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Fundamental Rights in Hungary**

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The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary

(Paper I)

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Abstract

The EU is harboring a Member State which, through a method of abusive constitutionalism, is not a constitutional democracy anymore. Systemic violations of the Rule of Law are part of its governance, to the detriment of democracy and the well-being of its citizens. Crucially, this Member State could not join the EU, was it to apply today. This reality has dire consequences not only for the well-being of Hungarian citizens, but also for the entire European project. Accordingly, reinforcing existing constitutional principles within the EU, as well as formulating new ones, is paramount: i.e. to be able to respond effectively to Rule of Law violations and improve EU's enforcement.

This paper (PAPER I) is an introduction to the matter at hand and will:

- (i) Analyze what the Rule of Law is and, crucially, why it is important for modern democratic societies and the well-being of citizens;
- (ii) Introduce the new authoritarianism in Hungary
- (iii) Present the EU's-framework in protecting Rule of Law/democracy
- (iv) Describe how the Hungarian regime exploits the EU's framework
- (v) Reflect on ensuring constitutional democracy at EU and national level.

In consequent papers, various elaborated and detailed case-studies of these aspects will be presented.

This paper was commissioned by the Netherlands Helsinki Committee. References to Paper I through Paper VII are to other reports in this series, published consecutively as working papers:

Paper I – The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary

Paper II – Tactics Against Criticism of Autocratization. The Hungarian Government and the EU's Prolonged Toleration

Paper III – Inventing Constitutional Identity in Hungary

Paper IV – The Constitutional Court

Paper V – Is the EU toothless? An assessment of the Rule of Law enforcement toolkit

Paper VI – The CJEU and the ECtHR – High Hopes or Wishful Thinking?

Paper VII – The Changes Undermining the Functioning of a Constitutional Democracy

¹ Authors are grateful for the insightful comments by Professor Daniel R. Kelemen. As always, responsibility for any errors remains our own.

(i). **Constitutional democracy: Rule of Law, Democracy and Fundamental Rights**

*Why study Rule of Law? Why is the Rule of Law so important? When we are talking about the **Rule of Law**, we are talking about a constitutional legal term of a modern democratic state, embedded together in a web of operative values: i.e. **democracy, fundamental (human) rights** and Rule of Law must be treated as a unit.² They are interdependent requirements against authoritarian practices of the state, in particular the executive).*

In other words, Rule of law and the concomitant fundamental rights are constitutional instruments in guaranteeing and pursuing democracy (or: the democratic ideal).

But in whose interest, in whose name? What is it for? Our initial ascertainment is based on the simple statement, that human life in democracy is (can be) much happier than in non-democracies.

▪ **Constitutional democracy**

The concept of constitutional democracy is originally without a political adjective, i.e. there is no liberal or illiberal version of it. Constitutionalism itself is built upon the long tradition of liberal values rooted in humanism and enlightenment. Its most important achievement is the conviction that human rights precede state sovereignty and the legitimacy of a state constitution can only be recognized if its primary aim is to limit the power of the state (*executive*). Constitutional state, limited governance is a vehicle for democratic aspirations of citizens.

The often malicious misinterpretations and misunderstandings or ill-constructed categories on democracy jeopardize its consolidation.³ From his sociological perspective democracy is a social process in broad social contexts in which different normative claim-makings take place. In transitional states, where democratic traditions are weak, these claims can be easily manipulated by populist, autocratic intents.

▪ **The relevance of the Rule of Law**

[In this democratic social process, the Rule of Law has a constitutive role, in particular to ensure fundamental rights]

As general rights of the citizens became the vocabulary of society and the dominant institutional channels of politics, medium of government society nexus, the Rule of Law (Rechtsstaat) as a system of guarantees has been given constitutive role in this process. Neither active citizens, nor citizens as origin of law (these are the political and legal implications of democratic legitimacy) cannot be imagined without generally recognized and operational safeguards; *i.e. the Rule of Law*.

The Rule of Law is according to the most popular dichotomy a sheer opposite of the rule of men.

In defining the Rule of Law, a popular distinction exists between a 'thin concept' and a 'thick concept' of the Rule of Law. The formal, thin concept is simply the duty of the law maker and law enforcement to follow form and processes for the sake of legal certainty. The thick concept of rule of law is based on material principles, which bind the lawmaker such as liberal and social values (fairness, righteousness, humanism, freedom). Another version [Or: accompanying version?] is the processual morality thesis: law has an inner morality (logic and processual rationality), which must be ensured. It is the core of the

² Wouter van Ballegooij: Addressing violations of democracy, the rule of law and fundamental rights, EPRS Ideal Paper, European Parliament

³ Chris Thornhill: The Sociology of Law and the Global Transformation of Democracy, Cambridge University Press, 2018

concept of Rule of law, which is disputed by the non-Rule of law politics saying, that the content of the RoL is subject to arbitrary interpretation.⁴

[The ('thick') Rule of Law as principle and system ensures fundamental rights, crucial for democratization and consolidation of democracy]

Without Rule of Law, the limitation of power and the control of the executive is impossible. As there is no democracy without an independent judiciary that can safeguard the fundamental rights necessary for participation *such as* – freedom of speech, assembly and other rights.

- **The relevance of Fundamental Rights**

Indeed, as a deep-lying social process, democratization and consolidation of democracy are strongly tied to the status of citizens and the legal regulation which guarantees their rights.

Citizens involvement into the forms of counter-balancing political authority above voting is the challenge for which there are no answers without *fundamental rights guaranteed by the Rule of Law*.

This is especially important when classic constitutional institutions such as parliamentary committees and independent organs (ombudspersons, National Bank, Budgetary Committee, Media Council, Constitutional Court) are themselves in the traps of losing confidence and no longer being effective tools vis-a-vis the executives.

Active citizenry is of paramount importance for a qualitative democracy. Institutional guarantees of fundamental rights makes this possible and are therefore indispensable.

The suggestions of Pierre Rosanvallon's Counter Democracy are all tied to the Fundamental rights within a Rule of law framework.⁵ His conceptualization of active citizenry is built on the activities of inspecting, monitoring, investigating, evaluating *and judging* the actions of the government. *Consequently*, active citizenry can overstep the limited legitimacy of voting and enhance the power of social agents.

For example, citizens can act as veto-players by protesting, challenging government decisions with legal tools and even with civil disobedience. Citizens can also get dressed in judicial robes when they take their demands to court.

All these forms of citizens' activity, new appearances as watchdog, as veto-wielder and as judge presume strong legal entitlements and shields.

- **(Historical) vulnerability of constitutional democracy**

[Historical vulnerability]

Modern democratic society was built on liberal values, such as fundamental rights and Rule of Law, these elements are constitutive in democracy and form a new political form of society. However, the combination of liberal ~~ism~~ values and democratic equality, identity and popular sovereignty is a historical contingency.

In reality the idea of citizens as rational active agents who themselves create their rights collides with grave obstacles and contradictions.

⁴ Lon L. Fuller: The Morality of Law, Yale University Press, 1969.

⁵ Pierre Rosanvallon: Counter-Democracy. Politics in an Age of Distrust, Cambridge University Press, 2008.

The birth of democracy was full of contingencies and paradoxes, at least constraining pragmatics: "As democracy took shape, however, it became clear that it was not the legislature but the executive that would form the dominant branch of democratic government, and, as a general norm, the larger the franchise represented through the governmental system, the more preponderant the executive would become."⁶

Democratic institutional setting at the beginning owed much more to the practice of Bonapartism, an executive dominated authoritarian state pattern, which utilized some aspects of constitutionalism for consolidating and centralizing administration. Which means, that constitutional institutions from the very beginning of their modern career are open for serving not clearly democratic purposes.

[Today's vulnerability]

Generally, as we all know and experience day by day, constitutional democracy is one of the most vulnerable institutions, capable of being distorted easily. Examples are the oligarchy of parties, the manipulation of the people through the press, the political apathy, the resolution of debates through bureaucratic means (the lack of mitigation), the misinterpretation of public interest, the misuse of constitution-making, the capture of constitutional adjudication and judiciary, centralization of power, strong hierarchy, the oppress of civil groups, the deconstruction of social partnership.

The contemporary crisis of democracy is a deeper political, legitimacy crises, the breakdown of the old establishment. Citizens have lost their confidence in elites and institutions. Classic constitutional institutions such as parliaments, parliamentary committees, independent organs are themselves in the traps of losing confidence and effective tools vis-a-vis the executives. The Rule of Law as institutional framework is in danger of being irrelevant and untrusted.

The deep structural crises of modern democracy affect the idea and legitimacy of the *Rule of Law and constitutional democracy*, often referred to as 'liberal democracy'. *Liberal democracy is being framed today as a peculiar regime type*, if liberal democracy is a peculiar regime type, a different way of doing politics, the Rule of Law is forced to endure all the blames and critics aiming low intensity participation, hollowing out sovereignty and neglecting expectations of curing grave inequalities.

