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Recent developments in responding to rule of law threats in Europe – new responses by the European Commission and the Venice Commission

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Contents

SUMMARY 1

SAMMANFATTNING 2

ABBREVIATIONS 3

ACKNOWLEDGEMENTS 4

1 INTRODUCTION 5

1.1 Purpose and Research Question 5

1.2 Method and Theory 5

1.3 Delimitations 6

1.4 Previous research 7

1.5 Disposition 7

2 THE RULE OF LAW IN EUROPE – A WESTERN THEORETICAL FRAMEWORK 9

2.1 Why is the history relevant? 9

2.1.1 What can Aristotle and his concept of law teach us? 11

2.1.2 The Rechtstaat 12

2.1.3 The Rule of Law and Separation of Powers 13

2.1.4 The 'laundry lists' 14

2.1.5 The Political approach 15

2.1.6 The Moral approach 16

2.2 Contemporary organisations and the Rule of Law 16

2.3 Conclusion – why is the definition relevant? 18

3 THE EUROPEAN UNION AND THE RULE OF LAW 19

3.1 Introduction 19

3.2 Basis in Treaties 19

3.3 A new EU Framework to strengthen the Rule of Law - why was it needed? 21

3.3.1 Pre-framework options for responding to rule of law threats 22

3.3.2 The gap filler - what is included in the new framework? 25

3.3.3 How is the rule of law defined? 27

3.4 Conclusion 29

4 THE COUNCIL OF EUROPE AND THE RULE OF LAW 30

4.1 Introduction 30

4.2 How does the CoE define the rule of law? 30

4.2.1 The "Nuclear" option(s) 31

4.2.2 The Venice Commission 33

4.2.3 The Rule of Law Checklist 36

4.3 Conclusion 37

5 EFFORTS COMBINED 39

5.1 The Polish example 39

5.2 Conclusion 42

6 CONCLUSIVE ANALYSIS 44

6.1 Building a step forward 44

LEGAL DOCUMENTS 46

BIBLIOGRAPHY 50

TABLE OF CASES 53

Summary

This thesis assesses two relatively new rule of law tools of two regional organisations in Europe – the European Union with the new EU Framework for strengthening the rule of law, and the Venice Commission with a new rule of law checklist, and puts them in relation with a concrete case. The rule of law is a principle worth safeguarding at any time, but its relevance increases as it is being questioned and threatened. Regional organisations provide expertise that is somewhat detached from national political discourses, and has a higher chance of addressing national rule of law issues in an unbiased way. The rule of law is commonly referred to, but it is seldom defined. Therefore, the first section of this thesis is devoted to giving conceptual meaning and historical context to the rule of law. The following two sections addresses how the rule of law is defined in each organisation, and in relation with two recent tools for combating rule of law threats. The fourth section demonstrates how the European Union and the Council of Europe (foremost via the Venice Commission) are implementing these tools in a concrete case - the Polish Constitutional crisis. With best practices identified, the fifth and last section is a proposal on how to build a step forward. In this thesis, it will become clear that the European Union and the Council of Europe conceives the rule of law as a substantive concept and part of a bigger 'package' together with democracy and human rights.

Sammanfattning

Syftet med denna uppsats är att analysera och kontrastera två nya verktyg från EU och Europarådets Venedigkommission ämnade att bekämpa hot mot rättsstatsprincipen i Europa. Framförallt behandlar uppsatsen innehållet i Venedigkommissionens checklista för rättsstatsprincipen, samt EU:s nya ramverk för att förstärka rättsstatsprincipen. Idag ifrågasätts allt mer internationella organisationers arbete för rättsstatsprincipen liksom principen som sådan. Regionala organisationer bidrar med expertis som är någorlunda frånkopplad nationella politiska diskurser, och har därför högre chans att adressera problemen på ett objektivt sätt. Rättsstatsprincipen är en vanlig princip att åberopa, men som sällan blir definierad. Uppsatsens första del är därför ägnad till att ge en konceptuell grund och historisk kontext till rättsstatsprincipen. De följande två delarna beskriver hur rättsstatsprincipen definieras i respektive organisation, och ställer det i relation till de nyaste verktygen för att bekämpa hot mot samma princip. Den fjärde delen framställer hur EU och Europarådet (främst via Venedigkommissionen) implementerar dessa verktyg i ett konkret fall – den 'konstitutionella krisen' i Polen. Delen presenterar även vad som anses vara 'bästa praxis', och ligger till grund för det avslutande kapitlet, som innehåller ett antal förslag på fortsatt utveckling. I denna uppsats kommer det bli tydligt att EU och Europarådet ser rättsstatsprincipen som en substantiell princip och en del av ett större 'paket' tillsammans med demokrati och mänskliga rättigheter.

Abbreviations

CoE	Council of Europe
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights)
ECtHR	European Court of Human Rights
EC	European Commission
ECJ	European Court of Justice
EU	European Union
EU FRA	European Union Agency for Fundamental Rights
EP	European Parliament
ICJ	International Court of Justice
NGO	Non-governmental organisation
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
VC	European Commission for Democracy through Law (commonly referred to as the Venice Commission)
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

1.1 Purpose and Research Question

The purpose of this thesis is to examine what the rule of law entails today for the two most important regional organisations in Europe. To contextualise this, a brief historical account of the development of this concept is presented, since the regional organisations refer to legal scholars and philosophers to legitimise their current understanding of the rule of law. The purpose is to investigate the *current* understanding of the rule of law, which is why two relatively new tools have been chosen to exemplify this. It will in this thesis also be analysed whether potential cross-fertilisation takes place between the European Union (henceforth EU) and the Council of Europe (henceforth CoE), in their work to strengthen the rule of law. The Polish Constitutional crisis was chosen to serve as a concrete case. Given the purpose of this thesis, the research question is: *How successful are the current tools in the EU and the CoE for combating rule of law threats in their member states?*
In order to answer the research question, these sub-questions will be addressed:

- How do the EU and the CoE define the rule of law?
- What are the new tools for combating rule of law threats in Europe?
- In what way does potential cross-fertilisation or mutual enforcement between the EU and the CoE take place?

1.2 Method and Theory

The theoretical framework is a section that serves to enhance the understanding of the sometimes vague definitions in binding legal sources. The history of the term the 'rule of law' is presented to facilitate and contextualise how the 'rule of law' is used today in Europe's regional organisations. The theoretical framework is particularly relevant in relation with the two sections following it, but bears an importance for case study on Poland as well. By gaining knowledge on what the rule of law have developed to include historically, particularly on constitutional matters, it is understandable why the EU and the CoE puts so much emphasis on these matters when they act in relation to a concrete case. The conclusions in the final chapter is built on an analysis on the working methods of the EU and the CoE, but is facilitated by the theoretical framework.

This thesis concerns mostly the law of international organisations, and to some extent international law. The majority of sources are soft law[1], and documents enacted by international organisations, which is why this thesis

[1] Soft law can be defined as "normative provisions contained in non-binding texts". Cf Shelton, Dinah, p. 292 ed. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000.

only partly has a legal dogmatic method.[2] When binding legal sources are presented, they serve to answer the research question, which is to analyse the words used in a binding legal source, most importantly the ‘rule of law’. Soft law and the history of legal philosophy are used when they serve to interpret binding international law, in this particular case what is meant by the ‘rule of law’ today.

Sources of international law are often equated with article 38 of the ICJ statute and are (1) international conventions, (2) international custom, (3) general principles, (4) judicial decisions and (5) doctrine.[3] This thesis focuses particularly on international conventions and doctrine. The goal has not been to interpret what the rule of law means from the authors point of view, using international principles of treaty interpretation set forth most importantly in articles 31-33 VCLT[4], but rather to ‘enter the mind’ of those organisations that work practically with rule of law enforcement, using soft law instruments.

This thesis does not employ any specific theory of application. It concerns a theory/concept whose meaning is arguably contested. The scope of this thesis is to discuss this concept (the rule of law) with no determined way of application, to draw some conclusion as to what are some current understandings of its nature. No stance has been taken by the author on beforehand regarding the definition of the rule of law, nor is it the purpose. The conceptual and historical chapter does offer a broad arrange of theories, all of which discuss the nature of the rule of law in some sense. Therefore, it will not be repeated in this section. Lastly, it should be added that the perception of the author is that the rule of law entails something positive, and worth safeguarding.[5]

1.3 Delimitations

The rule of law will only be discussed in a European context. This means that only a European/Western theoretical approach is considered, when presenting the various philosophical theories concerning the rule of law. The term ‘rule of law’ has in itself other potential meanings in other languages, which is also something that will not be accounted for in this thesis. However, when

[2] A legal dogmatic method is about analysing the sources of law, to discern and fully understand its legal content. See Sandgren, Claes (2015). Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation. Third Edition. Stockholm: Norstedts juridik. pp. 43-44.

[3] Statute of the International Court of Justice, New York 16 December 1966, 999 UNTS 171.

[4] Vienna Convention on the Law of Treaties, Vienna 22 May 1969, 1155 UNTS 331.

[5] Perhaps it is easiest to express why the rule of law is something positive when trying to imagine a state with a failed rule of law situation. This hypothetical state will most likely not provide effective means for the judiciary, and ensure that the justice system works in an equal way. The state would most likely be more corrupt as well. If the rule of law is viewed as being interconnected with human rights and democracy, it is a precondition and fundament for having a democratic state. A democratic state is desirable because it prevents despotism. Cf. Price, Alistair, “Why the Rule of Law matters”, 19 November 2012, https://worldjusticeproject.org/news/why-rule-law-matters.

considered necessary it will be mentioned. The practical framework is in principle limited to the EU and the CoE, though it should be mentioned that the Organization for Security and Co-operation in Europe (OSCE) is an important regional actor in Europe regarding rule of law adherence as well. Since this essay concerns the law of international organisations, national legislation is not particularly accounted for. While being mentioned in the thesis below, it should be recalled that many of the sub-organs of reginal organisations have some connection with the rule of law. This thesis does take a particular focus and interest for the Venice Commission (VC) and the European Commission (EC).

1.4 Previous research

There are various works written on the rule of law, with different focuses. As the core of this essay is understanding regional organisations' certain position on a concept, official working documents from the EU and the CoE has been most helpful. A study that has inspired this essay particularly is Petra Bárd et. Al. *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*[6]. This thesis offers a recent account and comparative analysis between two relatively new soft law tools, combined with a theoretical framework.

1.5 Disposition

The second chapter of this thesis is a theoretical framework that introduces the notion of rule of law, and puts it in a historical context. This was found relevant since its clear that Europe's regional organisations does not define the rule of law in a vacuum, but have been influenced by the long academic debate around this concept. Chapter three and four deals with how two of Europe's most important regional organisations understand and implement their strategies on the rule of law. It offers a combination of legal sources, commentaries and theoretical sources. The binding legal sources such as the treaties as fundamental, since they establish the organisation's mandate of dealing with the issue of the rule of law in its member states. As will be demonstrated, binding legal sources such as conventions and statues are usually vague and abstains from giving any real meaning to the concept of the rule of law. To be able to discern what is meant in a more clear way, 'soft law' sources have been used, such as communications and notes from the sub-organs of respective organisation. Chapter five demonstrates how a specific case is being dealt with, using tools for combating rule of law threats in member states. It is clear that the rule of law is nowadays something prioritized, which stems from the fact that it is perceived as increasingly threatened. This is probably why Europe's regional organisations are creating new tools and reference documents to expand their working processes. In this chapter, the reader is free to decide whether the new tools are effective or not.

[6] Bárd, Petra et al., "An EU mechanism on Democracy, the Rule of Law and Fundamental Rights", CEPS Paper in Liberty and Security in Europe No. 91 / April 2016, p. 3. Henceforth 'Bárd (2016)'.

The sixth chapter contains a closing analysis with the authors recommendations for building a step forward. With best practices identified, the author makes some propositions on how each organisation can learn from the other in their work of combating rule of law threats in Europe.

2 The rule of law in Europe – a western theoretical framework

"wherever law ends, tyranny begins"
John Locke, Book II, Two treatises of Government

2.1 Why is the history relevant?

The Rule of Law has many supporters.[7] Few are explicitly against it, which could suggest that it is something good and something that society should adhere to.[8] The consensus however, becomes less apparent when discussing the material scope of the rule of law. This part aims to introduce and theoretically approach the concept of the rule of law. It will be assessed how scholars throughout time have defined and discussed this concept. The intention is not to present a full account of the history of the rule of law, but rather to convey what might facilitate the understanding of the following chapters. To fully grasp how and why the EU and the CoE (with its Venice Commission) find the rule of law a fundamental value in their working processes, one should understand the historical background of this doctrine. Fundamental questions to be addressed are what the rule of law is, how it is related to human rights and democracy and why it is important in a democratic society and in Europe.

Initially, it can be stated that there is no absolute definition of the rule of law - it remains a subject for debate amongst scholars. What is clear on the other hand, is that it differs from *a* rule of law. When one speaks of *the* rule of law one is referring to an ideal in liberal political morality.[9] Other arguably

[7] Throughout this thesis, 'rule of law' is used to describe a concept that exists in many other languages as well. In International Organisations today, the English version is most frequently used. Closest to 'rule of law' comes the French État de droit and the German Rechtstaat. This thesis will not argue whether understandings of these words differ nor how other translations close to 'rule of law' differ, but focus on the English term 'rule of law'. A starting point for the Anglo-Saxon tradition could be Chief Justice Marshall locution in *Marbury v. Madison* (1803) 1 Cranch 137, p. 163: "The government of the United States has been emphatically termed a government of laws, and not of men.".

