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The Rule of Law in the European Union

A critical analysis of Poland's rejection of the EU legal order

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Preface

Now, four and a half years later, the result of my law studies is finally here. This autumn and winter have seen many late nights writing, with theoretical discussions with my closest about the European Union, the rule of law and about Poland. This thesis had never been possible without all of you in my support circle.

I therefore wish to thank my supervisor, Professor Ester Herlin-Karnell for sparking my interest in EU constitutional law and for guiding me in the right direction through our dialogues about the European Union and its complex web of primary and secondary law. I hope our paths in academia will cross again.

I furthermore wish to thank Professor Roger Sträng, my father, for valuable academic insights and discussions regarding methodological and epistemological matters, and for being my academic inspiration throughout my entire law studies. I also wish to thank my mother, who sparked my interest in the opaque, sometimes rough, Polish political landscape. I can now say I have come full circle regarding my personal background and heritage.

Lastly, I give my warmest thanks to Angela, my significant other, who has been very understanding and supportive of my studies and writing, with many interesting discussions about the often-grey border between political science and law.

Adam Sträng
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Abstract

The European Union is founded on certain core values as expressed in its constitutional framework. One of the fundamental values is the adherence of the rule of law, which constitute a legal obligation across all 27 member states. The rule of law as envisaged by the EU, is aimed towards ensuring good governance and upholding fundamental rights and freedoms for its citizens.

Drawing on the many previous European wars, conflicts and the genocide by Adolf Hitler's Nazi Germany, the post-World War II EU legal order aims to pre-empt similar situations happening again. In the 2010's concerns and discussion regarding rule of law and democratic backsliding began to gain traction in the EU. Legislative changes in Hungary seemed to entrench the ruling *Fidesz* party led by Eurosceptic Hungarian Prime Minister Viktor Orbán. European institutions held that changes made to the national judiciary, which saw the lines blur between politicians, the executive and the judiciary, amounted to a violation of the EU legal order and its rule of law obligation.

In 2015 the Polish right-wing, populist Eurosceptic political party *Prawo i Sprawiedliwość* swept to power in Poland, winning both the presidency and a parliamentary majority. The new Polish government has since 2015 been on a collision-course with the European Commission and the Court of Justice of the European Union over legislative changes to the national judiciary, which according to the EU breaches the rule of law by dismantling checks and balances.

In October 2021, the Polish Constitutional Tribunal rejected the principle of primacy of EU law as a response to the criticism from European institutions. The ruling saw the EU-Polish tug-of-war over the rule of law sharply escalate. The rule of law in the European Union and the recent events in Poland is of greater public interest as it comes in a volatile global situation. The ongoing Covid-19 pandemic, global terrorism, migration and potential geopolitical conflicts in Europe are all factors which affect the European Union.

Domestic rifts between member states and the EU political leadership risks eroding the impact of EU law in member states. By using a multi-faceted interdisciplinary methodological approach, through the doctrinal legal method, the comparative legal method and document analysis, various contrasting perspectives are interpreted with a broad epistemological understanding in mind, in order to explain the situation. This study will investigate the situation through critical analysis and answer what rule of law backsliding tell us about EU values, how the rule of law is enforceable from an EU perspective, and how rule of law backsliding has been developing in Poland and why.

The rule of law in the EU is a highly complex and opaque issue. Poland's standpoint can be traced to its history and the constitutional culture in part owing to the communist-era weak legal culture and a modern political will geared towards national sovereignty. Concerns about the efficiency of enforcement of the EU's own legal framework point towards larger issues relating to the legal structure of which the EU is built upon. In the face of a global volatile state, it can be considered imperative the European Union be adequately prepared to enforce its own structure, or risk internal disintegration.

List of Abbreviations

AFSJ	The Area for Freedom, Security and Justice
CFR	The European Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CSFP	Common Security and Foreign Policy
Dz. U.	Dziennik Ustaw (Polish Legislative Gazette)
e.g.	exempli gratia (for example)
ECC	European Economic Community
ECHR	European Convention on Human Rights
ECR	European Conservatives and Reformists
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
Ed(s)	Editor(s)
Edn	Edition
EU	the European Union
ff.	and the following pages
i.e.	id est (that is)
Ibid.	ibidem (the same thing)
IDEA	the Institute for Democracy and Electoral Assistance
IGC	Intergovernmental Conference
KRS	Krajowa Rada Sądownictwa
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OSCOLA	Oxford Standard for the Citation of Legal Authorities
para(s)	Paragraph(s)
PCT	Polish Constitutional Tribunal
PGE	Polska Grupa Energetyczna
PiS	Prawo i Sprawiedliwość (Law and Justice)
Polish Tribunal	the Polish Constitutional Tribunal
PRL	Polska Rzeczpospolita Ludowa
TEC	Treaty for Establishing a Constitution for Europe
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning on the European Union
the Commission	the European Commission
the Court of Justice	the Court of Justice of the European Union
the Tribunal	the Polish Constitutional Tribunal
the Union	the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

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1. Introduction

1.1. Background

In September 2021 at the annual State of the Union address to the European Parliament, the European Commission President Ursula von der Leyen spoke of Europe being at a make it or break it situation.[1] Von der Leyen touched upon current challenges that are facing the Union; terrorism due to a deteriorating global security situation, along with issues posed by an unregulated migration; a global transistor shortage which has affected European industries and challenges posed by climate change.

The European Commission President also dedicated a large part of the State of the Union speech towards the rule of law situation in the Union and how Europe is facing a domestic rule of law and democratic backsliding crisis which European institutions must prioritise to tackle.[2]

Rule of law backsliding has been a gradual process over time, with the migration crisis beginning in 2015 being described as a defining moment, after which rule of law backsliding accelerated due to the change in the public discourse and strains between national governments and EU institutions.[3] Today, rule of law and democratic backsliding comes at a sensitive period in the European Union's history. The ongoing rule of law crisis mainly surrounds and concerns ex-Warsaw Pact states, with Poland and Hungary in particular, where Eurosceptic, nationalist political parties, have overhauled national judiciaries through the regular national legislative channels and forums, in order to exert political control over important parts of the national judiciaries in breach of the rule of law legal framework of the EU.

The European Union and its institutions have voiced great opposition to the state of the rule of law in particularly Poland and Hungary, and have demanded, through rulings from the Court of Justice of the European Union, that Poland and Hungary adhere to the rule of law constitutional framework as enshrined in the Treaties. However, as this study will try to explore and analyse, the situation is not as black and white, as in Poland merely reintegrates into the EU legal order and rollbacks legislative changes made since 2015. Instead, contributing factors as to why and how the current situation has been able to emerge will be highlighted.

Legislative changes made in Poland to the national judiciary and rule of law-based legal principles are also reflected in international good governance ranking. In November 2021, the International Institute for Democracy and Electoral Assistance (IDEA) published their annual *Global State of Democracy Report*, which ranks nations' democratic credentials, among them rule of law.[4]

1 European Commission, '2021 State of the Union Address by President von der Leyen (Speech to European Parliament on 15 September 2021)' Speech/21/4701 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701> accessed 15 September 2021.

2 Ibid.

3 Tsourdi, Evangelina Lilian, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) vol 17 European Constitutional Law Review 471 <https://doi.org/10.1017/S1574019621000250> accessed 15 December 2021, 472-473.

4 International Institute for Democracy and Electoral Assistance, *The Global State of Democracy 2021: Building*

The report notes that Poland is one of the states where democratic and rule of law backsliding has seen the greatest decline in the period 2010-2020, along with Turkey, Serbia, Nicaragua and Brazil.[5]

The European Union, ultimately is a consensus machine in lieu of its member states conferring or devolving parts of their sovereignty to the Union and its institutions. When EU member states strive towards the same goal, it showcases the European post-war project from its best sides, resulting in one of the most effective and competitive markets in the world.[6]

The departure of the United Kingdom from the European Union being a stark reminder of the consequences when competing political and legal agendas are rendered incompatible. Ultimately, the EU is at the behest of the political wills of the European heads of state which have key decisive roles in the European Council.

As this study will problematise, the political deadlock in the European Council has contributed to the rule of law crisis, as it will be argued that the European Union's legal order and constitutional framework *inter alia* rule of law backsliding, is insufficient in order to take control of the deteriorating state of law in the EU.

This study will also explore from a d*e lege ferenda* perspective suggestions relating to changes of European Union primary and secondary law, proposing potential structural changes aimed at strengthening rule of law-based enforcement mechanisms, while simultaneously addressing the European Union's own perceived democratic deficit.

The focus will primarily be on Poland, with comparisons to Hungary, as Poland is one of the most populous EU member states, an important economic actor in the EU, and which has seen drastic deterioration of the rule of law nationally since Law and Justice (PiS, *Prawo i Sprawiedliwość*) came to power in 2015. Poland is also of significant geostrategic importance, bordering several non-EU states, of which Poland and the EU has seen a tense stand-off with Belarus, concerning migration and a new type of hybrid warfare in the fall and winter of 2021.[7]

However, the rule of law crisis in Poland is not self-explanatory and cannot be explained from the perspective of merely the EU's rule of law framework and member states' constitutional obligations relating to rule of law, as the many grey areas of the EU legal order, its semi-federal structure and political leadership is complex and multi-faceted. The European Union has a unique structure with several different interconnected and intersectional legislative components. The political and ideological considerations in Poland ought therefore be analysed from a hermeneutical perspective

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Resilience in a Pandemic Era (International IDEA 2021) <www.idea.int/gsod/sites/default/files/2021-11/the-global-state-of-democracy-2021_1.pdf> accessed 28 November 2021, x.

5 Ibid. 6.

6 Guiterrez German & Philippon, Thomas, 'How EU Markets Became More Competitive Than US Markets: A Study of Institutional Drift' (2018) National Bureau of Economic Research Working Paper Series 24700, <https://www.nber.org/system/files/working_papers/w24700/revisions/w24700.rev0.pdf> accessed 13 November 2021, 2.

7 Keating, Dave, 'The EU Scrambles to Respond to 'Hybrid Warfare' on the Poland-Belarus Border' *World Politics Review* (Tampa, 11 November 2021) <www.worldpoliticsreview.com/trend-lines/30113/for-the-eu-belarus-border-crisis-is-hybrid-warfare> accessed 16 November 2021.

as an underlying component of the methodological choices.

The Polish, and Hungarian, stance in the rule of law crisis must be weighed as well. The European Union has itself been criticised for its relatively weak democratic credentials and especially in regard to the powerful executive branch of the EU – the European Commission, tasked with safeguarding the even application of EU legal acts and monitoring the rule of law in the Union. The advancement of legal integration through, albeit formally correct but politically divisive, *intra vires* CJEU case law and not through treaty reform is also targeted by populist member state governments.

The present issues and concerns can be argued to derive from to the now ten-year old Lisbon Treaty and the legislative compromises it had as a result of the failed European Constitution in the mid-2000's, but also as a consequence of different political wills in the European heads of states, resulting in opaque articles in the Treaties. The study will also explore from a d*e lege ferenda* perspective suggestions relating to changes of European Union primary and secondary law, proposing potential structural changes aimed at strengthening rule of law-based enforcement mechanisms, while simultaneously mentioning the European Union's own perceived democratic deficit.

1.2. Purpose and approach

The study's analysis aims to contribute to the wider EU constitutional law discussion and analysis relating to the functioning of the rule of law in the European Union, its future and Poland's place in the Union. The European Union has seen political and legal upheavals in Poland, that from a legal perspective severely escalated in the autumn of 2021, which saw Poland rejecting the principle of primacy of EU law, and important rule of law safeguards, such as the right to a fair trial covered by both EU law, but also the European Convention for Human Rights.

From a general scholarly perspective it can be considered important to contribute to a wider constitutional law critical analysis and discussion on how rule of law and other good governance principles can be made resilient, in a period of time in which core values and legal principles of the European Union are rejected by member states, whereas these values had been accepted during accession to the Union. An equally fundamental question is how the situation had been allowed to develop and why. The legal relevance lying in how rule of law backsliding affects the legal integration between member states and EU law.

Concerning Poland, its history and constitutional tradition are also of significance in explaining the recent happenings concerning rule of law. Statistics concerning the preliminary ruling procedure from Sweden, Finland, Poland, Hungary, Belgium and Germany will aim to display that the impact of EU law is showing a discrepancy in its usage, which can be linked to the question of the role of national judiciaries' sovereignty in the EU constitutional framework.

Sweden and Finland were chosen due to similarities in legislation, with both becoming member states in 1995. Belgium, due to Brussels being the seat of the European Commission, European Council and Council of the European Union. Germany as the largest EU member state and Poland and Hungary due to the rule of law concerns and criticisms of their national judiciaries. Using preliminary ruling statistics from more member states was considered, although in lieu of the scope and approach of this study, was not considered viable due to the preliminary ruling statistics serving a relatively minor role in explaining the rule of law in the EU.

Due to the hybrid legal-political nature of the European Union and events surrounding the rule of law, the matter is interconnected and touches upon both constitutional, political and ideological considerations, merely using a traditional legal method cannot be considered adequate to explain and analyse the current situation. The main avenues for analysis in this study will therefore be made from an interdisciplinary legal research perspective, which ventures into different methodological points of view, all who aim to explain different aspects of the question at hand.

1.3. Presentation of research questions

The purpose of this study is to contribute to an EU constitutional law analysis and discussion regarding EU values, as laid out in Article 2 Treaty on the European Union (TEU), with a focus on the rule of law, which is one of the legal principles mentioned in Article 2 TEU. As Poland has been the focus of the recent EU political and legal discussion and debate relating to rule of law and democratic backsliding, the study will focus on Poland from a critical analysis perspective.

To be able to fulfil the study's purpose, the following research questions are presented:

- What does rule of law backsliding tell us about abstract EU values?
- How is rule of law enforceable from an EU legal perspective?
- How has rule of law backsliding been developing in Poland and why?

The research questions are relevant to allow for critically analysing the present situation and explain the many components of rule of law backsliding. The first research question has its foundation in Article 2 TEU of which rule of law is identified as a common value to all member states, though these Article 2 values are not further defined in the article.

The second research question will explore and discuss which legal avenues EU institutions, mainly the European Commission and the Court of Justice of the European Union, have under the EU constitutional framework to enforce the rule of law. The third research question aims to nuance the debate concerning rule of law backsliding in Poland and explain it from a Polish perspective.

1.4. Methodological choices and considerations

1.4.1. The doctrinal legal method

The European Union, with a primary and secondary law constitutional framework, calls for a legal-dogmatic method in order to find the normative foundation of the rule of law in the European Union. The traditional doctrinal legal method is from a methodological perspective supposed to guide the researcher into finding normatively correct materials, in order to establish the existing valid law in the area the researcher wishes to expose.[8]

Although the doctrinal legal method, or legal-dogmatic method, cannot be considered to have one specific definition, or even consensus on the method's terminology, it has certain common characteristics in legal science.[9] The method is useful and relevant in analysing constitutional legal questions, as the doctrinal method aims to manifest the different components of constitutional systems by analysing the principles, laws and concepts, in relation to a legal question relating to the constitutional framework.[10]

The legal scholar can then interpret the sources of law, and view them through the different components which are influencing the law in order to solve a legal problem or identify gaps in the legal system.[11] An important part of the doctrinal legal method is its internal perspective. It takes the form of an internal perspective, where the law is studied through the normative and theoretical framework of law itself, which means the method sets its own material boundaries regarding scope, view and discourse.[12]

As from what chosen perspective the scholar is writing, the doctrinal legal method takes on the judge's perspective in reaching a legal conclusion to a specifically identified legal question. A central aspect of the method is to make a decision in the case at hand, without external influences apart from the normative sources of law and constitution.[13] The method is positivist in nature, due to how the law being held to be a valid system by virtue of itself.[14]

The doctrinal legal method's internal perspective has been described by legal scholars as typical of the method and one of its core features; to in essence teach practical knowledge in solving legal disputes as a judge, lawyer or legislator.[15] Another important characteristic of the doctrinal legal method is the view of the law as an interconnected system. To give a normatively correct answer to a legal question, the legal practitioner has to "connect the dots" between a wide array of material,

8 Smits, Jan M, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W. Micklitz and Edward L. Rubins (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017), 5.

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid. 5-6.

13 Ibid. 6.

14 Ibid. 7.

15 Ibid. 6.

case law, law, doctrine and general principles into a unitary matter.[16] The doctrinal legal method further aims to explain the present state of law, at a given moment in time.

For the doctrinal method to be able to give relevant answers to legal questions, irrespective of societal change, it needs to consider developments in case law and the legal system itself, to achieve constancy.[17] It can be argued that the doctrinal legal method's aims are geared towards itself, especially considering the absence of external factors as accepted normative sources of law.[18] It is descriptive in nature, and neutral concerning the result. The doctrinal method is rather a tool to be able to trickle down the many complexities of a legal system into practical usability.[19]

A systematisation of law further aims towards making the legal system coherent and predictable to the subjects under it.[20] The diverseness of EU primary and secondary law, it can be argued, calls for a neutral method in order to, regardless of external factors, establish where the rule of law can be found, how it is constructed at present and concerning enforcement, and which legal avenues can be taken. In relation to EU constitutional law, the doctrinal legal method can also be considered prescriptive.

The prescriptive element of the doctrinal legal method means a solution to a legal question should be taken from the perspective of what is formally correct according to the system, regardless of whether it is a desirable outcome from other perspectives.[21] The prescriptive element therefore aims to pre-empt the jurists internal personal values affecting the legal system and align them with the legal normative order.[22] As the doctrinal legal method draws legitimacy from itself, and any change of norms aims to create coherency in the system, the method can also be described as having a high degree of practical consequences, where even slight changes in normative understanding most likely will have practical consequences in how the law is applied.[23]

One of the more salient features of the doctrinal method is how it justifies the existing law. Due to the internal dimension of the doctrinal perspective, it argues normative validity by referring to the system itself, as a sort of legal meta-justification.[24] The traditional legal method is from a methodological perspective neutral, as it does not aim to reflect on potential external factors influencing neither the normative framework nor the identified legal problem or the solution.

It can be considered as a weakness of the method as it tries to explain constitutional questions only by drawing conclusions from constitution itself. Such an approach risks creating a legally correct answer, albeit overly formalistic, which fails to take into account the diverse nature of abstract values and principles, which are often multi-layered.[25] The method can be argued to, although its

16 Ibid.
17 Ibid. 7.
18 Ibid. 8.
19 Ibid. 9.
20 Ibid.
21 Ibid. 10.
22 Ibid.
23 Ibid. 11.
24 Ibid.
25 Ibid. 14.

rigid formalistic perspective of a unitary system, being opaque concerning methodological questions.

The doctrinal legal method is to implicitly be used while conducting formalistic legal research, yet there is no clear answer which explains the jurist's choices relating to why the specific sources of law were chosen and why from a critical perspective.[26] Public policy for example could be argued from a dogmatic-legal perspective to fall outside the scope of a valid assessment.[27] Omitting external factors could instead contribute to hide the underlying values which guides the decision-maker and disguises them in front of the jurist which never critically assesses the normative system.[28] The doctrinal method can preferably be used when hermeneutically interpreting the many different foundations of Union primary and secondary law. To hermeneutically interpret means to view the source material from the original author's perspective, from the researcher's own comprehension in the present.[29]

Hermeneutical methodology is broad, and although initially developed to interpret Biblical scripture, it can be argued that legal and religious scripture share the common trait of being normative sources of law. The jurist and researcher need to be able to interpret the original author, the legislator's, original meaning behind the norms to understand how to use it. Hermeneutical interpenetration can be said to contain three epistemological levels. The researcher first looks at the source being interpreted, attempting to uncover what it meant at its onset.[30] Secondly, the researcher transforms the interpretation, internalises the knowledge and concludes at what the understanding means to the researcher, taking on a first-hand perspective.[31]

Lastly, the researcher, combining the original and first-person meaning, attempts to share it to others externally.[32] As hermeneutics are diverse, there is no uniform methodological process, however the three steps of hermeneutical interpretation can be considered important in order to receive a nuanced and comprehensive view of the source material.[33] One possible perspective is to view the hermeneutical process and method as a spiral, which will take the reader from the meaning of the text at its onset to the meaning today as explained by the researcher, however it should be noted that there are other hermeneutical approaches for interpretation.[34]

The doctrinal method itself can be considered to be a hermeneutical discipline, as the jurist who make the choices regarding source material needs to come to a decision if the material at hand is diverging or contradictory while interpreting and attempting to uncover its original meaning.[35]

26 Ibid. 15.
27 Ibid.
28 Ibid. 10
29 Osborne, Grant R., *The Hermeneutical Spiral: A Comprehensive Introduction to Biblical Interpretation* (Inter Varsity Press 1991), 5.
30 Ibid. 6.
31 Ibid.
32 Ibid.
33 Ibid.
34 Ibid.
35 Van Hoecke, Mark, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoeckes (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), 4.

Texts, and documents are the focus of a hermeneutic analysis, which the legal researcher interprets in the light of the legal question.[36] The hermeneutical method can from a practical point of view prove useful when interpreting case law from the Court of Justice of the European Union and other official policy-based EU documents, stemming from its institutions in order to see the system as a whole, as the doctrinal legal method aims towards.

1.4.2. Comparative legal method

This study departs from the point of view of the doctrinal legal method as it tries to critically analyse domestic Polish law, case law and doctrine, and connect them together to a comprehensible whole in a European Union law context, which are then weighed upon each other, interpreted and analysed with a conclusive end-result.
The main difference between a doctrinal understanding of the law and comparative legal studies is the scope of which non-valid sources of law are used.[37] The doctrinal legal method does not allow from an epistemological point of view to take into account different legal realities of other normative systems.[38] For the legal scholar to achieve a greater epistemological freedom, the comparative legal method can be used to bring in different legal source materials and disregard the neutral, formalistic nature of the doctrinal legal method.[39]

The comparative legal method holds there is no single normatively correct interpretation and instead aims for epistemological flexibility. The purpose of the comparative legal method is to consider and bring together a diverse range of legal sources and systems, in order to build upon the doctrinal method in a larger scholarly point of view while maintaining the legal focus.[40] It can be noted that the doctrinal legal method remains as a theoretical foundation in this study and the comparative legal method builds upon and expands it.[41]

What differs the comparative legal method to other general academic methodology is that the comparative legal method revolves around *valid* law, where the various sources are brought together to broaden the analytical framework.[42] The method is flexible, allowing to combine different studies, legal and non-legal and fuse them together from a normative foundation.[43] When examining domestic Polish normative sources, the comparative legal method can be considered useful due to the Polish and European Union's legal perspectives attempt to regulate different areas of society and with contrasting epistemological foundations.[44]

36 Ibid.
37 Husa, Jaakko, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Mark Van Hoeckes (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), 209.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid. 211.
42 Ibid. 210.
43 Ibid.
44 Ibid.

