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An EU mechanism on Democracy, the Rule of Law and Fundamental Rights

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with thematic contribution by Wim Marneffe

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Abstract

The European Union is founded on a set of common principles of democracy, the rule of law, and fundamental rights, as enshrined in Article 2 of the Treaty on the European Union. Whereas future Member States are vetted for their compliance with these values before they accede to the Union, no similar method exists to supervise adherence to these foundational principles after accession. EU history proved that this 'Copenhagen dilemma' was far from theoretical. EU Member State governments' adherence to foundational EU values cannot be taken for granted. Violations may happen in individual cases, or in a systemic way, which may go as far as overthrowing the rule of law. Against this background the European Parliament initiated a Legislative Own-Initiative Report on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights and proposed among others a Scoreboard on the basis of common and objective indicators by which foundational values can be measured. This Research Paper assesses the need and possibilities for the establishment of an EU Scoreboard, as well as its related social, economic, legal and political 'costs and benefits'.

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Abbreviations

BVerfG	Budesverfassungsgericht, German Federal Constitutional Court
CAT	Committee against Torture
CDDECS	European Committee for Social Cohesion, Human Dignity and Equality
CED	Committee on Enforced Disappearances
CEDAW	Committee on the Elimination of Discrimination against Women
CEPEJ	Council of Europe's Commission for the Evaluation of the Efficiency of Justice
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CLS	Council Legal Service
CMW	Committee on Migrant Workers
CoE	Council of Europe
COREPER	Committee of Permanent Representatives
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Committee on the Rights of the Child
CRC-OPAC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
CRC-OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
CRPD	Committee on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECRI	Commission against Racism and Intolerance
EDPS	European Data Protection Supervisor
EP	European Parliament
EU	European Union
EFRIS	European Fundamental Rights Information System
FRA	EU Agency for Fundamental Rights
GRECO	Council of Europe Group of States against Corruption
ICCPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
MEP	Member of the European Parliament
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture
SPT	Subcommittee on Prevention of Torture
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNICEF	United Nations Children's Fund
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
UPR	Universal Periodic Review
WHO	World Heath Organization

Executive summary

The European Union (EU) received its core values at its inception: achieving peace and prosperity, the immediate goals of integration still with us since the times of the Schuman declaration, had a strong implied liberty component. Dictatorships and any countries which were not 'free' were not welcome to join the Union. Notwithstanding the fact that democracy and the rule of law were not part of the black letter law of the Communities for a long time, both have clearly been regarded as important unwritten principles, which became codified thanks to the pre-accession strategy in the context of the preparation of the 'big-bang' enlargement to the east of the continent. Currently there is Treaty basis behind EU values, such as democracy, the rule of law, and fundamental rights, which are entrenched in Article 2 of the Treaty on the European Union (TEU). Future Member States are vetted for their compliance with these values *before* they accede to the Union. The so-called 'Copenhagen criteria' ensure that all new EU Member States are in line with the Union's common principles before joining the EU. That notwithstanding, no similar method exists to supervise adherence to these foundational principles *after* accession. This has been referred to as the 'Copenhagen dilemma'.

Borrowing from James Madison, "If angels were to govern men, neither external nor internal controls on government would be necessary." History has shown that EU governments are no exceptions: they do violate foundational EU values in multiple ways. It happens in individual cases, or in a systemic manner that might result in a serious and persistent breach of EU values, which may go as far as overthrowing a system based on the rule of law.

Beyond harming nationals of a Member State, all Union citizens in that State will also be detrimentally affected. Lack of limits to illiberal practices may encourage other Member States' governments to follow, and subject other countries' citizens to abuse. In other words, rule of law violations – if no consequences occur – may become contagious. Moreover, all EU citizens beyond the borders of the Member States concerned will to some extent suffer due to the given State's participation in the EU's decision-making mechanism, or to say the least, the legitimacy of Union decision-making will be jeopardised. Therefore, a state's departure from the rule of law standards and the European consensus will ultimately hamper the exercise of rights of individuals EU-wide. As a further consequence of no consequent and uniform enforcement of fundamental rights throughout the Union, and regular health check of judicial independence of Member States for granted, mutual trust- and mutual recognition-based instruments are jeopardised. The CJEU has accepted that the presumption of EU Member States' compliance with fundamental rights may be rebuttable – but if EU Member States cannot properly ensure an efficient, human rights-compliant and independent judiciary to carry out that test, how possibly could the principle of mutual recognition stand in EU JHA law? Beyond the political and social costs of the democracy, rule of law and fundamental rights deficit exposed in the non-compliant Member States, economic costs should also be mentioned. Rational law presents a necessary condition for economic transactions, and its application creates a sense of foreseeability and predictability on the part of economic agents. The latter is a necessary condition in order for rational economic actions to occur. Control of private capture and corruption, institutional checks on government, protection of property rights and mitigation of violence are all in close correlation with economic performance. Especially in times of financial and economic crises solid State institutions based on commonly shared values play a key role in creating or restoring confidence and fostering growth.

In a democracy based on the rule of law, built-in correction mechanisms and sites of resistance compensate for the deficiencies of a majoritarian government, such as the concept of separation of powers, checks and balances, emphasis on independent judicial control, media freedom, etc. In a country where domestic checks fails, solely the control mechanism of international law including

supranational courts protecting the rule of law is left. Accordingly, international and EU norms and enforcement mechanisms shall be regarded as external tools of militant democracy whereby the people are granted protection against their substandard representatives, when all domestic channels of criticism have been effectively silenced and all domestic safeguards of democracy become inoperational – in short, when the rule of law has been efficiently deconstructed in a state of constitutional capture.