[8] Although, there are enemies to the rule of law. A prominent legal philosopher that was an adversary to liberal values and in favour for a totalitarian view of the state, was Carl Schmitt (1888-1985). Cf. Weimar: A Jurisprudence of Crisis by A. Jacobson, B. Schlink, The University of Toronto Law Journal, Vol. 53, No. 4 (Autumn, 2003), pp. 443-454, Toronto: University of Toronto Press. Henceforth 'Jacobson (2003)'.

[9] Stanford: Waldron, Jeremy, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/. Henceforth 'Waldron (2016)'.

interconnected values are democracy and human rights.[10] Certain elements remain uncontroversial and are broadly accepted to be a part of the rule of law. In a very general way one could express that the rule of law is about protection against abuse of power.[11] For the rule of law to have any meaning of its own, it must be distinguished from a rule *by* law, that simply reiterates the principle of legality[12]. The legality principle should be seen as a fundamental part, indispensable to the rule of law. The rule of law does however encompass more than just merely having sovereign power exercised through laws.

The commonly accepted broad description of this concept seems to suggest that a set of rules should be what constrains both a government and its citizens.[13] The government should abide to these established rules in its practising of power and be, according to law, held accountable in the way that the law prescribes when there has been a breach of the given rules of governance. Without a reasonable amount of compliance with legal norms from the citizens, one cannot speak of the rule of law. Therefore, it is implied that citizens must comply with the given norms that define their rights and duties. Arguably, in the commonly accepted definition lies that the law should be equal for everyone and that everyone has access to the law and the judiciary.[14]

One might say that the rule of law refines the idea that law is a specific way to deal with human freedom. Human autonomy seems to be the starting point, and there appears to be an intrinsic connection between human freedom and law – law organises human freedom. Regulation of freedom then becomes a limitation of freedom. This resonates in the work of many philosophers. Cicero, that is representing the Roman conception of law and state, famously expressed *Omnes legum servi sumus ut liberi esse possumus* ('we are all servants of the laws in order that we may be free' or

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[10] The reason for 'arguably' is that there are different understandings of what the rule of law should encompass, as is best embodied in the formal contra the substantial understanding, which will be presented further down in this thesis.

[11] The reason for this statement, which comes from the author, will become more apparent in this chapter. In other words, this general sentence is a sort of summary of the views that will be presented below. In the wording of 'rule of law' it is implied that 'law' should be what guides governance, in opposition to individual power and will. Individual power is often more sensitive to fluctuation and non-concistency, that is why society has created law and the principle of legality. The rule of law however, does today, as we shall see, entail more than just the principle of legality - it would otherwise be redundant. Cf. Stanford: Waldron, Jeremy, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N. Zalta (ed.) (Henceforth 'Waldron (2016)', " […] legal institutions and their procedures should be available to ordinary people to uphold their rights, settle their disputes, and protect them against abuses of public and private power."; Bingham, Tom., 2010, chapter 3, *The Rule of Law*, London: Allen Lane (Henceforth 'Bingham (2010)'. "[…] the core of the existing principle of the rule of law: that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."

[12] Tamanaha, Brian, On the Rule of Law. History, Politics, Theory, Cambridge: Cambridge University Press, 2004, p. 92. Henceforth 'Tamanaha (2004)'.

[13] Waldron (2016).

[14] Ibid.

'we are all slaves of the laws so we can be free').[15] From this quote, Cicero can be said to have expressed that there is no real conflict between freedom and the law and hence give support to the idea that law merely organises human freedom. This view, as we shall see, is amongst others also held by Immanuel Kant.

Ordinary people, i.e. not politicians or legal philosophers, usually equate the rule of law with the absence of corruption, the independence of the judiciary, and a presumption in favour of liberty.[16] Today, views and attitudes of citizens does bear an importance for measuring the level of rule of law, most notably in the index of the World Justice Project.[17] The knowledge that a state is perceived to comply well with the rule of law may for example be positive for business, as it provides a form of certainty. Tom Bingham states that "[n]o one would choose to do business […] involving large sums of money, in a country where parties' rights and obligations were undecided."[18]

The rule of law is an organic concept, in constant change due to its partly political nature. The remaining chapter serves as a historical background and hence the 'common ground' and theoretical framework from which the EU and the CoE derives their views.[19]

2.1.1 What can Aristotle and his concept of law teach us?

The modern scholarly discussions on the rule of law are still highly inspired by the original formulators of the concept. Ideas that are linked to the modern interpretations of the rule of law can be traced back all the way to Aristotle. In *Politics*[20], Aristotle raised the question and dichotomy of whether rule of man or rule of law was the better. He understood that not only was the quality of law crucial in a society, but also what type of regime was operating through the law, and their subsequent *attitude* towards the law. This is an important observation that resonates until today and is highly relevant in Europe. In corruption matters, it is fairly uncontroversial to conclude that government officials need to adhere to corruption laws to a greater extent than currently exhibited. What perhaps has been underestimated, is that *attitudes* towards corruption need to shift in society as a whole, which most importantly includes the citizens as well. Without citizens resenting corruption in all its forms, rule of law is not as strong as it could be.[21] Generally, Aristotle can be said to have had positive approach to having law as the primary way of

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[15] Marcus Tullius Cicero,Pro Cluentio 53.146.
[16] Ibid..
[17] https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016.
[18] Cf. Bingham (2010). This quote finds support in this work as well: Barro, R., 2000, "Democracy and the Rule of Law", in *Governing for Prosperity*, B. de Mesquita and H. Root (eds.), New Haven: Yale University Press.
[19] It must be underlined that the intention is not to give a full account of the history of the rule of law in an encyclopaedian way, as numerous works on this matter already has been successfully written. See, for example Tamanaha (2004).
[20] Aristotle, *The Politics* (c. 350 BC), Stephen Everson (trans.), Cambridge: Cambridge University Press, 1988.
[21] The parliamentary assembly of the CoE has stressed this point in Council of Europe Parliamentary Assembly Resolution 1943 (2013) Final version.

governance. He saw the politician as a tool for creating and maintaining a constitution as well as introducing reforms when these were deemed necessary. Aristotle regarded the legislative science as more important than everyday political activity such as ruling by decrees.[22] His legacy has significantly influenced our modern conception of the rule of law, which can be identified in the works of later legal philosophers as well as the approach taken by Europe's regional actors today.[23]

2.1.2 The Rechtstaat

Immanuel Kant's (1724-1804) doctrine of Rechtstaat[24] is another fundament for the contemporary conception of the rule of law. For Kant, the legitimate basis of state power is human freedom.[25] In the sense of his political philosophy, freedom is about the individual's freedom of action and "the independence from being constrained by another's choice". This freedom of choice should be respected even if the choice is not rational or virtuous. The existence of the state is not an obstacle for freedom, but rather provides the means to uphold freedom when someone is hindering another's freedom.[26] In other words, the power of the state should be focused on protecting the citizens from arbitrary authority and this is best done through having a supreme written constitution.

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[22] Aristotle, Nicomachean Ethics, Book VI, chapter 8 from Aristotle in 23 Volumes, Vol. 19, translated by H. Rackham. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1934.

[23] These views on decrees are held by Europe's regional organisations today as well. In the aftermath of the failed coup attempt in Turkey in July 2016, the Turkish government issued a state of emergency whereby President Erdogan's power to rule by decree laws was drastically elevated. This led to, inter alia, tens of thousands of people being suspended from their jobs in public sector and numerous NGOs being shut down. President Erdogan's motivation was that they posed a threat to the Turkish state by having affiliations with the Gülen-movement, whose leader was pointed out as the conspirator of the attack. With a reference to the values embedded in the Rule of Law and human rights, the Venice Commission has in several opinions criticised Turkey for the measures provided in the emergency decree laws to be too extensive.
This event has been extensively reported in the global media. For example: http://edition.cnn.com/2016/07/29/europe/turkey-post-coup-arrest-numbers/ [Accessed 23 May 12:00]. Turkey's amendments to the constitution adopted by the grand national assembly on 21 January 2017 and to be submitted to a national referendum on 16 april 2017 was criticised by the Venice commission as a threat to the Rule of Law. Most recent Venice Commission Opinion on this matter: Opinion No. 872 / 2016, document CDL-AD(2017)007.

[24] In German, 'rule of law' is translated as 'Rechtstaat'. When using 'Rechtstaat' in this section, it is referred to the historical use by the cited authors, and not the modern interpretation of the German word 'Rechtstaat', with respect for how the latter has influenced the current. For a comparison on modern differences between 'Rechtstaat', 'Rule of law' and État de droit', see Pech Laurent, The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper 04/09. Henceforth 'Pech (2009)'. For further studies on legal thought during the Weimar period, by most importantly Carl Schmitt and Hans Kelsen, see: Jacobson (2003).

[25] Kant, Immanuel, Groundwork of the Metaphysics of Morals, (8:290-91), 2012,Gregor, M, Timmermann, J, trans., Cambridge: Cambridge University Press.

[26] Rauscher, Frederick, "Kant's Social and Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2017/entries/kant-social-political/>.

The Rechtstaat operates with a hierarchical set of norms. The consequences of this is that the executive power must be founded on statutory law and that parliamentary law is hierarchically inferior to the constitution. This implies that the Rechtstaat includes judicial review by a constitutional court. The doctrine of Rechtstaat is closely connected Hans Kelsen's (1881-1973) idea of the hierarchical organised legal system.[27] Kant's doctrine of Rechtstaat was developed and popularized by Robert Von Mohl (1799-1875) in the early 19th century.[28]

Today, many values found in the doctrine of Rechtstaat are well embedded in Europe's regional organisations conception of the rule of law.[29] It is unthinkable for a state that is said to comply with the rule of law to not have a constitution that sets the framework for the exercise of power.

2.1.3 The Rule of Law and Separation of Powers

John Locke (1632-1704) is one of the most prominent political philosophers to develop the idea of separation of powers, a theory crucially related to, if not fundamental to, the modern view of the rule of law. His idea was later built upon by Montesquieu[30] (1689-1755). In Locke's view, a government is legitimate when the power is divided between the legislative, executive and federative power.[31] The legislative power, which is bound and legitimized by natural law[32], is administrating "[…] how the force of the commonwealth shall be employed […]".[33] The executive power has the authority to enforce the laws and the federative power acts as an entity towards other countries. Although Locke was not opposed to the idea of some chosen people, such as "Kings or Rulers", to have a *prerogative* right, i.e. "the power of doing good without a rule"[34] he likewise considered the legislative power, and hence the law, to be supreme.[35]

Montesquieu's conception of the separation of powers is slightly different. To prevent despotism, the separation of government should be

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[27] Kelsen, Hans, 1960/1967. *Pure Theory of Law*, M. Knight, trans., Berkeley: University of California Press.
[28] Mainly through his book Die deutsche Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates, (Published 1844 by H.Laupp).
[29] This is a general statement that is supposed to summarize the modern opinion by Europe's regional actors. It will become clear in chapter three and four that the EU and the CoE considers a written constitution to be essential for the rule of law. That a constitutional court has to be able to conduct effective constitutional review will become apparent in chapter five on the Polish Constitutional crisis.
[30] Full name: Charles-Louis de Secondat, Baron de La Brède et de Montesquieu.
[31] Tuckness, Alex, "Locke's Political Philosophy", *The Stanford Encyclopedia of Philosophy*(Spring 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2016/entries/locke-political/>.
[32] Locke, John, §135, Second Treatise of Government and a Letter Concerning Toleration, 2016, Goldie, M, edt, Oxford University Press. Henceforth 'Locke (2016)'.
[33] Locke (2016), §143.
[34] Locke (2016), §166.
[35] Locke (2016), §149.

divided between the legislative, the executive and the judiciary.[36] It is fundamental that these three sources of power should be administrated by different persons so they can control each other and hence sustain a balance, that also satisfies the citizens.[37]

These preceding examples of how past ideas of the rule of law are still relevant for modern interpretation.[38] This part will now shift focus to some thinkers of the 20th and 21th century, such as Lon Fuller (1902-1978), Joseph Raz (1939-), Tom Bingham (1933-2010) and Jeremy Waldron (1953-).

2.1.4 The 'laundry lists'

Some scholars of the 20th century have in their, although different views of the rule of law, started to work with lists of principles. These principles would, if they are fulfilled, indicate that a particular state is acting in congruence with the rule of law - a "manual" for good governance. However, it is worth mentioning that they might not have anything more in common substantially except for the fact that they work with lists of principles. These lists are often talked about as 'laundry' or 'wash' lists.

One approach to the rule of law, held today most notably by Joseph Raz[39], is the formal approach, means that the rule of law should not be confused with other virtues such as democracy, justice, equity, equality before the law, human rights, respect for human dignity and so on. The rule of law is in this view a purely formal theory or concept that does not encompass the above-mentioned values. His principles of the rule of law are: (1) All laws should be prospective, open, and clear, (2) Laws should be relatively stable, (3) The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules, (4) The independence of the judiciary must be guaranteed, (5) the principles of natural justice must be observed, (6) the courts should have review powers over the implementation of the other principles, (7) the courts should be easily accessible and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.[40]

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[36] Montesquieu, Charles de Secondat, Book XI, Ch. VI, The spirit of the laws, 1989, Cohler, A.M, etd., Cambridge: Cambridge University Press.

[37] Bok, Hilary, "*Baron de Montesquieu, Charles-Louis de Secondat*", The Stanford Encyclopedia of Philosophy (Summer 2014 Edition), Edward N. Zalta (ed.).