In the semi-federal, multi-layered, autonomous legal system of the European Union, it can be considered inevitable that the EU and its member states' different normative systems affects each other through mutual integration. The comparative legal method can aid the researcher to translate the different normative systems, systematise them and interpret them in a methodological sense.[45]

To make use of the comparative method, the researcher needs to be mindful concerning sources and material choices as the researcher, which from a doctrinal legal method perspective, needs to be able to identify comparable legal sources and how they should be understood.[46] As different normative systems have their own internal legal language and complexities, the researcher should emanate from the base of different legal systems when using the comparative legal method, to reduce the risk of wrongly using the sources in for example overvaluing or underestimating their importance in the legal system being compared.[47]

Although the comparative legal method is diverse, with no single methodological meaning, it can be separated into areas depending on what is being compared. The researcher can conduct a dogmatic-systematic comparison, a legal-historical comparison or a more theoretical legal-philosophical comparison.[48] It can be argued that a strength of the comparative method is to look behind the normative systems and uncover the underlying values of the law, reconstruct them and see the specific reasons as to why a certain norm was adopted and what purpose and function it servers in that respective system.[49] It can be mentioned that the comparative legal method is due to its pluralist normative scope close to the hermeneutical method, which gives the material in this study a deeper significance.[50]

Concerning the epistemological meaning of rule of law in a comparative law context, the method suggests separating the semantics, how the rule of law written and formulated, from its actual content and taking into consideration the normative meaning in its own cultural context.[51] The rule of law in Poland and the EU exists in two different cultural settings, with its own inner values. This study will attempt to take this notion into account when comparing the history and development of the rule of law in Poland and the EU respectively.

The comparative law perspective will take the form of a dogmatic comparison, but also a legal-historical and legal-philosophical comparison to be able to receive potential answers and not merely take an external perspective looking towards the rule of law, but instead making an attempt to view rule of law from the inside, looking outwards to receive a realistic picture.[52] In essence, the comparative legal method can be described as figuring out how the legal systems think and how it solves the identified problems of that particular society.[53]

45 Ibid. 211.
46 Ibid. 216.
47 Ibid.
48 Ibid. 217.
49 Ibid.
50 Ibid. 227.
51 Ibid. 217.
52 Ibid.
53 Ibid.

The comparative law method can be considered useful in attempting to shed light on legal problems as most societies faces similar problems which are regulated through different legal provisions albeit with the same end-result in mind.[54] European Union law is complex and it is important as a researcher to be mindful from a comparative law perspective of how the legal translation from Union law to its implementation in the national legal order takes place. It is equally important explore how EU law is understood and interpreted in the national context, looking for dissimilarities and explanations through a for example political, historical and cultural lens.[55]

The Court of Justice of the European Union also resorts to the comparative legal method to ensure a uniformly written case law, as a legal translation needs to be undertaken when its rulings are translated into the different official languages of the EU. An unclear common content risks being interpreted differently in member states and could hinder its effect.[56] Taking into account the European Union's legal pluralism through methodological variety can be considered to be useful for the researcher to bring together the internal and external aspects of normative systems.[57]

1.4.3. Document analysis

The chosen materials and normative sources of law are also analysed and interpreted through documentary analysis. As this study tries to interpret a large variety of policy documents from the European Union, but also from separate member states, a suitable method to aid in the interpretation is through document analysis.

Document or documentary analysis has been identified in previous research as suitable in case studies and studies revolving around a single phenomenon or theme which is described in detail.[58] The documents being analysed need not be strictly legal choices, as the method concerns document and policy in general. It can be argued that the epistemological foundation of the document analysis in a research setting is the method's pre-disposition that policy has underlying values and that these values plays a large role in the policy coming alive.[59]

From a normative perspective, the doctrinal legal method and comparative legal method will aid the researcher in exposing the underlying values of law, and the document analysis will aid in interpreting what influences law and law's impact in society. Surrounding the normative foundation of law is policy which influences in both directions and adds substance.[60] When analysing policy through documentary analysis, the researcher primarily looks at three components of policy documents; context, text and consequences.[61]

54 Ibid. 221.
55 Ibid. 224.
56 Ibid. 225-226
57 Ibid. 228.
58 Bowen, Glenn, 'Document Analysis as a Qualitative Research Method' (2009) vol 9:2 Qualitative Research Journal 27, 29.
59 Cardno, Carol, 'Policy Document Analysis: A Practical Educational Leadership Tool and a Qualitative Research Method' (2018) vol 24:4 Educational Administration: Theory and Practice 623, 624.
60 Ibid. 626.
61 Ibid. 628.

The context can be the political and historical context in which the need for policy arose.[62] The textual component means the content of the policy and the researcher critically asking questions to the text in order to uncover its true meaning and values, also from different perspectives.[63] The consequence component of document analysis means the researcher investigates the implementation of the policy, which is reliant upon the underlying values and how the receiver interprets them.[64]

For the researcher to bring together the three components of document analysis can contribute to measuring its effectiveness and review its purpose.[65] Though, the document analysis method is also suitable when the researcher looks at a specific question over time, noting how it has changed and transformed when being compared with each other.[66]

For a document analysis to be viable, the researcher should have the material and scope pre-determined to reduce the risk of the analysis becoming uncompelling. Already having a pre-determined structural framework, the method can be suited as a secondary research method to help contextualise material and work as a theoretical and methodological aid.[67]

Due to the document analysis method preferably being used in conjunction with other methods, the researcher can reduce the risk of bias by viewing the same question from different perspectives, by sourcing evidence through different sources which can increase credibility.[68] The researcher should however be mindful in the document selection process, as the method concerns more data selection than collection, it risks creating a biased selectively concerning material and how the sources align with the researcher.[69] Viewing the material objectively is an important prerequisite and if the choice of materials prove inconclusive, the researcher should investigate related document in which different perspectives can be explored and analysed.[70]

For different voices and perspectives regarding the European rule of law to be seen and heard in this study and its analysis, a wide array of policy-documents and interviews have been included in order to achieve nuance and as they serve different purposes. Official Polish or EU policy is detailed, and often highly technical from a legal perspective, while interviews in media and political science perspectives tend to expose underlying ideological and moral values. The document analysis method aims to complete the picture through problematising the respective sources' contribution to the subject researched.[71]

62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid. 629.
66 Bowen, Glenn, 'Document Analysis as a Qualitative Research Method' (2009) vol 9:2 Qualitative Research Journal 27, 30.
67 Cardno, Carol, 'Policy Document Analysis: A Practical Educational Leadership Tool and a Qualitative Research Method' (2018) vol 24:4 Educational Administration: Theory and Practice 623, 637.
68 Bowen, Glenn, 'Document Analysis as a Qualitative Research Method' (2009) vol 9:2 Qualitative Research Journal 27, 28.
69 Ibid. 32.
70 Ibid. 33-34.
71 Ibid. 33.

1.4.4. Critical discussion regarding method and sources

A fundamental part of research is achieving reliability and validity, presenting to the reader research which is understandable and makes possible assessment in order to identify discrepancies.[72] In order to reach reliability, peer-review can be considered an effective critical assessment tool. Peer-reviewed sources have been critically assessed by other experts in the field, which assess the arguments, source material and the evidence it produces.[73] A peer-reviewed source can at least point in the direction towards reliability, even though the process is different for every publication.[74] The journals cited in this study have been chosen for their respective contribution in answering the research questions, and whether they have been peer-reviewed or not. Regarding the reliability of authored books, the test in determining quality of content can consist of two factors. Whether the publisher can be considered reputable, and the author's credentials.[75]

The latter being deemed more important and especially whether the researcher can be said to have authority in the field of which the published work aims to be normative in.[76] A discrepancy between the author's primary research credentials or education and the published work could point towards questionable reliability.[77] The authored books used in this study have been chosen with this in mind, with most authors having a scholarly or educational background which correlates with the published research.

The researcher also needs to be mindful of current research paradigms in the field being researched. Prevailing notions and trends can lead to confirmation bias and discouraging further research or problematisation of the topic.[78] Underlying ideological values affecting the research paradigms should not be ruled out, as dominant paradigms are often shaped and influenced by political and moral substance.[79] From an EU law perspective, it should be noted that the currently dominant research paradigm surrounding the rule of law tends to support the EU's current perspective, while being critical of member states who views rule of law from the national perspective.

This study furthermore methodologically analyses and interprets media articles and statements made by government officials and other important stakeholders through media outlets in the traditional sense (e.g., television, newspapers). Media coverage is also being used to highlight a current event, situation or happening corresponding with this study's research questions. Assessing the reliability of media generally follows the quality assessment concerning articles and other authored works.[80]

72 Bailin, Alan and Grafstein, Ann, *The Critical Assessment of Research: Traditional and new methods of evaluation* (Chandos Publishing 2010), 1-2.
73 Ibid. 8.
74 Ibid. 9.
75 Ibid. 9-10.
76 Ibid. 10.
77 Ibid. 11.
78 Ibid. 59.
79 Ibid. 45.
80 Ibid. 13.

Media used in this study springs from fundamentally different perspectives, creating a dichotomy with pro- and anti-EU narratives compete in wanting to influence the public discourse. From a scholarly perspective, using sources which are contrasting each other can prove useful in exposing new data and perspectives, which hermeneutically can be interpreted, compared and placed into its contextual reality.[81]

The dominant perspective of this study is by virtue of the research questions from a top-down perspective. The hierarchical meaning being that national legislation, ideology and political statements in member states are viewed through a European Union primary and secondary law lens according to the principle of primacy of EU law.

A bottom-up perspective is being undertaken when exploring if and how the Polish constitution is compatible with Union law, and the following analysis and discussion. Even though the main perspective of this study is from a top-down perspective, it is important to take into account the current dominant research paradigms in EU constitutional law in order to not disregard contrasting perspectives. Furthermore, the increasing escalation of events in the autumn and winter of 2021 regarding the rule of law in the EU is still ongoing as of December 2021. A such, this study's scope, analysis and sources reflect the legal reality and the situation as it is in December 2021.

For referencing this study follows the Oxford Standard for the Citation of Legal Authorities (OSCOLA).[82]

81 Ibid. 90.

82 Nolan, Donal and Meredith, Sandra (eds), *OSCOLA The Oxford University Standard for Citation of Legal Authorities* (4th edn, Hart Publishing 2012).

2. Rule of Law in the European Union

2.1. The historical development of the rule of law in the European Union

To be able to understand the current situation facing the European Union, its history has to be explored, as the evolution of the rule of law from the European perspective has been a gradual, organic process. From a historical perspective, the European continent has been fraught with conflict, rivalry and wars. During the first half of the 20th century, the European continent saw the rise of Adolf Hitler's national socialist Germany and its expansion on the European continent. An expansion which ultimately resulted in the death of over 75 million people worldwide.[83]

In 1945 after the Second World War ended, a battle-ravaged Europe was in tatters and steps were therefore undertaken to safeguard against future aggression and destruction in and around the European continent. Lasting peace and stability in Europe could serve as a catalyst for economic growth and good governance while aiming to prevent a similar situation happening again.

Thus, the discussion on the relationship between law and morality was renewed following the end of the war. The Nazi German authorities had according to the domestic legal order, legally carried out *inter alia* executions, genocide, ethnic discrimination, expropriation of Jewish properties and incarceration of opposition.[84] The *Nuremberg Laws*, which stripped Jews and other non-desired ethnicities of citizenship and societal rights, were even touted as taking into account legal principles such as proportionality.[85] Judges, lawyers and civil servants claimed they had merely been following the law and constitutional order of Germany, and thus bore no responsibility of atrocities committed.[86]

The Nuremberg trials concluded that individual responsibility cannot be exculpated through the legality of the national law at the time, instead holding that any act must be seen from the national and international law perspective simultaneously to be able to ascertain what is permitted or required in the national legal order.[87] However, many convicted judges returned to the judiciary following Germany re-gaining statehood in 1948.[88]

The post-war justification alluded to the absence of any form of tool or mechanism in a positivistic legal structure, to challenge or disapplying arbitrary or criminal laws that were procedurally correct and enacted under the constitutional framework at hand.[89]

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83 'Research Starters: Worldwide Deaths in World War II' (*The National WWII Museum*) <www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war> accessed 10 September 2021.

84 Steinweis, E. Alan and Rachlin, Robert. D., (eds), *The Law in Nazi Germany: Ideology, Opportunism and the Perversion of Justice* (Berghahn Books 2013), 47-48.

85 Ibid. 48.

86 Ibid. 154.

87 Ibid.

88 Ibid. 171.

89 Ibid.

The judge's role in Nazi German legal positivist judiciary, was solely to apply law and not interpret it, thus there existed no possible means of injecting morality in the legal process.[90] Legal positivism in Nazi Germany, and how to safeguard human rights in a legal positivist system, was further debated by legal scholars.

2.2. The legal philosophy behind the rule of law

Positivist scholar Herbert Lionel Adolphus Hart held that since actions committed under the prevalent legislation at the time was legal, no legal wrong had been committed and the only remedy would be to retroactively change it. Hart argued that morals and law were two separate entities and were not interconnected.[91]

As a contrast, legal philosopher Lon Fuller, critical of Hart's interpretation of positivist law, instead held that the law in Nazi Germany was fundamentally and inherently wrong and evil which meant it was never valid. Thus the law has a core of inner morality that needs to be satisfied in order to hold validity.[92] According to Fuller, the inner morality of law has a certain set of requisites which leads to a just rule of law.[93] Hart's position was that the law enacted in Nazi Germany still had *legal* validity, regardless of whether morally acceptable.[94] Fuller instead argues law has natural law elements which are procedural and secular in nature.[95]

According to Fuller, the rule of law by virtue encompasses moral values, and the absence of morality leads to the degradation of rule of law.[96] Fuller therefore holds that a legal system where the eight principles, the morality of law, is absent either partly or wholly, ceases to be law at all and therefore rule of law in a state ceases to be.[97] The break in reciprocity between the legislator and the citizen concerning rule of law and the eight principles causes the moral duty of observance to be severed.[98]

The newly-established United Nations and its Universal Declaration of Human Rights (UDHR) was proclaimed in 1948 as a direct answer to the Second World War and addressed questions of the role of law and its morality. Indeed, the philosophical aspect of morality consisted of finding a common set of moral norms which would reach world consensus and translated into enforceable norms.[99] The morality found in the UDHR was even described by French philosopher Jacques Maritain from a natural law perspective as *truth*.[100] The UDHR aimed to provide universal principles of

90 Ibid. 172.
91 Cane, Peter, (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010), 33.
92 Ibid. 34-35.
93 Ibid. 34.
94 Ibid. 33.
95 Fuller, Lon, *The Morality of Law* (rev edn, Yale University Press 1969), 96.
96 Murphy, Colleen, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 Law and Philosophy 239, 246.
97 Fuller, Lon, *The Morality of Law* (rev edn, Yale University Press 1969), 39.
98 Ibid. 40.
99 Taylor, Charles, 'Conditions of an Unforced Consensus on Human Rights' in Joanne R. Bauer and Daniel A. Bells (eds), *The East Asian Challenge for Human Rights (*Cambridge University Press 1999), 129.
100 Maritain, Jacques, Introduction, in 'Human Rights Comments and Interpretations: A Symposium edited by UNESCO' (Columbia University Press 1949), 10-11.

unalienable human rights and human dignity which would amount to a fundament in the rule of law globally.[101]

However, due to ideological differences in the new United Nations member, the General Assembly instead adopted the UDHR as a non-binding declaration, which albeit was supposed to shape and influence global human rights, it did not bind signatories to any legal obligations under international law.[102] The role of constitutional rights was therefore strengthened under the philosophy behind the UDHR.

A constitution was not supposed to be merely a tool for the sovereign to exercise control and executive power. Instead it was to be seen as a tool for peacefully governing a society, and at the base of the constitution lied rule of law which aimed to protect subjects in its jurisdiction.[103] The concept of justice had therefore changed into a mechanism which guarantees, enforces and upholds basic human rights through rights and procedural rules.[104]

Directly building upon the UDHR and its rule of law framework, the Council of Europe (CoE) was established by ten European states on 5th of May 1949 to conceptualise the articles of the UDHR in the European continent.[105] In 1950 the members of the CoE, drawing upon the UDHR, adopted the European Convention for Human Rights (ECHR) as a tool to achieve and realise the fundamental freedoms and human rights as envisaged by the UDHR. This was achieved through collective enforcement by means of judicial review through the European Court for Human Rights as laid out in the preamble to the convention.[106] As opposed to the UDHR, the ECHR was (and still is) in its entirety binding upon its members and the European Court of Human Rights (ECtHR) can hear cases directly from both states and individuals.[107]

2.3. The humble beginnings of a supranational rule of law-based order

In 1951 the Treaty of Paris was signed by France, Luxembourg, West Germany, Belgium, the Netherlands and Italy, establishing the European Coal and Steel Community (ECSC), which acted as an embryo of the European Union by establishing a common market, common assembly and its own court in the form of the Court of Justice.[108] The Court of Justice was established as a legal tool ensuring members would be subjected to the principle of the rule of law.[109]

101 Odello, Marco and Cavandoli, Sofia, (eds), *Emerging Areas of Human Rights in the 21st Century: The Role of the Universal Declaration of Human Rights* (Routledge 2011), 1.
102 Ibid.
103 Odello, Marco, 'Indigenous rights in the constitutional state' in Marco Odello and Sofia Cavandolis (eds), *Emerging Areas of Human Rights in the 21st Century: The Role of the Universal Declaration of Human Rights* (Routledge 2011), 112.
104 Ibid. 111.
105 Lorenz Arold, Nina-Louisa and others, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (The Raoul Wallenberg Institute Human Rights Library vol 44, Martinus Nijhoff 2013), 11.
106 European Convention on Human Rights, preamble <www.echr.coe.int/documents/convention_eng.pdf> accessed 20 September 2021, 5.
107 European Convention on Human Rights, arts 1, 33, 34 and 35.
108 Charles River Editors, *The European Union: The History of the Political and Economic Union of Europe's Nations after World War II* (Charles River Editors 2020), 34.
109 Francis Jacobs, 'Foreword' in Anthony Arnulls, *The European Union and its Court of Justice* (2nd edn, Oxford

In the current constitutional framework of the European Union in lieu of the Lisbon Treaty, the CJEU's role in enforcing rule of law is reflected in Article 19 TEU, which gave the Court jurisdiction for judicial review in member states concerning *inter alia* rule of law and legal protections that stems from the treaties.[110]However, the ESCS proved inefficient in enacting any meaningful legislative acts in terms of legal principles, partly due to the continent's rapid post-war economic transformation, with for example petroleum and nuclear energy competing with the traditional use of coal as an energy source.[111] The aim of deeper European integration was in 1957 conceived in the Treaty of Rome which established the legal foundation of the European Economic Community (ECC).

The Treaty of Rome greatly expanded the ambitions of the ECSC and for the first time directly made a mention of legal principles which were to guide the newly-established ECC, by referring to the UN charter, itself a new post-war governance instrument, of which rule of law was a fundamental principle.[112] The Court of Justice, which already had been established in lieu of the ECSC, was given an expanded role in the ECC and rule of law, and the principles outlined in both the Treaty of Rome and the good governance principles of the UN Charter for the first time became legally enforceable in a pan-European setting.[113]

Already the Treaty of Rome, what was then Article 164, specifically outlined that the Court of Justice had the competence to ensure the observance of law and obligations stemming from the treaty.[114] From a European perspective the possibility of enforcing legal principles attributed to the larger goal of ensuring peace and good governance in a post-war European context.[115] During the 1970's and 1980's the ECC's focus laid primarily with other matters than good governance principles and to which the enlargement of the ECC can be noted. Greece, Spain, Portugal, Denmark and the United Kingdom all became members during this time.

The United Kingdom under Prime Minister Margaret Thatcher saw further European integration and the legislative process with regards to rule of law negatively, instead arguing that the ECC instead be based on voluntary cooperation than legislation, which in effect hindered substantial political initiatives regarding the rule of law in the ECC.[116]

University Press 2006), vii.

110 Consolidated Version of The Treaty on The European Union [2011] OJ C326/13, art 19.

111 Charles River Editors, *The European Union: The History of the Political and Economic Union of Europe's Nations after World War II* (Charles River Editors 2020), 36.

112 Ibid. 43.

113 Ibid. 46.

114 Traité instituant la Communatué Économique Européenne et documents annexes [1957], art 164.

115 Rifkin, Jeremy, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream* (Polity Press 2004), 297-298.

116 Charles River Editors, *The European Union: The History of the Political and Economic Union of Europe's Nations after World War II* (Charles River Editors 2020), 66.

2.4. The rule of law renaissance following the end of the Cold War

During the latter part of the 1980's the Soviet Union and its Warsaw Pact allied states saw unrest and political upheaval, ultimately resulting in the collapse of communist governments in Eastern Europe and the dissolution of the Soviet Union in 1991. The newly-independent post-Warsaw Pact states held free elections for the first time since World War II and East and West Germany were reunited. For the ECC, the end of the Cold War in Europe was seen as yet another step in the direction of achieving peace and political stability in the European continent and a re-focus of Europe's vision.[117]

The Maastricht Treaty, which was adopted in 1992, transformed the ECC into the European Union which was re-designed to rest upon three pillars; The European Communities, the Common Foreign and Security Policy and Justice and Home Affairs.[118] The Maastricht Treaty greatly expanded the role of legal principles partly in due to the Union's new legislative process as set out in the treaty, where the European Parliament had been given an expanded role. The rule of law principle was further set out as a prerequisite in the European Council's Copenhagen Criteria of 1993 for accession eligibility to the Union, a move that directly targeted primarily Eastern European states which previously had been one-party states with weak legalistic traditions.[119]

The importance of the Maastricht Treaty, in relation to the rule of law as a fundamental principle, is considered to be a paradigm shift in the EU legal order. In the amended treaty, the principle of the rule of law was a fundamental part of both the Common Security and Foreign Policy (CSFP) and the means of cooperation between the member states, meaning the Union's functioning were resting upon rule of law.[120]

Further reinforcing and strengthening the rule of law principle as a legal foundation of the EU, the Amsterdam Treaty, signed in 1997, required any future states vying for EU accession, to become members of the Council of Europe and ratify its European Convention for Human Rights, due to the explicit mention of the ECHR in the revised Article 6.[121]

The Council of Europe and its European Convention for Human Rights has by itself the principle of rule of law as a prerequisite for joining and considers rule of law as a common European heritage that constitutes political tradition.[122] In 1997 the Amsterdam Treaty was signed, and one major new

117 Rifkin, Jeremy, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream* (Polity Press 2004), 206.

118 Treaty on European Union [1992] OJ C191/01, preamble.

119 Dzehtsiarou, Kanstantsin and others, *Human rights law in Europe: the influence, overlaps and contradictions of the EU and the ECHR* (Routledge 2014), 64.

120 Pech, Laurent, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (2020) RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law Working Paper 7, <https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf> accessed 20 September 2021, 9.

121 Consolidated Version of the Treaty on European Union [1997] OJ C340/02, art 6.

122 European Court of Human Rights, 'The Rule of Law and the European Court of Human Rights: the independence of the judiciary (Speech by EctHR judge Linos-Alexandre Sicilianos to the Montenegrin Academy of Sciences and Arts, Montegegro on 28 February 2020)' <www.echr.coe.int/Documents/Speech_20200228_Sicilianos_Montenegro_ENG.pdf> accessed 25 September

addition to the EU's legal framework regarding the rule of law was the direct and explicit inclusion of active enforcement regarding member states' deficiencies regarding the rule of law.

The new mechanism in Article 7 of the Amsterdam Treaty gave the European Commission and European Council a mechanism of addressing member states in breach of core EU values, including the rule of law principle.[123] The inclusion of Article 7 and its rather clear provision meant that the EU now *inter alia* had a constitutional dimension of the principle of the rule of law and an obligation for member states to follow it, or risk enforcement. In essence, the EU gained competence to enforce and supervise a core, abstract, value of the EU in a manner that was not tied to the functioning of the inner market, instead widening the scope of the Union's powers.[124]

However, the Article 7 procedure concerning breaches of rule of law required unanimity in the European Council in determining whether such a breach existed. After the Council had determined a breach of the core EU values, the Council could decide, by a vote of a qualified majority, on sanctions for the member state in question; including the suspension of certain treaty-based rights and voting rights in the Council.[125] The Article 7 procedure post-Lisbon was split into two parts. A breach of core values found in Article 2 TEU could be determined by the Council, by a majority of four fifths, that there exists a clear risk of serious breach by a member state.

