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THE CONTRIBUTION OF THE VENICE COMMISSION TO THE STRENGTHENING OF THE RULE OF LAW IN EUROPE

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INTRODUCTION

The expression 'Rule of Law' is undoubtedly one of the most fortunate in the last centuries' legal science. Elaborated as the ideological creature of the Enlightenment, the Rule of Law is a modern phenomenon that represents a 'central principle of constitutional governance'[1]. Born alongside the birth of sovereignty, it embodies a product of the contemporary state's formation in Europe[2].

First of its name was the concept introduced in the English constitutional debate in the second half of the Nineteenth Century by W. E. Hearn[3] and later refined in its classical formulation by A. V. Dicey[4]. From the beginning, he captured it as 'a trait of national character, which is as noticeable as it is hard to portray'[5]. The English idea of the Rule of Law finds its correlative continental formulations in the concepts of *Rechtsstaat, Etat de droit, Stato di diritto, Estado de derecho,* and so on. However, despite a common origin, these expressions are not direct equivalent[6]. Indeed, the way the Rule of Law has been conceived and developed varies according to European governing regimes' different histories and cultures[7].

As argued by Kochenov, this 'omnipresence of the Rule of Law suggests that the concept is sufficiently vague to be easily found in any legal system'[8]. Consequently, identify its meaning has been detected as a critical issue by the doctrine[9]. Not only, is the Rule of Law connected to different ways of conceiving the relation between State and Law, but it is also rooted in different European legal traditions which widely affect the significance of its scope. Therefore, according to the considered legal tradition, the scope

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[1] P. CRAIG, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', in R. BELLAMY, *The Rule of Law and the Separation of Powers*, Abingdon, 2016, p. 115.

[2] B. KRIEGEL, M. A. LE PAIN and J. C. COHEN, *The State and the Rule of Law*, Princeton, 1995, p. 42.

[3] W. E. HEARN, *The Government of England: its Structure and Development*, 1867.

[4] A. V. DICEY, *Introduction to the Study of the Law of the Constitution*, 1885.

[5] *Ibid.* p. 109.

[6] E. W. BÖCKENFÖRDE, *State, Society and Liberty: Studies in Political Theory and Constitutional Law*, New York, 1991, pp. 47-70, '*Rechtsstaat* is a term peculiar to the German-speaking world: it has no equivalent in any other language […] 'The Rule of Law' in Anglo-Saxon law is not in substance a parallel concept, and French legal terminology has no comparable words or concepts whatever'.

[7] M. LOUGHLIN, *Foundations of Public Law*, Oxford, 2010, pp. 312 ff.

[8] D. KOCHENOV, 'The EU Rule of Law: Cutting Paths through Confusion', in *Erasmus Law Review*, vol. 6, 2009, p. 6.

[9] R. GROTE, 'Rule of Law, Rechtsstaat and État de droit', in C. STARCK, (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis, Baden-Baden: Nomos Verlagsgesellschaft*, 1999, p. 271.

of the Rule of Law, *Etat de Droit*, *Rechtsstaat*, *Estato de Deerecho*, *Stato di Diritto* and so on varies considerably[10].

It is undoubted that at the core of the Rule of Law there is the idea that any exercise of power should be subject to the Law[11]. A basic but effective definition, applicable at both national and international levels, has declined its essence in two basic principles: 'holding power by law and limiting power by law'[12]. In other words, this means that authorities are empowered to carry out their activities by law and, at the same time, are bound to conduct them under these same laws, avoiding any arbitrariness. This definition, not exhaustive nor complete, offers a good starting point for a more comprehensive discussion above the principle's different content and declination according to peculiar national and international contexts.

Notwithstanding the difficulties related to the diverging views on the content and the significance of the Rule of Law, through the years it has moved beyond its national understanding, gaining global appeal and recognition, and becoming a frequently used idea in the European constitutional scenario. This process - defined by Reitz as 'export of the Rule of Law'[13] - has raised it 'from a parochial and controversial political and legal ideal to universal international slogan'[14], paving the way for a new conception of the Rule of Law[15].

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[10] There are different declinations of the Rule of Law concept in the various legal traditions which have made it mean different things to different people. Therefore, scholars are divided on the possibility to assimilate the three conceptions under analysis. For the position contrary to the equation of the Anglo-American Rule of Law to the German Rechtsstaat see M. ROSENFELD, 'The Rule of Law and the Legitimacy of Constitutional Democracy', in *Southern California Law Review*, Vol. 74, 2001, pp. 1307- 1351. For the conception according to which the *Rechtsstaat* is often treated as the equivalent of the Rule of Law in the Anglo-American Tradition see e.g., E. J. EBERLE, 'Human Dignity, Privacy and Personality in German and American Constitutional Law', 1997, in *Utah Law Review*, p. 963, 967-971.

[11] K. POPPER, *The Open Society and Its Enemies*, Princeton University Press, 1971.

[12] L. MOKRÁ, P. JUCHNIEWICZ AND A. MODRZEJEWSKI, 'Rule of Law in Poland – Integration or Fragmentation of Common Values?', in *European Journal of Transformation Studies*, 2019, V. 7, no. 2, p. 179.

[13] J. C. REITZ, 'Export of the Rule of Law', in *Transnational Law and Contemporary Problems*, vol. 13, 2003, pp. 429-486.

[14] M. KRYGIER, 'The Rule of Law: Pasts, Presents, and Two Possible Futures', in *Annual Review of La and Social Sciences*, 2016, vol. 12, p. 200.

[15] See, among others, P. COSTA AND D. ZOLO, *Rule of Law: History, Theory and Criticism*, Netherlands, Springer, 2007; L. PECH, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09; M. SELLERS AND T. TOMASZEWSKI, *The Rule of Law in Comparative Perspective*, Netherlands, Springer, 2010; M. KRYGIER, *Rule of Law*, in M. ROSENFELD, A. SAJO (eds.), The *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2015, pp. 233-249; M. ADAMS, A. MEUWESE, E. HIRSCH BALLIN (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, Cambridge University Press, 2016.

This new 'transnational understanding'[16], representing a paradigmatic of the constitutions of western liberal states and the 'benchmark of political legitimacy'[17], is increasingly regarded as a necessary element destined to play a prominent role in any modern democratic legal system[18].

Starting from the moment in which, after the Second World War, it was put into the foundation of a new constitutional order, it proved to be a shared value among all the European Nations. This evolution has translated it into a universal value proclaimed by the most important international and human rights legal instruments[19]. As well summarized by Stephen Humphreys, today the Rule of Law is not merely a 'condition of membership' for aspiring EU countries but represents a critical new term in the vocabulary of international affairs, increasingly cited as both a goal and a condition of the assistance of all kinds in countries all over the world[20].

After the end of the Cold War, international law has paid ever-increasing attention to the principle. Together with human rights and democracy, it is now upheld as a core value in the 'virtuous trilogy' upon which the international legal order is built[21]. The European Commission has recently clarified its scope in making sure 'that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts'[22].

[16] T. T. KONCEWICZ, 'The Supranational Rule of Law: Thinking the Future', in *Verfassungsblog*, 31 December 2019.

[17] J. WALDRON, 'The Concept and the Rule of Law', in *Georgia Law Review*, Issue 1, 2008.

[18] D. KOCHENOV, 'The EU Rule of Law: Cutting Paths through Confusion', in *Erasmus Law Review*, vol. 6, 2009, p. 4.

[19] See for instance UN Universal Declaration of Human Rights, G.A. res. 217 A (III) of 10 Dec. 1948, U.N. Doc. A/810, Preamble, § 3; CoE European Convention on Human Rights of 4 Nov. 1950, ETS 005, Preamble, § 6.

[20] S. HUMPHREYS, *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice*, Cambridge, 2010, p. XIV.

[21] A. MAGEN, 'The Rule of Law and its Promotion Abroad: Three Problems of Scope', 2009, in *Stanford Journal of International Law*, vol. 45, p. 53.

[22] EUROPEAN COMMISSION, Communication to the European Parliament and the Council, *A New EU Framework to strengthen the Rule of Law*, p. 3.

The principle is mostly understood by international organizations[23] as an international standard to improve the effectiveness of the existing Rule of Law traditions[24]. Therefore, international organizations play a unique role in assisting their Member States in developing – or building - the Rule of Law. Within the European scenario, the Council of Europe and the European Union have played a central role in affirming and implementing the Rule of Law among their Member States.

Trough the adaptation of the different national understandings of the principle to a supranational context, the two organizations have changed the original idea –intrinsically connected with the State as an entity - into a new concept, undoubtedly pivotal to the success of the European integration and the well-being of the individuals in it[25].

Although some scholars[26] and politicians[27] have defined it as a mere slogan, in its constitutional evolution, the concept of Rule of Law matured in the contemporary European tradition - the so-called 'European model of the Rule of Law' - can be seen more as an *evolving formula*. No longer something meaning different things to different people, but a container of shared standards and principles deriving from the European constitutional tradition. As recently contended by some scholars, 'diversity and dynamic evolution notwithstanding, the Rule of Law can, and should, be correctly considered a fundamental and consensual element of the European constitutional heritage'[28].

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[23] In the international scenario there are several organizations which are paying the heed to the Rule of Law principle. The UN, for instance, is one of the most important international actors engaged in the Rule of Law implementation and protection. Its multifaceted approach is directed towards both national and international level. The World Bank and the Council of Europe are other examples of international organizations focused on the Rule of Law. Their conception, mainly concerned with development, is devoted to monitoring and of the Rule of Law standards in their member states.

[24] *Ibid*, p. 84.

[25] T. KONSTADINIDES, *The Rule of Law in the European Union. The internal dimension*, Oxford, 2017, pp. 3ss.

[26] J. N. SHKLAR, 'Political Theory and the Rule of Law', in A. C. HUTCHINSON AND P. MONAHAN, *The Rule of Law: Ideal or Ideology?* Toronto, pp. 1-16, 'It would not be difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to the ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.

[27] Hungary's Minister of Justice has 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'; in the same light, Poland's Minister of Foreign Affairs has recently offered 'a horse and addle 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'.

[28] L. PECH, J. GROGAN, P. BÁRD, D. KOCHENOV, B. GRABOWSKA-MOROZ, J. BEQIRAJ, C. CLOSA, E. PIRJATANNIEMI, O. ŚNIADACH, J. FERNÁNDEZ-ALBERTOS, L. MOXHAM, T. KONCEWICZ, K. WARYLEWSKA, A. PODOLSKA, A. WENTON, 'Meaning and Scope of the EU Rule of Law', *RECONNECT Working Paper Deliverable 7.2,* 30.04.2020, p.5.

To identify the consensual core meaning of the Rule of Law in Europe, this work will first conduct a reconstruction of the Rule of Law's notion in Europe. It will start with the first national theorizations of the concept, which will be exemplified through the Anglo-American, German, and French formulas. Then, projecting the notion in the European scenario, the thesis will focus on the supranational conception of the Rule of Law principle. It will analyze it both in the Council of Europe and European Union scenarios, starting with its formal provision in the Organizations' founding documents and then concentrating on its practical implementation. This second part will pay specific attention to the interpretative and creative work conducted on the principle by the European Court of Human Rights and the Court of Justice of the European Union. With the aim to identify the European common standards on the Rule of Law, it will analyze the most relevant Rule of Law-related case-law.

Once determined the relevant European standard, the second chapter of the thesis will focus on their practical implementation in Europe. Among the different approaches adopted by international organizations to this new supranational understanding of the principle, we will focus on the Venice Commission's innovative conception of the Rule of Law's promotion within its Member States. The Venice Commission, being the Council of Europe's advisory technical body in constitutional matters, plays a fundamental role in the promotion and protection of democracy, Rule of Law, and human rights at the supranational level. Its international prominence, especially concerning a typically national-related topic as the Rule of Law, has been recognized by several international actors, first, the EU, thus playing a unique role in the perspective of multilevel protection of the principle.

Although the existence of some essential characteristics that make up a 'non-negotiable core'[29], a combination of formal and material aspects which has become accepted in many Member States[30] and constitute a 'consensual European meaning'[31], Member States and the European Organizations themselves, have proved to be challenged by the implementation of the Rule of Law principle.

[29] T. T. KONCEWICZ, 'The Supranational Rule of Law: Thinking the Future', op. cit.
[30] T. BINGHAM, *The Rule of Law*, London, 2010, p. 37.
[31] L. PECH, J. GROGAN ET AL., 'Meaning and Scope of the EU Rule of Law', op. cit., p. 6.

The Venice Commission, while recognizing the differences between the various definitions of Rule of Law, has tried to identify a common core content of the principle. It has considered as a primary condition for the fulfillment of the notion of the Rule of Law the existence of 'a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality, and rationality and in accordance with the laws and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures'[32]. Simultaneously, the VC's definition stresses the fundamental relation between the Rule of Law and human rights, arguing that the principle 'would just be an empty shell without permitting access to human rights' and, vice-versa that 'the protection and promotion of human rights are realised only through respect for the Rule of Law'[33].

The VC's approach, which will be defined in the second chapter of the present work as inclusive, operational, and systematic, has proved and is still proving to be a valuable tool for the protection of the Rule of Law in Europe and beyond.

This work aims to put forward the innovative aspects of the Venice Commission's approach to the Rule of Law. It highlights its contribution to creating a new understanding of the principle, shifting from a purely formalistic and theoretical notion to a substantive and practical idea applicable to the European context.

After a brief introduction to the Venice Commission's composition and credentials, the work exposes its contribution to creating a common European framework on the Rule of Law. Specifically, it presents the innovative aspect of the Venice Commission's approach to the Rule of Law principle, highlighting three original facets of its working method. First, the adoption of an inclusive conception of the Rule of Law, intertwined with democracy and human rights principles; Secondly, the operationalization of the Rule of Law's notion; And, finally, the systematization of its implementation within Member State's legal orders.

Once described the VC's working method and the innovative aspects of its approach to the Rule of Law, the work focuses on its understanding of the principle. First, the thesis discusses the framework in which the VC's notion has been developed.

[32] VENICE COMMISSION, *Rule of Law Checklist*, §15.
[33] Venice Commission, *Rule of Law Checklist*, CDL-ADF(2016)007, §31.

After having identified the sources, the work focuses on the principle's content. We will identify and discuss the elements selected by the Venice Commission as 'core values' of the Rule of Law principle. This part of the work will rely on the ECtHR's and CJEU's case law and their contribution to identifying common standards on the Rule of Law and on the VC's interpretation of such standards.

Following the description of the standards and the benchmarks on the Rule of Law selected by the Venice Commission, the third chapter, adopting a case-study approach, analyzes their practical implementation through the VC's working method. The analysis converges on some recent and relevant opinions, adopted after the creation of the *Rule of Law Checklist,* in which the VC has issued its assessment concerning the conformity of the state's legal framework with the identified Rule of Law's standards in Europe.

This practical approach consists of the study of the Commission's application within its Member Stats of the standards it has identified and developed based on the common European heritage.

Specifically, we will concentrate on the 'illiberal triad': Poland, Hungary, and Romania[34], identifying the *Rule of Law*'s components challenged by the national regimes; on the progressive *Rule of Law*'s implementation in North Macedonia; on the challenges to legality and legal certainty in Kosovo and, finally, on the balancing between *Rule of Law* and state of emergency during the COVID-19 pandemic.

The rationale of the research will be to demonstrate the success of the VC's working method in the Rule of Law's enforcement within its Member States and the potential strengths of adopting a Common European definition of the principle. As we will see, indeed, a consensual approach on the content of the Rule of Law principle among European organizations and States will surely bring important results in the fight against illiberalism and give new impetus to the promotion of the European founding values.

[34] According to some scholars, Romania should be singled out from the illiberal triad. Unlike Hungary and Poland, indeed, in Romania the ideological dimension of nationalism and Euroscepticism is marginal and subdued. For an in-depth analysis see B. IANCU, '*Quod licet Jovi non licet bovi?*: The Venice Commission as Norm Enterpreneur, in *Hague Journal on the Rule of Law*, 2019, vol. 11, pp. 189-211.

CHAPTER I

WHAT RULE OF LAW? SOURCES AND CONTENT OF THE RULE OF LAW PRINCIPLE IN EUROPE

SUMMARY: I. Introduction. - II. The National Theorizations of the Rule of Law in Europe: Rule of Law, *Rechtsstaat, and Etat De Droit*. - II.1 The Anglo-American Conception of the 'Rule of Law'. - II.2 The German tradition of the '*Rechtsstaat*': A State ruled through law. - II.3The French Tradition of the '*Etat de Droit*': Fundamental Rights through Law. - II.4 A comparison: The 'Core Content' among different European Conceptions. - III. The Rule of Law Principle within the Council of Europe. - III.1 The Rule of Law's Legal Framework within the Council of Europe. - III.2 The Rule of Law's Monitoring Mechanisms within the COE. - III.3 The ECtHR's case-law on the Rule of Law. - IV. The Rule of Law Principle in the European Union. - IV.1 The 'discovery' of the Rule of Law principle in the EU: The Role of the CJEU. - IV.2 The Rule of Law in the EU legal order: Legal basis and protection. - IV.3. The Rule of Law Principle in the CJEU's Case-Law. - V. Conclusions.

I. INTRODUCTION

Before examining the Rule of Law's practical implementation provided by the Venice Commission, it is important to identify the legal basis it relies upon, by reconstructing the evolution of the principle's notion in Europe. As affirmed by the same VC, indeed, the Rule of Law represents a content of standards and principles derived from the European constitutional traditions and developed by the Council of Europe and the European Union[1]. Therefore, to better understand the Commission's approach to the principle, we will dedicate the first chapter of the present work to the analysis of the transformation of the Rule of Law from a national ideal to a supranational fundamental value.

[1] VENICE COMMISSION, *Rule of Law Checklist*, CDL-AD(2016)007, § 32.

The Rule of Law principle, intended as the system of rules and values governing the exercise of public power, represents one of the fundamental values of the European 'common constitutional heritage'[2].

Today, Europe is faced with the awareness that the European Constitutions, especially those emerging from the Eastern constitutional wave, are no longer trustworthy and well equipped to allow the Member States to tackle the emerging constitutional threats. Many states demonstrate an ever-increasing inability to cope with the various cracks affecting the European Union's and the Council of Europe's founding values.

Over the past few years, this situation has prompted both the Council of Europe and the European Union to act on multiple fronts to promote and strengthen the Rule of Law principle in Europe. Therefore, it immediately became apparent the need to find a consensual definition of the Rule of Law, to be placed as the basis for any future action in this field.

The consensus was reached that 'the Rule of Law does constitute a fundamental and common European standard to guide and constraint the exercise of democratic power'[3]. However, it soon became evident that in the many European States, compliance with this standard was a process much more demanding than expected in the initial stages of their accession to the European Union and the Council of Europe. From the beginning, a significant differentiation emerged in the content and declination of standards and principles deriving from the Rule of Law. This 'constitutional gap' leads to the consequent difficulties of its identification and practical implementation.

The generality and abstractedness of its definition, together with the non-homogeneous identification among the States, requires an operational approach and needs to be elaborated into more specific standards to be able to offer guidance in constitutional planning and the assessment of compliance with common European standards on the Rule

[2] For a definition of this concept, see S. BARTOLE, 'Standards of Europe's Constitutional Heritage', in *Giornale di Storia Costituzionale*, vol. 30, 2015 pp. 17-24. 'The European constitutional heritage is made up not only by the European treaties and conventions in the field of the human rights and Rule of Law, but also by those principles which have been at the basis of the historical process of gradual growth of the legal orders of the European States. Therefore, the concept covers at the same time the legal provisions which have been in force in those legal orders and the scientific elaboration of them which has supported their implementation and their development. This definition implies that the terms of reference of the concept are, on one side, the normative experience of the European countries and, on the other side, the doctrines and the theories which have prepared and supported this experience.'.

[3] VENICE COMMISSION, *Report on the Rule of Law*, CDL-AD(2011)003rev, § 69.

of Law[4]. Indeed, one of the most severe obstacles encountered in putting in practice the Rule of Law's notion was that of transforming it into a set of principles and values understandable – which also means recognizable within the national legal system – and directly applicable in the Member States[5].

As we will see in-depth in the following chapter, the Venice Commission has powerfully contributed, with its *Rule of Law Checklist*, to identify and implement a common European understanding of the principle. Its work of selection of the values which compose the Rule of Law and their tailor-made adaptation to the national legal systems of its MS represent one of the most innovative ways to bring back states in compliance with the Rule of Law principles.

However, the Venice Commission is not an island. On the contrary, being a soft-law body, it requires standards and principles upon which build a comprehensive definition of the Rule of Law. Its work, rather than creative, must be defined as selective. Indeed, the VC is not demanded to create new standards, but to identify the existing ones and translate them into operational and directly applicable tools at the Member States' disposal.

Therefore, in its activity of standards-selection, the VC relies upon the well-known common European heritage, a source of principles and values developed in the European constitutional landscape and inspired to the European contemporary liberal democracies' funding pillars.

As declared by the same Venice Commission in the Preamble to the *Rule of Law Checklist*, the sources of the European understanding of the Rule of Law principle must be found in the historical constitutional traditions of European liberal states, and in the Council of Europe's and European Union's implementations of such traditions within the supranational order[6]. Specifically, the *Checklist* 'emphasizes the legal situation in Europe, as expressed in the case-law of the European Court of Human Rights and of the Court of Justice of the European Union within its specific remit'[7].

[4] K. TUORI, 'From Copenhagen to Venice', in *Reinforcing Rule of Law Oversight in the European Union*, edited by C. Closa and D. Kochenov, Cambridge, 2018, p. 243.

[5] PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, *Resolution 1594(2007) on 'The principle of the Rule of Law'*.

[6] VENICE COMMISSION, *Rule of Law Checklist, Op. Cit.*, § 9 ff.

[7] *Ibid.*, § 32.

In the following paragraphs, to better understand the innovative scope of the Venice Commission's approach to the Rule of Law, it is important to describe the existing European framework. To do so, we will focus on its sources, analyzing the different interpretations of the principle that led to the Commission's version.

We will begin our analysis with a brief overview of the most relevant national traditions of the Rule of Law developed in Europe: the Anglo-American, the German, and the French conceptions.

Once reconstructed the roots of the principle's significance at the national level, we will transfer it on the supranational level, identifying the main features emerging from the translation of a commonly national-referred value into a principle placed at the foundation of two fundamental European organizations: The Council of Europe and the European Union.

Despite the absence of an explicit and formally recognized definition within the two organizations, relying upon their institutions' interpretative work, we will identify the standards on the Rule of Law within the COE and the EU, which forms the basis of the VC's understanding.

We will first focus on the Council of Europe, identifying the legal framework upon which the Organization has been developed. Then, we will focus on the principle's interpretation deriving from the Strasbourg Court's case-law. In parallel, shifting to the European Union's field, we will reconstruct the path through the recognition of the Rule of Law principle within the Organization, focusing on its recent institutional developments. Once defined the legal framework, we will analyze its interpretation through the Luxembourg Court's case-law.

II. The National Theorizations of the Rule of Law in Europe: Rule of Law, *Rechtsstaat*, and *Etat de Droit*

From a historical point of view, the first theorizations of the Rule of Law principle in Europe were deeply interconnected with the idea of Nation. Therefore, the principle was first conceived of as a purely national element, associated with the concept of law intended as the product of national parliaments and state authority. As we will see in the

following paragraphs, it will take decades and the supranational organizations' joint effort to transfer this Nation-related concept to the European sphere.

In the absence of a 'single model for the rule of law'[8], the principle represents one of the most flexible and contested concepts, which can be defined in many ways according to the specific historical, political, and constitutional background in which it has been developed[9]. In its different declinations, a fundamental element of differentiation is undoubtedly played by the role assigned in each experience to the State and, consequently, to some aspects of the State as parliamentary legislation, separation of powers, judiciary, and sources of legitimation of public power[10].

In this sense, it could be said that it represents both a political idea and a legal principle. It is political as it focuses on how public authority shall be practiced; and legal since it is embodied in the form of law. According to Raz it 'refers to a state and to a constant process in which the public authority is practiced by the means of law, according to the law. The law rules, not the men'[11] .

The wide variety of forms of states and governments makes Europe a multi-coloured scenario of Rule of Law's conceptions. In the next paragraphs, we will briefly summarize its historical evolution in three essential European traditions: The Anglo-American 'Rule of Law', the German *Rechtsstaat,* and the French *Etat de droit*.

The scope of this general overview – certainly not exhaustive nor complete - is to identify the common elements of the European legal traditions and understand their implementation into the supranational scenario in the light of the development of the 'European Rule of Law' concept.

Any attempt to clarify the origins of the Rule of Law concept should be based on the premise that its different conceptions have taken root in different traditions. Accordingly, it must be noted that the three conceptions we will analyze endorse the Rule of Law in its

[8] P. SELZNICK, 'Democracy and the Rule of Law', in *Syracuse Journal of International Law and Commerce*, 2005.

[9] See R. BIN, 'Rule of law e ideologie', in G. PINO and V. VILLA, *Rule of law. L'ideale della legalità*, Bologna, 2016, p. 37.

[10] M. LOUGHLIN, *Foundations of Public Law*, Oxford, op. cit., p. 312.

[11] J. RAZ, *The Authority of Law – Essays on Law and Morality*, Oxford, 1979, p. 222.

narrow sense[12] but significantly diverge from one another in some fundamental elements as the conception of State, the role of the judiciary, and the protection of human rights.

1. THE ANGLO-AMERICAN CONCEPTION OF THE 'RULE OF LAW'

The English tradition is the oldest in perceiving and elaborating in theory, the Rule of Law principle as a means of restraining the government's arbitrary power. The first conception of the Rule of Law in the United Kingdom can be traced back to the Magna Charta, where the ruler's power was for the first time acknowledged to be limited by law in relation to all free men[13].

The modern conception of the Rule of Law in the Anglo-American tradition is frequently attributed to the British constitutional scholar A. V. Dicey. In his famous work *Introduction to the Study of the Law of the Constitution*, he conceived of the Rule of Law as a guiding principle of the English Constitution. When defining it, he identified three fundamental meanings: the supremacy of law over the arbitrary power[14], the equality before the law[15] and, finally, the fact that general principles of the constitutions are the result of judicial decisions based on common law[16]. These three aspects are commonly regarded as the basic requirements of a formal understanding of the Rule of Law[17]. In his perception, a fundamental role is attributed to the courts, intended as authentic sources of law in the British Constitution[18]. Within the State structure, they represent an adjunct to the principle of parliamentary sovereignty, thus becoming an expression of the idea of

[12] The Rule of Law intended in its narrow sense must be interpreted as a very ancient conception that can be dated back at least as far as Aristotle's Greek times.

[13] T. BINGHAM, *The Rule of Law*, *op. cit.*, p. 10.

[14] A. V. DICEY, *Introduction to the Study of the Law of the Constitution*, op. cit., p. 34, 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'.

[15] *Ibid*, 'when we speak of 'the rule of law' as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing), that here 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] *Ibid*, 'We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution are with us the result of judicial decision determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security given to the rights of individuals results, or appears to result, from the general principles of the constitution'.

[17] S. CHESTERMAN, 'An International Rule of Law?', in *American Journal of Comparative Law*, 2008, p. 7.

[18] See *Duport Steels v. Sirs*, HL 3 January 1980, Lord Diplock, 'it cannot be too strong emphasized that the British constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interprets them'.

the 'legislative state'[19]. This shows the formalistic character of Dicey's conception of the Rule of Law[20], intended as a purely procedural principle, without any specific reference to a necessary adherence to fundamental rights.

Dicey's understanding was directly tied to the peculiarities deriving from the English constitutional traditions of common law and promoted a highly conservative constitutional history interpretation. He did not conceive of the Rule of Law as a universal good. On the contrary, placing the expression in the English Constitution's restatement, he introduced the term 'Rule of Law' as a peculiarity of the British Constitutional system[21]. His reasoning assumed that proper rights are not found in paper constitutions, as they pre-exist from every legislative, and therefore artificial, act[22]. In the English tradition, indeed, rights derive from the generalization of precedents expressed in the land's ordinary law. Consequently, their added value is that they can 'hardly be destroyed without a thorough revolution in the institutions and manners of the nation'[23]. In short, as summarized by Barker, in Dicey's understanding, the Rule of Law represents not the rule of the legislative state but the rule of the judicature[24].

Through the years, Dicey's conception evolved within the Anglo-American tradition by taking two different paths: the formal one and the substantial one[25].

On one side, the formal conception – more adherent to Dicey's original formulation - states that the Rule of law is satisfied when laws conform to specific formal and procedural requirements. Therefore, regardless of the law's content, it only requires legal rules that are properly framed and administered[26].

An overly formal[27] conception of the Rule of law has been theorized by Brian Z. Tamanaha, who stated that 'on its own terms, [Rule of Law] requires only that

[19] A. V. DICEY, *Introduction to the Study of the Law of the Constitution*, op. cit., p. 57.

[20] P. CRAIG, 'Formal and substantive conceptions of the rule of law', in *Public Law,* 1995, p. 35 ss.

[21] *Ibid*. 'The rules that in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of the individuals, as defined and enforced by the Courts', p. 21.

[22] *Ibid*, p. 196, 'Rights contained in written constitutions are something extraneous to and independent of the ordinary course of the land and, since they owe that statute to that constitution, they can be suspended'.

[23] *Ibid*, p. 197.

[24] E. BARKER, 'The Rule of Law', *Political Quarterly*, 1914, pp. 117-140.

[25] P. CRAIG, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', op. cit., p. 95 ff.

[26] See J. RAZ, 'The Rule of Law and its Virtue', in *The Law Quarterly Review*, vol. 195, 1977.

[27] P. RIJPKEM, 'The rule of law beyond thick and thin', in *Law and Philosophy*, 2013, p. 793 ff.

government officials and citizens be bound by and abide the law' and that 'this requirement says nothing about how those laws are made – whether through democratic means or otherwise – and it says nothing about the standards that those laws must satisfy – whether measured against human rights standards or any others.'[28]

On the other side, according to the substantive conception, the Rule of Law is not exhausted by procedural and formal requirements but, while insisting on these elements, it additionally demands that law must be substantively just. In few words, this means that the law, in order to respect the Rule of Law, 'must take fundamental rights seriously'[29].

This reasoning can be detected in the already mentioned Bingham's conception of the Rule of Law, which laid the basis for the Venice Commission's understanding of the Rule of Law. Shifting from a formal approach to a more pragmatic one, Lord Bingham has defined the Rule of Law's core in the fact that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.'[30].

2. THE GERMAN TRADITION OF THE '*RECHTSSTAAT*': A STATE RULED THROUGH LAW

The (almost) correspondent[31] German concept of *Rechtsstaat* was born during the first half of the nineteenth century[32], and its intellectual origin can be traced back to Kant[33]. It belongs to the broader 'continental tradition', characterized by a slightly different understanding of the law's role in ordering society, placing less emphasis on the judicial process than on the State's nature.

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[28] B. Z. TAMANAHA, *On the Rule of Law: History, Politics, Theory*, Cambridge, 2004, p. 91 ff.

[29] See, e.g., A. L. YOUNG, 'The Rule of Law in the United Kingdom: Formal or Substantive', in Vienna Online Journal of International Constitutional Law, 2012, Vol. 6, p. 259 ff.

[30] T. BINGHAM, *The Rule of Law*, London, 2010, p. 37.

[31] As we will see, there are different declinations of the Rule of Law concept in the various legal traditions which have made it mean different things to different people. Therefore, scholars are divided on the possibility of assimilating the three conceptions under analysis. For the position contrary to the equation of the Anglo-American Rule of Law to the German Rechtsstaat see M. ROSENFELD, 'The Rule of Law and the Legitimacy of Constitutional Democracy', in *Southern California Law Review*, Vol. 74, 2001, pp. 1307-1351. For the conception according to which the *Rechtsstaat* is often treated as the equivalent of the Rule of Law in the Anglo-American Tradition see e.g., E. J. EBERLE, 'Human Dignity, Privacy and Personality in German and American Constitutional Law', 1997, in *Utah Law Review*, p. 963, 967-971.

[32] K. STERN, *Das Staatsrecht et Bundesrepublik Deutschland*, Munich, 1984, p. 769.

[33] I. KANT, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, 1797.

German legal scholars have conceived of the *Rechtsttaat* as an attempt to reconcile modern claims of liberty with the tradition of authoritarianism through a sort of formal legality principle. In the German conception, this new 'law-bound' State is designed to act under precise and fixed mechanisms and pre-defined rules, thereby self-limiting its power through the law[34]. Accordingly, the law becomes inextricably tied to the State as the only legitimate instrument through which it can wield its power[35].

This conception includes both separation of powers and legality, which are constitutive elements of a State where administrative power is created by legislation and submitted to it as a product of the parliament[36]. Thus, the law represents the State's authentic voice, an instrument through which it shapes its own will.

In its first formulation, the expression *Rechtsstaat* was defined as a 'descriptive category applicable to all modern states which used general laws to harmonize the sovereign concentration of political power with liberal policy'[37]. Only in 1829, with the systematic work undertaken by Robert von Mohl, the term has gained a relevant place in the constitutional doctrine.

Von Mohl's understanding of the *Rechtsstaat* can be resumed in three main principles: the rejection of the idea that political order is divinely ordained, the government of the order must be directed towards the promotion of liberty, security, and property and, finally, the organization of the state should be rational and should incorporate the principles of responsible government, judicial independence, parliamentary representation, rule by means of law and recognition of fundamental liberties[38].

Von Mohl promoted the idea of freedom through the State, delineating a model in which the law-bound State was designed not to specify precise limits to governmental action but to measure such action against the general objective of promoting an individual's complete development.

Consequently, Mayer's classical interpretation of administrative law of the late Nineteenth Century interprets the *Rechtsstaat* as the law, intended as an act deliberated

[34] G. PALOMBELLA, 'The Rule of Law as an Institutional Ideal', in G. PALOMBELLA, L. MORLINO, *Rule of Law and Democracy. Inquiries into Internal and External Issues*, Leiden, 2010, p. 11.
[35] M. ROSENFELD, 'The Rule of Law and the Legitimacy of Constitutional Democracy', op. cit., p. 1319.
[36] O. MAYER, *Deutsches Verwaltungsrecht*, Leipzig, 1895, p. 64 ff.
[37] L. KRIEGER, *The German Idea of Freedom: History of a Political Tradition*, Chicago, 1957, p. 253.
[38] R. VON MOHL, *Das Staatsrecht des Königsreichs Württemberg*, Tübingen, 1829.

by a representative parliament that defines the sphere of autonomy of individuals with respect to the State; the supremacy of law on administration and, consequently, the subordination of citizen's rights to the law; finally, the existence of an independent judiciary, exclusively competent to apply the law[39].

In this conception, the State continued to play a fundamental role, even though oriented to protecting citizen's rights against the administration's arbitrariness. Therefore, some scholars have defined it as 'state liberalism'[40]. In its more traditional interpretations, the guarantee, the origin, and the purpose of the rights are reconducted to the State, thus overturning the liberal idea of right's pre-existence to the State[41].

Here lies the instability of this conception. The *Rechtsstaat* constituted an unstable attempt to reconcile the State's authority and society's freedom, which could have been easily transformed - as indeed happened - by an authoritarian state, through bending its legislative function to one's will and plans[42]. The German experiences of the Second World War showed that the formal legality conception of *Rechtsstaat* was not equipped to cope with the abuses of power perpetrated during the Nazi regime[43].

Set against the horrors of the Nazi era, the contemporary *Rechtsstaat,* which has been shaped in the 1948 Basic Law, is closely related to a constitutional democracy framed by substantive values[44] of protection of human rights, separation of powers, independence of the judiciary, legality, and legal certainty.

3. THE FRENCH TRADITION OF THE '*ETAT DE DROIT*': FUNDAMENTAL RIGHTS THROUGH LAW

A different history is the one related to the development of the French concept of *Etat de droit*. As explained above, the English idea of the Rule of Law derived from the attempt to give a formalized interpretation of the common law's engagement with a

[39] O. MAYER, *Deutsches Verwaltungsrecht*, op. cit..

[40] G. AMATO, 'Forme di Stato e Forme di Governo', in G. AMATO, A. BARBERA, *Manuale di Diritto Pubblico*, Bologna, 1997, vol. 1, p. 43.

[41] S. ROMANO, 'La teoria dei diritti pubblici subbiettivi', in V. E. ORLANDO, *Primo trattato di Diritto Amministrativo*, Milan, 1900, p. 137.

[42] G. ZAGREBELSKY, 'Ritorno al Diritto', in G. ZAGREBELSKY, *La Legge e la sua Giustizia. Tre capitoli di giustizia costituzionale*, Bologna, 2008, p. 110.

[43] S. CHESTERMAN, op. cit., p. 11,'Nazi Germany is the most prominent example of a State in which the rule of law was used for pernicious ends'.

[44] D. P. KOMMERS, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 1997, p. 36.

modern idea of constitutionalism. The German *Rechtsstaat* evolved from the tensions between authoritarianism and liberalism in governmental practices. Quite differently, the French formula was a creature of the absolutism that, after the French Revolution aimed to replace the king's power with the one of the Parliamentary Assembly, making the law 'expression of the general will'[45].

In this conception, which is more recent, the law is a Nation's product against arbitrary power indiscriminately directed to all the citizens and is, for its nature, general and abstract[46].

Alongside the general will expressed through the law, the other product of the Revolution consists of the *Déclaration* of 1789. The law, interpreted as a mere translation of already existing values, was relegated to the demolition of the *Ancien Régime* and the creation of a new order of freedom and equality, based on fundamental rights.

The proclamation of the centrality of fundamental rights entailed the new idea of *Etat de droit* as the 'omnipotence of the law in the service of rights'[47]. Article 16 of the *Déclaration* clearly states that 'any society in which no provision is made for guaranteeing rights or for the separation of powers has no Constitution'. This conception was at the basis of the so-called '*Légicentrisme*'[48], where legislative power knows no other limits than those which it sets itself. Consequently, diverging from the English idea of the Rule of Law, the French conception relegates the judiciary's role to a 'passive service' of law. In addition to a different organization of the State, this probably shows a consequence of the traditional French distrust of the judiciary. This tendency must be reconducted to its negative image before the French Revolution, when the judges obstructed the legislative reform that the monarchy would have introduced[49].

[45] J. J. ROUSSEAU, *Du Contrat Social, ou Principes du Droit Politique*, 1762.

[46] G. LAUTENBACH, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford, 2013, p. 33.

[47] *Ibid*, p. 113.

[48] L. JAUME, *Préface aux droits de l'homme, in Les déclarations des droits de l'homme*, Paris, 1989, p. 60.

[49] J. JENNINGS, 'From 'Imperial State' to 'l'Etat de Droit': Benjamin Constant, Blandine Kriegel and the Reform of the French Constitution', in *Political* Studies, 1996, XLIV, pp. 488-504.

The French concept of *Etat de droit* has reached its first complete theorization in the Twentieth Century by some jurists who exploited it as a normative principle to highlight those deficiencies perceived in the post-revolutionary governing arrangements[50].

In response to the need to balance the concept of national sovereignty with the one of sovereign law, Raymond Carré de Malberg was the first to develop a new theorization, undoubtedly pivotal to the modern Rule of Law's understanding. For the first time, the general principle was established according to which the State could act only through law. Additionally, it was linked to human rights' protection, which finally gained a central role in the Rule of Law's framework. Going further, he stated that as a legal entity, the State, implementing the concept of self-limitation, could bind itself to its norms[51].

4. A Comparison: the 'Core Content' among Different European Conceptions

From the historical reconstruction conducted above, it appears clear that the meta-legal principles of Rule of Law, *Rechtsstaat,* and *Etat de Droit* represent, in their different historical and political contexts, guiding principles in the process of consolidation of new emerging democracies. At the same time, this principle does not only reflect different 'identities' depending on the state in which it came into existence, but it has also developed over time to meet new social and political needs within the same state it was created.

Although it was rooted in the joint fight against absolutism, the way the states have implemented the Rule of Law varies according to the variety of histories, cultures, and practices of the European governing regimes.

The analysis of the three most common formulations has shown that the content and the understanding of the Rule of Law principle must be seen as a product of the historical development and the existing legal traditions.

Undoubtedly, there is a common origin of the debate behind their conception: the discussions over the Rule of Law were fuelled in England, Germany, and France by liberal jurists concerned about the impact on the concept of law of the emergence of an

[50] M. Loughlin, *Foundations of Public Law*, op. cit., p. 322.
[51] R. C. de Malberg, *Contribution à la Théorie Générale de l'Etat*, Paris, 1920.

extensive governmental system (no more absolutist), in charge of regulating social life and welfare through administrative measures.

Despite this common origin, a first differentiation emerges between the Anglo-American and the continental conceptions. Indeed, while the State's juridical dimension strongly influences the continental tradition, the Anglo-American one is founded on the command's objectification, assuming that part of the law is independent from the sovereign's will[52]. This difference can be well understood in the words of Giovanni Sartori, who, referring to the Anglo-American conception, noted that 'the Rule of Law does not postulate the State, but an autonomous law, external to the State: the common law, the case law, in sum the judge made and jurists' law. Therefore, in the Anglo-American conception, Rule of Law can exist without the State: 'it does not require the State to monopolize the production of law'.[53]

This also explains why in continental Europe fundamental rights' protection has been developed alongside the formation and affirmation of parliaments[54], by linking them directly to the law, while, on the contrary, in the Anglo-American tradition, they have been considered as pre-existent and, in some cases, out of the legislator's reach.

Therefore, in the continental tradition, the innovative element lies in the democratization of the law-making instruments. In the Anglo-American conception, the dynamic element resides in its orientation to and towards fundamental rights, representing its starting point and purpose[55].

Another point of difference consists of the origins of the Rule of Law idea. In the continental tradition, it emerged either through self-imposed limits to state sovereignty, as it was in Germany, or through the replacement of the sovereign assembly by the king, as it happened in France. In the Anglo-American tradition, the fight against absolutism dwelled in opposition to those privileges and freedoms represented and protected both by

[52] G. PALOMBELLA, *È possible una legalità globale? Il Rule of law e la governance del mondo*, Bologna, 2012, p.28.

[53] G. SARTORI, 'Nota sul rapporto tra Stato di diritto e Stato di giustizia', in *Rivista internazionale di filosofia del diritto*, 1964, p. 310.

[54] E. GIANFRANCESCO, 'Il principio dello Stato di diritto e l'ordinamento europeo', in S. MANGIAMENLI, *L'ordinamento europeo. I principi dell'Unione*, Milan, 2006, p. 234 ff.

[55] G. ZAGREBELSKY, *La legge e la sua giustizia. Tre capitoli di giustizia costituzionale*, op. cit., p. 120.

judges and the Parliament. This last has been defined as a 'doubly absolutistic' concept, against the royal absolutism and, on the other side, the parliamentary absolutism[56].

Despite the identified differences, from a comparative analysis of the three systems, it is possible to find those recurring elements we were looking for at the beginning of this analysis, which constitutes the reliable standards of the principle in Europe. These 'pillars' can be identified in protection against arbitrariness, legality, judicial safeguards, and separation of powers.

Protection against arbitrariness plays a crucial role in all three models. This is not surprising, as the principle has been developed in all the European traditions as a response to the monarchical absolutism. Therefore, the primary need shown by the emerging political class was to stem the administration's excessive power by limiting its arbitrariness. As emerges from the different translations of the Rule of Law, the solution was to introduce law's supremacy over the arbitrary power.

Consequently, legality can undoubtedly be another central element of the Rule of Law in Europe. The link between administration and law is ubiquitous in all models, and all require that law respects certain quality conditions. However, what is different is the concept's institutionalization. On 'the continental' side, these requirements are based on codified constitutional law, while on the Anglo-American side, they are developed through judicial review. Therefore, legality also sets different requirements: while France and Germany presume a clear hierarchy of norms, in the United Kingdom the sovereignty of parliament ensures that the democratic heritage of laws represents a fundamental element of legality.

In the same way, judicial safeguards are components of all three conceptions, although the judiciary's role and organization considerably differ. While, indeed, in the Anglo-American view it is placed at the centre of the identification of the State's constitutional elements, in the 'continental' conception, it remains an instrument for the system's functioning, inextricably connected with the 'bouche de la loi'[57] idea. However, scholars consider the existence of differences regarding the judiciary's organization and the extent

[56] G. ZAGREBELSKY, *La Legge e il suo Diritto*, op. cit., p. 118.
[57] C. L. MONTESQUIEU, *Esprit des Lois*, 1777.

of its powers to review governmental acts compatible with a common idea of the Rule of Law principle[58].

Lastly, separation of powers represents in all the three conceptions a formal element of the Rule of Law, even though the powers' organization is very different. For instance, in the United Kingdom, the link between the separation of powers and the Rule of Law is more connected to the judiciary than to the other state's powers. In the continental tradition, instead, the separation of powers is intended in a more general way. It ensures that power is not exercised arbitrarily[59] and that those who can enact general rules are not the same as those executing the rules[60].

In conclusion, despite the different origins and theorizations, there are common features between the traditional conceptions of the Rule of Law in Europe. Such commonalties form the hardcore of the principle and, as we will see in the next paragraphs, are at the basis for a shared conception of the Rule of Law in Europe.

In the following paragraphs, we will analyze the relocation of the identified components into the supranational order, focusing on the Rule of Law's understanding within the Council of Europe and the European Union as sources of the VC's conception.

III. The Rule of Law Principle Within the Council of Europe

After the Second World War, the values that were considered the cornerstones of the national ideal of the Rule of Law become part of a new supranational order. During the War, the horrors perpetrated had exposed all the weaknesses of European national legal systems and made states aware of the need for a higher common level of protection of their constitutional values.

Ten European States, animated by the desire to stand together against the crimes perpetrated during the world conflict, created a new international organization founded upon the Rule of Law, human rights, and democracy: The Council of Europe.

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[58] G. LAUTENBACH, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford, 2013, p. 52.

[59] M. SCHELTEMA, 'De Rechtsstaat', in J. W. M. ENGELS, C. LAMBERS, E. NIEMEIJER, M. SCHELTEMA, K.F. SCHUILING, B.C. VIS, AND R.L. VUCSÁN, *De Rechtsstaat Herdacht*, 1989, p. 19.

[60] G. LAUTENBACH, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford, 2013, p. 49.

From the beginning of the COE's experience, the Rule of Law principle appears to be a core element toward the foundation of a new order based on the liberal democratic values of separation of powers, judicial independence, legality, and legal certainty. The minutes from the Preparatory Conference for establishing the Council of Europe in 1949 reveal that the references to the Rule of Law in the statute were adopted without discussion[61]. All the founding states agreed on the importance of the Rule of Law as a fundamental value and steering principle for the Organization's future work.

Despite the COE's general commitment to the Rule of Law principle, the notion's content is not strictly carved out. Nevertheless, within the Council of Europe's legal framework, several provisions refer to the principle and several organs – as the Venice Commission – are engaged in its interpretation and promotion.

In the following, we will first outline the Rule of Law's legal framework within the Council of Europe and then, once identified the main provisions, we will focus on their interpretation and implementation through the COE's organs and bodies. This will help us identify the relevant standards on the Rule of Law that are inherent to the Venice Commission's understanding.

1. THE RULE OF LAW'S LEGAL FRAMEWORK WITHIN THE COUNCIL OF EUROPE

The Preamble of the Council of Europe's Statute counts the Rule of Law, alongside individual freedom, and political liberty, among the common heritage's principles that form the basis of all genuine democracies[62].

As a Council of Europe's founding value, it appears between the requirements for its membership. Article 3 of the Statute states that '*Every member of the Council of Europe must accept the principles of the Rule of Law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in the realization of the aim of the Council*'[63].

[61] COUNCIL OF EUROPE, CE (Prep) (1949) M 5th Meeting Final, 6 April 1949, point 5 (c): CE (Prep) M, 8th meeting Final, 12 April 1949, *Minutes from the Preparatory Conference for the establishment of the Council of Europe*, St. James' Palace, London.

[62] STATUTE OF THE COUNCIL OF EUROPE, Preamble, '[…] Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the Rule of Law, principles which form the basis of all genuine democracy; […]'.

[63] STATUTE OF THE COUNCIL OF EUROPE, Art. 3, London, 1949.

Besides being a precondition for access to the organization, it also represents a condition of permanence within the Council of Europe. According to Article 8 of the Statute[64], indeed, a State may be suspended from its rights of representation and, upon request of the Committee of Minister, withdraw if it seriously violates the respect for the Rule of Law.

The European Convention on Human Rights, whose Preamble defines the Rule of Law as an indispensable part of the European Countries' 'common heritage', has played a crucial role[65]. Alongside the Convention, other essential documents inherent to the Council of Europe have referred to the Rule of Law as the Vienna Declaration[66], the Strasbourg Final Declaration and Action Plan[67], and the Warsaw Declaration[68].

Through the years, the Council of Europe's various institutions and bodies have made extensive use of the general principle of the Rule of Law as a founding value, even though it is still challenging to find any authoritative definition provided and acknowledged as univocal by the organization[69]. There is no doubt that the Council of Europe is at the

[64] STATUTE OF THE COUNCIL OF EUROPE, Art. 8, 'Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.'

[65] PREAMBLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Rome, 1950, '*Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the Rule of Law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration […]*'

[66] VIENNA DECLARATION AND PROGRAM OF ACTION, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, § 67, '[…] *important is the assistance to be given to the strengthening of the Rule of Law, the promotion of freedom of expression and the administration of justice, and to the real and effective participation of the people in the decision-making processes*'.

[67] STRASBOURG DECLARATION AND ACTION PLAN, Strasbourg, 10-11 October 1997, '*solemnly reaffirm our attachment to the fundamental principles of the Council of Europe - pluralist democracy, respect for human rights, the Rule of Law*'.

[68] WARSAW DECLARATION, Warsaw, 16-17 May 2005, § 4 '*We are committed to strengthening the Rule of Law throughout the continent, building on the standard setting potential of the Council of Europe and on its contribution to the development of international law. We stress the role of an independent and efficient judiciary in the member states in this respect. We will further develop legal cooperation within the Council of Europe with a view to better protecting our citizens and to realising on a continental scale the aims enshrined in its Statute*'.

[69] When addressing the issue of the Rule of Law as part of the core mission of the Council of Europe, the Committee of Ministers of the Council of Europe, despite quoting several documents referring to such concept, have noted that '*the foregoing overviews are not sufficient to allow the drawing up of a list of key Rule of Law requirements accepted by the Council of Europe, let alone a definition*', The Council of Europe and the Rule of Law. – An overview, CM(2008)170, 21 November 2008, § 22.

forefront of defending the Rule of Law among its Member States and beyond the organization's borders.

Especially in this very peculiar moment, defined by the scholars as a time of 'Rule of Law backsliding'[70], where the values and the standards of the Rule of Law are at stake in the several Member States[71], the Council of Europe is engaged in a vigorous defense of this principle on various fronts.

1.1 THE RULE OF LAW PRINCIPLE IN THE ECHR

Among the mentioned instruments of promotion and protection of the Rule of Law within the Council of Europe, a central role is undoubtedly played by the European Convention on Human Rights.

According to the ECHR, the Rule of Law forms part of its Member States' 'common heritage' [72]. Despite the absence of a consensual definition of the Rule of Law, it is

[70] Recently K. L Scheppele e L. Pech have tried to define this phenomenon 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*', in 'What is Rule of Law Backsliding?', *Verfassungsblog*, 2018. For a more detailed analysis of the question see: N. BERMEO, 'On Democratic Backsliding', in *Journal of Democracy*, Johns Hopkins University Press, Vol. 27, no. 1, 2016; D. KOCHENOV, 'EU Law without the Rule of Law', *Yearbook of European Law*, Vol. 34, 2015, p. 74 ss.; D. KOCHENOV & M. VAN WOLFEREN 'The Dialogical Rule of Law and the Breakdown of Dialogue in the EU', *EUI Working Paper Law*, January 2018; A. MAGEN, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU', *Journal of Common Market Studies*, 2016, Vol. 54, N. 5, pp. 1050-1061; D. KOCHENOV, A. MAGEN & L. PECH, 'Introduction: The Great Rule of Law Debate in the European Union', in *Journal of Common Market Studies*, Vol. 54, N. 5, 2016, p. 1045-1049; A. VON BOGDANDY & P. SONNEVEND, 'Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania', Oxford, 2014; A. VON BOGDANDY, et al., 'A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines', *Common Market Law Review*, Vol. 55, 2018; A. DI GREGORIO, 'Lo stato di salute della *Rule of Law* in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?', in *DPCE Online*, vol. 4, 2016, pp. 175-195; A. PECH, L., & K SCHEPPELE, 'Illiberalism Within: Rule of Law Backsliding in the EU', in *Cambridge Yearbook of European Legal Studies*, 2017, Vol.19, pp. 3-47; L. BESSELINK, K. TUORI, G. HALMAI, C. PINELLI, 'The Rule of Law Crisis in Europe', in *Diritto Pubblico*, Fascicolo 1, 2019, pp. 267-287; R GRZESZCZAK,. & I.P. KAROLEWSKI, 'The Rule of Law Crisis in Poland: A New Chapter', *Verfassungsblog*, 8 August 2018, R. UITZ, 'The Perils of Defending the Rule of Law through Dialogue', in *European Constitutional Law Review*, 2019, pp. 1 ff.; D. ADAMSKI, 'The social contract of democratic backsliding in the 'new EU' Countries', in *Common Market Law Review*, 2019, Vol. 56, pp. 623-666.

[71] See, for instance, the illiberal reforms undertaken in Hungary, Poland, and Romania.

[72] EUROPEAN CONVENTION ON HUMAN RIGHTS, Preamble, 'Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the Rule of Law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

uncontroversial that, at the international level, respect for fundamental human rights is considered as essential to establishing a Rule of Law-based society[73].

Lord Bingham argued that 'the Rule of Law requires that the law afford adequate protection of fundamental human rights. It is a good start for public authorities to observe the letter of the law, but not enough if the law in a particular country does not protect what are there regarded as the basic entitlement of a human being'[74].

The idea of respect for human rights, indeed, as will emerge by the same VC's approach that will be described in the second chapter, permeates all the Rule of Law's components, and informs how they need to be conceived and implemented, i.e., granting respect for and fulfillment of human rights.

Nevertheless, why human rights play such a prominent role in establishing the Rule of Law? The answer can be found in the distinction between the Rule of Law and rule by law. Several examples of oppressive dictatorial regimes can be ruled by laws adopted in total disrespect of human rights and freedoms[75]. Therefore, respect for human rights constitutes a necessary precondition for a democratic and inclusive regime, respectful of the Rule of Law values.

In the conventional context, the Rule of Law represents a multifaced and multi-layered concept that inspires and emanates from the whole Convention. However, nowhere in the provisions of the Convention or its Protocols the Rule of Law principle is stated.

Nevertheless, it is expressly enshrined in the text of its Preamble, as follows: 'Being resolved, as the governments of European Countries which are like-minded and have a common heritage of political traditions, ideals, freedom, and the rule of law, to take the

[73] See for instance the Universal Declaration of Human Rights whose Preamble states that '*it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law*' and point 5 of the elements identified by the Venice Commission as composing the definition of Rule of Law '*These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law*', *Rule of Law Checklist* of the Venice Commission, Venice, 11-12 March 2016, CDL-AD(2016)007, § 18.

[74] T. BINGHAM, *The Rule of Law*, op. cit., p. 84.

[75] E. STEINER, 'Rule of Law in Jurisprudence of the ECtHR', in W. SCHROEDER, *Strengthening the Rule of Law in Europe*, Oxford, 2016, p. 138.

first steps for the collective enforcement of certain of the rights stated in the Universal Declaration […]'[76].

The Preamble's drafters were clearly inspired by the way the Preamble to the Universal Declaration of Human Rights refers to the Rule of Law: 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law […]'[77].

As directly flows from this definition, tyranny is the Rule of Law's antithesis, and oppression is the external manifestation of a society where the rule of law is disregarded by those in power.

But what does the Rule of Law really mean? What's the Convention's foundational ideal behind the Rule of Law principle?

According to some scholars, the core content of the Rule of Law within the Convention should be identified with the 'respect for personal autonomy and the exclusion of the arbitrary use of governmental power'[78].

Through the interpretation provided by the ECtHR in its case law, it is possible to identify some safeguards within the Convention. Articles 5[79], 6[80], 7[81], 10[82] and 13[83] of the ECHR must be read as part of those core contents of the Rule of Law. Indeed, it is not surprising that the Court has affirmed in its case-law that the Rule of Law principle 'inspires the whole Convention'[84] and is 'inherent in all the Articles of the Convention'[85].

As clarified by the ECtHR, the Rule of Law under the Convention is founded upon specific conceptual elements. According to the Court's case-law, the principle demands that laws are clear and not excessively vague and open to abuse[86]; that laws, specifically

[76] EUROPEAN CONVENTION ON HUMAN RIGHTS, Preamble.
[77] UNIVERSAL DECLARATION OF HUMAN RIGHTS, Preamble, 10 December 1948, General Assembly Resolution 217 A.
[78] R. SPANO, *Infra.*, p. 3.
[79] EUROPEAN CONVENTION ON HUMAN RIGHTS, Article 5, *Right to liberty and security.*
[80] EUROPEAN CONVENTION ON HUMAN RIGHTS, Article 6, *Right to a fair trial.*
[81] EUROPEAN CONVENTION ON HUMAN RIGHTS, Article 7, *No punishment without law.*
[82] EUROPEAN CONVENTION ON HUMAN RIGHTS, Article 10, *Freedom of expression.*
[83] EUROPEAN CONVENTION ON HUMAN RIGHTS, Article 13, *Right to an effective remedy.*
[84] EUROPEAN COURT OF HUMAN RIGHTS, *Engel and Others v. the Netherlands*, App. no. 5200/71 and no. 5101/71, 8 June 1976, § 69.
[85] EUROPEAN COURT OF HUMAN RIGHTS, *Amur v. France*, App. no. 19776/92, 25 June 1006, § 50.
[86] EUROPEAN COURT OF HUMAN RIGHTS, *Sinkova v. Ukraine*, App. No. 39496/11, 27 February 2018, § 68; *Baydar v the Netherlands*, App. No. 55383/14, 24 April 2018, § 39.

criminal laws, are not applied retroactively[87]; that laws must be relatively stable and secure legal certainty[88]. Additionally, laws must be interpreted and applied by independent and impartial courts, and their final and binding judgements should not be called into question[89].

