

Unity and Diversity in National Understandings of the Rule of Law in the EU

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1. Introduction

Notwithstanding the different terms used to convey the concept of ‘rule of law’ in different languages,¹ the rule of law has long been presented as one of the core elements of Europe’s constitutional heritage.² The EU Treaties also refer to the rule of law as one of the values common to the EU Member States and one on which the EU is based.³ Most recently, the European Commission presented the rule of law as ‘a well-established principle, well-defined in its core meaning. This core meaning, in spite of the different national identities and legal systems and traditions that the Union is bound to respect, is the same in all Member States.’⁴

This working paper aims to assess the extent to which the European Commission is correct in asserting that the rule of law is not only a well-established principle whose core legal meaning is shared across the EU. In tandem with the second working paper for work package 7 prepared within the framework of the RECONNECT research project, it will move beyond the national legal systems to analyse the meaning and scope of the rule of law at the levels of both the EU and the Council of Europe, and further consider the extent to which national and European understandings share a number of common core features.⁵

A focus on the meaning and scope of the rule of law may appear to some as a rather academic exercise at best, and possibly futile exercise at worst. Indeed, the rule of law continues to be regularly referred to as an ‘essentially contested concept’, a point first made by W.B. Gallie in 1956.⁶ This working paper will review the validity of this conceptual relativism in light of the evolution of positive law in the EU legal space as far as the rule of law is concerned. Our focus on the meaning of the rule of law in European legal traditions is also far from constituting a scholastic exercise when one considers the seemingly increasing criticism originating from the representatives of self-defined ‘illiberal regimes’ in a broader context where serious ‘concerns regarding respect for the rule of law, democracy and fundamental rights and freedoms have emerged in several Member States’.⁷

To give two examples of the criticism of a conceptual nature originating from countries whose national authorities are subject to special rule of law monitoring procedures, let us first quote

¹ For further discussion, see Council of Europe (Parliamentary Assembly), Resolution 1594 (2007): ‘The principle of the rule of law’, 23 November 2007.

² See eg Preamble to the ECHR: ‘the governments of European countries ... have a common heritage of political traditions, ideals, freedom and the rule of law’.

³ See Art 2 TEU.

⁴ Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, Brussels, COM(2019) 343 final, 17 July 2019, 1.

⁵ While this working paper is grounded primarily on legal analysis, it is important to also note the interdisciplinary nature of some of its methodologies. For example, in refutation of the argument of an ‘East-West’ divide in the core conceptualisation of the rule of law, we refer and rely on the results of the Eurobarometer study which shows clear support for values and limitations on governmental action which could be clearly understood as rule of law principles. We note here, however, the limitations of the work, and would refer readers to further sociological accounts of the rule of law. See eg P Blokker P, ‘EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections’ in C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 249-269.

⁶ WB Gallie, ‘Essentially contested concepts’ (1956) *Proceedings of the Aristotelian Society* 167-198.

⁷ CJEU, Address by President Koen Lenaerts, annex to press release No 1/2020 ‘The President and Members of the European Commission give a solemn undertaking before the Court of Justice of the European Union’, 13 January 2020.

Hungary's Minister of Justice who argued in November 2019 that the rule of law 'has become a buzzword in the European Union' which 'lacks well-defined rules and remains the subject of much debate'.⁸ On the basis of the alleged lack of any clear definition of the rule of law, Hungary's Minister of Justice argued that the EU and other bodies 'should pay greater respect' to the alleged 'specifics of Member States and not try to impose an artificial, one-size-fits-all framework'.⁹ On a similar tune, one may quote Poland's Minister of Foreign Affairs between 2015 and 2018 who recently promised 'a horse and saddle or box of Belgian chocolates for anyone who finds the definition of 'the rule of law' in the Treaty or any other legally binding EU document',¹⁰ implicitly suggesting that the EU therefore is in no position to monitor the country's adherence (or lack thereof) to the rule of law. Despite numerous detailed disputes regarding the precise definition of the rule of law, in general, the role of the rule of law does not generate essential opposition. However, the recent rule of law crisis in the EU led to political statements which present the rule of law as a political sword used to express arbitrary criticism. At the same time, it is difficult to find a state which openly admits that it does not follow rule of law principles.

This working paper will however show that not only is the rule of law one amongst the few overarching constitutional principles that can together be regarded as undergirding all legal systems in Europe, it is also a constitutional principle whose core meaning is consensual and well-defined as asserted in 2019 by the European Commission. This is not to say that the process by which the rule of law has achieved near universal endorsement in Europe was linear nor that the meaning and scope of the concept has not varied over time. It is however submitted that there is now a broad legal consensus in Europe on the core meaning of this principle, its minimum components, and how it relates to other key values such as democracy and respect for human rights.

On the other hand, one cannot deny that 'in a growing number of circles the values of Article 2 TEU are openly challenged' with attacks on the rule of law particularly visible in 'East Central Europe, where 'law' and the 'rule of law' have for a long time been viewed with suspicion in the first place'.¹¹ These attacks by representatives of self-labelled 'illiberal democracies' may be viewed however as self-serving ones which should not distract from the lack of evidence of any meaningful east-west divide in this area. This is why it is submitted that one cannot claim that the rule of law is not a common European value or that the rule of law would allegedly be a Western value which would have been or is being imposed on East Central European countries.

2. Modern Origins: Rule of law, *Rechtsstaat* and *Etat de droit*

This working paper focuses on the modern legal meaning of the rule of law and the enshrinement of this principle in European positive law. As such the historical origins of the

⁸ J Varga, 'Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask' (*Euronews*, 22 November 2019) <www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view>.

⁹ Ibid.

¹⁰ Był szef MSZ komentuje list Jourovej 'Konia z rzędem, kto znajdzie w traktatach UE definicję praworządności' (*Niezależna*, 27 December 2019) <<http://niezalezna.pl/303625-byly-szef-msz-komentuje-list-jourovej-konia-z-rzedem-kto-najdzie-w-traktatach-ue-definicje-praworzadnosci>>.

¹¹ M Claes, 'Editorial Note: How Common are the Values of the European Union?' (2019) 15 CYELP VII, IX-X.

concept will be related only to the extent they illuminate both the common heritage and core meaning of the rule of law in Europe. Suffice it to say here ‘the qualities embodied in the notion of the rule of law have been propounded for centuries and go back to antiquity’.¹² The expression ‘rule of law’ however did not gain wide currency until the end of the nineteenth century and as will be shown below, its rhetorical dominance was initially limited to the United Kingdom and Germany.¹³ In the latter half of the twentieth century the concept, however, gained a new and significant currency being adopted into the constitutional narratives of other common law and civil law jurisdictions throughout the EU. Following the fall of the Berlin Wall, and the transition of states in Central and Eastern Europe to constitutional democracies, the ‘rule of law’ gained new and important relevance as a means to brand and outline the limitation of state and executive powers. The following sections will introduce and outline the meaning and scope of the rule of law across these jurisdictions. It will highlight and underline this common heritage and core meaning of the rule of law.

2.1. Meaning and Scope of the Rule of Law in the Common Law

As a legal concept, the rule of law was introduced into English constitutional discourse only in the latter half of the nineteenth century. As a phrase, it was first elaborated by Hearn,¹⁴ though it achieved its classic formulation by Albert Venn Dicey who derived three key principles from this concept in his *Introduction to the Study of the Law of the Constitution* (1885): The rule of law means in the first place that no man is punishable ‘except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.’¹⁵ It also implies that ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’¹⁶ Finally, Dicey argued that the British constitution is pervaded by the rule of law to the extent that the general principles of the constitution are ‘the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.’¹⁷

To follow Paul Craig’s analysis,¹⁸ the first two principles essentially require that people’s actions should be governed by legal norms regularly passed as opposed to arbitrary norms, the equal subjection of all legal persons to the law of the land as well as equal access to a system of ordinary courts. In other words, Dicey’s understanding of the rule of law entails no more than the traditional principles of legality and equality before the law. Dicey’s third and final principle is more peculiar. It has to be understood in light of his concerns about the French practice of enshrining non-justiciable individual rights into constitutional texts, which were furthermore regularly repealed, and Dicey thought, not without good reasons, that the rights of British

¹² Venice Commission, *Report on the Rule of Law* (4 April 2011) para 7. For a comprehensive historical account, see B Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004) ch 1.

¹³ Section 2 of this paper directly borrows from L Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) Jean Monnet Working Paper 04/09, <www.jeanmonnetprogram.org/archive/papers/09/090401.html>.

¹⁴ W Hearn, *The Government of England: Its Structure and Development* (Longmans 1867) 89-91.

¹⁵ A Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (5th ed, MacMillan 1897) 179.

¹⁶ Ibid at 185.

¹⁷ Ibid at 187.

¹⁸ P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework’ (1997) Public Law 467.

citizens were better protected as they flowed from ancient and often reaffirmed judicial decisions.

While Dicey's three meanings of the rule of law continue to be regarded as an indispensable point of departure in any debate about what the rule of law ought to entail, doctrinal discussions have been traditionally marked by multiple and at times competing understandings and categorisations in the Anglo-American world,¹⁹ 'with opposing views having been expressed over time by different judges, academics and practitioners' depending on their normative ideals, areas of expertise and/or personal understandings of a principle which remains largely open-ended.²⁰ The American author of a comprehensive study went as far as to say that its precise meaning 'may be less clear today than ever before.'²¹ To follow Craig, one may however contend that the three modern meanings of the rule of law in the Anglo-American world are as follows:

- (i) Compliance with the rule of law first essentially means 'that the government must be able to point to some basis for its action that is regarded as valid by the relevant legal system'.²² This obviously goes beyond the idea of rule *by* law, and is reminiscent of the traditional principle of legality, which requires that public authorities act only on a proper legal basis;
- (ii) The rule of law, and this is the second meaning distinguished by Craig, is also understood as requiring that legal rules 'should be capable of guiding one's conduct in order that one can plan one's life'.²³ In other words, to follow Raz's influential account, legal norms should have the following 'formal' attributes:²⁴ They must be prospective, adequately publicised, clear, relatively stable and law-making should also be guided by open, stable, clear and general rules. But the rule of law is not merely about the 'quality' of legal norms as standards capable of providing effective guidance, it also requires the protection of the right to a fair trial and access to courts while an independent judiciary should be granted the power to review that laws comply with the 'qualities' mentioned above;
- (iii) Thirdly and finally, the rule of law may also be understood as encompassing elements of political morality such as democracy and substantive rights for individuals. For Dworkin, this conception may be distinguished from what he calls the 'rule-book conception' under which the rule of law and substantive justice are viewed as separate and independent ideals.²⁵

Because most conceptions of the rule of law rely on both procedural and substantive elements, it is today far from unusual to see scholars, lawyers and judges go beyond the traditional formal-

¹⁹ For a particularly instructive study for those not familiar with relevant Anglo-American scholarship, see J Rose, 'The Rule of Law in the Western World: An Overview' (2004) 35 *Journal of Social Philosophy* 457.

²⁰ Lord Falconer, HL Deb, 7 December 2004, vol 667, col 741.

²¹ R Fallon, 'The 'Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1.

²² P Craig, 'The Rule of Law', Appendix 5 in House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, HL Paper 151(2006-2007) 98.

²³ Ibid at 99.

²⁴ J Raz, 'The Rule of Law and its Virtue' in J Raz, *The Authority of Law. Essays on Law and Morality* (Clarendon Press 1979) 214-218.

²⁵ See R Dworkin, *A Matter of Principle* (Harvard University Press 1985) ch 1.

substantive divide when attempting to outline the core elements of the rule of law.²⁶ To mention just one example, Lord Bingham defended the view that the rule of law may be equated with a set of eight ‘sub-rules’.²⁷ Most of these sub-rules are concerned with the formal ‘qualities’ of a legal system and of legal norms, i.e. their accessibility and intelligibility, but it is also clear that for the eminent judge, the rule of law further entails the substantive principle that the law must afford adequate protection to individual fundamental rights. Furthermore, it is quite consensual to view judicial review as one core component of the rule of law. It is important to emphasise, however, that through judicial review, public power is subject to constraints that ‘are in part procedural and in part substantive,’ the range of which varies but which ‘normally includes ideas such as: legality, procedural propriety, participation, fundamental rights, openness, rationality, relevancy, propriety of purpose, reasonableness, equality, legitimate expectations, legal certainty and proportionality.’²⁸

Surprisingly, considering its importance in the UK (uncodified) constitution as a fundamental constitutional principle of the common law, the rule of law lacked a formal statutory recognition until the Constitutional Reform Act 2005. According to its Section 1, this Act is said to ‘not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor’s existing constitutional role in relation to that principle.’ No definition is given but as noted above, it is consensual to view the rule of law must be viewed, along with the principle of parliamentary sovereignty, as one of the twin pillars on which the British Constitution rests; and as also having both formal and substantive components. Amongst these key components, one may cite:²⁹

- The principle of legality ‘whereby legislation will only be interpreted in a manner contrary to constitutional principles of the common law where there are clear and precise words to indicate that Parliament specifically intended to legislate contrary to these principles’;
- The principle of legal certainty which ‘has been used to develop a doctrine of substantive legitimate expectations’ and while ‘There is no specific legal principle of non-retroactivity’, there is some case law which concluded that retrospective legislation is incompatible with Article 6 ECHR ‘in the specific situation where the retrospective legislation enacted had interfered with the outcome of a legal case concurrently being determined by the court’;
- The principle of open justice which ‘requires judicial cases to be heard in public, unless private hearings are strictly necessary to ensure justice between the parties’;
- The right to judicial review which is ‘a long-standing principle of the common law that courts will require extremely clear words in legislation to oust judicial review of a specific decision’;

²⁶ See eg J Jowell, ‘The Rule of Law and its Underlying Values’ in J Jowell and D Oliver (eds), *The Changing Constitution* (9th ed, Oxford University Press 2019) 9.

²⁷ Lord Bingham, ‘The Rule of Law’ (2007) 66 Cambridge Law Journal 67, 69.

²⁸ Craig (n 18) 101.

²⁹ A Young et al, ‘Europe’s Gift to the United Kingdom’s Unwritten Constitution – Juridification’ in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 83, 95 et seq.

- The right to access to the court as a fundamental right which ‘prevents individuals from being impeded in their access to courts, but does not extend to a positive obligation to provide information on legal rights.

An additional point worth mentioning, as this is, as we shall see, a consensual feature in Europe, while ‘breach of the rule of law’ is not a head of judicial review in and of itself’, the rule of law is nevertheless a justiciable principle to the extent that it ‘is used to interpret the scope of heads of judicial review, to ensure that legal principles prevent arbitrary decision-making by the executive’ but also ‘used as a justification for the creation of new heads of judicial review and of the principle of legality.’³⁰ The Courts have recognised however, as Lord Styen stated in the *Pierson* case: ‘Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law.’³¹ Two recent judgments of the UK Supreme Court bear immediate relevance to the justiciability of the principle: In the *UNISON* judgment,³² the Supreme Court held that the mere existence of independence courts was necessary, but not sufficient for the rule of law to be upheld but rather that people must have meaningful access to the Courts as ‘[w]ithout such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.’ Underlining the core function of the courts as a necessary corollary to Parliamentary Sovereignty, in *Privacy International*,³³ the Supreme Court held that a necessary consequence of parliamentary sovereignty is the rule of law, as understood to mean an authoritative and independent judicial body providing oversight (and limits) to the exercise of legislative power: ‘it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review’.

The Republic of Ireland is also a common law system but one with a codified constitution. The Irish Constitution, adopted in 1937, does not make explicit reference to the ‘rule of law’. However, in common with the UK, the concept has been primarily recognised and protected in Irish law through precedent set by the Supreme Court. In this context, Article 5 of the Irish Constitution³⁴ has been increasingly cited by Irish courts to ‘justify decisions supporting the rule of law’.³⁵ The following core components of the rule of law, can be directly drawn from Irish case law:³⁶

- The principle of legality: every decision affecting legal rights must have an appropriate legal basis.
- The executive cannot constitutionally be given the power by statute to act in an arbitrary or autocratic fashion.

³⁰ Ibid 96.

³¹ *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 587.

³² *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

³³ *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, at para 131.

³⁴ ‘Ireland is a sovereign, independent, democratic state’.

³⁵ G Hogan, ‘Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country’ in Albi and Bardutzky (n 28) 1323, 1135. The same author notes that ‘over and above the specific constitutional provisions lie the general principles of law – such as proportionality, non-retroactivity and legal certainty – some of which have a specific constitutional grounding.’

³⁶ Ibid, 1336-1337.

- The right of access to the courts: legislation which restricts the right of access to the courts will be construed narrowly. Legislation which unfairly restricts access to the courts will be found to be unconstitutional.
- The law must be certain and accessible.
- Legislation cannot retroactively create new criminal offences or other legal wrongs.
- Fundamental rights should not be affected adversely by legislation save through the use of clear language.
- Legal penalties cannot be created by the use of oblique language in a statute.

As will be shown below, every one of these core (legal) components of the rule of law is consensual in most if not all the EU Member States.

2.2. Civil Law Systems: Variations on the Same Theme

2.2.1. *The German Rechtsstaat*

The German term of *Rechtsstaat*, traditionally understood as the concept corresponding to the English rule of law, was apparently first coined by Wilhelm Petersen in 1798,³⁷ and mostly used initially in opposition to the notion of police State (*Polizeistaat*). In the first half of the 19th century, liberal scholars popularised the neologism but the failure of the liberal revolution of 1848-1849 and the rise of legal positivism led to the virtual disappearance of the concept from constitutional doctrine at the end of the 19th century. *Rechtsstaat* mostly retained a meaning in administrative law and was transformed ‘into a mere principle of legality.’³⁸ In other words, compliance with the *Rechtsstaat* principle was narrowly understood as requiring judicial review of administrative acts mostly on procedural grounds, and not constitutional review of legislative acts.³⁹ Its main purpose was to protect against illegal or arbitrary administrative decisions, not to enforce substantive human rights. Essentially, the concept of the rule of law was primarily understood in a formal sense.

With the entry into force of a new constitution in 1949, known as the Basic Law, *Rechtsstaat* re-emerged as a central constitutional principle, with both formal and substantive components, on which the whole politico-legal system is said to be based and to which all state activity must conform.⁴⁰ However, unlike federalism, democracy and the *Sozialstaat*, which are all explicitly guaranteed as basic institutional principles at the heart of the German constitutional order,⁴¹ the *Rechtsstaat* is not explicitly referred to as a principle binding on the Federal Republic. Instead, it is said to be a principle which binds the *Länder* under Article 28(1) of the Basic Law:

³⁷ For a general overview and among a plethora of studies, see E-W Böckenförde, ‘The Origin and Development of the Concept of the Rechtsstaat’ in E-W Böckenförde, *State, Society and Liberty* (Berg Publishers 1991) 47.

³⁸ R Grote, ‘Rule of law, Rechtsstaat, and Etat de Droit. The Origins of the Different National Traditions and the Prospects for their Convergence in the Light of Recent Constitutional Developments’ in C Starck (ed), *Constitutionalism, Universalism and Democracy – a Comparative Analysis* (Nomos 1999) 281.