As regards the concept of the Rule of Law, the inner paradoxes are well-known.⁷ Nevertheless, as analyzed above, the Rule of Law is indispensable for constitutional democracy. The Rule of Law must show its strength in helping the fights against systemic oppressions, as indispensable element of democratic participation.

(ii). New authoritarianism and the practice of abusive constitutionalism

- **Describing Hungary's non-democracy: abusive constitutionalism or autocratic legalism**

The EU by now is harboring a Member State that is not a constitutional democracy anymore and where systemic violations of the Rule of Law are part of the system of governance.⁸

⁶ op. cit. p. 54.

⁷ Takács Péter: Előszó, in Takács (szerk.): Joguralom és jogállam, Budapest, 1995.

⁸ This Member State could not join the EU, was it to apply today. The Varieties of Democracy (V-Dem), one of the largest social science data collection projects on democracy showed that Hungary was not a democracy any longer, <<https://www.v-dem.net/en/>>(all websites last visited 20 January 2021) while the assessment by Freedom House is that Hungary was not a free country <<https://freedomhouse.org/country/hungary>>.

The contemporary decline or backsliding of liberal democracy in Hungary and other countries, especially Poland, are defined in various ways, but many of the widely used labels such as “constitutional breakdown,” “stealth authoritarianism,” or “democratic recession” indicate the process rather than the substance. The political systems that emerge as a result of these tendencies are often referred to in political science works as “hybrid regimes”, or “competitive” or “electoral authoritarianisms”.

János Kornai defined the Orbán regime as an autocracy, which is not a middle term but a distinct system type.⁹ He argues against the so called mixed conceptions as various democracy with adjectives or hybridity. The clear distinctions which define the system are easily grasped: there are four primary characteristics: 1. government cannot be removed through a peaceful and civilized procedure, 2. institutions which could jointly guarantee the conditions of removing the government are either formal or weak, 3. legal parliamentary opposition exists, multiple parties run for elections, 4. no terror, but various means of coercion are occasionally used against political adversaries

The consequent, secondary features of this distinct system type gave autocracy a unique character: the occasionally used repressive means against opposition, the non-independent and weakened checks, the systemic character of appointing own cadres to all important positions, the attacks against civil society, the conscious omitting of participatory frameworks, the constrained media freedom by legal and economic means.

Today Hungarian government systemically violates Rule of Law principles through a veneer of legality. The governing supermajority uses legal tools, abusive constitutionalism¹⁰ and legislation to consolidate its political power and to undermine democracy. András Sajó depicted the Hungarian regime “illiberal democracy”, since the constituent power is based on votes. However his prognosis clear: it easily leaves the remaining democratic character.¹¹

Indeed, Hungary introduced processes “through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.”¹² These systemic Rule of Law violations are intentionally designed to serve particularistic interests of the ruling majority and authorize arbitrary decisions with the effect of turning the Rule of Law into rule by law.

This new model of authoritarianism grew in the shadow of democratic institutional forms, repressive leaders learned how to use legal framework for their own aims, they use sophisticated techniques to suppress freedoms, manipulate society and limit civil forces. All government steps deconstructing constitutionalism, democracy and human rights have a veneer of legality – but instead of limiting government, these constitutional and other legal norms are there to entrench governmental powers, furthermore to silence and shrink the space for criticism and civil participation. *This is what we call abusive constitutionalism.*

- **Historical background/vulnerability.**

East-European societies are particularly vulnerable, non-resistant to institutional abuses.

⁹ János Kornai: The System Paradigm Revisited. Clarification and Additions in the Light of Experiences in the Post-Socialist region, *Revue D'études Comparatives Est-Ouest*, 2017, Vol. 48, N 1-2, p 239-296.

¹⁰ According to David Landau, abusive constitutionalism involves the use of the mechanism of constitutional change – both constitutional amendment and constitutional replacement – in order to create authoritarian or semi-authoritarian regimes. As a result, these systems still look democratic from a distance and contain various elements that are not different from liberal democratic constitutions. See: David Landau, “Abusive Constitutionalism,” 47 *UC Davis Law Review* (2013), 189-260, at 191.

¹¹ András Sajó: *Ruling by Cheating. Governance in Illiberal Democracy*, Cambridge University Press, 2021

¹² Pech and Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU”, 19 *CYELS* (2017), 3-47, at 8.

*The abuse of formal legal means or autocratic legalism*¹³, i.e. reversing the spirit and essence of regulations, is unfortunately supported by the traditional formalistic legal culture, which remained dominant even three decades after the transition.¹⁴

Constitutional principles, autonomies were easily cheated by legal tricks because etatism, coercive state and hierarchical dependence remained supported by institutional actors.

In addition, the culturalist counter arguments of autocratic leaders and their servants seem late reactions for the blind institutionalism of the elites during transformation.

Indeed the decline of liberal constitutionalism is deeply embedded in the social consciousness as closed mind and negation of freedom.¹⁵

Universal rights in the ruling ideology appear as the “imperialism” of alien interests. All over the post-Communist world these arguments sound very familiar, and reactivate mental remnants which never passed away completely.

Moreover, it turns out that despite the democratic lip-service, democracy has strong rivals in the world. Disintegration of temporarily democratic states can receive supports from abroad, the “authoritarian Internationale”, alliance of non-democracies willingly invest in instruments of soft power tools and global manipulation to stabilize the power of the companion autocrats.¹⁶

- **The authoritarian design (practice /examples) of abusive constitutionalism**

Because of the low-intensity of the self-defense of democracies, autocracies can successfully maintain and extend their power by mimicking empty forms of democracy.

The strategic pool of use, non-use and abuse of law opened the institutional gates wide to autocratic aims.¹⁷ Abusive constitutional provisions, amendments, revisions serve the power centralization and monopolization, in Hungary even the process of constructing the Basic Law was abusive. The political aims of the legislative changes, the norms questionable constitutionality are often remained covered, buried among technical norms, in “salad acts”.

Despite the deceptive nature of the new authoritarian regime type distinctive markers of authoritarian regimes can be specified by institutional characteristics.

- The constitution became sham mixture of norms, does not serve as normative benchmark, not able to effectively control governing, consequently it is inconclusive, lack normative relevance.¹⁸

¹³ Kim Lane Scheppele: Autocratic Legalism, *The University of Chicago Law Review*, 85 (2018), 545-583

¹⁴ Zdenek Kühn: Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement, *The American Journal of Comparative Law*, Vol. 52. No. 3., 2004, pp. 531-567.

¹⁵ Sajó András: Alkotmányosság bezárkózó társadalmakban (Constitutionalism in Closing Societies), *Közjogi Szemle* 2017/4.

¹⁶ Christopher Walker: Dealing with the Authoritarian Resurgence, in: Diamond, Plattner, Walker (eds.): *Authoritarianism Goes Global. The Challenge to Democracy*, Johns Hopkins University Press, 2016

¹⁷ Javier Corrales: Autocratic legalism in Venezuela, in: Diamond, Plattner, Walker (eds.)

¹⁸ Tóth Gábor Attila: Constitutional Markers of Authoritarianism, *Hague Journal on the Rule of Law*, 10 September 2018, <https://doi.org/10.1007/s40803-018-0081-6>

- The relations among powers are not based on checks and balances, separation of powers does not apply, even denied by high ranking civil servants and political leaders. Autonomous institutions are packed by loyalists, during appointment ideological and personal loyalty precedes competences. Control institutions are reshaped by cutting competencies, thus these became the sheer tools of authoritarian leaders.
- Fundamental elements of political and individual rights are restricted *by cumbersome and dubious enforcement, while formally declaring to uphold them.*

(Strategy of non-use of law. The highly critical passivity of the government friendly General Prosecutor and the selective use of criminal procedures in cases of electoral frauds, corruption cases is strong characteristic of the strategy of non-use of law of the Hungarian autocracy)

- *The reliance on illegality (extortions, threats) and even privatization of coercion (using paramilitary groups for political aims) is not excluded.*
- The election system is manipulated, elections are managed ensuring the dominance of the ruling party,
- biased media coverage distorts the distribution of political opinion-flows, excludes opposition and the critical opinions in general.
- *Suffocating civil society.* (Not that the zombie NGOs financed by the government spreading pro-governmental narratives are really dangerous, but the process of suffocating the public spirit of society, closing the fields of open discussions, the enforced ideological monopoly.)
- After institutional redesign, autocratic regimes can even afford to bear some uncomfortable decisions by formally independent bodies. Thus minority dissenting opinions play the role of stuffing the fake legitimacy bag.

• Decline of the democratic ideal

The “autocratic culturalism” denies the universality of the human rights and rule of law values, thereby deny the common European foundations.