The failing member state would then receive recommendations on how to avert the risk.[126] For the European Council to determine the existence of a serious and persistent breach of EU values, unanimity is still required.[127] The Lisbon Article 7 procedure has been criticised by EU constitutional law scholars as hindering the EU of enforcing its own values through the non-triggering of Article 7 in face of democratic and rule of law backsliding in Poland and Hungary.[128]

In the current framework, the Article 7 TEU post-Lisbon changed the unanimity requirement. Although, the Lisbon treaty added a new paragraph to Article 7, which held that in order for sanctions to be decided, a unanimous decision establishing a breach had to be made before enabling the four fifths majority decision triggering sanctions on the member state.[129]

2021, 2.

123 Hillion, Cristophe, 'Overseeing the rule of law in the European Union: Legal mandate and means' (2016) 1 Swedish Institute for European Policy Studies <www.sieps.se/en/publications/2016/overseeing-the-rule-of-law-in-the-european-union-legal-mandate-and-means-20161epa/Sieps_2016_1_epa> accessed 24 September 2021, 4.

124 Ibid. 5.

125 Consolidated Version of the Treaty on European Union [1997] OJ C340/02, art 7.

126 Consolidated Version of The Treaty on The European Union [2012] OJ C326/13, art 7(1).

127 Ibid., art 7(2).

128 Kochenov, Dimitry, 'Busting the myths nuclear: A commentary on Article 7 TEU' (2017) European University Institute Department of Law Working Paper 10, <https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW_2017_10.pdf?sequence=1> accessed 26 September 2021, 11.

129 Consolidated Version of The Treaty on The European Union [2012] OJ C326/13, art 7(3).

2.5. The European rule of law in the new millennia

The Treaty of the European Union was revised and amended again in 2001 when European leaders signed the Treaty of Nice. The rule of law framework had a relatively minor role in the revised treaty, instead aiming at the future accession of ex-Warsaw Pact states into the Union. Article 7, regarding the constitutional obligation of adhering to the rule of law received a minor albeit important added paragraph. The new provision enabled the EU to act regarding deficiency in the rule of law in member states not only when it has already occurred, but also pre-emptively where there existed a clear risk of a breach of the fundamental rights and core values of the EU.[130]

The newly-revised article also made reference for the first time to the European Charter of Fundamental Rights (CFR), which was signed in 2000, although the CFR was at the time non-binding, as the United Kingdom opposed it during the EU's Intergovernmental Conference of 2000 (IGC 2000) regarding treaty amendment.[131] Despite the United Kingdom's position, the EU's ambition forward being that the CFR being included in the main treaty and given legal and thus binding status in the 2004 Treaty for Establishing a Constitution for Europe (TEC).[132]

The planned inclusion of the CFR into the TEC was considered a step towards defining and creating a EU-wide human rights protections for EU citizens and marking a new era of the EU political agenda of an ever closer union.[133] The role of the Court of Justice of the European Union was envisaged to expand and amass the role of a true constitutional court which would safeguard and enforce the European version of a bill of rights.[134] The issue proved politically sensitive, and divisions regarding the character of the CFR and TEC emerged primarily from the United Kingdom, which instead saw the EU's role as an extension of national sovereignty as opposed to being a parallel system with sovereign elements.[135]

Issues relating to the CFR were eventually overcome and resulted in the unanimous approval of the necessary EU legislative institutions of the full text of the CFR, and more importantly a consensus of incorporating the CFR into the TEC, giving the rule of law and human rights provisions a constitutionally binding character in the EU.[136] The binding character of the CFR was in the end as a result of negotiations, slightly altered from being universal in application to only have force regarding the application of Union law by EU institutions and in member states in the application of EU law.[137]

130 Sokolska, Ina, 'The Treaty of Nice and the Convention on the Future of Europe' (*European Parliament*, September 2021) <www.europarl.europa.eu/factsheets/en/sheet/4/the-treaty-of-nice-and-the-convention-on-the-future-of-europe> accessed 26 September 2021.

131 Heffernan, Liz, 'The Treaty of Nice: Arming the Courts to Defend a European Bill of Rights?' (2002) vol 65 Law and Contemporary Problems 189, 190.

132 Kiljunen, Kimmo, *The European Constitution in the Making* (Centre for European Policy Studies 2004), 33.

133 Ibid. 59-60.

134 Heffernan, Liz, 'The Treaty of Nice: Arming the Courts to Defend a European Bill of Rights?' (2002) vol 65 Law and Contemporary Problems 189, 191-192.

135 Rifkin, Jeremy, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream* (Polity Press 2004), 210

136 Kiljunen, Kimmo, *The European Constitution in the Making* (Centre for European Policy Studies 2004), 59-60.

137 Ibid.

After approval of the TEC draft treaty by the necessary EU legislative institutions, the TEC failed after France and The Netherlands failed to ratify the TEC, ultimately resulting in the collapse of the proposed EU constitution in 2005.[138]

Following the failure to ratify the European Constitution, the rule of law and the CFR ultimately entered EU primary law, in accordance with the successful ratification of the Lisbon Treaty in 2009. The CFR was given constitutional status in the TEU in Article 6(1) which gave the CFR direct effect in member states. The scope of application of the CFR was limited in accordance with Article 51 which stated that the CFR is not universal in application, rather the CFR is binding only for EU institutions, and member states in relation to the implementation of EU law.[139] Although not constituting a legal act the preamble of the Lisbon Treaty also outlines the fundamental values of the EU of which rule of law explicitly is mentioned.[140]

The preambles mention of fundamental values are furthermore laid out in Article 2 of the TEU which holds that respect for *inter alia* the rule of law is at the core of EU values.[141] The respect for the rule of law was further clarified in the Lisbon Treaty, regarding the potential accession of further states to the Union, evolving on the Copenhagen Criteria of 1993, and incorporating the binding demand of adhering to and promoting the rule of law in Article 49 TEU. Effectively, under Lisbon a constitutional obligation of adhering to the rule of law was introduced both for existing member states and potential candidate states. Also revamped under Lisbon was the EU's foreign policy aims of which global advancement of the principle of the rule of law is given primary law status in Article 21 TEU.

2.6. Rule of law post-Lisbon Treaty setting the scene

The Lisbon Treaty introduced in 2009 brought with it major changes to the role of the CJEU in terms of addressing, monitoring and upholding the rule of law. Since the amended treaty disposed of the three-pillar structure of the Union in favour of a unified legal structure, the CJEU saw its jurisdiction extend to both the CFSP and more importantly, the AFSJ, of which rule of law was a prime component.[142] A form of judicial review of decisions and legal acts of the EU institutions was introduced in the Treaty of the Functioning of the European Union (TFEU) Article 263, which gave the CJEU the power to review the legality of these legislative, also effecting third parties.

138 Podolnjak, Robert, 'Explaining the Failure of the European Constitution: A Constitution-Making Perspective' (2007) vol 57 Collected Papers of Zagreb Law Faculty <https://ssrn.com/abstract=963588> accessed 27 September 2021, 2.

139 Marzocchi, Ottavio, 'The protection of Article 2 TEU values in the EU' (European Parliament, April 2021) <www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-article-2-teu-values-in-the-eu> accessed 27 September 2021).

140 Consolidated Version of The Treaty on The European Union [2012] OJ C326/13, preamble.

141 Ibid. art 2.

142 Carruthers, Stephen, 'The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs' (2009) 6 European Human Rights Law Review 784, 799.

The CJEU was to specifically address shortcomings regarding *inter alia* lack of competence, treaty infringement and rule of law.[143] The inclusion of explicit mentions to rule of law in the treaties, the expanded scope of the CJEU's jurisdiction in relation to judicial review, of which rule of law was considered to be an important component, and the inclusion of the Copenhagen Criteria in the treaties, can be understood as the EU responding to criticism of having a rule of law deficit.[144] It was considered to be a political priority in the Lisbon Treaty to address and bridge the gap between the treaties, the jurisprudence of the CJEU and the different priorities of the member states had until Lisbon, of which rule of law had been described as a *jurisdictional black hole*.[145]

Since the ratification of the Lisbon Treaty, the rule of law in the European Union has developed through other means than treaty-based constitutional obligations for member states. The European Commission has made use of soft law resulting in several frameworks, legal tools and mechanisms, in monitoring and addressing the rule of law in member states. The European Union's options regarding enforcement of rule of law are broad and of different legal natures. Both binding, non-binding, secondary, primary and soft law co-exist at the same time.[146]

Since 2012 the European Commission has a soft law "toolbox" of measures to address rule of law shortcomings in member states. The toolbox focus is not merely legal action, but also aims to be used pre-emptively. The EU Commission aims to act through prevention and promotion of rule of law by for example reviewing and comparing the state of the rule of law in member states in relation to the independence, quality and the efficiency of the national judiciary.[147]

An important part of the Commission's preventative and promoting part also concerns financial support for different stakeholders in the form of soft law approaches, such as organisations promoting media freedom and anti-corruption initiatives.[148] At the centre of the pre-emptive approach is the annual publication of the *Annual rule of law report* which identifies challenges to the rule of law in member states. The second approach by the EU Commission stems from its constitutional enforcement role as laid out in the treaties.

In accordance with Article 258 TFEU, the Commission can open an *infringement procedure* against any member state which the Commission holds is in breach of its constitutional obligations stemming from the treaties.[149]

143 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 263.

144 Pech, Laurent, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 European Constitutional Law Review 359, 366-367.

145 Carruthers, Stephen, 'The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs' (2009) 6 European Human Rights Law Review 784, 799.

146 von Bogdandy, Armin and others, *Defending Checks and Balances in EU Member States* (Springer 2021) <https://doi.org/10.1007/978-3-662-62317-6> accessed 28 September 2021, 80.

147 European Commission, 'Rule of Law Report 2020' (European Commission, September 2020) <https://ec.europa.eu/info/sites/default/files/rule_of_law_mechanism_factsheet_en.pdf> accessed 27 September 2021.

148 Ibid.

149 Art 258 TFEU: *If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union*.

The European Commission has however received criticism relating to its perceived inconsequential usage of Article 258 and the lack of political will in the Commission to use Article 258 concerning rule of law backsliding issues, instead focusing Article 258 on cases with less political sensitivity.[150] In accordance with Article 7 TEU, the Commission also has a legal possibility of holding states accountable for rule of law shortcomings by submitting a so-called *reasoned proposal* regarding a member state's breach of the core values in Article 2 TEU, of which rule of law is an essential component.[151]

The Article 7 procedure however requires a unanimous decision in the European Council, essentially confirming the state's breach of Article 2. The current wording of the article and the procedure has been heavily criticised as being insufficient to address rule of law and fundamental breaches of EU law due to the political composition of the European Council.[152] To this day, Article 7 has been triggered only twice, both times by the European Parliament and concerning the rule of law and the state of the judiciary in Poland and Hungary, but has never received the unanimous confirmation of the European Council for Article 7 to have any legal effects and the processes are currently stalled.[153]

Due to the politically sensitive nature of the Article 7 procedure, the Commission has instead made extensive use of the infringement procedure; as per 13th of September 2021, the Commission had 202 open infringement cases regarding rule of law and Article 2 TEU obligations.[154] The number can be compared to only 15 rule of law infringement cases in the period 2010-2012, and of which twelve cases were in relation to the so-called Citizens' Rights Directive concerning free movement.[155]

The infringement procedure stemming from Article 258 is ultimately brought before the CJEU which is to decide upon the matter in accordance with Article 260 and the member state(s) the ruling concerns have a constitutional obligation of rectifying the situation and to adapt to the ruling from the CJEU.[156]

150 Scheppele, Kim Lane, Kochenov, Dimitry and Grabowska-Moroz, Barbara, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) vol 39 Yearbook of European Law 3 <https://doi.org/10.1093/yel/yeaa012> accessed 27 September 2021, 11-12.

151 Consolidated Version of The Treaty on The European Union [2012] OJ C326/13, art 7.

152 von Bogdandy, Armin and others, *Defending Checks and Balances in EU Member States* (Springer 2021) <https://doi.org/10.1007/978-3-662-62317-6>, 130.

153 Overton, Sara, 'The EU and the rule of law' (UK in a Changing Europe, 3 July 2021) <https://ukandeu.ac.uk/explainers/eu-and-the-rule-of-law/> accessed 28 September 2021.

154 Statistics received from the European Commission on 15th September 2021, active rule of law infringement cases as per 13th September 2021, available on file.

155 Statistics received from the European Commission on 15th September 2021, rule of law infringement cases in the period 2010-2012, available on file.

156 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 260.

In what can be considered to be a weakness of the infringement procedure is that it largely rests upon the Commission's own discretion and makes the ultimate decision whether to launch a formal procedure or not. In 2015, France unilaterally banned the plastic Bisphenol A. The Commission's own legal assessment held that such a unilateral measure was in breach of important internal market principles such as proportionality, and weakened the legal obligation of mutual recognition.[157] Due to disagreements in the Commission, the planned infringement procedure was eventually put on hold. [158] The Commission's handling of the matter was criticised in European media for eroding foreseeability surrounding the procedure and highlighting internal challenges in the infringement procedure.[159]

In recent years, it has been argued that rule of law in the European Union is facing internal challenges; in part due to the still-ongoing Covid-19 pandemic, political polarisation and a growing populist movement which tends to lean Eurosceptic.[160] The Union has as result been facing a democratic deficit, which in turn risks undermining the primacy of EU law and the resonance of the CJEU's rulings in member states. These issues have been identified as serious challenges of the impact and upholding of the principle of rule of law in the European Union and its member states.[161]

2.7. Rule of Law backsliding in the European Union

At the core of the European Union, the functioning of the Union rests upon that its member states are adhering to basic legal principles, democracy and the rule of law which aims to uphold fundamental rights for EU citizens.[162] The state of the rule of law in the European Union is currently facing a democratic deficit in the form of so-called *democratic backsliding*. The EU's institutions, judges of the CJEU and legal scholars are of the opinion that the rule of law is *backsliding*, and the rule of law in general is witnessing a deterioration in member states, and in Poland and Hungary specifically.[163]

Rule of law backsliding, or democratic backsliding, is an issue which recently has been of great concern of European institutions and its political leadership. Rule of law backsliding can be described as legislative processes in individual member states that breaches EU law and values.

157 European Commission, 'Meeting with PlasticsEurope on BPA' (Briefing note 17 April 2015) <www.asktheeu.org/en/request/5226/response/17030/attach/7/3%20050417%20Briefing%20Plastics%20Europe%20on%20BPA%202%20Redacted.pdf> accessed 28 September 2021, 3.

158 Ibid. 4-5.

159 Teffer, Peter, 'How France escaped EU legal action over chemical ban' *EUobserver* (Brussels, 18 May 2018) <https://euobserver.com/health/141830> accessed 16 November 2021.

160 von Bogdandy, Armin and others, *Defending Checks and Balances in EU Member States* (Springer 2021) <https://doi.org/10.1007/978-3-662-62317-6>, accessed 27 September 2021, 4.

161 Ibid. 5.

162 Scheppele, Kim Lane, Kochenov, Dimitry and Grabowska-Moroz, Barbara, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) vol 39 Yearbook of European Law 3 <https://doi.org/10.1093/yel/yeaa012> accessed 27 September 2021, 4.

163 Gora, Anna and de Wilde, Pieter, 'The essence of democratic backsliding in the European Union: deliberation and rule of law' (2020) vol 28 Journal of European Public Policy <https://doi.org/10.1080/13501763.2020.1855465 > accessed 28 September 2021, 2.

Although there is no consensus of defining democratic backsliding,[164] common denominations of backsliding *inter alia* incorporate acts by a democratically elected government, which by its actions gradually reverse democratisation by weakening state institutions, stymieing freedom of the press and media plurality, and reducing the independence of the judiciary and thus blurring the lines between rule of law and political power.[165]

Backsliding in essence amounts to a member state, or potential candidate state, meeting both the requirements of the accession criteria regarding rule of law in the Copenhagen Criteria of 1993, and the rule of law criteria in Article 2 TEU, the CFR and the preamble to the treaties where signatories confirm their obligation of adherence, and after time backslides from these values through a gradual political process.[166]

164 Bakke, Elisabeth and Sitter, Nick, 'Democratic backsliding in the European Union' (2019) vol 28 Oxford Research Encyclopedia of Politics <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1476> accessed 29 September 2021, 3.

165 Ibid. 5.

166 Ibid. 6.

3. Defining rule of law in the EU and exploring its philosophical foundation

3.1. Giving life to an abstract idea

A horse and a saddle or a box of Belgian chocolates to anyone who can find the definition of 'rule of law' in the treaties or any other legally-binding EU document.[167]

- Ex Polish Foreign Minister Witold Waszczykowski

This chapter will attempt to embody and give life to the abstract meaning of the rule of law. As the quote from the former Polish foreign means to highlight, the rule of law does not have a clear meaning as established by Union law. Instead, the abstract term draws inspiration from several sources which are both philosophical and legal in nature. From a comparative law perspective, the following chapter will aim to find a definition of the European Union's rule of law and explore the term from a general legal and philosophical perspective.

Article 2 TEU makes clear reference to the rule of law as a core EU value and calls for constitutional adherence of the principle. Though, Article 2 and the core values have been criticised as being vague, and member states and EU institutions instead opting for subjective interpretations of what rule of law constitutes, in a manner that suits the objective.[168]

The European Commission means that rule of law consists of legality, legal certainty, prohibition of arbitrary exercise of executive power, effective judicial protection by independent and impartial courts, separation of power, accountability of state authority and equality before law and these different components together constitute key principles of rule of law.[169] These principles can be said to echo the theoretical interpretation of rule of law according to Dicey, by holding the sovereign accountable and limits its exercise of power.

From a philosophical perspective, the traditional view of rule of law can be traced to ancient Greece where the question of state authority and title to respect and observance of *law* was problematised.[170] Greek philosophy evolved through the Roman justice system, which held that law was reason in agreement with nature and that rule of law, i.e., observance of authority was duty-bound and universally applicable.[171]

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167 'Były szef MSZ komentuje list Jourovej. "Konia z rzędem, kto znajdzie w traktatach UE definicję praworządności" *Niezalezna*(Warsaw 27 December 2019) <https://niezalezna.pl/303625-byly-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-znajdzie-w-traktatach-ue-definicje-praworzadnosci> accessed 19 October 2021.

168 Pech, Laurent, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (2020) RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law Working Paper 7, <https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf>, 21.

169 European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2021) 700 final, 1.

170 Harvey, William Burnett, 'The Rule of Law in Historical Perspective' (1961) vol 59 Michigan Law Review 487, 488.

171 Ibid.

In Europe, Christian philosophy built on the Roman and Greek concept of law and rule of law meant that observance of state (and church) authority was a part of the common good.[172] After the Christian Reformation in the 16th century the previously unitary view of law and its observance evolved in tandem with the evolution of the concept of territorial sovereignty, as promulgated by English philosopher Thomas Hobbes' theory of civil government. The civil government drawing its legitimacy from the man-made, positivist law and not originating from a sense of cosmic order. The man-made law in a civil government had, according to Hobbes rule of law at its core, as it was essential to ensuring peace and stability in a society.[173]

Building upon sovereign theory, the British constitutionalist Albert Venn Dicey first conceptualised the term *rule of law* in the 19th century, interpreting Greek and Roman law, the philosophy of Hobbes and sovereign theory.[174] For Dicey, political institutions were characterised by the supremacy of the legislator and the rule of law had three components; legality as opposed to arbitrary decisions, meaning no punishment or sanction without a breach of a specific provision enacted in a legislative process and tried before a recognised court.[175]

Secondly, of universal application meaning every person was subjected to the laws of the land which were under the jurisdiction of the courts, and thirdly that law and individual rights were derived from the court's jurisprudence as opposed to written law.[176] Dicey furthermore means that rule of law therefore acts as a safeguard and guarantee against the sovereign, i.e. government.[177] From the perspective of the European Union, rule of law is inherently based on theory on post-war liberal theory where rule of law, democracy, and human rights are to be seen as a triad.[178]

Rule of law has morphed from being merely the execution of the legal order instead evolving to encompasses democratic governance, building upon the notion of human dignity and fundamental equality.[179] In turn, these values have developed in tandem with post-war secularisation, which has seen a shift in understanding of authority from a sense of duty or adherence of an order and instead embody individual rights.[180] The European Union does not in detail define rule of law, instead holding that the definition rests upon certain core values universal to all member states, allowing for a broad interpretation of Article 2 TEU.

It can be argued that the European Union's interpretation of rule of law is influenced by principles of law as described by Lon Fuller. According to Lon Fuller, a state under the rule of law consists of eight primary characteristics. These are; the generality of laws which regulates the subjects behaviour. The law must be accessible to the public, i.e., promulgated. Laws are to be prospective

172 Ibid. 489.
173 Ibid.
174 Dicey, Venn Albert, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Classics 1982), lxxvi.
175 Ibid. 120-121.
176 Ibid. 114.
177 Ibid. 120.
178 Heusel, Wolfgang and Rageade, Jean-Philippe (eds), *The Authority of EU Law: Do We Still Believe in It?* (Springer 2019), 9.
179 Ibid. 10.
180 Ibid. 12.

in formulating *prospective* behaviour as opposed to retroactive. Law must be clear, meaning its subjects are able to understand what is required and how.

Laws also must follow the principle of non-contradiction, meaning law cannot permit what the other prohibits and cannot ask the impossible of its subjects. Furthermore, law must have a consistency over time, meaning a relatively constant framework and congruity resulting in the legislator only ought to enact laws that are able to be enforced and the enforcement must be seen through the lens of proportionality.[181]

If the legislator deviates from the principles of rule of law in the enactment of laws, the subjects under the laws will begin to feel resentment, according to Fuller.[182] A judicial system which fails at one or more of the general criteria of law, is according to Fuller not a legal system and the subjects no longer have a moral obligation to obey it.[183] In cases where there is a gradual deterioration of rule of law, the subjects under the laws cannot be expected to outright rebel against the system itself. The subjects under the law are unsure whether a cast vote will be counted against the alternative, but still votes due to a moral obligation of adhering to laws which has been left intact and not tainted by the gradual decline, and by doing so legitimises the system.[184]

The morality that exists in the Fullerian rule of law is of natural law character, however it is terrestrial in origin and does not stem from any religious conviction which claims normative supremacy.[185] Even though the rule of law's morality is atypically neutral in relation to ethical issues, it is not neutral in relation to how it perceives human dignity and reason.

The moral character of law and rule of law holds that every person is capable, responsible, understanding and answerable, which leads to a right of self-determination.[186] To deviate from the rule of law is therefore to violate human reason and dignity and insults human self-determination.[187] In a legal system which has ceased to function under the rule of law, or is gradually deteriorating, the state has lost the moral authority to *judge* a person's actions, it merely *acts* to the person's perceived wrongdoing.[188]

It can also be said that the European Union's interpretation of rule of law is influenced by principles of laws as described by Lon Fuller. In EU law, the key principles of rule of law are then translated into primary and secondary law, where the EU legislative process is itself tied to the rule of law in lieu of Article 2 TEU. Thus, the rule of law in the EU ought to be seen as a perspective rather than detailed definition, but with an emphasis on the inner morality and the values that fill the EU's concept of rule of law.