Currently, the EU possesses of one sole supervisory mechanism to uphold its values, in the form of Article 7 TEU. The Article 7 TEU procedure has not been used ever since its introduction in the Treaties – not because there were no situations that would have justified its use, but for lack of political will. In response to this deficiency, both scholars and European institutions have called for reforms; the latter's group of proposals most importantly include the Commission's New EU Framework to Strengthen the Rule of Law, commonly referred to as pre-Article 7 procedure, currently being tested with regard to Poland.

The formulation of a pre-Article 7 procedure is a milestone in a worrying trend of non-enforcement of European values to be witnessed for almost two decades. The Amsterdam Treaty introduced the Article 7 sanction mechanism in 1999, and soon the Nice Treaty added a preventive arm to it. Whereas there were good reasons for instigating the mechanism in the recent history of integration, instead of making use of the already diluted procedure of Article 7(1), the Commission decided to water down the process even further by inserting a preventive-preventive process. Moreover is used selectively, thereby questioning the objectivity of the process and the equal treatment of Member States. Despite its weaknesses, the creation of the Commission's new EU Rule of Law Framework can be seen as an acknowledgment of the rule of law problem, and as a step in the right direction to overcome it. On a positive note, the ongoing rule of law debate shifted its focus from an Article 7 TEU emergency-led context toward a discussion on shared European values and legal principles. Beyond supervision, EU values shall be promoted actively. Still, previous mechanisms and the EU Rule of Law Framework are crisis-driven and do not constitute a permanent and periodic monitoring and evaluation process of EU Member States' compliance with Article 2 TEU legal principles. Neither do they go far enough in ensuring objective, independent and regular scrutiny of EU Member States' rule of law obligations.

The present Research Paper was written with the establishment of such a mechanism in mind, responding to a call by Resolution of 10 June 2015 the European Parliament to create an annual monitoring of compliance with democracy, the rule of law and the situation of fundamental rights in all Member States through a Scoreboard, to be established on the basis of common and objective indicators.

The first part of the Research Paper – accompanied by three Annexes – provides a map of the state of the art; existing instruments in the EU, Council of Europe and United Nations settings to assess various aspects related to democracy, the rule of law and fundamental human rights; summaries of scholarly and institutional approaches to overcoming the Copenhagen dilemma; and finally, by way of currently ongoing procedures, an illustration of deep-seated tensions within the Union's architecture to tackle rule of law backsliding and constitutional capture. The second and third parts highlight general and EU-specific methodological issues and challenges to be tackled. On the basis of our findings the fourth part incorporates an enumeration of substantive and procedural factors to be taken into account when considering the establishment of an EU Scoreboard. Annex 4 summarised the impact of the rule of law on economic performance and introduces factors to consider when assessing the costs of an EU Scoreboard.

The Research Paper formulated the following recommendations with regard to the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights.

1. The Research Paper understands the Scoreboard as a combination of 'discussion and dialogue', 'monitoring', 'measuring/evaluating and benchmarking' and 'supervision', with various actors and methods channelled into one EU-specific system. In this sense a Scoreboard could be described as a 'process' encompassing a multi-actor and multi-method cycle.

2. The Research Paper argues with respect to the principle of conferral that the EU can intervene to protect its constitutional core, but what is more, the EU is also unequivocally obliged by the Treaties to act. Member Sates are interdependent in multiple areas, and depreciation of EU values will have EU-wide effects in all possible ways. In order to ensure that the principle of subsidiarity and, by consequence, the sovereignty of the Member States are respected, it is indispensable for the Union to create reliable instruments of data collection and exchange, to enable it to be always on top of the situation on the ground in all the Member States. A Scoreboard instrument in this sense is not in contravention of the subsidiarity principle but, quite to the contrary, would contribute to making it operational.

3. In order to prevent hypocrisy and enhance credibility in and outside the EU, preferably both the supranational entity – in the case at hand, the EU – and its constitutive elements, i.e. the Member States, shall be scrutinised via a Scoreboard, even if certain remedies are by nature exclusively applicable to the EU's constitutive elements.

4. Possibilities and limits of borrowing from existing monitoring and evaluation instruments in other international or regional *fora* shall be acknowledged. As has been shown in this Research Paper, making use of international mechanisms is already happening, with the EU Justice Scoreboard relying among others on the CoE CEPEJ model of evaluation/benchmarking, and the EU Anti-Corruption Report making use of the GRECO model. Borrowing may take place with regard to information, data, standards, structures and mechanisms. One option is to bring together all existing data and analyses from the international scene under one umbrella, in a 'one-stop shop', like the European Fundamental Rights Information System within the frame of the Fundamental Rights Agency. Already existing data and analyses on various 'rule of law-related dimensions' at the CoE and the UN should be taken in consideration during the EU Rule of Law Scoreboard.

At the same time, bringing together data and analysing synergies, or even making comparisons as suggested in the literature, is an exercise that is close to impossible and more akin to 'alchemy'. Standards, sources, data, data-handling methods and the interpretations of each of the various sets of tools are so different in nature and fundamentals, they necessitate a very tedious methodological exercise for making international mechanisms comparable and conclusions and findings meaningful.

While relying on external sources and mechanisms, the EU element or specificity of the process shall always be kept. In other words, a rule of law mechanism shall never be 'contracted out' entirely to third parties, since non-EU actors fail to take due account of their relevance or links with existing European law and policies as well as general principles of European law, such as that of mutual recognition of judicial/administrative decisions. The EU shall be allowed to set higher standards than other international mechanisms.

The EU Rule of Law Scoreboard could fit into the timetable of the European Semester and could be linked to the Cycle of Economic Governance. Beyond necessary overlaps in data collection however the EU Scoreboard shall be detached from other existing mechanism, with special regard to the latter's weaknesses with regard to enforcement. EU values beyond monitoring.

