Palacky University in Olomouc
Faculty of Law

The European Union Amidst an Escalating Rule of Law Crisis

An Analysis into the Art. 7 TEU Mechanism in the Context of the Legal Reforms in Hungary and Poland

Master's thesis

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DECLARATION

I hereby declare that this Master's Thesis on the topic "The European Union Amidst an Escalating Rule of Law Crisis: An Analysis into the Art. 7 TEU Mechanism in the Context of the Legal Reforms in Hungary and Poland" is my original work and I have acknowledged all the sources used.

In Olomouc, on the 25th of May 2020 Alena Vaňková, BA

ABSTRACT (EN)

The ongoing backsliding of rule of law in Hungary and Poland following a number of legal reforms which have been undertaken over the past years indicates a recurring pattern which appears to be not only incompatible with the EU legal system, but a major challenge to it, questioning the efficiency of its legal toolkit and undermining its inherent values. This thesis examines the EU's rule of law framework as opposed to the recent legal reforms in Hungary and Poland, underlining the discrepancy between the EU's intention to enforce rule of law and its continuous deterioration in two of its Member States. Departing from the existing mechanism of enforcement, it then undertakes an in-depth analysis of Art. 7 TEU in view of assessing its judicial power, but also focusing on the question whether a substantial reform of the instrument is required, or the ultimate problem behind the insufficient response of the EU institutions goes beyond this mechanism. In that sense, it argues that the Art. 7 alone does not provide a legitimate basis for inaction of EU institutions, rather, it reveals the EU's static lack of proactive approach which compromises an otherwise viable tool.

Key words: rule of law, Article 7 TEU, reform, EU law, EU values, Hungary, Poland, value conflict, enforcement of EU law

ABSTRAKT (CZ)

Prohlubující se krize právního státu v Maďarsku a Polsku následkem schválení řady právních reforem v průběhu posledních let poukazuje na opakující se vzorec, který je nejen v rozporu s právním systémem EU, ale také jeho vážným napadením, neboť odhaluje mezery v účinnosti právních instrumentů EU a zároveň podrývá základní hodnoty, na kterých Unie stojí. Tato diplomová práce zkoumá evropský právní rámec pro právní stát, zejména v kontextu právních reforem v Maďarsku a Polsku. Zdůrazňuje přitom rozpor mezi úmyslem EU vymáhat hodnoty právního státu a jejich stálým zhoršováním ve dvou jejích členských státech. Za použití stávajícího mechanismu pro vymáhání evropských hodnot jako výchozího bodu práce provádí hloubkovou analýzu čl. 7 SEU s cílem objasnit jeho právní hodnotu, ale rovněž zodpovědět otázku, zda je nutná zásadní reforma tohoto instrumentu, nebo hlavní příčina nedostatečné odezvy evropských institucí s tímto mechanismem jako takovým nesouvisí. Práce argumentuje, že samotný čl. 7 neposkytuje legitimní důvod pro nečinnost institucí, a na vině je tak spíše nedostatek proaktivního přístupu EU, který kompromituje jinak životaschopný nástroj.

Klíčová slova: právní stát, čl. 7 SEU, reforma čl. 7, právo EU, hodnoty EU, Maďarsko, Polsko, konflikt hodnot, vymahatelnost evropského práva

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LIST OF ABBREVIATIONS AND ACRONYMS

Acquis – body of law accumulated by the European Union

Ad hoc – formed for a specific purpose, usually appointed to solve a particular problem

Aka – also known as

Art. – Article

Carte blanche – complete freedom to act as one wishes

CEECs – Central and Eastern European Countries

CEU – Central European University

CFR – Charter of Fundamental Rights of the European Union

Communiqué – an official report or statement such as a government press release

CoE – Council of Europe

COE – Council of the European Union

CVM – Cooperation and Verification Mechanism

EC – European Community

ECSC – European Coal and Steel Community

EEC – European Economic Community

e.g. – for example

ECJ, CJEU – European Court of Justice

EC – European Commission

ECt – Treaty establishing the European Community

ECtHR – European Court of Human Rights

Effet utile – form of interpretation of treaties and other instruments which looks to the object and purpose of a treaty with a view to effectively achieve the intent of the legislation

EP – European Parliament

EU – European Union

FPÖ – Freedom Party in Austria *(Freiheitliche Partei Österreichs)*

GAC – EU's Council of Ministers in the General Affairs Council configuration

Ibid. – in the same place

i.e. – that is

ICJ – International Court of Justice

IO – International organisation

Lex talionis – the law of retaliation, an ancient legal principle according to which the punishment inflicted should correspond in degree and kind to the offense of the wrongdoer

MS – Member State(s) of the European Union

NGO – Non-governmental organization

NJO – National Judicial Office

NJC – National Council of Judiciary

Opinio juris – an opinion of law

Pacta sunt servanda – agreements must be kept

Para – Paragraph

PiS – Law and Justice Party in Poland *(Prawo i Sprawiedliwość)*

PM – Prime minister

QMV – Qualified majority voting

RLF – Rule of Law Framework of the European Union

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

Sine qua non – [a condition] without which it could not be

Subpara – subparagraph

Ultra vires – beyond the powers

UN – United Nations

VCLT – Vienna Convention on the Law of Treaties

Vice versa – the other way around

Vs, v – Versus, against/as opposed to

V4 – Visegrad Four Countries: Poland, Hungary, Czech Republic and Slovakia

1 INTRODUCTION

1.1 Introduction to the topic and the research area

In 2015, what seemed as an isolated case of Hungary being on a collision course with the European Union (EU) over rule of law, itself an ample cause for concern, turned into a wider assault on the EU's founding principles and its entire legal system when the Polish Constitutional Court gave in to the right-wing populist government, doubling the number of EU Member States (MS) in which the rule of law is backsliding.[1] Indeed, a previously unintended situation arose as the Polish *Law and Justice* Party (PiS) joined the Hungarian *Fidesz* in a controversial quest to reform the State organisation whereby most systems of internal checks and balances within the country were removed under the pretext of a shared national identity, let alone the compromising of the entire system of judicial independence.[2]

Therefore, at a time when the EU has been already navigating through numerous crises, Hungary managed to use the constitutional supermajority to revisit the totality of the Hungarian legal-political system, initiating systemic and unprecedented changes of the State infrastructure, silencing dissent and virtually amputating the Constitutional Court's powers.[3] Poland, on its part, embarked on a series of reforms of the Constitutional Tribunal and the National Council of the Judiciary, which ultimately led to the appointment of *PiS* affiliated candidates and a deliberate politization of the institutions.[4] These allegedly well-intentioned legal reforms, or rather deliberate and systematic attempts of the respective governments to weaken the system of checks on power in the view of initiating the long-term rule of the single-majority party, are not only incompatible with the EU legal system, but also an evidence of a disturbing trend come alive.[5] Where the presumption of ongoing compliance with EU values does no longer hold, it seems only logical for the EU to, in light of the indispensable nature of these values, take resolute action against the defiant Member States (MS).[6] Perhaps even more so given that it has

[1] Koncewicz, T. (2018). The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux. *Review of Central and East European Law*, *43*(2), 116-173.
[2] Pech, L. and Scheppele, K. (2017). Illiberalism Within: Rule of Law Backsliding in the EU. *Cambridge Yearbook of European Legal Studies*, 19, 3-47.
[3] Tóth, G. (2017). Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism. In: M. Adams, A. Meuwese and E. Ballin, ed., *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*. Cambridge University Press, 386-416.
[4] Bucholc, M. (2018). Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015. *Hague Journal on the Rule of Law*, *11*(1), 85-110.
[5] Reference to the definition by Pech and Scheppele (2017).
[6] Pech, L., and Kochenov, D. (2019). *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*.

an available legal instrument at its disposal as far as enforcement of EU values is concerned. In fact, the Art. 7 of the Treaty on the European Union (TEU) was precisely intended for cases of MS' incompliance with the EU's fundamental values, themselves listed in Art. 2 TEU.[7] Even though the original Treaty drafters thought of it as of preventive measure and did not expect that such a large-scale detachment from basic values of the Union would ever take place, the provision explicitly provides a legal basis for action in case of a 'serious and persistent breach' of EU values such as the rule of law – and – not only has it power to determine the risk of such breach and initiate proceedings with the State concerned, but it can also suspend certain rights of the perpetrator including voting through a sanctioning mechanism.[8]

Expectations of coordinated EU action, have, however, not mirrored reality.[9] Contrarily, the lack of effective response and no imminent legal action aimed at bringing Hungary and Poland back in line with their European commitments translated into an enhanced opportunity for these countries to embed the newly established practices, adversely affecting the EU's own legal system and law enforcement capacity.[10] As a result, despite the fact that there seems to be an existing mechanism within the *acquis*, the EU institutions seem to be either reluctant to invoke it or unsuccessful in providing results and improving the situation on the ground. Genuinely, they take time to consider what measures would be best suited when a convenient instrument is arguably already at hand. That, in turn, suggests the existence of a systemic problem at the level of practical activation of Art. 7 which prevents it from being used.[11]

Meanwhile, it should be asserted that the ongoing backsliding of rule of law in not one, but two EU MS, points towards a dangerous 'constitutional capture' which appears to be a major challenge to the EU legal system, demonstrating the EU's inability to curb the attempts of the defiant States to tighten their grip on the previously independent institutions.[12] After all, in the spirit of mutual cooperation and recognition, MS need to rely on each other's legal system and full adherence to the set of common values in order to ensure consistent application of the EU standards throughout the Union as well as to maintain efficient judicial cooperation among themselves. Notably, failure to implement the tenets of rule of law undermines the reliance of

[7] Art. 7 TEU.
[8] Kochenov, D. (2018). Article 7: A Commentary on a Much Talked-about "Dead" Provision. *Polish Yearbook of International Law*, 166-187.
[9] Pech, L., and Kochenov, D. (2019).
[10] Jakab, A. and Kochenov, D. (2017). *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*. Oxford University Press, p.3.
[11] Argyropoulou, V. (2019). Enforcing the Rule of Law in the European Union, Quo Vadis EU?. *Harvard Human Rights Journal*.
[12] Koncewicz, T. (2018).

EU citizens and companies on their fundamental rights and thereby questions the integrity, legitimacy and external credibility of the EU as such.[13]

Correspondingly, a thorough analysis of the Art. 7 is needed in order to shed light on whether the mechanism itself is inherently deficient – and cannot, the way it is drafted – effectively address the rule of law backsliding in the MS, or, if the ultimate problem could potentially lie beyond Art. 7.[14] Either way, the EU proved only limited capacity in its endeavour to bring the situation in Hungary and Poland in terms with its legal system, and many further shortcomings surfaced in the process relating to the efficiency of its legal toolkit on one hand, and its willingness to enforce compliance with its own laws on the other.[15]

1.2 Aim

The aim of the present thesis is to inquire into the EU rule of law framework, particularly the legal instrument of Art. 7 TEU, which is intended to secure compliance of MS with the core values of the EU. Taking the recent examples of the legal reforms in Hungary and Poland as a point of reference, the usability and/or efficiency of this instrument will be brought into question in order to determine whether a substantial reform of the instrument is required due to its numerous flaws (as suggested by some legal scholars) or the ultimate problem behind the insufficient response of the EU institutions could originate elsewhere.

The impact of eroding rule of law in two MS is appalling in that it undermines the entire EU legal system and law enforcement at the level of the MS, which are seemingly free to engage in illiberal practices. Such ongoing and widespread infringement of the basic notions which rule of law represents, namely judicial independence, legality and legal certainty; presupposes the existence of a structural problem which needs to be approached with due vigilance. Despite the fact that this issue attracts a lot of attention from policymakers across Europe and legal experts invest their time commenting on possible substitutions of Art. 7, the reasons why the situation was not successfully remedied in the first place seem to remain unclear.[16] In fact, there is no definite consensus among scholars regarding whether the Art. 7 genuinely lacks potential

[13] Closa, C. and Kochenov, D. (2016). *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press, p.16.
[14] Kochenov, D. (2018).
[15] Kochenov, D., and Bárd, P. (2018). Rule of Law Crisis in The New Member States of the EU: The Pitfalls of Overemphasising Enforcement. *Reconciling Europe With Its Citizens Through Democracy and Rule of Law*.
[16] Koncewicz, T. (2018). *The Democratic Backsliding and the European Constitutional Design in Error*.

to be an efficient legal tool and justifies the calls for a substantive reform.[17] At the same time, the settlement of this point conditions the availability of further legal steps and perhaps the very manner in which the EU institutions could respond to the current crises in Poland and Hungary.

1.3 Research questions

The research questions of the present thesis have been formulated as follows.
First, the primary question inquires:

1) Does Art. 7 provide, the way it is drafted, an elementary reason for inaction of the EU institutions?

In order to respond to this question, an evolutive sub-question inspects:

2) Is the mechanism at hand deficient to such an extent that it inherently cannot be used?