³⁹ Only with the Weimar Republic (1919-1933) did the idea of constitutional review of legislation resurface, and only with the entry into force of the Basic Law (1949) were effective mechanisms created.

⁴⁰ See eg U Karpen, ‘Rule of Law’ in U Karpen (ed), *The Constitution of the Federal Republic of Germany* (Nomos 1988) 175-181.

⁴¹ Art 20(1): ‘The Federal Republic of Germany is a democratic and social federal state.’

The constitutional order in the *Länder* must conform to the principles of the republican, democratic, and social state under the rule of law, within the meaning of this Basic Law.⁴²

Another provision introduced in 1992 also refers to the *Rechtsstaat* principle but only in relation to the EU. According to Article 23(1), Germany ‘shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law...’

In light of the wording of these two provisions, one may submit that they are both necessary imply that the federal State itself is governed by similar principles. For the German Federal Constitutional Court, this debate is however somewhat irrelevant as it held the *Rechtsstaat* principle to be one of the fundamental principles of the Basic Law,⁴³ whose existence can be clearly derived from several constitutional provisions,⁴⁴ such as Article 19(4) which provides that recourse to the courts to anyone whose fundamental rights are violated by a public authority or Article 20(3) which states that ‘the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.’

Leaving the question of its textual foundations aside, a more fundamental question concerns the meaning and scope of the *Rechtsstaat* principle. At its core, this constitutional principle means that the exercise of public authority is constrained by the law and following the adoption of the 1949 Basic Law and the inclusion of a catalogue of procedural as well as substantive rights, the *Rechtsstaat* has been interpreted using a rights-based approach.⁴⁵ In time, this approach has led the rule of law principle to be ‘transformed into subjective rights of the individuals ... As a consequence, the rule of law plays an important role in the jurisprudence of the *Bundesverfassungsgericht* [BVerfGE], not only in cases brought by organs of the state or the *Länder*, but also in individual complaints’.⁴⁶ In more practical terms, this led the rule of law principle to become ‘the roof under which a number of specific legal protections have been developed’ in the jurisprudence of the BVerfG.⁴⁷ Among these key legal protections, one may cite the following:⁴⁸

- The principle of legal certainty which ‘requires that laws are formulated in a way that the addressee can recognise what behaviour is required or forbidden. This of course implies that laws are not only promulgated but also published’;
- The prohibition of retroactive laws with the rule of law requiring in cases of lawful retroactivity that ‘the rule of law principle requires that the legitimate expectations of the addressees of the law are honoured (Vertrauensschutz)’;
- The principle of legality, which includes an obligation for state action to have a basis in law in specific areas such as the areas covered by fundamental rights, as

⁴² Art 28(1).

⁴³ BVerfGE 20, 323 (331).

⁴⁴ See eg BVerfGE 2, 380 (403); BVerfGE 30, 1 (24); BVerfGE 85, 90 (121); BVerfGE 94, 49 (104).

⁴⁵ For a clear and concise overview, see Grote (n 38) 289–291.

⁴⁶ Grimm, Wendel and Reinbacher, ‘European Constitutionalism and the German Basic Law’ in Albi and Bardutzky (n 28) 407, 435.

⁴⁷ Ibid, 409.

⁴⁸ Ibid, 434–435.

- 'the rule of law would be incomplete if it only required that the state rule according to law. The state would then be free to decide where it is bound by law and where it can act according to will';
- The principle of independent courts having 'the power to control whether the state complies with the laws that bind its activity.'

To conclude our brief overview of the *Rechtsstaatsprinzip*, possibly the key change one may note since the *Rechtsstaat* principle was first conceptualised is that it ceased to be predominantly understood as a set of formal legal principles such as legality post World War II to become instead closely associated with the principle of fundamental rights protection. As will be shown below, this development from a predominantly formal to a substantive and more holistic understanding of the rule of law is neither unprecedented nor unique.

2.2.2. Migration of a Concept Across Western Legal Systems

Before becoming an overarching principle of German constitutionalism, the concept of *Rechtsstaat* also heavily influenced European legal doctrine in countries such as Italy (*Stato di diritto*), France (*Etat de droit*) and Spain (*Estado de derecho*), where the first scholarly works debating the German notion can be respectively dated to 1880, 1901 and 1933.⁴⁹

The migration or borrowing analogies should however be used with precaution. Not only is it difficult to empirically measure or prove the external influence of a particular understanding of the rule of law but lexical differences may also mask the existence of broadly similar concepts. For instance, while the French concept of *Etat de droit* was undoubtedly influenced by the German concept of *Rechtsstaat*, the fundamental idea that a proper State has to be one governed by law had been present in France even before the terms 'rule of law' or *Rechtsstaat* gained prominence.⁵⁰ In other words, the long-time lack of a concept similar to that of the English rule of law or the German *Rechtsstaat* may simply be explained by the specific French understanding of the notions of State, Republic or of Constitution, which all implied the submission of political power to law.

In the contemporary period, however, the concept of *Etat de droit* has however become rhetorically dominant. The main reason behind the 'return' of the concept is the introduction of constitutional review in France in 1958 which, not unlike what happened in Germany following the entry into force of the 1949 Basic Law, progressively led to an increasing 'constitutionalisation' of the French legal order and obliged scholars to redefine the purpose and scope of constitutional law. This change and the consequences associated with it led an eminent author to go as far as arguing that the idea of realisation of the *Etat de droit* dominates French modern constitutional law.⁵¹

⁴⁹ For a comprehensive historical overview of the 'reception' of the German *Rechtsstaat* in these three legal orders, see E Carpano, *Etat de droit et droits européens: L'évolution du modèle de l'Etat de droit dans le cadre de l'euroéanisation des systèmes juridiques* (L'Harmattan 2005) 117–195. For a more recent account from the same author, see 'La définition du standard européen de l'Etat de droit' (2019) 2 RTDEur 255.

⁵⁰ See L Pech, 'Rule of Law in France' in R Peerboom (ed), *Asian Discourses of Rule of Law* (Routledge 2004) 79. For an exhaustive study, L Heuschling, *Etat de droit – Rechtsstaat – Rule of Law* (Dalloz 2002).

⁵¹ L Favoreu, 'Le droit constitutionnel, droit de la Constitution et constitution du droit' (1990) 1 Revue française de droit constitutionnel 71, 79.

Strictly speaking, however, the expression '*Etat de droit*' cannot be found in the French Constitution of 1958 but the consensual view in French legal circles is that the concept is 'firmly grounded' in Article 16 of the Declaration of the Rights of Man and of the Citizen, which provides that 'any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution'.⁵² The case law of the Conseil constitutionnel has furthermore confirmed 'the strong link between the concept of *État de droit* and the notion of justiciabilité or access to courts',⁵³ the importance of the principle of legal certainty and its derivatives such as the principle of clarity and intelligibility of statutes; the principle of non-retroactivity; the respect of the principle of separation of powers and *res judicata*; respect of the right to an effective remedy; respect of the principle of non-retroactivity of criminal sanctions; etc.⁵⁴

While the French Constitution, in common with other pre-1980 constitutions, still does not explicitly refer to the concept, the meaning, scope and normative impact of the principles of *Etat de droit* and *Rechtsstaat* seem to have largely converged.⁵⁵ At the risk of oversimplification, it may be said that both concepts have been primarily used to redefine the nature and purpose of their respective constitutional orders and justify the judicial control, through formal and substantive requirements, of state policies with a view to guaranteeing compliance with the basic values (liberty, equality, dignity, etc.) on which the national constitutional order is formally based.

Leaving aside the French experience, one may reasonably argue that the English rule of law or the German *Rechtsstaat* have been the most influential beyond the borders of their respective legal systems. As noted above, the doctrinal and judicial discussion and diffusion of these notions have more often than not resulted in the constitutional enshrinement of the rule of law. The paradox here is that the British and German legal traditions have 'exported' a concept, which seemed, by contrast, to have lacked a formal recognition in line with its alleged importance in their own legal systems. As previously noted, the *Rechtsstaat* is not indeed explicitly referred to as a principle binding on the German Federal Republic but rather as one binding on the *Länder* and the EU.

Outside the English-speaking world, the German *Rechtsstaat* has also proved particularly influential with the German-influenced French *Etat de droit* having also inspired a number of European legal systems. To begin with, one may refer to Italy where notwithstanding the lack of an explicit mention to a 'constitutional category equivalent or similar to the rule of law', 'at least two conceptualisations of the same principle can be inferred from the text of the Constitution and have been developed by scholarly literature, which usually refers to the concept of rule of law by the term 'Stato di diritto' (similar to *Rechtsstaat*; *État de droit*).'⁵⁶ In other words, the Italian *Stato di diritto* protects, not unlike other legal systems in the EU, the rule of law is the concept used to justify the guarantee of rights such as right to access to court

⁵² L Burgorgue-Larsen, P-V Astresses and V Bruck, 'The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved' in Albi and Bardutzky (n 28) 1181, 1196.

⁵³ Ibid, 1197.

⁵⁴ Ibid.

⁵⁵ For L Burgorgue-Larsen et al, the French concept of *État de droit* is furthermore 'comparable to the rule of law'. See 'The Constitution of France in the Context of EU and Transnational Law' (n 52) 1196.

⁵⁶ G Martinico, B Guastaferro and O Pollicino, 'The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance' in Albi and Bardutzky (n 28) 493, 504.

and the right to judicial review but it is also the concept on the basis of which principles such as the principle of legality and the principle of non-retroactivity are derived from.

Similarly to the situation in France or Italy, Belgium and the Netherlands lack a formal constitutional enshrinement of the rule of law but yet again, the core components of the concept have either been explicitly guaranteed in the constitutional text or protected via the courts' case law. In the case of Belgium,

there is no separate category in the Constitution regarding the rule of law, nor a specific title. However, it is without any doubt that the Belgian polity and Constitution are based on this notion. First, the main principles of the formal concept of the rule of law are explicitly entrenched in the Constitution, in particular the separation of powers (Title III, Title IV, Title V). Secondly, the underpinning material criteria of this principle are also entrenched as specific rights in the Constitution, such as the equality of all persons before the law (Art. 10), the application of the law without discrimination (Art. 11) and the legality principle with regard to punishments (Art. 14).⁵⁷

The Belgian concept of the rule of law, which has been 'influenced by the classic French notion as developed during the Enlightenment',⁵⁸ is therefore understood, similarly to other European legal systems, as encompassing formal and substantive requirements with the primary aim to prevent and sanction the 'arbitrary use of power by public authorities'.⁵⁹ As a fundamental constitutional principle, the rule of law has been relied upon by the Belgian Constitutional Court to protect 'several legal principles and rights on the basis of protection of this notion, such as the legality principle and equality principle'.⁶⁰

The Dutch legal system also lacks an express constitutional recognition of the rule of law.⁶¹ Yet, while 'the principle of *rechtsstatelijkhed* (rule of law) is not laid down in the text of the Constitution', it 'is considered a general principle of law' with 'several elements of the rule of law' included in the constitutional text and the case law having in addition protected rights such as the right to access independent courts.⁶²

A number of post authoritarian constitutions in the 'old' Member States⁶³ also show the influence of the German and French approaches and a number of consensual features when it comes to the rule of law. While the rule of law principle was not explicitly enshrined in the Greek Constitution until 2001, the principle 'had been part of the Greek constitutional culture

⁵⁷ P Popelier and C Van de Heyning, 'The Belgian Constitution: The Efficacy Approach to European and Global Governance' in Albi and Bardutzky (n 28) 1225, 1239-1240.

⁵⁸ Ibid, 1239.

⁵⁹ Ibid.

⁶⁰ Ibid, 1240.

⁶¹ In 2009-10, a proposal was made by the Constitutional Committee to introduce a new clause providing i.a. that the Netherlands is a democratic state under the rule of law. This led to a bill introduced in 2016 which provided that '[t]he Constitution guarantees democracy, the rule of law and fundamental rights'. The bill was however never adopted. See L Besselink and M Claes, 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution' in Albi and Bardutzky (n 28) 179, 182.

⁶² Ibid, 196.

⁶³ To follow the characterisation adopted by A Albi and S Bardutzky, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project' in Albi and Bardutzky (n 28) 14.

ever since the birth of the Greek state' while also being shaped in part by 'the French 'État de droit' and the German 'Rechtsstaat' traditions'.⁶⁴ Under the 'rule of law umbrella', a number of principles 'have been judicially elaborated'⁶⁵ such as the principles of legal certainty, legitimate expectations or proportionality, in a process which is similar to what has happened in many Western European legal systems, with other key components of the rule of law such as the principle of legality provided for directly by the Constitution.

The influence of the German *Rechtsstaat* also proved particularly important in Portugal and Spain. With respect to Portugal, 'The French constitutional experience was preferentially chosen for the adoption of the main tenets of the political system and the organisation of the state' whereas 'Germany's fundamental law was mirrored for the basic principles of the rule of law and the protection of fundamental rights'.⁶⁶ The Portuguese Constitution, similarly to the German Basic Law, explicitly refers to the principle of a democratic State based on the rule of law (*Estado de direito democrático*), a reference which was inserted in 1982 in Article 2. The provisions governing the delegation of powers to the EU also include references to the need to respect the 'fundamental principles of a democratic state based on the rule of law' (Articles 7(6) and 8(4)). Legal scholars and judges have conceptualised

the rule of law as a structuring constitutional principle encompassing a variety of sub-principles: not only legal certainty, proportionality, non-retroactivity and legitimate expectations, as already mentioned, but also the separation of powers (Art. 111(1)), the independence of judicial power (Art. 203) and access to law and effective judicial protection as established in the detailed Art. 20. The rule of law principle is normally justiciable through its sub-principles.⁶⁷

One may also note the ruling in which the Constitutional Court of Portugal observed that the 'constitutional principles of equality, proportionality and the protection of legitimate expectations that have been used by the Constitutional Court to assess the constitutionality of internal norms in matters related to those that are being reviewed are at the core of the rule of law and the common European legal traditions that also bind the EU'.⁶⁸

The Spanish Constitution, which 'was very much influenced by the German and Italian constitutions, regarding for instance the centralised model for the judicial review of legislation',⁶⁹ was ratified in 1978. Similarly to the Portuguese Constitution, the Spanish Constitution formally provides that Spain is 'a social and democratic State, subject to the rule of law [*Estado de Derecho*], which advocates freedom, justice, equality and political pluralism as highest values of its legal system' (Article 1(1)) before offering, a rather unusual feature, a detailed overview of the core components of the *Estado de Derecho* in Article 9(3):

⁶⁴ X Contiades et al, 'The Constitution of Greece: EU Membership Perspectives' in Albi and Bardutzky (n 28) 641, 651.

⁶⁵ Ibid.

⁶⁶ F Pereira Couthinho and N Piçarra, 'Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution' in Albi and Bardutzky (n 28) 591, 593.

⁶⁷ Ibid, 607.

⁶⁸ Case 575/2014, 15 August 2014, para 25, translated by Pereira Couthinho and Piçarra (n 66) 602.

⁶⁹ J Solanes Mullor and A Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Albi and Bardutzky (n 28) 543, 544.

⁶⁹ Ibid.

The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities.

In short, ‘the principle of the rule of law is encapsulated in Art. 1(1) of the Constitution, and further specified in Art. 9’ with Article 9(3) laying ‘down a set of techniques for the realisation of the rule of law principle’.⁷⁰

As demonstrated by the previous section, a core meaning of the rule of law emerges among these constitutional traditions, emphasising the principles of legality, access to judicial protection to protect individual rights and legitimate interests, as well as the expected guarantees of the non-retrospectivity and certainty of the law. These limitations on the exercise of State power as a common denominator of the rule of law across European legal traditions evidences a clear and common meaning.

2.3. Central and Eastern European Legal Traditions

2.3.1. *Rule of Law as foundational to the transition to democratic constitutionalism*

Out of the thirteen countries from Central and Eastern Europe that have joined the EU since 2004, nine refer to the rule of law or more often, to the principle of a state governed by law in their constitutions.⁷¹ Constitutions adopted by these states, have incorporated strong commitments to the rule of law and the protection of fundamental rights, and the model of democratic constitutionalism adopted by transitioning regimes post-1989 was modelled directly on the established democracies of Western Europe.⁷²

Membership of the Union under (now) Article 49 TEU demands a high level of commitment to the rule of law. The declaration of respect for, and commitment to, the rule of law in the pre-accession states was seen in academic and political discourse with optimism, and presented not only as a guarantee of good governance, but also as a precursor to liberal democracy, free market, human rights and European integration.⁷³ Where these states had a history of arbitrary exercise of power under communist regimes, their constitutions entrenched safeguards against systemic human rights violations and abuse of public power.

Adopting a new system required many institutional changes, including all the new institutions of constitutionalism: an independent judiciary and constitutional courts.⁷⁴ This creation of constitutional courts, and the allocation of the power of constitutional review of the legislature, was understood as important to prevent previous experiences of parties holding majorities

⁷⁰ Ibid, 553.

⁷¹ See the English translation of these texts offered by *Oxford Constitutions of the World* (OCW).

⁷² M de Visser, *Constitutional Review in Europe: a Comparative Analysis* (Hart Publishing 2014) 61.

⁷³ J Priban, ‘From “which rule of law?” to “the rule of which law?”: post-communist experiences of European legal integration’ (2009) HJRL 338, 338-39. See also A Czarnota, M Krygier and W Sadurski, *Rethinking the Rule of Law after Communism* (Central European University Press 2005).

⁷⁴ L Balcerowicz, ‘Institutional change after socialism and the rule of law’ (2009) HJRL 215.

overriding, eroding or even ignoring constitutional mandates of rights.⁷⁵ All post-communist states in the EU have a constitutional court, and commentators have lauded the success of these courts in securing the rule of law. Indeed, the presence of a ‘strong, independent, separate, activist, constitutional court’ is believed to be the ‘essential protector of constitutionalism, the rule of law, and liberal values more generally’.⁷⁶

In this section, we consider the understanding and realisation of the rule of law in Central and Eastern European legal traditions. Particular and individual focus is then given to Poland and Hungary due to the increased attention on the situation in these two countries following the activation by the European Commission of Article 7(1) TEU in December 2017 in respect of Poland and the activation of the same Treaty provision by the European Parliament in September 2018 in respect of Hungary. The aim of this section is to evidence the rule of law as a core component of central and eastern European legal traditions, and the recognition of its essential, core and common meaning.