5. A case-by-case approach would be needed, where assessment through numerical indicators could be an element, but it should not constitute the core of the new Scoreboard. Instead, emphasis shall be

placed on a contextual, qualitative assessment of data and a country-specific list of key issues, in order to grasp interrelations between data and the causalities behind them.

Limits of the Scoreboard should also be acknowledged: it would not be suitable to predict or prevent future trends; rank Member States according to who is performing 'better' or 'worse'; or conduct simplistic cross-country comparative analyses.

Fundamental rights to a lesser extent, but democracy and even more the rule of law are fluid concepts and phenomena, and there is no single ideal formula to achieve them. Rule of law is a contested concept, and even the most detailed definition, to be true to the idea of the rule of law, has to contain a share of vagueness in order to accommodate rule of law's very nature. This requirement of vagueness plays strongly against any Quichotean attempts to turn the rule of law into a shopping list of elements, even if some examples of relatively good lists are known. Eliminating vagueness entirely, on such a reading, profoundly undermines the usefulness of the concept itself. Therefore the Research Paper argues against designing the standards along indicators – a rather dubious exercise that can easily be attacked as politically or ideologically biased. It is suggested to carefully consider whether needed and sparingly use benchmarking methods and indicators.

Lack of agreement on standards and a context-sensitive analysis is not only benefiting states, but at the same time it does not allow rule of law backsliders to hide their efforts by referencing other states and claiming that there was nothing unorthodox about their structures. Whereas it may be true that formally a state borrowed the existing legal solutions, institutions and practices from various other jurisdictions, it might well be a selection of 'worst practices' and taken as a whole, in violation of EU values.

6. The Research Paper systemized possible stages of respect for European values and identified three scenarios. In the *first scenario*, the boundaries of democracy, the rule of law and fundamental rights are correctly set by national constitutional law and domestic bills of rights, whereas the enforcement of the values is first and foremost the task of the domestic courts, but other checks and balances are also operating well and fulfil their function. In this scenario an external mechanism is not vital but can have an added value. In a *second scenario* a Member State still adhering to democracy, the rule of law and fundamental rights might be in violation of individual rights, due to individual mistakes or structural and recurrent problems. In such cases, as a general rule, if domestic mechanisms (such as a constitutional court, civil society or media pressure) are incapable of solving the problem, the national law will be overwritten by international law and deficiencies in application of the law will be remedied to some extent by international apex courts. In other cases chronically lacking capacity to solve systemic problems such as corruption, international norms and *fora* cannot remedy the problems but can point to them and contribute to domestic efforts to tackle them. The *third scenario* is qualitatively different from the previous two. Without going into the details, this is the state of a constitutional capture with a systemic breach of separation of powers, constitutional adjudication, failure of the ordinary judiciary and the ombudsman system, civil society or the media. Before reaching that stage, the country on its way towards the third scenario, in a state of so-called rule of law backsliding shall be warned and a constitutional capture be prevented.

7. The institutional framework behind the Scoreboard shall reflect objectivity. The proposal to establish a 'EU Rule of Law Commission' as an independent body of scholars should be seriously considered. The EU Rule of Law Commission could be placed at the centre of the EU Rule of Law Scoreboard. The selection and organizational model could follow the one currently utilized in actors like the Venice Commission and the CEPEJ. Yet particular attention should be paid to the academic and independent nature of the members.

The EU Rule of Law Commission shall make a context-specific assessment in light of data available or call for the need to gather extra information on EU issue-specific questions. The possibility to conduct country visits (following the UN Special Rapporteurs model) could also be envisaged. The UN model of well-established working relationships/close partnerships with national Human Rights Authorities and civil society organisations should be pursued.

An EU Rule of Law Commission could draw up Annual (Country Specific) Reports on the basis of available and additional materials. The annual report shall point to the strengths and weaknesses, and suggest specific ways to overcome the latter.

8. Tools and institutional design shall be adjusted to the needs, and accordingly the Scoreboard shall establish a two-prong mechanism for Member States 'on track' and 'off the track' of the rule of law.

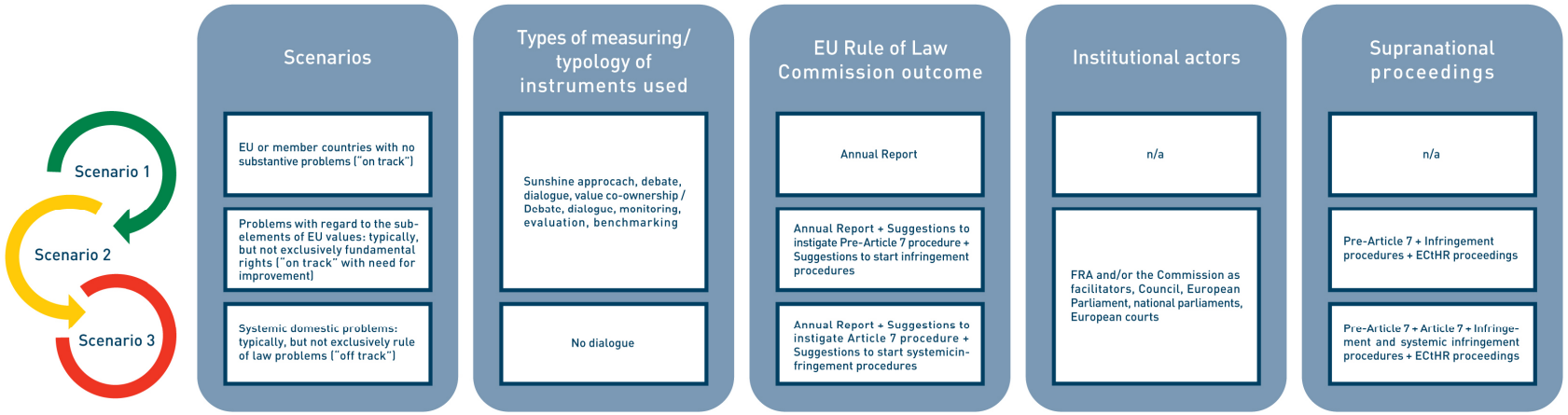
In both the first and second scenarios described above, i.e. when international mechanisms are used for upholding and promoting European values, remedying some breaches of single elements of European values or reversing the trends in the deterioration of some sub-elements of democracy, the rule of law and fundamental rights, the Scoreboard mechanism may follow a "'sunshine policy', which engages and involves rather than paralyses and excludes", and where value-control "is owned equally by all actors".