As recently argued by Judge Robert Spano, the Rule of Law within the Convention acquires a three-dimensional normative force. An *organic dimension*, where it manifests itself as a legal principle, a *functional dimension*, where it comprises 'a rule with quite fixed content encompassing a particular functional element', and, finally, a *hybrid dimension*, where it simultaneously displays its normative force as a legal principle and as a rule with fixed content. [90]

In the following paragraphs, we will see that the Rule of Law represents a core guiding principle in the Court's case-law, proving to be a 'particularly useful tool for the Court, assisting it in interpreting, supplementing and enhancing the protection standards set out in the Convention'[91].

Undoubtedly, the work conducted by the European Court of Human Rights through its case-law on the delineation and interpretation of the Rule of Law value within the ECHR has proved and is still proving to be fundamental. Its interpretative work represents a unique source of standards for the Venice Commission's understanding of the principle, alongside the contribution of other institutions and bodies such as the Parliamentary Assembly (PACE) Monitoring Committee, the Group of States against Corruption (GRECO), the European Commission for the Efficiency of Justice (CEPEJ) and the Council of Europe Commissioner for Human Rights.

To better understand the content and the scope of the Rule of Law principle within the Council of Europe, and derive its relevant standards, we will analyze its implementation from different point of view in the next paragraphs. We will first focus on the contribution of the Rule of Law's monitoring mechanisms to the principle's definition and promotion.

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[87] EUROPEAN COURT OF HUMAN RIGHTS, *Isikirik v. Turkey*, App. No. 41226/09, 14 November 2017, §§57-58.

[88] EUROPEAN COURT OF HUMAN RIGHTS, *Del Rio Prada v. Spain*, App. No. 42750/09, 21 October 2013, §§ 78-80.

[89] EUROPEAN COURT OF HUMAN RIGHTS, *Ireland v. The United Kingdom*, Appl. No. 5310/1971, Judgement of 20/03/2018, § 122.

[90] R. SPANO, *Infra.*, p. 5.

[91] E. STEINER, 'Rule of Law in Jurisprudence of the ECtHR', op. cit., p. 139.

Then, we will aim attention at the ECtHR's interpretative role, considering its contribution to identifying and clarifying the components of the Rule of Law principle in Europe as sources of the VC's understanding.

2. THE RULE OF LAW'S MONITORING MECHANISMS WITHIN THE COE

The Council of Europe's monitoring bodies have played an essential role in defining and implementing the Rule of Law principle. The importance of these organ's role emerges from a document requested by the Committee of Ministers in 2008 on the Council of Europe and the Rule of Law[92].

Together with the Venice Commission, other COE's bodies have contributed to the elaboration of standards on the Rule of Law. The interplay between these organs has created a multilevel system of Rule of Law's protection within the Council of Europe. Their different approaches and tasks have contributed to the progressive formation of a comprehensive concept capable of being implemented and protected on different grounds and scopes.

In the following paragraphs, we will briefly present their participation in the definition of the Rule of Law's understanding within the Council of Europe.

2.1 THE PACE MONITORING COMMITTEE

The Committee on the Honouring of Obligations and Commitments by the Member States of the Council of Europe (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe was established in 1997[93]. It is responsible for verifying the fulfillment of obligations assumed by the Member States based on the Statute, the European Convention on Human Rights, and all the other Council's Conventions.

The Committee's activity is based on cooperation and dialogue with national delegations of Countries under a monitoring procedure. It has proved to be important in the monitoring procedure and in the post-monitoring dialogue with those States that have joined the Council of Europe after 1989. Through the years, it assisted several Member

[92] COMMITTEE OF MINISTERS, *The Council of Europe and the Rule of Law – An overview*, C;(2008)170.
[93] PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Resolution 1115(1997).

States to comply with the European rule of law standards, by bringing those standards into states' legal systems[94].

Today the Committee is deeply involved in several monitoring activities of Member States as for Montenegro, Georgia, Republic of Moldova, Poland, Albania, and post-monitoring as for North Macedonia[95].

In the context of the monitoring, the Parliamentary Assembly disposes of a range of sanctions. By disposal of the Resolution 1115(1997) paragraph 12, in the case of a Member State that shows 'persistent failure to honour obligations and commitments accepted' and 'lack of cooperation in the monitoring process', the Assembly can undertake three different measures. First, it is empowered to adopt a resolution and a recommendation penalizing the State. Secondly, it can refuse to ratify the credentials of a national parliamentary delegation at the beginning of its next ordinary session or by the annulment of the ratified credentials during the same ordinary session. Finally, should the Member State continue not to respect its commitments, the Assembly can address a recommendation to the Committee of Ministers requesting it to take the necessary action under Articles 7 and 8 of the Statute of the Council of Europe[96].

In the past years, the Russian Federation has been subject to two resolutions, in 2014[97] and 2015[98], adopting diplomatic and restrictive measures due to the grave violations of international law committed concerning the conflict in eastern Ukraine and the illegal annexation of Crimea. Since then, its credentials have been restored only in 2019, with a resolution of the Parliamentary Assembly inviting the Russian delegation to return to co-operating with the Monitoring Committee and fulfill its obligations and commitments[99].

2.2 THE GROUP OF STATES AGAINST CORRUPTION (GRECO)

[94] S. HOLAVATY, 'The Rule of Law in Action', *Reports of the Conference 'The Rule of Law as a Practical Concept'*, 2 March 2012, pp. 17-70.

[95] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *The progress of the Assembly's monitoring procedure (January – December 2019)*, Draft Resolution adopted unanimously by the Committee on 11 December 2019.

[96] PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Resolution 1115(1997), § 12.

[97] PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Resolution 1990(2014).

[98] PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Resolution 2034(2015).

[99] PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Resolution 2292(2019), *Challenge, on substantive grounds, of the still unratified credentials of the parliamentary delegation of the Russian Federation*, § 12.

The Group of States against Corruption (GRECO) was created in 1999 to improve Member State's capacity to fight against corruption by monitoring through its evaluation procedures[100]. It is based on an enlarged agreement including the COE's 47 Members, and Belarus and the United States. Its scope is to provide a mechanism to ensure respect for and address threats to the Rule of Law in all the Member States.

The deep interconnection between the fight against corruption and the Rule of Law principle already emerges from the Preamble of the Criminal Law Convention on Corruption, which identifies corruption as a threat to the Rule of Law, democracy, and human rights[101]. Simultaneously, the Parliamentary Assembly has recognized corruption as a significant threat to the Rule of Law as it 'jeopardises the good functioning of public institutions and diverts public action from its purpose, which is to serve the public interest'[102]. Finally, the ECtHR has reiterated this connection highlighting the 'importance of thwarting the corrosive effect of corruption on the rule of law in a democratic society'[103].

In the fight against corruption, GRECO represents the first Council of Europe's monitoring mechanisms in charge of control simultaneously the respect of soft and hard law instruments. On one side, indeed, it monitors the implementation of the 20 guiding principles for the fight against corruption (GPC), which are not legally binding and have the legal status of recommendations. On the other side, it supervises the implementation of several Council of Europe's conventions and recommendations with binding value[104].

The monitoring activities are based on the principles of mutual evaluation and peer pressure. They are carried out by evaluation teams composed ad hoc by members chosen from a list of experts proposed by the GRECO members. These teams are empowered to

[100] COMMITTEE OF MINISTERS, Resolution (98)7.

[101] GRECO, *Criminal Law Convention on Corruption*, Preamble, 'Emphasising that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society'.

[102] PARLIAMENTARY ASSEMBLY, *Corruption as a threat to the rule of law*, Resolution 1943 (2013), § 2.

[103] ECTHR, *Matanović v. Croatia*, Appl. No. 2742/12, Judgment of 4 April 2017, § 144.

[104] In particular the Criminal Law Convention on Corruption (ETS 173, 1999), the Civil Law Convention on Corruption (ETS 174, 1999), the CM Recommendation on codes of conduct for public officials (Rec(2000)10) and the CM Recommendation on Common rules against corruption in funding of political parties and electoral campaign (Rec(2003)4).

examine corruption in each Member State and prepare a draft evaluation report for the discussion and adoption in the plenary session.

These public reports contain recommendations for the Member States under evaluation to improve their domestic regulations and practices to fight corruption. After the report's release, the states concerned are invited to report the measures adopted to follow these recommendations. If a State is non-compliant with the suggested implementations, GRECO is entitled to issue public statements[105].

2.3 THE EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)

The European Commission for the Efficiency of Justice (CEPEJ) was established in 2002 by the Committee of Minister to promote a precise knowledge of Europe's judicial system and the different existing tools that enable it to identify any difficulties and facilitate their solution[106].

It is composed of experts from all the 47 Member States of the Council of Europe plus seven Observer States (Holy See, Canada, Japan, Mexico, United States, Israel, Morocco). The European Union also participates in its activities without being a full Member.

One of its primary functions is to promote the conditions necessary for the Rule of Law's implementation[107]. Its main activities are to provide practical tools for judicial practitioners, helping them to improve the efficiency and quality of the judicial system's functioning and to develop networking between Member States courts.

It plays a fundamental role in promoting Rule of Law's respect[108] by supporting individual Member States in their judicial reforms, based on the European standards and other Member States' experience. Its expertise it contributes to the debate on the justice system's functioning in Europe and beyond, providing suggestions and advice to stakeholders, national and international courts, and institutions.

[105] COMMITTEE OF MINISTERS, Appendix to CM Resolution (99)05, Statute of GRECO, Artt. 10-16.
[106] COMMITTEE OF MINISTERS, Res. (2002)12.
[107] COMMITTEE OF MINISTERS, CM(2008) 170, 21 November 2008, § 67.
[108] *Ibid*, § 80.

Among its tasks, it also monitors the functioning of the Member State's judicial systems through a regular process of collection and analysis of data and evaluates them based on pre-defined benchmarks[109].

2.4 Council of Europe Commissioner for Human Rights

The Commissioner for Human Rights was established in 1999 as an independent institution within the Council of Europe[110]. It is a non-judicial body in charge of the promotion of respect and education in human rights.

Despite a mandate in the field of human rights, its activity has essential repercussions on the Rule of Law. For instance, the effects of justice's administration on human rights' effective enjoyment have gained greater importance between the Commissioner's tasks. In the last year, it has conducted efficient monitoring work on justice administration in several countries such as Ukraine, Russia, Poland, Georgia, and Turkey.

Recently, after a country visit in Poland, the Commissioner has released a report dealing with judiciary's independence and the composition of the National Council. In this report, while stating that '*entrusting the legislature with the task of electing the judicial members to the National Council for the Judiciary infringes on the independence of this body, which should be the constitutional guarantor of judicial independence in Poland*'[111], it gave several recommendations to change this course. For instance, concerning the composition of the National Council, the Commissioner suggested to '*ensure that the fifteen judicial members of the body are duly elected by a wide representation of their peers and not by the legislative branch*'[112].

Furthermore, the 9th of January, following the adoption of a new reform of the judiciary, the Commissioner sent to the Senate a letter inviting it to '*reject the bill adopted by the Sejm, and to ensure that any legislation passed is in full compliance with the relevant standards of the Council of Europe and in particular the relevant past and future recommendations of the Venice Commission*'[113].

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[109] *Ibid,* § 105.

[110] Committee of Ministers, Resolution (99)50.

[111] Commissioner for Human Rights, CommDH(2019)17, Report following the country visit in Poland, 28 June 2019, § 20.

[112] *Ibid,* § 21.

[113] Commissioner for Human Rights, Letter to the Marshal of the Senate of the Republic of Poland, 9 January 2020.

The Commissioner represents within the Council of Europe an essential source of information concerning systemic Rule of Law's infringements in the Member States, with a particular focus on justice-related issues. It plays a crucial role, for instance, in the proceedings before the European Court of Human Rights, to which, according to Article 36 ECHR[114], it can take part and bring its expertise, 'particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties'[115].

2.5 The Monitoring Organ's Interplay

From the brief overview emerge some recurring elements of the Rule of Law's conception. Judicial independence, anti-corruption, and human rights protection are at the centre of the COE's fight against Rule of Law's dismantling.

The interplay between the analyzed bodies and the Venice Commission has created a deep network of preservation of the Rule of Law in its different aspects. The expertise put in place by each organ has enriched the notion with specific new insights.

Undoubtedly, the VC's cooperation with the other COE's body is maximum. GRECO is one of its recurring partners in dealing with Rule of Law related issues. On 31 October 2020, the VC and GRECO Presidents have sent a letter to the Speaker of the Verkhovna Rada of Ukraine relating to the draft law 'on renewal of public confidence in constitutional judiciary'. The letter states that 'an effective fight against corruption and respect for judicial independence and the Rule of Law have to go together. There can be no effective fight against corruption without an independent judiciary and respect for the Rule of Law. Equally, there can be no independent judiciary and respect for the Rule of Law when corruption is pervasive'[116]. The two Presidents' words show the importance of the VC and GRECO's interplay in the Rule of Law's protection.

In the same way, the PACE Monitoring Committee is one of the main interlocutors of the VC, frequently requesting its opinion on Rule of Law-related issues. Recently it has invoked the VC's intervention on the Ukrainian legal framework on the Supreme Court

[114] ECHR, Art. 36 '*In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings*.'

[115] Explanatory Report to the Protocol no. 14 to the ECHR, § 87.

[116] *Letter of the Presidents of the Venice Commission and GRECO to the Speaker of the Verkhovna Rada of Ukraine relating to the draft law 'on renewal of public confidence in constitutional judiciary*, Strasburg, 31 October 2020, J.Dem.486 GB/SGM/GE.

and judicial self-governing bodies[117]. Such interaction is of greatest importance, as it highlights the main Rule of Law-related issues in COE's Member States and allows a tailor-made intervention directed to specific situations.

Finally, the High Commissioner for Human Rights regularly cooperates with all the other bodies, being human rights deeply interconnected with the Rule of Law principle. In a recent letter to the Minister for Foreign Affairs of San Marino, it has clearly outlined this correlation: 'In my view, the best way to address these allegations and allay any concern of political interference in judicial matters would be to make full use of the assistance and expertise of the relevant Council of Europe bodies, and notably the Venice Commission and the Consultative Council of European Judges (CCJE) to assess the institutional setup affecting the independence of the judiciary in San Marino, and if necessary, to reform it in accordance with their recommendations. I am also aware that the Group of States against Corruption (GRECO) is expected to adopt its relevant evaluation report on San Marino very soon.'[118]

To complete the framework of VC's standards on the Rule of Law remains to be analyzed the most important standard-setting tool within the Council of Europe: the ECtHR's case-law.

3. THE ECTHR'S CASE-LAW ON THE RULE OF LAW

Within the COE's system, the European Court of Human Rights plays a unique role of interpreter and standards setter. Therefore, to identify the Venice Commission's sources, it is fundamental to analyze the ECtHR's case-law on the Rule of Law.

The Strasbourg Court has made clear that the 'Statute of the Council of Europe, an organization of which each of the States Parties to the Convention is a Member, refers in two places to the rule of law: first in the Preamble, where the signatory governments affirm their devotion to this principle, and secondly in Article 3, which provides that 'every Member of the Council of Europe must accept the principle of the rule of law''[119].

[117] VENICE COMMISSION, *Opinion on the amendments to the legal framework governing the supreme court and judicial governance bodies*, Venice, 6-7 December 2019.

[118] COMMISSIONER FOR HUMAN RIGHTS, Letter to the Minister for Foreign Affairs of San Marino, 15 September 2020.

[119] EUROPEAN COURT OF HUMAN RIGHTS, *Aliyev v. Azerbaijan,* App. Nos. 68,762/14 and 71,200/14, Judgement of 20 September 2018, § 225.

Here lies the core conception behind ECtHR's Rule of Law's conception as one of the 'Fundamental components of the European public order'[120].

Although the ECtHR has never defined the Rule of Law principle, referring to it for the first time in *Golder v. United Kingdom*, has stated that it should not 'be regarded as a merely more or less rhetorical reference'[121]. On the contrary, it represents 'one of the features of the common spiritual heritage of the member States of the Council of Europe'[122].

Consequently, through the years, the ECtHR has frequently included the Rule of Law principle in its jurisprudence, intending to interpret, supplement, and enhance the standard of protection set out in the Convention.

Starting from the case *Klass and Others v Germany*, the Court has considered[123] the Rule of Law as 'one of the fundamental principles of a democratic society', emphasizing that a democratic society shall be based on the Rule of Law[124], thereby demonstrating an interdependence between the concepts of democracy and the Rule of Law[125].

The Strasburg Court has consistently emphasized that the rule of law principle is 'inherent in all the Articles of the Convention', recalling that it represents one of the very foundations of the Convention system.

The ECtHR has referred to the Rule of Law in its case-law concerning a wide variety of legal issues. It aimed to underline the importance of the principle within the Convention and to highlight its persuasive power to show that the judgment is in line with generally acknowledged legal standards. As recently commented by Professor

[120] R. SPANO, *Infra*, p. 4.

[121] EUROPEAN COURT OF HUMAN RIGHTS, *Golder v. United Kingdom*, App. no. 4451/70, Judgement of 21 February 1975.

[122] *Ibid.*, § 3.

[123] EUROPEAN COURT OF HUMAN RIGHTS, *Leki v. Slovenia*, App. no. 36480/07, Judgement of 11 December 2008, § 94; *Selahattin Demirtas v. Turkey*, App. no. 14305/17, Judgement of 22 December 2020, § 249 'The Court refers to its well-established case-law to the effect that an impugned measure must have some basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles'.

[124] EUROPEAN COURT OF HUMAN RIGHTS, *Klass and Others v Germany*, App. no. 5029/71, Judgement of 8 September 1978, § 55.

[125] J. G. MERRILS, *The Development of International law by the European Court of Human Rights*, Manchester University Press, 1993, p. 133.

Polakiewicz, 'the ECtHR thus has, and continues to hold, a crucial function in safeguarding the Rule of Law by fleshing out many of its principles through case-law'[126].

In 2008, the Committee of Ministers of the Council of Europe elaborated an overview of the Court's case-law related to the Rule of Law, collecting it in the report 'The Council of Europe and the Rule of Law – an Overview'[127]. Although the case law reported is no longer updated, the Committee was already conscious that 'the adherence of all Council of Europe member states to the ECHR and their being subject to the jurisdiction of the European Court of Human Rights was highly instrumental in creating a common European core of Rule of Law requirements which is still developing further'[128].

As recently highlighted by Judge Robert Spano, 'the rule of law principle is an empty vessel without independent courts embedded within a democratic structure which protects and preserves fundamental rights. Without independent judges, the Convention system cannot function'[129]. Therefore, judicial independence and the connected principles of separation of powers, the right to an independent and impartial tribunal, and the principle of legality represents the bulwark of the Rule of Law's protection under the Convention.

In this sense, in the following paragraphs – also given the impossibility of analyzing all the Court's case-law related to the Rule of Law - we will try to retrace the ECtHR's standard-building activity on three crucial components of the Rule of Law: the right of access to a court, the judiciary's independence and the legality principle.

[126] J. POLAKIEWICZ, Director of Legal Advice and Public International Law of the Council of Europe, Speech 'The Rule of Law – Dynamics and Limits of a Common European Value', Minsk, September 20, 2019.

[127] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, 'The Council of Europe and the Rule of Law – an Overview', CM(2008)170, 21 November 2008.

[128] *Ibid*, §33.

[129] R. SPANO, *Conference of the Ministers of Justice of the Council of Europe, 'Independence of Justice and the Rule of Law'*, Strasbourg, 9 November 2020.

3.1 Right of Access to a Court

Article 6 of the Convention provides the right to a fair trial and includes detailed requirements to which domestic laws must adhere[130]. The Strasbourg Court has defined the right to a fair trial as a fundamental element of the Rule of Law[131].

As highlighted by the Court, the right to a fair trial is a container of several different elements. In some cases, as for the principle of judiciary's independence or the requirement of a tribunal established by law, the Convention explicitly provides these components. In some other cases, as the right of access to a court, there is no express provision in the text. Therefore, sometimes an interpretative intervention of the Court is required to ensure comprehensive and complete protection of the Convention's rights.

In the specific case of the right of access to a court, the Strasbourg Court's jurisprudence has proved to be fundamental in providing its inclusion within the Convention, starting from the *Golder v. the United Kingdom* case[132].

A prisoner, Mr. Golder, wished to bring a civil action for defamation against a correctional officer who had falsely accused him of instigating a prison riot, but his letters directed to a solicitor and to the Parliament were censored and withheld by the prison authorities. Therefore, once released from prison, he complained before the ECtHR the violation of his right of access to a court. The question brought before the Court was

[130] European Convention on Human Rights, Article 6, Right to a fair trial, '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: 10 11 (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.

[131] European Court of Human Rights, *Sunday Times v United Kingdom*, App. no. 6538/74, 26 April 1975, § 55.

[132] The *Golder* case concerned the question of how far rights of prisoners could be restricted. Mr. Golder had been imprisoned when he was wrongly accused of starting a prison riot. Determined to start a civil procedure against the accuser, he was not allowed to consult a solicitor, thus being unable to commence a civil action. He decided, therefore, to go to the ECtHR complaining the violation of Article 6 ECHR.

whether Article 6 paragraph 1 could secure the warranty of access to court although the text did not expressively provide such a right.

The Court, while acknowledging that Article 6 § 1 does not state a right of access to the courts or tribunals in express terms, explained that it 'enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term'[133]. Therefore, it recognized its duty to ascertain, through interpretation, whether access to the courts constitutes one factor or aspect of this right.

In conducting its interpretative work, the Court considered that, according to the Vienna Convention[134], the preamble to a treaty forms an integral part of the context and is generally very useful to determine the 'object' and 'purpose' of the instrument to be construed. It highlighted that both the Preamble and Article 3 ECHR expressly proclaim the Rule of Law as a fundamental principle which informs the whole Convention. Therefore, Article 6 § 1 must be read considering this principle. It relates to the Convention's affirmation of adherence to the Rule of Law principle[135] to affirm that the right of access constitutes an element inherent in the right stated by Article 6 §1 ECHR.

In explaining that the right of access to a court represents a procedural guarantee in Article 6 §1, the Court opined that it constitutes the very essence of the Rule of Law, describing it as 'one of the main objects and purposes of the Convention'[136].

In the *Golder* case, the Rule of Law principle represents the Court's most important argument for including the right of access to a court within the scope of Article 6 ECHR[137]. According to the Court, though, this expansion of the Convention's significance is not considered a 'constitutive' approach but a 'declaratory' one, in the sense that the Court's ruling relies on already existing principles.[138] This innovative

[133] EUROPEAN COURT OF HUMAN RIGHTS, *Golder v. United Kingdom*, § 28.

[134] VIENNA CONVENTION ON THE LAW OF THE TREATIES, Vienna, 23 May 1969, Art. 31, § 2.

[135] ECHR, *Preamble*, 'Resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration'.

[136] EUROPEAN COURT OF HUMAN RIGHTS, *Golder v. United Kingdom*, §§ 33-34.

[137] J. G. MERRILS, *The Development of International law by the European Court of Human Rights*, Manchester University Press, 1993, pp. 128-129.

[138] *Ibid*, pp. 85-90. Golder case is the leading case of the recourse of the ECtHR to the expedient of implied terms. This technique of interpretation of the Convention is used by the Court to explicit rights

analysis raises the Rule of Law to an interpretative parameter, used by the Court to clarify the content of Article 6, in compliance with the substance of the entire Convention.

The subsequent case-law was fundamental in crystalizing the principle of access to a court and its scope within the Convention. In *Bellet v. France*, the Court stated that 'the degree of access afforded by the national legislation must also be sufficient to secure the individual's 'right to a court', regarding the principle of the Rule of Law in a democratic society'[139]. In *Roche v United Kingdom*, the Grand Chamber referred to the *Golder* case to state that the reasons for broadening Article 6 have been 'Rule of Law and the avoidance of arbitrary power which underlay much of the Convention'[140].

Developing this line, the Court has recently deepened its position in the famous case *Baka v Hungary*[141]. Mr. Baka, President of the Hungarian Supreme Court, was dismissed by its mandate because of the views he expressed on the constitutional reform affecting the judiciary. After the dismissal, he was prevented from the possibility to appeal the decision before domestic courts. Therefore, he claimed the violation of Articles 10 and 6 of the Convention.

Scholars highlighted the case's relevance, defining it as 'the tip of the iceberg, operating as a magnifying glass of the assaults on separation of powers and judicial independence in CEE'[142]. In the specific case, the Grand Chamber held that since Mr. Baka had no domestic remedies available to contest his removal from the office of President of the Supreme Court due to the newly introduced constitutional reform[143], there was a violation of his right of access to a court.

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which are implicitly provided therein. In the specific case, it has been used to include the protection of right of access to a court within the scope of Article 6 ECtHR.

[139] EUROPEAN COURT OF HUMAN RIGHTS, *Bellet v France*, App. no. 23805/94, 4 December 1995, § 36.

[140] EUROPEAN COURT OF HUMAN RIGHTS, *Roche v United Kingdom*, App. no. 32555/96, 19 October 2005, § 116.

[141] EUROPEAN COURT OF HUMAN RIGHTS, *Baka v Hungary*, App. no. 20261/12, Grand Chamber, 23 June 2016.

[142] D. KOSAR, K. ŠIPULOVÁ, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law', in *Hague Journal on the Rule of Law*, April 2018, Volume 10, Issue 1, p. 85.

[143] In Hungary, after the April 2010 election, with the victory of the right-wing party, Fidesz, the constitutional system witnessed a series of reforms which gradually strengthened parliamentary sovereignty and weakened its constraints and counterweights. The reform was ideated to affect all levels of the judiciary. First, it involved the Constitutional Court, with the increasing of the number of judges, from 11 to 15, the prolongation of the term from 9 to 12 years and the modification of the rules of nomination of judges from consensual to governing majority system. Second, it affected the whole judiciary through the lowering of the retirement age of all judges across the bard, justifying the decision with the idea of 'purging the judicial

To reach this conclusion, the Court had to determine whether Article 6 §1 applied to the 'civil' nature of Mr. Baka's right. In assessing the content of the provision, the ECtHR has applied the so-called 'Eskelinen test'[144]. According to this formula, a civil servant's exclusion from Article 6 § 1 protection was compatible with the Convention only if two conditions were met simultaneously: first, national law must have *expressly* excluded access to a court for the relevant post; second, the exclusion must be justified on objective grounds in the State's interest[145]. Article 6 § 1 does not apply when these two conditions are simultaneously met.

According to the Court, the President of the Supreme Court was not expressly excluded from the right of access to a court. Indeed, Hungarian law explicitly provided for a right of judicial review in case of dismissal, in line with several (soft law) international and Council of Europe standards concerning the judiciary's independence.

Moreover, for national legislation excluding access to a court to have any effect under article 6, § 1, it should be compatible with the Rule of Law, which is inherent to the Convention. Since the new legislation is directed against a specific person and therefore not an instrument of general application, the Court considered it contrary to the Rule of Law. When assessing the compliance of the Hungarian Transitional Provisions of the

system of old communist judges'. This reform had a high impact on the judiciary, resulting in the termination of employment of 277 out of the 2996 judges by the end of 2012. Third, it interested the restructuring of the Supreme Court and the division of competences between the existing National judicial Council and the newly established National Office for the Judiciary. Is this last reform that has originated the case of Mr. Baka. Mr. Baka was elected in 2009 as President of the Supreme Court for a six-year term. during its mandate, he became a critic voice against Orbán's judicial reforms and repeatedly addressed, in its official capacity, the Parliament against the new laws affecting the judiciary. After several conflicts, in 2012 the Parliament approved a law terminating the mandate of the President and Vice-President of the Supreme Court, effectively terminating Baka's mandate three years before. Mr. Baja challenged his early termination from the Presidency of the Supreme Courts on two grounds: first, violation of Article 10 ECHR since he was dismissed for his critical remarks towards the judicial reform; second, violation of Article 6 paragraph 1 ECHR, for the privation of the right to access to a court, since his removal was exempted from judicial review. For a more detailed analysis of the judgment see: D. KOSAR, K. ŠIPULOVÁ, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law', in *Hague Journal on the Rule of Law*, April 2018, Volume 10, Issue 1, pp. 83-110; A. VINCZE, 'Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment *Baka v Hungary*', in *European Public Law*, 2015, Issue 3, pp. 445-456.

[144] This 'test' was first theorized by the European Court of Human Rights within the case *Vilho Eskelinen and Others v Finland*, Application no. 63235/00, 19 April 2017, §62 'To recapitulate, for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.'.

[145] EUROPEAN COURT OF HUMAN RIGHTS, *Baka v Hungary*, Application no. 20261/12, Grand Chamber, 23 June 2016, § 103-106.

Fundamental Law[146] with the right of access to a court, the Court reiterated that the lack of judicial review of Mr. Baka's early termination 'was the result of a legislation whose compatibility with the requirements of the Rule of Law is doubtful'.

In this light, it cannot be concluded that national law expressly excluded access to a court. Given that the two conditions for excluding the application of article 6, §1 must be fulfilled, the Court did not find it necessary to examine the second condition.

The Court noted that the premature termination of Mr. Baka's mandate as President of the Supreme Court was not reviewed, nor was it open to review by an ordinary tribunal or other body exercising judicial powers, because of legislation whose compatibility with the requirements of the Rule of Law is doubtful. Indeed, the Court referred to the growing importance that international and Council of Europe legal instruments, international case-law, and practice of international bodies attach to procedural fairness in cases involving the removal or dismissal of judges. Therefore, the ECtHR held that Hungary impaired the very essence of the applicant's right of access to a court, as guaranteed by article 6, §1 of the Convention.

In the Court's view, considering the sequence of events in their entirety, there is evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate. Indeed, the Hungarian government had previously assured the Venice Commission that the Transitional Provisions to the Fundamental Law would not have been used to unduly put an end to the terms of office of persons elected under the previous legal regime. Moreover, the parliamentary majority had indicated that Mr. Baka's mandate would not be terminated upon entry into force of the new Fundamental Law. The authorities questioned neither Mr. Baka's qualification nor his professional conduct. Lastly, the Court considered that the changes made to the President's tasks were not of such a fundamental nature that they should or could have prompted the termination of Mr. Baka's mandate. Therefore, the mandate's termination

[146] ACT ON THE TRANSITIONAL PROVISIONS OF THE FUNDAMENTAL LAW, approved by the Parliament on the 31st of December 2011, introduced new amendments to the Hungarian Constitution. Relevant to the present case is the provision contained in Article 11 § 2 '(2) The mandate of the President of the Supreme Court, the President and members of the National Justice Council end when the Fundamental Law comes into effect'.

was an interference with the exercise of his right to freedom of expression, guaranteed by Article 10 ECHR.

The Court reiterated that Mr. Baka had a right and duty, as President of the National Council of Justice, to express his opinion on legislative reforms affecting the judiciary. He expressed his views on the functioning and reform of the judicial system, the independence of judges, and their retirement ages, which are all questions of public interest, calling for a high degree of protection of the freedom of expression. Mr. Baka was removed 3,5 years before the end of his term, which is hard to reconcile with judges' irremovability. The early termination, therefore, defeated rather than served the independence of the judiciary. Lastly, the Court found the measure to have an undeniable chilling effect in that it discourages judges from participating in the public debate on issues concerning the judiciary. In sum, the measure was not necessary in a democratic society. Accordingly, the Court found a violation of Article 10 ECHR.

When emphasizing that the Hungarian constitutional provisions are incompatible with the Rule of Law, the Court attributes Article 6 § 1 and the Rule of Law itself a supra-constitutional effect, reaffirming it as a principle inherent to the whole Convention[147]. Thus, it clearly demonstrated that the Member States cannot circumvent their obligation to protect fundamental rights by adopting constitutional legislation, which is not subjected to judicial review at the domestic level. By unlawfully individualizing the application of the Transitional Provisions to the Fundamental Law and terminating Mr. Baka's mandate, the Hungarian authorities not only violated the right to a fair trial and the freedom of expression but also trampled the Rule of Law.

Notwithstanding the judgment's importance for the delineation of the Rule of Law's protection within the ECHR system, some scholars have argued that the Court could have been 'sharper'[148]. Indeed, the judgment highlights systemic deficiencies stemming from the Court's approach towards the Rule of Law and democracy's requirements within the Convention. Given the absence of principles inherent to institutional judicial independence or the separation of powers in the Convention[149], the ECtHR had to frame

[147] EUROPEAN COURT OF HUMAN RIGHTS, *Baka v Hungary*, § 117.

[148] D. KOSAR, K. ŠIPULOVÁ, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law', op. cit.

[149] A. VINCZE, 'Dismissal of the president of the Hungarian supreme court: ECtHR Judgment Baka v. Hungary', in *European Public Law*, 2015, vol. 21, Issue 3.

the Supreme Court's president removal as a freedom of speech case. Moreover, due to the narrowness of the ECtHR's power to stay the political changes or prevent structural interferences into the domestic judiciary, the Grand Chamber, instead of relying on the well-established case law and providing clear arguments, has stretched Article 6 to find a solution for the specific case, avoiding clarifying the Rule of Law concept within the Convention.

By choosing to address the Baka case as a freedom of expression issue, the ECtHR missed an opportunity to explore the separation of powers under the procedural guarantees of the right to a fair trial[150] and to interpret the principle of checks and balances as a concept inherent to the fair trial, the judicial independence and, consequently, the Rule of Law within the Convention.

To conclude, indeed, the Rule of Law represents one of the main handholds that the Court had used and is still using to broaden the scope of Article 6 and include judicial safeguards. However, as argued by some scholars, the ECtHR, to grant full and relevant protection of the Convention, needs to take a further step, going well beyond individual human rights protection and try to open a way to address challenges that concern basic tenets of constitutionalism, namely separation of powers and the Rule of Law[151].

3.2 INDEPENDENCE OF THE JUDICIARY

The Court has analyzed the judiciary's independence as an element of the Rule of Law in several cases related to Article 6 ECHR and the principle of the separation of powers.

On the Judicial independence's requirement, the Court has held in a series of pivotal judgements that the law must itself provide for clear and foreseeable guarantees in the respect of judicial activities and the status of judges, specifically regarding their appointment, dismissal, promotion, irremovability, immunity and discipline[152].

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[150] See on this theoretical position: J. WALDRON, 'The Rule of Law and the importance of procedure', in J. FLEMING (ed) *Getting to the Rule of Law*, New York, 2014; VAROL, 'Structural Rights', in *Georgetown Law Journal*, 2017, 105, 1001.

[151] D. KOSAR, K. ŠIPULOVÁ, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law', op. cit.

[152] EUROPEAN COURT OF HUMAN RIGHTS, *Baka v. Hungary*, App. no. 20261/12, Judgement of 23 June 2016, § 107-119; *Ramos Nunes de Carvalho E S A v. Portugal*, App. no. 55391/13, Judgement of 6 November 2018; *Denisov v Ukraine*, App. no. 76639/11, Judgement of 25 September 2018; *Guomundur Andri Astraosson v. Iceland*, App. no. 23674/18, Judgement of 1 December 2018.

Indeed, despite its limited – in fact non-existent[153] – jurisdiction on the separation of powers within the Member States, the ECtHR has progressively expanded its operation field through an extensive interpretation of the 'right to independent and impartial tribunal established by law'[154].

The classical 'external' approach views judicial independence almost exclusively from a separation of powers perspective[155]. It relies upon the idea that an independent judiciary represents a necessary safeguard against legislative and executive powers' possible abuses. According to this view, in the last quarter of the 20th century, the ECtHR interpreted Article 6 ECHR very restrictively. In several judgments, it stated that 'the concept of separation of powers between the executive and the judiciary has assumed growing importance in the case-law of the Court'[156].

Stafford v UK[157] represents one of the first cases in which the Court has defined the separation of powers within the Convention. The Grand Chamber had to evaluate the compatibility with the Convention standards of the UK Secretary of State's far-reaching powers– which gave it the authority to decide on the punitive elements of a criminal sentence and the release of prisoners once the tariff had expired. The Court stated that 'the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case-law of the Court'[158]. Nonetheless, it is

[153] D. KOSAR, 'Policing Separation of Powers: A New Role for the European Court of Human Rights.', in European Constitutional Law Review, vol. 8, no. 1, February 2012, p. 38, 'the ECtHR has very limited competences in the area of separation of powers. More specifically, the ECtHR has limited powers to arbitrate conflicts among CoE member states (state-against-state conflicts) under inter-State cases jurisdiction and minimal powers to police the division of powers between the CoE organs and the CoE member states (CoE-against-state conflicts) under its advisory opinion jurisdiction. It has no explicit jurisdiction to address competence conflicts among CoE organs (CoE-organ-against-CoE-organ conflicts) or within CoE member states (state-organ-against-state-organ conflicts).'

[154] EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 6. §1.

[155] J. SILLEN, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights', in *European Constitutional Law Review*, 2019, vol 15, p. 105.

[156] E.g., ECtHR 28 May 2002, Case No. 46 295/99, *Stafford v UK*, para. 78; ECtHR 6 May 2003, Case No. 39 343/98, 39 651/98, 43 147/98 and 46 664/99, *Kleyn et al. v The Netherlands*, para. 193; ECtHR 22 June 2004, Case no. 47 221/99, *Pabla Ky v Finland*, para. 29; ECtHR 6 November 2018, Case No. 55391/13, 57728/13 and 74041/13, *Ramos Nunes de Carvalho e Sá v Portugal*, para. 144. For a comment on this topic see D. KOSAŘ, 'Policing Separation of Powers: A New Role for the European Court of Human Rights?', 8(1) EuConst (2012) p. 33.

[157] EUROPEAN COURT OF HUMAN RIGHTS, *Stafford v United Kingdom*, App. no. 46295/99, 28 May 2002.

[158] *Ibid,* § 78.

essential to note that, in this case, the notion of separation of powers was not directly linked to the Rule of Law principle, which was subject to a separate analysis concerning the applicant's continued detention.

Assanidze v Georgia[159] was the first landmark case where the ECtHR has described the judiciary's independence as a Rule of Law's component. The applicant, a member of the Ajarian Supreme Council, was arrested on suspicion of illegal financial dealings and sentenced to 8 years of imprisonment. Upon his request, the Georgian President granted Mr. Assanidze the pardon, suspending the remaining two years of detention. The pardon's lawfulness was challenged before the Tbilisi Court of Appeal and the Supreme Court of Georgia, which confirmed its validity. The Parliament then referred the pardon's legality to a committee responsible for supervising the civil servants' activities' lawfulness. The committee criticized the final judgment regarding the granting of the pardon. Subsequently, the President of the Georgian Supreme Court condemned the committee's report finding contrary to the Rule of Law, due to the breach of the separation of powers, to criticize a final judgment[160].

The ECtHR stated that it would be contrary to the Rule of Law a legislation that 'empowers a non-judicial authority, no matter how legitimate, to interfere in court proceedings or to call for judicial findings into question'[161]. It also found that 'the principle of legal certainty – one of the fundamental aspects of the Rule of Law – precluded any attempt by a non-judicial authority to call that judgment into question or to prevent its execution'[162].

To conclude, in this case, the Court has assessed judicial independence in the context of domestic remedies, highlighting that the Rule of Law principle and the notion of fair trial preclude any interference by the legislature with the administration of justice aimed at influencing the judicial determination of the dispute[163].

The declination of the judiciary's independence as incompatibility of the legislature's interference with the administration of justice has been confirmed in other cases before

[159] EUROPEAN COURT OF HUMAN RIGHTS, *Assanidze v Georgia*, App. no. 71503/01, 8 April 2004.
[160] *Ibid,* § 91.
[161] *Ibid,* § 129.
[162] *Ibid,* § 130.
[163] *Ibid* §§ 129-130.

the Court. In the case *Maggio and Others v Italy*, for instance, the Court have stated that 'The principle of the Rule of Law and the notion of fair trial enshrined in Article 6 of the Convention precludes any interference of the legislature – other than on compelling grounds of general interest – with the administration of justice designed to influence the judicial determination of a dispute'[164].

In its case-law, the Court has also related the judiciary's impartiality to the Rule of Law principle. This is particularly evident in the judgment *Kyprianou v Cyprus*[165]. It concerned a case of contempt committed by the applicant regarding the same judges that had tried, convicted, and sentenced him. The ECtHR, finding a violation of Article 6 ECHR, concluded that the national court had failed to meet the required impartiality standards. Therefore, it stated that 'the impartiality of the judiciary constitutes a fundamental aspect of the legal system, and the Rule of Law principle requires that a judge must be considered impartial and his judgment binding until a higher court has established the unfairness of the proceedings'[166].

According to the Court, together with the judiciary's impartiality, another aspect of judicial independence enshrined in Article 6 is that a tribunal must be 'established by law'. In the Court's case-law, this requirement 'reflects the principle of the Rule of Law'[167], concerning the judiciary's independence from the executive power.

[164] EUROPEAN COURT OF HUMAN RIGHTS, *Maggio and Others v Italy*, Applications nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011, § 43. The applicants, who were Italian nationals, lived and worked for many years in Switzerland before retiring to Italy. On their return to Italy, the Istituto Nazionale della Previdenza Sociale ('INPS'), an Italian welfare body, decided to re-adjust their pension claims to consider the low contributions paid while working in Switzerland. The applicants brought proceedings to contest this method of calculating their pension rights, but their claims were dismissed following the introduction of Law no. 296 of December 2006, which effectively endorsed the INPS' interpretation of the relevant legislation. In their applications to the European Court, the applicants complained that Law no. 296/2006 had modified the method used to calculate their pension calculations retrospectively while the proceedings to decide their claims were still pending before the domestic courts.

[165] EUROPEAN COURT OF HUMAN RIGHTS, *Kyprianou v Cyprus*, App. No. 73797701, GC 2 May 2005.

[166] *Ibid*, §119.

[167] EUROPEAN COURT OF HUMAN RIGHTS, *Dmd Group, AS v Slovakia*, App. no. 19334/03, 5 October 2010, § 58.

Reflecting on this fundamental principle, the Court determined for the first time in *Zand v Austria*[168] and in *Coëme v Belgium*[169] that the judiciary's organization must be regulated by a law emanating from parliament and should be independent of executive power's discretion. However, while the cases were related to the Rule of Law, the Court did not establish a direct relation between this principle and the requirement that a tribunal must be established by law until the recent case *Dmd Group, AS v Slovakia*[170].

Here the ECtHR, taking a step forward, stated that the judiciary's organization must not be dependent on the executive's discretion, thereby explicitly connecting the principle of the Rule of Law with the requirement that a tribunal must be established by law[171]. Furthermore, the Court explained that the law intended in the term 'established by law' not only concerns the laws that set up a tribunal[172], but also, the fact that this law must emanate from parliament and include 'provisions concerning the independence of the members of a tribunal, the length of their term of office, impartiality and the existence of procedural safeguards'[173].

The right to an independent and impartial tribunal established by law under Article 6 § 1 ECtHR represents one of the Rule of Law's fundamental elements. The Strasbourg Court has developed an extensive jurisprudence over the concepts of judicial

[168] EUROPEAN COURT OF HUMAN RIGHTS, *Zand v Austria*, App. no. 7360/76, 12 October 1978. In the specific case, the applicant argued that the Austrian labor courts were not established by law since the executive had discretionary power to determine their jurisdiction. The EComHR ruled that the judicial organization should be regulated by a law emanating from parliament and should not depend upon the executive's discretion.

[169] EUROPEAN COURT OF HUMAN RIGHTS, *Coëme and Others v Belgium*, App. nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000. In the case, the procedural rules were not established before the applicant stood trial in the Court of Cassation. The Court of Cassation established the procedural rules because there was no legislation on the topic. The applicant argued that the Court of Cassation had violated the principle of the separation of powers by laying down the procedural rules itself. The ECtHR found that the judicial organization should not be dependent upon the executive's discretion and confirmed that judicial organization should be regulated by a law emanating from parliament.

[170] EUROPEAN COURT OF HUMAN RIGHTS, *Dmd Group, AS v Slovakia*, App. no. 19334/03, 5 October 2010.

[171] *Ibid*, § 58 'The Court reiterates that under Article 6 § 1 of the Convention a tribunal must always be 'established by law'. This expression reflects the principle of Rule of Law, which is inherent in the system of protection established by the Convention and its Protocols'.

[172] The notion of tribunal has been defined by the Court in *Belilos v Switzerland* as 'characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis if rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' term of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1) itself.'

[173] *Ibid*, § 59.

independence and impartiality. However, recently it has developed the question whether the provision should be applied to also to judges' appointment. The answer came from the recent case *Guðmundur Andri Ástráðsson v. Iceland*[174].

Here the Court first observed that the object of the term 'established by law' in Article 6 §1 of the Convention is to 'ensure that the judicial organization in a democratic society does not depend on the discretion of the executive, but that is regulated by law emanating from the Parliament'. The Court held that, having regard to its importance for the functioning of the judiciary in a democratic State governed by the Rule of Law, the appointment of judges necessarily inheres to the concept of establishment of a tribunal by law[175]. The Court's reasoning is thus at the basis of Article 6 interpretation including appointment of judges as an internal element of a tribunal established by law. Simultaneously, the Court held that the right to a tribunal established by law is a 'stand-alone right' under Article 6 §1 of the Convention, although it has a 'very close relationship with the guarantees of independence and impartiality'[176]

Moreover, in its judgement the Court adopted a 'three-step threshold test' for determining the violation of the right to a tribunal established by law. First, it must be determined whether the breaches of internal law were manifest. Secondly, it must be determined whether such breaches pertained to a fundamental rule or procedure for judges' appointment. Thirdly, it must be verified whether the allegations regarding the breaches to the right were effectively reviewed and remedied by the national courts[177]. This test, which sets a very high threshold, seeks to reconcile the principle of subsidiarity, demanding the deference to the national courts in national law's interpretation and application, and the principle of effective protection of Convention rights, with special reference to those right enshrined in Article 6 § 1 securing judicial independence[178].

In the case *Posokhov v Russia*, the Court has specified that 'established by law' also means 'established in accordance with law', so that the requirement provided in Article

[174] EUROPEAN COURT OF HUMAN RIGHTS, *Guðmundur Andri Ástráðsson v. Iceland*, App. no. 26374/18, 12 March 2019.
[175] Ibid., §§ 211,214 and 227.
[176] *Ibid.*, § 231.
[177] *Ibid.*, §§ 243-252.
[178] R. SPANO, op. cit., p. 11.

6 is infringed not only when is contrary to all the above-mentioned legal requirements, but also if a tribunal does not function by the rules that govern it[179].

In conclusion, through its case-law, the ECtHR has demonstrated a deep connection between the Rule of Law and judicial independence, developing it through two fundamental principles: the principle of separation of powers and the principle of a tribunal established by law. Thus, the Court gave the relationship between judicial independence and the Rule of Law two different interpretations. On the one hand, it has been read as a non-interference of legislative and executive powers with justice administration. On the other hand, it has been interpreted as a non-intrusion of the executive power into regulating the judiciary's internal aspects, which is an exclusive prerogative of parliaments.

3.3 The Legality Principle

Legality represents the heart of the Rule of Law concept and is connected to all the elements understood to be part of it. As we will see in-depth in the following, a considerable part of the Court's case-law referring to the Rule of Law concerns the legality principle.

Whenever a human right protected by the Convention is limited, respect for the legality principle is fundamental. There are many provisions within the Convention and its Protocols, allowing some limitations to the rights guaranteed therein; however, these interferences must fulfill specific requirements. The Court divides the legality principle in two major requirements: first, the condition that a law exists in the domestic system, and second, that the existing law complies with specific quality requirements.

The qualitative criterion is at the center of the Court's reasoning and represents a problematic aspect of the legality principle. According to the Court, a healthy legal system is a fundamental precondition for ensuring an adequate human rights protection level. For this purpose, it has stated that the Convention requires the Contracting States to set up 'a minimum legislative framework' to allow individuals to assert their rights

[179] European Court of Human Rights, *Posokhov v Russia*, App. no. 63486/00, 4 March 2003.

effectively and to seriously fall short of their obligation to protect the Rule of Law and prevent arbitrariness[180].

When determining the legality's operative notion, the ECtHR uses a comprehensive understanding of the law, which fits all the different declinations of the legality principle in each of its Member States[181].

The term 'law' appears in many articles of the Convention and its Protocols[182]. Within the Convention, several provisions authorize limitation to the rights and freedoms protected therein, when necessary, for the achievement of specific aims and 'prescribed by law'[183], 'provided for by law'[184]or 'in accordance with the law'[185].

Except for the case of the tribunal 'established by law'[186], the notion is used by the Court in its material and substantive meaning. This means that its understanding covers statutes, unwritten laws, regulations, and other acts that do not have the status of law within the national system.

In this sense, the Court, giving significance to the obligation contained in Article 5 ECHR that any deprivation of liberty must be put into effect 'in accordance with a procedure prescribed by law', has stated that 'Article 5(1) requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer to domestic law; like the expressions 'in accordance with the law' and 'prescribed by law' in the second paragraphs of Articles 8 to 11, they also relate to the quality of the law, requiring it to be compatible with the Rule of Law, a concept inherent in all the Articles of the Convention.'[187]. In the case *CR v United Kingdom*[188] it specified that when

[180] EUROPEAN COURT OF HUMAN RIGHTS, *Kotov v Russia,* App. no. 54522/00, GC 3 April 2012, § 117.
[181] K. DZEHTSIAROU, 'What is Law for the European Court of Human Rights?', in *Georgetown Journal of International Law*, 2018, vol. 49, p. 80 ff.
[182] Articles 2, 5, 6, 7, 8, 9, 10, 11 of the Convention, Article 1 Protocol No. 1, Article 2 Protocol No. 4, Article 2 Protocol No. 6, Article 1, 3 and 4 Protocol No. 7, Article 1 Protocol No. 12.
[183] For instance, Articles 9 (Freedom of thought, conscience, and religion), 10 (Freedom of Expression) and 11 (Freedom of assembly and association) ECHR.
[184] For instance, Article 1 (Protection of property) ECHR.
[185] For instance, Article 4 (Right not to be tried of punished twice) and Article 8 (Right to respect for private and family life).
[186] In this case, indeed, the notion is used in its formal significance.
[187] EUROPEAN COURT OF HUMAN RIGHTS, *Amour v France*, App. no. 19776/92, 25 June 1996, §50.
[188] EUROPEAN COURT OF HUMAN RIGHTS, *CR v United Kingdom,* App. no. 20190/92, 22 November 1995.

speaking of law, it alludes to a 'concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability'[189].

As explained by the Court, these 'qualitative requirements' demand that the law in question is 'adequately accessible'. This means that 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case' and 'formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'[190]

The case *Sunday Times v United Kingdom*[191] was a landmark case in identifying those requirements. It was one of the first judgments where the Court interpreted the expression 'prescribed by law' in Article 10 of the Convention, specifying that national law must conform to specific quality standards.

With the case *Malone v United Kingdom*[192], the Court had the chance to specify the significance of foreseeability within the Convention, explaining that mere compliance with domestic law is insufficient to assess compliance with Convention standards. Indeed, the British Government, defending a law on interception of communications by the police, argued that the ECtHR, when the law is not concerned with creating obligations for individuals, should only evaluate whether an interference with a conventional right is lawful under domestic law. The Court, giving an extensive interpretation to the phrasing 'in accordance with the law' contained in Article 8 ECHR, did not accept the Government's view, and declared that lawfulness 'does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the Rule of Law, which is expressly mentioned in the Preamble to the Convention'[193].

Consequently, to satisfy the legality's requirements contained in the Convention is not sufficient to merely respect national laws and procedures but is necessary that national laws conform to the Convention, being accessible and clear enough to provide an

[189] *Ibid*, § 33.
[190] EUROPEAN COURT OF HUMAN RIGHTS, *Sunday Times v United Kingdom*, App. no. 6538/74, 26 April 1979, §49.
[191] EUROPEAN COURT OF HUMAN RIGHTS, *Sunday Times v United Kingdom*, App. no. 6538/74, 26 April 1979.
[192] EUROPEAN COURT OF HUMAN RIGHTS, *Malone v United Kingdom*, App. no. 8691/79, 2 August 1984.
[193] *Ibid*, § 67.

adequate indication of when and how this potentially dangerous interference with civil liberty can be applied.

Enforcing this criterion, the Court declared that the UK law on interception of communication 'does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the Rule of Law in a democratic society is lacking'[194].

Foreseeability and accessibility represent two recurring elements of the legality principle – and consequently of the Rule of Law – according to which the Strasbourg Court conducts its 'quality assessment'.

According to the Court, accessibility means that 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case'[195]. This also signifies that citizens who are to be affected by those legal rules shall have the possibility to become aware of their content. However, it does not necessarily imply that the law needs to be published or publicly available: the obligation for the State is to provide who requests to consult the law with copies or to ensure that they can otherwise consult it[196].

Foreseeability, as interpreted by the Strasbourg Court, requires two conditions that must be contemporarily fulfilled by the law: firstly, it must be worded in a general manner, and secondly, it must be sufficiently precise. At first sight, these requirements may be seen as conflicting, but they are not. Indeed, on one side, the generality of law provides the law with an appropriate level of flexibility to fit different circumstances. On the other side, its precision enables individuals to be aware of the consequences of their conduct[197].

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[194] *Ibid*, § 69.

[195] EUROPEAN COURT OF HUMAN RIGHTS, *Sunday Times v United Kingdom*, § 49.

[196] See for instance the case *Groppera Radio AG and others v Switzerland*, where the Court stated that technical regulations in the field of internal telecommunication laws, due to their easy retrieval, were sufficiently accessible.

[197] E. STEINER, 'Rule of Law in Jurisprudence of the ECtHR', in W. SCHROEDER, *Strengthening the Rule of Law in Europe*, Oxford, 2016, p. 152.

In *Silver and Others v. the United Kingdom,* the Court has stated that 'a law which confers a discretion must indicate the scope of that discretion'[198]. Further developing this statement, in *Malone* case, it has established that 'it would be contrary to the Rule of Law for the legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.'[199].

To conclude, according to ECtHR's case law, legality requires that domestic law conforms to the Convention quality standards of accessibility and foreseeability, which demand in turn law to be general and precise, according to the principle of the Rule of Law. In this sense, the Court emphasizes that the Rule of Law encompasses the legality principle as a component of the foreseeability requirement.

3.4 Conclusive Remarks on the ECtHR's Rule of Law's Standards

As emerges from the analysis conducted so far, the Strasbourg Court has played and is still playing a unique role in interpreting the Convention towards the Rule of Law principle. It represents one of the most important values underlying the European Convention of Human Rights. Its core elements, namely legality, equality before the law, access to a court, judicial independence and impartiality, and judicial safeguards[200] are fundamental for protecting all Convention rights. It derives that the Rule of Law can be understood as a constitutional principle of the Convention[201].

The ECtHR refers to the Rule of Law in its case-law concerning a large variety of issues, using it as an instrumental principle to define the framework of Conventional rights' application and add persuasive power to the Court's argumentation. Despite the absence of a formal and exhaustive definition of the principle, thanks to the Court's case-

[198] European Court of Human Rights, *Silver and Others v. United Kingdom,* App. no. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, Judgment of 25 March 1983, § 88.

[199] European Court of Human Rights, *Malone v United Kingdom*, § 68.

[200] S. Trechsel, 'Liberty and Security of Person', in R. St. J. Macdonald, F. Matscher and H. Petzold, *The European System for the Protection of Human Rights*, Dordrecht, 1993, p. 292.

[201] S. Greer, *The European Convention on Human Rights, Achievements, Problems and Prospects*, Cambridge, 2006, p. 201.

law it is possible to distill a core content of the Rule of Law. Such a nucleus is mainly based on the frequency and consistency of the argumentations linked to it and on its impact on the Convention rights scope.

In this regard, as well exemplified by the analyzed case-law, the influence of the Rule of Law on the Convention's interpretation has been most significant concerning the quality requirements of legality and judicial safeguards. Through its innovative approach to these values, the Strasbourg Court has broadened the scope and effectiveness of the right to a fair trial, developing a new dialectic based on the respect for the Rule of Law.

The Court's case-law has played a fundamental role in promoting and developing the Rule of Law's standards and principles within its Member States, identifying a 'broadly accepted core' of principles common to them all. In general terms, today, it is undoubted that the right of access to a court, the respect for final judicial rulings, and the demand for the execution of final judicial rulings are commonly accepted as elements of the Rule of Law.

From the overview of the Court's case-law related to the Rule of Law, it emerges that one of the main objectives of the Rule of Law's enforcement is the protection against arbitrariness[202]. In several judgments, the Court has explicitly linked this aspect to the Rule of Law principle, establishing that the cornerstone of ensuring respect for human rights under the Rule of Law lies in granting individual's protection from arbitrary power[203]. The Court's jurisprudence concerning the guarantees mentioned above takes a step in this direction. The Committee of Ministers in its report on the Rule of Law confirmed that 'all these Rule of Law requirements under the ECHR pursue an important objective: to avoid arbitrariness and offer individuals protection from arbitrariness, especially in the relations between the individual and the state'[204]

Undoubtedly, the success of such a potentially excellent tool necessarily implies the involvement of Member States in the promotion and protection of the Rule of Law, both at the international and national level, and depends on their reaction. Concurrently, it requires a strong commitment and an extensive interpretative work of the ECtHR, which

[202] See for instance *Malone v United Kingdom* in relation to Article 8 ECHR.
[203] E. STEINER, 'Rule of Law in Jurisprudence of the ECtHR', op. cit., p. 154.
[204] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, CM(2008)170

so far has been proved to be conducted very intensively. It derives that, at the international level, the most important achievement of the ECtHR has been the improvement of the Rule of Law values within national legal orders by promoting the implementation of additional safeguards to individuals for the protection of their rights against arbitrary interferences.