1.4 Previous research and relevance of the topic

The topic of rule of law and notably its backsliding in Europe has been amply documented by scientific researchers across the fields of law, political science and sociology.[18] Indeed, with regard to the significance of the topic and its persisting relevance for the EU alone – which is in part translated by the threat of two of its MS falling short of respecting its basic constituents – it is hardly surprising that the previous research in the area is quite extensive. Correspondingly, a number of monographs, academic journals and expert legal commentaries focus on the meaning, background and scope of application of the rule of law as a universal principle of democratic States or comment on its enforcement in various settings. At the same time, some of these sources contemplate the concept in somewhat general terms, while others seek to assess its position in the EU legal system and recent challenges that have been revealed. It is worth noting that the General Secretariat of the Council of the EU under the Finnish presidency compiled a reading list regarding the rule of law, which consists of some of the most

[17] Kochenov, D. (2018).
[18] See the full bibliography at the end of the thesis.

important publications and recent findings in the field. While setting out useful literature propositions, this list definitely provides a point of reference for further research in this area.[19]

In *'The Rule of Law as a Constitutional Principle of the EU'*, the roots of rule of law as a part of EU's constitutional tradition are explored, investigating the shared traits in the English, German and French constitutional systems. The normative impact of the concept is then illustrated by the creation of an organizational paradigm in which rule of law becomes a multi-faceted legal principle with both formal and substantive elements which simultaneously reflects a distinctive EU character.[20] In '*Establishing the Supremacy of European Law'*, Alter explains how European legal system developed into an effective legal framework which is primarily demonstrated by the manner in which European regulations are enforced in the domestic jurisdictions of the MS, and how the European Court of Justice (ECJ) contributed to the legal basis of rule of law.[21] The '*The Rule of Law in the EU'* further stresses the pivotal role of rule of law for successful integration, identifies its place in the EU legal framework and denounces the insufficient culture of compliance in an increasingly diversified European setting.[22]

On a different note, in a monograph from 1999, Krygier and Czarnota unveil the question in what ways has rule of law been shaped by the experience of communism and how complex its development has been in the East-Central Europe, which is particularly relevant for the case of former communist States such as Hungary and Poland, whose democracies had only a limited experience with democratic formation.[23] Similarly, Měšťánková and Filipec comment on the difficulty of democratic transition and the challenges for newly formed democracies to truly embrace the European values they once pledged to respect. Whilst describing the historic context of the integration, they question the extent of democratic consolidation and strive to trace the reasons for backsliding rule of law in Europe today.[24]

To elaborate on the recent developments, in '*Reinforcing Rule of Law Oversight in the EU'*, a detailed account of prospects for an improved control and enforcement of rule of law is made in light of the deteriorating rule of law in EU MS. Precisely, there exists a number of

[19] COE. (2019). *Rule of Law Reading References*. Finland's Presidency of the Council of the EU.
[20] Pech, L. (2009). The Rule of Law as a Constitutional Principle of the European Union. *SSRN Electronic Journal*, 1-72.
[21] Alter, K. (2003). *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press.
[22] Konstadinides, T. (2017). *The Rule of Law in the European Union: The Internal Dimension* (1st ed.). Hart Publishing.
[23] Krygier, M. (1999). *The Rule of Law after Communism: Problems and Prospects in East-Central* Europe (1st ed). London: Routledge.
[24] Měšťánková, P. and Filipec, O. (2019). *Transition to Democracy in Central Europe* (1st ed.). Olomouc: Iuridicum Olomoucense.

articles which examine the legal reforms in Hungary and Poland and their impact on State organization and consequently on the EU legal system itself. For instance, in *'The Capture of the Polish Constitutional Tribunal and Beyond'*, Koncewicz explores the constitutional capture of Poland with an emphasis on the constitutional changes which alter the judicial reality in the country.[25] Similarly, Scheiring discusses the rise of authoritarianism and compromising of the independent institutions in Hungary, whereby power perilously concentrates at the hand of the dominant party.[26] In addition, Pech and Scheppele discuss the major responses of EU institutions aiming at bringing Hungary and Poland back in line with their commitments.[27]

Equally important are the already existing legal assessments of the Art. 7, its scope of application, enforcement and most problematic aspects. Namely, Larion investigates the effectivity, extent and wording of the mechanism. Kochenov engages in several analyses of Art. 7 and the context in which it was formed. Criticizing its labelling as a "nuclear option", he stresses its potential if there was sufficient will to use it. Contrarily, other legal scholars such as Śledzińska-Simon find the article genuinely ineffective and call for the adoption of new mechanisms which would allegedly bring better outcomes than Art. 7.

As illustrated above, many aspects of rule of law backsliding and Art. 7 in both general and specific terms have been covered. However, despite the number of sources examining the issue, it remains a matter of great concern for Europe. Essentially, there seems to be a continuous disagreement on why the EU institutions prove to be unable to put an end to the rule of law backsliding, and, what is the ultimate reason behind the non-use of available mechanisms.[28] Essentially, it remains unclear whether Art. 7 itself provides an elementary reason for inaction of the institutions, and whether it is an inherently deficient legal tool which should be revised/substituted, or, if it still has a prospect of being a viable tool.

A number of various reforms and/or extension of existing legal toolkit has been proposed by both experts and EU policymakers, which suggests that even at the EU level, no consensus has been reached regarding how to react to the ongoing crises.[29] After all, the EU institutions have been heavily criticized for their lack of action and internal divisions on the issue.[30] In fact,

[25] Koncewicz, T. (2018).
[26] Scheiring, G. (2019). Dependent Development and Authoritarian State Capitalism: Democratic Backsliding and the Rise of the Accumulative State in Hungary. *Geoforum*.
[27] Pech, L. and Scheppele, K. (2017).
[28] Koncewicz, T. (2018). *The Democratic Backsliding and the European Constitutional Design in Error.*
[29] See e.g. Bárd, P. and Śledzińska-Simon, A. (2019). Rule of Law Infringement Procedures: A Proposal to Extend the EU's Rule of Law Toolbox. *Centre for European Policy Studies: Liberty and Security in Europe*, 1-20.
[30] Kochenov, D., and Bárd, P. (2018).

some researchers go as far as predicting that similar scenarios could gradually appear in the rest of Europe, spreading the authoritarian infection in relentless attacks on the EU ideals. In particular, the risk of disintegration of the V4 countries comes to mind with half of its members already in the dock with the European Commission (EC) over rule of law.[31] The significance of the topic is further sustained by the fact that the new EC under the leadership of Ursula von der Leyen listed the respect for rule of law amongst its key priorities, underlining the need to protect the core values common to all MS.[32]

Either way, it is certain that upholding the rule of law standards and reviewing the application of the existing legal instrument is of vital interest for the EU as it has direct effect on its administration. Despite the high-profile debate on the current situation in Hungary and Poland, the potential of Art. 7 has so far been neglected. An analysis aimed at an unbiased and in-depth understanding of Art. 7 and its (non)usability in practice is therefore needed. Correspondingly, adding a value to the debate by closely examining the arguments of legal scholars against this instrument, focusing narrowly at the mechanism itself instead of turning to proposed adjustments/substitutions, and by taking into account the new developments in the field, is beyond justified. Effectively, unless a point is made regarding the future prospect of Art. 7, the search for better working mechanism lacks valid grounds and a persisting gap exacerbates in the context of the future prospects of rule of law enforcement.

1.5 Delimitation of the topic

For the purposes of the present thesis, the definition of rule of law will follow the EU's understanding that all members of a society – governments and parliaments included – are equally accountable and subject to law, whereby they are subordinated under the authority of independent courts irrespective of political majorities.[33] While there is no extensive list to be used throughout the text, the principles of judicial independence and impartiality, legality (implying transparent, accountable and pluralistic process for enacting laws), legal certainty, effective judicial review, prevention of arbitrariness of the executive power, equality before the law, non-discrimination and access to justice are understood to account for the key determinants

[31] Morillas, P. (2016). *Illiberal Democracies in the EU: The Visegrad Group and the Risk of Disintegration*. CIDOB. Barcelona Centre for International Affairs.
[32] EC. (2019). *The von der Leyen Commission: For a Union that Strives for More*.
[33] EC. (2019). *The EU's Rule of Law Toolbox*.

of the rule of law, at least in the EC's view.[34] Similarly, the text does not intend to stir up debate about what precisely the rule of law is nor to initiate philosophical assumptions about it. Instead, without describing it at great length and accepting that it has been thoroughly documented by numerous experts in the past, the generally accepted definition of this principle is observed.

Without the intention to limit the role of other instruments such as, and not limited to, the infringement procedure laid down in Art. 258 TFEU; the Charter of Fundamental Rights of the EU (CFR), the multi-faceted soft instruments including the EU Justice Scoreboard/European Semester Process, EU Anti-Corruption Report, the Council's Annual Rule of Law Dialogue or even external tools such as the Venice Commission[35], a narrowly-oriented, in-depth assessment of Art. 7 will be made precisely because it is within the defined aim of the thesis which seeks to determine the (non)usability of this specific instrument at a time when other researchers focus on finding alternative solutions. The narrow scope of the research is therefore justified by the context of an existing Treaty-based instrument which is continuously not activated, i.e. by the intention to fill an existing gap when it comes to reviewing the current mechanism instead of dismissing it in favour of strengthening supplementary tools[36] or even proposing substitutions[37].

The considerations on strengthening the existing rule of law toolkit or drafting new instruments altogether remain absolutely relevant in that they could provide important findings, but they would also lead to different research approaches, methods, aims and results than this thesis intends. That is, they could be the content of a completely different research, which is not the case here. The thesis rather strives to determine whether such reforms are needed in the first place, determining whether Art. 7 is inherently incapable of providing effective response to rule of law backsliding which is important as the potential of the existing mechanism should be fully visited before it is even assumed that a different mechanism is needed.

Even though the cases of Hungary and Poland will be used as examples of backsliding rule of law, especially from the point of view of *enforcement* by the EU institutions, their

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[34] Konstadinides, T. (2017); see also the checklist by the Venice Commission of the CoE (2016), p. 21.
[35] See Schroeder, W. (2016). *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (1st ed.). Hart Publishing; European Parliamentary Research Service. (2019). *Protecting the Rule of Law in the EU: Existing Mechanisms and Possible Improvements*; or European Network of National Human Rights Institutions. (2020). *Towards a Strategic Engagement of NHRIs in EU Rule of Law Mechanisms*.
[36] Closa, C. and Kochenov, D. (2016). *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press; Bárd, P. and Śledzińska-Simon, A. (2019). Rule of Law Infringement Procedures: A Proposal to Extend the EU's Rule of Law Toolbox.
[37] Halmai, G. (2018). The Possibility and Desirability of Rule of Law Conditionality. *Hague Journal On The Rule Of Law, 11*(1), 171-188; EU Justice and Home Affairs. (2019). *Future of Justice: Strengthening the Rule Of Law: Independence, Quality and Efficiency of National Justice Systems and the Importance of a Fair Trial*.

national legislation will not be thoroughly inspected nor reviewed in the original languages. The legal reforms in the countries will be sufficiently covered by English-speaking sources, namely academic articles, government statements, CJEU judgments and EU *communiqués*. Importantly, for the purposes of this thesis, it is not necessary to go through these reforms extensively: it is sufficient to acknowledge them in contrast to the (non)applicability of Art. 7 as the focus of the thesis lies in assessing the instrument's capacity to respond to such crises.

And, while critics might refer to Art 7. as a blend of law and politics where law has only limited merit and thus does not require a detailed legal analysis anyway, it is contrarily argued that especially due to its political dimension and the reluctance of EU institutions to address it in legal terms means that it should be assessed as a legal provision it genuinely is. In this sense, it should be pointed out that European law will be always closely linked to politics as it surrounds its very development from the beginning of the integration: the assumption that a certain legal point could be examined entirely without political influence, albeit a small one, is definitely naïve and should not prevent researchers to dive into complicated European topics. As a consequence, the fact that this topic has a political dimension should not be seen as a limitation, rather a state of art which needs to be taken into account. Failing to recognize this context in the legal discussions about Art. 7 would be simply a blatant ignorance.

1.6 Suggestions for further research

Due to the limited extent of the thesis, suggestions for further research beyond its scope were identified. While not being limited to the subsequent list of topics, it could be valuable to consider them in future studies relating to the problematics of Art. 7:

- Political divisions within the EU institutions and their motivation regarding Art. 7
- New proposals aimed at strengthening the rule of law framework, as complementing Art. 7
- Strengthening the enforcement of EU law (and values) in general
- Role of the V4 in addressing the rule of law backsliding in Hungary and Poland

1.7 Methodological framework

In order to carry out the analysis, a traditional desktop-based research will be conducted, drawing on a number of scientific sources and legal documents. First, with respect to the choice of topic and material required to answer the research questions, legal method in conjunction with analytical method will be adopted throughout the text. The combination of these two methods enabling to accomplish a detailed study of Art. 7 by bringing its scope, practical use and efficiency into question seems to best fit the research design of the thesis.

Second, case studies of the Polish and Hungarian violations of rule of law will be used as a point of departure in order to criticize the response of the EU institutions and/or Art. 7 itself to the ongoing breach of rule of law in the MS. In conformity with the aims of the thesis, the work will attempt to reach a *value result*, i. e. an analytical reason connected to the idea why the Art. 7 is not working rather than a *normative outcome* which would be contrarily related to the idea of how Art. 7 should theoretically work. In the author's view, opting for such result could lead to higher substantiality and practicality of the results acquired.

As regards the process itself, prior to conducting the analysis, an in-depth research into the topic will be carried out, identifying relevant sources from monographs, academic articles, legislation, EU official publications and other sources deemed appropriate for the most up-to-date assessment of Art. 7 and its shortcomings. Then, an outline of the working structure of the thesis including the major points of focus will be established. Third, bearing in mind the established research design, the previously consulted literature will be used to analyse the phenomena from an independent perspective in the view of answering the research questions. At the end of the work, results of the analysis will be stated.

1.8 Material

When it comes to material, the analysis builds on the primary sources of EU law, namely the TEU, TFEU and other legal acts and court decisions comprised in the *acquis* such as the previous judgments of the CJEU. Additionally, it uses official statements, publications and press releases of the EU institutions, namely EC and Council, in order to determine their position towards specific developments in Hungary and Poland. Furthermore, the thesis draws on the insights and arguments covered in the scientific journals and monographs regarding the rule of law, its scope and importance as well as sources investigating the democratic backsliding

in Hungary and Poland or legal commentaries on Art. 7. As a result, the thesis uses both *primary* (treaties, judgments, *communiqués*) and *secondary* sources (academic articles, monographs), and even includes some internet sources such as media news, online publications or websites concerned with the EU policy.