Prominent politicians and high public officials often openly deny the basic values of liberal constitutionalism as division of power, limited executive power and human rights.¹⁹ By this the minimum ideological consensus of a working democracy is questioned

Authoritarian regimes function with lack of real participatory elements, their legitimacy is based on such counter-norms as nation-state sovereignty, exclusionary nationalism, sheer majoritarianism (“will of the nation”, “interests of the majority”). All of these are served - according to the ruling ideology - as peculiar cultural, local traditions against the expansive, but otherwise dying Western universalism.

From the narrow perspective of authoritarian political ideology politics must be exerted exclusively by professional (elected, appointed) organizations and specialists. It is a political claim against active civic participation and primarily against the functioning of human rights NGOs which criticize government measures, but it also contradicts populist leaders’ anti-establishment rhetoric.

¹⁹ <https://hungarianspectrum.org/2019/10/26/laszlo-kover-thinks-that-the-system-of-checks-and-balances-is-crap/>

According to the Hungarian Minister of Justice, the rule of law is essentially a political concept beyond the legal domain.²⁰

Another argument is the alleged existence of an alternative, CEE or illiberal concept of the rule of law.²¹

However, denying the legal nature of the rule of law is a clear negation of it, similar to the composition of illiberal democracy.

"Illiberal democracy" as a self-picture of the Hungarian government should be taken seriously, as a direct and strong negation of basic values which belong to all the individuals. Rule of law is based on freedom, rights, autonomy, limited executive, division of power: these are the liberal basis of modern democracy.

When we worry about RoL, we defend democracy, non-rule of law or illiberal democracy is the same lie as the former communist phrase of "socialist democracy". One cannot attack or omit RoL without being anti-democratic.

Consequently for us the term *illiberal democracy as political self-definition* is dubious.²² The mere logic of majoritarianism leads to egotism, and democracy falls. The formal rule of law leads to legal fetishism where constitutional institutions serve autocracy, and the constitutional rights lose their value.

What is at stake in these regimes is not just a simple institutional destruction of democratic framework and liberal constitutionalism, but a wider backlash of democratic principles.²³

Thus weakening rule of law as final system of guarantees defending political activities of individual citizens and groups kill the institutional condition of democratic social activity. While drastic narrowing of political activity, pulling out the ground from civic activities kill the subject of democracy.

However, the other side of this tradition of fake/abusive constitutionalism, the possibility of resistant utilization of the surviving constitutional structures could give hope for the future. Think of the strategies of the democratic opposition under the last decades of Communist rule using the empty, lying legal forms of the constitution at least narratively. Thanks to the Stalinist-type tactical Patomkin constitution-making.

(iii). The European Union

Rule of Law backsliding extend way beyond Hungarians, and spill over to the European Union, too. They endanger the concept of liberal democracy both in the domestic setting and in the EU as well.

²⁰ MTI-Hungary Today, Justice minister: Rule of Law Must Not Be Used for 'Political Blackmail', 21 September 2020, <https://hungarytoday.hu/varga-rule-of-law-blackmail-hungary/>

²¹ See Laurent Pech, Joelle Grogan, Petra Bárd, Julinda Beqiraj, Barbara Grabowska-Moroz, Dimitry Kochenov, Carlos Closa, Elina Pirjatanniemi, Olga Śniadach, Lucy Moxham et al., Unity and Diversity in National Understandings of the Rule of Law in the EU RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, Work Package 7 – Deliverable 2, 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf>, 44-61.

²² <https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01?barrier=accesspaylog>, Jan-Werner Müller: Safeguarding Democracy Inside the EU. Brussels and the Future of Liberal Order, Transatlantic Academy, 2012-2013 Paper Series No. 3. <https://www.gmfus.org/publications/safeguarding-democracy-inside-eu-brussels-and-future-liberal-order>

²³ Alexander Cooley: Countering Democratic Norms, in: Diamond, Plattner, Walker (eds.)

EU action would correspond to the expectations of citizens from backsliding states who had high hopes to join the West not only economically, but also in terms of democracy, the Rule of Law and fundamental rights, when Hungary acceded to the European project one and a half decade after the regime change.

European mechanisms including EU ones could be considered as external forms of “militant democracy”,²⁴ which refers to the capacity of modern constitutional democracies to defend themselves against domestic political challenges to their existence as democracies.²⁵ Take for example a national constitutional court captured and not in the position to declare judicial capture, harassment of civil society organisations or violations of academic freedom contrary to constitutional norms. In line with the concept of abusive constitutionalism, such a constitutional court may find these governmental steps constitutional, upholding national laws *that infringe on citizens fundamental rights*.

- **Current EU multi-level constitutional system**

Rule of law is a part of EU primary law cannot be ignored. In this respect, the development of EU law can follow the same path as for several other legal institutions, i.e. it can develop an autonomous jurisprudence based on the common constitutional traditions of the Member States.

Although the principle of the rule of law is an abstract category, and the various legal, scientific and political conceptualizations may attribute partly different requirements to it, the range of commonly shared standards is much larger than that of the differences in various legal systems or theories.

The multilevel constitutional system of the Union is based on the national constitutional traditions in the field of fundamental rights and basic constitutional principles. It is important, however, that its basis is the common constitutional traditions as a whole, not any single tradition of a certain State.²⁶

Although Article 2 formulates values, these can be considered as basic principles²⁷ of the Union, because they produce – however yet indirect – legal consequences. The Court of Justice of the European Union (hereinafter: ECJ) for the first time referred to these values – enshrined at that time in Article 6(1) of the TEU pre-Lisbon – in its famous decision in *Kadi*, as principles that cannot be derogated by any acts of the Union even by those based on international law.²⁸

Besides affirming the shared values, the TEU also declares that the Union shall respect the national identities of its Member States, defined by the Treaty of Lisbon as inherent part of their political and constitutional structures.²⁹ Article 4(2) TEU emphasises the constitutional, political and state aspects,

²⁴ For a full description, see Loewenstein, “Militant Democracy and Fundamental Rights”, 31 *APS Rev.* (1937), 417–433 and 638–658.

²⁵ Sajó (ed.), *Militant Democracy* (Eleven International Publishing, 2004); Capoccia, “Militant Democracy: The Institutional Bases of Democratic Self-Preservation”, 9 *An. Rev. of LSS* (2013), 207-226.

²⁶ See John Erik Fossum and Agustín José Menéndez, “The Constitution’s Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union”, (2005) 11 (4) *European Law Journal* 380, 390-391.

²⁷ Principles command, values recommend. Principles are legal norms that regulate substantive components of the legal order. Values have moral character, and they can be conceptualised as normative objectives. See more in Jürgen Habermas, *Between Facts and Norms* (Polity Press, Cambridge, 1996) 255.

²⁸ Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, §303: ‘Th[e EC Treaty] provisions [on the direct effect and priority of international law, in particular the obligations member states have accepted for the purpose of maintaining international peace and security] cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Art. 6(1) EU as a foundation of the Union.’

²⁹ Article 4(2) TEU: ‘The Union shall respect the equality of member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each member state.’ According to Besselink, the plural in the first sentence of Article 4(2) may refer to the fact that the national identity does not mean merely state identity, instead, the TEU

thus in this context the national identity can be understood (much more) as constitutional (than as a cultural) identity. One of the legally relevant questions in this respect is who will decide on the content of the constitutional identity of a Member State and on the acts or measures of Union affecting or infringing that constitutional identity. It became a popular argument that a relationship of cooperation (so called judicial dialogue) between the national (constitutional) Courts and the ECJ is necessary in case of such conflicts, the first to determine the constitutional identity case by case, and the latter to decide on the meaning of the relevant EU law in dispute.³⁰

As a result of the multilevel European constitutional development, the constitutional traditions of the Member States converged in their respective content and interpretation, while the single States managed to preserve their own constitutional identity.

It is clear, however, that the functions of the constitution (integration of society, division of public power, ensuring human rights etc.) shall be taken into account during the constitution making, and formally the international obligations – unless the state intends to abrogate them – limit this freedom.³¹ Taking into consideration the global tendencies of constitutionalism as well, it is worth to mention that the national constitutional development of most democratic States have converged since the 1950's in three features: (i) supremacy of the legislation is refused and judicial (constitutional) review is emerging,³² (ii) states are committed to the protection of fundamental rights and basic freedoms prescribing explicit – sometimes implicit – limitation clauses with respect to the principle of proportionality, (iii) states are committed to the respect of guarantees of the rule of law.³³

Theoretically, if a state wishes to remain the member of the Union, it is expected to respect the Union's membership criteria, and must not deny the primacy of the Union law in its national constitution.

The first unlawful scenario arises if a Member State tries to abolish democracy or gives up the essential elements of the rule of law. It is true that different forms of democracy or the rule of law are possible, but serious and persistent breaches of democratic and rule of law norms are unacceptable – such as individual breaches of the EU law are unacceptable, this is what infringement procedures for example are there for (as a general rule). The challenge is to operationalize the EU-toolkit and draw boundaries in case of systemic backsliding.