In the second scenario, it may be useful to disentangle the interrelated values of democracy, the rule of law and fundamental rights. Maintaining the distinction is particularly useful at this point, since infringement in this second scenario typically affects fundamental rights, whereas a number of mechanisms exist in Europe to tackle fundamental rights problems.

The third scenario – which is the trigger for the attempts to tackle the Copenhagen dilemma and also for the present Research Paper – is fundamentally different from the first two, and therefore the methodology of the Scoreboard shall introduce a second prong accordingly. When a State systematically undermines democracy, deconstructs the rule of law and engages in massive human right violations, there is no reason to presume the good intentions of those in power to engage in a sunshine approach involving a dialogue and soft measures in order to make the entity return to the concept of limited government – a notion that those in power wished to abandon in the first place.

A challenge lies in identifying the point when a Member State enters or is on the path towards the third phase, and to remedy the situation. It is under this Scenario that the systemic infringement proceedings, the EU Rule of Law Mechanism or Article 7 TEU would come in. All these procedures have – and we assume all future mechanisms will have – a discussion phase, where the Member State in question can present its views on its laws, policies and their realisation in practice. The Scoreboard could guide the discussion and make the process foreseeable and transparent. The discussion could still be led by an inter-institutional arrangement/agreement, with the FRA and/or the Commission taking the lead.

Figure ES1. The three rule of law scenarios and responding mechanisms



Source: Authors' elaboration.

9. the procedural matters are in close correlation with the key challenge of any Scoreboard method, namely their 'politicisation' versus retaining their legitimacy when governments and the various EU institutions will accuse them of being 'political' and 'non-neutral'. The main challenges identified with regard to ensuring and enhancing legitimacy were the need for objective standards, equal treatment of Member States, a prompt response to rule of law backsliders, respect for the principles of conferral and subsidiarity, potentially reversing the burden of proof of compliance with European values and shifting it from European institutions to the Member States, the need for follow-up mechanisms and the introduction of efficient, dissuasive and proportionate sanctions.

10. Follow-up mechanism and efficient sanctions
There was a general agreement between interviewees that a follow-up mechanism was needed, such as the Committee of Ministers in the framework of the Council of Europe overseeing Strasbourg judgments. After problems – whether individual or systemic – have been identified, there shall be regular assessment and a special procedure on compliance and follow-up with recommendations. The supervisory prong of the Scoreboard would however need to go beyond that. As is apparent from the state of the art and the depreciation of rule of law values, enforcement is the weak side of the existing legal framework overseeing European values – including the Article 7 mechanism or general infringement procedures according to Articles 258-260 TFEU. Enforcement with effective sanctions is also the weak side of suggestions by EU institutions and academic proposals.

The highly probable failure of both naming and shaming, and also of a more positive discursive approach, shall be acknowledged: an illiberal State is unlikely to be persuaded to return to EU values by way of diplomatic attacks, political criticism, discussions and dialogue. Proposals "adding bite to the bark" therefore typically point to the power of the purse, i.e. operate with quasi-economic sanctions, such as the suspension, withholding or deduction of EU funds, or pecuniary sanctions. Whereas pecuniary sanctions may be effective with regard to all Member States, for the time being the power of the purse could be particularly strong, as paradoxically the main rule of law backsliders are countries which are net beneficiaries of European integration. Freezing EU funds in their case would also put an end to the paradox of using EU money to build authoritarian regimes in denial of EU values.

11. Concerning the legal basis dilemma, we have several options under the current Treaty framework to set up an EU Rule of Law Commission as a consultative body.

The option of an inter-institutional agreement without any further legal basis shall be considered.

Also, Article 352 TFEU constitutes the foundations for Regulation 168/2007 establishing the FRA. There is therefore a precedent in its use. The FRA's organisational structure also includes a Scientific Committee composed of eleven independent persons, highly qualified, whose terms of office is not renewable. The Scientific Committee thus is a candidate for fulfilling the role of the EU Rule of Law Commission. However, there are strong reasons against entrusting the FRA or the FRA Scientific Committee with such a mandate. First, autonomy and legitimacy of the entity can only be preserved, if governments and the various EU institutions cannot accuse it of being 'political' and 'non-neutral', and therefore any such body shall be detached from EU institutions and bodies. Second, whereas democracy, the rule of law and fundamental rights are closely interrelated, they cannot be used as synonyms, and there are strong benefits in keeping these apart.

Alternatively, or in parallel, the implementation of Article 70 TFEU could also be used. This article would give a sound entry point in an area, which is specific to EU law, namely mutual recognition.

Preferably the Court of Justice could get involved, in particularly at times of determining what is a systematic rule of law deficiencies. If the EU Rule of Law Commission determines that there are systematic deficiencies, one could consider to call the Court to intervene and have a substantial assessment even before the context of Article 7 TEU, particularly when the deficiencies affect mutual recognition based EU policies and aspects where fundamental rights of people are at stake, for example in cases of detention. An option is to make use of the urgent preliminary ruling procedure laid down in CJEU Rules of Procedure.