In this regard, it should be pointed out that the requisites of reliability, representativeness and objectivity of the sources were considered in the selection procedure. Correspondingly, peer-reviewed academic journals and legal commentaries which inspect the phenomena in an independent and critical way were consulted primarily. Furthermore, monographs from established authors in the field as well as important publications of NGOs permitting to acquire high-quality data were used, too. While the existence of multidisciplinary connections across fields was taken into consideration as it put the findings into context and provide for their better understanding, legal perspective on the topic was the predominant variable with conformity with the topic specification. On a final note, although the topic is particularly accurate for the MS, it should be underlined that it has been covered by numerous non-EU based scholars and legal experts, which is important from the point of view of objectivity and impartiality of the sources, as well as from the point of view of the relevance of the topic.

1.9 Chapter outline

The 1st chapter of the thesis contained an introduction to the research area of the thesis, identified its aim and research questions. The 2nd chapter elaborates on the conceptual foundations of the EU's rule of law framework, underlines the position of rule of law within the Union's constitutional system and outlines the mechanism of Art. 7 in cases of incompliance with EU values. The 3rd chapter illustrates the discrepancy between the EU's intention to enforce rule of law and its actual deterioration in Hungary and Poland, tracing specific patterns of backsliding and contrasting them with inadequate response at the level of EU institutions. The 4th chapter undertakes an in-depth analysis of Art. 7 and investigates whether it provides a legitimate basis for inaction of the EU institutions. Finally, the 5th chapter concludes on the linkage between the lack of adequate response and Art. 7 while summarizing the key findings of the thesis. At the end of the text, an extensive list of references is provided.

2 THE CONCEPTUAL FOUNDATIONS OF THE EU'S RULE OF LAW FRAMEWORK

2.1 Historical reasons behind the creation of common values

In a landmark judgment from 1986, *Les Verts v. Parliament*, the ECJ referred to the then European Economic Community (EEC) as to a "community based on the rule of law, inasmuch as neither its MS nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty".[38] By doing so, the ECJ set up a somewhat constitutional level of the EEC, a legal basis aimed at reviewing the legality of measures adopted by both the institutions and MS in the view of protecting legal and natural persons against arbitrary decisions, which after all stands at the core of the rule of law principle – "government of laws, not of men".[39]

Accordingly, it should be emphasized that the rule of law, together with a number of other constituent principles of the EU, forms the very foundation undergirding the existence of the Union in the sense that all of the *acquis* builds on it. The rule of law is therefore considered an indispensable, underlying and defining element of the constitutional character of the EU, albeit not constitutionalized, preconditioning the realization of fundamental rights of the EU citizens and further ensuring the notions of legal certainty, separation of powers and the independence of the judiciary in the daily operation of the MS.[40] In that regard, the rule of law does not only involve a certain power status of the State, in which its powers are a prerogative which is not limitless nor arbitrary, but it also grants certain rights to the citizens and imposes corresponding obligations on the State to uphold them.[41]

To elaborate, the rule of law has been conceived as something which comes naturally to all States in alignment with their intention to live in peace, as opposed to something which would be created artificially and imposed on them by coercion.[42] Indeed, from the early beginnings of the European integration, there was an understanding that a united Europe in the form of a binding international institution with a distinct legal system could serve as a preventive mechanism against the emergence of wars, which would therefore secure peace and

[38] *Les Verts v. Parliament*, para 23.
[39] Ibid., para 23-24.
[40] Pech, L. (2009).
[41] Ciongaru, E. (2016). Constitutional Law Connotations of Legal Certainty in the Rule of Law. *Fiat Iustitia*, 1, 43-50.
[42] Ciongaru, E. (2016).

stability of the international order.[43] In particular, in the 1950s, Europe has been stranded in a crisis, undergoing a long process of post-war reconstruction, so the creation of an international institution binding West Germany with the rest of Europe and effectively preventing its future use of military force seemed to be a wise solution.[44] In this spirit, the former ECSC was created to control the German war commodities and to build an interdependence between European States, which was later reinforced by an economic and political unity. This was an important leap for Europe, helpful in fostering social, diplomatic and industrial progress. On a similar note, it outlined the power of democratic governance and binding rules which are above the individual will of MS through the means of High Authority, which was a supranational institution of the ECSC and the EC's predecessor.[45]

Naturally, the end of the Cold War marked a growing interest of IOs as well as national governments in pledging support for the rule of law, which was widely conceived as something positive in terms of State protection.[46] According to these actors, the rule of law ensured that all public powers of a given country acted 'within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts', that is a mutual supervision system based on law.[47] And again, such system generates legal certainty, consistency, equality and protection of citizens. Moreover, the democratic transition of Central and Eastern European countries (CEECs) was significantly impacted by the EU accession process, which served as a strong incentive for political leaders to initiate the necessary reforms conditioning the membership in the EU.[48] In conformity with the balance-of-power theory, according to which States integrate primarily in order to boost their strength vis-à-vis an external threat, the negative experience of the Soviet expansionism led to the facilitation of the EU integration.[49] For one thing, the EU Core feared the potential power of the Soviet Union should it rule over a significant part of Europe, but also the newly emerged States were keen on participating in the common project. In particular, the threat of authoritarian regimes spreading across Europe and turning sovereign States into abiding

[43] Eilstrup-Sangiovanni, M. and Verdier, D. (2005). European Integration as a Solution to War. *European Journal of International Relations*, *11*(1), 99-135.
[44] Ibid.
[45] EC. (2002). *Fifty Years at the Service of Peace and Prosperity.*
[46] Pech, L. (2009).
[47] EC. (2014).
[48] Měšťánková, P. and Filipec, O. (2019). *Transition to Democracy in Central Europe* (1st ed.). Olomouc: Iuridicum Olomoucense, 101-113.
[49] Eilstrup-Sangiovanni, M. and Verdier, D. (2005).

satellites of a powerful hegemony, reinforced the need for an independent IO based on a set of common, mutually advantageous values such as the rule of law.[50]

On this account, it should be asserted that the *Copenhagen criteria*, once established to condition the very membership in the organisation, require potential members to ensure 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' whereby rule of law is specifically listed as a determining criterion.[51] Similarly, Art. 49 TEU only allows application for membership in the EU if the State concerned adheres to the values stipulated in Art. 2 TEU. This illustrates the discrepancy between MS which fail to comply with rule of law requirements, and which would at the same time not qualify as MS if they were to apply for membership today: "the TEU does not provide for adequate safeguards to ensure that a State's pre-accession undertakings to demonstrate respect for the rule of law will continue following that State's accession to the EU".[52]

To emphasize, there is no legal basis in the EU law for an imposed termination of membership, even on the grounds of a serious violation of the EU law. The only possibility of membership withdrawal is governed by Art. 50 TEU and has to be a voluntary and autonomous decision of the MS.[53] In contrast, the counterpart of Art. 7 in the CoE enshrined in Art. 8 of its Statute, provides the ground for forced termination of membership upon a serious violation of the rule of law, suggesting that the CoE could in fact invoke failure to uphold rule of law as a reason for termination of membership.[54]

Due to the communist past of the CEECs, particularly illustrated by their struggle to cope with the high requirements of other MS upon accession forcing the CEECs to implement a wide range of previously unseen reforms of institutions and policies, it seems obvious that values acquired in such manner are not adequately deep-rooted in the society. Arguably, in order for the rule of law to become a stable and consistent principle in these countries, a lengthy process of democratic consolidation and practice is required.[55] In a sense, the institutions in the CEECs are, despite their attempts, less robust than in other Western countries, which partly

[50] Eilstrup-Sangiovanni, M. and Verdier, D. (2005).
[51] Marktler, T. (2006). The Power of the Copenhagen Criteria. *The Croatian Yearbook of European Law and Policy*, (2), 343-363.
[52] Argyropoulou, V. (2019).
[53] Hamuľák, O. and Stehlík, V. (2013). *European Union Constitutional Law: Revealing the Complex Constitutional System of the European Union* (1st ed.). Olomouc: Palacký University, p.19.
[54] Besselink, L. (2017). The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives. In: A. Jakab and D. Kochenov, ed., *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, p.6.
[55] Měšťánková, P. and Filipec, O. (2019).

explains why some MS do not respond well to the attacks on their liberal institutions – their courts and institutions face a potential danger of drifting towards authoritarianism.[56]

Despite this, the protection of fundamental rights became a characteristic attribute of the EU governance, making it a strong prerequisite for its legitimacy and enabling it to impact the democratic development in less developed parts of the world in accordance with Art. 21 TEU. As a matter of fact, the EU made use of its soft power and began to promote the substantive understanding of the rule of law through legislative and policy instruments in its relations with other regions and entities.[57] Placing the rule of law alongside democracy and human rights, the EU was successful in underlining the intertwined and mutually reinforcing nature of these principles, which demonstrates that its understanding of rule of law accounts for more than a somewhat formal and thin value. On the contrary, its instruments vary from legally binding trade, technical and financial, measuring indexes of adherence and devised lists of minimum legal requirements for the rule of law in other countries.[58]

The external pressure on other regions is apparent especially from the conditioning of business opportunities via the respect for rule of law and human rights when the State in question must adhere to the EU values set out in Art. 2 TEU in order to be able to trade with EU companies, and whereby partnership deals close up in cases of incompliance even at the expense of European investments.[59] This normative impact of EU values abroad underlines the authority of the EU's constitutional framework and capacity to promulgate its ideals.

To conclude, it is important to take these circumstances into consideration as they illustrate the importance of the creation of common values within the broader EU body from the point of view of historic necessity but also increasing will to become a single entity pertaining to a set of shared values. In addition, the wider perspective allows to underline the legal discrepancy between the conditioning of EU membership through the respect of rule of law on one hand, and refusal to trigger the mechanism capable of rectifying non-compliant behaviour in case when a regular MS resorts to it on the other.[60]

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[56] Bugarič, B. (2015). A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism. *International Journal of Constitutional Law, 13*(1), 219-245.
[57] EP. (2019). *EU Support for Democracy and Peace in the World*.
[58] Pech, L. (2013). *Rule of Law as a Guiding Principle of the European Union's External Action*. CLEER Working Papers. The Hague: Asser Institute Centre For the Law of EU External Relations, 1-56.
[59] See e.g. the recent partnership withdrawal between the EU and Cambodia: PR Newswire. (2019). *The European Chamber of Commerce in Cambodia Calls the European Commission for Sober Second Thought on "Everything But Arms" Trade Partnership Withdrawal*.
[60] Kochenov, D. (2018).

2.2 The rule of law and its position within the EU constitutional system

As noted above, throughout time, the rule of law became an identifiable common denominator of the MS to the extent sufficient to be part of the EU general constitutional framework.[61] It should be asserted that both the ECJ and the ECtHR confirmed that the rule of law does not only consist of formal and procedural requirements, but is an inherent constitutional principle with formal and substantive components, which lays down a foundation for judicial review and also comprehensive judicial review processes.[62] In fact, the ECJ repeatedly stressed the substantive value of the provision in its judgments, namely in *Unión de Pequeños Agricultores v Council* and *Kadi and Al Barakaat International Foundation v Council and Commission*[63], where it stipulated the means of judicial review of the compatibility of the acts proposed by EU institutions and the entitlement to effective judicial protection through the principle of rule of law.[64]

Upon accession to the EU, States consent to a number of obligations resulting from their membership in the organisation. Being of both general and specific character, the fundamental obligation is to observe the values laid down in Art. 2 TEU, which includes the rule of law.[65] According to the Art. 4(3) loyalty principle, the MS are expected to undertake positive duties, i.e. taking all appropriate measures in order to fulfil its membership obligations, but also negative duties, which requires that the State in question has to refrain from any action which could infringe the EU's objectives.[66] Therefore, this principle could be interpreted as giving rise to an obligation to respect the rule of law and refrain from taking any measures contradicting the rule of law, such as purposefully introducing legislative acts which seek to abolish the independence of the MS's Supreme Court for instance.[67] In addition, pursuant to the ECtHR's interpretation of the ECHR, the rule of law is present throughout the document and does not require an explicit reference to give effect to the general requirement to interpret the text within the confines of the rule of law.[68] This assumption is further reinforced by the

[61] Pech, L. (2009).
[62] Ibid.
[63] EC. (2014).
[64] *Unión de Pequeños Agricultores v Council of the European Union*, para 38-39; *Kadi and Al Barakaat International Foundation v Council and Commission*.
[65] Hamuľák, O. and Stehlík, V. (2013), p.16.
[66] Ibid.
[67] Ekiert, G. (2017). *How To Deal With Poland And Hungary*. Social Europe. Harvard Center for European Studies, 1-12.
[68] *Stafford v The United Kingdom*.

wording of national Constitutions of the MS, in which rule of law is explicitly referred to and which complements the EU constitutional developments.[69] To put it in different terms, while constantly evolving, the EU came to a point where "a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another MS and a European Arrest Warrant against an alleged criminal issued in one MS must be executed as such in another MS"[70], which means that the legal systems of the MS are mutually interdependent and directly influenced one by another.