181 Fuller, Lon, *The Morality of Law* (rev edn, Yale University Press 1969), 39.
182 Ibid.
183 Ibid.
184 Ibid. 40-41.
185 Ibid. 96.
186 Ibid. 162.
187 Ibid.
188 Ibid. 163.

This notion can be compared to Fuller, holding that principles surrounding rule of law is a larger aspiration which ultimately will enlarge the moral community and include all good-willed persons.[189] However, the European Union's rule of law fundament has been criticised as while being overly theoretically substantial, it is simultaneously lacking in its enforcement, and member states which are backsliding face mild consequences in the form of condemnation, economic penalties and possibility a ruling by the CJEU.[190]

In the following sections, the European Convention for Human Rights, the European Union's Charter for Fundamental Rights and the Court of Justice of the European Union will be explored and analysed, according to how respective institutions contribute to the legal-constitutional framework relating to rule of law in the European Union through its binding case law.

3.2. The ECHR and its legal influence on the European Union rule of law

The purpose of this section is to explore the synergies, influences, and differences between the two major human rights courts of Europe, both which have shaped the case law concerning rule of law, fundamental freedoms and human rights. The European Union's own fundamental rights framework, the Charter for Fundamental Rights, binding since the Lisbon Treaty's ratification, will also be explored, discussed and problematised.

The European Union has a constitutional obligation of accessing to the European Convention for Human Rights (ECHR) since the ratification of the Lisbon Treaty.[191] However, the ambitions of the European Union accessing to the ECHR were laid out in the Maastricht Treaty, which for the first time made an indirect reference to the ECHR and its articles as constituting general principles of European Community law.[192]

In 1994 the European Council tasked the CJEU with delivering an opinion on the admissibility of the European Community to the Council of Europe and the ECHR. The CJEU ruled in the negative, holding that its interpretation of the treaties meant that firstly the Community institutions lacked the conferred legal possibility of legislating in the field of human rights, and secondly only could be possible through treaty amendment as accession would entail fundamental constitutional and institutional implications.[193]

189 Ibid. 183.
190 Heusel, Wolfgang and Rageade, Jean-Philippe (eds), *The Authority of EU Law: Do We Still Believe in It?* (Springer 2019), 257-258.
191 Consolidated Version of The Treaty on The European Union [2012] OJ C326/13, art 6(2).
192 Consolidated Version of the Treaty on European Union [1992] OJ C191/01, art F(2).
193 Case C-2/94 *Opinion Pursuant to Article 228 of the EC Treaty* [1996] ECLI:EU:C:1996:140, paras 27, 35.

Post-Lisbon, the Commission was again in 2010 tasked with negotiating accession of the EU to the ECHR[194], and a draft agreement was finalised in 2013 whereas the Commission asked the CJEU of the admissibility of the EU to the ECHR.[195] The CJEU yet again ruled in the negative, holding in its opinion that the EU's accession to the ECHR would entrust effective judicial reviews of EU legislative acts or CJEU rulings to a non-EU institution.[196]

According to the CJEU, such a procedure would contravene with the autonomy of EU law[197] and thus fail to consider the CJEU's exclusive jurisdiction as interpreter of EU law; essentially a ruling from the European Court of Human Rights (ECtHR) would from a treaty perspective be unconstitutional.[198]

The CJEU had previously in *Mox Plant* ruled it as the sole interpretation of EU law rested with the CJEU in order to ensure an autonomous and coherent jurisprudence of EU law, and that no disputes could be referred to any other courts as it would circumventing the CJEU's exclusive jurisdiction.[199] Currently, as of late 2021, the admission of the EU to the ECHR is being renegotiated.[200] The relationship between the EU's CFR and the ECHR has been described as overlapping[201] and creating legal asymmetries concerning individual safeguards and rule of law.[202] In certain situations the CFR's scope of application is wider than corresponding rights under the ECHR, with the CJEU having more autonomy in legal interpretation of the horizontal application of rights in its cases.[203]

Arguably, the status of the CFR and its binding articles in the EU legal order is therefore stronger than the ECHR, with the EU legislative process requiring that all legislative proposals conform, not to the ECHR, but the CFR in order to uphold the rule of law in *inter alia* Article 2 TEU.[204]

194 Groussot, Xavier, Lock, Tobias and Pech, Laurent, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011' (2011) no 218 European Issues 1 <www.robert-schuman.eu/en/doc/questions-d-europe/qe-218-en.pdf> accessed 20 October 2021, 2.

195 European Parliamentary Research Service, 'EU accession to the European Convention on Human Rights (ECHR)' (Briefing) EPRS_BRI(2017)607298<www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI(2017)607298_EN.pdf> accessed 20 October 2021, 4-5.

196 Case Opinion C-2/13 *Opinion Pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454, para 255.

197 Ibid. para 258

198 Ibid. paras 245-247.

199 Case C-459/03, *Commission v Ireland (MOX Plant)* [2006] ECLI:EU:C:2006:345, para 169.

200 European Parliamentary Research Service, 'Completion of EU Accession to the European Convention on Human Rights' (Legislative train schedule 22 October 2021) <www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr> accessed 28 October 2021,

201 Tzevelekos, Vassilis P, 'When elephants fight it is the grass that suffers: 'hegemonic struggle' in Europe and the side-effects for international law' in Kanstantsin Dzehtsiarous and others (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*' (Routledge 2014), 9.

202 Kargopoulos, Vassilis P, 'When elephants fight it is the grass that suffers: 'hegemonic struggle' in Europe and the side-effects for international law' in Kanstantsin Dzehtsiarous and others (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*' (Routledge 2014), 112.

203 Ibid. 113.

204 Butler, Israel, 'Ensuring compliance with the Charter of Fundamental Rights in legislative drafting: the practice of the European Commission' (2012) vol 37:4 European Law Review, 397, 398-399.

Furthermore, until the entrance of the CFR into EU primary law, rule of law and fundamental rights were in large parts *de facto* viewed through the lens of the ECHR's articles in the general principles and fundamental values of EU law pre-Lisbon Treaty.[205]

One major difference between the application of the ECHR nationally and the CFR is that individual citizens in most cases do not have *locus standi* in terms of human rights abuses or actions that defy the rule of law, as the CFR is only to be applied in relation to EU law, while the ECHR allows for individuals to have standing.[206] However, rulings with a CFR foundation from the CJEU have direct effect and primacy of EU law as established in 1963 by the CJEU in *Van Gend en Loos*.[207]

The CFR does not create a jurisdiction for the CJEU to hear individual cases for breaches of fundamental rights.[208] Though, through the preliminary ruling procedure under Article 267 TFEU, individuals can in theory have a direct link to the CJEU which would direct the national court to interpret CFR-related questions.[209]

Rulings from the ECtHR does not constitute *res judicata* concerning the matter and cases can only be referred to the ECtHR after all national legal remedies have been exhausted.[210] The CFR has however from an international perspective being described to cover more than the U.S. *Bill of Rights,* which itself is an important document in terms of safeguarding humans rights and the rule of law.[211] The European Union's CFR can also be said to expand upon the rule of law and human rights framework established by the ECHR, allowing for a broader coverage of individual rights for EU citizens inside the EU legal order, a legal development the ECHR cannot meet due to autonomy of the EU legal order.[212]

From the perspective of the Council of Europe and the ECtHR, the continued development of the CFR risks creating a fault line in the area of human rights and rule of law in Europe, as the jurisdictional overlap can create different outcomes on whether the ECHR is applied or whether the CFR is.[213] The CoE is further worried that the CJEU's case law eventually will deviate from a fundament of ECHR and instead rely on the CFR, thus having an adverse effect to the legal cohesion in the European continent with the end-result of the ECHR being found incompatible with

205 Cuyvers, Armin, 'General Principles of EU Law' in Emmanuel Ugirashebujas and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects'* (Brill 2017), 224.
206 Ibid. 226.
207 Case C-26/62, *Van Gend en Loos* [1963] ECLI:EU:C:1963:1
208 Cuyvers, Armin, 'General Principles of EU Law' in Emmanuel Ugirashebujas and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects'* (Brill 2017), 224.
209 Consolidated Version of The Treaty on The Functioning European Union [2012] OJ C326/47, art 267.
210 Etinski, Rodoljub and Djajic, Sanja, 'Direct effect of the European Convention on Human Rights' (2015) vol 63:3 Anali Pravnog fakulteta u Beogradu, 91 DOI:10.5937/AnaliPFB1503091E, 96.
211 Rifkin, Jeremy, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream* (Polity Press 2004), 212.
212 Butti, Elena, 'The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection' (2013) JURIST <http://jurist.org/dateline/2013/09/elena-butti-lisbon-treaty.php.> accessed 29 October 2021.
213 Callewaert, John, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe Publishing 2014), 10.

EU law.[214]

As opposed to the CJEU, the CoE does not view the exclusive competence of the CJEU in relation to EU law as contravening accession to the ECHR. With the ECtHR believing their rulings are in essence declaratory in nature and that the European Union would be free to execute the ECtHR's judgment according to the means it finds relevant, as the ECtHR cannot unilaterally, albeit in a few cases, decide which action a state shall take in relation to a judgment in order to remedy the breach of the ECHR's articles.[215]

From a rule of law perspective, the European Union has itself been criticised being democratically deficit, with weak electoral and legal accountability, leading to executive dominance and complexity in the legislative process, effectively hindering public and voter scrutiny.[216] It has therefore been suggested, that by enabling ECtHR to in effect judicially review the EU's legal acts, the rule of law in the EU will become a functional legal principle.[217]

Due to the contrasting legal scopes, jurisdictional questions and taking into account the principle of primacy of EU law, it has simultaneously been suggested that the synergies between the CFR and the ECHR are better achieved through case law influences, rather than becoming in effect a new court instance in the European Union, as the CJEU held in its opinion on accession.[218]

On the 24th of November 2021 the Polish Constitutional Tribunal ruled on the compatibility of Article 6.1 ECHR regarding the right to a fair trial and the Polish constitution.[219] The case for judicial review of the constitutionality of Article 6.1 ECHR was sent to the Polish tribunal in July after a petition by the Polish Prosecutor-General and minister for justice Zbigniew Ziobro, where he questioned the possibility of using the ECHR to judicially review the legality the disciplinary procedure of lawyers, judges and other actors in the national judiciary to the Polish Constitutional Tribunal.[220]

The Polish tribunal further ruled that the ECtHR lacks competence, in lieu of the Polish constitution, to hear cases pertaining to the legality concerning the disciplinary procedure in the Polish Supreme court's disciplinary chamber, and therefore any ruling by the ECtHR will not be recognised in the national legal order due to the favourable predisposition of the Polish constitution.[221] The Polish minister of justice's petition to the Constitutional tribunal came as a

214 Ibid. 11.
215 Ibid. 62-63.
216 Craig, Paul, 'Integration, democracy, and legitimacy' in Paul Craig and Grainne de Búrca (eds), *The evolution of EU law* (2nd edn Oxford University Press 2011), 30.
217 Kochenov, Dimitry, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It' (2015) vol 34 Yearbook of European Law, 21-22.
218 Case Opinion C-2/13 *Opinion Pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454, para 239.
219 Wyrok Trybunału Konstytucyjnego z dnia 24 listopada 2021 r. sygn. akt K 6/21.
220 'Art. 6 ust. 1 zd. 1 Konwencji o ochronie praw człowieka i podstawowych wolności w zakresie, w jakim pojęciem „sąd" obejmuje Trybunał Konstytucyjny' (Trybunał Konstytucyjny) <https://trybunal.gov.pl/sprawy-w-trybunale/art/art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny> accessed 24 November 2021.
221 Wyrok Trybunału Konstytucyjnego z dnia 24 listopada 2021 r. sygn. akt K 6/21.

reaction to a ruling by the ECtHR on the 22nd of July, where the Court held that Poland had breached Article 6.1 of the ECHR regarding the right to a fair trial, as the disciplinary chamber of the Polish Supreme Court could not be considered to meet the rule of law demands of independence and impartiality as required in Article 6.1 ECHR.[222]

Notably, the ECtHR found that the Polish disciplinary chamber of the Supreme Court could not be considered a *tribunal established by law*, as the independence from the executive and legislative branches of government could not be considered sufficient.[223] Furthermore, the ECtHR considered the appointment process of judges to the disciplinary chamber to lack the character of being a lawful tribunal which compromises its legitimacy from a ECHR perspective.[224]

On the 26th of November 2021, the ruling was published in the *Dziennik Ustaw*, the official Polish legislative gazette, and according to Polish law the ruling and its substance has therefore received the force of law in Poland.[225] For Poland to reject the European Convention for Human Rights, it has been argued by rule of law scholars that Poland is breaching international law by invoking its domestic law to reject an international convention, in lieu of Article 27 of the Vienna Convention of the Law of Treaties.[226]

3.3. The Court of Justice as the driving force behind rule of law

The CJEU has an extensive case law regarding rule of law in the EU and echoes the fundamental principles and core values of the treaties, with rule of law specifically being a common theme in the jurisprudence of the CJEU. The court first held that the Union is based on a constitutional charter, based on rule of law in *Les Verts* in 1986, ruling that no member state or Union institution can circumvent judicial review in lieu of the treaty's constitutional character, effectively allowing for judicial review of all legislative measures.[227]

It can therefore be argued, that as the CJEU is from a legal perspective an important stakeholder concerning the impact and application of the rule of law in Europe, some important rulings from its case law will be explored to showcase how the Court has been a driving force behind the evolution of the rule of law in the European Union.

The ruling has been described as significant, due to the CJEU holding that of an act of the European Parliament being in breach of the treaty, even though no legal basis for judicial review of the European Parliament's acts were made possible through Article 230 EC, thus expanding the scope of the CJEU's jurisdiction under the premise of the constitutional character of the rule of law.[228]

222 *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021).
223 Ibid. para 280.
224 Ibid.
225 Dz.U. 2021 poz. 2161 Wyrok Trybunału Konstytucyjnego z dnia 24 listopada 2021 r. sygn. akt K 6/21.
226 Garner, Oliver and Lawson, Rick, 'On A Road to Nowhere: The Polish Constitutional Tribunal assesses the European Convention on Human Rights' (2021), Verfassungsblog,<https://verfassungsblog.de/on-a-road-to-nowhere/> accessed 26 November 2021.
227 Case 294/83 *Les Verts v European Parliament* [1986] ECLI:EU:C:1986:166, para 23.
228 Alemanno, Alberto, 'What Has Been, and What Could Be Thirty Years after Les Verts/European Parliament: Individual Access to EU Justice' in Miguel Poiares and Loïc Azoulai (eds) *The Past and Future of EU Law: The*

The Treaty, the CJEU argued, therefore offers a complete set of legal remedies to reflect this legal fact.[229] The sentiment of *Les Verts* was further elaborated and expanded in *Johnston v Chief Constable of the Royal Ulster Constabulary*, where the CJEU ruled judicial protection in member states must comply with Community law, affirming rule of law as a legal fundament in member states through EU law.[230]

Subsequently expanding the scope and status of rule of law, the CJEU held in *Kadi* that constitutional principles of the EU cannot be set aside, neither by virtue of Union law nor member state obligations under international law.[231] The CJEU further held that the fundamental values of the Union were of such importance that no derogation or challenge to their status may be permitted by virtue of the treaties.[232] The *Kadi* case has been described as constitutionally important since not only did it assert the autonomy and primacy of the EU's legal order, but it also in essence outlawed any form of circumventing or deviation from the constitutional guarantees and rule of law as provided for by the treaties.[233]

In recent years the CJEU has ruled on several important cases which refers to post-Lisbon treaty obligations concerning rule of law in EU member states. In a case which has been described as ground-breaking[234] for rule of law observance in the European Union, the CJEU held in *Portuguese judges* that member states are limited in organising or reforming national judiciaries that threatens judicial independence and disempowerment of judges by making a reference to Article 19 TEU, thus creating new layer of a *European Union Judiciary*.[235]

The CJEU argued that by virtue of Article 19 TEU, member states have a constitutional obligation of offering sufficient judicial protection of all courts, and tribunals that have the possibility of applying and enforcing EU law, creating a new sphere of EU law and setting a new precedent.[236] It can also be said that the ruling indirectly targeted the issue of rule of law backsliding in the EU, with the CJEU President remarking that judicial independence and the state of rule of law in member states cannot be taken for granted.[237]

Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty (Hart Publishing 2010) <https://ssrn.com/abstract=1552746> accessed 29 October 2021, 324-325.

229 Case 294/83 *Les Verts v European Parliament* [1986] ECLI:EU:C:1986:166, para 23.

230 Alemanno, Alberto, 'What Has Been, and What Could Be Thirty Years after Les Verts/European Parliament: Individual Access to EU Justice' in Miguel Poiares and Loïc Azoulai (eds) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) <https://ssrn.com/abstract=1552746> accessed 29 October 2021, 327.

231 Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, para 5.

232 Ibid. paras 303-304.

233 Herlin-Karnell, Ester, *The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012), 73..

234 Bonelli, Matteo and Claes, Monica, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) vol 14:3 European Constitutional Law Review 622, 622.

235 Ibid. 642-643.

236 Ibid. 642.

237 Lenaerts, Koen, 'New Horizons for the Rule of Law Within the EU' (2020) vol 21 German Law Journal 29, 30-31.

Drawing on the CJEU's set precedent in *Portuguese judges*, the Court reaffirmed the constitutional obligation of judicial independence and rule of law in cases dealing with changes in the Polish and Hungarian judiciaries. In a spate of judgements, the CJEU found that changes to the Polish judiciary undermined the rule of law, contravened EU law and CJEU case law, drawing from the precedent set in *Portuguese judges*.[238] In general, the new direction of the CJEU can be described as being a reaction to democratic and rule of law backsliding in EU member states through its own case law.[239]

The jurisprudence of the CJEU is viewed as an important factor in the status of rule of law, since the constitutional obligation of adherence to rule of law has shifted from being a legal presumption to a requirement of adherence which targets both the political and legal context of the definition itself, i.e. the rule of law is vis-a-vis declaratory in nature and instead becomes an enforceable principle that circumvents the political aspect of the Article 7 TEU infringement procedure.[240] The CJEU has by virtue of its own case law become more assertive and been using interim measures in order to reverse effective compliance with rule of law in member states. Simultaneously, the Court has given the European Commission new tools in dealing with democratic and rule of law backsliding.[241]

The status of the CJEU and its rulings have in recent years been challenged by governments in the European Union who dismiss the primacy of CJEU court judgements as well as the duty to adhere by them. The Hungarian Fidesz-led parliament passed legislation, named *The Transparency Law*, in 2017 aimed at restricting funding for foreign non-governmental organisations (NGOs), ultimately resulting in the closure of the private Central European University in Budapest.[242]

The European Commission referred Hungary to the CJEU holding the *Transparency Law* concerning foreign NGO's breached EU law by violating the CFR and being detrimental to rule of law.[243] In June 2020 the CJEU held it its judgment that the legislation amounted to a restriction on the flow of capital and the free movement of capital in the Union.[244] The Court also held that Hungary breached Articles 7, 8 and 12 of the CFR and was discriminatory and unlawful in nature.[245]

In February 2021 the Commission sent a letter of formal notice to the Hungarian government, demanding that the Transparency Law be repealed in light of the CJEU's judgment and reiterated that CJEU judgements are immediately binding on EU member states.[246] The Hungarian Parliament

238 Pech, Laurent and Kochenov, Dimitry 'Respect for the Rule of Law in the Case Law of the European Court of Justice: a Casebook Overview of Key Judgements since the Portuguese Judges Case' (2021) vol 3 Swedish Institute for European Policy Studies Report 12, 24-25

239 Ibid. 175.

240 Ibid. 161.

241 Ibid. 164.

242 Dunai, Marton and Than, Krisztina 'Soros-funded school says forced out of Hungary on 'dark day for Europe'' *Reuters* (Budapest 3 December 2018) <www.reuters.com/article/us-hungary-soros-ceu-move-idUSKBN1O218Z> accessed 2 November 2021.

243 Case 78/18 *European Commission v Hungary* [2020] ECLI:EU:C:2020:476, para 1.

244 Ibid. para 45.

245 Ibid. para 143.

246 European Commission, 'February infringement package: key decisions' (Press release 18 February 2021) INF/21/441 <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_441> accessed 5 November 2021.

replaced the legislation in May 2021, however the new legislation was criticised by civil society stakeholders as being unconstitutional and amounting to a violation of civil rights, effectively resetting the previous *Transparency Law*.[247]

In May 2021, the Court ruled, after the application of the Czech Republic, that a state-owned Polish company must immediately pending the full judgement on the matter, cease mining lignite at the open-cast Turów mine., As the mine is situated close to the Czech border, the mining activity on the Polish side had caused severe environmental and ground water damage on the Czech side.[248]

As a response the Polish Prime Minister Mateusz Morawiecki openly rejected that the mine would be closed in line with the CJEU ruling, due to the mine being of significance to the Polish energy security.[249] The operator, state-owned Polska Grupa Energetyczna (PGE), criticised the CJEU's ruling and held that the mines closure would take away families' livelihoods.[250]

In September 2021, following Poland's non-compliance with the CJEU's ruling in May, the Court imposed financial penalties on Poland amounting to 500 000 € for every day the lignite mine keeps operating in violation of the closure order by the Court in May.[251] Following the CJEU's order, the Polish government rejected the order by the CJEU and affirmed the continued operation at the Turów mine.[252]

Poland's deputy Prime Minister and chairman of the ruling Law and Justice (PiS) Party, Jarosław Kaczyński, commented in September 2021 that EU institutions want to alter the Polish legal system, its constitution, and blamed the opposition of waging war on the Polish state in order to create a new EU legal order.[253]

The effectiveness of the CJEU's jurisprudence and its impact in member states has been identified as being reliant on policy stakeholders and governance structures and therefore the European Commission has been forced to selectively refer non-compliance of CJEU judgments, to the CJEU.[254] How CJEU rulings and orders are being met in member states influences the European

247 Makszimov, Vlagyiszlav 'Hungary repeals NGO law but civil rights group deem replacement is unconstitutional' (Brussels 19 May 2021) <www.euractiv.com/section/politics/short_news/hungary-repeals-ngo-law-but-civil-rights-group-deem-replacement-is-unconstitutional/> accessed 7 November 2021.

248 Case C-121/21 R *Czech Republic v Poland* [2021] ECLI:EU:C:2021:420.

249 'Poland does not expect Turow mine to close, will negotiate – PM' *Reuters* (Warsaw 24 May 2021) <www.reuters.com/article/poland-coal-court-idUSL5N2NB2VJ> accessed 10 November 2021.

250 'Poland told to halt brown coal mine near border with Czech Republic' *Euronews* (Lyon 21 May 2021) <www.euronews.com/2021/05/21/poland-told-to-halt-brown-coal-mine-near-border-with-czech-republic> accessed 10 November 2021.

251 Court order in case C-121/21 *Czech Republic v Poland* [2021] ECLI:EU:C:2021:752.

252 'Poland's Turow mine and power plant to keep operating, PM says' *Reuters* (Warsaw 21 September 2021) <www.reuters.com/business/energy/turow-mine-power-plant-will-continue-operate-says-polands-pm-2021-09-21/> accessed 30 September 2021.

