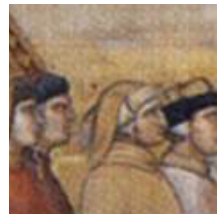
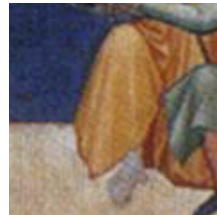
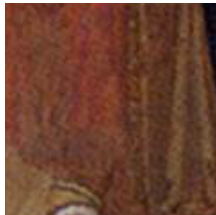
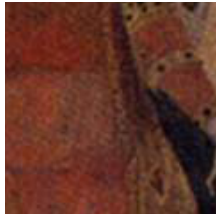
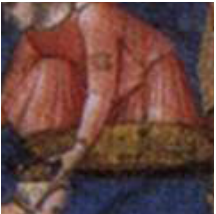
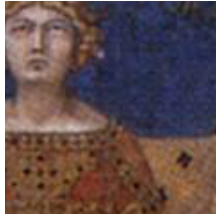
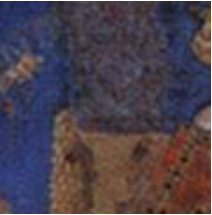
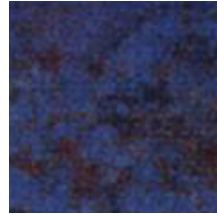
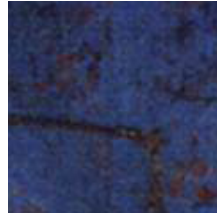
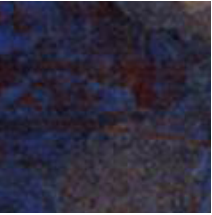
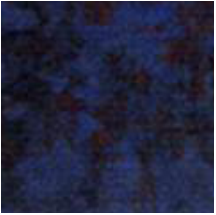
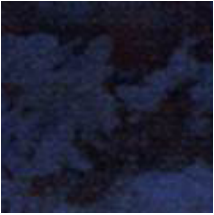
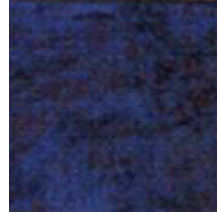




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PROTECTING FUNDAMENTAL VALUES IN THE EUROPEAN UNION THROUGH THE RULE OF LAW

Articles 2 and 7 TEU from a legal, historical
and comparative angle

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Artwork: Allegory of the Good Government, Lorenzetti Ambrogio (b. ca. 1290, Siena, d. 1348, Siena)
Palazzo Pubblico, Siena.



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ARTICLES 2 AND 7
TEU FROM A LEGAL,
HISTORICAL AND
COMPARATIVE ANGLE

Author:

Dr. GÜNTER WILMS

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FOREWORD

The present study is the result of my research during a fellowship at the European University Institute (EUI) in the academic year 2015/2016 (N.B.: the manuscript was closed on 1 June 2016. More recent developments are only briefly referred to in the footnotes). The idea for the topic was born quite some time before and, as it often happens, the article grew bigger with time. It reflects more than three decades of studies in European Law, first as a student, then as a researcher and teacher, followed by more than twenty years of practice in applying Union law at the European Commission's Legal Service.

The text in front of you combines the shortcomings of an analysis which is both, too long and too short. Too long for an overview and too short for an exhaustive discussion of all the issues raised by Fundamental Values and the Rule of Law in a multi-layer system such as the European Union. On a more positive note, it combines practical experience with the implementation of Union law 'on the ground' with an academic approach. It intends to shed some light on the interpretation of the fundamental values mentioned in Article 2 TEU and the mechanisms for their enforcement, in particular Article 7 TEU. For this purpose I put them in a historical and comparative context. From a practical perspective, it shows the dilemma the Commission is facing before initiating a formal procedure under Article 7 TEU. It is the Council/the European Council taking the final decision regarding the existence of a clear risk of a serious breach/existence of a serious and persistent breach. The majority thresholds for both decisions are very high (4/5 or even unanimity). When faced with the question whether to commence a procedure under Article 7 TEU the Commission has to take into consideration the three possible outcomes of such a procedure: a) the Council/European Council will find a violation of Article 2 TEU (Commission 'gets it right'); b) the Commission's initiative under Article 7 TEU will not find the necessary majority in the Council/European Council, in other words the Commission would be overdoing it ("false positive"¹) and c) the Commission does not initiate an Article 7 TEU procedure although the conditions for a violation

of Article 2 TEU would have been fulfilled and the necessary majorities for Article 7 TEU could have been obtained ("false negative"). The present study gives examples for all three scenarios and illustrates their consequences. Due to the high probability of creating a "false positive" and its potentially far-reaching consequences, the decision to initiate an Article 7 TEU procedure must be taken with the utmost prudence². The glass house argument used by some authors might plead also in favor of a very careful approach³.

Without venturing into speculations what could be done *de lege ferenda* the present study is, in principle, limited to the situation of the law as it stands.

I am grateful to the European Commission, in particular the Director General of its Legal Service, *Luís Romero Requena*, for having granted me leave for an academic year; to *Brigid Laffan*, the Director of the Robert Schuman Centre for Advanced Studies, for her interest in the topic and for the opportunity to organize a workshop on the 'Rule of Law' at the EUI in March 2016; to the speakers (*María José Martínez Iglesias*, *Doyin Lawunmi*, *Jean-Baptiste Laignelot* and *Carlo Zadra*) and participants in this workshop for giving me numerous ideas for my research; to *Deirdre Curtin* and *Bruno de Witte* for inviting me to present the topic of my research in their seminar on 'Current Issues of EU-law' and to the colleagues at the Robert Schuman Centre for fruitful discussions on an earlier outline.

The opinions expressed in this study are the ones of the author and do not necessarily reflect positions of the European Commission or the European University Institute.



FIRST PART:
BASIC ISSUES
CONCERNING THE
PROTECTION OF
THE FUNDAMENTAL
VALUES IN THE
EUROPEAN UNION

I. INTRODUCTION

Issues of respect for the European Union's fundamental values, in particular the Rule of Law, and their enforcement, have been at the centre of political and legal interest for some years now. Developments in several Member States, mainly in Hungary (from 2010 on) and later in Poland (from end of 2015 on), have given rise to intense discussions as to their compatibility with the fundamental values of the European Union enshrined in Article 2 TEU. Those fundamental values include foremost the respect for human rights⁴, democracy and the Rule of Law. Indeed, in its second sentence Article 2 TEU states that 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.*" Article 7 TEU then provides for an enforcement mechanism in case of violations of those values. This provision is, however, highly complex. Thus, doubts concerning the efficiency of the 'Enforcement Mechanism' provided for by Article 7 TEU have been repeatedly voiced. Publications on the subject abound⁵.

The European Union's institutions reacted quite diversely to the threats for the Rule of Law. Whereas the European Parliament called very early on for action regarding the 'value crisis'⁶, the Council took much longer and suggested entering into an annual dialogue which addresses the Rule of Law⁷. The Commission, for its part, adopted a differentiated approach⁸. With regard to the problems raised in Hungary, it tackled the different threats to fundamental values (e.g.: independence of judges, media laws, independence of the data protection commissioner) separately. In some cases it initiated 'isolated' infringement procedures⁹, while in others it contented itself with mere warnings within the framework of an informal dialogue¹⁰. Sometimes such dialogues led to the desired outcome. Even when this was not the case, a formal Article 7 TEU procedure has not been initiated yet, although the European Parliament asked the Commission to do so against Hungary¹¹. A citizen's initiative to this effect was accepted by the Commission in November 2015¹². On 23 June 2016 the initiators withdrew the initiative¹³.

With a view, then, to more efficiently addressing threats to the Rule of Law in the Member States, it adopted a

'Rule of Law Framework' in March 2014 ('Pre-Article 7 TEU Procedure'). This Pre-Article 7 TEU Procedure was criticised as being illegally adopted 'ultra vires'¹⁴. When the Commission deployed the Pre-Article 7 TEU Procedure for the first time in January 2016 with regard to the constitutional situation in Poland¹⁵, its approach was not unanimously welcomed¹⁶.

The present article cannot claim to provide a comprehensive overview of all issues on the Rule of Law raised in recent years. In the course of this research it has become obvious, though, that the understanding of the underlying issues concerning the Rule of Law and its protection in the European Union could benefit from a historical, comparative¹⁷ and interdisciplinary analysis. By placing specific problems in a wider context it aspires to present a clearer view of the issues at stake and of the risks involved due to a certain disconnection to the lived experience¹⁸. Historical and comparative experiences with the protection of the Rule of Law at national and at international level can help to understand the structure and objective of Articles 2 and 7 TEU and, hence, can be useful for their interpretation.

Additionally, the article approaches the subject more broadly while at the same time more narrowly than previous research. More broadly, because it will place the protection of the Rule of Law at the level of the European Union in a historical and comparative context using not only legal but also political science research. Narrower because it will not attempt to provide for an all-encompassing analysis of all the minute elements of the Rule of Law but limit itself to just the core elements. This approach seems to be justified for the following reasons: first, since there is already considerable research upon which this article is built¹⁹; secondly, because Article 7 TEU does not provide for a mechanism to sanction each and every violation of any aspect of the Rule of Law. Indeed, it rather limits the European Union's competences to 'serious' breaches of the values mentioned in Article 2 TEU. Narrower, because it will work very closely to the text of the relevant articles of the Treaties. In doing so, it will attempt to shed some light on the interpretation of the broad concepts used in Articles 2 and 7 TEU. In interpreting those provisions it will follow the classical approach to the interpretation of European Union law provisions.

The first part of the article takes a look at the wording of the Treaties regarding the protection of the Rule of Law and the European Union. Due to their degree of abstraction and complexity, they need to be understood and interpreted in a historical and comparative context.

The second part takes a look, firstly, at historic examples of homogeneity clauses and their enforcement in some multilevel systems of governance at a national level (using the examples of the United States of America, Canada, the Weimar Republic, the Federal Republic of Germany, the Republic of Italy, the Kingdom of Spain) and then at an international level (Council of Europe, regional international organisations in Latin America and Africa, Commonwealth of Nations). It will attempt to reply to the following questions: what are the main elements of the protection of the Rule of Law in those systems? What is their experience with rules on homogeneity²⁰ and their enforcement ('militant democracy') in federal and quasi-federal States and in other international organisations²¹?

The third part applies the findings of the second part to the protection of the Rule of Law in the European Union. It initially examines the underlying reasons for the European Union to protect the Rule of Law (all affected principle; community based on trust; credibility inside and outside; transnational issues requiring transnational solutions). Secondly, it describes the roles of the European Union institutions in the protection of the Rule of Law (looking closely at the attributions of competences provided for by the Articles 14-19 TEU). Paying special attention to the roles European Union's institutions have played in the protection of the Rule of Law up to now, it evaluates how far the criticism voiced in this regard is justified. Finally, and more prospectively, it examines how the European Court of Justice could play a more active role in the protection of the Rule of Law *de lege lata*.

II. THE RULE OF LAW IN THE EUROPEAN UNION: BASIC CONCEPTS

A. The Wording of Articles 2 and 7 TEU

Fundamental values of the European Union as listed in Article 2 TEU include democracy, fundamental rights and the Rule of Law. Democracy and the Rule of Law have a double character. Each of them is a fundamental value on its own account, at the same time they function also as instruments for the achievement of the other fundamental values, which are, in the end, synonymous with the common good²². All three major elements of Article 2 TEU are largely interdependent²³. Amongst the fundamental values the Rule of Law is of particular importance, because it is perceived as the basic condition for ensuring democracy and human rights²⁴. Also in the perception of citizens it stands out as being – together with free and fair elections – the most important aspect of democracy²⁵. Therefore, the present research will expressly refer only to the Rule of Law and not the other fundamental values mentioned in Article 2 TEU, although it is to be understood that its basic findings are equally applicable to democracy and human rights.

With regard to the protection of those values, Article 7 TEU provides in its first paragraph a mere statement of a '*clear risk*' of a '*serious breach*' by a Member State of the values referred to in Article 2 TEU²⁶. This statement is made by the Council, acting by a four-fifth majority of its members. The procedure can be initiated either by one third of the Member States, by the European Parliament or by the European Commission. At this stage, no sanctions are foreseen.

The procedure for the protection of those fundamental values is burdensome. The majorities required for decision-making under Article 7 TEU are particularly high (four-fifths of the members of the Council in the case of Article 7 (1) TEU and unanimity of members of the European Council in the case of Article 7 (2) TEU). The high level of abstraction of the fundamental values in Article 2 TEU might give the impression of a

tool which is rather blunt²⁷. On the other hand, given the seriousness of the claims made against the Member State concerned, Article 7 TEU is frequently referred to as a ‘nuclear weapon’²⁸.

Article 7(3) TEU allows for the suspension of voting rights only when the Member State is found in ‘*serious and persistent breach of the values referred to in Article 2 TEU*’ (Article 7 (2) TEU). In this case it is either one-third of the Member States or the Commission that can initiate the procedure, and not the European Parliament. The European Council, comprising the Heads of State and Government, is competent for taking the decision on such a breach. It decides by unanimity after having obtained the consent of the European Parliament.

Procedurally, those strict majority requirements increase the likelihood for “false positives” tremendously. Those high procedural thresholds coupled with the relative vagueness of the terms used in Article 7 TEU and with the lack of precision of the fundamental values in Article 2 TEU already give the overall impression of a tool which is rather blunt. But that is not even the end of the story:

When taking measures to protect the Rule of Law (and the other Fundamental Values), the EU has to respect the specific characteristics of the European Union and of European Union law resulting from its specific constitutional structure. Essential elements of this structure include the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and the institutional framework established in Articles 13 TEU to 19 TEU²⁹.

B. History and Comparative Law as important Tools for the Interpretation of Articles 2 and 7 TEU

For interpreting the broad and abstract concepts contained in Articles 2 and 7 TEU, I suggest following the classical rules on interpretation of European Union law. As the European Court of Justice (ECJ) has constantly held, “*every provision of [EU] law must be placed in its context and interpreted in the light of the*

provisions of [EU] law as a whole, regard being had to the objectives thereof and to its state of evolution”³⁰. In order to place the provisions of Articles 2 and 7 TEU in their context, I will initially examine the preamble of the TEU and then the relevant provisions of EU law as a whole. According to the European Court of Justice, the preamble of an act provides important information as to the interpretation of its provisions³¹. It refers to the preamble of legal acts when interpreting the intention of the legislator³² and the ‘general scheme’ of secondary legislation and international conventions.³³

Given the abstract notions used in Article 2 TEU, a deeper understanding of the elements referred to in the preamble might prove particularly useful for its interpretation.

The preamble expressly refers to the “*cultural, religious and humanist inheritance of Europe*”, from which the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law have developed. It is obvious that the European Union was built on a break from the past³⁴. By referring to the ‘universal values’ in the context of the inheritance of Europe, it becomes clear that the historical dimension of the protection of the Rule of Law plays a crucial role in the interpretation and application of Articles 2 and 7 TEU.

There is more, however: in the preamble, Member States have underlined the “*historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe*” (see 3rd paragraph of the Preamble to the TEU). Finally in its 4th paragraph the preamble confirms the Member States’ “*attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law*”. Member States have, therefore, renounced a ‘Westphalian’ interpretation of state sovereignty³⁵, that is, one that was conceived to serve the interests of hereditary monarchies and “*balkanized not only sovereignty but political legitimacy as well*”³⁶. The preamble of the TEU clearly indicates that the European Union wants to draw conclusions from Europe’s historical experiences which led to the horrors of the Holocaust, two World Wars and the subsequent division of Europe. Such conclusions cannot be based solely on blind faith in the

same formal, legal approaches that had formerly sent the whole continent into the abyss³⁷. As *Plunkett* put it: the law, like all instruments, can be used for good or bad purposes³⁸.

The understanding of the current rules on the protection of the Rule of Law in the European Union is dependent on other factors too. Those rules are based on previous experience in Europe and on other continents, in particular the US. The historic experiences of Europe are therefore in its DNA³⁹. Europe does not invent itself. Since antiquity it has been based on human, sometimes inhuman, and political facts⁴⁰. One of the lessons learned from those facts is that none of the empires created on European soil has endured. Indeed, many led to fratricidal conflict⁴¹. As the European Union breaks out of this classical scheme of alliances to pacify and unite the continent⁴², it is vital to see and understand the historical background of the provisions within its treaties. History gives the ‘raison d’être’ of the creation of such protection mechanisms designed to prevent the dismantling of a liberal-democratic system. Lessons can be learned from the mistakes of the past (“*Those who do not learn history are doomed to repeat it.*”). Also in this context it is essential not to adhere to a strictly national approach. European history is transnational history and its narratives can break the increased ‘self-reflexivity’ we can observe since the early years of the second decade of the 21st century⁴³. A good example is the history of remembrance concerning the Holocaust and the Gulag memory since it could help understand the tension between national and supra-national identity⁴⁴.

The examination of historic experiences serves well as a tool for the interpretation of rules. As we have seen, the preamble of the Treaty on European Union refers expressly to the “(...)cultural, religious and humanist inheritance of Europe” as a source “for the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.” Therefore, it seems to be entirely judicious to examine the inheritance. As *Rosenfeld* put it, “a European constitutional identity could easily ground its narrative of origins on a repudiation of Nazism and Soviet communism and on the need to create a political order that would minimize the chances of any return to tyrannical totalitarian rule.”⁴⁵

Going back to the source of the European Union is essential in this moment of European history when the very need for European integration is put into question, when most Europeans have not experienced the ravages of the Second World War and when nationalism is gaining strength⁴⁶. There is an identifiable risk that generations who have not lived through the Second World War may trivialise the dictatorships, even that of Germany with its own terrible history, of the first half of the 20th century⁴⁷. Additionally, the new political leaders are mostly born after the Second World War and do not show the same enthusiasm for European integration as their predecessors⁴⁸. This situation is aggravated by the fragility of democracies. Due to its very character, democracy is one of the most challenging forms of governments, and at the same time, it is more open to such risks⁴⁹.

The understanding of the Rule of Law in the European Union is inspired by the constitutional traditions of the Member States and by international treaties⁵⁰. Therefore we shall take a look at rules on values, homogeneity and their enforcement in other multi-layer systems and at historic examples of such practices.

ENDNOTES

- 1 For the terminology see, e.g. : Roderick M. Hills Jr, *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173-82 (2005) at 176.
- 2 The principle: Do nothing without a regard to the consequences. quidquid agis prudenter agas et respice finem, Aesop fables 45 the two frogs, fully applies here.
- 3 Joseph H.H. Weiler, *Living in a Glass House: Europe, Democracy and the Rule of Law*, in *Reinforcing Rule of Law Oversight in the European Union*, Carlos Closa et al. eds. (Robert Schuman Centre for Advanced Studies, EUI Working Paper No. RSCAS 2014/25, March 2014) 25-29 at 29
- 4 Human dignity, equality, non-discrimination and equality between women and men are expressly referred to amongst the human rights and fundamental values which are common to the Member States and are the foundation for the Union. See most recently, Case C-404/15 & C-659/15 PPU (joined cases), *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases [2016] (delivered 5 April 2016), paras. 85 & 87 mentioning the absolute prohibition of torture as one of the fundamental values of the EU and its MS; for references to 11 other constitutions of Member States of the European Union see Karl-Peter Sommermann, *Herkunft und Funktionen von Verfassungsprinzipien in der Europäischen Union*, in *VERFASSUNGSPRINZIPIEN IN EUROPA, CONSTITUTIONAL PRINCIPLES IN EUROPE, PRINCIPES CONSTITUTIONNELS EN EUROPE*, 15-44 (Hartmut Bauer & Christian Calliess eds. 2008) at 23, fn. 32.
- 5 For a comprehensive bibliography mainly of the English-language literature on the topic see: Petra Bárd et al. *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights* (CEPS Paper in Liberty and Security in Europe No. 91, 2016, at 220-31.
- 6 See an overview on its resolutions with regard to the situations in Hungary since 10 March 2011 in European Parliament, Resolution of 16 December 2015 on the Situation in Hungary, (2015/2935(RSP)) P8_TA PROV(2015)0461 (16 December 2015) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+V0//EN>. For more details see below Third Part.
- 7 Council Presidency Document No. 16862/14 of 12 December 2014, Conclusions of the Council of the EU and the Member States Meeting within the Council on Ensuring Respect for the Rule of Law, <http://data.consilium.europa.eu/doc/document/ST-17014-2014-INIT/en/pdf>. For a more detailed discussion see below Third Part.
- 8 See below, Third Part.
- 9 See below, Third Part.
- 10 See below, Third Part.
- 11 See below, Third Part.
- 12 European Citizen's Initiative, ECI(2015)000005, <https://ec.europa.eu/citizens-initiative/REQ-ECI-2015-000005/public/index.do?initiativeLang=it>.
- 13 See references at Wake Up Europe!, A Petition Urging the EU to Stand Up for Its Values <http://www.act4democracy.eu/?lang=en>.
- 14 For details see below, Third Part.
- 15 See Press Release, European Commission, Statement by First Vice-President Frans Timmermans and Commissioner Günther Oettinger – EP Plenary Session – Situation in Poland (19 January 2016). http://europa.eu/rapid/press-release_SPEECH-16-114_en.htm
- 16 For more details, see below, Third Part.

- 17 For the importance of comparative law in finding answers to concrete legal problems of Union law see, Vassilios Skouris, *Der Einfluss des nationalen Rechts und der Rechtsprechung der mitgliedstaatlichen Gerichte auf die Auslegung des Europarechts*, ZEITSCHRIFT FÜR VERWALTUNGSGERICHTSBARKEIT, 203-207 (2014) at 204.
- 18 Samuel Issacharoff, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015) at IX.
- 19 Petra Bárd et al. *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights* (CEPS Paper in Liberty and Security in Europe No. 91, 2016) at 220-31 <https://www.ceps.eu/publications/eu-mechanism-democracy-rule-law-and-fundamental-rights>.
- 20 For the terminology, see Helmut Schmitt von Sydow, *Liberté, démocratie, droits fondamentaux et Etat de droit, analyse de l'article 7 du traité UE*, REVUE DE DROIT DE L'UNION EUROPÉENNE, 285-328 (2001) at 178; more recently for instance: Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum ,Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015).
- 21 Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming).
- 22 Mortimer Sellers, *What Is the Rule of Law and Why Is It So Important?*, in *DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION, ESSAYS IN HONOUR OF JAAP W. DE ZWAAN*, 2-14 (Flora Goudappel & Hirsch Ballin, eds., 2016) at 4; European Commission for Democracy through Law (Venice Commission), Document CDL-AD(2016)007-e Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)
- 23 This interdependency is generally recognised: Erik O Wennerström, *THE RULE OF LAW AND THE EUROPEAN UNION* (2007) at 24 with further references to UN documents; Ofer Raban, *The Rationalization of Policy: On the Relation Between Democracy and the Rule of Law*, N.Y.U. J. LEGIS. & PUB. POL'Y (2015) at 46.
- 24 Frank Schorkopf, *Wertesicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?*, EUROPARECHT 147-63 (2016) at 158; see also the First Vice-President of the European Commission Frans Timmermans in 2014 in his replies to the Questions from the Committee on Legal Affairs, Reply to Question 5, Frans Timmermans, Answers to The European Parliament, Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights (2014) http://ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/2014-ep-hearings-reply-timmermans_en.pdf.
- 25 Enrique Hernandez, *Europeans Views on Democracy*, in *HOW EUROPEANS VIEW AND EVALUATE DEMOCRACY*, 43-63 (Monica Ferrin & Hanspeter Kriesi eds. 2016) at 57.
- 26 Para. 1 was introduced by the Nice Treaty of 2001; after the experience of the 'Austrian case' in 2000 (see below Third Part) it was felt that the EU should have an 'early warning mechanism before serious and persistent violations have actually happened.
- 27 See below Third Part.
- 28 See below Third Part.
- 29 Opinion 2/13, *Avis rendu en vertu de l'article 218, paragraphe 11, TFUE*, (Full Court) [2014] (delivered 18 December 2014) at paras. 163 & 165.
- 30 See, for example, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health (CILFIT)* [1982] E.C.R. 03415 at para. 20

- 31 Case C-429/14, *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba (Air Baltic)* [2016] (delivered 17 February 2016), para. 38 and Case C-498/13, *Agrooikosystimata EPE v. Ypourgos Oikonomias kai Oikonomikon & Others (Agrooikosystimata EPE)* [2015] (delivered 5 February 2015) at paras. 33-35 referring to the different language versions.
- 32 Case C-157/14, *Société Neptune Distribution v. Ministre de l'Économie et des Finances (Neptune Distribution SNC)* [2015] (delivered 17 December 2015) at para. 49; Case C-498/13, *Agrooikosystimata EPE v. Ypourgos Oikonomias kai Oikonomikon & Others (Agrooikosystimata EPE)* [2015], at paras. 33-35 and Case C-429/14, *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba (Air Baltic)* [2016] (delivered 17 February 2016) at para. 38.
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SECOND PART:
RULES ON VALUES,
HOMOGENEITY
AND THEIR
ENFORCEMENT IN
OTHER MULTI-
LAYER SYSTEMS

I. INTRODUCTION

In his visionary and far-sighted⁵¹ Zürich speech delivered on 19 September 1946, Winston Churchill reminded us of the importance not only of the existence of values but on their defence. He pointed out that the League of Nations “*did not fail because of its principles or conceptions. It failed because those principles were deserted by those states which brought it into being, because the governments of those states feared to face the facts and act while time remained. This disaster must not be repeated.*”⁵² This part of the speech sounds like a plea in favour of effective procedures to protect the basic values of any international organisation or federal state. They not only ensure a certain degree of homogeneity of the system but are often at the very heart of its ‘raison d’être’.

All ‘composed’ systems, whether they are federal or ‘quasi-federal’, require a certain degree of homogeneity⁵³. Respect for this homogeneity by the ‘composites’ is necessary for the proper functioning and even for the continued existence of any composed system⁵⁴. In light of the experience of the League of Nations and of the Weimar Republic, it does not come as a surprise that many other post-war international organisations and constitutions of federal states have not just contented themselves with homogeneity provisions but also provided for ‘defense mechanisms’. In this way they have usually aimed at protecting their very existence against destruction from the inside⁵⁵. Effective constitutional instruments for the protection of the fundamental values are a necessary condition for the efficiency of a well-fortified democracy⁵⁶.

As will be shown in more detail below, this homogeneity is normally accompanied by the obligation of a certain federal loyalty (or *Bundestreue*, in German terminology). This latter is inherent to the principle of Unity which is the backbone of any system of ‘composed states’⁵⁷. In the case of violation of such a federal loyalty clause, the system of composed states provides equally for a form of ‘coercion’ (or *Bundeszwang*)⁵⁸. In the following chapter I shall briefly examine, firstly, the relevant provisions and practice in (quasi-) federal states (section II) and later in international organisations (section III).⁵⁹

II. HOMOGENEITY CLAUSES IN (QUASI-)FEDERAL STATES

A. Introduction

One might validly ask the question why it is useful to examine the provisions on the protection of the Rule of Law in federal states within the context of the European Union. Such an opposition to the European Union’s federal character seems particularly justified given that the European constitution was rejected. Indeed, in the current political climate,⁶⁰ probabilities that it will be resuscitated are very low. Furthermore, by defining the European Union as a ‘Union of States and citizens’⁶¹, Article 4(2) TEU excludes the creation of a European Federal State⁶². Comparing the European Union with federal systems is, however, relevant since, in political science, the European Union is often referred to as an ‘emerging federal system’⁶³ with some legal scholars referring to the European Union as a ‘federally constituted entity beneath a state’⁶⁴. Therefore we can compare the European Union to known entities within ‘meaningful paradigms’⁶⁵.

In my view such a comparison is also a useful exercise since (a) the European Union’s *sui generis* nature places it somewhere between an international organisation and a federal state⁶⁶, (b) the introduction of Articles 2 and 7 in the TEU was spurred by the accession of new Member States and fear for their political stability,⁶⁷ and (c) according to some authors, the European Court of Justice has in several recent cases followed the model of ‘homogeneity clauses’ in federal constitutions engaging in actions similar to those undertaken by federal states against its members⁶⁸. This last reason resembles, as we shall see in the following paragraphs, the motive for including provisions of so called ‘militant democracy’⁶⁹ in the Basic Law. Its goal is to avoid the freedoms granted by the constitution being abused to the point of abolition and, in the end, the destruction of the democratic regime in its entirety⁷⁰. This is one of the lessons learned from the overthrow of the Weimar Republic by Hitler and his followers⁷¹.

Sweeping comparisons should, however, be avoided and all associations are to be made very cautiously. Additionally, it is difficult to establish a general theory of militant democracy due to the different solutions found in constitutional systems⁷². Nevertheless, some lessons can be learned from the past. The Weimar Republic is an instructive example in its mistakes and causes of negative developments in a federal system⁷³. Theoretical articles at the time on how to protect the state as an institution were not lacking, nor were norms to this effect absent. One of the key issues was that the Weimar constitution was value-neutral⁷⁴. That is, it was not considered to be unconstitutional to abolish democracy and the rule of law by a two-thirds' majority in Parliament⁷⁵. Therefore, the state as such was the object of the protection, not the values it was supposed to protect, promote and defend⁷⁶.

Some authors state that post-communist countries were more successful in establishing democratic institutions than in establishing a democratic culture, and describe those countries as '*democracies without democrats*'⁷⁷. The same words were used to describe the situation in the Weimar Republic⁷⁸. Similar remarks have been made about Europe. In the same vein, the President of the Commission, Jean-Claude Juncker, has underlined that "[T] *there is not enough Europe in this Union. And there is not enough Union in this Union;*"⁷⁹ a statement quite close to the one on democracies without democrats. If we add to this picture the belief that '*Europe was born in Auschwitz*'⁸⁰ it becomes obvious that an analysis of the reasons for including rules on militant democracy and their protection in federal constitutions can provide useful lessons for the understanding, interpretation and, ultimately, implementation of the rules on the protection of fundamental values in the TEU.

This finding is only part of the solution. To use Jean Monnet's famous sentence: "*Nothing is possible without men; nothing is lasting without institutions.*" So what about the citizens? *Tirole* stated in an interview in 2015 "...*the European people are not ready to be European. I hope I am wrong because it's depressing.*"⁸¹ With regard to other young democracies such as Spain, educating the people in order to create a democratic culture has been considered to be the most important task of the state after the creation of a constitution⁸². But more

established democracies such as the US⁸³ or the Federal Republic of Germany⁸⁴ are also facing the problem of 'civic illiteracy'⁸⁵. Education on the European dimension of democracy, the functioning of the state and the rights of the European citizens is largely absent in schools⁸⁶. It is generally recognised that democracies need informed citizens, if the latter are outvoted by masses inflamed by populist statements, liberal democracy is at risk⁸⁷. Therefore, legal measures need to be complemented with educational measures⁸⁸.

It is interesting to note that such a lack of education among citizens leads to the increased appeal of political fringe parties such as the Front National, Fidesz, FPÖ or AfD. They appeal frequently more to emotions than to rational thinking. Loading the political discourse with emotions such as fear and anger is a characteristic of the extreme right and some leftist protest movements⁸⁹. At the same time, it is obvious that it is essential to contain those emotions in order to provide for a truly inclusive democratic deliberation process⁹⁰. Exchanging rational decision making with emotional government bears a striking resemblance to the situation in Europe in the interwar period. As a reaction to this phenomenon *Loewenstein* justified his appeal for militant democracy *inter alia* with '*a supersession of constitutional government by emotional government*'. In his view, constitutional government signifies the Rule of Law, which guarantees rationality and calculability of administration⁹¹, an opinion which is shared by many modern authors⁹².

In the following sections I shall examine two different sets of rules: firstly those ensuring homogeneity within the federal system, for instance the supremacy of federal laws and fundamental constitutional values, and, secondly how those rules are implemented. I will concentrate my research principally on 'horizontal rules', i.e. the ones applicable between state authorities on a federal/sub-federal level, as opposed to 'vertical' rules, i.e. norms applicable between the state authorities and the citizens, aiming at the protection of the state against subversion. The latter are typical for a state and, therefore not directly covered by European Union law.

B. Some examples for clauses on homogeneity and their enforcement in federal constitutions

It lies in the nature of political communities that they provide for instruments of internal intervention⁹³. One of the plainest homogeneity clauses in federal constitutions is the one on the supremacy of federal laws over state laws. In general, federal constitutions stipulate that the federal rules prevail.

1. The United States of America

To use the example of the United States would be particularly illustrative since historically the US constitution was the first federal constitution⁹⁴. Even more important than this historical aspect, however, is the fact that the US federal system served as an example for many systems, in particular with regard to the powers of the Supreme Court as a constitutional court, in Europe after the Second World War⁹⁵ and beyond (e.g. Australia⁹⁶, Brazil⁹⁷ and India⁹⁸). Notably, the homogeneity clauses and their enforcement in the Basic Law were drafted according to the US model (see below). Recently, the Venice Commission provided another example for the particular relevance of the United States' experience for the interpretation of the content of the Rule of Law: in its opinion of 11 March 2016 on the situation in Poland, it quoted at length examples of the jurisprudence of the US Supreme Court⁹⁹.

Homogeneity Clauses in the US Constitution

Article VI, Paragraph 2 of the Constitution is commonly referred to as the 'Supremacy Clause'. It establishes that the federal constitution and federal law generally take precedence over state laws, and even state constitutions¹⁰⁰. Additionally, Article IV Section 4 US guarantees the Republican form of government in the states¹⁰¹. Amendment XIV, which was integrated in 1868 after the Civil War, ensures that also the states respect fundamental rights and due process¹⁰². It ensures that the Federal Constitution and federal laws are supreme; therefore the federal state controls the states and not vice versa¹⁰³.

Enforcement of homogeneity

Under the US Constitution, Congress can call forth the militia to execute the laws of the Union, suppress insurrection and repel invasion (Article I Section 8). Article IV Section 4 US contemplates federal intervention¹⁰⁴. Ensuring the faithful execution of the law is described as being the essence of the duties of the President of the United States of America¹⁰⁵, or, in other words, the core constitutional duty of the president's office¹⁰⁶. In the most extreme cases, the President of the United States of America can – as *ultima ratio* – 'federalize the National guard in order to ensure the execution of the laws of the United States'¹⁰⁷. Such cases, however, have been extremely rare¹⁰⁸.

Examples for the enforcement of homogeneity - stand-off in Tuscaloosa

President Kennedy federalized the National guard in 1963¹⁰⁹ in order to enforce both the order of the court of 1 July 1955, in the case of *Lucy v. Adams*¹¹⁰, and also the order of United States District Court for the Northern District of Alabama of 5 June 1963; both cases concerning the issue of 'de-segregation' of college education in Alabama. Specifically, the order enjoined the Governor of the State of Alabama from blocking the entry of Afro-American students to the campuses of the University of Alabama at Tuscaloosa and Huntsville, Alabama. This led to a stand-off between State Troopers under the command of Governor Wallace and the federalized National Guard¹¹¹.

The stand-off in Tuscaloosa and Huntsville is a good illustration of how the Rule of Law, the protection of fundamental rights and the respect for constitutional checks and balances go together. It shows also that the application of homogeneity clauses can override the political decision by one democratically elected authority forming part of a multi-level system of governance. The executive, that is the President who wields the sword, and the judicial branch, disposing of the rational weapons of the words and tools for applying the interpretative methods of the law, work hand in hand for the protection of the common good and fundamental rights. As we know, such a coercive enforcement of homogeneity clauses in the European Union is not possible (for more details, the reasons and consequences, see below Third Part).

2. The Weimar Republic, in particular the reaction to the Beer Hall Putsch of November 1923

The Weimar Republic is a tragic and well documented example¹¹² of the failure of a federal state, and one with the most horrendous of consequences. It teaches us what a polity must avoid if it wants to ensure its survival and the survival of its values. The Weimar Republic is an illustrative example of how to recognise the causes for negative developments in a federal system¹¹³.

Homogeneity clauses

In effect, Article 13 of the Weimar constitution stipulated the supremacy of Reich law over State law and established jurisdiction by the Reich Supreme Court for disputes on the matter¹¹⁴.

Enforcement

Article 15 of the Weimar constitution gave the Reich government the power to supervise the execution of Reich laws and establish general directions. As *ultima ratio*, the Reich President (Article 48) had the power to use armed force to cause the Länder to oblige.

Problems

One of the key issues for the absence of a true defence of the Weimar Republic and its democratic model was that the Weimar constitution was value-neutral. As such, only the State was the object of the protection and not the values it was supposed to protect, promote and defend¹¹⁵. Therefore, as Müller puts it correctly, it “*had set no limits to political and legal changes enacted by the legislature*”¹¹⁶.

Another key reason for the failure of the Weimar Republic was the absence of democratic roots in society as a whole and, in particular, within both the power elite¹¹⁷ and the institutions of the State¹¹⁸.