The interconnectivity and mutually reinforcing nature of the rule of law therefore underlines the interest of MS and the EU institutions to safeguard it. Indeed, even the EC recalled in its 2014 *New Framework to Strengthen the Rule of Law* that "the rule of law has progressively become a dominant organisational model of modern constitutional law and international organisations (…) to regulate the exercise of public powers."[71] Consequently, the active dialogue among the European and highest Constitutional and Supreme courts of the MS with the view of protecting a set of common values suggests a solid legal basis for the realization of fundamental rights. In this regard, it is possible to argue that there is a general belief, an *opinio juris* even, relating to the fact that the rule of law is a fully judicable legal obligation based on the common European legal tradition, which then stipulates the need for its observance and enforcement within the EU territory.[72] In effect, the EU's ability to enforce respect of the rule of law is a condition *sine qua non* of its existence, without this ability, the EU would be powerless in enforcing its laws and could no longer effectively undertake its duties.[73] Including but not limited to, the successive Treaty amendments reinforced the constitutional level of the rule of law principle by stressing both its internal (as an internal foundational value of the EU) and external (as a guiding principle of EU's foreign policy) dimension.[74]

Another essential point about rule of law violations which should be taken into account is that they differ from failures to comply with other Treaty obligations in that they are systemic in nature and cause unprecedented changes of entire infrastructures of laws at the State level, authorizing arbitrary decisions without a proper accountable and pluralistic process for enacting

[69] Pech, L. (2009).
[70] EC. (2014).
[71] Ibid.
[72] Polakiewicz, J. (2016). *Europe's Multi-layered Human Rights Protection System: Challenges, Opportunities and Risks.*
[73] Konstadinides, T. (2017).
[74] Pech, L. (2013).

laws.[75] More importantly, even though the isolated cases of legal enactments do not necessarily trigger concerns, particularly from the point of view of regular citizens who lack a deeper understanding of the MS's constitutional traditions, if viewed in the wider context of the internal systems of check on power of other MS, their arbitrary nature becomes obvious. An illustration of this issue could be the system of judicial appointment in State A, which could seem neutral or even benevolent if considered in isolation, but which is essentially random and in violation of the rule of law principles if compared to the judicial appointment requirements in the States B and C.[76]

As in the recent years the EU has repeatedly noted cases of rule of law backsliding, the new EC under the leadership of Ursula von der Leyen listed the respect for rule of law amongst its key priorities, underlining the need to protect the inherent values common to all MS.[77] That, in turn, illustrates the burden imposed on Art. 7 as a mechanism to redress these crises. That being said, the rule of law backsliding goes beyond the sole political ideology apparent from the definition to which *Pech and Scheppele* refer to, and which is connected to a "process through which elected public authorities deliberately implement governmental blueprints which systematically aim to weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic State and entrenching the long-term rule of the dominant party".[78] It was largely sustained that rule of law is a legally binding provision with own constitutional tradition which can be enforced at the EU level.[79]

2.3 The procedure anticipated by Art. 7 TEU

As already pointed out, the Treaties initially operated on the assumption that there is no need to codify the founding values of the EU, whereby the only procedure relating to the enforcement of MS compliance at that time was linked to the general infringement procedures laid out in Art. 258 and 259 TFEU.[80] This however created an unbalanced situation "where compliance with the rules of EU law was strictly enforced while the enforcement of the core

[75] Bárd, P. and Śledzińska-Simon, A. (2019). Rule of Law Infringement Procedures: A Proposal to Extend the EU's Rule of Law Toolbox. *Centre for European Policy Studies: Liberty and Security in Europe*, 1-20.
[76] Ibid.
[77] EC. (2019). *The von der Leyen Commission: For a Union that Strives for More*.
[78] Pech, L., and Scheppele, K. (2017).
[79] Pech, L. (2013).
[80] Larion, I. (2018). Protecting EU Values: A Juridical Look at Article 7 TEU. *Lex ET Scientia International Journal*, (2), 160-176.

principles on which all the law in question rested remained seemingly out of reach for the supranational institutions".[81]

At the same time, it seems clear that the enforcement of core principles underlying the EU laws is equally important as enforcing the law itself, if not more, since the ability to check goes hand in hand with possible intervention. The uncertain enforceability of the EU core principles therefore created a gap within the *acquis* which had to be rectified eventually, especially given the future enlargement.[82] The evidence shows that after a number of successive enlargements in which former totalitarian States sought democracy under the EU umbrella, the issue of enforcement became rather pressing as the rule of law tradition in these States was fragile and eventual breaches had to be brought under control.[83]

Before the Nice Treaty, which revised the first version of Art. 7 and which allowed for the determination of 'a clear risk of a serious breach', a similar situation to what the EU is dealing with today arose in Austria: Jörg Haider's far-right *Freedom party* (FPÖ) blatantly assaulted the EU values by breaching the rights of minorities, refugees and immigrants, whereby it revealed the necessity to set up a minimum level of normative homogeneity within the EU.[84] At that time, the situation was settled by a series of non-legal, ad hoc bilateral sanctions such as blocking of Austrian candidates for positions in IOs imposed on Austria by 14 other MS, which attracted a lot of controversy as these sanctions were passed on Austria outside of the official EU law framework – albeit with the help of EU institutions – and a wave of criticism of unfounded interference into Austria's democratic elections stroke.[85]

On one hand, this case pointed to the EU's lack of capacity to address such crisis. On the other, it suggests that Austria was mistreated in a breach of EU law as it was never accused of infringement of the EU values, and the EU institutions made no reference to the procedure of Art. 7 whatsoever.[86] Notably, it was argued that the situation required a swift reaction which was not possible due to the lack of reference to a 'risk' of serious breach incorporated in the former Art. 7. Allegedly, the FPÖ's policies, albeit inconsistent with the EU values, represented rather a *risk of* than an actual *serious* and *persistent* breach, as required by the initial sanctioning

[81] Kochenov, D. (2017). Busting the Myths Nuclear: A Commentary on Article 7. *EUI Working Paper No. LAW 2017/10.*
[82] Ibid.
[83] Larion, I. (2018).
[84] Leconte, C. (2005). The Fragility of the EU as a 'Community of Values': Lessons from the Haider Affair. *West European Politics, 28*(3), 620-649.
[85] Closa, C. and Kochenov, D. (2016). *Reinforcing Rule of Law Oversight in the European Union*. Cambridge University Press.
[86] Leconte, C. (2005).

mechanism, and in which particularly the word *persistent* refers to a continuous act existing for certain period of time, which was not the case in the Haider affair.[87] According to the Council, the conditions of Art. 7 have not been met in relation to the existence of *serious* and *persistent* breach and there was in fact not a clear breach of values.[88] Such high threshold for the use of Art. 7 seems however illogical in the sense that the biggest threat to the EU values lies in their imminent abuse, which is why the Nice Treaty proposed a change of Art. 7 and incorporated the existence of a "mere" threat into TEU. Strangely, the EU institutions often referred to the Austrian experience in negative terms as a ground against using Art. 7 due to its "heavy" implications while Art. 7 was never used in this particular case.[89] Or, perhaps it is possible to interpret the FPÖ policies as too isolated in that they specifically targeted a small group of persons and lacked the widespread nature necessary to compel the EU institutions to act.

Subsequently, the Art. 7 was upgraded with the Lisbon Treaty. In fact, from the 1990s onwards, human rights clauses were inserted into all EU agreements, and the significance of enforcing common values – including the rule of law – was underlined on a number of occasions. By that time, it was established that it is primarily the responsibility of the EC, the 'guardian of the Treaties', the EP and the Council to make sure that the rule of law is duly respected within the EU territory, and if necessary, to resort to measures aimed at remedying defiant behaviour of MS. Above all, it was decided that it is a matter to be settled within the EU law framework, not by bilateral action of remaining MS.[90]

As evidenced by the wording of TEU, while Art. 2 explicitly lists the fundamental values of the Union, Art. 7 serves as a suspension clause in case of a serious and persisting breach of these values.[91] The procedural capacity of Art. 7 is in fact threefold: Art. 7(1) TEU is considered a preventive measure which determines the existence of a 'clear risk of a serious breach' and allows for the adoption of recommendations to the perpetrator. The Art. 7(2) provides for the declaration of an actual existence of such serious and persistent breach. The Art 7(3) then gives rise to a sanctioning mechanism following a declaration of breach from para 2.[92] In all, Art. 7 supposedly provides a solid legal framework to remedy MS incompliance.

[87] Kochenov, D. (2018).
[88] Sadurski, W. (2016). Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider. *Columbia Journal of European Law*, *16*(3), 385-426.
[89] Ibid.
[90] Besselink, L. (2017).
[91] Ibid.
[92] Art. 7 TEU.

2.4 Implied commitments through the EU Constitutional Principles

In addition, not only is the rule of law explicitly contained in the MS' *primary* commitments through the means of Art. 2 TEU, but it also stems from *secondary*, i.e. implied commitments through a number of relevant EU constitutional and administrative principles.[93] In other words, the primary law does not bring an exhaustive answer as regards the rule of law, demonstrating that other sources of EU law should be consulted in addition.[94] These general principles of EU law, aside from being generally applied, have a primary law status and therefore are binding for all EU institutions in the exercise of their legislative and administrative competences. This fact is further sustained by the ECJ interpretation of the general principles, which sees them as 'common to all MS', and the wording of Art. 3(1) and 13(1) TEU, which establishes the promotion of these principles as the EU's aim.[95] Seeking to consolidate the scope and application of the EU law, they represent a set of justiciable principles which uphold the rule of law within the EU territory.[96]

The Art 4(3) TEU, that is the principle of loyalty, sometimes also referred to as principle of sincere cooperation, solidarity or even equality has its roots in various international legal documents. It is expressed by virtue of a universal recognition of *pacta sunt servanda* in the preamble of the Vienna Convention on the Law of Treaties (VCLT) and also as the 'good faith' principle from the UN Charter.[97] The inherent assumption behind this principle is that the integrity of the EU legal system is in fact placed higher than the protection of national regulatory autonomy, which refers to the primacy of EU law.[98] Hence, for example in terms of effective judicial protection, MS are under a duty stemming inter alia from their loyalty to ensure the availability of domestic remedies in their legal orders.[99]

Moreover, the principles of consistency, legitimate expectations and legal certainty all to some extent bring implicit commitments to the respect for rule of law: the principle of consistency requires the law to be applied in a rational and coherent way and sets up a unified

[93] Konstadinides, T. (2017), p.85.
[94] Šišková, N., 2019. The EU Concept of the Rule of Law and the Procedures de lege lata and de lege ferenda for its Protection. *International and Comparative Law Review, 19*(2), 116-130.
[95] Besselink, L. (2017), p.4.
[96] Ibid.
[97] VCLT Preamble; Art. 2(2) UN Charter.
[98] Konstadinides, T. (2017), pp.85-86.
[99] Ibid, p.87.

manner in which the individual national legal systems are to be assessed.[100] Similarly, the principle of legal certainty underlines that decisions need to be consistent with the existing framework of the EU legal system, which allows for a certain predictability and certainty of the jurisprudence. In connection with the principle of legitimate expectations, which states that citizens should be able to rely on the government policies as they were presented to them, implying that an unlawful measure could be retroactively revoked, these three principles reinforce the role of the rule of law in the EU legal system.[101]

On a different note, according to the principle of proportionality, the EU must be limited to what is necessary to achieve the objectives of the Treaties. It is primarily connected to judicial review of public acts, e.g. review of the legality of the secondary EU law and compatibility of national law with EU law.[102] Importantly, the CJEU jurisprudence displays an increasing tendency of weighing the EU fundamental freedoms against national legislation seeking to protect the domestic interests. In that regard, the use of the principle legitimises the constitutional claims of EU law, suggesting that individual rights will be on the rise.[103]

Essentially, Art. 19 (1) TEU states that MS "shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law", obliging MS to maintain effective judicial protection through independent courts as a concrete manifestation of their rule of law commitments.[104] Therefore, the guarantee of judicial independence is clearly formulated as a legal obligation arising out of the TEU.[105] To elaborate, the CFR stipulates in its preamble that the EU is based on the principles of democracy and rule of law. Art. 47 CFR could be particularly relevant in that it provides a legal basis for an effective remedy before an independent tribunal in case of violations of rights guaranteed by EU law.[106] Even though by virtue of Art. 51 CFR this provision can be only applied to MS when they are implementing EU law and it does not create any new power on the part of the EU, inasmuch as cases of rule of law violations are concerned, it is argued that the Art. 51 CFR does not extend the application of the Charter beyond the scope of EU law, but rather "substantiates the claim about the systemic character of a breach of Member States' obligations stemming from the Treaties (such

[100] Konstadinides, T. (2017), pp.87-92.
[101] Ibid.
[102] Sauter, W. (2013). Proportionality in EU Law: A Balancing Act?. *SSRN Electronic Journal*, 439-466.
[103] Ibid.
[104] Art. 19 TEU.
[105] See e.g. European Judicial Training Network. (2019). *Rule of Law in Europe: Perspectives from Practitioners and Academics*.
[106] Art. 47 CFR.

as the obligation to respect the rule of law under Article 2 TEU)."[107] Correspondingly, it can be used as an additional layer in the argumentation for triggering other relevant mechanisms when confronted with MS infringing upon their Treaty obligations.

To conclude, it should be noted that the EU institutions seem to be equipped with a presumably strong rule of law framework which consists of both primary and secondary commitments on the side of the MS. The EU should be thus able to use the corresponding mechanism, which was essentially designed to protect its inherent values, to remedy the rule of law backsliding in its MS. In this sense, with regard to the conceptual foundation of the EU rule of law framework, there seem to be no particular reason for the inaction of EU institutions vis-à-vis Art. 7, if a situation in which a MS fails short of contemplating its commitments, arises.[108]

[107] Bárd, P. and Śledzińska-Simon, A. (2019).
[108] Kochenov, D. (2018).