In conclusion, the intensive work conducted by the ECtHR on the Rule of Law principle represents a unique repository of standards and principles which, as we will see in-depth in the next chapter, represents the sources of the Venice Commission's work of identification of shared core content of the Rule of Law in Europe.

To complete the framework of standards used by the VC to define the European Rule of Law's content, alongside the European States and the Council of Europe, remains to analyze one last source: the European Union. Therefore, in the next paragraphs, we will focus on the Rule of Law principle in the EU, paying particular attention to its interpretation within the joint institutional efforts of the European Parliament, the European Commission, and the Court of Justice of the European Union.

IV. The Rule of Law Principle in the European Union

The Rule of Law represents a fundamental element of the European Union's legal order, effectively considered by the European Commission as 'the backbone of any modern constitutional democracies'[205].

Recently, the President of the Court of Justice of the European Union has described it as 'the only reliable bulwark against the arbitrary exercise of power and means, in essence, that any legal dispute must be resolved in accordance with – and only in accordance with – the applicable norms provided for by law'[206]. Applied within the EU framework, this 'means that neither the EU institutions nor the member States are above EU law'[207].

[205] European Commission, 'Communication to the European Parliament and Council. A new Framework to Strengthen the Rule of Law', p.1, COM(2014)0158.

[206] K. LENAERTS, 'Upholding the Rule of Law within the EU', Report of RECONNECT 2nd Conference, 5 July 2019, p. 20.

[207] *Ibid.*

Both in the Preamble[208] and Article 2[209] TEU, it is defined as a foundational value shared between the Union and its Member States. Furthermore, in Article 21 TEU[210], when defining the general provisions of the Union's external action, Rule of Law is mentioned as one of the principles which have inspired its creation, development, and enlargement.

As previously highlighted for the Council of Europe, in the European Union there is no unanimous definition of the Rule of Law[211]. Given the Community's economic and social policy's character, it has taken decades for the Rule of Law to acquire the status of

[208] PREAMBLE OF THE TREATY OF THE EUROPEAN UNION, '*DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the Rule of Law*' and '*CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the Rule of Law*'.

[209] TREATY OF THE EUROPEAN UNION, Article 2, '*The Union is founded on the values of respect of human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*'.

[210] TREATY OF THE EUROPEAN UNION, Article 21 '*1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the Rule of Law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organizations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations. 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; C 326/28 Official Journal of the European Union 26.10.2012 EN (b) consolidate and support democracy, the Rule of Law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance. 3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies. The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.*'

[211] S. CARRERA, E. GUILD and N. HERNANZ, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, Brussels, 2013, p. 18 ff.

an EU law's principle. Even though the Treaties of Rome did not contain any explicit reference to it, when establishing the Community, the Member States agreed on some of its fundamental elements, without which the integration process would not have been possible[212].

At the beginning of the 1960s, Walter Hallstein, trying to define a preliminary framework of adherence of the European Community to the Rule of Law principle, stated that it 'was not created by military power or political pressure but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the striving for hegemony and the play of alliances we have, for the first time, the Rule of Law. The European Community is a community of law because it serves to realize the idea of law'[213].

Undoubtedly, the use of the expression 'community of law' in that context, rather than signifying that the Member States of the Community were governed by and committed to the Rule of Law principle, aimed at emphasizing that the Community only disposed of legal power and not of means of coercion. However, as we will see in the next paragraph, Hallstein's conception is pivotal to the subsequent declaration of adherence to the Rule of Law principles of the European Community.

The Rule of Law principle was first explicitly mentioned within an EU legal instrument in the Conclusions of the European Council of Copenhagen in 1993 where the candidate countries for EU's membership were requested to be committed to 'stability of institutions guaranteeing democracy, the Rule of Law, human rights, respect for and protection of minorities'[214]. Only in 1997, with the Amsterdam Treaty[215], the principle was officially recognized as a genuine element of the EU's law, common to all the Member States.

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[212] TREATY OF ROME, 1957, art. 2.

[213] W. HALLSTEIN, 'Die EWG – Eine Rechtsgemeinschaft. Rede anlässich der Ehrenpromotion', University of Padua, 12 March 1962, in T. OPPERMANN AND W HALLSTEIN, *Europäische Reden*, Stuttgart,1979, pp. 343-344,

[214] EUROPEAN COUNCIL, *Conclusions of the Presidency*, 1993, SN 180/1/93 REV 1, p. 13.

[215] AMSTERDAM TREATY, 1997, art. F, '*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the Rule of Law, principles which are common to the Member States*'.

The recognition of the Rule of Law as an EU fundamental value coincides within the Europe's progressive transformation from an economic community to a community of law[216]. In this process, the CJEU's constitutional rhetoric played a fundamental role since the middle of the 1980s.

Whereas the process of recognizing the Rule of Law as an EU's funding value deeply affects the organization's understanding and implementation of the principle, the following paragraphs will be dedicated to its discovery within the EU legal system. The focus will be first on the CJEU's role in the identification and affirmation of the Rule of Law principle in Europe and on the contribution of EU institutions in its progressive crystallization within the EU legal system. After having established the Rule of Law's legal framework within the Eu, we will focus on its interpretation through the most relevant CJEU's case-law on the topic.

1. THE 'DISCOVERY' OF THE RULE OF LAW PRINCIPLE IN THE EU: THE ROLE OF THE CJEU

The absence of a formal definition of the Rule of Law and - at least since the Amsterdam Treaty – of an explicit provision referring to it as a principle shared among the Member States allowed, if not obliged, the CJEU to extrapolate it from the existing Treaty provisions.

The CJEU's pivotal contribution to the process of recognition of the Rule of Law as an EU fundamental value consisted of taking up Hallstein's concept of a 'Community based on law' and giving it - in the absence of an explicit provision - a constitutional base within the Treaties.

It is undoubted that through its case-law, the Court of Justice has consistently ensured the recognition and application of the Rule of Law values[217]. This work has been conducted through the affirmation and implementation of Rule of Law-related elements

[216]J.H.H. WEILER, 'The Transformation of Europe', 1991, *Yale Law Journal*, pp. 2403 ff.

[217] T. VON DANWITZ, 'Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the CJEU', in *Potchefstroom Electronic Law Journal*, Vol. 21, 2018, pp. 6-7.

as the principles of legality[218] and legal certainty[219], the protection of legitimate expectations[220], the principle of proportionality[221], the rights of defense[222], the right to be heard[223] and the right of access[224] within the EU.

Les Verts [225] represents a seminal decision, in which the Court, for the very first time, traced the way to the protection of the Rule of Law principle in the Community, officially accrediting the concept of European Union as a 'Community based on the rule of law'[226].

Reinterpreting the ECC Treaty provisions in a 'context of blatant judicial activism'[227], it had stated that 'the ECC Treaty, albeit concluded in the forms of an international agreement, nonetheless constitutes the constitutional charter of a Community based on

[218] See for instance: Judgment of 12 July 1957, *Algera et al. v Common Assembly*; Judgment of 22 March 1961, *Snupat v High Authority*; Judgment of 17 April 1997, *de Compte v Parliament*, C-90/95, § 35; Judgment of 24 January 2002, *Conserve Italia v Commission*, C-500/99, § 90; also see the Judgment of 7 January 2004, X, C-60/02, § 63; Judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, §§ 49-50.

[219] See for instance: Judgment of 9 July 1981, *Gondrand and Garancini*, 169/80, § 15; Judgment of 13 February 1996, *Van Es Douane Agenten*, C-143/93, § 27; Judgment of 14 April 2005, *Belgium v Commission*, C-110/03, § 30; Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, C-550/07 P, § 100.

[220] See for instance: Judgment of 12 July 1957, *Algera et al. v Common Assembly*; Judgment of 22 March 1961, *Snupat v High Authority*; Judgment of 13 July 1965, *Lemmerz-Werke v High Authority*; Judgment of 25 February 1969, *Klomp*, § 44; Judgment of 11 July 2002, *Marks & Spencer*, C-62/00, §§ 44-45; Judgment of 18 June 2013, *Schenker & Co. et al*., C-681/11, § 41; Judgment of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation*, C-362/12, §§ 44-45.

[221] See for instance: Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, § 12; Judgment of 29 April 1982, *Merkur Fleisch-Import*, § 12; Judgment of 17 May 1984, *Denkavit Nederland*, § 25; Judgment of 11 July 1989, *Schräder HS Kraftfutter*, § 2; Judgment of 8 July 2010, *Afton Chemical*, C-343/09, § 45; Judgment of 23 October 2012, *Nelson et al*., C-581/10 and C-629/10, § 71; Judgment of 22 January 2013, *Sky Österreich*, C-283/11, § 50.

[222] See for instance: Judgment of 4 July 1963, *Alvis v Council*, 32/62; Judgment of 24 October 1996, *Commission v Lisrestal et al*., C-32/95, § 21; Judgment of 21 September 2000, *Mediocurso v Commission*, C-462/98, § 36; Judgment of 18 December 2008, *Sopropé*, C-349/07, §§ 36-37; Judgment of 21 December 2011, *France vs. People's Mojahedin Organization of Iran*, C-27/09 §§ 65- 66; Judgment of 10 September 2013, *G. and R.*, C-383/13, § 32.

[223] See for instance: Judgment of 18 May 1982, *AM & S Europe v Commission*, 155/79, § 18; Judgment of 18 October 1989, *Orkem v Commission*, 374/87, § 32; Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, C-550/07, § 92.

[224] See for instance: Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, § 9; Judgment of 8 July 1999, *Hercules Chemicals v Commission*, C-51/92, § 75; Judgment of 15 October 2002, *Limburgse Vinyl Maatschappij et al. v Commission*, C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to C-252/99 and C-254/99 , § 315; Judgment of 7 January 2004, *Aalborg Portland et al. v Commission*, C-204/00 , C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00, § 68; Judgment of 1 July 2010, *Knauf Gips v Commission*, C-407/08, § 22.

[225] COURT OF JUSTICE OF THE EUROPEAN UNION, Case C-294/83, *Partie Ecologiste 'Les Verts' v. Parliament*, 1986.

[226] *Ibid*, § 23.

[227] L. PECH, 'A Union founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', in *European Constitutional Law Review*, issue 6, 2010, p. 370 ff.

the Rule of Law'[228]. Therefore, it is 'based on the Rule of Law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'[229].

The Court has used the Rule of Law principle without defining it, however, it undoubtedly considered it a positive value and one of the fundamental principles within the Community's constitutional framework. What emerges from this judgment is a peculiar understanding of the Rule of Law, interpreted as a 'complete set of legal remedies and procedures' with a dual purpose. In the first place, it aimed to ensure that Community institutions adopt measures in conformity with primary sources of Community law; in the second place, that natural and legal persons can challenge, directly or indirectly, the legality of any act affecting their Community rights and obligations[230].

Therefore, the reference to a Community based on the Rule of Law was directly intended to support establishing a complete system of remedies and procedures in the Community. Indeed, the Court's jurisdiction in the annulment actions was limited to actions brought against measures adopted by the Council and the Commission, but not by the Parliament. In the applicant's view, the French association *Parti écologiste 'Les Verts'*, such limitation was translated in a denial of justice. Thus, interpreting the Treaty in the name of the Rule of Law, the Court has exerted a 'constitutional gap-filling role'[231]. It has included among the actionable acts also those adopted by the Parliament with legal effects on third parties.

From the very first judgments of the Court of Justice in this field, two important insights for the examination of the role of the Rule of Law in the European Union emerge: on the one hand, the Court's conception is primarily focused on the Rule of Law within

[228] COURT OF JUSTICE OF THE EUROPEAN UNION, Case C-294/83, *Partie Ecologiste 'Les Verts' v. Parliament*, § 23.

[229] *Ibid*, § 23.

[230] L. PECH, 'A Union founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', in *European Constitutional Law Review*, op. cit., p. 371.

[231] L. PECH, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', *RECONNECT Working Paper No. 7*, March 2020.

the Union itself and not in the Member State, on the other, it restricts the content of the Rule of Law principle on the Union level to questions of adequate legal protection[232].

Therefore, the first understanding of the Rule of Law principle in CJEU's case-law can be described as legalistic and procedural, as it is closely related to the traditional principles of legality, judicial protection, and judicial review. It will take some time and more interpretative efforts from the judges sitting in Luxembourg to go beyond this formal aspect and affirm the substantive dimension of the Rule of Law, requiring the protection of substantive rights along with judicial remedies[233].

That said, the Court makes clear in its jurisprudence that the Rule of Law must be understood as one of the founding principles of the EU constitutional framework, upon which it relies to interpret the Treaties in a 'generous and dynamic' way, to 'ensure that the evolution in the powers and Community institutions does not undermine the Rule of Law and the institutional balance'[234].

Following *Les Verts* doctrine, in the middle of the 1980s, in the context of the CJEU's commitment to the constitutionalizing of Community law[235], the topic of the Rule of Law became part of the Court's strategy. The CJEU opened the way to recognizing the Rule of Law as a fundamental principle of EU's law through its inclusion in the Treaties[236].

2. The Rule of Law in the EU Legal Order: Legal Basis and Protection

After the first jurisprudential discovery of the Rule of Law principle in the EU legal order, it took seven years for the political institutions to recognize it in the Treaties

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[232] W. Schroeder, 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening', in *Strengthening the Rule of Law in Europe. from a common concept to mechanisms of implementation*, Oxford, 2016.

[233] In this respect, are worthy of note the CJEU's judgments on the Union's 'terror list' in which the Rule of Law principle is affirmed as a component of the Union's 'objective order of values' and, therefore, must be interpreted thorough 'fundamental rights' lenses'. See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351, para. 316.

[234] A.G. Jacobs, *UPA v.* Council, Opinion in Case C-50/00P, § 71.

[235] See J.H.H. Weiler, 'The Community System: The Dual Character of Supranationalism', in *Yearbook of European Law*, 1981, vol. 1, pp. 267-274; T. Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Communities', in *American Journal of Comparative Law*, pp. 229-231.

[236] Article 6 of the Amsterdam Treaty corresponds to the actual Article 2 TEU 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

explicitly. The first formal recognition of the principle can be traced back to 1993, when the European Council, meeting in Copenhagen, agreed that candidate states must have 'achieved stability of institutions guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities'[237]. This first inclusion of the Rule of Law in the EU legal discourse, initially referred only to the aspiring countries, appears to take for granted a minimum background of respect of such values in the organization.

This understanding has led to today's legal framework on the Rule of Law. The Treaty on the European Union[238] provides a 'tripartite structure' of the Rule of Law principle. First, it is described in the Preamble and Article 2 TEU as a shared value on which the Union is founded. Second, according to article 49 TEU, it represents a 'yardstick' the respect for and the promotion of which is a formal requirement for States' accession to the European Union[239]. Third, after the European Union accession, it maintains its relevance through the sanctioning procedure provided in Article 7 TEU against Member State whose conducts cause a clear risk of a serious breach of the Rule of Law.

Article 2 represents an explicit declaration of the EU's adherence to the values enshrined in the Rule of Law principle. For this purpose, it interprets it from a double viewpoint: an internal one, as one of the foundational values on which the EU is based, and an external one, as a value which is common to and shared among the member States. Therefore, according to the CJEU's interpretation, be a Union based on the Rule of Law means that 'individual parties have the right to challenge before the courts the legality of any decision or to other national measure relating to the application to them of an EU act' because 'the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the Rule of Law'[240].

Given the non-existence of an identical Rule of Law's conception among the EU Member States, the claim for its respect in the EU should be understood as the observation of a minimum standard. Undoubtedly, the definition of this minimum standard is not easy, mainly because, as we have seen in the previous paragraphs, Member States have

[237] EUROPEAN COUNCIL, Conclusions 21-22 June 1993, SN 180/1/93 REC 1, 13.

[238] It refers to the consolidated version of the Treaty on European Union approved on the 26 October 2012, C 326/13.

[239] TEU, art. 49, '*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union*'.

[240] Court of Justice of the European Union, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, 27 February 2018, §§ 31 and 36.

different conceptions of the content of fundamental constitutional principles. Besides, the Treaties do not contain specific provisions, and instead of defining the content of the Rule of Law principle, they tend to assume it[241].

Alongside the Court of Justice, which has played a unique role in the identification of the Rule of Law in the EU legal framework, the European Commission has sought to clarify its content by adopting its Communication of 11 March 2014 on '*A new EU Framework to strengthen the Rule of Law*'[242]. The novelty of the Commission's intervention– which also recalls the importance of the Rule of Law in the European Union legal framework – lies in acknowledging that the Rule of Law, to be effective in the Member States, may require further action of EU institutions. Therefore, while recognizing the Luxemburg Court's actual work, it admits that the need to establish a common content on the principle cannot be postponed anymore.

As recently highlighted by Groussot and Lindholm[243], the Rule of Law in the EU has predominantly been a political affair, originally related to the so-called 'Copenhagen criteria' within the new Member States admission processes and, more recently, involved in the fight against the progressive transition to illiberal democracies of some Member States. This last function represents the peculiarity of the Rule of Law principle in the EU legal order: it represents a yardstick and a 'plain stick', conformed into a legal compliance tool[244]. Therefore, as we will see in the following paragraph, the 'creative jurisprudence' of the CJEU on the principle must be anchored to a reliable and unitary conception of the Rule of Law. Consequently, the European Commission plays a central role in identifying the values and principles that make up the concept of the European Rule of Law.

The recent Rule of Law crisis within the EU has represented the drop that broke the camel's back. From the moment it became clear that the Rule of Law was under attack and its respect could no longer be taken for granted, the European institutions had to work

[241] This is different, for example, from the principle of democracy, which is deeply analyzed in article 10 TEU.

[242] EUROPEAN COMMISSION, '*Communication from the Commission to the European Parliament and the Council: a new EU Framework to strengthen the Rule of Law*', COM(2014)158 final.

[243] X. GROUSSOT, J. LINDHOLM, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union', in K. ZIEGLER ET AL, *Constructing Legal Orders in Europe: General Principles of EU Law*, 2019, *Lund University Legal Research Paper 1/2019*.

[244] T. KONSTADINIDES, *The Rule of Law in the European Union: the Internal Dimension*, Oxford, 2017, p. 169.

alongside the Court to find a common definition that could guarantee its respect by all the Member States.

Respect for the Rule of Law is a prerequisite for the accession to the EU and, consequently, for the protection of all the values listed in Article 2 TEU, including democracy and fundamental rights, for the effectiveness of EU law and the establishment of mutual trust between the Member States.

It follows that once they became Members of the European Union, all the States should be well designed and equipped to protect citizen's rights against any threats to the Rule of Law[245]. In theory, nothing to object to; however, in recent years, the EU has assisted in several crisis[246] in its Member States, which have proved that the Rule of Law's respect cannot be taken for granted anymore[247]. On the contrary, the European Union is now facing a unique historical moment. Some of its Member States are 'backsliding' into authoritarian and illiberal political regimes, and the EU institutions have been caught mostly unprepared to deal with such situations.

As emphasized by the CJEU, the EU is a legal ecosystem based on the premise that 'each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU'. Therefore, it implies and justifies 'the existence of mutual trust between the Member States that those values will be recognized and, that the law of the EU that implements them will be respected'[248]. It derives that the backsliding of one of the EU

[245] M. BONELLI, 'Carrots, sticks, and the rule of law: EU political conditionality before and after accession', in *Ianus – Diritto e Finanza – Rivista di studi giuridici*, 2017, p. 179, 'The system is based on the idea that once countries have achieved the standards required in the accession phase, there is no necessity of general oversight and there is a presumption that Member States respect the common values on the EU'.

[246] The maternity of the term 'rule of law crisis' belongs to Viviane Reding, former Vice-President of the European Commission who, during a speech at the Centre for European Policy Studies in Brussels on the 4th of September 2013, has defined it as 'any deficiencies in the independence, efficiency or quality of the justice system in another Member State'. During the speech, she has also suggested the promotion of the Rule of Law as a principle with a defined structure through the construction of a systematic mechanism for handling Rule of Law crisis within EU.

[247] K. L. SCHEPPELE, 'Enforcing Basic Principles of EU Law through Systemic Infringement Actions', in C. Closa and D. Kochenov, *Reinforcing Rule of Law Oversight in Europe*, Cambridge, 2016, p. 116 'Prospective Member States were required to run the gauntlet of the Copenhagen Criteria to be admit to the EU, but Treaties never adequately anticipated that commitments to the values in Article 2 of the Treaty of the European Union might be substantially weakened after a Member State gained entry. As a result, the Treaties have no mechanism for throwing out a state which persistently fails to respect the values of democracy, rule of law and human rights'.

[248] COURT OF JUSTICE OF THE EUROPEAN UNION, Opinion 2/13, 18 December 2014, § 168.

Member States affects and concerns all the other, threatening the stability of the entire Union.

Two evident examples of the ever-increasing Rule of Law backsliding in Europe are Hungary[249] before and Poland[250] right after which, since 2010, have progressively converted into authoritarian regimes creating, through the abuse of national sovereignty, serious threats to the Rule of Law[251]. Within these Member States, the safeguards placed to protect the Rule of Law, democracy, and fundamental rights are seriously under attack. Once in power, the majority has pursued a series of reforms to dismantle the checks and balances system and create an Executive's 'superpower'.

The main target of such reforms was the judiciary, whose independence was severely challenged and limited. As already highlighted in the previous section on the COE, judicial independence represents a core value of the Rule of Law in Europe. On this point, Zoll and Wortham have recently stated that 'for democracy and the Rule of Law to function and flourish, important actors in the justice system need sufficient independence from politicians in power to act under Rule of Law rather than political pressure'[252] .

Therefore, it is clear that - as emerged from a recent diagnosis of judicial networks in Europe - the EU's common legal system is at risk because the judiciary's independence

[249] For more information about the Rule of Law crisis in Hungary see: B. BUGARIČ, 'Protecting Democracy inside the EU. On article 7 TEU and the Hungarian Turn to Authoritarianism', in C. CLOSA AND D. KOCHENOV, *Reinforcing Rule of Law Oversight in the European* Union,Cambridge, 2016, p. 82 ff.; K.L. SCHEPPELE, 'Understanding Hungary's Constitutional Revolution', in A. VON BOGDANDY AND P. SONNEVEND, *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford, 2015; Z. SZENTE, 'Challenging the Basic Values – The Problems with the Rule of Law in Hungary and the EU's Failure to Tackle Them', in A. JAKAB AND D. KOCHENOV, *The Enforcement of EU Law and Value*s, Oxford, , 2017; K.L. SCHEPPELE, 'Constitutional Coups in EU Law', in M. ADAMS, A. MEEUSE AND E. HIRSCH BALLIN, *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, 2017.

[250] To learn more about the Rule of Law crisis in Poland see: T.T. KONCEWICZ, 'Of Institutions, Democracy, Constitutional Self-defence', 2016, vol. 53, *Common Market Law Review*, pp. 1753 ff; T.T. KONCEWICZ, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux', 2018, Issue 43, *Review of Central and East European Law*, pp. 116 ff.; W. SADURSKI, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', 2018, *Sydney Law School Research Paper*, No. 18/01; M. MATCZAK, 'Poland's Rule of Law Crisis: Some Thoughts', in *Hague Journal on the Rule of Law*, 2019, Vol. 11, pp. 407-410.

[251] D. KOCHENOV, P. BÁRD, 'Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement', *RECONNECT Working Papers*, No. 1, July 2018, p. 5.

[252] F. ZOLL AND L. WORTHAM, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland', in *Fordham International Law Journal*, Vol. 42, Issue 3, 2019, p. 876.

has been 'severely threatened, and the separation of powers between the executive branch and the judicial branch […] dismantled'[253] in many EU's Member States.

The reaction of the other EU Member States to such crises was not long in coming. Several international and national actors have asked the Commission to intervene as guardian of the Treaties to grant their respect by all the Member States of the European Union and avoid the dreaded 'progressive destruction of law by arbitrariness' which, if not counteracted effectively, would 'undermine the entire European project' [254].

A recent Commission's diagnosis has recognised the existence of a real threat to the Rule of Law within the EU. It stated that: 'While, in principle, all Member States are considered to respect the rule of law at all times, recent challenges to the rule of law in some Member States have shown that this cannot be taken for granted [...] Many recent cases with resonance at EU level have centred on the independence of the judicial process. Other examples have concerned weakened constitutional courts, an increasing use of executive ordinances, or repeated attacks from one branch of the state on another. More widely, high-level corruption and abuse of office are linked with situations where political power is seeking to override the rule of law, while attempts to diminish pluralism and weaken essential watchdogs such as civil society and independent media are warning signs for threats to the rule of law'[255].

As interpreted by some scholars, this stance of the Commission may represent a starting point to 'finally accepting that some countries are now led by authorities deliberately seeking to undermine the rule of law with the aim of deceitfully establishing electoral autocracies'[256].

Given the apparent risks deriving from the Rule of Law backsliding for the stability and integrity of the EU, it will be engaging in the following to analyze

[253] Letter to the President of the European Commission from the President of the Network of Presidents of the Supreme Courts of the EU; the President of the European Association of Judges; and the President of the European Network of Councils for the Judiciary, Brussels, 20 September 2019.

[254] L. PECH, D. KOCHENOV ET AL., 'Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid', *RECONNECT Policy Brief,* 14 July 2019, p. 1.

[255] EUROPEAN COMMISSION, *Strengthening the rule of law within the Union. A Blueprint for Action*, op. cit., pp. 1-2.

[256] L. PECH, D. KOCHENOV, B. GRABOWSKA-MOROZ AND J. GROGAN, 'The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism', *RECONNECT blog*, 4 September 2019.

the measure taken and those still in progress to overcome the issue within the European Union.

2.1 WORD TO THE TREATIES: ARTICLE 258 TFEU AND ARTICLE 7 TEU

According to the Treaties, the EU has two main options to address Rule of Law issues within its Member States: on one side, there is a political option, which may trigger the Article 7 TEU mechanism. On the other side, there is a legal option, which may trigger the infringement proceedings under Article 258 TFEU.

As a first remedy, the Commission, after careful consideration, decided to intervene by exerting political pressure and, where possible, with infringement proceedings[257].

This remedy, based on Articles 258 and 260 TFEU[258], despite the sceptical view of some scholars[259], has been frequently used by the Commission, since the beginning of the Rule of Law crisis, for addressing specific Rule of Law concerns in the EU Member States.

The European Commission can activate it in cases of failure by a Member State to fulfill an obligation under the Treaty and provides the Commission with the power to start a dialogue with the State concerned, delivering a reasoned opinion. At a later stage, if the State does not comply with the opinion by the term indicated, the Commission is empowered to bring the case before the Court of Justice.

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[257] In 2013 at the European Commission's *Assises de la* Justice conference, Kim Lane Scheppele proposed for the first time to use infringement proceedings in cases of systemic infringement of EU law. The proposal received much attention and was welcomed by the Commission, which has started using it as alternative mechanism to the 'nuclear option' of Article 7 TEU. Find more in: K. L. SCHEPPELE, 'Enforcing Basic Principles of EU Law through Systemic Infringement Actions', in C. CLOSA AND D. KOCHENOV, *Reinforcing Rule of Law Oversight in Europe*, Cambridge, 2016, pp. 105 ff.

[258] TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Article 258, 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'

[259] A. VON BOGDANDY AND M. IOANNIDIS, 'Systemic deficiency in the Rule of Law: What it is, what has been done, what can be done', 51 *Common Market Law Review*, 2014, p. 61, according to which this mechanism is 'far too case-specific'. Also in L. Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', op. cit., p. 19, the dialogue-based approach adopted by EU institutions is criticized as reflecting that 'In a situation where national authorities deliberately pursue the transformation of a democratic system based on the rule of law into a de facto autocratic regime, soft law and/or dialogue based instruments or mere monitoring tools will not help neither contain backsliding nor reverse the damage done to the rule of law'.

As an example, the European Court of Justice, based on an infringement proceeding triggered by the Commission against Hungary, had the opportunity to declare that a sudden reduction in the mandatory retirement age for judges and public prosecutors – which represents a clear threat to the Rule of Law principle – was incompatible with the Directive 2000/78/EC which prohibits discrimination at the workplace on the grounds of age. Even not expressively referring to the Rule of Law principle, the Court's judgment contributed to the restoration of the Rule of Law in Hungary by protecting the judiciary against unlawful national provisions attacking its position[260].

The systemic infringement procedure provides a mechanism for the Commission to act alongside the European Court of Justice to ensure that Member States that persistently and pervasively violate EU law fulfill their legal obligations provided by the Treaties[261]. Here lies the strength of this mechanism: the effectiveness of the infringement procedure largely depends on the Court's involvement, which maximizes the procedure's legitimacy by depoliticizing it and giving the decision immediate effect[262].

Indeed, this procedure has a great potential to tackle Rule of Law-related issues within the EU Member States. However, despite its potential, two other elements are fundamental for the success of this proceeding. On one side, it is necessary the engagement of the Court in recognizing the existence of a Rule of Law problem – what some commentators have effectively defined as the possibility to 'call a spade a spade'[263]. On the other hand, is required a full commitment of the European Commission to adopt legal rather than political solution when Rule of Law is at stake – according to some scholars, indeed, experience have proved that there is no reason to entertain lengthy political relations with governments not fulfilling the Rule of Law standards[264].

[260] EUROPEAN COURT OF JUSTICE, *Commission v Hungary*, case C-286/12, 6 November 2012.

[261] K. L. SCHEPPELE, 'Enforcing Basic Principles of EU Law through Systemic Infringement Actions', in C. CLOSA AND D. KOCHENOV, *Reinforcing Rule of Law Oversight in Europe*, Cambridge, 2016, pp. 131-132.

[262] M. SCHMIDT AND P. BOGDANOWICZ, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU', in *Common Market Law* Review, 2018, v. 55, pp. 1065-1066.

[263] A. ŚLEDZIŃSKA-SIMON AND P. BÁRD, 'The *Teleos* and the Anatomy of the Rule of Law in EU infringement procedures', in *Hague Journal on the Rule of Law*, 2019, p. 44.

[264] *Ibid*, p. 44.

If these infringement proceedings cannot be applied, the Commission has given some relevance to the preventive and sanctioning mechanism enshrined in Article 7 TEU[265]. It provides a special sanction mechanism for those Member States who fail in the respect of the fundamental values listed in Article 2 – including Rule of Law.

As almost unanimously recognized by the doctrine, the political rhetoric labelling Article 7 as a 'nuclear option' – definition coined by President Barroso – has misleadingly interpreted the provision as an exceptional and disruptive tool in the hands of the Commission[266]. More accurately, the Commission – downsizing its destructive potential

[265] TREATY ON THE EUROPEAN UNION, Article 7 '1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall consider the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council, and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

[266] For a more detailed analysis of the topic see: K. L. SCHEPPELE AND L. PECH, 'Is Article 7 Really the EU's 'Nuclear Option?', in *Verfassungsblog*, 6 March 2018; T. KONSTADINIDES, *The Rule of Law in the European Union: The Internal Dimension*, Oxford, 2017, pp. 141-145; D. KOCHENOV, *Busting the myths nuclear: A commentary on Article 7 TEU*, EUI Working Papers, 10/2017; L. BESSELINK, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in *Amsterdam Centre for European Law and Governance*, Research Paper no. 2016-01, 2016; B. BUGARIČ, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in C. CLOSA AND D. KOCHENOV (eds), *Reinforcing the Rule of Law Oversight in the European Union*, Cambridge, 2016, pp. 82 ff. ; D. KOCHENOV, L. PECH, 'Better Late Than Never?', in Journal of Common Market Studies, 2016, issue 24, p. 106; W. SADURSKI, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' in *Columbia Journal of European Law*, 2010, Issue 16, p 385.

- has recently described it as 'the most prominent mechanism for protecting all common values'[267], even if meant to be used only exceptionally.

The Treaty provision provides for two separate mechanisms: a preventive one (Art. 7(1) TEU), and a sanctioning one (Article 7(2), (3) and (4)) which may be activated by the European Commission, the European Parliament or one-third of the Member States in case of existence of a 'clear risk of a serious breach' of the values referred to in Article 2 TEU within a Member State.

Such determination opens the way to the so-called 'preventive mechanism', based on a dialogue between EU institutions, namely the Commission, and the concerned Member State. The preventive mechanism can be activated not only in areas covered by EU law, but also in areas belonging to Member States' autonomy, on condition that there is a 'clear risk of a serious breach' of the values referred to in Article 2 TEU.

In case of failure of this dialogue-based mechanism, paragraph 2 offers a more severe proceeding, defined as a 'sanctioning mechanism'. It provides that the European Council, acting by unanimity on a proposal by one-third of the Member States or the Commission, with the consent of the European Parliament and after inviting the Member State in question to submit its observations, may determine the existence of a 'serious and persistent breach' of the values referred to in Article 2 within the Member State concerned.

Following such determination, the Council, as a very last resort, may decide, acting by a qualified majority, to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights in the Council.

The sanctioning mechanism, provided in paragraph 3, can be activated in the presence of a 'serious and persistent breach': it requires an extreme scenario and only represents the last resort.

The 'political' nature of this mechanism, which distinguishes it from the institutional proceeding under Article 258 TFEU, emerges from two main factors: first, it can be activated by the European Council, which, being composed of the heads of states or

[267] European Commission, Communication on 'Further Strengthening the Rule of Law within the Union', 3 April 2019, p. 2.

government of all EU countries, is undoubtedly the most politically oriented EU institution; second, once triggered, it can lead to the political sanction of the suspension of voting rights of the State concerned within the Council.

As highlighted by some scholars, and as recently demonstrated by the situation in Poland, the two described mechanisms are not exclusive but, in case of severe failures of Treaty obligations, such as the serious threats to the Rule of Law, can act as parallel instruments of constitutional supervision for the Union[268]. Recently, the Court of Justice has implicitly confirmed that the same issue can be subject to both Article 7 and Article 258 procedures at the same time. The opinion has been supported by Advocate General Tanchev, according to whom 'Article 7 TEU and Article 258 TFEU are separate procedures which may be invoked at the same time'[269].

The Rule of Law's crisis[270] that has erupted during the last years was the litmus test of the above-mentioned measures' inefficiency of the. The Article 7 TEU and the infringement proceedings of art 258 TFEU mechanisms, indeed, have proved to be not always adequate measures to react to the threats to the Rule of Law, especially when severe and systemic. As noted by L. Pech, indeed, when 'national authorities deliberately pursue the transformation of a democratic system based of the rule of law into a *de facto* autocratic regime, soft law and dialogue-based instruments or mere monitoring tools will not help neither contain backsliding nor reverse the damage done to the rule of law'[271].

This explains why the Commission has decided to develop a set of instruments alternative to the so-called 'nuclear option' of Article 7 TEU and, at the same time, more robust than the 'soft power' of political persuasion[272].

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[268] M. SCHMIDT AND P. BOGDANOWICZ, 'The Infringement Procedure in the Rule of Law Crisis: How to make effective use of Article 258 TFEU', in *Common Market Law Review*, 2018, Vol. 55, p. 1063.

[269] A.G. TANCHEV, Opinion delivered on 11 April 2019 in Case C-619/18, § 50.

[270] At various stages and with different level of seriousness, Austria, Greece, Hungary, Poland, and other Member States had some issue regarding the protection of the Rule of Law in their national systems.

[271] L. PECH, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', *RECONNECT Working Paper No. 7*, March 2020, p. 19.

[272] In the State of Union 2012, the former President of the European Commission Barroso, in relation to the Rule of Law crisis in Europe, stated that: 'In recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check. But these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments – not just the alternative between the «soft power» of political persuasion and the «nuclear option» of article 7 of the Treaty'.

Starting from this point, several Member States and EU institutions[273] have paved the way to creating a collaborative and effective mechanism to tackle systemic Rule of Law threats and regularly assess Member States' compliance with the fundamental values of Article 2 TEU[274].

As a first response to the calls to act deriving from the Hungarian crisis, the Commission, in March 2014, issued its 'Communication introducing a new EU Framework to strengthen the Rule of Law'[275].

2.2 EU'S RULE OF LAW TOOLBOX: A NEW EU FRAMEWORK TO STRENGTHEN THE RULE OF LAW

Alongside the Treaty provisions, the European Commission has played a fundamental and meaningful role in monitoring the Rule of Law developments within the EU. The above-described arising challenges to the Rule of Law in some member States, indeed, has been progressively acknowledged as a most pressing issue to address, with an ever-increasing involvement of EU institutions[276]. This growing awareness of the threats deriving from the Rule of Law backsliding has resulted into a rapid evolution – certainly faster than the Treaty ones - of the EU's Rule of Law 'toolbox'[277].

The European Commission, through the Framework, has sought, first, to clarify the core meaning and scope of the EU Rule of Law. It did so by elaborating a detailed definition, consisting of a list of elements understood to be the core principles of the Rule of Law within the EU context, drawing them primarily by the CJEU's case law, but also, as explicitly recognized, by the ECtHR's case law and by the Venice Commission's work. In the European Commission's understanding, the Rule of Law includes:

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[273] COUNCIL OF THE EUROPEAN UNION, Justice and Home Affairs Council meeting, 6 and 7 June 2013.

[274] EUROPEAN PARLIAMENT, Resolution of 3 July 2013 about fundamental rights: standards and practices in Hungary; Resolution of 27 February 2014 on the situation of fundamental rights in the European Union; Resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law; Resolution of 2 April 2014 on the mid-term review of the Stockholm Program.

[275] EUROPEAN COMMISSION, '*Communication from the Commission to the European Parliament and the Council: a new EU Framework to strengthen the Rule of Law*', COM(2014)158 final.

[276] EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European Council, the European Economic and Social Committee and the Committee of Regions, Strengthening the rule of law within the Union. A Blueprint for Action*, COM/2019/343, 17 July 2019, p. 1.

[277] See https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf.

1. Legality, implying a transparent, accountable, democratic, and pluralistic process for enacting laws.
2. Legal certainty.
3. Prohibition of arbitrariness of the executive power.
4. Effective judicial protection by independent and impartial courts.
5. Effective judicial review, including respect for fundamental rights.
6. Separation of powers.
7. Equality before the law.

From a comparison with the benchmarks identified by the Venice Commission emerges a certain similarity in the content. According to L. Pech, 'the elements contained in the EU list are virtually identical to the elements listed by the Venice Commission. […] And while separation of powers is not explicitly mentioned as a core element of the rule of law by the Venice Commission, the Venice Commission did present judicial independence as being an integral part of the fundamental principle of the separation of powers'[278].

The Framework has a direct connection with Commission's powers in Article 7 TEU, and therefore is informally known as the 'pre-Article 7 procedure'[279]. According to the provisions, indeed, the Commission may present a proposal to trigger the preventive or sanctioning mechanisms provided in Article 7 TEU. The target must be in situations where legal measures such as the infringement procedures under Article 258 TFEU are not available, and the threshold of application of Article 7 TEU is not satisfied[280].

The purpose of the Framework is to enable the Commission to find a solution directly with the Member State concerned by the violation, to prevent the emerging of a systemic threat to the Rule of Law which could develop in that 'clear risk of a serious breach' capable of triggering the 'nuclear option' of Article 7 TEU.

The scope of the Framework, as expressively stated by the Commission, is to address threats to the Rule of Law which are of a 'systemic nature' regarding specifically: the

[278] L. PECH AND J. GROGAN, 'Meaning and scope of the EU Rule of Law', in *Reconnect Work Package 7*, 30 April 2020, p. 39.
[279] V. REDING, 'A new Rule of Law initiative', Speech at the European Parliament, 11 March 2014.
[280] K. TUORI, 'From Copenhagen to Venice', in C. CLOSA AND D. KOCHENOV, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, 2016, p. 236.

political, institutional, and legal order of a Member State, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review, including constitutional justice. Therefore, it will be activated only in cases where national authorities 'are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the Rule of Law'[281].

Once identified the clear indicators of a systemic threat to the Rule of Law in a Member State, according to the Framework, the Commission may start a dialogue with the concerned Member State, taking into account four guiding principles: focusing on finding a solution through dialogue with the Member State; ensuring an objective and thorough assessment of Member State; respecting the principle of equal treatment of Member States; and finally indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.

The process provided by the Framework develops in three progressive stages conducted by the Commission and directed to the concerned Member State.

The first stage consists of the 'Commission assessment', in which the Commission collects and analyses the relevant information and assesses whether the situation presents the 'clear indicators of a systemic threat to the rule of law'. In this phase, the Commission can always seek external opinions - for example, as we will see, from the Venice Commission, to better understand the situation and the existence of possible threats to the Rule of Law. If the European Commission considers that the case corresponds to a systemic threat to the Rule of Law, it must send a 'rule of law opinion' to express its concerns, giving the Member State the possibility to respond[282].

Second, the 'Commission recommendation', where, in the case of persistence of the situation, the Commission issues a 'rule of law recommendation' to the Member State, inviting it to solve the problems identified within a fixed time limit and inform the Commission of the steps taken to that effect[283].

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[281] EUROPEAN COMMISSION, '*Communication from the Commission to the European Parliament and the Council: a new EU Framework to strengthen the Rule of Law*', COM(2014)158 final, p. 7.

[282] EUROPEAN COMMISSION, '*Communication from the Commission to the European Parliament and the Council: a new EU Framework to strengthen the Rule of Law*', COM(2014)158 final, p.7.

[283] *Ibid*, p. 8.

Third, the 'Follow-up to the Commission recommendation', where the Commission monitors the Member State's response to its recommendation. If no satisfactory feedback is found within the limit set, the Commission, as a last resort, may consider triggering one of the mechanisms set out in Article 7 TEU[284].

Of course, unlike the Treaties provisions, this mechanism requires a high level of cooperation from the concerned Member States. As explained by the Commission in its Communication, indeed, it is expected that the State participate proactively in the process and refrain from adopting any irreversible measure about the issues of concern.

Undoubtedly, the Commission's Rule of Law Framework, being the first official document of the European Union focusing on the relevance of the principle, represents an important step for its operationalization towards the EU Member States. It presents some weaknesses, such as the fact that it makes the Rule of Law almost indistinguishable from the other fundamental values enshrined in Article 2 - democracy and human rights. However, it seems a convincing tool capable of granting a common interpretation and, possibly, a 'normativization' of the principle within EU law, establishing a legal basis for assessing Member States' compliance with the Rule of Law value[285].

Being a dialogue-based mechanism, it presents the strengths and the weaknesses of a 'political' tool in the hands of the Commission. As outlined above, it is placed halfway between the infringement proceedings and the Article 7 mechanisms, representing an interesting option for the State concerned to solve the situation before it degenerates into something more serious. Of course, this requires that the crisis be taken at an early stage when the State has not yet undertaken steps to generate that 'clear risk' under Article 7 TEU. Alongside this, it demands a certain level of engagement from the Member State and a clear intention to restore a situation of compliance with the Treaties[286].

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[284] *Ibid*, p. 9.

[285] A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, M. TABOROWSKI AND M. SCHMIDT, 'A potential constitutional moment for the European rule of law – The importance of red lines', in *Common Market Law Review*, 2018, Vol. 55, p. 986.

[286] As some commentators have highlighted, this last point represents one of the main weaknesses of all the dialogue-based instruments to resolve the Rule of Law crisis. Indeed, they argue that experience have proved that there is no reason to entertain lengthy political relations with governments not fulfilling Rule of Law standards, implicitly believing that such States would hardly satisfy non-imperative and non-binding requests. For a more detailed analysis see: A. ŚLEDZIŃSKA-SIMON AND P. BÁRD, 'The *Teleos* and the Anatomy of the Rule of Law in EU infringement procedures', in *Hague Journal on the Rule of Law*, 2019.

As admitted by the Commission in its Communication 'Further strengthening the Rule of Law within the Union', the Framework has been applied in one case so far and served its function of an intermediate step[287]. It helped establish a dialogue, detailed fact-finding, analysis and recommendations, and a knowledge base which has proved useful in further action from the Union. However, as it has explicitly recognized, some refinements could be necessary, such as deeper involvement of the Council and the European Parliament and a more precise timeline of the dialogue phase's duration.

Some scholars have defined it as a 'new, non-binding, pre-Article 7 procedure', thus highlighting its lower strength in fighting against backsliding on the Rule of Law among the EU Member States and the low degree of depth with which the issue has been only apparently resolved[288].

The Framework has been practically implemented so far only in one EU Member State: Poland. In the following, we will briefly reconstruct the process that led to its application and the results obtained with its implementation.

In 2015 the right-wing party Law and Justice won the elections. For two years, from 2015 to 2017, the Polish authorities have adopted more than 13 laws affecting the entire Polish justice system. Specifically, the reforms impacted the Constitutional Tribunal, the Supreme Court, the ordinary courts, the National Council for the Judiciary, the prosecution service, and the National School of Judiciary. The reform aimed to enable the executive and legislative branches to politically interfere with the composition, the powers, the administration, and the functioning of the judicial branch, thus undermining its independence and impartiality.

The new laws affected, among others, the procedures for judicial appointments, the disciplinary procedure for judges, and the structure of the Supreme Court. It introduced new retirement age for Supreme Court's judges, thus allowing those in power to dominate the selection of members of the National Council of the Judiciary, take control of the

[287] The Commission has activated the Framework for the first time in January 2016 in relation to Poland on two main grounds: on one side, the lack of compliance with binding rules of the Polish Constitutional Tribunal and, on the other, the adoption of measures by the Polish legislature to undermine its functioning.

[288] D. KOCHENOV, 'The EU and the Rule of Law – Naïveté or a Grand Design?', in M. Adams et al. *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, 2017.

disciplinary proceeding and, *de facto*, remove Supreme Court's judges who reached the newly established retirement age.

This situation attracted the Commission's attention. Considering the existence of the clear risk of a serious breach of the Rule of Law, it engaged a dialogue with Polish authorities. Therefore, applying for the first time the procedures provided in the Rule of Law Framework, in January 2016, the Commission opened a dialogue with the Polish authorities. Since then, the Commission has continuously attempted to work constructively with Poland with the European Parliament's consistent support[289].

After one formal Opinion and four formal Rule of Law Recommendations adopted on 27 July 2016, 21 December 2016, 27 July 2017, and 20 December 2017[290], the Commission, not having achieved through dialogue the desired result, has acknowledged that 'Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland. The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration, and functioning of the judicial branch'[291].

The seriousness of the situation left no other choice to the Commission than act, triggering for the first time, in December 2017, the Article 7 TEU mechanism and giving a time limit of three months to Polish authorities to solve the Rule of Law related issues[292]. According to L. Pech[293], this proved that the criticisms of the Framework – defined as a discursive strategy of methodically annihilating the Rule of Law[294] – were well-founded.

In parallel, on 2 July 2018, the Commission has launched an infringement procedure referring the Polish Government to the European Court of Justice for breach of EU law,

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[289] EUROPEAN PARLIAMENT, Resolution 13 April 2016, Resolution 14 September 2016 and Resolution 15 November 2017.

[290] These recommendations concerned mainly the situation involving the Constitutional Tribunal, as well as regulations concerning the ordinary courts, the Supreme Court, and the National Judicial Council. The Commission emphasized that the legitimacy of the Constitutional Tribunal is undermined and there is a lack in the Polish legal system of an independent control of the constitutionality of the law.

[291] EUROPEAN COMMISSION, *Rule of Law: European Commission acts to defend judicial independence in Poland*, IP/17/5367, 20 December 2017.

[292] For more information about Article 7 TEU proceeding against Poland see: M. TABOROWSKI, 'The European Commission launches Art. 7 TEU proceedings against Poland for breach of Rule of Law', in *Quaderni Costituzionali*, vol. 1, 2018, pp. 238-241.

[293] L. PECH, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', *RECONNECT Working Paper No. 7*, March 2020, p. 23.

[294] D. KOCHENOV AND L. PECH, 'Monitoring and Enforcement of the Rule of Law in the EU', op. cit., p. 532.

concerning the Law on the Supreme Court and, specifically, the retirement provisions and their impact on the Supreme Court's independence. Given the lack of cooperation from the State, on 24 September 2018, the case was referred to the Court of Justice of the EU, which delivered its final judgment on 24 June 2019[295]. As we will see in-depth in the following, the Court has found that lowering the retirement age of judges of the Supreme Court is contrary to EU law and breaches the principle of the irremovability of judges and, consequently, judicial independence, which forms part of the Rule of Law value affirmed and protected in Article 2 TEU.

2.3 No Pain no Gain: Budget's Rule of Law Conditionality

The persistent violation of the Rule of Law values and the ineffectiveness of the implemented measures have encouraged the European Commission's recent idea to strengthen the link between the EU funding and the respect for the Rule of Law.

To this end, on 3 May 2018, the Commission presented a proposal for a new regulation that would have introduced a general Rule of Law conditionality into the EU's financial rules[296]. The regulation charges the EU Commission to determine the existence of generalized deficiencies and establish countermeasures, notably, suspending EU financing. According to the proposal, as amended by the European Parliament, any Commission decision would be implemented only when not rejected or amended by Parliament and Council.

The instrument aims at tackling the situations where governments are interfering with the Rule of Law's implementation. However, it can only be used in an independent report on generalized Rule of Law's deficiencies risking affecting the EU budget.

However, on 26 November 2020 Poland and Hungary presented a joint declaration indicating their intention to block the ratification of the EU's new recovery fund if the other Member States would insist on including the Rule of Law budgetary mechanism[297].

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[295] Court of Justice of the European Union, *European Commission v Republic of Poland*, case C-619/18, Grand Chamber, 24 June 2019.

[296] European Commission, *Proposal for a regulation of the European Parliament and the Council on the protection of Union's budget in cases of generalized deficiencies as regards the rule of law in the Member States*, 3 May 2018, COM(2018)0324.

[297] Joint Declaration of the Prime Minister of Poland and the Prime Minister of Hungary, Budapest, 26 November 2020, at https://www.gov.pl/web/eu/joint-declaration-of-the-prime-minister-of-poland-and-the-prime-minister-of-hungary.

Despite the initial resistance, the European Council has reached, in its meeting of 10 and 11 December 2020, a unanimous agreement for the adoption of the main parts of the EU's post pandemic recovery plan[298]. This was made possible tanks to a mediation on the *Regulation on a general regime of conditionality for the protection of EU budget*, 'with a view to finding a mutually satisfactory solution and addressing the concerns expressed'.

In its Conclusions, the European Council has expressively stated that the mechanism will have to be proportionate to the impact of the breaches of the Rule of Law on the financial management of the Union budget. Moreover, to meet the needs of the Visegrad Group states, the Regulation will be applied in full respect of the Member State's national identities.

On 16 December 2020, the European Parliament approved the Regulation, which will be applied as of 1 January 2021. The procedure provides that the Commission, after establishing that Rule of Law has been breached, proposes the mechanism's triggering. The Council will then have one month to vote on the proposed measures by a qualified majority.

The unknowns are still numerous, however, the values at stake are of utmost importance. On one side, many Member States need EU's funding for the financing of the extraordinary measures requested by the COVID-19 pandemic crisis. On the other side, EU institutions and most Member States are aware that budget distress measures could be the last resort to induce the recalcitrant states to restore the Rule of Law. The question to which EU institutions and the Member States should answer before deciding which good weights the most on the scales is: can a drastic reduction in the Member State's budget, with evident consequences on its population, be the solution to the Rule of Law crisis in that state? The European Parliament has tried to mitigate the Regulation's consequences on the final beneficiaries, who count and depend on EU support, by introducing a complaint procedure which will ensure them the due amounts.

Moreover, since a clear definition of the Rule of Law principle within the EU is still lacking, the introduction of such conditionality could generate confusion on its practical implementation. As recently highlighted in the Rule of Law Report 2020, Rule of Law-

[298] EUROPEAN COUNCIL, *European Council meeting Conclusions*, 10 and 11 December 2020, EUCO 22/20.

related issues affect several EU Member States at different levels. Consequently, today Poland and Hungary are at the forefront in contrasting this measure because they are the mainly affected States, but tomorrow it could affect any of the 27, even the so-called 'mature democracies'. Therefore, the EU may find it difficult to determine the range of the measure's application without a clear definition of the Rule of Law to refer to. In its recent Law, the Parliament established that the mechanism would apply both to individual cases of EU funds' misuse and systemic breaches of fundamental values. We will see, in the following months, how this Regulation will be implemented in practice and to which extent it will manifest its effects.

In the context described so far, considering all the political and institutional measures at the disposal of the EU's Institutions to tackle Rule of Law crisis, it will be interesting to follow the next steps and identify the EU's response to the dismantling of its core values. In the meantime, we will conclude the EU's Rule of Law's legal framework's analysis with the European Commission's proposals for *Further possible actions*.

2.4 The Commission's Dialogical Approach: Further Possible Actions within the EU and the Rule of Law Report

After some years of close monitoring of the state of health of the Rule of Law within the EU, the first cases of practical application of the New Framework, the procedures under Article 7 TEU[299] and infringement proceedings, on 3 April 2019, the Commission published a Communication on 'Further Strengthening the Rule of Law within the Union'. The Communication, recalling the importance of the Rule of Law in the European Union, and considering successes and failures of the tools put into place so far, set out the three pillars of future action: promotion, prevention, and response.

While recognizing the efforts undertaken during the years in the fight against Rule of Law and democracy dismantle, the Commission has noticed that neither Article 7 TEU nor infringement proceedings and the Framework had proved to be conclusive.

The Rule of law is still under threat within the Union's Member States, and further efforts should be conducted to bring back its level of protection to the European standards on this topic. Therefore, the Commission has highlighted some common features which

[299] In addition to the Polish case, in September 2018 the European Parliament has initiated a procedure under Article 7 TEU against Hungary.

could inform future reflections on the state of play of the Rule of Law within the Union: 'First, there is a legitimate interest from both the EU and other Member States in the proper functioning of the Rule of Law in every Member State. Second, the primary responsibility to ensure the Rule of Law must lie on each Member State, and the first recourse should always be to national redress mechanisms, as not only the EU's but also national legal orders need to be respected. Third, the EU's role in this area must be objective and treat all Member States alike and must rest on the contribution of all its institutions in accordance with their respective institutional role. Finally, the objective must not be to impose a sanction but to find a solution that protects the Rule of Law, with cooperation and mutual support at the core.'[300]

Undoubtedly, this approach opens new possible avenues for the future of Rule of Law's protection in Europe, based on a common approach to the problem and promoting a robust political and legal culture of support of the principle within the Member States.

Strengthening the rule of law, indeed, cannot be limited to discussions about institutions, procedures, and mechanisms: a great effort must be directed towards building a social understanding of the rule of law. The Commission, through its 2019 Communication, unequivocally stated that compliance with this principle by public authorities has a direct impact on the lives of every European citizen in many ways. According to Koncewicz and Michalak, 'building this belief will put public authorities under strong pressure to respect the rule of law. If the public understands what this principle means in practice, all forms of its violation will be met with stronger resistance. Therefore, even though it seems to be a non-invasive measure, which can bring rather long-term benefits, it should not be ignored or marginalized. If we perceive violations of the rule of law as like running a red light, rather than a vague concept used by lawyers, we will be more sensitive to whether it is observed in practice or not.'[301]

The road traced by the Commission views the Rule of Law protection as both a national and supranational issue. In its *2020 Rule of Law Report* the Commission has highlighted that 'ensuring respect for the rule of law is a primary responsibility of each

[300] EUROPEAN COMMISSION, 'Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps', COM/2019/163 final, Chapter IV.

[301] T.T. KONCEWICZ AND M. MICHALAK, 'The EU's rule of law toolbox in the light of Europe's constitutional heritage: The Polish experience', in *Reconnect*, 27 November 2020.

Member State, but the Union has a shared stake and a role to play in resolving rule of law issues whenever they appear'[302]. Therefore, it has been stated that 'when there is a common approach, it is more straightforward to benchmark particular national systems and be confident that they are fit for purpose'[303].

Alongside the promotion, the Commission has identified prevention as a fundamental element of the EU's future action. In these regards, the Commission has highlighted the importance of giving Member States the necessary support to 'build a long-term approach which helps to ensure that national checks and balances are equal to the challenge and, ultimately, that the EU does not have to find itself in a situation where it has to address a Rule of Law crisis in a Member State.'[304].

Finally, the third feature identified by the Commission as fundamental in the further actions of the EU is the response: when national Rule of Law's safeguards do not seem able to resist against threats to the Rule of Law in a Member State, it is a shared responsibility of the EU and national institutions to remedy to the situation. Alongside the already existing mechanisms, though, the Commission has advanced the idea of strengthened consequences if a Member State refuses to remedy to the situation.

In the context of the Commission's promotion of a dialogical approach to Rule of Law's issues, the Political Guidelines of President von der Leyen[305] set out the intention to establish an additional and comprehensive Rule of Law's mechanism. This new mechanism aims at promoting the Rule of Law and improving understanding and awareness in areas that directly impact on the respect for the principle.

The approach is based on a close dialogue with national authorities and stakeholders, such as the Venice Commission, to bring transparency and cover all the Member States on an objective and impartial basis. The analysis' results are brought together each year

[302] EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, op. cit., p. 2.

[303] EUROPEAN COMMISSION, 'Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps', p. 11.

[304] *Ibid*, p. 12.

[305] U. VON DER LEYEN, 'A Union that Strives for More. My agenda for Europe', *Political Guidelines for the Next European Commission 2019-2024*, at https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

in a Rule of Law report, including a general overview and a State-by-State assessment in 27 country chapters.

As explicitly stated by the Commission in its 2020 Communication, the 'rule of law mechanism frames the Commission's support to the Member States and national stakeholders in addressing the Rule of Law challenges'[306]. It represents an element of a broader endeavour at the EU level to strengthen the values of democracy, equality, and respect for human rights, including the rights of persons belonging to minorities.