Example: The case of the Beer Hall Putsch

According to Professor Weiler, “the European Union was built on the ashes of World War II”¹¹⁹. Other authors phrase it even more drastically: Europe “was born in Auschwitz”¹²⁰. Europe in its current political form would not have come about without the horrors

of the Second World War and the Holocaust. A precondition for those horrors was the establishment of Nazi rule after 1933 in a formally and largely legal manner. But how could the Nazi Party and its leader gotten that far after the failed Putsch of November 1923? As Loewenstein put it in his seminal article on ‘Militant Democracy’ in 1937: “The law for the protection of the Republic(...), was openly defied by Bavaria and secretly made blunt by hyper-legalistic, or even mutinous, courts from the beginning;...”¹²¹.

In the following section I shall have a closer look at what *Loewenstein* meant by ‘open defiance’, how this open defiance was possible and analyse its consequences for the application of rules on ‘militant democracy’, such as the ones protecting the Rule of Law. In doing so, we shall see that, from a Rule of Law and from a homogeneity perspective, ‘Auschwitz’ was born in Munich. Bavaria and the Government of the Weimar Republic became the effective ‘midwives’ in this process by turning a blind eye to the most obvious violations of the Rule of Law and by not enforcing the ‘homogeneity and protection clauses’ provided for by the laws of the Weimar Republic. Indeed, Bavaria had been a stronghold for the anti-democratic, nationalist Right and remained so after the unsuccessful Putsch of November 1923¹²² and the Government of the Reich in Berlin lacked determination to counter those political tendencies in Bavaria.

The relevant facts of the unsuccessful Beer Hall Putsch can be summarised as follows¹²³: on 8 November 1923 Hitler and his followers tried to seize power declaring that the Bavarian and Federal governments and President Ebert were deposed. Hitler and Ludendorff were then to constitute a provisional German National Government¹²⁴. On the morning of 9 November 1923 they marched with approximately 2000, mostly armed, supporters¹²⁵ to the ‘Emperor’s Hall’ in Munich, their ultimate goal being a March on Berlin copying Mussolini’s march on Rome in October 1922¹²⁶. In front of the residence of the Bavarian government they encountered police, who opened fire on them. The short-lived ‘putsch’ was suppressed by military and police forces and left several people (12 Nazis and 4 police officers¹²⁷ - other sources speak of 4 policemen, 15 Nazis and one innocent bystander¹²⁸) dead.

These events led to a trial in Munich against Hitler and some of his co-putschists. Notwithstanding the intention to overthrow the government and the fatal consequences of the attempt to carry out the putsch, Hitler was only condemned to the minimum sentence of four years of imprisonment and released on parole after 8 months¹²⁹.

The trial did not deserve the name 'court proceeding'¹³⁰. 'Sham proceedings' would be a more correct denomination¹³¹. The judges sympathised with the 'putschists' motives and allowed Hitler to turn the failed putsch – and the trial – into a propaganda victory¹³². Legal reasoning was suppressed in favour of political considerations. Judicial impartiality and respect for the law was completely amiss.

With reference to the 'horizontal' measures the flaws abounded: To cite only the most striking violations of the most fundamental legal principles in this case, the Munich court was not a competent tribunal; the trial should instead have taken place in front of a state court for the protection of the Republic in Leipzig which had been established by the law on the protection of the Republic of 21 July 1922¹³³. This court had issued a warrant against Hitler and some of his followers which the Bavarian authorities ignored. The Bavarian Prime Minister declared that this law was not applicable in Bavaria since, in his view, it violated the rules on the distribution of competences between the Republic and the regions¹³⁴. Out of political considerations, the government of the Republic did not use their powers to enforce the homogeneity clauses of Articles 15 and 48 of the Weimar Constitution against Bavaria, as they had done previously in Saxony and Thuringia¹³⁵.

Hitler was an Austrian national. According to Article 9 section 2 of the Law on the protection of the Republic, foreign nationals who committed crimes against the Republic were to be extradited. The provision did not allow for any discretion of the judge; the extradition was obligatory. Instead of being incarcerated and released in Germany, he should, therefore, have been extradited to Austria¹³⁶. The 'court' based its completely arbitrary decision *contra legem* on entirely political grounds¹³⁷. The judgment failed to mention that the 'putschists' had killed 4 police officers¹³⁸.

Furthermore, the execution of the five years minimum sentence for high treason was suspended on probation

after a mere 8 months. This early release was also entirely illegal. Hitler had been previously condemned for serious disturbance of the peace and had been released on probation until 1926, a period that was not to end till after the putsch took place. Consequently, the next sentence could not have been suspended on probation¹³⁹. He should, therefore, have been incarcerated for at least five years and extradited to Austria.

How history would have unfolded if the competent court had judged the events of November 1923 and, consequently, Hitler had either been incarcerated until 1929 and extradited to Austria or executed belongs to the sphere of speculation. What goes beyond mere speculation is the effect that the Putsch Trial had on the later provisions of the 'well-fortified' democracy in the Federal Republic of Germany, which I will shortly examine in the next section. It is undisputed, though, that his leadership was indispensable to the Nazi movement¹⁴⁰. Indeed, already during Hitler's short imprisonment, the Nazi Party had fallen apart amidst rivalry between different groups¹⁴¹. Reuniting the Nazi movement after an interruption of five years would certainly have been at least considerably more difficult than doing so after an interruption that lasted merely 8 months. Reuniting large parts of public opinion behind him would have been more difficult had he not had the stage of the 'trial' in 1924 where he managed to present himself as a victim rather than as a perpetrator of high treason and – at least - accessory to the death of four police officers¹⁴². Grabbing power in a formally legal manner as it happened in 1933¹⁴³ would also have been an entirely different matter if he had been tried by the proper court in the proper manner¹⁴⁴, convicted, sentenced and extradited according to the applicable law.

The formally legal power-grab in 1933 was only possible because the constitution of the Weimar Republic was value-neutral. The 'trial' in 1924 and subsequent lenient judgment were only possible since the Republic did not use its competences under the law on protection of the Republic and under Article 48 of the Weimar Constitution. Ironically, many commentators see the main reason for the later fall of the 'Weimar Republic' as the 'over-use' of exactly that same provision¹⁴⁵. A case where a 'false negative' enabled 'false positives'.

Lessons to be Learned

The relevance of these events for the Rule of Law, for the existence of effective enforcement mechanisms and their actual employment is clear. We have shown that the Weimar Republic did not lack the mechanisms to protect itself from being overthrown¹⁴⁶. The fundamental issue was rather that in the case of the Beer Hall Putsch they were not used, and when Hitler overused them later, he could not be opposed, since they were value-neutral.

A legal mechanism for ensuring the homogeneity of values is, therefore, only as strong as the resolve of the competent institutions to employ it to its full extent (virtue). The Weimar example also shows the potentially devastating consequences if political considerations take primacy over the strict application of legal rules in such fundamental areas as the protection of a democratic system's integrity. The sham nature of the post-Putsch trial also exemplifies the need for judges to enjoy complete independence and show entire impartiality: 'independence' being understood as the absence of external influences that interfere with the judges' neutrality, and 'impartiality' as the absence of similarly interfering internal factors.

The lessons drawn with respect to the 'homogeneity' clauses are basically twofold: first, that a 'false negative' can have devastating consequences; secondly, that clauses on the protection of a 'Rule of law' cannot be understood as being 'value-neutral'; indeed, they need to be interpreted in the context of the protection of democracy and fundamental rights and, lastly, that the existence of enforcement mechanisms is not enough, it also takes the virtue of the responsible institutions to use them.

3. The Federal Republic of Germany

Homogeneity clauses in the Basic Law of the Federal Republic of Germany¹⁴⁷

The homogeneity clauses and their enforcement mechanisms in the Basic Law (BL) are based on the lessons learned from the traumatic experiences of the Weimar Republic¹⁴⁸. As we have seen in the previous section, the helplessness of the Weimar Republic became evident during the 'trial' against Hitler and his

followers in 1924¹⁴⁹, and continued in the wake of the seizure of power in 1933.

Those who framed the BL were very well aware of the shortcomings of the Weimar Republic, drafting it with a view to establishing a democracy capable of defending itself¹⁵⁰. To a large extent, the BL can be understood as a reaction to the defects of the Weimar Constitution¹⁵¹. Therefore, the homogeneity clauses and their supervision in the Federal Republic of Germany are of particular importance for understanding the Rule of Law instruments in the EU treaties. Historically, since they are based on the lessons learned from the disastrous shortcomings of the Weimar Republic's constitution; politically, because the lessons learned from the ensuing catastrophe was the basis for the creation of the European Communities; empirically because the homogeneity clauses in the German Basic Law served as an example for similar clauses in many other constitutions of 'new democracies', such as Spain in 1978¹⁵² and some Central and Eastern European countries in the 1990s¹⁵³. Additionally, the German doctrine on 'Homogeneity' is particularly extensive¹⁵⁴.

Yet, examining the homogeneity clauses in the Federal Republic of Germany is also interesting from a different point of view. The western military governors determined the general principles necessary for the German constitution, reserving their right to approve its final draft¹⁵⁵. Among other concerns, they were keen on ensuring that the German government exercised its rights in conformity with the Constitution, and, should this not be the case, they were determined to uphold security and preserve democracy by exercising full authority over the territory of the Federal Republic of Germany¹⁵⁶. The draft of the Basic Law was approved by the Allies. Therefore they deemed that the German Constitution contained the necessary requirements for upholding security and preserving democracy, such as a powerful representation of the *Länder* (regions), a strong constitutional court and an apolitical civil service¹⁵⁷. The importance of those conditions goes, therefore, far beyond the Parliamentary Council but express what the Western Allies considered important tools for avoiding another dictatorial power-grab.

Historically speaking, the Bavarian constitution of 1946, which was the first to refer expressly to the term '*Rechtsstaat*'¹⁵⁸, was largely drafted in exile by *Wilhelm*

Hoegner, a Bavarian lawyer and politician, who had heavily criticised the ‘Beer Hall’ trial as being a denial of justice and entirely scandalous¹⁵⁹. After the war he became Prime minister of Bavaria and played a key role in the democratic reconstruction of that *Land*¹⁶⁰.

In 1950 when ‘Rule of Law’ found its way into the preamble of the European Convention on Human Rights, only the Federal Republic of Germany mentioned the term expressly in its BL. By 2008, however, 15 out of 27 Member States had already expressly provided for the Rule of Law in their constitutions¹⁶¹.

To come back to Germany: The historic second chance for Germany to build a democratic system of government is based on two pillars: a strong protection of the basic values, and respect for international obligations¹⁶² in particular the cooperation within the European Union¹⁶³. Yet, according to some authors, the jurisprudence of the Federal Constitutional Court has a slightly ambivalent role in this ‘pillar structure’. Whereas with regard to the former (i.e. a well-fortified constitution), it has made a historical contribution in correcting the course of Germany’s *Sonderweg* and thus helped it return to the community of civilized nations and Western liberal democracies, with regard to the second pillar (European Unification) it has placed stumbling blocks in the path of history’s greatest effort to unify the liberal democracies of Europe¹⁶⁴. The Court, to put it bluntly, might have corrected one *Sonderweg* only to launch another¹⁶⁵. In a recent judgment on the binding effects of public international law a similar tendency can be observed¹⁶⁶. It might well be, then, that this approach, brings to light that Carl Schmitt’s ‘long shadow’¹⁶⁷ can still be felt.

The present analysis will briefly mention the main content of the Rule of Law in the BL and the mechanisms foreseen for their protection. Given the complexity of the topic, it will limit itself to the aspects relevant to the understanding of the system provided for by the EU Treaties.

Basic considerations

Constitutional law must provide for the guarantee of its continued existence¹⁶⁸. On the basis of historical experience, the awareness of this need is particularly

high with regard to Germany. History also explains why the notion of the Rule of Law is a substantial one and not a merely formal concept¹⁶⁹. The opposite opinion would ignore the lessons to be learned from the Weimar experience; lessons which adhered to the Schmitt-ian idea of a merely formal notion of the Rule of Law¹⁷⁰ and the structure of the Basic Law itself. The Basic Law puts fundamental rights at the helm of the constitution. The protection of human dignity and the need for legality of the exercise of all state power and the Rule of Law are even rendered unamendable (cf. Article 79 section 3 BL).

In the same vein, the principle of Democracy is not merely limited to periodic elections but a conscious decision in favour of substantial values¹⁷¹. Already the Greek philosophers were in agreement that it must avoid perverting itself into a dictatorship of the majority¹⁷². As early as 1956 the Federal Constitutional Court found that political parties must combine respect for and the furtherance of pluralism and tolerance with the acceptance of certain inalienable values of the state¹⁷³. It is interesting to note that, on the level of the European Union, Regulation No 1141/2014 of 22 October 2014 on the statute and funding of European political parties and European political foundations contains a similar requirement for the recognition of a European political party¹⁷⁴. In effect, in its Article 2 this regulation stipulates that a European political party “*must observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in Article 2 TEU, (...)*”. It also contains certain sanctioning mechanisms¹⁷⁵.

The state is obliged to protect an individual sphere of freedom and strive for substantive justice. The individual enjoys the protection of the courts¹⁷⁶. The competences of the Federal Constitutional Court (FCC) played a pivotal role in achieving this purpose¹⁷⁷. At the same time, this system must be ready to defend itself. By 1937 *Loewenstein* had already recognised that democracy “*must be ready to fight in order to protect its very untouchable core against those forces which would destroy the very basis of its existence and justification*”¹⁷⁸. Thus, the BL was drafted in a manner to bring together the principles of democracy and Rule of Law which had not efficiently co-existed since 1848¹⁷⁹.

Homogeneity clauses

The basic rule on material homogeneity¹⁸⁰ in the Basic Law is Article 28 BL¹⁸¹. In essence, democracy and the Rule of Law are necessary elements of the constitutional order of the *Länder* (para. 1). It reflects the basic principles applicable to the Federal State contained in Article 20, the so-called constitutional principles. With regard to implementation, the Federation guarantees respect for those requirements (Article 28 para. 3 BL).

The content of those principles becomes clearer when put in the context of the fundamental provision of Article 20 BL. This states *inter alia* that the Federal Republic of Germany is a democratic state. With regard to the Rule of Law it stipulates that the “*legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.*” In particular, Article 20(3) BL establishes the Rule of Law principle. As a consequence of the strict positivism under the Weimar constitution, which led to the results described above, the executive and the judiciary are expressly bound not only by law but also by ‘justice’. This substantial concept of the Rule of Law under the Basic Law becomes even clearer when seen in the context of Article 1 BL, according to which human dignity shall be inviolable and that all state authority is obliged to respect and protect it.

Article 31 BL contains a classic supremacy clause for federal law: “*Federal law shall take precedence over Land law.*” This supremacy clause serves as a barrier even for constitutional provisions of the *Länder*¹⁸². Altogether, these ‘homogeneity’ clauses lead to considerable uniformity with regard to the basic set up of the *Länder* in the FRG.¹⁸³

Enforcement

After the Weimar experience, it comes as small surprise that the provisions for the enforcement of these ‘homogeneity provisions’ are extremely elaborate. They range from appeals to the Federal Constitutional Court for federal oversight, a non-defined competence of ‘Federal coercion’ (according to Article 37 BL) to the (hypothetical) possibility of deploying the armed forces. The latter being a scenario which resembles the one used by President Kennedy in Alabama¹⁸⁴. I will now look at these different mechanisms in turn.

Article 84 (3) BL provides for Federal oversight of the *Länder* administration with a view to ensuring that “*the Länder execute federal laws in accordance with the law. For this purpose the Federal Government may send commissioners to the highest Land authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.*” In case of persistence by the *Land*, the Federal Government needs the consent of the second chamber, the *Bundesrat*, for any further measures (Article 84(a) and (5) BL).

The main implementation mechanism for these homogeneity clauses and competences is Article 37 BL (‘Federal Coercion’). In cases where a *Land* fails to comply with its obligations under the Basic Law or other federal laws, the Federal Government is empowered to take the necessary steps to compel the *Land* to comply with its duties. Before the Federal Government can act under Article 37(1) BL, it has to obtain the consent of the second chamber, the *Bundesrat*. For the purpose of implementing such coercive measures, the Federal Government or its representative shall have the right to issue instructions to all *Länder* and their authorities (Article 37(2) BL).

Although this article has never been used it is still an important provision due to its dissuasive effects on possibly ‘recalcitrant’ *Länder*¹⁸⁵. It is understood as an *ultima ratio*, which is generally understood as requiring a prior request to the FCC¹⁸⁶ although formally a prior appeal to the FCC is not necessary¹⁸⁷. Procedurally, the Federal Government has to state the violation, decide on the use of the Federal Execution, define the measures to be taken, obtain the agreement of the *Bundesrat* (2nd chamber of Parliament) and then apply the measure. According to the FCC’s jurisprudence, the proportionality principle as a concretisation of the Rule of Law is not applicable between state authorities¹⁸⁸.

In the context of European Union action under Article 7 TEU, the situation would be different. The use of all Union competences is governed by the principles of subsidiarity and proportionality (Article 5 TEU). Therefore, the Union has to respect the principle of proportionality also in its - horizontal - relations with the Member States¹⁸⁹.

The Basic Law puts fundamental rights at the helm of the constitution. The protection of human dignity, the need for legality (in the broad, substantive sense) in the exercising of all state power, the federal system and the Rule of Law are all, as fundamental principles, even rendered unamendable (cf. Article 79(3) BL). All these innovations can be understood as a reaction to the negative experiences of the Weimar Constitution¹⁹⁰. Article 79(3) BL was, therefore, meant to constitute a protection against a *coup d'état* from the inside¹⁹¹. All the more surprising is that since its seminal Maastricht judgment, the Federal Constitutional Court has interpreted this provision in a way that is directed towards the outside, thereby, effectively putting a brake on further EU integration.

Another tool for ensuring homogeneity in the Federal Republic of Germany lies in the competence of the Federal Constitutional Court for deciding in cases of conflicts between the Federal Government and the *Länder*. Such cases concern, in particular, the compatibility of federal law or *Land* law with the Basic Law, the compatibility of *Land* law with other federal law, or else disagreements concerning the rights and duties of the Federation and the *Länder* (Article 93(1) and (2) BL).

Similar to the relevant provisions in US legislation, the BL allows for the employment of armed forces in case of any risk to the fundamental values. It is interesting to note that this option is open either, upon request, to the *Land* in question or, if that party is unable or unwilling to make such a request, to the Federal Government (Article 87a BL). As a safeguard against abuse, the Federal Parliament and the second chamber can veto the action which then has to be discontinued.

4. Spain

In Spain, the transition to a democratic system was accompanied by a process of decentralisation granting a high degree of autonomy to the *Comunidades Autónomas*¹⁹².

Homogeneity clauses

The Spanish Constitution (SC) contains a number of clauses which ensure homogeneity¹⁹³. Nevertheless, in its judgment of 25 March 2014, the Spanish

constitutional court found that Spain is not a militant democracy¹⁹⁴. Together with the judgement of 2 December 2015, it provides some interesting insights into the relationship between democracy and the Rule of Law and the Spanish Constitutional Court's understanding of the defence mechanisms contained in the Spanish Constitution. Therefore the relevant passages of those judgments merit a closer analysis.

The judgment of 25 March 2014 underlined the importance of the legality principle and the supremacy of the constitution over general laws. Any state activity must respect “*democratic principles, fundamental rights or all other constitutional mandates, and its effective achievement follows the procedures foreseen for constitutional reform (...)*”¹⁹⁵.

On a procedural note, the Spanish Constitutional Court makes clear that the Legislative Assembly of an Autonomous Community has to respect the “*duty of reciprocal assistance*”, “*reciprocal support and mutual loyalty*”, “*constituting in turn the broadest duty of loyalty to the Constitution*”. The Spanish Parliament would therefore have to consider any application made according to the rules for constitutional reform (Articles 87(2) and 166 SC)¹⁹⁶.

In a more recent decision¹⁹⁷, the Spanish Constitutional Court clarifies the idea further:

“in a constitutional state, the democratic principle cannot be detached from the unconditional primacy of the constitution. The latter requires that all decisions de iure imperii are, without exception, subject to the constitution. In this respect the constitution does not grant any freedom to Public authorities or spaces of immunity.”

*“When exercising its task as supreme interpreter of the Constitution it (i.e. the Constitutional Court) must ensure that the use of the constituted authority power respects the limits drawn by the constituent authority”*¹⁹⁸

In point 5 of the same judgment, the Spanish constitutional court declares that the resolution of the Catalan Parliament in question cannot be based on democratic legitimacy of the Autonomous Community, and that is in absolute contradiction with

the constitution and the Autonomy Statute of said Autonomous Community. It finds that the resolution disrespects not only the requirements of the Rule of Law, which require full submission to the laws and the Law, but also its own democratic legitimacy, which the Constitution recognises and protects.

The legitimacy of an act by a public authority or a public policy relies, in principle, on its conformity with the constitution and the legal system. Without this conformity there is no legitimacy. According to the democratic concept of power, the Constitution transmits the highest legitimacy. The Constitutional Court therefore sees the democratic principle as a superior value with regard to the Constitution (Article 1.1 SC). This principle has to be construed in the context of the constitutional order and its processes. The unconditional supremacy of the Constitution is the source of democracy's legitimacy and, by providing for special procedures for amendments, of its content.

Under point 5 b), the Constitutional Court explains that the Spanish Constitution is based *inter alia* on the values of human dignity, democracy, the Rule of Law and fundamental rights. It concludes that the democratic principle must be interpreted in light of its position within the whole constitutional system. The legal system with the constitution at its helm cannot be seen as limiting but has to be understood as guaranteeing democracy¹⁹⁹. It was, after all, approved by the people when they voted in favour of the constitution.

In contrast to the German Basic Law, the Spanish Constitution does not contain 'eternity clauses'²⁰⁰. Complete revisions are therefore theoretically possible. At the same time, such a complete revision would need to respect the procedural rules for reforming the constitution. If this were not the case, the public authorities would create a free space outside the Law which would, in turn, lead to irreparable damage to the citizens' freedom²⁰¹.

The Spanish Constitutional Court therefore follows a concept of the Rule of Law which is similar to the one adhered to by the European Court of Justice. It understands the Rule of Law and Democracy as inalienable preconditions for the protection of the fundamental rights of citizens²⁰². It is interesting

to note that the Spanish Constitutional Court uses exactly the same terminology as the first paragraph of the preamble of the TEU²⁰³.

This jurisprudence of the Spanish Constitutional Court allows the following conclusions to be drawn: a) in contrast to the Basic Law, the Spanish Constitution does not contain an 'eternity clause' but b) it subjects any revision to the respect of the constitutionally foreseen procedures. These act, at the same time, as guarantors of the respect for the Rule of Law and Democracy; the latter covering on the one hand, the democratic will on the national level, i.e. the Spanish people as a whole, and on the other, as legally distinct, the democratic will expressed by the people of Spain as the '*pouvoir constituant*', to which all authorities of the state are subjected. The constitutional court supervises the respect of those provisions. Therefore, the Spanish constitution indeed defends itself against illicit reforms but does not contain an inviolable core of principles. At the same time, it ensures that the principle of the rule of Law is observed by all expressions of state authority.

Enforcement

As we have seen in the previous section under the Spanish constitutional system it is, in the first place, the Spanish Constitutional Court that ensures that 'homogeneity' clauses are respected. For this purpose, Article 161(2) SC provides locus standi for the Central Government to bring a challenge before the Constitutional Court against "enactments without force of law", and "decisions of the Autonomous Communities". In case the ensuing judgment should not be respected, Article 155 SC provides for an additional enforcement mechanism²⁰⁴.

Article 155

1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to

protect the above-mentioned general interests.
2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities.²⁰⁵ (emphasis added)

The leading commentary on the Spanish Constitution states expressly that this provision was drafted with Article 37 BL²⁰⁶ in mind. Following this model, the Spanish constitution, contrary to the Italian constitution (see below) does not specify the means to be employed by the central government. Contrary to Article 37 BL, the Spanish doctrine is quasi unanimous in upholding that the central government has to respect the principle of proportionality when applying Article 155 SC²⁰⁷. Therefore, the means to be employed are limited by these concepts, which explains why the use of the armed forces would be, largely excluded²⁰⁸.

Also the Spanish doctrine considers this article as an *ultima ratio*²⁰⁹. In contrast to Article 37 BL, the situation in question must, according to leading Spanish constitutional lawyers, seriously endanger the general interests of the nation, and a mere disrespect for the law is not sufficient²¹⁰. Up to now this mechanism has never been used, either in Germany or in Spain²¹¹. In a conflict with the Canary Islands in 1989 concerning fiscal obligations of EU law, the central government threatened with the application of Art. 155 SC. In the end, the conflict could be resolved without formally using the enforcement mechanism²¹².

Should the central government intend to use Article 155 SC, it is obliged to give the Autonomous Community's President a final warning, the purpose of which is to allow the Autonomous Community to meet the obligations on its own initiative.²¹³ Should the Autonomous Community not oblige, the Central government can, after approval of the Senate, give direct instructions to its authorities, thereby amounting to a *de facto* replacement of the Autonomous Community's government²¹⁴. The Central government can also take economic measures such as the blocking of funds. Procedurally, however, the Central government can only take measures which are approved by the Senate. Without such an authorisation the acts in question would be taken *ultra vires* and could be challenged²¹⁵.

According to constitutional experts, Article 155 SC is an exceptional tool which aims to remedy extreme situations. It covers situations where an Autonomous Community disrespects the constitution and seriously violates the general interest of the State²¹⁶. Formally, a prior application to the Constitutional Court is not necessary although with an eye to respecting the principle of loyal cooperation and proportionality some authors deem it preferable²¹⁷ others necessary²¹⁸. Parts of the academic literature classify the decisions as to whether or not the general interests of the State are seriously violated as a '*substantially political decision*'²¹⁹ others underline at the same time the political character must be limited by constitutional considerations²²⁰. Others underline that the general interest of the state refers to respect for constitutional concepts²²¹, also qualitative elements such as the knowledge of the violation, its repetitive character and the intention to undermine the distribution of competences as foreseen by the Constitution are suggested²²². Those attempts to underline the exceptional character lead to a situation that its application becomes more difficult and the concepts less clear. This situation resembles the one that the EU institutions are facing with regard to Article 7 TEU²²³. The application of Article 155 SC is controlled initially by the involvement of both chambers of Parliament, and subsequently by the Constitutional Court by means of a 'conflict of competence procedure' under Article 161(1) let. c) SC²²⁴.

Similar to the description reserved for Article 7 TEU as the 'nuclear option', Article 155 SC is referred to as the most explosive article of the Spanish Constitution, and one which should be used with great political caution²²⁵.

5. Italy

Homogeneity clauses

The Italian constitution of 1999 (IC) contains several homogeneity provisions²²⁶. Similar to the system of Article 4 TEU, Article 120 para. 4 IC obliges the State and the Regions to respect the principles of subsidiarity and loyal cooperation. Thus, regional statutes have to comply with the constitution (Article 123 IC).

Enforcement of homogeneity clauses

The following enforcement provisions are particularly relevant: Article 120 para. 3 IC provides that the State can act for regional and municipal bodies *inter alia* “whenever such action is necessary to preserve legal or economic unity”. The national government has standing before the Constitutional Court when it deems that the regional law exceeds the competence of the Region (Article 127 para. 1 IC). However, a region can challenge a state or regional law, when it is deemed that that said law or measure infringes upon its competence (Article 127 par. 1 IC). Meanwhile, article 126 IC is a particularly interesting provision since it refers, like Article 7 TEU, to ‘grave violations of the law’. In such cases it provides for a quite radical measure to ensure homogeneity. According to Article 126 IC, in the case of acts in conflict with the Constitution or displaying grave violations of the law, the President of the Republic may dissolve the Regional Council and remove the President of the Executive by reasoned decree. Before adopting such a decree though, the President has to consult with a committee of Deputies and Senators for regional affairs which is set up in the manner established by a law of the Republic. The Italian Constitutional Court has clarified the scope of these provisions in its judgement of 16 July 2013²²⁷.

Article 126 IC reflects the division of competences and responsibilities as intended by the *pouvoir constituant*. For this purpose, it establishes the pre-conditions for dissolution of the regional council as well as the competent institutions. It also ensures the compatibility of two essential aspects of the Italian constitution: that the Italian Republic is on the one hand, a ‘state of regions’ and, on the other, it is united and indivisible. (Article 5 IC)²²⁸. Art 126 of the Italian Constitution, meanwhile, covers only truly exceptional situations. It cannot be applied when exercising political discretion but merely in situations of serious violations of specific legal obligations which encroach upon the regional system, as established by the Constitution or by the laws of the Italian Republic²²⁹.

Regional autonomy does not entail the right to deviate from the common path traced by the Constitution as this relies on the sharing of values and principles independently from the territorial dimension²³⁰. The

Italian Constitution has the power vested in it of ensuring the legal and economic unity of Italy in the Republic²³¹. When exercising the powers granted by Article 126 IC, the government of the Republic enjoys certain discretion, notably as to whether violations of the law are indeed “grave”. The President of the Republic is competent for the dissolution though he can only act upon a proposal adopted by the Head of Government, which has been previously discussed by the Committee referred to in Article 126²³². The President represents national unity whereas the Head of Government determines the general political guidelines²³³. Already in a judgment prior to the one just discussed, the Italian Constitutional Court had underlined the crucial role of the Republic’s government in the process²³⁴. Article 126 IC obliges the Government to motivate the decree dissolving the Regional Council with a view to ensuring cohesion and the harmonious functioning of the authorities of the regions and the Republic which form the constitutional structure of the Republic²³⁵.

6. Brief overview of homogeneity clauses and their enforcement in other federal systems

6.1 Canada

- Canadian federalism has drawn comparisons with the European Union²³⁶. Due in particular to the secession movement in Quebec, Canada is familiar with tensions between cooperative federalism and the doctrine of parliamentary sovereignty, which is one of the central points in the current debate on the Polish constitutional crisis²³⁷.
- In quite similar fashion to the German system, the Canadian State is based on four fundamental and organisational principles: federalism, democracy, constitutionalism, and the Rule of Law²³⁸.
- In 1998 the Supreme Court of Canada was asked whether Quebec could unilaterally secede from Canada. The Court said ‘no’: the principle of the rule of law requires that a government, even one mandated by a popular majority in a referendum, must still obey the rules of the Constitution. It stated in very clear terms:

*“The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations.”*²³⁹

- This Constitution stipulates the procedures for its own amendment, and those procedures must be followed for the secession of a province. Indeed, those procedures are important in safeguarding the interests of dissenting minorities within the province, not to mention the interests of the rest of Canada, which would be profoundly affected by secession²⁴⁰.
- On a comparative note, it is interesting to see that, the Spanish Constitution Court, when faced with a similar situation with regard to Spain and Cataluña (see above), followed the same line of argument the Canadian Constitutional Court had employed 17 years earlier.

6.2 Australia

The Australian federal system is largely influenced by the US Constitution²⁴¹. The Australian Constitution established the supremacy of the laws of the Commonwealth in the following terms:

Section 109 – Inconsistency of laws

*When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*²⁴²

At a federal level, the principle of the Rule of Law transfers responsibility for interpreting that legislation and assessing whether it is within the guidelines established by the Constitution ultimately to the High Court²⁴³. The Australian federal system does not provide for any other of the safeguards of a well-fortified democracy. Executive action dominates the field in this respect²⁴⁴. Nevertheless, the Australian High Court found in one of its landmark cases concerning the ban of the Communist Party that the Commonwealth

had an implied legislative power to protect itself from ‘subversion’²⁴⁵. At the same time, the legislator could not simply dissolve the Communist Party, against which the executive action had been directed, before it had been declared guilty of subversion by the courts²⁴⁶.

6.3 Switzerland

The Swiss Constitution (CHC) contains in its Article 5 para. 1 a direct reference to the Rule of Law: *“All activities of the state are based on and limited by law.”* With regard to homogeneity Article 46, the CHC obliges the Swiss cantons to implement federal law in accordance with the Federal Constitution and federal legislation. Article 49 CHC contains in para.1(a) a classic supremacy clause while para. 2 empowers the Confederation to ensure that the cantons comply with federal law.

Cantonal constitutions must be democratic and fall in line with federal law. The Confederation guarantees respect for both requirements (Article 51 paras. 1 and 2 CHC). Institutionally, the power to take measures to enforce federal law is vested in the Federal Assembly (Article 173 para. 1 (e) CHC).

C. Conclusions

We have seen in this section that many federal systems provide for homogeneity clauses with regard to Democracy, Human Rights and the Rule of Law. At the same time, the requirements for ‘federal intervention’ used in federal constitutions such as those in Italy or in Spain (*‘Seriously prejudicing’, ‘grave violations’*) are no more precise than the ones used in Article 7 TEU. A certain vagueness of the terms seems to be inherent in cases of grave constitutional crisis. Criticism of this aspect of Article 7 TEU could also, therefore, be voiced against several federal constitutions.

Commentators on most of the relevant provisions also agree that triggering the enforcement mechanisms provided by national constitutions is largely a political decision. In federal systems, with the exception of the US, such a decision has not been taken. This proves that on the national level such measures are the ‘ultima ratio’ for ensuring homogeneity. Federal systems are very cautious not to create ‘false positives’; therefore they prefer generally to solve problematic situations

concerning their fundamental values in informal ways. In case they opt for enforcement, the case of Governor Wallace shows that they must be ready to go the whole way, meaning until the threat or even the use of force – an option which the European Union obviously does not have at its disposal. This finding pleads in favour of a very cautious approach also on the level of the European Union.

III. HOMOGENEITY CLAUSES AND THEIR ENFORCEMENT IN INTERNATIONAL ORGANISATIONS

A. Introduction

Regional international organisations provide for homogeneity clauses for similar reasons as federal systems. A minimum degree of homogeneity is essential for the proper functioning and even for the very existence of a multi-level system be it on a national or international level²⁴⁷.

In the post-war period, many states had drawn conclusions from the lessons taught by the bad experiences of the inter-war period and became ‘Militant Democracies’. In many cases, in particular in new democracies in Latin America, similar strategies were followed at the level of regional international organisations. *Ratione temporis*, these events took place in particular after the fall of the Wall, “when democracy and integration intertwined”²⁴⁸.

Almost at the same time, a homogeneity clause was discussed at the European level. This phenomenon is generally understood as expressing a certain level of distrust of the ‘new democracies’ which had formerly been behind the Iron Curtain. It should not be forgotten, however, that these events also coincided with granting the Federal Republic of Germany its full sovereignty. In the ‘Two-Plus-Four-Treaty’ ending formally the prerogatives of the allied forces over Germany in 1990, the Allies underlined the importance of Germany’s integration into the European Union²⁴⁹. Establishing

safety mechanisms in the European Treaties can, therefore, as well be understood as an attempt to cement newly sovereign Germany’s attachment to the fundamental values. On a general scale it would be arrogant and complacent to speak about a completely stable democracy²⁵⁰.

The end of the Cold War also had an important impact on the rise of liberal democracies in Latin America²⁵¹ and of the democratic process in Africa²⁵². It was described as a “second independence”²⁵³. The fall of the military regimes in the 1980s and the end of the Cold War were decisive events in the establishment of a better protection for democracy²⁵⁴. Possible attacks on liberal democracy show similar features. In Latin America and Central and Eastern Europe (for examples, see below in the Third Part) governments attempt to control the media. In both regions, certain governments have developed policies aiming at strengthening the communication hegemony of the executive²⁵⁵.

The examples of Latin America are therefore useful in order to analyse the gap between public discourse and policies on the ground²⁵⁶ which can also be found in Member States of the EU. In Latin America and in some Central and Eastern European countries media polarisation has led to situations where new elites have replaced a traditional private hegemony with a public one and tried to impose their points of view on the public whilst pretending to defend the democratic will of the people²⁵⁷. In terms of the rhetoric used, parallels are abundant, especially in their common appeals to emotions rather than to rational reasoning. The result might be considered, in the terms Loewenstein used already in 1937 (see above in this Part) ‘*a superseding of constitutional government by emotional government*’. Constitutional government signifies the Rule of Law, which guarantees rationality and calculability of administration²⁵⁸. Emotionalising political discourse via the media can easily be used for anti-democratic purposes²⁵⁹. It offers easy solutions by dividing the world between ‘friend and foe’ as exemplified by Carl Schmitt with the horrendous consequences described earlier (see part II above). According to some studies, leftist governments²⁶⁰ and more right wing governments for example in Hungary and in Poland²⁶¹ employ similar bipolar rhetoric.

Another important parallel between ‘new democracies’ in Latin America and Central and Eastern Europe merit special attention: in both regions the executive ‘cracks down on non-compliant judges’²⁶². Such activities by the executive, be it in the form of polemic criticism of judgments, personal attacks on judges²⁶³ or replacement of ‘non-complacent’ judges, is an important indicator of a governments true respect for the Rule of Law²⁶⁴ or, respectively, the lack of it.

With regard to constitutional policy, some Latin American constitutions contain far-reaching social, cultural and economic rights. These constitutional stipulations have a considerable influence on constitutional stability and, in the end, on the Rule of Law. Different governments pursue different objectives in this respect. Therefore, legal reformism also captures the constitution and leads to a politicisation of constitutionalism²⁶⁵. In Hungary, the constitution was also used as an ‘instrument of Everyday Party Politics’²⁶⁶, whilst in Poland, the change in government led to a flurry of amendments to constitutionally relevant laws²⁶⁷.