3 DISCREPANCY BETWEEN THE EU'S INTENTION TO ENFORCE THE RULE OF LAW AND ITS DETERIORATION IN HUNGARY AND POLAND

While there is an existing legal framework protecting the rule of law at the EU level and Art. 7 alone is presumably well-suited for remedying incompliance with EU values of the MS, the EU institutions showed reluctance to call this provision into action, in fact, they seem internally undecided on how to address it.[109] In different circumstances, this could be perhaps translated as a sign of adherence to the Treaty obligations where no action from the EU is needed whatsoever. However, considering the wide variety of legal scholars, EU officials, public authorities, NGOs and other independent institutions criticizing the legal reforms and their devastating impact on the operation of rule of law in Hungary (2010) and Poland (2015), it is clear that this is not the case.[110]

In 2014, following the outburst of the judicial reforms in Hungary, the EC only vaguely stated that "results have been achieved. However, the Commission and the EU had to find ad hoc solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law."[111] This statement creates the impression that the situation has been brought more or less under control, and appears to be intentionally unspecific as to the concrete results achieved. At the same time, the EC criticizes the 'current EU mechanism and procedures'. Despite the fact that it does not specifically mention Art. 7, it suggests that Art. 7. is precisely what the EC has in mind with this criticism. By way of explanation, it denounces its alleged 'inappropriateness' and inability of usage in the need of 'effective and timely response'. Then, the EC goes on by declaring that the MS are in fact in a good position to protect their citizens against any threat to the rule of law despite some limited evidence of lack of respect for the fundamental values.[112] Accordingly, this declaration conveys aspects which seek to legitimize the use of ad hoc solutions instead of relying on the existing mechanism of Art. 7.

This example of a *communiqué* between the EU institutions shows evidence of a hesitant attitude when it comes to denouncing the breach of EU values within the framework of Art. 7.

[109] Kochenov, D. (2018).
[110] Pech, L. and Scheppele, K. (2017).
[111] EC. (2014).
[112] Ibid.

Moreover, it illustrates a discrepancy between the EU's intention to enforce the rule of law and its current deterioration in two of its MS. Although the EU seems to frame the rule of law as one of its highest priorities, when the situation so requires, the use of Art. 7 is genuinely not seen as a possibility. Instead, the EU institutions resort to criticism of the instrument without offering further evidence, seeking to bring other measures into play. It could be thus suggested that without giving the instrument a proper chance, the institutions jump directly to the conclusion that its use would be inefficient due to its presumed juridical limits.

Additionally, when contemplating several *communiqués* from the EC regarding the use of Art. 7 TEU and/or violation of EU values and comparing it to different contexts which have occurred in Hungary and Poland over time, it seems justified to conclude that the instrument exists rather in theory than in practice.[113] Namely, in 2015 the EC informed of the initiation of an infringement procedure against Hungary for its amended asylum legislation which featured no possibility to refer to new facts and circumstances in the context of appeals whereby the decisions in case of appeals were not automatically suspended, forcing applicants to leave the territory before the time limit for lodging an appeal expires, and which limited the right to translation and interpretation and allowed court secretaries to take judicial decisions.[114]

While Art. 47 CFR was referred to by the EC, no reference to the Art. 7 TEU was made. Similarly, in the 2016 press release on the College of Commissioners debate, the EC criticized the Polish reform of the Constitutional Tribunal and the governance of Public Service Broadcasters. Although the existence of Art. 7 was mentioned in this statement and the procedure explained, the EC mainly informed of its two written letters to the Polish government seeking additional information and recommending to consult the Venice Commission beforehand.[115] The nature of these measures seem to be inadequate and strange in the sense that the EU does not need to invoke the Venice Commission's appraisal of the rule of law as it has its own legal framework and enforcement capacity. Despite that, the EC's approach could be described as indulgent and highly diplomatic.[116]

[113] Von Bogdandy, I. and Ioannidis, M. (2014). Systematic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done. *Common Market Law Review*, 59-96.
[114] EC. (2015). *Commission Opens Infringement Procedure Against Hungary Concerning its Asylum Law.*
[115] EC. (2016). *College Orientation Debate on Recent Developments in Poland and the Rule of Law Framework: Questions & Answer.*
[116] Lehne, S. and Grabbe, H. (2017). *Defending EU Values in Poland and Hungary*. Carnegie Europe.

3.1 The nature of the legal reforms in Hungary

In 2010, the Hungarian *Fidesz* made use of the Christian-Democratic People's Party to secure more than two-thirds of the seats in the parliament, which at that time disposed of a single legislative chamber. Starting with the second Orbán government, the national ballot was changed to feature a one-round election procedure relying on gerrymandering and citizenship extension in total disrespect for the principles of fair elections.[117] First, the government attempted to set a mandatory retirement age for judges at 62 with imminent effect and without the employer's discretion, whereby the most experienced judges were consequently removed from the judiciary.[118] Even though by the end of 2012, due to the pressure from the Constitutional Court and the ECJ, Hungary eventually re-hired some of the judges, it did so in a way that it was more appealing for the judges to accept a financial compensation and give up their posts than actually returning to their offices. In other terms, the government's compensation equalling 12 months of service was too good in comparison to the mere return to the office for judges who were already between 60-70 years of age and who would probably not work for a long time anyway. As a result, Hungary accomplished its goal of getting rid of the previously serving judges whilst making the decision seem voluntary.[119]

At the same time, the case *Commission v Hungary* was misconstrued in that there was no mention of Art. 19(1) TEU ("MS shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"[120]) or Art. 47 CFR (right to an effective remedy and to a fair trial[121]). In this sense, the case involved an illegal age discrimination rather than an alleged breach of rule of law, which was essentially compromised in the scenario. It is also evident that no procedure relating to Art. 7 was undertaken.[122]

The new party's policies gradually translated into a series of legal steps aimed at completely revoking the judicial oversight of the country by disposing of the Constitutional Court, altering the procedure for judicial appointment and limiting the powers of the judicial council. Correspondingly, other fora responsible for checks and balances within Hungary were suppressed, and the silencing of dissent of both the political opponents and the citizens started

[117] Kochenov, D., and Bárd, P. (2018).
[118] Bárd, P. and Śledzińska-Simon, A. (2019).
[119] Ibid.
[120] Art. 19(1) TEU.
[121] Art. 47 CFR.
[122] *European Commission v Hungary.*

to take place on a regular basis.[123] In fact, *Fidesz* used the constitutional supermajority to revisit the totality of the legal-political system. Invoking the need to boost economic development at all cost, it legitimized the setting up of an illiberal democracy à la Putin and turned the Constitution into its political tool. Actually, Orbán himself explicitly underlined the advantages of economic growth at the expense of democratic values.[124]

As a consequence, a new Constitution entitled *Fundamental Law* was adopted and then abused to render the checks on the government without effect. Importantly, "Orbán expanded the size of the Constitutional Court and then packed it, made sure that he can install a new president of the Constitutional Court, ousted the Supreme Court president through a constitutional amendment"[125] and continued to undermine the judicial independence in Hungary by setting up a new institution with power over ordinary judicial appointments. Indeed, the government's assumption that the key to the long-term control of the judiciary are presidents of ordinary courts and judicial councils led to the dismissal of the Supreme Court President. By ousting the president, the government gained control of the most crucial court in the country and simultaneously got rid of its major critic. This was an important step from the point of view of trouble-free rule which operates beyond any control mechanism.[126]

Accordingly, since 2018, Hungary is undergoing an unprecedented constitutional crisis over the supervision of court administration amidst a heated propaganda campaign against uncorrupted judges and judicial autonomy.[127] *Fidesz* is in the position to appoint its own candidates to the National Judicial Office (NJO), which is the most influential actor in the area of court administration. The National Judiciary Council (NJC), entrusted with overseeing the NJO, was accused of operating unlawfully because of the low number of members and because administrative and labour courts are no longer represented in it. The work of both NJO and NJC is therefore questionable as to its legitimacy and efficiency.[128]

The country is continuously hit by intimidation as there is sufficient evidence of pressure induced on judges, but also NGOs that could hold the government's measures to account.

[123] Bárd, P. (2018). The Rule of Law and Academic Freedom or the Lack of it in Hungary. *European Political Science*.
[124] Kochenov, D., and Bárd, P. (2018); see the speech by Viktor Orbán at the 25th Bálványos Summer Free University and Student Camp from 2014.
[125] Bárd, P. (2018).
[126] Kosař, D. and Šipulová, K. (2018). The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law. *Hague Journal on the Rule of Law, 10*(1), 83-110.
[127] Medvegy, G. (2019). *Slowly and Stealthily: Rule of Law Being Undermined in Hungary*. Hungarian Civil Liberties Union for Europe.
[128] Ibid.

Meanwhile, the increasing danger lies in the politization of the legal procedures, and the fact that the Hungarian judiciary becomes more and more political is of particular concern for the EU. The virtual absence of courts and judicial oversight makes it extremely difficult to address the situation.[129] Besides the attacks on the judiciary, the government undertook additional measures aimed at consolidating its rule, namely through silencing of the NGOs, civil society and academia. The discontent with the academic opposition culminated with the conflict with the Central European University, which was expelled from the country.[130] Even though academic freedom has been previously constitutionally embedded in Hungary since the democratic transition, after a series of laws and policies eliminating government criticism, a modification of the Act on National Higher Education was adopted, and its only objective was to force the US-accredited CEU out of Budapest.[131]

Actually, the modification of similar acts and unconstitutional law amendments fit perfectly into the broader picture of constitutional capture, in which Hungary is no longer capable of ensuring its own democratic commitments, let alone adhering to the EU values. While proceedings under Art. 7(1) have been triggered in 2018 after a series of thorough warnings from the EU institutions, the situation remains unchanged and the risk of compromising of EU values contrarily increased.[132]

3.2 The nature of the legal reforms in Poland

From 2015, Poland was successful in mirroring the events in Hungary by introducing a package of law revisions with the aim to completely change the procedure for judicial appointments, the disciplinary procedure for judges and the structure of the Supreme Court. Lacking the super-majority to change the Constitution, Poland simply decided to ignore it, which led to an absurd situation in which it failed to comply with its own laws.[133]

Above all, the criticized reform of the Constitutional Tribunal and the NJC, which lowered the mandatory retirement age for judges and led to naming of *PiS* own candidates in the selection procedure, attracted a lot of criticism.[134] Interestingly enough, Poland identically replicated the 2001 Hungarian attempt to remove judges from the judiciary, even though it

[129] Medvegy, G. (2019).
[130] Gall, L. (2018). *Central European University Forced to Leave Hungary*. Human Rights Watch.
[131] Bárd, P. (2018).
[132] Ibid.
[133] Kochenov, D. (2017).
[134] Eyre, M. and Allsop, J. (2019). *Poland Is Purging Its Prosecutors*. Foreign Policy.

invented own justifications. In fact, the proposed changes of the Constitutional Tribunal, Supreme Court, NJC as well as the ordinary courts were passed under the pretext of a wider reform of the judiciary, which, as Poland constantly reminded, was within the sovereign powers of the MS. Accordingly, in Poland's understanding, any countermeasures of the EU would be consequently illegal considering that the EU would act *ultra vires*.[135]

It should be noted here that even though the MS do enjoy discretion and are sovereign in their decision to amend domestic laws, i.e. they are not superseded by a supranational entity, the principle of *primacy* of EU law entails an obligation not to apply the national law should it prove to be inconsistent with EU laws.[136] In other words, in case of a collision between a domestic and EU regulation, the EU law prevails; and albeit there is no direct invalidation of the national law because of the separate nature of the two legal systems, it is clear that it is not possible to justify the creation of illiberal laws with appeals to national sovereignty: "the EEC treaty has created its own legal system which (…) became an integral part of the legal systems of the MS and which their courts are bound to apply".[137]

First, the powers of the Polish Constitutional Tribunal were restricted. Its structure and proceedings were changed, its budget considerably cut and some of the elected justices were not allowed to take oath which led to unconstitutionally elected *PiS* candidates taking the oath instead. Therefore, the power dynamics in the Tribunal changed.[138] Shortly after, the government turned to the Supreme Court, whereby it empowered the executive to prematurely end the tenure of judges, determine the conditions and procedure for becoming a judge, control the disciplinary procedures, amend the rules of procedure, change the number of judges serving in it or the case allocation.[139] In regard to the ordinary courts, it was further established that all Presidents and Directors of the courts responsible for administrative and financial issues will be subordinated to the Minister of Justice.[140] It goes without saying that the integrity of these persons lies in their independent and impartial work outside the political influence of government authorities, and that the contrary implies a profound politization of the judiciary.

In reality, even the EC itself acknowledged that "more than 13 laws affecting the entire structure of the justice system in Poland [have been passed] (…) the common pattern is that the

[135] Koncewicz, T. (2016). Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law. *Common Market Law Review*, *53*(6), 1753-1792.
[136] Hamuľák, O. and Stehlík, V. (2013), pp.89-90.
[137] *Flaminio Costa v E.N.E.L.*, para 3.
[138] Kochenov, D., and Bárd, P. (2018).
[139] Ibid.
[140] Ibid.

executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch".[141] This fact demonstrates the extent to which the independence of the judiciary, impartiality of judges and right to fair trial have been compromised in the country. It is thus not surprising that it was held on a several occasions that the whole Polish judiciary is no longer operational due to the numerous controversial legal amendments and politization of the institution.[142]

On a different note, it should be stressed that 'if the legal system in a MS is broken, the legal system in the whole of the EU is broken'. This is how the situation in Poland could be described, though, given the extent of the judicial changes and their consequences on the operation of justice.[143] Importantly, "by questioning the powers of the EU the Polish government does not aim to initiate a legitimate discussion about the delineation between national and EU powers. It much rather wishes 'to break free from the supranational machinery of control and enforcement'."[144] Following this logic, both national and international institutions seeking to exercise control over the legal reforms of the country are deemed undesirable. By questioning the EU's capacity to enforce its legal provisions along with the general attitude that it is in fact entitled to make such changes, Poland seeks to legitimize its adopted measures outside the reach of EU's scrutiny.[145]

In a case from 2018, an action was brought against Poland under Art. 258 TFEU for failure to fulfil obligations, namely Art. 19(1) TEU (rule of law, effective judicial protection in the fields covered by EU law, principles of the irremovability of judges and judicial independence, lowering of the retirement age of judges, possibility of continuing to carry out the duties of judge beyond that age subject to obtaining authorisation granted by discretionary decision of the President of the Republic etc.).[146] While it could be argued that the EC has taken a proactive approach by bringing an action against Poland, it is worth noting that the infringement procedure relates primarily to the manner in which judges are elected and on their alleged discrimination as to age instead of invoking rule of law directly.[147] Arguably, this

[141] EC. (2017). *Rule of Law: European Commission Acts to Defend Judicial Independence in Poland*.
[142] Bárd, P. and Śledzińska-Simon, A. (2019).
[143] Kochenov, D., Pech, L. and Scheppele, K. (2017). *The European Commission's Activation of Article 7: Better Late than Never?*. Verfassungsblog On Matters Constitutional.
[144] Kochenov, D., and Bárd, P. (2018).
[145] Ibid.
[146] *Case C-619/18 European Commission v Republic of Poland.*
[147] Jakab, A. and Kochenov, D. (2017).

solution was seen as a more suitable option for the EC, which sometimes prefers to tackle smaller technical issues than the important implications, aka Al Capone tactics.[148]

Despite the fact that proceedings under Art. 7(1) have been initiated, the lack of progress on the ground is striking. Some researchers claim that "the recent period highlights the inability of Art. 7 to correct potential deviations from rule of law in MS, except if one takes into account the possibility that the much praised 'strengthening of the dialogue' between the EU's Council of Ministers and the MS may help to reconcile positions."[149] However, such beliefs are quite idealistic and the progress one year after the actual application of Art. 7(1) appears to be genuinely limited. It is thus evident that the EC did not take full use of Art. 7.