[38] Separation of powers remains of high relevance today, and signs of confusion are often condemned by Europe's regional actors as a threat to the rule of law. Poland's new law amending the law of the Constitutional Tribunal in 2015 has been criticized for threatening the rule of law and the balance in the separation of powers. The law introduced several changes to the Tribunal's functioning such as lowering the number of judges that need to be present for decisions on crucial issues, raising the importance of the President's veto on the laws, changing decision making from majority to two thirds and cases need now to be dealt with in order as they arrive and not in order of importance as before. Although the new law was amended, the Venice Commission has continued to criticise it in an Opinion of 14 October 2016. More on this further below. Another legal theorist with largely influential views on the rule of law was Albert Venn Dicey (1835-1922).

[39] Although Raz was inspired by earlier thinkers such as F.A. Hayek (1899-1992).

[40] Raz, Joseph., 1977, "The Rule of Law and its Virtue", from his book, The Authority of Law, Oxford: Oxford University Press, 1979. Henceforth 'Raz (1977)'.

Lon Fuller constructed a list of eight principles, that qualifies law through morality, called "the inner morality of law". The usage of 'morality' can be questioned and has been criticised[41], since the principles seem formal: (1) generality, (2) publicity, (3) prospectivity, (4) intelligibility, (5) consistency, (6) practicability, (7) stability, and (8) congruence.[42]

The approaches by both Joseph Raz and Lon Fuller are formal, because they concern only how norms are governed and not their substance. Joseph Raz has expressed that "the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged".[43]

There are also substantive approaches to the rule of law. One of the critics of Raz is Tom Bingham, who advocates a "thick" understanding of the rule of law. He is in favour of incorporating human and fundamental rights within the rule of law concept, and argues that a state which represses certain minorities cannot be said to take the rule of law into account, even if the state's action is preceded by an excellent formal procedure.[44]

Above is the dichotomy of the 'thin' versus the 'thick' understanding of the rule of law. It can be debated whether the formal approach even is a purely formal one, because it protects some values that arguably are not entirely formal. To state that the rule of law should be formal and not substantive is not purely a formal argument, but rather a political or a moral argument. If law is required to be general, it is suggested that law must be general because we consider each other as equal and that rules must be applied equally to equal cases. Underlying this formal approach is therefore equality, which is not God given and hence moral or political. To conclude, even the formal version of the rule of law takes some account of human dignity, and therefore does not exclude the substantial approach. Put it in other words, the approaches bear more similarities than may appear at first glance. It might be easier to gain a larger consensus amongst states on the meaning of the rule of law with a formal approach. Jeremy Waldron has pointed out that a problem with the substantive approach is that anyone who wants can incorporate their ideals into the rule of law, which can lead to a dilution of any real meaning, "as people struggle to use the same term to express disparate ideals".[45]

2.1.5 The Political approach

Jeremy Waldron characterizes the rule of law as part of a political discussion, in which disagreement is the most important aspect – without disagreement, there is no politics and the rule of law is a part of politics.[46] His theory might seem somewhat strange, as most legal theories try to separate law and politics. Most people prefer a legal judge rather than a political judge. Even though law finds it origin in politics, as soon as it becomes a rule, we would like to

[41] Nicholson, Peter P., 1974, The Internal Morality of Law: Fuller and His Critics, Ethics Vol. 84, No. 4, pp. 307-326, Chicago: The University of Chicago Press.
[42] Fuller, Lon., 1964, *The Morality of Law*, New Haven: Yale University Press.
[43] Raz (1977), p. 211.
[44] Bingham (2010).
[45] Waldron (2016).
[46] Waldron, Jeremy, "The Concept and the Rule of Law" (2008). Sibley Lecture Series. Paper 29.

keep it far from the realm of politics. In defence of this, Waldron suggests that law is a specific type of governance. According to Waldon, the Rule of Law is an 'essentially contested concept'.[47] The term was first introduced by Walter Bryce Gallie (1912-1998) and aims to facilitate the understanding of concepts that lack a definite interpretation. While there can be a general agreement on a broad definition, the concept will always lack an agreement on the best realisation.[48]

The advantage of Waldron's political approach to the rule of law, is that it becomes something that is not fixed and that can be discussed and elaborated upon. But if the definition of the rule of law falls within the realm of politics, it may be hard to conceive it as something normative and as a yardstick. The rule of law must then depend upon political goodwill and wisdom.

2.1.6 The Moral approach

Another approach to the rule of law is a moral approach. According to John Rawls, the Rule of Law is undeniably connected to the moral idea of human freedom, because law interferes with freedom, and human freedom has a legitimate priority.[49] In this aspect, Rawls was inspired by Kant. The priority of human freedom implies that limitation of freedom can only be possible when taking into account the concept of freedom itself. Because we are all free we must also be equal and this must be reflected in the laws. Rawls principles for the rule of law are (1) rules must be made possible to abide by, (2) equal cases must be treated equally and laws should be stable over time, and (3) nullum crime sine lege, law must be clear, published and general.[50] Rawls' principles for the rule of law is not a laundry list but rather a set of principles based on a moral argument of justice.

2.2 Contemporary organisations and the Rule of Law

From this section it will become clear that the substantive approach, i.e. the approach of incorporating values such as human rights, justice and democracy into the rule of law, seems to prevail in the understanding of some contemporary NGOs that have the rule of law as their core value.

The World Justice Project (henceforth WJP), an American NGO, has the main target of advocating the rule of law around the world.[51] One of their most prominent activities is 'the Rule of Law index', where 113 countries are

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[47] Waldron, Jeremy, 2002, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" *Law and Philosophy*, 21: 137–64.

[48] Gallie, W. B., Essentially Contested Concepts, Proceedings of the Aristotelian Society, New Series, Vol. 56 (1955 - 1956), pp. 167-198, New Jersey: Blackwell Publishing on behalf of The Aristotelian Society.

[49] Rawls, John. 1999, *A Theory of Justice*, chapter 'the Rule of Law', Cambridge: Harvard University Press.

[50] Ibid.

[51] http://worldjusticeproject.org/what-we-do-0.

being assessed on their rule of law compliance according to the parameters set out by the organisation.[52] In the WJP's definition of the rule of law, one can find traces of many legal philosopher's ideas of the rule of law. The four principles for their definition are mainly formal. However, there are also traces of a substantive approach. Most notably, the parameters for the rule of law index include values such as "fundamental rights", "absence of corruption" and "open government". How citizens and experts are assessing their own communities does also bear importance on the rule of law evaluation.[53]

The international Network to Promote the Rule of Law (henceforth INPROL) is a global, online community of some +3000 rule of law practitioners from 120 countries and 300 organizations.[54] INPROL is a community where practitioners from different backgrounds have the possibility to discuss the importance of the rule of law. The members' common denominator is that they work on rule of law reform issues in post-conflict and developing countries, from a policy-, practice- or research-perspective.[55] No single definition is to be found on INPROL's website, but based on the topics of publications and news that they choose to publish, one can draw the conclusion that the overall view of the network is a substantive one, not hesitating to incorporate human rights and justice within the scope of rule of law protection.

The United Nations (UN) is another strong advocate for the rule of law, and has a reference to it in the preamble of the United Nations Universal Declaration of Human Rights from 1948[56]:

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

At the UN, the work for the rule of law is embodied in many different forms, most notably in the High Commissioner for Human Rights[57] with the OHCHR[58], the UN Global Compact[59] and work for peacekeeping and rule of law[60]. The preamble of the Universal Declaration of Human Rights does not define the rule of law. However, studying the UN approach as a whole, one inevitably comes to the conclusion that the organisation, in line with other regional organisations, defines the rule of law in a substantive way. The rule of law and human rights are in the UN approach interconnected.[61]

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[52] http://worldjusticeproject.org/rule-of-law-index.
[53] Ibid.
[54] http://www.inprol.org/about-inprol.
[55] Ibid.
[56] http://www.un.org/en/universal-declaration-human-rights/.
[57] http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx.
[58] http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/RuleOfLawIndex.aspx.
[59] https://www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law.
[60] http://www.un.org/en/peacekeeping/issues/ruleoflaw.shtml.
[61] See Resolution adopted by the General Assembly on 16 September 2005, A/RES/60/1, p. 27 "We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United

2.3 Conclusion – why is the definition relevant?

As has been demonstrated, the rule of law is a concept that has existed in some way or another during more than two thousand years. The rule of law is a living idea and not just a theoretical concept. It is fundamental to certain regional organisations in Europe, such as the EU, the CoE, OSCE, the UN and numerous other NGOs. These organisations work with the rule of law in their daily work, and recent developments in Europe has intensified the need to further uphold the principles enshrined in the rule of law. The definition is relevant because it guides the practical work on the rule of law in the member states. For example, when one of the CoE action plans for a specific country is being implemented "on the ground", it is helpful if the definition of the rule of law is clear, so that the staff can know what they work with when they for example are training local government in the strengthening the rule of law.

It remains to be seen how the rule of law is defined in these organisations. The following two chapters offer an account for how the EU and the CoE defines and works with the rule of law. It will be explored how the concept is defined in official language, and whether there is such a clear definition.

Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates."
See also General Assembly Resolution adopted by the General Assembly on 24 September 2012, A/RES/67/1, point 7, "We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.".
Cf. Resolution adopted by the General Assembly, 18 September 2000, A/RES/55/2.

3 The European Union and the rule of law

3.1 Introduction

The next two chapters put the conceptual definition of the rule of law aside and instead examines how the rule of law gains life within the two major regional organisations in Europe – the European Union (EU) and the Council of Europe (CoE). Both chapters will follow a similar structure. Initially, the legal mandate and basis for working with the rule of law will be presented and then it will be explored how the different institutions within the respective organisations work with the rule of law.

The EU and the CoE are two of the major regional organisations in Europe. It comes naturally when writing about international organisations and the rule of law to include the CoE, since one of its core values is the rule of law. The EU has also expressed that the rule of law is one of its 'key common values'.[62] As both the EU and the CoE have neighbourhood policies, transmitting their views on external states, their policies become very influential in the whole world. In other words, the views held be European regional organisations have more influence than only in Europe. This makes it even more important and interesting to investigate what exactly is meant when using certain terms, in this case the rule of law. By examining one recent tool from each organisation, it becomes more clear how combating threats to rule of law is being implemented.

3.2 Basis in Treaties

The preamble of the latest treaty of the European Union (TEU)[63], the Lisbon Treaty, mentions the rule of law twice. The first time, it establishes that inspiration is drawn from the cultural, religious and humanist inheritance of Europe, from which has been developed some "universal values of the inviolable and inalienable rights of […] the rule of law". The second time the rule of law is mentioned, the treaty confirms the Member States' attachment to the same principle.

In article 2 TEU, it is stated that the Union is founded on, amongst other values, the rule of law. This value also guides the Union's external action – in article 21 TEU, the EU confirms that its' actions on the international scene shall be guided by its own principles, which it seeks to advance in the wider world. Once again, amongst other values such as democracy and human rights, the rule of law is reiterated. A precondition for joining the EU, which

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[62] A new EU Framework to strengthen the Rule of Law, p. 6, Communication from the Commission to the European Parliament and the Council, COM(2014) 158 final/2. Henceforth 'Framework (2014)'. See Article 2 TEU.

[63] Treaty on European union (Consolidated version 2016) - official Journal of the European Union, C 202, 7 June 2016.

is found in Article 49 TEU, is to respect the values referred to in Article 2 TEU, which includes the rule of law.

The rule of law is mentioned in the preamble of the Charter of Fundamental Rights[64], as a principle on which the EU is founded upon. It should be noted that the rule of law is in the TEU referred to as a "value" in comparison with the Charter of Fundamental Rights, which refers to it as a "principle". Another relevant provision is found in the Treaty of the Functioning of the European Union (TFEU)[65], Article 67(1). The rule of law is not explicitly mentioned, but by reading the wording it could be argued that it is mentioned indirectly; "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States." The EU as a legal entity has not yet acceded to the European Convention on Human Rights (ECHR)[66] and is therefore not formally bound by it, although the jurisprudence from the European Court of Human Rights (ECtHR) does bear implications for EU law, since all EU member states have ratified the ECHR. If or when the EU accedes to the ECHR it will become possible for individuals and undertakings to apply to the ECtHR for legal review of the acts of EU institutions.[67]

As far as the TEU is concerned, this is all that is mentioned about the rule of law. This clearly does not provide much information for understanding how the EU as a legal entity perceives the rule of law. One could ask oneself if the EU understanding of the rule of law is defined in conformity with the national understandings of the principle, or if the EU aims to develop its own definition. Article 2 TEU does not explicitly require the EU to rely on national constitutional traditions to interpret the rule of law, contrary to what it does as regards to the principle of respect for fundamental rights in Article 6.3 TEU.[68]

The major constitutional traditions of Europe - the French, German and English have their own language for describing the rule of law, which have emerged from different philosophical traditions. While there might be differences in the understanding of this concept to this day, they cannot be said to be so irreconcilable that the regional organisations are unable to work with this term, as representing the gathered European constitutional traditions. It is worth quoting the European commission in this respect;

> "Mutual trust among EU Member States and their respective legal systems is the foundation of the Union. The way the rule of law is implemented at national level plays a key role in this respect."[69]

[64] Charter of Fundamental Rights of the European Union (2016) - Official Journal of the European Union, C 202, 7 June 2016.
[65] Treaty on the Functioning of the European Union (Consolidated version 2016) - Official Journal of the European Union, C 202, 7 June 2016.
[66] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[67] More information on this subject on this link: http://www.echr.coe.int/Pages/home.aspx?p=basictexts/accessionEU&c= [Accessed 23 May 12:00].
[68] Pech (2009).
[69] 'Framework (2014)', p. 2.