These approaches contrast sharply with the modern or Kantian understanding of democracy. Democracy in the broadest sense is more and more understood to be a ‘global good’ which should be protected by international organisations²⁶⁸. In this way it will be possible to counter national anti-democratic tendencies²⁶⁹. Such a tendency grew particularly strong in the last decade of the 20th century²⁷⁰ with *von Bogdandy* observing that “*sovereignty used to be like one house alone on a big plot, nowadays it is the ownership of an apartment in a building with 200 units.*”²⁷¹ Regarded from the perspective of evolution theory it is a very recent phenomenon²⁷².

B. Regional International Organisations

1. The Council of Europe

Introduction

The Council of Europe is of particular importance for the understanding of the system of the European Union²⁷³. With the exception of the Federal Republic

of Germany, all founding members of the European Economic Community were founding members of the Council of Europe²⁷⁴. Currently all members of the European Union are equally members of the Council of Europe.

The Council (of the European Union) underlined that “*the Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe*”²⁷⁵ and referred to the 2007 Memorandum of Understanding between the European Union and the Council of Europe²⁷⁶.

In its Rule of Law Framework Communication of 2014²⁷⁷, as well as in the first case of its application regarding Poland²⁷⁸, the Commission has underlined the importance of the Council of Europe’s Venice Commission for the evaluation of a possible violation of the Rule of Law as well as for the definition of the elements of the Rule of Law under the EU-Treaties²⁷⁹. Also the academic literature pleads in favour of using the Venice Commission’s experience²⁸⁰. Therefore, the relevant provisions of the Statute of the Council of Europe are of particular importance for the understanding of Articles 2 and 7 TEU.

Homogeneity clause

The Statute of the Council of Europe (StCoE) is an example of decoupling democracy and Rule of Law. The principle of democracy is mentioned in its preamble. The article on ‘homogeneity’, Article 3 StCoE refers expressly only to the Rule of Law and to human rights and fundamental liberties. The relevant provisions of the Statute of the Council of Europe read as follows²⁸¹:

“Preamble:

(...)

Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy;

(...)

Chapter I – Aim of the Council of Europe

Article 1

The aim of the Council of Europe is to achieve a greater unity between its members for the

purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

(...)

Article 3:

Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

The Council of Europe follows a substantial concept of the Rule of Law. It considers the Rule of Law as a ‘fundamental ingredient of any democratic society’²⁸².

Enforcement

Similar to Article 7 TEU, the Council of Europe mechanism has been criticised as not being effective due to its radical character and ‘questionable usefulness’ in the protection of human rights²⁸³. In case of serious violations of the principles of Article 3 StCoE, sanctions are provided for by Article 8.

Article 8

Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine. (Emphasis added)

This article, regarding possible suspension in the case of serious violation of principles, does not refer explicitly to democracy, whereas the preamble establishes a direct link between fundamental rights, the Rule of Law and ‘genuine’ democracy²⁸⁴.

Similar to the system provided for by Article 7 TEU, only ‘serious’ violations can trigger the application of sanctions. The Member State concerned can be excluded from the Council of Europe if it does not follow up on the request to exit on its own initiative.

According to Article 20(d) StCoE, such a decision requires a double majority: 2/3 of votes cast and a simple majority of those members who have the right to vote. The majority requirements are therefore considerably lower than in the case of Article 7 TEU.

Examples

As of mid-March 2016 this procedure has only been used twice. When Greece was ruled by the ‘Colonels’, the Council of Europe threatened to expel her, but Greece withdrew from the Council of Europe before the threat could materialize²⁸⁵. Then, the Parliamentary Assembly of the Council of Europe (PACE) excluded the members of the Russian Federation after the annexation of the Crimea and in light of Russia’s role in the conflict in Ukraine. The assembly condemned the 2014 Russian military intervention in Ukraine and voted to suspend *inter alia* the Russian delegation’s voting rights in the Council of Europe’s Parliamentary Assembly from 10 April 2014 onwards. The suspension of Russia has so far been limited to PACE activities, and does not affect the Russian delegation in the second statutory political body of the Council of Europe, the Committee of Ministers. On 4 June 2014, Russia suspended its cooperation with PACE since its delegates had been deprived of voting rights in the aftermath of the Ukrainian conflict. On 28 January 2015 PACE decided to renew the suspension of the Russian delegation’s voting rights and its right to be represented in the Assembly’s leading bodies. By this, it understood such sanctions to be “a clear expression of condemnation of continuing grave violations of international law in respect of Ukraine” by Russia.²⁸⁶ It follows from the resolution of 24 June 2015²⁸⁷ that the Russian delegation maintained its decision to suspend all official contacts with the Assembly until the end of 2015.

Evaluation

A definite exclusion of a member of the Council of Europe is understood as a ‘self-cleansing’ exercise²⁸⁸. Such exclusion in extreme circumstances has the advantage that the Council of Europe maintains its credibility. However, exclusion from membership in the organisation has the undesirable effect that the Council of Europe loses the power to influence the course of a ‘recalcitrant’ Member State. Some authors

plead in favour of integrating a similar clause into the TEU²⁸⁹.

Considering the more far-reaching objectives of the European Union, its understanding as a 'Union of Law' of supranational character and the far-reaching consequences for the citizens of the Member State concerned, the exclusion of a Member State from the European Union would have more serious immediate effects for the Member State concerned and its citizens than its exclusion from the Council of Europe. Additionally it would amount to a capitulation to the actions of a 'recalcitrant state'.

In the system of the Council of Europe concerns the European Court of Human Rights' (ECtHR) possibility to issue a 'pilot-judgment'. It can do so in situations where the ECtHR receives a significant number of applications based on the same root cause²⁹⁰. It gives the ECtHR the possibility to choose one 'model case' and address concrete suggestions to the Member State on how to remedy the problem. Some authors would favour such a procedure also for the European Court of Justice²⁹¹. As the law currently stands, the infringement procedure under Articles 258 to 260 TFEU does not provide for such a possibility. The ECJ can merely state that a Member State has failed to fulfil an obligation under the Treaties (see the wording of Article 260(1) TFEU). We shall see below in the Third Part, whether there are options which could enable the ECJ to take a more 'constructive' as opposed to merely 'reactive' part in the discussion of the protection of the Rule of Law in the European Union.

2. Regional international organisations in the Americas and in Africa

2.1 Introduction

Regional organisations in the Americas are founded on three fundamental principles: Fundamental Rights, the Rule of Law and Democracy²⁹². One of their main characteristics is that they fight exclusion²⁹³. In the last three decades, governments that normally jealously guard their sovereignty have agreed to such measures for the protection of democracy²⁹⁴. Some recent studies have explained the reason for this paradox. One is that democracy is conceived as a 'global good'²⁹⁵ and the other that governments want to ensure that this

development becomes more difficult to alter²⁹⁶. Those mechanism are intended to impede the overturning of democracy²⁹⁷. It is interesting to note that the likelihood that regional organisations will provide for such protection increases in line with its degree of complexity²⁹⁸.

The large majority of regional international organisations in Africa, Latin-American and Asia are intergovernmental. A 'recalcitrant' government can therefore exercise its right to veto and block a decision which it considers unfavourable²⁹⁹. Such veto-rights coupled with unclear definitions and procedures in addition to a high level of discretion hamper the efficiency of any measures to protect democracy. This is valid in particular for the protection of human rights³⁰⁰.

2.2 Overview of some Latin-American regional international organisations

The existing mechanisms for ensuring homogeneity in Latin-American regional international organisations have recently been described in an exhaustive study (in Spanish) by *Carlos Closa, Palestini and Ortiz*³⁰¹ and a contribution by Carlos Closa to a collective work on the enforcement on EU law and values³⁰². Therefore a short summary of their findings can suffice in this context.

Some of the instruments in question provide for sanctions such as the treaty on the Andean Community (Article 4) and UNASUR (Article 4). In the case of MERCOSUR, the Ushuaia Protocol itself does not include sanctions. Only the Montevideo Protocol (Ushuaia II) allows for the suspension of membership rights (Article 6), the power to request those sanctions lying with the 'constitutional government' (Articles 4 and 5 Ushuaia II).

One feature is common to all the mechanisms discussed in this section: they all provide for a pivotal role played by the other Member States of the organisation in question³⁰³. In some organisations, such as the Community of Latin American and Caribbean States (CELAC)³⁰⁴ and the Caribbean Community (CARICOM)³⁰⁵, only the affected Member State itself can trigger the monitoring mechanism³⁰⁶.

2.3 Organization of American States (OAS)

In 1985, the Protocol of Cartagena de Indias integrated the obligation to protect and consolidate democracy in the OAS. In the 1990s, this process was strengthened by establishing the possibility of a meeting of the Permanent Council in the case of any threat to democracy within one of the OAS Member States. A sanction mechanism, introduced in 1992, entered into force in 1997, providing for the suspension of the rights of any Member whose democratic government had been put out of office in an unconstitutional manner. The last instrument to be employed in this context was the Democratic Inter-American Charter of 2001³⁰⁷.

It is interesting to note that a large number of regional organisations, as in the case of the European Union, did not have protection mechanisms included in their founding acts. On the contrary, they were often added later by means of additional protocols or similar documents³⁰⁸. One of these protocols added to the MERCOSUR Treaty, Ushuaia II, of 20 December 2011³⁰⁹ mentions democracy with the Rule of Law but is still to be ratified³¹⁰. Another interesting difference between the Latin American Organisations and the European Union is that in contrast to the European Union,³¹¹ not all Latin-American regional organisations formally contain a clause excluding non-democratic states from membership³¹².

Many of the regional organisations treaties in Latin America contain a link between democracy and the Rule of Law³¹³. Often, however, the definitions are vague. The Inter-American Democratic Charter signed in Lima on September 11, 2001 contains a relatively precise definition of the concepts of democracy, Rule of Law and fundamental rights:

Article 2

The effective exercise of representative democracy is the basis for the Rule of Law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.

Article 3

Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.³¹⁴

It also provides for a sanctioning mechanism:

Article 20

In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.

The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy.

If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter. The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.

Article 21

When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state

from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The suspension shall take effect immediately.

The suspended member state shall continue to fulfil its obligations to the Organization, in particular its human rights obligations.

Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.³¹⁵

Procedurally it is interesting to note that, contrary to the other systems described above, (a) the Secretary General can initialise the procedure and (b) that the quorum for a suspension vote (2/3) is far lower than in Article 7 TEU (unanimity for stating a serious and persistent breach and a qualified majority for the sanctions). Both provisions seem to facilitate the use of the mechanism. On the other hand, the suspension can only be used when diplomatic initiatives were not successful. It is, therefore, the *ultima ratio*. This instrument has been widely criticized for being inefficient and underused³¹⁶.

2.4 Conclusions

With regard to the typology of sanctions, the majority of organisations allow diplomatic sanctions and the suspension of membership rights, while some permit economic sanctions.³¹⁷ One of the common elements in the triggering of such sanction mechanisms is that the Heads of Government enjoy a high level of discretion³¹⁸. This is certainly one of the reasons for the scarcity if not complete absence of any practice in this regard. It might also explain why 'democratic backsliding' often meets a passive non-critical reaction which diminishes the quality and seriousness of the implementation of the fundamental values³¹⁹.

3. The Organisation of African Unity (OAU)

Homogeneity clause

In its constitutive act, the Organisation of African Unity (CAOAU) underlines the importance it attaches to democracy, the protection of human rights and the

Rule of Law³²⁰. Even in its preamble, the Heads of State of the African countries express their determination "to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the Rule of Law (...)". Article 4 mentions under point (m) "respect for democratic principles, human rights, the Rule of Law and good governance;" as some of the principles on which the OAU is based.

On 30 January 2007, the OAU reinforced its commitment to those principles by adopting the African Charter on Democracy, Elections and Governance (ACDEG)³²¹, whose objectives are defined in Article 2 ACDEG:

1. Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights;
2. Promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties.

State Parties are obliged to implement the ACDEG in accordance with the principles of respect for human rights, democracy and the Rule of Law (Article 3 ACDEG).

Implementation

Under Article 23 of the CAOAU, the Assembly of the OAU shall determine sanctions in case of non-respect for the decisions and policies of the Organisation. The article does not contain a closed array of sanctions but rather mentions examples such as "denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly".

Article 46 of the ACDEG empowers the Assembly and the Peace and Security Council of the African Union to determine "the appropriate measures in case of violation" of the ACDEG. Under Article 52 of the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR), non-respect for judgments by the ACJHR can trigger such sanctions³²². Following an application by one of the parties, the ACJHR may refer the non-compliant party to the Assembly which, in

turn, may decide on sanctions. This Protocol has not entered into force yet³²³.

Suspension of members is foreseen in case of governments coming to power 'through unconstitutional means' (Art. 30 CAOAU). The OAU has indeed suspended several members following *coups d'états*³²⁴. In cases where, under the umbrella of a semblance of formal legality, formerly legitimate governments have used doubtful means to prolong their stay in power, the OAU has, however, been largely inactive³²⁵. As with the Latin American systems, we observe here that the CAOAU does not seem to sanction legitimate governments when they engage in formally legitimate activities against the fundamental principles of the OAU.

Besides 'hard' implementation measures, such as suspension of members, the OAU also provides for 'soft' compliance and monitoring procedures. In 2002, the Assembly of Heads of State and Government of the OAU adopted the New Partnership for Africa's Development (NEPAD) obliging State Parties to promote and deepen democratic governance (Article 36)³²⁶. For this purpose, the NEPAD establishes *inter alia* an African Peer Review Mechanism (APRM) based on voluntary accession. The APRM aims to enforce strict adherence to the position of the African Union (AU) on unconstitutional changes of government and on other decisions of African organization aimed at promoting democracy, good governance, peace and security³²⁷. Here we find an interesting mechanism defending the status quo, defending Member States' sovereignty³²⁸ which contrasts the objectives of Article 7 TEU.

Three of the APRM's central objectives are identical to the values protected by Article 2 TEU: democracy, the Rule of Law and the protection of fundamental rights³²⁹. The APRM performs peer reviews based on mutually agreed codes and standards of democracy, as well as political, economic and corporate governance. Additionally, Article 49 ACDEG obliges the State Parties to present a report every two years on the legislative or other relevant measures taken in order to give effect to the principles and commitments of the Charter.

Experience

The practical experience with the suspension clause starts in the early 2000s. Since then the OAU has been very active. Its sanctions have influenced similar actions by regional African organisations³³⁰.

Evaluation

With regard to their substance, the principles and values defended by the OAU are largely identical to the ones of the TEU. With regard to the mechanisms for implementation, the reporting and peer review provided for could serve as a basis for discussion on alternative 'soft' mechanisms within the EU (see below Third Part). On the other hand, these mechanisms are largely triggered by the governments concerned and not by supranational independent institutions, which limits their scope compared to the one of Article 7 TEU. This difference might also explain procedural flaws and predominantly political considerations in the deployment of sanctions observed by some commentators³³¹.

4. Economic Community of Western African States (ECOWAS)

In 2001 the ECOWAS adopted a Protocol on Democracy and Good Governance³³². The Protocol on Democracy and Good Governance appears to be an attempt at strengthening human security, political institutions and practices, human right norms, rule of law and socio-economic policies in the Member States. Article 45 provides for sanctions. The most severe measures being the suspension of the Member State concerned from all ECOWAS decision-making bodies. They can be triggered either by an 'abrupt end of democracy' or massive violations of fundamental rights in a Member State. The relation between these provisions and the constitutional requirements of some of the Member States is considered problematic, given the lack of supra-national character of ECOWAS³³³.

5. South African Development Community (SADC)

Some cases provide rather sad examples of non-respect for the Rule of Law. One of these concerns the Tribunal of the SADC. In its preamble and its sections on principles (Article 4 SADC Charter), the SADC

expressly guarantees Human Rights and the Rule of Law³³⁴. Article 6 SADC Charter, similar to Article 4(3) TEU, obliges Member States to take measures to promote achievement of those principles and to refrain from measures jeopardising them³³⁵. Article 33 SADC Charter empowers the Summit of the SADC to apply sanctions on Member States that persistently fail to fulfil obligations under the SADC or that implement policies which undermine its objectives.

Unfortunately these provisions proved to be dead letters when the SADC Tribunal rendered a judgment in a case concerning land reform in Zimbabwe³³⁶. The Tribunal has been defunct since³³⁷; due to the influence of the Mugabe regime it has been suspended³³⁸. The SADC did not intervene against the Mugabe regime, notwithstanding the obvious disrespect for the judgement of the Tribunal's authority. We are therefore faced with an obvious failure to ensure the Rule of Law, at least according to the traditional European understanding³³⁹ in its most basic form. Some authors put this failure down to the historic character of the SADC as an association based on friendly cooperation and that, in the African context, litigation is at times understood as an alien way of resolving disputes, leading finally to a breakdown in relations³⁴⁰. Others see in it a clash between the ex-colonial and the post-colonial powers dominating southern Africa³⁴¹. A third opinion relates the failing of the Court to a precipitated emulation of an EU style judiciary which was at odds the SADC member states' desire to 'retain a more sovereignty-preserving institution'³⁴². Whatever the reasoning, the case of the SADC tribunal is a clear example that the mere existence of sanction mechanisms is not enough to ensure efficient protection of the Rule of Law.

C. Global International Organisations (sensu largo)

1. The United Nations

In the 2005 Outcome Document of the World Summit all Members States of the United Nations committed themselves "to actively protecting and promoting all human rights, the rule of law and democracy"³⁴³.

One of the characteristics of the UN system is that it

allows for enforcement measures in case of threat to international peace and security (Chapter VII)³⁴⁴. Those measures are specific to the UN and, therefore, do not appear relevant for the research on the system established under the EU Treaties.

More relevant provisions for the purposes of the present research are found in the first part of the UN Charter. According to Article 5 of the UN Charter³⁴⁵ a member against which preventive enforcement action has been taken might be suspended by the General Assembly following a recommendation from the Security Council. The idea behind this provision is to discipline a Member State which threatens or violates international peace and security or, more directly, committed an act of aggression³⁴⁶. *Kelsen* considered it a more valuable sanction than exclusion (see *infra*)³⁴⁷. Its role in practice has been limited due to the strict procedural requirements³⁴⁸.

As with Article 7 TEU the core elements are clear only the penumbral meaning is more doubtful³⁴⁹. Similar to the procedure foreseen in Article 7 TEU it requires unanimity in the Security Council. The General Assembly has to vote with a two-thirds majority³⁵⁰. The intention behind the high procedural threshold was to mirror the seriousness of the procedure but in practice the need to pass the Security Council twice has proven to render the application of the suspension clause close to impossible³⁵¹. Up to 2003 no member state has ever been suspended on this basis³⁵². Instead the UN has chosen a more pragmatic approach. It has refused the credentials of Members. They were effectively prevented from any participation in the activities of the General Assembly without having to apply the heavy procedure of Article 5 UN Charter³⁵³.

Article 6 UN Charter provides, contrary to the provisions in the TEU, for the possibility of expelling a member of the UN. The expulsion of a UN member requires a 'persistent violation' of the principles contained in the Charter. The General Assembly is competent for the expulsion and acts after recommendation of the Security Council. The possibility of expulsion needs to be put in the context of the typical UN system. According to this system, the Security Council can decide enforcement actions under Chapter VI of the Charter with a view to preserving international peace

and security. The latter has been found to be a more suitable tool for ensuring respect of the principles of the UN Charter³⁵⁴.

It is disputed whether the possibility of expulsion helps to achieve the goals of the UN Charter. On one hand expulsion might lead to a situation where a procedural deadlock can be overcome and it is a deterrent for potential 'recalcitrant' members. It has, on the other hand, a number of serious shortcomings: the 'recalcitrant' state can no longer be disciplined and expulsion runs counter to the objective of the UN to achieve universal membership³⁵⁵. *Kelsen* does not consider expulsion an adequate tool if it merely rids the member of its obligations³⁵⁶. It may be doubtful whether expulsion from an organization whose purpose is the maintenance of peace is an adequate sanction at all. This is certainly not the case, if by expulsion the member gets rid of the obligations which it has violated and thus has shown that it considers these obligations as an unwelcome burden. I share the evaluation of Tams, who argues that membership of the UN without any respect for its founding principles would, in the end, undermine the credibility of the UN itself and render it rather useless. Therefore the expulsion should be used only as a last resort³⁵⁷.

For the purposes of the present research there is no need to go into the details of the discussions on the usefulness of Article of the 6 UN Charter. A mere glance at its wording shows that a) the terms used 'persistently violated' and 'the principles of the UN Charter' (without specifying which) and b) the procedural requirements (no veto by any of the Security Council members and two thirds majority in the General Assembly³⁵⁸ make expulsion of a member close to impossible, although there have been cases of persistent violation³⁵⁹. Instead, the UN used its powers under Chapter VII³⁶⁰. In general, expulsion clauses have not proven effective³⁶¹.

Zimbabwe has been sanctioned under the Commonwealth³⁶². This expulsion shows that such a sanction does not improve the situation in the Member State concerned. They rather lead to a complete lack of monitoring in the 'recalcitrant' State and can have disastrous consequences³⁶³.

In the end the expulsion clause is unlikely to be ever applied and leads to a lack of legal certainty since the

practice concerning non-compliant Member States has followed a more pragmatic approach³⁶⁴.

2. *The Commonwealth of Nations*

I shall conclude this chapter by briefly examining the practice of the Commonwealth of Nations with regards to the homogeneity of its members and its enforcement thereof (suspension or exclusion). The Commonwealth of Nations is not an international organisation in the traditional sense but rather a voluntary association of states bringing together 54 developing and developed nations from six continents³⁶⁵. The Commonwealth Charter underlines the sovereign character of the Commonwealth's members, who are responsible for their own policies³⁶⁶. Its goal is to influence international society to the benefit of all through the pursuit of common principles and values by means of consultation and co-operation.

Despite fundamental differences with the EU, which is a much more closely knit organization, the Commonwealth's practice can give some insights into the consequences of suspension of membership for violations of said 'homogeneity clauses'.

Homogeneity clauses

The 1991 Commonwealth Heads of Government Meeting (CHOGM) in Harare reaffirmed its member states' commitment to protecting and promoting the "fundamental political values of the Commonwealth":

9. (...) *democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;*
 - *fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;*
 - *equality for women, so that they may exercise their full and equal rights;*³⁶⁷

In the Charter of 2013 they went on to confirm this commitment, mentioning the Rule of Law as an essential element for the progress and prosperity of all³⁶⁸. The effective separation of powers between the Legislature, Executive and Judiciary guarantees the "rule of law,

*the promotion and protection of fundamental human rights and adherence to good governance.*³⁶⁹. The Rule of Law is considered to be essential protection for the people and an assurance of limited and accountable government. Particular emphasis is also put on an independent and impartial judiciary³⁷⁰. In addition, the Rule of Law plays a crucial role for the promotion of good governance³⁷¹.

The content of those values is largely identical to the ones on which the European Union is based, according to its Article 2 TEU. At the same time the Harare Declaration states explicitly that those are fundamental 'political' values which raises the question as to their legal value. Taking into consideration the character of the Commonwealth of Nations as a loose association of states with no supranational character, this statement comes as no real surprise. At the same time, as we shall see in the following section, it is one of the few international mechanisms that has gained experience with enforcement mechanisms of homogeneity clauses.

Enforcement mechanism

In 1995, Commonwealth Heads of Government adopted the Millbrook Commonwealth Action Programme on the Harare Declaration in order to "*fulfil more effectively the commitments contained in the Harare Commonwealth Declaration*"³⁷². In order to monitor respect for those values, the Millbrook Commonwealth Action Programme created *inter alia* a Ministerial Action Group to "*deal with persistent or serious violations of the Commonwealth's shared principles*"³⁷³. It is interesting to note that its substantial requirements are also similar to the ones we find in Article 7 TEU, i.e. persistent or serious violations.

The Group is composed of foreign ministers who assess infringements of the Commonwealth's political values in its member states, and who recommend action to be taken as a result. Its task is to assess the nature of infringements and recommend measures for collective Commonwealth action with a view to restoring democracy and constitutional rule. For this purpose, the Group can suspend a country or even recommend its expulsion from the Commonwealth³⁷⁴.

Practice of suspension or expulsion

Between 1995 and 2000, the Commonwealth has suspended Nigeria, Fiji and Pakistan from the benefits of full membership, either following military coups and/or serious breaches of the association's fundamental principles³⁷⁵. Since its establishment, the Commonwealth Ministerial Action Group (CHOGM) has suspended member states eight times. All suspended countries (except Zimbabwe, which opted to leave the Commonwealth in December 2003, following the CHOGM Statement on Zimbabwe) were returned to full membership following the restoration of democracy³⁷⁶. On 3 October 2013, the Government of Gambia withdrew from the Commonwealth.

The Commonwealth itself places special emphasis on successful prevention and deterrence. It thus evaluates the work of the CHOGM very positively. Indeed, its authority to suspend member governments goes beyond the experience of other intergovernmental organizations³⁷⁷.

Zimbabwe has been sanctioned under the Commonwealth³⁷⁸. This expulsion shows that such a sanction does not improve the situation in the Member State concerned. They rather lead to a complete lack of monitoring in the 'recalcitrant' State and can have disastrous consequences³⁷⁹.

Evaluation and lessons learned

Comparing the case of the Commonwealth of Nations with the Council of Europe, it is striking that Zimbabwe followed a similar approach to Greece in the 1980s when it decided to leave the Council of Europe rather than be excluded (see above in this Part). On the other hand, this experience shows that the existence of a sanctioning mechanism seems to work relatively well in the large majority of cases. Only when confronted with extreme 'recalcitrant' situations such as in Greece under the colonels and in Zimbabwe under President Mugabe, those international mechanisms reach their limits.

IV. CONCLUSIONS

In most of the regional international systems the concept of the Rule of Law is a substantial one. It is understood as being either a pre-condition for or a necessary element of true democracy and the protection of Human Rights. Regional international organisations play an important role in the definition and the protection of democracy and human rights³⁸⁰.

Our brief overview also confirms the findings of the Venice Commission that legal provisions on the Rule of Law at national and at international level are general in character and do not contain detailed definitions³⁸¹.

A common element among the clauses providing for the protection of fundamental values in both Latin American and European international organisations is a certain element of discretion in their application. A distinction, however, can be drawn between the objects of these clauses: whereas in the Latin American and in the African contexts, they are largely if not exclusively directed inwards, that is, towards a ‘non-constitutional’ government, in the Council of Europe and the European Union they can act against the government. On the basis of their historical experiences, the relevant Latin American and African mechanisms refer more to *coup d'état*-like situations. Even in cases where interventions happen, a structural bias in favour of the incumbent’s position in the conflict can be observed³⁸².

To the contrary, the European mechanisms based on the specific European experience of the 20th century (see II above) focus rather on violations of the fundamental values by the formally ‘legitimate’ government itself, thus trying to safeguard government ‘for the people’ against a formally constitutional government.

With regard to the practical experience with the enforcement mechanisms this section has shown that practice is relatively scarce. Only in a relatively loosely knit cooperation mechanism such as the Commonwealth, the experience of suspension is more widespread. This can be explained by the nature of the association. The less serious the consequences for the Member State suffering suspension, the easier the application of the sanction. This finding can, in the end, be understood as an expression of a certain proportionality aspect of enforcement mechanisms

against recalcitrant Members of an international organisation in the broad, non-technical sense. With regard to the conclusion to be drawn for the European Union it is, on the other hand, obvious that the high degree of integration pleads in favour of a rather prudent approach.

Based on the experience in federal systems, we can reasonably rebut the ‘unjustified negative feedback loop’³⁸³ pertaining to the alleged lack of activity by the European Union in relation to threats to the Rule of Law in Member States. Such unmotivated and disproportionate blame of the European Union’s institutions merely adds unnecessarily to what one author rightly called an “unfair and inaccurate narrative of institutional paralysis, policy failure and cynical *realpolitik*”³⁸⁴. In the end, it only favours ‘Westphalian’ sovereignty discourses by putting coal on the fire of populist Euroscepticism instead of allowing for an open and rational discourse about the protection of fundamental values which takes into consideration the legal, historical, institutional and political framework the European Union has to respect.

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- 53 Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum ,Rechtsstaatsmechanismus der Europäischen Kommission, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG*, 499-543 (Christian Calliess ed., 2015).
- 54 Antonio Arroyo Gil, *Lealtad federal y coerción federal*, EL PAIS (10 September 2014) http://elpais.com/elpais/2014/09/04/opinion/1409831275_944297.html
- 55 Christopher May, *THE RULE OF LAW, THE COMMON SENSE OF GLOBAL POLITICS* (2014) at 162ss.
- 56 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 847-877 (3d ed. 2014) at 861.
- 57 Antonio Arroyo Gil in El Pais of 10 September 2014 http://elpais.com/elpais/2014/09/04/opinion/1409831275_944297.html
- 58 Roland Bieber & Francesco Maiani, *Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?* 51 CMLR 1057-1092 (2014) at 1061 with examples; see also Antonio Arroyo Gil, *Lealtad federal y coerción federal*, EL PAIS (10 September 2014) http://elpais.com/elpais/2014/09/04/opinion/1409831275_944297.html
- 59 For more details see Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming).
- 60 Jürgen Habermas, *THE LURE OF TECHNOCRACY* (2015) at IX speaks about 'unfavourable circumstances'.
- 61 Christiaan Timmermans, *How to Define the European Union*, in *DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION*, ESSAYS IN HONOUR OF JAAP W. DE ZWAAN, 81-90 (Flora Goudappel & Hirsch Ballin, eds., 2016) at 88.
- 62 Christiaan Timmermans, *How to Define the European Union*, in *DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION*, ESSAYS IN HONOUR OF JAAP W. DE ZWAAN, 81-90 (Flora Goudappel & Hirsch Ballin, eds., 2016) at 86.
- 63 Johanne Poirier & Cheryl Saunders, *Comparing Intergovernmental Relations in Federal Systems: An Introduction*, in *INTERGOVERNMENTAL RELATIONS IN FEDERAL SYSTEMS: COMPARATIVE STRUCTURES AND DYNAMICS* (Johanne Poirier et al. eds., 2015) at 3.
- 64 Ulrich Everling, *The European Union as a Federal Association of States and Citizens*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, 701-34 (Armin von Bogdandy ed., 2d ed., 2009) at 734.
- 65 Joseph H.H. Weiler, *The Transformation of Europe*, YALE L. J. (1991) at 2407.
- 66 See below, Third Part.
- 67 See below, Third Part.
- 68 Giuseppe Martinico & Anna Margherita Russo, *Is the European Union a Militant Democracy? The Perspective of the Court of Justice in Zambrano and Kadi*, 21 EUROPEAN PUB. L. 659-78 at 677s.
- 69 Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417-32 (1937) at 418; see also Giuseppe Martinico & Anna Margherita Russo, *Is the European Union a Militant Democracy? The Perspective of the Court of Justice in Zambrano and Kadi*, 21 EUROPEAN PUB. L. 659-78. (2015) at 659.

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- 77 Jan Komárek, *Waiting for the Existential Revolution in Europe*, 12 INT’L J. CONST. L. 190-212 (2014) at 194 with further references; Werner Heun, THE CONSTITUTION OF GERMANY: A CONTEXTUAL ANALYSIS (2011) at 18.
- 78 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 847-77 (3d ed. 2014) at 851.
- 79 Jean-Claude Juncker, President of the European Commission, *State of the Union 2015 Address* (9 September 2015) http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm
- 80 Alfonso Mattera, *L’Europe est née à Auschwitz. Mémoire et engagement pour ouvrir la voie de l’espérance vers un nouvel Humanisme*, REVUE DU MARCHÉ COMMUN ET DE L’UNION EUROPÉENNE 637-46 (2004).
- 81 See Nobel Prize winning economist Jean Tirole in an interview given to the EUI Times: Olivia Arigho-Stiles, *Europe Under a Common Roof*, EUI TIMES (17 June 2015) <https://times.eui.eu/europe-under-a-common-roof.html>.
- 82 “*Lo que a partir de ahí empieza es lo más importante: la educación de un pueblo cuya tentación crónica fue siempre la facilidad engañosa de la formulas dictatoriales o revolucionarias y que, si en algún momento pudiera desanimarse de la democracia, sería porque la hubiese recibido con el mismo talante mesiánico con que antes acogió a los ‘salvadores de la patria’ o las ‘revoluciones liberadoras’: coma a la panacea que va a dárnoslo todo, sin que tengamos que tomarnos otra molestia que aplaudir.*” José María García Escudero & María Asunción García Martínez, LA CONSTITUCIÓN DÍA A DÍA, LOS GRANDES TEMAS DE LA CONSTITUCIÓN DE 1978 EN EL DEBATE PARLAMENTARIO (1998) AT 204-05.
- 83 Sandra Day O’Connor, *The Rule of Law and Civic Education: Foreword*, 67 SMU L. REV. 693-835 (2014) at 695.
- 84 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 847-877 (3d ed. 2014) at 876.
- 85 Sandra Day O’Connor, *The Rule of Law and Civic Education: Foreword*, 67 SMU L. REV. 693-835 (2014) at 695.
- 86 Christiaan Timmermans, *How to Define the European Union*, in DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION, ESSAYS IN HONOUR OF JAAP W. DE ZWAAN, 81-90 (Flora Goudappel & Hirsch Ballin, eds., 2016) at 85 quoting *inter alia* Habermas.
- 87 Very instructive: Robert Menasse, DER EUROPÄISCHE LANDBOTE (2012) at 42.
- 88 For a more philosophical description on the way from where we are (*Istopia*) to where we want to be (*Eutopia*) which, according to the authors, leads through *Knowtopia* [according to me, *Learntopia* would be a better term], Philip Allott, EUTOPIA: NEW PHILOSOPHY AND NEW LAW FOR A TROUBLED WORLD (2016) at 289.