3.3 The scope of the conflict with the EU Commission

It is beyond doubt that the rule of law is of crucial importance for the functioning of the EU as it subordinates citizens under jurisdiction, protects equality before law and prevents the arbitrary use of power, particularly through the means of independent and impartial courts and the realization of the right to fair trial.[150] In contrast, the removal of such basic institutional and procedural guarantees seriously undermines the effective enforcement of EU law within MS and therefore the protection of the fundamental rights of EU citizens. The backsliding rule of law in MS thus has a detrimental impact on the EU's legal system as a whole in that it undermines the legitimacy and authority of the organization.[151]

Though the assaults on the rule of law in Hungary and Poland seem to be sufficiently documented through the numerous examples of law amendments, the EU institutions have not gone far regarding the use of its legal toolkit.[152] Unsurprisingly, both Hungary and Poland dismiss any claims suggesting that their legal measures are in fact incompatible with the rule of law and/or EU laws, let alone unconstitutional and undemocratic. Both countries relied on raising the arguments of national sovereignty and unfounded EU interference into their domestic affairs.[153] Despite the fact that the Commission initiated proceedings against both

[148] Nagy, C. (2017). Do European Union Member States Have to Respect Human Rights? The Application of the European Union's "Federal Bill of Rights" to Member States. *Indiana International & Comparative Law Review, 27*(1), 1-13.
[149] Michelot, M. (2019). *The "Article 7" Proceedings Against Poland and Hungary: What Concrete Effects?*. Jacques Delors Institute: Institute for European Policy.
[150] Krygier, M. (1999).
[151] COE. (2019).
[152] Kochenov, D. (2017).
[153] Koncewicz, T. (2018). The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux.

States pursuant to Art. 7 in 2018 and 2017 respectively, the state of art in Hungary and Poland remains largely unchanged: "the current approach of European institutions is either to deny that problems with the judicial independence in a MS have implications for the protection of fundamental rights in the EU or to address them exclusively as a fundamental rights issue."[154] Nonetheless, there is a difference between invoking a breach of Art. 2 TEU whereby activating the procedure of Art. 7 and addressing structural attacks on the judiciary as an issue of fundamental rights of individual citizens. Such approach seems to effectively play down the severity of the situation and fails to address the implications on all EU citizens.

Similarly, even though the triggering of Art. 7 against Poland gave way to three hearings of the Polish Government before the GAC on the basis of four corrective recommendations by the EC from 2016 and 2017 regarding the application of ECJ decisions in cases involving the Polish judicial system, the outcome of these hearings was rather disappointing: none of the CEECs took the floor to ask the Polish delegation further information about its law revisions, which reflected the political divide on these issues and which made the problems in Poland seem inferior. Moreover, already at that time, the Council could initiate a vote on the existence of a *clear risk of serious breach* following the EP's approval, but it was not the case.[155]

As regards the request for interim measures by the EC to the ECJ, a temporary suspension of measures concerning the forced retirement of judges of the Polish Supreme Court was made. However, while some judges returned to their offices, it is unclear whether it led to any positive changes on the ground. "These advances, albeit important, cannot fully prevent the implementation of reforms of the Polish judicial system, nor even other abuses such as the fact that some Polish judges, who have had issued preliminary references to the CJEU, have been subjected to preliminary disciplinary investigations in Poland."[156] Besides, the ECJ did not address the full range of measures impeding the effective operation of the Supreme and Constitutional court, and the reluctance of the Polish authorities to comply with the ECJ measures along with the insufficient implementation of the order suggests that the EC will have to continue in its endeavour to issue infringement proceedings.[157]

Interestingly, Ireland made a request for preliminary reference with regard to the validity of the European arrest warrant if the requesting country displayed 'systemic or widespread

[154] Bárd, P. and Śledzińska-Simon, A. (2019).
[155] Michelot, M. (2019).
[156] Ibid.
[157] Ibid.

deficiencies that would affect the independence of the judicial system'.[158] The ECJ judgment included a two-step rule of law test, particularly for assessing the risks of lack of access to a fair trial before an independent tribunal. By doing so, it laid down a basis of a jurisprudential structure which appears to be incompatible with the principle of mutual trust, which is the driving force behind the relations between the judicial systems of the MS. In that regard, it offered an individual test which is to be applied on a case-by-case basis instead of providing an answer to a systematic threat to rule of law.[159] To elaborate on the facts, the only tangible progress relates to the infringement procedure, and not to Art. 7. While the activation of Art 7(1) suggests a move towards accountability, the structure and functioning of the Council seems to do nothing but buying more time for Poland and Hungary.[160]

Notably, Hungary and Poland have created a paradox where two MS with atrocious rule of law record simultaneously receive a considerable portion of EU funding. That is why in 2018 the EC presented a proposal of a system to block access to EU funds in order to protect the EU's financial interests in the event of 'generalised deficiencies'.[161] The European Council, however, stalled the procedure to tie EU funds with respect for the rule of law. Taking into consideration that half of the constituting V4 members are in conflict with the EC due to serious detour from EU values, it can be only assumed what could happen in the remaining two. This assumption can be illustrated by the growing preferences of the populist Czech *ANO* party.[162] Despite the PM's fraud criminal investigation reopened and numerous affairs giving rise to unprecedented demonstrations in the Czech Republic, it seems that his supporters are determined to see him winning the next elections more than ever, which is after all how everything started in Hungary or Poland.[163]

In fact, in a recent article, Hillion argues that by the decision to be no longer bound by the EU Treaties as expressed through the non-compliance with rule of law, Hungary and Poland have implicitly notified the EU of their will to leave the EU and invoked the Art. 50 TEU exit

[158] *Minister for Justice and Equality v LM*.
[159] Pech, L. and Wachowiec, P. (2019). *1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II).* Verfassungsblog on Matters Constitutional.
[160] Michelot, M. (2019).
[161] Bachmaier, L. (2019). Compliance with the Rule of Law in the EU and the Protection of the Union's Budget: Further reflections on the Proposal for the Regulation of 18 May 2018. *The European Criminal Law Associations' Forum*, (2), 120-126.
[162] Morillas, P. (2016).
[163] Cage, M. (2019). *In Prague, Protesters Demand the Resignation of Prime Minister Andrej Babiš*. Washington post.

clause.[164] However controversial this claim is, it goes without saying that the crises have escalated since the triggering of Art. 7(1). While an important leap forward was made by the recent ECJ order in *Case C-791/19 R Commission v Poland* whereby Poland "must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges"[165], the impact of similar judgments and the MS's willingness to abide by them are yet unknown. To conclude, without further arguing in what ways is the rule of law backsliding in Hungary and Poland – this is an empirically observed fact confirmed by a large number of scholars – the analysis will focus on the usability and/or efficiency of Art. 7 in order to determine whether a substantial reform of the instrument is required, or whether the ultimate problem behind the insufficient response of the EU institutions could perhaps relate to other variables than merely Art.7.

[164] Hillion, C., 2020. *Poland And Hungary Are Withdrawing From The EU*. Verfassungsblog on Matters Constitutional.
[165] Case C-619/18 *Commission v Republic of Poland.*

4 AND IN-DEPTH ANALYSIS OF ART. 7 TEU

4.1 A juridical assessment of Art. 7 TEU

The Art. 7(1) TEU entitles the Council to determine that there is a 'clear risk of a serious breach' by a MS of the values listed in Art. 2 TEU. Before making such decision, the Council may further initiate a communication process with the State concerned, addressing it with some recommendations. However, this procedure can be only triggered based on a reasoned proposal by one third of the MS, by the EP or the EC, whereby the Council, acting by a majority of four fifths and after obtaining the consent of the EP, can determine the existence of such a risk.[166] Similarly, Art. 7(2) gives the European Council the power to determine the existence of a 'serious and persistent breach', acting by unanimity on a proposal by one third of the MS or by the EC and after obtaining the consent of the EP, provided that it invited the MS in question to submit its observations on the facts.[167]

Under Art. 7(3), the Council, acting by a QMV, may decide to suspend certain of the rights deriving from the application of the Treaties to the MS after the determination of a *serious and persistent breach*. That in fact includes the voting rights of the representative of the given government in the Council.[168] In this sense, the para 3 sets into motion the most effective part of the procedure, particularly because the Art. 7 does not clearly define the type and extent of the sanctions to be imposed on the MS, it only mentions 'certain rights' without further reference to what these should constitute and therefore it is within the Council's discretion to decide what concrete sanctions will be inflicted.[169] All the more, in the *Bosphorus* case, the ECJ confirmed that if the sanctions are putting an end to massive violations of human rights, a substantial interference into the fundamental rights of citizens who are in no way responsible for such violations are justified, their planned objective being sufficient entitlement for such EU action.[170] Accordingly, if the breach under Art. 7 was similar to a massive human rights violation, which could be sustained in the cases of Poland and Hungary, the EU could legally impose extensive punitive measures. Though this is an extreme example amounting to *lex talionis* in that fundamental rights infringements would in fact justify further fundamental rights

[166] Art. 7(1) TEU.
[167] Art. 7(2) TEU.
[168] Art. 7(3) TEU.
[169] Besselink, L. (2017), p.6.
[170] *Bosphorus* case, para 22.

infringements, it is important to realize the far-reaching potential of para 3, if there was sufficient will to use it.[171]

However, the wording "may" suggests that while sanctions can be imposed on the perpetrating State, there is no legal obligation for the Council to do so even if the existence of a *persistent* and *serious* breach was actually determined through the para 2, which leaves the decision on the Council. In strict terms, the European Council acts together with the EP, after a proposal either by the EC or one third of the MS and after the EP's consent, which requires an interplay between the institutions themselves and the MS: the EP must consent, the EC can take the initiative but the European Council makes the declaration. Coordination and cooperation are therefore logical prerequisites for successful action when it comes to triggering of the instrument, suggesting that the opposite causes ineffectiveness.[172]

The Art. 7(4) is related to the amendment or revocation of measures imposed by means of para 3. Art. 7(5) identifies the voting arrangements which apply to Art. 7, and which are laid down in Art. 354 TFEU. Primarily, it is concerned with the fact that the defiant MS shall not take part in the vote and shall not be counted in the one third or four fifths of MS referred to in para 1 and 2 of that Art.[173] Naturally, this provision is required as it seems very unlikely for States to go against their own interests, and the voting should therefore take place without their interference. Additionally, para 5 states that abstentions by both absent and present members shall not prevent the adoption of decisions referred to in para 2, which is important from the perspective of counting votes. All things considered, it could be argued that para 1-3 form the most important part of the instrument as they codify the procedure for the determination of the *risk*, the *breach* and the possibility to impose *sanctions*. Similarly, the actual determination of the *existence of a serious and persistent breach* is the most important step of the procedure, which despite the possibility of MS to dominate the process, gives the European Council a privileged position.[174]

To conclude, Art. 7 includes both a *preventive* and a *sanctioning* mechanism. While these two mechanisms co-exist, it is important to note that they are not dependent one on another in the sense that only the successive completion of all the phases could lead to a legal imposition of sanctions.[175] Moreover, it is clear from the wording of Art. 7 that many EU institutions are

[171] Besselink, L. (2017), p.10.
[172] Ibid, pp.6-11.
[173] Art. 7(4), 7(5) TEU; Art. 354 TFEU.
[174] Besselink, L. (2017), pp.10-11.
[175] Kochenov, D. (2018).

to some extent present in the procedure and have power to influence how quick and efficient it will be. The reason behind this is probably connected to the severity of the procedure and the fact that it was not anticipated for daily use. While there are some positive aspects in this reasoning, especially as it makes it more difficult to misuse the Art., it has also negative connotations because the procedure is seemingly complicated and is dependent upon resolute action of all the actors concerned. Therefore, should one institution be hesitant to actively participate, it could hinder the activation of the instrument. At this stage, although the initial triggering of the article seems complex, nothing suggests that the instrument is inherently deficient inasmuch as it could not be used in a situation where the rule of law is under attack.