It is still debatable whether there is a discrepancy between national understandings of the rule of law and the "EU understanding". This is however not the question this thesis seeks to answer. A substantial connection is nonetheless hard to deny. The different types of legal situations that require mutual recognition amongst member-states does perhaps best exemplify this. A starting point was a judgement of the European Court of Justice (ECJ) establishing the Cassis De Dijon-principle, which determines that products sold legally in one member state cannot be illegal in another member state.[70]

As is pointed out in the new EU Framework to strengthen the rule of law, more recent cases establish that judgements in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State.[71] While these examples do not show that EU member states perceive the rule of law identically, they at least have agreed to trust each other in judicial matters[72], which subsequently could point to the fact that there are similar views on how important parts of the judiciary are to be organised.

3.3 A new EU Framework to strengthen the Rule of Law - why was it needed?

As we have seen, amongst other values, rule of law adherence is a precondition for acceding to the EU, which was elaborated upon in 1993 when the 'Copenhagen criteria' was formulated:

> "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union"[73]

However, there was no specific mechanism or follow-up process to monitor whether continuous adherence to the 'Copenhagen criteria' was fulfilled *after* accession. This 'one-way-street' might be a problem and could possibly be abused, which may subsequently lower credibility for the EU as a Union

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[70] Judgment of the Court of 20 February 1979.
Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.
Reference for a preliminary ruling: Hessisches Finanzgericht - Germany.
Measures heaving an effect equivalent to quantitative restrictions.
Case 120/78.
It should be noted that there are exceptions to this principle, mainly found in Article 36 TFEU.

[71] Framework (2014). See also Judgment of the Court (Second Chamber), 30 May 2013 Jeremy F. v Premier ministre, Case C-168/13 PPU, paras 35 and 36.

[72] For example, via European Arrest warrant laws that are implemented in national legislation. See http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm.

[73] Hillion, 'The Copenhagen Criteria and Their Progeny' in: C. Hillion, *EU Enlargement: A Legal Approach,* Oxford: Hart, 2004, 1–23. See also footnote 1 in Bárd (2016).

founded upon certain values, that it additionally seeks to advance in the wider world.[74] It has been argued that systematic deconstruction of the rule of law results in fundamental rights violations "in all possible ways", which is to be understood as posing threats to democracy and human rights as well.[75]

3.3.1 Pre-framework options for responding to rule of law threats

The ultimate consequences for a member state, if Article 7 TEU is invoked are suspension of rights deriving from the Treaties and voting rights being withdrawn from the Council. In other words, fundamental parts of EU membership can be suspended, which is such a serious procedure that it is commonly referred to as a 'nuclear option' or a 'last resort'.[76] Article 7 TEU has never been activated. The role of the ECJ if Article 7 would be invoked is only to decide upon the legality of such an act, according to Article 269 in the Treaty on the Functioning of the European Union (TFEU).

In practice, it is hard to conceive how such a procedure could take place, since no framework is presented for assessing if the nature of a supposed rule of law threat meets the intention of Article 7 TEU. An Article 7 procedure should then perhaps be seen as a mainly diplomatic or political tool. Due to the consequences it could bear, it is not hard to understand why it has never been invoked.[77] In a Union whose existence is increasingly being questioned in Member States, Article 7 TEU is probably not seen as a sensible option. The external message of cooperation is arguably in this aspect a stronger value to uphold.

A tool that has been proven to be somewhat, but not sufficiently effective towards perceived rule of law threats is the infringement procedure pursuant to Article 258 TFEU.[78] The commission has by this Article the mandate of bringing a matter to the ECJ if a Member State is considered to

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[74] Expression 'one-way-street' taken from: Bàrd (2016). See also the statement by Vice-President of the European Commission V. Reding, 12 September 2012, European Parliament (2012), Plenary debate on the political situation in Romania, "Once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect".

[75] Bàrd (2016), p. 3.

[76] Framework (2014), p. 6.

[77] "If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs", Communication from the Commission of 15 October 2003: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, henceforth 'Communication (2003)'. Voices have been heard in the EP that Article 7 TEU should be triggered in respect to Hungary. To this day, 22 May 2017 it has not been the case yet. See http://www.europarl.europa.eu/news/en/news-room/20170511IPR74350/fundamental-rights-in-hungary-meps-call-for-triggering-article-7.

[78] The new EU framework to strengthen the Rule of Law points out three cases to exemplify this: C-286/12 Commission v Hungary, (equal treatment as regards the compulsory retirement of judges and public prosecutors); C-518/07 Commission v Germany [2010] ECR I-01885 and C-614/10 Commission v Austria, (independence of data protection authorities).

have failed to fulfil an obligation under the treaties. Herein lies also the problem; such an important matter for the EU as a threat to the rule of law does not always constitute a breach of a specific provision of EU law. Another tool related to the matter is Article 260 TFEU, that gives the EC the mandate of issuing a sanction in the form of a penalty payment if a Member State fails to comply with a judgement of the ECJ.[79] It has been stated that Article 7 TEU does in fact mandate EU intervention "even if the threats or breaches of EU values concern issues lying outside of the EU scope of competence".[80] While this might be a theoretical possibility, the fact that it has never been the case should speak for itself.

The Charter of Fundamental Rights does incorporate rights that are relevant to the rule of law, such as Article 47 on the right to an effective and fair trial. However, according to Article 51, the charter is only valid when member states are implementing Union law, which may lead to a failure in addressing national threats to the rule of law.[81]

Some highlights of informal intergovernmental cooperation on the rule of law should be mentioned. Most relevant in this aspect is the "rule of law dialogue", of which the conclusions were on 16 December 2014 jointly adapted by the General Affairs Council and the member states in the Council, thus establishing the dialogue.[82] The purpose of the dialogue is to ensure respect for the rule of law by establishing "[…] an annual rule of law dialogue and foresee possible thematic debates in the Council (General Affairs) in order to promote and safeguard rule of law in the framework of the Treaties as one of the key values on which the Union is based.".[83] The dialogue is first and foremost intergovernmental, which means that the European Parliament (EP) or the European Commission (EC) does not have a formal role, although the latter is invited. The first dialogue took place during the Luxembourg Presidency in the Council (General Affairs) on 17 November 2015. Themes such as the role of the rule of law in responding to antisemitism and anti-Muslim hatred, and the rule of law in the age of digitalization were discussed.[84]

On 24 May 2016, the European Council held, under Dutch presidency, its second annual rule of law dialogue with a focus on the challenges that the current migratory flows create for the safeguarding of the EU's fundamental values. Bert Koenders, the Netherlands Minister for Foreign Affairs expressed:

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[79] See http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm [Accessed 23 May 12:00].

[80] Bàrd (2016), p. 6. See also Communication (2003), page 5.

[81] This matter is elaborated upon in Commission, Communication, p. 10, "Strategy for the effective implementation of the Charter of Fundamental rights" of 19 October 2010 (COM(2010) 573 final).

[82] Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law, General Affairs Council meeting, Brussels, 16 December 2014.

[83] Council of the European Union, Note 8774/16, Brussels, 13 May 2016.

[84]Council of the European Union, Note 13744/15, Ensuring the respect for the rule of law – Dialogue and exchange of views, 9 November 2015, http://data.consilium.europa.eu/doc/document/ST-13744-2015-INIT/en/pdf.

"The rule of law is one of the fundamental values of the European Union and a cornerstone of European cooperation. It is not only an intrinsic value, but is also essential for the smooth functioning of the internal market through enhancing mutual trust between and within member states. The significant inflows of refugees are without doubt a test to these values. But only by respecting these values ourselves and ensuring their respect by those who come to us we will be able to overcome the migration challenge and successfully integrate refugees in our societies. No member state has a monopoly on virtue or vice, and the rule of law requires ongoing effort and self-reflection"[85]

Soft power in the form of political persuasion and dialogue does take place within the EU and the member states. Their success rate is hard to discern. By learning from history, it is clear that when a state takes a turn against the rule of law, outside criticism does not necessarily make an important impact.[86] Political dialogues with no concrete improvements are just window dressing. The dialogues have so far taken a substantive stance on the interpretation of rule of law, incorporating inter alia discrimination against minority groups as a threat to the rule of law.

Since 2012, the EU publishes an annual rapport called 'The EU Justice Scoreboard', giving a "[…] comparative overview of the quality, independence and efficiency of justice systems in the European Union".[87] The aim is allegedly to assist Member States in improving effectiveness of their justice systems. Since 2017, the scoreboard has developed its purpose, including new aspects and parameters of the functioning of justice systems such as access to justice for customer related issues and length of criminal court proceedings relating to money laundering offences.[88] The report is issued with the context of justice reform being a high priority for the EU and the evaluation is made with three key words – efficiency, quality and independence. The source for the data included comes mainly from the CoE Commission for the Evaluation of the Efficiency of Justice. The impact of the scoreboard is not very profound, since the report does not come with any binding force. Therefore, it should be seen as a part of the whole spectrum of the EU's work with highlighting the rule of law as a prioritized issue. Another reporting mechanism worth taking note of is the 'EU Anti-corruption Report', established on 6 June 2011[89]. The work with issuing reports on a continuous level seems however to have ceased.[90]

[85] Council of the European Union, Note 8774/16, Brussels, 13 May 2016, Presidency non-paper for the Council (General Affairs) on 24 May 2016 - Rule of law dialogue. http://data.consilium.europa.eu/doc/document/ST-8774-2016-INIT/en/pdf. See also: http://www.consilium.europa.eu/en/meetings/gac/2016/05/24/ [Accessed 23 May 12:00].
[86] The Mammadov-case in the ECtHR that will be commented upon in the next part is a clear example of that.
[87] http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm [Accessed 23 May 12:00].
[88] Ibid.
[89] https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report_en [Accessed 23 May 12:00].
[90] https://euobserver.com/institutional/136775 [Accessed 23 May 12:00].

3.3.2 The gap filler - what is included in the new framework?

In 2014, the EC issued a Communication to the European Parliament and the Council, called "A new EU framework to strengthen the Rule of Law"[91] as a part of the EU Justice Agenda for 2020.[92] The previous chapter was intended to show why such a new tool was considered important for enforcing the rule of law in Europe.

Throughout the communication, the EC depicts a need for intensified work to respond to threats to the rule of law in Europe. These threats are said to have triggered a "clear request from the public at large for the EU, and notably the Commission, to take action".[93] The current EU mechanisms are deemed as not satisfactory in addressing these threats adequately.

It is made clear in the new Framework that it does not address individual breaches of fundamental rights by a miscarriage of justice, as those should be dealt with by the national judicial systems and by the protection offered under the ECHR. Instead, the purpose of the new framework is to address threats to the rule of law which are of a *systemic* nature.

The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national "rule of law safeguards" do not seem capable of effectively addressing those threats.[94]

The new EU Framework is intended to work as a "three stage process" – assessment, recommendation and follow-up. Judging by the Framework, it remains somewhat unclear as to what should initiate the assessment. It is stated that "The Commission will collect and examine all the relevant information and assess whether there are clear indications of a systemic threat to the rule of law […]".

The assessment is aimed at reaching an opinion to whether there is or is not a systemic threat to the rule of law. If there is indeed such a situation, a dialogue will be commenced with the member state in question. A part of the assessment is the dialogue as such. Non-cooperative actions that are in conflict with the duty of sincere cooperation set out in Article 4(3) TEU is being considered when measuring the seriousness of the threat.

If such a threat to the rule of law is considered serious and systematic, the EC will issue a "rule of law recommendation" containing the issues of concern and when relevant a concrete proposal on how to resolve them. The member state has then to take steps within a fixed time limit to address and solve the problems.

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[91] Framework (2014).
[92] For the agenda in its entirety, see http://ec.europa.eu/justice/effective-justice/files/future_justice_brochure_en.pdf [Accessed 23 May 12:00].
[93] Framework (2014), p. 1.
[94] Ibid., p. 7.

Lastly, the third step consists in evaluating the follow-up given by the member state in question relating to the previous recommendation. Not much is said in the new EU Framework about this step except that it is intended to be an exchange of views concerning the situation. If this process does not bear fruit, the EC states that it will "assess the possibility of activating one of the mechanisms set out in Article 7 TEU".[95]

The bodies of the CoE (most notably the Venice Commission) and the EU Fundamental Rights Agency (FRA) are exemplified as trusted sources for knowledge.[96] The FRA has a broad mandate to evaluate member state cooperation with EU values, most notably in Article 4(1)(a) of the Council regulation establishing the FRA.[97] A broad array of contributors for monitoring is set out Article 4 of the Council regulation, including NGOs and other international organisations. Amongst the articles of the regulation setting out the purpose and procedures that have been mandated, a definition of the rule of law is not to be found. Other possible partners are the networks of the Presidents of Supreme Courts of the EU[98], the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU[99], or the Judicial Councils[100]. It is not specified in what way the assistance of these judicial organisations will be used.