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- 90 Paolo Cossarini & Roberto García Alonso, *El papel de las emociones en la teoría democrática. Desafíos para un uso público de la razón en tiempos de populismo*, REVISTA DE ESTUDIOS POLÍTICOS, 291-315 (2015) at 311.
- 91 Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417-432 (1937) at 418.
- 92 See for instance, Jan-Werner Müller, *Militant Democracy*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, (Michel Rosenfeld & András Sajó, eds., 2012). at 1257 and Ofer Raban, *The Rationalization of Policy: On the Relation Between Democracy and the Rule of Law*, N.Y.U. J. LEGIS. & PUB. POL'Y (2015) at 50 & 66.
- 93 Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUROPEAN L. J. 141-60 (2015) at 145s.
- 94 Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum ,Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015) at 500.
- 95 Wojciech Sadurski, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence*, in THE AMERICAN EXCEPTIONALISM REVISITED, 79-107 (Marcello Fantoni & Leonardo Morlino, eds., 2015) at 83s & 98.
- 96 See below point 6.2 in this Part.
- 97 According to Article 34 of the Brazilian Constitution, the Federal State is entitled to intervene in the states or in the federal districts in order to provide for the enforcement of federal law and to ensure compliance with the constitutional principles of the Republic, the democratic regime and the rights of the human person http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf. According to the constitution of Brazil, the power to decree and enforce federal intervention is vested in the President of the Republic (Article 84 section X, http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf). The President can only act on the request of the institution which claims that its vested powers were encroached upon.
- 98 Under the Constitution of the Republic of India the (federal) President can take over the powers of the governor of any state if it has “*failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution*” (Sections 356 and 365 of the Constitution of 1949, http://india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf
- 99 European Commission for Democracy through Law (Venice Commission), Document CDL-AD(2016)001-e, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) at para. 101, fn. 25 and para. 135, fn. 33; both referring to the landmark case *Marbury v. Madison*, 5 U.S. 137 (1803) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e)
- 100 U.S. Const. art. VI; see also https://www.law.cornell.edu/wex/supremacy_clause
- 101 Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 55-110 (2005) at 60.
- 102 Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum ,Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015) at 500

- 103 Akhil Reed Amar, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012) at 30 with reference to *Washington v. US*, 460 US 536, 547 (1983).
- 104 Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015) at 500.
- 105 Harold H. Bruff, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* (2015) at 18ss.
- 106 Harold H. Bruff, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* (2015) at 3 & 457.
- 107 10 U.S. Code § 12406 - National Guard in Federal service: call “Whenever— (...) (3) the President is unable with the regular forces to execute the laws of the United States; the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws.”; see: <https://www.law.cornell.edu/uscode/text/10/12406>
- 108 For a list of historical examples, see CNN, National Guard Fast Facts (29 June 2016) <http://edition.cnn.com/2013/08/09/us/national-guard-fast-facts/>.
- 109 The American Presidency Project, Website, John F. Kennedy <http://www.presidency.ucsb.edu/ws/?pid=9270>.
- 110 *Lucy v. Adams*, 350 U.S. 1 (1955).
- 111 The scene has been immortalized by the movie *Forest Gump*. <https://www.youtube.com/watch?v=eluXKOqxM28>
- 112 According to Ian Kershaw no other failure of democracy has attracted remotely the attention paid to the collapse of the Weimar Republic: Ian Kershaw, *Introduction: Perspectives of Weimar's Failure*, in: *WEIMAR: WHY DID GERMAN DEMOCRACY FAIL?* 1 (Ian Kershaw, ed., 1990) at 1.
- 113 Joahim Lampe & Sigrid Hegmann, *MÜNCHENER KOMMENTAR ZUM STGB* [Munich Commentary of the Criminal Code], (2d ed. 2012) at preliminary remarks, para. 2.
- 114 For an English version see: Facing History and Ourselves, *Excerpts from the Weimar Constitution*, <https://www.facinghistory.org/weimar-republic-fragility-democracy/politics/weimar-constitution-excerpts-politics-general>
- 115 Joahim Lampe & Sigrid Hegmann, *MÜNCHENER KOMMENTAR ZUM STGB* [Munich Commentary of the Criminal Code], (2d ed. 2012) para. 5; Daniel Volp, *Parteiverbot und wehrhafte Demokratie*, *NEUE JURISTISCHE WOCHENSCHRIFT* 459-64 (2016) at 460.
- 116 See Jan-Werner Müller, *Militant Democracy*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW*, (Michel Rosenfeld & András Sajó, eds., 2012) at 1257.
- 117 Ian Kershaw, *TO HELL AND BACK: EUROPE 1914-1949* (2015) at 146; more differentiated: Kathrin Groh, *DEMOKRATISCHE STAATSRECHTSLEHRER: VON DER KONSTITUTIONELLEN STAATSLEHRE ZUR THEORIE DES MODERNEN DEMOKRATISCHEN VERFASSUNGSSTAATES* (2008).
- 118 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, *XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, 847-877 (3d ed. 2014) at 851.
- 119 Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe's 'Sonderweg'* (Jean Monet Center for International and Regional Economic Law & Justice, Working Paper, 2000) at 10. <http://jeanmonnetprogram.org/archive/papers/00/001001.html>
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- 121 Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417-32 (1937) at 417.
- 122 Ian Kershaw, *TO HELL AND BACK: EUROPE 1914-1949* (2015) at 146.
- 123 United States Holocaust Memorial Museum, *Beer Hall Putsch (Munich Putsch)* <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007884>; for a complete analysis, see Harold J. Gordon, *HITLERPUTSCH 1923. MACHTKAMPF IN BAYERN 1923-1924* (1971).
- 124 Otto Gritschneider, *Der bayerische Richter Neithardt und sein folgenschweres Hitler-Urteil von 1924*, NEUE JURISTISCHE WOCHENSCHRIFT (2001) at 485.
- 125 Jeremy Noakes & Geoffrey Pridham, *NAZISM 1919-1945, VOL. 1 THE RISE TO POWER 1919-1934, A DOCUMENTARY READER* (2005) at 33.
- 126 Jeremy Noakes & Geoffrey Pridham, *NAZISM 1919-1945, VOL. 1 THE RISE TO POWER 1919-1934, A DOCUMENTARY READER* (2005) at 27.
- 127 United States Holocaust Memorial Museum, *Beer Hall Putsch (Munich Putsch)* <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007884>; Otto Gritschneider, *Der bayerische Richter Neithardt und sein folgenschweres Hitler-Urteil von 1924*, NEUE JURISTISCHE WOCHENSCHRIFT (2001) at 484; other sources speak about 14 Nazis and 3 police officers, Joachim C. Fest, *HITLER, EINE BIOGRAPHIE* (8th ed. 1973) at 273.
- 128 Winfried Nerdinger, ed., *MÜNCHEN UND DER NATIONALSOZIALISMUS: KATALOG DES NS DOKUMENTATIONSZENTRUMS MÜNCHEN* (2015) at 68.
- 129 United States Holocaust Memorial Museum, *Beer Hall Putsch (Munich Putsch)* <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007884>, Otto Gritschneider, *Der bayerische Richter Neithardt und sein folgenschweres Hitler-Urteil von 1924*, NEUE JURISTISCHE WOCHENSCHRIFT (2001) at 485.
- 130 Bernd Steger, *Der Hitlerprozess und Bayerns Verhältnis zum Reich*, VIERTELJAHRESHEFTE FÜR ZEITGESCHICHTE 441-66 (1977) at 442.
- 131 Geoffrey Pridham, *HITLER'S RISE TO POWER, THE NAZI MOVEMENT IN BAVARIA 1923-1933* (1973) at 17.
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- 137 Joachim C. Fest, *HITLER, EINE BIOGRAPHIE* (8th ed. 1973) at 278.
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- 141 Jeremy Noakes & Geoffrey Pridham, *NAZISM 1919-1945, VOL. 1 THE RISE TO POWER 1919-1934, A DOCUMENTARY READER* (2005) at 36.
- 142 Joachim C. Fest, *HITLER, EINE BIOGRAPHIE* (8th ed. 1973) at 276; Ian Kershaw, *HITLER (PROFILES IN POWER)* (1995) at 43.
- 143 Otto Gritschneider, *Der bayerische Richter Neithardt und sein folgenschweres Hitler-Urteil von 1924*, *NEUE JURISTISCHE WOCHENSCHRIFT* (2001) at 486.
- 144 See above in this Part.
- 145 Michael Head, *EMERGENCY POWERS IN THEORY AND PRACTICE: THE LONG SHADOW OF CARL SCHMITT* (2016) at 44-45.
- 146 Daniel Volp, *Parteiverbot und wehrhafte Demokratie*, *NEUE JURISTISCHE WOCHENSCHRIFT* 459-64 (2016) at 461.
- 147 For a historical overview of prior German constitutions, see Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum Rechtsstaatsmechanismus der Europäischen Kommission*, *HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG*, 499-543 (Christian Calliess ed., 2015) at 500s.
- 148 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, *XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, 847-877 (3d ed. 2014) at 848.
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- 150 Justin Collings, *DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001* (2015) at Prologue p. xxiii.
- 151 Werner Heun, *THE CONSTITUTION OF GERMANY: A CONTEXTUAL ANALYSIS* (2011) at 20.
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- 157 Michael Sachs, *Introduction in GRUNDGESETZ KOMMENTAR* (Michael Sachs ed. 5th ed., 2009) (2014) at para. 19.
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- 159 Winfried Nerdinger, ed., *MÜNCHEN UND DER NATIONALSOZIALISMUS: KATALOG DES NS DOKUMENTATIONSZENTRUMS MÜNCHEN* (2015) at 70s.

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- 162 Thomas Giegerich, *Völkerrechtsfreundlichkeit “light” – Viel Schatten und wenig Licht im BVerfG-Beschluss zum Treaty Override* (Saar Expert Paper, 02/2016) http://jean-monnet-saar.eu/?page_id=70.
- 163 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 847-877 (3d ed. 2014) at 876.
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- 167 Michael Head, *EMERGENCY POWERS IN THEORY AND PRACTICE: THE LONG SHADOW OF CARL SCHMITT* (2016); Giegerich notes that this is a regrettable return to the idea of sovereignty of the first half of the twentieth century which the Basic Law had intended to correct Thomas Giegerich, *Völkerrechtsfreundlichkeit “light” – Viel Schatten und wenig Licht im BVerfG-Beschluss zum Treaty Override* (Saar Expert Paper, 02/2016) http://jean-monnet-saar.eu/?page_id=70 with reference to the discussions in the Parliamentary assembly which drafted the Basic Law and expressly based its approach on Kant’s philosophy that a state can only guarantee rights to its citizens if it accepts to be bound by obligations to other states.
- 168 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 847-877 (3d ed. 2014) at 849.
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- 173 Federal Constitutional Court, Judgment of 17 August 1956 in case 1 BvB 2/51 (prohibition of the German Communist Party), collection of decisions vol. 5, pp. 85ss at 138s
- 174 Council and Parliament Regulation 1141/2014, 2014 O.J. (L 317) at 1 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R1141&from=EN>
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- 180 Arthur Gunlicks, *THE LÄNDER AND GERMAN FEDERALISM* (2003) at 146.
- 181 GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (Basic Law): English version available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html
- 182 Arthur Gunlicks, *THE LÄNDER AND GERMAN FEDERALISM* (2003) at 147.
- 183 Arthur Gunlicks, *THE LÄNDER AND GERMAN FEDERALISM* (2003) at 158.
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- 188 Beck'scher Online-Kommentar GG ("BeckOK GG/Hellermann GG") GG Art. 37 Rn. 10, 27th ed. (12 December 2015) referring to a judgment of the FCC of 22.05.1990 - 2 BvG 1/88, BVerfGE 81, 310 (338).
- 189 As we shall see below in this section according to the Spanish constitution the proportionality principle is also applicable in the relation between the central state and the Autonomous Communities.
- 190 Werner Heun, *The Constitution of Germany: A Contextual Analysis* (2011) at 20s.
- 191 Jean-Philippe Derosier, *Les Limites consitutionnelles à l'intégration Européenne, Etude comparée, Allemagne, France, Italië*, Bibliothèque Constitutionnelle et de Science Politique, tome 144, (2015) at 37 & 42.
- 192 M. Gonzalez Pascual, Barcelona and D. Toda Castán, *Katalonien und Spanien: Bruch oder Verfassungsreform?*, Die öffentliche Verwaltung (DÖV) 69 (2016), pp 269-278 at 270.
- 193 Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, Revista Española de Derecho Constitucional 55-110 (2005) at 71ss.
- 194 S.T.C., 42/2014, de 25 de marzo de 2014, B.O.E. n. 87 10 April 2014, Sec. TC, p. 77 point 4 c) (Spain) <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2014-3885.pdf>
- 195 S.T.C., 42/2014, de 25 de marzo de 2014, B.O.E. n. 87 10 April 2014, Sec. TC, p. 77 point 4 c) (Spain) <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2014-3885.pdf>
- 196 S.T.C., 42/2014, de 25 de marzo de 2014, B.O.E. n. 87 10 April 2014, Sec. TC, p. 77 point 4 c) (Spain) <http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2014-3885.pdf>

- 197 It concerned certain resolutions adopted by Cataluña in the framework of its striving for independence, for details on the political, factual and legal back ground, see: Maribel González Pascual et al., *Katalonien und Spanien: Bruch oder Verfassungsreform?*, 69 Die öffentliche Verwaltung 269-78 (2016).
- 198 S.T.C., 259/2015, de 2 de diciembre de 2015, B.O.E. n. 10, 12 January 2016, Sec. TC, p. 1951 at 1967 (Spain) <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2016-308.pdf>
- 199 S.T.C., 259/2015, de 2 de diciembre de 2015, B.O.E. n. 10, 12 January 2016, Sec. TC, p. 1951 at 1967 et sequi (Spain) <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2016-308.pdf>
- 200 S.T.C., 259/2015, de 2 de diciembre de 2015, B.O.E. n. 10, 12 January 2016, Sec. TC, p. 1951 at 1970 e (Spain) <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2016-308.pdf>
- 201 S.T.C., 259/2015, de 2 de diciembre de 2015, B.O.E. n. 10, 12 January 2016, Sec. TC, p. 1951 at point 7 (Spain) <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2016-308.pdf>
- 202 See also: Maribel González Pascual et al., *Katalonien und Spanien: Bruch oder Verfassungsreform?*, 69 Die öffentliche Verwaltung 269-278 (2016) at 277 with further references.
- 203 See above, First Part.
- 204 For its drafting history see: Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 55-110 (2005) at 55-110, 75-78
- 205 Constitución Española (The Spanish Constitution), (1978) http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf at 47 sequi.
- 206 José María Gil Roble & Gil Delago, *Commentary to Art. 155*, in *Comentarios a la Constitución Español*. Tomo XI - Artículos 143 a 158 de la Constitución Española de 1978 501-20 (2006). <http://app.vlex.com/#/vid/339030>; Antonio Arroyo Gil, *Lealtad federal y coerción federal*, El País (10 September 2014) http://elpais.com/elpais/2014/09/04/opinion/1409831275_944297.html
- 207 Vincente Juan Calafell Perra, *La Compulsion of corecion estatal, Estudio de Artículo 155 de la Constitucion Espanola*, Revista de Derecho Político, 99-146 (2000) at 127.
- 208 Vincente Juan Calafell Perra, *La Compulsion of corecion estatal, Estudio de Artículo 155 de la Constitucion Espanola*, Revista de Derecho Político, 99-146 (2000) at 134.
- 209 José María Gil Roble & Gil Delago, *Commentary to Art. 155*, in *Comentarios a la Constitución Español*. Tomo XI - Artículos 143 a 158 de la Constitución Española de 1978 501-520 (2006) at 504. <http://app.vlex.com/#/vid/339030>; Mariano Bacigalupo quoted in Marisa Cruz, *¿Cómo se aplica el artículo 155 de la Constitución?*, El Mundo (26 July 2015) <http://www.elmundo.es/espana/2015/07/26/55b3da8f22601d06178b4583.html>
- 210 Mariano Bacigalupo quoted in Marisa Cruz, *¿Cómo se aplica el artículo 155 de la Constitución?*, El Mundo (26 July 2015) <http://www.elmundo.es/espana/2015/07/26/55b3da8f22601d06178b4583.html>; Antonio Arroyo Gil in El País 11 November 2015, http://elpais.com/elpais/2015/11/05/opinion/1446727253_643972.html
- 211 Mariano Bacigalupo quoted in Marisa Cruz, *¿Cómo se aplica el artículo 155 de la Constitución?*, EL MUNDO (26 July 2015) <http://www.elmundo.es/espana/2015/07/26/55b3da8f22601d06178b4583.html>; Antonio Arroyo Gil, *Lealtad federal y coerción federal*, EL PAIS (10 September 2014) http://elpais.com/elpais/2014/09/04/opinion/1409831275_944297.html
- 212 Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 55-110 (2005) at 55-110, 87.
- 213 José María Gil Roble & Gil Delago, *Commentary to Art. 155*, in *COMENTARIOS A LA CONSTITUCIÓN ESPAÑOL*. TOMO XI - ARTICULOS 143 A 158 DE LA CONSTITUCION ESPAÑOLA DE 1978 501-520 (2006) at 511. <http://app.vlex.com/#/vid/339030>.

- 214 José María Gil Roble & Gil Delago, *Commentary to Art. 155*, in *COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA*. TOMO XI - ARTICULOS 143 A 158 DE LA CONSTITUCION ESPAÑOLA DE 1978 501-520 (2006) at 514. <http://app.vlex.com/#/vid/339030>.
- 215 José María Gil Roble & Gil Delago, *Commentary to Art. 155*, in *COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA*. TOMO XI - ARTICULOS 143 A 158 DE LA CONSTITUCION ESPAÑOLA DE 1978 501-520 (2006) at 517. <http://app.vlex.com/#/vid/339030>; see also: Vincente Juan Calafell Perra, *La Compulsion of corecion estatal, Estudio de Artículo 155 de la Constitucion Espanola*, *REVISTA DE DERECHO POLÍTICO*, 99-146 (2000) at 114.
- 216 Marisa Cruz, *¿Cómo se aplica el artículo 155 de la Constitución?*, *EL MUNDO* (26 July 2015) <http://www.elmundo.es/espana/2015/07/26/55b3da8f22601d06178b4583.html>
- 217 Marisa Cruz, *¿Cómo se aplica el artículo 155 de la Constitución?*, *EL MUNDO* (26 July 2015) <http://www.elmundo.es/espana/2015/07/26/55b3da8f22601d06178b4583.html>
- 218 Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL* 55-110 (2005) at 55-110, 75-88.
- 219 G. Gomez Orfanel, *Art. 155*, in : M.-E. Casas Baamonde/M. Rodriguez-Piñero y Bravo-Ferrer, *Comentarios a la Constitución Española*, 2009, p. 2579-80
- 220 Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL* 55-110 (2005) at 91.
- 221 Vincente Juan Calafell Perra, *La Compulsion of corecion estatal, Estudio de Artículo 155 de la Constitucion Espanola*, *REVISTA DE DERECHO POLÍTICO*, 99-146 (2000) at 109.
- 222 Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL* 55-110 (2005) at 93.
- 223 See above First Part.
- 224 Germán Gómez Orfanel, *Art. 155*, in *COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA* (María Emilia Casas Baamonde et al. eds., 2009) at 2582, see also Vincente Juan Calafell Perra, *La Compulsion of corecion estatal, Estudio de Artículo 155 de la Constitucion Espanola*, *REVISTA DE DERECHO POLÍTICO*, 99-146 (2000) at 137.
- 225 Germán Gómez Orfanel, *Art. 155*, in *COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA* (María Emilia Casas Baamonde et al. eds., 2009) at 2583, see also: Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL* 55-110 (2005) at 81.
- 226 Costituzione [Cost.](It.) (Constitution of the Italian Republic) https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf
- 227 Corte. Cost., Sentenza 219/2013 (It.) <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=219>; for a comment on the judgment see: Enrico Albanesi, *Il decreto presidenziale di scioglimento/rimozione ex art. 126, primo comma, Cost. è un atto sostanzialmente governativo o complesso eguale?* 41 *LE REGIONI* 1148-61 (2013).
- 228 Corte. Cost., Sentenza 219/2013 (It.) at para 14.4 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=219>
- 229 Corte. Cost., Sentenza 219/2013 (It.) at para 14.4 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=219>
- 230 Corte. Cost., Sentenza 219/2013 (It.) at para 14.4 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=219>

- 231 Corte. Cost., Sentenza 219/2013 (It.) at para 14.4 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=219>
- 232 Article 3 (3) let. o) of Law n. 400 of 23 August 1988
- 233 Corte. Cost., Sentenza 219/2013 (It.) at para 14.7 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=219>
- 234 Corte. Cost., Sentenza n. 101/1966
- 235 Corte. Cost., Sentenza n. 1/2013
- 236 Jeremy Webber, *THE CONSTITUTION OF CANADA* (2015) at 139.
- 237 Jeremy Webber, *THE CONSTITUTION OF CANADA* (2015) at 169
- 238 Jeremy Webber, *THE CONSTITUTION OF CANADA* (2015) at 259, see also Canadian Supreme Court *Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.) point 2 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>
- 239 *Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.) point 2 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>
- 240 *Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.) point 2 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do> The factual parallels with secession votes in some Member States and even with votes on membership in the European Union are striking.
- 241 Melissa Castan & Sarah Joseph, *Federal Constitutional Law, A Contemporary View* (2001) at 11.
- 242 Australianpolitics.com, *Australian Constitution – Chapter 5* <http://australianpolitics.com/constitution-aus/text/chapter-5-the-states>
- 243 Australianpolitics.com, *Separation of Powers* <http://australianpolitics.com/democracy-and-politics/key-terms/separation-of-powers> for an example see: George Winterton, *The Communist Party Case, in Australian Constitutional Landmarks*, 108-146 (Hoong Phun Lee & George Winterton eds., 2003) at 129.
- 244 Melissa Castan & Sarah Joseph, *Federal Constitutional Law, A Contemporary View* (2001) at 255.
- 245 George Winterton, *The Communist Party Case, in Australian Constitutional Landmarks*, 108-146 (Hoong Phun Lee & George Winterton eds., 2003) at 126.
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- 247 See Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum ,Rechtsstaatsmechanismus der Europäischen Kommission*, Herausforderungen an Staat und Verfassung, *Völkerrecht - Europarecht – Menschenrechte, Liber Amicorum für Torsten Stein zum 70. Geburtstag*, 499-543 (Christian Callies ed., 2015) at 506.
- 248 Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 11.
- 249 Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, S. TREATY DOC. No. 20, 101st Cong., 2d Sess. (1990), 29 I.L.M. 1186 (1990) “*Welcoming the fact that the German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a state so that they will be able to serve the peace of the world as an equal and sovereign partner in a united Europe;*” <http://usa.usembassy.de/etexts/2plusfour8994e.htm>.
- 250 Daniel Volp, *Partei- und wehrhafte Demokratie*, *NEUE JURISTISCHE WOCHENSCHRIFT* 459-64 (2016) at 464.

- 251 Jairo Lugo-Ocando & Sara Garcia Santamaria, *Media, Hegemony and Polarization in Latin America*, in *MEDIA AND POLITICS IN NEW DEMOCRACIES*, 265-275 (Jan Zielonka ed., 2015) at 267; see also Daniele Caramani, *THE EUROPEANIZATION OF POLITICS, THE FORMATION OF A EUROPEAN ELECTORATE AND PARTY SYSTEM IN HISTORICAL PERSPECTIVE* (2015) at 293.
- 252 See Ulf Engel, *Africa's „1989“, in 1989*, IN *A GLOBAL PERSPECTIVE* 331-348 (Ulf Engel et al., eds., 2015) at 347 he notices “*an emerging transnational social arena*“ in Africa since 1989.
- 253 David Simo, *Africa and the Turning Point of 1989*, in *1989 IN A GLOBAL PERSPECTIVE* 363-74 (Ulf Engel et al., eds., 2015) at 373.
- 254 Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 42; Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming) at 22.
- 255 For Latin America, see: Jairo Lugo-Ocando & Sara Garcia Santamaria, *Media, Hegemony and Polarization in Latin America*, in *MEDIA AND POLITICS IN NEW DEMOCRACIES*, 265-275 (Jan Zielonka ed., 2015) at 266; for CEE: Gábor Polyák, *Context, Rules and Praxis of the New Hungarian Media Laws: How Does the Media Law Affect the Structure and Functioning of Publicity*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA, THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, 125-52 (Armin von Bogdandy & Pál Sonnevend eds., 2015); for Poland see infra Third Part.
- 256 Jairo Lugo-Ocando & Sara Garcia Santamaria, *Media, Hegemony and Polarization in Latin America*, in *MEDIA AND POLITICS IN NEW DEMOCRACIES*, 265-275 (Jan Zielonka ed., 2015) at 266.
- 257 Jairo Lugo-Ocando & Sara Garcia Santamaria, *Media, Hegemony and Polarization in Latin America*, in *MEDIA AND POLITICS IN NEW DEMOCRACIES*, 265-75 (Jan Zielonka ed., 2015) at 273.
- 258 Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 *AM. POL. SCI. REV.* 417-432 (1937) at 418; see also Jan-Werner Müller, *Militant Democracy*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW*, (Michel Rosenfeld & András Sajó, eds., 2012) at 1257.
- 259 Daniel Volp, *Parteiverbot und wehrhafte Demokratie*, *NEUE JURISTISCHE WOCHENSCHRIFT* 459-64 (2016) at 464.
- 260 According to Jairo Lugo-Ocando & Sara Garcia Santamaria, *Media, Hegemony and Polarization in Latin America*, in *MEDIA AND POLITICS IN NEW DEMOCRACIES*, 265-275 (Jan Zielonka ed., 2015) at 270; see below in this Part this is the case for example in Ecuador.
- 261 See below in the Third Part.
- 262 Matthew C. Mirow, *LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CADIZ AND ITS LEGACY IN SPANISH AMERICA* (2015) at 269; for the Polish and Hungarian examples see Third Part
- 263 According to an article in the press on 11 March 2016, Polish Foreign Minister Witold Waszczykowski said that the head of the constitutional court reminds him of an “ayatollah in Iran,” *Poland Defends Democracy, Rejects Criticism on Reforms*, TRT WORLD (11 March 2016) <http://www.trtworld.com/europe/poland-defends-democracy-rejects-criticism-on-reforms-65497>
- 264 Martin Scheinin, *The Potential of the EU Charter of Fundamental Rights for the Development of the Rule of Law Indicators*, in *REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION*, (Carlos Closa & Dimitry Kochenov eds, 2016); see the case of Poland, infra Third Part.
- 265 Matthew C. Mirow, *LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CADIZ AND ITS LEGACY IN SPANISH AMERICA* (2015) at 269.

- 266 Pál Sonnevend et al., *The Constitution as an Instrument of Everyday Politics: The Basic Law of Hungary*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA, THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, 33-110 (Armin von Bogdandy & Pál Sonnevend eds., 2015).
- 267 For more details see below in the Third Part; cf.: European Commission for Democracy through Law (Venice Commission), Document CDL-AD(2016)007-e Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e), see also, most recently: European Commission, Commission Recommendation of 27.7.2016 Regarding the Rule of Law in Poland C(2016) 5703 final (27 July 2016) http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf; due to the date when the manuscript was closed a mere reference must suffice here.
- 268 See 2005 World Summit Outcome, G.A. Res. 60/1, UN Doc. A/RES/60/1 (24 October 2005) <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>; for a theoretical underpinning of the concept and its legitimacy: Ronald Dworkin, *A New Philosophy for International Law*, 41 *PHIL. & PUB. AFF.* 2-30 (2013) at 16.
- 269 Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming).
- 270 Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015).
- 271 Armin von Bogdandy, *Ius Constitutionale Commune Latinoamericanum, una aclaración conceptual*, in *IUS CONSTITUTIONALE COMMUNE EN DERECHOS HUMANOS EN AMÉRICA LATINA*, 1-24 (Armin von Bogdandy et al. eds, 2013) at 4
- 272 See John Hands, *COSMOSAPIENS, HUMAN EVOLUTION FROM THE ORIGIN OF THE UNIVERSE* (2015) at 554.
- 273 Case T-340/14, *Klyuyev v. Council of the European Union* [2016] (delivered 15 September 2016) at paras. 87 & 88.
- 274 The Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland; see Statute of the Council of Europe, 87 U.N.T.S. 103, E.T.S. 1 <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052>
- 275 Council Presidency Document No. 16862/14 of 12 December 2014, Conclusions of the Council of the EU and the Member States Meeting within the Council on Ensuring Respect for the Rule of Law, at para. 6. <http://data.consilium.europa.eu/doc/document/ST-17014-2014-INIT/en/pdf>
- 276 Statute of the Council of Europe, 87 U.N.T.S. 103, E.T.S. 1 <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052>
- 277 *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) at 4 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 278 Weekly Meeting News, European Commission, Rule of Law in Poland: Commission Starts Dialogue (13 January 2016) http://ec.europa.eu/news/2016/01/20160113_en.htm; see also European Commission, MEMO/16/62, Fact Sheet – College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers, (13 January 2016) http://europa.eu/rapid/press-release_MEMO-16-62_en.htm
- 279 Case T-340/14, *Klyuyev v. Council of the European Union* [2016] (delivered 15 September 2016) at paras. 87 & 88.
- 280 For example, Carlos Closa, *The EU Needs a Better and Fairer Scrutiny Procedure over Rule of Law Compliance*, (Robert Schuman Centre for Advanced Studies, Policy Brief, Issue 2015/1, May 2015) at 7; see also Cesare Pinelli, *Protecting the Fundamentals, Article 7 of the Treaty on the European Union and Beyond*, (Foundation for European Progressive Studies, 2012) at 17 et sequi <http://www.feps-europe.eu/assets/9a4619cf-1a01-4f96-8e27-f33b65337a9b/protecting%20the%20fundamentals.pdf>

- 281 Council of Europe, Statute of the Council of Europe, 87 U.N.T.S. 103, E.T.S. 1 <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052>
- 282 See European Commission for Democracy through Law (Venice Commission), Document CDL-AD(2011)003rev-e, Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e);
- 283 Armin von Bogdandy & Michael Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, COMMON MKT L. REV. 59-96 (2014) at 68.
- 284 Carlos Closa Montero et al., ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA (2015) at 48.
- 285 See Armin von Bogdandy & Michael Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, COMMON MARKET L. REV. 59-96 (2014) at 68; see also C. Pinelli, *Protecting the Fundamentals, Article 7 of the Treaty on the European Union and Beyond*, 2012, p. 16 <http://www.feps-europe.eu/assets/9a4619cf-1a01-4f96-8e27-f33b65337a9b/protecting%20the%20fundamentals.pdf>
- 286 Council of Europe, News & Events, Citing Ukraine, PACE renews sanctions against Russian delegation, including suspension of voting rights <https://go.coe.int/3puu4>
- 287 Parliamentary Assembly, Council of Europe, Resolution 2063 (2015) <http://semantic-pace.net/tools/x?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbncveG1sL1hSZWYvWDJILURXLWV4dHluYXNwP2ZpbGVpZD0yMTk1NiZsYW5nPWVu&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIxOTU2>
- 288 See Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015) at 478.
- 289 Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum ,Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015) at 503.
- 290 See ECtHR, Fact Sheet – Pilot Judgments (November 2016) http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf see also ECtHR, The Pilot-Judgment Procedure: Information note issued by the Registrar http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf
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- 292 Armin von Bogdandy, *Ius Constitutionale Commune Latinoamericanum, una aclaración conceptual*, in IUS CONSTITUTIONALE COMMUNE EN DERECHOS HUMANOS EN AMÉRICA LATINA, 1-24 (Armin von Bogdandy et al. eds, 2013) at 7.
- 293 Armin von Bogdandy, *Ius Constitutionale Commune Latinoamericanum, una aclaración conceptual*, in IUS CONSTITUTIONALE COMMUNE EN DERECHOS HUMANOS EN AMÉRICA LATINA, 1-24 (Armin von Bogdandy et al. eds, 2013) at 15.
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- 295 See Carlos Closa, *Governance Structures and Processes in Integration Organisations*, in COMPARATIVE REGIONAL INTEGRATION, GOVERNANCE AND LEGAL MODELS, 1-154 (Carlos Closa & Lorenzo Casini eds., 2016) at 18.

- 296 This is convincingly argued by Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming) at 1-2.
- 297 See Carlos Closa, *Governance Structures and Processes in Integration Organisations*, in *COMPARATIVE REGIONAL INTEGRATION, GOVERNANCE AND LEGAL MODELS*, 1-154 (Carlos Closa & Lorenzo Casini eds., 2016) at 25.
- 298 See *infra* III.C. 2.
- 299 Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 25.
- 300 Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 25.
- 301 Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015).
- 302 Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming) at 23.
- 303 For more details see Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 54.
- 304 CELAC includes permanently thirty-three countries in Latin America and the Caribbean. According to its own understanding it is as an 'intergovernmental mechanism for dialogue and political agreement', see CELAC, Homepage <http://www.caricom.org/>
- 305 CELAC, Homepage <http://www.caricom.org/>
- 306 For more details see Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 56
- 307 For more details see Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 42
- 308 For more details see Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 43.
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- 311 See Article 49 TEU and, prior to the Treaty of Lisbon the so-called Copenhagen Criteria
- 312 For more details see Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 44-45.
- 313 For more details see Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 45.
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- 315 Organization of American States, Inter-American Democratic Charter 11 September 2001) http://www.oas.org/charter/docs/resolution1_en_p4.htm

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- 317 For more details see Carlos Closa Montero et al., ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA (2015) at 25 at 58ss and table 6.
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- 319 Ted Piccone, FIVE RISING DEMOCRACIES AND THE FATE OF THE INTERNATIONAL LIBERAL ORDER (2016) at 229s.
- 320 African Union, *Constitutive Act of the African Union*, adopted by the 36th ordinary session of the Assembly, held in Lome, Togo (11 July 2000) http://au.int/en/sites/default/files/ConstitutiveAct_EN.pdf
- 321 African Union, *African Charter on Democracy, Elections and Governance*, adopted by the 8th ordinary session of the Assembly, held in Addis Ababa, Ethiopia (29–30 January 2007) <http://www.achpr.org/instruments/charter-democracy/>; African Union, *List of Countries Which have Signed, Ratified/acceded to the African Charter on Democracy, Elections and Governance* http://www.au.int/en/sites/default/files/treaties/7790-sl-charter_on_democracy_and_governance.pdf
- 322 African Union, *Protocol on the Statute of the African Court of Justice and Human Rights* adopted in Sharm El Sheikh, Egypt (1st July 2008). http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf
- 323 It shall enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States; the ratification status as of 01 April 2016 is that out of a total of 54 countries, 30 have signed, 5 ratified and 5 deposited ratification instruments. See: African Union, *List of Countries Which Have Signed, Ratified/Acceded to The Protocol on the Statute of the African Court of Justice and Human Rights*, http://www.au.int/en/sites/default/files/treaties/7792-sl-protocol_on_statute_of_the_african_court_of_justice_and_hr_0.pdf
- 324 Examples of the suspension of members: 2003: Central African Republic, Guinea-Bissau; 2005: Mauritania, Togo; 2008: Mauritania, Madagascar, Guinea; 2010: Côte d'Ivoire; 2012: Mali, Guinea-Bissau; 2013: Central African Republic, Egypt, Guinea-Bissau; 2015: Burkina Faso; see Ionel Zamfir, *Actions of the African Union against Coups d'état*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, PE 580.878 (April 2016) [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/580878/EPRS_ATA\(2016\)580878_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/580878/EPRS_ATA(2016)580878_EN.pdf)
- 325 Ionel Zamfir, *Actions of the African Union against Coups d'état*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, PE 580.878 (April 2016). [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/580878/EPRS_ATA\(2016\)580878_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/580878/EPRS_ATA(2016)580878_EN.pdf)
- 326 African Union, *Declaration on Democracy, Political Economic and Corporate Governance*, adopted the 38th ordinary session of the Assembly, held in Durban, South Africa (8 July 2002) <http://www.sarpn.org/NEPAD/july2002/declaration/declaration.pdf>
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- 328 Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming) at 15.
- 329 African Peer Review Mechanism, Website, <http://aprm-au.org/democratic-and-political-governance>

- 330 Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming) at 15 et sequi of 23 with an overview of cases.
- 331 Carlos Closa, *The Protection of Democracy in Regional and International Organizations*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE*, 1 (András Jakab & Dimitry Kochenov, eds., forthcoming) at 22-23.
- 332 ECOWAS, Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security (December 2001) http://www.internationaldemocracywatch.org/attachments/350_ECOWAS%20Protocol%20on%20Democracy%20and%20Good%20Governance.pdf
- 333 Jerry Ukaigwe, *ECOWAS LAW* (2016) at 160-63.
- 334 Southern African Development Community (SADC) <http://www.sadc.int/documents-publications/show/865>
- 335 For more details see: Werner Scholtz & Gerrit Ferreira, *Much Ado About Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration*, 2 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 331-58 (2011).
- 336 *Mike Campbell (Pvt) Ltd et al. v. Republic of Zimbabwe* is a landmark test case decided by the Southern African Development Community (SADC) Tribunal, based in Windhoek, Namibia. The Tribunal held that the Zimbabwean government violated the organisation's treaty by denying access to the courts and engaging in racial discrimination in the confiscation of land in the "land reform" program in Zimbabwe. On 28 November 2008, the Tribunal ruled that the 78 farmers facing eviction could keep their farms because Zimbabwe's land reform programme undermined the Rule of Law. In response, the government said it would not recognize the SADC Tribunal and relentless victimisation of the farmers has continued. The Zimbabwe Government was held by the Tribunal to have been in contempt of its ruling in both 2009 and 2010. The judgement was never respected. Instead, the SADC suspended the Tribunal and, in August 2015, modified its rules of procedure. In the future its competence will be limited to disputes between states. Individuals will not have standing anymore. Tapiwa Shumba, *HARMONISING REGIONAL TRADE LAW IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC). A CRITICAL ANALYSIS OF THE CISG, OHADA AND CESL* (2015) at 113; see also Werner Scholtz & Gerrit Ferreira, *Much Ado About Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration*, 2 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 331-58 (2011) at 334ss.; for a detailed description of what happened in the wake of the judgment see: Karen Alter et al., *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 *EUROPEAN J. INT'L L.* 293-328 (2016) at 307ss.
- 337 Tapiwa Shumba, *HARMONISING REGIONAL TRADE LAW IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC). A CRITICAL ANALYSIS OF THE CISG, OHADA AND CESL* (2015) at 111.
- 338 James Fowkes, *Relationship with Power: Re-imagining Judicial Roles in Africa, Separation of Powers*; in *AFRICAN CONSTITUTIONALISM* 205-25 (C.M. Fombad ed., 2016) at 210.
- 339 For the need to adopt a different approach in the African context, more oriented towards the experience in Latin America: Michaela Hailbronner, *Constitutional Legitimacy and the Separation of Powers Looking Forward*, in *AFRICAN CONSTITUTIONALISM* 385-99 (Charles Manga Fombad ed., 2016) at 396 with reference to the different colonial traditions shaping the understanding of law and the role of the judiciary; see also Jerry Ukaigwe, *ECOWAS LAW* (2016) at 160-63 at 161ss.
- 340 Tapiwa Shumba, *HARMONISING REGIONAL TRADE LAW IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC). A CRITICAL ANALYSIS OF THE CISG, OHADA AND CESL* (2015) at 113.
- 341 Carlos Closa Montero et al., *ORGANIZACIONES REGIONALES Y MECANISMOS DE PROTECCIÓN DE LA DEMOCRACIA EN AMÉRICA LATINA Y EN EUROPA* (2015) at 23.