Finally, the EU Rule of Law Commission could follow a similar format than the Venice Commission. An open question is who should appoint its members. In the Venice Commission it is the Member States. For the EU, prospective potential members should pass the test of the European Parliament before nomination, and they could be chosen from candidates proposed by Council and the Commission.

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1. Democracy, rule of law and fundamental rights mechanisms: Moving beyond the state of the art

1.1. State of the art, research questions and methodology

The current situation as regards democracy, the rule of law and fundamental rights in the EU is faced with substantial challenges and uncertainties. The UK referendum on the EU is only one of the obstacles to better governance of the EU and one which presents a particularly problematic challenge as the threat is to remove a Member State from the rule of law framework altogether. The use of the threat of a referendum as a mechanism to drive negotiations with the EU institutions as the UK has approached the issue, has already encouraged copy cat referenda – notably now in Hungary over the refugee crisis. The present Research Paper is written against the background of ruptures in the fabric of the complex web of interconnectedness within the European Union.

The European Union is founded on a set of common principles of democracy, the rule of law, and fundamental rights. This has been enshrined in Article 2 of the Treaty on European Union (TEU) which lists "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human

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rights, including the rights of persons belonging to minorities" as the shared values in which the Union is rooted. With the entry into force of the Lisbon Treaty, the EU became officially equipped with its own bill of rights in the form of the Charter of Fundamental Rights. Moreover, national constitutional traditions of EU Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), and the jurisprudence of the Strasbourg court are also constitutive elements of EU law.

Member States are vetted for their compliance with these values *before* they accede to the Union (Article 49 (1) EU). The so-called 'Copenhagen criteria' established in 1993 are meant to ensure that all new EU Member States are in line with the Union's common principles before joining the EU.[1] Also, the Union is obliged by law to export these values, which underlie the Union's international relations (Articles 21, 3 (5) and 8 TEU).[2] That notwithstanding, no similar method or 'mechanism' exists to supervise and regularly monitor adherence to these foundational legal principles *after* accession. A gap emerged between the proclamation of fundamental rights and foundational values and principles, and their actual enforcement. Whereas before accession the most severe sanctions could be imposed on a prospective member country – namely disregard of EU values could result in the suspension of membership negotiations and any financial assistance from the EU[3] – there is no counterpart to such scrutiny after accession. In theory – and there is convincing evidence that also in reality – Member States may abuse the fact that EU membership is a one-way-street, and might jeopardise EU values to an extent that they would not be permitted to accede, had they not been already member countries. This has been referred to by Vice-President of the European Commission Viviane Reding as the 'Copenhagen dilemma'.[4]

Against this background former Commissioner Reding's call in 2013 to stop applying double-standards in and outside the EU when it comes to respect for the rule of law shall be seen as an important initiative. "Whereas it is the duty of domestic legal systems to uphold the Treaties, including EU objectives, rule of law matters are no longer a 'domain reservé' for each Member State, but are of common European interest."[5]

The lack of monitoring, evaluating and supervisory mechanisms for the EU's legal founding principles would not constitute a problem if Member States adhered to these principles after accession. This, however, is a very unlikely hypothetical scenario. As James Madison put it, "If angels were to govern

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[1] The criteria read as follows: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union". Cf.: C. Hillion, 'The Copenhagen Criteria and Their Progeny' in: C. Hillion, *EU Enlargement: A Legal Approach*, Oxford: Hart, 2004, 1–23; D. Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law', 8 *European Integration online Papers* 10 (2004).

[2] Cf. L. Pech, 'Promoting the Rule of Law Abroad', in: D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013, 108–129; M. Cremona, 'Values in EU Foreign Policy', in: M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, Oxford: Hart Publishing, 2011, 275–315.

[3] C. Hillion, 'Enlargement of the European Union: A Legal Analysis', in: A. Arnull and D. Wincott (eds.), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002, 401–418.

[4] "Once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect". European Parliament (2012), Plenary debate on the political situation in Romania, statement by V. Reding, 12 September 2012. See also V. Reding, "The EU and the Rule of Law: What Next?", speech delivered at CEPS, 4 September 2013.

[5] V. Reding, "The EU and the Rule of Law: What Next?", speech delivered at CEPS, 4 September 2013.

men, neither external nor internal controls on government would be necessary."[6] The whole idea of the rule of law implies that law is an effective check on the exercise of political power.[7] However, governments of human beings, including Member State governments, may – and do – violate foundational principles,[8] and they do so in at least two ways.

First, concepts such as fundamental rights are fluid ones. Member States may violate them by sticking to their old black letter law or jurisprudence instead of responding to the changed social circumstances (criminalisation of homosexuality, non-criminalisation of domestic violence, or lack of reasonable accommodation are just illustrative and obvious examples).

Second, a country may straightforwardly turn against its own previously respected principles of democracy, the rule of law and fundamental rights. This latter scenario may happen in a narrow field, but in a gravely injurious manner, which is typically the case with regard to fundamental rights. Cases in point include the Roma crises in France in 2010-13, the Italian Ponticelli incident, and the mass surveillance programmes of EU citizens by the British Government Communications Headquarters (GCHQ) intelligence service and other EU Member States in collaboration with the United States NSA. Alternatively, a country may make a U-turn on the path of the rule of law, systematically eliminating – at least in the domestic setting – the channels for any kind of internal dissent, i.e. diminishing the potentialities of criticism by the voters (by media dominance, gerrymandering, etc.), civil society (by cutting funds and systematically harassing NGO representatives), and the state institutions (by weakening the powers of the constitutional court, influencing the judiciary, eliminating ombudsman's offices, etc.), thereby deconstructing effective checks and balances. Hungary and more recently Poland are illustrative examples in this regard, and are yet not exceptions across the Union.

