to document requests as the Council continues, for reasons which remain unclear, to classify them as a “LIMITE”: Council documents no 10906/18; no 12970/18; no 15469/18; no 10246/21 and no 6600/22 in respect of Poland and Council documents no 12345/19; no 5775/20 and no 10247/21 in respect of Hungary. At the time of finalising this article, the formal report for the fourth Article 7(1) hearing of Hungary, which took place on 22 May 2022, had yet to be made public.



If one divides the EU Member States between those who never asked any questions (or made any comments) at any of the *eight* Article 7(1) TEU hearings to date (five have been organised in respect of Poland and three organised in respect of Hungary at the time of finalising this article), a seemingly strong East–West divide appear in addition to an apparently strong founding Member States versus post 2004 enlargement divide. Indeed, the only pre-2004 enlargement EU Member State which has never asked any question or made any comment is the United Kingdom which, due to Brexit, decided to disengage from Article 7(1) proceedings while also seeking to leverage this disengagement to secure support from the Polish and Hungarian

governments in its negotiations with the EU.¹¹⁷ As for the countries whose governments have *never* deemed it worthy to submit any questions to the Polish and/or Hungarian governments, we have a total of seven post 2004 EU Member States: (1) Bulgaria; (2) Croatia; (3) Czech Republic; (4) Latvia; (5) Lithuania; (6) Romania and (7) Slovakia.

On the basis of the rhetorical challenges and the data briefly presented above, it would be tempting to agree the existence of an East–West divide which could possibly reflect a nascent but growing dissensus regarding the rule of law which, as recently solemnly recalled by the Court of Justice, forms ‘part of the very foundations’ of the EU ‘and its legal order’.¹¹⁸ Yet, as will be argued below, rather than an East–West divide, the real divide may instead be the one opposing national elites seeking to empty the rule of law of any core legally enforceable meaning and those who aim to defend the enforcement of this core meaning against autocratic authorities.

4.3 Or an Authoritarian-Liberal Divide at the Elite Level?

As previously mentioned, a number of EU Member States are experiencing a process of democratic and rule of law backsliding, that is a ‘process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.’¹¹⁹ This is a *top-down*, orchestrated hollowing-out of liberal democracies which, once completed, allows the new ‘illiberal elites’ to freely ‘appropriate state resources for partisan and private purposes, and expand informal patronage networks in order to penetrate society’.¹²⁰

The EU has not been immune to democratic and rule of law backsliding with Poland¹²¹ and Hungary¹²² being the two most manifest examples of such a phenomenon. Crucially, there is no evidence in these two cases of initial and/or subsequent popular bottom-up demand for the structural undermining of judicial independence

¹¹⁷ See e.g. D. Boffey, ‘EU hearing puts Poland in dock over judicial changes’, *The Guardian*, 26 June 2018 (‘Arriving in Luxembourg, the UK’s minister in the room, Martin Callanan, expressed the British government’s belief that the commission should not be meddling in the domestic affairs of an EU member’); J. Stone, ‘Brexit pushes Theresa May into alliance with Hungary’s right-wing populists as Tories vote against sanctions’, *Independent*, 27 June 2018.

¹¹⁸ C-156/21, op. cit., para. 128.

¹¹⁹ Pech and Scheppele, op. cit., p. 10.

¹²⁰ International IDEA, *The Global State of Democracy 2019*, op. cit., p. 226.

¹²¹ See e.g. H Tworzecki, ‘Poland: A Case of Top-Down Polarization’, *ANNALS, AAPSS*, 681, January 2019, 97: Democratic backsliding in Poland has been ‘a process driven from the top down by a segment of the political class that donned the cloak of radical populist anti-establishmentarianism to gain popular support, win an election, and rewrite the constitutional rules of the game to its own benefit’ which only subsequently resulted in polarization at the level of the electorate.

¹²² See e.g. P. Bárd and L. Pech, *How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The “Hungarian model*, RECONNECT Working Paper No. 4, October 2019, <https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>.

or a new constitutional autocratic order.¹²³ Yet, one can often read that ‘many surveys in recent years have shown rising support for illiberal and even quasi-authoritarian values in some parts of Europe’.¹²⁴ When it comes to the rule of law, opposing evidence can however be found. In addition to regular, popular and unprecedented demonstrations against governmental repeated attacks on the rule of law, in particular judicial independence, we have seen in countries such as Poland and Romania,¹²⁵ the results of a special Eurobarometer carried out in April 2019 and published in July 2019 does show a quasi-unanimous and widespread support for the rule of law in every single EU Member State.¹²⁶

For the purposes of this survey, the concept of the rule of law itself was divided into 17 principles which were grouped into 3 main thematic areas which reflected the Venice Commission and European Commission’s definitions of the rule of law: (1) Legality, legal certainty, equality before the law and separation of powers; (2) Prohibition of arbitrariness and penalties for corruption; and (3) Effective judicial protection by independent courts. The results show overwhelming majorities (above 85%) in each EU Member State finding *each* of the 17 principles as being essential or important.