The Commission released the first Rule of Law Report in September 2020. The document aims to 'set out first key elements of the situation in the Member States, on which the new cycle of the rule of law mechanism and future reports will be able to build'[307].

The assessment is not limited to Rule of Law-related issues in the narrow sense but also covers aspects that have a direct bearing on the Rule of Law. It refers to all the 27 Member States and focuses on four main pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances.

According to the Commission, effective justice systems are essential to protect the Rule of Law. Regardless of the legal systems' national model, independence, quality, and efficiency are the defined parameters of an effective judicial system. The Commission has noted that despite the Member States' efforts to enhance judicial independence, it remains an issue of concern for the EU. Hungary and Poland are certainly the States that raise the more serious concerns about the capacity of councils for the judiciary to exercise their function, and the increasing influence of the executive and legislative branch over the functioning of the justice system.

At the same time, the fight against corruption is essential for maintaining the Rule of Law. In the Commission's understanding, 'corruption undermines the functioning of the state and of the public authorities at all levels and is a key enabler of organised crime'[308].

[306] EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, op.cit., p. 3.
[307] *Ibid.*, p. 4.
[308] *Ibid.*, p. 12.

Therefore, an effective anti-corruption system can strengthen national legal systems and trust in public authorities.

Media pluralism and freedom are critical enablers of the Rule of Law, democratic accountability, and the fight against corruption. The Report focuses on some fundamental elements of media freedom and pluralism affecting the Rule of Law, such as the independence of the media regulatory authorities, transparency of media ownership, state advertising, the journalists' safety, and access to information. The Commission has highlighted that even though media authorities' independence and competence are established by law in all the Member States, 'some concerns have been raised regarding the risk of politicization of the authority, for instance in Hungary, Malta and Poland'[309].

Finally, the Report refers to institutional checks and balances to guarantee the functioning, cooperation, and mutual control of State organs so that power is exercised by one state authority with other's scrutiny. According to the Commission, 'in addition to an effective justice system, checks and balances rely on a transparent, accountable, democratic, and pluralistic process for enacting laws, the separation of powers, the constitutional judicial review of laws, a transparent, high-quality public administration as well as effective independent authorities such as ombudsperson institutions or national human rights institutions'[310].

The Report focuses on some fundamental elements relevant to the Rule of Law's implementation, such as the process for preparing and enacting laws, the use of fast-track and emergency procedures, and the regime for the constitutional review of laws. The Commission has observed that in some Member States, 'the repeated recurse to fast-track legislation in Parliament or emergency ordinances from the government has given rise to concerns, especially when applied in the context of broad reforms affecting fundamental rights or the functioning of key State organs such as the judicial system or the Constitutional Court.'[311]. In such cases, indeed, there is a risk of adopting laws that puts fundamental rights, democracy, and the Rule of Law under threat. Poland, with its reform process primarily conducted through expedited procedures, and Romania, through the

[309] *Ibid.* p. 18.
[310] *Ibid.* p. 20.
[311] *Ibid.* p. 22.

widespread use of government emergency ordinances in crucial areas, are examples of a lack of checks and balances in the legislative process.

As remarked by the European Commission, the first Rule of Law Report results from a new dialogue between the Commission and the Member States, feeding into the country-specific analysis for all the Member States[312]. It indeed represents a step forward in strengthening and implementing a common understanding of the Rule of Law within the EU.

Interestingly, from the Report emerges that many Member States in the EU have high rule of law standards and are globally recognized as providing best practices in applying the fundamental principles of the Rule of Law. Nevertheless, it also finds important challenges, that need the further engagement of the Member States and EU institutions.

The choice to involve all the 27 Member State in the accurate analysis of strengths and weaknesses in the Rule of Law's implementation is undoubtedly new and positive, and the results are, in some cases, unexpected. From the analysis of the country-chapters, indeed, it emerges that well-established democracies can have Rule of Law-related issues and, on the contrary, that states under observation for systemic breaches to the Rule of Law can put in place positive measures[313]. Certainly, this circumstance will have to be taken into consideration, as mentioned above, when choosing the criteria to link EU's budget to the Rule of Law's compliance.

Generally, commentators have positively welcomed the monitoring mechanism, highlighting its potential to facilitate and optimize the constitutional tools that the EU uses to intervene in the Rule of Law crisis[314]. Nevertheless, some authors have criticized it as 'too little, too late' because it ensures prevention but does not provide for sanctions[315]. While this represents a legitimate concern about the general EU's action on the Rule of Law, it seems to miss the point that the document was created with a

[312] *Ibid.* p. 26.

[313] S. PRIEBUS, 'Too Little, Too Late. The Commission's New Annual Rule of Law Report and the Rule of Law Backsliding in Hungary and Poland', in *Verfassungsblog,* 2 October 2020.

[314] V. POULA AND E. HOWART, 'The European Commission's Rule of Law Report: a key tile in the mosaic of rule of law protection in the EU', at https://europeanlawblog.eu/2020/10/22/the-european-commissions-rule-of-law-report-a-key-tile-in-the-mosaic-of-rule-of-law-protection-in-the-eu/, 22 October 2020.

[315] S. PRIEBUS, 'Too Little, Too Late. The Commission's New Annual Rule of Law Report and the Rule of Law Backsliding in Hungary and Poland', op. cit.

monitoring objective. Therefore, its purpose is not to replace the already existing Treaty-based mechanism, but to respond to the need of improving understanding and awareness of the Rule of Law.

One of the main features of the Report is the establishment of a permanent and regular dialogue on the Rule of Law among the EU's Member States, pursuing the goal to 'instil a real rule of law culture across the European Union and trigger a genuine debate at national and EU level'[316].

After having analyzed the Rule of Law's legal framework and its implementation by the European Parliament and the European Commission, we will now focus on its interpretation by the CJEU.

3. THE RULE OF LAW PRINCIPLE IN THE CJEU'S CASE-LAW

Since its ruling in 1986 on case *Les Verts*, in which the Court of Justice has essentially connected the Rule of Law with the 'traditional and interrelated legal principles of legality, judicial protection and judicial review, principles which are inherent to all modern and democratic legal systems'[317], several other judgments have implemented and clarified their scope as components of the Rule of Law.

After being a pioneer in discovering and applying the Rule of Law principle in the European legal order, the CJEU returned in recent years, following the Rule of Law crisis in Europe, to play a fundamental role in identifying and implementing the principle.

Through an emerging case-law, the Court has developed the 'judicial applicability' of EU law's general principles to uphold concepts like judicial independence and the right to a fair trial as cornerstones of the Rule of Law principle[318]. As highlighted by the European Commission in 2019, the 'recent case law of the Court of Justice of the

[316] D. REYNDERS, Commissioner for Justice and Consumer, at https://www.scottishlegal.com/article/european-commission-publishes-first-eu-wide-rule-of-law-report.

[317] L. PECH, 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working paper 04/09, p. 16.

[318] S. CARRERA, V. MITSILEGAS, 'Upholding the Rule of Law by Scrutinising Judicial Independence. The Irish Court's request for a preliminary ruling on the European Arrest Warrant', in *CEPS Commentary*, 11 April 2018.

European Union has made an indispensable contribution to strengthening the rule of law, reaffirming the Union as a community of values'[319].

Some scholars[320] argue that the Court, dealing with a context of lack of action of the other EU institutions, had no choice but act and address, through what has been described as 'existential jurisprudence'[321], the issue of the Rule of Law backsliding.

In this process, Article 2 TEU, on one side, has played a fundamental role as 'parameter' of the definition of judicial enforcement of EU values in the Rule of Law crisis, becoming the justiciable hard-core of the EU law. Article 19 TEU, on the other side, has served as the 'jurisdictional trigger' of the values enshrined in Article 2, offering a 'rescue path' for the warranty of effective judicial protection by independent courts within the EU[322]. Therefore, judicial independence has become instrumental for the affirmation, at the jurisprudential level, of the Rule of Law within the EU.

In the following paragraphs, we will focus on the CJEU's case-law establishing a connection between the protection of judicial independence and the compliance with the Rule of Law principle. To outline the path followed by the Court, we will analyze some of the landmark cases in the delineation of the Rule of Law principle within EU legal order.

3.1 Effectiveness of EU Law and the Rule of Law: The Bialowieska Forest Case

One of the first cases in which the CJEU had the chance to clarify the scope of the Rule of Law principle enshrined in Article 2 TEU was the order of interim measures in the *Bialowieska Forest* case[323]. It concerns the preservation of the Bialowieska forest from a deforestation program approved by the Polish environmental minister. The European Commission, taking a stand against the operation, decided to bring proceedings under Article 258 TFEU for infringement of Articles 6 and 12 of the Habitats Directive

[319] European Commission, *Communication Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps,* op.cit., pp. 1-2.

[320] See D. Kochenov, A. Magen, and L. Pech, 'The Great Rule of Law Debate in the EU', *Journal of Common Market Studies*, 2016, Issue 54, pp. 1043-1259.

[321] T. Koncewicz, 'The Existential Jurisprudence of the Court of Justice Moving Beyond the Boats, Embracing the Journey', August 8, 2019, RECONNECT https://reconnect-europe.eu/blog/existential-jurisprudence-koncewicz/.

[322] L. Pech, J. Grogan et Al., 'Meaning and Scope of the EU Rule of Law', op. cit., p. 19.

[323] CJEU, *Order of 27 July 2017*, in Case C-441/17 R, *Commission v. Poland*, EU:C:2017:622.

and Articles 4 and 5 of the Birds Directive. Given the urgency of the situation, it also requested interim relief under Article 279 TFEU.

With an Order of 27 July 2017[324], the CJEU provisionally intimated the Polish authorities to interrupt the operations. At their refusal, the Commission upped the stakes by requiring a penalty payment as long as the Polish authorities had complied with the interim measures. Poland reacted to the Commission's request by asking for the interim relief assignment to the Grand Chamber of the Court. Despite its unusualness, due to the importance of the case, the request was accepted.

In the interim proceeding under Article 279 TFEU the CJEU confirmed the provisional order to cease the logging and, unexpectedly, coupled the cessation order with a penalty payment[325].

The measure undertaken by the Court is unprecedented. Indeed, the most relevant issue raised by the case concerns whether the Court was empowered to impose a pecuniary sanction under Article 279 TFEU. Giving an innovative and extensive interpretation of the provision, the Court has highlighted the need to guarantee the final decision's effectiveness in the main proceedings[326]. From a purely formalistic perspective, it is undoubted that the provision's wording seems to offer support for the Court's interpretation, entitling it to prescribe 'any necessary interim measures'[327]. In the Court's view, such a broad description – broader than Article 278 TFEU, which provides for the suspension of the contested act – may include any 'ancillary measure', comprised of sanctions to enforce an interim relief[328]. According to some commentators, 'the judgment in *Polish Forest* has given Article 279 TFEU new teeth and turned it into a carnivore that must be respected'[329].

For the present research, it is interesting the purpose identified by the Court for imposing the penalty payment for non-compliance with interim measures. In the Court's reasoning, indeed, the measure has been taken 'to guarantee the effective application of

[324] CJEU, *Order of 27 July 2017*, in Case C-441/17 R, *Commission v. Poland*, EU:C:2017:622.
[325] *Ibid*., §§ 94-108.
[326] *Ibid*, §§ 100-102.
[327] TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Article 279, 'The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.'.
[328] CJEU, *Order of 27 July 2017*, §§ 99-100.
[329] P. WENNERÅS, 'Saving a forest and the rule of law: Commission v. Poland', in *Common Market Law Review*, 2019, Vol. 56, p. 553.

EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'[330].

For the first time, in *Bialowieska forest* case, the Court has linked the effective application of EU law to the Rule of Law principle, defining it as an 'essential component'. Until then, as argued by Wennerås, the Rule of Law was 'a modestly interesting principle of EU law' which 'primarily served to explain why legal acts must be amenable to review'. Then, after the Rule of law Backsliding in Hungary and Poland, 'Article 2 TEU confused the concept of rule of law by referring to it as a value rather than a principle, and everyone started biting their nails in anticipation of learning whether the rule of law involved justiciable obligations'[331]. The present case, alongside the *Associação Sindical dos Juízes Portugueses* case – that will be analyzed in-depth in the next paragraph – transforms the Rule of Law value into an obligation, even concluding that effective judicial review is the essence of the Rule of Law[332].

The *Bialowieska Forest* case presents a double interpretation of the issue of the effective application of EU law. The first aspect concerns the substantive fact that without the threat of a sanction, the EU directives on Habitat and Birds would have been infringed. The second aspect concerns the institutional sense: if a Member State can violate an order for interim relief without any consequences, there would be a leak in the enforcement of CJEU's decisions. This binary conception of the practical application of EU law represents the reason beyond the Court's statement that ensuring the effective implementation of EU law through sanctioning measures constitutes an essential element of the Rule of Law. Therefore, it can be said that the Court's interpretation of Article 279 was necessary to ensure effective application of substantive EU law and to protect its institutional role.

In the next paragraph, we will see that the Rule of Law reasoning developed in *Bialowieska Forest* will be applied by the Court to the Case *Associação Sindical dos Juízes Portugueses* to enlist national courts as guardians of the Rule of Law principle within the EU.

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[330] *Ibid*. § 102.

[331] P. WENNERÅS, 'Saving a forest and the rule of law: Commission v. Poland', *op. cit.*, pp. 554-555.

[332] COURT OF JUSTICE OF THE EUROPEAN UNION, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, 27 February 2018, § 36.

3.2 JUDICIAL INDEPENDENCE AND ARTICLE 2 TEU: THE *ASSOCIAÇÃO SINDICAL DOS JUÍZES PORTUGUESES* CASE

The case *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*[333] represents a milestone in identifying and promoting the Rule of Law principle in the CJEU case-law. Although it appears as a rather unspectacular salary-related issue, the case gave the Court the chance to ground in the Treaties the Member States' obligation to guarantee the judicial independence of the national judiciary, regardless of the existence of a specific reference within the EU law.

The case concerned a temporary remuneration's reduction and the modification of the reversibility conditions, among others, of the judges of the Tribunal of the Contas. These measures were adopted according to the policy aimed at reducing Portuguese state's deficit in application to budgetary indications issued by the EU.

The referring court asked the CJEU whether the principle of judicial independence stated in Article 19 TEU and Article 47 of the European Charter of Fundamental Rights must be interpreted as precluding salary reduction measures such as those applied to the judiciary in Portugal.

In response, the CJEU ruled that the principle of judicial independence does not preclude such measures. Indeed, since the reduction was temporary and generally addressed to all the public sector employees, it could not have affected the independence of the judges.

Nonetheless, through its reasoning, the Court took the chance to develop the Rule of Law's notion and its understanding within the Treaties, creating an unbreakable connection between the right to effective legal protection and the right to an effective remedy and the Rule of Law[334].

In the Court's interpretation, Article 19 TEU 'gives concrete expression to the value of the rule of law stated in Article 2 TEU and entrusts the responsibility for ensuring

[333] COURT OF JUSTICE OF THE EUROPEAN UNION, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, 27 February 2018.

[334] K. LENAERTS, 'Upholding the Rule of Law through Judicial Dialogue', in *Yearbook of European Law*, Vol 0, no. 0, 2019, pp. 1-15.

judicial review in the EU legal order'[335]. In few words, this means that while the EU may not have any legislative competence regarding the national judiciary's organization, no internal reform can undermine the principle of judicial independence enshrined in Article 19 TEU[336].

It has also emphasized that 'the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'[337]. This recourse to the EU founding values opened the way to the Article 2 TEU's judicial applicability, albeit refusing a 'self-application' of it and opting for a combined approach[338] (in this case with Article 19 TEU).

The reasoning adopted by the Court, going beyond the 'age discrimination argument', represents a cornerstone in removing any doubt over the assumption that national measures undermining the independence of national courts which may hear questions of EU law may directly be challenged based on Article 19 TEU[339].

The judgment is remarkable for at least two reasons; on the one hand it represents an expansion of Article 19 TEU, creating the basis for a future interpretation of it as a 'stand-alone principle' on which rely when building infringement actions aimed at tackling violations of the principle of effective judicial protection[340]. Moreover, when defining the scope of article 19 TEU, the Court ruled that this provision is applicable independently of a situation in which the Member States are implementing Union law in the meaning of Article 51 of the Charter. Hence, the Court clarified that the principle of judicial independence enshrined in Article 19 TEU is not only referred to the situation in which Union law is *in concreto* involved but stretches to all national jurisdictions which might

[335] COURT OF JUSTICE OF THE EUROPEAN UNION, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, 27 February 2018, § 32.

[336] R. D. KELEMEN AND L. PECH, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', in *Cambridge Yearbook of European Legal Studies*, 2019, pp. 14-15.

[337] *Ibid*, § 36.

[338] L. D. SPIEKER, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis', in *German Law Journal*, 2019, Vol. 20, Issue 8, p. 1205.

[339] L. PECH, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', *RECONNECT Working Paper No. 7*, March 2020, pp. 28-29.

[340] See C.N. KAKOURIS, 'La Cour de Justice des Communautès europeèennes comme cour constitutionelle: trois observations', in O. Due, M. Lutter, J. Swarze (edited by), *Festschrift für Ulrich* Everling, 1995, p. 629, on the untapped remedial potential of Article 19(1) TEU.

be confronted with cases related to its application[341]. This interpretation, going beyond the specific case, seems noteworthy for the fact that, according to the Court's reasoning, any disrespect of the guarantees of judicial independence must be considered as an infringement of Article 19 TEU whenever a national judicial body in question is involved in a situation in which Union law is implemented[342]. Using Article 19 TEU, the CJEU created a new sphere of EU law application to domestic judicial organization, liberating itself from the constraints allowing it to make only discrete, incremental changes to national procedural laws or judicial systems[343].

On the other hand, through making a firm reference to Article 2 TEU, the Court confirms the tendency – started with the order for interim measures against Poland in the *Białowieska forest case*[344] – to affirm that Rule of Law and value-related issues cannot be limited to situations covered by EU law.

Indeed, this case openly reflects that Hallstein's formula characterizing the European Union as a community based on the Rule of Law and the repeated recognition of the EU common values are much more than abstract references with no practical importance. With this judgment, the Court of Justice has opened the door of a 'brave new world'[345], giving life to the founding values of the Union and applying them on a case-by-case basis through the disputes brought under its lenses. In doing so, the Court not only reminds the Member States of the core values accepted for the access to the Union but also clarifies the core meaning and content of the Rule of Law principle.

As highlighted by some scholars, the Court's new impulse to uphold the Rule of Law via rigorous monitoring of the general principles of EU law, has allowed Article 2 TEU

[341] COURT OF JUSTICE OF THE EUROPEAN UNION, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, § 39.

[342] T. VON DANWITZ, 'Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the CJEU', in *Potchefstroom Electronic Law Journal*, Vol. 21, 2018, p. 14.

[343] M. BONELLI AND M. CLAES., 'Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary', in *European Constitutional Law Review*, Vol 14, 2018, pp. 641 ff.

[344] COURT OF JUSTICE OF THE EUROPEAN UNION, *European Commission v Republic of Poland*, case C-441/17, 20 November 2017, § 102 'The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'. In this case the Court has justified the imposition of a fine on Poland in interim proceedings as a means to guarantee the effective application of Rule of Law principles in the Country.

[345] L. PECH, J. GROGAN ET AL., 'Meaning and Scope of the EU Rule of Law', op. cit., p. 20.

to 'take a shape as a relevant normative utensil in the Court of Justice toolbox'[346], finally giving to the Rule of Law a unitary meaning for all the EU's Member States.

3.3 Right to a Fair Trial and Mutual Trust: The *LM* case

In the recent *LM* case[347], the Court of Justice has followed the trail opened with the *Associação Sindical dos Juízes Portugueses* judgment, further deepening the engagement for upholding the Rule of Law within the European Union. It also confirms the approach adopted by the Court concerning Article 2 TEU, reaffirming, although from a different perspective, that the premises of Member States' compliance with the values enshrined in Article 2 TEU is not absolute and, therefore, that 'mutual trust is not blind trust'[348].

The issue concerned a case of extradition of a Polish crime suspect from Ireland to Poland. The Irish executing judicial authority had serious doubts about whether the suspect would have received a fair trial in the recipient State, because of the lack of judicial independence following the Polish judiciary reforms[349].

Specifically, Irish High Court Justice Aileen Donnelly stayed the extradition of Mr. Celmer, a Polish national accused of drug trafficking, questioning whether the independence of the Polish judiciary had so deteriorated that it threatened the mutual trust and recognition among EU jurisdictions upon which the European arrest warrant system rests[350]. Hence, she requested a preliminary ruling under Article 267 TFEU, which

[346] D. Sarmiento, 'Provisional (And Extraordinary) Measures in the Name of the Rule of Law', in *Verfassungsblog*, 24 November 2017.

[347] Court of Justice of the European Union, *PPU – Minister for Justice and Equality v LM*, case C-216/18, Grand Chamber, 25 July 2018.

[348] K. Lenaerts, 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', in *Common Market Law Review*, 2017, Issue 3, pp. 805-840.

[349] Court of Justice of the European Union, *PPU – Minister for Justice and Equality v LM*, case C-216/18, Grand Chamber, 25 July 2018, § 24, 'The referring court is uncertain whether, where the executing judicial authority has found that the common value of the rule of law enshrined in Article 2 TEU has been breached by the issuing Member State and that that systemic breach of the rule of law constitutes, by its nature, a fundamental defect in the system of justice, the requirement to assess, specifically and precisely, in accordance with the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), whether there are substantial grounds to believe that the individual concerned will be exposed to a risk of breach of his right to a fair trial, as enshrined in Article 6 of the ECHR, is still applicable, or whether, in such circumstances, the view may readily be taken that no specific guarantee as to a fair trial for that individual could ever be given by an issuing authority, given the systemic nature of the breach of the Rule of Law, so that the executing judicial authority cannot be required to establish that such grounds exist.'

permits a Member State court to ask the CJEU an interpretation of EU Treaties when such clarification is needed to decide in the national court.

Justice Donnelly's ruling referred to the European Commission reasoned proposal triggering Article 7 TEU and the Venice Commission's opinions on the Polish legal reform, to state that the Republic of Poland undertook the legislative measures, 'taken as a whole, breach the common value of the Rule of Law referred to in Article 2 TEU'. Therefore, it concluded that there was a 'real risk of the respondent in the main proceedings not receiving a fair trial in Poland, because the independence of the judiciary is no longer guaranteed there and compliance with the Polish Constitution is no longer ensured'[351].

The case brings into play two fundamental principles of the EU: On one side, the principle of mutual trust among its Member States, which represents a fundamental value of the European Union, and, on the other side, the protection of those fundamental values enshrined in Article 2 TEU.

Following the principle of mutual trust, indeed, Ireland should have taken for granted the respect of the fair trial by the Polish authorities. However, the judiciary's well-known situation in Poland and the systemic breaches of the Rule of Law in the Country represented the basis for a request of a preliminary ruling under Article 267 TFEU before the Court of Justice.

On 28 June 2018, Advocate General Tanchev delivered its opinion, ruling that, to deny the extradition, a court must find a real risk of a flagrant denial of justice to the specific individual involved on account of deficiencies in the justice system of the Member State requesting the extradition[352].

On 25 July 2018, the Grand Chamber of the CJEU handed down its decision. It acknowledged the Irish court's awareness of 'material such as that set out in the reasoned

[351] OPINION OF THE ADVOCATE GENERAL TANCHEV, delivered on 28 June 2018, Case C-216/18 PPU, *Minister of Justice and Equality V. LM*, § 23.

[352] OPINION OF THE ADVOCATE GENERAL TANCHEV, delivered on 28 June 2018, Case C-216/18 PPU, *Minister of Justice and Equality V. LM*, §§ 69 ff. In its opinion the Advocate General explicitly refers to the ECtHR case law on fair trial quoting its jurisprudence on case *Soering v. the United Kingdom*, where the court held that 'an issue might exceptionally be raised under Article 6 ECHR by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial', ECtHR, 7 July 1989, *Soering v. the United Kingdom*, § 113.

proposal of the European Commission adopted according to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systematic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary'[353].

Therefore, the Court ruled that to decide on executing the Polish arrest warrant, the Irish court must 'determine, specifically and precisely' whether the person in question will risk denying a fair trial if extradited to Poland[354].

In its judgment, the CJEU confirmed that the fundamental right to a fair trial before an independent tribunal is enshrined in Article 6 TEU and Article 47 of the Charter and that judicial independence is a constitutionally protected essential component of the Rule of Law[355]. In this respect, the judgment follows the line traced by the case *Associação Sindical*. However, while in this judgment the legal basis from which the CJEU has derived judicial independence were Article 2 TEU and Article 19 TEU, in *LM* the Court has focused on Article 47 of the EU Charter. It stressed that: 'the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant.'[356]

According to Konstadinides, this judgment represents a 'balancing act'[357]. On one side, the Court exercised its self-restraint abstaining from declaring the suspension of all European arrest warrant requested from Poland, showing to be aware of its boundaries in finding systemic or generalized deficiencies in the Member States[358]. On the other side,

[353] *Ibid,* § 70.
[354] *Ibid,* § 34.
[355] See *Associação Sindical dos Juízes Portugueses v Tribunal de Contas, supra*.
[356] *Ibid,* § 59.
[357] T. KONSTADINIDES, 'Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: *LM*', in *Common Market Law Review*, Issue 3, 2019, p. 762.
[358] Some commentators have criticized this restraint of the Court noting that it could have gone beyond the specific case and frame it primarily as a Rule of Law issue, ordering the overall suspension of EAW requested from Poland until it fulfills the European standards on the issue. See, for example, VAN

using all legal instruments at its disposal, the CJEU addressed the problem of the lack of control of the judiciary, emphasizing its incompatibility with the standards requested in a democratic State subject to the Rule of Law[359] .

LM case set a fundamental step in progressively enabling executive judicial authorities and individual litigants to rely on Article 7 Rule of Law enforcement mechanism against the serious deterioration of EU values enshrined in Article 2 TEU. As some commentators have argued the Court, insisting on Article 47 of the Charter, added bite to the 'toothless' Article 7 TEU by providing the Commission's tool with constitutional effects[360]. Through the enlistment of national courts as guardians of the Rule of Law, the Court clearly expresses that its enforcement and protection through the political institution is necessary but not sufficient: it is also for the Courts, domestic and European, to defend it.

The *LM* case provides the CJEU with new tools in the Rule of Law's protection, proving that, despite the absence of competence to find a breach on the Rule of Law under the procedure provided for in Article 7 TEU, courts are making extraordinary efforts. As a result, the Rule of Law's enforcement is gradually becoming 'a shared domain between the political and judicial institutions'[361].

Some commentators have not welcomed the CJEU's approach, noting that it could have gone 'beyond its case law and frame the case primarily as a problem of rule of law' and order an overall suspension of the European arrest warrant extraditions to Poland until it breaches the Rule of Law[362]. However, such interference of the Court with domestic competences would breach the principles of conferral laid out in Article 5 § 1 and § 2 TEU and loyalty in Article 4 § 3, which ensures that EU Institutions respect Member State's exercise of power under the Treaty[363].

The Court proves to be perfectly aware of the fact that the case raises a problem of Rule of Law in Poland, but it is also aware of the boundaries in finding systemic or

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BALLEGOOIJ S. AND BÁRD P., 'The CJEU in the Celmer case: One step forward, two steps back for upholding the Rule of Law within EU', *Verfassungsblog*, 29 July 2018.

[359] COURT OF JUSTICE OF THE EUROPEAN UNION, *PPU – Minister for Justice and Equality v LM*, case C-216/18, § 22.

[360] A. VON BOGDANDY ET AL., 'Drawing Red Lines and Giving (Some) Bite – the CJEU's Deficiencies Judgment on the European Rule of Law', *Verfassungsblog*, 3 March 2018.

[361] T. KONSTADINIDES, *op. cit.*, p. 763.

[362] VAN BALLEGOOIJ S. AND BÁRD P., 'The CJEU in the Celmer case: One step forward, two steps back for upholding the Rule of Law within EU', *Verfassungsblog*, 29 July 2018.

[363] T. KONSTADINIDES, *The Rule of Law in the EU: The Internal Dimension*, London, 2017, p. 87.

generalized deficiencies in the Member States - which is of exclusive competence of the EU's political institutions[364]. However, it is uncontroversial that the judgment represents a fundamental tool for national courts, who are now empowered to discover systemic or generalized deficiencies in the other Member States to protect individuals' right to a fair trial.

In conclusion, the CJEU's classification of the Rule of Law-related issues through the lenses of fundamental rights, stated with *Les Verts* and developed with *Associação Sindical* and *LM*, adds Article 47 of the Charter to the existing arsenal available to the EU Institutions to enforce the Rule of Law.

3.4 Irremovability of Judges: European Commission v Republic of Poland I and II

In the wake of the cases *Associação Sindical dos Juízes Portugueses* and *LM*, the Court has recently delivered two judgments related to two infringement procedures triggered by the European Commission against Poland.

The first judgment, *Commission v Poland I* (Law on the Supreme Court)[365], was released on the 24 June 2019, and represented for the Court a further chance to define the scope of the principle of judicial independence, thus consolidating its jurisprudence on Article 19 TEU.

The case must be located within the European Commission's action against the systemic threats to the Rule of Law in Poland. In 2018 the Commission launched infringement proceedings against Polish authorities due to the incompatibility with Article 19 TEU and Article 47 of the Charter of the provisions of the New Law on the Supreme Court, which lowered the mandatory retirement age for Supreme Court Judges

[364] Opinion of the Advocate General, *op. cit.*, § 102 'First, the referring court cannot rely on the Commission's reasoned proposal to find a breach of the Rule of Law in Poland since, in particular, the Polish legislation was amended after the reasoned proposal was adopted. The referring court lacks competence to find a breach of the Rule of Law by the Republic of Poland, as, under the procedure provided for in Article 7 TEU, such competence lies with the European Council. Nor does the referring court have competence to suspend application of the Framework Decision as, in accordance with recital 10 of the Framework Decision, such competence lies with the Council. Second, the referring court has not established that LM himself would be exposed to a real risk of breach of the right to a fair trial. Indeed, it has, in particular, been unable to indicate even hypothetical reasons why LM would be exposed to a risk of not receiving a fair trial.'.

[365] Court of Justice of the European Union, *European Commission v Republic of Poland*, case C-619/18, 24 June 2019.

and granted the President of the Republic the discretionary power to extend judges' mandate beyond the fixed term.

In its judgment the Court has clarified that the principle of irremovability of judges is not absolute, and those exceptions are permitted when based on 'legitimate and compelling grounds' and subject to the principle of proportionality[366]. Such restrictions, however, added the Court, 'should not raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality respect to the interests before it'[367]. Regarding the specific case, thus, the Court upheld the Commission's complaint stating that the reform aimed at excluding a targeted group of Supreme Court Judges[368].

As to the second plea, the Court, underlined that 'it is for the Member States alone to decide whether or not they will authorise such an extension to the period of judicial activity beyond normal retirement age, the fact remains that, where those Member States choose such a mechanism, they are required to ensure that the conditions and the procedure to which such an extension is subject are not such as to undermine the principle of judicial independence'[369]. As stated by the Court, the discretion accorded to the President of the Republic was capable to 'give rise to reasonable doubts, inter alia in the minds of individuals, as to imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them'[370].

In doing so, the Court took a further step ahead of *Associação Sindical*. It affirmed that the legitimacy of judicial independence restriction should always be subjected to a proportionality test, and, even if justified and proportionate, should not 'affect' the neutrality of the court.

Moreover, focusing on Article 19 TEU, the Court has confirmed that it does not represent an autonomous standard of reference for the judicial review of national remedies in the field covered by EU law. Judicial protection is a general principle of EU law which content is not determined by Article 47 of the Charter. Indeed, given that

[366] *Ibid*, § 76.
[367] *Ibid*, § 79.
[368] *Ibid*, § 85.
[369] *Ibid*, § 111.
[370] *Ibid*, § 118.

Article 19 TEU does not confer individual rights but only impose to the Member States a positive obligation to provide sufficient remedies in the fields covered by EU law, a violation of the right to effective judicial protection in concrete cases can only be assessed with regards to Article 47 ECFR. However, Article 19 TEU may be invoked by privates as a parameter of judicial review to assess the compatibility of the national guarantees for judicial independence with EU law.

This combined reading of Article 19 TEU and 47 CFR places judicial independence at the core of the EU constitutional order, making it a 'meta-norm of the EU judicial architecture'[371] able to interfere with Member States' discretion in the organization of their judiciaries.

Following the same guideline, the 5th November 2019 the CJEU has delivered a second judgment *Commission v Poland II* (Law on Ordinary Courts)[372], representing the latest relevant step of the Polish 'Rule of Law saga' within the EU.

Once again, the CJEU had to deal with the legitimacy of restrictions to the principle of judicial independence on the ground of Article 19 TEU. In the specific case, the Court was asked to state whether the newly introduced reform on ordinary courts which provided on one side the introduction of different retirement ages for men and women and, on the other side, the empowering of the Minister of Justice with the discretion to extend the period of judicial activity of judges who reached the retirement age were compatible with EU law.

Regarding the first plea, the Court found that the difference in retirement ages was directly discriminatory and, thus, adopted in violation of Article 157 TFEU and Directive 2006/54/EC on equal treatment.

More interesting for our analysis is the second issue regarding, once again, the principle of effective judicial protection enshrined in Article 19 TEU. In this regard, after having recalled the scope of application of Article 19 TEU as interpreted in the

[371] R. VOLKER, 'Judicial Protection as the Meta-Norm in the EU Judicial Architecture', in *Hague Journal on the Rule of Law*, 2019.

[372] COURT OF JUSTICE OF THE EUROPEAN UNION, *European Commission v Republic of Poland*, case C-192/18, 5 November 2019.

Associação Sindical judgment, and the notion of judicial independence therein stated, the Court upheld the Commission's plea.

First, the CJEU, outlining its action's framework, has found that, since the Polish judiciary might be called to rule on issues related to EU law, Article 19 TEU applies to them such as to any other national of its Member States. Thus, the Court laid the foundations for entering the substance of the case.

In the specific case, the Court has identified as problematic the substantive conditions and procedural rules that empowered the Minister of Justice to extend the judges' mandate beyond the fixed term. As stated by the Court, indeed, those rules should not have given rise to doubts 'as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them'[373].

The power to authorize judges to continue their mandate beyond the fixed retirement age was granted to the Minister of Justice under 'too vague and unverifiable' criteria and independent from any state reason or judicial remedy[374]. Moreover, the absence of any time limit for the Minister of Justice to answer a request for extension of the mandate represented a source of uncertainty for the judge concerned. Finally, if located in the context of the general lowering judges' retirement age, the reform was a clear breach of the principle of irremovability of judges.

In line with the previous judgment in *Commission v Poland I*, the Court found Poland in breach with Article 19 TEU, thus confirming its pivotal role in the enforcement of the Rule of Law within the EU and the importance of infringement proceedings as instruments of implementation of EU values.

3.5 Conclusive Remarks

The last two years have shown an ever-increasing commitment of the CJEU to protect EU common values against illiberal developments within the Member States. The recent Polish experience, seen through the lenses of the principle of judicial independence, has shown that the Rule of Law value can be vitiated by governing power. Nevertheless, it

[373] Court of Justice of the European Union, *European Commission v Republic of Poland*, case C-192/18, 5 November 2019, § 119.

[374] Court of Justice of the European Union, *European Commission v Republic of Poland*, case C-192/18, 5 November 2019, § 122.

has also proved that the European institutions can react against these threats and protect it. The selected judgments have highlighted the Court's ground-breaking potential in affirming EU common values, here more significantly the Rule of Law, and their judicial application in the EU crisis of values.

Through the 'operationalization' of the values enshrined in Article 2 TEU - made practically applicable thanks to an extensive and innovative interpretation of Article 19 TEU - can be observed an increasing tendency of the Court to affirm its foundational value in the EU legal order and, with specific regard to the Rule of Law, to recognize its nature of constitutional principle enforceable not only in the context of Member State's action but also, as notably demonstrated in the *Commission v Poland* cases, concerning the actions of the Union's Institutions.

From a systemic point of view, the cases discussed show a clear opening of the CJEU to its responsibility for upholding the Rule of Law in the European Union. It represents a consequence of its function of 'ensuring that the interpretation and application of the Treaties is observed'. Therefore, promoting the Rule of Law via the rigorous monitoring of EU's law general principles constitutes a central tenet of the CJEU's jurisprudence[375].

The CJEU's mandate to protect the Rule of Law is particularly significant since the development of the Rule of Law's implementation in the EU has been led not merely by legislative reforms but, first, through the jurisprudence of the Luxembourg Court, beginning with *Les Verts* case and developed, after that, in the recent cases *Associação Sindical*, *LM* and *Commission v Poland*.

The CJEU's *modus operandi*, mostly based on the 'compartmentalization' of the issues related to the Rule of Law principle and its protection through the lenses of the fundamental rights, adds to the existing arsenal available to the EU institutions under Article 7 TEU and Article 258 TFEU a new tool to enforce the principle towards 'backsliding' Member States.

From the VC's perspective, the CJEU's case-law offers new standards for the Rule of Law's implementation at the European level. Placing at the centre of its understanding the principle of judicial independence and its multiple reflections, the Court has created

[375] P. CRAIG, 'General Principles of Law: Treaty, Historical and Normative Foundations', in *Oxford Legal Studies Research Paper*, No. 46/2019.

a rich and detailed container of relevant standards for the VC's Rule of Law's understanding.

V. Conclusions

From the overview conducted so far, it emerges that the Rule of Law principle was central to the evolution and scope of the European constitutional law. Its promotion and protection have always represented one of the principal common goals of the Council of Europe and the European Union.

Overcoming the differences in its origins and conceptions, it has become a foundational value of many European constitutional orders in the last Centuries, from the national to the supranational level. Over time, it has evolved from a national principle to a container of common values acknowledged by all the European States. Together with the States, the protagonists in this evolution were undoubtedly the Council of Europe and the European Union. Nevertheless, the principle's 'discovery' and development have taken different paths within the two organizations, with consequent different approaches to its definition and protection.

On one side, the Council of Europe has identified the Rule of Law as a fundamental principle since the beginning, framing it as a pillar in the Statute and the European Convention of Human Rights. Thanks to its formal recognition, its promotion and protection have proved to be multilateral and multilevel. From the definition and delineation through the ECtHR's case-law, to the practical implementation by COE's organs and bodies - in the first place the Venice Commission - it has become a general parameter of action within the whole organization.

On the other side, the European Union took some time before giving formal recognition to the Rule of Law principle. The Court of Justice of the European Union played a fundamental role in giving a central place to the principle even before its formal recognition within the Treaties, through its famous judgment in *Les Verts* case. Nonetheless, today, it is undisputed that the EU is based on the Rule of Law, and its respect, enshrined in Article 2 TEU, is an endogenous feature of the EU and constitutes part of a group of fundamental values highlighted therein.

From the analysis of the interpretation given to the principle by the two organization, it emerges an almost analogous conception of the Rule of Law[376]. The Venice Commission and the European Commission have identified an almost identical list of the Rule of Law's core components. Looking at Strasbourg and Luxemburg's case-law, the values highlighted as vital for respecting and strengthening the Rule of Law are very similar. In recent years, due to the general crisis of values among European states, legality and judicial independence are indeed predominant elements in the principle's promotion. Both the ECtHR and the CJEU focused on highlighting the deep connection between the Rule of Law and an impartial and independent judiciary, enhancing it as a principle's core element.

It must be noticed that both organizations, when framing the Rule of Law, have embraced it as a constitutional principle, with formal and substantive components in constant relation – and mutual reinforcement – with democracy and respect for human rights. The choice of a 'thick' definition of the Rule of Law is undoubtedly a consequence of the two organizations' mission, aiming at promoting the founding values of the European constitutional heritage. As emerged from the Strasbourg and Luxembourg's case-law - and will emerge from the Venice Commission's work - the conjunct promotion of the values of Rule of Law, democracy, and human rights guarantees an ever-increasing level of protection of common constitutional traditions in Europe.

As to the interpretation given to the principle by the Strasbourg and Luxembourg Courts, it must be noticed that there is a jurisprudential common core which determines a 'symbiotic relationship'[377] between the two Courts on the Rule of Law.

When comparing the case-law of the two Courts, it immediately appears that the legal basis on which the judgements insist reveal a conceptual symmetry of values between the two systems. Article 19 § 1 TEU and Article 47 ECHR relies on the same framework of values enshrined in Article 2 TEU, namely 'respect for human dignity, freedom,

[376] 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 F. AMTENBRINK AND D. KOCHENOV (eds), *The EU's Shaping of the International Legal Order*, 2013, § 108.

[377] R. SPANO, *op. cit.*, p. 13 ff.

democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.

Today, we can affirm the existence of a European understanding of the Rule of Law, which can be derived both from the EU's and COE's legal framework and case-law. According to L. Pech, the European Rule of Law is a 'principle of a fundamental and compelling nature stemming from the common European heritage and which aims to regulate the exercise of public power. […] Similarly to national traditions, this principle has progressively and rightfully become a dominant organizational paradigm as regards the EU's constitutional framework, a multifaceted or umbrella legal principle with formal and substantive elements'[378].

Thus, we can say that there is a common source of values and standards, forming the heart of the Rule of Law principle in Europe. Such values form the basis of the VC's work on the principle and, precisely, give content to the benchmarks selected by the Commission as the components of the Rule of Law's hardcore.

In the next chapter, after having introduced the Venice Commission, we will focus on the innovative aspects of its approach to the Rule of Law, projecting the standards identified so far into an operational and 'ready to use' notion of Rule of Law.

[378] L. PECH, *The Rule of Law as a Constitutional Principle of the European Union*, op. cit., pp. 7-9.

CHAPTER II

A NEW APPROACH TO THE RULE OF LAW IN EUROPE: THE ROLE OF THE VENICE COMMISSION IN THE CREATION OF A COMMON EUROPEAN FRAMEWORK

SUMMARY: I. Introduction. - II. The Venice Commission: A 'Constitutional Law Network'. - II.1. 'Returning to Europe': The VC's Establishment and Mission. - II.2. The Venice Commission's Working Method: A Tailor-Made Intervention. – II.3. The Sources of the Commission's Activity: The Standards. – II.4. What Impact of the Venice Commission's Work? The Value of VC's Non-Binding Opinions. – II.5. A 'Constitutional Law Network': Peculiarities of the 'Venice Commission System'. - III. Strengthening the Rule of Law: The Contribution of the Venice Commission to the Creation of a Common European Framework on the Principle. – III.1. Introduction. – III.2. The VC's Commitment to Strengthening the Rule of Law within its Member States. – III.3. A New Approach to the Rule of Law Principle. – IV. Conclusions.

I. INTRODUCTION

The Venice Commission, is the Council of Europe's advisory body on constitutional matters. Although it is hardly known to a broader public, it is considered one of the most influential institutions within the Council of Europe, to the point of being defined as the COE's 'crown jewel'[1].

During its thirty years of activity, the Commission has proven to be a unique international player in promoting the COE's funding principles of the Rule of Law, human rights, and democracy.

[1] F. PONS, 'Venice Commission: an unbiased criticism of Hungary', at www.euractiv.com/central-europe/venice-commission-unbiased-criticism-hungary-analysis-511682.

In the last decade, characterized by a profound crisis of values in Europe, the Venice Commission was instrumental in assisting its Member States to bring their values in line with the COE's standards.

Before entering in detail with the analysis of the Venice Commission's contribution to the strengthening of the Rule of Law in Europe, it seems necessary to briefly present its credentials and clarify the grounds of its prestige within the International community.

In the following paragraphs we will first discuss the establishment and mission of the Venice Commission, considering the evolution from its initial restrained conception to the transformation in a 'constitutional law network'. Specifically, we will focus on its unique working method, developed through 30 years of experience, and based on a tailor-made intervention.

Within the delineated institutional framework, we will focus on the VC's main instruments: the standards. Being the Commission a soft law body which operates in the framework of the Council of Europe, its work necessary relates to standards deriving from the so-called European constitutional heritage. In this chapter we will analyze the sources of such standards and their practical implementation in the VCs' work.

Once defined its credentials, we will focus on its international prestige, trying to answer to an important question: Why should Member States and International Institutions implement the VC's recommendations? Looking at the Commission through the lenses of its Member States, the COE and EU institutions, we will analyze its impact within the European scenario.

This analysis will help us in demonstrating the evolution of the Venice Commission 'from a European club into a global, transnational constitutional forum'[2] and understanding its unprecedent influence in the Rule of Law debate in Europe.

Within the outlined framework, we will focus on the VC's efforts to strengthen the Rule of Law and to make it a pragmatic and operational rather than an abstract academic topic. We will identify the value of the VC's working method looking at three main innovative aspects.

[2] K. TUORI, 'From a European to a Universal Constitutional Heritage?', in a paper presented in the *Conference on Global Constitutional Discourse and Transnational Constitutional Activity*, Venice, 7 December 2006, CDL-PI(2016)015, p. 2.

First, the adoption of an inclusive notion of the Rule of Law, comprehensive of human rights and democracy principles. Second, the adaptation of the theoretical academic definition of the Rule of Law into a pragmatical and directly applicable concept. Third, the conception of a systemic working method, related not only to assessing compliance with the Rule of Law in relation to specific issues but to the entire national legal system.

The highlighted features will demonstrate the ever-increasing importance of the Venice Commission's contribution to the strengthening of the Rule of Law in Europe and will pave the way for a deeper comprehension of the principle's content and significance within the VC's Member States.

II. THE VENICE COMMISSION: A 'CONSTITUTIONAL LAW NETWORK'

1. 'RETURNING TO EUROPE': THE VC'S ESTABLISHMENT AND MISSION

The Venice Commission was established in 1990 at the initiative of an Italian constitutionalist, Antonio La Pergola[3], through a partial agreement between eighteen Member States of the Council of Europe[4]. In 2002, it was enlarged with the participation of all the 47 COE Member States and other non-European States as Morocco, Tunisia, Algeria, Brazil, and Mexico[5]. Today the Venice Commission has 62 Member States: the 47 Council of Europe Member States and 15 other non-European Countries[6].

In its introductive speech to the Conference of Venice in 1989 Antonio La Pergola has defined it as 'a point of reference for the study of the rules governing democracy and its inspiring philosophy, a discussion forum and a laboratory for binding legislative provisions and bound to the reality of the individual countries involved'[7]. His first

[3] As highlighted by J. JOWELL in *The Venice Commission: Disseminating Democracy through* Law (Public Law, 2001, p. 675), La Pergola's foresight has been remarkable due to the fact that 'The Soviet Union was then still intact, and it was by no means a foregone conclusion that Marxist totalitarianism would wither away as it did'.

[4] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *Resolution (90)6 On a Partial Agreement Establishing the European Commission for Democracy through Law* (10 May 1990).

[5] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, Resolution (2002)3, Revised Statute of the European Commission for Democracy through Law, (21 February 2002).

[6] Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA.

[7] A. LA PERGOLA, *Speech at the First Venice Conference*, 31 March - 1st April 1989. For more information about the role played by La Pergola in the foundation and development of the Venice

conception, dated before the fall of the Berlin wall, intended the Venice Commission as scientific support for the promotion of studies on cooperation among the Member States of the COE, focusing on the relations between Europe and Latin American countries.

In practice, being born shortly after the fall of the Berlin wall[8], 'the first requests came largely from those countries wishing to build new democracies in Central and Eastern Europe, starting with the Russian constitution as a part of that country's accession process to the Council of Europe'[9].

Hence, after the fall of the Berlin wall, the idea of a 'return to Europe' of Eastern European countries accompanied the beginning of the Venice Commission's experience[10]. Therefore, its original purpose became to assist States which separated from the Soviet Union in the process of reform towards democracies according to the European model[11]. This 'fortuitous timing'[12] represented for the Commission the first real chance to demonstrate in practice its usefulness and establish a solid record as a competent advisor on constitutional matter[13].

The unique nature of the Venice Commission can be immediately grasped in its Statute, which describes it as 'an independent consultative body which co-operates with

Commission see *Atti della giornata in ricordo del Presidente emerito della Corte costituzionale Antonio La Pergola*, 17 December 2008, at www.cortecostituzionale,it.

[8] De Vissier describe this coincidence as a 'fortuitous timing' in being the first international body dedicated exclusively to accumulating and dispensing constitutional thinking in Europe and being immediately able to get to work and demonstrate its usefulness in practice, in M. DE VISSIER, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform', in American Journal of Comparative Law, vol. 63, 2015, p. 969.

[9] J. JOWELL, 'The Venice Commission: Disseminating Democracy through Law', op. cit.

[10] S. NINATTI, S. GRANATA-MENGHINI, 'The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission', in L. VIOLINI, & A. BARAGGIA (edited by), *The Fragmented Landscape of Fundamental Rights Protection in Europe. The Role of Judicial and Non-Judicial* Actors, London, p. 203.

[11] P. VAN DIJK, 'The Venice Commission on Certain Aspects of the European Convention of Human Rights *Ratione Personae*', in S. BRETTENMOSER ET AL., *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, 2007, p. 185.

[12] M. DE VISSIER, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform', in American Journal of Comparative Law, vol. 63, 2015, p. 969.

[13] On this point, S. Bartole has noted that 'The coincidence of its establishment with the fall of the Wall facilitated the involvement of the Commission in the development of the democratic constitutional reforms in the Countries of Central Eastern Europe as far as they moved in the direction of the adhesion to the Council of Europe and to the European Union and were and are interested, year by year, in keeping safe this membership', S. BARTOLE, 'International Constitutionalism and Conditionality. The Experience of the Venice Commission', *Rivista AIC*, vol. 4, 2014.

the member states of the Council of Europe, as well as with non-member states and interested international organizations and bodies'[14].

As of June 2020, the Venice Commission has 62 Member States, with further states and institutions, namely the EU and the OSCE, enjoying observer or special status. This opening outside the European continent makes the VC a unique international actor that facilitates a dialogue between countries worldwide. Currently, the Commission entertains a constructive exchange with states in Central Asia, Southern Mediterranean and Latin America, developing projects and programs for constitutional assistance. Without losing sight of its objectives in Europe, the Commission is increasingly called upon to act outside the continent and spread common European values worldwide[15].

It is composed of one representative for each Member State that, according to the Statute, must be independent experts 'who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science'[16]. To grant their independence, they act on their individual capacity and not on behalf of their states[17].

Its Permanent Secretariat is located in Strasbourg, at the headquarters of the Council of Europe, and its Plenary Sessions are held in Venice (hence the name of Venice Commission), at the Scuola Grande di San Giovanni Evangelista four times a year (March, June, October, and December).

According to its Statute, the role of the Venice Commission is to provide legal advice on draft legislative texts or issues of constitutional relevance to its Member States and to

[14] VENICE COMMISSION, *The Revised Statute of the European Commission for Democracy through Law*, Res(2002)3, 27 February 2002, Art. 1, c1.

[15] See for instance, Peru - Opinion on linking constitutional amendments to the question of confidence, adopted by the Venice Commission at its 120th plenary session, Venice, 11-12 October 2019, CDL-AD(2019)022; Tunisia - Opinion on the Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019), CDL-AD(2019)013; Tunisia - Opinion on the draft institutional law on the organisation of political parties and their funding, adopted by the Venice Commission at its 116th Plenary Session (Venice, 19-20 October 2018), CDL-AD(2018)025; Opinion on the draft institutional law on the Constitutional Court of Tunisia, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)024; Venezuela - Opinion on the legal issues raised by Decree 2878 of 23 May 2017 of the President of the Republic on calling elections to a national constituent Assembly, endorsed by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017), CDL-AD(2017)024.

[16] *Ibid*, Article 2.

[17] *Ibid*.

help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights, and the Rule of Law. Moreover, it helps to ensure the dissemination and consolidation of a common constitutional heritage, playing a unique role in conflict management and provides 'emergency constitutional aid' to states in transition[18].

2. The Venice Commission's Working Method: A Tailor-Made Intervention

Although the original mission of the Venice Commission was to provide Constitutional assistance and emergency constitutional aid to those states in transition in Central and Eastern Europe emerging from the former Soviet regime, during the last decades, the number and type of activities performed have been significantly increased, going far beyond its original function of advisor on constitutional matters.

Nowadays, the Venice Commission is playing a unique role in the identification and dissemination of the values which constitutes the 'European constitutional heritage'[19] through the production of documents, opinions, guidelines, and reports on various issues regarding its three key areas of action, which are: democratic institutions and fundamental rights, constitutional justice and ordinary justice, and elections, referendums, and political parties.

The Commission's primary task is to provide States with legal advice in the form of opinions on draft legislation or legislation already into force submitted to its examination. These opinions can be requested by the head of state or representatives of parliaments and governments of each member state, by the institutions of the Council of Europe (Secretary-General, Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities), and by other international organizations such as the European

[18] Venice Commission, *The Revised Statute of the European Commission for Democracy through Law*, Res(2002)3, 27 February 2002.

[19] For a definition of this concept see S. Bartole, 'Standards of Europe's Constitutional Heritage', in *Giornale di Storia Costituzionale*, vol. 30, 2015 pp. 17-24. 'The European constitutional heritage is made up not only by the European treaties and conventions in the field of the human rights and Rule of Law, but also by those principles which have been at the basis of the historical process of gradual growth of the legal orders of the European States. Therefore, the concept covers at the same time the legal provisions which have been in force in those legal orders and the scientific elaboration of them which has supported their implementation and their development. This definition implies that the terms of reference of the concept are, on one side, the normative experience of the European countries and, on the other side, the doctrines and the theories which have prepared and supported this experience.'.

Union and the OSCE. To maintain its neutrality, the Commission cannot prepare country-specific opinions on its initiative, but only general studies or guidelines on specific topics.

It is not surprising that requests often come directly from Member States: opinions aim both at obtaining the VC's support in constitution-making and an authoritative acknowledgment of 'democratic accountability' regarding the international community[20]. Asking the VC's advice, indeed, might increase both the domestic and the international legitimacy on the legal document submitted to its attention[21].

Once requested, the drafting of the opinion is entrusted to a working group of rapporteur members and experts assisted by the Secretariat. The objective of the opinion is to evaluate the compliance of the text under exam with the selected international standards and, in case of non-adherence, to propose improvements and changes to bring it in line with the identified standards.

The final draft of the opinion elaborated by the working group is then submitted to all members of the Commission before the Plenary Session for comments and suggestions. Finally, it is discussed and adopted in the Plenary Session and submitted to the body which requested it. After the adoption, all the opinions are public and available on the Commission's website.

3. THE SOURCES OF THE COMMISSION'S ACTIVITY: THE STANDARDS

Looking through the Venice Commission's documents, it frequently appears the referral to the so-called 'European standards'[22]. These standards, commonly identified as part of the European Constitutional Heritage[23], form the Venice Commission's yardsticks

[20] S. NINATTI, S. GRANATA-MENGHINI, 'The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission', *op. cit.*, p. 213.

[21] M. TUSHNET, 'Observation on the Politics of 'Best Practices' in Constitutional Advice Giving', 2015, in *Wake Forest Law Review*, p. 852.

[22] See S. BARTOLE, 'Standards of Europe's Constitutional Heritage', in *Giornale di Storia Costituzionale*, vol. 30, 2015 pp. 17-24.

[23] The concept has been used by S. Bartole when describing the Commission's activity and defined as a 'concept whose content is not stated in clear and detailed form in any international document but has to be elaborated based on the constitutional experiences of the Western European States and of some international instruments in the field of the human rights. Therefore, it implies an intellectual and interpretative activity aimed at comparing those different experiences and drawing principled conclusions from the domestic choices of the European Countries', in S. BARTOLE, 'International Constitutionalism and Conditionality. The Experience of the Venice Commission', *op. cit.*

for its activity of assessment and evaluation of any national piece of legislation submitted to its examination.

These standards can derive both from hard law, such as the European Convention on Human Rights, and soft law, such as, for instance, the bodies of rules and best practices deriving from the other organs of the Council of Europe and its Member States.

The ECHR represents a standard upon which the VC continuously relies. As the same Commission has frequently stated, it represents the 'absolute minimum standard'[24], which must be accepted also by those states which are not Council of Europe's Members but participate in the Commission's work.

Alongside with the Convention, a unique role is played by the ECtHR's case law, which is closely followed and extensively mentioned by the Commission. As Pieter van Dijk argued, this relation may represent a double exchange given that, in applying the ECHR, the Venice Commission has contributed to its theoretical and practical implementation[25]. Indeed, it must be noticed that in the last 20 years the Court has frequently mentioned opinions and documents of the Venice Commission in its case law[26].

When developing general standards, the Commission usually refers to the ECHR and other international treaties, preferring to look for general principles rather than detailed regulations applicable to the case.

The latitude for concretization is often acquired using the instrument of soft law, which helps the VC to put general principles into practice. Examples of soft law include recommendations of the Committee of Ministers, the Parliamentary Assembly of the Council of Europe, and its various committees[27]. In this regard, a preference for COE's

[24] See for instance, VENICE COMMISSION, *Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey,* CDL-AD(2009)006, Strasbourg 13 March 2009, § 62.

[25] P. VAN DIJK, 'The Venice Commission on certain aspects of the European Convention of Human Rights', in S. BREITENMOSER, B. EHRENZELLER, M. SASSÒLI, W. STOFFEL and B. WAGNER PFEIFER (eds.), *Human Rights, democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Zurich, 2007, pp. 183-184.

[26] Since 2001, when the European Court of Human Rights first referred to the Venice Commission's *Report on the Preferential Treatment of National Minorities by their Kin-States* in *Banković and others v. Belgium*, the references to Venice Commission's work has become more and more frequent, until it becomes systematic. To present around 170 judgments and decisions of the ECtHR refers to Venice Commission documents.

[27] See STATUTE OF THE COUNCIL OF EUROPE, Articles 15 and 20.

documents – without any restriction– is often found in the Venice Commission's opinions. While considering the essential documents of international law, the landscape of the Commission's activities is a regional one, i.e., European[28].