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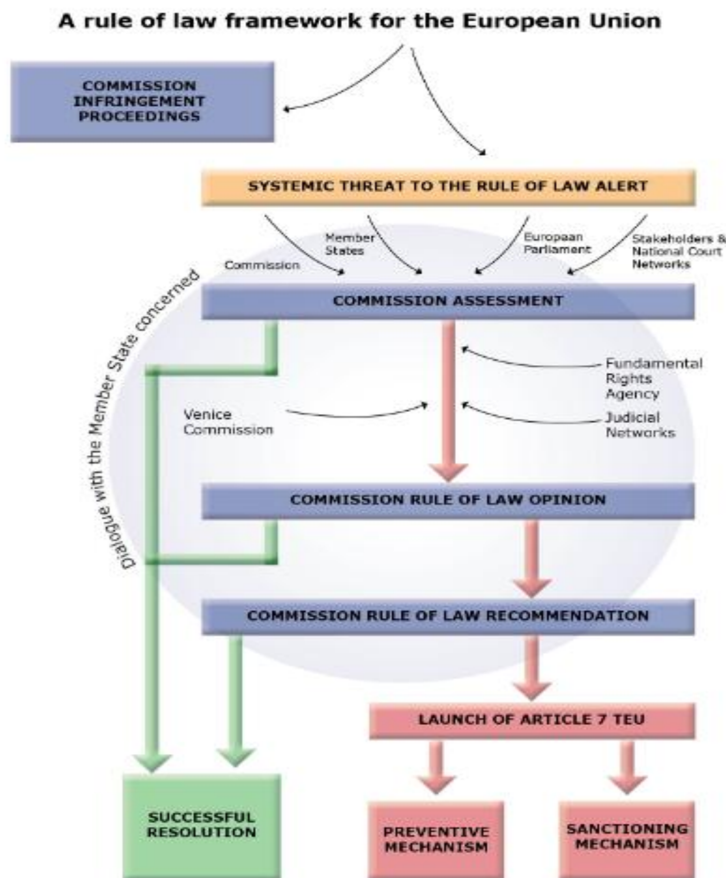
[95] Ibid., p. 8.
[96] Ibid., p. 7.
[97] Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights.
[98] Network of the Presidents of the Supreme Judicial Courts of the European Union (see http://www.networkpresidents.eu/).
[99] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union(see http://www.aca-europe.eu/index.php/en/) [Accessed 23 May 12:00].
[100] European Network of Councils for the Judiciary (see http://www.encj.eu). [Accessed 23 May 12:00].



Picture: Illustration of the process for the new Framework. Source: Annex 2, Framework (2014), p. 4. http://ec.europa.eu/justice/effective-justice/files/com_2014_158_annexes_en.pdf [Accessed 23 May 12:00].

3.3.3 How is the rule of law defined?

The first explicit reference to the rule of law was made in the Preamble of the Maastricht Treaty of 1992. Since the Amsterdam Treaty, the rule of law has been mentioned in substantially the same way as the current Article 2 of the TEU.

Currently, the EC is adhering to a substantial approach to the rule of law, held most notably by the ECJ and the ECtHR as well. Values such as democracy and fundamental rights are essential within the EC understanding of the rule of law.[101] Also noteworthy, is a direct reference to the VC's work on the definition of the rule of law. The definition set out by the VC is put in direct relation to Article 2 TEU.[102]

[101] Framework (2014), p.4.
[102] Ibid.

The EC is inter alia referring to a non-exhaustive list of principles provided by the VC, intended to "[…] define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU."

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.[103]

In a way, the EU does indirectly define the rule of law by referring to the definition(s) set out by the VC.[104] What is also remarkable is that the mandate of defining the rule of law is partly put in the hands of experts working for an advisory body of another regional organisation.

Furthermore, the ECJ has a crucial role being the final arbiter in interpreting the EU treaties - it shall "[…] ensure that in the interpretation and application of the Treaties the law is observed.".[105] Since the establishment of the court, the ECJ has been developing the EU jurisprudence and given concrete meaning to the articles, sometimes accused for judicial activism.[106] An important landmark is the 1986 judgement "Les verts", where the ECJ stated that the EU is "based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty".[107]

The Commission has developed a set of principles that are based on, and intended to summarise the case law of the ECJ in respect to the rule of law. The principles are: (a) the principle of legality[108], (b) legal certainty[109], (c) prohibition of arbitrariness of the executive powers[110], (d) independent and effective judicial review, including respect for fundamental rights[111], (e)

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[103] Ibid..

[104] The formulation "definition(s)" was used to highlight that the work by the Venice Commission on the rule of law is an ongoing project. In other words, their understanding of the rule of law is not a static one, but develops over time. Numerous documents on the rule of law have been published that led to the most recent Rule of Law Checklist from 2016, which will be discussed in the coming part.

[105] Article 19 TEU.

[106] For an extensive account of the ECJ's supposed judicial activism, see Dawson, Mark, et al, Judicial Activism at the European Court of Justice, Northampton: Edward Elgar publishing, 2013.

[107] Case 294/83, "Les Verts" v European Parliament, [1986] ECR 01339, para 23.

[108] Case C-496/99 P, Commission v CAS Succhi di Frutta [2004] ECR I-03801, para 63.

[109] Joined cases 212 to 217/80 Amministrazione delle finanze dello Stato v Salumi [1981] ECR 2735, para 10.

[110] Joined cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 02859, para 19.

[111] Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, para 91; Case C-550/09 E and F, [2010] ECR I-06213, para 44; Case C-50/00 P Unión de Pequeños Agricultores [2002] ECR I-06677, para 38 and 39.

separation of powers[112], and (f) equality before the law[113].[114] Worth noting is that principle (d) makes a direct reference to the ECHR, and the general commitment to the CoE and its court is also reiterated in the same annex.[115]

3.4 Conclusion

Soft law tools, such as political dialogues, tend to incorporate immediate threats to unity and cooperation in Europe, as a threat to the rule of law. Hard law, such as the treaties are too vague when referring to the rule of law, abstaining from definition, thus leaving it to other EU bodies, such as the EC and the ECJ, which have an explicitly substantive understanding of the rule of law.

When a threat to the rule of law is of a *systemic* nature, it implies that the threats may be so severe that there is no political will to address them. This forces the EU[116] to fall back on empty threats of activating the "nuclear option" Article 7 TEU. The threats are empty since they cannot be envisaged in the current context. Subsequently, the Framework runs the risk of falling flat in terms of achieving a higher degree of rule of law adherence. Another question worth mentioning is what impact triggering Article 7 would have on the rule of law in a Member State – it might be a double-edged sword in the sense that the situation might just deteriorate even more.

What the EC means with a *systemic* threat to the rule of law can be used to create a negative definition, and hence a good measurement, of the boundaries of the rule of law in the eyes of the EC.

It seems that the EU is trying to become a guardian of the 'common values' and hence a sovereign mechanism to respond to threats to the rule of law and other values/principles in the member states. An "EU rule of law commission" has been proposed by various scholars, which would bear similarities with the VC, but also have a possibility of conducting country visits for monitoring purposes.[117] Whether this is a feasible idea in the current context remains to be seen.

[112] Joined cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission, [2000] ECR I- 00001, para 17 and Case C-279/09 DEB, [2010] ECR I-13849, para 58.
[113] Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v Commission [2010] ECR I-08301, para 54.
[114] Cases and principles from Annex 1 to Framework (2014), pp. 1-2. For another extensive list of cases between Sept. 2002-2008 with references to the rule of law, see the annex of Pech (2009).
[115] Annex 1, Framework (2014), pp. 2-3.
[116] Most notably via the EC and the EP.
[117] Bárd (2016) pp. 82-87.

4 The Council of Europe and the rule of law

4.1 Introduction

The founding treaty of the Council of Europe (CoE) establishes the rule of law as one of three core values, together with democracy and human rights.[118] The rule of law is explicitly mentioned twice; in the preamble where it is stated as a basis for 'genuine democracy', and in Article 3 where member states, by signing the treaty, affirm their sincere cooperation with the CoE in relation to the rule of law, human rights and fundamental freedoms. Adherence to Article 3 is a precondition for becoming a member, and does also bear importance for becoming an associate member.[119] Serious violation of Article 3 may result in suspension of rights of representation in the Committee of Ministers, pursuant to Article 8 of the statute.

All 47 member states of the CoE have ratified The ECHR, that also establishes the ECtHR.[120] The preamble of the ECHR is the only place in the convention where the rule of law is explicitly referred to; the member states "[…] which are like-minded and have a common heritage of […] the rule of law […]".

The CoE has numerous commissions, commissioners, consultative bodies and common standards and policies that all in some way are working with rule of law adherence in its' member states and neighbouring states.[121] In this part, the work by the Venice Commission (VC) will be particularly focused upon. The work by other bodies, and case law of the ECtHR, will be referred to when considered relevant.

4.2 How does the CoE define the rule of law?

Notwithstanding the fact that the rule of law is widely referred to in political documents, conventions and recommendations throughout the various CoE bodies, a definition is not to be found in those texts. There is also no monitoring mechanism that specifically deals with rule of law issues, but it is in a way done through the different bodies within the CoE, where each body has a specific purpose. For example, monitoring on corruption issues, as being performed via The Group of States against Corruption (GRECO), is

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[118] Statute of the Council of Europe, London, 5.V.1949.

[119] See Article 4-5 of the Statute of the Council of Europe.

[120] See Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI. 1950 (ECHR).

[121] This includes, inter alia, CEPEJ, CCJE, CCPE, the Venice Commission, CDCP, GRECO and MONEYCAL. Out of time and resource reasons, every body will not be accounted for, but further research into the organisation of the CoE is accessible on this link: http://www.coe.int/en/web/portal/rule-of-law.

considered a part of the gathered approach towards rule of law promotion.[122] In other words, the CoE defines the rule of law through how it is being implemented in the various sub-organs and its Court judgements.

In some instances, efforts have been made to approach what the concept of the rule of law encompasses for the CoE. In a 2007 resolution by the Parliamentary Assembly of the CoE (PACE), the problem of different languages in understanding a concept that is supposed to be a common value was discussed, and ended by a call for further assistance by the VC.[123]

The VC built on this call for assistance in its 2011 Report on the rule of law.[124] The Report concluded that the rule of law concept has not been as developed as the other two pillars of the CoE, democracy and human rights, and that legal provisions mentioning the rule of law are general and lack specificity. An attempt was made to materialise what substantial elements the rule of law is conceived of. A formalistic concept of the rule of law that only requires that state action is authorised by law was considered 'distorted' - the VC seems instead to have aligned their understanding with the substantial conception by Tom Bingham, whose views were briefly presented in the first chapter.[125]

The following chapters will present what tools the CoE has when a state is not complying to the organisation's fundamental values, and a new rule of law checklist adopted by the VC.

4.2.1 The "Nuclear" option(s)

The CoE has an article similar to Article 7 TEU, which concerns the effect of serious violations against the rule of law. Article 8 establishes that any CoE member state "[…] which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw […]". Article 3 is an essential paragraph, establishing a principle of sincere cooperation in respect to upholding the CoE core values, such as the rule of law.

Another Article of the same kind is Article 46 of the ECHR, which concerns member state compliance with ECtHR judgements. Article 46(4) establishes a process for handling a situation where a member state is refusing to implement an ECtHR judgement:

> If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

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[122] The Group of States against Corruption (GRECO) is the Council of Europe anti-corruption body. From 'about' on http://www.coe.int/en/web/greco/about-greco/priority-for-the-coe; "As it is emphasised in the Criminal Law Convention, corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.".

[123] Parliamentary Assembly (PACE), Resolution 1594 (2007).

[124] Venice Commission, Report on the Rule of Law, CDL-AD(2011)003rev.

[125] Ibid., p. 9.

According to Article 46(5), the ECtHR can then examine the case, and if a violation against the principle of abiding ECtHR judgements in Article 46(1) is found, the case is referred to the Committee of Ministers. Since this process has never been exhausted, it is not completely clear what such a procedure could result in. For example, the Committee of Ministers could activate the 'nuclear option' in Article 8 of the CoE statute. This has however never been the case, for the same reasons discussed in the chapter about the EU.

There is no specific expert mechanism that deals with member state compliance with binding judgements by the ECtHR. As we have seen, the executive organ of the CoE – the Committee of Ministers is in charge of this process by the provisions in Article 46 ECHR.[126] Additionally, The Committee of Ministers arranges four "DH-meetings" every year, where execution of ECtHR judgements are being supervised in the form of a dialogue between Member States, that results in a final resolution.[127] The dialogues should be seen as a tool for creating political pressure against states who fail to implement ECtHR judgements.

As mentioned, the nuclear option found in Article 8 of the CoE statute has never been activated and neither has Article 46 ECHR been fully exhausted. One case has however the potential of triggering such a process – Ilgar Mammadov v. Azerbaijan.[128] The ECtHR found that the arrest of the regime critical Mr. Mammadov was unjustified, carried out in bad faith and that his right to presumption of innocence had been breached and thus violated several articles of the ECHR and the rule of law. Moreover, the court found that Mr. Mammadov should be immediately released. To this day[129], Mr. Mammadov remains imprisoned, contrary to the ECtHR judgement. The case has been highlighted by Thorbjørn Jagland, Secretary General of the CoE, in a statement on 29 April 2016, urging the Azerbaijan courts to follow its commitments under the ECHR.[130] Numerous similar cases in Azerbaijan display a systematic disregard of CoE core values and judgements of the ECtHR.[131] Whether the Committee of Ministers will ultimately decide to suspend or detach Azerbaijan from the CoE remains to be seen. How such a measure would improve adherence to values such as the rule of law, democracy and human rights is unclear. What is however clear, is that political pressure seems to this day to not be a very effective tool towards

[126] See Article 46(2) ECHR.
[127] See: http://www.coe.int/en/web/cm/execution-judgments.
[128] Case of Ilgar Mammadov v. Azerbaijan, (Application no.15172/13), Judgement, Strasbourg, 22 May 2014, Final 13/10/2014.
[129] 23 May 2017.
[130] http://www.coe.int/en/web/portal/full-news/-/asset_publisher/VN6cYYbQB4QE/content/jagland-azerbaijan-court-decision-on-ilgar-mammadov-deeply-disturbing- [Accessed 23 May 12:00]. See also European Parliament resolution P7_TA-PROV(2013)0285, http://www.europarl.europa.eu/document/activities/cont/201306/20130620ATT68102/20130620ATT68102EN.pdf.
[131] http://www.coe.int/hu/web/commissioner/-/azerbaijan-stop-reprisals-against-human-rights-defenders. [Accessed 23 May 12:00]. It should be noted that Azerbaijan is not the only member state showing this development, but similar trends have been noted in, inter alia, Turkey, Russia, Hungary and Ukraine.

states with a negative attitude towards these values. It is worth noting that in the CoE context, there is no economical sanctioning mechanism.