2.3.2. An overview of the Rule of Law as a Core Constitutional Principle in Central and Eastern Europe

The Bulgarian Constitution declares that the state is governed by the rule of law,⁷⁷ the core elements of which are enshrined in the provisions of the Constitution itself. Though this fundamental principle is filled in with contents through legislation, it can nevertheless be directly referred to in lawsuits. As part of the rule of law, the Bulgarian Constitution guarantees the publicity of, and appropriate time for preparation for, normative acts.⁷⁸ Legal certainty is guaranteed by the functioning of the Supreme Court of Cassation⁷⁹ and the Supreme Administrative Court.⁸⁰ The Constitution also enshrines the right to access to courts of all persons,⁸¹ and makes it possible that ‘[c]itizens and legal entities [...] have [...] legal counsel at all stages of a trial’.⁸² With specific regards to criminal law, the principle of *habeas corpus*⁸³ and *nullum crimen sine lege*⁸⁴ are also ensured. The constitutional provisions related to the prohibition of retroactivity of criminal law are supplemented by the Criminal Code.⁸⁵ On the top of the constitutional legal system is the Constitutional Court. Its mandate is to provide binding interpretation of the Constitution, and to ensure that legislative acts are in conformity with it.⁸⁶

⁷⁵ de Visser (n 72) 61.

⁷⁶ See Krygier, ‘The Rule of Law: An Abusers’ Guide’ (n 68) 152; and W Sadurski, *Rights before Courts, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005).

⁷⁷ Preamble and Art 4, para 1, of the Constitution of the Republic of Bulgaria. This is a summary of the findings of E Tanchev and M Belov, ‘The Bulgarian Constitutional Order, Supranational Constitutionalism and European Governance’ in Albi and Bardutzky (n 28) 1097.

⁷⁸ Art 5, para 5, of the Constitution of the Republic of Bulgaria.

⁷⁹ Art 124 of the Constitution of the Republic of Bulgaria.

⁸⁰ Art 125, para 1, of the Constitution of the Republic of Bulgaria.

⁸¹ Art 31, para 3, and Art 120, para 2, of the Constitution of the Republic of Bulgaria.

⁸² Art 122, para 1, of the Constitution of the Republic of Bulgaria.

⁸³ Art 30, para 3; Art 31, para 1, of the Constitution of the Republic of Bulgaria.

⁸⁴ Art 5, para 3, of the Constitution of the Republic of Bulgaria.

⁸⁵ Art 2 of the Criminal Code.

⁸⁶ Art 149, para 1, points 1, 2 and 4, of the Constitution of the Republic of Bulgaria.

Similarly, the principle of the rule of law is among those highest values which characterise ‘the constitutional order of the Republic of Croatia’ and serve as ‘bas[e]s for interpreting the Constitution’.⁸⁷ According to the Croatian Constitutional Court, the legislator is bound by the principle of the rule of law, which has to be taken into account when legislative acts are adopted.⁸⁸ In this context, it has been established that the ‘legal consequences must be unambiguous for all those to whom the law is applied’.⁸⁹ For this purpose, laws must be published in the official journal and, as a rule, cannot enter into force earlier than the eighth day after the date of its publication.⁹⁰ Legislative acts cannot limit or eliminate previously recognised rights,⁹¹ and retroactive application of laws is allowed only ‘for exceptionally justified reasons’.⁹² ‘[W]hen [the legislator] restricts or revokes a right previously granted, [it] must have a legitimate aim in the public interest for doing so by which it may justify that measure, and it must also respect other requirements which stem from the principle of the rule of law, legal security and legal certainty, which did not arise when that right was recognised.’⁹³ The Constitutional Court also held that laws must be accessible, sufficiently precise and foreseeable.⁹⁴ With respect to criminal law, the prohibition of retroactivity is enshrined in the principles of *nullum crimen sine lege* and *nulla poena sine lege*.⁹⁵

We can see similar provisions in the Romanian Constitution which declares that ‘Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values [...]’⁹⁶ (emphasis added), and that ‘the observance of the Constitution, its supremacy and the laws shall be mandatory’.⁹⁷ Legislative acts are published in the Official Gazette and come into force, as a rule, 3 days after its publication.⁹⁸ Even though the rule of law is dogmatically elaborated, until recently, it has not often been invoked by the Constitutional Court, since it was considered as too broad a concept. Nevertheless, the Romanian Constitutional Court has established that the principle of the rule of law ‘allows to censor political options and [to] enable the law to ponder the abusive or discretionary tendencies of state institutions. [It] guarantees the supremacy of the Constitution’,⁹⁹ the

⁸⁷ Art 3 of the Constitution of the Republic of Croatia. This is a summary of the findings of Iris Goldner Lang, Zlata Đurđević and Mislav Matajija, ‘The Constitution of Croatia in the Perspective of European and Global Governance’ in Albi and Bardutzky (n 28) 1139.

⁸⁸ See Decision of the Constitutional Court of Republic of Croatia Nos. U-I-659/1994 et al. (15 March 2000) para 10, as considered by Goldner Lang, Đurđević and Matajija, ibid.

⁸⁹ Decision of the Constitutional Court of Republic of Croatia Nos. U-I-659/1994 et al. (15 March 2000) para 11.1.

⁹⁰ Art 90, para 1 and 3, of the Constitution of the Republic of Croatia.

⁹¹ Decision of the Constitutional Court of Republic of Croatia No U-I-4113/2008 (12 August 2014).

⁹² Art 90, para 4 and 5, of the Constitution of the Republic of Croatia; Decision of the Constitutional Court of Republic of Croatia No U-I-4113/2008 (12 August 2014).

⁹³ Decision of the Constitutional Court of Republic of Croatia No U-I-4113/2008 (12 August 2014). See the summary of the decision: <<https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=F01ED05C62655F7AC1257E75002EFCAC>>.

⁹⁴ Decision of the Constitutional Court of Republic of Croatia Nos. U-I-659/1994 et al. (15 March 2000) para 19.5.

⁹⁵ Art 31, para 1, of the Constitution of the Republic of Croatia.

⁹⁶ Art 1, para 3, of the Constitution of Romania.

⁹⁷ Art 1, para 5, of the Constitution of Romania. This is a summary based on the findings of B Iancu, ‘Romania – the Vagrancies of International Grafts on Unsettled Constitutions’ in Albi and Bardutzky (n 28) 1047.

⁹⁸ Art 78 of the Constitution of Romania.

⁹⁹ Cf. Art 1, para 5, of the Constitution of Romania (n 97).

constitutionality of inferior legal norms,¹⁰⁰ and the separation of powers,¹⁰¹ which are only to act within the bounds of law and more particularly within the limits of a law expressing the general will.¹⁰² According to the Romanian Constitutional Court's interpretation, the rule of law is 'a series of guarantees, including jurisdictional safeguards, to ensure the protection of rights and liberties by means of limiting the state',¹⁰³ and criminal law is also mandated with the protection of its realisation.¹⁰⁴

This is similar to the Slovakian Constitution which provides that '[t]he Slovak Republic is a sovereign, democratic state governed by the rule of law'.¹⁰⁵ Though its elements are not articulated in the Constitution, the Constitutional Court's has extensively elaborated them in its practice. For example, it has established that the rule of law includes 'the citizens' trust in the legal order'¹⁰⁶ and that '[t]he material rule of law concept includes a requirement of substantive quality and value quality of a legal norm, which is to ensure that the legal instrument, as implemented in the chosen legislative regulation, is adequate in relation to the legitimate aim pursued by the legislator, and that the chosen legislative measure is compatible with constitutional principles and democratic values'.¹⁰⁷

The principle of the rule of law is recognised on constitutional level in Slovenia.¹⁰⁸ Several traditional elements of the rule of law concept have been included in the Constitution, such as the separation of powers,¹⁰⁹ the limitation of human rights and fundamental freedoms,¹¹⁰ the right to appeal and to other legal remedies,¹¹¹ the limits of the administrative authorities' powers,¹¹² the hierarchy of legal acts,¹¹³ the obligation to publish legal norms,¹¹⁴ and the prohibition of retroactive effect.¹¹⁵ In addition to the foregoing, the Slovenian Constitutional Court has elaborated other essential components of the state governed by the rule of law. Besides proportionality related to limiting human rights and fundamental freedoms,¹¹⁶ the Constitutional Court deems part of the concept the trust in the law¹¹⁷ as well as the clarity and

¹⁰⁰ Cf. the powers of the Constitutional Court provided for by Art 146, points a) and d), of the Constitution of Romania.

¹⁰¹ Cf. Art 1, para 4, of the Constitution of Romania.

¹⁰² Decision of the Constitutional Court of Romania No 70/2000 (19 July 2000) as cited by Iancu (n 97).

¹⁰³ Decision of the Constitutional Court of Romania No 17/2015 (30 January 2015) as cited by Iancu (n 97).

¹⁰⁴ Cf. Decision of the Constitutional Court of Romania No 2/2014 (29 January 2014) as cited by Iancu (n 97).

¹⁰⁵ Art 1, para 1, of the Constitution of the Slovak Republic.

¹⁰⁶ Cf. Decision of the Constitutional Court of the Slovak Republic No Pl ÚS 3/00 (24 April 2001) as cited by Z Vikarská and M Bobek, 'Slovakia: Between Euro-Optimism and Euro-Concern' in Albi and Bardutzky (n 28) 835, 854.

¹⁰⁷ Cf. Decision of the Constitutional Court of the Slovak Republic No Pl ÚS 17/08 (20 May 2009) as cited by Vikarská and Bobek, *ibid*.

¹⁰⁸ Art 2 of the Constitution of the Republic of Slovenia.

¹⁰⁹ Art 3, para 2, of the Constitution of the Republic of Slovenia.

¹¹⁰ Art 15 of the Constitution of the Republic of Slovenia.

¹¹¹ Art 25 of the Constitution of the Republic of Slovenia.

¹¹² Art 120, para 2, of the Constitution of the Republic of Slovenia.

¹¹³ Art 153 of the Constitution of the Republic of Slovenia.

¹¹⁴ Art 154 of the Constitution of the Republic of Slovenia.

¹¹⁵ Art 155 of the Constitution of the Republic of Slovenia.

¹¹⁶ S Bardutzky, 'The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain' in Albi and Bardutzky (n 28) 687, 702.

¹¹⁷ Decision of the Constitutional Court of the Republic of Slovenia No U-I-47/94, as cited by Bardutzky, *ibid*.

coherence of legal norms.¹¹⁸ The rights and duties of citizens and other persons¹¹⁹ as well as taxes, customs duties, and other charges imposed¹²⁰ need to be defined by law. Further, the Constitution recognises the principle of *nullum crimen sine lege*¹²¹ and *nulla poena sine lege*.¹²²

Unlike the constitutions of, for example Hungary and Poland, the Czech constitution is relatively brief and concerned with organizational matters of the state and separation of powers and does not (due to disagreements over social rights) include fundamental rights.¹²³ The rule of law (in Czech *právní stát*, a concept identical to Rechtsstaat¹²⁴) is the first principle to be stated in Article 1. The Constitution provides that '[t]he Czech Republic is a sovereign, unitary, and democratic state governed by the *rule of law*, founded on respect for the rights and freedoms of man and of citizens'¹²⁵ (emphasis added). The Constitutional Court has touched on the notion of the rule of law on several occasions. In one of its decisions, it laid down that 'the interpretation and application of legal norms are subordinated to their substantive purpose', underlying that 'in a state which is designated as democratic and which proclaims the principle of the sovereignty of the people, no regime other than a democratic regime may be considered as legitimate'.¹²⁶ The protection of legitimate expectations¹²⁷ and the principle of the prohibition of retroactivity¹²⁸ are essential elements of the rule of law. Fundamental rights and freedoms do not form part of the Czechian Constitution, and have been enumerated separately in the Charter of Fundamental Rights and Basic Freedoms, which, by contrast, is vested with constitutional power.¹²⁹ With respect to them, the Constitutional Court stated that 'one of the essential features of the democratic rule of law is the principle of adequacy, which implies in particular that the measures restricting fundamental rights or freedoms may not have negative consequences exceeding the positives represented by the public interest in such measures'.¹³⁰

In states where it is not mentioned in the constitution, the Lithuanian Constitutional Court has nevertheless understood the rule of law to derive from the essential nature of a democratic state.¹³¹ Article 1 of the *Satversme*, under a democratic republic, and capable of direct effect. Similarly, although the rule of law (or *teisinės valstybės principas*) is not mentioned beyond

¹¹⁸ Decision of the Constitutional Court of the Republic of Slovenia No U-I-282/94, para 5, and No U-I-287/95, as considered by Bardutzky, ibid.

¹¹⁹ Art 87 of the Constitution of the Republic of Slovenia.

¹²⁰ Art 147 of the Constitution of the Republic of Slovenia.

¹²¹ Art 28, para 1, of the Constitution of the Republic of Slovenia.

¹²² Art 28, para 2, of the Constitution of the Republic of Slovenia.

¹²³ Z Kühn, 'The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment Ultra Vires' in Albi and Bardutzky (n 28) 795, 807.

¹²⁴ Ibid.

¹²⁵ Art 1, para 1, of the Constitution of the Czech Republic.

¹²⁶ Constitutional Court of the Czech Republic, Judgment of the 21 December 1993, No Pl ÚS 19/93, *Lawlessness of the Communist Regime*, Headnote 1.

¹²⁷ Constitutional Court of the Czech Republic, Judgment of 27 September 2006, No Pl ÚS 51/06, *Non-Profit Hospitals*, para 66.

¹²⁸ Constitutional Court of the Czech Republic, Judgment of 10 September 2009, No Pl ÚS 27/09, *Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*, Part VI./b.

¹²⁹ Art 112, para 1, of the Constitution of the Czech Republic.

¹³⁰ Constitutional Court of the Czech Republic, Judgment of 12 March 2008, No Pl ÚS 83/06 (N 55/48 SbNU 629, No 116/2008 Coll.), cited by Constitutional Court of the Czech Republic, Judgment of 13 May 2014, No Pl ÚS 44/13, *Fuel Distributors' Deposit Cancellation*, para 18.

¹³¹ This is a summary based on the findings of I Jarukaitis and G Švedas, 'The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges' in Albi and Bardutzky (n 28) 997.

within the preamble to the Lithuanian Constitution, the Constitutional Court has interpreted both it and its core components (including for example legal certainty) to be justiciable in the courts,¹³² and has identified the following as essential elements of the rule of law:

rules of general application must be established by laws passed by the Parliament; the supremacy of laws and hierarchy of different legal acts, which are all subordinated to the Constitution; the accessibility of legal provisions; legal certainty and the integrity of law; nullum crimen, nulla poena sine lege; natural justice; due process of law; the independence and impartiality of judges and courts; legitimate expectations; proportionality; and the constitutional imperative to observe the public international law principle *pacta sunt servanda*.¹³³

Clear from the foregoing is the identification, embrace and embedding of the core of the principle of the rule of law, in addition to the determination of constitutional courts to both recognize the essential foundational nature of the rule of law, and to guarantee its justiciability throughout the legal system. There further is no clear argument for the existence of a special, or distinction model of rule of law constitutionalism in Central and Eastern Europe, that does not share common traits and characteristics with the other nations of Europe.¹³⁴ To understand this, we focus in the next two sections on two EU Member States, Hungary and Poland, and consider the extent to which the rule of law can be understood as a constitutional principle in both states. In doing so, we make clear that there is no ‘unique’ understanding of the rule of law which is particular to either state. On the contrary, an assertion that certain states present a constitutional identity which creates a unique understanding of the rule of law particular to them, or as representing a ‘new’ ‘illiberal democracy’ is unfounded at best, and, simply, an intentional misrepresentation of authoritarianism.

2.3.3. Rule of Law as a Constitutional Principle in Hungary

During the 1989 Eastern Europe ‘velvet revolutions’, the deconstruction of the Socialist regime involved roundtable negotiations, where delegates of the state party and representatives of the opposition agreed on new elections and some constitutional changes. The only exception remained Hungary, which formally adopted a new constitution, but introduced an ambitious amendment in 1989.¹³⁵ The literature references the amended constitution as the ‘89 Constitution, albeit the official numbering still remained Act XX of 1949. As Kriszta Kovács and Gábor Attila Tóth stated, ‘the Constitution agreed upon by the parties in 1989 was based on the principles of liberal democracy and the rule of law.’¹³⁶ The rule of law was explicitly mentioned in Article 2(1) of the ‘89 Constitution: ‘The Republic of Hungary is an independent, democratic state based on the rule of law.’ The concept of the rule of law contributed to the successful completion of the regime change and to legitimizing the role of the Hungarian

¹³² Ibid, 1014.

¹³³ Ibid, 1016.

¹³⁴ M Avbelj, ‘There is No Such Thing As a Particular “Center and Eastern European Constitutionalism”’ (*Verfassungsblog*, 18 May 2018) <<https://verfassungsblog.de/there-is-no-such-thing-as-a-particular-center-and-eastern-european-constitutionalism/>>. See also J Letnar Černič and M Avbelj (eds), ‘Special Issue on the Crisis of Constitutional Democracy in Central and Eastern Europe’ (2018) 10(1) Hague Journal of the Rule of Law 1.

¹³⁵ Act XXXI of 1989 on the modification of the Constitution of 18 October 1989.

¹³⁶ K Kovács, G Attila Tóth, ‘Hungary’s Constitutional Transformation’ (2011) 7 European Constitutional Law Review 183, 202.

Constitutional Court (HCC) in this process. It became an umbrella term determining the philosophical frame of the new Hungarian constitutional order.¹³⁷ Separation of powers – albeit not having a textual reference in the constitutional text – was realized. An independent judiciary ensured that the laws were fairly applied. The HCC was created¹³⁸ exercising important corrective roles in a democracy based on the rule of law.¹³⁹ An effective fundamental rights protection mechanism was established, and apart of the judiciary and the HCC, four ombudspersons and certain powers of the public prosecutors' office complemented the system of human rights protection. The HCC has emphasized a substantive rule of law beyond a formal understanding, comprising of the rule of the laws, the legality of applying the law, legal certainty, protection of rights, independence of the judiciary, fair trial, human dignity, human rights and equality.¹⁴⁰

A certain trend can be identified based on the HCC decisions of the past few years. Reasonings based on the rule of law are much less visible than before, and rule of law arguments are only raised with regard to too short periods of *vacatio legis* and non-retroactivity of law. Legal certainty and protection of acquired rights seems to be less protected. This, according to Nóra Chronowski can be traced back to multiple factors, such as the new role and powers of the HCC, the scrapping of *actio popularis*, or the fact that in a constitutional complaint procedure violation of rights have to be claimed, infringement of the rule of law in itself is insufficient.¹⁴¹ The greatest weakness of the Fundamental Law (FL) in the lack of a possibility of a comprehensive constitutional review of and remedy for constitutional violations by the legislature.¹⁴²

¹³⁷ N Chronowski, 'Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről [The rule of law – Thoughts on the legal developments in Hungary and the European Union]', Pro Publico Bono – Magyar Közigazgatás, 2016/4, 32-42.

¹³⁸ Established by a comprehensive amendment to the 1949 Constitution (Act XX of 1949) through Act XXXI of 1989 of 18 October 1989, which granted the Court exceptionally wide jurisdiction. The specific law applicable to the HCC is Act XXXII of 30 October 1989.

¹³⁹ For a comprehensive evaluation see C Boulanger, 'Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe"' in S Wojciech, A Czarnota and M Krygier (eds), *Spreading Democracy and the Rule of Law?* (Springer 2006) 263-280.

¹⁴⁰ See the preamble of Act XXXII of 1989 on the Constitutional Court.