The second scenario occurs if a state declares in its constitution that the domestic law and national legislation overrides EU law. EU membership sets certain requirements for state organisation and the national legal system, in particular to ensure the uniform and effective application of EU law. The implementation of EU law is the duty of domestic public administrations and national courts in the first place. Therefore, the system and functioning of national courts and public administration is essential to

acknowledges the potential multinational character of Member States, where the – national, ethnic, cultural etc – diversity is part of the constitutional structure. See Besselink (2010) 43-44.

³⁰ Besselink (2010) 45. See to this e.g. the Omega-judgment of the ECJ (Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609) and the Lisbon-judgment of the German Federal Constitutional Court (BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009 [2 BvE 2/08]).

³¹ Constitution-making power is original as it is not bound by the former Constitution and determines the procedural frameworks itself. However, it does not mean, that this power would be unlimited. Constitution-making takes place in a particular political community and in a particular situation. If it aims at creating a democratic constitution, these objective limits the scope, content, and procedure of the constitution-making. International obligations of the State and respected international and European standards are viewed also as external legal limits during constitution-making.

³² As Klug pointed out, while before 1989, in about 10 countries was an effective method for constitutional review applied, a decade later in 70 countries continued the (constitutional) Courts substantive norm control. Heinz Klug, *Constitutional Transformations: Universal Values and the Politics of Constitutional Understanding*, in Charles Sampford and Tom Round (eds): *Beyond the Republic, Meeting the Global Challenges to Constitutionalism* (Leichhardt, NSW, The Federation Press, 2001) 192.

³³ Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, (2009) 50 (1) *Virginia Journal of International Law* 985, 985-986.

the EU. EU membership sets certain requirements for state organisation and the national legal system, in particular to ensure the uniform and effective application of EU law.³⁴ That is why judicial independence, fair trial rights, right to good administration, etc. are no more domestic constitutional issues, they are EU law matters.³⁵

Beyond the political noise and upheaval around the rule of law, there are other important principles of the ever-closer union that can buttress the rule of law to prevail. These are the fundamental rights protection and the European solidarity.

- **Fundamental rights**

The Charter of Fundamental Rights of the European Union has become part of the primary sources of Union law based on Article 6 (1) TEU. This reform has been of key importance from the aspect of the (constitutional) development of the Union. Ensuring the legal binding force of the Charter did not mean a change in the division of competences between the Union and the member states. This follows, on the one hand, from the guarantees relating to the field of application defined in Article 51 of the Charter and, on the other hand, from the statement made by the ECJ that fundamental rights protection guaranteed by the Union cannot have the effect of extending the competences of the Community defined by the founding treaties,³⁶ which was also reinforced by the second subparagraph of Article 6(1) of the TEU

Member States are subject to their own constitutional bill of rights, and they shall respect the Charter only insofar as they apply Union law. This logic system is challenged sometimes by the ECJ on the one hand, by the ambiguous interpretation of the “acting within the scope of” criterion, and on the other hand by national courts whose questions in the preliminary ruling procedures seem to indicate an existing need for enhancing the scope of the Charter beyond the application of Union law. However, this soft, case law-based expansion of scope is somehow uncertain.³⁷

Article 51(1) of the Charter³⁸ is implemented principally in the ‘agency-situation’ elaborated by the ECJ, at two levels: in a normative and administrative dimension. The normative level means the dimension when, during the transposition – or omitting the transposition – of Union law (directives) into the national law, the member state is bound by the fundamental rights during the adoption of normative

³⁴ Dieter Grimm, “Zur Bedeutung nationaler Verfassungen in einem vereinten Europa”, in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, Vol. VI/2 § 168 RN 59 (C.F. Müller, 2009) 26.

³⁵ It is questioned by Varga Zs., András, Védi vagy kiüresíti a bírói függetlenséget az EU Bírósága? [Does the EU Court of Justice protect or vacate judicial independence?] *Mandiner Precedens* 10 April 2020. https://precedens.mandiner.hu/cikk/20200410_vedi_vagy_kiuresiti_a_biroi_fuggetlenseget_az_eu_birosaga, He states “The recent decision of the Court of Justice of the European Union to suspend the operation of the Polish Disciplinary Court not only expects to a judicial oath but is also detrimental to judicial independence. Moreover, none of the EU institutions has the power to regulate the functioning of a Member State's judicial system.” Then he analyses the ECJ-order in Case C-791/19 R, *Commission v Poland*.

³⁶ Judgment of the Court of 17 February 1998 in *Lisa Jacqueline Grant v South-West Trains Ltd.*, C-249/96 [ECR 1998, I-621]

³⁷ Michael Dougan, “Judicial review of Member State action under the general principles and the Charter: defining the “scope of Union law”, (2015) 52 *Common Market Law Review* 1201-1246.; Bernhard Schima, “EU fundamental rights and Member State action after Lisbon: putting the ECJ's case law in its context”, (2015) 38 *Fordham International Law Journal* 1097, 1113-1114.

³⁸ Article 51(1) of the Charter: “The provisions of this Charter are addressed (...) to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

decisions. The administrative level appears in the case of directly applicable Union law (regulations): in such a case the law of Union content is regarded formally as domestic law right away.³⁹ ECJ understands this in a wider sense: member states have to respect the fundamental rights ‘acting within the scope of’ Union law.⁴⁰ Thus on the basis of the preliminary ruling of the ECJ (*Aziz Melki/Sélim Abdeli*), seemingly national courts of law may apply the Charter directly,⁴¹ but only in those cases where any Union legal act is concerned.

To date, the condition of the direct application of the Charter is the application of another Union legal norm,⁴² and it is problematic in case of authoritarian Member States.

- **Solidarity**

Solidarity in the European Union is a foundational value recognised also by the preamble of the Charter (“the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”) and Article 2 of the TEU (“These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”), thus it can be considered as an identity-forming feature, socially it may serve the supranational community-building.⁴³ In other articles of the founding treaties ‘mutual solidarity’ and fair sharing of responsibility are presented as principles which determine relations among Member States in the domains of external and security policies, and of freedom, security and justice.⁴⁴ Solidarity rights – as a separate chapter of the Charter of Fundamental Rights – were codified by the EU Fundamental Rights Convention in 2000 with regard to their close connection to human dignity, which is the first foundational value of the EU under Article 2 TEU.

In particular, solidarity has inspired policies and legislation in the field of financial regulation (e.g. ESM), asylum and border management (e.g. refugee relocation), and intra-EU labour mobility. The solidarity polity of the European Union reaffirmed by law and policies of the institutions prevails if Member States are loyal to the Union and committed strongly to the principle of solidarity.⁴⁵

- **European (judicial) dialogue**

A focal question in the multilevel constitutional system of the EU is whether and to what extent do the national courts consider the judgments of European or foreign courts. Do they just simply refer them, or do they reflect on them even by overruling their own, former jurisprudence? The latter would prove

³⁹ M. Borowsky, Kapitel VII, Allgemeine Bestimmungen, in J. Meyer (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos, Baden-Baden, 2003) 567-572.

⁴⁰ K.L. Mathisen, *The Impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States’ obligations with respect to the protection of fundamental rights*, University of Luxembourg, Law Working Paper Series, Paper No 2010-01, 29 July, 2010, 20.

⁴¹ C-188/10 and C-189/10. *Aziz Melki* (C-188/10) and *Sélim Abdeli* (C-189/10) joint cases, Judgment of the Court of 22 June 2010

⁴² As Rosas pointed out, “(...) the real problem is not so much the applicability of the Charter as such but rather the applicability of another norm of Union law.” A. Rosas, “When is the EU Charter of Fundamental Rights Applicable at National Level?” (2012) 19 (4) *Jurisprudence* 1269-1288.

⁴³ J. Ottmann, *The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model*, (2008) 36 (1) *Vienna Journal on International Constitutional Law* 43-44

⁴⁴ See A.W.M. Gerrits, “Solidarity and the European Union: From the Welfare State to the Euro Crisis”, <<http://media.leidenuniv.nl/legacy/solidarity-and-the-european-union.pdf>> “The ‘mutual defence clause’ of Article 42.7 of the TEU requires member states to collaborate in the case of armed aggression; while the ‘Solidarity Clause’, framed in Article 222 of the TFEU, formulates an explicit demand on the member states to come to each other’s assistance in the event of terrorist attacks, natural or man-made disasters.”