- 342 Karen Alter et al., *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUROPEAN J. INT'L L. 293–328 (2016) at 306.
- 343 2005 World Summit Outcome, G.A. Res. 60/1, UN Doc. A/RES/60/1 (24 October 2005) at para. 119 <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>
- 344 For a concise overview of UN practice see Nico Krisch, *Articles 41 et sequi*, in THE CHARTER OF THE UNITED NATIONS (Bruno Simma et al. eds., 3d ed., 2012); a summary of the deliberations until 1995 can be found at United Nations, Website, Repertoire of the Practices of the Security Council, <http://www.un.org/en/sc/repertoire/admission.shtml>
- 345 UN Charter, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>
- 346 Christian Tams, *Article 5 in THE CHARTER OF THE UNITED NATIONS* (Bruno Simma et al. eds., 3d ed., 2012).
- 347 Hans Kelsen, *Sanctions under the Charter of the United Nations*, 12 CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE/REVUE CANADIENNE DE ECONOMIQUES ET SCIENCE POLITIQUE 429-38 (1946).
- 348 Christian Tams, *Article 5 in THE CHARTER OF THE UNITED NATIONS* (Bruno Simma et al. eds., 3d ed., 2012) at para. 2.
- 349 Christian Tams, *Article 5 in THE CHARTER OF THE UNITED NATIONS* (Bruno Simma et al. eds., 3d ed., 2012) at para. 12.
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- 357 Christian Tams, *Article 5 in THE CHARTER OF THE UNITED NATIONS* (Bruno Simma et al. eds., 3d ed., 2012) at para. 6,
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362 See below in this section.

363 See the example of Zimbabwe and supra with regard to the Council of Europe with reference to Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015) at 503.

364 Christian Tams, *Article 6 in THE CHARTER OF THE UNITED NATIONS* (Bruno Simma et al. eds., 3d ed., 2012) at para 28.

365 See Charter of the Commonwealth, adopted on 14 December 2012, preamble <http://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf>

366 See Charter of the Commonwealth, adopted on 14 December 2012, preamble <http://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf>

367 The Commonwealth, The Harare Commonwealth Declaration (1991) <http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf> The Commonwealth Charter explicitly affirms its validity and the Heads of governments commitments to the values and principles expressed in the Harare Declaration, see preamble at 2.

368 The Harare Commonwealth Declaration Section “III. INTERNATIONAL PEACE AND SECURITY”

369 The Harare Commonwealth Declaration, Section “VI. SEPARATION OF POWERS”

370 The Harare Commonwealth Declaration, Section “VII. RULE OF LAW”

371 The Harare Commonwealth Declaration, Section “VIII. GOOD GOVERNANCE”

372 The Commonwealth, Millbrook Commonwealth Action Programme on the Harare Declaration (1995) <http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf>

373 The Commonwealth, Millbrook Commonwealth Action Programme on the Harare Declaration (1995) <http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf>

in 2011 the Heads of Government of the Commonwealth renewed their commitment to “actively promote, uphold, preserve and defend the fundamental values, principles and aspirations of the Commonwealth.” They confirmed that the Group’s task is “to deal with the full range of serious or persistent violations of Commonwealth values;” The Commonwealth, News, Commonwealth Leaders Release CHOGM 2011 Communiqué (30 October 2011) <http://thecommonwealth.org/media/news/commonwealth-leaders-release-chogm-2011-communic%C3%A9>

374 The Commonwealth, Millbrook Commonwealth Action Programme on the Harare Declaration (1995) <http://thecommonwealth.org/sites/default/files/history-items/documents/millbrook%20declaration.pdf>

375 Alison Duxbury, *Austria and the European Union - The Report of the ‘Three Wise Men’*, 10 MELBOURNE J. INT’L L. (2000) at fn 35 with references.

376 The Commonwealth, Website, Protecting Democracy and Human Rights <http://thecommonwealth.org/agv/protecting-democracy-and-rights>

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378 See above, Second Part III.C.2.

- 379 See the example of Zimbabwe and supra with regard to the Council of Europe with reference to See Thomas Giegerich, *Verfassungshomogenität, Vefassungsautonomie und Verfassungsaufsicht in der EU: Zum ,Rechtsstaatsmechanismus der Europäischen Kommission, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG*, 499-543 (Christian Calliess ed., 2015) at 503.
- 380 Ted Piccone, *FIVE RISING DEMOCRACIES AND THE FATE OF THE INTERNATIONAL LIBERAL ORDER* (2016) at 229.
- 381 European Commission for Democracy through Law (Venice Commission), Document CDL-AD(2011)003rev-e, Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) at para. 68 [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e)
- 382 Carlos Closa & Stefano Palestini, *Between Democratic Protection and Self-Defense: The Case of UNASUR and Venezuela*, (Robert Schuman Centre for Advanced Studies, EUI Working Paper No. RSCAS 2015/93) in particular at 6 and a good overview of the dramatic situation of democracy at 22 et sequi, and the attacks on judicial independence at 21; in Venezuela can be found in Benigno Alarcón et al., *Can Democracy Win in Venezuela?*, 27 *JOURNAL OF DEMOCRACY* 20-34 (2016).
- 383 See Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three Interrelated Problems*, 53 *COMMON MKT. L. REV.*, 597–605 (2016) at 605.
- 384 See Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three Interrelated Problems*, 53 *COMMON MKT. L. REV.*, 597–605 (2016) at 605.



THIRD PART: THE
RULE OF LAW AND
ITS PROTECTION
BY THE EUROPEAN
UNION

I. THE RULE OF LAW UNDER ARTICLE 2 TEU

A. Core Elements of the Rule of Law in Article 2 TEU

Definitions concerning the rule of law have occupied legal science for a long time³⁸⁵. Two basic philosophies exist: one a thin, merely formal definition of the Rule of Law³⁸⁶, and one more substantial, including elements such as human rights. As we have seen in the introduction to the First Part of this article, the understanding of the Rule of Law in the European Union is inspired by the constitutional traditions of the Member States and by international treaties, first and foremost by the European Convention on Human Rights and Fundamental Freedoms³⁸⁷. In the Second Part we have shown that both apply a ‘thick concept’ of the Rule of Law.

In the European context a ‘thin’ definition limited to mere formal legality cannot prevail since it would negate the experiences of history in particular with the Weimar Constitution³⁸⁸ and would not respect the substantial concept of the Rule of Law followed in other European constitutions³⁸⁹. We have also seen (see *supra* Second Part III.) that international organisations on the regional and on the global level apply a ‘thick’ definition of the Rule of Law, including elements such as democratic participation and an effective system of checks and balances.

The modern Rule of Law can only serve its purpose as a fundamental value when it is understood as a tool for the protection of the other fundamental values and democracy. These three concepts are inseparably linked³⁹⁰. Merely defending formal lawfulness does not do the job³⁹¹. The Rule of Law is necessary to complete the triadic notion of government of, by and for the people and it explains the essence of a comprehensive understanding of democracy as the absence of a dictatorship of the majority³⁹².

In its Communication of 11 March 2014 the Commission mentioned the main elements of the fundamental values protected in Article 2 TEU³⁹³. They reflect the finding made above that the European Union

is based on a ‘thick concept’ of the Rule of Law³⁹⁴.

Although disputed in some respects³⁹⁵, even critical authors agreed that the Commission listed the core elements of the Rule of Law³⁹⁶:

- Legality (checks and balances), as essential elements for the protection of democracy and Human Rights
- Legal certainty
- Respect for human rights (in particular equality & non-discrimination)
- Protection against arbitrariness of executive power (good administration)
- Judicial control: independent (externally and internally) courts decide in case of conflict
- Application of procedural guarantees (equality of arms; right to be heard)

This list is largely identical to the draft of a Rule of Law Checklist the Council of Europe’s Venice Commission on the necessary elements of the Rule of Law³⁹⁷. The final ‘checklist’ adopted in March 2016 is based on the same principles. At the same time, it is more detailed and enriched by concrete benchmarks³⁹⁸ which can provide useful guidance for the Commission in the fulfilment of its tasks under Article 7 TEU. There is no need to define all possible ramifications of the rule of law since Article 7 TEU only covers ‘serious breaches’.

Some authors criticize the list in the Commission’s Communication for not including ‘accessibility’ of the law, the protection of legitimate expectations, or the principle of proportionality³⁹⁹. This criticism seems to be largely unwarranted. All three aspects are actually covered by the core elements listed by the Commission. Legal certainty comprises *inter alia* ‘clarity of the law’, which seems to include both the aspects of accessibility and of the need to respect legitimate expectations. In addition, under the heading ‘*prohibition of arbitrariness of the executive powers*’, the Communication refers expressly to the protection against disproportionate intervention⁴⁰⁰. The ECJ refers to legal certainty and to legitimate expectations as general principles of European Union law which Member States are required to respect when adopting measures implementing European Union law⁴⁰¹.

II. ENFORCEMENT OF THE RULE OF LAW IN THE EUROPEAN UNION BY MEANS OF ARTICLE 7 TEU

A. Interpretation of the notions ‘serious and persistent’ breach

Article 7 TEU allows for sanctions only in case of a clear risk (para. 1) or the actual existence (para. 2) of a serious breach. As we have seen in the Second Part, the qualification of the breach as ‘serious’ was inspired by texts of national systems and other international agreements⁴⁰², a statement which shows that the interpretation problems Article 7 TEU creates are not unique but does not provide any immediate help for solving them. At the same time, it puts the criticism voiced against the uncertainty of the terms used in Article 7 TEU into perspective. Whilst, on one hand, it is true to point out their lack of precision; such vagueness is, on the other, unavoidable and very common when truly exceptional situations must be covered by a norm. An analysis of the existing jurisprudence in other fields can help with the interpretation of those concepts. It also replies to a request by the European Parliament to establish objective criteria for the implementation of Article 7 TEU⁴⁰³.

When facing the task of interpreting vague terms in legislation, it is always useful to compare with the case-law in other fields.

The concept of a ‘serious breach’ is also found in the ECJ’s jurisprudence with regard to non-contractual liability⁴⁰⁴. The case-law requires that for engaging the EU’s non-contractual liability a sufficiently serious breach of a rule of law intended to confer rights on individuals has to be established. Whether the institution concerned manifestly and gravely disregarded the limits of its discretion is the decisive test for the seriousness⁴⁰⁵. *”It is solely where that institution or organ has only considerably reduced, or even no, discretion, that the mere infringement of Community law may suffice to establish the existence of a sufficiently serious breach”*⁴⁰⁶. In situations where an institution

enjoys a large margin of discretion, any sufficiently serious breach of the rules of law at issue must be based on a manifest and serious disregard of the limits on the broad discretion enjoyed when exercising its powers⁴⁰⁷.

In agreement with this case-law, the seriousness of a violation can be defined with regard to its object, its result, its intensity and the behaviour of the ‘violator’⁴⁰⁸. It is striking that this suggestion is very similar to the one brought forward by some Spanish authors in order to define the concept of serious violation of the State’s interest in Art. 155 SC⁴⁰⁹. It does not come as a surprise that if applied by analogy to Article 7 TEU situations, in general the margin of discretion enjoyed by Member States is very large, therefore the ambit of Article 7 TEU very limited.

The European Court of Justice had the opportunity to develop some case-law with regard to the notion of a ‘persistent breach’. The cases concerned situations in which the Commission attacked a Member State’s administrative practice under Article 258 TEU.

The leading case with regard to ‘systemic or persistent breach’ under Article 258 TFEU is case C-494/01 *Commission v. Ireland*⁴¹⁰. It was based on a series of complaints received by the Commission over a period of 3 years between 1997 and 2000 from Irish citizens on a number of incidents involving the deposit of waste allegedly in violation of the provisions of the waste directive. The Commission not only asked the Court to establish that Ireland had failed to comply with its obligations under the waste directive in each of these individual cases, it also maintained that the cases provided the basis for a declaration by the Court that there has been a general and structural infringement of the waste directive by Ireland. The Commission’s action was aimed primarily at establishing that Ireland has failed to comply with its obligations under the waste directives in a general and structural manner⁴¹¹. It referred to a number of other cases that were not the subject of the twelve complaints, but were in the public domain as further illustrations of non-compliance. The Commission attacked these incidents as a part of an underlying pattern.

The Court accepted in its judgment that an administrative practice can be the subject-matter of an action for failure to fulfil obligations when it is, to some

degree, of a consistent and general nature⁴¹².

The opinion of Advocate General *Geelhoed* in this case is particularly instructive. He refers to a dimension of scale, a dimension of time and a dimension of seriousness. He understands scale as referring to the number of instances of infringements. The dimension of time obviously relates to the fact that the situation of non-compliance has existed for some time. The dimension of seriousness refers to the degree to which the actual situation in the Member State deviates from the result intended to be achieved by the Community obligation⁴¹³.

In other cases the Court has confirmed this case-law. It referred to a situation where a Member State has repeatedly over a long period of time failed to meet its obligations under EU law and found that administrative practices fall within the scope of infringement procedures if the Commission can establish that the breaches are structural and general⁴¹⁴. The Commission must document the practice and provide detailed proof that there is some degree of a consistent and general nature and that the cases are not isolated⁴¹⁵.

Conclusion of A.

The three criteria developed by the European Court of Justice to determine whether a Member State's administrative practice violates its obligations under Union law, i.e. the general and structural character of an infringement; the scale; the time or duration; and the seriousness, could be applied for determining whether the conditions in Article 7(2) TEU are fulfilled.

B. Main characteristics of the EU

The powers (and in particular their limits) of the European Union under Article 7 TEU have to be understood against the background of the main characteristics of the European Union as compared to a state, on the one hand, and to an international organisation, on the other.

The European Union is a 'Union of States and citizens' (Articles 1 and 4(2) TEU) and not 'a state'. It is understood

that the wording of Article 4(2) TEU excludes the creation of a European Federal State⁴¹⁶. Therefore, the Rule of Law in the EU context needs to take into consideration the 'tripartite relations'⁴¹⁷ between the European Union, in particular its institutions, the Member States and individuals. Also the fact that the EU is not a state has important repercussions for the competences of the European Union in the field of protecting the Rule of Law. Most of the mechanisms described by *Loewenstein* in '*Militant Democracy*'⁴¹⁸ cannot be applied by the European Union since it involves 'vertical' measures which are typical for a 'state'. They are employed by public authorities and directed at citizens or associations such as political parties. The European Union does not have those 'policing' powers; on the contrary, Article 4(2) TEU expressly obliges the European Union to respect the essential functions of the State such as the maintenance of law and order. Consequently, 'horizontal' mechanisms (between public authorities) are more relevant to the purpose of the present research.

Contrary to international organisations Union law enjoys through its own authority primacy over the law of the Member States. Declaration 17 annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon recalls the settled case-law of the European Court of Justice since 1964.

The context of European Union law as a whole underlines the importance of fundamental values. According to Article 3 TEU, the promotion of its values and the well-being of its peoples is one of the European Union's goals (para. 1) which it shall pursue by appropriate means commensurate with the competences which are conferred upon it in the Treaties (para. 6). In all its activities, the European Union is bound by the principles of conferral, subsidiarity and proportionality.

But what about the Member States' role in this context? The Treaties do not only limit the powers of the European Union as just described but, as a counterweight, also impose important obligations on the Member States. First and foremost through the primacy of Union law which Member States recognised, (see above) and are obliged to respect.

More concretely, according to the principle of sincere cooperation, Member States are obliged to assist the European Union in carrying out those tasks which flow from the Treaties (TEU and TFEU) (Article 4(3) TEU) (for more details see below in this Part). Furthermore, the Member States have to (positively) facilitate the achievement of the Union's tasks and (negatively) refrain from any measure which could jeopardize the attainment of the Union's objectives. Additionally, according to Article 19 (1) TEU, Member States must provide efficient legal protection in the fields covered by Union law. Fundamental values and their protection are undisputably covered by Union law at least since Article 7 TEU has been incorporated into the Treaty. Given the high rank the Rule of Law enjoys among the Union's objectives these findings can have an important influence on the interpretation of the Member States' obligations.

C. Why should the European Union protect the Rule of Law and other fundamental values in the Member States?

First, an obvious reply: because the Treaties say so. This answer is not as trivial and legalistic as it seems. The Treaties were ratified by all the parliaments of all the Member States, which gives them a high degree of democratic legitimacy⁴¹⁹. It proves that, at least in theory, national authorities accept that transnational bodies, here the European Union's institutions, are better placed to ascertain and interpret transnational standards⁴²⁰. At the same time it would be extremely useful in this context if national authorities themselves (such as governments, parliaments and courts) could break their shell as defenders of strictly national interests. They should understand that they have become to a certain extent European Institutions and, thus, should also defend European interests⁴²¹. From a theoretical point of view *I. Kant* underlined long ago that a State only enjoys the authority to request its citizens to abide by the internal rules if it respects its legal obligations vis-à-vis other states⁴²². Historically it also makes perfect sense since experience has shown that having a multiplicity of jurisdictions helps to manage risk and can increase resistance to bad rule⁴²³.

In the 20th century federalism often came under threat when government systems moved from democracy to more authoritarian regimes⁴²⁴.

We have seen above that the European Union is a Union of Member States and its citizens. European integration is seen historically as one of the principal means with which to consolidate democracy⁴²⁵.

Nowadays defending democracy has long become both a European and global task⁴²⁶. The blind 'Schmitt-ian' faith in the state as the sole protector against threats to the individual and his strict juxtaposition of Own and Foreign, Friend and Foe⁴²⁷ do not reflect modern transnational reality. As *P. Häberle* put it: "*With Carl Schmitt neither Switzerland can be explained nor Europe can be built*"⁴²⁸. Nevertheless Carl Schmitt's theories are still influential in political and legal circles in Germany and beyond⁴²⁹.

On a more macro-oriented perspective such an approach neglects the occurrence of cooperation as a gradual replacement for aggressive competition and a rapidly increasing force shaping human evolution⁴³⁰. Instead of being forward-oriented, it negates the developments brought about in theory by *I. Kant* in the late 18th century and in practice by the movement towards effective international cooperation since the end of the Second World War. Instead it brings society back to its atavistic destructive origins of aggressive competition which has dominated the human species for millions of years⁴³¹ culminating in two World Wars in the last century.

There is also a much more practical side of the importance to find transnational solutions. Decisions taken in a Member State which does not respect the Rule of Law affect European Union's citizens on two levels ('all affected principle')⁴³². Indirectly, since all Member States participate in decisions in the Council and the European Parliament. Hence, illiberal tendencies can influence the outcome of European Union legislation which is applicable in all Member States⁴³³. More directly, since citizens of all Member States can be affected by internal decisions taken by a Member State, when making use of their freedoms under the EU Treaties, for example when living or doing business in a different Member State. Therefore, providing for a certain degree of homogeneity in the European Union

also ensures a level of ‘indirect democracy’. Otherwise EU citizens would be affected by decisions in Member States which are entirely beyond their influence⁴³⁴. If a norm or a decision has effects beyond the level on which it is made the national democratic legitimacy cannot heal the flaw in the norm/decision⁴³⁵. Such as decisions can, for example, concern issues of a major scale such as the independence of parts of the territory⁴³⁶ or, on a minor scale, issues such as the need for non-nationals to pay a guarantee in case of civil litigation⁴³⁷.

Ensuring respect for the Rule of Law in the European Union amounts to an expression of the European Union’s obligation to protect the general interest and its rational legitimacy in the Weberian sense⁴³⁸. Therefore these substantial values give, at the end of day, a meaning to the organisation of the polity⁴³⁹. The European Union was not created as an end in itself but rather to further the objectives agreed to under the founding act⁴⁴⁰, be it the Constitution in national systems, or the TEU and TFEU in the system of the European Union. Thus, the transnational authorities can actually enhance the democratic legitimacy of states⁴⁴¹ and create synergies between national and supranational legitimacy⁴⁴². In this context it is important to underline that the European Union enjoys a triple legitimacy: a democratic legitimacy through the direct elections to the European Parliament, an integration legitimacy by means of the independent Commission and one derived from the Member States via the Council and the European Council⁴⁴³. Its ‘transnational legitimacy’ can help establish one of the most important aspects of the human condition: the relationship to the alien is what Professor *Weiler* famously called one of the normatively most important aspects of the human condition and to our multicultural societies: a decent relationship to the alien⁴⁴⁴.

The European Court of Justice has repeatedly decided that the European Union is a “*Community based on the mutual trust that the common values will be recognised in the EU*”⁴⁴⁵. As *Müller* puts it in a very catchy manner: “*It is exactly because Brussels can mistrust Member States, Member States can then trust each other*”⁴⁴⁶. The only qualification I would add is that the ‘mistrust’ is an exception to the rule. Its exceptional character can be easily explained by the fundamental importance of the trust between Institutions and Member States and the subsidiarity principle (see *supra* in this Part).

Other important aspects pleading in favour of a protection of the Rule of Law are to maintain the European Union’s credibility inside and outside its territory⁴⁴⁷ and to provide transnational solutions for transnational issues⁴⁴⁸. Faced with the growing interdependency between Member States national governments, notwithstanding their ‘national’ democratic legitimacy, Member States are not able to include everyone affected by their decisions. Therefore Member States actually suffer a democratic deficit⁴⁴⁹.

On a more critical note, other authors refer to the lack of truly democratic policy choices offered to the voter with regard to the European Union and the ensuing risk of objectifying the citizen⁴⁵⁰. On a more general level, with regard to post-national citizenship and answering to *Habermas* and *Rawls*, the question is asked whether the role of the citizen as a political actor is duly taken into consideration⁴⁵¹. If this is not the case, it is argued that the citizen will lack attachment to the political community and the desire to participate in the activities of citizenship⁴⁵².

This criticism is understandable but not entirely convincing. It fails to take into account the special character of the European Union and does not take into consideration the down-sides of a ‘non-transnational’ political community. Whilst it is undoubtedly true that the institutions of the European Union lack the democratic legitimacy commonly associated with national polities, the European Union can be understood as reflecting a pluralist model of democracy. Democratic legitimacy is granted by the national representatives in the Council and by the directly elected European Parliament⁴⁵³. Furthermore, we have just seen that national democratic legitimacy easily reaches its limits when faced with transnational issues for the simple reason that the national decisions do not take into consideration their effects on citizens who cannot participate e.g. in the national elections or in referenda. Therefore they exclude and might alienate the European Union nationals living on the national territory, using their right to free movement. It is common knowledge that, at the same time, ‘traditional’ merely procedural democratic decisions have led to evil regimes objectifying citizens to the point of annihilating parts of the population. This proves the limits of traditional, national policy choice democratic legitimacy. Since democracy is not a goal

in itself⁴⁵⁴, but like the Rule of Law, should further the common good and protect the individual against arbitrary government⁴⁵⁵, new solutions must be found in order to reply to those demands.

How can this ‘disenchantment’ of the people with the political process be avoided? How can we ensure that a political decision in one Member State takes into account the potential negative effects on citizens living in other Member States and on foreigners living in the Member State where the decision is taken? A reply to the latter question is urgently needed in a transnational context. If national systems fail to address these issues they fail an important test for a truly democratic system.

It is interesting to note that transnational participation is well known in other fields, in particular the environment as an Environmental Impact Assessment (EIA). The EIA aims at furthering the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, and, thus contribute to strengthening democracy⁴⁵⁶.

With regard to projects/programmes having transboundary environmental effects, the ESPOO Convention provides for a notification and consultation process and the obligation to take the results of the process into account when the decision is made⁴⁵⁷. The International Court of Justice has recognised the obligation of a ‘transboundary EIA’ as a general principle of customary international law (para. 205)⁴⁵⁸. Similar wording is to be found in Principle 17 of the Rio Declaration⁴⁵⁹ and Article 7 of the ILC’s Articles on Prevention of Transboundary Harm and Article 206 of the 1982 UN Convention on the Law of the Sea⁴⁶⁰. Although the details are not firmly defined, at least the following elements are undisputed: notification, information, consultation of the public and a general duty of cooperation⁴⁶¹.

The idea behind these procedural requirements is that a state first needs to have sufficient information and understand the environmental impact of an activity before it can take a reasonable decision⁴⁶². It is plain to see that such an approach could also increase the democratic legitimacy of political decisions with transnational effects (in the sense of transboundary and fundamentally affecting also nationals of other

Member States living on its territory). A recent study on the European’s perception of democracy has revealed that a large majority considers that ‘their’ national government does not take the views of other governments sufficiently into account in its decision-making⁴⁶³.

Whether the findings on transboundary EIA can partially be applied by analogy to transnational effects of political decisions is obviously an extremely delicate question and would exceed the purpose of the present article. Theoretically, possible justifications for such an approach could be found in Article 4(3) third indent TEU, which obliges the Member States to facilitate the achievement of the Union’s tasks. One of those tasks is mentioned in Article 3(1) TEU, *inter alia* to promote its values, amongst which democracy figures prominently. According to *Rodrik*, the absence of transnational democracy at the EU-level creates vicious circles which *inter alia* lead to the absence of durable EU-wide institutional arrangements⁴⁶⁴.

Further research on this question would also have to take into consideration the particular character of the European Union; the need to respect the national identities (Article 4(2) TEU) and the principle of subsidiarity (Article 5 TEU). One important aspect for evaluating subsidiarity is that experience has shown that Member States cannot achieve the objective of ensuring ‘transnational democracy’; which, at first glance could speak in favour of an action at Union level. Some of the political advantages of such a European Political Impact Assessment (EPIA) would be the following: citizens could participate in decision affecting them; the need to exchange information between Member States could lead to a rationalisation of the political discourse since merely populist arguments might not be as successful in one Member State as in its neighbouring countries which are equally affected by the decision.

Independently from such possible participation rights *de lege ferenda* one important question can be examined already *de lege lata*: What is the role of the individual in this context referring to the protection of the ‘transnational good’? For the citizens, the Rule of Law should act as a shield against arbitrary power exercised by the Union and by the Member States⁴⁶⁵. In

order to illustrate this concept, I'd like to use the roles of complainants in the infringement procedure under Article 258 TFEU and in the preliminary reference procedure under Article 267 TFEU as an example. Quantitatively, the latter has become the most important procedure in recent years⁴⁶⁶. The frequency with which preliminary questions are asked show the national courts' and the litigants confidence in the ECJ⁴⁶⁷. From a qualitative point of view, the preliminary ruling procedure is a keystone of the European Union's judicial system⁴⁶⁸. It is essential in ensuring the uniform application of European Union law⁴⁶⁹. The former President of the ECJ Mr *Skouris* called it the main instrument for the development and implementation of Union law⁴⁷⁰. Besides these important substantial functions it closes, from a procedural view, the gap of legal remedies for the individual by establishing the possibility of indirectly challenging the validity of a European Union norm⁴⁷¹. In this respect it is an essential part of the system of efficient legal protection under European Union law⁴⁷². Therefore it fulfils its task to render the ECJ closer to the citizen and, hence, a bit 'more constitutional', which appears to have been the intention of the founding fathers in order to reply to demands by Germany⁴⁷³. The same goes for the role of the complainants in the infringement procedure. Complaints have led to important procedures against Member States in the interest of upholding the supremacy of Union law, against a Member State who was not always willing or able to respect its obligation.

But what is the citizen's role in the context of protecting the fundamental values of the European Union? Is it true that, as Professor *Weiler* states, the preliminary reference procedure posits an individual against the national public good⁴⁷⁴? From a strictly procedural point of view that statement is correct, but this is, in my view, not necessarily the end of the story. The national public good should also comprise respect for European law and its supremacy. Because that is what Member States agreed to when they joined the European Union. Therefore the preliminary reference procedure plays a pivotal role in ensuring the effective and uniform application of Union law. On a more formal point and replying to the criticism of the individual being a mere 'object' of Union law as mentioned earlier, the preliminary reference procedure puts the national

courts and the individual in a very active role. In these cases the individual, and the national court asking the preliminary question, become the actors on the European legal scene. They turn into active agents and leave their role as mere objects of European law. This is exactly the genius of the preliminary reference procedure⁴⁷⁵. If the individual manages to convince the European Court of Justice of his or her point of view it is the general European interest as expressed in the law of the European Union which prevails over the narrower national interest as expressed in the national legislation in question. It is, therefore, not necessarily the 'self-centered' individual that is in the center of the preliminary reference procedure. It is rather, to use, *mutatis mutandis*, the words of St. Thomas, rendering a famous passage of the *Ethics* an expression of the leitmotiv of the European Union: "*bonum commune Europae est melius et divinius quam bonum unius*"⁴⁷⁶. There is one more important aspect inherent in the procedure under Article 267 TFEU: the parties of the national legal procedure are not necessarily nationals of the country where the national litigation takes place⁴⁷⁷. Hence, the preliminary reference procedure helps also to partially re-establish the legitimacy of the national legislation at stake. It gives a procedural tool to EU-residents who were turned into mere objects of national legislation without having enjoyed any participation rights in the legislative process.

D. Which role for the different institutions of the European Union?

1. Introduction

The distribution of competences under the Treaties provides important elements for the reply to the question which role the different institutions of the European Union play in ensuring respect for the Rule of Law. The importance of institutions was famously underlined by Jean Monnet; "*Nothing is possible without men; nothing is lasting without institutions.*"

For this purpose we shall examine separately the core powers attributed to the European Union's institutions by the Treaties. The principle of separation of power in the European Union has been intensely studied⁴⁷⁸.

For the purpose of this research it appears sufficient to outline the basic structure with a close view to the text of the Treaties and the practice of the institutions. All institutions have important, complementary roles to play in the protection of fundamental values, in particular the Rule of Law⁴⁷⁹. In order to be complementary, they cannot be identical as this would imply a duplication of efforts and would blur the separation of powers under Union law. The EU institutions must respect the distribution of competences and the institutional balance foreseen by the Treaties.

2. The role of the European Parliament in the protection of the ROL

The tasks of the European Parliament are enumerated in Article 14 TEU. Its primary role is to exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. With regard to the discussions of issues of Fundamental Values in Hungary and Poland the European Parliament was very active in monitoring the Member States (Hungary⁴⁸⁰, Poland⁴⁸¹) and politically controlling the activities of the Commission. It has an important role to play in holding the Commission accountable for its actions or for its inactivity.

At the same time it should not be forgotten that the European Parliament itself can initiate the procedure under Article 7(1) TEU. Neither with regard to Hungary nor Poland has it found the necessary one-third majority⁴⁸². Another aspect speaking against a more active role for the European Parliament is that the Article 7 TEU procedure should not be over-politicised. The European Parliament is an eminently political institution; therefore its classical role is to be seen more in monitoring the Commission to avoid risk of political or at least perceived political bargaining (Austria case).

Currently the European Parliament is working on a mechanism to improve the use of Article 7 TEU. On 5 April 2016 the *Committee on Civil Liberties, Justice and Home Affairs* suggested the conclusion of an inter-institutional agreement (“*EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) in the form of an inter-institutional agreement*”) on a more effective use of the Article 7 TEU mechanism⁴⁸³.

Such an inter-institutional agreement would need the approval of the Council. Experience with the Pre-Article 7 TEU Procedure and the ‘Rule of Law dialogue’ shows the Member States’ reluctance to enter into any form of binding undertaking with regard to the respect for the Rule of Law. Probabilities that they would enter into an inter-institutional agreement providing for concrete obligations in this regard appear fairly limited. On a more general level it is doubtful whether embarking in a long discussion on new instruments would be a better way of ensuring respect for the Rule of Law than improving the current tools⁴⁸⁴.

3. The European Council

The European Council is composed of the Heads of State or Government of the Member States together with the President of the European Parliament and the President of the Commission (Art. 15(2) TEU). It shall give the European Union the necessary impetus for its development and shall define priorities and general political directions (Art. 15(1) TEU).

Already its composition shows that it is an eminently political institution. It largely works with a consensus mechanism⁴⁸⁵ which will make it difficult to adopt measures against one of its members.

4. The Member States of the EU

Although the Member States are not an ‘institution’ in the technical sense they play an important role in the achievement of the European Union’s objectives. We have already seen (above in this Part) that according to Article 4(3) 2nd and 3rd section TEU they are obliged to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties (TEU and TFEU) and to facilitate the achievement of the Union’s tasks. Inversely, they have to refrain from any measure which could jeopardise the attainment of the Union’s objectives.

With regard to the control of the application of Member States have – at least in theory – far-reaching competences. They can bring a non-compliant Member State to the European Court of Justice for violation of an obligation under the Treaties (Article 259 TFEU). Empirically speaking, this option has hardly ever been used. According to the leading German Commentary

on the EU Treaties, until 2015 only six cases were brought under Article 259 TFEU of which two were withdrawn before a judgement was rendered⁴⁸⁶. Practically this option is rather ‘a sleeping beauty’ which is used in rather exceptional and sometimes politically important cases⁴⁸⁷. Some authors explain the lack of Member States’ initiative in this regard as an expression of ‘diplomatic considerateness’⁴⁸⁸. Others, on a more positive note, interpret its infrequent use by as an expression of Member States’ trust in the Commission’s effectiveness as Guardian of the Treaties (TEU and TFEU)⁴⁸⁹.

Under Article 7 TEU they enjoy the right of initiative but have not found the one third quorum for initiating a procedure. As one author put it, asking the Member State to initiate such a procedure amounts to asking turkeys voting for Thanksgiving (4/5 or unanimous)⁴⁹⁰; other describe it as scandalous how Member States turn a blind eye to the violations of fundamental values by their peers⁴⁹¹.

5. The Council

According to Article 16 TEU the core task of the Council is to exercise legislative, budgetary, policy-making and coordinating functions. Some authors refer to the Council as a Janus-like institution⁴⁹² since, on one hand, it is an EU institution whereas, on the other, it is composed of Member States’ representatives.

The Council has continuously underlined the importance of the Rule of Law. When it comes to concrete steps to ensure respect for the Rule of Law in Member States it is much more hesitant though. It aims to encourage the culture of “*respect for rule of law*” through a “*constructive dialogue among all Member States*”.

Empirically, the Council’s suggestion of an annual Rule of Law dialogue⁴⁹³ is not very useful for attacking concrete Rule of Law issues. The first ‘Rule of Law dialogue’ organised by the Council Presidency in November 2015 did not mention any of the concrete issues on the Rule of Law, such as the situation in Hungary, but rather generally dealt with the Rule of Law in the digital age⁴⁹⁴.

Consequently, the annual dialogue as an ‘instrument’ to protect the Rule of Law in the Member States led

to strong criticism by academic authors. To name just a few: it was considered as a ‘façade for action’⁴⁹⁵; has the lowest possible formal value, does not refer to any concrete obligations of the Member States and reverts to a purely intergovernmental procedure⁴⁹⁶.

Whilst undoubtedly justified with regard to the first ‘annual dialogue’, the situation changed in 2016. The second Rule of Law dialogue which was held under the Dutch presidency in the first half of 2016, provided for more concrete discussions⁴⁹⁷. The debates focussed on the challenges to the Rule of Law and the other fundamental values created by the high number of refugees coming to the EU.

6. The Commission

In the current section we shall only present the Commission’s general role under the Treaties. Its current practice is dealt with below in Section III.

According to Article 17 TEU the Commission has the tasks of promoting the general interest of the Union and of taking appropriate initiatives to that end. It shall also ensure the application of the Treaties (TEU and TFEU) (...) and oversee the application of Union law under the control of the Court of Justice of the European Union. It allows for a large range of activities such as collection, assessment and publication of information concerning compliance with Union law⁴⁹⁸.

The General Court has recently confirmed the importance of the Commission’s independence.

“81 (...) it is also for the Commission, which, in accordance with Article 17(1) TEU, is to promote the general interest of the European Union and take appropriate initiatives to that end (...) (see, to that effect, judgment of 14 April 2015 in *Council v Commission*, C-409/13, ECR, EU:C:2015:217, paragraph 70).

82 Thus, the Commission, which is to promote the general interest and to be completely independent in carrying out its responsibilities, has been made responsible for discerning the general interest of all the Member States and proposing solutions capable of furthering that general interest (see, to that effect, *Opinion of Advocate General Jääskinen in Council v*

Commission, C-409/13, ECR, EU:C:2014:2470, paragraph 43).

83 *Consequently, when the Commission prepares and develops policy proposals, it must ensure that it acts in a fully independent manner and that its proposals are made exclusively in the general interest.*

84 *Correspondingly, that institution must be placed in a position to act, at that stage, in a fully independent manner and in the service of the general interest.*⁴⁹⁹

The other institutions recognise the Commission's role as Guardian of the Treaties (TEU and TFEU). Lately this respect found its expression in the inter-institutional agreement on Better Law-making of 9 March 2016⁵⁰⁰. It states in paragraph 25 last subparagraph that it is the Commission's "*institutional role to ensure that the Treaties and the case-law of the Court of Justice of the European Union are respected.*"⁵⁰¹ The importance of an independent Commission is underlined *e contrario* by the experiences with less independent 'secretariats' in other regional international organisations. The lack of independence of the secretariats of some African RIOs has proven instrumental in the weakening of the impact of judgements of the regional courts⁵⁰².

Empirically, the Commission has taken this task seriously. In the period from 2010 to 2015 it has brought more than 400 infringements to the European Court of Justice⁵⁰³ (Article 258 TFEU). This number contrasts sharply with the few cases the Member States have brought against each other since the foundation of the EU⁵⁰⁴.

Since the entry into force of the Lisbon Treaty on 1 December 2009 this so-called 'infringement procedure' refers to infringement of Treaties (TEU and TFEU). Therefore, also a violation of the obligations of the Member States under the TEU can give rise to a procedure under Article 258 TFEU (details *infra*)⁵⁰⁵.