4.1.1 Legal delimitation of the procedures and powers under Art. 7

In regard to the *preventive* dimension of the instrument, the aim of para 1 lies in the power to *precede* an actual infringement of EU values by preventing it from happening in the first place. However, in reality the preventive nature of para 1 results in the separation of it from paras 2 and 3, as the manner in which the EU could respond under these paras differs substantially. As a consequence, the use of the preventive procedure was not particularly successful until this point since the institutions were concerned with the fact whether a concrete situation is grave enough to justify resorting to something which is often seen as a *last resort* solution. Meanwhile, it goes without saying that waiting for the situation to get more serious precludes this procedure from fulfilling its aim, and it creates a contradictory state of art where para 1 should respond to an external situation while it is unclear whether it has power to monitor the situation in the MS prior to the determination of the *clear risk*.[176]

Indeed, the monitoring powers seem to be explicitly given to the Council, and even though the EC previously confirmed the logical assumption that monitoring is inherent in the powers of the Council given its need to provide a solid factual basis when deciding on the severity of the situation in a MS, the Council recently disputed this power.[177] It is worth emphasizing that Art. 7 is not limited to areas of EU competence, so it also applies to areas in which the MS enjoy exclusive autonomy on their domestic level. The scope of application is meaningful in that it provides a legal basis for action in *any field* provided that fundamental principles are not respected. In contrast, as regards the infringement procedure, it is only

[176] Besselink, L. (2017), pp.15-16.
[177] Ibid, p. 16.

possible for the EU to activate it if it is within its exclusive or partial competence.[178] It could be asserted that another problem lies in the "fuzzy boundaries of the MS political orders as distinct from the EU political order. The very identity of the foundational values of the Union and of the MS makes it impossible to delimit the scope of EU law from that of MS orders when it comes to guaranteeing these values. This also explains the politically highly sensitive nature of doing so."[179] The impossibility to draw a clear line between these orders in turn complicates the manner in which EU values are enforced within the MS.

The procedural requirements behind the Art. 7 remain problematic in nature. First, the criteria for *serious and persistent* and *clear risk* have never been defined, which again puts the burden of proof on the institutions to justify that these conditions have been met, and which presupposes that they are under no obligation to make such declaration. Second, the high threshold for voting regarding the formal determinations along with the political dimension of the procedure and decisive role of the Council strikes. Third, the role of the EP, EC and the MS is often overlooked, which leads to a situation where their potential is not fully realized.[180]

It should be further noted that some scholars interpret the Art. 7(1) and 7(2) as a consecutive-step procedure. The grounds for this argument are twofold: first, in factual terms, the successive procedure has been used in the historically first activation of Art. 7 against Hungary and Poland.[181] Despite the severity of the situation, the EU institutions seemed to follow this script by only resorting to 7(1) so far. Second, "a warning step" is traditionally implied in other EU sanctioning instruments such as the infringement procedure.[182] If the articles were to be read independently, it is argued, they should have been contained in two different articles instead of being part of a single one. However, it is evident from the wording of the TEU that the declaration under Art. 7(2) is not dependent on a prior determination of a *clear risk* from Art 7(1), which logically means that para 2 can be activated directly and before any previous warning.[183] Precisely, if Art. 7(1) and 7(2) were supposed to be a successive procedure, they would have been formulated in such manner, but nothing in the wording itself suggests it. Even from a historic perspective, the TEU first contained the *existence of a breach* before adding the presumably separate instrument of a *threat of a breach*, which involves

[178] Sadurski, W. (2016). Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider. *Columbia Journal of European Law, 16*(3), 385-426.
[179] Ibid.
[180] Besselink, L. (2017), pp.37-38.
[181] European Parliament. (2020). *Rule of Law in Poland and Hungary Has Worsened.*
[182] European Policy Institute. (2017). *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in The European Union*. Open Society.
[183] Besselink, L. (2017), p.5.

different players and different type of action.[184] As a consequence, Art. 7(1) and 7(2) should be rather considered as independent procedures. Either way, it cannot be said that the record of Art. 7(1) is by far higher than Art. 7(2), which means that irrespective of this argument, the EU's endeavour to provide a needed response to the situation is limited.

The use of the term 'value' rather than principle in Art. 2 TEU further creates the impression that it is not a fully justiciable EU principle, and there is no apparent distinction between foundational but non-justiciable EU values and foundational legally enforceable principles.[185] Nonetheless, from the point of view of general interpretation of treaties, Art. 31 of the VCLT requires the provision to be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[186] Following this, Art. 7 should be read and interpreted in good faith and in a manner in which it was genuinely intended for use. As the law lays down a basis for action in case of a serious breach of EU values, such action should be taken in order to fulfil this goal. In other words, there is no obvious reason or implication regarding why it should not be used.

Also, it is worth noting that the ECJ does not hold any explicit role in activation of Art. 7 as its jurisdiction is limited to procedural issues only.[187] In other terms, no prior conviction of the court precedes the imposition of sanctions. The only jurisdiction the ECJ has relates to the review of procedural requirements and stems from Art. 269 TFEU. At the same time, considering the number of EU institutions present in the process, it is surprising that the ECJ's role was not more significant as it could potentially provide weight which is now lacking.[188]

4.1.2 The conceptual discrepancy between a supranational value and an intergovernmental mean of enforcement

While the States themselves once determined the need to be subject to an international, in other words *supranational* system of checks and balances, including as regards the rule of law, which is understood as a value transcending a specific moment in time as it consolidates the common benefit of States, the manner in which this supranational value meets intergovernmental enforcement displays a profound conceptual discrepancy.[189] Indeed, the

[184] Kochenov, D. (2018).
[185] Pech, L. (2013).
[186] Art. 31 VCLT.
[187] Besselink, L. (2017).
[188] Art. 269 TFEU.
[189] Koncewicz, T. (2018). *The Democratic Backsliding and the European Constitutional Design in Error.*

EU's constitutional design seems to suffer from a normative asymmetry where emphasis is placed on a supranational value at the EU level independent on the individual will of the MS, where self-governing and sovereign States agreed on the fact that some values are so foundational that they indeed go beyond their own interests, while at the same time these inherent values are only to be enforced by intergovernmental institutions: the European Council and the Council. Since both these institutions represent rather the interests of the MS than the EU as a whole, it appears illogical to put them in charge of a procedure which seeks to secure a supranational principle, implying that they would have to place the EU's interests above anything else at the expense of the MS.[190]

Simply put, this goes against the very nature of these institutions and clarifies why it is so difficult to trigger the instrument. Basing on a logical reasoning, it would seem more accurate to place such burden on the EC which is a supranational institution favouring the greater good of the EU. However, that it not the case and the highly sensitive political nature of the mechanism comes into picture. Assuming based on the role of the European Council and the Council, it is suggested that the procedure is guided mainly by diplomatic considerations, which is definitely a deficiency of a legal instrument. Moreover, the fact that the Council has a definitive say in the initiation of 7(3) is in contradiction with the principle that the EC holds the exclusive right of initiative in EU law.[191] In fact, even the changing presidency in the Council of the EU itself could be seen as a significant factor impeding a coordinated institutional action.

Furthermore, as regards the voting under 7(2) which leads to 7(3) suspension of rights, Art. 7 includes a procedure in which the remaining MS in the Council have to vote in order to hold the deviant State accountable for infringement of EU values, e.g. rule of law, and whereby *unanimity* is required. Although it is possible to relate to the threat of the instrument's overuse (and the breach must entail systemic nature), this high threshold makes the procedure inherently ineffective: if more than one State faces similar allegations from the EU, the second State can effectively block the voting by teaming up with the initial perpetrator.[192] This is particularly accurate for the case of Hungary and Poland, which established an alliance whereby Poland does not vote against Hungary and vice versa, as they will simply not undermine one another in the view of escaping sanctions.[193] The impact of such alliances, which were not anticipated by the TEU, is concerning as they impede the smooth activation of Art. 7 and protect the

[190] Koncewicz, T. (2018).
[191] Kochenov, D. (2017).
[192] Ibid; Financial Times. (2016). Orban Promises To Veto Any EU Sanctions Against Poland.
[193] Financial Times. (2016). Orban Promises To Veto Any EU Sanctions Against Poland.

perpetrators. Moreover, the remaining MS are captured in a circle where no accountability nor remedy for such serious breaches is within their reach.[194]

Once again, the intergovernmental nature of the voting creates an unbalanced situation where decisions are not made solely because of the lack of a supranational element in the process. Meanwhile, the inaction of the European Council and other institutions lead to more infringements of EU law, which then undermines its entire legal system. The fact that it is both within the MS and EU interest to see these values upheld thus remains unanswered.[195] In this context, it is claimed that the participation of a MS which is already subjected to the Art. 7(1) procedure in another Art. 7 procedure of another MS is clearly counter-productive and legally ambiguous as regards the *effet utile* of Art. 7 and calls for exclusion of such MS from the voting. That is, without the need to revise the TEU, the existing concept could be reinterpreted to take similar situation into account while maintaining the initial aim of the Treaty.[196]

4.1.3 The label of "nuclear option"

One of the most problematic aspects behind the activation of Art. 7 is that it has been long considered a measure which is somehow too strong to be used, a 'nuclear option', that is to say. Some legal scholars in fact go as far as calling it a *dead* provision, which only exists in theory but virtually cannot be invoked. This negative connotation apparently makes it too difficult for the EU institutions to justify its triggering, because it was only a theoretical measure not intended for use, and the implications of the instrument are too far-reaching.[197] Undeterred by this impression, the mere fact that the EC, the EP or one third of the MS can initiate the procedure, at least as regards para 1, should be sufficient to clear out any doubts as to the usability of the instrument. The four fifths majority in the Council is not as difficult to reach, all things considering, and is definitely far below the prerequisite of *unanimity* in the European Council which is necessary for the declaration of a breach under para 2.

Another essential point to stress is that the sanctions as such can be hardly regarded as too *heavy* given how easily they could be lifted under para 4. Besides that, the relevant actors should continuously monitor the situation and respond to changes of the situation, meaning that

[194] Koncewicz, T. (2018).
[195] Besselink, L. (2017), p.39.
[196] Pech, L., and Kochenov, D. (2019). *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid.*
[197] Larion, I. (2018).

the Council could react quickly by adjusting or revoking the sanctions with a QMV.[198] In light of the gravity of the violations they seek to redress, the sanctions are thus definitely proportionate and should be inflicted if needed so. To elaborate, it is important to underline that the wording of Art. 7 does not in any way suggest that it should not be used and any similar assumption is in contradiction with the *effet utile* of the provision.[199] Clearly, the object and aim of the provision is linked to the protection of fundamental values including the rule of law, and the article should be therefore triggered in situations of systemic rule of law backsliding, as is the case of Hungary and Poland.

By ignoring the fact that there is no factual obstacle in invoking the instrument apart from its procedural requirements and especially by fuelling the negative rhetoric surrounding it, the EU institutions undermine the instrument and prevent it from fulfilling its ultimate objective. All the more, this approach leads to the reinforcement of the idea that this provision is inherently deficient, and a substantial reform or even replacement of the mechanism is required. Notwithstanding, it seems that the EU institutions have been successful in spreading the nuclear myth and shielding their lack of action behind it. And the more they insist on this assertion, whatever unfounded and thin in evidence, the more it is complicated to argue that Art. 7 has the potential of being a viable tool. Either way, the procedure is hard enough as it is, so making it even harder in terms of phrasing it as somewhat unusable bombshell suggests the lack of will to approach it as a fully enforceable legal provision.[200]

To conclude, although the EU did not anticipate that the need to use Art. 7 would actually arise, there is no particular reason nor justification for not using it now. Genuinely, the commentaries of legal experts illustrate that the legal obstructions connected to the procedural requirements can be surmounted if supported by will to do so. Therefore, the assumption that nothing can be done in face of the situation in Hungary and Poland merely because of Art. 7 is by its nature wrong and does not legitimize the lack of measures taken. [201]

4.1.4 Criticism of MS as to double standards

Although the general principles of EU law lay down the foundational principles of the organization, they do not always prevail in the daily operation of its political life: they tend to

[198] TEU, Art 7(4)
[199] Kochenov, D. (2017).
[200] Ibid.
[201] Ibid.

be overlooked or reduced to merely theoretical ideals which explains the criticism relating to the question of enforcement of EU law. Not only are some of the provisions provided for in the Treaties rarely applied, but there is also inconsistency in the application of the law. Precisely, the considerations behind the activation of Art. 7 are often denounced by MS who criticize the double standards of the EU institutions, whereby EU allegedly reacts to rule of law backsliding in certain MS while ignoring the same state of art in others.[202]

The criticism is twofold: first, while the EU expects strict compliance with the rule of law from the candidate countries, insisting on a high threshold for rule of law, the MS are reluctant when it comes to allowing the EU institutions to interfere with their domestic institutions.[203] Second, the EU institutions supposedly treat similar cases in different ways and thereby place unproportionate burden on certain MS only. Naturally, this is one of the Hungarian and Polish most recurring arguments since both States claim that they respect the rule of law and that the EU has been targeting them deliberately. To be exact, Hungary often refers to EU criticism as a retaliation for its immigration policies.[204]

Among the most cited cases in which Art. 7 was not activated even though a breach of EU values occurred is the low Italian record on media pluralism from 2012, French 'Roma Crisis' from 2010 when citizens of Romani origin were deported in violation of EU law, or the Constitutional crisis in Romania from 2012.[205] In all these cases, some EU values were arguably disrespected without the EU interfering. Nonetheless, it should be asserted that the emphasis for the triggering of Art. 7 lies on the *systemic* nature of the violation implying that the domestic institutions are not capable of auto-correcting the deviations. Indeed, Art. 7 requires a certain level of constitutional capture which leaves the institutions *defenceless* and without means to respond. In the above-mentioned cases, the assaults on EU values could be dealt with by the national systems and the breaches did not amount to the threshold necessary to attract Art. 7.[206]

In fact, it is suggested that the question of triggering of Art. 7 puts into play the *intensity* versus *widespread* character of the violation. In the case of Austrian FPÖ, the breach of values was isolated in that the party's policies specifically targeted a relatively small group of persons in the society (immigrants) and lacked the widespread nature necessary to go from a case of an exceptional non-compliance related to an error of judgment or institutional weakness to a

[202] Konstadinides, T. (2017), p. 85.
[203] Kochenov, D. and Bárd, P. (2018).
[204] Rankin, J. (2019). *EU Leaders Must Do More To Save Rule of Law in Hungary, Says MEP*. The Guardian.
[205] Jakab, A. and Kochenov, D. (2017). *The Enforcement of EU Law and Values*. Oxford University Press, p.3.
[206] Ibid.

systemic assault.[207] In practice, however reprehensible or illegal the action was, only specific rights of specific persons were breached. Similarly, in the case of France, the intensity of the violation itself was severe, but affected only a specific group of people in France (Roma persons of Romani origin). In contrast, the events from Hungary and Poland cannot be attributed to a failure of a single institution and they do not limit themselves to a certain category of rights or specific target group. The wide-scale character of the rule of law backsliding in Hungary and Poland goes from free elections, fair trial and strong civil society to transparent law-making and governmental accountability: if the rule of law is not secured, many other rights will be neither as a result of their interconnected and mutually reinforcing nature. The backsliding therefore affects the totality of the country's citizens. It could be thus assumed that perhaps a single value breach is not sufficient to attract the activation of Art. 7 while *plurality* of values breached, and their *width* could be the game-changing criterion.