¹⁴⁰ L Sólyom, 'Introduction to the Decisions of the Constitutional Court of the Republic of Hungary' in L Sólyom and G Brunner (eds), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press 2000) 38. For example, in Decision 36/1992. (VI. 10.), the HCC ruled that the state can only function democratically, if democracy is based on the rule of law and the protection and operation of the constitutional order incorporated respect for and protection of rights and freedoms. Among others, the HCC ruled on the foreseeability and limited nature of exercising state power, (HCC Decisions 56/1991. (XI. 8.), 1/1995. (II. 8.)) the prohibition of arbitrariness (HCC Decision 35/1994. (VI. 24.)), the transparent functioning of the state (HCC Decision 60/1994. (XII. 24.)), the need for democratic legitimacy of state powers (HCC Decisions 16/1998. (V. 8.), 30/1998. (VI. 25.), 30/1998. (VI. 25.)), the legality of lawmaking (HCC Decision 751/B/1990.), and the efficient functioning of constitutional organs (HCC Decision 12/2006. (IV. 24.)). Separation of powers was not expressly mentioned by the Constitution (it is mentioned by Art C) Fundamental Law), therefore the HCC derived it from the rule of law, and considered it to be the most crucial basic principle of Hungarian constitutionalism. (HCC Decisions 31/1990.) The richest body of case-law is connected to legal certainty (HCC Decisions 34/1991 (VII. 15.), 10/1992 (11.25.), 25/1992 (IV.30.)).

¹⁴¹ N Chronowski (n 137) 37.

¹⁴² N Chronowski, M Varju, P Bárd, G Sulyok, 'Hungary: Constitutional (R)evolution or Regression?' in Albi and Bardutzky (n 28) 1439, 1441-1442.

¹⁴² Adopted by the Hungarian Parliament on 11 March 2013.

The fourth amendment to the FL repealed the rulings of the HCC given prior to the entry into force of the FL.¹⁴³ This was interpreted to mean that HCC Decision 45/2012 (V.11.) saying the opposite is overwritten by the constitution-amending power, and the HCC is no longer bound by its earlier rulings and may not even make reference to them. After the Fourth Amendment the Hungarian constitutional Court addressed the issue once again in Decision 13/2013 (VI.17.), and came again to the conclusion that it was still possible to reference reasons, legal principles, and constitutional issues developed by former HCC decisions on a case by case basis, if a detailed reasoning is given to why such an exercise was needed. However, the HCC added that due to the fourth amendment to the FL, it may disregard legal principles elaborated in earlier decisions even if the text of the given provision in the FL and the previous Constitution is identical. In theory the HCC could therefore interpret also the rule of law differently than before.

As foretold by Imre Vörös, arbitrary interpretation of the historical constitution and by consequence, the FL started to appear in the case-law. Arbitrariness and cherry-picking is most apparent in HCC Decision 22/2016 (XII. 5.). In a government-friendly ruling, the HCC signaled it would support Orbán's 'constitutional identity' justification for defying EU migration law. The HCC in order to underpin its review power, introduced a constitutional identity argument, where 'constitutional identity equals the constitutional (self-)identity of Hungary', and its content is to be determined by the HCC on a case-by-case basis based on the FL, its purposes, the National Avowal and the achievements of the Hungarian historical constitution. As explained earlier, the latter is so vague, that this definition can only be understood as granting a *carte blanche* type of derogation to the executive and the legislative from Hungary's obligation under EU law.¹⁴⁴ Albeit the FL's rule of law clause corresponds to that of the '89 Constitution, and the HCC still references earlier case law, a significantly different jurisprudence is in the making. This can partially be explained by the capturing of the HCC, partially by the fact that the rule of law is more than the black letter law and procedures. Institutions are crucial to create and uphold it, whereas the HCC was captured by the state by 2013.¹⁴⁵ Furthermore, without a rule of law culture, or as Zoltán Fleck put it 'in an environment beyond the rule of law, one cannot efficiently make use of the different rule of law institutions.'¹⁴⁶

2.3.4. Rule of Law as a Constitutional Principle in Poland

The Constitution of the Republic of Poland of 2 April 1997¹⁴⁷ relies on two concepts which attach to the rule of law – the principle of a state ruled by law (Article 2) and the principle of legality (Article 7). Under Article 2, the Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice, whereas under Article 7, public authorities shall function on the basis of and within the limits of law. Such dualism has

¹⁴³ Art 19 of the fourth amendment to the FL, incorporated as point 5 in the Closing and Miscellaneous Provisions of the Fundamental Law.

¹⁴⁴ G Halmai, 'Absolute Primacy of EU Law vs. Pluralism: the Role of Courts' (2018) <https://me.eui.eu/wp-content/uploads/sites/385/2018/05/IJPL_Special_Issue_Concluding_remarks_Halmai_final.pdf>.

¹⁴⁵ P Bárd and L Pech, 'How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The "Hungarian model"', RECONNECT Working Paper No 4, October 2019, <<https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>> 14.

¹⁴⁶ Z Fleck, 'Szakmai és politikai érvek a közigazgatási bíráskodás kapcsán [Professional and political arguments in relation to the administrative adjudication]', Közjogi Szemle, 2016/4. 16-19, 17.

¹⁴⁷ Journal of Laws 1997, No 78 item 483 with further amendments.

existed in the constitutional law since 1989. The principle of the rule of law was introduced to the Polish legal order with the Act of 29 December 1989 on the amendment to the Constitution¹⁴⁸ to modify the substance of Article 1. The constitutional amendment also provided a revised version of Article 3 to now read:

1. The observance of law of the Republic of Poland shall be a primary duty and obligation of each and every public authority.
2. All state and public administration authorities shall act pursuant to the rules of law.

A number of the Courts judgments point to derivative rights and elements of the principle of a democratic state ruled by law, among which the principle of citizens' trust in the state and its law. In the light of the Court of Appeal in Kraków judgment (13 October 2015) in a democratic state ruled by the law embodying social justice, the principle of citizens' trust in the state and its law applies due to the Article 2 of the Constitution. Addressees of legal norms may assume that the content of applicable law is exactly as established by the courts, especially when it was done by the Supreme Court. The principle of legality derives from Article 2 of the Constitution. Among the first rulings of the Constitutional Tribunal, the court expressed a broad understanding and construction of the principle of legality.¹⁴⁹ The Tribunal took the view that the infringement of the principle of legality may consist in making law so imprecise for it not only to become the ground for an unreasonable infringement of the right of an individual, but also to become the requirement (in the positive sense) to make law comprehensible to an individual.

As regards the core components and cardinal importance of the rule of law in the Polish legal framework, one may finally quote extensively from the extremely significant resolution adopted on 23 January 2020 by the chambers of the Supreme Court of Poland which, at the time of writing, were still independent and not the subject of ongoing Article 7(1) proceedings and pending cases before the European Court of Justice such as for instance, the so-called disciplinary chamber of the Supreme Court.¹⁵⁰ In a rather inspired, if not inspiring paragraph, the yet independent Supreme Court recalls its duty to

provide protection against arbitrary and self-interested government and against emotions of those who prevail in the dispute by virtue of money, sheer numbers, or physical power. However, to protect the weak, the court must be independent of any direct and indirect influence of the government and parliament, political parties, and financial groups. That independence is not absolute: court judgments are subject to multi-level review, the functioning of the court must be transparent, and the reasoning for court decisions cannot be disclosed but must be exhaustively presented to those whose case is heard by the court and to the general public.

In adjudicating, courts are bound by the will of the people expressed in the Constitution and in law. By decision of the people to join international organisations, courts must

¹⁴⁸ Journal of Laws 1989, No 75 item 444.

¹⁴⁹ U11/97.

¹⁵⁰ Case BSA I-4110-1/20, English translation made available by Iustitia: <www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf?fbclid=IwAR2bjrROX7zzqRXdF0tRfWVmShM_LT5j7g-yHsqIGSBRqD8U-dhPeUriZfY>.

comply with international law and the law of international organisations. This includes in particular European Union law.

Courts which are no longer impartial and independent turn into adjudicating institutions which enforce the will of the governing group and the current parliamentary majority. Courts which are no longer impartial and independent cannot determine the truth and administer justice in the case of conflicts and disputes; consequently, judicial procedures rely on rules necessary to establish whether a given court in a given case meets the requirements of impartiality and independence.¹⁵¹

[...]

Passing a resolution concerning regulations providing unconditional grounds for appeal and invalidity of proceedings due to non-fulfilment of the criteria of an impartial and independent court may have far-reaching consequences for the functioning of courts and the enforcement of the constitutional right of the individual to hearing of his case by an independent court. The notion of hearing of a case involves the right of stability of the judgment and legal certainty. It is a foundation of the rule of law.

Stability of court judgments mainly depends on stability of the systemic framework of the judiciary. This is why the fundamental concepts of the functioning of the judiciary are anchored in the Constitution, preventing a parliamentary majority from passing laws challenging the legitimacy of courts which adjudicate in individual cases. This is why compliance with the applicable constitutional procedures for the appointment of judges and the functioning of courts is essential.¹⁵²

2.4. Nordic Variations on the same theme

The legal systems of the Nordic countries – Denmark, Finland, Iceland, Norway and Sweden – are close, but distinct.¹⁵³ No such thing as *Nordic law* exists, but one may arguably speak of ‘a Nordic legal mind.’¹⁵⁴ The Nordic version on constitutionalism respects the will of the legislator and gives, for example, great significance to *travaux préparatoires* as source of law. Consequently, Nordic countries have looked upon judicial review with some degree of caution. Politicisation of courts is not accepted and the doctrine of ‘political question’ is found in most of the Nordic systems. None of the supreme courts, nor other organs, have the power to nullify the Acts of Parliament. The strong emphasis on the will of the legislator is reflected, *inter alia*,

¹⁵¹ Ibid., para 14.

¹⁵² Ibid., para 57-58.

¹⁵³ This section considers two non-EU countries, Norway and Iceland, not only as they share close and common ties with the other Nordic countries and so provide important insights into the rule of law in Nordic legal systems, but also as they are EEA Member States.

¹⁵⁴ P Letto-Vanamo and D Tamm, ‘Nordic Legal Mind’ in P Letto-Vanamo, D Tamm, & B O G Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 1, 9-10. Also Husa emphasizes that the most relevant similarities do not include formal rules, but ‘the legal mentality which proves that certain basic values concerning social justice, social ethics and law in general are close to each other.’ J Husa, ‘Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?’ (2010) 55 Scandinavian Studies in Law 102, 105.

in the fact that none of the countries have a constitutional court and the judiciary has traditionally seldom questioned the authority of the legislator.¹⁵⁵

These traditional characteristics of Nordic constitutionalism have nevertheless been challenged since the late 1980s. Nordic countries have witnessed a clear shift toward rights-based constitutionalism, where the legislative sovereignty paradigm has given more room for judicial review. This development has been driven especially by the growing significance of European-level judicial review as exercised by the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ).¹⁵⁶ Moreover, the classical Nordic doctrine on sources of law, with its strong reliance on parliamentary legislation and travaux, is moving closer to common law, and the relevance of case law as a source has been strengthened.¹⁵⁷

The constitutional status of the rule of law principle is formulated to some extent differently in the Nordic countries. The constitutions of Finland and Norway explicitly mention the relevance of the rule of law in the text. In the Finnish Constitution, we can find the concept in Section 2 (Democracy and the rule of law):

The powers of the State in Finland are vested in the people, who are represented by the Parliament. Democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions. The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.¹⁵⁸

In Norway, the Constitution states: 'Our values will remain our Christian and humanist heritage. This Constitution shall ensure democracy, a state based on the rule of law and human rights.'¹⁵⁹ In Iceland, the rule of law is mentioned in the preamble to the Constitution: 'Iceland is a free and sovereign state which upholds the rule of law, resting on the cornerstones of freedom, equality, democracy and human rights.'¹⁶⁰ Explicit constitutional provisions are important, but they are, naturally, not the only decisive issue here. In fact, the rule of law is also embedded in many other constitutional provisions in the above-mentioned countries. The same is true as regards Sweden¹⁶¹ and Denmark.¹⁶²

As already mentioned, none of the Nordic countries have a constitutional court. They all have, however, some kind of mechanism for judicial review, but the constitutional arrangements in

¹⁵⁵ Letto-Vanamo and Ditlev (n 155) 11; Husa (n 155) 106.

¹⁵⁶ R Hirschl, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) 9 International Journal of Constitutional Law 449, 459; see also J Lavapuro, T Ojanen, and M Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' (2011) 9 International Journal of Constitutional Law 505, 507.

¹⁵⁷ Husa (n 155) 119; Lavapuro et al (n 155) 515.

¹⁵⁸ Finlands grundlag (731/1999) § 2.

¹⁵⁹ Grunnloven (LOV-1814-05-17) § 89.

¹⁶⁰ Stjórnarskrá lýðveldisins Íslands (1944 nr. 33 17. Júní). There is currently an on-going process to revise the Constitution of Iceland. The process has been cumbersome, and consequently, the new Constitution has not yet been accepted. See further on the process, H Landemore, 'Inclusive Constitution-Making: The Icelandic Experiment' (2015) 23 Journal of Political Philosophy 166.

¹⁶¹ See further J Nergelius, 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power' in Albi and Bardutzky (n 28) 315, 333-336.

¹⁶² See further H Krunk and T Baumbach, 'The Role of the Danish Constitution in European and Transnational Governance' in Albi and Bardutzky (n 28) 269-313, 283-286.

this regard vary. Finland, Norway and Sweden have explicit constitutional rules on judicial review, whereas these are lacking in Denmark. Judicial review is nevertheless recognized in Denmark as well. In Iceland, there is no constitutional provision on judicial review in the Constitution, but it is generally perceived as constitutional custom.

Denmark could perhaps be characterized as the clearest representative of the tradition of the Nordic judicial self-restraint. Even if judicial review is recognized, there has been no tradition, nor practice of judicial review by the courts.¹⁶³ As Rytter and Wind illustrate: ‘The entire idea of courts as powerful players in a democracy and the legitimacy of judicial scrutiny of the political process have not yet been embraced by Danish lawyers, judges, politicians, and the general public; few signs suggest that this will happen in the near future.’¹⁶⁴ In Denmark, judicial review is very cautious and the courts can only set aside legislation that is manifestly in violation of the constitution.¹⁶⁵

In comparison with Denmark, in Finland the protection and interpretation of the Constitution is construed as a shared duty of the members of the democratically elected legislature and the independent judiciary. The first task is given to the Constitutional Law Committee, which has, according to the Constitution of Finland, the power to issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.¹⁶⁶ This review is done *ex ante*. If the Constitutional Law Committee finds that the proposal has some problematic elements, it must be amended to comply with the Committee’s ruling or disregarded. However, it is noteworthy that the Committee does not declare the proposal invalid or null and void. Instead, it customarily proposes modifications to the bill in order to achieve compliance with the Constitution.¹⁶⁷

As far as the role of the judiciary is concerned, Section 106 of the Constitution of Finland stipulates that:

[...] if, in a matter being tried by a court of law, the application of an Act [of the legislature] would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.

This provision is relatively new, as it is an outcome of the latest reform of the Constitution in 1999. Nevertheless, the aim of the legislator was not to shift the task of securing the constitutionality of legislative acts from the Constitutional Law Committee to the judiciary.¹⁶⁸ The primary mechanism for reviewing the constitutionality of legislation is still the abstract *ex ante* review done by the Constitutional Law Committee.

¹⁶³ EJ Rytter and M Wind, ‘In need of juristocracy? The silence of Denmark in the development of European legal norms’ (2011) 9 International Journal of Constitutional Law 470, 471.

¹⁶⁴ Ibid, 471.

¹⁶⁵ Ibid, 474-475.

¹⁶⁶ Finlands grundlag (731/1999) § 74.

¹⁶⁷ See T Ojanen and J Salminen, ‘Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism’ in Albi and Bardutzky (n 28) 359-404, 380.

¹⁶⁸ See Government Bill on the new Constitution HE 1/1998, 194 and the Report by the Constitutional Law Committee on Government Bill HE 1/1998, PeVM 10/1998, 31.

The basic constellation is fairly similar in Sweden. According to the Instrument of Government (IG), which is one out of four Swedish constitutional acts:

If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made.

In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law.¹⁶⁹

Judicial review was originally limited to equivalent situations as in Finland, that is, a review was allowed only if the proposed act was manifestly contrary to the constitution.¹⁷⁰ In the current version of the IG, there is no requirement of a manifest conflict. A review must be linked to a specific case or dispute, that is, abstract judicial review is not allowed. Interestingly, it seems to be unclear whether the Swedish courts have an *obligation* to exercise judicial review if they identify a conflict with a constitutional act or whether they *may do so* only when the argument is raised by the parties in a case.¹⁷¹

As regards Sweden, it is also important to mention the important role of the Law Council, an organ which consists of justices or former justices of the two supreme courts. According to Chapter 8, Article 20 IG, the Law Council shall pronounce opinions on draft legislation. It is, however, noteworthy that the Government and the Parliament are not formally bound by the opinions of the Law Council.¹⁷²

The Norwegian constitution of 1814 belongs to the oldest constitutions still in force in the world. In 1822, the Supreme Court of Norway became the second court in the world to constitutionally review legislation.¹⁷³ In the beginning, the Court was very cautious and preferred to interpret the legislation in a way that made it constitutional.¹⁷⁴ It was first later, in the mid-1970s, when the Supreme Court moved toward a more robust form of judicial review, especially in cases relating to core civil rights. This willingness to protect citizens' rights has been present since then, while there still exists a certain dividedness as regards to whether the Court should have a more progressive role or to function as a mere guardian of the constitution.¹⁷⁵

Recently in 2014, when the Constitution of Norway was reformed, judicial review became formally recognised in the Constitution. Accordingly, the courts have the right and duty to review the constitutionality of legislation, administrative decisions and other decisions.¹⁷⁶ The

¹⁶⁹ Instrument of Government (1974:152) ch 11, s 14.

¹⁷⁰ The high threshold was seen as necessary so that the courts would not gradually undermine the Swedish popular democracy. See the Report from the Constitutional Committee, KU 1978/79:39, 13.

¹⁷¹ See Nergelius (n 161) 333.

¹⁷² Nergelius (n 161) 334-335.

¹⁷³ M Langford and BK Berge 'Norway's Constitution in a Comparative Perspective' (2019) 6 Oslo Law Review 198, 198.

¹⁷⁴ Ibid, 216.

¹⁷⁵ Ibid, 217-219.

¹⁷⁶ Grunnloven (LOV-1814-05-17) § 89: 'I saker som reises for domstolene, har domstolene rett og plikt til å prøve om lover og andre beslutninger truffet av statens myndigheter strider mot Grunnloven.'

formal recognition was not a manifestation of a new approach to review as such; the Norwegian courts continue to respect the will of the legislator.¹⁷⁷ It is thus highly unlikely that they would choose to engage themselves in questions that are seen as political.