In some cases, the Venice Commission, recalling the work of the Parliamentary Assembly and some constitutional courts, creates its standards autonomously, feeding them into other decisions in a self-referential manner. For instance, this frequently happens with the *Rule of Law Checklist*. Often, indeed, the Commission must deal with question and issues which are not covered by any legal or judicial precedent and therefore, as acutely argued by Professor Bartole, needs to work out new 'constitutional answers which, by way of the machinery of the conditionality, have entered in the practice of the European constitutionalism and are frequently helpful to other international bodies'[29].

It derives that, without exercising any formal normative power, the VC has taken part and is still influential in national processes of law-making in many different States, proving to be not only 'consumer' but also 'producer' of soft law standards[30]. In this respect, the Commission has adopted several guidelines, on its own or in cooperation with the OSCE-ODIHR - f.i. guidelines on elections[31], political parties[32], *referendum*[33], freedom of peaceful association[34], and the *Rule of Law Checklist*[35]. It has also published many 'compilations' of its country-specific opinions and general reports on specific issues, thus contributing the European soft law development[36].

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[28] L. BODE-KIRCHHOFF, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a Link between the EU and the ECHR', in K. DZEHTSIAROU, T. KONSTADINIDES, T. LOCK and N. O'MEARA (eds), *Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR*, London, 2014, p. 57.

[29] S. BARTOLE, 'International Constitutionalism and Conditionality. The Experience of the Venice Commission', *op. cit*.

[30] G. BUQUICCHIO and S. GRANATA-MENGHINI, 'The Interaction between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europe', in *Intersecting Views on National and International Human Rights Protection, Liber Amicorum Guido Raimondi*, Tilburg, 2019, p. 38.

[31] VENICE COMMISSION, *Code of Good Practice in Electoral Matters*, Guidelines and Explanatory Report, Venice, 18-19 October 2002, CDL-AD(2002)023rev2-cor.

[32] VENICE COMMISSION, *Guidelines on Political Party Regulation*, Venice 15-16 October 2010, CDL-AD(2010)024.

[33] VENICE COMMISSION, *Revised Guidelines on the Holding of Referendums*, 8-9 October 2020, CDL-AD(2020)031-e.

[34] VENICE COMMISSION, *Joint Guidelines on Freedom of Peaceful Assembly*, Strasburg, Warsaw, 8 July 2019, CDL-AD(2019)017.

[35] VENICE COMMISSION, *Rule of Law Checklist*, Venice, 11-12 March 2016, CDL-AD(2016)007.

[36] See for instance the *Compilation of Venice Commission Opinions and Reports on States of Emergency*, Strasbourg, 16 April 2002, CDL-PI(2020)003.

The Venice Commission's standard selection is a very dynamic activity, which needs to consider various internal and external factors, such as the existing rules, the shared values, the comparable traditions, the source, and the substance of the standards.

Indeed, the VC's work is not limited to the identification of the relevant standards but consists also of their practical implementation within the national framework. In doing so, it must be sensitive to cultural, political, economic, legal, and religious traditions, adapting them to the respective cultures in the relevant societies. This activity has become particularly challenging with the enlargement of the membership of the VC to non-European states. As Hoffmann-Riem argued, indeed, 'the broader the VC's scope of action becomes, the more generous it will have to be in acknowledging the features unique to the respective cultures in the relevant societies and when undertaking modelling'[37].

We must bear in mind that the VC's goal is the implementation of its recommendation by the recipient State. Therefore, to obtain this result, it must take any effort to make the identified standards compatible with the existing national framework. Therefore, in the following, we will analyze the work of the Commission from the dimension of its effectiveness.

4. What Impact of the Venice Commission's Work? The Value of VC's Non-Binding Opinions

The Venice Commission, as a soft law body, produces non-binding opinions. On this point, De Vissier highlighted that its opinions and guidelines are 'intended to be suggestive rather than prescriptive'[38], thus characterizing the VC's work as non-imperative and dialogical. However, this assumption points out one of the most important challenges for the success of the VC's system: 'the compliance with the opinions is at the basis of the final production of the law-making effects'[39].

[37] W. Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact', in *The European Journal of International Law*, Vol. 25, no. 2, 2014, p. 583.

[38] M. De Vissier, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform', in *American Journal of Comparative Law*, 2015, vol. 63, Issue 4, p. 992.

[39] S. Bartole, 'The Experience of the Venice Commission: Sources and Materials of its Elaboration of the International Constitutional Law', in a paper presented at the *Conference on Global Constitutional Discourse and Transnational Constitutional Activity*, Venice, 7 December 2016, CDL-PI(2016)016, 7 December 2016.

According to the doctrine, the effects and, consequently, the value of the VC's work relies upon some essential elements, such as the Commission's reputation of competence and usefulness; its ability to prepare tailor-made opinions, adapted to the legal and cultural context of the recipient state; its capacity of building fruitful relations with the oppositions and the civil society, and, finally, the pressure to which it subjects the recipient state in case of non-adherence with its recommendations[40].

Surely, the relevance of the Venice Commission's work lies in the international 'prestige' it has acquired through the years, not only in Europe, but also in the International Community[41]. Its origin as a spontaneous group of jurists and legal experts and the status of an international commission under the edge of the Council of Europe have contributed to perceive it as an autonomous and neutral body, totally independent from any political logic. This makes the Commission a very attractive choice as an external participant into a domestic constitution-making process, unquestionably more suitable than foreign states or international institutions who may be suspected of placing their interest before those of the constitution makers[42].

This aspect of neutrality and impartiality is accentuated by the fact that the Venice Commission always refers to existing legal documents, emphasizing its nature of technical rather than political body, whose opinions are always rooted in law[43].

[40] In a recent paper, Simona Granata-Menghini, deputy-secretary of the VC, identified these factors in: 1) the reputation of competence, objectivity and usefulness the Commission enjoys; 2) the ability of the Commission to prepare opinions adapted to legal and political context of the country in question; 3) the pressure under which the opposition, civil society and the media submit national authorities in order to encourage them to comply; 4) finally, the pressure under which international political bodies responsible for monitoring the obligations of the state in question subject it with the related risk, in case of non-compliance, of consequences not only political but also financial. See GRANATA-MENGHINI, S. 'Richiesta di opinioni *amicus curiae* da parte della Corte e anomalie procedurali (la Venice Commission)', in *Questione Giustizia*, April 2019, pp. 175-183.

[41] See, e.g., W. HOFFMANN-RIEM, 'The Venice Commission of the Council of Europe-Standards and Impact', *op. cit.*, p. 579; M. DE VISSIER, 'A Critical Assessment of the Role of the Venice Commission in Process of Domestic Constitutional Reform', *op. cit.*, p. 968; Other Council of Europe bodies-such as the Parliamentary Assembly, the Committee of Ministers, and the European Court of Human Rights also regularly express their appreciation for the work of the Venice Commission. See, e.g., D. SPIELMANN, President of the ECtHR, 'Address at the Venice Commission's 100th Plenary Session' (Oct. 10, 2014), available at http://echr.coe.int/Documents/ Speech_20141010_OVSpielmannFRA.pdf.

[42] M. DE VISSIER, *Op. cit.*, p. 968.

[43] E. PAASIVIRTA, 'Can external programs influence internal development of the Rule of Law, some observations from the European Union perspective', in *University of Pittsburgh Law Review*, vol. 72, 2010, pp. 217-224.

Given this premise, we will try, in the following, to answer an important question: How can be identified the impact of a non-binding opinion produced by a soft law body as the Venice Commission?

Despite the absence of a systematic study on the VC's influence on accomplishing its objectives, we will try to identify and describe them, looking at the effects they produce within and outside national legal systems.

Being the Venice Commission a supranational institution, the effects of its work can arise on a variety of levels. On one side, at the national level, being the Member States the principal recipients of the Commission's work, a first critical assessment of its activity can be found in the conclusion drawn by the parties to whom opinions are addressed, namely the implementation of or non-compliance with the prescribed recommendations. On the other side, at the international level, the Commission's work can manifest its effects by being mentioned in decisions and documents developed by other COE's bodies, primarily the ECtHR or, even more surprisingly, by the EU's organs.

4.1 Reception of the Opinion by the Concerned State

One of the best ways to understand the value of non-binding opinions released by a soft law body as the Venice Commission is to examine whether and to what extent the recipient states take up and implement the prescribed recommendations.

A first attempt – to tell the truth nor systematic and neither exhaustive – to follow the aftermath of its suggestions was initiated by the Venice Commission in 2015, by introducing a 'follow-up' section in its website. Unfortunately, though, the information is scarce and only indicates those recommendations already implemented by the recipient state, giving very little space to the ongoing processes. As highlighted by some scholars, filling this gap would surely add 'prestige' to the VC. It would also encourage its Member States to accomplish the prescribed suggestions [44], at least for the political convenience of not being officially blacklisted amongst countries not adhering to the Commission's recommendations.

[44] W. Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact', op. cit., p. 589.

The overview[45] shows that the relevant state did not implement the recommendations contained in the opinions in many instances, at least not in a proper way. In some cases, this represents a consequence of the fact that the project was abandoned, in other that the legal text was implemented without considering the VC's suggestions[46].

On the contrary, there are cases in which we can derive information about the implementation of the prescribed recommendations directly from the text of the opinions. The Venice Commission's work, indeed, has been described as a 'long-term dialogue'[47], in which the issue can result in a sequence of different opinions which acknowledge the status of implementation of the previous recommendations. For instance, in the case of North Macedonia, several opinions have been prepared on the Law on Judicial Council. As we will see in-depth in the last chapter, from the most recent opinion, we have information about the implementation of almost all the recommendations prescribed by the Commission[48].

One premise of the VC's working method is the presumption that some effects of its activity can result in gradual changes that become evident only in the long term. The degree of effectiveness of the VC's opinion depends on several factors different from the recalled 'soft power of persuasion'[49]. As highlighted by Hoffmann-Riem, other factors may interfere with the success or failure of the Commission's activity[50].

Looking deeply into the dynamics of request and response to the VC's opinions, it appears clear that it largely depends on recipient state's 'political interest'. For instance,

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[45] Available at https://www.venice.coe.int/WebForms/followup/default.aspx?lang=EN

[46] See for instance VENICE COMMISSION, *Poland - Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws*, Strasbourg, 18 June, § 61, 'In order to avoid further deepening of the crisis, the Venice Commission invites the Polish legislator to seriously consider the implementation of the main recommendations contained in the 2017 Opinion of the Venice Commission'.

[47] W. HOFFMANN-RIEM, 'The Venice Commission of the Council of Europe – Standards and Impact', op. cit., p. 589.

[48] VENICE COMMISSION, *Opinion on the Draft Law on the Judicial Council of North Macedonia*, CDL-AD(2019)008, Venice, 15-16 March 2019, §62. 'The constant efforts of the authorities of North Macedonia to bring the rules governing the judicial system in line with the international standards and best practices are praiseworthy. Those efforts in the past two years went mostly in the right direction.'; § 66 'The Venice Commission observes with satisfaction that the last version of the draft law implements many of the above recommendations'.

[49] See BODE-KIRCHHOFF, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a Link between the EU and the ECHR', op. cit..

[50] W. HOFFMANN-RIEM, 'The Venice Commission of the Council of Europe – Standards and Impact', op. cit., pp. 590 ff.

some opinions can be disregarded by states that have not yet overcome totalitarianism and therefore are not interested in the Rule of Law and democratic discourse[51]. Similarly, when the opinions are 'imposed' upon the state, for example, by request of the Parliamentary Assembly, they can often meet with opposition by the state concerned in implementing the suggested recommendations[52]. On the opposite, a state who has directly requested the VC's opinion can be more interested in its implementation[53].

Again, some states that lack an established constitutional tradition, can be more interested in receiving suggestions and recommendations from the VC and gaining a sort of 'certification of compliance' with European constitutional standards[54]. In the same line, the VC's expertise can serve to some states with the prospect of documenting that they are part of the community of democracies and their legal orders are committed to the Rule of Law[55].

A peculiar case can be the one regarding those states seeking to join the European Union. When evaluating potential candidates for the accession, the EU, according to the so-called 'Copenhagen criteria', considers the extent to which the candidate is compliant with the European standards on the Rule of Law, democracy, and human rights. In this assessment, membership of the VC forms a vital precondition and a sort of declaration of commitment[56]. On the VC side, the presence of other actors, such as the European

[51] See, for instance, the case of Belarus, CDL-AD(2010)006.

[52] An example of strong opposition from the recipient state to the VC's work is the Hungarian case concerning its Fundamental Law (2011). See Opinions CDL-AD(2011)016, 17/18 June 2011; CDL-AD(2012)001, 16/17 Mar. 2012; CDL-AD(2012)004, 16/17 Mar. 2012; CDL-AD(2012)011, 15/16 June 2012; CDL-AD(2012)012, 15/16 June 2012; CDL-AD(2012)001 on Hungary, CDL-AD(2012)020, 12/13 Oct. 2012; CDL-AD(2012)023, 12/13 Oct. 2012; CDL-AD(2013)012, 14/15 June 2012.

[53] See for instance VENICE COMMISSION, *Poland - Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws*, Strasbourg, 18 June, directly requested by the Marshal of the Senate of the Republic of Poland.

[54] This can be the case, for instance, of all those States emerging from the Soviet tradition and wishing to bring their legal orders in line with the European tradition. See VENICE COMMISSION, *Opinion on the draft law amending the Constitution of Ukraine*, submitted by the President of the Ukraine on 2 July 2014, 10-11 October 2014, CDL-AD(2014)037.

[55] The hope of gaining stronger political support in the conflict against Russia can be the motive that may have led Georgia to ask for the VC's suggestion in its constitutional reform.

[56] For further information on this topic, see BODE-KIRCHHOFF, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a Link between the EU and the ECHR', pp. 63 ff, in which can be found an interesting analysis of the cooperation between VC and EU on the accession of Serbia to the latter.

Commission, with hard instruments at their disposal, represents a more decisive starting point for its recommendations' success.

4.2 Strasbourg Calls Strasbourg: The Fruitful Relationship between the VC and the ECtHR

The Venice Commission and the ECtHR perform different functions within the COE's system; however, due to the firm reference, form both sides, to the same source of law, the ECHR, their interplay on the fields of human rights, democracy and the Rule of Law is commonly recognized[57].

The interaction between the VC and the ECtHR manifests itself as a 'mutual exchange' between the two institutions.

On one side, it emerges in the Commission's systematic use of the ECtHR's case law. The same Statute of the VC indicates as a priority of its action the protection and promotion of 'fundamental rights and freedoms, notably those that involve the participation of citizens in public life'[58]. Therefore, the whole Commission's work conforms to the ECHR and applies the ECtHR's case law. Through the years, the VC devoted a great effort in ensuring that the ECHR principles – notably as declined by the Strasbourg Court – be duly reflected in its Member States implemented legislation. In addition, the VC has conducted an extensive work, together with the OSCE/ODHIR, of translation of the ECtHR's case law into legislative principles and best practices to be applied in national contexts[59].

On the other side, the relationship is developing in an ever-increasing referral to Commission's documents by the ECtHR. Since 2001, when the European Court of Human Rights first quoted the Venice Commission's *Report on the Preferential Treatment of National Minorities by their Kin-States*[60] in *Banković and others v.*

[57] L. Bode-Kirchhoff, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a Link between the EU and the ECHR', op. cit., p. 58.

[58] Statute of the Venice Commission, Art. 1, par. 2, lett. b.

[59] This activity led to the adoption of relevant documents such as the Guidelines on Freedom of Association, on Freedom of Religion, and on Political Parties which represent an important instrument for both national and international actors within the European scenario.

[60] Venice Commission, *Report on the Preferential Treatment of National Minorities by their Kin-States*, (CDL-INF(2001)019).

Belgium[61], the references to Venice Commission's work has become more and more frequent, until it becomes systematic.

To present, around 170 judgments and decisions of the ECtHR refers to VC's documents. The analysis carried out on these judgments has emerged in different ways of using the Commission's work[62].

In large part of cases, the Commission's materials are mentioned as relevant international rules and practices, becoming a sort of international standard used by the ECtHR to construct its reasoning[63] and interpret the exact scope of the rights and freedoms guaranteed by the Convention[64]. The Commission's more frequently referred type of documents are guidelines[65], reports[66], codes of good practices[67], and opinions[68]. In *Demir and Bajakara v Turkey*[69], the Court has explicitly noted that 'In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has, for example, made use of the work of the European Commission for Democracy through Law'.

[61] ECtHR, *Case Banković and others v. Belgium* Application no. 52297/99, §60, decision of 12 December 2001.

[62] The data exposed and the analysis conducted in this paragraph result from a cross-study conducted by the Author updated to 2020 on the ECtHR judgments directly referring to VC's opinions and documents.

[63] In the recent case *Navalnyy v. Russia* (Judgment of 15/11/2018) the ECtHR has used the Commission's Guidelines on Freedom of Assembly to identify the international standards to be applied in this area, §49. In case *Ramos Nunes de Carvalho e Sá v. Portugal* (Judgment of 6/11/2018) the Commission's Report on Judicial Appointments (CDL-AD(2007)028) is used by the Court as an International standard in the topic matter of the judgment.

[64] ECtHR, case *Muršić v. Croatia* (Judgment of 20/10/2016), §19, 'Evolutive interpretation of the Convention has also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. To interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has made use, for example, of the work of the European Commission against Racism and Intolerance (ECRI) and the European Commission for Democracy through Law (the Venice Commission)'

[65] F.i. in the above-mentioned case *Navalnyy v. Russia*, (Judgment of 15/11/2018) the ECtHR has mentioned the Commission's *Guidelines on Freedom of Assembly*.

[66] F.i. in case *E.S. v. Austria* (Judgment of 25/10/2018) the ECtHR has used the Commission's *Report on the Relationship between Freedom of Expression and Freedom of Religion* (17-18 October 2008, CDL-AD(2008)026).

[67] F.i. in case *Davydov and Others v. Russia* the ECtHR has used the *Code of Good Practices in Electoral Matters* (CDL-AD(2016)002).

[68] F.i. in case *Selahattin Demirtas v. Turkey* (Judgment of 20/11/2018) the ECtHR has mentioned the Commission's *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 16 April 2017 and submitted to a national referendum on 16 April 2017*, (9-11 March 2017).

[69] ECtHR, *Demir and Bajakara v Turkey*, App. no. 34503/97, Judgment 12.11.2008, § 75

Often, when the VC finds no uniform regulation between the Member States on a given issue, the Court uses the Commission's argument as a 'justification' for respecting the discretion afforded to the recipient state. In some ways, this practice could be another way for the Court to assert the margin of appreciation doctrine[70], relying entirely upon the VC's work to identify the existence – or non-existence – of a consensus upon a specific issue between its Member States. This was the case, for example, of *Parti Nationaliste Basque v France*[71], where the Court established the absence of a consensual regulation of the party financing by foreign political parties – thus recognizing to the State a wide margin of appreciation - relying upon the Commission's *Guidelines on Political Parties Financing*[72].

[70] On the margin of appreciation doctrine see: BREMS E., 'Positive subsidiarity and its implications for the margin of appreciation doctrine', in *Netherlands Quarterly of Human* Rights, 2019, vol. 37, pp. 210-227; BENVENISTI E., 'The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy', in *Journal of International Dispute Settlement*, 2018, vol. 9, pp. 240-253; AGHA P., *Human Rights between Law and Politics. The Margin of Appreciation in Post-National Contexts*, Oxford, 2017; MACIOCE F., 'Cultural Rights and the Margin of Appreciation Doctrine: A Legal Tool for Balancing Individual Rights and Traditonal Rules', in *Law, Culture and* Humanities, 2017, vol. 13, pp. 446-468; VOICULESCU N. AND BERNA M. B., 'Theoretical Difficulties and Limits of the Margin of Appreciation of States in European Court of Human Rights Case-Law', in *Law Annals from Titu Maiorescu* University, 2018, pp. 11-42; DOTHAN S., 'Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies', in *Journal of International Dispute Settlement*, 2018, VOL. 9, PP. 145-153; GERARDS J., 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights', in *Human Rights Law Review*, 2018, vol 18, pp. 495-515; GREER S., *The margin of appreciation and discretion under the European Convention on Human Rights*, Council of Europe, 2000; MACDONALD R. ST. J., 'The margin of appreciation in the jurisprudence of the European Court of Human Rights', in *Coll. Cour. Of the Acad. Of Eur. Law*, 1992, 103 ff.; MACDONALD R. ST. J., 'The margin of appreciation', in R. ST. J. MACDONALD, F. MATSCHER, H. PETZOLD (edited by), *The European system for the protection of human rights*, L'Aja, 1996, 83 ff.; M.O'BOYLE, *'The margin of appreciation and derogation under Article 15: ritual incantation or principle?'*, in *HRLJ*, 1998, 23; T. O'DONNEL, 'The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human rights', in *Human Rights Quarterly*, 1982, 474 ff.; C. OVEY, 'The margin of appreciation and article 8 of the Convention', in *HRLJ*, 1998, 10 ff.; S. C. PREBENSEN, 'The margin of appreciation and articles 9, 10 and 11 of the Convention*'*, in *HRLJ*, 1998, 13 ff.; R. SAPIENZA, 'Sul margine di apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo', in *Riv. Dir. Int*., 1991, 571 ff.; J. SCHOKKENBROEK, 'The prohibition of discrimination in article 14 of the Convention and the margin of appreciation', in *HRLJ*, 1998, 20 ff.; Y. WINISDOERFFER, 'The margin of appreciation and article 1 of protocol no. 1', in *HRLJ*, 1998, 18 ff.; H. C. YOUROW, *The margin of appreciation doctrine in the dynamics of european human rights jurisprudence*, L'Aja, 1996.

[71] ECTHR, Case *Parti Nationaliste Basque v France*, App. No. 71252/01, Judgment of 7.06.2007, §32 '*En conclusion, la Commission de Venise souligne qu'au vu de la variété des approches de la question d'un Etat membre du Conseil de l'Europe à un autre, il ne peut y avoir une réponse unique à la question de la nécessité « dans une société démocratique » de la prohibition du financement des partis politiques par des partis politiques étrangers*.'

[72] VENICE COMMISSION, Guidelines on Political Party Financing, 9 March 2001, CDL-INF(2001)8.

In some other cases, the Commission acts as a 'third party intervenient'[73] before the ECtHR, offering directly to the Strasbourg Court its technical advice. This generally happens in particularly sensitive issues of constitutional law that the Commission considers necessary to clarify. In such cases, the VC's opinion is more than merely mentioned by the ECtHR but may also have a profound influence on the Court's legal reasoning[74].

In a smaller group of cases, up to now seven, the ECtHR has directly asked the Commission for an *amicus curiae* brief[75], one of which concerns the Italian case *Berlusconi v. Italy*[76]. The goal of these briefs is to provide the Court a comparative overview of the international standards in a specific and particularly intricate issue of constitutional law.

The electoral sphere represents one of the first areas in which the Strasbourg Court began to refer to the Commission's work[77] and, to present, seems also to be the most cited. The most frequently referred documents are the *Code of Good Practice in Electoral Matters*[78] and the *Guidelines on Political Party Regulation*[79]. These papers are usually used in ECtHR's judgments as relevant international materials, together with other international rules and documents. This tendency to place the Venice Commission's work

[73] F. i. in the Case *Rywin v. Poland* (Judgment of 18/02/2016), §190-199 the VC, as a third-party intervenient, has given its interpretation to the Commissions of Inquiry, used by the Court to come to the final decision. Again, is famous the Commission's intervention as a third party in the case *Bijeclić v. Montenegro and Serbia* in 2005.

[74] W. HOFFMANN-RIEM, 'The Venice Commission of the Council of Europe – Standards and Impact', op. cit., p. 586.

[75] The first amicus curiae brief was requested in a case on the nature of the proceedings before the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina, *Opinion no. 337/2005*, CDL-AD(2005)020, Strasbourg, 15 June 2005; the last, in October 2019, refers to the case *Mugemangango v. Belgium* on the procedural safeguards which a State must ensure in procedures challenging the result of an election or the distribution of seats.

[76] VENICE COMMISSION, *Amicus Curiae Brief for the European Court of Human Rights in the Case of Berlusconi v. Italy on the Minimum Procedural Guarantees which a State Must Provide in the Framework of a Procedure of Disqualification from Holding an Elective Office*, Opinion No. 898/2017, CDL-AD(2017)025, Strasbourg, 9 October 2017.

[77] ECtHR, Case *Hirst v. United* Kingdom, Code *of Good Practice in Electoral Matters*

[78] VENICE COMMISSION, *Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report*, CDL-AD(2002)23rev); See f.i. ECtHR, *Davydov and others v. Russia*, Judgment of 13/11/2017; Case *Gahramanli and Others v. Azerbaijan*, Judgment of 8/10/2015, Case *Scoppola v. Italy*, Judgment of 22/05/2013.

[79] VENICE COMMISSION, *Guidelines on Political Party Regulation*, CDL-AD(2010)024; See f.i. ECtHR, Case *Republican party of Russia v. Russia*, Judgment of 12/04/2011; *Case Özgürlük Ve Dayanışma Partisi (ÖDP) v. Turkey*, Judgment of 10/05/2012; Case *Cumhuriyet Halk Partisi v. Turkey*, Judgment of 26/04/2016; *Yabloko Russian United Democratic Party and Others v. Russia*, Judgment of 24/04/2017.

on the same level of international rules and regulations also confirms the ever-increasing value they are acquiring in the supranational legal scenario.

In the field of the Rule of Law, which is at the center of the present work and is increasingly gaining importance in the ECtHR's case-law, the Commission's most frequently cited documents are the *Report on the Rule of Law*, with its *Rule of Law Checklist*[80], the *Report on Judicial Appointments*[81] and the *Report on the Independence of the Judicial System*[82].

It clearly appears that the topic of independence of judiciary is becoming one of the most important Rule of Law-related issue Europe. This increasing tendency is a direct consequence of the fact that this topic is becoming a hot topic in the European agenda, especially because of the democratic backsliding that is affecting several Member States of the Council of Europe[83] such as Poland, Hungary, Romania, and Turkey[84]. From the analysis of the relevant judgments, it emerges that the ECtHR uses Venice Commission's work to set a minimum level of compliance with international standards in the field of the Rule of Law and, consequently, evaluate the compatibility of specific national provisions with these parameters[85].

More recently[86] the Commission's work in the protection of fundamental rights, especially Freedom of Religion, Freedom of Assembly, and Freedom of Expression, has

[80] VENICE COMMISSION, *Report on the Rule of Law*, Venice, 25-26 March 2011; See f.i. ECtHR, Case *Mráz and Others v. Slovakia*, Judgment of 25/11/2014; Case *Borovská and Forrai v. Slovakia*, Judgment of 25/11/2014.

[81] VENICE COMMISSION, *Report on Judicial Appointments*, (CDL-AD(2007)028); See f.i. ECtHR Case *Ramos Nunes de Carvalho e Sá v. Portugal*, Judgment of 6/11/2018.

[82] VENICE COMMISSION, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, Venice, 12-13 March 2010; See f.i. ECtHR, Case *Ramos Nunes de Carvalho e Sá v. Portugal*, Judgment of 6/11/2018; Case *Jakšovski and Trifunovski v. 'The Former Yugoslav Republic of Macedonia'*, Judgment of 7/01/2016; Case *PSMA, SPOL, S.R.O. v. Slovakia*, Judgment of 9/06/2015.

[83] On the definition of 'democratic backsliding' see f.i.: L. CIANETTI, J.DAWSON AND S. HANLEY, 'Rethinking 'democratic backsliding' in Central and Eastern Europe – looking beyond Hungary and Poland' in *Eastern European* Politics, Vol. 34, Issue 3, 2018; D. KELEMEN, M. BLAUBERGER, 'Introducing the debate: European Union safeguards against Member States'democratic backsliding', *Journal of European Public Policy*, Vol. 24, Issue 3, 2017.

[84] The 'democratic backsliding' is a phenomenon that goes well beyond the strict EU borders, involving several COE's Member States at different stages. In addition to the best known and most cited ones, as Poland, Hungary, Romania, and Turkey, it is affecting several other States as Russia, North Macedonia, Bosnia and Herzegovina, Ukraine, Azerbaijan, Georgia, and others.

[85] This topic will be explored in the second chapter of this work. There we will see the influences that the ECtHR had in identifying the notion of Rule of Law adopted by the Venice Commission on one side; on the other side, we will analyze the use that the Court has made – and is currently making- of this notion in its case-law.

gained greater importance and has collected a fair number of citations by the ECtHR. In 2018 nine out of fifteen Court's judgments refer to Commission's documents concerning the sphere of Freedom of Assembly, Religion, and Expression.

Precisely, the Commission's most frequently cited documents on these topics are the *Report on the Relationship between Freedom of Expression and Freedom of Religion*[87], the *Guidelines on Freedom of Peaceful Assembly*[88], and the *Guidelines for Legislative Reviews of Laws affecting Religion or Belief*[89].

All these documents, which constitute a sort of *vademecum* for the guarantee of a minimum level of protection of fundamental rights, are typically used by the ECtHR to identify the deviations of the national legislation from the European standards in the same subject.

In the analysis conducted on the ECtHR's judgments appears an evident concentration in the use of Commission's documents and opinions concerning States that, in recent times, have revealed serious problems of democratic instability.

The first country affected by the Court's judgments citing the Commission's work is Russia, with 18 cases[90]. Between these judgments, the main areas of interest are Freedom of Assembly, Freedom of Expression, and Elections. This fact is not surprising given that the Russian Federation is one of the most closely monitored states by the Venice

[87] VENICE COMMISSION, *Report on the Relationship between Freedom of Expression and Freedom of Religion*, Venice, 17-18 October 2008, (CDL-AD(2008)026); See f.i. ECtHR, *Case E.S. v. Austria*, Judgment of 25/10/2018, Case *Mariya Alekhina and Others v. Russia*, Judgment of 17/07/2018.

[88] VENICE COMMISSION, *Guidelines on Freedom of Peaceful Assembly*, Strasbourg, 9 July 2010, CDL-AD(2010)020; See f.i. Case *Navalnyy v. Russia*, Judgment of 15/11/2018, Case *Frumkin v. Russia*, Judgment of 5/01/2016, Case *Pentikäinen v. Finland*, Judgment of 20/10/2015; Case of *Navalnyy and Yashin v. Russia*, Judgment of 4/12/2015, Case *Primov and Others v. Russia*, Judgment of 12/06/2014.

[89] VENICE COMMISSION, *Guidelines for Legislative Reviews of Laws affecting Religion or Belief*, Venice, 18-19 June 2004, CDL-AD(2004)028), See f.i. ECtHR, Case *Izzettin Dogan and Others v. Turkey*; Case *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Judgment of 8/04/2014, Case *Sinan Isik v. Turkey*, Judgment of 2/02/2010.

[90] ECtHR, Case *Karastelev and Others v. Russia*, Judgment of 6/10/2020; Case *Obote v Russia*, Judgment of 19/11/2019; Case *Navalnyy v. Russia*, Judgment of 17/07/2018; *Case Mariya Alekhina and Others v. Russia* Judgment of 15/11/2018; *Case Bayev and Others v. Russia* Judgment of 20/06/2017; Case *Davydov and others v. Russia*, Judgment of 13/11/2017; Case *Yabloko Russian United Democratic Party and Others v. Russia*, Judgment of 24/04/2017; Case *Orlovskaya Iskra v. Russia* Judgment of 21/02/2017; Case *Lashmankin and Others v. Russia* Judgment of 7/2/17; Case *Frumkin v. Russia* Judgment of 5/1/16; Case *Novikova and Others v. Russia* Judgment of 26/04/2016; Case *Republican Party of Russia v. Russia* Judgment of 12/04/2011; Case *Russian Conservative party of Entrepreneurs v. Russia* Judgment of 11/01/2007; Case *Navalnyy and Yashin v. Russia* Judgment of 4/12/2015; Case *Kharlamov v. Russia* Judgment of 8/10/2015; Case *Primov and Others v. Russia* 12/06/2014; Case *Anchugov and Gladkov v. Russia* 4/7/13; Case *Communist Party of Russia and Others v. Russia* Judgment of 19/06/2012.

Commission and, more generally, one of the most problematic states adhering to the Council of Europe[91].

With 15 cases[92], Turkey has recently been under the Commission's lenses due to the emergency legislation following the failed coup d'état of July 2016. Consequently, between the analyzed judgments, there are several cases regarding Freedom of expression and Freedom of association.

Among the states most frequently subject to the Court's judgments that contain Commission's documents there are also Hungary, with 10 cases[93], Azerbaijan, with 7 cases[94], Slovakia, with 6 cases[95], Ukraine, with 6 cases[96] and Romania, with 3 cases[97]. Even in this case, nothing surprising considering the purpose for which the Commission

[91]Russian membership in the Council of Europe is getting more and more risky. In 2014 the PACE decided to suspend the voting rights of the Russian delegation in reaction to Russia's aggression against Ukraine. In response to the adopted sanctions, since 2017, Russia ceased to pay annual contribution to COE's budget. The suspension lasted till May 2019, when Russia's voting rights were restored by a declaration of the PACE. For further information about the actions undertaken by the PACE against Russian Federation see A. ALÌ, 'The Parliamentary Assembly of the Council of Europe and the sanctions against the Russian Federation in response to the crisis in Ukraine', in *Italian Yearbook of International Law*, Volume XXVII, 2017, pp. 77-91.

[92] ECtHR, Case *Bas v Turkey*, Judgment of 3/03/2020; Case *Kavala v Turkey*, Judgment of 10/12/2019; Case *Parmak and Bakir v Turkey*, Judgment of 3/12/2019; Case *Selahattin Demirtaş v. Turkey*, Judgment of 20/11/2018; Case *Imret v. Turkey*, Judgment of 10/07/2018; Case *Bakir and Others v. Turkey*, Judgment of 10/07/2018; Case *Isikirik v. Turkey*, Judgment of 9/4/2018; Case *Isikirik v. Turkey*, Judgment of 14/11/2017; Case *Cumhuriyet Halk Partisi v. Turkey*, Judgment of 26/4/2016; Case *Izzettin Dogan and Others v. Turkey*, Judgment of 26/04/2016; Case *Hadep and Demír v. Turkey*, Judgment of 14/12/2010; Case *Sinan Isik v. Turkey*, Judgment of 02/02/2010; Case *Yumak and Sad v. Turkey*, Judgment of 08/07/2008; Case *Kart v. Turkey*, Judgment of 08/07/2008; Case *Oya Ataman v. Turkey*, Judgment of 05/12/2006; Case *Özgürlük Ve Dayanışma Partisi (ÖDP) v. Turkey*, Judgment of 10/05/2012.

[93]ECtHR, Case *Mandly and Others v. Hungary*, Judgment of 26/05/2020; Case *Magyar Kétfarkú Kutya Párt*, Judgment of 20/01/2020; Case *Atv Zrt v. Hungary*, Judgment of 28/04/2020; Case *Baka v. Hungary*, Judgment of 23/06/2016; Case *Miracle Europe KFT v. Hungary*, Judgment of 21/01/2016; Case *Karácsony and Others v. Hungary*, Judgment of 17/05/2016; Case *Szabó and Vissy v. Hungary*, Judgment of 12/01/2016; Case *Baka v. Hungary*, Judgment of 27/05/2015; Case *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Judgment of 8/4/14; Case *Tatár and Fáber v. Hungary*, Judgment of 12/06/2012.

[94] ECtHR, Case *Religious Community of Jehovah Witnesses v. Azerbaijan*, Judgment of 20/02/2020; Case *Jafron and Others v. Azerbaijan*, Judgment of 25/07/2019; Case *Abdalov and Others v. Azerbaijan*, Judgment of 25/07/2019; Case *Ilgar Mammadov v. Azerbaijan*, Judgment of 29/05/2019; Case *Mammaldi v. Azerbaijan*, Judgment of 19/04/2018; Case *Rasul Jafarov v. Azerbaijan*, Judgment of 17/03/2016; Case *Gahramanli and Others v. Azerbaijan*, Judgment of 8/10/2015.

[95] ECtHR, Case *PSMA, SPOL, S.R.O. v. Slovakia*, Judgment of 9/6/15; Case *DRAFT - OVA A.S. v. Slovakia*, Judgment of 9/6/15; Case *COMPCAR, S.R.O. v. Slovakia*, Judgment of 9/6/15; Case *Mráz and Others v. Slovakia*, Judgment of 25/11/2014; Case *Borovská and Forrai v. Slovakia*, Judgment of 25/11/2014; Case *Harabin v. Slovakia*, Judgment of 20/11/2012.

[96] ECtHR, Case *Poliakh and Others v. Ukraine*, Judgment of 17/10/2019; Case *Chernega and Others v. Ukraine*, Judgment of 18/06/2019; Case *Bulanov v. Ukraine*, Judgment of 9/12/2010; Case *Vyerentsov v. Ukraine*, Judgment of 11/04/2013; Case *Oleksandr Volkov v. Ukraine*, Judgment of 9/1/13; Case *Melnychenko v. Ukraine*, Judgment of 19/10/2004.

[97] ECtHR, Case *Kövesi v. Romania*, Judgment of 05/05/2020; Case *Albu and others v. Romania*, Judgment of 10/05/2012; Case *Grosaru v Romania*, Judgment of 2/03/2010.

was created: to assist the Eastern Europe's emerging democracies in their formation and consolidation. In this regard, it is interesting to note that most of the rulings mentioned above concern the Rule of Law.

Finally, attention must be paid to the presence of a fair number of cases of mature democracies, belonging to the hardcore of Europe, on which the Strasbourg Court ruled referring to Venice Commission documents. There are, for instance, 3 cases on the United Kingdom[98], 3 on Spain[99] and 3 on Italy[100]. This aspect, undoubtedly new and interesting, appears to be a direct consequence of the ever-increasing value that the Venice Commission is gaining as an advisory technical body in constitutional matters, not only between emerging democracies but also between well-established ones.

From all the highlighted figures, it emerges the existence of a deep interaction between the VC and the ECtHR; Pieter van Dijk, a former member of both the ECtHR and the VC, has generously defined it as a 'two-way street' and a 'cross-fertilization'[101]. In a less enthusiastic interpretation, the ECtHR does not have to rely on VC opinions, though its decisions may be enriched by references to its studies and documents[102]. Therefore, it becomes evident that the Court uses the Commission as a source of information and inspiration[103].

The synergy between the VC and the Court, therefore, has proved to be very fruitful for both: on one side, the Court has gained information and additional elements, provided by experts and of recognized value, to come to a decision; on the other side, the Commission, thanks to a frequent quotation by the ECtHR, has gained international acknowledgment of its value and, even more important, has raised the value of its

[98] ECtHR Case *Big Brother Watch and Others v. United Kingdom*, Judgment of 13/09/2018; Case *Shindler v. United Kingdom*, Judgment of 07/05/2013; Case *Hirst v. United Kingdom*, Judgment of 30/03/2004.

[99] ECtHR, Case *López Ribalda and Others v. Spain* (GC), Judgment of 17/10/2019; Case *López Ribalda and Others v. Spain*, Judgment of 09/01/2018; *Case Fernández Martínez v. Spain*, Judgment of 12/06/2014.

[100] ECtHR, Case *Sallusti v. Italy,* Judgment of 07/03/2019; Case *Scoppola v. Italy*, Judgment of 22/05/2013; Case *Centro Europa 7 S.R.L and Di Stefano v. Italy*, Judgment of 07/06/2012.

[101] P. VAN DIJK, 'The Venice Commission on certain aspects of the European Convention of Human Rights', in S. BREITENMOSER, B. EHRENZELLER, M. SASSÒLI, W. STOFFEL and B. WAGNER PFEIFER (eds.), *Human Rights, democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Zurich, 2007, pp. 183-184.

[102] W. HOFFMANN-RIEM, 'The Venice Commission of the Council of Europe – Standards and Impact', in *The European Journal of International Law*, Vol. 25, no. 2, 2014, p. 57.

[103] P. VAN DIJK, 'The Venice Commission on certain aspects of the European Convention of Human Rights', 2007, op. cit., p 184, 'The two institutions do not duplicate but endorse and complement each other's work'.

documents from the ground of non-binding recommendations to the level of parameter for the assessment of compliance with the Convention.

This interaction strengthens the effectiveness and authoritativeness of the Commission's opinions, encouraging its Member States to request its assistance at an earlier stage, when drafting laws, to prevent subsequent appeals or judgments of violation once the laws are in effect.

4.3 Luxembourg Calls Strasburg (VC): An Unexpected Relationship

An unexpected and very welcomed relationship, on the other hand, is the one developing between the VC and the European Court of Justice. Although the European Union has referred on several occasions to the Venice Commission's documents, through the work of the European Parliament[104], the European Commission[105], and the European Council[106], it is a novelty worthy of note the increasing tendency of the Court of Justice to mention the VC's work.

It is interesting to note that the CJEU made the first referrals on the VC's definition of the Rule of Law. In two cases[107], the Court has placed the *Rule of Law Checklist* on the same level of CJEU's and ECtHR's case-law, using it as a relevant source for identifying the components of the *Rule of Law* principle in Europe.

[104] The European Parliament has referred to the Venice Commission's work on more than 150 occasions. From 2010 to 2018 more than 80 European Parliament's resolutions credit Venice Commission's advisory competencies and call for close cooperation with it on different issues. For instance, the European Parliament in its Report *on the composition of the European Parliament*, (2017/2054(NL)), para. H, p. 4, 26 January 2018, refers to the Venice Commission's *Code of Good Practice in Electoral Matters*.

[105] Since 2010, around 125 European Commission documents (reports, communications to the European Parliament and other documents) mention the Venice Commission studies and opinions concerning various countries. For instance, European Commission, Report from the Commission to the European Parliament and the Council – First Report under Visa Suspension Mechanism, Brussels, 20 December 2017, (COM(2017) 815 final).

[106] For instance, in its recent document *EU priorities for cooperation with the Council of Europe in 2018*-1029, 22 January 2018, the European Council claimed that 'In challenging times, the EU has a strong interest in working with the CoE and in capitalizing on its expertise and experience, as illustrated by the essential advisory role of the Venice Commission'.

[107] CJEU, Case T- 240/16, Judgment of 11 July 2018, § 63; Case T-245/15, Judgment of 8 November 2017, § 74, 'The case-law of the Court of Justice and of the European Court of Human Rights and the work of the Council of Europe, through the offices of the Venice Commission, provide a non-exhaustive list of principles and standards which may fall within the concept of the Rule of Law. Those include the principles of legality, legal certainty and the prohibition of arbitrary exercise of power by the executive, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law (see, in that respect, the *Rule of Law Checklist* adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016))'.

In its recent Judgment *Commission v Poland*, referring again to the VC's activity on *Rule of Law*- related issues, the CJEU has invoked the *Opinion 904/2017* on Poland to confirm its serious doubts on the reasons beyond the lowering of the retirement age of Supreme Court judges[108].

An even more widespread use of the VC's materials emerges from the opinions of the Advocates General. So far, there are 13 Advocates General opinions referring to the Venice Commission' work, mostly regarding Judiciary-related issues[109].

Particularly important for the present thesis's purpose are the references made by Advocate General Tanchev and Advocate General Saugmandsgaard. Tanchev has very frequently mentioned the work of the Venice Commission in its opinions. Noteworthy are the references made in *Minister for Justice and Equality v. LM*[110] and in *European Commission v. Republic of Poland*[111] to the VC's Opinion 904/2017 on Poland[112]. Saugmandsgaard quoted the VC's work in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*[113]. He referred to the *Report on the Independence of the Judicial*

[108] CJEU, Case C-619/2018, *Commission v. Poland*, Judgment 24 June 2018, §82 'However, it must be observed, first, that, as the Commission points out and as has already been observed by the European Commission for Democracy through Law ('Venice Commission'), in points 33 and 47 of its Opinion No. 904/2017 (CDL-AD(2017)031), the explanatory memorandum to the draft New Law on the Supreme Court contains information that is such as to raise serious doubts as to whether the reform of the retirement age of serving judges of the Sąd Najwyższy (Supreme Court) was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court.'

[109] Opinion of Advocate General Bobek, case C-397/19, delivered on 23 September 2020, §§ 61-63; Opinion of Advocate General Bobek, Joined cases C-83/19, C-127/19 and C-195/19, delivered o 23 September 2020, § 170; Opinion of Advocate General Tanchev, case C-619/18, delivered on 11 April 2019, § 72; Opinion of Advocate General Tanchev, Joined cases C-585/18, C-624/18 and C-625/18, delivered on 27 June 2019; Opinion of Advocate General Tanchev, delivered on 24 September 2019; Opinion of Advocate General Saugmandsgaard ØE, Case C-311/18; Opinion of Advocate General Tanchev, case C-216/18, delivered on 28 June 2018; Opinion of Advocate General Tanchev, case C-192/18, delivered on 20 June 2019; Opinion of Advocate General Campos Sánchez-Bordona, Case C-78/18, delivered on 14 January 2020; Opinion of Advocate General Wahl, case C-118/17, delivered on 15 November 2018.

[110] CJEU, Case C-216/2018, *Minister for Justice and Equality v. LM*, Opinion of Advocate General Tanchev, paragraph 10, 'The question is of importance, since the referring court indicates that it takes the view, based on the Commission's reasoned proposal and two opinions of the European Commission for Democracy through Law ('the Venice Commission'), that such deficiencies are established.'

[111] CJEU, Case C-192/18, *European Commission v. Republic of Poland*, Opinion of Advocate General Tanchev, §§ 3, 109, 112-113.

[112] VENICE COMMISSION, *Opinion on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organisation of Ordinary Courts*, 11 December 2017, CDL-AD(2017)031.

[113]CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, Opinion of Advocate General Saugmandsgaard ØE, § 46, 'Likewise, according to the 'Report on the independence of the judicial system — Part I: The independence of judges' of the European Commission for Democracy through Law (Venice Commission), of 16 March 2010, 'the level of remuneration should be determined in the light of the social conditions in the country''.

System: The Independence of Judges, recalling the Commission's criteria concerning judges' remuneration.

It is interesting to notice that all the cases mentioned so far are related to the Rule of Law principle, and specifically to the element of judicial independence. This may be interpreted as a recognition of the Commission's expertise in this field and a sort of entrustment to its work.

This interesting relationship under development certainly needs to be kept under close observation, for three main reasons.

Firstly, it represents a corroboration of the international value of the Commission's work and a further case of the recognition of the effects of its recommendations by a supranational institution. Secondly, it serves as a fundamental point of exchange on Rule of Law-related issues, which are now crucial in both the EU and COE agenda. Finally, given the considerable 'legal issues' that, in the recent years, have affected the relations between the European Court of Justice and the Council of Europe [114], it creates a possible contact point between the two institutions, pending the process of accession of the EU to the ECHR[115].

4.4 Cooperation with the European Union

An element to consider for recognizing the Venice Commission's international appeal lies in the resonance of its activity outside the Council of Europe's system. Alongside the most recent relationship with the CJEU described above, the Venice Commission has matured a close relationship with other EU's institutions, especially with the European Commission.

The origin of the relationship between the VC and the EU can be traced back to the *Third Summit of State of Government of the COE of 2005*, where plans were made to 'create a new framework for enhanced co-operation and interaction between the COE and

[114] Especially following the Court of Justice's Opinion 2/13 and the setback to the EU's accession to the European Convention of Human Rights.

[115] It seems that recently the negotiations for the EU accession to the ECHR have reopened. The CDDH ad hoc negotiation group ('47+1') on EU accession of the European Convention on Human Rights held its 6th meeting from 29 September – 1 October 2020. It was the first meeting of the Group since April 2013. The Group had reconvened following the request by the European Union to reopen the accession negotiations in October 2019 and the Committee of Ministers' decision to provide the Group with new terms of reference in January 2020 to finalize the accession instruments. The 7th negotiation meeting is scheduled for 24-27 November 2020.

the EU in areas of common concern, in particular human rights, democracy and the Rule of Law'[116]. The Venice Commission, indeed, was at the top of the list of those Institution entrusted for making this cooperation possible[117].

The relation between the EU and the VC is characterized by very few formal ties, namely EU's qualification as a 'special status' member of the Commission, which consists of the possibility for its representatives to participate in the VC's Plenary Sessions[118].

In concrete, in the last years, the EU has involved the VC in several operations related to its membership. Beginning with informal requests, such as the negotiations on the dissolution of the State Union of Serbia and Montenegro or the judicial reforms in Serbia, the relation between the two institutions has become more intense after the EU's enlargement to Eastern European Countries. Indeed, it is known that the VC has played a crucial role in assisting the process of creation of those new democracies.

The European Commission made its first formal request of opinion in 2011, on the question of legal certainty and judicial independence in Bosnia and Herzegovina[119]. Since 2007 Bosnia and Herzegovina has been the beneficiary of the Instrument for Pre-Accession Assistance funds. As a 'potential candidate country', its legal order has been subject to in-depth scrutiny by the EU representatives. In the cadre of such supervision, the VC has been involved as a qualified actor in charge of assessing the country's legal order's compliance with common European standards on judiciary and legal certainty. Indeed, this entrustment represents a clear signal of recognition of the VC's expertise. Undoubtedly, this first VC's involvement in a 'pre-accession assessment' to the EU represented a clear signal of recognition of its expertise and of entrustment to its evaluation capacity.

[116] COE, Warsaw Declaration, 2005, §10.

[117] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, CM(2005)80, § IV.1.

[118] VENICE COMMISSION, Rules of Procedure, CDL-AD(2018)018, Art. 2.

[119] VENICE COMMISSION, *Opinion on legal certainty and independence of the judiciary in Bosnia and Herzegovina*, 15-16 June 2012, CD-AD(2012)014, § 1 'Within the context of the European Union (EU) and Bosnia and Herzegovina's (BiH) Structured Dialogue on the work of the judiciary, the Venice Commission received a request for an opinion on 19 October 2011 from the European Commission (EC) on: 'How the judicial framework, the division of powers and the existing co-ordination mechanisms affect legal certainty and the independence of the judiciary in Bosnia and Herzegovina'.

Despite the few formal ties, through the years, the VC has been involved in strong cooperation concerning EU's accession or stabilization and association processes. This relation is focused on potential candidates for EU's membership and is mostly informal. In the last few years, the Venice Commission has worked, alongside with the European Union, to bring the legal orders of Serbia[120], Montenegro, North Macedonia, Turkey, and Albania, in line with the European Constitutional Standards, making actual signals of progress in the process of accession to the EU[121].

The increasing relevance acquired by the Venice Commission in the EU's accession process has played a crucial role in the definition of the yardstick of political conditionality, with a direct impact on the internal organization of the legal system of the aspiring EU's Member States[122].

The VC's fundamental contribution to the EU's accession process makes it a 'guarantor' of the compatibility of national legal systems with common European values, thus generating a double profile of interest. On the one hand, it increases the Venice Commission's reputation as an international actor in the field of Rule of Law, democracy, and human rights, and, on the other hand, it acts as an incentive for its Member States to fulfill the recommendations contained in its opinions.

Bode-Kirchhoff defined this partnership as a 'rare exception'[123]. However, the cooperation between the VC and the EU on assessing their Member States has recently become a relevant sphere of the Commission's work. Hungary's case is an excellent example of this engagement, where the VC's involvement has been frequent and relevant. Right from the beginning of the Hungarian 'revolution at the ballots'[124], the VC lenses where focused on the legal and constitutional implications of the announced reforms. In its first of a long series of opinions on the 'Hungarian basic law', the Commission has voiced its concerns against the illiberal reforms, inviting the Hungarian Government to

[120] See, VENICE COMMISSION, CDL-AD(2005)023; CDL-AD(2007)004; CDL-AD(2009)039; CDL-AD(2010)006; CDL-AD(2010)048; CDL-AD(2011)005; CDL-AD(2011)006.

[121] See f.i. in the following paragraph the case of North Macedonia.

[122] S. BARTOLE, *International Constitutionalism and Conditionality – The Experience of the Venice Commission*, *op.cit.*.

[123] BODE-KIRCHHOFF, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a Link between the EU and the ECHR', op. cit., pp. 66 ff.

[124] This was the phrase used by Viktor Orbán, the Hungarian Prime Minister, to label its overwhelming victory in the 2010 parliamentary elections which gave the 2/3 majority in parliament to his FIDESZ party.

an evident change of course[125]. Following this opinion, and several other concerns expressed by, *inter alia*, COE members and the European Parliament, the European Commission had finally analyzed the new provision concerning their compatibility with EU law and decided to launch the infringement procedures under Article 258 TEU [126]. Since then, the cases of cooperation between the VC and the European Union on issues regarding its Member States have multiplied and, as some commentators have argued, does not seem far-fetched to assume that 'the European Commission played a vital role in encouraging Hungarian government to seek the advice of the Venice Commission'[127].

This tendency has been recently confirmed by the President of the European Commission Ursula von der Leyen. In her letter to the Secretary General of the Council of Europe she has defined EU's cooperation with the Venice Commission 'essential to reinforcing the Rule of Law and the fight against corruption both within the EU and in our neighborhood'[128].

Under the aegis of this partnership the European Commission has referred to nearly 200 Venice Commission's documents, using them as 'relevant standards' for EU's internal and external action.

Recently, this relation resulted in significant developments within the Rule of Law field, intended as a common ground of concern. In its *Communication to Strengthening the Rule of Law within the Union*[129], the European Commission has embraced the Venice Commission's definition of the Rule of Law principle, thus recognizing its expertise in

[125] VENICE COMMISSION, CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary, 25-26 March 2011.

[126] EUROPEAN COMMISSION, Press release IP/12/24 of 17 January 2012.

[127] BODE-KIRCHHOFF, 'Why the road from Luxembourg to Strasbourg leads through Venice: the Venice Commission as a Link between the EU and the ECHR', op. cit., p. 69.

[128] Letter of the President of the European Commission to the Secretary General of the Council of Europe, 17 February 2020.

[129] EUROPEAN COMMISSION, Communication from the Commission to the European Parliament and the Council, *A New EU Framework to Strengthen the Rule of Law*, 11.03.2014, COM(2014)158; 'The precise content of the principles and standards stemming from the Rule of Law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ('the Court of Justice') and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the Rule of Law as a common value of the EU in accordance with Article 2 TEU.', p. 4; 'The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis', p. 10.

this field, and laying the foundations for further collaboration on the protection of the Rule of Law in Europe. This cooperation has been recently formalized in the Commission's *Blueprint for action for strengthening the Rule of Law within the Union*[130], where the intensification of the work with the Venice Commission concerning the EU priorities on the Rule of Law has been included among the Commission's actions to promote its protection in Europe.

From the framework outlined so far, it emerges that the EU is increasingly recurring to the Venice Commission's expertise to increase the level of protection and promotion of shared fundamental values within its Member States and those Countries candidate to the EU's accession. This tendency proves the VC's international relevance as a valid interlocutor in the field of human rights, democracy, and Rule of Law and contributes to the spreading of its work within and beyond Europe.

5 A 'CONSTITUTIONAL LAW NETWORK': PECULIARITIES OF THE 'VENICE COMMISSION SYSTEM'

As highlighted by several Authors, the Venice Commission represents a very peculiar instrument, defined both as an international organization *latu sensu* and as a 'constitutional law network'[131], for several reasons that we will try to sum up below.

The first strength of this body lies in its composition. As we have seen in paragraph 1, it mixes up members coming from very different experiences within the legal landscape, from high and constitutional court judges to professors, politicians, and civil servants, all united in the same goal of selection and dissemination of common constitutional traditions inside and beyond Europe. This peculiarity makes possible a unique exchange of ideas and knowledges coming from the expertise of the 62 Member States' representatives.

Secondly, although formally placed under the edge of the Council of Europe, since its creation in 1990, the Venice Commission has an independent organization, based on a

[130] EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union. A blueprint for action*, Brussels, COM(2019)343, 17.07.2019, p. 8.

[131] C. DALLARA, 'The Role of the Venice Commission in Two RoL Reversal Cases: Hungary and Romania', in C. DALLARA, D. PIANA, *Networking the Rule of Law*. *How Change Agents Reshape Judicial Governance in the EU*, p. 63 ff.

permanent secretariat and a self-regulated plenary assembly. This peculiar organization makes the Venice Commission a real independent and impartial body, which renders its recommendations more welcomed by recipient States.

Thirdly, as described above, its geographical composition represents a fruitful point of international exchange. The fact that its membership goes beyond the Council of Europe's Member States, including other states belonging to the African, Asian, and American continents, creates an enlarged constitutional forum capable of selecting and sharing standards from very different democratic experiences within the Council of Europe countries and spread them beyond Europe.

Fourthly, the fact that OSCE and EU are participant members of the Venice Commission, able to ask for opinions and intervene in the drafting of Commission's documents, extends the above-mentioned constitutional forum to other international organizations, creating a fundamental point of reference for common and shared action on sensitive issues such as democracy, Rule of Law, and human rights.

Finally, its special status within the Council of Europe is of great importance. Being born under the aegis of the COE, makes the VC a privileged interlocutor on the understanding of the values of Rule of Law, democracy and human rights, the founding principles of the Organization.

The VC was by its nature genetically created to protect and strengthen these same values from a privileged point of observation. From one side, indeed, its advantaged position of dialogue with the ECtHR in the light of an always more profound protection of human rights, democracy and Rule of Law in Europe have created a unique forum of exchange on constitutional matters. From the other side, its role of technical advisor within the Council of Europe makes it a 'constitutional law network' with an international view on typically nationally related issues as Rule of Law and democracy.

Here lies the strength of the Venice Commission's work: interpret from a supranational point of view, namely the COE's one, principles and values that up to now have had a predominantly national character, thus opening the way for a 'multilevel' protection of the Rule of Law in Europe.