The question has been asked whether the Commission's role of Guardian of the Treaties and neutral broker has been weakened since the procedure for nominating the Commission President has been linked to the outcome of the elections to the European Parliament ('Spitzenkandidat')⁵⁰⁶. From a political

point of view, this change in procedure was not only seen as formally increasing the democratic legitimacy of the Commission President⁵⁰⁷ and the college of Commissioners as a whole but also as strengthening its position altogether⁵⁰⁸. Legally speaking, it has not changed the description of the Commission's tasks and obligations under Article 17 TEU. Therefore it remains independent.

This 'politisation' of the nomination of the Commission's president has not changed the Commission's obligation to be 'non-partisan' and act as a neutral defender of the European interest. A distinction needs to be made between the procedure for nomination and the actual exercise of the office. Whilst the former might be 'partisan' and political this does not imply that the latter needs to reflect this character. Such a distinction between nomination and exercise of the function is not only well known in politics⁵⁰⁹ but is also common practice in the case of nomination of judges at highest courts which often has political elements. Since they are obliged to obey only the constitution, they do have an 'obligation of ingratitude' towards the political parties who nominated them⁵¹⁰. Different mechanisms such as majority decisions or the secrecy of deliberations, increase the judges' independence from national interests⁵¹¹. The same applies by analogy also to the Members of the European Commission and its President. Since the Treaty obliges the Commission to act only in the common European interest, it would be violating this obligation if it acted on the basis of political affiliation. Procedurally, the collegiality principle and the ensuing risk for Commissioners' reputation if they blindly follow orders from 'their Member States' are additional safeguards in this respect⁵¹². In the light of these arguments the position that the Commission has lost its independence due to the 'Spitzenkandidat' procedure of its nomination seems not convincing.

As we seen under the previous heading the 'all-affected principle' and the very character of transnational problems show the need for finding transnational solutions. By bringing civil servants from different countries together the Commission as an emergent form of transnational government allows for more cosmopolitan and transnational identities and transnational public sector values⁵¹³. Such transnational

values are, on the level of the European Union in particular reflected by Article 2 TEU and protected by its Article 7.

Procedures under Article 7 TEU are highly sensitive. Therefore, it is particularly important that the monitoring of the respect for those transnational values is ensured ‘*sine ira et studio*’, neutrally and impartially, respecting the Weberian concept of public civil servants⁵¹⁴. When making decisions and when serving the citizen, the civil servants are guided by their own preferences and values⁵¹⁵. Since those demands can only be fulfilled when the transnational values are part of the ones of the civil servants in question, the officials of the Commission seem to be well placed for this task.

7. Current Role of the ECJ

Article 269 TFEU limits the ECJ’s competences with regard to the protection of the Rule of Law expressly to procedural stipulations. This limitation in itself raises questions concerning its compatibility with the Rule of Law⁵¹⁶. It seems that the intergovernmental conferences in Amsterdam and Nice showed that several Member States were reticent to give the ECJ any powers under Article 7 TEU.⁵¹⁷ So the question is whether the buck stops there or, to the contrary, whether the ECJ does have powers established under the Treaties to protect the Rule of Law.

Historically, the founders of the Communities established a relatively strong Court with a view to ensure an effective protection of the Rule of Law⁵¹⁸. Often the decisions of the ECJ were instrumental in translating political initiatives into concrete advantages for the citizens⁵¹⁹. Notwithstanding occasional criticism of some of its judgements the ECJ has constantly seen its powers confirmed and even extended, which is understood as confirming the Member States’ conviction that a strong ECJ as one of the salient features of EU law has passed the test of time⁵²⁰.

According to Article 19(1) TEU the ECJ ensures that in the interpretation and application of the Treaties (TEU and TFEU) the law is observed. The expression ‘the rule of law’ is not expressly mentioned but the wording of Article 19 TEU is wide enough to cover it. The Treaties encompass both the values under Article 2 TEU and the control mechanism of Article 7 TEU.

One of the core elements of the Rule of Law is judicial review of decision (see supra). It would be absurd if this did not apply to the review of the Rule of Law itself.

Empirically the ECJ has enhanced democratic accountability in a number of ways⁵²¹. It protected the European citizens’ rights *inter alia* through upholding due process and by providing guidance in the interpretation through its interpretation of Union law and by ensuring respect for the institutional balance between the European Union institutions. With regard to democracy, it held in its landmark judgment ‘*Roquette Frère/Isoglucose*’ that the participation of the European Parliament in the legislative process is an “essential factor in the institutional balance of the Treaty, reflecting the fundamental democratic principle that the peoples should take part in the exercise of power”. This democratic participation right is exercised through the intermediary of the European Parliament. Failing to respect this principle constitutes a fundamental formality which renders the measure concerned void⁵²². It is interesting to note that the Council was the defendant in this case, which proves that sometimes not the representatives of the Member States but the European Union institutions protect democracy on the European level.

On the other hand, it is also clear from the ECJ’s case-law that the principle of institutional balance⁵²³ alone cannot create competences⁵²⁴.

It would be a paradox to leave ECJ out of the equation of the Rule of Law. One of the essential elements of the Rule of Law is exactly the control of legality by the Courts. The ECJ has clarified this in numerous judgments. This control is subjected to the system of legal protection as provided for by the Treaties. So what is the system provided for by the Treaties? In other words how can an act which violates the Rule of Law be subjected to the ECJ’s scrutiny?

In the light of the Court’s interpretation of the Treaty, the Court could consider itself competent to rule on a dispute under Article 7(1) TEU re the substantive determination of a clear risk of a serious breach of the Rule of Law. In my view, arguments on *lex specialis* do not prevent that.

First, unlike for the Common Foreign and Security Policy (Article 24(1) TEU) the Treaties do not expressly

exclude the ECJ's jurisdiction in the matter of Protecting Fundamental Values; secondly, because Article 7 TEU is only *lex specialis* as far as its scope reaches. The ECJ has repeatedly found that the *lex specialis* rule is applicable only in so far as the special rule in effect regulates matters⁵²⁵. Article 7 TEU is limited to clear risks/serious and persistent breaches and, as far as the sanctions are concerned to the suspension of voting rights as defined by Article 7 TEU. Therefore it does not exclude for example a mere statement as to the violation under Article 258 TFEU, in particular since Article 258 TFEU is expressly applicable to violations of the obligations imposed under the Treaties (TEU and TFEU) (see *infra*).

This finding is corroborated by an analysis of the ECJ's case-law concerning the elements of the Rule of Law. The ECJ has constantly held that judicial review of measures adopted by the Member States and the EU's institutions is one of the core elements of the Rule of Law⁵²⁶. Remedies and procedures must be available for ensuring the conformity of European and Member State measures with primary Union law⁵²⁷.

Article 7 TEU is not confined to areas covered by Union law i.e. it is not restricted to matters over which the EU has competence. So it covers spheres where the Member States can act autonomously. This means that it is different from the European Union's powers to respect fundamental rights when implementing Union law. The courts have always held that Member States are obliged to respect fundamental rights as general principles of Union law.

III. ANALYSIS OF THE COMMISSION'S PRACTICE WITH REGARD TO PROTECTING THE RULE OF LAW

In the following section I shall examine whether the Commission has lived up to this task in its practice with regard to protecting the Rule of Law. Before entering into the details it is useful to describe the risks an institution faces with when using enforcement mechanisms.

A. False positives and false negatives: risks of initiating an Article 7 TEU procedure

1. General

Sanctions are never popular and sanctioning mechanisms might backfire and weaken the authority of European Union law⁵²⁸. These negative effects are obviously considerably bigger should the procedure fail. Before formally addressing Rule of Law issues in a Member State within the framework of Article 7 TEU, the institutions, in particular the Commission, always need to analyse and weigh the consequences of 'getting it wrong' or being 'overruled' by the Council. Due to the high majority threshold required by Article 7 TEU, such a risk is considerable (see above). In other words, the institutions have to analyse in each case the practical consequences of their activity or inactivity for a) the Member State concerned, b) the citizens (in the respective Member State and in the EU as a whole; the 'all affected principle', see Part three), and c) the European Union as a whole⁵²⁹.

Both over-enforcement (false positives) and under-enforcement (false negatives)⁵³⁰ bear considerable risks. False positives would imply that the Commission were to find a violation of Article 2 TEU and commence the Article 7 TEU procedure. However, *in fine*, the competent institution, the Council or the European Council, would reach the conclusion that there was no violation. In such a case, the political damage would be considerable. Starting an 'Article 7 TEU like' procedure against Austria inflicted lasting damage to the EU in that Member State, to the European Union as a whole and beyond (see above). What is probably still worse is that a negative decision would give additional legitimacy to the respective Member State, who would thence be confirmed in its 'illiberal' course. It will also have a uniting effect within the 'indicted' state and, as a corollary, alienate even more this Member State's government and its population from the European Union and its institutions⁵³¹. Instead of a reuniting effect, such a false positive would, on the contrary, increase the 'US' and 'THEM' feeling. The latter being a *topos* often times abused by populist movements⁵³².

Therefore, from a legal and a political standpoint, the institutions should employ a cautious but firm and, above all, coherent approach.

A ‘false negative’ is to be understood as a situation where the European Union institutions do not commence an Article 7 TEU procedure, although the formal and substantial requirements would be met. Some authors severely criticize for example the absence of a “Pre-Article 7 TEU” procedure against Hungary⁵³³. A failure to condemn in terms of Rule of Law is sometimes understood as equivalent to an endorsement of the situation in the Member State concerned⁵³⁴. The first evaluation seems to disregard the problems an institution is facing when confronted with a threat to the fundamental values of a Member State; whereas the second exaggerates the effects of a ‘false negative’. As in many other occasion what might be best must yield to what is practicable⁵³⁵.

Theoretically it appears, at first glance, convincing to apply the principle of ‘resist beginnings’ in cases of violation of the Rule of Law⁵³⁶. On second glance, already in theory, the reply is much more complex. The protection of fundamental values is superfluous when the threat to it is minimal, it might even violate its own premise to protect a ‘pluralistic society’; at the same time, it becomes ineffective when the threat to the fundamental values has reached already a certain level⁵³⁷. Also in practice the situation is complex for the institution having to take a decision. An institution venturing into the first application of Article 7 TEU or Pre-Article 7 TEU Procedure needs to take other aspects into consideration. This application would mean to venture into *terra incognita*, which, as Professor Weiler rightly states, is in itself a scary prospect⁵³⁸. As another author put it: “*Pioneering voyages can, as we all know, end in glory or catastrophe*”⁵³⁹

Indisputably, ‘false negatives’ also give certain legitimacy to an illiberal course and risk a copy-cat effect in other Member States⁵⁴⁰. On the other hand, a ‘false negative’ lacks the formal rubber-stamping of a situation in a Member State. Even more importantly, the criticism voiced against the Commission’s alleged inactivity does not take into consideration the possibility of using informal mechanisms to solve a ‘Rule of Law’ issue with a Member State⁵⁴¹. We shall see

in the Third Part that in the European Union dialogue is often the most adequate way of addressing Rule of Law and other conformity issues.

In evaluating the lack of use of the formal mechanism of Article 7 TEU, the consequences of a ‘false positive’ cannot be left out of sight. As we shall see in the following section the case of sanctions against Austria in 2000 has shown that such ‘false positives’ have serious negative consequences, such as legitimizing effects for the government creating Rule of Law issues and they have serious negative repercussions on the perception of the European Union and its institutions as such.

2. Example: Effects of a ‘false positive’: The ‘sanctions’ against Austria (2000)

Article 7 TEU has not been formally employed yet. Nevertheless, there was one practical example where a large majority of Member States acted in order to protect the European Union’s fundamental values. It was not a formal use of Article 7 TEU but came close.

The facts leading to the ‘sanctions’ against Austria can be briefly summarised as follows.⁵⁴² After elections in Austria, the FPÖ was likely to become a member of the government coalition in the year 2000. The FPÖ has been described as a ‘*right wing populist party with extremist expressions*’, whose party officials had made xenophobic statements. As a reaction, the Portuguese Presidency of the European Union, speaking in the name of 14 Member States, sent a statement to Austria on 31 January 2000 announcing several measures (‘sanctions’) should the FPÖ become part of the coalition government in Austria. The ‘sanctions’ announced in the letter included *inter alia* the renouncement of official bilateral contacts at a political level⁵⁴³; the denial of support for Austrian candidates seeking positions in international organisations, and, lastly, the reception of Austrian ambassadors to European Union capitals at a purely technical rather than political level⁵⁴⁴. Those ‘sanctions’ were formally not EU measures, but rather 14 bilateral coordinated moves⁵⁴⁵.

Although the letter did not expressly mention Article 7 (new version) TEU, subsequent statements by the

European Commission and the European Parliament referred to these provisions⁵⁴⁶. Contrary to the action of the 14 Member States, the Commission did not pursue a policy of isolating Austria. According to its then President, Romano Prodi, it saw the task of a supranational institution as binding its members to its values rather than isolating them⁵⁴⁷. The ‘sanctions’ were therefore lifted on 12 September 2000 after a report by ‘three wise men’ had suggested that Austria was not violating the values contained in Article 7 TEU (at the time Article 6 TEU)⁵⁴⁸.

Those ‘sanctions’ led to fierce criticism (terms such as ‘*European mobbing*’⁵⁴⁹, ‘*Austria became “a pariah within the European Union”*’⁵⁵⁰ were used to describe the effects of the ‘sanctions’) and a ‘constitutional crisis’ in the European Union⁵⁵¹. One commentator even speculated that this ‘false negative’ would prevent Article 7 TEU from ever being used since the Union would explode were it to trigger the procedure ‘again’⁵⁵². However, politically, the report of the ‘three wise men’ noted that the ‘sanctions’ by the 14 Member States had some positive effects by increasing awareness of the importance of European values and intensifying the efforts by the Austrian Government to defend them⁵⁵³. In addition, sections of the academic literature mention some other positive effects of the ‘sanctions’ against Austria: at a political level, they intensified the discussion on human rights in the European Union and, from a legal perspective, they led to a modification of the Treaties⁵⁵⁴. Indeed, in 2001, the Treaty of Nice introduced a new Article 7(1) TEU which allows for preventive actions in the case of ‘a clear risk’ of a ‘serious breach’ of one of the fundamental values referred to in Article 2 TEU. It is to be noted, however that the use of the ‘surveillance’ procedure is not a procedural condition for the use of the sanction procedure under Article 7(2) TEU. If this were the case, the European Union would not be able to react to urgent situations such as an undemocratic putsch⁵⁵⁵.

On the other hand, the negative effects, such as a stirring-up of nationalistic feelings, were predominant⁵⁵⁶. The decision was taken at a time when 12 of the 14 governments were ruled by parties which were members of the Socialist International⁵⁵⁷. This led to speculations by some commentators that the Austrian Socialist Party (SPÖ), after having lost the

elections, had been operational in convincing party friends in other Member States to intervene against Austria⁵⁵⁸.

The ‘letter of the 14’ had other unwanted consequences which, in the end, even rendered the ‘sanctions’ counterproductive. In Austria itself they produced a “*rallying-round the flag effect*” and gave rise to a wave of EU-scepticism. As a ripple effect they created suspicion towards the European Union in other small Member States⁵⁵⁹. In the light of this situation, the ‘wise men’ suggested lifting the sanctions⁵⁶⁰ but their mandate did not include a judgment on the legality of the measures⁵⁶¹. Therefore, the report does not expressly address the legality of the sanctions. Commentators nearly unanimously reach the conclusion that the reaction of the 14 Member States was not only politically unwise but also illegal⁵⁶². It possibly violated substantial legal principles including the proportionality principle⁵⁶³, circumvented the Treaty provision of Article 7 TEU (old version) itself, bearing in mind that the old version, before the modifications introduced by the Nice Treaty in 2001, did not contain the preventive mechanism of Article 7(1) TEU (‘*clear risk of a serious breach*’)⁵⁶⁴. Hence, at the time, only the ‘*existence of a serious and persistent breach*’ could trigger the ‘Rule of Law mechanism’. It is undisputed that those conditions had not been fulfilled in the case of Austria, since any possible threats to the values mentioned in Article 7 TEU (new version) had not materialised at the time the ‘sanctions’ were adopted⁵⁶⁵.

From a procedural point of view, the ‘sanctions’ suffered the following legal flaws: they were not motivated and violated the right to be heard⁵⁶⁶; they infringed an essential procedural requirement since, contrary to Article 7(1) TEU (old version), the European Parliament had not been consulted prior to their adoption⁵⁶⁷. These violations by the 14 Member States taken together were also considered as infringing the principle of sincere cooperation as expressed in Article 4(3) TEU (new version)⁵⁶⁸.

3. *Lessons to be learned*

The case of sanctions against Austria teaches us several important lessons for future use of the Article 7 TEU procedure:

a) Although the procedure has important political ramifications, approaches which are too obviously politically motivated must be avoided⁵⁶⁹, otherwise the credibility of the European Union as an organisation based on values risks being undermined. In cases where it is legally uncertain whether the conditions for triggering the Rule of Law procedure are fulfilled, an application of any Rule of Law procedure would be difficult to reconcile with the basic principles of subsidiarity and respect for the constitutional identity of the Member States. These are, in the end, an expression of the Rule of Law and the separation of powers within the European Union.

b) Respect for the procedural requirements such as the right to be heard and the obligation to motivate a decision is vital. Only if those central core procedural elements of the Rule of Law are respected will the action to protect or enforce the Rule of Law be credible and coherent. In order to have the necessary institutional support the participation of the – other -institutions during the whole procedure leading to sanctions is essential.

On a more general level, the ‘Austrian case’ has shown that the Institutions should be careful but honest, principled and coherent⁵⁷⁰ in the use of Article 7 TEU. An unjustified use could trigger serious unwanted effects. In brief, it is essential that the European Union institutions act cautiously in order to avoid creating ‘false positives’ with regard to the protection of the Rule of Law in the European Union.

B. General criticism of the Commission’s practice concerning threats to the Rule of Law Article 7 TEU

After having described the steps the institutions had taken with respect to Articles 2 and 7 TEU one author states: “*This flurry of initiatives on the rule of law front is yet to lead, however, to concrete actions*”⁵⁷¹. Article 7 TEU is referred to as a sort of “sleeping giant in the history of EU law”⁵⁷². An Editorial of the Common Market Law Review was entitled: *Safeguarding EU values in the Member States – Is something finally happening?*⁵⁷³. Other authors lament the Commission’s

‘*lack of political will to activate the new mechanism*’⁵⁷⁴ and predict ‘*damaging effects of the further development of the Rule of Law in the EU and the EU’s credibility*’⁵⁷⁵.

This harsh criticism seems, at best, only partially justified. It disregards the special character of the European Union described supra in part 2. Any action to be taken under Article 7 TEU has to respect the Member States’ constitutional identity, subsidiarity and the supra-nationality principle.

The ‘sleeping giant’ allegory raises the question of the historical dimension of Article 7 TEU. This provision was only introduced into the TEU by the Treaty of Amsterdam in 1996. Compared to similar clauses in national systems and other international organisations (see supra Second Part) it is a relatively recent provision. We have seen in the Second Part that much older ‘homogeneity’ provisions and their enforcement mechanisms have either never or only very rarely been used. On a comparative perspective the use of the ‘enforcement of homogeneity clauses’ is extremely rare. We have seen supra that neither in the Federal Republic of Germany nor in Spain have those mechanisms been used yet. Even in the US, and notwithstanding its comparatively long constitutional tradition, there are only a handful of cases where the ‘enforcement mechanism for homogeneity’ was used⁵⁷⁶. Also in other international organisations with a high level of integration, the use of the ‘homogeneity measures’ are particularly rare. The only examples are the Commonwealth, for example the exclusion of Zimbabwe, which did not produce the desired effect on the country’s policies (see Second Part).

Given the exceptional character of Article 7 TEU, the need for caution is inherent. We shall see infra that the situations which raised questions as to their compatibility with the Rule of Law were not identical and, hence, called for differentiated reactions. Those differences in situations required a difference in approach by the competent institutions, in particular the Commission⁵⁷⁷.

The criticism turned in particular around the alleged inactivity of the European Union institutions from 2012 on⁵⁷⁸. Several of those concerned real or perceived Rule of Law issues which had occurred prior to the 2014 communication⁵⁷⁹. To name just a view: the

deportation of Roma from France⁵⁸⁰, the concentration of media power in Italy⁵⁸¹, the constitutional crises in Romania and Hungary.

On 13 January 2016, the situation in Poland has given rise to the first use of the Pre-Article 7 TEU Procedure established by the Commission in March 2014⁵⁸². On 1 June 2016 the Commission has issued the first 'rule of law opinion', i.e. the first step in the Pre-Article 7 TEU Procedure against Poland⁵⁸³. On 27 July 2016 the Commission launched the second step in this procedure, the 'rule of law recommendation' which is public⁵⁸⁴.

The situations described (with the exception of the case of Poland) have already been subject of in-depth analysis from a legal and political science point of view⁵⁸⁵. Therefore the present article will only briefly describe the similarities and to pointing at the particularities of each individual case.

The basic point of departure for the Union's institutions is identical in all cases of alleged or presumed violations of the Rule of Law. In particular the Commission has to evaluate the risk between a 'false positive' and a 'false negative'. Most of the cases mentioned have in common that the government in power tried to reinforce its power base by one or all of the following measures: Limiting media pluralism (Italy⁵⁸⁶, Hungary⁵⁸⁷, Poland⁵⁸⁸); hampering the work of NGOs (Hungary, Poland) trying to disturb the balance between the different branches of government by tilting it in favour of the governing party (Romania, Hungary, Poland) in particular by means of curbing the independence of the judiciary (Italy, Romania⁵⁸⁹, Hungary⁵⁹⁰, Poland⁵⁹¹); attacking fundamental rights (France).

It is striking that in all but one of those cases⁵⁹², we can observe classical attacks of illiberal governments with a view to influencing the democratic process of forming opinions. At times these measures were combined, in particular in Hungary and Poland, with an attempt to curb the established system of checks and balances. The first two examples, limiting media pluralism and hampering the work of NGOs seem to be 'softer'⁵⁹³ and less related to the Rule of Law than the others. Nevertheless, a correct understanding of the Rule of Law encompasses those measures too.

A free press as the 'fourth estate' is seen as playing an essential part in an effective system of checks and

balances⁵⁹⁴. Free media and independent NGOs ensure also a certain political opposition, in particular in situations where there is no institutionalised opposition yet or anymore. Therefore they play a key role in creating and maintaining a viable democracy⁵⁹⁵. The High Level Group on Media Freedom and Pluralism (HLG) considered a free and pluralistic media crucial for European democracy⁵⁹⁶. Additionally there seems to be a more direct link between limiting a free press and a more classical Rule of Law issue: authors note a correlation between curbing media pluralism and a lack of an independent judiciary⁵⁹⁷. This is small wonder since censorship and propaganda are typical tools of authoritarian and totalitarian systems, which use both⁵⁹⁸. Media can even at least indirectly play a role in maintaining the Rule of Law⁵⁹⁹. They are definitely one of the core elements for monitoring and sanctioning actions of government⁶⁰⁰.

The parallels with what happened towards the end of the Weimar Republic ('forced harmonisation', 'Gleichschaltung' see above First Part) are striking. Similarities with the situations faced by the protection mechanisms for democracy in Latin America⁶⁰¹ (see supra Second Part) are also obvious. Nevertheless, the situations described supra show also important legal, factual and political differences. Those differences warrant, in our view, the differentiated approach the European Commission has adopted up to now.

Before embarking on a description of the differences in the situations and the reasons why they justify a differentiated reply by the Commission it is helpful to briefly recall the situation of an institution faced with a situation where the Rule of Law is threatened. As we have seen supra, the institutions always have to weigh the consequences of 'getting it wrong' or being 'overruled' by the Council, see Article 7(1) and (2) TEU against the usefulness of employing such a procedure. In other words, in each case they have to analyse the practical consequences for the citizens concerned (in the respective Member State and in the European Union as a whole, for the 'all affected principle' see supra in this Part) and for the European Union as a whole of its activity or inactivity. Over-enforcement (false positives) and under-enforcement (false negatives)⁶⁰² bear considerable risks as we have seen in the case of Austria in 2000 (see supra in this Part).

The ultimate goal of the enforcement of homogeneity clauses is to stop the threat to fundamental values. If this goal can be achieved without encountering the high risk of a false positive, it would seem that strong arguments speak in favour of following, the other, less risk-prone, path. A good example for this is how Norway handled the dispute with Hungary concerning the distribution of funds to Hungary by NGOs. After 19 months of discussion during which the funds were blocked, the Hungarian authorities dropped the 'charges' against the NGOs⁶⁰³.

Is political fear the real reason for the apparent lack of usage of Article 7 TEU or are there objective differences between the situations which had occurred before the Polish constitutional crisis? Not entirely; at least two arguments of an entirely legal character speak in favour of the legality and opportunity of the approach chosen by the Commission. The first is the need for the Commission to respect the proportionality principle⁶⁰⁴. In other words: it should not be biting, if barking does the job⁶⁰⁵. The second argument is the subsidiarity principle on the basis of which Article 7 TEU measures can only be taken as ultima ratio.

In my view there are several differences between the situations in France, Italy, Romania and Hungary and the one in Poland.

Ratione temporis, the majority of those Rule of Law problems occurred before March 2014 when the Commission adopted the Article 7 Framework. Therefore a potential Article 7 TEU procedure would have had to face the majority requirements of 4/5 of the Member States in the case of Article 7(1) TEU and unanimity in the case of Article 7(2) TEU. Obtaining such a majority would have been no easy task – in other words, the risk of false negatives would have been considerable.

Such tactical considerations are not the only ones pleading for choosing different ways to solve the issues regarding the Rule of Law previously described.

There are also differences '*ratione materiae*'. The Article 7 TEU procedure is not an objective in itself. Its purpose is to remedy the situation of a threat to the Rule of Law. In this respect, it is similar to the infringement procedure under Article 258 TFEU. Its primary goal is also to make Member States comply with and fulfil

their obligations under the Treaties by bringing the non-compliant behaviour as quickly and effectively as possible to an end⁶⁰⁶. Ceasing illegal behaviour is a much clearer expression of promoting respect for the Rule of Law than punishment⁶⁰⁷.

One other factor plays an important role in this context: At the end of the day the situation can only be changed by the Member State itself, since the EU is not equipped with an effective executing mechanism as the President of the US (see *infra* First Part). Therefore the two options which are open are either to rely on the institutions of the Member State itself to remedy the situation or to incite the Member State concerned via 'pressure from Brussels/Luxembourg'.

The experience with management mechanisms⁶⁰⁸, as opposed to the enforcement mechanism of Article 258 TFEU, with regard to infringements is also useful in this context:

Informal mechanisms such as SOLVIT⁶⁰⁹, the Internal Market Scoreboard and the EU-Pilot Procedure⁶¹⁰ have proven effective in addressing cases of wrong application of EU-law⁶¹¹ and, therefore, in ensuring compliance of national law with EU-law⁶¹². They foster cooperation and dialogue on two levels: on the one hand, between different layers of administration within one Member state and, on the other, between the Member State concerned and the Commission⁶¹³. Negotiation is rightly seen as the prime means of promoting compliance⁶¹⁴.

From a legal point of view, subsidiarity also speaks in favour of leaving the solution of a threat to the Rule of Law to the national system as long as it is still functioning. If an effective system of checks and balances is already abolished or about to be abolished the situation is obviously different⁶¹⁵. In such a situation a solution of the Rule of Law issues on the Member State's level becomes impossible or, at least, unlikely.

The institutions of the Member State threatening the Rule of Law can remedy the situation themselves if – and only if – the system of checks and balances is still working. Contrary to the situation in some federal states we have seen in the Second Part (see in particular the 'Wallace case'), the EU cannot use coercion to enforce Union law against a recalcitrant Member State⁶¹⁶. In other words, the European Union cannot

wield a sword or deploy the army to ensure respect for the Rule of Law.

In the following section we shall see that the informal approach followed by the Commission incited Member States to undertake steps to align the national situation with the values of the European Union⁶¹⁷. Therefore the Commission fulfilled its task as Guardian of the Treaties by engaging in a dialogue with the Member States concerned without using the formal Article 7 TEU mechanism.

In the case of Romania, the situation was solved in a first step by political pressure by the Council and more direct messages from the Commission's President⁶¹⁸. Later on the Commission established a Cooperation and Verification Mechanism⁶¹⁹.

In the case of France it seems that the concentrated forced evacuation and expulsion actions against Roma ceased after the Commission had threatened to start an infringement procedure⁶²⁰. Additionally French tribunals declared some measures illegal⁶²¹. Therefore no complete breakdown of the legal system of checks and balances existed. Consequently, had the Commission employed the Article 7 TEU procedure in this case, it would probably have violated the subsidiarity principle.

In the case of Italy it was the Italian legal and political system itself that foiled several of the attempts either to further concentrate media power, to avoid 'biased' judges, to curb the powers of the constitutional court or to have laws '*ad personam*' adopted⁶²². Contrary to the opinion of several commentators⁶²³, political and legal reasons spoke against initiating an Article 7 TEU procedure against Italy. These examples given above have shown that the institutions of the EU were correct in assuming that Italy's legal and political system itself would be able to remedy the threat to the Rule of Law⁶²⁴. Such a cautious approach is also in line with the character of Article 7 TEU as an instrument of last resort⁶²⁵.

Political reasons speak also against using an Article 7 TEU procedure in cases where the Member State concerned still disposes of a functioning system of checks and balances. In such a case the Commission would face the risk of taking sides in a political conflict. In order to maintain its role as 'honest broker' and

objective Guardian of the Treaties, the Commission should avoid this impression.

Against this background, we shall briefly examine the 'Pre-Article 7 TEU Procedure'. We shall have a look at its legality and the first case of its application.

C. The Case of the Pre-Article 7 TEU Procedure

1. Introduction

We have already seen that the Commission has tackled Rule of Law problems in the Member States by different means. It searched for an intermediate way between the thorny path of Article 7 TEU, called a 'nuclear option'⁶²⁶ and the difficulties in effectively using it because of the majorities needed⁶²⁷ and the soft powers of dialogue.

As a reaction to those practical difficulties in initiating the Article 7(1) TFEU mechanism, the Commission adopted in March 2014 a Communication entitled "*A new EU Framework to strengthen the Rule of Law*"⁶²⁸. It is the result of discussions following an initiative by 12 foreign ministers to establish a mechanism to improve the protection of the fundamental values, in particular human rights⁶²⁹ on different levels.

The Commission adopted the Pre-Article 7 TEU Procedure since during the first years of the 2010s developments in several Member States showed that it was difficult to set the Article 7 TEU procedure in motion. The reasons for this are manifold. To mention just a few:

- national governments are reluctant to target each other with sanctions⁶³⁰;
- the threshold for arriving at a suspension is particularly high (4/5 of the Member States, see Article 7 (1)TEU
- as shown above the example of Austria as a 'false negative'⁶³¹ hangs like a Damocles' sword over any future use of such a mechanism
- naming the Article 7 TEU procedure a 'nuclear option' did not necessarily increase the likelihood of its use; since it implies that no reasonable politician would employ it

In the light of those difficulties, on 6 June 2013 the Justice and Home Affairs Council asked the Commission to “take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues”⁶³². In 2013 and in 2014 the European Parliament also invited all the institutions of the European Union to launch a joint reflection and debate on how to equip the Union with the necessary tools to fulfil its Treaty obligations on democracy, the rule of law and fundamental rights. At the time the European Parliament underlined the importance of “avoiding any risks of applying double standards among its Member States and stressed the importance of ensuring continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law”⁶³³.

In the wake of these requests the Commission also organized a conference during which the different options were discussed with academia, practitioners and judges⁶³⁴.

In reaction to the situation in several Member States and following the requests by the other EU institutions to find a more efficient way of dealing with possible threats to the Rule of Law the Commission adopted a Communication⁶³⁵. The Commission understands this ‘Pre-Article 7 TEU Procedure’ as a new framework within the context of the Commission competences as provided for by the existing Treaties⁶³⁶. The procedures provided for by Article 7(1) and (2) TEU are not always appropriate to quickly respond to threats to the rule of law in a Member State⁶³⁷; therefore the need to find practical and rapid solutions to situations where the Fundamental Values are at risk called for a new mechanism.

The Pre-Article 7 TEU Procedure has, according to the Commission’s understanding, the following characteristics:

- it does not replace the existing Article 7 TEU procedure;
- it aims at ensuring an effective and coherent protection of the rule of law and, more broadly, at contributing to the objectives of the Council of Europe, including on the basis of the expertise of the European Commission for Democracy through Law⁶³⁸;

- it only concerns threats to the Rule of Law of a systemic nature, i.e. threats to 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;
- it will only be activated when national “rule of law safeguards” fail⁶³⁹;
- these objectives are to be achieved by establishing a dialogue with the concerned Member State in order to find solutions⁶⁴⁰.

The reactions to the Pre-Article 7 TEU Procedure were mixed. Some concerned the establishment of the mechanism as such, whereas other criticized the Commission for not using it in specific cases. Some authors hold that it “falls short of what is required to effectively address internal threats to EU values” but, at the same time prefer it largely to “the Council’s alternative proposal to hold an annual rule of law dialogue”⁶⁴¹. Others welcome it since its character as a monitoring tool reflects the “profound and general concept of mutual responsibility for the respect for common values by all Member States” and might help to avoid ‘pathological situations’⁶⁴². It is also heralded as an important visible confirmation of the importance the Rule of Law enjoys in the European Union⁶⁴³. The Commission’s initiative to adopt the Communication is described as ‘courageous’⁶⁴⁴. Some academic authors welcomed the Pre-Article 7 TEU Procedure as an expression of the Commission’s competences under Article 17(1) TEU⁶⁴⁵.

The European Parliament asked the Commission to use the Pre-Article 7 TEU Procedure against Hungary⁶⁴⁶. The Commission did not follow this request which was met with criticism by the European Parliament⁶⁴⁷ and certain parts of academia⁶⁴⁸. Having asked the Commission to use the Pre-Article 7 TEU Procedure implies that the European Parliament accepts it as being, in principle, a legal tool for ensuring compliance with the values of Article 2 TEU. Hence the European Parliament seems to accept that the Commission acted in the framework of its competences when it adopted the Pre-Article 7 TEU Procedure.

The Council, for its part, did not follow the same path. Its Legal Service considered the Pre-Article 7 TEU Procedure an *ultra vires* act and, therefore, illegal⁶⁴⁹. This opinion is, at best, doubtful⁶⁵⁰. It merits a more detailed analysis, since the legality of the Pre-Article 7 TEU Procedure is the basis for the Commission's dialogue on the situation in Poland. Some authors speculated that this opinion explains the Commission's hesitations as to the use of the Pre-Article 7 TEU Procedure⁶⁵¹.

The Pre-Article 7 TEU Procedure is supposed to find ways for the Commission to fulfil its role as Guardian of the Treaties in a situation where it suspects that the rule of law is at risk in a Member State. In the introduction to its Work Programme for 2014 the Commission suggests to activate the mechanism only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks⁶⁵².

The situation is politically very sensitive. Normally, in cases of a suspected breach of EU law, the Commission starts an infringement procedure according to Article 258 TFEU. In cases of "a clear risk of a serious breach" by a Member State of the values referred to in Article 2, the TEU provides for a special procedure in Article 7 TEU. Under this provision the Commission (as well as 1/3 of the Member States or the European Parliament) can send a reasoned proposal to the Council, initiating such a procedure.

The Pre-Article 7 TEU Procedure is meant to be an initial procedural step aiming at either finding an informal solution to threats to the Rule of Law or for preparing the reasoned proposal under Article 7 TEU.

2. Legality of the Pre-Article 7 TEU Procedure as a procedure analogous to the EU-Pilot Procedure

The question has to be asked which procedural steps the Commission is legally entitled to undertake before/ instead of using its right to initiative under Article 7 TEU. The Council Legal Service sees in the Pre-Article 7 TEU Procedure an *aliud* to the Article 7 TEU procedure.

It is suggested that the Pre-Article 7 TEU Procedure is to be considered a procedure analogous to the

one of 'EU Pilot' in the framework of infringement procedures. Therefore it is not an '*aliud*' but merely formalises a necessary procedural step before the Commission can use its – formal - right of initiative under Article 7 TEU. As we will see this procedure has a three advantages: first, that the analogous EU-Pilot procedure has been accepted by the European Court of Justice; secondly; it shows that the Commission has learned its lessons from the experience of the 'Austrian' case where the right to be heard had not been respected⁶⁵³ and thirdly that, at least in theory, it allows for an amicable solution of the potential Rule of Law conflict, before a formal procedure will have created 'trenches' between the institutions of the European Union and the Member States concerned. Before embarking on this evaluation exercise it is helpful to recall briefly the main characteristics of the EU-Pilot procedure and then compare it with the Pre-Article 7 TEU Procedure.

2.1 Main characteristics of the EU-Pilot Procedure

The EU-Pilot procedure was introduced by the Commission's 2007 communication ('A Europe of Results – Applying Community Law')⁶⁵⁴. The communication laid down the Commission's policy for improving the application of Union law. It aims at providing more rapid answers to citizens and businesses and solutions to problems, including correction of infringements before entering into formal infringement procedures.⁶⁵⁵ EU-Pilot was one of the key components of this new policy. The system was launched in 2008. In the meantime all Member States participate in EU-Pilot.