⁴⁵ J. Habermas, “Democracy, Solidarity and the European Crisis”, in A.M. Grozelier, B. Hacker, W. Kowalsky, J. Machnig, H. Meyer and B. Unger (eds), *Roadmap to a Social Europe* (Social Europe 2013) 11 <https://www.ictu.ie/download/pdf/roadmap_to_social_europe_sej_oct_2013.pdf>

the existence of judicial dialogue and contribute to the common understanding of the shared values, the former, however, is not enough to satisfy the criteria of the dialogue.⁴⁶

Applying the general features of the dialogue to the courts, one can conclude that the basic condition – the equal position – is given if we consider the powers and status of the ECJ and the ECtHR, the constitutional courts and ordinary courts of last instance.

The concrete goal of each court is to solve a given case, safeguard e.g. the ECHR, TEU/TFEU or the constitution in line with its function, and the way they reach this goal is influenced by the circumstances of the given case.

The international and domestic courts may cooperate effectively by referring each other's decisions.

Finally, in the 'dialogue' of the courts, the mutual respect can be observed, and rivalry is rare phenomenon, but it is also true, that courts are not compelled to mutual concessions. Thus, it can be stated that the domestic courts apply the international law and EU law if they have to, or sometimes if they want to decorate their reasoning with it, but it is still far from a constructive dialogue.

The judicial dialogue is rather a metaphor than a normative claim.

In the case of EU law, the situation is a bit different, as there is an established procedure for 'judicial dialogue', the preliminary ruling procedure, thus the dialogue is compulsory for the ordinary courts. The constitutional courts however free to decide whether they start this kind of dialogue. European judicial dialogue can have another, broader meaning only within EU law, through specific EU law mechanisms with respect also to the jurisprudence of the Strasbourg Court.

The European constitutional judicial dialogue has been a recurring motif since December 2016 in the reasoning of the Hungarian Constitutional Court decisions concerning EU law. It may even suggest the promise of a substantive and fruitful cooperation based on mutual respect with the ECJ. It is therefore worthwhile reviewing the case law in PAPER ..., in terms of the legal situations in which the HCC referred to the need for such a dialogue,⁴⁷ and what has been outlined so far as the content of the dialogue.

(iv) Current EU deficiencies/weaknesses/abuse

[However, Hungary authoritarian, abusive. Also on EU-level]

• Failure of dialogue

The European fora and especially the EU institutions appear weak to effectively intervene when a member state does not observe the rule of law and respect for human rights voluntarily.⁴⁸ The infringement procedures are of narrow scope, the parliamentary scrutiny is just a political tool of persuasion and the opinions of the Venice Commission are although prestigious but not legally binding. The EU Commission had some successful actions in case of the Hungarian and Polish government but did not really restrain the systemic changes.

The typical casting in the scene of "constitutional dialogue" is an unbalanced equivocation by seemingly educated autocrats with hijacked democratic institutions behind them and unsuspecting old democracies.

⁴⁶ For a wider concept of constitutional dialogue, see Tímea Drinóczi, "Constitutional dialogue theories – extension of the concept and examples from Hungary", (2013) 68 (1) Zeitschrift für öffentliches Recht 87-110.

⁴⁷ Of course, it could also be interesting, when the Constitutional Court did not refer to the necessity of the 'European constitutional dialogue' although EU law was at stake – such as in CCD 9/2018. (VII. 9.) AB (constitutional interpretation related to the Unified Patent Court Agreement).

⁴⁸ On the detailed evaluation and possibilities of the European measures see: Petra Bárd, op. cit.

Renegade governments can easily circumvent the rule of law requirements by constitutional amendments or by chilling judiciary and constitutional review.

The main lesson to be learned after a decade of Rule of Law violations in Hungary and with several member states joining the illiberal club is that dialogue is only abused by illiberal regimes to gain more time to compete constitutional capture.

The Commission follows a very clear structure of Rule of Law promotion, with one prong focused on prevention of violations and another on responses to violations.

Prioritizing Rule of Law promotion and prevention goes hand in hand with demand for more dialogue. Justice Commissioner Didier Reynders emphasized that discussion is the key to Rule of Law problems⁴⁹ and he was also the mastermind behind the Belgian-German proposal for a Periodic Peer Review of the Rule of Law in the EU,⁵⁰ setting up a regular interactive discussion on an expert level, and on a political level in the General Affairs Council.

The Hungarian experience indicates the renewal of legal fetishism and the rule by law solutions instead of the observance of rule of law. At the end of the day this pattern of member state disobedience can easily undermine the European community of law.

What we experience in the political reality is the flourishing of rule by law governance and autocratic state practice since the 2010s on the side of Hungarian government accompanied with a never-ending constitutional pluralism argumentation on the impossibility of measuring the rule of law and democracy requirements.⁵¹ This leads to a kind of agitated paralysation of the EU control-mechanisms.

Ironically, those member states labelling themselves as illiberal are still highly relying on the benefits from the unique liberal value community that is committed to rule of law, democracy, and human rights. In other words, the European Union is continuing to finance – on the basis of the mutual trust – these derogatory members as well. These governments gain from the deficiencies of European value protection system.

Surprisingly, illiberal regimes, foremost the Hungarian one, prove themselves to be very adaptive and moreover resilient to European influence. On the one hand, they have an interest to remain in the EU, and to enjoy all the benefits of the membership financially and politically, which restrains them and force them to co-operate to an extent, and, on the other, they also would like to minimize the strait-jacket of the EU, and to find ways how not to comply with some standards in order to maximize the power within the country. These two demands force to chameleon-like behaviour: upholding the façade of obeying the law on the surface, but substantially disobeying it. In order to achieve this objective, they misuse all the gaps, and stretch all available means.

- **Attack on/misuse of judicial dialogue**

⁴⁹ See the speech delivered at the Center for European Policy Studies, CEPS - Europe, back on track: speech by Minister Didier Reynders, 23 February 2018, <https://diplomatie.belgium.be/en/newsroom/news/2018/ceps_europe_back_on_track>.

⁵⁰ Brozowski, "Belgium, Germany make joint proposal for EU rule of law monitoring mechanism", EURACTIV (19 March 2019), <<https://www.euractiv.com/section/justice-home-affairs/news/belgium-germany-make-joint-proposal-for-eu-rule-of-law-monitoring-mechanism/>>

⁵¹ Attila Vincze, "Talking Past Each Other: On Common Misperceptions in the Rule of Law Debate", in Astrid Lorenz and Lisa H. Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe*, (Palgrave Macmillan 2020) 209-233.

The use of dialogue-argument in the case law of the constitutional courts of the Member States can serve the purpose of cooperative constitutionalism,⁵² but it can also serve as the constitutional basis of articulating national interests in disputes between the European Union and Member States, and in case of a captured – either a constitutional or a supreme – court it is hard to believe that the dialogue rhetoric is sincere, which can even undermine the primacy of EU law.

The popular argument about a so-called judicial dialogue existing between the national (constitutional) Courts and the ECJ⁵³ contains a trap: it leads to a parallel play, where “courts have played alongside each other, but not with each other.”⁵⁴ This parallel game is exactly what for example the Hungarian Constitutional Court is playing: beyond making references to the necessary mutual judicial dialogue, it justifies the restrictive and abusive governmental policies and legislation in the field of asylum law, or silently assists (by non-decisions) the devastation of the rule of law guarantees.

Since 2016 the Constitutional Court uses the term of constitutional dialogue, but the mere fact is that the maximum of ‘cooperation’ on its side were effectively some suspending orders – two of them were revealed in politically ‘sensitive’ cases, when the HCC suspended its procedure to wait for the ECJ-judgment in the infringement procedures against Hungary. These were the cases of Central European University and NGOs funded from abroad. The HCC blatantly pretended the ‘dialogue’ here, as after the ECJ judgments⁵⁵ it forgot to go on with its procedures.

As to the case law after 2016 there is no change in the far-reaching practice that the HCC still continues cherry-picking the precedents from the jurisprudence of the ECtHR and the ECJ⁵⁶ in order to support its arguments as befitting its own – or government’s – preconceptions (especially in cases concerning the asylum policy); and that it bases its decisions more on internal arguments of constitutional law, i.e. it uses the option of interpretative primacy to a limited extent only, when using international and EU law standards, and grants applicative priority to these standards only exceptionally.⁵⁷

The HCC has taken an arm’s length keeping position in conflicts of norms between EU law and domestic constitutional law, the turn came only in 2016. Although the fundamental rights, ultra vires and identity control standards of the GFCC were transplanted, apparently according to Hungarian specificities, so far, the Constitutional Court did not apply them. A further difference is that while the German Constitutional Court made the preliminary ruling procedure a condition for ultra vires review, the Hungarian body did not make such a stipulation regarding its cherished sovereignty-control.

- **Example: Charter/Venice Commission.**

To date, the condition of the direct application of the Charter is the application of another Union legal norm,⁵⁸ and it is problematic in case of authoritarian Member States.

⁵² Várnay, Ernő, “Az Alkotmánybíróság és az Európai Bíróság – együttműködő alkotmánybíráskodás”, (2019) 60 (2) Állam- és Jogtudomány 63.