In comparison with other Nordic countries, Iceland has a strong tradition of judicial review and the use of it has been on steady rise since the 1990s. In Iceland, laws are more frequently held to be unconstitutional and there is no ‘political questions’ doctrine. Opposition to judicial review, political or theoretical, is almost non-existent.¹⁷⁸ Nevertheless, the Icelandic Supreme Court cannot be described as particularly dynamic, neither is it an example of legal activism. It has, in fact, a rather legalistic and almost technocratic, emphasis, which results in a limited constitutional review and thus undervalues the role of the courts in the Icelandic constitutional system. Judicial review is seen as from a very narrow legal perspective, and it is understood as inherently non-political. The courts can only disregard the law in a given case, not to invalidate the law as such. In addition, the use of judicial review is linked to stringent procedural rules. Judicial review is possible only in individual cases of controversy where someone has legal standing, which makes the system to some extent random and it can also lead to a situation where systemic problems stay unaddressed.¹⁷⁹ The stringent and technocratic understanding of the concept of judicial review means that the Icelandic view does not necessarily differ from the position of the other Nordic countries in practice.

If we briefly summarise the key message of the description above, we can state that in the Nordic countries, the basic understanding is that courts should not impose limits on the democratic process, where elected politicians rule through their popular mandate. The cautiousness with regard to the role of the judiciary is dependent on the strong emphasis on popular sovereignty in traditional political and constitutional thinking in these countries.¹⁸⁰ Nevertheless, the core components of the rule of law are shared and come to the fore, including the principle of legality, legal certainty and non-retroactivity, access to the courts, and limitations on the exercise of public power.

3. Unity and Diversity in National Understanding

In light of the previous overview of the dominant national legal understandings of the rule of law one may derive from positive law, case law and/or doctrinal works, one may disagree with the claim that ‘The German *Rechtsstaat*, the French *État de droit*, and the corresponding British and American conceptions all endorse the rule of law in the narrow sense [i.e. generalised rule through law, legal predictability, a significant separation between the legislative and the adjudicative functions and the principle of equality before the law] but otherwise diverge significantly from one another’, or conversely, with the claim that the English rule of law ‘is not the perfect mirror of the continental *Rechtsstaat*; its content is more substantive than formal.

¹⁷⁷ Langford and Berge 2019, 221.

¹⁷⁸ H Ragnhildur, ‘Nonproblematic judicial review: A case study’ (2011) 9 International Journal of Constitutional Law 532, 533-537.

¹⁷⁹ Ibid, 542-545.

¹⁸⁰ The Nordic reluctance to put aside the will of the legislator is not only a manifestation of the appreciation of the democratically chosen, and thus legitimate, politicians. Another explanatory factor is the dominant role of the positivist tradition of legal interpretation in the Nordic countries. In addition, the strong emphasis of legal realism in some of the Nordic countries explains the tradition of judicial self-restraint. See further, Rytter and Wind (n 163) 476-477; see also Helgadóttir (n 178) 541-543 and Husa (n 155) 109-110 and 119.

The rule of law is less interested in the hierarchy of norms than in the primacy of the individual over the State.¹⁸¹ Similarly, the reference to ‘State’ in the German *Rechtsstaat* should not be understood as necessarily implying a fundamental difference with the English rule of law as the *Rechtsstaat* principle is now predominantly understood and applied as a generic constitutional principle of governance whose primary aim is to guide and constrain public power and which can be usefully applied to any legal order and not necessarily the sole internal legal order of a state as the EU experience demonstrates.¹⁸²

In broad agreement with a number of scholars,¹⁸³ this working paper defends the view that despite the existence of different and equally worthy of respect constitutional traditions in Europe and the persistence of some significant differences between legal systems primarily when it comes to ‘institutionalising’ the rule of law (for instance, not every Member State has deemed it necessary to organise the constitutional review of legislation via a constitutional court), a series of shared traits can be outlined.

First and foremost, the rule of law has progressively become a dominant organisational paradigm of modern constitutional law in all the EU Member States. It is unanimously recognised as one of the foundational principles undergirding all European constitutional systems. To put it differently, not only is the rule of law a shared political ideal, it has also become in most European countries a posited legal principle of constitutional value. This is not to say that this principle is always explicitly guaranteed in each national constitution. This is especially true for countries in which did not transition to constitutional democracies after 1989, such as in France, for instance, where judges and legal academics however regularly refer to the rule of law to describe and conduct a normative assessment of national constitutional arrangements or address specific legal problems without an explicit reference to the rule of law within the French constitution. When there is no explicit reference to the rule of law in a constitutional or quasi-constitutional text, it is often said to constitute a principle that is inherent to the national constitution. For instance, until the CRA of 2005, the United Kingdom was lacking ‘grand statutory exhortations’,¹⁸⁴ yet no British lawyer, court or prime minister has ever doubted that it constituted a fundamental principle of the British (uncodified) constitution that courts must take into account. One may also note that a large majority of the countries that have joined the EU in the past two decades explicitly refer to the rule of law in their constitutions,¹⁸⁵ having recognised it to be an essential value in the transition to, and

¹⁸¹ See eg E Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Nijhoff 2008) 114, fn 7. See also eg R Grimm, M Wendel and T Reinbacher, ‘European Constitutionalism and the German Basic Law’ in Albi and Bardutzky (n 28) 409: While the Rechtsstaatsprinzip ‘can linguistically be translated by the term “the rule of law”, it should conceptually not be confounded with “the rule of law” in the sense of the common law system’. The authors do not however explain why and how the rule of law would be understood in the ‘common law system’.

¹⁸² This is further examined in Working Paper 7.2.

¹⁸³ See eg ML Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International 1999) 65-100; Carpano (n 49) 115-239; E Wennerström, *The Rule of Law and the European Union* (Iustus Förlag 2007) 48-89; D Zolo, ‘The Rule of Law: A Critical Reappraisal’ in P Costa and D Zolo (eds), *The Rule of Law. History, Theory and Criticism* (Springer 2007) 18-29.

¹⁸⁴ Lord Falconer, *HL Deb 7 December 2004, vol 667 col 739*.

¹⁸⁵ See for example Art 2(1) of the 1949 Hungarian Constitution (as amended in 1989): ‘The Republic of Hungary is an independent, democratic state governed by the rule of law’; Art 10 of the 1992 Estonian Constitution: ‘The rights, freedoms and duties set out in this Chapter ... conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law’; Art 3 of the Croatian Constitution: ‘Freedom, equal rights

foundation of, a constitutional democratic state. The Statute of the Council of Europe and the EU Treaties similarly contain multiple references to the rule of law.

A second common trait is that the rule of law is never precisely defined either by national constitutions or by courts.¹⁸⁶ This is true not only in Germany but also, for instance, in the United Kingdom. Indeed, despite a recent and unprecedented statutory reference to the principle, the British legislator has remained silent on what the rule of law precisely entails. In a similar fashion, the EU Treaties and the Council of Europe's most important legal texts lack details as regards the meaning of the rule of law. One could then reasonably claim that the lack of a definition (or of a detailed one) of the rule of law and its specific demands, which has led national constitutional/supreme courts to define its specific contours on a case-by-case basis, is a common feature of the European legal space. This lack of definition and the need for a case-by-case 'discovery' and application of the key components of the concept is however far from unique to the rule of law. As observed by Kim Lane Scheppelle and Laurent Pech:

many important principles of law have solid cores that can be legally enforced even if there is disagreement about where the boundary is at the margins. The right to 'free speech' surely includes the idea that the state may not punish the political opposition for criticising the government even if there is no unanimity about whether hate speech may be legally prohibited. The right to data privacy surely includes the requirement that the state may not as a general matter indiscriminately collect private information even if there is no unanimity about how far this right gives way in the immediate aftermath of a terrorist attack. Most general principles have clear cores and contestable margins, and it is no argument against the existence of the clear core that one can imagine cases at the margins over which one can reasonably argue.¹⁸⁷

One may conclude that regardless of the national legal system, it is commonly left to scholars and judges to flesh out the meaning and implications of this principle. Unsurprisingly, therefore, another similarity lies in the fact that there continues to be debate about the precise meaning and scope of the English rule of law, the German *Rechtsstaat*, the French *Etat de droit*, etc. Despite their ancient pedigree, or perhaps because of it, the proper use of these concepts tends to be disputed. Equally striking is the fact that scholarly debates tend to be conducted largely on similar terms all across Europe. In addition to the regular question of whether the rule of law should be understood in a predominantly formal or substantive manner, the strongest criticism made against the rule of law is almost always related to its alleged elusive nature, which is considered by some to make it an inherently unhelpful legal concept or rather illustrates the fact that it is no more than a mere neologism.¹⁸⁸

... the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia'.

¹⁸⁶ With the arguable exception of Spain as the Spanish Constitution includes a rather complete list of the formal components at the heart of the *Estado de Derecho*.

¹⁸⁷ KL Scheppelle and L Pech, 'Is the Rule of Law Too Vague a Notion?' (*Verfassungsblog*, 1 March 2018) <<https://verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers/>>.

¹⁸⁸ If one agrees to equate the State with law, the concept of *Rechtsstaat* may be viewed as redundant because every State is then, by definition, a 'State of law]. The tautological nature of the rule of law has also been questioned if it is understood to mean 'that all government action must have foundation in law' as '[a]ctions not authorized by law cannot be the actions of the government' Raz (n 124) 212.

Its contested theoretical usefulness and the use of different terminology notwithstanding, the rule of law tends to be understood by jurists as a meta-principle which provides the foundation for an independent and effective judiciary and essentially describes and justifies the subjection of public power to formal and substantive legal constraints with a view to guaranteeing the primacy of the individual and its protection against the arbitrary or unlawful use of such public power. Furthermore, in contrast to the position adopted by a majority of Anglo-American scholars, who tend to favour formal conceptions of the rule of law over substantive ones, most judges and legal scholars in Continental Europe would appear to reject this dichotomy and view the formal and substantive components of the rule of law as interdependent and not mutually exclusive. Indeed, the formal and procedural components of the rule of law in liberal and democratic European polities are supposed to serve the substantive values upon which these societies are founded. The legal and policy documents produced by the EU and the Council of Europe appear to similarly promote a broad, substantive and holistic understanding of the rule of law.¹⁸⁹ In other words, the rule of law is generally understood as a principle that includes substantive components (e.g. equality before the law) as well as formal/procedural elements (e.g. legal certainty, judicial review), and which requires a democratic and liberal constitutional order giving full effect to human rights. Indeed, it is often noted that ‘there can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law.’¹⁹⁰

Last but not least, the principle of the rule of law is commonly viewed as not justiciable in itself. In other words, the rule of law is not traditionally used as *a rule* of law. Instead, the rule of law is often understood as providing the foundation for judicial review and the manner in which such review may be exercised. This is not to say, however, that the rule of law, as a legal principle, lacks normative effect and merely fulfils a descriptive function. On the contrary, the highest courts tend to rely on the rule of law both as a ‘transversal’ principle that must guide the interpretation of all legal norms, and a basis from which a set of ‘hard’ legal principles, formal as well as substantive, can be derived to help the judiciary in their day-to-day mission to interpret and scrutinise the validity of public authorities’ measures. This is, for instance, what clearly happened in Germany.¹⁹¹ The case law of the EU Court of Justice and the European Court of Human Rights similarly reveals an understanding of the rule of law as a structuring principle which these courts must always take into account in their day-to-day adjudicative role with a view of strengthening concrete compliance with it, and as an ‘umbrella principle’¹⁹² from which judges may derive formal and substantive components or sub-principles.¹⁹³ While the case law in some legal systems may not always be as straightforward and plentiful when it comes to recognising the normative impact of the rule of law, there is no doubt this principle has shaped the development of the law and has also implicitly or explicitly led to the recognition of new and justiciable principles in most legal systems in Europe.

¹⁸⁹ This will be further examined in Working Paper 7.3.

¹⁹⁰ Council of Europe (Committee of Ministers), *The Council of Europe and the Rule of Law – An Overview*, CM(2008) 170, para 27.

¹⁹¹ See above Section 2.

¹⁹² To borrow the expression used by G Marshall, ‘The Rule of Law. Its Meaning, Scope and Problems’ (1993) 24 Cahiers de philosophie politique et juridique 43.

¹⁹³ For further consideration of the principle of the rule of law in case law, see Working Paper 7.2.

To conclude this section, the following shared traits can be highlighted: the rule of law tends to be understood as (i) a posited legal principle of constitutional value inherently linked with democracy and respect for human rights; (ii) an umbrella principle with formal and substantive components; (iii) a primary principle of judicial interpretation and (iv) a source from which standards of judicial review may be derived. The shared traits do not mean that understandings of the rule of law are static in nature. On the contrary, each legal system has demonstrated a dynamic, evolving understanding of this principle. In other words, the historical context proper to each legal order matters. As a result, the precise list of principles, standards and values that the rule of law entails in each legal system may obviously vary. The ‘institutionalisation’ of the rule of law has also led to the implementation of different arrangements and mechanisms but the underlying logic at work remains largely similar, i.e., all acts of public authorities can be subject, in principle, to judicial review and eventually annulled or set aside by the judicial branch. Furthermore, European legal systems share in common the use of formal and substantive legal standards to regulate the exercise of public authority and have all known an ‘intensification of judicial review’,¹⁹⁴ in particular as far as fundamental rights are concerned. And notwithstanding the different expressions used to convey the concept, the rule of law may be said to have progressively grown into a key, undeniable element of Europe’s constitutional heritage and a common political ideal, which has firmly established itself as a key transnational legal principle of what may be referred to as European constitutional law, i.e., the body of principles common to the national constitutional orders and the EU and ECHR legal frameworks as Working Paper D7.2 will show. In the past few years, however, following the emergence of a new type of ‘threats to the legal and democratic fabric in some of our European states’,¹⁹⁵ the rule of law seems to be increasingly challenged not only in practice but also on the conceptual front. Could this signify the start of a new era where national understandings of the rule of law begin to diverge?

4. Towards more dissensus?

The scholarly argument that the rule of law is a vague and/or contested concept is not new. What is new, at least within the EU, is that the legitimising force of the rule of law is increasingly attacked by alternative discourses arguing that democratic legitimisation through elections and/or referenda ('the will of the people' argument) should prevail over rule of law constraints and principles, with some politicians going as far as to say that 'the law has to follow politics and not politics the law'.¹⁹⁶ In today's era of increasing authoritarian populism, it is no surprising that the very concept of the rule of law is being challenged, in particular by elected officials from central and eastern European countries. This has raised *inter alia* the question of whether 'the common European values really common? Or are they really Western values, originating in the Western European Member States which are now being imposed on East Central European countries?'¹⁹⁷

¹⁹⁴ To paraphrase G Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' (1994) 57 *The Modern Law Review* 191, 205.

¹⁹⁵ President of the Commission, State of the Union Address 2012 (Press Release) SPEECH/12/596 <http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm>.

¹⁹⁶ H Kickl, then Federal Minister of the Interior of the Republic of Austria, quoted by M Steinbeis, 'Minister of Civil Resistance' (*Verfassungsblog*, 26 January 2019) <<https://verfassungsblog.de/minister-of-civil-resistance/>>.

¹⁹⁷ M Claes (n 11) VII.

As the previous section showed, the rule of law cannot be said to be a Western European concept or value which was imposed on central and eastern European countries. In this section, we aim to go further and assess the validity of arguing a new ‘East-West divide’ with respect to the rule of law. It is submitted that while there is evidence of attacks of a political nature regarding the core meaning of the rule of law previously identified coming primarily from representatives of governments and ruling parties from central and eastern European countries, rather than citizens, this development is hardly surprising considering the unprecedented deterioration of the rule of law situation in these countries. This does not mean, however, that there is compelling evidence on the basis of which one could claim that the rule of law is a Western European value which would not be necessarily shared on the ground in the new Member States. As of today, we would also submit there is no evidence of national legal understandings which would fundamentally diverge from the mainstream, common understanding previously outlined and which would, for instance, reflect a vision denying the importance of guaranteeing judicial independence. Rather, it can be shown that there is evidence of, at its core, a shared conceptual understanding of the core meaning of the rule of law among citizens as well as legal professionals and scholars.

4.1. An East-West Rhetorical Divide?

Rhetorically speaking, there is ample evidence of repeated critical statements originating from central and eastern European politicians with respect to the rule of law as a whole or some of its core – until now extremely consensual – components such as judicial independence.

For instance, some strong criticism can be regularly heard from members of Hungary’s ruling party. To give some recent examples, a Fidesz MEP referred to the rule of law as a fiction,¹⁹⁸ whereas the Fidesz-KDNP Delegation to the European Parliament claimed that the rule of law is now akin to a ‘magic word’ which is used by ‘pro-migration forces’, alongside other ‘vague concepts’, to weaken Hungarian sovereignty.¹⁹⁹ Not to be undone, a judge from Hungary’s captured constitutional court, has argued that in general, the rule of law ‘as a normative yardstick is little more than an empty 19th century ideal and a political joker for all purposes.’²⁰⁰ More sophisticatedly, the Hungarian prime minister has not denied the fundamental importance of the rule of law as a value but challenged the EU’s authority to enforce it:

I speak as a member of the generation which, when young [...] dreamt that in Hungary one day there would be freedom, democracy and the rule of law [...] The rule of law means that people do not rule other people: in contrast with people – who are often biased – it is the law which rules supreme, according to a single standard applied equally to all, making no distinctions between individuals. As a new concept, I could also add that neither does it make any distinction between countries. The Member States have

¹⁹⁸ Quoted in K Zoltán, ‘Fidesz MEP issues apology after claiming Spain holds political prisoners’, 5 December 2019: <https://index.hu/english/2019/12/05/jozsef_szajer_fidesz_spain_political_prisoners_apology/>.

¹⁹⁹ Press Release by the Fidesz-KDNP Delegation to the European Parliament, 5 September 2019: <<https://fidesz-eu.hu/en/with-timmermans-at-the-forefront-pro-migration-forces-prepare-once-more-for-revenge/>>.

²⁰⁰ Sitting Hungarian Constitutional Court judge elected by Fidesz quoted by M Steinbeis: ‘Piercing the Hull’ (*Verfassungsblog*, 12 January 2019) <<https://verfassungsblog.de/piercing-the-hull/>>.

never transferred control over enforcement of the rule of law to the institutions of the EU. The remit of the EU institutions refers solely to the enforcement of EU law.²⁰¹

It is however difficult to fully understand what the Hungarian prime minister means when he refers to the law ‘making no distinctions between individuals’ considering a number of legal measures specifically pushed forward by his government in relation to George Soros. It is also not clear what he means by ‘new concept’ considering for instance that the rule of law is mentioned no less than five times in the 1949 Statute of the Council of Europe.²⁰²

Be that as it may, a broadly similar critical case was made by the Hungarian government in its submission to the European Commission in reply to the Commission’s call for feedback on how to strengthen the EU’s rule of law toolbox in April 2019.²⁰³ While there is no direct challenge as regards the identification of the rule of law as a value which is common to the Member States as stated by Article 2 TEU, the consensual core meaning we have previously identified is openly contested so as to – one may assume – both justify violations of it and pre-empt EU intervention:

It is common ground that the Union is founded on the value of respect for the rule of law; a value that is common to the Member States [...] The principle of rule of law has been subject to an extensive constitutional dialogue with the participation of international organisations, national constitutional organs, academia and civil society. Nevertheless, this dialogue hasn’t changed the nature of rule of law as a constitutional principle that is constantly being tested and reshaped by the dialogue itself. Therefore, the starting point of the Commission that intends to portray rule of law as a set of well-defined rules and suggests that compliance can be objectively assessed is a clear misrepresentation of the rule of law concept and a misunderstanding of the related constitutional dialogue.²⁰⁴

In other words, current Hungarian authorities do not contest that the rule of law is a common value. What they do not appear to accept is that anyone else but them should be able to define and shape its meaning and scope as well as guarantee respect with it.