Pre-infringement discussions between the Commission and Member State authorities before sending the letter of formal notice (Article 258 TFEU) had always existed. With the introduction of EU-Pilot they have been given a clearer and more efficient structure. EU-Pilot provides a common online platform for such discussions and has introduced binding time-limits for both the Member States and the Commission. Given that cases should, in principle, be dealt with within 20 weeks EU-Pilot dialogue facilitates speedy resolution of problems.

In December 2011 the Commission presented the Second Evaluation Report⁶⁵⁶ on the operation of EU-Pilot and it will continue to report on the use of EU-Pilot in its Annual Reports on the Application of Union law. In its 29th Annual Report on the Application of EU-Law the Commission concluded that the problem solving discussions under EU-Pilot are working. They allowed for timely resolution of nearly two thirds of potential infringements in 2011⁶⁵⁷. The proportion has risen to three-fourths in 2014⁶⁵⁸.

2.2 Comparison between Article 7 TEU And Article 258/260 TFEU

Article 7 TEU provides for a three-step procedure. First, on the basis of a reasoned proposal which can be sent *inter alia* by the Commission, the Council may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU.⁶⁵⁹ Before making such a determination, the Council has to hear the Member State in question (Article 7(1) TEU). In a second step, the European Council may, on a proposal for instance by the Commission, determine the existence of a serious and persistent breach of the values referred to in Article 2 TEU. In a third step, the Council may impose the sanctions described in Article 7 (3) TEU (e.g. loss of voting rights in Council).

Under Article 258 TFEU the Commission initiates the formal procedure with the letter of formal notice. Traditionally there have been contacts between the Commission and the Member State concerned before that stage (see in this section below).

Both procedures provide for several procedural steps before sanctions may be applied: According to Article 258/260 TFEU two pre-trial exchanges have to take place between the Commission and the Member State concerned (letter of formal notice and reasoned opinion) before an application can be sent to the European Court of Justice (Article 258 TFEU). Only in a 'second infringement procedure' (exception: non-communication cases) the ECJ may apply sanctions (Article 260 TFEU); in this case only one pre-trial exchange (reasoned opinion) is requested before the application can be sent to the European Court of Justice. What are the procedural requirements under Article 7 TEU? The Council determines whether there is a clear risk of a serious breach (para. 1) and the European

Council determines existence of serious and persistent breach (para. 2). Only in a third step the Council may decide about sanctions (para. 3).

Ratione materiae the standards of Article 7 TEU are considerably more stringent than the ones for a 'normal violation' under Article 258 TFEU. This goes for the degree of the violation (only a 'serious' breach, whereas under Article 258 TFEU any breach is sufficient) and the legal values concerned (only the basic values of the EU, such as the Rule of Law, democracy and fundamental rights, whereas under Article 258 TFEU any infringement of any rule of Union-law can be challenged, according to the jurisprudence of the ECJ there is '*no de minimis rule*').

Given the importance of the violation at stake, a reasoned proposal under Article 7(1) TEU has to be based on a sound factual and legal analysis. A close cooperation between the Member State and the Commission is at least extremely useful if not absolutely necessary in this respect.

A difference between the two procedures concerns the standard of proof required. Whereas in an infringement procedure under Article 258 TFEU the Commission bears the full burden of proof for the infringement by the Member State, Article 7(1) TEU ('*clear risk*') is less severe in that respect.⁶⁶⁰

Procedures under Article 7 TEU have much wider political and, potentially economical, repercussions than infringement procedures. I would not go as far as *Schmitt von Sydow* who describes Article 7 TEU as a 'political mechanism'⁶⁶¹. In my view, it is true that, on one hand, the sanctions are political and that the procedure requests a number of evaluations which might involve political choices. On the other hand, at the same time, the procedure is prescribed by law and the criteria are essentially legal. Finally, as well with regard to the infringement procedures under Article 258 TFEU, political choices have to be made which does not mean that the infringement mechanism is a political one.

Procedures under Article 7 TEU can have serious consequences for the Member State concerned even before the existence of a 'clear risk' under Article 7(1) TEU is pronounced (e.g. lack of trust of investors, see for Poland after the change in government⁶⁶²).

Hence it is obvious that the Commission and the Member State concerned have at least a vital interest, if not a legal obligation⁶⁶³ in entering into contact before sending a reasoned proposal under Article 7(1) TEU to the Council. According to the principle of sincere cooperation (Article 4(3) TEU) it can be argued that the Commission might be even legally obliged to enter in such a discussion before using its right of initiative under Article 7(1) TEU. Actually this interest is threefold: firstly, as in the EU-Pilot procedure, such a ‘partnership approach’ could help gathering the necessary information. Secondly, since the values at stake are more fundamental than the ones in an infringement procedure, the Commission is *a fortiori* interested in finding a speedy solution and in ensuring rapidly respect for those fundamental values. Lastly the ‘false positive’ of Austria (see *supra* in this Part) has shown that the procedural right to be heard is essential in cases concerning the ROL. It would be absurd not to grant it since it is one of the indisputable elements of the Rule of Law.

In my view the Pre-Article 7 TEU Procedure can be understood as a ‘Rule of Law Pilot’ procedure. The Article 258 TFEU pilot procedure has been approved by the General Court.

2.3 Application of existing jurisprudence

In my view the lawfulness of the Pre-Article 7 TEU Procedure follows by analogy from existing jurisprudence of the Union courts.

In a case where the Commission had decided not to follow up on a complaint, the applicants had challenged the ‘EU-Pilot’ procedure⁶⁶⁴. In their view it was an ‘aliud’ compared to the infringement procedure as foreseen by Article 258 TFEU. Consequently, the applicants contended that the Commission was not competent to adopt such a procedure. The General Court rejected their claims with the following reasoning:

“Even if the EU Pilot procedure is not expressly provided for by the Treaty, this does not mean by itself that it has no legal basis. The EU Pilot procedure results from the inherent powers of the Commission to control the respect for EU law by the Member States. A mechanism or a

procedure for the exchange of information which precedes the formal opening of an infringement procedure is inevitable in order to proceed with the first factual verifications and to find the first indications for a possible violation of EU-law. This is exactly the goal the EU Pilot procedure pursues; it formalises the first information exchanges between the Commission and the Member States concerning possible violation of EU-law. Under these circumstances (...) the EU Pilot procedure gives a structure to the steps the Commission has traditionally undertaken after either having received a complaint or acted on its own initiative. (...).⁶⁶⁵

In this order the General Court recognises expressly the Commission’s authority to formalise a ‘pre-Article 258 TFEU’ procedure. This authority is based on the institution’s inherent powers of the Commission as Guardian of the Treaties. The latter competence comprises the respect for the fundamental values.

Given the similarities of the two procedures (see above) the same reasoning can be applied to the Pre-Article 7 TEU Procedure. An exchange of information prior to the formal opening of a procedure is *a fortiori* necessary in the case of Article 7 TEU due to the vagueness of the terms used, the complexity of the issues involved, the necessary respect for the constitutional identity of the Member State concerned, its character as ‘ultima ratio’ and the seriousness of the claimed violation.

In such cases it belongs to the implied competence of the Commission as Guardian of the Treaties to structure a dialogue between the Commission and the Member State concerned⁶⁶⁶. The *ultra vires* argument used by the Council’s Legal Service is, therefore, not convincing.

It is interesting to note that, in its opinion referred to earlier, the Council’s Legal Service does not discuss the effects of this order on the lawfulness of the Pre-Article 7 TEU Procedure. It is even more surprising since the opinion is dated 27 May 2014; therefore the Council’s Legal Service should have been aware of the Court Order issued on 10 March 2014. In my view it deserved at least some discussion in its opinion.

2.4 Conclusion: Lawfulness of the Pre-Article 7 TEU Procedure

The Pre-Article 7 TEU Procedure can be understood as a ‘Rule of Law-Pilot’. It provides a clear procedural framework for the Commission’s actions using its right of initiative under Article 7 TEU. On the procedural side it has several advantages. To name just a few: by setting the Member State clear deadlines for replying to its questions and, in turn, accepting to react speedily itself, it creates legal certainty and grants the right to be heard.

With regard to the substance, i.e. the objective of finding rapid solutions to threats to the Rule of Law the Pre-Article 7 TEU Procedure has also positive aspects: The Member State concerned can adapt or correct its contentious behaviour at an early stage. Thus it allows, potentially, for an early respect for the most fundamental values the European Union is built upon.

The Commission can rely on a procedure which has proven to be effective and which allows for a structured approach.

D. Criticism of using the of Pre-Article 7 TEU Procedure against Poland but not against Hungary

The European Parliament asked the Commission in December 2015 to use this Pre-Article 7 TEU Procedure with regard to Hungary⁶⁶⁷.

In order to understand the Commission’s differentiated approach it is helpful to compare the situation in Poland with the one in Hungary. Legally, the Hungarian government undertook several isolated steps which, taken together, raised serious issues with regard to the Rule of Law. Several of the isolated actions such as the massive replacement of judges⁶⁶⁸ and the interference with the independence of the Data Protection Officer⁶⁶⁹ were successfully attacked by the Commission by means of infringement procedures under Article 258 TEU. At the same time, many of the ‘suspicious’ activities were adopted via constitutional amendments making it more difficult to prove their incompatibility with the fundamental values.

In the case of Poland, the opinion of the Venice Commission⁶⁷⁰ shows clearly that the direct attack on the authority of the constitutional court’s authority has a different quality with regard to the Rule of Law. Respect for judgements of constitutional courts is undisputedly the very essence of the Rule of Law and the lack of it undermines the other fundamental values, democracy and fundamental rights⁶⁷¹. The Member States do not enjoy any discretion in this regard. This absence of discretion is of primordial importance when establishing the seriousness of a violation. According to the jurisprudence of the European Court of Justice in the context of establishing non-contractual liability of the European Union the absence of discretion indicates that the breach of an obligation was serious⁶⁷². We have seen above that this jurisprudence can be applied by analogy to the definition of what constitutes a ‘serious’ breach in the meaning of the Pre-Article 7 TEU Procedure.

The opening of the Pre-Article 7 TEU Procedure with regard to Poland received mixed reactions from commentators. Some critical voices describe the differences between the situation in Hungary and Poland as merely political, pointing in particular at the *Fidesz* party’s heavier weight in the European Parliament than the one of the *PiS*, the ruling party in Poland⁶⁷³.

One of the most prolific scholars on the Rule of Law describes the opening of the Pre-Article 7 TEU Procedure with regard to Poland as “*an act of short-sighted naïveté, or simple sloppiness in legal reasoning? Could it be an attack on the effet utile of Article 7?*”⁶⁷⁴. He also mentions four points of criticism against the Commission’s approach with regard to Poland. We shall examine them in turn:

First, in his view, using the Pre-Article 7 TEU Procedure procedure implies that the Commission is of the opinion that the requirements for Article 7(1) TEU are not met. He considers this position is most likely wrong and, therefore, the Pre-Article 7 TEU procedure would only lead to a loss of time.

This inference from using the Pre-Article 7 TEU Procedure is not convincing. As we have already seen in this Part, the Commission created this procedure in order to structure the dialogue with the Member

State before entering into a formal Article 7 TEU procedure. Due to its high procedural thresholds the latter carries considerable risks ('false negatives', see above). Therefore, and given that at the end of the day it is only the Member State which can effectively ensure compliance, it would seem that entering into a dialogue is not a 'loss of time' but rather a necessary procedural stage before formalising any steps under Article 7 TEU. This position is confirmed by the statement made by First Vice-President of the European Commission Frans Timmermans on 1 June 2016 when announcing the adoption of a 'Rule of Law' opinion. He referred to the dialogues as intensive and constructive⁶⁷⁵.

Secondly, the same author doubts the willingness of the Polish authorities to enter into a dialogue at all. As well this argument is legally not convincing. The European Court of Justice has repeatedly underlined that the European Union is a community based on trust in the compliance of Member States⁶⁷⁶. In a recent case concerning the relation between Member States the ECJ clarified the limitations of the principles of mutual recognition and mutual trust between Member States. Factually the case concerned a possible refusal to execute an arrest warrant based on the possibility that the destination Member State could employ methods amounting to torture or inhuman or degrading treatment.

Given the seriousness of the possible violation of the most fundamental of European values *ratione materiae* in the case decided it would seem that these findings can be applied *a fortiori* to the case concerning the Pre-Article 7 TEU Procedure with regard to Poland. Also *ratione personae* they can be applied *mutatis mutandis* to situations arising between the Commission and the Member States, such as in the case concerning Poland.

As outlined above, the EU is a "Community based on the mutual trust that the common values will be recognised in the EU"⁶⁷⁷, therefore limitations to these basic principles can be applied only 'in exceptional circumstances'⁶⁷⁸.

The ECJ defines the criteria as follows: there must be evidence of a real risk⁶⁷⁹; such circumstances have to be based on information that is objective, reliable, specific and properly updated⁶⁸⁰. Procedurally, it is necessary to contact the 'target' Member State before applying

a limitation in order to obtain information on the concrete case⁶⁸¹.

Transferring these findings of an extremely strict scrutiny for limitations to the principle of mutual trust to the opening of the Pre-Article 7 TEU Procedure leads to the following result: the Commission would have been badly advised, if had it relied on this exception to the principle of mutual trust. Presupposing the unwillingness of the Polish authorities to fulfil their obligation of sincere cooperation could easily have been considered as not granting the Polish authorities the right to be heard. It would have amounted to repeating the mistakes made in the 'case against Austria' in 2000⁶⁸².

The third argument is of an entirely procedural nature: first, *Kochenov* sustains that by employing the Pre-Article 7 TEU Procedure the Commission would create a legitimate expectation that it has become a necessary precondition for employing Article 7 TEU. This would make the use of the genuine Article 7 TEU procedure more difficult.

As well this argument is not convincing when having a closer look at the relevant texts. In its Communication of March 2014, the Commission stated expressly that the Pre-Article 7 TEU Procedure does "not prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU"⁶⁸³. For the very reasons for adopting such a procedure it is clear, that the direct recourse to Article 7 TEU would be subject to further requirements. Therefore, the actual one-time-use of the Pre-Article 7 TEU Procedure with regard to Poland does not seem to have an effect going beyond the wording of the Communication.

The last argument links the attitude of the Hungarian government to the difficulty of obtaining unanimity in Council under Article 7(2) TEU to the deployment of the Pre-Article 7 TEU Procedure. It is as difficult to understand as the author's suggestions to, on the one hand to "forget about the Pre-Article 7 procedure", and on the other "do not pursue one recalcitrant Member State when it is known that there are more than one and unanimity is required". I cannot grasp how this statement rhymes with the criticism voiced against the Commission that it would weaken Article 7 TEU when

suggesting, at the same time, that Article 7 TEU should never be used if no unanimity can be obtained in the European Council. Does this imply that complete inactivity is considered preferable to starting a dialogue with a view to improving the situation? Certainly not, since the same authors stated that by adopting the Pre-Article 7 TEU Procedure “*the Commission has fulfilled its duty as guardian of the Treaties*”⁶⁸⁴. He even asked “*the Commissioner in charge of the rule of law to stop talking the talk and start walking the walk*”⁶⁸⁵. In my view, this is exactly what it did when opening the Pre-Article 7 TEU Procedure with regard to Poland.

More positive comments referred to the Pre-Article 7 TEU Procedure with regard to Poland as a more “conducive alternative” to Article 7 TEU⁶⁸⁶.

IV. CAN THE ECJ PLAY A MORE ACTIVE ROLE IN THE PROTECTION OF THE RULE OF LAW DE LEGE LATA?

A. Can Article 258 TFEU be used for presumed violations of the Rule of Law by Member States?

Since the entry into force of the so-called Lisbon Treaty on 1 December 2009 this so-called ‘infringement procedure’ refers to infringement of Treaties (TEU and TFEU). Therefore its ambit is not limited to the Treaty on the Functioning of the European Union but includes the TEU and, therefore the Fundamental Values contained in Article 2 TEU. The opposite opinion expressed by some authors⁶⁸⁷ overlooks the fact that the Treaty of Lisbon extended the competence of the European Court of Justice to the Treaties (TEU and TFEU). The judgement of 2004⁶⁸⁸ which is quoted as authority for the opposite opinion was pronounced prior to the amendments of the TEU and TFEU by the ‘Treaty of Lisbon’. Therefore, in principle, also the obligations of the Member States under the TEU can give rise to a procedure under Article 258 TFEU. The Commission has constantly underlined that the Pre-

Article 7 TEU Procedure is without prejudice to its competences under Article 258 TFEU⁶⁸⁹.

We have already seen in this Part that Article 7 TEU is only *lex specialis* to Articles 258 and 259 TFEU as far as its ambit (sanctions foreseen and conditions for their deployment) reaches. It does not generally exclude opening infringement procedures for violations of the Member States’ obligations with regard to fundamental values.

In the framework of the protection of fundamental values such violations could, for instance, consist in a lack of cooperation in a Pre-Article 7 TEU Procedure (Article 4(3) first indent TEU). The ECJ has found that a Member State is obliged to help the Commission in its task to monitor the application of Union law. If the Member State itself holds the information necessary for the effective exercise of this competence, it must transmit the ‘self-incriminating’ evidence to the Commission⁶⁹⁰.

In evaluating the situation in a Member State with regard to the Rule on Law the Commission largely depends on information about the national law and practice. If the Member State concerned does not provide this information, it might be found in violation of its obligation of sincere cooperation⁶⁹¹.

In case of either a permanent obstruction or a series of measures by one Member States which threaten the Rule of Law, the jurisprudence concerning the administrative practices, see above in this Part, could be applied by analogy.

These examples show that, contrary to the more intergovernmental approaches of many other international organisations (see above Second Part), in the European Union supranational mechanisms play a role in the protection of the Rule of Law. As a consequence, recalcitrant Member States cannot entirely rely on political means in order to avoid a control of their compliance with Article 2 TEU.

B. Could a Pre-Article 7 TEU Procedure be challenged by the Member State concerned?

The question appears whether the ECJ could be invoked by a Member State against which the Pre-Article 7 TEU Procedure has been started. A possible procedural way for the member state concerned of contesting such an act could be Article 263 TFEU. According to some authors the result of such a challenge would be difficult to predict⁶⁹².

In my view the chances of success of such a challenge would be extremely limited. Independently from the arguments presented above concerning the legality of the Commission's Pre-Article 7 TEU Procedure, such a claim would probably already be inadmissible.

According to Article 263 TFEU a measure can only be attacked, if it is intended to produce legal effects. The Pre-Article 7 TEU Procedure does not produce such effects. In my view the jurisprudence of the Court with regard to the reasoned opinion and to the letters sent in the framework of claiming own resources from the member states can be applied by analogy to the situation at hand. The General Court has recently confirmed that only a judgment under Article 258 or 259 TFEU can validly determine the obligations of Member States and declare the illegality of a measure adopted by a Member State⁶⁹³. Although the Commission is free to express its opinion, such declarations do not produce legal effects and, therefore, do not constitute challengeable legal acts under Article 263 TFEU⁶⁹⁴.

CONCLUSIONS

The three examples used in the present article ('Weimar', 'Wien' and 'Wallace') prove that (a) that the existence of Values is fundamental for any polity; (b) that mechanisms for their Verification/Implementation are essential for their effective protection and (c) that, in applying those mechanisms, the competent authorities must show a high degree of Virtue¹ (understood as rational resolve). Only in the 'Wallace' case Values, Verification and Virtue coincided; it took, however,

1 I thank Professor Weiler for having drawn my attention to this particular aspect.

place in a particular political and legal context which is far away from the reality of the European Union.

When fundamental values are put at risk, the European Union faces similar problems as international organizations and federal states. One of them consists in the considerable degree of abstraction of the terms employed, another in the high threshold for the use of implementation mechanisms often coupled with their political character. The present study has shown that those difficulties are inevitable, given the highly exceptional nature of such situations. We have also seen that it is possible to fill those abstract terms with life; first and foremost by applying the interpretation methods provided by the ECJ's jurisprudence and also by using the Venice Commission's toolbox on the Rule of Law.

Criticism against the European Union's institutions' practice should take into account the particular context they are acting in. The institutions' practice has to be understood in the framework of the specific nature of Union law, in particular the subsidiarity and proportionality principle. The Austria case has shown that it can be paradoxical and counterproductive to defend the Rule of Law whilst at the same time violating some of its basic principles.

Often commentators do not ask the question which everyone who has to take a decision is confronted with: what is the risk of creating 'a false positive' compared to the one of creating a 'false negative' (over- or under-enforcement of the rules)? Given the high majority thresholds in Article 7 TEU this risk is considerable. Therefore it seems comprehensible to prefer a dialogue-based approach whenever possible. If this method fails, the institutions need the necessary resolve in order to act swiftly against threats to or violations of the Rule of Law. At the same time, they have to respect scrupulously the requirements of the Rule of Law themselves.

Let me close with a quote by US-President *Dwight D. Eisenhower*. When he opened the first Law Day in 1958 he said:

*"The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law."*⁶⁹⁵

ENDNOTES

- 385 See, for example, Luc Heuschling, *État de Droit, Étude linguistique, de théorie & de dogmatiques juridiques comparées*, in *Verfassungsprinzipien in Europa*, CONSTITUTIONAL PRINCIPLES IN EUROPE, PRINCIPES CONSTITUTIONNELS EN EUROPE, 103-166 (Hartmut Bauer & Christian Calliess eds. 2008) at 132-142 ; Tom Bingham, *THE RULE OF LAW* (2011) at 10-33.
- 386 Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, OXFORD J. OF LEGAL STUD. 325-53 (2015) at 331 et sequi distinguishes between “thick or substantive versions, teleological versions and procedural versions” of the Rule of Law
- 387 Koen Lenaerts, *The Court of Justice as the Guarantor of the Rule of Law within the European Union*, in *THE CONTRIBUTION OF INTERNATIONAL AND SUPRANATIONAL COURTS TO THE RULE OF LAW* 242-264 (Geert De Baere & Jan Wouters eds., 2015) at 243.
- 388 Koen Lenaerts, *The Court of Justice as the Guarantor of the Rule of Law within the European Union*, in *THE CONTRIBUTION OF INTERNATIONAL AND SUPRANATIONAL COURTS TO THE RULE OF LAW* 242-264 (Geert De Baere & Jan Wouters eds., 2015) at 242; see also Daniel Volp, *Parteiverbot und wehrhafte Demokratie*, NEUE JURISTISCHE WOCHENSCHRIFT 459-64 (2016) at 463.
- 389 See also, with a comparative perspective, Albrecht Weber, *EUROPÄISCHE VERFASSUNGSVERGLEICHUNG* (2010) at 145 and with references to the Spanish and to the Portuguese constitutions, at 149 and 151, to recent ‘post-communist’ constitutions at 150.
- 390 Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, EUROPARECHT 625-641 (2015) at 630; see also Helle Krenke & Martin Scheinin, *Introduction*, in *JUDGES AS GUARDIANS OF CONSTITUTIONALISM AND HUMAN RIGHTS* 1-24 (Martin Scheinin et al. eds., 2016) at 5; from a political science perspective: Ted Piccone, *FIVE RISING DEMOCRACIES AND THE FATE OF THE INTERNATIONAL LIBERAL ORDER* (2016) at 219 sees the Rule of Law, democracy and the protection of human rights as a synonym for good governance around the world.
- 391 Koen Lenaerts, *The Court of Justice as the Guarantor of the Rule of Law within the European Union*, in *THE CONTRIBUTION OF INTERNATIONAL AND SUPRANATIONAL COURTS TO THE RULE OF LAW* 242-64 (Geert De Baere & Jan Wouters eds., 2015) at 242.
- 392 See above, Second Part, II.C.3.
- 393 Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law of 19 March 2014, COM(2014)158, http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 394 This approach is shared by the Council who sees the Rule of Law as a pre-condition for the protection of fundamental rights, see Council Presidency Document No. 16862/14 of 12 December 2014, Conclusions of the Council of the EU and the Member States Meeting within the Council on Ensuring Respect for the Rule of Law, at para 8 <http://data.consilium.europa.eu/doc/document/ST-17014-2014-INIT/en/pdf>; on the international level it is seen as a commitment to the content of the rules regarding inter alia the distribution of power, and liability, Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 *GLOBAL CONSTITUTIONALISM* 396-427 (2015) at 395.
- 395 For details see below in the third part of this report.
- 396 Dimitry Kochenov & Laurent Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11 *EUROPEAN CONST. L. REV.* (2015) at 514, 522; Luc Heuschling, *État de Droit, Étude linguistique, de théorie & de dogmatiques juridiques comparées*, in *Verfassungsprinzipien in Europa*, CONSTITUTIONAL PRINCIPLES IN EUROPE, PRINCIPES CONSTITUTIONNELS EN EUROPE, 103-66 (Hartmut Bauer & Christian Calliess eds. 2008) at 109-10.

- 397 European Commission for Democracy through Law (Venice Commission), Document CDL-AD(2011)003rev-e, Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e)
- 398 European Commission for Democracy through Law (Venice Commission), Document CDL-AD(2016)007-e Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)
- 399 Dimitry Kochenov & Laurent Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11 EUROPEAN CONST. L. REV. (2015) at 523.
- 400 Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law of 19 March 2014, COM(2014)158, Annex I, at 1 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 401 See, most recently, Case C-260/14 & C-261/14 (joined cases) *Neamț & Bacău v. Ministerul Dezvoltării Regionale și Administrației Publice* [2016] (delivered 26 May 2016) at paras. 53 et sequi.
- 402 See Helmut Schmitt von Sydow, *Liberté, démocratie, droits fondamentaux et Etat de droit, analyse de l'article 7 du traité UE*, REVUE DE DROIT DE L'UNION EUROPÉENNE, 285-328 (2001) at 295.
- 403 Eva-Maria Poptcheva, *Member States and the Rule of Law, Dealing with a Breach of EU Values*, European Parliament Briefing, March 2015, PE 554.167.
- 404 Helmut Schmitt von Sydow, *Liberté, démocratie, droits fondamentaux et Etat de droit, analyse de l'article 7 du traité UE*, REVUE DE DROIT DE L'UNION EUROPÉENNE, 285-328 (2001) at 296 with more examples.
- 405 Case T-429/05, *Artogodan GmbH v. European Commission*, [2010] E.C.R. II-00491 (delivered 3 March 2010) at paras. 52-55.
- 406 Case T-333/10, *Animal Trading Company (ATC) BV and Others v European Commission* [2013] (delivered 16 September 2013) at paras. 62 & 63.
- 407 Case T-333/10, *Animal Trading Company (ATC) BV and Others v European Commission* [2013] (delivered 16 September 2013) at para. 64; in paras. 84ss, the General court underlines the importance of respecting the guarantees of administrative procedure in coming to an impartial decision in such cases.
- 408 Helmut Schmitt von Sydow, *Liberté, démocratie, droits fondamentaux et Etat de droit, analyse de l'article 7 du traité UE*, REVUE DE DROIT DE L'UNION EUROPÉENNE, 285-328 (2001) at 299.
- 409 Eduardo Virgala Foruria, *La coaccion estatal del Artículo 155 de la constitución*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 55-110 (2005) at 93.
- 410 Case C-494/01, *European Commission v. Ireland* [2005] E.C.R. I-3331 (delivered 26 April 2005).
- 411 Case C-494/01, *European Commission v. Ireland* [2005] E.C.R. I-3331 (delivered 26 April 2005) at paras. 16 ss.
- 412 Case C-494/01, *European Commission v. Ireland* [2005] E.C.R. I-3331 (delivered 26 April 2005) at para. 28.
- 413 Case C-494/01, Opinion of Advocate General Geelhoed, *European Commission v. Ireland* [2014] E.C.R. I-3338 at paras. 43-48
- 414 Case C-135/05, *European Commission v. Italy* [2007] E.C.R. I-03475 at paras. 20-22.
- 415 Case C-441/02, *European Commission v. Germany* [2006] E.C.R. I-03449 (delivered 27 April 2006) at paras. 48-50 and Case C-150/07, *European Commission v. Portugal* [2009] E.C.R. I-00007 (delivered 22 January 2009) at paras. 65-66, 68.

- 416 Christiaan Timmermans, *How to Define the European Union*, in DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION, ESSAYS IN HONOUR OF JAAP W. DE ZWAAN, 81-90 (Flora Goudappel & Hirsch Ballin, eds., 2016) at 86.
- 417 This term is used by Kaarlo Tuori, EUROPEAN CONSTITUTIONALISM, (2015) at 214.
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- 419 Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUROPEAN L. J. 141-60 (2015) at 145s at 144; Ingolf Pernice, *Multilevel constitutionalism and the crisis of democracy in Europe*, 11 EUROPEAN CONST. L. REV. 541-62 (2015) at 550.
- 420 Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 GLOBAL CONSTITUTIONALISM 396-427 (2015) at 419.
- 421 See, in the context of the financial crisis, also Michael Rodi, *Machtverschiebungen in der Europäischen Union im Rahmen der Finanzkrise und Fragen der demokratischen Legitimation*, JURISTENZEITUNG 737-44 (2015) at 744.
- 422 See the speech by Carlo Schmid, „Was heißt eigentlich: Grundgesetz?“ German Parliamentary Council – the Constitutional Assembly (8 September 1948), https://www3.spd.de/linkableblob/5652/data/rede_carlo_schmid.pdf recalling the fundamental importance of this position and comparing it with the jurisprudence of the FCC concerning obligations under public international law: Thomas Giegerich, *Völkerrechtsfreundlichkeit “light“ – Viel Schatten und wenig Licht im BVerfG-Beschluss zum Treaty Override* (Saar Expert Paper, 02/2016) http://jean-monnet-saar.eu/?page_id=70 fn 60.
- 423 Daniel Halberstam, *Federalism: Theory, Policy, Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 577-606 (Michael Rosenfeld & Andrés Sajó eds., 2012) at 587.
- 424 Halberstam uses the examples of Germany under the Hitler regime and de-federalising tendencies in Venezuela under Presidents Chavez and Maduro: Daniel Halberstam, *Federalism: Theory, Policy, Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 577-606 (Michael Rosenfeld & Andrés Sajó eds., 2012).
- 425 Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe’s ‘Sonderweg’* (Jean Monet Center for International and Regional Economic Law & Justice, Working Paper, 2000) at 10 <http://jeanmonnetprogram.org/archive/papers/00/001001.html>
- 426 Utz Schliesky, *Die wehrhafte Demokratie des Grundgesetzes*, XII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 847-77 (3d ed. 2014) at 875s.
- 427 See Paul Kirchhof, *Europäische Integration*, in 10 HANDBUCH DES STAATSRECHTS, (Josef Isensee & Paul Kirchhof eds., 1st ed. 1992) at 869.
- 428 Robert Chr. van Oyen, *Von der Staatsrechtslehre zur offenen Gesellschaft de vergleichenden und europäischen Verfassungslehre, ein Interview [mit Peter Häberle] im Sommer 2014*, in VERFASSUNGSKULTUR, STAAT, EUROPA UND PLURALISTISCHE GESELLSCHAFT BEI PETER HÄBERLE, 191-206 (R.C Van Oyen et al. eds, 2016) at 193.
- 429 David Dyzenhaus, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR (1999) at 3.
- 430 John Hands, COSMOSAPIENS, HUMAN EVOLUTION FROM THE ORIGIN OF THE UNIVERSE (2015) at 554.
- 431 John Hands, COSMOSAPIENS, HUMAN EVOLUTION FROM THE ORIGIN OF THE UNIVERSE (2015) states at 554s that if human existence is compared to a 24h day, this kind of cooperation has appeared only 3 minutes to midnight.
- 432 Dimitry Kochenov & Laurent Pech, *Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction*, (Robert Schuman Centre for Advanced Studies, EUI Working Paper No. RSCAS 2015/24) at 5; Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, EUROPARECHT 625-41 (2015) at 630s.

- 433 Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUROPEAN L. J. 141-60 (2015) at 145.
- 434 To name just one example, der Spiegel reported that 3 Million EU-foreigners living in the UK could not participate in the referendum on Brexit although they are directly affected by the outcome: SPIEGEL ONLINE, EU-Bürger in Großbritannien: “Ich kann mir nicht vorstellen, dass das friedlich abgehen wird” (22 June 2016). <http://www.spiegel.de/fotostrecke/brexit-was-eu-buerger-in-grossbritannien-darueber-denken-fotostrecke-138588.html>.
- 435 Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 GLOBAL CONSTITUTIONALISM 396-427 (2015) at 403.
- 436 See the Second Part above for the case of Quebec or Catalonia.
- 437 See for instance one of the early anti-discrimination cases. It concerned the need to deposit of a guarantee for non-nationals (including EU-citizens) in the German Code On Civil Procedure. An English couple having their business in Germany raised the question of compatibility with EU-law. The ECJ followed their line of argument which had also been supported by the European Commission in its observations. judgement of 20 March 1997 in Case C-323/95, *Hayes v Kronenberger GmbH*, [1997] E.C.R. I-01711 (delivered 20 March 1997) press release [in German]: <http://curia.europa.eu/de/actu/communiqués/cp97/cp9714de.htm>
- 438 Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 GLOBAL CONSTITUTIONALISM 396-427 (2015) at 427; similar: Sébastien Roland, *LE TRIANGLE DÉCISIONNEL COMMUNAUTAIRE À L'AUNE DE LA THÉORIE DE LA SÉPARATION DES POUVOIRS* (2008) at 515.
- 439 Karl-Peter Sommermann, *Herkunft und Funktionen von Verfassungsprinzipien in de Europäischen Union, in VERFASSUNGSPRINZIPIEN IN EUROPA, CONSTITUTIONAL PRINCIPLES IN EUROPE, PRINCIPES CONSTITUTIONNELS EN EUROPE*, 15-44 (Hartmut Bauer & Christian Calliess eds. 2008) at 29.
- 440 Similar, with regard to the legitimacy of a state: Karl-Peter Sommermann, *Herkunft und Funktionen von Verfassungsprinzipien in de Europäischen Union, in VERFASSUNGSPRINZIPIEN IN EUROPA, CONSTITUTIONAL PRINCIPLES IN EUROPE, PRINCIPES CONSTITUTIONNELS EN EUROPE*, 15-44 (Hartmut Bauer & Christian Calliess eds. 2008) at 29.
- 441 Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 GLOBAL CONSTITUTIONALISM 396-427 (2015) at 419.
- 442 Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 GLOBAL CONSTITUTIONALISM 396-427 (2015) at 427.
- 443 See also: François Hervouet, *Brèves réflexions à propos de la légitimité de l'Union européenne, in L'IDENTITÉ DU DROIT DE L'UNION EUROPÉENNE, MÉLANGES EN L'HONNEUR DE CLAUDE BLUMANN*, 375-87 (Brunessen Bertrand et al. eds. (2014) at 381.
- 444 Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe's 'Sonderweg'* (Jean Monnet Center for International and Regional Economic Law & Justice, Working Paper, 2000) at 10 <http://jeanmonnetprogram.org/archive/papers/00/001001.html>
- 445 Opinion 2/13, *Avis rendu en vertu de l'article 218, paragraphe 11, TFUE*, (Full Court) [2014] (delivered 18 December 2014) at para. 168; Case C-404/15 & C-659/15 PPU (joined cases), *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases [2016] (delivered 5 April 2016) at para. 78 with regard to the principle and 82ss with regard to limitations in ‘in exceptional circumstances’; for a commentary on this judgment: Daniel Halberstam, *The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade*, VERFBLOG, 2016/6/09, <http://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/>.
- 446 Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUROPEAN L. J. 141-60 (2015) at 145.