Typically, depreciation of one foundational 'value' triggers depreciation of others. Take the discrimination against the Roma, which goes hand in hand with arbitrary determinations of a state of emergency. Also, unlimited electronic surveillance was possible due to lack of transparency and democratic and judicial accountability of intelligence communities' practices. A systematic deconstruction of the rule of law results in fundamental rights violations in all possible ways. Since democracy, the rule of law and fundamental rights are co-constitutive, throughout the present Research Paper they will be discussed together, with due regard to their triangular relationship.[9]

Against this background the present Research Paper examines the viability and added value (costs and benefits) of the establishment of an EU mechanism on democracy, the rule of law and fundamental

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[6] J. Madison, The Federalist No. 51. The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments, *Independent Journal*, 6 February 1788.

[7] G. Palombella and N. Walker (eds.), *Relocating the Rule of Law*, Oxford: Hart Publishing, 2009; G. Palombella, *È possibile la legalità globale?* Bologna: Il Mulino, 2012.

[8] On the relationship between democracy and the rule of law, see, e.g. L Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* Leiden: Brill, 2010.

[9] 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*, CEPS 2013, available at http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf; the original study done for the Directorate General for Internal Policies of the European Parliament, PE 493.031, 2013, is available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf; S. Carrera, E. Guild and N. Hernanz, 'Rule of law or rule of thumb, A new Copenhagen mechanism for the EU', CEPS policy brief, 2013, available at http://www.ceps.eu/system/files/No%20303%20Copenhagen%20Mechanism%20for%20Fundamental%20Rights_0.pdf. Cf. Council of Europe (Parliamentary Assembly), Report of the Committee on Legal Affairs and Human Rights: The Principle of the Rule of Law, Doc. No. 11343, 6 July 2007, para. 5. One should not forget that the substance of EU values received a synergetic treatment also in the pre-accession context leading to the 'big-bang' enlargement: D. Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law', 8 *European Integration online Papers* 10 (2004).

rights, making use of an EU Scoreboard assessing EU Member States' compliance with democracy, the rule of law and fundamental rights.

The methodology used in the elaboration of this Research Paper has included both quantitative and qualitative analysis of data when assessing the various options and research questions, as well as their related social, economic, and political costs and benefits. The Research Paper is based on the information already gathered from publicly available sources of information and data (both primary and secondary sources), as well as own field research. The desk research was complemented with a set of semi-structured (face-to-face) interviews with relevant EU policy-makers, representatives from other relevant supranational organisations and in the broader context, with individuals shaping the European understanding of democracy, the rule of law and fundamental rights.

Chapter 1 provides an synthesised overview of existing EU instruments that assess EU Member States' compliance with democratic, rule of law and fundamental rights legal principles 'outside the scope of EU law'. At the same time, Council of Europe and UN instruments will be presented, which might well serve as inspirations or sources for an EU Scoreboard, as well as at times of reflecting on ways to avoid unnecessary duplications and take into account 'lessons learned' from these already existing instruments when (and if) developing a Scoreboard instrument specific to the EU. Scholarly and institutional approaches tackling the Copenhagen dilemma will be summarised and, finally, ongoing rule of law scrutiny against two Member States will be described as illustrations of institutional, procedural and political obstacles to conducting a meaningful supervision of EU legal principles.

Chapter 2 highlights the general methodological challenges to be addressed by any Scoreboard measuring complex social phenomena and 'rule of law in the EU legal system' more generally. The focus of Chapter 3 is narrowed to the EU jurisdiction and the possible objections against a supervisory mechanism established at the EU level. Drawing on the considerations, challenges, obstacles, advantages and dangers identified in the previous parts of the Research Paper, Chapter 4 provides 'policy options' and suggestions with regard to the value added and specficities of an EU Scoreboard designed to monitor and assess democracy, the rule of law and fundamental rights in the EU legal system.

1.2. A Typology of existing EU instruments

What are the existing instruments that assess EU Member States' compliance with rule of law-related or relevant aspects? This Section provides a synthesised overview of existing EU rule of law instruments that fall outside the formal institutional and procedural arrangements foreseen by the Treaties for the enforcement of EU, and of EU Member States' practices that fall outside the scope of EU law.[10] A detailed overview and typology of EU rule of law instruments has already been provided in a previous 2013 European Parliament study.[11] Table 1 below provides an updated snapshot of the set of most relevant and recent instruments, as well as a picture of the wider policy landscape of diversified methods and EU actors involved.

[10] For a detailed account of compliance and enforcement of EU law refer to M. Cremona (ed.), Compliance and the Enforcement of EU Law, Oxford University Press: Oxford, 2012; A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford University Press, Oxford, 2016, forthcoming.

[11] 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*, CEPS 2013, available at http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf, 4–15, and Annex 1 of the study.

Table 1. Landscape of combined EU rule of law methods and actors

Supervision	Evaluation	Benchmarking	Monitoring	Discussion/ Dialogue
Article 7 TEU	EU Justice Scoreboard	EU Justice Scoreboard	EU Framework to Strengthen the Rule of Law	Council Rule of Law Dialogue
	EU Anti-Corruption report	EU Anti-Corruption report		
	Cooperation and Verification Mechanism (CVM)			

Source: Authors' elaboration.