A broadly similar position has been defended by current Polish authorities, which are similarly subject to the exceptional procedure laid down in Article 7(1) TEU. During the second Article 7(1) TEU hearing held in respect of Poland, the Polish government concisely expressed its understanding as follows: ‘The EU’s values [are] common but their implementation [is] in the hands of the Member States.’²⁰⁵ This approach was subsequently detailed in their submission in reply to the Commission’s call previously mentioned:

²⁰¹ Prime Minister V Orbán, Speech at the launch of the Judicial Handbook on 5 March 2018, Budapest: <www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-launch-of-the-judicial-handbook>.

²⁰² See Working Paper 7.2 for further consideration.

²⁰³ COM(2019) 163 final, 15.

²⁰⁴ Hungary, State Secretariat for EU Relations, 1, <https://ec.europa.eu/info/publications/stakeholder-contributions_en>.

²⁰⁵ Polish Delegation, in Council of the EU, Report of the Hearing held by the Council on 18 September 2018, Doc No 12970/18, Brussels, 5 November 2018, 8.

Poland believes that the rule of law is one of the fundamental values on which the European Union is founded [...] The European Commission, in its attempt to create uniform rule of law standards for all, must take into account the diversity among Member States when it comes to their constitutions, legal systems and organization of administration of justice – as provided in Article 67 (1) TFEU.²⁰⁶

In other words, current Polish authorities, whose actions have led Poland to be the first EU Member State ever to be simultaneously subject to the EU's Article 7 procedure and the Council of Europe's special monitoring procedure, do not object to the rule of law as such but they are of the view that we would not yet have an agreed common definition of the rule of law in the EU: 'Raising awareness and rule of law promotion are important tasks, but we should first agree on a common definition of rule of law and – on the basis of the CJEU case-law – work out standards that will be acceptable for everyone, in line with national legal systems and traditions of all Member States.'²⁰⁷ Moreover, the Polish government also denied in the same submission to the Commission the existence of standards which would be 'universally applied in practice in the area of justice systems'.²⁰⁸ While no explanation was offered as regards how the Polish government understands the notion of 'standards', one must assume it means basic structural principles such as the principles of impendence, impartiality or irremovability of judges.

This line of reasoning recently led the President of the CJEU to observe that

given that the principle of judicial independence stems from the constitutional traditions common to the Member States as one of the founding tenets of any democratic system of governance, it was assumed that national governments would not threaten it. That principle was 'uncontested and incontestable.' [...] It is thus assumed that after taking up EU membership such a State will remain committed to defending liberal democracy, fundamental rights, and a government of laws, not men. Recent developments show that this assumption cannot simply be taken for granted.²⁰⁹

While the President of the CJEU did not of course explicitly name any countries nor any politicians, it is not too difficult to guess what he meant by 'recent developments' and the countries he must have had in mind.

4.2. An East-West Practical Divide?

Moving beyond the rhetoric to practices, it is not unusual for instance to see the international media focusing exclusively on rule of law problems in central and European countries, which some may construe or possibly misconstrue as evidence of an East-West practical divide as far as the rule of law is concerned. To give a single example:²¹⁰

²⁰⁶ See 'Stakeholder contribution on rule of law – Poland' available here: <https://ec.europa.eu/info/publications/stakeholder-contributions_en>.

²⁰⁷ Ibid, 3.

²⁰⁸ Ibid.

²⁰⁹ K Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 German Law Journal 29-34, 30-31.

²¹⁰ Bloomberg View, 'Eastern Europe and the Rule of Law', 20 June 2017: <www.bloomberg.com/view/articles/2017-06-20/eastern-europe-and-the-rule-of-law>.

Eastern Europe Rift

Governments challenging rule of law norms are EU's latest headache

Bulgaria

- Failure to fight corruption and organized crime
- Failure to reform judiciary

Czech Republic

- Rejection of EU refugee quotas

Hungary

- Rejection of EU refugee quotas
- Possible "emerging systemic threat to the rule of law" from actions including clampdowns on universities and foreign NGOs

Poland

- Judicial-reform package that would boost government sway over the courts
- President has refused to swear in justices to Constitutional Court, government has rejected some of its rulings
- Rejection of EU refugee quotas

Romania

- Attempt to decriminalize certain abuse-of-office offenses



Source: Rodney Jefferson, 'Balance of Power: Populism Is Alive and Kicking in Europe' (*Bloomberg* 26 September 2017).

Let's examine the reality of this seemingly East-West divide in light of the different rule of law rankings currently available and the data some of the present authors of this working paper have collected in respect to the multiple Article 7(1) hearings to date.

With respect to rule of law rankings, space preclude the mention of every single one of them but they appear to confirm that the rule of law is, broadly speaking, under more intense threat in Eastern than Western Europe. To begin with, one may refer to the Rule of Law Index produced by the World Justice Project. In its 2019 edition, the five countries with the lowest scores in the EU/EFTA/North America grouping were Romania, Greece, Croatia, Bulgaria and Hungary with Poland, Bosnia-Herzegovina and Serbia specifically highlighted as the three countries having 'lost the most ground' in the 'Constraints on Government Powers' dimension,²¹¹ which the WJP identifies a sign 'suggesting rising authoritarianism' in a broader context however where 60% of the countries assessed by the WJP 'show a decline over the last four years' in this dimension of the rule of law.²¹² The 2020 edition confirms previous tendencies and rankings with Hungary highlighted as one of the countries which experienced the largest average annual percentage drop in the rule of law over the past five years and Poland highlighted as one of the two countries (the other one being Egypt) having experienced the single biggest decline by factor over the past five years when it comes to constraints on government powers.²¹³ Using 2015 as a starting point and looking at EU countries only, the

²¹¹ World Justice Project, Rule of Law Index 2019 Insights, 7.

²¹² Ibid, 18.

²¹³ World Justice Project, WJP Rule of Law Index 2020: Global Press Release, 11 March 2020:

countries which have experienced the biggest declines regarding the principle which measures whether the imposes limits on the exercise of power by the state and its agents, as well as individuals and private entities, are Poland (-6.8%); Hungary (-5.3%) and Bulgaria (-3.4%).²¹⁴

While the rule of law ranking produced by BertelsmannStiftung ('Sustainable Governance Indicators') on the basis of a lower number of criteria,²¹⁵ do show a number of central and eastern European countries ahead of western European countries such as France or the Netherlands (e.g. Estonia, Lithuania, Czechia), the bottom 5 EU Member States are Malta, Bulgaria, Romania, Poland and Hungary.²¹⁶ The last three countries previously mentioned are also the two which have known an abrupt lowering of their rule of law scores when one used their scores in 2014: -0.5 for Hungary; -0.8 for Romania and -4.2 for Poland. One may possibly be surprised by the relatively small decline as far as Hungary is concerned but that it because the rule of law had already been seriously damaged there in 2014 so there was little more to fall from (Hungary's score was 3.5 in 2014 to reach a score of 3.0 in 2019 when the EU average is 6.9 in 2019). Hungary is also the EU country which the same organisation no longer considers a 'consolidated democracy ... a particularly harrowing fact, given that OECD and EU membership actually presupposes an intact respect for democracy and commitment to protecting fundamental rights'.²¹⁷ Since then, this diagnosis has been confirmed by the V-DEM project, which brings together thousands of social scientists working in the areas of democracy and governance, in their annual democracy report, the 2020 edition of which categorises Hungary as the EU's first authoritarian Member State.²¹⁸

²¹⁴ <<https://worldjusticeproject.org/news/wjp-rule-of-law-index-2020-global-press-release>>.

²¹⁵ World Justice Project, *Rule of Law Index 2020 Insights*, 2020, 20: <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-of-law-index-2020>>.

²¹⁶ The following four are used: Legal certainty; judicial review; appointment of justices; corruption prevention. By contrast, the WJP Rule of Law Index relies on four broader principles: accountability; just laws; open government; accessible and impartial dispute resolution. These four principles are further developed in eight factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice.

²¹⁷ SGI Network, 'Quality of Democracy: Rule of Law', <www.sgi-network.org/2019/Democracy/Quality_of_Democracy/Rule_of_Law>.

²¹⁸ Policy Performance and Governance Capacities in the OECD and EU. *Sustainable Governance Indicators 2018*, BertelsmannStiftung, 8.

²¹⁹ V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, 4 and 13: 'Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State ... Hungary is an electoral authoritarian regime and is the most extreme recent case of autocratization'.

**TABLE 1: TOP-10 MAIN AUTOCRATIZING COUNTRIES
(LIBERAL DEMOCRACY INDEX (LDI), 2009–2019)**

	CHANGE	LDI 2009	LDI 2019	REGIME TYPE 2009	REGIME TYPE 2019
Hungary	-0.36	0.76	0.40	Liberal Democracy	Electoral Autocracy
Turkey	-0.36	0.46	0.10	Electoral Democracy	Electoral Autocracy
Poland	-0.33	0.83	0.50	Liberal Democracy	Electoral Democracy
Serbia	-0.27	0.53	0.25	Liberal Democracy	Electoral Autocracy
Brazil	-0.25	0.76	0.51	Electoral Democracy	Electoral Democracy
India	-0.19	0.55	0.36	Electoral Democracy	Electoral Democracy
Mali	-0.17	0.48	0.31	Electoral Democracy	Electoral Autocracy
Thailand	-0.16	0.32	0.15	Electoral Autocracy	Closed Autocracy
Nicaragua	-0.16	0.22	0.06	Electoral Autocracy	Electoral Autocracy
Zambia	-0.15	0.42	0.27	Electoral Democracy	Electoral Autocracy

Source: V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, p. 16.

Lastly, one may refer to the 2019 State of Democracy which notes while ‘more than half of the democracies in Europe have suffered democratic erosion in recent years’, the three EU countries mentioned in the list of ‘the 10 democracies in the world currently experiencing democratic backsliding’ are Hungary, Poland, Romania.²¹⁹ Similarly, this report observes that while ‘the phenomenon of ruling political parties showing autocratic tendencies can be discerned in several countries in the region,’ it is particularly discernible ‘in Central and Eastern Europe.’²²⁰

With respect to multiple Article 7(1) hearings to date, two of the present authors have been collecting data on the national governments asking questions or making comments in relation to the situation in Poland and Hungary. When this date is presented in the form of maps, it is difficult not be struck by the geographical concentration of questions and comments in Western/Nordic European countries.

²¹⁹ International IDEA, *The Global State of Democracy 2019 – Addressing the Ills, Reviving the Promise*, 214.

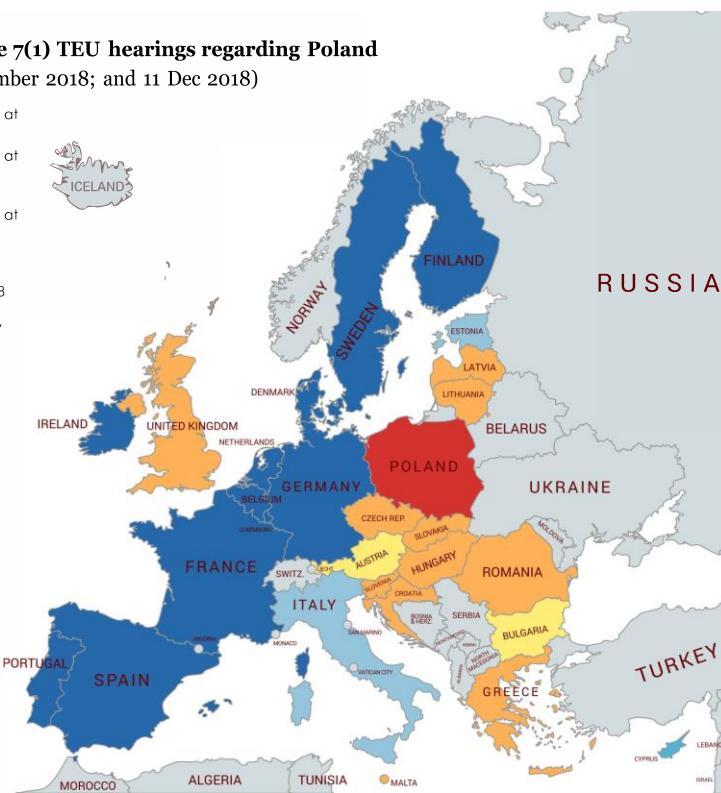
²²⁰ Ibid.

Participation in Article 7(1) TEU hearings regarding Poland
 (26 June 2018; 18 September 2018; and 11 Dec 2018)

- EUMS which asked questions at all three Art 7(1) hearings
- EUMS which asked questions of two (of three) Art 7(1) hearings
- EUMS which asked questions at one (of three) Art 7(1) hearings
- EUMS which held rotating Presidency of Council in 2018 but did not ask questions before/after their Presidency
- EUMS which did not ask any questions at any of the three hearings
- EUMS subject to Art 7(1) procedure

By @ProfPech and @JoelleGrogan
 based on formal reports of hearings
 (Council docs no 10906/18;
 12970/18 and 15469/18)

Created with mapchart.net ®



The data collected in relation to the two hearings to date held in respect of Hungary offers a quasi-identical picture:

Participation in Article 7(1) TEU hearing regarding Hungary
 (16 September 2019)

- EUMS subject to Art 7(1) procedure
- EUMS which asked questions at Art 7(1) hearing
- EUMS which did not ask any questions at Art 7(1) hearing
- EUMS holding rotating Presidency of Council at time of hearing

By @ProfPech and @JoelleGrogan
 based on formal report of hearing
 (Council doc no 12345/19)

Created with mapchart.net ®

Participation in Second Article 7(1) TEU hearing regarding Hungary
 (10 December 2019)

- EUMS subject to Article 7(1) EU procedure
- EUMS which asked questions of all four Article 7(1) TEU hearings to date
- EUMS which did not ask any questions
- EUMS holding rotating presidency of Council

By @ProfPech and @Joelle Grogan
 based on media reports
 (19 December 2019)

Created with mapchart.net ®

If one divides the EU Member States between those who never asked any questions (or made any comments) at any of the five Article 7(1) TEU hearings to date, with some exceptions (Cyprus, Estonia, Slovenia), there is a seemingly strong East-West divide in addition to an apparently strong founding Member States versus post 2004 enlargement divide:

EU Member States which have asked at least one question at one of the hearings (total of 15)	EU Member States which have never asked any question at any hearing (total of 11)
Belgium (1958)	Austria (1995/held rotating presidency during which 2 hearings were organised)
Cyprus	Bulgaria (2007/held rotating presidency during which 1 hearing was organised)
Denmark (1973)	Croatia (2013)
Estonia	Czech Republic (2004)
Finland (1995)	Greece (1981)
France	Latvia (2004)
Germany	Lithuania (2004)
Ireland	Malta (2004)
Italy	Romania (2007)
Luxembourg	Slovakia (2004)
Netherlands	United Kingdom (1973/departed in 2020)
Portugal	
Spain	
Sweden	
Slovenia (2004)	

On the basis of the rhetorical challenges we have seen and the data briefly presented above, it would be tempting to agree the existence of an East-West divide which could possibly reflect a nascent but growing lack of consensus regarding the rule of law as a value which the EU Treaties however present as a common value. It will be submitted below that the real divide could be instead one splitting national elites seeking to empty the rule of law of any core legally enforceable meaning and those who aim to defend the enforcement of this core meaning against autocratic forces.

4.3. Or an Authoritarian-Liberal Divide at the elite level?

A number of EU Member States are experiencing a process of democratic and rule of law backsliding. Several definitions have been offered of this phenomenon. For instance, rule of law backsliding has been defined

as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party. This process enables the establishment of electoral autocracies and the solidification of one-party states in which

elected officials of the ruling party claim exclusive authority to act on behalf of ‘the people’.²²¹

Democratic backsliding refers to a similar top-down, orchestrated hollowing-out of democratic institutions, via the means and instruments of democratic decision-making.²²² This process has been particularly visible in countries such as Hungary, Poland and Turkey where the ruling parties ‘have skilfully used democratic rules to dominate democratic institutions (including the parliament, judiciary and media), and change the rules (e.g. electoral laws, judicial appointment procedures and constitutional provisions) with the purpose of maintaining hold on those institutions indefinitely’²²³. Encroaching political interference in judicial matters, stifling of parliamentary opposition voices and the curtailment of civic space and media freedoms have slowly led to severe democratic backsliding’.²²⁴

Deliberately undermining the rule of law is a key component of would-be autocrats’ blueprint. Once they become unaccountable when the deliberate process of dismantling national checks and balances has succeeded, the new ‘illiberal elites’, which tend to have been voted into office by citizens disappointed with the performance of democracy and mainstream political forces’,²²⁵ can then freely ‘appropriate state resources for partisan and private purposes, and expand informal patronage networks in order to penetrate society.’²²⁶

To summarise, we have been witnessing in the EU a deliberate, careful planned process of top-down dismantlement of checks and balances, including of course the national judiciary, with Poland²²⁷ and Hungary²²⁸ being the two most obvious examples of such a phenomenon. There is no evidence in these two cases of initial popular demand for the annihilation of judicial independence or a constitutional autocratic revolution.

Yet, one can often read that ‘many surveys in recent years have shown rising support for illiberal and even quasi-authoritarian values in some parts of Europe’.²²⁹ When it comes to the rule of law, opposing evidence can however be found. In addition to regular, popular and unprecedented demonstrations against governmental repeated attacks on the rule of law, in particular judicial independence, the results of a special Eurobarometer published in July 2019

²²¹ Pech and Scheppelle (n 191).

²²² International IDEA, *The Global State of Democracy 2019 – Addressing the Ills, Reviving the Promise*, 216.

²²³ The report refers here to the book edited by F Bieber, M Solska, and D Taleski, *Illiberal and Authoritarian Tendencies in Central, Southeast and Eastern Europe* (Peter Lang 2019).

²²⁴ Ibid.

²²⁵ International IDEA, *The Global State of Democracy 2019 – Addressing the Ills, Reviving the Promise*, 226.

²²⁶ Ibid.