253 'Jarosław Kaczyński ws. nacisków UE dotyczących TK. "To godzi w fundamenty naszej suwerenności"' *Polsat News* (Warsaw 18 September 2021) <www.polsatnews.pl/wiadomosc/2021-09-18/jaroslaw-kaczynski-ws-naciskow-ue-dotyczacych-tk-to-godzi-w-fundamenty-naszej-suwerennosci/> accessed 30 September 2021.

254 Falkner, Gerda, 'A casual loop? The Commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgements' (2018) vol 40:6 Journal of European Integration 769 <https://doi.org/10.1080/07036337.2018.1500565> accessed 12 November 2021, 769.

Commission on whether an infringement procedure is relevant in the individual case, or if the Courts ruling will take heed in national governments and institutions and how EU legal acts are perceived.[255]

A qualitative study measuring the compliance level of six social policy directives in 15 member states resulted in only 11 % good compliance in enacting national legislation to meet the demands of the directives.[256] From an infringement perspective, it can be reflected in the rising annual number of infringement procedures launched by the European Commission, which in December 2019 amounted to 800 total pending cases as compared to 692 in December 2018.[257]
Furthermore, out of 28 member states in December 2019, 24 member states had seen a rise in the number of pending infringement cases concerning national compliance with EU law.[258]

As the legal framework of the EU is built upon a rule of law-based approach through mutual cooperation, the low level of compliance in member states has been identified as a key concern and is being described as a gap in the rule of law framework, with the constitutional framework concerning rule of law in the EU being particularly weak.[259] Even though the total pending and open infringement cases has been rising, the referral of cases to the CJEU has been declining; in 2005 the CJEU received 170 new cases compared to 31 in 2016.[260] For 2020 the CJEU received 18 cases from the Commission relating to member state failures to fulfil EU law obligations.[261]

Possible explanations for the decrease in referrals to the CJEU can be due to the Commission adapting to the *realpolitik* of the relationship between the Commission and member states in terms of non-compliance; the disapproval in member states of Commission enquiries into what is seen as internal affairs and the Commission instead focusing its limited resources to conduct in-depth control and enforcement where it is most needed.[262]

255 Ibid. 770.
256 Falkner, Gerda and others, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press 2005), 266.
257 European Commission, 'Single Market Scoreboard: Performance per governance tool: infringements' (Information) <https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm> accessed 5 November 2021.
258 Ibid.
259 Falkner, Gerda, 'Is the European Union Losing Its Credibility?' (2013) vol 51 Journal of Common Market Studies Annual Review 13, 21.
260 Falkner, Gerda, 'A casual loop? The Commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgements' (2018) vol 40:6 Journal of European Integration 769 <https://doi.org/10.1080/07036337.2018.1500565> accessed 12 November 2021, 772.
261 Court of Justice of the European Union, 'The Year in Review: Annual Report 2020' (Directorate for Communication, May 2021) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf> accessed 5 November 2021, 56.
262 Falkner, Gerda, 'A casual loop? The Commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgements' (2018) vol 40:6 Journal of European Integration 769 <https://doi.org/10.1080/07036337.2018.1500565> accessed 12 November 2021, 774.

The Commission has therefore since 2017 adopted a policy of strategic enforcement of EU law infringement, with a primary focus on rule of law and essential matters relating to the functioning of the legal order of the EU.[263] Separately, the Commission has also been wary of overusing the CJEU as a tool for judicial remedy, relating to infringements of EU law which could lead to a devaluation of the legal significance and impact of CJEU judgments.[264]

The ongoing concerns and challenges to rule of law and the enforcement of EU values in Poland and Hungary are also identified as a negative factor in the CJEU's role in enforcing EU law which affects the Commissions strategic reasoning. There exists no other concrete legal means of enforcing a CJEU ruling, other than applying for the CJEU to impose financial penalties upon the failing state, or triggering Article 7 TEU proceedings in the European Council, of which it only requires two votes of opposition for the proceedings to be rejected.[265]

Poland and Hungary have vowed to block any attempts at triggering Article 7 TEU proceedings concerning one or the other in the European Council.[266] Non-compliance with CJEU rulings and the EU legal order are thus identified as a risk to the functioning of the EU and the internal market, due to the legal framework being reliant on a voluntary cohesive application of EU law in all member states.[267]

3.4. The Preliminary Ruling and its role in rule of law enforcement

The Court of Justice of the European Union has, according to Article 267 TFEU jurisdiction, to hear cases referred from national courts which have been referred to the CJEU, concerning interpretation of treaty-based legal questions and judicial review of acts stemming from the EU's institutions.[268]

The Article 267 TFEU process is two-fold; national courts of lower instances *may* request a ruling by the CJEU which binds the referring court on how to interpret the specific legal question which relates to EU law. Courts of last instance are however constitutionally *bound* in lieu of Article 267 TFEU to refer the legal question to the CJEU for its ruling.[269]

Any ruling by the CJEU is binding on the national court and cannot be dismissed, due to the principle of primacy of EU law and by virtue of CJEU case law as the Court promulgated in the preliminary rulings *Milchkontor* and *Munari*. The CJEU held in *Milchkontor* that while a

263 European Commission, 'EU law: Better results through better application' (Communication from the Commission 19 January 2017) (2017) C18/02.

264 Falkner, Gerda, 'A casual loop? The Commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgements' (2018) vol 40:6 Journal of European Integration 769 <https://doi.org/10.1080/07036337.2018.1500565> accessed 12 November 2021, 780.

265 Ibid. 774.

266 Ceu, Beatriz, 'EU blocked over sanctions on Hungary, Poland' (2021) *Euractiv* (Brussels 1 March 2021) <www.euractiv.com/section/politics/short_news/eu-blocked-over-sanctions-on-hungary-poland/> accessed 16 November 2021.

267 Falkner, Gerda, 'A casual loop? The Commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgements' (2018) vol 40:6 Journal of European Integration 769 <https://doi.org/10.1080/07036337.2018.1500565> accessed 12 November 2021, 780.

268 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 267.

269 Ibid.

preliminary ruling binds the national court to the CJEU's interpretation, the national court can ask the CJEU of further clarification or interpretation in the same national case if the ruling by the CJEU is considered to be insufficient.[270]

In *Munari,* the judicial nature of the preliminary ruling was elaborated on by the Court. The referring Italian court asked the CJEU of the nature of the preliminary ruling procedure itself, whether the preliminary ruling is binding on the national court and what force of law, if any, a preliminary ruling by the CJEU has on the substance-matter of the case in the national legal order.[271]

The CJEU answered that by virtue of its role as the sole interpreter of the treaties and EU law in general, the Court cannot, constitutionally, have a purely consultative role. The Court's role in the preliminary ruling procedure should instead be seen from the perspective of a jurisdictional activity.[272] The CJEU furthermore reiterates the primacy of EU law by holding that the CJEU's ruling takes precedence over any inconsistent national legislation and that the national court is constitutionally obligated to disregard it.[273]

The Court additionally stressed that the force of its rulings is seen even from a literal interpretation of the treaties that are explicitly mentioned in the-then Article 177 EC the CJEU *giving rulings* which excludes any purely advisory or consultative role of the CJEU.[274] Subsequently, the CJEU reaffirmed its own case law and reasoning concerning the preliminary ruling procedure as in *Milchkontor*, by making a direct reference to the case.[275] From the Court's perspective, the motives behind the preliminary ruling procedure concerns the uniform application of EU law in member states.

The preliminary ruling has therefore been instrumental in advancing a cohesive approach towards uniformity in EU law application. In the CJEU landmark ruling of *Costa v ENEL* in 1964, which confirmed the primacy of EU law over national law, the CJEU held that due to member states limiting their sovereignty by transferring certain sovereign rights to the EU, a new body of law had been created that binds both the states and its nationals.[276] Legal supremacy must also be seen in tandem of the core legal principle of *direct effect,* in which the CJEU in *Van Gend and Loos* ruled that EU legal acts create a legal direct effect which generates individual rights that member states are obliged to protect.[277]

270 Case C-29/68 *Milch-, Fett- und Eierkontor GmbH v Hauptzollamt Saarbrücken* [1969] ECLI:EU:C:1969:27, paras I(2)-I(3).
271 Case C-52/76 *Luigi Benedetti v Munari F.lli s.a.s.* [1977] ECLI:EU:C:1977:16, para B(7).
272 Ibid. Page 172.
273 Ibid.
274 Ibid. Page 177.
275 Ibid.
276 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:1964:66, page 593.
277 Case C-26/62, *Van Gend en Loos* [1963] ECLI:EU:C:1963:1, para II(B).

It would therefore prove challenging to uphold the legal order of the EU, if its member states could override EU law or rulings, an independent source of law, by enacting contradicting national legislation; leading to the treaty-based obligations put on member states being rendered null and void of legal force.[278] However, the CJEU cannot in its current role be considered a court of last instance in relation to national courts, as the jurisdiction covers interpretation of the treaties of EU legal acts and concerning questions sent from the national court, and not *per se* ruling on the substance-matter in the domestic case according to Article 267 TFEU.

The CJEU has itself identified the preliminary ruling procedure as crucial to the legal functioning of the European Union, its institutions and the efficiency of EU law, however the deciding factor of the impact of the Court's case law has been identified as being reliant on acceptance in national courts and institutions.[279]

It has further been identified as a weakness of the preliminary ruling process, that in reality a national court may refuse to rule on the substance-matter in light of the CJEU's interpretation, if the case is nationally considered to exist outside the legal sphere of EU law and instead being of national constitutional questions.[280]

Another factor which affects the preliminary ruling and the CJEU's case law is due to the principle of direct effect and primacy of EU law not being enshrined in the treaties, instead existing as *unwritten principles of EU law*, which is being given EU constitutional law status on account of the binding nature of CJEU case law.[281] National courts in EU member states have been suggested in legal doctrine to play an important role in the further integration of the EU. When national courts are being judicially empowered with Article 267 it can affect the legal integration of EU and national judiciaries, owing to the latter being given a clear legal tool and mechanism to conduct judicial review, even if such a mechanism is absent in the national legal framework.[282]

Accordingly, as it is the national court's responsibility to implement and interpret the preliminary ruling in relation to national law, it has been suggested that this procedure strengthens the national judiciary and increases the impact of the national court on the legislative process and public policy in the member state.[283] However, it can also be seen from the perspective of EU law and the preliminary ruling procedure, where the biding effect is disrupting the national legal foreseeability and status of the domestic legal framework, causing governments in some instances to direct the national judiciary in being restrictive in using Article 267 TFEU.[284]

278 Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:1964:66, page 594.
279 Craig, Paul, 'Integration, democracy, and legitimacy' in Paul Craig and Grainne de Búrca (eds), *The evolution of EU law* (2nd edn Oxford University Press 2011), 346.
280 Ibid. 347.
281 Ibid.
282 Leijon, Karin, 'National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?' (2021) vol 44:3 West European Politics 510, 512.
283 Ibid. 512.
284 Ibid. 513.

As a measure of national courts' attitudes towards further EU legal integration, several factors have been identified in relation to requests for preliminary rulings. A large number of referrals to the CJEU from national courts has been found to have a positive impact on the advancement of EU legislation, due to the CJEU indirectly affect the development of public policy in individual member states. Respectively, low referral rates have been connected with preventing EU law of having significant impact in the national legal framework.[285]

Regarding politically sensitive cases which can have a lasting and profound impact on national law, local courts usually refrain from referring such cases to the CJEU, which in effect, could lead to the failure of domestic policies after the CJEU's judicial review.[286] The prime motif for either requesting a preliminary ruling or not revolves around whether the case can be considered politically sensitive, and the informal test is being identified as being detrimental to the uniform advancement of the EU legal order, which is the *raison d'être* of the preliminary ruling procedure in its current form.[287]

How the national court semantically asks the CJEU its questions on EU law is furthermore used as a form of meta-discussion correspondence which aims to show the CJEU the boundaries of what can be considered politically acceptable nationally.[288] From CJEU's perspective, Article 267 TFEU is supposed to be used regardless of potential political sensitivities. The Court held in *Köbler* that national courts that withdraws or abstains from using the preliminary ruling procedure is violating the EU legal order.[289] The prime current challenge in terms of the CJEU advancing rule of law, through its case law in the preliminary ruling procedure, stems around the conflict of interests between ceded sovereignty to the EU in lieu of the treaties and the role of the CJEU, its case law, and balancing the risk of member states openly rejecting the CJEU due to perceived judicial activism from the Court.[290]

The qualitative study also found that the main, practical avenue for member states to resist or reject further legal integration of the EU, is through the non-referral of cases to the CJEU from national courts.[291] There were also signs that the culture inside the national judiciaries constitutes a factor in whether the national courts are pro-integration or opposes the case law of the CJEU, though further research is needed to be able to explain integration theory in relation to CJEU case law and national courts.[292]

285 Ibid.
286 Ibid.
287 Ibid. 514.
288 Ibid. 514.
289 Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECLI:EU:2003:513.
290 Leijon, Karin, 'National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?' (2021) vol 44:3 West European Politics 510, 523-524.
291 Ibid. 525.
292 Ibid. 525.

3.5. Preliminary ruling statistics, how it affects legal integration and enforcement of EU law

The integration theory as explored from the qualitative study on national courts and preliminary references can also be seen in the light of available statistics. According to the Swedish National Courts Administration, in 2010 Swedish courts produced 370 653[293] rulings, and respectively in 2020 a total of 495 816[294] rulings.

The number of cases referred to the CJEU or which involves the preliminary ruling procedure in Article 267 TFEU is not being officially monitored by individual courts. According to the Swedish National Courts Administration there exists no parameter for EU-related cases in the digital case management systems in use by the judiciary in Sweden.[295]

The CJEU however provides statistics regarding Article 267 TFEU and its usage by member states courts'. In 2010 and 2020 respectively, Swedish courts made six (6) references for preliminary rulings to the CJEU.[296] Sweden became an EU member state in 1995 and has requested from the CJEU an average of 6,07 preliminary rulings per year since accession to the Union.[297]

Comparably, Germany requested an average of 67,26 preliminary rulings; Belgium, where the CJEU is located, an average of 24,34 requests, in the period 1995-2020; Poland requested an average of 14,8 preliminary rulings annually and Hungary 14,06, with Poland and Hungary entering the EU in 2004.[298] Finland, which has a similar legal and administrative framework to Sweden[299], has made an average of 5,19 requests annually since entering the EU in 1995.[300]

Article 267 furthermore sets out the requisites of the preliminary ruling procedure, with courts of lower instance *may* ask the CJEU for clarification in interpreting an EU legal act or law, while courts of last instance *shall* refer the matter to the CJEU, meaning the latter has a constitutional obligation of using the preliminary reference procedure.[301] The CJEU makes reference to the total number of preliminary ruling requested from respective instance in member states, the numbers are however not broken down on a year-by-year basis.

293 Sveriges Domstolar, 'Årsredovisning 2010' (Domstolsverket, March 2011) <http://old.domstol.se/Publikationer/Arsredovisning/ÅR_2010_webb.pdf> accessed 11 November 2021, 18.

294 Sveriges Domstolar, 'Årsredovisning 2020' (Domstolsverket, February 2021) <www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/arsredovisning/arsredovisning_2020_sverigesdomstolar.pdf> accessed 15 November 2021, 15.

295 Email from Hanna Strandberg, Swedish Court Administration Service, to author (8th September 2021).

296 Court of Justice of the European Union, 'The Year in Review: Annual Report 2020' (Directorate for Communication, May 2021) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf> accessed 5 November 2021, 230.

297 Ibid.

298 Ibid.

299 Letto-Vanamo, Pia, '*Courts and Proceedings: Some Nordic Characteristics*' in Laura Ervo, Pia Letto-Vanamo and Anna Nylunds (eds), *Rethinking Nordic Courts* (Springer 2021), 21-22.

300 Court of Justice of the European Union, 'The Year in Review: Annual Report 2020' (Directorate for Communication, May 2021) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf> accessed 5 November 2021, 230.

301 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 267.

In Sweden it can be noted that the top instances, the supreme court and supreme administrative court, refer less cases to the CJEU than courts of lower instance. The supreme court has made 26 requests and the supreme administrative court 40 requests while courts of lower instance has made 92 requests, all since 1995.[302] The same trend can be seen in Germany, where lower instances request roughly three times more preliminary rulings than higher instances.[303]

In Belgium, lower instances request more preliminary rulings than the highest instances at a 142:49 ratio.[304] The Polish judiciary follows the trend with the notable exception that since 2004, the Polish Constitutional Tribunal has only made one preliminary ruling request, which was made in 2011 where the Tribunal questioned the constitutionality of enforcing a Belgian verdict on Polish territory, in lieu of the current EU law at the time.[305]

The Hungarian preliminary reference statistics follow the previous examples of higher usage of Article 267 TFEU in lower court instances, where last instances have made 47 requests and lower instances 178.[306] Finland however has a higher degree of preliminary ruling requests from top instances than courts of lower instances, with the supreme administrative court has made 67 requests, the supreme court 27 and courts of lower instances 41, all since 1995.[307]

The preliminary ruling reference statistics can therefore be said to reflect the views that courts of lower instances support EU law and further integration to a higher degree than courts of last instances, which more often tends to assert and voice the importance of national legal sovereignty.[308] However, national courts tend to signal support for the CJEU mostly in cases considered to be of low political sensitivity, and respectively send signals siding with national legislation in matters sensitive, but at the same time strive towards finding a balance between closer integration through case law and national legal autonomy.[309]

The use of the preliminary reference procedure in constitutional cases stemming from constitutional courts has simultaneously been suggested to be a natural evolution. As EU law often intersects several areas of law and touches upon constitutional provisions in individual member states, therefore the use of the preliminary reference procedure can be said to strengthen constitutional practices in member states, which otherwise could be challenged by courts of lower instance.[310]

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302 Court of Justice of the European Union, 'The Year in Review: Annual Report 2020' (Directorate for Communication, May 2021) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf> accessed 5 November 2021, 233.

303 Ibid. 231.

304 Ibid.

305 Kustra, Aleksandra, 'Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure' (2015) vol 16:06 German Law Journal 1543, 1554.

306 Court of Justice of the European Union, 'The Year in Review: Annual Report 2020' (Directorate for Communication, May 2021) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf> accessed 5 November 2021, 232.

307 Ibid. 233.

308 Leijon, Karin, 'National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?' (2021) vol 44:3 West European Politics 510, 520-521.

309 Ibid. 521-522.

310 Kustra, Aleksandra, 'Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure' (2015) vol 16:06 German Law Journal 1543, 1564 ff..

4. From Communism to EU membership to rejection of the EU legal order

4.1. The rule of law in the Polish People's Republic

In order to understand rule of law backsliding and concerns relating to democratic principles in Poland, its constitutional history has to be explored and discussed. After the Second World War Poland came under communist rule as a satellite state to the Soviet Union.[311] [312] Prior to the establishment of the People's Republic of Poland (PRL), the state had been occupied by the Third Reich as part of the Nazi party's *lebensraum* strategy, under which the perceived inferior Slavic peoples had to make room in order for the German nation to expand through a process of genocide and destruction of ethnic Poles and the Polish state.[313]

Following the re-establishment of the Polish state post-war, legislation in the People's Republic of Poland was highly centralised to the ruling communist party and no real opposition or democratic legislative process existed. [314] The state was either totalitarian or authoritarian, depending on the current political leadership, and no legal possibility of challenging authority or law were possible for the ordinary citizen.[315]

Reforms in order to achieve more inclusion of citizens in the legislative process were planned in the 1950's and 1960's, aimed at changing the single-party legislative situation, failed due to the proponents being arrested and civil movement associations disbanded.[316] Law, legality and constitutionalism in communist states were not primarily designed to set out the norms regulating the relationship between the state and its citizens. Instead, constitutionalism in communist states was a reflection of the political reality as seen by the ruling party, and a tool towards the future transformation of society, enabling a Marxist socialization of society.[317]

Rule of law as conceptualised by Dicey, Hart and Fuller, from a liberal democratic perspective was therefore absent in communist states, as constitutional law according to Marxist theory exists outside of a democratic constitution, labelled as constitutional practice, in order to lay the foundation for a new political system.[318] The socialist concept of freedom and justice stems from a notion of which rule of law and liberal freedoms are tied to the collective need, rejecting that liberal freedoms and democracy are individual and achieved through political freedoms.[319]

311 Korys, Piotr, *Poland from Partitions to EU Accessions: A Modern Economic History 1772-2004* (Palgrave Macmillan 2018), 267.
312 Ibid. 273
313 'Lebensraum' (*United States Holocaust Memorial Museum*) <https://encyclopedia.ushmm.org/content/en/article/lebensraum> accessed 28 September 2021.
314 Korys, Piotr, *Poland from Partitions to EU Accessions: A Modern Economic History 1772-2004* (Palgrave Macmillan 2018), 276-277.
315 Ibid. 290.
316 Ibid. 279.
317 Inglot, Tomasz, 'The Role of the Constitution in the Evolution of the Polish Communist System' (Master's thesis, Loyola University Chicago 1988) <https://ecommons.luc.edu/luc_theses/3586> accessed 29 September 2021, 3.
318 Ibid. 37-38.
319 Simpson, Evan. 'Socialist Justice' (1976) vol 87 Ethics 1, 2.

Socialism, in its ideological core, rejects the classical interpretation of rule of law, liberty and freedom as it rejects the very society of which rule of law and its principles and core concepts stems from.[320] Thus, the fundamentally contrasting ideas about liberty and its internal values and the concept of freedom, precludes rule of law, from a liberal perspective, in a socialist state.[321] Furthermore, the classic interpretation of law and constitutional frameworks which emphasise rule of law and democracy, was seen as a remnant of a capitalist society and therefore rejected *in blanco* for ideological reasons in the socialist state.[322]

The political and legal climate in communist Poland was based on non-democratic principles, elitist and egalitarian values.[323] Communist rule in Warsaw Pact states ended in the late 1980's, with Poland holding its first general election since pre-war times in 1989, resulting in the re-establishment of the upper chamber of parliament and the presidential office.[324]

4.2. Polish rule of law post-communism

The cohesive political priorities in post-communist Poland were two-fold; to create a culture of constitutionalism, rule of law and rapprochement with the West.[325] [326]

Post-1989 Poland had left in place a weak culture of legality, and political efforts were aimed at restraining or managing the power of the executive branch of government. Low social consciousness towards law and legality was identified as a particular challenge in achieving rule of law and constitutional debate in Poland.[327]

The creation of the Polish Constitutional Tribunal was identified in the 1990's as an important factor in strengthening constitutionalism and a return to the rule of law in Poland.[328] The challenge in a post-communist transition was to balance the needs of the executive, together with creating a legal environment which fostered a long-term adherence to the rule of law, legal order and a culture of constitutionalism.[329]

320 Ibid.
321 Ibid. 6.
322 Inglot, Tomasz, 'The Role of the Constitution in the Evolution of the Polish Communist System' (Master's thesis, Loyola University Chicago 1988) <https://ecommons.luc.edu/luc_theses/3586> accessed 29 September 2021, 40.
323 Ibid. 158.
324 Korys, Piotr, *Poland from Partitions to EU Accessions: A Modern Economic History 1772-2004* (Palgrave Macmillan 2018), 323.
325 Brzezinski, Mark F., 'Constitutionalism and Post-Communist Polish Politics' (1998) vol 20:3 Loyola of Los Angeles International and Comparative Law Review 433 <https://digitalcommons.lmu.edu/ilr/vol20/iss3/2> accessed 30 September 2021, 437.
326 Korys, Piotr, *Poland from Partitions to EU Accessions: A Modern Economic History 1772-2004* (Palgrave Macmillan 2018), 323.
327 Brzezinski, Mark F., 'Constitutionalism and Post-Communist Polish Politics' (1998) vol 20:3 Loyola of Los Angeles International and Comparative Law Review 433 <https://digitalcommons.lmu.edu/ilr/vol20/iss3/2> accessed 30 September 2021, 435.
328 Ibid. 433-434.
329 Ibid. 438.