The results for the two countries subject to Article 7(1) proceedings are also worth highlighting. Indeed, they suggest the ‘illiberal’ critique of the rule of law is yet to permeate popular views. With respect to Hungary, one may highlight the clear dominant view that there is a need for improvement when it comes to the 17 principles identified by the Eurobarometer. This is however not unique to Hungary. The countries where respondents appear to see the least need for improvement are Sweden, Netherlands and Denmark which is not surprising considering their usually top scores in the main rule of law rankings currently available.

With respect to Poland, one may highlight the broad (but below EU average) popular support for the propositions that ‘if your rights are not respected, you can have them upheld by an independent court’ and ‘judges are independent’.¹²⁷ Interestingly, and contrary to the rhetoric originating from the current government, only 26% of the respondents in Poland are of the view that there is a definitive need for improvement when it comes to the existence of ‘independent controls to ensure that laws can be challenged and tested’ and only 32% and 35% are of the same view

¹²³ On the contrary, rule of law backsliding represents a top-down strategy. See Bárd and Pech, *ibid.*, and H Tworzecki, ‘Poland: A Case of Top-Down Polarization’, *ANNALS, AAPSS*, 681, January 2019, p. 97 (Democratic backsliding in Poland has been ‘a process driven from the top down by a segment of the political class that donned the cloak of radical populist anti-establishmentarianism to gain popular support, win an election, and rewrite the constitutional rules of the game to its own benefit’).

¹²⁴ International IDEA, *The Global State of Democracy 2019*, *op. cit.*, p. 225 referring to R. Foa and Y. Mounk, ‘The signs of deconsolidation’ (2017) 28 *Journal of Democracy* 5.

¹²⁵ See e.g. K. Connolly, ‘Poland’s president to veto controversial laws amid protests’, *The Guardian*, 24 July 2017; ‘Romania: Protests against judicial changes’, *Deutsche Welle*, 24 February 2019.

¹²⁶ Special Eurobarometer 489, Rule of law Report, July 2019: <https://europa.eu/eurobarometer/surveys/detail/2235>.

¹²⁷ Eurobarometer 91.3, Rule of Law, Factsheet Poland, p. 3: <https://europa.eu/eurobarometer/surveys/detail/2235>.

regarding the previous two propositions mentioned.¹²⁸ This undermines the argument that there would be a popular demand for the so-called judicial reforms the country's ruling coalition has relentlessly pushed for notwithstanding their manifest lack of compatibility with Poland's Constitution and European rule of law standards.¹²⁹ In this respect, one may also refer to a poll whose results showed Poles trust the EU (68%) more than the Polish government—an important result considering the long-lasting nature of the rule of law conflict between EU institutions and current Polish authorities—while Polish courts (41.1%) are also more trusted than the government (30.5%) or the captured and irregularly composed 'Constitutional Tribunal' (32.5%).¹³⁰

More recent surveys continue to confirm this strong and widely shared support for the rule of law. One may in particular refer to the survey requested by the European Parliament at the time of final phase of negotiations regarding what became the EU's Rule of Law Conditionality Regulation.¹³¹ In addition to clear public support for more effective control of EU funds to be disbursed within the framework of the NextGenerationEU programme, 81% of the respondents agree with the proposition that 'the EU should only provide funds to Member States conditional upon their government's implementation of the rule of law and democratic principles'. This proposition is consensual in each of the Member States with more than seven in ten in agreement.

One may finally mention a survey published in January 2022 and forming part of a series presenting a snapshot of the way Europeans perceive the EU and its future. According to this Special Eurobarometer report, the EU's respect for democracy, human rights and the rule of law was considered the EU's main asset by 27% of the respondents, followed by its economic, industrial and trading power (25%), with Hungary for instance one of the eight countries where EU's respect for its foundational values is ranked first or joint first.¹³² Speaking of the future of Europe, one may also understand the prominence of the rule of law during the debates held within the framework of the Conference on the Future of Europe as additional evidence both of its large appeal and increasing salience at a time of spreading backsliding. Unsurprisingly, this led national and European citizens' panels to make several recommendations to better protect it with the Conference Plenary adopting several proposals at the end of April 2022.¹³³

¹²⁸ *Ibid.*, p. 2.