III. Strengthening the Rule of Law: The Contribution of the Venice Commission to the Creation of a Common European Framework on the Principle

1. INTRODUCTION

From the analysis conducted so far on the Venice Commission it can be said that the institution represents a unique place for the implementation of the Council of Europe's values within its Member States. Its peculiarities – the tailor-made intervention, the global appeal, the selection and implementation of common European standards, the multilevel approach, and so on – have made it a unique player in the European scenario.

Being an organ of the Council of Europe, the Venice Commission, through its thirty years of existence, devoted particular attention to the promotion of its founding values – human rights, democracy, and Rule of Law -, assessing and strengthening their implementation within its Member States.

In the last ten years, because of the spreading of illiberal values and the crisis of liberal democratic principles in Europe, the defense and improvement of the COE's pillars has become preponderant and urgent both at national and international level. The fostering of a typically national value, as the Rule of Law, with multilevel approach represents one of the most important innovations of the Venice Commission's working method. In some cases, upon request of the COE and the EU, in other of the interested Member States, the VC has dealt with an ever-increasing number of internal issues related to the Rule of Law principle.

As we will see in the following, human rights and democracy are deeply intertwined with the notion of the Rule of Law, which is today at the center of a political and institutional debate in Europe. After being the least influential of the three pillars for years, the Rule of Law has recently gained a prominent position. Undoubtedly, through the years, democracy and human rights have become consolidated and undisputed values, with well-defined content. On the contrary, the Rule of Law has been a contested value with undefined content since the beginning. This character, which initially set it aside, turned out to be the reason for its recent fortune. Indeed, its indeterminacy made it a

'multifaceted or umbrella legal principle'[132], capable of containing the various constitutional issues that could not fall within the scope of the principles of democracy and human rights. Therefore, it has progressively become a dominant organizational paradigm within the EU's constitutional order.

The next paragraphs will focus on Venice Commission's role in promoting and defending these European values against the spreading of illiberal and undemocratic reforms, with peculiar attention on its innovative approach to the Rule of Law principle.

2. THE VC'S COMMITMENT TO STRENGTHENING THE RULE OF LAW WITHIN ITS MEMBER STATES

The promotion of the Rule of Law within its Member States is one of the principal objectives of the VC's activity. Article 1 of its Statute establishes that its work is devoted to identifying 'constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the Rule of Law'[133].

During its thirty years of existence, the Venice Commission has dealt extensively with Rule of Law-related issues in all its Member States, preparing several opinions and recommendations on draft constitutions and legislation submitted to its expertise. Since

[132] L. PECH, 'The Rule of Law as a Constitutional Principle of the European Union', in *Jean Monnet Working Paper 04/09*, pp. 7, 9 and 68.

[133] Statute of the Venice Commission, Article 1 '*1. The European Commission for Democracy through Law shall be an independent consultative body which co-operates with the member states of the Council of Europe, as well as with interested non-member states and interested international organisations and bodies. Its own specific field of action shall be the guarantees offered by law in the service of democracy. It shall fulfil the following objectives:*

- strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer;

- promoting the rule of law and democracy;

- examining the problems raised by the working of democratic institutions and their reinforcement and development.

2. The Commission shall give priority to work concerning:

a. the constitutional, legislative, and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law;

b. fundamental rights and freedoms, notably those that involve the participation of citizens in public life;

c. the contribution of local and regional self-government to the enhancement of democracy.

3. With a view to spreading the fundamental values of the rule of law, human rights and democracy, the Commission encourages the setting up of similar bodies in other regions of the world and may establish links with them and run joint programmes within its field of activity.'

the beginning, the Commission's activity has aimed to clarify and streamline the meaning of the Rule of Law as a concept of universal validity[134].

In 2007 the Parliamentary Assembly called upon the Venice Commission to assist it in analyzing the concept of the Rule of Law within the Council of Europe[135]. As the Committee of Ministers has stated in its document 'The Council of Europe and the Rule of Law – An overview'[136], within the Council of Europe there are five main areas in which the Rule of Law unfolds: promoting the conditions necessary for the Rule of Law; promoting the respect for the Rule of Law; addressing threats to the Rule of Law; ensuring respect for the Rule of Law; and strengthening the international Rule of Law[137]. To fulfil all these functions, the Council of Europe has mostly relied upon the VC's expertise[138]. Indeed, the purpose of the request was to identify the 'core elements' of the principle through a consensual definition intended to help international organizations, Member States and domestic and international courts in applying this fundamental value[139].

From these premises the Venice Commission's role in defining a new approach to the principle was clear: give a definition that allows the Member States to enact an individual practical implementation of the Rule of Law principle within their national legal frameworks. In other words, the goal was to create an operative tool and pose it at the disposal of the national legislator to adapt its legislation to Common European Standards on the Rule of Law.

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[134] L. PECH, J. GROGAN ET AL., 'Meaning and Scope of the EU Rule of Law', op. cit., p. 35.

[135] PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Resolution 1594 (2007), *The principle of the Rule of Law*.

[136] COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *The Council of Europe, and the Rule of Law. – An overview*, CM(2008)170, 21 November 2008.

[137] *Ibid*, § 22.

[138] Within the Council of Europe's framework, the Venice Commission is not the only body dealing with the Rule of Law principle, but certainly is the most relevant when it comes to a comprehensive and structured activity of strengthening and promoting its values. Among the other COE's institutions involved in the Rule of Law promotion there are the Parliamentary Assembly (PACE) Monitoring Committee, the Group of States against Corruption (GRECO), the European Commission for the Efficiency of Justice (CEPEJ) and the Council of Europe Commissioner for Human Rights.

[139] *Ibid*, § 3, '*Despite a general commitment to this principle, the variability in terminology and understanding of the term, both within the Council of Europe and in its member states, has elicited confusion. In particular, the French expression Etat de droit (being perhaps the translation of the term Rechtsstaat known in the German legal tradition and in many others) has often been used but does not always reflect the English language notion of 'Rule of Law' as adequately as the expression prééminence du droit, which is reflected in the French version of the Statute of the Council of Europe, in the preamble to the European Convention on Human Rights (ETS No. 5) and in the Strasbourg Court's case law*.'

The VC took the request as a chance to finally identify a unique European understanding of the principle, applicable within the Council of Europe legal system and beyond, in the light of a joint promotion and protection of the values enshrined in its notion.

After years of careful reflections and deliberations, in 2011, the Venice Commission published a Report on the Rule of Law. It was the first official COE's document proposing a functional, even though non-exhaustive, definition of the Rule of Law[140]. For this purpose, the Commission has identified as the closest existing academic definition of Rule of Law the one proposed by the British judge Lord Bingham. To briefly recall its understanding, Bingham states that the core principle of the Rule of Law lies in the fact 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of the law publicly made, taking effect (generally) in the future and publicly administered in the courts'[141].

The choice of this definition is not a coincidence. Indeed, Bingham's work represents one of the most famous attempts to go beyond the traditional notion of Rule of Law, mostly connected with the idea of Nation and regarded as a purely theoretical issue and put it in practice. For this purpose, he extrapolated some elements considered as fundamental components of the Rule of Law. They are:

1) Accessibility of the law (that it be intelligible, clear, and predictable).

2) Questions of legal right should be decided by law and not discretion

3) Equality before the law.

4) Lawful, fair, and reasonable exercise of power.

5) Protection of human rights.

6) Means must be provided to resolve disputes without undue cost or delay.

7) Fair trial.

8) Compliance by the State with its obligations in international law[142].

[140] VENICE COMMISSION, *Report on the Rule of Law*, CDL-AD(2011)003rev, Venice, 25-26 March 2011
[141] T. BINGHAM, *The Rule of Law*, op. cit.
[142] *Ibid*, pp. 37-129.

Among the elements identified as components of the Rule of Law, he has added to the classical one the aspect of State's adherence to international obligations and human rights protection. These new ingredients introduced by Bingham in the Rule of Law's notion are relevant for the Venice Commission. Being an international institution, which protects Rule of Law, democracy, and human rights, it has found in Bingham's understanding the perfect synthesis for a multilevel protection of the principle.

Starting from Bingham's list of values inherent to the notion of the Rule of Law, the Venice Commission has derived its catalog of six core elements, on which there is a consensus between the Member States of the Council of Europe. These necessary elements, according to the Commission, are:

1) Legality, including a transparent, accountable, and democratic process for enacting law

2) Legal certainty.

3) Prohibition of arbitrariness.

4) Access to justice before independent and impartial courts.

5) Respect for human rights.

6) Non-discrimination and equality before the law[143].

The list was accompanied by the first draft of a *Rule of Law Checklist*, intended to make more functional and operational the content of the Report. This document, created to provide practical parameters to evaluate the state of the Rule of Law in the Member States, consists of sub-requirements under each of the six core elements of the principle[144].

Some scholars have identified this functional approach of the Venice Commission, alongside its definition of the Rule of Law, as 'one of the few widely accepted conceptual frameworks for the Rule of Law in Europe'[145]. Its value is also confirmed in the European Union's scenario, where, in the recent *Communication from the European Commission*

[143] *Ibid*, §§ 41 ff.

[144] For instance, under the requirement of legality, the *Checklist* outlines nine sub elements whose respect is necessary to fulfil the criteria in each Member State. For instance, point c) evaluates whether 'the exercise of power is authorized by law' within the Member State under analysis, *Ibid*., p. 15.

[145] S. CARRERA, E. GUILD, N. HERNANZ, op. cit., p. ii.

'A New EU Framework to strengthen the Rule of Law', the definition of the Rule of Law applied is the one identified by the Venice Commission[146]. It has been argued, indeed, that the European Commission's Framework 'applies an almost identical list of parameters' to the one elaborated by the VC, with the only difference that 'the EU Communication does not mention respect for human rights as such but refers to respect for fundamental rights in respect of effective judicial review'[147].

Few years after the release of the Report, the Venice Commission decided to extend its work on the *Rule of Law Checklis*t involving for this purpose some experts of the Bingham Centre. This cooperation brought to a revision of the existing document to make it more operational and at the disposal of the Member States' necessities. In 2016 the *Rule of Law Checklist* was adopted by the Venice Commission's Plenary Session as an independent official document[148].

The six elements identified in 2011 were condensed into five, making clear that respect for human rights – the apparently excluded element – had to be seen as a principle informing all the other components. As highlighted by the Commission, indeed, 'The Rule of Law would just be an empty shell without permitting access to human rights. Vice-versa, the protection and promotion of human rights are realized only through respect for the Rule of Law'[149].

Each of the five elements of the Rule of Law identified in the *Checklist* is accompanied with practical benchmarks, intended to be used as operational tools for an 'objective, transparent and equal' assessment of the Member State's adherence to the Rule of Law. It has been conceived of as an assessment tool for stakeholders, national and international

[146] EUROPEAN COMMISSION, '*Communication from the Commission to the European Parliament and the Council: a new EU Framework to strengthen the Rule of Law*', COM(2014)158 final, p. 4 '*The precise content of the principles and standards stemming from the Rule of Law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ('the Court of Justice') and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the Rule of Law as a common value of the EU in accordance with Article 2 TEU*.'.

[147] J. POLAKIEWICZ AND J. SANDVING, in 'The Council of Europe and the Rule of Law', in W. Schroeder (ed) *Strengthening the Rule of Law in Europe*, Oxford, 2016, pp. 120-121.

[148] VENICE COMMISSION, *Rule of Law Checklist*, CDL-AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016.

[149] *Ibid*, § 31.

courts, and institutions wishing to bring their legal orders in line with the European standards on the Rule of Law.

3. A New Approach to the Rule of Law Principle

The parameters identified by the VC as components of the Rule of Law are selected among standards and principles of the Common European Heritage. Despite their formal recognition as fundamental values by all VC's Member States, there are still problems in their practical implementation. Indeed, it is well known that to put into practice a theoretical concept, an interpretative and applicative job is often required.

However, in many cases, States are not equipped, or unwilling, to take this fundamental step for an ever-increasing level of Rule of Law's protection. Therefore, external assistance is sometimes necessary to make these values directly applicable within the national legal system. The Venice Commission, developing a new approach to the Rule of Law principle, has become a key actor for promoting its implementation and strengthening among its Member States.

The contribution of the Venice Commission to the creation of a common European framework on the Rule of Law appears relevant for at least three reasons.

First, distancing itself from the theoretical formal tradition, it has created a new inclusive notion, in which the Rule of Law principle dialogues with democracy and human rights as part of a unique constitutional structure.

Second, it represents an innovative methodological approach to the Rule of Law principle, shifting it from an abstract academic topic to a pragmatic and operational tool at the Member States' disposal.

Third, upon close examination of the Council of Europe's internal mechanisms, it offers a new approach towards its Member States, no more individual, as it has always been through the ECtHR case law[150], but systemic, aimed at evaluating the whole legal system of the State subject to the Commission's assessment.

[150] See for instance case *Baka v. Hungary*, Appl. No. 20261/2012, 23 June 2016, §§ 116-119, where the Court, talking about the applicability of Article 6 ECHR to the case in analysis, even though referring to the VC documents on Rule of Law and judicial power, keeps the discussion on the level of the individual recurrent, referring only to matters relating to the present case, without intervening on the national system. The Court founds a violation of the principle of separation of powers. However, instead of proceeding to a

3.1 An Inclusive Notion: Rule of Law, Human Rights, and Democracy's Interplay

The interplay between three fundamental components of the contemporary state as Rule of Law, democracy and human rights has characterized the last century's doctrinal debate. The European Commission has recently defined these values as the 'bedrock of our societies and common identity'[151].

Focusing on the Rule of Law notion and its relationship with the other two elements, scholars have identified one central dichotomy between a 'thin' or 'formal' conception and a 'thick' or 'substantive' one. According to Tamanaha, the main difference consists of the fact that 'formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principle)[152].

On the one hand, the 'thin' conception of the Rule of Law focuses on the law's formal or procedural aspects. Its 'thinnest' version can be identified with the 'rule by law'[153] conception, where the government acts 'through law', using it as a mere instrument, to avoid the 'rule by men'[154]: this means that 'whatever a government does, it should do it through laws'[155].

Hertog argued that this formal legality represents a 'substantively empty' conception, only based on procedural requirements, and totally disconnected from any other substantive value[156]. For some theorists, this 'value-free nature' of the formal conception

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deeper scrutiny of the whole national system emerging from the anti-democratic reforms promoted by the Hungarian President Orban, it strictly maintains the analysis on the applicant, limiting itself to an assessment of the compatibility of his situation with Articles 6 and 10 ECHR. For a complete analysis of the case see D. Kosar and K. Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', in *Hague Journal on the Rule of Law*, Vol. 10, 2018, pp. 83-110.

[151] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*. *2020 Rule of Law Report. The rule of law situation in the European Union*, Brussels, 30 September 2020, COM(2020) 580 final, p.1.

[152] B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, 2000.

[153] S. Holmes, 'Lineages of the Rule of Law', in J. Maravall and A. Przeworski, Democracy and the Rule of Law, Cambridge, 2003, pp. 49-51.

[154] On the relation between Rule of Law and rule by law see G. Palombella, 'L'ideale della legalità e il Rule of Law', in G. Palombella, *É possible una legalità globale? (il Rule of Law e la governance del mondo)*, Bologna, 2012.

[155] N. B. Reynolds, 'Grounding the Rule of Law,' in *Ratio Juris*, 1989, vol. 2, Issue 1, pp. 1-16.

[156] L. den Hertog, 'The Rule of Law in the EU: Understandings, Development and Challenges', in *Acta Juridica Hungarica*, vol. 53, 2012, pp. 204-217.

represents the key to its wide acceptance; however, on the contrary, it has been argued that it may also pave the way to extreme, and in some cases dangerous, conceptualizations: Raz pointed out that slavery and the Rule of Law as formal legality could be perfectly reconcilable![157]

On the other hand, 'thick' or 'substantive' theories have improved the thin concept of the Rule of Law, introducing new elements. Dworkin explained that the substantive conception, defined as 'the rights conception', 'assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.'[158]

This means that, in addition to formal requirements, this understanding of the Rule of Law principle opens the way to a significant interplay of this value with other fundamental values, such as democracy and human rights.

The 'thickest' version of the Rule of Law includes civil and political rights of the individuals and socio-economic welfare within a 'dynamic concept' of the Rule of Law[159], thus expanding it from the limited scope of a static notion to the so-called 'Rule of Life'[160]. According to Dworkin, which favors a 'right conception' over the 'rule book' approach, the rights are to be recognized by way of positive law and shall be enforced through courts[161].

Even this concept is not without criticisms. To make the thick conception a workable idea, fundamental rights must be placed above the law-making to determine the content of the law and prevent it from becoming tyrannical. Since the law's content is identified through a democratic process, in practice this would mean a triumph of fundamental rights over democracy. In their extreme substantive theorization, Hutchinson and Monahan even claimed that 'Rule of Law is more concerned with and committed to

[157] J. RAZ, *The Authority of Law*, Oxford, 1979, p. 221.

[158] R. DWORKIN, Political Judges and the Rule of Law, in *Proceedings of the British Academy*, vol. 64, 1978, p. 259.

[159] N. S. MARSH, *The Rule of Law in a Free Society, A Report on the International Congress of Jurists*, New Delhi, India, 1959.

[160] From the definition given by Prime Minister Jawaharlal Nehru in his opening speech at the International Congress of Jurists in New Delhi in 1959.

[161] R. DWORKIN, *A Matter of Principle*, Oxford, 1985, p. 11. The basic tenets of the rights conception are described by Dworkin as follows: *'It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable.'*

individual liberty than democratic governance'[162], thus, concluding that individual rights trump democracy when they conflict.

It clearly appears that the Rule of Law, whether being the thinnest or the thickest, is a matter of choice that might serve different purpose. To summarize it in Bedner's words 'thin seeks to access the quality of the legal system, while thick is about a desired state'[163].

Within the described debate, the VC's choice has been to distance from purely formalistic conceptions of the Rule of Law, merely requiring that any action of a public official be authorized by law. In its understanding, indeed, 'Rule by Law', or 'Rule by the Law', or even 'Law by Rules' are distorted interpretations of the Rule of Law[164]. Thus, it embraces a non-purely substantive notion, inclusive of democracy and human rights principles. It considers that 'the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression'[165].

In VC's understanding of the principle, human rights and democracy are interconnected inherent elements of the Rule of Law. Its unique notion, belonging neither to a purely formalistic, nor to a purely substantial conception results from the nature of the Commission itself. The Venice Commission, indeed, is an institution of the Council of Europe, and the achievement of these three principles - respect for human rights, pluralist democracy, and the Rule of Law - is regarded as a single objective - the core objective - of the Council of Europe[166].

The first crucial element of innovation of the VC's understanding lies in having identified a notion that involves and relates the three pillars on which the COE's system is founded. Precisely what we call an 'inclusive' notion.

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[162] A. C. HUTCHINSON AND P. MONAHAN, 'Democracy and the Rule of Law,' in *The Rule of Law: Ideal or Ideology*, 1987, p.100.

[163] A. BEDNER, 'The promise of the thick view', op. cit, p. 46.

[164] On the relation between Rule of Law and rule by law see G. PALOMBELLA, 'L'ideale della legalità e il Rule of Law', in G. PALOMBELLA, *É possible una legalità globale? (il Rule of Law e la governance del mondo)*, Bologna, 2012.

[165] OSCE, Document of the Copenhagen meeting of the conference on the human dimension of the CSCE, 29 June 1990, p. 3.

[166] VENICE COMMISSION, *Rule of Law Checklist*, § 11.

The virtue of a system of interplay between human rights, democracy and the Rule of Law has also been recognized by the UN, according to which 'the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[167]

The indispensable association between human rights protection and the Rule of Law has been one of the focuses of the Venice Commission from the very beginning[168]. The Rule of Law, indeed, would just be an empty shell without permitting access to human rights. Vice-versa, the safeguard and promotion of human rights can be realized only through respect for the Rule of Law. Besides, the Rule of Law and several human rights, such as fair trial and freedom of expression[169], frequently overlap[170].

In the Commission's understanding, the Rule of Law is linked not only to human rights but also to democracy, i.e., to the Council of Europe third primary value. While democracy relates to people's involvement in the decision-making process in a society, human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties and to secure human dignity. It follows that the Rule of Law, synthesizing in its scope the two other pillars, focuses on limiting and independently reviewing the exercise of public powers involving and protecting individuals.

Therefore, in the VC's view, the Rule of Law promotes democracy by establishing accountability of those wielding public power and safeguarding human rights, which

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[167] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN SC, UN Doc. S/2004/616 at 4)

[168] S. NINATTI AND S. GRANATA-MENGHINI, 'The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission', *op. cit.*, p. 221.

[169] VENICE COMMISSION, *Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media*, Venice, 10-11 March 2017, 'If free media in Turkey are effectively silenced over a prolonged period, the very foundation of the democratic state governed by the rule of law is affected', §89.

[170] *Ibid,* §31.

protect minorities against arbitrary majority rules[171]. This interplay can be well resumed in the European Commission words, stating that 'no democracy can thrive without independent courts guaranteeing the protection of fundamental rights and civil liberties, nor without an active civil society, and a free and pluralistic media.[172]'

3.2 The Operationalization of the Rule of Law's Notion

When the Venice Commission was required to conceive of a comprehensive notion of the Rule of Law, one of the most discussed features was related to its practical implementation within the Member States. Indeed, the purely theoretical approach adopted since then to solve national Rule of Law-related issues proved to be insufficient and needed to be rethought.

Therefore, in response to the identified necessity, the VC tried to translate a purely theoretical notion into practice. In the process of operationalization of the Rule of Law's notion, The VC's *Rule of Law Checklist* has undoubtedly played a crucial role. The *Checklist* is intended as a comprehensive tool to assess the degree of respect for the Rule of Law in each State.

The first innovative aspect consists in the identification of its recipients: it has been conceived of to be used not only by the experts of the Venice Commission but also by a variety of stakeholders, such as state authorities, international organizations, non-governmental organizations, scholars, and citizens in general.

As the process of evaluation of compliance with Rule of Law's principles is incredibly complex, alongside stakeholders is often necessary the support from experts. To reach an overall view of the situation, which considers all the relevant elements, a double perspective is indispensable. On the one hand, it requires an internal look, which gives an in-depth knowledge of the national legal system and the social background. On the other hand, a global and impartial vision of the constitutional framework is necessary, an expertise which can be introduced by experienced and impartial subjects, coming from the outside, and with specific knowledge in constitutional law.

[171] Venice Commission, *Rule of Law Checklist*, § 33.
[172] European Commission, *2020 Rule of Law Report, op.cit.*, p. 1.

Here lies the strength of the Venice Commission's working method 'fostered and developed on the basis on one hand of the strong belief in the absolute value of constitutions and on the other hand on the refusal to impose external, ready-made solutions on the authorities seeking its help'[173].

This attitude of respectful intervention has been noted by the doctrine[174] to recall both the EU dialectic on the respect of the national constitutional identities and the UN requirement that 'the options and advice provided must be carefully tailored to the local context, recognizing that there is no 'one size fits all' constitutional model or process'[175].

In its operational approach, the Commission gets a fuller picture of the situation by having interviews with all State's representatives, Government and opposition, the judiciary, media, and stakeholders. Its capacity to build constructive and fruitful relationships with its Member States, based on a tailor-made intervention, despite the 'non-binding' nature of its recommendations, is one of the primary reasons for its relevant impact in the international scenario.

Another advantage of the VC's *modus operandi* regards the factor time, which is of relevance in Rule of Law related issues. Often, when aiming at making radical changes in a democratic system, Governments proceed with remarkable speed, with the purpose to cut off public debate and obstruct democratic procedures[176]. On the contrary, usually, European bodies have a very long time of reaction[177]. To avoid potentially dangerous delays, the Venice Commission has established a working method that enable it to adopt opinions sometimes within weeks[178], regularly within two months.

[173] S. NINATTI AND S. GRANATA-MENGHINI, 'The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission', *op. cit.*, p. 219.

[174] *Ibid*., p. 212.

[175] UN SECRETARY GENERAL, *Guidance Note on United Nations Assistance to Constitutional-Making Processes*', April 2009, p. 4.

[176] See for instance the emergency ordinances adopted by Hungarian and Romanian Governments to undermine judicial independence and weaken the Rule of Law.

[177] See, for instance, the length of the Article 7 proceedings initiated by the EU against illiberal measures undertaken by Poland (20th December 2017) and Hungary (12th September 2018) to undermine the Rule of Law within their national frameworks.

[178] The VC's Rules of Procedures provide, at Article 14.a, for an urgent procedure through which the Commission can adopt urgent opinions without the deliberation of the Plenary Assembly.

The recent Urgent *Opinion on the Law on the Common and Supreme courts of Poland*[179] represents a clear example of the importance of VC's reactivity. In this case, the Polish Senate's Marshal requested the VC's assessment from the perspective of judicial independence. The urgency was determined by the fact that the VC's response was expected in two weeks, just before the end of the session of the Senate at which the amendments should have been discussed. In its opinion the Venice Commission strongly criticized the draft amendments, which it felt 'further undermine the independence of the judiciary in Poland'[180] and 'diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments'[181]. Thus, the VC recommended the Senate not to adopt those amendments. Based on this opinion, thanks to the punctual and quick intervention of the Commission, the Polish Senate rejected the bill in its entirety on 17 January 2020[182].

It derives that the VC's operational approach, based on a tailor-made and quick response to the needs that come to its attention, – together with the know-how and the reputation of its activity – emblematizes its success and its relevance for the action of other European bodies[183].

3.3 The Systematization of the Rule of Law's Notion

The third strength identified in the Venice Commission's approach epitomizes its capacity to drop the Rule of Law principle within the national legal system, analyzing its fulfillment from a multilateral perspective.

Before the conception and implementation of the new Rule of Law's notion, the Council of Europe's approach to the principle has always been a partial one, mainly triggered by the appeals brought before the European Court of Human Rights by individual citizens of COE's Member States. However, this approach was restrictive. It only allowed a narrow analysis, confined to the internal elements pertinent to the case in

[179] Venice Commission, *Joint Urgent Opinion on Amendments to the Law on the Common Courts, the Law on the Supreme Court and some other Laws*, 18 June 2020, CDL-AD(2020)017.
[180] *Ibid*, § 59.
[181] *Ibid*, § 60.
[182] See. PACE, Doc.15025 Add. 'The functioning of democratic institutions in Poland', 27 January 2020.
[183] C. Grabenwarter, 'Constitutional Resilience', *Verfassungsblog*, 6 December 2018.

point, precluding any systemic and overall review of the respect of the standards of the Rule of Law by the Member States concerned. As highlighted by von Bogdandy, indeed, 'Although the European Court of Human Rights may develop and apply the European Convention on Human Rights as a constitutional document, the length of its proceedings and its focus on individual cases prevent it from providing a sufficient answer to systemic deficiencies in the Rule of Law'[184].

Therefore, it is evident that the protection of the Rule of Law, when limited to a judicial level, maintains a fragmented character which prevents, as recently demonstrated by Hungary, Romania, and Poland, a general and efficient intervention[185]. On the contrary, based on a comprehensive analysis of the existing legal framework and an overall assessment of the political background, the VC's approach is reflected in a more advantageous action for the Member State.

The creation of the *Checklist* and the following work carried out by the Venice Commission in evaluating the compliance between the established standards and the national legislative system represents, once again, a completely new *modus operandi* for the Council of Europe.

One first innovation resides in the fact that, through the VC's intervention, such an evaluation now can be conducted right before the insurgence of a potentially systemic violation, both upon request of the Member States or of the COE's organs. This means, considering the time that the rule of previous exhaustion of internal remedies imposes between the concrete application of law and its examination by the Court, that the work of the VC in a certain sense anticipates the effects of the Court's ruling, by making a preventive execution of the general measures that would be necessary in case of a possible condemn[186]. Indeed, it is not uncommon that the VC intervene at a very early stage,

[184] A.VON BOGDANDY AND P. SONNEVEND, *Constitutional Crisis in the European Constitutional Arena. Theory, Law and Politics in Hungary and Romania*, Oxford, 2015, p. vii.

[185] See for instance the case *Minister for Justice and Equality v. LM*, (C-216/18, 25 July 2018), where the CJEU, when dealing with the topic of justice reform in Poland, misses the opportunity to approach the issue with a systemic approach, limiting its scope to the case in point. For a complete analysis of the case see W. VAN BALLEGOOIJ, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law within the EU', in *Verfassungsblog*, 29 July 2018.

[186] On this point see S. GRANATA MENGHINI, 'Richiesta di opinion *amicus curiae* da parte della Corte e anomalie procedurali (la Venice Commission)', *op. cit.*, p. 183.

working on draft laws right before their final adoption and implementation within the national legal system[187].

Even more relevant is that the Venice Commission's work considers for the first time the whole context, avoiding the risks mentioned earlier, connected with a superficial and partial analysis.

Such a systemic assessment, which examines all the Rule of Law's constitutive elements, assumes a very peculiar value. Indeed, the principle in question 'is not just the way the law conforms to the change of power, but the way legality is organized by also allowing a side of positive law capable of a contrasting and resisting autonomy vis á vis the laws issued by those in power.'[188] It derives that every assessment conducted above single and determined elements of the Rule of Law results partial and prevents an overall evaluation of the whole legal system's conformity to the principle under threat.

Therefore, the VC's systemic approach represents a unique instrument for a complete and effective implementation of the Rule of law principle within its Member States.

IV. CONCLUSIONS

Even though, as expressly stated in the Introduction, the *Checklist* is neither exhaustive nor final[189], it aims to cover the core elements of the Rule of Law that must be fulfilled to ensure compliance with the standards on the principle in Europe.

During its four years of application, the *Checklist* has become an essential tool for assessing the Rule of Law in each Country not only concerning a specific and limited issue but, more generally, from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case-law. It has enabled an exhaustive, objective, and equal assessment for all its Member States for the first time. It has offered a unique opportunity for revitalizing the relationship between citizens and States under the aegis of a major international player: the Venice Commission.

[187] It is an example the recent Urgent opinion on Poland released upon request of the Marshal of the Senate regarding a series of amendments approved by the Sejm and – at the moment of the request – under deliberation in the Senate, see VENICE COMMISSION, CDL-AD(2020)017.

[188] G. PALOMBELLA, 'Illiberal, Democratic and Non-Arbitrary? Epicentre and Circumstances of a Rule of Law Crisis', in *Hague Journal on Rule of Law*, 2018, vol. 10, p. 10.

[189] VENICE COMMISSION, *Rule of Law Checklist*, § 30.

This has been particularly evident, for instance, in the process undertaken by the Commission, upon request of the Parliamentary Assembly of the Council of Europe, concerning the emergency laws introduced in Turkey after the failed coup d'état in 2016. From a joint review of the numerous opinion the VC has adopted on this topic[190], it emerges an overall analysis, which goes beyond the specific and individual problems submitted to its attention. The VC, indeed, through a careful and stringent analysis of all the involved legal elements, submits the whole Constitution to an evaluation of compliance with those principles identified as fundamental elements of the Rule of Law – comprised human rights and democracy - highlighting its weaknesses and contradictions with the principles of separation of powers, independence of the judiciary and checks and balances.

To date, in the light of the cases in which it has been implemented, it can be stated that the use of the *Checklist* lays essential foundations for the conduct of an exhaustive, objective, and fair evaluation which involves all its Member States - whether they are relatively new or well-established democracies.

To quote L. Pech, 'The strength of the functional approach to the Rule of Law adopted by the Venice Commission is proved by the wide acknowledgment, use of and adherence to this approach by different Council of Europe and EU institutions'[191]. After its publication, the *Checklist* has been endorsed within the Council of Europe by the Committee of Ministers, the Congress of Local and Regional Authorities and the PACE[192]. According to the Director of the Directorate of Legal Advice and Public

[190] VENICE COMMISSION, Turkey - *Opinion on the Amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017*, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017) CDL-AD(2017)005; Turkey - *Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy*, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017) CDLAD(2017)021; Turkey - *Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media*, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017) CDL-AD(2017)007; Turkey - *Opinion on the duties, competences and functioning of the criminal peace judgeships*, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017) CDL-AD(2017)004; Turkey - *Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016*, adopted by the Venice Commission at its 109th Plenary Session, (Venice, 9-10 December 2016), CDL-AD(2017)037; Turkey – *Opinion on the suspension of the second paragraph of Article 83 of the Constitution* (parliamentary inviolability), adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016), CDL-AD(2016)027.

[191] L. Pech, 'Meaning and Scope of the EU Rule of Law', in *Reconnect*, Work Package 7, 30 April 2020, p. 37.

[192] PACE, *Resolution 2187* (2017).

International Law of the Council of Europe, the *Checklist* and the ECtHR's case-law 'are highly relevant for the setting up, by the Committee of Ministers and the Parliamentary Assembly, of a new joint procedure of reaction to severe violations of the Council of Europe's fundamental principles and values including the Rule of Law'[193]. Moreover, since 2016 the VC's definition of Rule of Law has been often referenced by the CJEU in judgments and opinions of the Advocate General[194]. Finally, it has become the basis for the European Commission's *Framework on the Rule of Law* and the consequent EU's action in this field[195].

For all these reasons, some scholars have recently identified the *Rule of Law Checklist* as 'one of the few widely accepted conceptual frameworks for the Rule of Law in Europe'[196]. Relying upon the credentials of the VC's working method and its international reputation in the strengthening and promotion of the Rule of Law, it will be interesting, in the next chapter, to identify the sources and define the content of its understanding of the Rule of Law principle. Once defined the principle's content as identified by the VC, the work will focus on its practical implementation within the VC's Member States through the analysis of a selection of relevant practical cases.

[193] J. POLAKIEWICZ, *The Rule of Law – Dynamics and Limits of a Common European Value*, Presentation to the Scientific-Consultative Council on International Legal Issues of the Ministry of Foreign Affairs of Belarus, Minsk, 20 September 2019.

[194] COURT OF JUSTICE OF THE EUROPEAN UNION, *Klyuyev v Council*, case T-731/15, 21 February 2018, § 76; *Yanukovych v Council*, case T-346/14, 15 September 2016, § 98; *Klymenko v Council*, case T-245/15, 8 November 2017, § 74; *Stavytsky v Council*, case T-242/16, 22 March 2018, § 69; and Opinion of AG Tanchev delivered on 27 June 2019, C-585/18, C-624/18 and C-625/18, §§ 71 and 128.

[195] See EUROPEAN COMMISSION, 'Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps', COM/2019/163 final; *Communication on 'Further Strengthening the Rule of Law within the Union'*, 3 April 2019; '*Communication from the Commission to the European Parliament and the Council: a new EU Framework to strengthen the Rule of Law*', COM(2014)158 final.

[196] S. CARRERA, E. GUILD AND N. HERNANZ, 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU', *op. cit.*, p. 17.

CHAPTER III

APPLYING THE RULE OF LAW: THE CONCRETE INTERVENTION OF THE VENICE COMMISSION IN ITS MEMBER STATES

SUMMARY: I. Introduction. – II. The *Rule of Law Checklist* and the Notion of the Rule of Law: The Benchmarks. – II.1. Legality. – II.2. Legal Certainty. - II.3. Prevention of Abuse/Misuse of Powers. - II.4. Equality before the Law and Non-Discrimination. - II.5. Access to Justice. - III. Case Study: The Venice Commission in Action. – III.1. Poland: the Venice Commission Strains the Contested Reform of the Judiciary. - III.2. Romania: The Reform of the Judiciary through the Lenses of the Venice Commission. – III.3. North Macedonia: A Virtuous Example of (almost) Successful Implementation of the Rule of Law. – III.4. Kosovo: Legality and Legal Certainty as Bulwarks of the Rule of Law. – III.5. State of Emergency: The Rule of Law's Guarantees During the Covid-19 Pandemic. – IV. Conclusions.

I. Introduction

As demonstrated so far, despite being relegated for decades to the background of the three pillars of the Council of Europe – democracy, human rights, and Rule of Law - the Rule of Law principle has gained paramount importance in the 21st century.

Nowadays, this topic is of acute relevance, especially in Europe, where the fundamental values that constitute the Rule of Law are under attack. The Council of Europe and the European Union are at the forefront in the fight against the principle's dismantling. As emerged from the first chapter, the two Organizations have fielded several efforts to strengthen and protect it in the last years.

Undoubtedly, the interpretative work conducted by the COE and the EU on the Rule of Law principle has created a unique repository of standards and best practices for its implementation. Today, we can say that the European States agree on a basic Rule of Law's content despite the absence of a formal definition.

In its 2011 *Report on the Rule of Law*, the Venice Commission, considering 'the legal instruments, national and international, and the writings of scholars, judges and

others' concluded that 'there is now a consensus on the core meaning of the rule of law and the elements contained within it'[1].

In the next paragraphs, we will analyze the Rule of Law's understanding derived by the Venice Commission from the standards and principles elaborated by the COE and EU's institutions. Specifically, we will present the content of the five benchmarks identified by the Venice Commission as the Rule of Law's core elements.

Once determined the theoretical framework of the VC's Rule of Law's notion, we will focus on its practical application. Adopting a case-study approach, we will analyze some VC's opinion implementing the Rule of Law principle in its Member States. Given the impossibility of retracing all the Rule of Law-inherent cases, we will focus on the most recent and relevant.

Specifically, we will concentrate on the 'illiberal triad': Poland, Hungary, and Romania identifying the Rule of Law's components; on the progressive Rule of Law's implementation in North Macedonia; on the challenges to legality and legal certainty in Kosovo and, finally, on balance between the Rule of Law and state of emergency during the COVID-19 pandemic.

II. The *Rule* of *Law Checklist* and the Notion of the Rule of Law: The Benchmarks

The Venice Commission first addressed the issue of the Rule of Law in its *Report on the Rule of Law*[2], adopted in 2011 to 'identify a consensual definition of the Rule of Law which may help the international organization and both domestic and international courts in interpreting and applying this fundamental value'[3]. From these premises, the Venice Commission's approach concerning the principle is clear: give a definition that allows the Member States to enact an individual practical application of the Rule of Law principle. In other words, the goal is to create an operative tool that can be put at the

[1] VENICE COMMISSION, *Report on the Rule of Law*, 2011, *op.cit*., § 35.
[2] VENICE COMMISSION, *Report on the Rule of Law*, Study No. 512/2009, 4 April 2011, CDL-AD(2011)003rev.
[3] *Ibid*, § 3.

disposal of the national legislator to adapt its legislation to Common European Standards on the Rule of Law.

While drafting the report, the Commission reflected on the Rule of Law's notion. It concluded that it was indefinable due to its variability depending on the social, cultural, political, and juridical context and the risks connected with a purely formalistic conception of this principle[4]. Consequently, rather than continue searching for a theoretical definition, it started from its basic understanding as a principle requiring a 'system of certain and foreseeable law, where everyone has the right to be treated by all decision makers with dignity, equality, and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures'. Taking this notion as a starting point, the Commission then decided to adopt an operational approach and concentrated its efforts on identifying its core elements from the common features of the *Rule of Law*, *Rechtsstaat,* and *État de droit*.

This was only the first step towards implementing a practical approach to the Rule of Law principle.

To facilitate a correct and consistent understanding and interpretation of the principle and encourage its implementation by all its Member States, the Commission decided to draft a *Checklist* based on five core elements of the Rule of Law, sub-itemized into detailed questions. These five benchmarks are:

1. Legality, including a transparent, accountable, and democratic process for enacting law.
2. Legal certainty.
3. Prevention of abuse/misuse of power.
4. Access to justice before independent and impartial courts, including judicial review of administrative acts.
5. Non-discrimination and equality before the law.

[4] VENICE COMMISSION, *Rule of Law Checklist*, § 15.

The content of the Venice Commission's *Rule of Law Checklist* has been described as 'instructive for what could be the content of an institutionally or conceptually defined notion of the Rule of Law'[5].

The five selected elements, notwithstanding the nuances of the Rule of Law, developed in various legal regimes and traditions, reflect, according to the Venice Commission, the principle's common core. Its wide-ranging content, which is the synthesis of a deep cross-analysis of the constitutive elements of the classical theories and the COE's and EU's interpretations, ensures the necessary flexibility to conduct an operational exploration, defined as one of the 'most formidable of all challenges surrounding the very concept of the Rule of Law'[6]. According to the doctrine, the *Checklist* is a helpful tool that explains in more detail what each of the Rule of Law's component means precisely and makes core ideas crystal clear[7].

Moreover, the elements identified by the Venice Commission as core components of the Rule of Law adequately reflect the principle's essential meaning within the European framework. However, there are some minor criticisms, such as the fact that the Venice Commission distinguish the principles of non-discrimination and equality before the law from the broader notion of fundamental rights. In other cases, it has been observed that some core principles are missing from the list, as the principle of accessibility of the law, the principle of the protection of legitimate expectations, and the principle of proportionality[8].

Also, the breadth of the VC's notion has been subject to some criticism. Some authors have highlighted that a 'too broad notion of the rule of law', as the VC's one, 'is likely to distort this concept thus making full compliance with it impossible, even for well-established democracies'[9]. However, the VC specified that the 'parameters of the

[5] Q. QERIMI, 'Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Virtue of Venice Commission's Rule of Law Checklist', in *Law and Developement Review*, 2020, vol. 13(1), p. 63.

[6] *Ibid.*

[7] K.L. SCHEPPELE, L. PECH AND R. D. KELEMEN, 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism', *Verfassungsblog*, 12 November 2018.

[8] D. KOCHENOV, L. PECH, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', in *ECLR*, Vol 1, p. 523.

[9] A. DI GREGORIO, 'Rule of law crisis in the new EU Member States', in E. CASTORINA, I. GANFALEAN, P. KAPUSTA, J. MICHALSKA, *Current Constitutional Issues : A Jubilee Book on the 40th Anniversary of Scientific Work of Prof. Bogusław Banaszak*, Warsaw, 2017, p. 70.

checklist do not necessarily all have to be cumulatively fulfilled for a positive final assessment on compliance with the Rule of Law. The assessment will need to consider which parameters are not met, to what extent, in what combination etc.'[10].

Therefore, it appears that in the VC's understanding, the benchmarks play a crucial but not exclusive role. Indeed, the work of the Commission is not limited to providing parameters for national application. On the contrary, its work, conducted in cooperation with national stakeholders and other international institutions, is vital to make these benchmarks as close as possible to the reality in which they are applied by conducting a tailor-made intervention.

On this point, some scholars have criticized the Commission's approach, arguing that it 'decontextualizes by standardization, in order to justify recommendations in newer democracies that would not be warranted by a more fine-grained analysis'[11]. However, especially in the Rule of Law's case, the Commission's mandate – critically define to 'bring together constitutionally traditions' – is to identify common standards to facilitate Member State's compliance with the principle. Therefore, what has been defined as the 'peril of oversimplification', may be the Commission's strong point in providing the Member States with a practically implementable definition of the Rule of Law.

The analysis of the principles identified as core elements of the Rule of Law in Europe will be essential to clarify the scope and the purpose of the VC's working method. As we will see, the VC necessarily bases each benchmark's content on the ECtHR's and CJEU's case-law, which represent one of the most important parameters in Europe[12].

1. LEGALITY

Many commentators have identified the principle of legality as the basis of the Rule of Law[13]. In the European scenario, it has been explicitly recognized as an aspect of the Rule of Law principle by the European Court of Justice which, in the case *Commission*

[10] VENICE COMMISSION, *Rule of Law Checklist*, op. cit., § 29.

[11] B. IANCU, '*Quod licet Jovi non licet bovi?*: The Venice Commission as Norm Entrepreneur', in *Hague Journal on the Rule of Law*, 2019, vol. 11, p. 192.

[12] VENICE COMMISSION, *Rule of Law Checklist*, op. cit., § 26.

[13] See for instance F. MERLI, Principle of Legality and the Hierarchy of Norms, in W. SCHROEDER, *Strengthening the Rule of Law in Europe*, Oxford, 2016, p. 37; M. Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', in *Southern California Law Review*, pp. 1307-1318.

v. CAS Succhi di Frutta, has stated that 'in a community governed by the Rule of Law, adherence to legality must be properly ensured'[14].

Essentially, it entails the supremacy of the law, providing that State's action must be conducted 'in accordance with' and 'authorized by' the law, where the 'law' covers not only constitutions, international law, statutes, and regulations, but also, where necessary, judge-made law[15].

The *Rule of Law Checklist* itemizes the principle into eight 'sub-elements', which, in the VC's understanding, represent the aspects of practical implementation of legality within a national system. These elements are supremacy of law, compliance with the law, relationship between international law and domestic law, law-making powers of the executive, law-making procedures, exceptions in emergency situations, duty to implement the law, and private actors in charge of public tasks.

The VC's approach on this principle rotates essentially around two basic elements, which are, on one side, the 'supremacy of the law', which recalls the very substance of legality: 'State action must be in accordance with and authorised by the law'[16]. As highlighted by Steven Greer concerning the Council of Europe's understanding, the principle's foundational ideal is that 'sate action should be subject to effective formal legal constraints against the exercise of arbitrary executive or administrative power'[17]. On the other side, 'compliance with the law' reflects an essential Rule of Law's requirement, which is that the powers of the public authorities must be defined by law, granting that the action of public officials is exercised within the limits of the powers conferred upon them[18].

In clarifying the scope of action of legality in relation to the Rule of Law, the *Checklist* emphasizes the executive's interference in parliament's law-making power. Indeed, opposite to a Rule of Law-based system, there are absolutists and dictatorial systems,

[14] EUROPEAN COURT OF JUSTICE, case *Commission v. CAS Succhi di Frutta*, C-496/99, Judgment of 29 April 2004.

[15] On this point see ECtHR, *Achour v France*, 67335/01, 29 March 2006, § 42 and *Kononov v Latvia*, 36376/04, 17 May 2010, § 185.

[16], VENICE COMMISSION, *Rule of Law Checklist*, §44.

[17] S. GREER, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 2000, pp. 15-16.

[18] VENICE COMMISSION, *Rule of Law Checklist*, § 45.

where the executive's unlimited powers are, *de jure* and *de facto*, central features[19]. As we will see in the following, when analyzing practical cases of application of the *Checklist*, the superpower of the executive represents one of the main issues concerning the Rule of Law backsliding in Europe[20].

Alongside the executive's superpower in law-making, the VC pays attention to the majority powers, recommending transparent legislative procedures as long as a clear and accountable commitment of parliaments in law-making processes[21].

Within the legality principle's framework, the *Checklist* also gives space to the topic of exceptions in emergency situations. According to the VC, indeed, to ensure the permanent respect of the Rule of Law in emergency situations, national constitutions must provide in advance clear rules to be triggered only in case of state emergency. Indeed, these particular cases are often abused by authoritarian governments to stay in power, silence the opposition, and restrict human rights. As highlighted by the VC when assessing the Ukrainian Constitution 'State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law'[22].

Especially during the COVID-19 pandemic crisis, the issue of emergency situation has become topical on the Commission's agenda. The VC noted that many national governments had implemented exceptional measures to handle the pandemic crisis. Therefore, it decided to reflect on the notion and the characteristic of the state of emergency. In June 2020, it endorsed a report on 'Respect for democracy, human rights and Rule of Law during States of Emergency – Reflections'[23].

According to the Report, a necessary precondition for declaring state of emergency, and thus recurring to exceptional measures, should be that the powers provided by ordinary legislation do not suffice for handling the situation[24]. The VC identifies the three general conditions of necessity, proportionality, and temporariness between the principles

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[20] See for instance the cases of Hungary, Poland, and Romania, where the Government, supported by a wide majority in Parliament, has started a series of reforms aimed at undermining the separation of powers and concentrating power in the hands of the executive.

[21] VENICE COMMISSION, *Rule of Law Checklist*, § 50.

[22] VENICE COMMISSION, CDL-AD(2006)015, § 33.

[23] VENICE COMMISSION, 'Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections', 19 June 2020, CDL-AD(2020)014.

[24] *Ibid*, § 5.

governing the state of emergency. It recalls that 'even in a state of public emergency, the fundamental principle of the Rule of Law must prevail'[25]. Its fundamental aspects – namely legality principle, separation of powers, division of powers, human rights, State monopoly of the force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation in and supervision on public decision making, transparency of government, freedom of expression, association and assembly, rights of minorities as well as the majority rule in political decision making[26] – must be maintained integrally.

To further assist its Member States in dealing with state of emergency issues, the Commission has created an Observatory on the situations of emergency in its Member States[27], which collects country-specific information on constitutional and extra-constitutional emergency powers on relevant mechanisms of parliamentary and judicial oversight and electoral experiences. The project aims to provide systematized comparative information for stakeholders, State officials, international organizations, and NGOs working in this field.

Moreover, through the CODICES database[28], the Commission has collected the first pronounces of member State's Constitutional Courts on Covid-19 and related state of emergency issues[29], to help to disseminate and share essential principles among its Member States.

This shows the VC's commitment to helping its Member States to manage the emergency situation in compliance with the Rule of Law's principles and demonstrates its capacity to adapt its action field according to the needs of the moment. As it was, in

[25] VENICE COMMISSION, *Opinion on the draft law on the legal regime of the state of emergency of Armenia*, § 44, CDL-AD(2011)049.

[26] VENICE COMMISSION, *Opinion on the Protection of Human Right in Emergency Situations*, § 34, CDL-AD(2006)015.

[27] VENICE COMMISSION, Observatory on emergency situations, available at https://www.venice.coe.int/files/EmergencyPowersObservatory/By_topic-E.htm.

[28] The CODICES database is a collection of more than 9.000 decisions of constitutional courts and supreme courts of all the Commission's Member States plus the Council of Europe and EU. It also collects all the Constitutions of the Member States indexed according to a Systematic Thesaurus which makes possible to search in the database under specific topics. It represents a valuable sharing tool of constitutional provisions and principles of the Commission's Member States. The database is available at: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm.

[29] VENICE COMMISSION, CODICES, Special collection of cases related to Covid-19, available at https://venice.coe.int/files/Bulletin/COVID-19-e.htm. So far, the Commission has collected 8 judgments from courts of Bosnia and Herzegovina, Brazil, Chile, Germany, Kosovo, and Norway.

its first steps, for the Balkans constitutional wave, it is today in supporting all its Member States in the management of the pandemic crisis.

2. LEGAL CERTAINTY

To comply with the requirement of legal certainty, the law must be sufficiently precise, foreseeable, accessible, and understandable. In Europe, the principle has been recognized as a core element of the Rule of Law by many scholars[30]. The ECtHR defined it as 'a principle which is implied in the Convention and which constitutes one of the basic elements of the Rule of Law'[31]. Its importance is confirmed because it is recognized as a fundamental principle also in the EU legal system[32] and the European national orders[33]. According to the CJEU, 'the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them'[34].

The principle's consistency has been developed at the jurisprudential level both from the ECtHR and the CJEU[35]. It is characterized by peculiar elements, all connected to the quality of national legislation, whose respect represents, according to the Venice Commission, the key to full implementation of the Rule of Law.

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[30] See for instance, J.R. MAXEINER, 'Legal Certainty: a European Alternative to American Legal Indeterminacy?', in *Tulane Journal of International and Comparative Law*, Vol. 15, 2007; J.R. MAXEINER, 'Some Realism about Legal Certainty in the Globalization of the Rule of Law', in *Houston Journal of International Law*, Vol. 31, 2008; E. PAUNIO, 'Beyond predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order', in *German Law Journal*, Vol. 10, 2009; P. POPELIER, 'Legal Certainty and Principles of proper Law Making', in *European Journal of Law Reform*, Vol. 2, 2000; J. RAITIO, *The Principle of Legal Certainty in EC Law*, Berlin, 2003.

[31] ECTHR, *Baranowski v Poland*, Application no. 28358/95, Judgment 28 March 2008, § 56 and, more recently, *Beian v. Romania* (no.1), Application no. 30658/05, Judgment 6 December 2007. On this point see P. POPELIER, 'Legal Certainty and Principles of Proper Law Making', in *European Journal of Law Reform*, vol. 2, 2000, pp. 327-328.

[32] J. RAITIO, *The principle of Legal Certainty in EC Law*, Berlin, 2003, pp. 125-130.

[33] Despite the different lexical declinations, the principle is found in Germany (Rechtssicherheit), in France (sécurité juridique), in Italy (certezza del diritto), in Spain (*seguridad jurídica*), in Sweden (rättssäkerhet), in Poland (obowiazujacego prawa) and in Finland (oikeusvarmuuden periaate).

[34] CJEU, *Plantanol GmbH v. Co. KG*, case C-201/08, Judgment of 10 September 2009, § 46, (see, inter alia, Case C-63/93 *Duff and Others* [1996] ECR I-569, § 20; CaseC-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, § 66; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, § 80).

[35] See for instance CJEU, *Mulder v. Minister van Landbouw en Visserij*, case c-120/86, 28 April 1988, § 21 ff; *Plantanol v Hauptzollamt Darmstadt*, case C-201/08 at § 53; *Altun v Stadt Boblingen*, case C-337/07, §§ 59–60; *Commission v Koninklijke Friesland Campina NV*, case C-519/07.

Among the identified components of legal certainty, foreseeability of laws[36] represents an essential aspect to be safeguarded by national legal systems. Foreseeability, as explained by the ECtHR, 'means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.'[37].

In the same way, the principles of non-retroactivity[38], *nullum crimen sine lege* and *nulla poena sine lege*[39], and *res iudicata*[40] form an important part, mostly related to criminal law, of legal certainty. According to these principles, the VC highlights that

[36] ECtHR, *Sunday Times v. the United Kingdom*, App. no. 6538/74, 26 April 1979, § 49 ''In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'

[37] ECtHR, *Sunday Times v UK*, Appl. No. 6538/74, 26 APRIL 1979, § 49.

[38] ECtHR, *Del Río Prada v. Spain*, Appl. no. 42750/09, 21 October 2013, 'The International Commission of Jurists pointed out that the principle of no punishment without law enshrined in Article 7 of the Convention and in other international agreements was an essential component of the Rule of Law. It submitted that, in conformity with that principle, and with the aim and purpose of Article 7 prohibiting any arbitrariness in the application of the law, the autonomous concepts of 'law' and 'penalty' must be interpreted sufficiently broadly to preclude the surreptitious retroactive application of a criminal law or a penalty to the detriment of a convicted person. It argued that where changes to the law or the interpretation of the law affected a sentence or remission of sentence in such a way as to seriously alter the sentence in a way that was not foreseeable at the time when it was initially imposed, to the detriment of the convicted person and his or her Convention rights, those changes, by their very nature, concerned the substance of the sentence and not the procedure or arrangements for executing it, and accordingly fell within the scope of the prohibition of retroactivity The International Commission of Jurists submitted that certain legal provisions classified at domestic level as rules governing criminal procedure or the execution of sentences had serious, unforeseeable effects detrimental to individual rights, and were by nature comparable or equivalent to a criminal law or a penalty with retroactive effect. For this reason, the prohibition of retroactivity should apply to such provisions.'

[39] ECtHR, *Scoppola v. Italy (No.2)*, Appl. No. 10249/03, 17 September 2009, §109, 'In the light of the foregoing considerations, the Court takes the view that it is necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and affirm that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.'

[40] ECtHR, *Ryabykh v. Russia*, Appl. no. 52854/99, 2003, §§ 51-52, 'one of the fundamental aspects of the Rule of Law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question' and 'Legal certainty presuppose respect of the principle of *res iudicata*'.

people must be informed in advance of the consequences of their behavior and, once recipients of a final judgment, this judgment must be respected unless there are cogent reasons for revising it[41].

3. Prevention of Abuse/Misuse of Powers

The prevention of abuse or misuse of powers regards, in the first place, the existence of legal safeguards against the threats of arbitrariness and discretion. Thus, these legal safeguards pursue the double objective of limiting discretionary power on the one hand and regulating that power through law on the other.

When clarifying the limit of discretionary power, the Committee of Ministers has stated that 'Public authorities shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose of which they have been conferred'[42].

Protection against arbitrariness is a recurring argument in the ECtHR's case law, in particular when related to freedom from arbitrary detention. In the case *Husayn (Abu Zubayadah) v. Poland*, the Court has stated that 'the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness'[43].

According to the CJEU, in all the legal systems of the Member States, 'any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law.[44]'

4. Equality before the Law and Non-Discrimination

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[41] See *The Council of Europe and the Rule of Law – An Overview*, CM(2008)170, 21 November 2008, § 48.

[42] Committee of Ministers, Appendix to the Recommendation of the Committee of Ministers on good administration, CM/Rec(2007)7, Article 2.4 ('Principle of Lawfulness').

[43] ECtHR, *Husayn (Abu Zubayadah) v. Poland*, Appl. No. 7511/13, 24 July 2014, §522.

[44] CJEU, *Hoechst v. Commission*, joined cases 46/87 and 227/88, Judgement of 21 September 1989, § 19.

Equality before the law is intrinsically linked to the Rule of Law principle: it represents the indispensable requirement that the law shall guarantee the prohibition and the absence of any discrimination on any ground such as sex, race, color, religion, language, political opinion, birth, origin[45].

Alongside non-discrimination, according to the *Checklist*, to conform with this principle, national legislation must 'treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination'. 'Equality in law'[46] is a fundamental element of the Rule of Law and must be granted in every situation; therefore, positive, or affirmative measures could be exceptionally put in place to prevent or compensate disadvantages[47], or to protect democratic work of Parliaments[48].

With 'equality in law', the other fundamental aspect of the concerned principle is represented by 'equality before the law'[49], which means that 'law should be equally applied, and consistently implemented'[50]. Equality is intended by the Venice Commission not only as a formal criterion but mainly in its substantial meaning, as equal treatment. Therefore, as stated by the ECtHR in *Hämäläinen v. Finland*, to fall within the scope of Article 14 ECHR, 'there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized'[51].