4.2.2 The Venice Commission

The European Commission for Democracy through Law, commonly referred to as the 'Venice Commission'[132], is a CoE advisory body on constitutional matters for its 61 member states.[133] The Venice Commission (VC) was created in 1990 in the aftermath of the fallen Berlin Wall, a time when need for constitutional reform amongst numerous European States was high. To present the VC with its methods and key components is relevant for understanding in what context the rule of law checklist exists.[134]

The three broad areas with which the VC works with are (1) democratic institutions and fundamental rights, (2) constitutional justice and ordinary justice and (3) elections, referendums and political parties.[135] The activity is based on the three core values of the CoE – democracy, human rights and the rule of law. It is performed in cooperation with the CoE secretariat. The VC became a part of the CoE though a partial agreement, but is an independent body that works on its own initiative.[136]

According to Article 2(1) of the statute, each member state shall appoint one independent expert and one substitute who has "[…] achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science." Amongst high judges, professors in international law and ombudsmen one can also find former prime ministers, justice ministers and high prosecutors.[137]

The main task for the VC is to issue opinions on legislation or draft legislation. A request for an opinion can come from the member state itself, from the CoE or from other international organisations such as the EU and the OSCE. The majority of requests do however come from the member states themselves. The European Court of Human Rights (ECtHR) can request *Amicus curiae* briefs from the VC, which means that the VC can, in relation

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[132] The name stems from the fact that the experts meet four times per year in Venice in plenum.
[133] The member states are Algeria, Brasilia, Chile, Israel, Korea, Kirgizstan, Kosovo, Mexico, Morocco, Peru, Tunisia, Kazakhstan, USA and the 47 member states to the CoE. Belarus is an associated member. Argentina, Canada, The Holy See, Japan and Uruguay are observer states. See: http://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN [Accessed 23 May 12:00].
[134] Some parts of this chapter concerning the VC working methods has been vaguely translated from a previous article in Swedish written by undersigned, called "Venedigkommissionens framgångar – vad beror de på?", during an internship at the Permanent Representation of Sweden to the Council of Europe.
[135] See Article 1 of the statute (Resolution(2002)3). For an overall presentation on the VC, see: http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN [Accessed 23 May 12:00].
[136] The latest statute of the VC is Resolution(2002)3, adopted by the Committee of Ministers on 21 February 2002. Link: http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute.
[137] For more information on budget and other matters, see the VC's own website, that provides all information on structure of organisation etc.

to a case, provide views on interpretation matters, or information on a situation in a member state.[138]

The VC initiates its work by receiving a draft of a changed constitution or other legislation by a member state, the CoE or another international organisation. The CoE secretariat then forms working group consisting of experts and rapporteurs to prepare a draft opinion, where international standards as well as national legislation relevant for the state in question is considered. Expertise, knowledge of language and of the legal culture are attributes that are considered when forming the working group. Country visits can be a part of the process, where the working group meets not only with relevant authorities and government officials, but also representatives for other interests, such as the civil society, the political opposition and NGO's.

A final draft opinion is prepared, that thenceforth is discussed in a plenary session in Venice between the experts. After the draft has been adopted, it is sent to the one who requested it and is published on the VC website. The VC is today a well-regarded and trusted institution in the eyes of the international community. In some member states, it has almost become a standard procedure to consult the VC for future major legislative changes within the VC's mandate.

Below, some key components in what could be the recipe for success will be laid out and lastly the new rule of law checklist will be accounted for.[139]

The VC strives to create a dialogue between its experts and officials from the member state in question. This dialogue can be presumed to create mutual understanding between VC experts and government officials, which could consequently improve the opportunity for opinions to be implemented. Another cornerstone in the VC's practise is cooperation with other international organisations. Opinions are often adopted jointly with the OSCE Office for Democratic Institutions and Human Rights (ODIHR) or the EC. The EC also funds activities and encourage candidates for EU accession to turn to the VC for advice in different matters.[140] Another key element for success is the flexibility in the organisation. The VC works on an ad hoc-basis and can therefore swiftly react to political crises.[141] It has been pointed out that holding the plenary sessions in Scuola Grande di San Giovanni

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[138] For a more detailed account of the process from request to opinion, see link: http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN. This thesis does only give a limited account of the working process [Accessed 23 May 12:00].

[139] All information stated in the text below is taken from the VC website, that describes its practices. For deeper information on the inner workings of the VC, these articles provides good insights and will be referred to when needed: Iain Cameron, Johan Hirschfeldt, 2016, Om Venedigkommissionen — uppdrag, arbetssätt och resultat, Svensk Juristtidning 100 år, Justus förlag, Henceforth 'Cameron (2016)', and Wolfgang Hoffmann-Riem, 2014, The Venice Commission of the Council of Europe – Standards and Impact, The European Journal of International Law Vol. 25 no. 2, Oxford University Press, Henceforth 'Hoffmann (2014)'.

[140] Cameron (2016), p. 408.

[141] This is mentioned in the preamble of the VC statute. See for example VC opinions on the situation in Turkey after the 15 July 2016 coup attempt: http://www.venice.coe.int/webforms/documents/? pdf=CDL-REF(2016)061-e & http://www.venice.coe.int/webforms/documents/? pdf=CDL-AD(2016)037-e. [Accessed 23 May 12:00]

Evangelista in Venice bears a non-negligible attractiveness for the experts to make available their knowledge, as well having ministers and government representatives visiting Venice and exposing themselves to the experts' review.[142]

Other attributes that should be ascribed to the VC are quality, tone and argumentation. Given that their opinions are not binding, but foremost advice and possibly 'soft law', a good diplomatic tone is essential. The VC shows a good understanding of the purpose of a new legislation and often presents alternative solutions that are more coherent with the CoE's core values. The high quality and argumentation that emanates from the distinguished members and a good organisation, is an effective method that encourages the state in question to respect the recommendations. Even if a recommendation is not implemented, it still has some effect by, for instance, supporting the opposition or becoming a basis on further pressure from the EC.[143]

The VC gets support for its opinions from other sources as well. While the opinions are not legally binding, the basis for the opinions are always binding legislation, such as the ECHR and the case-law of the ECtHR. Best practices are also identified, which are used as guidance in, for instance, rule of law matters, both within the VC but also for other member states.[144] The ECtHR also occasionally refers to VC opinions in its judgements, as a part of the court's argumentation.[145] This trust in the VC is shared by the ECJ, that has referred to VC opinions as well.[146] Whether there exists a certain cross-fertilization between the VC and the ECtHR remains unclear, but it has been argued in the research discourse.[147] It is, for example, a fact that there is a certain exchange of personnel between the two institutions.[148]

There is no systematic follow-up mechanism after opinions have been adopted. However, the Secretariat does have a brief information point on this matter during each plenary session. Member states do not always live up to the opinions – between 2009 and 2012 "[…] in many instances the relevant state did not take up the recommendations contained in opinions, at least not in a way that was noticed by the VC."[149]

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[142] Cameron (2016), p. 409.
[143] Cameron (2016), p. 410.
[144] Hoffmann (2014), p. 581.
[145] By mid-2016 the ECtHR has referred to VC opinions over 100 times, on various matters such as elections, the judiciary, political parties, freedom of religion and freedom of assembly. See link: http://www.venice.coe.int/WebForms/pages/?p=02_references&lang=EN. [Accessed 23 May 12:00].
[146] See Bode-Kirchhoff, 'Why the Road from Luxembourg to Strasbourg Leads Through Venice', in K. Dzehtsiarou et al. (eds), Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR (2014) 55, at sect. III. From note 29 in Hoffmann (2014).
[147] van Dijk, Pieter, 'The Venice Commission on Certain Aspects of the European Convention of Human Rights *Ratione Personae*', in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), p. 183.
[148] Hoffmann (2014), p. 587.
[149] In approximately one third of the cases the VC has no information about reactions to opinions by the states concerned. See: Hoffmann (2014), p. 589.

4.2.3 The Rule of Law Checklist

The VC 'Rule of Law Checklist' is a recent addition to understanding the VC approach to the rule of law, and hence the understanding of other international organisations.[150] The checklist was adopted on 18 March 2016 and has thenceforth been supported by, inter alia, the Committee of Ministers, PACE, the Congress of Local and Regional Authorities of Europe. This document holds implications for both how international organisations work with rule of law monitoring in national states, and serves as a guidance tool for nation states themselves. It is meant to develop the 2011 report on the rule of law that was mentioned above, and a first version of the checklist that was appended to that report.[151]

The checklist is structured in three parts. The first part, 'purpose and scope' explains the important place of the rule of law in international organisations such as the CoE, the UN and the EU. It also recaps how the rule of law was defined in the 2011 report and sets out what added value the checklist has – to "[…] build on these developments and to provide a tool for assessing the Rule of Law in a given country from the view point of its constitutional and legal structures, the legislation in force and the existing case-law. The checklist aims at enabling an objective, thorough, transparent and equal assessment."[152] Human rights, democracy and rule of law are expressed to be interlinked.[153]

The connection with human rights and democracy is elaborated upon in the second chapter, called "benchmarks". It is conveyed that Article 8 ECHR (Right to respect for private and family life) and case law has developed specific positive obligations of a state, that are combined with the rule of law.[154] The rule of law is expressed to not per se create positive obligations for a state, but it does entail certain principles relevant for human rights protection which creates the link between the two.

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[150] European Commission for Democracy through law (Venice Comission) Rule of Law Checklist**,** Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). Henceforth 'Rule of law checklist' or 'checklist'. The 2016 rule of law checklist is made in cooperation with several experts, the Birmingham Centre for the Rule of Law, the secretariats of the Consultative Council of European Judges (CCJE), the European Commission against Racism and Intolerance (ECRI), the Framework Convention for the Protection of National Minorities and the Group of States against Corruption (GRECO), as well as of OSCE/ODIHR and of the European Union Agency for Fundamental Rights (FRA). See checklist, p. 7.

[151] Report on the Rule of Law (CDL-AD(2011)003rev).

[152] Rule of Law checklist, point 24.

[153] Rule of Law checklist, point 31: "The Rule of Law would just be an empty shell without permitting access to human rights. Vice- versa, the protection and promotion of human rights are realised only through respect for the Rule of Law: a strong regime of Rule of Law is vital to the protection of human rights. In addition, the Rule of Law and several human rights (such as fair trial and freedom of expression) overlap. While recognising that the Rule of Law can only be fully realised in an environment that protects human rights, the checklist will expressly deal with human rights only when they are linked to specific aspects of the Rule of Law." In point 33 the link to democracy is made clear as well.

[154] Rule of law checklist, point 36. See also ECtHR cases: *Sylvester v. Austria*, 36812/97 and 40104/98, 24 April 2003, § 63; *P.P. v. Poland*, 8677/03, 8 January 2008, § 88.

"[…] the Rule of Law principle creates additional obligations of the State to guarantee that individuals under their jurisdiction have access to effective legal means to enforce the protection of their human rights, in particular in situations when private actors infringe these rights. Thus the Rule of Law creates a benchmark for the quality of laws protecting human rights: legal provisions in this field – and beyond – have to be, *inter alia*, clear and predictable, and non-discriminatory, and they must be applied by independent courts under procedural guarantees equivalent to those applied in conflicts resulting from interferences with human rights by public authorities."[155]

The incorporation of human rights in the understanding of rule of law is seen as a historical development.[156] The link to democracy is also made clear in the beginning of the second chapter. Rule of law "[…] promotes democracy by establishing accountability of those wielding public power […]".[157] Balance of power is another value that the checklist addresses.[158]

The second chapter goes on to present a number of questions that can be used to assess the degree of rule of law adherence in a state. It is divided into nine areas with sub-areas: legality, legal certainty, prevention of abuse (misuse) of powers, equality before that law and non-discrimination, access to justice, and examples of particular challenges to the rule of law. The structure is (generally) built up upon a question on whether a certain principle that is relevant to the rule of law, is recognised in a state. After the question(s) it follows a text explaining why the principle is important as well as a reference to several norms of different kind. The third chapter is a selection of standards that have been used to create the benchmarks, and consists of hard law and soft law relating to each sub-area in the benchmark chapter.

The VC recognizes cultural and constitutional diversity and hence that implementation of the rule of law does not have to be identical in order to fulfil this "global idea and inspiration", however stressing the fact that the main components should remain the same.[159]

There is no simple and short definition of the rule of law in the checklist, though this question is referred back to the 2011 report. By reading the report as well as chapter three (selected standards), one can grasp what sort of approach the VC utilises when assessing rule of law adherence.

4.3 Conclusion

The CoE remains committed to the rule of law by constantly developing guidance for Member States on how to benchmark rule of law levels as well as monitoring state practise by its various sub-organs. Political will and attitude from the member state itself seems however to be what is most crucial for achieving change. This maturity might not always exist in countries with an authoritative government, or with a history of authoritative government. One way for improvement could be to further develop the follow-up process, and/or to intensify cooperation with the EC. An important fact is that states

155 Rule of law checklist, point 36.
156 Rule of law checklist, point 35.
157 Rule of law checklist, point 33.
158 Rule of law checklist, point 39.
159 This idea is foremost conveyed in point 34 & 36 in the Rule of law checklist.

are more inclined to follow VC opinions if they are referred to as a step in avoiding infringement procedures from the EC.[160]

[160] Hoffmann (2014), p. 594.