- 447 Tine Carmeliet & Georgia Christina Kosmidou, *Enforcing Europe's Foundational Values in Central and Eastern Europe: A Case in Point*, in EUROPEAN JUDICIAL SYSTEMS AS A CHALLENGE FOR DEMOCRACY, 159-80 (Elzbieta Kuzslewska et al. eds., 2015) at 180; see also: European Parliament, Resolution of 16 December 2015 (2015/2935(RSP); <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+V0//EN>) on the situation in Hungary
- 448 Jürgen Habermas, *THE LURE OF TECHNOCRACY* (2015) at 66.
- 449 See also Daniel Innerarity, *The Inter-Democratic Deficit of the EU*, in BEYOND THE CRISIS: THE GOVERNANCE OF EUROPE'S ECONOMIC, POLITICAL AND LEGAL TRANSFORMATION, 173- 84 (Mark Dawson et al. eds., 2015) at 179s.
- 450 Joseph H.H. Weiler, *Living in a Glass House: Europe, Democracy and the Rule of Law*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, Carlos Closa et al. eds. (Robert Schuman Centre for Advanced Studies, EUI Working Paper No. RSCAS 2014/25, March 2014) 25-29 at 27.
- 451 Crystal Cordell Paris, *Ancient, Modern and Post-National Democracy: Deliberation and Citizenship Between the Political and the Universal*, in CIVIC REPUBLICANISM, ENLIGHTENMENT AND MODERNITY: ANCIENT LESSONS FOR GLOBAL POLITICS, 89-116 (Geoffrey Kellow & Neven Leddy eds., 2016) at 108.
- 452 Crystal Cordell Paris, *Ancient, Modern and Post-National Democracy: Deliberation and Citizenship Between the Political and the Universal*, in CIVIC REPUBLICANISM, ENLIGHTENMENT AND MODERNITY: ANCIENT LESSONS FOR GLOBAL POLITICS, 89-116 (Geoffrey Kellow & Neven Leddy eds., 2016) at 108.
- 453 See for example Karl-Peter Sommermann, *Herkunft und Funktionen von Verfassungsprinzipien in der Europäischen Union*, in VERFASSUNGSPRINZIPIEN IN EUROPA, CONSTITUTIONAL PRINCIPLES IN EUROPE, PRINCIPES CONSTITUTIONNELS EN EUROPE, 15-44 (Hartmut Bauer & Christian Callies eds. 2008) at 37.
- 454 See for example Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe's 'Sonderweg'* (Jean Monet Center for International and Regional Economic Law & Justice, Working Paper, 2000) at 10 <http://jeanmonnetprogram.org/archive/papers/00/001001.html>
- 455 Mortimer Sellers, *What Is the Rule of Law and Why Is It So Important?*, in DEMOCRACY AND RULE OF LAW IN THE EUROPEAN UNION, ESSAYS IN HONOUR OF JAAP W. DE ZWAAN, 2-14 (Flora Goudappel & Hirsch Ballin, eds., 2016) at 6; according to Tuori, this is the common core of the German notion of *Rechtsstaat* and the Anglo-American principle of the Rule of Law, Kaarlo Tuori, *EUROPEAN CONSTITUTIONALISM*, (2015) at 212.
- 456 So, literally, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998; which all Member States and The European Union have ratified, see Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447; 38 ILM 517 (1999) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en & <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>
- 457 Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, February 25, 1991, 1989 U.N.T.S. 309 http://www.unece.org/env/eia/about/eia_text.html
- 458 International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, (Merits) April 20, 2010 I.C.J. 14 at para. 204; for a detailed analysis see: Adele J. Kirschner & Katrin Tiroch, *The Waters of Euphrates and Tigris: An International Law Perspective*, in 16 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (Armin von Bogdandy & Rüdiger Wolfrum eds., 2012) at 358 et sequi, http://www.mpil.de/files/pdf4/mpunyb_07_Tiroch_16.pdf; see also, Alan Boyle, DEVELOPMENTS IN INTERNATIONAL LAW OF EIA AND THEIR RELATION TO THE ESPOO CONVENTION https://www.unece.org/fileadmin/DAM/env/eia/documents/mop5/Seminar_Boyle.pdf
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- 462 Adele J. Kirschner & Katrin Tiroch, *The Waters of Euphrates and Tigris: An International Law Perspective*, in 16 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (Armin von Bogdandy & Rüdiger Wolfrum eds., 2012) at 361.
- 463 Hanspeter Kriesi & Leonardo Morlin, *Conclusion: What Have We Learnt, And Where do We Go From Here?*, in HOW EUROPEANS VIEW AND EVALUATE DEMOCRACY, 307-25 (Monica Ferrin & Hanspeter Kriesi, eds., 2016) at 318 with references to the tables A 3.11 and A. 8.1 and figure 14.2 at pp. 343ss of Appendix C.
- 464 Dani Rodrik, *The Future of European Democracy*, in AFTER THE STORM: HOW TO SAVE DEMOCRACY IN EUROPE 55-65 (Luuk van Middelaar & Philippe Van Parijs, eds., 2015) at 60.
- 465 Kaarlo Tuori, EUROPEAN CONSTITUTIONALISM, (2015) at 214.
- 466 Koen Lenaerts, *Foreword*, in COURT OF JUSTICE OF THE EUROPEAN UNION ANN. REP. 2015 – JUDICIAL ACTIVITY, at 9; for a statistical overview *ibid.* pp. 74ss.; http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf
- 467 Koen Lenaerts, *Foreword*, in COURT OF JUSTICE OF THE EUROPEAN UNION ANN. REP. 2015 – JUDICIAL ACTIVITY, at 1 http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf
- 468 Bruno de Witte, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court*, 40 E. L. REV. 683-705 (2015) at 695.
- 469 See for example: Case C-205/09, *Criminal proceedings against Eredics & Sápi*, [2010] E.C.R. I-10231 at para. 33.
- 470 Vassilios Skouris, *Der Einfluss des nationalen Rechts und der Rechtsprechung der mitgliedstaatlichen Gerichte auf die Auslegung des Europarechts*, ZEITSCHRIFT FÜR VERWALTUNGSGERICHTSBARKEIT, 203-207 (2014) at 205.
- 471 See for instance, Case C-583/11P *Inuit Tapiriit Kanatami & Others v. European Parliament & Council of the European Union* [2013] (delivered 3 October 2013) at paras. 91 & 92.
- 472 See Case C-583/11P *Inuit Tapiriit Kanatami & Others v. European Parliament & Council of the European Union* [2013] (delivered 3 October 2013) at paras. 91 & 92 and Case T-400/11, *Altadis, SA v European Commission*, [2013] Order of the General Court, (delivered 9 September 2013) at para. 50.
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- 474 Joseph H.H. Weiler, *Living in a Glass House: Europe, Democracy and the Rule of Law*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, Carlos Closa et al. eds. (Robert Schuman Centre for Advanced Studies, EUI Working Paper No. RSCAS 2014/25, March 2014) 25-29 at 29.
- 475 Joseph H.H. Weiler, *Living in a Glass House: Europe, Democracy and the Rule of Law*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION, Carlos Closa et al. eds. (Robert Schuman Centre for Advanced Studies, EUI Working Paper No. RSCAS 2014/25, March 2014) 25-29 at 28.
- 476 Nicolai Rubinstein, *Political Ideas in Sieneese Art: The Frescoes by Ambrogio Lorenzetti and Taddeo di Bartolo in the Palazzo Pubblico*, 21 JOURNAL OF THE WARBURG AND COURTAULD INSTITUTES, 179-207 (1958) at 184.

477 See for instance one of the early anti-discrimination cases: Case C-323/95, *Hayes v Kronenberger GmbH*, [1997] E.C.R. I-01711 (delivered 20 March 1997), quoted above in this section.

478 Generally on the system of institutional balance in the EU see: Sébastien Roland, *LE TRIANGLE DÉCISIONNEL COMMUNAUTAIRE À L'AUNE DE LA THÉORIE DE LA SÉPARATION DES POUVOIRS* (2008).

479 See also speech of First Vice-President of the European Commission Frans Timmermans to the European Parliament: Press Release, European Commission, Commission Statement: EU framework for democracy, rule of law and fundamental rights (12 February 2015) http://europa.eu/rapid/press-release_SPEECH-15-4402_en.htm

480 European Parliament, Resolution of 10 June 2015 (2015/2700(RSP)) P8_TA(2015)0227 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0227+0+DOC+XML+V0//EN> and European Parliament, Resolution of 16 December 2015 on the Situation in Hungary, (2015/2935(RSP)) P8_TA PROV(2015)0461 (16 December 2015) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+V0//EN> on the situation in Hungary.

481 See the lively debate with the Polish Prime Minister in the European Parliament: European Parliament, EPTV: Situation in Poland (Debate), (19 January 2016) <http://www.europarl.europa.eu/ep-live/en/plenary/video?debate=1453218960960>

482 Heather Grabbe, *Six Lessons of Enlargement Ten Years On/ The EU's Transformative Power in Retrospect and Prospect*, *JOURNAL OF COMMON MARKET STUDIES* 40-56 (2014) at 53.

483 European Parliament, Motion for a Resolution of 5 April 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), PE576.988v01-00 8/20, PR\1086558EN.doc EN. <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-576.988&format=PDF&language=EN&secondRef=01> Whereas the unnecessary creation of new structures or duplication should be avoided and integration and incorporation of existing instruments is to be preferred”

“1. Requests the Commission to submit, by the end of 2016, on the basis of Article 295 TFEU, a proposal for the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) in the form of an interinstitutional agreement laying down arrangements facilitating the cooperation of institutions of the Union and its Member States in the framework of Article 7 TEU, integrating, aligning and complementing existing mechanisms, following the detailed recommendations set out in the Annex hereto;

484 See also speech of First Vice-President of the European Commission Frans Timmermans to the European Parliament of 12 February 2015, *EU framework for democracy, rule of law and fundamental rights*, SPEECH/15/4402, http://europa.eu/rapid/press-release_SPEECH-15-4402_en.htm

485 One commentator, the former German permanent representative at the EU, phrased the role of the European council as follows: “It represents national sovereignty as if we were still in the days of the Vienna Congress. Its consensus mechanism stands in the way of an efficient and integrated Union. It weakens the Commission and prevents decisions to be taken by qualified majority in the Council of Ministers.”, quoted by Christophe Leclercq, *German Ex-Ambassador: EU Council ‘Stands in the Way of Efficient and Integrated Union*, EURACTIV.COM (18 December 2015) <http://www.euractiv.com/section/eu-priorities-2020/interview/german-ex-ambassador-eu-council-stands-in-the-way-of-efficient-and-integrated-union/>

486 Nina Wunderlich, *Commentary of Article 259 TFEU in KOMMENTAR ZUM EUROPÄISCHEN UNIONSRECHT*, (Hans von der Groeben et al, eds., 7th ed. 2015).

487 See for example Case C-364/10, *Hungary v. Slovakia*, [2012] (delivered 16 October 2012) concerning the prohibition of the Hungarian president to enter Slovakian territory judgement of 16 October 2012; Press Release No 131/12, Court of Justice of the European Union, Slovakia did not breach EU law by refusing entry into its territory to the President of Hungary (16 October 2012) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/cp120131en.pdf>.

- 488 Ulrich Ehrlicke, *Commentary on Art. 259, § 3, in EUV/AEUV. VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ÜBER DIE ARBEITSWEISE DER EUROPÄISCHEN UNION-KOMMENTAR*, (Rudolf Streinz 2d ed., 2012); similar: Jürgen Basedow, *The Judge's Role in European Integration. The Court of Justice and its Critics, in THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES*, 65-79 (Hans-Wolfgang Micklitz & Bruno De Witte eds., 2012) at 70.
- 489 Nina Wunderlich, *Commentary of Article 259 TFEU in KOMMENTAR ZUM EUROPÄISCHEN UNIONSRECHT*, (Hans von der Groeben et al, eds., 7th ed. 2015) at para. 4.
- 490 Heather Grabbe, *Six Lessons of Enlargement Ten Years On/ The EU's Transformative Power in Retrospect and Prospect*, *JOURNAL OF COMMON MARKET STUDIES* 40-56 (2014) at 47.
- 491 Claudio Franzius, *Sinn und Unsinn einer Kopenhagen-Kommission*, *VERFBLOG*, 2013/4/08, <http://verfassungsblog.de/sinn-und-unsinn-einer-kopenhagen-kommission/>
- 492 Sébastien Roland, *LE TRIANGLE DÉCISIONNEL COMMUNAUTAIRE À L'AUNE DE LA THÉORIE DE LA SÉPARATION DES POUVOIRS* (2008) at 526.
- 493 Council Presidency Document No. 16862/14 of 12 December 2014, Conclusions of the Council of the EU and the Member States Meeting within the Council on Ensuring Respect for the Rule of Law at para. 14 <http://data.consilium.europa.eu/doc/document/ST-17014-2014-INIT/en/pdf>
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- 502 Karen Alter et al., *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 *EUROPEAN J. INT'L L.* 293-328 (2016) at 327.

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- 504 See above in this Part.
- 505 See First Vice-President of the European Commission Frans Timmermans in 2014 in his replies to the Questions from the Committee on Legal Affairs, Reply to Question 6: Frans Timmermans, Answers to The European Parliament, Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights (2014). http://ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/2014-ep-hearings-reply-timmermans_en.pdf
- 506 See for example Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUROPEAN L. J. 141-60 (2015) at 150; a detailed analysis of the procedure, its motivation and its legality can be found in: Thomas Holzner, *Das Europäische Parlament im Institutionengefüge der EU – Verschiebung der Kräfteverhältnisse infolge der Durchsetzung eines „Spitzenkandidaten“ als Kommissionspräsident?*, 525-42 EUROPARECHT (2015).
- 507 See Joseph H.H. Weiler, *Editorial, European Parliament Elections 2014: Europe's Fateful Choices*, 24 EUR. J. INT'L L. 747-753 (2013) at 750-51.
- 508 Ulrich Beck, *THE METAMORPHOSIS OF THE WORLD* (2016) at 156s.; Thomas Holzner, *Das Europäische Parlament im Institutionengefüge der EU – Verschiebung der Kräfteverhältnisse infolge der Durchsetzung eines „Spitzenkandidaten“ als Kommissionspräsident?*, 525-42 EUROPARECHT (2015) at 529.
- 509 In his speech to the electors of Bristol in 1774, E. Burke famously stated: “Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of parliament.” See Chris Bertram, *Bristol and Burke*, NEWSLETTER OF BRISTOL CIVIL SOCIETY, quoting Edmund Burke, *Speech to the Electors of Bristol of 1774*, <http://eis.bris.ac.uk/~plcdib/burke.html>
- 510 Document CDL-AD(2016)001-e, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e) at para.119
- 511 Or as Dehousse puts it makes “*it relatively cost-free for European judges to depart from their own country's preferences.*”; Renaud Dehousse, *The Politics of Delegation in the European Union*, in INDEPENDENCE AND LEGITIMACY IN THE INSTITUTIONAL SYSTEM OF THE EUROPEAN UNION, 57-82 (Dominique Ritleng ed., 2016) at 67.
- 512 Renaud Dehousse, *The Politics of Delegation in the European Union*, in INDEPENDENCE AND LEGITIMACY IN THE INSTITUTIONAL SYSTEM OF THE EUROPEAN UNION, 57-82 (Dominique Ritleng ed., 2016) at 67.
- 513 B. Peters, *PUBLIC ADMINISTRATION, RESEARCH STRATEGIES, CONCEPTS AND METHODS* (2016) at 70.
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- 518 Loïc Azoulay & Zane Rasnača, *The Court of Justice of the European Union as a Self-Made Statesman in A COMPANION TO EUROPEAN UNION LAW AND INTERNATIONAL LAW*, 166-178 (Dennis Patterson & Anna Södersten eds., 2016) at 167.
- 519 See for example, Maciej Szpunar, *Foreword*, in *EUROPEAN JUDICIAL SYSTEMS AS A CHALLENGE FOR DEMOCRACY*, (Elzbieta Kuzelewska et al. eds., 2015) at V.
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- 522 Case 138/79, *SA Roquette Frères v Council of the European Communities (Isoguclose)* [1980] E.C.R. 03333 at para. 33.
- 523 Generally on the system of institutional balance in the EU see: Sébastien Roland, *LE TRIANGLE DÉCISIONNEL COMMUNAUTAIRE À L'AUNE DE LA THÉORIE DE LA SÉPARATION DES POUVOIRS* (2008).
- 524 Case C-660/13, *Council of the European Union v. European Commission*, (Grand Chamber) [2016] at para. 84 and the case-law cited.
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- 527 Kaarlo Tuori, *EUROPEAN CONSTITUTIONALISM*, (2015) at 76.
- 528 Roland Bieber & Francesco Maiani, *Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?* 51 *CMLR* 1057-1092 (2014) at 1059.
- 529 See also: Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three Interrelated Problems*, 53 *COMMON MKT. L. REV.* 597-605 (2016) at 601.
- 530 For the terminology see, e.g. Roderick M. Hills Jr, *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 *HARV. L. REV. F.* 173-82 (2005) at 176.
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- 533 Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, *EUROPARECHT* 625-641 (2015) at 641 ; Kochenov, Dimitry: *The Commission vs Poland: The Sovereign State Is Winning 1-0*, *VerfBlog*, 2016/1/25, <http://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/>, DOI: <https://dx.doi.org/10.17176/20160126-172908> (for a detailed discussion of this criticism see below in this Part)
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- 535 Jed Atkins, *CICERO ON POLITICS AND THE LIMITS OF REASON: THE REPUBLIC AND LAWS* (2013) at 231.
- 536 Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, *EUROPARECHT* 625-641 (2015) at 641.
- 537 Helmut Steinberger, *KONZEPTION UND GRENZEN FREIHEITLICHER DEMOKRATIE, DARGESTELLT AM BEISPIEL DES VERFASSUNGSRECHTSDENKENS IN DEN VEREINIGTEN STAATEN VON AMERIKA UND DES AMERIKANISCHEN ANTISUBVENTIONSRECHTS* (1974) at 16.
- 538 See Joseph H.H. Weiler, *Editorial, European Parliament Elections 2014: Europe's Fateful Choices*, 24 *EUROPEAN J. INT'L L.* 747-753 (2013) at 751.
- 539 Fernando Guirao, *An Independent Catalonia as a Member of the European Union? Terra ignota*, in *CATALONIA: A NEW INDEPENDENT STATE IN EUROPE? A DEBATE OVER SECESSION IN THE EUROPEAN UNION*, 189-223 (Xavier Cuadras-Morató ed., 2016).
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- 541 For the importance of informal mechanisms on the national level see above Second Part, on the level of International Organisations see above, Second Part.
- 542 For more details, see Eugene Regan, *Are EU Sanctions Against Austria Legal?* 55 *ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT* 323-36 (2000) at 323; Katharina Serini, *SANKTIONEN DER EUROPÄISCHEN UNION BEI VERSTOSS EINES MITGLIEDSTAATS GEGEN DAS DEMOKRATIE- ODER RECHTSSTAATSPRINZIP* (2009) at 137-42.
- 543 Text of the statement reprinted in Eugene Regan, *Are EU Sanctions Against Austria Legal?* 55 *ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT* 323-36 (2000) at 323.
- 544 Alison Duxbury, *Austria and the European Union - The Report of the 'Three Wise Men'*, 10 *MELBOURNE J. INT'L L.* (2000).
- 545 Michael Merlingen et al., *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria*, 39 *JOURNAL OF COMMON MARKET STUDIES* 59-77 (2001) at 60.
- 546 Katharina Serini, *SANKTIONEN DER EUROPÄISCHEN UNION BEI VERSTOSS EINES MITGLIEDSTAATS GEGEN DAS DEMOKRATIE- ODER RECHTSSTAATSPRINZIP* (2009) at 23 with further references.
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- 550 Michael Merlingen et al., *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria*, 39 *JOURNAL OF COMMON MARKET STUDIES* 59-77 (2001) at 60.
- 551 Frank Hoffmeister, *Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA, THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, 125-152 (Armin von Bogdandy & Pál Sonnevend eds., 2015) at 203.

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- 577 In accordance with the citation of Heraclit that ‘No **man** ever steps in the **same river** twice, for it’s not the **same river** and he’s not the **same man**.’
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- 591 For an overview of the measures adopted by the Polish government, see European Commission, MEMO/16/62, Fact Sheet – College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers, (13 January 2016) at point 1 http://europa.eu/rapid/press-release_MEMO-16-62_en.htm
- 592 In the case of France it seems that the concentrated forced evacuation and expulsion actions against Roma ceased after the Commission had menaced starting an infringement procedure, see: Dimitry Kochenov et al., *Ni Panacée, Ni Gadget: Le Nouveau Cadre De L'Union Européenne Pour Renforcer L'Etat De Droit (Neither Gadget Nor Panacea: A New EU Framework to Strengthen the Rule of Law)* *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 689-714 (2015) at 697.
- 593 Some commentators speak of a less 'sinister' character, see Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three Interrelated Problems*, 53 *COMMON MARKET LAW REVIEW*, 597-605 (2016) at 597.

- 594 Marisa Kellam & Elizabeth A. Stein, *Why Do Presidents Try to Silence the Press and What Enables Them to Do So?* 49 COMPARATIVE POLITICAL STUDIES 48-77 (2016) at 67.
- 595 Petra Lea Lãncos, *Unearthing the values of European media law*, in MEDIA FREEDOM AND REGULATION IN THE NEW MEDIA WORLD, 199-231 (András Koltay ed., 2014) at 220ss.
- 596 REPORT OF THE HIGH LEVEL GROUP ON MEDIA FREEDOM AND PLURALISM, A FREE AND PLURALISTIC MEDIA TO SUSTAIN EUROPEAN DEMOCRACY (2013) at 3 <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf>
- 597 Marisa Kellam & Elizabeth A. Stein, *Why Do Presidents Try to Silence the Press and What Enables Them to Do So?* 49 COMPARATIVE POLITICAL STUDIES 48-77 (2016) at 67.
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- 599 REPORT OF THE HIGH LEVEL GROUP ON MEDIA FREEDOM AND PLURALISM, A FREE AND PLURALISTIC MEDIA TO SUSTAIN EUROPEAN DEMOCRACY (2013) at 12 <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf>
- 600 Enrique Hernandez, *Europeans Views on Democracy*, in HOW EUROPEANS VIEW AND EVALUATE DEMOCRACY, 43-63 (Monica Ferrin & Hanspeter Kriesi eds. 2016) at 58.
- 601 Marisa Kellam & Elizabeth A. Stein, *Why Do Presidents Try to Silence the Press and What Enables Them to Do So?* 49 COMPARATIVE POLITICAL STUDIES 48-77 (2016) at 66; Matthew C. Mirow, *LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CADIZ AND ITS LEGACY IN SPANISH AMERICA* (2015).
- 602 For the terminology see, e.g. Roderick M. Hills Jr, *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173-82 (2005). at 176.
- 603 Norway's European Affairs Minister Vidar Helgesen: "There is a message in this for the EU, in that it shows that it's possible to handle these cases in a principled way." REUTERS, *Norway Ends Boycott of Funds to Hungary* (10 December 2015) <http://www.reuters.com/article/us-norway-hungary-funding-idUSKBN0TT1YR20151210> <http://reut.rs/1XZ7gN7>
- 604 Contrary to the situation in the FRG but in line with the one Spain, see supra Second Part
- 605 See the title of Wojciech Sadurski, *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider*, Sydney Law Research Paper No. 10/01 (2010).
- 606 Catharina Koops, *Compliance Mechanisms Compared: An Analysis of the EU Infringement Procedures, SOLVIT, EU PILOT and IMS*, in FOSTERING GROWTH IN EUROPE: REINFORCING THE INTERNAL MARKET, 431-62 (José María Beneyto & Jerónimo Maillo eds, 2014) at 453 <http://www.idee.ceu.es/Portals/0/Libros/Fostering%20Growth.-Col.%20Gral.%2048.pdf>.
- 607 Karen Alter & Liesbet Hooge, *Regional Dispute Settlement*, in OXFORD HANDBOOK OF COMPARATIVE REGIONALISM 538-58 (Tanja Börzel & Thomas Risse eds., 2016) at 553.
- 608 Dorte Sindbjerg Martinsen & Mogens Hobolth, *The Effectiveness of Transgovernmental Networks: Managing the Practical Application of European Integration in the Case of SOLVIT*, in NEW DIRECTIONS IN THE EFFECTIVE ENFORCEMENT OF EU LAW AND POLICY 152-74 (Sara Drake & Melanie Smith eds., 2016) at 173.
- 609 For a detailed description of its functioning, see Dorte Sindbjerg Martinsen & Mogens Hobolth, *The Effectiveness of Transgovernmental Networks: Managing the Practical Application of European Integration in the Case of SOLVIT*, in NEW DIRECTIONS IN THE EFFECTIVE ENFORCEMENT OF EU LAW AND POLICY 152-74 (Sara Drake & Melanie Smith eds., 2016) at 154.

610 For more details see below in this Part

611 Dorte Sindbjerg Martinsen & Mogens Hobolth, *The Effectiveness of Transgovernmental Networks: Managing the Practical Application of European Integration in the Case of SOLVIT*, in *NEW DIRECTIONS IN THE EFFECTIVE ENFORCEMENT OF EU LAW AND POLICY* 152-74 (Sara Drake & Melanie Smith eds., 2016) at 153 & 173.

612 Catharina Koops, *Compliance Mechanisms Compared: An Analysis of the EU Infringement Procedures, SOLVIT, EU PILOT and IMS*, in *FOSTERING GROWTH IN EUROPE: REINFORCING THE INTERNAL MARKET*, 431-62 (José María Beneyto & Jerónimo Maillo eds, 2014) at 462 <http://www.idee.ceu.es/Portals/0/Libros/Fostering%20Growth.-Col.%20Gral.%2048.pdf>

613 Micaela Lottini, *The SOLVIT Network and the Effective Enforcement of EU Law: What is new?*, in *NEW DIRECTIONS IN THE EFFECTIVE ENFORCEMENT OF EU LAW AND POLICY* 130-51 (Sara Drake & Melanie Smith eds., 2016) at 135.

614 See e.g. Roland Bieber & Francesco Maiani, *Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?* 51 *CMLR* 1057-1092 (2014) at 1063 & 1068.

615 See also Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law of 19 March 2014, COM(2014)158, http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf, p. 6

616 See e.g. Roland Bieber & Francesco Maiani, *Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?* 51 *CMLR* 1057-1092 (2014) at 1061; Ingolf Pernice, *Multilevel constitutionalism and the crisis of democracy in Europe*, 11 *EUROPEAN CONST. L. REV.* 541-62 (2015) at 557.

617 *REPORT OF THE HIGH LEVEL GROUP ON MEDIA FREEDOM AND PLURALISM, A FREE AND PLURALISTIC MEDIA TO SUSTAIN EUROPEAN DEMOCRACY* (2013) at 18 <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf>

618 Frank Hoffmeister, *Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA, THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, 125-152 (Armin von Bogdandy & Pál Sonnevend eds., 2015) at 231.

619 Frank Hoffmeister, *Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA, THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, 125-152 (Armin von Bogdandy & Pál Sonnevend eds., 2015) at 231.

620 See Dimitry Kochenov et al., *Ni Panacée, Ni Gadget: Le Nouveau Cadre De L'Union Européenne Pour Renforcer L'Etat De Droit (Neither Gadget Nor Panacea: A New EU Framework to Strengthen the Rule of Law)* *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 689-714 (2015) at 697 & Jean-Christophe Barbato, *Les garanties du respect des valeurs par les Etats membres*, in *LES VALEURS COMMUNES DANS L'UNION EUROPÉENNE*, 11^{ÈME} JOURNÉE JEAN MONNET, 83-100 (Laurence Potvin-Solis ed., 2014) at 96.

621 European Parliament resolution of 9 September 2010 on the situation of Roma and on Freedom of Movement in the European Union, P7 TA-PROV(2010)0312, point (I) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0312+0+DOC+XML+V0//EN>

622 Frank Hoffmeister, *Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA, THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, 125-152 (Armin von Bogdandy & Pál Sonnevend eds., 2015) at 207.

623 Frank Hoffmeister, *Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels*, in *CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA, THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA*, 125-152 (Armin von Bogdandy & Pál Sonnevend eds., 2015) at 230, Katharina Serini, *SANKTIONEN DER EUROPÄISCHEN UNION BEI VERSTOSS EINES MITGLIEDSTAATS GEGEN DAS DEMOKRATIE- ODER RECHTSSTAATSPRINZIP* (2009) at 272 even accuses the EU institutions of using double standards with regard to the application of the Article 7 mechanism.

- 624 Jan-Werner Müller, *The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States*, 165 REVISTA DE ESTUDIOS POLÍTICOS 141-162 (2014) at 149s.
- 625 *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) at 6 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 626 José Manuel Durão Barroso, President of the European Commission, *State of the Union 2012 Address* (12 September 2012) http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm to which he referred also in his 2013 speech, José Manuel Durão Barroso, President of the European Commission, *State of the Union 2013 Address* (11 September 2013) at 10 http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm
- 627 Tine Carmeliet & Georgia Christina Kosmidou, *Enforcing Europe's Foundational Values in Central and Eastern Europe: A Case in Point*, in EUROPEAN JUDICIAL SYSTEMS AS A CHALLENGE FOR DEMOCRACY, 159-80 (Elzbieta Kuzslewska et al. eds., 2015) at 174.
- 628 *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 629 For details see Frank Schorkopf, *Wertesicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?*, EUROPARECHT 147-163 (2016) at 153.
- 630 As one author puts it: “The turkeys would have to vote unanimously for Christmas.” Heather Grabbe, *Six Lessons of Enlargement Ten Years On/ The EU's Transformative Power in Retrospect and Prospect*, JOURNAL OF COMMON MARKET STUDIES 40-56 (2014) at 47; see also Israel Butler, *European Commission Refuses to Uphold Rule of Law*, EU OBSERVER (27 November 2015) <https://euobserver.com/opinion/131100>
- 631 See supra in this Part.
- 632 Quoted in: Council Presidency Document No. 15206/14 of 14 November 2014, Ensuring Respect for the Rule of Law in the European Union at 3. <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015206%202014%20INIT>
- 633 Quoted in: Council Presidency Document No. 15206/14 of 14 November 2014, Ensuring Respect for the Rule of Law in the European Union at 3. <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015206%202014%20INIT>
- 634 The Commission organised a forum on EU justice policies held on 21 and 22 November in Brussels, under the title: ASSISES DE LA JUSTICE: SHAPING JUSTICE POLICIES IN EUROPE FOR THE YEARS TO COME, (21-22 November 2013) <http://ec.europa.eu/justice/events/assises-justice-2013/>
- 635 *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 636 José Manuel Durão Barroso, President of the European Commission, *Remarks by President Barroso on the Future of Justice and Home Affairs and the Rule of Law Initiative* (11 March 2014) http://europa.eu/rapid/press-release_SPEECH-14-204_en.htm
- 637 *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) at 6 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 638 *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) at 3 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

- 639 *Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) at 7 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf
- 640 José Manuel Durão Barroso, President of the European Commission, *Remarks by President Barroso on the Future of Justice and Home Affairs and the Rule of Law Initiative* (11 March 2014) http://europa.eu/rapid/press-release_SPEECH-14-204_en.htm
- 641 Dimitry Kochenov & Laurent Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11 EUROPEAN CONST. L. REV. (2015) at 514.
- 642 See e.g.: Roland Bieber & Francesco Maiani, *Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?* 51 CMLR 1057-1092 (2014) at 1085.
- 643 Frank Schorkopf, *Wertesicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?*, EUROPARECHT 147-63 (2016) at 161.
- 644 See Thomas Giegerich, *Verfassungshomogenität, Verfassungsautonomie und Verfassungsaufsicht in der EU: Zum „Rechtsstaatsmechanismus der Europäischen Kommission*, HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT - EUROPARECHT – MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG, 499-543 (Christian Calliess ed., 2015) at 526.
- 645 Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, EUROPARECHT 625-641 (2015) at 636; Roland Bieber & Francesco Maiani, *Enhancing Centralised Enforcement of EU Law: Pandora's Toolbox?* 51 CMLR 1057-1092 (2014) at 1086.
- 646 European Parliament, Resolution of 10 June 2015 (2015/2700(RSP)) P8_TA(2015)0227 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0227+0+DOC+XML+V0//EN> and European Parliament, Resolution of 16 December 2015 on the Situation in Hungary, (2015/2935(RSP)) P8_TA PROV(2015)0461 (16 December 2015) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+V0//EN> on the situation in Hungary
- 647 Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, EUROPARECHT 625-41 (2015) at 641.
- 648 Israel Butler, *European Commission Refuses to Uphold Rule of Law*, EU OBSERVER (27 November 2015) <https://euobserver.com/opinion/131100>; see also Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, EUROPARECHT 625-641 (2015) at 641 referring to Ovid's advice, „principiis obsta“
- 649 Council of the European Union, Document No. 10296/14 of 27 May 2014, Opinion of the Legal Service Commission's Communication on a new EU Framework to strengthen the Rule of Law, <http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>. It is also referred to in Council Presidency Document No. 15206/14 of 14 November 2014, Ensuring Respect for the Rule of Law in the European Union <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015206%202014%20INIT>
- 650 Waldemar Hummer, *Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten „Vor Artikel 7 EUV“-Verfahrens?*, EUROPARECHT 625-641 (2015) at 637 for a more detailed discussion see infra in this Part
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- 652 *Communication from the Commission from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2014*, COM(2013) 739 final (22 October 2013) at 8 http://ec.europa.eu/atwork/pdf/cwp_2014_en.pdf

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- 654 *Communication from the Commission from the Commission: A Europe of Results – Applying Community Law*, COM(2007) 502 final (5 September 2007) http://eur-lex.europa.eu/resource.html?uri=cellar:6fc1ad14-7018-485f-bceb-ab767b5c5927.0003.02/DOC_3&format=PDF
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- 656 European Commission, Report from the Commission Second Evaluation Report on EU Pilot COM(2011) 930 final (21 December 2011).
- 657 European Commission, 29th Annual Report on Monitoring the Application of EU Law (2001) COM(2012) 714 final (30 November 2012) at 13.
- 658 European Commission, Internal Market Scoreboard Website, http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm
- 659 N.B.: this first step was introduced by the Treaty of Nice with effect on 1 February 2003.
- 660 Full burden of proof, see e.g. Case C-301/10, *European Commission v. United Kingdom* [2012] (delivered 18 October 2012) (cf. points 70-72)
- 661 Helmut Schmitt von Sydow, *Liberté, démocratie, droits fondamentaux et Etat de droit, analyse de l'article 7 du traité UE*, REVUE DE DROIT DE L'UNION EUROPÉENNE, 285-328 (2001) at 312.
- 662 See *The Politics of Memory*, THE ECONOMIST, (9 April 2016) referring to a report by Moody's <http://www.economist.com/news/europe/21696555-poland-had-been-coming-terms-its-past-now-government-wants-bury-it-again>
- 663 Helmut Schmitt von Sydow, *Liberté, démocratie, droits fondamentaux et Etat de droit, analyse de l'article 7 du traité UE*, REVUE DE DROIT DE L'UNION EUROPÉENNE, 285-328 (2001) at 301.
- 664 Case T-518/12, *Spirlea & Spirlea v. European Commission*, , Order of the General Court [2014] (delivered 10 March 2014).
- 665 Case T-518/12, *Spirlea & Spirlea v. European Commission*, , Order of the General Court [2014] (delivered 10 March 2014) at point 32. Translation by the author; French and German text available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149341&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=34474>
- 666 Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three Interrelated Problems*, 53 COMMON MKT. L. REV., 597-605 (2016) at 602s.
- 667 European Parliament, Resolution of 16 December 2015 on the Situation in Hungary, (2015/2935(RSP)) P8_TA PROV(2015)0461 (16 December 2015) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0461+0+DOC+XML+V0//EN>
- 668 Case C-286/12, *European Commission v. Hungary* [2012] (delivered 6 November 2012); it is to be noted that the application was only sent on 7 June 2012. It shows that the infringement procedure can be brought rapidly to a successful conclusion.
- 669 Case C-288/12, *European Commission v. Hungary* [2014] (delivered 8 April 2014).
- 670 Document CDL-AD(2016)001-e, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e)

- 671 Document CDL-AD(2016)001-e, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e) Para. 138 convincingly states: ” *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*”
- 672 Case T-333/10, *Animal Trading Company (ATC) BV and Others v European Commission* [2013] (delivered 16 September 2013) at paras. 62 & 63; For more details see *infra*.
- 673 Agata Gostyńska-Jakubowska, Why the Commission is treating Poland more harshly than Hungary in its rule of law review, blogpost (04 February 2016) <http://blogs.lse.ac.uk/euoppblog/2016/02/04/why-the-commission-is-treating-poland-more-harshly-than-hungary-in-its-rule-of-law-review/>
- 674 Dimitry 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/>.
- 675 Press Release, European Commission, Opening Remarks of First Vice-President Frans Timmermans - Press Conference on Rule of Law in Poland (1 June 2016) http://europa.eu/rapid/press-release_SPEECH-16-2023_en.htm.
- 676 Opinion 2/13, *Avis rendu en vertu de l’article 218, paragraphe 11, TFUE*, (Full Court) [2014] (delivered 18 December 2014) at para.168; Case C-404/15 & C-659/15 PPU (joined cases), *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases [2016] (delivered 5 April 2016) at para. 78 with regard to the principle.
- 677 Opinion 2/13, *Avis rendu en vertu de l’article 218, paragraphe 11, TFUE*, (Full Court) [2014] (delivered 18 December 2014) at para. 168.
- 678 Case C-404/15 & C-659/15 PPU (joined cases), *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases [2016] (delivered 5 April 2016) at para 78 with regard to the principle and 82ss with regard to limitations in ‘in exceptional circumstances’; for a commentary on this judgment: Daniel Halberstam, *The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade*, VERFBLOG, 2016/6/09, <http://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/>; more general: Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21 EUROPEAN L. J. 141-60 (2015) at 145.
- 679 Case C-404/15 & C-659/15 PPU (joined cases), *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases [2016] (delivered 5 April 2016) at para. 82;; for a comment on this judgment see: Daniel Halberstam, *The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade*, VERFBLOG, 2016/6/09, <http://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/>.
- 680 Case C-404/15 & C-659/15 PPU (joined cases), *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases [2016] (delivered 5 April 2016) at paras. 88, 89
- 681 Case C-404/15 & C-659/15 PPU (joined cases), *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases [2016] (delivered 5 April 2016) at para. 94.
- 682 See above in this Part.
- 683 *Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law*, COM(2014) 158final/2 (19 March 2014) at 7 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf with reference to the 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.

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