According to the CJEU, equal treatment is a general principle of the European Union Law, enshrined in Articles 20 and 21of the Charter of Fundamental Rights of the European Union. It 'requires that comparable situations must not be treated differently

[45] See Art. 14 ECHR, 'Prohibition of discrimination' and Protocol 12 ECHR.
[46] VENICE COMMISSION, *Rule of Law Checklist*, p. 31.
[47] EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, *Recommendation No. 7*, § 5.
[48] ECTHR, *Cordova v. Italy*, Appl. Nos. 40877/98 and 45649/99, 30 January 2003, § 58-67.
[49] See Art. 1.2 Protcol 12 ECHR 'Any Public Authority – and not only the legislator - has to respect the principle of equality'; Art. 20-21 Charter of Fundamental Rights of the European Union.
[50] VENICE COMMISSION, *Rule of Law Checklist*, § 73.
[51] ECTHR, *Hämäläinen v. Finland*, Appl. No. 37359/09, 26 July 2014, § 108.

and that different situations must not be treated in the same way unless such treatment is objectively justified'[52].

5. ACCESS TO JUSTICE

Access to justice in the last few years has become the most questioned and risky parameter of the Rule of Law in Europe. Indeed, the authoritarian and counter-democratic wave, which is spreading around Europe, has embarked on a progressive erosion of the Rule of Law starting from the judiciary power's guarantees. Therefore, the judiciary's independence and impartiality, alongside the fair trial, are two of the most evoked principles in the VC's assessment of compliance to the Rule of Law.

When talking about access to justice, the principles of independence and impartiality refer to the judiciary as a whole.

According to the VC, independence means that the judiciary is free from external pressure and is not subject to political influence or manipulation, particularly by the executive power. In *Campbell and Fell v. UK*, the ECtHR has highlighted four factors upon which judicial independence relies: manner of appointment of its members, duration of their term of office, existence of guarantees against outside pressures, and appearance of impartiality and independence of the body[53].

The VC has been deeply involved in many national reforms regarding the independence of the judiciary. Thus, it has developed the Court's understanding through the identification of some practical features.

For instance, when talking about terms of office, the *Checklist* identifies limited or renewable terms as useful elements to make judges dependent on the authority that appointed them or has the power to re-appoint them[54]. At the same time, the system of appointment and dismissal should not be based upon political or personal considerations:

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[52] CJEU, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, case C550/07, Judgment of 14 September 2010, §§ 54-55. See also Case C-344/04, *IATA and ELFAA* [2006] ECR I-403, § 95; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, § 56; and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, § 23.

[53] ECtHR, *Campbell and Fell v. UK*, Appl. Nos. 7819/77 and 7878/77, 28 June 2014, §78, 'In determining whether a body can be considered to be 'independent' - notably of the executive and of the parties to the case - the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.

[54] VENICE COMMISSION, *Rule of Law Checklist*, § 76.

it is not uncommon, indeed, especially in counter-democratic and authoritarian regimes, that non-consensual transfer of judges is used as 'politically-motivated tool under the disguise of a sanction'[55].

To guarantee the judiciary's independence, the VC favors the constitution of an independent judicial council with decisive influence on judges' appointment and career. According to the Commission, it represents the most effective way to ensure that decisions concerning judges' selection and career are independent from the government and administration[56].

The perception of independence of the judiciary also plays a fundamental role. Indeed, a biased judiciary may encourage the perception of an absence of independence and, therefore, undermine the general trust in the judiciary itself[57].

In addition to the judiciary in general, the *Checklist* draws attention to the individual judges' independence, which must be ensured from the legislative and executive powers. Therefore, judges should not be subject to their colleagues' supervision or, even more, to any executive hierarchical power[58]. This guarantee can be promoted, for example, through the pre-determination of the order in which individual judge in a court[59].

Alongside independence, another requisite that the judiciary must fulfill to be in line with the Rule of Law standards is impartiality. In the classical formulation provided by the ECtHR, impartiality means that 'justice must not only be done, it must also be seen

[55] VENICE COMMISSION, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004, § 43, 'The Venice Commission has consistently supported the principle of irremovability in constitutions. Transfers against the will of the judge may be permissible only in exceptional cases. As regards disciplinary proceedings, the Commission's Report on Judicial Appointments favors the power of judicial councils or disciplinary courts to carry out disciplinary proceedings. In addition, the Commission has consistently argued that there should be the possibility of an appeal to a court against decisions of disciplinary bodies.'.

[56] VENICE COMMISSION, *Rule of Law Checklist*, § 81.

[57] VENICE COMMISSION, *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, CDL-AD(2012)014, 15-16 June 2012.

[58] COMMITTEE OF MINISTERS, Rec(2010)12, §§ 22ff.

[59] VENICE COMMISSION, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, §79 'The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. In terms of principle, it is clear that both aspects of the 'right to the lawful judge' should be promoted. It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed.'

to be done'[60]; this implies that the public's perception of the judiciary is fundamental in assessing whether the judiciary is impartial or not in practice.

The *Checklist* pays particular attention to the prosecution service, specifically to its organization. Given the absence of a common model of organization between the VC's Member States, especially regarding the appointment of the prosecution service's member and its internal composition, the *Checklist* draws some fundamental elements.

First, the prosecution service must be autonomous and protected from undue political influence. Secondly, according to the legality principle, it must act only based on, and in accordance with law[61].

Together with the judiciary's independence and impartiality, the *Checklist* identifies the fair trial as a fundamental element of the Rule of Law. The right ECtHR recognizes the right to a fair trial as 'inspired by Article 6 of the ECHR'[62] and is now explicitly provided in Article 47 of the Charter of Fundamental Rights of the European Union.

The Commission identifies the right of access to a court as one of the most important elements to be granted to respect the right to a fair trial. As highlighted by the ECtHR, 'the degree of access afforded by the national legislation must be sufficient to secure the individual's 'right to a court', regarding the principle of the Rule of Law in a democratic society'[63]. Amongst the requisites necessary to grant the right of access to a court, the VC has highlighted the absence of procedural obstacles and of excessive formal requirements, which may hamper the individual's access to justice.

Alongside the right of access to a court, another essential element of the right to a fair trial is the principle of presumption of innocence, provided by Article 6.2 of the ECHR. On this principle, the ECtHR has frequently reaffirmed that the presumption of innocence requires the burden of proof to be on the prosecution[64]. Consequently, in case of pre-trial

[60] ECtHR, *Micallef v. Malta*, Appl. No. 17056/06, 15 October 2009, § 98.

[61] VENICE COMMISSION, *Rule of Law Checklist*, op. cit., § 91.

[62] ECtHR, *Netherlands and Van der Wal v. Commission*, C-174/98 and C-189/98, 11 January 2000, § 17.

[63] ECtHR, *Bellet v. France*, Appl. No. 23805/94, 19 December 1995, § 36.

[64] ECtHR, *Barberá, Messegué and Jabardo v. Spain*, Appl. No. 10590/83, 6 December 1988, § 77; Telfner v. Austria, Appl. No. 33501/96, 20 March 2001, § 15; *Grande Stevens and Others v. Italy*, Appl. Nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014, § 159. 'The Court also reiterates that the principle of the presumption of innocence requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.'.

detention, an excessive incarceration time may be considered a prejudgment of guilt and, therefore, a measure against the presumption of innocence[65].

The CJEU recognized the right to a fair trial as 'inspired by Article 6 ECHR[66]' and 'guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union[67]'.

The *Rule of Law Checklist* includes as the third and last element of the benchmark 'access to justice' the Constitutional Justice (whether applicable). A general recommendation of the VC when it comes to Rule of Law protection is to provide, in each member state, a constitutional court or an equivalent body. Indeed, what it considers to be essential is an effective guarantee of the conformity of governmental action with the Constitution[68].

The most effective means to ensure respect for the Constitution is the full judicial review of constitutionality. In addition to ensuring individual access to the constitutional court, such a model offers the possibility of scrutiny on a wide variety of acts[69].

III. CASE STUDY: THE VENICE COMMISSION IN ACTION

In the previous chapter, we have defined the VC's approach as inclusive, operational, and systemic. To better understand its effectiveness and its practical implications, we will proceed with studying the Commission's relevant work on the Rule of Law principle.

So far, the Commission has referred to the Rule of Law principle in more than one hundred opinions and studies[70]. Many of these cases are concentrated in the last ten years, proving that the Rule of Law principle has become a relevant issue in the Commission's agenda. Indeed, an ever-increasing number of Member States are requesting its assistance to adapt their legal frameworks to the relevant European standards. Moreover, EU's and

[65] VENICE COMMISSION, *Rule of Law Checklist,* op. cit., §104.

[66] CJEU, *Netherlands and Van der Wal v. Commission,* case C-174/98 P and C-189/98P, Judgment of 11 January 2000, § 17.

[67] CJEU, *PPU – Minister for Justice and Equality v LM,* case C-216/18, Grand Chamber, 25 July 2018, § 33.

[68] VENICE COMMISSION, *Rule of Law Checklist,* §108.

[69] *Ibid,* § 109.

[70] For the entire compilation of cases related to the Rule of Law, see https://www.venice.coe.int/webforms/documents/?topic=34&year=all.

COE's institutions are increasingly relying upon the Commission's expertise to cope with the Rule of Law-related issues.

The principle of judiciary's independence - declined in its various elements - is one of the most recurring subjects in the Commission's Rule of Law-related opinions. As emerges from the case-law reconstruction conducted in the first chapter, both the ECtHR and the CJEU recognized the deep interconnection between the Rule of Law protection and the judicial independence safeguard. Therefore, many VC's opinions and studies deal with this relevant issue. In the following paragraphs, we will analyze the Commission's work on the Polish and Romanian judiciary's reforms. The study of the Commission's work in these cases will help us understand the advantages of its practical and tailor-made approach in guiding illiberal States through a process of democratic reform.

We will then focus on the Commission's process of progressive adaptation of North Macedonian legal framework to the Rule of Law principle. We choose this case to highlight the multiple facets of the Rule of Law principles and the Commission's systemic approach, delineating a successful process of democratic transition.

Alongside judiciary's independence, legality and legal certainty are two of the most relevant elements of the VC's understanding of the Rule of Law. Therefore, to better understand the practical implications of the two principles, we will study their implementation within the Kosovar legal system. The case will show the central role of legality and legal certainty in the formation of a new democracy's Rule of Law-conformed legal framework. It will also reveal the VC's contribution to the progressive Kosovar legal order's adaptation to the common European standards in the EU's accession perspective.

Finally, the recent growing attention to the state of emergency issue – which is inherent to the Rule of Law principle –involved the Venice Commission. The last paragraph will investigate the Member State's response to the COVID-19 crisis and the impact of the state of emergency on the Rule of Law.

1. POLAND: THE VENICE COMMISSION STRAINS THE CONTESTED REFORM OF THE JUDICIARY

As emerged from the first chapter, the Polish judicial reform represents one of the major current dangers to the Rule of Law principle in Europe. Alongside the efforts

promoted by the EU institutions, the Venice Commission has played a crucial role since the eruption of the democratic crisis[71].

Opinions 892/2017 and 904/2017 adopted by the Venice Commission upon request of the Parliamentary Assembly of the Council of Europe, and Opinion 977/2020, endorsed upon request of the Marshal of the Senate of the Republic of Poland, are part of the VC's assessment to the contested reform of the justice system in Poland.

Started with the Constitutional Tribunal reform in late 2015 and the Prosecution Office's reform in 2016, the process continued with the amendments to the laws on the judiciary in 2017 and 2019[72]. It was carried out to jeopardize judicial independence and enable the legislative and executive powers to interfere severely and extensively in justice administration[73]. A similar phenomenon, already identified concerning the Hungarian case, has been defined by K. L. Scheppele, borrowing an American term, 'court-packing'[74].

Specifically, in the Opinions we will analyze, the VC's assessment was conducted upon the reform of the Public Prosecutor's Office by the Polish Parliament in February 2016[75], the reform of National Judicial Council, the Supreme Court, and the Ordinary Courts of 2017[76] and the reform of the Common and Supreme Courts of December

[71] Since 2016, the VC adopted six opinions on the Rule of Law crisis in Poland. See VENICE COMMISSION, CDL-AD(2016)001; CDL-AD(2016)012; CDL-AD(2016)026; CDL-AD(2017)028; CDL-AD(2017)031; CDL-AD(2020)017.

[72] For a more detailed analysis of the situation in Poland see: W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford, 2019; R. GRZESZCZAK AND S. TERRETT, 'The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience', in *Northern Ireland Legal Quarterly*, n. 69, Issue 3, 2018, pp. 347-366; L. BESSELINK, K. TUORI, G. HALMAI, C. PINELLI, 'The Rule of Law Crisis in Europe', in *Diritto Pubblico*, Issue 1, 2019, pp. 267-287; A. BODNAR, 'Protection of Human Rights after the Constitutional Crisis in Poland', in *Jahrbuch des Öffentlichen Rechts der Gegenwart*, edited by S. BAER, O. LEPSIUS, C. SCÖBERGER, C. WALDHOFF, C. WALTER, 2018; R. Piotrowski, 'L'indipendenza della magistratura e la democrazia costituzionale. Rivisitazione dell'esperienza attuale della Polonia', in G. PITRUZZELLA, O. POLLICINO, M. BASSINI (edited by), *Corti europee e dmocrazia. Rule of Law, indipendenza e accountability*, Milano, 2019, pp. 95-122.

[73] VENICE COMMISSION, *Opinion on the draft act amending the Act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, CDL-AD(2017)031.

[74] K. L. SCHEPPELE, 'Populist Constitutionalism?', in European University Institute Blog, 16 November 2017. The term 'court-packing' derives from the American tradition established in relation to the 'Judicial Procedures Reform Bill' of 1937, proposed by President Roosevelt with the aim to manipulate the composition of the Supreme Court, thus ensuring its favor.

[75] *Act on the public prosecutor's office* (Dz. U.1 of 15 February 2016 r.), (CDL-REF(2017)048).

[76] *Act on the National Council of the Judiciary and the Act on the Supreme Court* (CDL-REF(2017)053 and CDL-REF(2017)052*), Act of 12 July 2017 on the Organisation of Ordinary Courts* (CDL-REF(2017)046).

2019[77]. In the following, we will study the three Opinions in chronological order, highlighting the extent of the Commission's action regarding the Polish judicial system.

Starting from Opinion 892/2017, the Commission identifies a double profile of non-compliance with the Rule of Law's principles. A procedural one, that corresponds to the legal instrument used to carry out the reform, and a substantial one, consisting of the object of the analysis, which is the reform of Public Prosecutor's Office.

Regarding the procedural issue, the use of an emergency instrument as the parliamentary initiative[78] poses severe problems concerning legality, one of those principles identified by the *Checklist* as a core component of the Rule of Law principle[79]. As highlighted by the VC, a reform that involves a sensitive topic, such as the judiciary's independence, should be conducted through a transparent, accountable, inclusive, and democratic process[80]. On the contrary, the instrument adopted by the Polish parliament, the parliamentary initiatives, permits to avoid the otherwise required hearings and consultations with the categories interested by the Act. It derives that the lack of public consultations and of any other civil society's involvement in the reform leads the Commission to an assessment of non-compliance with legality principle and, consequently, with the Rule of Law.

Moving to the substance of the new reform, the Venice Commission has identified several critical issues emerging from the merging of the Public Prosecutor's Office with the Office of the Ministry of Justice and the consequent unification of the position of the Prosecutor General with the position of the Minister of Justice.

From a general overview of the prosecutorial services in the COE's Member States, it emerges that only a few countries have opted for the subordination of Prosecutor's Office to the executive power[81]. Although there is no ideal model of regulation of public accuse, the general trend of Member States - among which Poland was included before the reform

[77] *Act of Law of 20 December 2019 on amending the Act - Law on the system of common courts, the act on the supreme court and certain other acts*, (CDL-AD(2020)002).

[78] In Poland, the rules applicable to the legislative process differ depending on the author of the draft Law. The drafts submitted by members of Parliament, unlike those submitted by the Government, do not require public consultation.

[79] VENICE COMMISSION, *Rule of Law Checklist*, § 49.

[80] VENICE COMMISSION, CDL-AD(2017)028, § 24.

[81] In particular Austria, Denmark, Germany, and Netherlands.

under analysis - is to keep the two powers separated and ensure the Public Prosecution's independence[82].

The unification of the Public Prosecution and the Ministry of Justice's Offices raised concerns about the appointment and removal from the Prosecutor General's Office. Indeed, it is generally recognized the principle according to which the Prosecutor General appointment methods should grant his impartiality and ensure trust and respect by civil society.

Therefore, the fact that the Prosecutor General's appointment and dismissal depend exclusively on Parliament, which also holds sovereign power in minister's appointment, raises serious criticisms. On the one hand, indeed, the Prosecution Office head remains inexorably connected to the political majority of the moment, with possible repercussions on his freedom of decision. On the other hand, a hypothetical political instability during his mandate could damage the continuity and harmony of the territorial offices under his control.

The tendency to subject the Prosecutor General to political power resulted in a further lowering of its appointment's requirements, making the position practically affordable to any law graduated. This weakness opens a breach into the Prosecutorial system's hierarchical structure, even leading to the paradox of a Prosecutor General with less experience and competence than the deputy prosecutors under his command.

To further aggravate an already critical situation, the Act provides an extension of the Prosecutor General's powers, who acquires the power to intervene in individual cases. This provision is part of a process devoted to bringing the public prosecution system into the executive power's hands. The reform leads to the obvious consequence of a Prosecutor General which becomes the government's *longa manu* for all its intents and purposes. Such a tendency, however, is not limited to the management and organization of the accusation system but, far more seriously, affects the individual judicial activity, thus triggering the risk – and doubt – of possible manipulation of the investigations by an officer which is also a politically exposed subject[83].

[82] For an accurate analysis of the public prosecution offices in COE's Member States see 'Challenges for judicial independence and impartiality in the Member States of the Council of Europe', (SG/Inf(2016)3rev).

[83] VENICE COMMISSION, CDL-AD(2017)028, § 98.

All these problems have led the VC to express a negative opinion on the newly introduced public accuse reform. Using the words of the *Rule of Law Checklist,* indeed, the Commission has stated that in a system where the prosecution is interconnected with the executive power, several specific and additional safeguards are needed to guarantee its autonomy and transparency and to protect it from undue political influence[84].

Therefore, being these guarantees absent or inadequate, in its conclusions, the VC recommends in the first place to return to the old regulation, which provided for the separation between the two offices. Otherwise, in case of maintenance of the newly established system, the Commission suggests resettling the Prosecutor General and the Minister of Justice's functions, excluding the possibility of intervening in individual cases and limiting their competences to the Office's general management. Only in this way, indeed, the respect of the principle of separation of powers - one of the core values of Rule of Law in Europe - could be granted[85].

From a methodological point of view, the analyzed opinion contains all the aforementioned innovative aspects of the Venice Commission's work. On the one hand, indeed, the Rule of Law principle falls directly into Poland's specific context and is declined in a series of practical recommendations to readapt the newly introduced legislation to make it in line with the *Checklist*'s standards and principles. On the other hand, paying particular attention to the State's institutional and political mechanisms, the Commission gives a comprehensive look at the reform, evaluating it in its substance and about the entire system. This approach allowed the Commission to identify problems and inconsistencies concerning the other aspects of the system.

The VC's systemic approach's advantages also emerge from the subsequent interventions on the other reforms affecting Polish judicial independence. After the prosecutorial system reform, in January 2017, the Polish Government announced plans for a large-scale reform of the judiciary. In a public statement, the Minister of Justice explained that the objective of such a comprehensive reform was to increase the efficiency of the court system, reduce delays in the proceedings, enhance the

[84] VENICE COMMISSION, *Rule of Law Checklist*, § 91 ff.

[85] For a detailed analysis of the interconnections between Rule of Law and separation of powers see J. ALDER, 'Constitutionalism: The Rule of Law and the Separation of Powers', in J. ALDER, *Constitutional and Administrative Law*, Berlin, pp. 69-89.

accountability of judges, strengthen their professionalism, combat corporatism, and re-establish the public trust in the judiciary[86].

With these aims, in May and July 2017, the Polish Parliament adopted three draft acts reforming Ordinary Courts, the National Council of the Judiciary, and the Supreme Court. Such reforms have been severely criticized by national stakeholders and the international community[87] as they were contrary to the Rule of Law principles.

The international pressure generated on the draft acts led the President of the Republic to veto two of the three proposed bills. In 2017, the President proposed two alternative Acts on the Supreme Court and National Council of the Judiciary, which considered some criticisms, while maintaining the reform's general direction. Therefore, the international community kept its critical position unaltered. In particular, the OSCE/ODHIR concluded that the draft acts 'would seriously undermine the separation of powers and the Rule of Law in Poland'[88] and the European Parliament concluded that it might 'structurally undermine judicial independence and weaken the Rule of Law in Poland'[89].

Opinion 904/2017 puts under the Venice Commission's lenses all these three amendments, giving it the chance to overview the whole Polish judicial system under the *Rule of Law Checklist*'s standards and principles. As we will see in practice, this Opinion

[86] See *Public Statement of 20 January 2017* by Mr. Ziobro, Minister of Justice and Prosecutor General of Poland.

[87] Against Polish reform of the judiciary of 2017 many national and international actors have express their concerns, see, for instance: Opinion of the CCJE Bureau of 7 April 2017; Statement of the Bureau of the CCJE of 17 July 2017; Preliminary Opinion by the OSCE/ODIHR of 22 March 2017 'On draft amendments to the Act on the National Council of the Judiciary and certain other acts of Poland'; Final Opinion of the same name of 5 May 2017; Opinion by the OSCE/ODIHR of 30 August 2017 'On certain provisions of the Draft Act on the Supreme Court of Poland'; an information note by the co-rapporteurs of the Monitoring Committee of the PACE (§ 27); Recommendation by the European Commission of 26 July 2017 regarding the Rule of Law in Poland, complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146; Opinion of the ENCJ Executive Board of 30 January 2017; Letter by the CoE Human Rights Commissioner to the Speaker of Sejm of 31 March 2017; Joint Letter of several major international NGOs to the European Commission (Amnesty International, FIDH, Human Rights Watch, Open Society European Policy Institute, Reporters without Borders etc.) of 16 February 2017; Statement by the Helsinki Foundation for Human Rights of 13 July 2017; Statement by MEDEL of 18 July 2017; Letter by the President of the Council of Bars and Law Societies of Europe to the President of the Sejm (of 3 April 2017) and to the President of the Republic (of 18 July 2017); Statement by the National Council of the Judiciary of 7 March 2017 'regarding the government's draft act on the National Council of the Judiciary'; Resolution of the General Assembly of the judges of the Supreme Court on the proposed changes to the judiciary in Poland of 16 May 2017; Report by the Board of the Law Faculty of the Jagiellonian University of 8 May 2017.

[88] OSCE/ODIHR, 'Opinion on certain provisions of the draft act on the Supreme Court of Poland (as of 26 September 2017)', of 13 November 2017.

[89] EUROPEAN PARLIAMENT, Resolution on the situation of the Rule of Law and democracy in Poland, 15 November 2017, Strasbourg, pp. 4 and 7.

represents a unique example of the Venice Commission's innovative approach, containing both the practical and systemic components of its working method.

Starting with the Draft Act on the National Council of the Judiciary, the VC identifies several profiles of non-conformity of the newly introduced legislation with the Rule of Law standards and principles.

First, focusing on the Judicial Council's role within the national legal system, the Commission highlights that its primary function is to ensure judiciary's accountability while preserving its independence[90]. Thus, its composition represents a fundamental element of impartiality and independence of the whole judiciary; to that effect, 'a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself'[91].

The Draft Act on the NCJ, changing the election's method of the 25 members of the Council, provides 15 judicial members not elected by their peers but from Parliament. Given that six other members are parliamentarians, and the President of the Republic nominates four others, the proposed reform would lead to a Council entirely nominated by politics.

This, according to the VC, will inevitably lead to an increasing political influence on the composition of the NJC and, consequently, will have an immediate influence on the work of this organ, which will become more political than technical in its approach[92].

In addition to the new procedures of election of the Council members, the new draft act introduces a provision on the early termination of all NCJ's judicial members at the moment of the new member's election[93].

The Polish authority explained this provision with the need for a 'joint term of office' of the NCJ's judicial members, implying that all mandates will start and end simultaneously. In the VC's view, this justification is regrettable. Indeed, the desynchronization of terms of office in collegiate organs is a common feature among

[90] VENICE COMMISSION, *Rule of Law Checklist*, § 81.
[91] *Ibid*, footnote 68.
[92] VENICE COMMISSION, CDL-AD(2017)031, § 24.
[93] *Draft Act on National Judicial Council*, 2017, Article 6. '*A member of the National Council of the Judiciary referred to in Article 187(1)(2) of the Constitution, elected under the previous provisions shall perform their function until the starting date of the joint term of office of the new members of Council elected by the Sejm from among judges under the Act referred to in Article 1, as amended by this Act.*'.

European states: it helps preserve their continuity and contributes to their internal pluralism and independence. The election of members by different terms of Parliament increases the chances that they belong to different political orientations; meanwhile, simultaneous replacement of all the members may lead to political uniformity within the NJC[94].

Taking a general overview at the newly introduced reform, the Venice Commission concluded that the 15 judicial members' appointment, in conjunction with their immediate replacement jeopardizes the NJC's independence, subjecting it to the parliamentary majority. Therefore, the VC recommended to abandon the proposed draft and maintain the current system, which combines parliamentary elected lay members and judicial members elected by their peers[95].

Regarding the Draft Act on the Supreme Court, the VC identifies three main criticisms, regarding the creation of new Chambers in the Supreme Court, the early termination of the mandate of many senior judges, and the introduction of the extraordinary review of final judgment.

Specifically, the Draft Act provides for the SC's division into five Chambers with specialized jurisdiction, creating two new Extraordinary Chambers. According to the law, these newly established bodies will have special powers that will put them above the other three Chambers. They will have the power to review any final judgment issued by the Ordinary Chambers and will be entrusted with examining politically sensitive cases.

The VC is particularly concerned that the heads of the newly established Chambers will be *de facto* hierarchically superior to the others, and the President of the Republic will almost entirely determine the SC's composition.

Moreover, the new act introduces changes in the judges' retirement age, lowering it from the actual age limit of 70 to 65 years. As noted by the VC, this provision contrasts with the other European states, where the trend consists of raising the retirement age[96]. In

[94] VENICE COMMISSION, CDL-AD(2017)031, § 29.
[95] *Ibid*, § 31.
[96] See VENICE COMMISSION, CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§ 104-105 .

practice, this provision's implementation would oblige almost 40% of Polish Judges to early retirement.

According to the VC, such an unjustified and radical proposal may negatively affect the Supreme Court's functioning, undermining individual judges' stability and the organ's independence.

Concerning the judge's individual rights, as already found in the similar case of Hungary, the sudden lowering of judges' retirement age violates European equal treatment rules[97].

More generally, drawing the attention of the Polish authorities on the ECtHR's case-law, the VC argued that early retirement does not only affect individual rights of judges, but it also undermines the courts' operational capacity, affecting its continuity and legal security and might also open the way for undue influence on the judiciary's composition[98].

Another source of concern for the VC lies in the provision allowing judges who reach the retirement age to apply for the extension of their office, giving the President of the Republic the discretion to decide to allow such extension. In addition to increasing the President of the Republic's powers, it grows its influence over those judges approaching the retirement age, thus undermining, once again, their independence.

Finally, the newly introduced amendment, which provides for an extraordinary review of final judgments, raises several criticisms. Indeed, as noted by the VC, a similar system existed in many former communist countries and the ECtHR has criticized it for violating the principles of *res judicata* and legal certainty, which form the hardcore of the Rule of Law in Europe[99].

Under the *Rule of Law Checklist*, the principle of *res judicata* implies that 'final judgments must be respected unless there are cogent reasons for revising them'[100]. Therefore, the reopening must be possible but only under specific conditions, which,

[97] VENICE COMMISSION, CDL-AD(2011)016, *Opinion on the new Constitution of Hungary*, § 108.

[98] COURT OF JUSTICE OF THE EUROPEAN UNION, *European Commission v. Hungary*, Case C-286/12, 6 November 2012.

[99] ECtHR, *Brumarescu v. Romania*, Appl. no. 28342/95, 28 October 1999; *Ryabykh v. Russia*, Appl. no. 52854/99, 24 July 2003.

[100] VENICE COMMISSION, Rule of Law Checklist, § 63.

according to the VC, are not fulfilled within the Polish system. Indeed, the Draft Act introduces the extraordinary review for future judgments and, even more problematic, for old judgments which, at the moment of their adoption, were final and non-subject to any possibility of revision. Moreover, being such revision entrusted only to two of the SC's chambers - almost entirely nominated by the President of the Republic –judiciary's independence is severely threatened.

Proceeding with a cross-analysis of all the cumulative effects of the proposed amendments, the VC expresses the potential of its innovative working-methodology. Looking at the system, the Commission identifies the weaknesses of the proposed amendments. It concludes that, if implemented, the reform would not only threaten SC's judges' independence, but also create a severe risk for the legal certainty. Indeed, it will enable the President of the Republic and the Parliament to play a determinant role in deciding the SC and the NJC's composition and the functioning.

Therefore, given all the above-explained criticisms, the VC concluded the Opinion calling the President of the Republic to withdraw the proposal and reconsider all the suggested reforms within a significant dialogue with the principal national actors and stakeholders and the assistance of the Commission.

Despite the VC's clear position and the initial appearance of Polish authorities' cooperation, the reform was adopted and implemented without any major changes. The only notable exception, which represents a conjunct success of the VC's intervention and the CJEU's case-law, is the revocation of the provision relative to the judges' early retirement at the end of 2018.

Because of the 2017 reform, Poland's judicial community lost its representation in the NJC and, hence, its influence on recruitment and promotion of judges. Simultaneously, the Minister of Justice, which is also the Prosecutor General, increased its powers, becoming, together with the President of the Republic, an influential actor on the judiciary's composition and activities.

The months following the reform were characterized by a complete reorganization of the NCJ, mass replacement of courts' presidents by the Minister of Justice, and intensification of disciplinary proceedings against ordinary judges. The civil society was divided. On one side, the reform supporters, who led a public campaign against the former

judiciary, accused it of corporatism, corruption, and affiliation to the communist regime. On the other side, the opponents to the reform condemned its significant encroachment on judicial independence.

In several cases, Polish courts tried to oppose the reform addressing the CJEU requests for preliminary rulings on whether the Polish judiciary resulting from the new provisions could be considered independent. Meanwhile, the European Commission started the infringement proceedings against Poland before the CJEU[101].

On 19 November 2019, the CJEU adopted a judgment in case *A.K. and others*[102] regarding the independence and impartiality of the newly established extraordinary Chambers of the SC. The judgment was largely awaited as a new 'red line'[103] to define the European Rule of Law. According to scholars, the CJEU delivered the much-awaited guidance as to whether and how domestic courts should verify the independence of other domestic courts[104]. Reaffirming the principle of primacy of EU law, the CJEU considered that a court is not independent and impartial when 'the objective circumstances in which that court was formed, its characteristics and how its members have been appointed are capable of giving rise to legitimate doubts as to direct or indirect influence of the legislature and the executive and its neutrality'[105]. However, the Court did not decide itself in the matter of independence of the Chamber, but left the decision to the referring court, thus affirming that national courts applying EU law must disregard national provisions if the body which has jurisdiction on a case does not meet requirements of independence and impartiality[106].

At first, the judgment was deemed disappointing by some commentators[107], while government representatives defined it as a step back in the CJEU's stance on the Polish judicial reforms. The CJEU, indeed, did not assess the independence of the DC on its

[101] See Chapter II, § 3.4 of the present work.

[102] COURT OF JUSTICE OF THE EUROPEAN UNION, *A.K. and Others V. Poland*, C-585/18, C -624/18, C-625/18), 19 November 2019.

[103] A. VON BOGDANDY ET AL., 'A potential constitutional moment for the European rule of law: The importance of red lines', in *Common Market Law Review*, 2018, vol. 55, pp. 994-995.

[104] M.KRAJEWSKI AND M.ZIÓŁKOWSKI, 'EU judicial independence decentralized: A.K.', in *Common Market Law Review*, 2020, vol. 57, p. 1109.

[105] *Ibid*, § 171.

[106] VENICE COMMISSION, CDL-AD(2020)017, § 15.

[107] B. GRABOWSKA-MOROZ AND J. JARACZEWSKI, 'High Expectations: The CJEU Decision about the Independence of Polish Courts', in *Verfassungsblog*, 19 November 2019.

own. Instead, it elaborated a test for the 'appearance' of judicial independence, drawn from the ECtHR's case-law[108].

The referring court and an extended formation of the Supreme Court subsequently applied the test. In compliance with the CJEU judgment, the Labor Chamber of the Supreme Court concluded that the Disciplinary Chamber of the SC did not fulfill independent and impartial court's requirements. However, despite this recognition, the resolution promoted by the 'old' chamber of the SC was ignored, and the non-independent Disciplinary Chamber is still operative, and, thanks to the amendments object of the last Opinion, it seems to be impossible for any court to challenge its legitimacy again[109]. In a speech delivered on 11 November 2019, President Duda launched another attack against Supreme Court's critical judges and declared 'We will sit them out'.

In sum, the scenario that led to the new round of amendments is characterized by what the VC has defined a 'schism between the old judicial institutions and judges, on one side, and, on the other, those bodies and judges who were created/appointed on the basis of the new rules introduced by the legislative amendments of 2017'[110]. The risk deriving from this situation, defined by Sadurski as a 'constitutional breakdown'[111], is that of legal chaos caused by decisions of some courts not recognized as valid by other courts.

In the Opinion 977/2020, the Marshal of the Senate of the Republic of Poland requested the VC to assess the amendments to the laws on the judiciary concerning the Rule of Law principle.

The first cause of incompatibility with the Rule of Law highlighted by the VC is procedural. Indeed, the draft Amendments were introduced with an expedited procedure. Being a private bill of some MPs of the majority, it must be discussed and adopted by the Sejm in less than 24 hours.

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[108] ECtHR, Appl. No. 22107/93, *Findlay v. the United Kingdom*, judgment of 25 February 1997, § 73; Appl. No. 54723/00, *Brudnicka and Others v. Poland*, judgment of 3 March 2005, § 38; Appl. No. 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, §§ 45–46.

[109] For more details on the two-headed approach of the Polish Supreme Court on the legitimacy of the newly established chambers of the SC, see M. ZIÓLKOWSKI, 'Two Faces of the Polish Supreme Court after 'Reforms' of the Judiciary System in Poland: the Question of Judicial Independence and Appointments', in *European Papers*, Vol. 5, 2020, No. 1, pp. 347-362.

[110] *Ibid*, § 17.

[111] W. SADURSKI, *Poland's Constitutional Breakdow*n, Oxford, 2019.

As already expressed in previous opinions, the VC criticizes the practice of using accelerated procedures for adopting acts of great importance as those regarding the judiciary[112]. Moreover, such procedures should not be used, as indeed was in Poland, to oust an essential part of the society from the debate and to avoid meaningful public consultation with minorities within the Parliament[113].

This practice, typically referred to anti-democratic and non-inclusive regimes, has been already condemned in several cases by the VC as a violation of the principles of land legal certainty, contemplated by the *Checklist* as core elements of the Rule of Law.

The Commission proceeds with a reconstruction of the legal framework of the notion of independence and impartiality within the European scenario. Specifically, to define the notion of 'independence and impartiality' the VC identifies ECtHR and CJEU's case-law as the relevant point of reference[114].

This preliminary reconstruction of the notion of judicial independence, which considers both EU and COE scenarios, besides having significant implications for the Opinion's substance, highlights the VC's working method potentialities. Indeed, it demonstrates the VC's capacity to collect standards from different sources and synthetize them for the specific case in analysis. Besides being necessary for a comprehensive understanding of the case, this capacity represents the conjunction point between the European Union and the Council of Europe's Rule of Law's understanding.

To confirm this tendency, among the relevant international standards, the Commission places the principle of primacy of EU law, stating that 'any impediment to disapplying the provision of national law which contravene the EU law is a violation of the EU law in itself'[115].

Moving to the provision's substance, the Commission identifies several aspects of non-compliance of the Amendments with the European standards on judicial independence.

[112] See for instance CDL-AD(2018)021, § 39.
[113] See on this point VENICE COMMISSION, Parameters on the Relationship between the Parliamentary Majority, and the Opposition in a Democracy: a checklist, §75.
[114] VENICE COMMISSION, CDL-AD(2020)017, § 20.
[115] VENICE COMMISSION, CDL-AD(2020)017, § 22.

First, it examines the newly introduced rules on freedom of expression and assembly of judges. The amendment to Article 107 of the Act on the Common Courts provides a disciplinary offense for those judges who question the other judges' appointments. It also makes it an offense for judges to be involved in 'public activities that are incompatible with the principle of judicial independence and impartiality', adding that the bodies of judicial self-government cannot deliberate on 'political matters'.

These limitations, provided with the clear intent to avoid the repetition of cases in which other courts challenge some court's legitimacy, – as it happened in the case *A.K.* – severely affect judge's freedom of expression. Indeed, as highlighted by the ECtHR in the case *Previti v. Italy*, judges, being legal experts, may criticize legal reforms for contributing to public interest's matter[116]. Thus, applying the relevant international standards, the VC considers such provision contrary to Article 10 ECHR.

In the same logic, the provision that prevents judicial self-government bodies from deliberating on political matters, may be interpreted as a prohibition to express critical opinions on the authorities' functioning, thus hindering the collective exercise of freedom of speech. Once again, this operation seems to be directed to restraint individual freedom and independence of judges.

Alongside these provisions that affect the judiciary's individual sphere, the newly introduced Amendments pursue the objective to eliminate the Polish courts' competence to examine whether another court decision was issued by a person appointed as a judge in compliance with the Constitution, European law, and other international legal standards.

The Venice Commission, referring to the *A.K.* case, highlights that the newly introduced Amendments seem to nullify the CJEU's judgement's effects and, consequently, the SC's judgment on the Disciplinary Chamber, as well as all the other pending proceedings[117]. In point of method, the VC's referral to the CJEU and the Polish Supreme Court must be highlighted. It demonstrates the commission's opening towards other international and national institutions in the definition of a common strategy against Rule of Law's dismantling in Europe. As to merit, the Commission acknowledges that

[116] ECtHR, *Previti v. Italy*, Appl. No. 45291/06, 8 December 2009.
[117] VENICE COMMISSION, CDL-AD(2020)017, § 31.

besides being a severe violation of the principle of judiciary's independence, this represents a serious challenge to the principle of primacy of the EU law. Moreover, according to the VC this approach raises challenging questions on Polish courts' institutional independence, which is also granted by the possibility of mutual control between courts.

Introduced to resolve the 'legal chaos' generated by the 2017 reform of the NCJ and the SC, the new amendments have accentuated the already existing discrepancies between the 'old' and the 'new' judiciary, without solving the problem from the basis: bring back the methods of appointment of judicial members of the NCJ and SC in accordance with European standards and best practices. Therefore, the VC's recommendation is to remove provisions that prevent the courts from examining the question of other judges' independence and impartiality in the short term. Looking at the future, it recommends reformulating the rules on the composition of the judiciary.

In conclusion, to fix those problems highlighted by the VC and the international community about the 2017 reform, the Polish Parliament has seriously curtained judges' freedom of speech and independence, in open violation of all the relevant European standards and best practices.

The three analyzed opinions give an overall understanding of the challenges to the Rule of Law within the Polish legal order. The VC's intervention, required in two cases by the PACE and in the last case by the Marshall of the Polish Senate, represents a fundamental step in the international acknowledgment of the Polish 'constitutional breakdown' and an essential step towards the establishment of a dialogue with Polish authorities. The same fact that in 2019 was a member of the Polish majority to require the intervention of the VC represents a possible opening signal towards the restoration of the Rule of Law in Poland.

Undoubtedly, President Duda's recent re-election represents an obstacle to the reaffirmation of democracy and the Rule of Law in Poland[118]. Therefore, today more than

[118] The elections, concluded on 12 July 2020 with the re-election of President Duda, leader of the governing nationalist-conservative Law and Justice party, are the result of an extremely tight race. President Duda won the elections with 51.03 percent of votes, against the 48.97 percent of his opponent. The OSCE's Office for Democratic Institutions and Human Rights has assessed the electoral campaign as 'characterized by negative and intolerant rhetoric' and a 'public broadcaster that failed to ensure balanced and impartial coverage'.

ever, it appears necessary a strong and clear EU intervention in response to the spreading illiberalism within the country. Indeed, as stated by G. Knaus, 'the Eu has a big responsibility for the future of Poland's democracy and the credibility of the bloc's legal order'[119].

Some scholars argue on this point that given the fact that few tools have remained in the hands of the EU to react to such a situation, remains one obvious way to tackle the Polish crisis: EU Member States should insist that the future financial solidarity is conditional on respect for the Rule of Law. Therefore, implementing all CJEU judgments related to the Rule of Law – which in large part insist on VC recommendations – should be a non-negotiable precondition for receiving funding from the EU budget[120].

Some other, more open to dialogue, have suggested some intermediary steps, such as the CJEU's intervention to suspend the activities of the Supreme Court's Disciplinary Chamber, on one side, and the mediation of the EU Member States in warning the Polish government against the consequences of undermining the independence of courts and voicing their support to EU's further actions – such as the abovementioned financial sanction – in defending the integrity of the Rule of Law in Europe[121].

2. ROMANIA: THE REFORM OF THE JUDICIARY THROUGH THE LENSES OF THE VENICE COMMISSION

Opinions 924/2018[122] and 950/2018[123], adopted by the VC on Romania, are part of the structural reform of the judiciary undertaken in 2015 to address concerns with relation to inefficiency and politicization of the judiciary and increase its quality, transparency, and accountability[124].

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[119] G. KNAUS, 'The reelection of Polish President Andrzej Duda represents an existential threat to the European Union's Legal order. After more than a decade of talk about conditionality, Member States must act now', July 14, 2020, in https://carnegieeurope.eu/strategiceurope/82290.

[120] *Ibid*.

[121] ESI, *Report on Poland's deepening crisis. When the Rule of Law dies in Europe*, 14 December 2019, p. 9, in https://www.esiweb.org/pdf/ESI-Batory%20Polands%20deepening%20crisis%2014%20December%202019.pdf.

[122] VENICE COMMISSION, CDL-AD(2018)017.

[123] VENICE COMMISSION, CDL-AD(2019)014.

[124] For further information on the political and institutional situation in Romania after the introduced reforms of the judiciary see C. MANOLIU, 'Short Considerations Regarding the Magistrate's Liability in the Context of the New Legal Provisions on the Reform of Justice', in *International Journal of Juridical Sciences*, no. 2, 2018, pp. 40-48.

The intervention started with some delay in August 2017 when, with the presentation of three draft amendments[125] to the judiciary legislation, the Minister of Justice explained to the Parliament the main aspects of the planned reform. The Parliament decided to adopt an accelerated procedure available only in case of emergency[126], entrusting parliamentary work to a commission appointed *ad hoc*.

The decision to use a shortened parliamentary procedure for structural reform of great importance, especially considering the political and institutional climate in which it has been conducted, raised several concerns both at the national[127] and the international[128] level.

To aggravate an already complex scenario, the Anti-Corruption National Authority's[129] investigation has found that the legislative procedure took place in a climate of marked political tensions due to alleged massive use of corruption. Many members of the Government and Parliament were sentenced[130]. The situation was exacerbated by a climate of general distrust and suspicion towards the judiciary. Indeed, it was accused of acting under political pressure and intimidation and having deliberately underestimated the plague of corruption, exacerbated the situation.

In sum, it appears that any legislative initiative undertaken in a similar context becomes a particularly sensitive one, capable of interfering with the judges' and prosecutors' work. Therefore, Opinion 924/2018 opens with a procedural issue related to the legal instrument through which the reform was conducted.

[125] Draft Law amending Law no. 303/2004 on the status of judges and prosecutors, Draft Law amending Law. No. 304/2004 on Judicial Organization e Draft Law amending Law no. 317/2004 on the Superior Council of Magistracy

[126] Romanian Constitution provides the possibility to adopt, upon Government's request, a legislative emergency proceeding to speed up parliamentary times.

[127] At national level, many criticisms have been raised by the Supreme Council of Magistracy, which has published two negative opinions, by the same Magistracy, which has published a Memorandum undersigned by 4000 judges and public procurators, and by the civil society, which has publicly demonstrated and produced several reports on the topic.

[128] Many criticisms have arisen also in the international scenario. Must be noticed the repeated recommendations of the Anti-corruption body of the Council of Europe (GRECO), who sided openly against the decision of the Parliament and the Government in its *Ad hoc Report on Romania* adopted in March 2018, recommending the beginning of a new legislative proceeding more transparent and inclusive.

[129] The Anti-Corruption Authority is a specialized division of the General Prosecutor's Office created in direct response to EU post-accession conditionalities.

[130] According to the official information more than 68 high officials have been investigated and alleged of corruption, 27 between Ministers and MPs were condemned.

The Commission, while not totally disapproving the use of emergency procedures in cases of extraordinary necessity, openly criticizes its use as part of a structural change of the regulation of the judiciary[131].

One of the principles in which the Commission declines the Rule of Law is legality, which requires, as a key element, that the legislative procedure is transparent, reliable, and democratic[132]. Precisely, when the legislation focuses on aspects that are particularly important for the society, the involvement of all political orientations and the civil society, constitutes a necessary precondition to achieve a result in line with the identified democratic standards[133].

Moving to the substance of the reform, between the essential aspects interested by the amendments, the newly introduced procedures of appointment and dismissal of Top Prosecutors has relevance.

Before the new law, the Prosecutor General and his deputies were nominated by the President of Romania on the Minister of Justice's proposal and with the Supreme Council of Magistracy's consent. The President also had the power to revoke the nominations on the Minister of Justice's request[134].

The amendments proposed in the new draft modify the system for the appointment and dismissal of top prosecutors by introducing two essential novelties. Firstly, the President will be able to refuse the appointment only once; in second place, instead of the opinion of the plenum of the Superior Council of the Magistracy, will be required only that of the newly created Prosecutors Section. In practice, the legislation poses the appointment in top prosecutors' hands through a procedure incomplete and practically devoid of meritocracy.

The Commissions highlights that the *Rule of Law Checklist*, concerning the system of the public prosecutor offices, states that 'although there is no common standard on the

[131] VENICE COMMISSION, CDL-AD(2018)017, §§ 32-34.
[132] VENICE COMMISSION, *Rule of Law Checklist*, § 17 ff.
[133] For a deepening on this topic see: VENICE COMMISSION, CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, §§ 16-19; CDLAD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government emergency ordinance on amendment to the Law n. 47/1992 regarding the organization and functioning of the Constitutional Court and the on the Government emergency ordinance on amending and completing the Law. N. 3/2000 regarding the organization of a referendum in Romania, § 74.
[134] Art. 54 §§ 1, 2 and 4 of Romanian Constitution.

organization of the prosecution service, especially about the authority required to appoint public prosecutors, however sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence'[135].

The first novelty introduced by the amendment under analysis, which regards the limitation of the President's possibility to veto the appointment of Prosecutors at one time only, the Venice Commission raises perplexities. Indeed, such provision would increase immeasurably the role of the Minister of Justice, thus weakening the system of checks and balances that grant the judiciary's independence[136].

The Romanian context, characterized by tensions between the prosecutors and some political parties, aggravates the effects of an already worrying reform. Indeed, if Top Prosecutors' appointments and dismissals depend on a Minister, there would be a clear risk that they do not effectively fight corruption among political allies of that Minister[137].

The only solution to bring back the legislation in line with European standards, in the view of the Commission, should be to strengthen the balance between powers: in few words, the conferment, within the appointment procedures, of equal powers to the Minister of Justice, to the President and the Superior Council of the Magistracy. Only in this way, it would be possible to balance the Government's political influence with that of the other institutions, giving full implementation to the principle of checks and balances[138].

To further aggravate an already particularly complex situation, between September 2018 and March 2019, the Romanian government continued the judicial system reform process with the adoption of five emergency orders[139], one of which affected the system of appointment and dismissal of prosecutors[140].

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[135] VENICE COMMISSION, *Rule of Law Checklist*, § 91.
[136] VENICE COMMISSION, CDL-AD(2018)017, § 52.
[137] *Ibid*, § 54.
[138] VENICE COMMISSION, *Rule of Law Checklist*, § 39.
[139] The Romanian Constitution provides , in Art. 115, a procedure of adoption of emergency ordinances by the Government. This instrument can be used only in exceptional cases whose regulation cannot be postponed. Emergency orders are subject only to an ex-post approval by the Parliament, without the provision of any time-limit within which the order must be discussed or an expiration date. Emergency orders cannot be adopted on constitutional laws or on the status of fundamental institutions, rights, freedoms, and duties provided for in the Constitution and electoral rights.
[140] Emergency Ordinances, GEO no. 7.

In fact, contrary to what the Venice Commission recommended in the previous opinion[141], the Government continued centralizing the power to appoint prosecutors, further reducing the Superior Council of the Magistracy's involvement on issuing a simple 'opinion', moreover not binding.

The Minister of Justice's influence on prosecutors' appointment was then further reinforced by the limitation of the mandate of the Top Prosecutors to only three years, renewable, if necessary, always on the indication of the same Minister.

Once again, the Venice Commission intervened with the Opinion 950/2019. The Commission for the compliance with the obligations and commitments by the Member States ('Control Commission of the Council of Europe '), requested the VC'S opinion on the compatibility of the emergency order with the relevant constitutional standards.

The Venice Commission had to express one preliminary criticism towards the Government's use of the emergency decree to regulate a sensitive topic as the judicial matter. Using a similar procedure to amend a legislation regulating the judicial sphere raises at least three issues concerning the Rule of Law principle.

In the first place, the adoption of regulatory acts governing essential aspects of the judiciary implemented without going through a legislative process involving Parliament raises serious doubts about the solidity of the substantial elements of the reform and its quality.

Respect for legality requires that the so-called 'structural' reforms involve the most considerable amount of society, passing through the Parliament, the oppositions, and the civil society. The use of emergency decrees primarily affects the quality of the legislation, which loses the assessment of the Parliament. At the same time, it alters the checks and balances system opposing the overwhelming power of the executive.

Secondly, the Government's conduct affects the principle of legal certainty. This patchwork of amendments and revisions, indeed, makes it challenging to spot the very substance of the discipline. As stated by the Venice Commission, clarity, predictability,

[141] VENICE COMMISSION, CDL-AD(2018)017.

consistency, and stability of legislation should be the main features of a legal system compliant with the principles of the Rule of Law[142].

Third, the government's excessive exercise of legislative power raises severe problems concerning the principle of separation of powers. The abuse of the emergency decree determines an encroachment of the executive power into the legislative. This tendency, primarily when related to sensitive issues as the judicial system's regulation, contrasts with the decrees' extraordinary and emergency nature, and leads to the Parliament's empowerment.

Moving to the reform's substantial aspects, the Commission deplores the failed adaptation of the regulations to the recommendations already expressed in the 2018 opinion. The danger of the total absence of control over the Ministry of Justice's appointment power contrasts with the principle of separation of powers, whose respect is fundamental for full compliance with Rule of Law[143].

From the methodological point of view, the case shows the Commission's capacity to deal with judicial independence with reference to its consistency towards the constitutional framework in which it is inserted. This potential is particularly evident in the attention paid to the procedures of adopting the newly introduced reforms and their evaluation concerning the principles of legality, legal certainty, and separation of powers.

In addition to demonstrating the Commission's ability to evaluate a reform concerning the whole legal system, it confirms its inclusive approach to the Rule of Law principle. The Commission's analysis is not limited to pointing out the most evident non-compliance with the judiciary's independence principle. Still, it is enriched with other Rule of Law's elements, as the principle of legality and checks and balances.

Notwithstanding this, Romanian authorities have disregarded VC's recommendation. In December 2019, the Minister of Justice initiated the interview procedures and selected three candidates who were proposed to the President of Romania. Despite the negative opinions given by the Section for Prosecutors of the SCM, the President insisted on their appointment. Thus, it minimized the role of the bodies chosen

[142] VENICE COMMISSION, *Rule of Law Checklist*, §§ 58-59.
[143] VENICE COMMISSION, CDL-AD(2019)014, § 30.

by magistrates to manage the judiciary and disrespected the Venice Commission's work[144].

Unfortunately, such attitude is not new and has partially been encouraged by some decisions of the Constitutional Court of Romania. In its Decision No. 358/2018, it has expressly found that 'the opinion provided by the Venice Commission cannot be used in the examination of constitutionality. The recommendations made by the international forum could have been useful to the legislator, in the parliamentary procedure for drafting or amending the legislative framework, the Constitutional Court being empowered to carry out a review of the compliance of the regulatory document adopted by the Parliament with the Fundamental Law, and not to verify the opportunity of one legislative solution or another, aspects that fall within the discretion of the legislator, within its policy regarding the laws of justice.'[145].

The Romanian case clearly shows one of the primary limits of the Commission's action, which, being non-binding, may incur in indifference from the recipient State. However, such attitude of non-compliance of the Member State does not go unnoticed in the international community's eyes, which, recognizing the Commission's authority, draws its conclusions about Romania's disrespect of the Rule of Law principles.

In the next months, given the strict cooperation between the VC and the EU, it will be interesting to follow the CJEU's assessment in some pending cases regarding the Rule of Law in Romania[146] and, consequently, the Romanian authorities' reaction.

3. North Macedonia: A Virtuous Example of (almost) Successful Implementation of the Rule of Law

All that being said, a question arises: what follow-up will the work of the VC have if its opinions have no binding force on MS?

At this point in the analysis of the Commission's work it is a question that seems right to ask considering the cases studied so far. In the following, we will try to give, once

[144] For more details see D. Călin, 'The appointment of top prosecutors in Romania: minimizing the role of the judiciary', in *European Law Blog*, 11 May 2020.
[145] Constitutional Court of Romania, *Decision No. 358/2018*, § 30.
[146] CJEU, *Asociația Forumul Judecătorilor din România și alții*, cases C.83/19, C-127/19, C-195/19.

again with a practical approach, a demonstration of the theoretical discussion conducted in the first part of this thesis on the effective value of the Commission's work.

We will take as an example the case of the reform of the judiciary in North Macedonia. After having been subject of several 'negative' opinions of the VC in 2005[147], 2014[148], 2015[149], and 2017[150], it has finally received a positive assessment of (almost) complete adherence to the values of the Rule of Law in two recent opinions adopted in 2018[151] and in 2019[152].

As a state emerging from the former Soviet Union, North Macedonia was one of those countries in which the Venice Commission played a vital role from the beginning. The process of constitutional assistance exercised in its regard has been very intense and led to excellent results.

Concerning the judiciary's reform, the Commission has adopted six opinions, trying every time to refine more and more national legislation to bring it back within the framework of common European standards of the Rule of Law.

In its first two opinions, the Venice Commission analyzed constitutional amendments concerning the judiciary, including the appointment and dismissal of judges, the scope of the judges' immunity, the composition of the Judicial Council, and the appeals against the decision of the Judicial Council.

In its 2015 Opinion, the VC assessed the earlier version of the Law on Courts, the Law on the Judicial Council, and the Law on the Council for Determination of the Facts and

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[147] VENICE COMMISSION, *Opinion on the Draft Constitutional Amendments concerning the Reform of the Judicial System in the 'Former Yugoslav Republic of Macedonia'*, CDL-AD(2005)038.

[148] VENICE COMMISSION, *Opinion on the Seven Amendments to the Constitution of the 'Former Yugoslav Republic of Macedonia' concerning, in particular, the Judicial Council, the competence of the Constitutional Court and Special Financial Zones*, CDL-AD(2014)026.

[149] VENICE COMMISSION, *Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of the 'Former Yugoslav Republic of Macedonia'*, CDL-AD(2015)042.

[150] VENICE COMMISSION, *Opinion on the Draft Law on the Termination of the Validity of the Law on the Council for Establishment of Facts and Initiation of Proceedings for Determination of Accountability for Judges*, CDL-AD(2017)033.

[151] VENICE COMMISSION, *Opinion on North Macedonia on the Draft Law Amending the Law on Courts*, adopted by the Venice Commission at its 117th Plenary Session, (Venice 14-15 December 2018), CDL-AD(2018)033.

[152] VENICE COMMISSION, *Opinion on North Macedonia on the Draft Law Amending the Law on Courts*, adopted by the Venice Commission at its 117th Plenary Session, (Venice 14-15 December 2018), CDL-AD(2018)033.

Initiation of Disciplinary Procedures for Establishing Disciplinary Responsibility of a Judge. The opinion focused on the disciplinary bodies, procedures, offenses, sanctions, and judges' professional evaluation.

After the opinion, the legislator implemented some of the recommendations formulated. The VC's 2017 opinion welcomed those improvements but identified additional issues regarding the disciplinary proceeding and the process of appointment of candidates to the judicial positions.

The 2018 Opinion on the Laws amending the Law on the Judicial Council and the Law on Courts focused on judges' disciplinary liability, disciplinary procedures and bodies, and judges' evaluation system. The Commission's assessment was overall positive. It welcomed the draft law as laying solid foundations for the well-functioning judiciary and suggested some minor improvements to clarify the law.

Finally, in December 2018, the VC adopted a follow-up opinion on the draft law amending the Law on the Courts. The Court welcomed the draft law as it addressed most of the previous recommendations, thus significantly increasing the Law on Courts' coherence and clarity.

Since 2005, when North Macedonia has become a 'candidate Country' for the accession to the EU, numerous attempts have been made to reform the judiciary and align it with the European standards. Every time, always at the Macedonian Minister of Justice's request, the draft laws were subjected to the VC's preventive compliance assessment with the European standards on the Rule of Law. Here lies one of the key elements of the final success of the reform process.

Indeed, as noted above, the VC's approach towards its Member States has always been 'non-imposing', even considering the non-binding nature of its opinions. On the contrary, it aims to establish a dialogue between international experts and national authorities to obtain the best desirable constitutional result. Therefore, the adjustment process' positive outcome largely depends on the state's willingness to adapt its legislation to the indications and recommendations that the VC's experts consider necessary in the specific case. In the December 2018 opinion, the Venice Commission acknowledged this capacity in North Macedonian authorities, stating that 'most of the proposed amendments are in

line with the European standards, and demonstrate the national authorities' willingness to follow previous recommendations of the Venice Commission'[153].