5 Efforts combined

5.1 The Polish example

A part of the "renewed" interest for upholding the rule of law in Europe most likely stems from recent member state actions being perceived as threatening the rule of law as a common value in Europe and hence, compliance with Article 2 TEU and Acticle 3 of the CoE statute.[161] In other words, Europe's regional organisations are working in the context of a perceived backlash to constitutional principles in several of its member states. Development in neighbouring states to the EU, such as in Russia and Turkey probably also adds to these concerns. In the CoE, these states are important member states.[162] We have seen how the historical development of this term is manifested today in Europe's regional organisations. Below, some EU and CoE actions to alleged rule of law threats in Poland during years 2015-2017 will be used as further material for exploring how the EU and the CoE[163] works in practice with strengthening the rule of law.[164]

Poland's adoption of the Act on the Constitutional Tribunal of 25 June 2015 (with amendments on 22 December 2015) has been a cause for worry for both the EU and the CoE, and caused the EC to trigger the new EU Framework. Another issue that was addressed by the new framework is a new "small media law" that allegedly modifies the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Treasury Minister, rather than an independent body. The new law also provided for the immediate dismissal of the existing Supervisory and Management Boards.

These new laws led to action from the EU consisting in activation of the new EU Framework. The EC and First Vice-President Timmermans sought additional information about the two new laws, and Poland was recommended to request a legal assessment from the VC on 23 December 2015. Poland followed with such a request, but continued with the legislative process, and answered concerning the new media law that it did not cause any negative impact on media pluralism, on 7 January 2016. The same month, the EU College of Commissioners held a first orientation debate in order to assess the situation in Poland in line with the new rule of law framework.[165]

Based on the debate, the EC adopted an opinion concerning the rule of law in Poland on 1 June 2016. The concerns in the opinion were focused

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[161] See previous chapter three and four.

[162] With 'important' it is referred to the fact that these states are big economic contributors to the CoE budget. See link: https://www.coe.int/en/web/about-us/budget?desktop=false [Accessed 23 May 12:00].

[163] Foremost via the European Commission and the Venice Commission.

[164] The content of these tools is based on the organisations' understanding of the rule of law. When determining a threat to the rule of law, it is essential that the rule of law is defined. As we have seen, this is an ongoing process, but it is also based on the development in the academia.

[165] For a more extensive account of these events, see: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm [Accessed 23 May 12:00].

mainly on three issues: the appointment of judges to the Constitutional Tribunal, the Act of 22 December 2015 amending the law on the Constitutional Tribunal and the effectiveness of the Constitutional review of new legislation.[166]

The cause for concerns for the appointment of judges to the Constitutional Tribunal in the fall/winter of 2015, in regard of the rule of law, were in the opinion the following.[167] The outgoing legislature held that five new judges should be appointed; three in line with the outgoing legislature and two in line with the incoming legislature which commenced on 12 November 2015. However, amendments to the law on the Constitutional Tribunal were quickly adopted in the meantime that introduced the possibility to annul the judicial nominations made by the previous legislature and to instead nominate five new judges. In contradiction with rulings of the Constitutional Tribunal on the matter on 3 and 9 December 2015, which upheld the previous nominations, the President appointed these five new judges, thus creating the issue of concern. In addition, the amendments also shortened the terms of office of the President and Vice-President of the Tribunal from nine to three years, with the previous terms coming to an automatic end within three months of the amendment's adoption. The Constitutional Tribunal declared the shortening of the terms invalid.

Moreover, in the way mentioned in the previous part, the functioning of the Constitutional Tribunal was modified by a new law amending the law on the Constitutional Tribunal, on 22 December 2015. Although the Polish Government requested an opinion from the VC, the law was by the Polish Parliament published in the Official Journal and entered into force on 28 December 2015. The amendments were criticised by the VC in its 11 March 2016 opinion to pose threats to the rule of law, but also democracy and human rights:

> Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective. Making a constitutional court ineffective is inadmissible and this removes a crucial mechanism which ensures that potential conflicts with European and international norms and standards can be resolved at the national level without the need to have recourse to European or other subsidiary courts, which are overburdened and less close to the realities on the ground.[168]

A ruling by the Constitutional Tribunal on 9 March 2016, deeming the amendments to be unconstitutional, was refused to be published in the official journal. This together with the material substance of the amendments, was another cause of worry for the EC expressed in its opinion. The opinion also included inquiries about new laws, such as the "small media law". On 13 April 2016, the European Parliament adopted a resolution on the situation in

[166] http://europa.eu/rapid/press-release_IP-16-2015_en.htm [Accessed 23 May 12:00].
[167] For a more extensive account of the opinion, see: http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm [Accessed 23 May 12:00].
[168] Venice Commission, CDL-AD(2016)001, Opinion on amendments to the act of 25 june 2015 on the constitutional tribunal of Poland, point 138.

Poland, urging the Polish government to follow both the EC and VC opinion.[169]

Since no viable solution was found in the dialogue with Poland regarding these concerns, the second stage of the new EU framework was subsequently initiated. On 27 July 2016, the EC adopted a recommendation on the rule of law in Poland, formally activating the second stage in the new EU Framework.[170] In the recommendation, it was made clear that the EC believes that there were clear systemic threats to the rule of law in Poland that require urgent actions.[171] The main indication of this is expressed in the fact that the Constitutional Tribunal cannot effectively exercise its core task of constitutional review, which is considered a "key component of the rule of law".[172] The EC recommended Poland to urgently follow its recommendations, addressing the same issues as were expressed in the opinion; to respect and implement the judgements of the Constitutional Tribunal of 3 and 9 December 2015 as well as other judgements, without the interference of the government, and also to follow the VC opinion stressing the Constitutional Tribunal as the guarantor of the Constitution, which means that future legal review should also be fully implemented.[173]

As a result of the criticism on the amendments on 22 December 2015 on the act on the Constitutional tribunal, a new act was signed by the President of Poland on 27 July 2016. The VC adopted a new opinion on 14 October 2016 which refers to the new act on the Constitutional Tribunal.[174] It is worth noting that the Polish Government declined to send a representative to the session where this opinion was adopted.[175] In the opinion, the VC examined whether, and to what extent, the recommendations in its previous 11 March opinion was followed via the Act of 22 July 2016.[176] As we know, Poland had been criticised for unbalancing the separation of powers via its amendments to the Act on the Constitutional tribunal, and thus posing serious threats for the independence of the Tribunal, which was deemed inconsistent with the rule of law. The new Act of 22 July 2016 was believed to contain some improvements, albeit 'very limited'.[177] For example, the VC pointed out that previous judgements by the Tribunal are still not respected and the appointment of judges is still not in accordance with the rule of law.[178] Consequently, the VC found in its concluding remarks, that the rule of law issue was far from solved in Poland with respect to the Constitutional tribunal.

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[169] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0123&language=EN&ring=B8-2016-0461 [Accessed 23 May 12:00].
[170] European Commission, C(2016) 5703 final, Brussels, 27.7.2016, http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf. Henceforth 'Commission Recommendation on the Rule of law in Poland'. Press releases: http://europa.eu/rapid/press-release_IP-16-2643_en.htm & http://europa.eu/rapid/press-release_MEMO-16-2644_en.htm [Accessed 23 May 12:00].
[171] Commission Recommendation on the Rule of law in Poland., p. 21.
[172] Ibid., p. 20.
[173] Ibid., p. 21.
[174] Venice Commission, Poland opinion CDL-AD(2016)026, on the act on the Constitutional Tribunal.
[175] Ibid., point 8.
[176] Ibid.., point 20.
[177] For the substantial improvements and limitations, see Ibid.., point 122-123.
[178] Ibid.., point 125.

Throughout the 14 October Opinion, the VC refers to the Rule of Law checklist as it is a 'central standard'.[179]

On 21 December 2016, the EC issued a press release presenting the latest developments in the dialogue with Poland as well as a complementary Recommendation.[180] In summary, the EC expressed that there was an urgent continuous systemic threat to the rule of law, that had not been resolved. Among a repetition of the previous recommendations, the Polish government was recommended to "[…] refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal". The EC also recalled Poland to take the VC opinion of 14 October 2016 fully into account. A two month frame was given to Poland to respond to the new recommendation. Where not satisfactory follow-up would be given within the set time limit, the EC expressed that it "[…] has the discretion whether or not to resort to the procedure laid down in Article 7 TEU.". Up to this date, it remains to be seen how this situation will develop.[181]

5.2 Conclusion

As far as different approaches are concerned, the EC and the VC speak with different voices, nevertheless addressing the same issues. The VC communicates with a more technical and diplomatic voice, giving *recommendations* and acting as an advisor. The EC has a rather political tone, not refraining from threats and often reliant upon the VC's analysis as a source of authority, due to the vast expertise of the VC. Whether this gives rise to cross-fertilisation or merely a complementary mechanism is a difficult enterprise to discern. There is more evidence that the nature of this cooperation is a complementary order. Besides reputation as a respectable institution, the VC does not gain as much to its work from the EC as vice versa. The EC on the other hand has referred member states to following VC opinions as a way of avoiding infringement procedures and hence financial penalties. The VC, and the CoE at large, do not have any concrete financial penalties. This is most likely due to the different nature of the two organisations. The EU is however more and more approaching the CoE in terms of what values to guard and highlight, and therefore cooperation between the two seem natural. As overlapping is a waste of resources, the organisations should draw upon their respective expertise. The EU has more leverage, while the CoE has more expertise on guarding fundamental values. Complete overlapping is not possible, since the CoE has more member states, and it is also for this reason that mutual enforcement is not completely possible. Therefore, it is sometimes necessary to concretely appropriate some attributes that are positive. How this could be done will be presented in the final section. The strongest asset of the EU is its leverage and intense political

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[179] See point 9 where the rule of law checklist is mentioned as a 'central standard', Venice Commission, Poland opinion CDL-AD(2016)026, on the act on the Constitutional Tribunal.

[180] Press release: http://europa.eu/rapid/press-release_IP-16-4476_en.htm. [Accessed 23 May 12:00]. See also: Commission Recommendation of 21.12.2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374, Brussels, 21.12.2016 C(2016) 8950 final.

[181] 23 May 2017.

cooperation.[182] The strongest asset of the VC is its history of working on the rule of law, argumentation and expertise through its staff.[183] Other best practices that can be derived from the new EU Framework is the consequent follow-up procedure that the VC lacks in its work. On the other hand, the EU Framework does not mandate country visits (and expert dialogues) for monitoring purposes, contrary to the VC. The new EU framework has proved to be an important addition to what can be considered as an 'early prevention mechanism' to threats to the rule of law, together with the already well established VC.[184] The question is however whether both of these procedures act early enough, and ultimately begs the question whether it is possible to act in any other way than ex post facto from an international organisation's point of view.

This section has hopefully served to demonstrate how the tools of the regional organisations are implemented and work in practice. The EC via the new EU Framework and the VC play important parts in adding pressure to the Member States to comply with the rule of law. The "constitutional crisis" in Poland has showed the fragility of separation of powers and the rule of law. Whether these regional organisations are capable of achieving more than just political pressure in this particular situation remains to be seen. Ultimately, the EU threat of triggering Article 7 TEU might in the Polish case be an empty one; it is not considered favourable in an unstable time, having the United Kingdom in formal proceedings of leaving the EU since the UK Government triggered Article 50 TEU on 29 March 2017. Pressure from regional organisations, NGOs and political opposition, play an important role in the context of a backlash to the rule of law.[185] Without political will, this might however remain solely as a futile exercise.

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[182] And after all more uniformity in views that the more diverse collection of member states to the CoE.

[183] "Because the VC is an institution with a high standing and a pluralistic composition, it can be very motivating for states that lack any tradition or experience with democracy and the rule of law, yet are trying to spur it to receive specific suggestions on regulations from the VC pursuant to a request.53 Such suggestions can be interpreted and applied in the country concerned as a sort of certification that compliance with the rule of law has been examined. This can facilitate the elaboration of specific norms and increase their acceptance at home.", Hoffmann (2014), p. 591.

[184] See Chapter 4.2.2, p. 34, on how the VC reacts to political crises.

[185] This affirmation is however not easy to prove. Human Rights Watch compiles an online list with the impact that international organisations and NGOs have on governments. See https://www.hrw.org/impact. While it can be said that they play an important role, it is not fully clear if they play an impactful role. See Hoffmann (2014), p. 591, "[…] Belarus, that have not yet overcome totalitarianism and are therefore uninterested in the rule of law and democratic discourse.". Belarus is receiving strong condemnation from the CoE regarding recent executions of the death penalty, and the process of abolishing this practice seems slow, it not inexistent. See Council of Europe Action plan for Belarus 2016-2017, GR-DEM(2016)20, 13 September 2016. "The abolition of the death penalty in Belarus remains the top priority for the CoE, as capital punishment is a major obstacle for Belarus to taking steps towards becoming a CoE member state.".

6 Conclusive analysis

6.1 Building a step forward

The theoretical framework has shown that the EU and the CoE are influenced by the academic development. Many modern academic views on the rule of law takes a substantial stand, which is what Europe's regional organisations do as well. Some parts of the EU's work, such as the rule of law dialogues, are solely working on an ad hoc-basis, by incorporating new societal challenges as challenges to the rule of law. The VC has since the rule of law opinion, started to refer to the opinion as a source of reference for what is meant by the rule of law, which could indicate some degree of self-reference.[186] The EU is apparently comfortable on relying upon the VC when it comes to determining what is meant by the 'rule of law'. The VC is therefore a sort of source for interpreting the Article 2 TEU.