This overview shows that the EU already counts on an increasing framework of tools and processes that engage in different ways in various kinds of assessments and monitoring procedures focused on EU Member States' compliance with Article 2 TEU-relevant legal principles under the current Treaties' configurations, including the legally binding EU Charter of Fundamental Rights. These instruments can be grouped into various categories depending on their actual scope, normative nature and degree of enforcement/follow-up as follows: supervision (Section 1.2.1.); Evaluation/Benchmarking (Section 1.2.2); Monitoring (Section 1.2.3); and Discussion/Dialogue (Section 1.2.4).

1.2.1 Supervision

Supervision instruments usually comprise monitoring and a detailed qualitative assessment/evaluation in cases where there are risks of a serious breach, or actual and persistent breaches, by an EU Member State of Article 2 TEU legal principles. In this way, this supervisory instrument has a preventive and a coercive arm. Supervising compliance is grounded on the Treaties or in an express provision envisaged in European law. There is also an enforcement or coercive arm in cases where EU Member States do not comply with their obligations. Article 7 TEU is the instrument serving such a function.

Although the values laid down in Article 2 TEU, including, most importantly, democracy and the rule of law, do not lie, strictly speaking, within the scope of ordinary *acquis* of the Union in the sense that the Union cannot legislate based on this provision alone, their inclusion within the broader ambit of EU law cannot be disputed, as underlined by scholars on numerous occasions.[12] In other words, it would be difficult to persuasively argue that the EU does not already possess a very clear and strong constitutional mandate to ensure that its foundational values are observed in each of its Member States. As a matter of law, EU Member States are in fact under a legal duty to cooperate in this endeavour and assist the EU in promoting its values both within and beyond the EU.

The special nature of Article 2 TEU is demonstrated by the existence of Article 7 TEU, which offers a specific enforcement mechanism in two situations:

1. Where there is a clear risk of a serious breach of Article 2 values in a Member State (a four-fifths majority of the Member States in Council is required, not counting the Member State subjected to the procedure). No sanctions can be adopted under this procedure. The 'best' outcome could be the adoption of recommendations provided that the European Parliament assents and a four-fifths majority is reached in the Council, conditions which do not seem unattainable if there is a political will to act.

[12] C. Hillion, 'Overseeing the Rule of Law in the EU', in: C. Closa and D. Kochenov, *Reinforcing the Rule of Law Oversight in the European Union,* Cambridge: Cambridge University Press, 2016, forthcoming; C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014); J.-C. Piris, *The Lisbon Treaty*, Cambridge: Cambridge University Press, 2010.

2. Where a serious and persistent breach of the same values has been established (unanimity of the Member States required, not counting the one subjected to the procedure). Once a breach is demonstrated under this procedure of Article 7, sanctioning of the troubled Member State is possible with the view of bringing it back to compliance with Article 2 TEU.

That being said, Article 2 values unquestionably form part of the 'Treaty', which the Commission is also empowered to protect on a case-by-case basis via the ordinary infringement procedure under Article 258 TFEU, notwithstanding the fact that the institution opted to interpret this power conservatively and has not deployed Article 258 TFEU procedure in this vein.

A point of debate has been the actual material scope of Article 7 TEU. The Commission Communication on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, COM(2003) 606 final – underlined that:

> The fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.[13]

Table 2. Effects and remedies of infringing national law, EU law and EU values

	Breach of national law		Breach of EU law		Breach of EU values in the national setting	
	Effect	Remedy	Effect	Remedy	Effect	Remedy
MS level						
EU level						

Source: Authors' elaboration.

Article 7 TEU allows for EU intervention even if the threats or breaches of EU values concern issues lying outside of the EU scope of competence.[14] It is however politically perceived as a remedy of last resort to use only in the most extreme circumstances, hence the 'nuclear option' label. Procedurally speaking, this provision is subject to relatively high decision-making thresholds. The presence of two countries in the EU in serious and persistent breach of EU values makes the deployment of the 'biting' clauses in the provision difficult, unless both problematic countries are tackled simultaneously. The Court of Justice can only review the legality of the procedure and not the decision establishing whether there is a risk or a persistent and serious threat to EU values.[15]

Neither of the two Article 7 TEU procedures has been used even once in practice since this provision's introduction into the Treaties. The provision does not provide any clear indication or way in which the determination and assessment of the rule of law threat is to be determined and by whom. The activation

[13] Commission Communication on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003, page 5.

[14] C. Hillion, 'Overseeing the Rule of Law in the EU', in: C. Closa and D. Kochenov, *Reinforcing the Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming; L. F. M. Besselink, 'The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives', in: A. Jakab and D. Kochenov (ed.), *The Enforcement of EU Law and Values: Methods against Defiance*, Oxford: Oxford University Press, 2016, forthcoming.

[15] Refer to Article 269 TFEU.

is also in hands of the various EU institutional actors, and is therefore subject to political manoeuvring or diplomatic will. The Council has been endowed with ample discretion when activating Article 7 procedure and in applying sanctions. The European Commission has recognised, "The thresholds for activating both mechanisms of Article 7 TEU are very high and underline the nature of these mechanisms as a last resort."[16] All these legal and political barriers have left a considerable gap that limits its effective operability and undermines legal certainty.

1.2.2 Evaluation and benchmarking

Evaluation instruments entail a qualitative and quantitative assessment of a specific subject or area of intervention following well-established social-sciences standards. It often involves scientifically-based design, collection and analysis of data. They are non-legally binding tools aimed at fostering change in Member States' arenas through soft methods of steering, coordination or non-coercive (guiding) tools. They are usually Member State or theme-specific or provide a qualitative comparison between EU Member States.

Evaluation instruments usually present conclusions drawn from the analysis and provide non-binding suggestions or recommendations to Member States for addressing deficits or obstacles. There is a lack of a coercive arm. They are aimed at incentivising States to comply or align with international and European standards, yet they usually present legally weak (if any) 'follow-up' procedures of conclusions reached and for ensuring effective implementation of recommendations.