⁵³ Besselink (2010) 45. See to this e.g. the Omega-judgment of the ECJ (Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609]) and the Lisbon-judgment of the German Federal Constitutional Court (BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009 [2 BvE 2/08]).

⁵⁴ R. Daniel Kelemen, On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone, (2016) 23 (1) Maastricht Journal of European and Comparative Law 136-150

⁵⁵ C-78/18, Commission v Hungary, Judgment of 18 June 2020, ECLI:EU:C:2020:476 (NGO-judgment), C-66/18, Commission v Hungary, Judgment of 6 October 2020, ECLI:EU:C:2020:792 (CEU-judgment).

⁵⁶ Zoltán Szente, The interpretive practice of the Hungarian Constitutional Court – A critical view, (2013) 14 (8) German Law Journal 1591–1614, 1602.

⁵⁷ As it relatively rarely uses the option of establishing conflict with an international treaty, and in general the option of investigating *ex officio* the conflict with an international treaty.

⁵⁸ As Rosas pointed out, “(...) the real problem is not so much the applicability of the Charter as such but rather the applicability of another norm of Union law.” A. Rosas, “When is the EU Charter of Fundamental Rights Applicable at National Level?” (2012) 19 (4) Jurisprudence 1269-1288.

The content of the rights enumerated by the FL is less detailed and the text raises the possibility of wider limitation of rights. The Venice Commission in its second opinion, which was given upon the request of the Parliamentary Assembly of the Council of Europe and was published on 20 June 2011, examining the final text revealed several criticalities that should be eliminated by utilising the common European values during the interpretation.⁵⁹

It must be noted that the draft of the new Constitution was not sent to the Venice Commission on time, thus the Opinion of 28 March 2011 contained general comments and not evaluated any particular provisions of the draft constitutional text. Meanwhile the governing party alliance published (on 7 March 2011) and submitted to the Parliament (on 15 March) a draft, which originally did not follow precisely the spirit and the content of the Charter. After a short – approximately one month – parliamentary debate, the adopted FL contains ‘almost’ the same rights as the Charter in its relevant Chapter (“Freedom and Responsibility”), and some sentences of the Charter were finally incorporated, but – compared to the Charter – the content of the rights enumerated by the FL is less detailed and the text raises the possibility of wider limitation of rights. The Venice Commission in its second opinion, which was given upon the request of the Parliamentary Assembly of the Council of Europe and was published on 20 June 2011, examining the final text revealed several criticalities that should be eliminated by utilising the common European values during the interpretation.⁶⁰

- **Example: /attack on Solidarity**

Unfortunately, in recent years in Hungary both the principle (and practice) of loyal cooperation and internal social solidarity have been undermined by the government, which imperils the vision of social Europe and supranational solidarity as well.

To mention here just one point, Hungary is a bulwark against migration and refugees, and not only rhetorically, but also in action. The fence at the southern frontier of Hungary, the firm decline of the refugee relocation quotas, and the since-then cancelled transit zones⁶¹ are clear signs of this policy. This war on migration – which was the infringement of the EU Treaties⁶² - as fuelled by Decision of the Hungarian Constitutional Court from 5th December 2016.

Hungarian Constitutional Court, by formally copying some recent decisions of the German Constitutional Court, established that upon a relevant motion and in the course of exercising its competences it may review whether the joint exercise of powers with other EU member states or by way of the institutions EU violates human dignity, or another fundamental right, the sovereignty of Hungary or its constitutional identity based on the country’s historical constitution. The judgment raises countless questions stemming on the one hand from the political influences such as the invalid refugee relocation referendum and the failed attempt of constitutional amendment, and on the other from the controversial former case law of the Court.

⁵⁹ European Commission For Democracy Through Law (Venice Commission) Opinion № 621/2011, Strasbourg 20 June 2011, Opinion on the New Constitution of Hungary, <<http://www.venice.coe.int/webforms/documents/CDL-AD%282011%29016-E.aspx>>.

⁶⁰ European Commission For Democracy Through Law (Venice Commission) Opinion № 621/2011, Strasbourg 20 June 2011, Opinion on the New Constitution of Hungary, <<http://www.venice.coe.int/webforms/documents/CDL-AD%282011%29016-E.aspx>>.

⁶¹ According to the ECJ the placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röszke transit zone at the Serbian-Hungarian border must be classified as ‘detention’, Judgment in Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság

⁶² ECJ - Joined Cases C 715/17, C 718/17 and C 719/17 Commission v Poland, Hungary and the Czech Republic, 2 April 2020 - By refusing to comply with the temporary mechanism for the relocation of applicants for international protection, Poland, Hungary and the Czech Republic have failed to fulfil their obligations under European Union law.

- **Tools not suited to enforcement the Rule of Law in the Member States**

As proven in the above chapters, the Copenhagen dilemma is a very vivid one in the EU. It exists despite the fact that the Union, under the current treaty configurations, is already a rule-of-law actor, relying on a set of policy and legal instruments, assessing Member States' compliance with values in Article 2 TEU. What is more, the EU already possesses important tools to counter Rule of Law problems. These include Article 7(2)-(3) TEU, infringement procedures, preliminary references, Regulation (EU) No 1303/2013 (Common Provisions Regulation, CPR) allowing the Commission to suspend European Structural and Investment Funds (ESIFs) where a Member State does not uphold the Rule of Law, and the recent Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. They are also promising academic and legislative proposals to strengthen enforcement. (See Paper 5) The Copenhagen dilemma exists on the one hand because these mechanisms have a scattered and patchwork nature and on the other because those powers entitled to use the tools they have available are unwilling to do so. The prerequisite of a dissuasive sanction system for Article 2 TEU is a methodologically correct monitoring system that can give an accurate picture of the state of the Rule of Law in the Member States. But as proven in the previous chapter, monitoring and discussion platforms are *not tools of enforcement*. Nevertheless, they are treated as such in political rhetoric. What is more, despite the fact that the EU already has sufficient mechanisms of monitoring, benchmarking, and evaluating, new and new tools with these objectives seem to be mushrooming.

- **Article 7(1) TEU** is very far from that. In fact, it is nothing more than a procedure offering a framework for a dialogue between EU institutions and a Member State where there is a clear risk of a serious breach of Article 2 TEU values in the domestic setting. Article 7(1) has only been activated against Member States in points in time, when an Article 7(2) TEU procedure against the governments was long overdue.⁶³
- **EU justice scoreboard.** The Commission's EU Justice Scoreboard is an important monitoring tool focusing on judicial independence. The EU Justice Scoreboard used to be and to some extent still is extremely formalistic, which did not only blur problems of the Rule of Law, but at times it did more than good. The content and scope of the EU Justice Scoreboard have improved since its launch in 2013. As Pech noted, it is "remarkable to see how this tool has evolved not only from the point of view of its length (from 26 pages in 2013 to 68 pages in 2019) but also its substance if one looks at the inclusion of indicators on ... the detailed spending of financial resources in each justice system; the standards applied to improve the quality of judgments in highest courts; the management powers over the national prosecution services, and the appointment and dismissal of national prosecutors; the authorities involved in disciplinary proceedings regarding judges; the standards and practices on managing caseloads and backlogs in courts."⁶⁴

⁶³ Sadurski, *Poland's Constitutional Breakdown*, (OUP, 2019); Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding", Sydney Law School Research Paper No. 18/01; Kochenov, "Article 7: A Commentary on a Much Talked-About 'Dead' Provision", University of Groningen Faculty of Law Research Paper Series No. 21/2019, 23.

⁶⁴ Pech, "The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox", Working Paper No. 7 (2020), 20. <<https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf>>

- **Rule of Law framework.** The Commission’s Rule of Law Framework⁶⁵ is often referenced as a pre-Article 7 TEU procedure. It has first – and so far only – been used vis-à-vis Poland,⁶⁶

The application of the Rule of Law Framework procedure raises numerous concerns. Triggering it against one Member State, i.e. Poland, but not another, namely Hungary – where constitutional capture happened much earlier – may call into question the objectivity and impartiality of the system, and the principle of equal treatment of all Member States.⁶⁷ The use of the EU Rule of Law Framework vis-à-vis Poland also raises numerous questions concerning effectiveness. Upholding and promoting European values may follow a “‘sunshine policy’, which engages and involves rather than paralyses and excludes”, or a “value-control which is owned equally by all actors”⁶⁸ – but only if the Member State dialoguing adheres to the concept of liberal democracy and accepts the validity of Article 2 TEU values. “Since the success of such a positive approach is very much dependent on the willingness of the recipients to adhere to the concept of cooperative constitutionalism, it will not work when a state systematically undermines democracy, deconstructs the Rule of Law and/or engages in massive human right violations. It is difficult to engage in a meaningful debate with someone who – like the Hungarian Prime Ministers – believes that the Rule of Law is nothing but “simply blah, blah, blah”.⁶⁹ Such a stance not only makes the debate a sham of a dialogue, but clearly contradicts the commitments of the Member States that they voluntarily entered into when acceding to the EU and signing the Treaties.