Due to the weak legal tradition the Polish People's Republic had created, several factors were identified in the early Polish post-communist state as threats to the rule of law; political *decommunisation* of an arbitrary nature, public exposure of former communist agents and the banning of former party apparatus members from holding public office or in state institutions.[330]

From a governance-perspective, the Catholic church in Poland's leading role in shaping public policy was perceived as a threat to the rule of law, due to the blurring of lines between the separation of church and state, an important rule of law principle.[331] The Catholic church actively influenced legislation relating to abortion, school prayer and the introduction of blasphemy laws which aimed to protect Christian values.[332]

The second political priority post-communism was rapprochement with the West and Western Europe in particular. In 1989 Poland and the then-EEC signed an agreement concerning trade, economic and commercial cooperation which acted as a precursor to a potential free trade agreement and closer Polish European integration.[333]

The EU-PRL agreement of 1989 was followed up in 1991, with Poland, Hungary and Czechoslovakia, all former post-Warsaw Pact states, signing association agreements with the European Community. The Western European political leadership saw the integration of the Central European states into the European Community as a political priority, and the agreement in 1991 explicitly aimed towards future membership in the European Union.[334]

A free trade agreement with the European Union was seen as the next important step in the road towards membership, and a new *Europe Agreement* entered into force in 1994 between Poland and the European Commission. The Europe Agreement was extensive in nature and covered not only free-trade, but set out the legislative framework of further integration which included Poland approximating its laws in order to be compatible with the EU legal order at the time.[335]

4.3. The domestic Polish debate surrounding EU accession

At the EU summit in Copenhagen in December 2002, the enlargement of the EU was decided by approving ten Eastern European post-communist states, of which Poland was the largest, to become European Union members in May 2004.[336] From a domestic point of view, Poland's political road towards EU membership was fragile, with Eurosceptic parties comparing the European Union to the

330 Ibid.
331 Ibid. 442.
332 Ibid. 442-444.
333 Agreement between the European Economic Community and the Polish People's Republic on trade and commercial and economic cooperation [1989] OJ L339/2, 2.
334 European Agreements with Czechoslovakia, Hungary, and Poland [1991] IP/91/1033 <https://ec.europa.eu/commission/presscorner/detail/en/IP_91_1033> accessed 30 September 2021.
335 Europe Agreements with Poland and Hungary – Entry into Force 1 February 1994 [1994] MEMO/94/17 <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_94_7> accessed 30 September 2021.
336 Taras, Ray, 'Poland's Accession into the European Union: Parties, Policies and Paradoxes' (2003) vol 48:1 The Polish Review 3, 6.

former dominant force in Poland, the Soviet Union.[337]

The notion of an integrated and unified European continent was in parts of the Polish parliament and political leadership, held as being grounded in German-Masonic thought that would result in Poland being forced into a new union.[338] The Polish public had a mixed view of the EU and European integration, with common themes among the public opinion being that Poland would be regarded as a second-class member, having an inferior political status, and that EU membership would be more advantageous for Western European states than for Poland.[339]

The Catholic Church in Poland viewed the Western European notion of democracy and legality as being primarily value-free and incompatible with Christian values as envisaged by the national clergy. The Church held that religion and religious values must be the foundation of the Polish state and that the Polish constitution reflects the Church hierarchy's view of Christian values.[340] Official Catholic Church policy on European reintegration and Poland's EU membership was therefore mixed.

Parts of the church hierarchy remained sceptical of the consequences of Western civilisation and democracy on the Church's role in Polish society, while other parts of the Church viewed European integration positively.[341]

An official church policy on Poland's membership of the EU and European integration came in March 2002, after accession negotiations ended between the EU and Poland. The Polish Episcopal Conference held that the Church and the Christian faith amounts to a foundation of European thought and the development of European civilisation. The Polish Catholic Church was however critical of the secular nature of the EU, which in its view would lead to a propagation of a materialistic, God-less lifestyle as fostered by Western European state-secularity, *laïcité.*[342]

The main concern of the Church was that EU membership would prove incompatible with the religious, national, political and cultural sovereignty of the Polish state, due to the posing challenges of European culture on Christian values.[343] In 2004, before Poland's formal accession to the Union, the church hierarchy published updated official policy towards the accession which was two-fold.

The Church recognised the importance of European integration in terms of advancing and developing the Polish state and society, but firmly held that Poles should resist certain elements of Western influence, also from EU institutions, which it held was detrimental to Christian life in

337 Ibid. 8.
338 Ibid.
339 Ibid. 14-15.
340 Brzezinski, Mark F., 'Constitutionalism and Post-Communist Polish Politics' (1998) vol 20:3 Loyola of Los Angeles International and Comparative Law Review 433 <https://digitalcommons.lmu.edu/ilr/vol20/iss3/2> accessed 30 September 2021,442-443.
341 Machaj, Lukasz and Bialas-Zielinska, Klaudyna, 'The Institutional Catholic Church in Poland on European Integration' (2013) vol 3:1 Wroclaw Review of Law, Administration & Economics 1, 2.
342 Ibid. 4.
343 Ibid.

Poland.[344] Church policy strongly opposed liberalisation of abortion in EU member states, euthanasia, LGBT rights which included same-sex marriages, partnerships and adoptions.[345]
From a Lisbon Treaty perspective, the Polish Episcopal Conference only approved of the government's signing of the treaty after Poland received an opt-out, concerning the Charter for Fundamental Rights. The Church's main oppositions centred around articles relating to concerns over the CFR giving same-sex couples potentially the same rights as heterosexual couples in Poland and paving the way for legal abortion.[346]

The Church's hierarchy's condition for acceptance was the preservation of the national legislative independence on moral matters, which meant that the church refrained from at least openly politically protesting against the Lisbon Treaty and its ratification in the Polish parliament.[347]

Poland's membership of NATO, and later the EU, also had a geostrategic dimension, due to Poland bordering Russia, Belarus and Ukraine, all former Soviet Union states and non-Schengen countries.

If Poland had not joined neither NATO nor the European Union, there were fears from a Western and NATO perspective that Russian influence would drag Poland and other ex-Warsaw Pact states into its political orbit.[348] Domestically, opinions were voiced by the Polish parliament that Poland and Ukraine become members of the EU together, simultaneously.[349] Ukraine however, never joined the European Union and remained under Russian influence, in which Russia eventually annexed the Crimean peninsula, belonging to Ukraine, in 2014, in breach of international law.[350]

Today as an established EU member state, the debate and concerns around rule of law backsliding mainly surrounds around Poland and Hungary, where ruling Eurosceptic populist parties have used parliamentary majorities to assert control over the judiciary and important aspects of state functioning.[351] It could be argued that the EU's response through legal means to the democratic backsliding is limited. Critics have pointed out that the threshold for Article 7 TEU infringement procedures are steep. Due to the nature of Article 7, and any action requiring unanimous decision by the European Council, it forces the European Commission's enforcement avenues to soft power approaches and CJEU court proceedings, of which the available remedy is financial penalties for the backsliding member state.[352]

344 Ibid. 7-8.
345 Ibid. 8.
346 Barnard, Catherine, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Stefan Griller and Jacques Zillers (eds), *The Lisbon Treaty (*Springer 2008), 15.
347 Machaj, Lukasz and Bialas-Zielinska, Klaudyna, 'The Institutional Catholic Church in Poland on European Integration' (2013) vol 3:1 Wroclaw Review of Law, Administration & Economics 1, 13.
348 Taras, Ray, 'Poland's Accession into the European Union: Parties, Policies and Paradoxes' (2003) vol 48:1 The Polish Review 3, 14.
349 Ibid. 8.
350 United Nations General Assembly Resolution 68/262 (27 March 2014) A/RES/68/262.
351 Matczak, Marcin, 'Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) vol 12 Hague Journal on the Rule of Law 421 <https://doi.org/10.1007/s40803-020-00144-0> accessed 2 October 2021, 422-423.
352 Scheppele, Kim Lane, Kochenov, Dimitry and Grabowska-Moroz, Barbara, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) vol 39 Yearbook of European Law 3 <https://doi.org/10.1093/yel/yeaa012>

Currently the two Article 7 TEU procedures against Poland and Hungary, launched in 2017 and 2018 respectively, regarding rule of law remains in the European Council, and the European Commission's Rule of Law Report for 2021 notes that as of June 2021 no decision has been made regarding the process.[353] As of 15th of September 2021, the European Commission has 153 open infringement cases relating to rule of Law in Poland and Hungary.[354]

Furthermore, the European Council has also been divided on how or whether at all to respond, with British PM Theresa May holding in 2017 that constitutional issues are of national concern and declined to criticise rule of law backsliding in Poland.[355] The United Kingdom left the European Union on 31st of January 2020.[356] It has therefore been suggested by legal scholars that the European Union currently lacks the effective legal tools and political willpower to restore the rule of law in backsliding member states.[357]

4.4. The European Commission's Avenues for rule of law enforcement

In the European Commission's first annual *Rule of Law Report* published in September of 2020, the Commission identified several challenges to the rule of law in member states which in 2020 extensively dealt with the pandemic. The Covid-19 pandemic has from a rule of law perspective brought legislative emergency measures, powers and suspensions of legal safeguards, checks and balances generally in EU member states, which the Commission sees as a challenge to the greater adherence of rule of law principles.[358]

Since the treaties do not confer exclusive or shared competence regarding health matters, member states have largely had national discretion on which measures to enact, subject to national constitutional tradition and legal provisions.[359] However, the principle of primacy of EU law holds that any legislative acts undertaken as a response to the ongoing pandemic must abide by the treaties, and specifically the rule of law provision in Article 2 TEU.[360]

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accessed 27 September 2021, 35.

353 European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2021) 700 final, 28.

354 Statistics received from the European Commission on 15th September 2021, active rule of law infringement cases as per 13th September 2021, available on file.

355 Kochenov, Dimitry Vladimirovich, Pech, Laurent and Scheppele, Kim Lane, 'The European Commission's Activation of Article 7: Better Late than Never?'(2017) Verfassungsblog <https://DOI:10.17176/20171223-131736> accessed 5 October 2021.

356 'When did the United Kingdom leave the European Union?' (*Government of the Netherlands*) <www.government.nl/topics/brexit/question-and-answer/when-will-the-united-kingdom-leave-the-european-union> accessed 10 November 2021.

357 Bakke, Elisabeth and Sitter, Nick, 'Democratic backsliding in the European Union' (2019) vol 28 Oxford Research Encyclopedia of Politics <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1476> accessed 29 September 2021, 14.

358 European Commission, '2020 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2020) 580 final, 6.

359 Ibid.

360 Ibid.

The European Commission can be said to be in practical legal means limited in its response to the suspension of the emergency measures introduced in member states, and its role instead amounting to monitoring the situation and evaluating the impact on the rule of law.[361] The Commission further holds that the introduction of restrictions which limits fundamental freedoms in response to the pandemic, must be seen from the legal and constitutional cultures in individual member states, and views this perspective as problematic, as rule of law has been facing national legal obstacles in terms of access to justice and public scrutiny.[362]

With regards to access to justice, the Commission also notes that court access and the possibility for judicial review are fundamental parts of rule of law, and the absence of such legal options that enables public scrutiny constitutes a major vulnerability in the rule of law in Europe.[363] Sweden for example, lacks any form of mechanism for abstract judicial review in the national legal order[364], thus hindering judicial review of the Swedish government's response to the pandemic, which has been a combination of law, non-binding recommendations and governmental decrees which restricts fundamental freedoms.[365]

The 2020 rule of law report also specifically focused on the ongoing tug-of-war between European Union institutions and the governments in Poland and Hungary over rule of law concerns, rulings by the CJEU and ongoing infringement procedures, with the European Commission describing the situation of the judiciary in Poland and Hungary as a *major source of controversy*.[366]

Bulgaria, Romania, Slovakia and Croatia, all former post-communist states which joined the EU in 2004, 2007 and 2013, respectively are also being criticised by the Commission due to gradual erosion of independent and efficient judiciaries.[367] The European Union therefore fears the refusal of the Polish government to implement EU primary and secondary law nationally, erodes the primacy of EU law, and risks leading to Poland leaving the European Union.[368]

Since the Law and Justice Party (PiS) won Polish parliamentary elections in 2015 and subsequent elections in 2019, both times with parliamentary majority, it has undertaken a restructuring of the national judiciary which the EU opposes as being a breach of fundamental values. The restructuring of the judiciary involves a politically appointed disciplinary chamber that has the mandate to remove sitting judges for perceived offences, which has been criticised as being illegal.[369]

361 Ibid.
362 Ibid. 7.
363 Ibid.
364 Nergelius, Joakim, *Svensk statsrätt* (3rd edn, Studentlitteratur 2014), 233, 249.
365 'The Government's work in response to the virus responsible for Covid-19' (*Government Offices of Sweden*, 3 September 2021) <www.government.se/government-policy/the-governments-work-in-response-to-the-virus-responsible-for-covid-1/> accessed 10 October 2021.
366 European Commission, '2020 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2020) 580 final, 10.
367 Ibid. 11.
368 'Top Poland court ruling moves toward undermining EU laws' *Deutsche Welle* (Berlin 14 July 2021) <https://p.dw.com/p/3wU72> accessed 05 October 2021.
369 Matczak, Marcin, 'Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) vol 12 Hague Journal on the Rule of Law 421 <https://doi.org/10.1007/s40803-020-00144-0> accessed 2 October 2021, 430.

Since the disciplinary chamber consists of judges appointed by PiS, the CJEU found that the regime does not live up to good governance standards of impartiality and independence but also the separation of the legislative, political power, and the judicial process.[370]

The CJEU *inter alia* found that judges were referred for disciplinary action for requesting preliminary rulings from the CJEU in lieu of Article 267 TFEU, a clear violation of the treaties and the rule of law in the EU.[371] The Court furthermore held that the current state of the judiciary in Poland contravenes Article 2 and its rule of law requisite and that the Polish judiciary cannot be considered independent vis-a-vis political control.[372]

The Polish government considers the disciplinary chamber necessary in order to root out communist-era corruption in the judiciary and instead enabling and protecting the rule of law in Poland.[373] Furthermore, in a recent ruling by the Polish Constitutional Court, the court held that if EU law or CJEU rulings contravenes the Polish constitution, then it is to be considered null and void in the Polish legal order.[374]

During Hungarian PM Viktor Orbán's tenure as Prime Minister, the ruling Fidesz political party has since 2010 overhauled the Hungarian constitution. In 2013, amendments to the Hungarian constitution lowered the retirement age for judges, prosecutors and notaries, thus effectively forcing early retirement.[375] The changes to the judiciary in Hungary was brought before the CJEU after the Commission launched an infringement procedure regarding the matter, and the CJEU ultimately ruled that the changes eroded rule of law in the Hungarian judiciary and contravenes EU law, specifically the obligation of adhering to the rule of law as laid out in Article 2 TEU.[376] Usually, the appointment of judges of some instances in the Hungarian court system rests as per the constitution in the Hungarian President.[377]

Separately, in an EU-criticised newly-established administrative court system, the appointment of judges are made by the minister of justice, a political member of the executive. [378] The Council of Europe's Venice Commission has stated that the Minister of Justice's role in the appointment of judges essentially is without checks and balances in order to counteract the executive's powers, effectively circumventing judicial review.[379]

370 Case C-791/19 *Commission v Poland* [2021] ECLI:EU:C:2021:596, para 235.
371 Ibid. para 227.
372 Ibid. para 157.
373 'Sad Najwyzszy nisczy panstwo prawa' *TVP Wiadomosci* (Warszawa 21 April 2020) <https://wiadomosci.tvp.pl/47671390/sad-najwyzszy-niszczy-panstwo-prawa> accessed 10 October 2021.
374 Dz.U. poz. 1309 Wyrok Trybunału Konstytucyjnego z dnia 14 lipca 2021 r. sygn. akt P 7/20.
375 Szente, Zoltan, 'Challenging the basic values – problems in the rule of law in Hungary and the failure of the EU to tackle them' in Andras Jakab and Dimitry Kochenovs (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance (*Oxford University Press 2017), 466.
376 Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687, para 81.
377 Kazai, Viktor Zoltan, 'The Last Days of the Independent Supreme Court of Hungary?'(2020) Verfassungsblog <https://DOI:10.17176/20201013-233456-0. > accessed 10 October 2021.
378 Gall, Lydia, 'Hungary's Latest Assault on the Judiciary: President Ader Should Reject Law That Sets Up New Court System' *Human Rights Watch* (New York 14 December 2018) <www.hrw.org/news/2018/12/14/hungarys-latest-assault-judiciary> accessed 15 October 2021.
379 Council of Europe, 'Hungary: Opinion on the Law on Administrative Courts and on the Law on the Entry into

Furthermore, the Hungarian constitutional court declared in 2016 that the concept of Hungarian identity and sovereignty cannot be conferred to the EU in lieu of treaty obligations, effectively limiting the status of the principle of primacy of EU law in Hungary.[380] The state of the Hungarian judiciary has been heavily criticised by the European Commission which holds that the judiciary in Hungary is not to be considered independent and does not live up to Article 2 TEU constitutional obligations regarding rule of law.[381]

Viktor Orbán and the Fidesz ruling party has defended the constitutional changes relating to judges, the judiciary and instead deems the political process is subject to normal checks and balances and contrary strengthens the rule of law in Hungary.[382]

In late July of 2021 the second annual Rule of Law Report from the European Commission was published. The Commission noted that the Covid-19 pandemic still poses a challenge of the resilience of national court systems and rule of law provisions, with pressures being put on constitutional checks and balances in relation to emergency powers laws and decrees.[383] However, the Commission is critical of how some member states lack the necessary legal regimes in order for pandemic-related emergency measure to undergo constitutional and parliamentary scrutiny, and the situation poses a larger challenge for the respect of the rule of law and fundamental rights in general.[384]

In terms of judicial independence, the Commission notes that in the EU Justice Scoreboard for 2021, a part of the EU rule of law framework of assessing and addressing democratic backsliding, the independence of the judiciary in Hungary and Poland remains low in the public opinion; with over 50 % of respondents holding that the judiciaries are subjected to interference from government and politicians.[385] In terms of the state of the judiciary concerning Poland and Hungary, there has been no change in direction over the current governments and changes relating to the appointment of judges, or as in the Polish case, the disciplinary chamber of the Supreme Court.[386]

Force of the Law on Administrative Courts and Certain Transitional Rules' (Venice Commission Opinion) CDL-AD(2019)004,

380 Drinóczi, Tímea, 'The Hungarian Constitutional Court on the Limits of EU Law in the Hungarian Legal System' (2016) Blog of the International Journal of Constitutional Law <www.iconnectblog.com/2016/12/the-hungarian-constitutional-court-on-the-limits-of-eu-law-in-the-hungarian-legal-system/> accessed 16 October 2021.

381 European Commission, 'Rule of Law Report 2020' (European Commission, September 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN> accessed 27 September 2021, 10.

382 Halmai, Gabor and Scheppele, Kim Lane, 'Orbán is Still the Sole Judge of his Own Law'(2020) Verfassungsblog <DOI:10.17176/20200501-013725-0> accessed 16 October 2021.

383 European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2021) 700 final, 3.

384 Ibid.

385 European Commission, 'The 2021 EU Justice Scoreboard' (Communication) COM(2021) 389, 41, fig 49.

386 European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2021) 700 final, 7.

The double role of the Polish minister for justice, simultaneously being prosecutor general, is also being forwarded as a threat to judicial independence and rule of law.[387] The Commission worries that the principle of primacy of EU law in Poland has not improved since the 2020 report.

On 14th of July 2021 the Polish Constitutional Court found that CJEU rulings that contravenes the Polish constitution are not to be implemented. Subsequently the Polish Supreme Court repealed previous rulings by the CJEU in relation to *inter alia* the demand to suspend activities of the disciplinary chamber concerning judges.[388]

The mechanisms and processes behind the current and ongoing rule of law backsliding in Poland has been explored and discussed both from EU and academic and legal perspectives. One possible explanation is that the current Polish post-communist state is following a legal-political pattern prevalent in the Polish People's Republic. The legal order and constitutional framework as envisaged by the European Union is considered by the ruling PiS to be obstacles in the realisation of the political will, and the deviating set of norms will therefore be disregarded or changed in order to realise political goals.[389]

The law and constitutional order as seen from the perspective of PiS is a balancing act between effectiveness and a formal set of values. Where the two different visions of society clash, the political will changes or aims to amend the law in order to achieve ideological changes, even though the result implies breaking the law's formal set of values.[390]

The current state of the Polish judiciary has been compared to the Stalinist 1952 constitution. The first constitution in the Polish People's Republic removed any pre-war rule of law necessities, such as checks and balances through a separation of powers. The PiS-led legislative process since 2015 and onwards has seen a similar development, where the judiciary's independence gradually has been replaced with abstract political ideas stemming from non-formal values, such as what is considered *good for the nation* as opposed to a formal rule-based system which has its own internal defence against attacks on the judiciary through non-legal methods.[391]

387 Ibid. 7.
388 European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2021) 700 final, 22.
389 Matczak, Marcin, 'Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) vol 12 Hague Journal on the Rule of Law 421 <https://doi.org/10.1007/s40803-020-00144-0> accessed 2 October 2021, 427.
390 Ibid.
391 Ibid. 446-447.

5. The Polish Constitutional Tribunal's judgement on the incompatibility of EU Law

5.1. The findings of the tribunal and the rationale for domestic judicial review

On the 16th of April 2021, the Polish Prime Minister Mateusz Morawiecki sent a constitutional question to the Polish Constitutional Tribunal on whether EU law or the Polish constitution takes legal precedence in the national Polish legal order.[392] The application to the constitutional tribunal was made in relation to the CJEU's ruling in March 2021, which held that national courts in Poland cannot be blocked by means of legislation to refer cases to the CJEU in lieu of Article 267 TFEU. The Court further ruled that the Polish legislation was enacted to prevent the judicial review of the appointment of judges by the controversial, politically-led *Krajowa Rada Sądownictwa* (KRS; National Council of the Judiciary).[393]

According to the CJEU, courts in Poland are *ex officio* able to judicially review the appointment of judges, regardless of hindrances in national legislation due to Article 19(1) TEU and Article 4(3) TEU being violated and due to the principle of primacy of EU law.[394]

On the 7th of October the Polish Constitutional Tribunal ruled on the matter and held in its ruling that firstly, certain Articles of the EU treaties were found to be incompatible with the Polish constitution; and secondly that Polish law takes precedence over EU law.[395] The ruling from the Polish Constitutional Tribunal has been described as a threat to the legal order of the EU insofar as the case rejects the primacy of EU law, a core legal principle of the EU's functioning.[396] In the run-up to the tribunal's verdict, a PiS MP and vice-chairman voiced that the CJEU's recent rulings concerning Poland lacks legal ground and amounts to competence creep and judicial activism.[397]

The ruling by the tribunal is significant due to the tribunal rejecting Articles 1, 2, 4(3) and 19(1) TEU as being incompatible with the Polish constitution and results in that Poland, according to the court, cannot function as a sovereign and democratic state.[398] Article 2 TEU gives mention to the core values of the EU and the principles which are to guide the legal framework of the Union, including asserting rule of law as a constitutional principle. The Polish court rejected the jurisdiction of the CJEU by ruling that Article 19 TEU, which regulates the CJEU's jurisdiction and

392 'Morawiecki zaskarżył do TK trzy przepisy Traktatu o UE. Opublikowano jego wniosek' (2021) *Dziennik Gazeta Prawna* (Warsaw 16 April 2021) <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8143885,morawiecki-wniosek-do-trybunalu-konstytucyjnego-traktat-o-unii-europejskiej.html> accessed 18 November 2021.