In the last two years, North Macedonia, thanks to the VC's assistance has proved to be a well-functioning country, able to intervene in its legal order and bring it towards a complete fulfillment of the Rule of Law values.

This is particularly evident in the 2019 opinion on the draft law on the Judicial Council. The Commission recognizes the 'constant efforts of the authorities of North Macedonia to bring the rules governing the judicial system in line with the international standards and best practices'[154]. Among the most significant amendments, for instance, a finding of a violation of the ECHR is no longer a reason for reducing judges' performance evaluation score[155].

The case under exam also demonstrates the complexity of the VC's assessment procedures, requiring a long time and many national authorities' efforts, which must intervene on internal rules to progressively conform them to the identified standards. The opinions adopted in 2018 and 2019, while still containing few recommendations and proposals of modification of the legislation, represent a generally positive response from the Commission, index of an always-evolving legal framework[156].

The acknowledgment of the progress achieved by North Macedonia also came from the European Commission. In its recent 'Update on the Republic of North Macedonia'[157] it recognized the 'tangible results in its continued implementation of EU-related reforms'. Specifically, observing the VC's efforts in assisting the judicial reform, it admitted that significant legislative steps have been taken to strengthen the judiciary's independence. It highlights that the new legal framework 'increases transparency in appointments, introduces qualitative criteria for evaluation of judges and increases accountability of judges and members of the Judicial Council'[158].

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[153] VENICE COMMISSION, CDL-AD(2018)033, § 67.
[154] VENICE COMMISSION, CDL-AD(2019)008, § 62.
[155] *Ibid.* § 63.
[156] VENICE COMMISSION, CDL-AD(2019)008, § 62 '*The constant efforts of the authorities of North Macedonia to bring the rules governing the judicial system in line with the international standards and best practices are praiseworthy. Those efforts in the past two years went mostly in the right direction*'.
[157] EUROPEAN COMMISSION, *Commission Staff Working Document. Update on the Republic of North Macedonia*, Brussels, 2 March 2020, SWD(2020) 47.
[158] Ibid, p. 2.

The reference, and appreciation, of the EU towards the VC's work is not surprising if we look at the financing of the two opinions under analysis. In both cases, they are VC's documents part of a cooperation project between the Council of Europe and the European Union.

Starting form 2019, the Council of Europe, in consultation with the European Union, has launched a project entitled 'Horizontal Facility for Western Balkans and Turkey'[159]. It aims to assist the Balkan states and Turkey to bring their legal systems in line with the parameters of the Council of Europe and the acquis of the European Union, as part of a process of enlargement. This cooperation is based on the intervention of the Council of Europe's control bodies, including the Venice Commission itself, through the instrument of recommendations and opinions to adapt the national legislations of these states to common European standards.

The idea of a collaboration between the two main international organizations of the European continent on democracy, human rights, and Rule of Law looks interesting for at least two aspects.

On the one hand extending the VC's work to the European Union's area of action undoubtedly constitutes an enlargement of the reference basin for the identification and selection of common constitutional traditions, which constitute the basis of the Commission's activity.

On the other hand, it is notable the fact that the European Union uses the Venice Commission's expertise to assist those states that have embarked on the accession process and will become possible future Member States. This cooperation suggests a feasible way of contact between the two organizations and encourages the creation of a baggage of shared and direct values applicable in their Member States' legal systems[160].

Furthermore, in response to the initial question, this cooperation confirms the international community's ever-increasing recognition of the VC's work. Despite the

[159] See www.coe.int/en/web/tirana/horizontal-facility-for-western-balkans-andturkey.

[160] K. TUORI, 'From Copenhagen to Venice', in *Reinforcing the Rule of Law Oversight in the European Union*, edited by C. CLOSA and D. KOCHENOV, Cambridge, 2018, pp. 243 ff.

absence of binding effects, it is becoming a key hub for the identification of common European standards and, consequently, for the implementation of national laws[161].

Seen from the other side of the coin, the pending accession process of North Macedonia to the EU and the necessary adaptation of its legal framework to Common European Standards have undoubtedly played a fundamental role in the reform process's success. Once again, this shows the importance of State political willingness in implementing VC's recommendations. Simultaneously, it demonstrates the Commission's potential if only it had the right tools, other than the EU's intervention in the process[162], to make it more effective.

4. KOSOVO: LEGALITY AND LEGAL CERTAINTY AS BULWARKS OF THE RULE OF LAW

Kosovo is a relatively recent State, resulting from secession from Serbia in 2008. Its status in Europe is still undetermined since 22 out of 27 EU Member States recognize it as an independent State while the remaining five still consider it a part of Serbia.

Notwithstanding the difficulties related to its uncertain status, Kosovo's accession to the European Union is currently on the agenda for future enlargement of the EU, and it is recognized as a potential candidate for the accession[163].

To ensure its stability and governability, since 2008, the EU is operating in Kosovo under the European Union Rule of Law Mission (EULEX)[164]. The mission's mandate is to support relevant Rule of Law institutions in Kosovo on their path towards increased effectiveness, sustainability, multi-ethnicity, and accountability. EULEX implements its mandate through monitoring selected cases and trials in the Kosovo justice system and providing technical support to the national institutions.

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[161] M. DE VISSIER, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform', in *American Journal of Comparative Law*, Vol. 63, no. 4, 2015, p. 965 ff.

[162] As highlighted in the first part of this chapter, indeed, the intervention of the EU in the process of reform surely represents a warranty on the implementation of VC's recommendations, at least towards those states aiming to join the EU.

[163] EUROPEAN COMMISSION, https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/kosovo_en.

[164] EUROPEAN COMMISSION, https://www.eulex-kosovo.eu/?page=2,60.

In 2014 Kosovo became a full member of the Venice Commission, thus reconfirming its willingness to be recognized as an independent state and to conform its legal framework to the common European heritage.

Since then, it submitted its first request for a legal opinion in 2018, asking for the VC's assessment of the law on the political entities' financing. The spontaneous approach to the Commission's work has been welcomed by the international community and the EU, in the framework of the State's progressive adaptation to the European standards and best practices.

One year later, in March 2019, the Prime Minister of the Republic of Kosovo requested the VC's opinion on the draft law on legal acts[165], which was part of the 2019 agenda and was intended at clarifying the various types of legal acts and their interrelation.

While assessing the law's adherence to best international practices, standards, and norms, the VC took the chance to clarify the legal framework applicable to law-making to grant respect for the Rule of Law principle. As already mentioned, several principles concerning the law-making are deeply interrelated to the Rule of Law. Therefore, considering an overall compliance assessment of the draft law with the international relevant standards, the Venice Commission provides a comprehensive overview of the relevant applicable standards.

When defining the international framework, the Commission highlights that the 'Rule of Law standards are crucial when dealing with formal aspects of legislation' and, therefore, 'reference has to be made to the *Rule of Law Checklist*'[166]. Concerning the 'legal acts' concept, it states that it is 'central to the idea of a State governed by the Rule of Law' and that 'a clear legal framework with a clear definition of legal acts and of how they are made and can be changed is essential in order to give effect to important Rule of Law principles such as accessibility, foreseeability, predictability, and consistency of the law'[167].

The first parameter presented by the Commission as a pillar of the law-making process is the principle of legality. According to the Commission, a law on law-making should

[165] VENICE COMMISSION, Opinion on the Draft Law on Legal Acts, Kosovo, Venice, 11-12 October 2019, CDL-AD(2019)025.
[166] VENICE COMMISSION, CDL-AD(2019)025, § 7.
[167] *Ibid.* § 32.

respect the principle of legality. On one side, it should safeguard the principle of law supremacy by ensuring legislation's conformity with the Constitution and the executive's subjection to the Constitution and other laws[168]. On the other side, it requires that State action must be authorized by the law[169], stating that 'Rule of Law requires that public officials have authorization to act, and their powers must be defined by law'[170]. Therefore, to be in accordance with the Rule of Law, a law on law-making should provide for clear and straightforward legislation, respectful of the principle of the hierarchy of legal norms.

The second parameter identified by the Commission is the principle of separation of powers. According to the common European tradition, in a democratic state respecting the principle of separation of powers, the power to adopt laws in the material sense belongs primarily to the legislative power. Nevertheless, in almost every state, this power is not an exclusive priority of parliaments but is shared with the executive. In the Commission's reasoning, the executive's legislative power is compatible with the separation of powers when regulated by the legislator.

The third parameter is the principle of legal certainty. Described as 'one of the main pillars of the Rule of Law'[171], according to the VC, it includes accessibility and foreseeability of the laws[172]. In the law-making process, legal certainty should be implemented through specific and transparent rules to apply to the drafting of the various types of legislation. In practice, as exemplified by the Commission, laws should be, on one side, published before entering into force and readily available[173]. On the other side, they should be written intelligibly and formulated with sufficient precision and clarity to enable people and legal entities to regulate their conduct in conformity with the law's requirements[174].

Once determined the general principles that should govern the law-making process to align with the Rule of Law standards, the Commission applies them to the specific case in analysis.

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[168] See Venice Commission's Report on Constitutional Amendment, CDL-AD(2010)001.
[169] VENICE COMMISSION, CDL-AD(2016)007, II.A.2.i and iv.
[170] VENICE COMMISSION, CDL-AD(2019)025, § 12.
[171] *Ibid.* §19.
[172] VENICE COMMISSION, CDL-AD(2016)007, II.B.1. and 3.
[173] *Ibid.* II.B.1:I and ii.
[174] *Ibid.* II.B.3.i and § 58. See ECtHR, *The Sunday Times v. The United Kingdom*, (No. 1), 6538/74, 2 April 1979, § 49.

In general terms, the Commission acknowledges that Kosovo's draft law contains many provisions that affect essential Rule of Law principles engaged with making legal acts. However, some parts of the draft law still raise questions about whether or how well they give effect to the internationally recognized Rule of Law standards.

Concerning the legality principle, the Venice Commission highlights that the hierarchy of norms is not clear enough. While welcoming the clarification of the Constitution's supremacy defined as 'the highest legal act', it recommends determining in detail on which norms a specific kind of legal act has primacy. This would help ensure that the executive is not left with a discretion that has not expressively conferred on it[175]. Specifically, the VC suggests affirming the primacy of international law over internal laws[176].

About the principle of legal certainty, the Commission suggests clarifying, for each type of legal act, by which authority or authorities it may be adopted. This is of relevance when determining the scope of the executive's action in the law-making process.

From the general overview conducted by the Commission on the draft law, emerges the role of legality and legal certainty as Rule of Law's bulwarks. The opinion presents a clear and specific framework for the practical implementation of the Rule of Law in the law-making process, dictating guidelines applicable to the draft in analysis and any future law. One of the strengths of the VC's work, indeed, is capacity building, which means putting at the disposal of national authorities and institutions all the necessary tools to create laws in line with the relevant international standards.

This methodology is particularly relevant when applied to new democracies, like Kosovo, during their state-building process. Indeed, the VC's role has been crucial in several emerging states in tracing the way to full implementation of the common European heritage. In Kosovo's case, the state-building process' success has been recognized by the same European Commission. In the *2020 Report on Kosovo*[177], while demanding a more significant commitment from the state to pursue EU-related issues, it

[175] *Ibid.* §§ 77-79.
[176] *Ibid.* § 93.
[177] EUROPEAN COMMISSION, *Key Findings of the 2020 Report on Kosovo*, Brussels, 6 October 2020.

acknowledged that progress was made in the Rule of Law's and fundamental rights' implementation.

In 2020, the Prime Minister of the Republic of Kosovo requested three other opinions to the VC regarding the Criminal Procedure Code[178], the Law on Public Gatherings[179], and the Law on Government[180]. As it was for North Macedonia, the ever-increasing dialogue of Kosovo's authorities with the VC, proves the confidence of the newly established democracies in the Venice Commission system. This also demonstrates the success of the Commission's methodology, based on tailor-made intervention on its Member States, in the process of the States' progressive adaptation to the common European Heritage. Moreover, it demonstrates the Commission's intermediary position between the States wishing to become EU's Member States and the EU's institutions.

5. STATE OF EMERGENCY: THE RULE OF LAW'S GUARANTEES DURING THE COVID-19 PANDEMIC

The Covid-19 pandemic has affected several aspects of the state's institution normal functioning. National governments have taken exceptional measures to handle the pandemic and slow down the virus' spread. Such emergency regulations undoubtedly impacted the democratic process and usually introduced additional limitations on fundamental rights and freedoms.

The issue of state of emergency and the legal framework on emergency powers were already part of the VC's mandate and were included among the *Rule of Law Checklist*'s benchmarks as exceptions to the principle of legality in emergency situations. During its

[178] VENICE COMMISSION, Kosovo, *Opinion on certain provisions of the draft Criminal Procedure Code, namely trial in absentia and suspension of officials from office*, 19 June 2020, CDL-AD(2020)008.

[179] VENICE COMMISSION, Kosovo, *Opinion on the Draft Law on Public Gatherings*, 8-9 October 2020, CDL-AD(2020)030.

[180] VENICE COMMISSION, Kosovo, *Opinion on the Draft Law on the Government*, 11-12 December 2012, CDL-AD(2020)034.

thirty years of activity, the VC has examined the constitutional framework of emergency powers in many Countries[181] and has prepared several general reports on the topic[182].

In April 2020, these materials were summarised by the Scientific Council of the Venice Commission in a Compilation of the Venice Commission's general reports and country-specific opinions on constitutional provisions and legislation on emergency situations[183]. The Commission intended the Compilation as a source of reference for drafters of constitutions and legislations on the judiciary, researcher, and Venice Commission's members. It has been structured in ten thematic areas concerning the state of emergency and its relevant implications within the State system.

The Compilation defines the state of emergency as a situation involving 'both derogations from normal human rights standards and alterations in the distribution of functions and powers among the different organs of the State'[184]. Then it focuses on the benchmarks referring, for instance, to the derogation from human rights obligations, the duration of the state of emergency, and its scope.

Simultaneously, the Commission's Scientific Council has created an Observatory on the emergency situations in the Venice Commission Member States[185]. It aims to collect country-specific information on constitutional and extra-constitutional emergency powers, the relevant mechanism of parliamentary and judicial oversight, and electoral

[181] See Armenia, *Opinion on the Draft Amendments to the Constitution of the Republic of Armenia*, CDL-AD(2015)037, §§ 61 and 116; Finland, *Opinion on the Constitution of Finland*, CDL-AD(2008)010, §§ 11 and 86; France, *Opinion on the Draft Constitutional Law on 'protection of the Nation'*, CDL-AD(2016)006, §§ 4-6; Georgia, *Opinion on the Draft Amendments to the Constitution of Georgia*, CDL-AD(2004)008, §§ 9-10; Kyrgyzstan, *Opinion on the Draft Constitution of the Kyrgyz Republic,* CDL-AD(2010)015, § 31; Montenegro, *Opinion on the Constitution of Montenegro,* CDL-AD(2007)047, § 102; Romania, *Opinion on the Draft Law on the Review of the Constitution of Romania*, CDL-AD(2014)010, § 95; Serbia, *Opinion on the Constitution of Serbia,* CDL-AD(2007)004, § 28; Tunisia, *Opinion on the Final Draft Constitution of the Republic of* Tunisia, CDL-AD(2013)032, § 117; Turkey, *Opinion on the Provisions of the Emergency Decree Law N° 674 of 1 September 2016,* CDL-AD(2017)021, §§ 40-74; and Ukraine, *Opinion on the Draft Law of Ukraine Amending the Constitution*, CDL-AD(2009)024, §§ 18 and 33.

[182] See *Compilation of the Venice Commission Opinions and Report on States of Emergency,* CDL-PI(2020)003; *Report on Respect for Democracy, Human Rights and Rule of Law during States of Emergency*, CDL-PI(2020)014; *Report on constitutional Amendment*, CDL-AD(2010)001; *Report on Democratic Control of the Armed Forces,* CDL-AD(2008)004; *Opinion on Protection of Human Rights in Emergency Situations*, CDL-AD(2006)015.

[183] VENICE COMMISSION, *Compilation of Venice Commission Opinions and Reports on States of Emergency*, 16 April 2020, CDL-PI(2020)003.

[184] *Ibid.* p. 5

[185] VENICE COMMISSION, *Observatory on emergency situations*, https://www.venice.coe.int/files/EmergencyPowersObservatory/By_topic-E.htm.

experiences. It provides systematized comparative information to be put at the disposal of lawyers, scholars, stakeholders, State officials, and organizations working in this field. The information collected by the Observatory is based on the answer received by the VC's Member States in reply to a questionnaire[186] complemented with other data obtained from open sources. The Observatory is regularly updated with the new information available.

Finally, in June 2020, the Venice Commission endorsed the Report on the 'Respect for Democracy, Human Rights and Rule of Law during States of Emergency – Reflections' (Report)[187]. The Report is thought in the context of the fight against Covid-19 and the challenges the pandemic posed to national legal systems. It is based on the observation of the current state of emergency but, being a general document based on common standards and best practices, can be applied to any future situation of emergency.

It was first applied in July 2020, when the President of the European Parliament requested a report from the Venice Commission on the measures taken in the EU Member States because of the Covid-19 crisis and their impact on democracy, the Rule of Law, and fundamental rights. The result was the Interim Report on the measures taken in the EU Member States as a Result of the Covid-19 Crisis and their Impact on Democracy, the Rule of Law and Fundamental Rights (Interim Report), adopted by the Venice Commission in October 2020[188].

In the following, we will proceed with a cross-analysis of the two documents, presenting the Report's standards and best practices and deriving from the Interim Report their practical implementation within EU Member States.

The Report opens with a definition of state of emergency, described as 'a temporary situation in which exceptional powers are granted to the executive and exceptional rules apply in response to and with a view to overcoming an extraordinary

[186] VENICE COMMISSION, *Questionnaire for the observatory on the implementation of declarations of state of emergency or of implementation of legislation on emergency situations following the Covid-19 pandemic*, 14 May 2020, CDL-PI(2020)006.

[187] VENICE COMMISSION, *Report on Respect for Democracy, Human Rights, and the Rule of Law during States of Emergency: Reflections*, 19 June 2020, CDL-AD(2020)014.

[188] VENICE COMMISSION, *Interim Report on the measures taken in the EU Member States as a Result of the Covid-19 Crisis and their Impact on Democracy, the Rule of Law and Fundamental Rights*, CDL-AD(2020)018, 8 October 2020.

situation posing a fundamental threat to a country'[189]. Therefore, a necessary precondition for declaring a state of emergency is that the powers provided by ordinary legislation are insufficient for overcoming the emergency.

Additionally, in the Commission's view, emergency measures, to be acceptable, should respect certain general principles aiming at minimizing the damage to fundamental rights, democracy, and the Rule of Law. Therefore, the measures should meet the triple, general conditions of necessity, proportionality, and temporariness.

As already explained in the *Rule of Law Checklist*'s benchmarks, the state of emergency has a direct impact on the Rule of Law principle. According to the so-called Rule of Law approach, the state of emergency is a legal institution subject to a specific legal regulation[190].

In this respect, the Venice Commission has stated that 'the concept of emergency rule is founded on the assumption that in certain situations of political, military, and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the Rule of Law must prevail'[191]. Therefore, all the Rule of Law's components, as legality, separation of powers, human rights, public and independent administration of justice, rights of minorities, and government transparency, must be maintained integrally[192].

Alongside the Rule of Law's elements, the Report identifies other principles governing the state of emergency: necessity, proportionality, temporariness, effective

[189] *Ibid. § 5.*

[190] For the legal theories on the Rule of Law and State of Emergency see A. ZWITTER, 'The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy', in *ARSP*, 2012, Vol. 98, No. 1, pp. 95-111.

[191] VENICE COMMISSION, *Opinion on the draft law on the legal regime of the state of emergency of Armenia*, CDL-AD(2011)049, § 44. See ECtHR, *Piskin v. Turkey*, Appl. No. 33399/18, Judgment of 15/12/2020, § 153 'Moreover, in the Court's view, even in the framework of a state of emergency, the fundamental principle of the rule of law must prevail. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims must be capable of being submitted to a judge for an effective judicial review - if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons'.

[192] VENICE COMMISSION, *Opinion on the Protection of Human Rights in Emergency Situations*, CDL-AD(2006)015, § 34.

parliamentary and judicial scrutiny, predictability of emergency legislation, and loyal cooperation among state institutions.

Under the condition of necessity, only necessary measures to help the State overcome the exceptional situation may be justified. According to the principle of proportionality, States may not resort to measures that would be disproportionate to the legitimate aim, choosing among several measures the less radical ones. Temporariness means that emergency measures may only be in place for the time of the exceptional situation and must be terminated once the exceptional situation is over. Effective parliamentary and judicial scrutiny is essential over the declaration and possible prolongation of the state of emergency and the activation and application of the emergency powers. Moreover, the emergency regime should be provided in the Constitution and detailed in a separate law ensuring the predictability of emergency legislation. Finally, as a state of emergency involves derogations from the ordinary rules on the distribution of powers, all state institutions must respect the principle of loyal cooperation and mutual respect.

These governing principles form the basis for the national institutions' response to the state of emergency. The Commission, deriving from the Member State's experiences[193] and the common European standards[194], has created a unique repository of values at the direct disposal of State's institutions and stakeholders. The Report, indeed, is available both for States which need to improve existing regulations and for States still lacking a regulation that need to create a new one. Therefore, it will serve as an operational tool for Parliaments and Governments to trace the state of emergency's framework in their legal system.

Once determined the guiding principles, the VC focuses on the scope of the emergency measures. Emergency situations generally involve derogations from usual human rights standards and alterations in distributing functions and powers among the State's organs.

[193] See for instance the Opinion on the draft law on the legal regime of the state of emergency in Armenia, CDL-AD(2011)049.

[194] See for instance ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 207; *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, § 43; *Aksoy v. Turkey*, judgment of 18 December 1996 § 68; *A and others v. United Kingdom*, judgment of 19 February 2009, § 173.

As several citizens have experimented worldwide during the pandemic crisis, it is commonly acknowledged that the state of emergency may involve human rights restrictions. Human rights are deeply interconnected with the Rule of Law principle, and their protection is an essential component of all contemporary democracies. However, in specific and exceptional situations, they can be restricted in accordance with the Rule of Law. Generally, human rights treaties and domestic legal orders foresee such restrictions through three main instruments. The first is the exception, which excludes from the scope of human rights certain actions taken in emergency times[195]. The second is the limitation, a restriction imposed on non-absolute human rights, such as the right to freedom of expression or association. The third is the derogation, a temporary suspension of certain human rights guarantees[196] in cases of 'public emergency which threatens the life of the nation'.

In the Covid-19 pandemic specific case, the ECHR provides for the possibility to restrict several rights on account of health's protection. For instance, Article 5 explicitly provides for people's detention in cases of infectious diseases. Other rights, containing more general grounds for restrictions, require the ECtHR's interpretation to determine their extent in accordance with the specific context[197].

Member States have a margin of discretion to assess whether a public emergency exists, and derogations are needed. However, their powers are not unlimited, and the ECtHR exercise its supervision[198]. The Strasbourg Court has repeatedly elaborated on the conditions under which States may derogate from the ECHR under Article 15. In *Lawless v. Ireland*, it held that 'the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear […] refer to an

[195] For instance, Article 4 ECHR provides the prohibition of forced and compulsory labor except for 'any service exacted in case of an emergency or calamity threatening the life or well-being of the community''.

[196] On derogation see, for instance, R. HIGGINS, 'Derogations Under Human Rights Treaties', in *British Yearbook of International Law*, vol. 48, 1977, pp. 281-320; F. COWELL, 'Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR, in *Birbeck Law Review*, vol. 1, 2013, pp. 135-162.

[197] ECTHR, *Hassan v. the UK*, Appl. No. 29750/09, 16 September 2014. On this point see, C. De Koker, 'Hassan V. United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law regarding the Deprivation of Liberty I Armed Conflicts', in *Utrecht Journal of International and European Law*, vol. 31, 2015, pp. 90-96.

[198] See ECtHR, *Brannigan and McBride v. the United Kingdom*, Application no. 14553/89; 14554/89, 25 May 1993, §43; *Aksoy v. Turkey*, application no. 21987/93,18 December 1996, §68; *A and Others v. the United Kingdom*, Application no. 3455/05, 19 February 2009, §173.

exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'[199].

In general, European institutions tend to grant a wide margin of appreciation to States in assessing whether the conditions for the application of Article 15 ECHR are met[200]. Regarding the Covid-19 sanitary emergency, some scholars have argued that the Court should adopt a more rigorous approach in assessing the proportionality of emergency measures and the respect of procedural requirements set out in Article 15 ECHR[201]. Specifically, stricter scrutiny has been called upon those measures which undermine freedom of expression and the public debate under the pretext of fighting Covid-19[202].

Alongside human rights restrictions, the state of emergency declaration often entails horizontal and vertical transfers of competences and powers.

The executive, for instance, may temporarily exercise certain powers typically reserved for the legislative. This transfer of power, directly affecting the principle of separation of power, must be based on explicit legal provisions. The *Rule of Law Checklist* provides for the supremacy of the legislature, and expressively provides that the executive's legislative power in times of emergency should be limited in terms of content and times[203]. Indeed, several VC's opinions have highlighted the misuse of legislative power by Governments willing to free the legislative process from the parliamentary guarantees. Poland's and Romanian's abuse of Government's emergency decree have proved to be part of illiberal democracy's strategy to dismantle the Rule of Law. As noted by the Commission in the *Checklist*, 'unlimited powers of the executive

[199] ECtHR, *Lawless v. Ireland*, Application No. 33257, judgment of 1 July 1961, § 28.

[200] ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, 18 January 1978, §§ 212-214; *Brannigan & McBride v. United Kingdom*, Application Nos 14553/89 and 14554/89, 26 May 1993, §§ 41-66.

[201] R. LUGARÀ, 'Emergenza sanitaria e articolo 15 CEDU: perché la Corte europea dovrebbe intensificare il sindacato sulle deroghe ai diritti fondamentali', in *Osservatorio AIC*, vol. 3, 2020.

[202] See, for instance, the Hungarian Organic Law n. 12 of 30 March 2020 on the protection against coronavirus which introduces the crime of false representation of facts concerning a public threat capable of determining public disturbance and hinder the effectiveness of the adopted measures. On this point see S. BENVENUTI, 'Sulla legge organica ungherese n. 12 del 30 marzo 2020 «Sulla protezione contro il coronavirus»', in *SIDIblog*, 7 April 2020, and A. FANÌ, 'Ungheria e Coronavirus: lo stato di pericolo', in *Ius in itinere*, 6 may 2020.

[203] VENICE COMMISSION, *Rule of Law Checklist*, 1.4.i.

are, *de jure* or *de facto*, a central feature of absolutists and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures the supremacy of the legislature'[204].

In Italy, the Government has declared the state of emergency on the 31st January 2020 and the pandemic crisis was mostly managed through the Decrees of the President of the Council of Ministers (DPCM)[205]. The decision to adopt extraordinary measures through the DPCM has been criticized in doctrine[206]. According to the scholars, indeed, the most appropriate tool would have been the Government's law-decree. Unlike the DPCM, which is a Government's exclusive instrument, the law-decree formally involves the Parliament in the decisional process[207], granting respect to the principles of checks and balances and separation of powers – which must be respected during the state of emergency. On the contrary, part of the doctrine took a favourable position towards the Government's work, underlining that it acted in implementation of powers authorized by the Parliament[208].

Considering the VC's guidelines on this point, the instrument of law-decree seems to be more compatible with the state of emergency principles. As highlighted by the Commission, indeed, democratic legitimacy is the most important factor a State must consider when devising the rules on delegation of powers[209]. Simultaneously, the other common need during a state of emergency, especially during a pandemic that risks significant loss of life, is quick decision-making. The concentration of decision-making

[204] *Ibid*, § 49.

[205] In the Italian legal order, the DPCM is an administrative decree provided by the President of the Council of Ministers. Being an administrative act, it is a secondary normative source, normally used to implement legislative dispositions. Unlike the law-decree, it is not subject to any conversion by the Parliament.

[206] On this point see M. LUCIANI, 'Il sistema delle fonti del diritto alla prova dell'emergenza', in *Rivista AIC*, vol. 2 pp. 109-141; E. RAFFIOTTA, 'Sulla legittimità dei provvedimenti del Governo a contrasto dell'emergenza virale da coronavirus', in *BioLaw Journal*, 18 March 2020; V. Baldini, 'Lo Stato costituzionale di diritto all'epoca del coronavirus', in *dirittifondamentali.it*, vol. 1, 2020, p. 683; E. Catelani, 'I poteri del governo nell'emergenza: temporaneità o effetti stabili?', in *Quaderni costituzionali*, vol. 4, December 2020, pp. 727-746.

[207] F. CLEMENTI, 'Il lascito della gestione normativa dell'emergenza: tre riforme ormai ineludibili', in *Osservatorio AIC*, vol. 3, 2020, pp. 3-7.

[208] See on this point, G. ZAGREBELSKY, 'Coronavirus e decreti, Zagrebelsky 'Chi dice Costituzione violata non sa di cosa sta parlando', intervista a *ilFattoQuotidiano*, 1 May 2020; A. RUGGERI, 'Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti', in *ConsultaOnline*, vol. 1, 2020, pp. 220-221; G. AZZARITI, 'I limiti costituzionali della situazione d'emergenza provocata dal Covid-19, in *QuestioneGiustizia.it*, 27 March 2020.

[209] VENICE COMMISSION, CDL-AD(2020)014, § 66.

power in the government usually creates a greater potential for speed. However, this power convergence threatens democratic legitimacy. Therefore, the Commission's recommendation is to opt for a solution that combines the respect for the supremacy of the legislature with the need for speed, providing that all government ordinances are speedily put before the legislature for approval[210].

As to the state of emergency's duration, the Commission considers that it should always be issued for a specific period, eventually prolongable for so long as necessary to overcome the exceptional situation. However, the VC believes that 'the longer the emergency regime lasts, the further the state is likely to move away from the objective criteria that may have validated the use of emergency powers in the first place. The longer the situation persists, the lesser justification for treating a situation as exceptional in nature with the consequence that it cannot be addressed by applying normal legal tools'[211]. In Europe, the approach to the declaration and duration of the Covid-19 state of emergency has been different from country to country[212].

In some cases, like Italy, it was first declared under Article 77 of the Constitution and then seamlessly renewed by ordinary law. In France, it has been declared by decree of the Council of Ministers, then it was interrupted and finally resumed[213]. In other cases, like

[210] *Ibid*. § 71.

[211] VENICE COMMISSION, CDL-AD(2020)018, §§ 45 ff. Nearly all EU Member States have introduced temporary emergency measures, only a few, namely Croatia and Hungary, did not prescribed a time limit for a state of emergency.

[212] On the Covid-19 state of emergency in Italy see M. LUCIANI, 'Il Sistema delle fonti del diritto alla prova dell'emergenza', in *Rivista AIC*, vol. 2, 2020, pp. 109-141; F. CLEMENTI, Il lascito della gestione normativa dell'emergenza: tre riforme ormai ineludibili', in *Osservatorio AIC*, vol. 3, 2020; S. STAIANO, 'Né modello né sistema. La produzione del diritto al cospetto della pandemia', in *Rivista AIC*, vol. 2, 2020, pp. 532-557; U. Ronga, 'Il Governo nell'emergenza (permanente). Sistema delle fonti e modello legislativo a partire dal caso Covid-19', in *Nomos*, vol. 1, 2020.

[213] On the Covid-19 state of emergency in France see L. MARGUET, 'État d'urgence sanitaire: la doctrine dans tous ses états ?', in *La Revue des droits de l'homme*, 2020, https://doi.org/10.4000/revdh.9066; S. RENARD, 'Covid-19 et libertés: du collectif vers l'intime', in *Revue des droits et libertés fondamentaux*, 2020, n. 10 (www.revuedlf.com); X. DUPRÉ, 'Éloge d'un état d'urgence sanitaire en «co-construction»', in leclubdejuristes.com, 26 May 2020.

Denmark, no state of emergency was declared[214], since the Danish legal order does not provide for a special constitutional regime of an emergency situation[215].

Independent from the different approaches to the state of emergency, the Commission advances that parliamentary oversight over the acts and actions of emergency rule authorities is necessary to realize the Rule of Law and democracy. Therefore, Parliaments should have the power to review the state of emergency at regular intervals and suspend it if necessary[216].

However, as stated in the Interim Report, 'during the Covid-19 crisis, parliaments in EU Member States seem to have been relegated to a secondary role'[217]. Indeed, in many cases, Parliaments have been side-lined, leaving governments free to take the necessary emergency measures to deal with the crisis. The Commission has identified three different situations. A first group of parliaments has continued their usual work by merely changing some procedures[218]; a second group of parliaments has suspended their ordinary activities to focus on the review of Covid-19 related activities[219]; and a third group of parliaments has suspended their activities entirely, handing nearly all power over to the government[220]. The general reaction of maintaining Parliament's regular activity responds to the presumption that suspending parliamentary scrutiny, in addition to being politically questionable, would be constitutionally blameworthy. In response to the need to strengthen parliamentary validation of emergency legislation, in some countries, as France, have been established special monitoring committees.

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[214] Together with Denmark other 12 EU Member States have not declared a *de jure* state of emergency: Austria, Belgium, Croatia, Cyprus, Denmark, Greece, Ireland, Lithuania, Malta, Netherlands, Poland, Slovenia, and Sweden. See on this point, Venice Commission, *Interim Report on the Measures Taken in the EU Member States as a Result of the Covid-19 Crisis and their Impact on Democracy, the Rule of Law and Fundamental Rights*, October 2020, CDL-AD(2020)018, §§ 41-44.

[215] On the Covid-19 state of emergency in Denmark see K. CEDERVALL LAUTA, 'Something is Forgotten in the State of Denmark: Denmark's Response to the COVID-19 Pandemic', in *Verfassungsblog*, 4 May 2020.

[216] VENICE COMMISSION, CDL-AD(2020)014, § 82.

[217] VENICE COMMISSION, CDL-AD(2020)018, § 64.

[218] As for Austria, Croatia, Denmark, Estonia, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovenia, Slovakia, Sweden

[219] As for Bulgaria, Greece, Finland, Italy, Spain, and Belgium. On this point see: S. CURRERI, 'Il Parlamento nell'emergenza: resiliente o latitante?', in *Quaderni Costituzionali*, vol. 4, December 2020, pp. 705-725; N. LUPO, 'L'attività parlamentare ai tempi del Coronavirus', in *forumcostituzionale.it*, vol. 2, 16 April 2020, pp. 121-142; A. Malaschini, 'Sulle concrete misure adottate dal Parlamento in occasione dell'emergenza COVID-19', in *forumcostituzionale.it*, vol. 2, 12 May 2020, pp- 268-283.

[220] Is the case of Cyprus and Czech Republic.

Next to the Parliament, the judicial system plays a crucial role in monitoring the executive's action during the state of emergency. The rights to a fair trial and effective remedies, as enshrined in Articles 6 and 13 ECHR, continue to apply during a state of emergency. Judiciary's role is to control the legality of a declaration of state of emergency and review the legality of specific emergency measures. This means that an individual hit by emergency measures must be able to challenge these measures in a court.

The guarantees against abuse of emergency powers are fundamental for respecting the Rule of Law in emergency situations. As highlighted by the Commission, indeed, 'the dichotomy between normalcy and exception which is at the basis of a declaration of the state of emergency does not necessarily entail and does not need to entail a dichotomy between effective action against the emergency and democratic constitutionalism, or between protection of public health and the rule of law'[221]. This proves that the respect for the Rule of Law is fundamental for the ordinary state functioning but even more important for the correct balance between powers in emergency times.

The Commission, by posing the Rule of Law at the top of the guarantees governing the state of emergency, demonstrates its far-reaching scope and its fundamental character of 'umbrella principle', capable of covering all the relevant aspects of the functioning of contemporary democracies, both in ordinary and extraordinary times.

Once again, it shows the advantages of its systemic and inclusive approach, able to identify general standards and best practices to be directly applied by its Member States to both ordinary and exceptional circumstances.

Undoubtedly, the VC's engagement in the definition of the state of emergency legal framework contributes to the global fight against the Covid-19 pandemic, at least in making available to its Member States all the necessary legal measures to deal with it. This is confirmed by the EU's expression of interest in the Commission's activity. The European Parliament's request of the VC's assistance demonstrates the cooperation between the two European organizations in Rule of Law's protection inside a joint action against Covid-19. This shows, alongside the multifaceted Commission's approach,

[221] VENICE COMMISSION, CDL-AD(2020)014, § 122.

capable to cover a vast and diversified field, its ever-growing international recognition as relevant interlocutor.

However, despite being a unique repository of standards and principles, the burden of implementing these guidelines and granting the respect of the Rule of Law principle during the pandemic remains with the Member States. Probably, to make it effective and operational, a crucial role should be played by the EU. In addition to requesting the VC's assessment, indeed, it should make the results known to its Member States, inviting them to comply with the recommendations provided therein.

IV. Conclusions

The overview conducted on some exemplar cases of practical implementation of the Rule of Law values in Europe shows the VC's commitment to the principle's promotion and protection.

From the theoretical elaboration of the Rule of Law's relevant standard to their practical adaptation to its Member States' specific situations, the Commission has developed a new methodology for the principle's protection.

With its benchmarks and standards, the *Rule of Law Checklist* has proved to be a multifaceted tool, capable of identifying and analyzing the most relevant Rule of Law-related issues. While creating a unique repository of standards and best practices, its generality and practicality have made the Rule of Law a 'directly implementable' principle. The *Checklist*, indeed, is undoubtedly an essential tool in the VC's hands, but also plays a fundamental role within its Member States. By asking the VC's intervention on their legal provisions, the States acknowledge the value of its approach to the Rule of Law and manifest their will to conform their legal frameworks to its understanding.

In the Commission's conception, the document is addressed to various actors, including parliaments and other state authorities, civil society, non-governmental organizations, and various international organizations, among which stand out the Council of Europe and the European Union.

The originality of the conception of the *Checklist* itself and, even more, the novelty in the Commission's *modus operandi* concerning the Rule of Law principle and its practical

implementation is unique in the European constitutional law scenario for at least two reasons.

On the one hand, there is a practical, systemic, and inclusive approach to the Rule of Law principle which, even without delving into definitional reasoning, offers an innovative point of view for dealing with Rule of Law-related issues as well as a valuable tool for its direct implementation within all the Member States.

On the other hand, thanks to the increasing importance that the Commission is gaining within the European scenario[222], and beyond, emerges a constant development in the *Rule of Law Checklist*'s use. Its value is now widely recognized by Member and non-Member States and other international organizations such as the European Union. It is noteworthy to point out that the European Commission, already in its first communication to the European Council and Parliament on the Rule of Law, recalled the VC's expertise on issues related to this principle, stating that 'the documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principle and hence define the core meaning of the Rule of Law as a common value of the EU in accordance with Article 2 TEU'[223].

Furthermore, everything stated so far demonstrates the VC's ever-increasing importance as an international soft law body in its work of identification and practical implementation of common European standards[224].

[222] Only in 2018, the Commission has adopted 33 opinions on constitutional reforms and laws upon requests of representatives of Member States, PACE, and other international organizations. During its 30 years of activity, it has played a crucial role in promoting a constitutional harmonization within Europe. Starting from the new constitutional wave in Eastern Europe, its main function has been that of identify and select common European standards which constitutes the so called Common European Heritage, with the aim of provide Member States with a professional and objective assessment of the examined issues and propose a workable solution to solve them.

[223] EUROPEAN COMMISSION, Communication to the European Parliament and Council, '*A New Framework to strengthen the Rule of Law'*, Brussels 11.03.2014, p. 9; and more recently, in the Communication '*Further Strengthening the Rule of Law within the Union. State of Play and possible next steps*', Brussels 3.04.2019, p. 7.

[224] M. CARTABIA, 'The Last Dangerous Branch', in G. PITRUZZELLA, O. POLLICINO, M. BASSINI (edited by), *Corti europee e democrazia, Rule of Law, indipendenza e accountability*, op. cit., p. XII.

Indeed, as emerges from the ever-wider membership[225], as well as from the numerous opinions adopted in the last years[226], it no longer operates exclusively within the European continent but, by exporting common European traditions in Africa[227], Asia[228] and America[229], it brings assistance to all those states wishing to build or rebuild democratic systems based on the European constitutional models.

Furthermore, its international recognition as an advisory body on the constitutional matter pushes, more and more frequently, States to request its assistance in the adaptation of their legal systems to those European Constitutional Heritage principles which the VC helps to identify and spread inside and outside the European continent[230].

Nevertheless, there are some limits within the Commission's action which, having no binding value, still depends on the will – or need - of the recipient State to adapt the internal regulation to the suggested recommendations. As for Romania and Poland's cases, the non-compliance of some states to the VC's recommendations raises questions on its effectiveness. As some scholars have argued, the Commission's intervention inefficacy in some states may depend on its tendency to standardize[231].

Newly established democracies, as indeed are the states coming from the Eastern European block, may not be equipped enough to welcome and implement ready-made

[225] With the recent accession of Canada, approved during the Plenary session of June 2019, today the VC counts 62 Member States, constituted by the 47 members of the COE and 15 other States from Africa, Asia and North and South America.

[226] See, for instance, *Tunisia - Opinion on the Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations*, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019).

[227] The intervention of the VC was fundamental in several states within the African continent, including Tunisia. Tunisia became member of the Commission in 2010 and requested its intervention to create a new democratic constitution which was finally approved in January 2014, after two years of close cooperation between the experts of the Commission and the Tunisian Constituent Assembly. See for instance Opinion on the final draft Constitution of Tunisia, CDL-AD(2013)032.

[228] Productive has been also the relationship of the VC with some countries of the former Soviet Union as Azerbaijan and Kazakhstan, which required the intervention of the VC in the context of wide constitutional reforms between 2015 and 2018. See for instance *Azerbaijan - Opinion on the draft modifications to the Constitution submitted to the Referendum of 26 September 2016*, endorsed by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016) and *Kazakhstan - Opinion on the amendments to the Constitution of Kazakhstan*, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

[229] Between others, has been added to the upcoming Plenary Session of October an Opinion on Peru on a recent proposal of constitutional reform regarding anticipated elections.

[230] D. KOCHENOV, 'The Aquis and its principles. The enforcement of the 'Law' versus the enforcement of the 'Values' in the EU', in A. JAKAB AND D. KOCHENOV, *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford, 2017, pp. 25 ff.

[231] B. IANCU, *op. cit.*, p. 192.

principles and standards. On the contrary, they may need a more fine-grained analysis of their specific context and nature before being ready to acknowledge the common European Standards directly. The 'transnational legal order' across which the VC operates, indeed, may in some cases bee too superficial to allow a compelling adaptation of the newly created legal order to the common European standards. To be forceful, indeed, as emerged from the North Macedonian case, the VC's intervention must be continuous, tailored to the state's actual needs, and conducted in respect of the state's specificities and traditions.

It is clear that no 'one-size-fits-all solution' will help achieve the state's conformation to the common European heritage. Consistently, the Commission has declared in the *Rule of Law's Checklist's* preamble that 'assessments have to consider the whole context and avoid any mechanical application of specific elements of the checklist'[232]. Therefore, the effort required to the Commission – which has been successful many times – is to avoid ready-made solutions. Instead, it should conduct painstaking comparative assessments of norms and institutions in established systems and careful appraisals of the specificities of the respective jurisdictions.

The analyzed cases highlight a trend worthy of attention, which seems to partially restore the original mandate of the European Commission for Democracy through law – that of supporting, following the collapse of the Berlin Wall, creating new constitutional democracies in Eastern Europe. Today, indeed, the VC has established fruitful cooperation with the European Union[233], providing constitutional assistance to all those Eastern European states who faced a first 'constitutional wave' in the Nineties and, now that are interested in joining the European Union, need to further increase their commitment to comply with the standards required by the Treaties[234].

This cooperation needs to be monitored and will possibly lead in the future to interesting results in the European constitutional scenario for the development of new mechanisms of interconnection between the European Union and the Council of Europe

[232] VENICE COMMISSION, *Rule of Law Checklist*, § 27.

[233] See for instance the abovementioned project '*Horizontal Facility for Western Balkans and Turkey*'.

[234] Examples of this trend are, among others, the aforementioned opinions concerning North Macedonia, which fall in the context of the '*Horizontal Facility for Western Balkans and Turkey*' project. It is remarkable that in 2011 the VC received a request of opinion directly from the EU Commission on the independence of judges in Bosnia and Herzegovina in the context of the wider negotiation for the accession of the Country to the EU.

in view of the resolution of the common issue emerged in the last years and defined by the doctrine as '*Rule of Law backsliding'*[235].

Finally, the VC's reaction to the Covid-19 pandemic, also triggered by the European Parliament, demonstrates the Commission's quick and on topic reaction's skills. Besides being an important reference tool for its Member States, its intervention represents a unique assessment instrument in the EU institution's hands to evaluate State's reaction to the crisis and organize a common response to the pandemic-related issues.

In conclusion, despite some deficiencies in the Member States' transposition, the VC's innovative approach to the Rule of Law principle has been demonstrated to be fruitful and mostly effective. Even regarding those States that have embarked on an illiberal drift, the expectation is that more and more Member States will rely on the Commission's expertise, seeking its advice to implement their national legal frameworks. The State willingness, indeed, represents a crucial component of the VC's success. On its side, the Commission - given its close cooperation with the EU and the pressure the latter is exerting on its Member States to ensure compliance with the Rule of Law - can play a fundamental role in the restoration of the European core values.

[235] Recently K.L. Scheppele and L. Pech have tried to define this phenomenon 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*', in 'What is Rule of Law Backsliding?', *Verfassungsblog*, 2018. For an overview on the topic see, between others, N. BERMEO, 'On Democratic Backsliding', in *Journal of Democracy, Johns Hopkins University Press*, Vol. 27, no. 1, 2016; D. KOCHENOV, 'EU Law without the Rule of Law', *Yearbook of European Law*, Vol. 34, 2015, p. 74 ff.; D. KOCHENOV & M. VAN WOLFEREN 'The Dialogical Rule of Law and the Breakdown of Dialogue in the EU', *EUI Working Paper Law*, January 2018; A. MAGEN, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU', *Journal of Common Market Studies*, 2016, Vol. 54, N. 5, pp. 1050-1061; D. KOCHENOV, A. MAGEN AND L. PECH, 'Introduction: The Great Rule of Law Debate in the European Union', in *Journal of Common Market Studies*, Vol. 54, N. 5, 2016, p. 1045-1049; A. VON BOGDANDY and P. SONNEVEND, 'Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania', Oxford, 2014; A., VON BOGDANDY et al., 'A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines', *Common Market Law Review*, Vol. 55, 2018; A. DI GREGORIO, 'Lo stato di salute della Rule of Law in Europa: c'è un regresso generalizzto nei nuovi Stati membri dell'Unione?', in *DPCE Online*, vol. 4, 2016, pp. 175-195; A. PECH, AND K.L. SCHEPPELE, 'Illiberalism Within: Rule of Law Backsliding in the EU', in *Cambridge Yearbook of European Legal Studies*, 2017, Vol.19, pp. 3-47; L. BESSELINK, K. TUORI, G. HALMAI, C. PINELLI, 'The Rule of Law Crisis in Europe', in *Diritto Pubblico*, Fascicolo 1, 2019, pp. 267-287; R. GRZESZCZAK and I.P. KAROLEWSKI, 'The Rule of Law Crisis in Poland: A New Chapter', *Verfassungsblog*, 8 August 2018, R. UITZ, 'The Perils of Defending the Rule of Law through Dialogue', in *European Constitutional Law Review*, 2019, pp. 1 ff.

Undoubtedly, the recently approved 'Rule of law conditionality for access to EU funds'[236] will unlock the existing situations of persistent Rule of Law's violation, thanks also the excellent relationship established with the EU, may play a crucial role in the resettlement of national legal orders in line with the Rule of Law's standards.

[236] See https://www.europarl.europa.eu/news/en/press-room/20201211IPR93622/parliament-approves-the-rule-of-law-conditionality-for-access-to-eu-unds#:~:text=Under%20the%20new%20regulation%2C%20EU,It's%20the%20law%20now

CONCLUSIONS

The rise of the Rule of Law principle from a national ideal to a supranational value has demonstrated its nature of constitutional principle shared among all the European countries and therefore constitutive element of the common European heritage. Its involvement, after the Second World War, in the international organizations' hardcore of principles and values has provided a unique opportunity to re-settle both the newly established and the mature democracy in a new constitutional order.

The engagement of the COE and the EU's institutions in safeguarding respect for the Rule of Law, at this stage of the European integration, is inescapable. Both the organizations have put the Rule of Law as a foundational value of their legal orders and the respect for its standards and principles, as stated by the Preamble to the COE's Statute and by Article 2 TEU, are the premises upon which their supranational orders are built. Therefore, it is undoubted that the issue of Member State's respect – or disrespect – for the principle has a European dimension. According to von Bogdandy, EU's constitutional crisis highlights 'the need to understand EU law also, and, given the depth of the crisis, perhaps even mainly, as a chance of preserving the core values of every constitution in Europe: democracy, the rule of law and respect for fundamental rights'[845].

The Rule of Law's implementation within the current European constitutional framework is a shared responsibility, involving citizens, NGO's, States, the European Union, and the Council of Europe. The efforts conducted so far, despite demonstrating the common commitment to the Rule of Law's enforcement, have shown a parallel but uncoordinated action, aimed at reaching the same goal – the Rule of Law's enforcement- but conducted through different procedures and strategies.

To get out of this impasse, rather than searching for the 'perfect Rule of Law mechanism', the focus must be placed on the development of a clear and coordinated 'rule of law strategy', involving all the interested actors at the different levels. To do so,

[845] A. VON BOGDANDY AND P. SONNEVEND, *Constitutional Crisis in the European Constitutional Arena. Theory, Law and Politics in Hungary and Romania*, Oxford, 2015, p.vi.

as highlighted by the European Commission in the 2020 *Rule of Law Report*[846], it is crucial to create a shared political and legal culture supporting the Rule of Law.

Within this framework, the Venice Commission's *Rule of Law Checklist* recalls that 'The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture'[847].

As already discussed, the Rule of Law is not just a legal and institutional concept, but rather a social, historical, and cultural phenomenon, largely influenced by the background in which it was developed. Therefore, for its promotion and protection, it is vital to engage with citizens and civil society.

Contrary to the common belief that the Rule of Law has become a worthless slogan, we are assisting, within the European scenario, to an institutional effort to restore the principle's conception as a fundamental component of the 'European public order'. The Rule of Law that emerges from the COE's and EU's approach is a constitutional and constitutive principle, that represents a fundamental pre-existing premise of the European constitutional order. Legality, legal certainty, prevention of abuse of powers, equality before the law, non-discrimination, and access to justice are the ingredients of every democratic State. Their interplay with human rights and democracy, which must be developed both at national and supranational level, forms the basis for that 'enabling environment' upon which the VC has built its understanding: an environment where 'democracy relates to the involvement of the people in the decision-making process in a society', 'human rights seek to protect individuals from arbitrary and excessive interferences with their freedom and liberties and to secure human dignity', and 'the Rule of Law focuses on limiting and independently reviewing the exercise of public powers'[848].

This understanding, in which the Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights and

[846] EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report. The Rule of Law situation in the European Union*, Brussels, 30.9.2020, COM(2020)final, p. 2.

[847] VENICE COMMISSION, *Rule of Law Checklist,* op. cit., § 43.

[848] *Ibid.* § 33.

protecting minorities against arbitrary majority rules, is new and forms the innovative basis for the principle's promotion and implementation in Europe.

In addition, the Commission's special 'position of taking part in a process which relates to the national process of law making of many different States even if without a formal normative power'[849], has given the boost to the promotion and restoration of the Rule of Law in Europe.

The VC's unique role of State's and stakeholder's legal interlocutor, if applied to Europe's quest for Rule of Law's promotion and protection, makes of it a privileged actor within the European scenario. It is commonly understood, indeed, that an 'external monitoring, whether by EU or COE institutions, could support or even launch cultural and social developments and alert national and European civil society and the public'[850] to the importance of a Rule of Law culture. However, external monitoring might yield negative results, triggering nationalist reactions against supranational control. This further enhances the importance of the Venice Commission described in the thesis as a 'constitutional law network'. Its nature of technical and impartial body, acting under the aegis of one of the most important European organizations, its geographical spread – involving European and non-European countries-, its fruitful relationship with other international organizations – as the EU and the OSCE -, and, mostly, its acknowledged expertise in the constitutional field, makes of it a peculiar body which enjoys confidence and authority among both institutional and non-institutional actors at national and international levels.

The notion adopted by the Venice Commission, as well as its working method, are not exempt from criticisms. On the one hand, some might criticize the VC's notion for over-simplify the Rule of Law principle by not taking in due consideration all the theoretical and juridical discussions over the principle and standardising its components in a *Checklist*. However – also considering the conclusion reached on the VC's field work - instead of an oversimplification, this should be seen as a common starting point for a European shared action of Rule of Law's dissemination and promotion. As expressed by

[849] S. BARTOLE, 'International Constitutionalism and Conditionality. The Experience of the Venice Commission', op. cit., 2014, p. 6.

[850] K. TUORI, 'From Copenaghen to Venice', in C. CLOSA AND D. KOCHENOV, *Reinforcing the Rule of Law Oversight in the European Union*, op. cit., p. 246.

the same Commission, the notion of the Rule of Law presented in the *Checklist* is neither exhaustive nor final. On the contrary, it is a living instrument which represents a tool for a variety of actors who may decide to carry out an assessment of the Rule of Law in a given country from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case-law[851]. One of the VC's added value – which really makes the Rule of Law a living instrument - lies in its tailor-made intervention, conducted through the adaptation of the identified basic notion to the domestic framework, proceeding case-by-case.

This led to the second possible objection, related to the VC's position between law and politics, which especially emerges in a sensitive topic as the Rule of Law. Despite being often linked to the political discourse, it is undoubted that the Rule of Law as intended by the European institutions cannot be transformed to meet 'the political agenda of those that seek unfettered power coupled with the subjugation of independent judicial review'. On the contrary it is 'organically embedded with an international system of law which rejects unequivocally the arbitrary use of governmental power'[852]. Therefore, the Venice Commission - being an advisory body on constitutional law – must be careful not to fall into politics and, as far as possible, maintain its role as a technical body and keep the discourse on a legal level. What makes the difference from other European institutions, as the European Commission, indeed, is its legal approach. The VC, when assisting Member States in implementing the Rule of Law principles, primarily refers to the law as an instrument of promotion of its founding values. Therefore, the State's political framework, which surely contributes to the determination of its legal structure, is not the object of the Commission's assessment. On the contrary, as emerged from the analysis of its opinions, the Commission's approach concerns State's legal provisions and institutions. The Commission's 'legal approach' emerges, for instance, in the Polish case, where its assessment could have easily fallen into the meshes of a political evaluation of the reforms implemented by President Duda. On the contrary, insisting on the non-

[851] VENICE COMMISSION, *Rule of Law Checklist,* op. cit., § 24.
[852] R. SPANO, *op. cit.*, p. 17.

conformity to the European standards of the judiciary's reform, the Commission has tried to keep, as much as possible, the discourse on a legal rather than political level[853].

To conclude, a question arises: What the way forward?

In 2015, after the first years of the Rule of Law crisis in Europe, J. Nergelius wrote that the VC's role in the future EU's action would 'depend on the seriousness of the current constitutional crisis'. Specifically, he argued that 'the deeper it gets itself into trouble over rule of law-related issues in individual Member States, the more the EU will rely upon the Venice Commission in order to set things right'[854]. Almost six years later, we can say that this scenario has come true: the EU's constitutional crisis has deepened, and the VC's involvement has grown[855], becoming crucial in identifying and applying the relevant European standards.

Nevertheless, the Commission is still playing an undetermined role in the crisis. Its official status refers to the Council of Europe's system, and its resonance is due to the prestige acquired in the field. Still, it has no official recognition by the EU and no binding powers over its Member States. In Nergelius's words, 'should the future of Europe be generally sunny, the Venice Commission may soon return to its early, peaceful existence'.

However, the sun still struggles to return, and the VC is far from heading Strasbourg. I would venture to say that it is unlikely, given the intense relationship developed with the EU and the common understanding found on the Rule of Law principle, that the Venice Commission would ever return to a peaceful and self-referential existence in Strasbourg. It is improbable, indeed, that the Commission will want to retract the broadening of its horizons and the room for manoeuvre gained in the last years. Its role, especially during the pandemic, has proved to be more crucial and necessary than ever in maintaining and monitoring the European constitutional heritage. If the EU is planning a package of legal, economic, and political measures – as it appears from the recent approval of the *Rule of Law's conditionality* for access to EU funds – then it is unlikely

[853] VENICE COMMISSION, *Joint Urgent Opinion on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws*, 18 June 2020, CDL-AD(2020)017-e.

[854] J. NERGELIUS, 'The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania', in A. VON BOGDANDY AND P. SONNEVEND, *Constitutional Crisis in the European Constitutional Area*, op. cit. p. 308.

[855] Considering, for instance, the so-called 'illiberal triad', starting from 2015 the VC has endorsed five opinions on Hungary, 4 on Romania and 6 on Poland, thus demonstrating a deep involvement in the European constitutional crisis.

to make decisions without taking the Venice Commission's opinion into account. Such decisions, indeed, would mean something unprecedented in the European contemporary politics' history, and thus are improbable to be made without the strong support from a leading advisory body as the Venice Commission.

It remains to be seen, in the coming months, how the Venice Commission will take part in the ongoing process of reaffirming the European constitutional heritage – which has been significantly stimulated by the COVID-19 by deeply calling into question Europe's founding values. What is clear is that today Strasbourg and Luxembourg are closer than ever.

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