²²⁷ H Tworzecki, ‘Poland: A Case of Top-Down Polarization’, ANNALS, AAPSS, 681, January 2019, 97: Democratic backsliding in Poland has been ‘a process driven from the top down by a segment of the political class that donned the cloak of radical populist anti-establishmentarianism to gain popular support, win an election, and rewrite the constitutional rules of the game to its own benefit’ which only subsequently resulted in polarization at the level of the electorate. What makes it unique according to author is that this is happening despite absence of major risk factors identified by previous literature such as persistent economic dysfunction, crippling racial or ethnic divisions, etc.

²²⁸ See eg P Bárd and L Pech (n 145).

²²⁹ International IDEA, *The Global State of Democracy 2019 – Addressing the Ills, Reviving the Promise*, 225 referring to R Foa and Y Mounk, ‘The signs of deconsolidation’ (2017) Journal of Democracy 5.

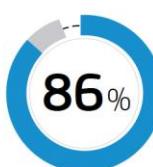
does show a quasi-unanimous and widespread support for the rule of law in every single EU Member State.²³⁰

The survey, carried out in April 2019, in the then 28 EU Member States, asked 27,655 respondents to answer a number of questions regarding the importance and the new for improvement for the rule of law not only in their own country but also, very interesting, in other Member States and in the EU as a whole. The concept of the rule of law itself was divided into 17 principles which were grouped into 3 main thematic areas: (1) Legality, legal certainty, equality before the law and separation of powers; (2) Prohibition of arbitrariness and penalties for corruption; and (3) Effective judicial protection by independence courts.

The results of this Eurobarometer of survey show overwhelming majorities (above 85%) finding *each* of the 17 principles outlined above in *each* EU Member State as being essential or important. Only 1% of the respondents did not consider any of the 17 principles essential or important and the scores are high in all countries even though one may note that the countries with the scores below 9.00 (out of 10.00) are all central and European countries (Lithuania, Poland, Austria, Croatia, Latvia, Czechia, Romania) with one exception (Luxembourg). In other words, not only national legal understandings of the rule of law reflect and protect a similar common core of legal principles when it comes to the rule of law but there is also an overwhelming popular support for these principles in each EU Member State. By connecting such strong support and consensus in the importance of the rule of law, a question of whether a deep understanding of the rule of law is effective widely endorsed by various political and legal elites throughout Europe is answered, and strongly in the affirmative.

★ What do Europeans say about the respect of the rule of law in their country?

Europeans say that respect of the rule of law is important and note that improvement is needed in their countries



at least 86% say that the principles⁽¹⁾ of the rule of law are important



at least 80% say that the respect of principles⁽¹⁾ of the rule of law needs improvement in their country

★ What do Europeans say about the respect of the rule of law in other EU Member States?



of Europeans say that it is important for all EU Member States to respect the core values of the EU including fundamental rights, rule of law and democracy



say that it is important to be able to trust that authorities in other Member States take decisions based on the law



say it is important to be able to access an independent and impartial court in other Member States



say it is important for media and civil society to operate freely and without pressure in other Member States

Source: Eurobarometer: What do Europeans say about the respect of the rule of law in their country?

²³⁰ Special Eurobarometer 489, April 2019 Rule of law Report, July 2019 (EU 2019), 124p.

The results for the two countries subject to Article 7(1) TEU due to the actions of their respective authorities are also worth highlighting. Indeed, they suggest the ‘illiberal’ critique of the rule of law we previously outlined is yet to permeate popular views on the importance of the rule of law. With respect to Hungary, one may highlight the clear dominant view that there is a need for improvement when it comes to the 17 principles of the rule of law identified by the Eurobarometer. This is however not unique to Hungary. The countries where respondents appear to see the least need for improvement are Sweden, Netherlands and Denmark which is not surprising considering their usually top scores in the main rule of law rankings currently available.

With respect to Poland, one may highlight the broad (but below EU average) popular support for the propositions that ‘if your rights are not respected, you can have them upheld by an independent court’ and ‘judges are independent’.²³¹ Interestingly, and contrary to the rhetoric originating from the current government, only 26% of the respondents in Poland are of the view that there is a definitive need for improvement when it comes to the existence of ‘independent controls to ensure that laws can be challenged and tested’ and only 32% and 35% are of the same view regarding the previous two propositions mentioned.²³² This may be construed as undermining the argument that there would be a popular demand for the so-called judicial reforms pushed by the country’s ruling party for the past five years. In this respect, one may also refer to a poll whose results showed Poles trust the EU (68%) more than the Polish government – an important result considering the long-lasting nature of the rule of law conflict between EU institutions and current Polish authorities – while Polish courts (41.1%) are also more trusted than the government (30.5%) or the captured ‘Constitutional Tribunal’ (32.5%).²³³

In light of the widely shared popular support for the rule of law, it is perhaps no surprise that the conceptual challenge originating from authoritarian populists does not primarily target the concept of the rule of law as such but aims, under the guise of the concepts of constitutional identity and constitutional pluralism,²³⁴ to redefine not to say hollow out the rule of law. Indeed, if one looks for instance at the public positions adopted by the Hungarian prime minister or the current Hungarian justice minister, the importance of the rule of law as a constitutional value is not directly and openly challenged. Rather, we seem to be witnessing an attempt to redefine the core meaning of the rule of law as it has crystallised in the EU in a more authoritarian direction or at the very least an attempt to deny the EU institutions any right to both define and enforce the rule of law and the sub-principles the concept may be said to contain (e.g. the principle of judicial independence). In other words, why throw the rule of law baby with the bathwater if you can be the one (re)defining the rule of law as rule by law.

The findings of the Eurobarometer rule of law survey however seriously undermine the claim from representatives from ‘illiberal’ regimes that the EU does not and/or should pay more due regard to the alleged special ‘constitutional identity’ of their countries when it comes to the

²³¹ Eurobarometer 91.3, Rule of Law, Poland, April 2019, 3.

²³² Ibid., 2.

²³³ D Tilles, ‘Poles trust EU the most and government the least among institutions, finds poll’ (*Notes from Poland*, 30 January 2020) <<https://notesfrompoland.com/2020/01/30/polish-trust-eu-the-most-and-government-the-least-among-institutions-finds-poll/>>.

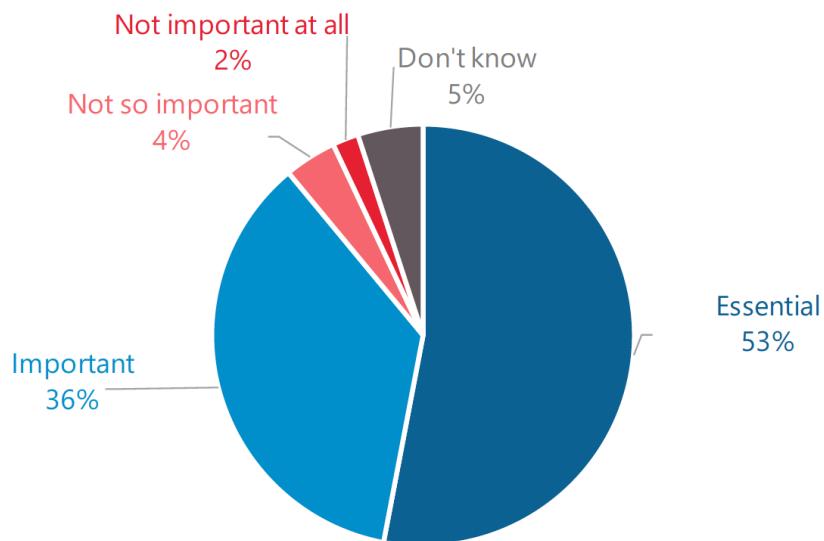
²³⁴ R Dan Kelemen and L Pech, ‘Why autocrats love constitutional identity and constitutional pluralism: Lessons from Hungary and Poland’, RECONNECT Working Paper No 2 (September 2018).

rule of law. Furthermore, their anti-EU ‘interference’ rhetoric flies in the face of a popular dominant view across the EU with respect to the proposition that all Member States respect the core values on the EU, including fundamental rights, the rule of law and democracy:

Q9.1 How important for you personally are the following points?

All EU Member States respect the core values of the EU, including fundamental rights, the rule of law and democracy

(% - EU)



Source: Special Eurobarometer 489, April 2019 Rule of law Report, July 2019 (EU 2019) p. 12.

One may draw the conclusion from this finding that in addition to being empowered to enforce the rule of law against national authorities,²³⁵ there is popular demand for the EU to step in when a Member State threatens or no longer respect the core values laid down in Article 2 TEU. At same time, there is also a clear majority of respondents who feel not sufficiently well informed about the EU’s foundational values. This is a gap, which we hope, this working paper and more broadly the RECONNECT project as a whole, will help fill.

5. Concluding remarks

The rule of law is one amongst a number of constitutional principles that can together be regarded as undergirding all national legal systems in Europe. It is also a principle on which organisations such as the Council of Europe and the EU are founded and which they have committed themselves to promoting within and beyond Europe. While the rule of law may be rightly presented as one of the fundamental features of Europe’s constitutional heritage and a principle common to the forty-seven Member States of the Council of Europe, twenty-eight of which are members of the EU, the near universal endorsement achieved by this principle is not the result of a linear process. Some degree of divergence also remains as regards *inter alia* the meaning of the rule of law or its scope of application.

Without ignoring or minimising the differences between national legal systems in Europe, one can however reasonably defend the view that legal understandings of the rule of law have

²³⁵ See Working Paper 7.2.

largely converged. In other words, the harmonising effect of membership of the EU and/or of the Council of Europe, along with earlier and continuing processes of horizontal and vertical ‘norm-diffusion’ between domestic and supranational legal orders, have led to the crystallisation and solidification of a broad consensus in Europe on the core meaning of the rule of law, the elements contained within it and the relationship of this principle to other foundational principles of modern Western constitutionalism, i.e., democracy and respect for human rights. The most difficult challenge today is accordingly more practical than conceptual in nature. While a fairly consensual ‘European’ conception of the rule of law is today well established on the international plane,²³⁶ devising policies and mechanisms that effectively contribute to the concrete strengthening of the rule of law at the national and international levels remain however as challenging as ever.

²³⁶ See L Pech, ‘Promoting the rule of law abroad: on the EU’s limited contribution to the shaping of an international understanding of the rule of law’ in D Kochenov and F Amtenbrink (eds), *The European Union’s Shaping of the International Legal Order* (Cambridge University Press 2013).

Annex

References to the ‘rule of law’ in the national constitutions of the EU27

	EU member (link to the Const)	Constitution (yr)	Articles and extracts
1	Austria	1920 Amended 2017	<p>The term ‘Rule of Law’ is not used, but the following Rule of Law elements are present:</p> <p>Article 7. (1) All nationals are equal before the law.</p> <p>Article 9. (1) The generally recognized rules of international law are regarded as integral parts of federal law.</p> <p>Article 18. (1) The entire public administration shall be based on law.</p> <p>Article 87. (1) Judges are independent in the exercise of their judicial office.</p> <p>Article 90. (1) Hearings in civil and criminal cases at the court of justice are oral and public. Exceptions are regulated by law.</p> <p>Article 94. (1) Judicial and administrative powers shall be separate at all levels of proceedings.</p>
2	Belgium	1831; Consolidated into one text 1994; Amended 2017	<p>The term ‘Rule of Law’ is not used, but the following Rule of Law elements are present:</p> <p>Article 10. No class distinctions exist in the State. Belgians are equal before the law.</p> <p>Article 11. Enjoyment of the rights and freedoms recognised for Belgians must be provided without discrimination.</p> <p>Article 12. No one can be prosecuted except in the cases provided for by the law, and in the form prescribed by the law.</p> <p>Article 13. No one can be separated, against his will, from the judge that the law has assigned to him.</p> <p>Article 14. No punishment can be introduced or administered except by virtue of the law.</p>

			<p>Article 31. No authorisation is necessary prior to taking legal action against civil servants for offences resulting from their administration, except with regard to what has been ruled on concerning ministers and members of the Community and Regional Governments.</p> <p>Article 32. Everyone has the right to consult any administrative document and to obtain a copy, except in the cases and conditions stipulated by the laws, federate laws or rules referred to in Article 134.</p> <p>Article 151(1). Judges are independent in the exercise of their jurisdictional competences.</p>
3	Bulgaria	1991 Amended 2015	<p><u>Preamble</u>. We, the Members of the Seventh Grand National Assembly ... hereby proclaim our resolve to create a democratic and social state, governed by the rule of law, by establishing this CONSTITUTION.</p> <p>Article 4(1) The Republic of Bulgaria shall be a State governed by the rule of law. It shall be governed by the Constitution and the laws of the country.</p>
4	Croatia	1991 Amended 2013	<p style="text-align: center;">ARTICLE 3</p> <p>Freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution.</p>
5	Cyprus	1960 Amended 2013	<p>The term 'Rule of Law' is not used, but the following Rule of Law elements are present:</p> <p style="text-align: center;">ARTICLE 11</p> <p>2. No person shall be deprived of his liberty save in the following cases when and as provided by law...</p> <p style="text-align: center;">ARTICLE 12</p> <p>1. No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed; and no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for it by law at the time when it was committed.</p>

		<p>ARTICLE 30</p> <p>1. No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional courts under any name whatsoever is prohibited.</p> <p>2. In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law. Judgment shall be reasoned and pronounced in public session.</p> <p>PART III. THE PRESIDENT OF THE REPUBLIC, THE VICE-PRESIDENT OF THE REPUBLIC AND THE COUNCIL OF MINISTERS</p> <p>ARTICLE 46</p> <p>The executive power is ensured by the President and the Vice-President of the Republic. The President and the Vice-President of the Republic in order to ensure the executive power shall have a Council of Ministers composed of seven Greek Ministers and three Turkish Ministers.</p> <p>PART IV. THE HOUSE OF REPRESENTATIVES</p> <p>ARTICLE 61</p> <p>The legislative power of the Republic shall be exercised by the House of Representatives in all matters except those expressly reserved to the Communal Chambers under this Constitution.</p> <p>PART IX. THE SUPREME CONSTITUTIONAL COURT</p> <p>ARTICLE 133</p> <p>8.1. There shall be established a Council consisting of the President of the High Court as Chairman and the senior in appointment Greek judge and the Turkish judge of the High Court as members.</p> <p>8.2. This Council shall have exclusive competence to determine all matters relating to</p> <p>a. the retirement, dismissal or otherwise the termination of the appointment of the President of the Court in accordance with the conditions of service laid down in the instrument of his appointment;</p>
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			<p>b. the retirement or dismissal of the Greek or the Turkish judge of the Court on any of the grounds provided in sub-paragraphs (3) and (4) of paragraph 7 of this Article.²³⁷</p> <p>10. No action shall be brought against the President or any other judge of the Court for any act done or words spoken in his judicial capacity.</p> <p>PART X. THE HIGH COURT AND THE SUBORDINATE COURTS</p> <p>8. 1. There shall be established a Council consisting of the President of the Supreme Constitutional Court as Chairman and the Greek and the Turkish judge of the Supreme Constitutional Court as members.</p> <p>8.2. This Council shall have exclusive competence to determine all matters relating to-</p> <p>a. the retirement, dismissal or otherwise the termination of the appointment of the President of the High Court in accordance with the conditions of service laid down in the instrument of his appointment;</p> <p>b. the retirement or dismissal of any Greek judge or the Turkish judge of the High Court on any of the grounds provided in sub-paragraphs (3) and (4) of paragraph 7 of this Article.</p> <p>10. No action shall be brought against the President or any other judge of the High Court for any act done or words spoken in his judicial capacity.</p>
6	Czechia	1993 Amended 2013	<p>Preamble</p> <p>We, the citizens of the Czech Republic in Bohemia, in Moravia, and in Silesia, At the time of the restoration of an independent Czech state,</p> <p>...</p> <ul style="list-style-type: none"> • Resolved to abide by all proven principles of a state governed by the rule of law. <p>Chapter I: Fundamental Provisions</p> <p>Article 1</p> <p>1. The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.</p>

²³⁷ Para 7 refers to incapacity, infirmity or misconduct.

			<p>2. The Czech Republic shall observe its obligations resulting from international law.</p> <p style="text-align: right;">Article 9</p> <p>1. This Constitution may be supplemented or amended only by constitutional acts. 2. Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible. 3. Legal norms may not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state.</p>
7	Denmark	1953 Amended 2009	<p>The term 'Rule of Law' is not used, but the following Rule of Law elements are present:</p> <p>22. A Bill passed by the Folketing shall become law if it receives the Royal Assent not later than thirty days after it was finally passed. The King shall order the promulgation of Statutes and shall see to it that they are carried into effect.</p> <p>62. The administration of justice shall always remain independent of the executive power. Rules to this effect shall be laid down by Statute.</p> <p>63. 1. The courts of justice shall be entitled to decide any question bearing upon the scope of the authority of the executive power.</p> <p>64. In the performance of their duties the judges shall be directed solely by the law. Judges shall not be dismissed except by judgment, nor shall they be transferred against their will, except in the instances where a rearrangement of the courts of justice is made. However, a judge who has completed his sixty-fifth year may be retired, but without loss of income up to the time when he is due for retirement on account of age.</p> <p>65. 1. In the administration of justice all proceedings shall be public and oral to the widest possible extent.</p>
8	Estonia	1992 Amended 2015	<p style="text-align: right;">Preamble</p> <p>With unwavering faith and a steadfast will to strengthen and develop the state ... which is founded on liberty, justice and the rule of law.</p>

			<p style="text-align: center;">Chapter II FUNDAMENTAL RIGHTS, FREEDOMS AND DUTIES</p> <p>§ 10. The rights, freedoms and duties set out in this chapter do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in conformity with the principles of human dignity, social justice and democratic government founded on the rule of law.</p>
9	Finland	1999 Amended 2018	<p style="text-align: center;">Chapter 1 - Fundamental provisions</p> <p style="text-align: center;">Section 2 - Democracy and the rule of law</p> <p>The powers of the State in Finland are vested in the people, who are represented by the Parliament.</p> <p>Democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions.</p> <p>The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.</p>
10	France	1958 Amended 2008	<p>The term 'Rule of Law' is not used, but the following Rule of Law elements are present:</p> <p>ARTICLE 1</p> <p>France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralized basis.</p> <p>ARTICLE 10</p> <p>The President of the Republic shall promulgate Acts of Parliament within fifteen days following the final passage of an Act and its transmission to the Government.</p> <p>TITLE VII. THE CONSTITUTIONAL COUNCIL</p> <p>ARTICLE 61-1</p>

			<p>If during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'état or by the Cour de Cassation to the Constitutional Council, within a determined period.</p> <p>TITLE VIII. ON JUDICIAL AUTHORITY</p> <p>ARTICLE 64</p> <p>The President of the Republic shall be the guarantor of the independence of the Judicial Authority.</p> <p>He shall be assisted by the High Council of the Judiciary.</p> <p>An Institutional Act shall determine the status of members of the Judiciary.</p> <p>Judges shall be irremovable from office.</p> <p>ARTICLE 65</p> <p>The section of the High Council of the Judiciary with jurisdiction over judges shall make recommendations for the appointment of judges to the Cour de cassation, the Chief Presidents of Courts of Appeal and the Presidents of the Tribunaux de grande instance. Other judges shall be appointed after consultation with this section.</p> <p>The section of the High Council of the Judiciary with jurisdiction over judges shall act as disciplinary tribunal for judges.</p>
11	Germany	1949 Amended 2014	<p style="text-align: right;">Article 16 [Citizenship – Extradition]</p> <p>(1) No German may be deprived of his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he does not become stateless as a result.</p> <p>(2) No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.</p> <p style="text-align: right;">Article 23 [European Union – Protection of basic rights – Principle of subsidiarity]</p>