- **Annual Rule of Law report.** The 2020 Annual Rule of Law Report⁷⁰. In order to pretend that “prevention” is still meaningful, the Commission’s Rule of Law Report “presents the situation in Poland or Hungary as one where a largely intact system of constitutional checks and balances is being attacked, [whereas i]n fact, in both countries key ones were already removed a while ago and the authoritarian developments are already institutionally entrenched.”⁷¹ Although it does give a devastating picture of notorious Rule of Law violators, the scale and especially the systemic nature of the problem of state capture is not made clear to the reader. On the side of authoritarian regimes, this approach fuels whataboutery. Most importantly, the document does not foresee remedies, it solely aims to give an assessment of the Rule of Law situation in the

⁶⁵ Press Release, “European Commission presents a framework to safeguard the rule of law in the European Union”, EC Press Corner (11 March 2014), <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_237>.

⁶⁶ Press Release, “Rule of law in Poland: Commission starts dialogue”, EC Press Corner (13 January 2016), <https://ec.europa.eu/commission/presscorner/detail/en/WM_16_2030> where it is stated that “*The College agreed to come back to the matter by mid-March, in close cooperation with the Venice Commission with the Council of Europe. Echoing what President Juncker said last week, First Vice-President Timmermans underlined after the College meeting that this is not about accusations and polemics, but about finding solutions in a spirit of dialogue. He underlined his readiness to go to Warsaw in this context.*” See also Press Release, “College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers”, EC Press Corner (13 January 2016), <[http://europa.eu/rapid/press-release MEMO-16-62_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm)>.

⁶⁷ For immediate criticism, see Kochenov, “The Commission vs. Poland: The Sovereign State Is Winning 1-0”, *VerfBlog* (25 January 2016), <<http://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/>>; Gotev, “Tavares: Discussing rule of law in Poland separately from Hungary will lead ‘nowhere’”, *EURACTIV* (13 January 2016), <<http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead>>.

⁶⁸ Toggenburg and Grimheden, “The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers”, in Closa and Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union*, (CUP, 2016), pp. 147-171.

⁶⁹ Szakacs, Baczynska, “EU executive snubs Hungarian demand to oust top democracy official”, (29 September 2020) <<https://www.reuters.com/article/us-hungary-eu-orban-idUSKBN26K124>>

⁷⁰ Op. cit. *supra* note 36.

⁷¹ Hegedüs, “The European Commission’s Missed Rule-of-Law Opportunity”, *GMFUS Blog* (1 October 2020), <<https://www.gmfus.org/blog/2020/10/01/european-commissions-missed-rule-law-opportunity>>;

Kelemen, “Op-Ed: “You can’t fight autocracy with toothless reports”, *EU Law Live* (6 October 2020), <<https://eulawlive.com/op-ed-you-cant-fight-autocracy-with-toothless-reports-by-roger-daniel-kelemen/>>.

Member States, which later may – or may not - feed into procedures that are designed to respond to Rule of Law violations.⁷²

- **The Council's dialogues on the Rule of Law** were adopted as a response to the Commission's Rule of Law Framework, clearly disliked by the Council.⁷³ Several dialogues were conducted on a thematic basis, with regard to the Rule of Law in the digital era (2015), migration (2016), media pluralism in the digital age (2017), trust in public institutions (2018). As noted by Pech, “presidency conclusions have been published but these tend to be as short (two-page long on average) as they are vague with “best practices” often alluded to but without ever being described. [...] early scholarly criticism was correct to point out both the anaemic nature of this tool and the Council's attempt to hide inaction behind a “façade of action”.⁷⁴ The Council's Annual Rule of Law Dialogue was identified as an unhelpful exercise in Rule of Law scrutiny.⁷⁵ It might be amended in the future and turned into a peer-review procedure.
- **The European Semester.** The European Semester is an annual cycle of economic and fiscal policy coordination. As it currently stands, it is rather vague in the area of the Rule of Law, and does not discriminate between ordinary shortcomings and systemic Rule of Law backsliding.⁷⁶

(v) **Reflection/solutions/proposals/militant-democracy at EU-level.**

European mechanisms including EU ones could be considered as external forms of “militant democracy”,⁷⁷ which refers to the capacity of modern constitutional democracies to defend themselves against domestic political challenges to their existence as democracies.⁷⁸ Take for example a national constitutional court captured and not in the position to declare judicial capture, harassment of civil society organisations or violations of academic freedom contrary to constitutional norms. In line with the *concept of abusive constitutionalism*, such a constitutional court may find these governmental steps constitutional, uphold rights infringing national laws, and attach a distorted interpretation on otherwise well-established legitimate legal concepts (see PAPER 3 Constitutional identity). The Court of Justice of the EU may in such cases still declare these steps to be contrary to secondary EU laws, the Treaties and the values enshrined therein, which the Member States were supposed to share and promote. Accordingly we regard international and EU norms and enforcement mechanisms as external tools of militant democracy, when the Rule of Law has been effectively deconstructed in the national setting. These tools are designed to protect the people in the captured state, but also to prevent deconstructing the Rule of Law in the supranational entity.

⁷² Bárd, *Diagnostic Autopsy: The Commission's 2020 Annual Rule of Law Report*, (RECONNECT, 2020), <<https://reconnect-europe.eu/blog/diagnostic-autopsy-the-commissions-2020-annual-rule-of-law-report/>>

⁷³ Council of the EU, Press Release No. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014.

⁷⁴ See Pech, op. cit. *supra* note 61.

⁷⁵ <<https://www.consilium.europa.eu/en/press/press-releases/2019/11/19/evaluation-of-the-annual-rule-of-law-dialogue-presidency-conclusions/>>

⁷⁶ <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en>

⁷⁷ For a full description, see Loewenstein, “Militant Democracy and Fundamental Rights”, 31 APS Rev. (1937), 417–433 and 638–658.

⁷⁸ Sajó (ed.), *Militant Democracy* (Eleven International Publishing, 2004); Capoccia, “Militant Democracy: The Institutional Bases of Democratic Self-Preservation”, 9 An. Rev. of LSS (2013), 207-226.

For the task of efficient European tools: most of the cases pure legal measures are unsuitable, political decisions must be done. On the political scenes authoritarian political forces have considerable advantages because of flexible populist arguments and manipulation of information. All the European measures should be felt by the wide circles of Hungarian citizens, thus the most suitable can be the financial decisions. All European RoL measures will be met with a harsh sovereignty argument. Consequently any RoL suggestions should deal with the relations between RoL values and nation-state sovereignty.

The conceptual clearing of rule of law should be taken into account the vast experiences of the uncertainties and dynamics of the concept of democracy. Because of the fact, that many states are only “ritually democratic”, all of the leaders have learned to play the election games, electoralism. Formal approach of the term became inadequate for demarcating democracy from non-democracy. The everyday or folk-concept of democracy, “democracy experienced” as culturalist conceptualization, instead of institutional terms could lead out from the confused situation.⁷⁹

The ideal way of change would be a more effective web of legal measures, including ‘Article 7 procedure’ with a strong political pressure, a generally binding EU bill of rights, and a more judicialized rule of law protection on union level – otherwise the constitutional identity claims of the member states undermine the European community of law.

We are in dialogue not with the governments denying rule of law values, but with European citizens, including Hungarian people.

In the last decade it turned out that the Venice Commission did not exaggerate. If we could suggest something even on the prize of treaty-amendment, it would be the extension of the scope of the Charter. (See also infra on the tools the EU has available to tackle the decline of Article 2 TEU values.)

Clear advantages of this step would be that (i) the Union could assume a more definite role in developing the common standards on fundamental rights,⁸⁰ (ii) renitent member states endangering these standards might be controlled more effectively even directly by their national courts,⁸¹ and (iii) *the development of fundamental rights could* evolve the effect of Article 2 TEU, or moreover, *this* can contribute to the reform of Article 7 TEU, which remained a kind of political – and practically inapplicable – sanction of violating the Union values. The Charter with direct applicability beyond the scope of EU law – being the part of the primary sources of EU law – will have much stronger position than the European Convention on Human Rights whose applicability is dependent on the monist or dualist approach of the member states to international law...It could contribute to the creation of a European Fundamental Rights Area and guarantee the Union citizens an equal and calculable level of protection.⁸²

- **Principles and strategies to be follow when designing tools to enforce the Rule of Law**

⁷⁹ Thomas Schaffer: *Democracy in Translation: Understanding Politics in an Unfamiliar Culture*, Cornell University Press, 1998

⁸⁰ As Bogdandy suggests, “the core idea of European law is no longer more and more integration (ever closer union) but to provide a common legal space that advances common aims under common values”. (Armin von Bogdandy: *European Law Beyond ‘Ever Closer Union’ – Repositioning the Concept, its Thrust, and the ECJ’s Comparative Methodology*, (2016) 22 (3) *European Law Journal* 519-538.) Still, the common standards of fundamental rights protection are exactly such aims and values that union and member states laws shall equally protect.