393 Case C-824/18 *A.B. and others v Prokurator Generalny* [2021] ECLI:EU:2021:153, paras 165-166.

394 Ibid.

395 Dz.U. 2021 poz. 1852 Wyrok Trybunału Konstytucyjnego z dnia 7 października 2021 r. sygn. akt K 3/21.

396 Scislowska, Monika, 'Court rules Polish Constitution has primacy over EU laws' (2021) *Associated Press* (Warsaw 7 October 2021) <https://apnews.com/article/european-union-poland-europe-courts-1175aa5efa731c9cac6189443eee3f9c> accessed 20 November 2021.

397 'Fogiel o TSUE: Większość ostatnich orzeczeń ma co najmniej wątpliwą podstawę prawną' (2021) *TVP Info* (Warsaw 7 October 2021) <www.tvp.info/56250743/fogiel-o-tsue-wiekszosc-ostatnich-orzeczen-ma-co-najmniej-watpliwa-podstawe-prawna> accessed 7 October 2021.

398 Dz.U. 2021 poz. 1852 Wyrok Trybunału Konstytucyjnego z dnia 7 października 2021 r. sygn. akt K 3/21, art 1(c).

responsibilities, is inconsistent with the domestic legal order of Poland.[399]

The ruling has been described as a *legal withdrawal* from the EU legal order, and in effect the Polish court rejecting conferred competency to the EU and the ruling could be used to disapply or refuse to adhere to rulings from the CJEU or other EU legal acts.[400] In a statement after the ruling was published, the tribunal reminded of the predispositional status of the Polish constitution, the role of the Polish Constitutional Tribunal and did not rule out a complete removal of CJEU case law from the Polish legal order, due to the legal incompatibilities.[401]

The European Commission *in blanco* rejected the Polish tribunal's ruling and reiterated the primacy of EU law, the binding nature of the CJEU's verdicts and has vowed to use all available tools given to the Commission in order to reassert the primacy of EU law in Poland.[402] Reactions from EU institutions feared the ruling might be the first step towards Poland leaving the European Union.[403] The Hungarian minister of Justice, Judit Varga, supported the Polish Tribunal's ruling, holding that the Polish ruling was an important step in stymieing Brussels' "imperialist" ambitions.[404]

The Polish Constitutional Tribunal's ruling has also been touted as a symptom of wider failure for the European Commission to tackle the ongoing challenges to rule of law in Poland and Hungary. Some MEP's hold that due to the Commission's inaction on rule of law in the EU, populist governments have been emboldened to cross legal red lines, *inter alia* the rejection of EU law primacy in Poland.[405] The European Commissioner responsible for rule of law, Vera Jourova, warned that the Polish tribunal's ruling will result in the collapse of the EU legal order if left unchallenged.[406]

399 Ibid.

400 Thiele, Alexander, 'Whoever equals Karlsruhe to Warsaw is wildly mistaken' (2021) Verfassungsblog <https://doi.org/10.17176/20211010-181242-0> accessed 3 November 2021.

401 'TK ogłosił wyrok. Niektóre przepisy traktatu UE niezgodne z konstytucją' (2021) *Polsat News* (Warsaw 7 October 2021) <www.polsatnews.pl/wiadomosc/2021-10-07/trybunal-konstytucyjny-ws-wyzszosci-prawa-unijnego-nad-krajowym/?ref=slider> accessed 8 October 2021.

402 European Commission, 'Statement by European Commission President Ursula von der Leyen' (Statement) 21/5163 <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5163> accessed 15 October 2021.

403 Scislowska, Monika, 'Court rules Polish Constitution has primacy over EU laws' (2021) *Associated Press* (Warsaw 7 October 2021) <https://apnews.com/article/european-union-poland-europe-courts-1175aa5efa731c9cac6189443eee3f9c> accessed 20 November 2021.

404 'Minister sprawiedliwości Węgier: Trzeba powstrzymać imperialne zapędy Brukseli' (2021) *TVP Info* (Warsaw 10 October 2021) <www.tvp.info/56300339/minister-sprawiedliwosci-wegier-i-szef-kancelarii-premiera-wegier-o-wyroku-polskiego-trybunalu-konstytucyjnego-ws-nadrzednosci-prawa-ue-nad-konstytucja> accessed 10 October 2021.

405 Freund, Daniel, 'Polexit ruling could be defining moment of Ursula von der Leyen's European Commission Presidency, argues Daniel Freund' (2021) *The Parliament Magazine* (Brussels 12 October 2021) <www.theparliamentmagazine.eu/news/article/polexit-ruling-could-be-defining-moment-of-ursula-von-der-leyens-european-commission-presidency-argues-daniel-freund> accessed 13 October 2021.

406 Jourova: EU 'will start collapsing' unless it takes on Polish challenge' (2021) Euractiv (Brussels 12 October 2021) <www.euractiv.com/section/elections/news/jourova-eu-will-start-collapsing-unless-it-takes-on-polish-challenge/> accessed 13 October 2021.

According to Polish law, the ruling took effect on the 12th of October by the publication of the verdict in the official legislative gazette, the *Dziennik Ustaw*.[407] From a legal perspective, parts of the EU legal order has therefore been found to not apply to the domestic legal order and cannot therefore be invoked by national institutions as per the constitutional framework now holds, as ruled by the tribunal, that Polish law takes precedence over EU law.[408]

However, on the same day, as the ruling received force of law in the national legal order, the Polish Association of Judges *Justitia*, representing 3500 judges totalling 1/3 of the total number of judges in Poland[409], released a statement signed by 352 active judges reiterating the primacy of EU law in relation to the Polish constitution and vowing to disregard the ruling by the Polish Constitutional Tribunal.[410] The statement by the Polish Association of Judges can be interpreted that there at least partly exists a discrepancy between the Polish legislator and the legal practitioners.

5.3. EU reactions to the Polish tribunal's ruling

On the 19th of October 2021 the ruling was debated in the European Parliament, with Polish PM Mateusz Morawiecki taking part. According to the Polish prime minister, the Polish tribunal's ruling was entirely in line with the treaties, and furthermore holding that it would be an affront to national sovereignty if the CJEU were to empower national court judges with the possibility of disregarding the Polish Constitutional Tribunal's rulings, or the Polish constitution and its articles.[411]

The Polish PM defended the verdict and the notion of national constitutional and legal supremacy in relation to EU law and CJEU case law, holding that any other interpretation would lead to anarchy, confusion and lawlessness in Poland, a development which no sovereign state can accept.[412]
The PM accused the European Union and specifically the CJEU of competence creep and strongly opposed legal integration through a perceived *judicial activism* by the CJEU and made the call for reformation of the EU, as the Union and its institutions vastly overstep their conferred competences.[413]

407 Dz.U. 2021 poz. 1852 Wyrok Trybunału Konstytucyjnego z dnia 7 października 2021 r. sygn. akt K 3/21.
408 Ibid.
409 'About us' (*Iustitia Stowarzyszenie Sedziow Polskich*) <www.iustitia.pl/en/about-us/about-us> accessed 18 October 2021.
410 'Podpisy pod apelem sędziów w sprawie wykonania orzeczeń trybunałów europejskich i systemu powołań sędziowskich' (*Iustitia Stowarzyszenie Sedziow Polskich*, 12 October 2021) <www.iustitia.pl/4290-podpisy-pod-apelem-sedziow-w-sprawie-wykonania-orzeczen-trybunalow-europejskich-i-systemu-powolan-sedziowskich> accessed 18 October 2021.
411 Government of Poland, 'Statement by Prime Minister Mateusz Morawiecki in the European Parliament' (*The Chancellery of the Prime Minister*, 19 October 2021) <https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament> accessed 19 October 2021.
412 Ibid.
413 Ibid.

Morawiecki accused the EU and Western European member states of patronising the Polish state and lecturing Poland on the rule of law, treating Poland as a second-class member state.[414] It has been suggested that the European Commission will use the new rule of law conditionality requirements as a prerequisite for payments from EU funds, and specifically relating to the Covid-19 recovery fund decided in 2020, to Poland.[415] The legality of the rule of law conditionality mechanism is currently as of December 2021 being judicially reviewed in the CJEU after petitions from Poland and Hungary. On the 2nd of December 2021 the Advocate General in the case held in his opinion to the CJEU that the Polish and Hungarian standpoints be dismissed as the rule of law conditionality had a clear legal foundation in the Treaties.[416] As of December 19th the case is still pending.

The European Commission has been reluctant in triggering the mechanism in relation to the rule of law dispute with Poland, resulting in the European Parliament suing the European Commission and bringing the matter to the CJEU for the latter's perceived inaction in relation to the changes to the Polish judiciary, the verdict from the Polish Constitutional Tribunal and other concerns over rule of law backsliding in the EU.[417]

The Polish Prime minister has as a response to the criticism accused the EU of financial blackmail. According to Morawiecki, the EU wants to start a third world war with Poland and that the withholding of EU funds meant that the European Commission itself breached the rule of law.[418]

5.4. The historical and legal reasons leading up to EU law rejection

The Polish stance in the rule of law crisis has also from an EU law perspective been said to contain concerns previously voiced and discussed. The CJEU has been accused of so-called *competence creep*, where the court advances legal integration through its case law, disregarding potential boundaries as set out by the treaties.[419] The functioning of the internal market and economic activities has frequently been used by the CJEU as the legal foundation for expanding the European Union's competences.

In *Bosman*, the CJEU found that football transfer rules are subject to EU law scrutiny due to the economic nature of the procedure, even though that the treaties, in their current form in lieu of the Lisbon Treaty, left sports in national governments' competence.[420]

414 Ibid.

415 Gwozdz-Pallokat, Magdalena, 'Poland vows not to pay any EU court fines' (2021) *Deutsche Welle* (Berlin 28 October 2021) <https://p.dw.com/p/42Isy > accessed 29 October 2021.

416 Cases C-156/21 *Hungary v Parliament and Council* [2021] and C-157/21 *Poland v Parliament and Council* [2021] ECLI:EU:C:2021:974, ECLI:EU:C:2021:978, Opinion of AG Campos Sánchez-Bordona.

417 European Parliament, 'Parliament files lawsuit against Commission over rule of law mechanism' (Statement by the President of the European Parliament 29 October 2021) <https://the-president.europarl.europa.eu/en/newsroom/parliament-files-lawsuit-against-commission-over-rule-of-law-mechanism> accessed 30 October 2021.

418 Foy, Henry and Fleming, Sam,'Poland's Prime Minister accuses EU of making demands with 'gun to our head', (2021) *Financial Times* (London 24 October 2021) <www.ft.com/content/ac57409d-20c9-4d65-9a5d-6661277cd9af> accessed 25 October 2021.

419 Garben, Sacha, 'Competence Creep Revisited' (2019) vol 57:2 Journal of Common Market Studies, 4.

420 Garben, Sacha, 'Competence Creep Revisited' (2019) vol 57:2 Journal of Common Market Studies, 5.

The actions of the CJEU has been furthermore identified as one of the components of the democratic deficit of the EU, and concerns over using the CJEU as an arena for both Eurosceptics and federalists with the goal of advancing a political agenda in which voter oversight is severely limited.[421] The main difference being that primacy of EU law was never questioned in *Bosman*, regardless of the analogue interpretation of competence via the inner market route, while the Polish Constitutional Tribunal's ruling targeted the EU legal order in general.

The principle of sincere cooperation as laid out in Article 4(3) TEU has also been brought forward as limiting national sovereignty by the CJEU by means of *intra vires* case law.[422] Controversial standpoints by the CJEU as expressed in its case law is however nothing new and has received mixed reactions in European governments since the 1950's.[423]

The CJEU has through a gradual evolution been said to acquire the character of a federal court, due to the success of the constitutionalist interpretation of EU law, and the impact of its case law as a result.[424] Core EU legal principles; primacy of the EU legal order *vis-a-vis* national law and direct effect were made possible only through the inclusion of judges favourable of European federalism and expressing political views positive of European legal integration.[425]

The European Commission viewed primacy of EU law as fundamental to the survival and advancement of the EU legal order and using the CJEU as tool to achieve this already since before the defining judgements which has shaped the EU legal order to this day.[426] The reasons as to why European governments accepted the role of the CJEU armed with a constitutionalist perspective with a positive view towards integration has been described in doctrine as European governments being preoccupied with more significant matters, both from an EU legislative perspective but also national perspective, as the 1960's was a sensitive time in lieu of the Cold War in post-war Europe and European leaders focusing on how to deal with the web of different legislative frameworks in an emerging common market.[427]

The United Kingdom and its political ambiguity towards the EU constitutional framework, with the ultimate result in the withdrawal from the EU, can also be said to have been a contributing factor to the rule of law crisis present. The accession of the United Kingdom to the EC was seen as hindering any reform of the CJEU and its role or the treaties in either direction, maintaining a political status quo until the mid-1980's.[428]

421 Ibid. 9-10
422 Case C-246/07 *Commission v Sweden* [2009] ECLI:EU:C:2009:589, Opinion of AG Maduro, para 58.
423 Rasmussen, Morten, 'Revolutionizing European law: A history of the Van Gend en Loos judgement' (2014) vol 12:1 International Journal of Constitutional Law 136, 140.
424 Ibid. 146.
425 Ibid. 148.
426 Ibid. 151.
427 Ibid. 161.
428 Ibid.

The United Kingdom has from a political perspective rejected suggestions of enshrining the principle of primacy of EU law into the treaties in writing, in which the last attempt was made to include an article codifying *Costa v ENEL* in the failed European Constitutional Treaty in 2004.[429] Political ambiguity surrounding the role of the CJEU and the absence of alternatives has also been found to have affected the situation.[430] Therefore, Brexit and the success of Eurosceptic political standpoints may have emboldened the Polish government to seek confrontation with the EU, as it has been suggested that Poland's ruling PiS party has the same view on EU membership as the British Conservatives under David Cameron.[431]

Poland's current stance towards the CJEU, European legal integration, and in lieu of the recent ruling by the Polish Constitutional Tribunal, can also be said to not be a new phenomenon. The Polish Constitutional Tribunal, whose rulings cannot be appealed and where the ruling has an *erga omnes* force[432] has from its perspective always held that the Polish constitution is the supreme set of norms in Poland and not the EU legal order and CJEU case law.

After the Polish accession to the EU, the Polish Constitutional Tribunal in May 2005 delivered its ruling concerning the constitutionality of the Accession Treaty. The main features of the ruling being that EU membership does not entail a limitation of Polish sovereignty, nor undermining the supremacy of the Polish legal order, and specifically the Polish constitution.[433] Furthermore, the Polish tribunal held that in lieu of the Polish constitution, no legal competence may be conferred to the EU if this would result in legislation, binding upon Poland, that contravenes the Polish constitution.[434]

The tribunal also spelled out a limit of conferral of legislative power, holding that no delegation can be conferred to the EU or its institutions to such extents that Poland cannot function as a sovereign and democratic state.[435] As for the status of the CJEU and its jurisdiction as the sole interpreter of EU primary and secondary law according to Article 19 TEU, the Polish constitutional court contested this in its 2005 ruling, instead holding that the CJEU cannot be considered the sole interpreter of EU legal acts, basing its reasoning on the principle of subsidiarity and mutual loyalty which creates and obligation for the CJEU to respect member states' national legal systems.[436]

429 Craig, Paul, 'Integration, democracy, and legitimacy' in Paul Craig and Grainne de Búrca (eds), *The evolution of EU law* (2nd edn Oxford University Press 2011), 344-345.

430 Rasmussen, Morten, 'Revolutionizing European law: A history of the Van Gend en Loos judgement' (2014) vol 12:1 International Journal of Constitutional Law 136, 162.

431 MacShane, Denis and Richter, Stephan, 'After Brexit: How Poland Replaces the UK' (2021) *The Globalist* (Washington D.C., 29 October 2021) <www.theglobalist.com/after-brexit-how-poland-replaces-the-uk/> accessed 16 November 2021.

432 Constitution of the Republic of Poland of 2nd April, 1997, as published in *Dziennik Ustaw* No 78, item 483, art 190.

433 Kustra, Aleksandra, 'Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure' (2015) vol 16:06 German Law Journal 1543, 1548.

434 Ibid.

435 Ibid.

436 Ibid. 1549

The Polish tribunal's standpoint can be considered significant from a EU constitutional perspective, as it denotes that the CJEU's jurisdiction in effect will be limited concerning the interpretation of the treaties, and has to accept being challenged by national courts in member states, drawing upon a different interpretation of judicial independence in a treaty-based setting.[437] The 2005 ruling, while asserting Polish legal supremacy, also held that there existed a need of creating a legal situation in which both the Polish constitutional tribunal and the CJEU's different, but sometimes overlapping jurisdictions could coexist, and prevent the Polish and EU legal orders being considered dysfunctional or incompatible.[438]

The Polish court has used the preliminary reference procedure under Article 267 once, in 2011 where it in the case *Supronowicz* judicially reviewed the constitutionality of EU law relating to executive enforcement in Poland as requested from a Belgian court.[439] *Supronowicz* is as significant from a constitutional perspective, as is the Polish court's *Accession Treaty* judgement from 2005, in part because it was the first time since *Solange I* and *Solange II,* in which the German Constitutional Court in the 1970's questioned the protection of fundamental rights in the EU legal order, a member state had conducted judicial review on compatibility, not *prima facie* accepting the outcome of *Solange I* and *II* and questioning the supremacy of EU legislation.[440]

Supronowicz has been described as a continuation of the *Solange* reasoning due to the Polish stance that the national legal order had more sufficient individual protections and safeguards than EU primary and secondary law.[441]

From a national Polish perspective, the Polish Constitutional Tribunal reiterated, both in 2005 Accession Treaty judgement and in 2011's *Supronowicz* that it in essence did not accept the principle of primacy of EU law, instead holding that the Polish constitutional court was to be considered the true court of last instance in the Polish legal order, irrespective of the EU constitutional framework.[442]

It should also be noted that the composition of the Polish Constitutional Tribunal was fundamentally different in both 2005 and 2011 and existed in a different political climate, in which the former European Council President Donald Tusk, was Polish Prime Minister.[443] [444]

437 Ibid.
438 Ibid.
439 Kustra, Aleksandra, 'The judgment of Polish Constitutional Court in case Supronowicz (SK 45/09): the constitutional borrowing of "Solange" formula and its outcomes for the European judicial dialogue ' (2017) no 1 European Journal of Public Matters 36, 42.
440 Ibid. 41.
441 Ibid. 40.
442 Ibid. 43.
443 'Wybory do Sejmu Rzeczypospolitej Polskiej zarzadzane na dzien 21 pazdziernika 2007' (*Panstwowa Komisja Wyborcza*) <https://wybory2007.pkw.gov.pl/SJM/PL/WYN/W/index.htm> accessed 20 November 2021.
444 'Wybory 2011 do Sejmu i Senatu Rzeczypospolitej Polskiej zarzadzane na dzien 9 pazdziernika 2011' (*Panstwowa Komisja Wyborcza*) <https://wybory2011.pkw.gov.pl/wsw/pl/000000.html> accessed 20 November 2021.

As for the legislative framework surrounding the Polish Constitutional Court, the 2011 and 2005 rulings were made before the gradual process of democratic and rule of law backsliding, which began in 2015 after Law and Justice (PiS) winning parliamentary elections and Andrzej Duda, a former PiS politician, being elected president, as the controversial reforms to the Polish judiciary were made from 2015 onwards.[445]

Regarding the composition of the Polish Constitutional Court, none of the current judges of the Polish Constitutional Tribunal, were participating in the previous rulings questioning primacy of EU law, as all current judges were nominated in 2015 and onwards.[446]

The reasoning of the Polish court's ruling on the status of EU law in the Polish constitutional framework in the case K 3/21 delivered on October 7th can be said to be a continuation of the reasoning expressed in both 2004 and 2011, as primacy of EU law from a Polish constitutional perspective never had been fully implemented or accepted from a Polish legal perspective.[447] In the ruling on the 7th of October 2021, *K 3/21*, the Polish Tribunal had therefore resorted to the *ultima ratio* measure it had reasoned on in both the previous constitutional conformity cases, finding that EU law and CJEU case law is non-compatible with the Polish legal order per the Polish constitution, and that Poland could no longer function as a democratic and sovereign state, due to the EU expanding their competence without a legal foundation and going beyond the scope of the treaties.[448]

According to the Polish court, as expressed in the earlier rulings, if EU law and the Polish constitution would be found to be incompatible with each other, the only remedies would be to either amend the Polish constitution, amending the EU treaties or withdrawal from the European Union.[449] The Court furthermore foresaw the potential consequences of declaring non-conformity with EU primary and secondary law, noting that such a declaration from a national court would most likely be in violation of member state obligations, in lieu of the treaties with the potential launch of infringement procedures by the European Commission by referral to the CJEU.[450]

The Court did not elaborate in detail regarding which decision should be undertaken, but held that due to the Polish principle of favourable disposition of the Polish legal order and the Polish constitution, any decision must stem from the notion of Polish legal supremacy in relation to EU law.[451] In addition, any EU law measure which would be found to be in breach of the national legal order, would have to be legally disregarded nationally.[452]

445 Szymanek, Jaroslaw, 'Kontekst i znaczenie reformy sądownictwa w Polsce po 2015 R.' (2021) no 1 The Warsaw Institute Review <https://warsawinstitute.review/pl/1-2021/kontekst-i-znaczenie-reformy-sadownictwa-w-polsce-po-2015-r/> accessed 21 November 2021.

446 'Kadencje sędziów - zestawienie' (Trybunał Konstytucyjny) <https://trybunal.gov.pl/o-trybunale/sedziowie-trybunalu> accessed 20 November 2021.

447 Wyrok Trybunalu Konstycyjnego z dnia 16.11.2011 r., sygn. akt: II SK 45/09, 93/9/A/2011, 25.

448 Dz.U. 2021 poz. 1852 Wyrok Trybunału Konstytucyjnego z dnia 7 października 2021 r. sygn. akt K 3/21, 1. Art. 1 c).

449 Wyrok Trybunalu Konstycyjnego z dnia 16.11.2011 r., sygn. akt: II SK 45/09, 93/9/A/2011, 25.

450 Ibid.

451 Ibid. 26.

452 Ibid. 27.

6. Analysis and conclusion

The purpose of this study is to contribute to the wider EU constitutional law discussion and analysis surrounding the rule of law in the European Union, with a particular focus on Poland, due to its legal conflicts with the European Commission and Court of Justice of the European Union. A clash of constitutional systems which escalated in the autumn of 2021 when the Polish Constitutional Tribunal rejected the principle of primacy of EU law. The gradual process of changing or altering the importance of legal principles and checks and balances aiming to entrench the rule of a dominant party, is from an EU perspective amounting to rule of law backsliding, and illegal according to the treaties.

The study wants to answer what rule of law backsliding tell us about abstract EU values, how the rule of law is enforceable from a EU legal perspective and how rule of law backsliding has been developing in Poland and why.