While the argument of double standards might have a valid basis in that EU institutions could be more critical, the fact that Art. 7 was not used in other cases does not necessarily mean that it should not be used now. Even if there was a historic situation in which it should have been used, the criticism goes back to the same reluctance of EU institutions which paralyses the activation of the instrument at the present time. As the Art. 7 is meant to cover only grave and persistent violations of EU values, these are the only criteria which should be taken into consideration when assessing the situation in Hungary and Poland. With regard to the widespread abuse of the institutions and massive politization of laws where the domestic courts are in no way in a position to correct the deviations on their own, the triggering of Art. 7 in the case of Hungary and Poland is beyond justified.[208]

4.1.5 Conflicting definitions, national identity, sovereignty and security of MS

Another argument against the use of Art. 7 relates to the definition of the rule of law, or the right of MS to determine the meaning of it according to their national understanding and constitutional traditions. In particular, the rule of law is seen as a concept which should be defined by the individual States rather than the EU, and the lack of universal EU definition is

[207] Reference to the *Spectrum of defiance* established by Jakab and Kochenov (2017).
[208] Von Bogdandy, A. and Ioannidis, M. (2014).

often raised, too. Interestingly enough, this reasoning is adopted especially by those MS which encounter problems with the EU regarding their rule of law record.[209]

The undeniable authority of the rule of law stemming from its constitutional character and universal validity already demonstrated throughout the text nevertheless permits to dismiss such claims. In effect, the Art. 6 TEU does not require the EU to interpret the rule of law in light of the Constitutions of the MS. Similarly, the CJEU can derive the general principles of EU law from the laws of the MS even though they are not unanimously recognized or applied in the same manner in all the MS.[210] Even if the content may vary, the case law of the CJEU and ECtHR, provide a non-exhaustive list of the principles and thereby define the core meaning of rule of law in accordance with Art. 2.[211]

Additionally, the term national sovereignty, constitutional identity and security are often invoked to undermine the operation of the domestic institutions, which further leads to systemic changes of the State infrastructure and its laws. At times, these invocations are not accompanied by any further justifications, simply basing on the somewhat magical word 'sovereignty' which is presumed to be a mean to escape supervision.[212] Similarly, the appeals to constitutional identity which seek to frame controversial measures with national interpretation of the Constitution are alarming and equal a "*carte blanche* type of derogation from (…) obligations under EU law."[213] With the *commonality* being at the heart of what the EU protects, it is only logical that the duty to respect the national identity of MS cannot be affected by means of Art. 7, nor can infringement of EU values be justified on the basis of the national identity clause.[214] Similarly, the right of sovereign decision-making does not imply that the EU acts *ultra vires* if it observes a violation of Art. 2 as there is a difference between the sovereign powers of a State within established legal limits and authoritarian buck-passing.[215]

4.1.6 Practical shortcomings in the hearings regarding Art. 7

Despite the fact that Art. 7(1) was activated against both Hungary and Poland, the evidence obtained from the hearings held to date expose a number of practical shortcomings.

[209] Pech, L. (2009).
[210] Ibid.
[211] EC. (2014).
[212] Kochenov, D., and Bárd, P. (2018).
[213] Ibid, p.12.
[214] Besselink, L. (2017), p.5.
[215] Budó, G. (2014). *EU Common Values at Stake: Is Article 7 TEU an Effective Protection Mechanism?*. Documents CIDOB. Barcelona Centre for International Affairs.

Primarily, the EU findings relating to the situation in the MS were not made available to the public, which demonstrates a clear lack of transparency.[216] Considering the high-profile debate and impact of the rule of law backsliding on the whole Union, the EU citizens should have access to such documents without any excessive obstacles. After all, they should be acquainted with possible perils at their doorstep. But for all that, the EC refrained from publishing its assessments as did the Council (in disregard with Art. 15(1) TEU concerned with conducting its work as openly as possible) which suggests that priority was given to diplomatic considerations over the public interests.[217]

Other issues in the Art. 7 hearings related to the randomised order of discussion of the selected topics, the absence of certain topics on the list or the low number of questions and comments by the national governments, which was underlined by the limit of two minutes for a maximum of two questions for each delegation taking the floor. What is more, the Council enabled the governments of the accused States to present their own observations at the end of the hearings without any time limitation whereas the remaining actors had to follow strict time limits at all times. This fact led to excessive timeslots given to the Polish and Hungarian authorities to defend their standpoints, often using absurd arguments.[218]

Furthermore, instead of inviting the EP to defend its proposal, the Council decided to make the EC the proxy for the EP against the EC's own position: "Article 7(1) TEU however does not provide for differential procedural rights between the different actors which have been granted the right to activate this provision. This is why the EC has been right to repeatedly point out to the Council that it ought to review its position and give the EP 'the possibility to present its case in procedures it has initiated' so as to respect the principle of institutional balance."[219] At the same time, such institutional balance is a prerequisite for the EU's functioning, especially in instances where serious violations of EU law are under investigation. In addition, similar scrambles at the level of EU institutions when it comes to practically deal with Art. 7 hearings do not play in favour of the institutions and their determination to take action, contrarily, they suggest that the issue transcends the shortcomings of the provision itself and leans toward a wider lack of institutional coordination.

[216] Pech, L. (2019). *From "Nuclear Option" to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date*. Reconnect Europe.
[217] Ibid.
[218] Ibid.
[219] Ibid.

5 CONCLUSION

5.1 Lack of adequate legal response – Due to the way Art. 7 is drafted or to other variables?

5.1.1 EU measures as opposed to recent developments in Hungary and Poland

During the past years, the EU has been caught amidst ongoing systemic challenges to the rule of law in two of its MS, bringing into question the effectivity of the legal instruments entrusted with its protection and with tremendous implications for its own law enforcement ability.[220] Against all odds, the EU institutions did not address even the most outrageous cases of incompliance by invoking Art. 7, at least to its full extent, while they attempted to ease the situation with non-legal means or with proposing new instruments of enforcement. Correspondingly, the EU institutions contributed to the current state of the instrument in which it fails to be recognized and is assumed to be irreversibly flawed.[221]

Namely, the EC, instead of invoking Art. 7(1) or 7(2) directly, focused on the deployment of a new RLF mechanism which contained a three-step approach in cases of a systematic threat to the stability, integrity and proper functioning of the MS institutions in the view of establishing an initial room for discussion with the non-compliant State.[222] The nature of the RLF nonetheless introduced additional steps in a procedure which already included the possibility to hear the MS out and address it with recommendations, not to mention that the MS would first need to be willing to cooperate with the EU institutions. Such pre-litigation steps are correspondingly in contradiction with the instrument's own rules of procedure. In light of its character, the RLF was simply not designed for situations in which MS willingly violate the rule of law, which in turn fails to consider the attitude of Hungary and Poland. Moreover, the RLF did not introduce any new legal obligations and therefore its only impact was the postponement of the actual triggering of Art. 7.[223]

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[220] Šišková, N. (2019). *The European Union - What is Next? A Legal Analysis and the Political Visions on the Future of the Union*. Wolters Kluwer.
[221] Kochenov, D. (2017).
[222] Adams, M., Meuwese, A. and Hirsch Ballin, E. (2017). *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*. Cambridge University Press, p. 424.
[223] Argyropoulou, V. (2019).

The Council, on its part, introduced an annual rule of law dialogue which consists of a peer review, but considering the composition of *peers* in this situation, it will hardly be more efficient than the RLF. The EP, which has the power to initiate Art. 7(1) on its own, worked on a detailed proposal to reform the existing instrument. Finally, the remaining MS which could have united themselves at a threat to the Union as a whole, were busy asking the EC to take action (which ultimately resulted in the introduction of RLF and not triggering of Art. 7) instead of launching 7(1) or (2) on their own, i.e. taking action themselves.[224] As a result, both States "received the benefit of years and years of time to entrench their regimes even further. Constantly failing to trigger Article 7 TEU the EU emerged as a paper tiger, absolutely incapable to enforce what it officially believes in."[225]

To emphasize, while a number of infringement proceedings have been brought to the CJEU, the situation barely improved, in fact, additional concerns were identified including the harassment of Polish judges in disciplinary cases via the Disciplinary Chamber of the Supreme Court in Poland.[226] The Polish *PiS* won the second term in office, *Fidesz* tightened its grip over the institutions, media and the civil society in Hungary, and despite the fact that the EU institutions repeatedly announced their intention to remedy the low rule of law record in both Hungary and Poland, they were not able to take full use of Art. 7 nor to achieve improvements with a limited use of it.[227]

5.2 Final remarks and conclusion

The thesis highlighted the EU rule of law framework in contrast to the legal reforms in Hungary and Poland. Stressing the importance of the rule of law, it demonstrated the perils of limiting its scope by needlessly undermining the enforcement mechanism at hand. For that matter, it proved that non-compliance with the most vital EU values did not prompt the EU institutions to take suitable action. Notwithstanding the limitations of the thesis reflected in the inability to cover all relevant procedural aspects and other important considerations related to specific actors responsible for the ultimate triggering of Art. 7, the analysis pointed out that the problem behind the EU's inability to bring tangible results on the ground is not the inefficient

[224] Kochenov, D. (2017).
[225] Kochenov, D. (2018).
[226] *Case C-791/19 R Commission v Republic of Poland*; European Parliament. (2020). Rule of Law in Poland and Hungary Has Worsened.
[227] Michelot, M. (2019).

legal framework, i.e. the fact that Art. 7 is inherently deficient, rather, it suggested that several other factors are responsible for the lack of action of the EU institutions.

In particular, the continuous reluctance of the EU institutions to invoke the procedure suggests that there is a lack of political will above anything else, which is appalling considering that the Art. 7 is first and foremost a *legal* instrument which should be free of overly political bargaining and should be used in accordance with the EU interests. The search for further justifications and the very framing of Art. 7 as an unusable provision by EU representatives, whereby criticism overshadows a missed opportunity, strikes in the context of escalating rule of law crises in Hungary and Poland. In addition, the length of the period during which the EU contemplated what measures would be best suited clearly demonstrates that diplomatic capital was invested at the expense of resolute legal action, leaving the institutions static in the face of lived escalating threats. Albeit the request for unanimity in the European Council is a valid concern, the institutions can hardly shield themselves behind it whenever action is required.

Notably, when the EU institutions finally activated the procedure of Art. 7, it was only the softer, somewhat MS-friendly Art. 7(1) and not the forceful 7(2). In a context where rule of law backsliding has moved beyond a mere threat and endangers not only the non-compliant MS, but the Union as a whole by systemic and unprecedented attacks compromising the independence of essential institutions, the triggering of Art. 7(1) is only a minor setback for the autocratic governments.[228] With such danger come alive, the non-activation of Art. 7(2) directly or promptly after failing to achieve results with 7(1) speaks of EU institutional failure which concerns the totality of MS. Once again, it should be underlined that the EU already has a sufficiently comprehensive legal toolkit, if it is to be used in a timely, vigorous and coordinated manner. Contrarily, an overly ambition to revamp the existing mechanism instead of using it could result in refusing the much-needed relief in the current circumstances.

While the Art. 7 is not a panacea and this thesis acknowledges its shortcomings, the EU institutions seem to deny that the ultimate solution to the current situation in Hungary and Poland could be to actually start using Art.7, getting rid of the 'nuclear' label and finally making it a viable tool by showing the MS that it *can* and *will* be activated against them. The threat of suspension of voting rights would therefore come to life, forcing MS to think twice about going against the system. That being said, the thesis does not intend to justify an excessive use of the

[228] Pech, L., and Kochenov, D. (2019). *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*.

instrument in situations where the threshold of *serious* and *persistent* nature of the breach has not been fulfilled. In that sense, Art. 7 should be still seen as a last resort solution, a safety net a too frequent usage of which would be counter-productive for the EU's interests in general. The rare use of Art. 7 should be a sign of a successful European project, however, not recoursing to it when the situation requires so only harms the EU's position and the sake of the MS.

Either way, the analysis has shown that the way Art. 7 is drafted does not provide an elementary reason for inaction of the EU institutions nor is the mechanism deficient to an extent which would prevent its use and thereby justify the need to reform it. The inadequate response on the side of EU institutions in fact helped to create a permissive political environment in which rogue governments can virtually do their bidding. The implied impression of tolerance which the EU institutions have repeatedly given by their approach to the events in Hungary and Poland has immense implications for future MS incompliance and trust in the organization. Ultimately, it is crucial to acknowledge that the EU itself has the major role in determining the future of Art. 7, having the power to shape it in one way or another.

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