¹²⁹ See L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

¹³⁰ D Tilles, 'Poles trust EU the most and government the least among institutions, finds poll', *Notes from Poland*, 30 January 2020, <https://notesfrompoland.com/2020/01/30/poles-trust-eu-the-most-and-government-the-least-among-institutions-finds-poll/>.

¹³¹ Flash Eurobarometer, State of the European Union, September 2021, <https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2021/soteu-flash-survey/soteu-2021-report-en.pdf>.

¹³² Special Eurobarometer 517 Report on the Future of Europe, 25 January 2022, p. 33: <https://europa.eu/eurobarometer/surveys/detail/2554>.

¹³³ See proposal no 25 whose main objective it to "systematically uphold the rule of law across all Member States" in Draft proposals of the Conference on the Future of Europe published on 27 April 2022: <https://futureu.europa.eu/>.

In light of the widely shared popular support for the rule of law, it is perhaps no surprise that the conceptual challenge originating from authoritarian populists and their captured bodies such as constitutional courts does not primarily target the concept of the rule of law as such but aims, under the guise of the concepts of constitutional identity and constitutional pluralism,¹³⁴ to redefine, in practice, to hollow out the rule of law. Indeed, if one looks for instance at the public positions adopted by the Hungarian prime minister or the current Hungarian justice minister, the theoretical importance of the rule of law as a constitutional value is not directly and openly challenged. Rather, we see attempts to redefine the core meaning of the rule of law as it has crystallised in the EU in a more authoritarian direction usually coupled with attempts to deny EU institutions any right to both define and enforce the rule of law. In other words, why throw the rule of law baby with the bathwater if you can be the one (re)defining the rule of law as rule by law. It was welcome, in this respect, to see the European Court of Justice directly and firmly deal with the definitional and conceptual claims made by the Hungarian and Polish governments when they sought the annulment of Regulation 2020/2092. As subsequently reiterated by the Court of Justice in the context of similar challenge originating from the Romanian constitutional court, while EU Member States are free to choose their respective constitutional model and the EU has an obligation to respect the constitutional/national identity of Member States, this cannot mean a licence to violate EU law and in particular the requirement that national courts must be independent.¹³⁵ The findings of the surveys mentioned above seriously undermine in any event the claim from representatives from ‘illiberal’ not to say authoritarian regimes that the EU does not and/or should pay more due regard to the alleged special ‘constitutional identity’ of their countries when it comes to the rule of law. Furthermore, their anti-EU ‘interference’ rhetoric flies in the face of overwhelming support across the EU for the proposition that all Member States must respect the core values on the EU, including fundamental rights, the rule of law and democracy.¹³⁶ One may draw the conclusion from this finding that there is in fact *popular* demand for the EU to more forcefully ‘defend’ inter alia the rule of law against those seeking to systematically undermine it.¹³⁷ This makes it all the more surprising, if not irresponsible considering their legal duties under the Treaties, to see the current EU Commission and Council of the EU repeatedly failing to do so.¹³⁸

¹³⁴ R Dan Kelemen and L Pech, ‘Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland’, RECONNECT Working Paper No 2 (September 2018).

¹³⁵ See most recently Case C-430/21, EU:C:2022:99, in which the Court of Justice further made explicit that no constitutional court has the jurisdiction ‘to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court’, para. 70.

¹³⁶ Special Eurobarometer 489, Rule of law Report, op. cit., p. 12.

¹³⁷ C-156/21, op. cit., para. 127.

¹³⁸ On the current Commission’s recurrent appeasement of authoritarian populists and concomitant dereliction of duties on the rule of law front, see most recently D.R. Kelemen, ‘Appeasement, ad infinitum’ (2022) 29(2) *Maastricht Journal of European and Comparative Law* 177, p. 177 (‘The capacity of the von der Leyen Commission (and of Commissions before it) to contrive excuses for refusing to enforce the EU rule of law norms that all Member States have committed to respect is something awesome to behold. The excuses keep changing, but the procrastination and appeasement are consistent’); P. Bárd

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Footnote 138 (continued)

and D. Kochenov, 'War as a pretext to wave the rule of law goodbye? The case for an EU constitutional awakening' (2022) *European Law Journal*, <https://doi.org/10.1111/eulj.12435>, p. 6 ('Rewarding the autocrats in power in Poland with billions of euros of Covid recovery fund for the destruction of the system of independent judiciary (...) von der Leyen Commission has reached an unfathomable new low in eagerly flushing Article 2 TEU values down the drain along with billions of EU money. The war came handy to wave the values goodbye, potentially steeply exacerbating the Rule of Law crisis and putting the Union's future as a democratic community of law in danger')