The ongoing rule of law crisis, democratic backsliding and the debate and discussion surrounding these issues, that the European Union currently is facing, is from a legal-historical perspective a conflict that has been brewing since the end of the Cold War in the late 1980's and early 1990's. The situation today has been deteriorating over time and emerged in lieu of perhaps larger societal changes in Europe, of which has involved political decisions, events on the world stage external to the EU, and a resurgence in nationalism as reflected in parliamentary compositions in member states.

When former Warsaw Pact states began the process of democratisation and reintegration with the West in the 1990's, they had from a European Union political perspective a clear place in future enlargement of the EU.

The reasons for including Poland, Hungary and other ex-communist states correlated with the political idea of a united European continent as envisaged in the early days of the EU, however the strategic and geopolitical dimension of EU enlargement cannot be understated. Though, the implications of more than 40 years of one-party rule and its effects on national legal traditions and constitutional culture should not be underestimated either, from a Western European perspective.

Poland, being situated in Central Europe, is of strategic importance bordering Russia (Kaliningrad), Belarus and Ukraine, all former Soviet Union states and non-EU members. The events during summer and autumn 2021 on the Polish-Belorussian border, which has seen thousands of Middle Eastern migrants being pushed towards the EU's external border by Belarus president Alexander Lukashenko. Arguably as a Belorussian reaction to EU sanctions, the situation has seen EU institutions, EU political leaders and NATO all uniting behind the Polish stance of not letting migrants enter the European Union and apply for asylum. This can be interpreted as a sign of the geopolitical and geostrategic importance of Poland in Europe.

In November 2021, NATO intelligence reports suggested Russia seems to be planning to invade Ukraine in the near future, possibly in early 2022.[453] A Russian-occupied Ukraine would put EU and NATO member Poland at the border to a potential war zone, with unclear consequences to the general security situation in Europe.

The rule of law criticism from the EU seems to have been toned down in late 2021 in lieu of the current events on the EU's external border, as European leaders likely are mindful of a repeat process of both the migration crisis, which politically and legally grappled member states in the mid-2010s, and by concerns over actions by geopolitical adversaries.

For Poland, the events on the external border is simultaneously a signal to the European Union that Poland will defend its sovereignty by all means, and as a show of force, but also an opportunity to show that it is taking responsibility and safeguarding the European Union from foreign interference, an obligation stemming from the treaties.

Disregarding the geostrategic dimension of Poland as an EU member, the rule of law backsliding and the changes to the national judiciary in Poland cannot wholly be blamed on the Law and Justice (PiS) party either.

The controversial changes to the Polish judiciary began in 2015 after PiS winning both the Polish presidency and a parliamentary majority. The parliamentary majority saw PiS control both chambers of parliament, the first time it had been achieved by any political party since the end of the People's Republic of Poland. From a democratic perspective the majority means it reflected the popular vote, as PiS was running on a platform vowing to reform the judiciary it held was a relic from Poland's communist past.

However, as remarkable the Polish Constitutional Tribunal's ruling of October 7th 2021 is, where it found that the EU legal order was incompatible with the Polish constitution, it can in hindsight have been predicted. Previous rulings by the Polish tribunal in essence echoed the same perspective, that the Polish constitution and Polish legal order enjoys a favourable disposition over EU law, openly rejecting core EU legal principles and constitutional provisions. From the same perspective, the Polish Constitutional Tribunal's ruling of November 24th 2021 regarding the incompatibility of the ECHR and the Polish constitution, is also understandable, from a Polish domestic perspective.

PiS considers both the EU legal order, and the ECHR, as foreign tools stymieing the Polish constitution and its political playing field. Poland ratified the ECHR in 1993. Barely a few years after the dissolution of the Polish People's Republic and in the first, constitutionally tumultuous years of the new democracy. PiS therefore might consider the accession as a remnant of Poland's communist legacy, and in order to achieve true sovereignty, it must declare itself independent in relation to such conventions.

453 North Atlantic Treaty Organization, 'Doorstep statement by NATO Secretary General Jens Stoltenberg at the Meeting of NATO Ministers of Foreign Affairs, Riga' (Speech by NATO Secretary General 30 November 2021) <www.nato.int/cps/en/natohq/opinions_188767.htm?selectedLocale=en> accessed 1 December 2021.

From the Polish perspective of national sovereignty, Brussels is no different to Moscow, concerning legal influences on the Polish state and its constitution.

The previous rulings coming out of the Polish Constitutional Tribunal, from before PiS had majority, regarding the hierarchy of norms in Poland, have largely been omitted in the general debate in EU law circles, doctrine and journals surrounding the Polish tribunal's ruling in October 2021. What the latest rulings potentially shows and reiterates is that the principle of primacy of EU law never fully penetrated the Polish legal framework in a way that the EU or its institutions expected when Poland entered the Union in 2004. It can be argued it has been previously known to the general public, how the Polish judiciary acts when there is a conflict of norms – it defaults to domestic legal provisions.

From a Polish constitutional perspective, the Polish constitution always had preferential status in the national legal order, regardless of parliamentary majorities, existing in a legal status quo between two different sets of constitutional frameworks. The absence of external events, causing political upheaval or confrontation, can be said to have maintained a legal status quo between EU and Polish law.

Due to the general instability in the 2010's with the Syrian Civil War, the rise of ISIS and a resurgent Russia, the roles of the EU and its member states was being called into question, resulting in political ambiguity and strains between some member states and Brussels. The departure of the United Kingdom from the European Union can be argued to in part having played a factor in the legal stagnation of the European Union, in which the EU post-Brexit lacks clear vision and way forward, especially concerning the need for potential Treaty reform in lieu of the shortcomings of Lisbon becoming aware in the current rule of law crisis.

There are as of December 2021 no concrete proposals for treaty amendment or other reforms coming from EU institutions. Poland, however, argues for treaty reform, albeit from its national perspective with constitutional sovereignty in mind. The difference of opinion is fundamental, as Poland argues the EU needs to reform to reflect member states' legal sovereignty. The EU instead reiterates the primacy of EU law, even in relation to national constitutions and constitutional provisions, with CJEU case law as the normative source.

The rule of law crisis and debate concerning rule of law and democratic backsliding can therefore be said to have been a crisis in the making. The United Kingdom rejected many attempts at codifying in the treaties important aspects of CJEU case law, which had since landmark decisions such as *Costa v ENEL* or *Van Gend en Loos* shaped the constitutional character of the European Union. However, in the 2004 draft Constitutional Treaty, which would merge the treaties together into a new constitutional framework, the primacy of EU law had its own article and the binding force of CJEU rulings was clarified.

The proposed European Constitution however failed after public vote in France and the Netherlands, even though a majority of EU states had ratified it. The Lisbon Treaty recycled many parts of the constitutional treaty, while omitted the explicit article concerning EU law primacy as a compromise. The legal avenues for dealing with rule of law backsliding had therefore been reduced by political decision, and the EU instead being reliant on member states favouring further legal integration and reaching consensus on important issues.

The consequences for not adhering to, or even openly rejecting the EU legal order, is reliant on a political decision by European head of states in the European Council, subject to a broad range of, in the end, political considerations separated from the constitutional framework of the EU. It has been proven hard to use the Article 7 infringement procedure, as European *realpolitik* evidently has shown and is reflected in Article 7 TEU being triggered only twice and with no conclusive result. Though, both of the Article 7 proceedings concerned rule of law backsliding in Poland and Hungary respectively.

The Polish, and Hungarian, stance in the rule of law crisis should therefore be given some thought and reflection, as it raises questions of the democratic deficit of the EU, with a constant advancement of legal integration through formally correct *intra vires* CJEU case law and not through treaty reform, due to the latter being politically impossible at this present stage.

From a rule of law perspective, and according to the morality of laws and constitutional theory as expressed by Dicey, Hart and Fuller[454] [455] [456], important provisions ought to be reflected in a constitutional context. Otherwise, it reduces the subjects of holding the sovereign accountable. A member state – the subjects under the laws – has from a theoretical perspective a reduced capacity of holding the sovereign, the EU, accountable and conduct checks and balances of its legislative capabilities and power.

The Lisbon Treaty is in force since 2009 and it is unclear if the EU and its member states have the political will for a comprehensive new Treaty which will allow the EU to deal, through a comprehensive and clear constitutional framework, to the current issues facing the Union; migration, foreign and security policy, the democratic deficit and rule of law backsliding.

6.1. Does the European Union need treaty reform?

The current state of the Union's constitutional framework can be perceived as non-fulfilling, with important legislative mechanisms such as the Article 7 TEU infringement procedure relating to rule of law and human rights rendered practically unusable, due to the current unanimity requisite for any meaningful substantive action, resulting in a serious constitutional crisis.

454 Dicey, Venn Albert, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Classics 1982).
455 Cane, Peter, (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010).
456 Fuller, Lon, *The Morality of Law* (rev edn, Yale University Press 1969).

The European Union has developed its own legal system and constitutional framework for over 60 years and expanded into covering civil rights through the CFR and under the auspice of the CJEU. The CJEU in particular can be considered to have been an efficient enforcer of human rights, fundamental freedoms and upholder of rule of law, forcing member states to, sometimes reluctantly, adhere and adapt to important rule of law principles such as for example *ne bis in idem* in *Åkerberg Fransson* which uprooted decades of administrative law and criminal law breaches of fundamental rights in Sweden.[457]

As the EU is consensus-based, the legal and constitutional framework is optimal when the European Council is unanimous and working towards a common goal. The political divisions of European leaders and the lack of vision regarding the future of the European Union in recent years has also affected the situation. The need for a discussion regarding treaty reform is important to not allow the EU's legal order to reach status quo, especially in relation to wider events such as migration crisis, Brexit, rule of law backsliding and also addressing the European Union's own democratic credentials.

To address the democratic deficit of the EU, the European Council and Council of Ministers could be abolished, with its responsibilities transferred to the European Parliament and European Commission respectively. To strengthen the European Union's internal democracy, the European Parliament ought to be given the right of initiative regarding legislative proposals as its parliamentarians are elected in general elections.

One further possibility for strengthening the EU's own internal democracy is how the Commission president is chosen. The President of the European Commission could as an alternative to the current process instead be decided upon by solely the European Parliament, as the choice of current Commission President Ursula von der Leyen laid bare the political horse-trading behind the scenes and in the end was a previously unknown candidate, which the European Council could accept and the European Parliament in effect was forced to agree on.

The need for addressing the democratic aspect of the EU is of significant importance as the Union needs to be able to address the rise of Eurosceptic, nationalist parties with clear anti-EU political agendas.

The rule of law crisis the Union currently is experiencing in Hungary and Poland ought not to become the new normal, as it might risk reducing the European constitutional framework into a paper tiger and depriving EU citizens of fundamental freedoms and civil rights as enjoyed in other member states; for example, gay marriage and the right to your own body through deciding for example on an abortion.

457 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

Considering the avenues for effective enforcement in practice are limited, it can be said to exist a need for Treaty reform aiming at making the EU legal order resilient to almost coup-like decisions by political parties and politically-controlled national judiciaries that contravenes basic rule of law and good governance principles as laid out by the Treaties.

This raises the question whether the European Council still would be as reluctant to deal with Article 7 if a member state had become truly non-democratic, but being of important geostrategic value, acting as a buffer towards a potential geopolitical adversary?

If the EU would fail to address the rule of law crisis and its own democratic deficit, it could potentially lead to the gradual demise of the European project by a deterioration of the importance of its constitutional framework. A dysfunctional legal structure could risk depriving millions of European citizens of fundamental human rights and fundamental freedoms built from the end of the Second World War, which resulted in a rule of law-based constitutional framework, a human rights framework through the CFR ensuring individual rights and freedoms, and the CJEU as an effective enforcer which has an impact for the individual subject.

The current constitutional and identity crisis the EU is experiencing, and the Polish-EU legal confrontation has most likely not yet reached its apex, but the last time a member state expressed a clear rejection of common values, legal norms and principle of primacy of EU law, it led to the withdrawal of the United Kingdom from the Union.

Where the latest stand-off between Poland under PiS rule and Viktor Orban's Hungary leads the EU is therefore unclear. If left unsolved, there are signs of a gradual demise of the EU legal order with a potential dissolution in the larger perspective, as the constitutional remedies to deal with rule of law backsliding and authoritarian tendencies in member states can be said to be insufficient. Regardless, the current situation can be said to highlight the fault lines in the EU as competing political goals and ideas clash, while no effective dispute mechanism between member states and EU institutions exist. Arguably, due to internal differences between mainly Western and Eastern European member states, it is unclear if treaty reform would be fruitful and how this would affect the CJEU. Would reform strengthen the impact of EU law, or risk deepening the current enforcement deficit.

Rule of law backsliding in the European Union is a highly complex and contentious issue. From a normative perspective, when strictly using the legal doctrinal method, the situation arguably points in one direction. Poland is breaching the values as held by Article 2 TEU and by that breaches its larger obligation of adhering to EU law.

However, the rule of law is abstract, and the epistemological understanding of what actually rule of law constitutes greatly differs depending on whether the term is viewed from a top-down or bottom-up perspective. From the source material of this study analysed through the comparative legal method and document analysis, a different perspective is seen. It can be argued that Poland never accepted EU law primacy and the jurisdictional scope of the CJEU from the onset of EU accession, in lieu of its Constitutional Tribunal's established precedents.

The reasons for Poland's standpoints be seen in its constitutional and political history as it is reflected in present day. By analysing the Polish perspective, it can be argued that Poland views its national, legal, political and religious sovereignty as fundamental components for the modern Polish state, mindful of its history in which no real sovereignty and statehood existed since before the fall of the Polish-Lithuanian Commonwealth in late 18th century, which culminated in the partitioning of Poland.

By hermeneutically interpreting statements made in present time by the government and domestic legislative initiatives, it can be said that the ruling party, Law and Justice (PiS), considers itself to be akin to a saviour of the Polish state, and the European Union is yet another hegemonic power which wants to contain the ambitions of a Polish democracy, in neo-colonialist fashion. Unfortunately, the constitutional and political context has to a degree been omitted in the debate surrounding the rule of law backsliding.

It can from the current perspective be said that Poland has taken the first legal steps toward EU discoupling, to a large degree due to the fundamental disagreements concerning the reach and meaning of EU law and how it affects national legal orders. The EU legal framework perhaps has an inherent weakness in attempting to legally translate abstract, sometimes opaque, values into common content which can reach consensus Union-wide.

The avenues for enforcement are also limited by virtue of the compromise-seeking political decision-making, resulting in common content which from a practical perspective in some cases creates deep uncertainties.

The assessment of this study is that the legal and political status quo cannot be allowed to continue. Not explicitly because of Poland, the EU after all survived Brexit, but from a larger legal perspective of what the EU aspires to be in the future. The uncertainties in its legislation ought to be adapted to better meet a global situation in constant flux, or risk becoming rendered weak in front of potential dangerous geopolitical adversaries.

6.2. Avenues for future research

Considering the conclusions that could be drawn from the preliminary ruling statistics and the discussion surrounding the national impact of EU law, depending on court instance, level of political sensitivity of the case referred (or not referred), it could be of value to the field of EU law if the underlying reasons for the relative impact of EU law in member states national judiciaries could be showcased. Impartial and independent courts have furthermore been a central point surrounding the rule of law crisis and concerns of democratic backsliding in the EU. Independent judiciaries constitute a key rule of law requirement in EU primary and secondary law, and the ECHR.

The European Union has viewed Poland's increasingly political control over the judiciary as detrimental to the rule of law. From a wider perspective, drawing on the EU's rule of law framework, further research investigating other potential forms of political influence of the

judiciary could be considered important for the values of Article 2 TEU and the CFR to have practical impact in member states, and the application of EU law in member states in general.

The individual compositions of the courts and its judges, recommendations and standard practices affects the effective implementation of EU law, through *inter alia* the preliminary ruling procedure in Article 267 TFEU. One potential way of explaining the inconsistencies in the available statistics would be to analyse individual judges' and lay judges' opinions on EU law, legal integration and the role of EU law in the national legal order, from different perspectives as explained through discourse analysis, cultural analysis and legal typologies.

A typology exploring judges' and courts different perspective towards EU law, with an emphasis on EU law or national law, could be used and is of methodological and epistemological relevance. A certain type of typology has previously been used to research individual judges' legal consciousness and decision-making, and builds upon the typology of Robert Allen Kagan, which was used to explain how bureaucrats apply the law.[458] [459]

The role of the national judge is of particular interest from an EU legal perspective, as Union law considers national judges in member states as a decentralised EU judiciary, with a Treaty obligation of ensuring the effectiveness of EU law nationally.[460] Previous research investigating judges' legal consciousness towards implementing EU law in national courts, showed in some cases, open rejections of the authority of the CJEU or principle of primacy of EU law domestically, with some judges considering EU law lacking a legal foundation.[461]

In particular the politically-appointed lay judges, who according to Swedish law are considered judges and decide on both guilt and sentencing, alongside professional, legally-trained judges[462], are of interest for future studies, due to the political appointment process, in which municipal and county councils elect lay judges to the courts in their respective jurisdiction. The lay judge system ought to be viewed in the light of the rule of law requirement in Article 2 TEU and the right to a fair trial in the CFR, as the lay judges' potential underlying political influence in court rulings and decisions should be problematised and critically analysed.

Possible research question could be formulated as:

- Is the Swedish system with politically-appointed lay judges compatible with EU law?
- How is EU law and EU values applied in a setting where politically-appointed lay judges hold direct influence over the outcome in court cases that concerns EU law?

458 Nowak, Tobias and Glavina, Monika, 'National courts as regulatory agencies and the application of EU law' (2021) vol 43:6 Journal of European Integration 739 <https://doi.org/10.1080/07036337.2020.1813734> accessed 16 December 2021, 741 ff.

459 Kagan, A. Robert, *Regulatory Justice: Implementing a Wage-Price Freeze* (Russel Sage Foundation 1978).

460 Nowak, Tobias and Glavina, Monika, 'National courts as regulatory agencies and the application of EU law' (2021) vol 43:6 Journal of European Integration 739 <https://doi.org/10.1080/07036337.2020.1813734> accessed 16 December 2021, 739.

461 Ibid. 746-747.

462 Rättegångsbalk (1942:740), 4 kap. 5 § ff.

Earlier research has shown that lay judges in the Swedish judiciary are mostly older, wealthy white males with a political background.[463] The scope of the research would be to include lay judges from all political parties who have nominated lay judges. In a Swedish political context, one political party which entered parliament after the 2010 general election is of particular interest, due to its increase in the total vote share in a ten-year period.

Since 2010 and subsequent elections in 2014 and 2018, the self-declared social-conservative[464] and nationalist[465] political party Sweden Democrats (*Sverigedemokraterna*) has increased their mandates in municipal councils from 612 in 2010 to 1806 in the 2018 general election.[466] [467]

The party's county council mandates increased from 68 in the 2010 general election to 224 in the 2018 general election.[468] [469] As a comparison, in the 2018 general election the Sweden Democrats became the third largest party.[470] From a voter share perspective, the Sweden Democrats increase of mandates has been the largest, compared to other political parties in Sweden.[471]

Due to the large increase of mandates in lay judge-appointing political councils it can therefore be suggested that the Sweden Democrats have increased their number of appointees in domestic courts which uses lay judges. The primary voter base of the Sweden Democrats are middle-aged men,[472]and, notably, has a very low confidence in the national judiciary.[473] A voter analysis after the 2019 European Parliament elections showed that 41 % of those who voted for the Sweden Democrats believe Sweden should leave the European Union, as opposed to 37 % of respondents who held Sweden should remain an EU member state.[474]

463 Malsch, Marijke, *Democracy in the Courts: Lay Participation in European Criminal Justice Systems* (Ashgate Publishing 2009), 48 ff.

464 'Principprogram: Sverigedemokraternas principprogram 2019' (Sverigedemokraterna) <https://ratatosk.sd.se/sd/wp-content/uploads/2020/11/16092141/Sverigedemokraternas-principprogram-2019.pdf> accessed 21 November 2021, 7.

465 Ibid. 8.

466 '2010 Val till kommunfullmäktige - valda' (*Valmyndigheten*) <https://data.val.se/val/val2010/slutresultat/K/rike/valda.html> accessed 21 November 2021.

467 'Valpresentation 2018: Val till kommunfullmäktige - valda' (*Valmyndigheten*) <https://data.val.se/val/val2018/slutresultat/K/rike/valda.html> accessed 21 November 2021.

468 '2010 Val till landstingsfullmäktige - valda' (*Valmyndigheten*) <https://data.val.se/val/val2010/slutresultat/L/rike/valda.html> accessed 21 November 2021.

469 'Valpresentation 2018: Val till landstingsfullmäktige - valda' (*Valmyndigheten*) <https://data.val.se/val/val2018/slutresultat/L/rike/valda.html> accessed 21 November 2021.

470 'Valpresentation 2018: Val till riksdagen - valda' (*Valmyndigheten*) <https://data.val.se/val/val2018/slutresultat/R/rike/valda.html> accessed 21 November 2021.

471 Ibid.

472 Jylhä, Kirsti, Rydgren, Jens and Strimling, Pontus, *Sverigedemokraternas väljare: Vilka är de, var kommer de ifrån och vart är de på väg?* (Institutet för Framtidsstudier 2018), 95.

473 Ibid. 57.

474 Berg, Linda, 'Europaparlamentsvalet 2019 - Sverige går sin egen väg' (2019) 11 Swedish Institute for European Policy Studies <www.sieps.se/globalassets/publikationer/2019/2019_11epa.pdf?> accessed 16 December 2021, 11.

In addition, research has further shown that Sweden Democrats' voters have the lowest amount of confidence towards democracy and politicians in both the national context as well as on EU level.[475] As a comparison 57,5 % of the general population was in November 2021 positive towards Swedish EU membership and 15,9 % against.[476]

Considering the Sweden Democrats' official Eurosceptic stance, where a withdrawal from the EU is left open[477] it would be of EU law relevance to research, through cultural analysis, discourse analysis and the typology inspired by Kagan, if lay judges appointed by the Sweden Democrats, affect the outcome in cases where EU law and EU constitutional questions are ruled upon, due to the party's ideological standpoint concerning EU law and Swedish EU membership.

It should also be noted that the Sweden Democrats and the Polish Law and Justice party, belong to the same political group in the European Parliament, the European Conservatives and Reformists Group (ECR).[478] The ECR believes the powers of EU institutions are unchecked, resulting in a disregard for member states' national identities and sovereignty.[479] Both parties can as a result be considered to share a common ideological foundation.

In general, the compatibility of the Swedish lay judge system ought to be questioned and problematised from a CFR and Article 2 TEU perspective, in lieu of the greater general legal concerns in the EU concerning rule of law backsliding and further concerns over politicisation of judiciaries.

475 Ibid. 15.

476 'EU preferences 1996-2021' (*SCB - Statistics Sweden*, 8 December 2021) <www.scb.se/en/finding-statistics/statistics-by-subject-area/democracy/political-party-preferences/party-preference-survey-psu/pong/tables-and-graphs/eu--euro-preferences/eu-preferences-in-sweden/> accessed 18 December 2021.

477 'EU' (*Sverigedemokraterna*, 3 May 2020) <https://sd.se/our-politics/eu/> accessed 21 November 2021.

478 'Member Parties' (*European Conservatives and Reformists*) <https://ecrgroup.eu/ecr/parties> accessed 16 December 2021.

479 'We are the voice of common sense' (*European Conservatives and Reformists*) <https://ecrgroup.eu/files/ECR_Image_Brochure_%28online_version%29.pdf> accessed 16 December 2021, 12.

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