In the previous section, 'best practices' from both the EC as well as the VC have been identified. As already mentioned, the EC frequently legitimises its critique via VC opinions.[187] The VC has, since the rule of law checklist was adopted, started to use the checklist as a source of legitimacy to its opinions.[188] In this concluding section, some concrete improvements to both organisations will be presented.

As a measure to improve rates of implemented opinions, the VC could develop a mechanism for more systematic follow-up, as an addition to what exists today during plenary sessions and DH-meetings. This must of course be done with precaution in order to not deter member states from approaching the VC for advice, as their failure to comply with recommendations would be more out in the open, which is also a matter of resources in terms of both time and finances. To present follow-up for each opinion during plenary sessions would be too time consuming. A more feasible way would be to publish the follow-up online, which of course would imply that more financial means need to be granted for the VC staff. That publicity implies pressure is undoubtable.[189] Therefore, the more transparent the monitoring can become, the better. The CoE could use more leverage both in respect to the ECtHR and its other bodies, such as the VC. However, to introduce financial penalties cannot be seen as a realisable.

As EU scepticism is on the rise, assessments and threats from the EC can lead to further polarisation and lead to a deterioration in cooperation. Its current means, including the new EU Framework has not yet proven to be effective in the sense of achieving adherence to its recommendations. This does not necessarily imply that something is not working, but demonstrates a broader problem for international organisations – they are only ever as strong as the commitment from their member states. Financial penalties could be tied

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[186] However, the checklist was a continuation of the 2011 report, which cited Tom Bingham as a source.
[187] See chapter 5.1.
[188] Ibid.
[189] The impact of pressure, however, is more doubtable.

closer to rule of law adherence, and perhaps as a final step in the new EU Framework, the recommendation stage, as this tool of achieving adherence already exists in the EU in relation to Member State implementation of ECJ judgements. Granted that member states would accept this procedure, it would at least more probable be to actually be activated, than the current 'last resort' that is Article 7 TEU. The EU could establish a cooperation via the new Framework that enables a meeting of experts from the EU with local officials, similar to country visits that the VC conducts.

Both the EU and the VC have only to gain from introducing more rigid and unbiased follow-up procedures. It is not unthinkable that an NGO comprised of independent experts could take on the work to assess whether both VC opinions and EU Framework opinions/recommendations have been satisfactorily implemented in a pure technical way.

The EU applies pressure in rather political manner, while the VC works on a more technical basis. A final general thought is that both organisations could benefit from moving towards a middle-way, combining both approaches for a hopefully more successful adherence to the rule of law.

Legal Documents

Conventions, Statutes and Treaties:

Statute: Resolution(2002)3, Revised Statute of the European Commission for Democracy through Law, (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies), http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute, [Accessed 23 May 12:00].

United Nations Universal Declaration of Human Rights, 1948, http://www.un.org/en/universal-declaration-human-rights/.

Treaty on European union (Consolidated version 2016) - official Journal of the European Union, C 202, 7 June 2016.

Treaty on the Functioning of the European Union (Consolidated version 2016) - Official Journal of the European Union, C 202, 7 June 2016.

Charter of Fundamental Rights of the European Union (2016) - Official Journal of the European Union, C 202, 7 June 2016.

Statute of the International Court of Justice, New York 16 December 1966, 999 UNTS 171.

Statute of the Council of Europe, London, 5.V.1949.

Vienna Convention on the Law of Treaties, Vienna 22 May 1969, 1155 UNTS 331.

Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Rome, 4.XI. 1950.

Communications, Reports, Opinions:

A new EU Framework to strengthen the Rule of Law, Communication from the Commission to the European Parliament and the Council, COM(2014) 158 final/2.

Annex 2, A new EU Framework to strengthen the Rule of Law, Communication from the Commission to the European Parliament and the Council, COM(2014) 158 final/2, p. 4, http://ec.europa.eu/justice/effective-justice/files/com_2014_158_annexes_en.pdf [Accessed 23 May 12:00].

Council of Europe Parliamentary Assembly Resolution 1943 (2013) Final version, http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19948&lang=en [Accessed 23 May 12:00].

Council of Europe Action plan for Belarus 2016-2017, GR-DEM(2016)20, 13 September 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806a3606 [Accessed 23 May 12:00].

Council of the European Union, Note 8774/16, Brussels, 13 May 2016. http://data.consilium.europa.eu/doc/document/ST-8774-2016-INIT/en/pdf [Accessed 23 May 12:00].

Council of the European Union, Note 13744/15, Ensuring the respect for the rule of law – Dialogue and exchange of views, 9 November 2015, http://data.consilium.europa.eu/doc/document/ST-13744-2015-INIT/en/pdf [Accessed 23 May 12:00].

Council of the European Union, Note 8774/16, Brussels, 13 May 2016, Presidency non-paper for the Council (General Affairs) on 24 May 2016 - Rule of law dialogue. http://data.consilium.europa.eu/doc/document/ST-8774-2016-INIT/en/pdf. [Accessed 23 May 12:00]

Commission Recommendation of 21.12.2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374, Brussels, 21.12.2016 C(2016) 8950 final, http://ec.europa.eu/newsroom/document.cfm?doc_id=40988 [Accessed 23 May 12:00].

Communication from the Commission of 15 October 2003: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final. http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf. [Accessed 23 May 12:00].

Communication from the Commission, p. 10, "Strategy for the effective implementation of the Charter of Fundamental rights" of 19 October 2010 (COM(2010) 573 final). http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf [Accessed 23 May 12:00].

Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law, General Affairs Council meeting, Brussels, 16 December 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/146323.pdf [Accessed 23 May 12:00].

European Parliament, Resolution, P7_TA-PROV(2013)0285, http://www.europarl.europa.eu/document/activities/cont/201306/20130620ATT68102/20130620ATT68102EN.pdf, [Accessed 23 May 12:00].

European Commission, C(2016) 5703 final, Brussels, 27.7.2016, http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf [Accessed 23 May 12:00].

European Commission for Democracy through law (Venice Comission) Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf [Accessed 23 May 12:00].

General Assembly Resolution adopted by the General Assembly on 24 September 2012, A/RES/67/1, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1 [Accessed 23 May 12:00].

General Assembly Resolution adopted by the General Assembly on 16 September 2005, A/RES/60/1, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1 [Accessed 23 May 12:00].

Resolution adopted by the General Assembly, 18 September 2000, A/RES/55/2, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/2 [Accessed 23 May 12:00].

Parliamentary Assembly (PACE), Resolution 1594 (2007), http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17613&lang=en [Accessed 23 May 12:00].

Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), CDL-AD(2011)003rev-e, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e [Accessed 23 May 12:00].

Venice Commission, CDL-AD(2016)001, Opinion on amendments to the act of 25 june 2015 on the constitutional tribunal of Poland, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e [Accessed 23 May 12:00].

Venice Commission, Poland opinion CDL-AD(2016)026, on the act on the Constitutional Tribunal, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282016%29026-e [Accessed 23 May 12:00].

Venice Commission, Opinion No. 872 / 2016, document CDL-AD(2017)007,

http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)007-e
[Accessed 23 May 12:00].

Venice Commission, Report on the Rule of Law, CDL-AD(2011)003rev, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e, [Accessed 23 May 12:00].

Bibliography

Aristotle, *The Politics* (c. 350 BC), Stephen Everson (trans.), Cambridge: Cambridge University Press, 1988.

Aristotle in 23 Volumes, Vol. 19 (Nicomachean Ethics Book VI), translated by H. Rackham. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1934.

Bárd, Petra et al., "An EU mechanism on Democracy, the Rule of Law and Fundamental Rights", CEPS Paper in Liberty and Security in Europe No. 91 / April 2016, p. 3.

Barro, R., 2000, "Democracy and the Rule of Law", in *Governing for Prosperity*, B. de Mesquita and H. Root (eds.), New Haven: Yale University Press.

Bode-Kirchhoff, 'Why the Road from Luxembourg to Strasbourg Leads Through Venice', in K. Dzehtsiarou et al. (eds), Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR (2014).

Bok, Hilary, "*Baron de Montesquieu, Charles-Louis de Secondat*", The Stanford Encyclopedia of Philosophy (Summer 2014 Edition), Edward N. Zalta (ed.).

Bingham, Tom., 2010, *The Rule of Law*, London: Allen Lane.

Marcus Tullius Cicero, Pro Cluentio 53.146.

Dawson, Mark, et al, Judicial Activism at the European Court of Justice, Northampton: Edward Elgar publishing, 2013.

van Dijk, Pieter, 'The Venice Commission on Certain Aspects of the European Convention of Human Rights *Ratione Personae*', in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007).

Fuller, Lon., 1964, *The Morality of Law*, New Haven: Yale University Press.

Gallie, W. B., Essentially Contested Concepts, Proceedings of the Aristotelian Society,
New Series, Vol. 56 (1955 - 1956), pp. 167-198, New Jersey: Blackwell Publishing on behalf of The Aristotelian Society,
http://www.jstor.org/stable/4544562?origin=JSTOR-pdf&seq=1#page_scan_tab_contents [Accessed 23 May 12:00].

Hillion, 'The Copenhagen Criteria and Their Progeny' in: C. Hillion, *EU Enlargement: A Legal Approach,* Oxford: Hart, 2004, 1–23.

Iain Cameron, Johan Hirschfeldt, 2016, Om Venedigkommissionen — uppdrag, arbetssätt och resultat, Svensk Juristtidning 100 år, Uppsala: Justus förlag.

Weimar: A Jurisprudence of Crisis by A. Jacobson, B. Schlink, The University of Toronto Law Journal, Vol. 53, No. 4 (Autumn, 2003), pp. 443-454, Toronto: University of Toronto Press.

Kant, Immanuel, 2012, Groundwork of the Metaphysics of Morals, Gregor, M, Timmermann, J, trans., Cambridge University Press.

Kelsen, Hans, 1960/1967. *Pure Theory of Law*, M. Knight, trans., Berkeley: University of California Press.

Locke, John, Second Treatise of Government and a Letter Concerning Toleration, 2016, Goldie, M, edt, Oxford University Press.

Von Mohl, Robert, 1844, Die deutsche Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates, Tubingen, H.Launn.

Montesquieu, Charles de Secondat, The spirit of the laws, 1989, Cohler, A.M, etd., Cambridge University Press.

Nicholson, Peter P., 1974, The Internal Morality of Law: Fuller and His Critics, Ethics Vol. 84, No. 4, pp. 307-326, The University of Chicago Press.

Pech Laurent, The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper 04/09, http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf [Accessed 23 May 12:00].

Rauscher, Frederick, "Kant's Social and Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2017/entries/kant-social-political/>. [Accessed 23 May 12:00]

Rawls, John. 1999, *A Theory of Justice*, Cambridge: Harvard University Press.

Raz, Joseph., 1977, "The Rule of Law and its Virtue", from his book, *The Authority of Law*, Oxford: Oxford University Press, 1979.

Sandgren, Claes (2015). Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation. Third Edition. Stockholm: Norstedts juridik. pp. 43-44.

Shelton, Dinah, ed. Commitment and Compliance: The Role of Non-binding Norms in the International Legal System. Oxford: Oxford University Press, 2000.

Stanford: Waldron, Jeremy, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/ [Accessed 23 May 12:00].

Waldron, Jeremy, "The Concept and the Rule of Law" (2008). Sibley Lecture Series. Paper 29. http://digitalcommons.law.uga.edu/lectures_pre_arch_lectures_sibley/29 [Accessed 23 May 12:00].

Waldron, Jeremy, 2002, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" *Law and Philosophy*, 21: 137–64.

Wolfgang Hoffmann-Riem, 2014, The Venice Commission of the Council of Europe – Standards and Impact, The European Journal of International Law Vol. 25 no. 2, Oxford: Oxford University Press.

Tamanaha, Brian, *On the Rule of Law. History, Politics, Theory,* Cambridge University Press, 2004, p. 92.

Tuckness, Alex, "Locke's Political Philosophy", *The Stanford Encyclopedia of Philosophy*(Spring 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2016/entries/locke-political/>. [Accessed 23 May 12:00].

Table of Cases

United States Supreme Court

Marbury v. Madison (1803) 1 Cranch 137

European Court of Justice

Case 120/78, Judgment of the Court of 20 February 1979.
Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.
Reference for a preliminary ruling: Hessisches Finanzgericht - Germany.
Measures heaving an effect equivalent to quantitative restrictions.

Case C-168/13 PPU, Judgment of the Court (Second Chamber), 30 May 2013
Jeremy F. v Premier ministre.

Case 294/83, "Les Verts" v European Parliament, [1986] ECR 01339.

Case C-496/99 P, Commission v CAS Succhi di Frutta [2004] ECR I-03801.

Joined cases 212 to 217/80 Amministrazione delle finanze dello Stato v Salumi [1981] ECR 2735.

Joined cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 02859.

Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council.

Case C-550/09 E and F, [2010] ECR I-06213.

Case C-50/00 P Unión de Pequeños Agricultores [2002] ECR I-06677.

Joined cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission, [2000] ECR I- 00001.

Case C-279/09 DEB, [2010] ECR I-13849.

Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v Commission [2010] ECR I-08301.

European Court of Human Rights

Ilgar Mammadov v. Azerbaijan, (Application no.15172/13), Judgement, Strasbourg, 22 May 2014, Final 13/10/2014.

Sylvester v. Austria, (Application no. 36812/97 and 40104/98), 24 April 2003.

P.P. v. Poland (Application no. 8677/03), 8 January 2008.