			<p>(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.</p> <p style="text-align: right;">Article 28 [Land constitutions – Autonomy of municipalities]</p> <p>(1) The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.</p>
12	Greece	1975 Amended 2008	<p style="text-align: center;">FOREWORD</p> <p>The Constitution of 1975, animated by the principles of the rule of law and the welfare state and raising the respect to the value of man as the primary obligation of the state, fully expressed the acquis of post-war European constitutionalism, and, indeed, considering the institutional backwardness of the Country at the political level during the first decades following World War II, signalled a real advance in that direction.</p> <p style="text-align: center;">Article 25</p> <p>1. The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State.</p>
13	Hungary	1990 Amended 2018	<p style="text-align: center;">FOUNDATION</p> <p>Article U) (1) The state structure based on the rule of law, established in accordance with the will of the nation through the first free elections held in 1990, and the previous communist dictatorship are incompatible.</p>
14	Ireland	1937 Amended 2018	<p>The term ‘Rule of Law’ is not used, but the following Rule of Law elements are present:</p> <p>Foreword (front cover page of constitution): Bunreacht na hÉireann [Constitution of Ireland] falls, broadly speaking, into the liberal democratic tradition of Europe and America. It asserts that all powers of government, legislative, executive and judicial, derive,</p>

		<p>under God, from the people and it provides for a democratic parliament and government to exercise the legislative and executive powers respectively, and for an independent judiciary to exercise the judicial power. In its fundamental rights articles it guarantees the individual citizen freedom, equality and justice.</p> <p>Article 6(1) all powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the state and, in final appeal, to decide all questions of national policy, according to the requirements of the common good. (2) these powers of government are exercisable only by or on the authority of the organs of state established by this constitution.</p> <p>Article 15(1)(1°) the national Parliament shall be called and known, and is in this constitution generally referred to, as the Oireachtas.</p> <p>(2°) the Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a senate to be called Seanad Éireann.</p> <p>(2)(1°) the sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the state.</p> <p>Article 25(4)(2°) every Bill signed by the President under this constitution shall be promulgated by him as a law by the publication by his direction of a notice in the iris oifigiúil stating that the Bill has become law.</p> <p>Article 29(4)(4°) Ireland affirms its commitment to the European Union within which the member states of that union work together to promote peace, shared values and the well-being of their peoples.</p> <p>Article 34(1) Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.</p> <p>Article 35(2) all judges shall be independent in the exercise of their judicial functions and subject only to this constitution and the law.</p> <p>(3) no judge shall be eligible to be a member of either house of the Oireachtas or to hold any other office or position of emolument.</p>
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			<p>(4)(1°) a judge of the supreme court, the court of appeal, or the high court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.</p> <p>Article (40)(1) all citizens shall, as human persons, be held equal before the law.</p> <p>(3) (1°) the state guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.</p> <p>(4)(1°) no citizen shall be deprived of his personal liberty save in accordance with law.</p>
15	Italy	1947 Amended 2012	<p>The term 'Rule of Law' is not used, but the following Rule of Law elements are present:</p> <p>ART 24</p> <p>Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law.</p> <p>ART 25</p> <p>No case may be removed from the court seized with it as established by law.</p> <p>No punishment may be inflicted except by virtue of a law in force at the time the offence was committed.</p> <p>No restriction may be placed on a person's liberty save for as provided by law.</p> <p>ART 28</p> <p>Officials of the State or public agencies shall be directly responsible under criminal, civil, and administrative law for acts committed in violation of rights.</p> <p>In such cases, civil liability shall extend to the State and to such public agency.</p> <p>ART 73</p> <p>Laws are promulgated by the President of the Republic within one month of their approval.</p>

			<p>If the Houses, each by an absolute majority of its members, declare a law to be urgent, the law is promulgated within the deadline established therein.</p> <p>A law is published immediately after promulgation and comes into force on the fifteenth day following publication, unless such law establishes a different deadline.</p> <p>ART 113</p> <p>The judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration.</p> <p>ART 104</p> <p>The Judiciary is a branch that is autonomous and independent of all other powers.</p> <p>ART 105</p> <p>The High Council of the Judiciary, in accordance with the regulations of the Judiciary, has jurisdiction for employment, assignments and transfers, promotions and disciplinary measures of judges.</p> <p>ART 107</p> <p>Judges may not be removed from office; they may not be dismissed or suspended from office or assigned to other courts or functions unless by a decision of the High Council of the Judiciary, taken either for the reasons and with the guarantees of defence established by the provisions concerning the organisation of Judiciary or with the consent of the judges themselves.</p>
16	Latvia	1922 Amended 2016	<p>Preamble</p> <p>Latvia as democratic, socially responsible and national state is based on the rule of law and on respect for human dignity and freedom; it recognises and protects fundamental human rights and respects ethnic minorities. The people of Latvia protect their sovereignty, national independence, territory, territorial integrity and democratic system of government of the State of Latvia.</p>
17	Lithuania	1992 Amended 2019	<p>Preamble</p>

			THE LITHUANIAN NATION ... – striving for an open, just, and harmonious civil society and a State under the rule of law , by the will of the citizens of the reborn State of Lithuania, adopts and proclaims this CONSTITUTION.
18	Luxembourg	1868 Amended 2016	<p>The term 'Rule of Law' is not used, but the following Rule of Law elements are present:</p> <p>Article 10bis 1. Luxembourgers are equal before the law.</p> <p>Article 12 Individual freedom is guaranteed. No one may be prosecuted except in the cases specified by the law and in the form which it prescribes.</p> <p>Article 13 No one may be deprived against his will of the judge that the law assigns to him.</p> <p>Article 14 No penalty may be established or applied except by virtue of the law.</p> <p>Article 86 A tribunal or a jurisdiction in contentious matters may only be established by virtue of a law. No extraordinary commissions or tribunals may be created under whatever denomination that may be.</p> <p>Article 88 The hearings of the tribunals are public, unless such publicity is a threat to order and morality, and in which case, the tribunal so declares by a judgment.</p> <p>Article 89 Every judgment is substantiated. It is pronounced in public hearing.</p> <p>Article 91 The justices of the peace, judges of the tribunals of the districts and the councillors of the Superior Court are irremovable. - Any of them may only be deprived of his post or suspended by a judgment. The transfer of one of these judges can only take place by a new appointment and with his consent. However, in the event of infirmity or misconduct, he may be suspended, dismissed or transferred, following the conditions determined by the law.</p>

			<p>Article 95 The courts and tribunals only apply general and local orders and regulations when these comply with the laws.</p> <p>Article 112 A law, a decree or a regulation of general or communal administration is only obligatory after having been published in the form determined by the law.</p> <p>Article 34 The Grand Duke promulgates the laws within three months of the vote of the Chamber.</p> <p>Article 30 No prior authorization is required to exercise proceedings against public functionaries, for faults in their administration, save that which is established in this regard [concerning] the members of the Government.</p>
19	Malta	1964 Amended 2019	<p>The term 'Rule of Law' is not used, but the following Rule of Law elements are present:</p> <p>Article 39(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.</p> <p>(2) Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.</p> <p>(3) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.</p> <p>(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.</p> <p>45(1) Subject to the provisions of sub-articles (4), (5) and (7) of this article, no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to the provisions of sub-articles (6), (7) and (8) of this article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.</p>

			<p>Article 46(1) Subject to the provisions of sub-articles (6) and (7) of this article, any person who alleges that any of the provisions of articles 33 to 45 (inclusive) [fundamental rights] of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress. (2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) of this article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said articles 33 to 45 (inclusive).</p> <p>Article 72(1) The power of Parliament to make laws shall be exercised by bills passed by the House of Representatives and assented to by the President. (2) When a bill is presented to the President for assent, he shall without delay signify that he assents. (3) A bill shall not become law unless it has been duly passed and assented to in accordance with this Constitution. (4) When a law has been assented to by the President it shall without delay be published in the Gazette and shall not come into operation until it has been so published, but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.</p>
20	<u>Netherlands</u>	1815 Amended 2008	<p>The term 'Rule of Law' is not used, but the following Rule of Law elements are present:</p> <p>ARTICLE 1</p> <p>All persons in the Netherlands shall be treated equally in equal circumstances.</p> <p>ARTICLE 16</p> <p>No offence shall be punishable unless it was an offence under the law at the time it was committed.</p> <p>ARTICLE 17</p> <p>No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.</p>

		<p>ARTICLE 88</p> <p>The publication and entry into force of Acts of Parliament shall be regulated by Act of Parliament. They shall not enter into force before they have been published.</p>
		<p>ARTICLE 89</p> <p>1. Orders in council shall be established by Royal Decree.</p> <p>2. Any regulations to which penalties are attached shall be embodied in such orders only in accordance with an Act of Parliament. The penalties to be imposed shall be determined by Act of Parliament.</p> <p>3. Publication and entry into force of orders in council shall be regulated by Act of Parliament. They shall not enter into force before they have been published.</p> <p>4. The second and third paragraphs shall apply mutatis mutandis to other generally binding regulations established by the State.</p>
		<p>ARTICLE 90</p> <p>The Government shall promote the development of the international legal order. [in some translations this is referred to as ‘the international rule of law’].</p>
		<p>ARTICLE 93</p> <p>Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.</p>
		<p>ARTICLE 94</p> <p>Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.</p>
		<p>ARTICLE 112</p> <p>1. The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary.</p>

			<p>ARTICLE 113</p> <p>1. The trial of offences shall also be the responsibility of the judiciary.</p> <p>ARTICLE 117</p> <p>1. Members of the judiciary responsible for the administration of justice and the Procurator General at the Supreme Court shall be appointed for life by Royal Decree.</p> <p>** ARTICLE 120</p> <p>The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.**</p> <p>ARTICLE 121</p> <p>Except in cases laid down by Act of Parliament, trials shall be held in public and judgments shall specify the grounds on which they are based. Judgments shall be pronounced in public.</p>
21	Poland	1997 Amended 2009	<p>Article 2</p> <p>The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.</p> <p>Article 51</p> <p>Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law.</p>
22	Portugal	1976 Amended 2005	<p>PREAMBLE</p> <p>The Constituent Assembly affirms the Portuguese people's decision to defend national independence, guarantee fundamental citizens' rights, establish the basic principles of democracy, ensure the primacy of a democratic state based on the rule of law and open up a path towards a socialist society, with respect for the will of the Portuguese people and with a view to the construction of a country that is freer, more just and more fraternal.</p>

		Fundamental principles Article 2 (Democratic state based on the rule of law) The Portuguese Republic shall be a democratic state based on the rule of law , the sovereignty of the people, plural democratic expression and organisation, respect for and the guarantee of the effective implementation of fundamental rights and freedoms, and the separation and interdependence of powers, all with a view to achieving economic, social and cultural democracy and deepening participatory democracy. Article 3 (Sovereignty and legality) 3. The state shall be subject to this Constitution and shall be based on the democratic rule of law . Article 7 (International relations) 6. Subject to reciprocity and to respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may enter into agreements for the exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union. Article 8 (International law) 3. The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law . Article 9 (Fundamental tasks of the state) The fundamental tasks of the state shall be: b) To guarantee fundamental rights and freedoms and respect for the principles of a democratic state based on the rule of law . Article 199 (Administrative responsibilities) In the exercise of its administrative functions the Government shall be responsible for: f) Defending the democratic rule of law . Article 202 (Jurisdiction)
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			<p>2. In administering justice the courts shall ensure the defence of those citizens' rights and interests that are protected by law, repress breaches of the democratic rule of law and rule on conflicts between interests, public and private.</p> <p style="text-align: right;">Article 219 (Functions, status and role)</p> <p>1. The Public Prosecutors' Office shall be responsible for representing the state and defending such interests as the law may lay down, and, subject to the provisions of the following paragraph and as laid down by law, for participating in the implementation of the criminal policy defined by the bodies that exercise sovereign power, conducting penal action in accordance with the principle of legality, and defending the democratic rule of law.</p> <p style="text-align: right;">Article 272 (Police)</p> <p>1. The functions of police forces shall be to defend the democratic rule of law and to guarantee citizens' internal security and rights.</p>
23	Romania	1991 Amended 2003	<p style="text-align: right;">Article 1</p> <p>(3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.</p> <p style="text-align: right;">Article 8</p> <p>(2) Political parties are established and carry out their activity under the conditions of the law. They contribute to the definition and expression of the citizens' political will, respecting national sovereignty, territorial integrity, the rule of law, and the principles of democracy.</p> <p style="text-align: right;">Article 40</p> <p>(2) Parties or organizations which by their objectives or activities militate against political pluralism, the principle of rule of law, or the sovereignty, integrity, or independence of Romania, are unconstitutional.</p>
24	Slovakia	1992 Amended 2017	<p style="text-align: right;">Article 1</p> <p>1. The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not linked to any ideology, nor religion. 2. The Slovak Republic recognizes and honors general rules of international law, international treaties by which it is bound and its other international obligations.</p> <p style="text-align: right;">Article 86</p>

			<p>i. adopting resolutions annulling a presidential decision under Article 102 par. 1 subparagraph. j), if this decision violates the principles of the rule of law and democracy; the adopted resolution shall be generally binding and promulgated in the same manner as is prescribed for the promulgation of laws.</p> <p style="text-align: right;">Article 134</p> <p>4. A judge of the Constitutional Court is sworn in by the President of the Slovak Republic by taking the following oath:</p> <p>"I promise on my honor and conscience that I will protect the inviolability of the natural rights of man and civic rights, protect the principles of the state governed by the rule of law, abide by the Constitution, constitutional laws and international treaties that the Slovak Republic ratified and were promulgated in a manner laid down by law, and decide independently and impartially, according to my best conscience."</p>
25	Slovenia	1991 Amended 2016	<p style="text-align: right;">Article 2</p> <p>Slovenia is a state governed by the rule of law and a social state.</p> <p style="text-align: right;">Article 3a</p> <p>Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.</p>
26	Spain	1978 Amended 2011	<p style="text-align: right;">Preamble</p> <p>Consolidate a State of Law which ensures the rule of law as the expression of the popular will.</p> <p style="text-align: right;">Section 1</p> <p>1. Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.</p> <p style="text-align: right;">Section 9</p>

			<p>3. The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities.</p> <p style="text-align: right;">Section 106</p> <p>1. The Courts shall check the power to issue regulations and ensure that the rule of law prevails in administrative action, and that the latter is subordinated to the ends which justify it.</p> <p style="text-align: right;">Section 117</p> <p>1. Justice emanates from the people and is administered on behalf of the King by judges and magistrates members of the Judicial Power who shall be independent, shall have fixity of tenure, shall be accountable for their acts and subject only to the rule of law.</p> <p style="text-align: right;">Section 124</p> <p>1. The Office of Public Prosecutor, without prejudice to functions entrusted to other bodies, has the task of promoting the operation of justice in the defence of the rule of law, of citizens' rights and of the public interest as safeguarded by the law, whether ex officio or at the request of interested parties, as well as that of protecting the independence of the courts and securing before them the satisfaction of social interest.</p> <p>2. The Office of Public Prosecutor shall discharge its duties through its own bodies in accordance with the principles of unity of operation and hierarchical subordination, subject in all cases to the principles of the rule of law and of impartiality.</p>
27	Sweden	The Instrument Government 1994 Amended 2015	<p>of</p> <p>Chapter 2. Fundamental rights and freedoms</p> <p>PART 3. RULE OF LAW</p> <p>ART 9</p> <p>If a public authority other than a court of law has deprived an individual of his or her liberty on account of a criminal act or because he or she is suspected of having committed such an act, the individual shall be entitled to have the deprivation of liberty examined before a court of law without undue delay. This shall not, however, apply where the matter concerns the transfer to Sweden of responsibility for executing a penal sanction involving deprivation of liberty according to a sentence in another state.</p> <p>Also those who for reasons other than those specified in paragraph one, have been taken forcibly into custody, shall likewise be entitled to have the matter of custody examined before a court of law without undue delay. In such a case, examination before a</p>

		<p>tribunal shall be equated with examination before a court of law, provided the composition of the tribunal has been laid down in law and it is stipulated that the chair of the tribunal shall be currently, or shall have been previously, a permanent salaried judge. If examination has not been referred to an authority which is competent under paragraph one or two, such examination shall be undertaken by a court of general jurisdiction.</p> <p>ART 10</p> <p>No one may be sentenced to a penalty or penal sanction for an act which was not subject to a penal sanction at the time it was committed. Nor may anyone be sentenced to a penal sanction which is more severe than that which was in force when the act was committed. The provisions laid down here with respect to penal sanctions also apply to forfeiture and other special legal effects of crime.</p> <p>No taxes or charges due the State may be imposed except inasmuch as this follows from provisions which were in force when the circumstance arose which occasioned the liability for the tax or charge. Should the Riksdag find that special reasons so warrant, it may however lay down in law that taxes or charges due the State shall be imposed even though no such act had entered into force when the aforementioned circumstance arose, provided the Government, or a committee of the Riksdag, had submitted a proposal to this effect to the Riksdag at the time concerned. A written communication from the Government to the Riksdag announcing the forthcoming introduction of such a proposal is equated with a formal proposal. The Riksdag may furthermore prescribe that exceptions shall be made to the provisions of sentence one if it considers that this is warranted on special grounds connected with war, the danger of war, or grave economic crisis.</p> <p>ART 11</p> <p>No court of law may be established on account of an act already committed, or for a particular dispute or otherwise for a particular case.</p> <p>Legal proceedings are to be carried out fairly and within a reasonable period of time. Proceedings in courts of law shall be open to the public.</p> <p>CHAPTER 8. ACTS OF LAW AND OTHER PROVISIONS</p> <p>ART 21</p> <p>The Council shall examine:</p>
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| | | <ol style="list-style-type: none">1. the manner in which the draft law relates to the fundamental laws and the legal system in general;2. the manner in which the various provisions of the draft law relate to one another;3. the manner in which the draft law relates to the requirements of the rule of law;4. whether the draft law is so framed that the resulting act of law may be expected to satisfy the stated purposes of the proposed law; and5. any problems that may arise in applying the act of law. |
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CHAPTER 11. ADMINISTRATION OF JUSTICE

PART 2. INDEPENDENT ADMINISTRATION OF JUSTICE

ART 3

Neither the Riksdag, nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a **rule of law** in a particular case. Nor may any other public authority determine how judicial responsibilities shall be distributed among individual judges.

ART 4

No judicial function may be performed by the Riksdag except to the extent laid down in fundamental law or the Riksdag Act.

ART 5

A legal dispute between individuals may not be settled by an authority other than a court of law except in accordance with law.

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