⁸¹ See the actions taken by the Commission to ensure the respect of the Charter by Hungary, especially C-286/12 *European Commission v Hungary*, Judgment of the Court of 6 November 2012 (compulsory retirement of judges, prosecutors and notaries), where the national constitutional court avoided the application of the Charter.

⁸² A. Jakab, “Supremacy of the EU Charter in National Courts in Purely Domestic Cases”, <http://www.verfassungsblog.de/de/ungarn-was-tun-andras-jakab/#.Un652RAtb5R>

Constitutional capture in several Member States taught us important lessons concerning what works and what does not.

One aspect that distinguishes such cases from other breaches of treaty law is that **the government responsible for the Rule of Law backsliding does not acknowledge a problematic legal measure or policy as a breach**. Instead they argue that the Rule of Law was “too vague a notion”,⁸³ or it was “a matter of honor”,⁸⁴ a “tool to advance a political agenda”⁸⁵ and “double standards”,⁸⁶ or there were some alternative, but equally valid East Central European understandings of the term.⁸⁷ **Therefore as a first step, it is crucial for any forum to be well equipped against such criticism, and to have a clear description of what the Rule of Law is.**⁸⁸

Second, for a long time, the approach of European institutions was to not to call Rule of Law problems by their names,

We argue that the assessment of Rule of Law compliance must offer a thorough and accurate picture of Rule of Law compliance or violations. In order to achieve this,

Third, a regular scrutiny should be conducted. So far available legal instruments were used on a case-by-case basis, rather randomly and often well after the damage had been done.

Fourth, it should be applied equally to all Member States. the EU so far failed to take a principled approach towards Article 2 TEU violations.

Fifth, the EU could rely on a number of already existing instruments and indicators, such as for example, the Worldwide Governance Indicators (WGI) project,⁸⁹ the United Nations Rule of Law Indicators,⁹⁰ the World Justice Project Rule of Law Index,⁹¹ V-DEM⁹² and the Venice Commission’s checklist for evaluating the state of the Rule of Law in individual states.⁹³ **Country reports and monitoring** provided by actors such as the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, and other relevant UN human rights

⁸³ Maurice, “Borisov: Poland vote would give EU 'sleepless nights’”, EU Observer News (11 January 2018), <<https://euobserver.com/institutional/140515>>.

⁸⁴ Kovács, “PM Orbán: “When they question the rule of law, they step on our honor’”, About Hungary (1 October 2019) <<http://abouthungary.hu/blog/pm-orban-when-they-question-the-rule-of-law-they-step-on-our-honor/>>.

⁸⁵ Varga, “The EU Commission rule-of-law report: wrong in so many ways”, EU Observer Opinion (8 October 2020) <<https://euobserver.com/opinion/149676>>.

⁸⁶ Prime Minister Viktor Orbán’s speech at the launch of the Judicial Handbook, (5 March 2018) <<http://www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-launch-of-the-judicial-handbook/>>

⁸⁷ For debunking these claims see Pech, Grogan, Bárd, Beqiraj, Grabowska-Moroz, Kochenov, Closa, Pirjatanniemi, Śniadach, Moxham et al., *Meaning and Scope of the EU Rule of Law*, Work Package 7 – Deliverable 2, (RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law 2020), 38-43. <<https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf>>; Pech, Grogan, Bárd, Beqiraj, Grabowska-Moroz, Kochenov, Closa, Pirjatanniemi, Śniadach, Moxham et al., *Unity and Diversity in National Understandings of the Rule of Law in the EU*, Work Package 7 – Deliverable 1, (RECONNECT, 2020), 46-48. <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf?fbclid=IwAR3fjs8L0J5HpnP6_y-d-zzGG45EA_V4kKN19-BMdBn1sDuKNhcCulkHW2M>.

⁸⁸ Something the European Commission did in very clear terms in European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11.3.201, and since then repeatedly. The latest instance was the Commission’s first Annual Rule of Law Report in 2020, discussed *infra*.

⁸⁹ <<http://info.worldbank.org/governance/wgi/>>

⁹⁰ <https://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf>

⁹¹ <<http://worldjusticeproject.org/rule-of-law-index/>>

⁹² See V-Dem, op. cit. *supra* note 1.

⁹³ Venice Commission, *Report on Rule of Law* (CoE 2011), <<http://www.eods.eu/library/VC.Report%20on%20the%20rule%20of%20law%20english.pdf>>

bodies and rapporteurs **also constitute fundamental sources on the state of play of Article 2 TEU values. Additionally, case law from the European Court of Human Rights, together with its implementation, provides us with a first-hand assessment of Rule of Law deficits.**

Sixth, **as many sources as possible** should feed into the assessment. Whereas many pieces of information can be gathered via existing mechanisms, additional, updated data will also be needed for a complete and correct evaluation of the domestic Rule of Law situation. **Official state information should come from various sources, such as ministries, ombudspersons, data protection authorities, equality committees. But state information must not be the only source. Whether in good faith, or bad faith, information might be distorted or lacking. Regimes that are engaged in systematic attacks on democracy and the Rule of Law naturally cannot be trusted to provide reliable information** on those activities. **International actors**, such as the European Court of Human Rights or the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) **already play a vital role for EU assessment of Article 2 TEU values. Civil society actors have a special watchdog function, while academics have specialised knowledge in matters that are relevant for a state’s health check** regarding its compliance with democracy, the Rule of Law and human rights. **EU bodies, such as the Fundamental Rights Agency could provide for a comprehensive database on national instruments related to Article 2 values, which could get a special role in feeding data into the process of assessment. The Agency’s EFRIS database⁹⁴ could be a starting point.**

Seventh, the assessment therefore needs to be conducted within the framework of the European Union, and has to be **EU and EU law specific.**

Eighth, **the burden of proof should be shifted. Where contradictory information is revealed, the Member State should provide an explanation of the discrepancies, and that explanation should be cautiously tested. Such a shifting of the burden of proof to the stronger party is common in EU law.**⁹⁵

Ninth, **Rule of Law scrutiny should put an emphasis on a contextual understanding of the problem, instead of only quantifying it. Illiberal states tend to introduce changes that amount to lesser or graver Rule of Law violations, but their uniqueness lies in the fact that the various types of value infringements “point to a pattern of violations that adds up to more than the sum of the parts.”**⁹⁶ **This is why Kim Lane Scheppele calls these states “Frankenstates”, which are “composed from various perfectly reasonable pieces, and its monstrous quality comes from the horrible way that those pieces interact when stitched together”.**⁹⁷ **Even if the individual elements taken out of context might pass a Rule of Law scrutiny,**⁹⁸ – as explained, in the first part of the paper with regard to fake or abusive constitutionalism –, **those pieces taken together add up to an authoritarian system.**

⁹⁴ <<https://fra.europa.eu/en/databases/efris/>>

⁹⁵ See for instance Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which states that it is up to the respondent to prove that there has been no breach of the equal treatment principle.

⁹⁶ Pech and Kochenov, *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, Policy Brief No. 1 (RECONNECT, 2019), <<https://reconnect-europe.eu/wp-content/uploads/2019/06/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>>.

⁹⁷ Scheppele, “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work”, (2013) 26 *Governance* 4, 559-562.

⁹⁸ *Ibid.*, 562; Scheppele, “Not Your Father’s Authoritarianism: The Creation of the “Frankenstate”, (2013) *ESP Newsletter*, 5-9 at 5.

Tenth, **time matters**. Criminal lawyers and criminologists are well aware of the fact⁹⁹ that **it is not the gravity of the (criminal) sanction, but its inevitability and proximity to the crime committed that has a deterrent effect. The same logic applies to sanctions against states.**

Finally, **sanctions** and other **legal consequences** matter. A lack of enforcement with effective sanctions is also the weak side of new instruments proposed and introduced by EU institutions.¹⁰⁰ This problem accompanies EU institutions including the Commission, guardian of the Treaties, until today.

In addition to dissuasive and proportionate sanctions, **there is a need to suspend legal instruments that had been based on the assumption that all Member States are based on the Rule of Law, all protect fundamental rights, and everyone will receive a fair trial by an independent judiciary.** At the very minimum, mutual trust and mutual recognition based **laws in the area of freedom, security and justice.**

⁹⁹ At least since C. Beccaria wrote his famous work 250 years ago. For an English language version, see Beccaria, *On crimes and punishments* (Bobbs-Merrill, 1963).

¹⁰⁰ Kochenov and Pech, “Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality”, 11 *EuConst* 3 (2015), 512-540, at. 528.

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