A specific category of evaluation instruments are those covering 'benchmarking' methods, which utilise indicators and identify 'best practices' when comparing EU Member States' performance. Benchmarking is not the same as evaluation, but entails a rather specific methodology based on complex indexing methodologies (calculation of averages), the identification of common principles and standards and the selection of good/bad practices (corresponding to the highest/lowest standard). The outputs are represented in complex, yet highly visually attractive, graphs and quantitative methods. There are several examples of EU evaluation instruments comprising a 'benchmarking' approach which are of relevance for the purposes of this Research Paper. These include, for example, the EU Justice Scoreboard (1.2.2.1) and the EU Anti-Corruption Report (1.2.2.2).[17]

1.2.2.1 The EU Justice Scoreboard

Since 2012 the quality, independence and efficiency of justice and national judicial regimes constitute one of the priorities in the EU yearly cycle of economic policy coordination, or 'European semester', to foster structural reforms at national levels.[18] This has taken the form of the so-called 'EU Justice Scoreboard'.[19] The last edition was published in 2015.[20]

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[16] European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11.3.2014, page 6.

[17] Other examples include the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania. For the latest CVM see http://ec.europa.eu/cvm/progress_reports_en.htm.

[18] See Communication from the Commission, Annual Growth Survey 2015, COM (2014) 902 final. For a study of the European semester method refer to 2013 CEPS Study.

[19] The EU Justice Scoreboard: Towards more effective justice systems in the EU, http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm.

[20] http://ec.europa.eu/justice/effective-justice/files/justice_Scoreboard_2015_en.pdf. The first edition of the EU Justice Scoreboard was published in 2013 by the previous European Commission. See European Commission (2013), The EU Justice Scoreboard – A tool to promote effective justice and growth, COM(2013) 160 final, Brussels, 27 March.

The material scope of the EU Justice Scoreboard is rather limited. It only includes data that deals with civil, commercial and administrative justice. Criminal justice and other justice-relevant fundamental rights aspects fall outside the scope of evaluation. The driving approach pays particular attention to a set of 'parameters' which would enable any justice system to facilitate the improvement of business and investment. According to the Commission the main objective of the EU Justice Scoreboard is:

> to assist the EU and the Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States. Quality, independence and efficiency are the key components of an 'effective justice system'. Providing information on these components in all Member States contributes to identifying potential shortcomings and good examples and supports the development of justice policies at national and at EU level.[21]

The EU Justice Scoreboard uses a number of indicators which broadly relate to the efficiency of the justice systems (length of proceedings, clearance rates, pending cases, etc.), quality of justice systems (monitoring, evaluation and survey tools, information and communication technology systems, courts' communication policies, alternative dispute resolution methods, promoting judge training resources and equal share of female judges) and the independence of the judiciary (perceived and structural).[22] The source from which the data comes is mainly the Council of Europe's Commission for the Evaluation of the Efficiency of Justice (refer to Section 1.3 below for a detailed overview of CEPEJ), on the basis of a study commissioned by the European Commission to this body,[23] as well as two field studies commissioned to two external contractors.[24] The financial costs granted to the CoE to deliver this work was approximately €800,000.[25]

The results of the Scoreboard have reportedly received mixed reactions from EU Member States.[26] Most important, the Scoreboard is incapable of catching the most atrocious violations: it does not sufficiently detect internal linkages, thus it examines individual elements but fails to supply a qualitative assessment of the whole.[27] The Scoreboard does not foresee any coercive action or sanctions/penalties in a situation where an EU Member State may be seen as performing poorly on the above-mentioned

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[21] Page 3 of the Communication.

[22] The 2015 edition states, "*The 2015 Scoreboard has evolved: this third edition of the Scoreboard seeks to identify possible trends whilst taking a cautious and nuanced approach as the situation varies significantly, depending on each Member State and indicator. The 2015 Scoreboard also contains new indicators and more fine-tuned data based on new sources of information, for example, on the efficiency of courts in the areas of public procurement and intellectual property rights, the use and the promotion of alternative dispute resolution methods (hereafter ADR), the use of Information and Communication Technology (hereafter ICT) for small claim proceedings, courts' communications policies, composition and powers of Councils for the judiciary. It also contains, for the first time, data on the share of female professional judges, as more gender diversity can contribute to a better quality of justice systems*", page 6. Moreover, the Scoreboard states, "*Pursuing efforts to promote the exchange of best practices is key for supporting the quality of justice reforms in Member States.*"

[23] See http://ec.europa.eu/justice/effective-justice/files/cepj_study_Scoreboard_2015_en.pdf, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2015-005198+0+DOC+XML+V0//EN and Nielsen, N., Hungary in surprise ranking on EU justice scoreboard, 27 March 201, https://euobserver.com/justice/119597.

[24] European Commission, Directorate-General for Justice, Consumers and Gender Equality, Case study on the functioning of enforcement proceedings relating to judicial decisions in Member States, Final Report, February, 2015, http://ec.europa.eu/justice/effective-justice/files/enforcement_proceedings_final_report_en.pdf. See also Europe economics and Milieu (2015), Economic efficiency and legal effectiveness of review and remedies procedures for public contracts Final Study Report MARKT/2013/072/C.

[25] See http://ted.europa.eu/udl?uri=TED:NOTICE:263765-2013:TEXT:EN:HTML&src=0 and http://ted.europa.eu/udl?uri=TED:NOTICE:25222-2014:TEXT:EN:HTML&src=0.

[26] Nikolaj Nielsen, EU justice Scoreboard upsets some Member States, 17 March 2014, https://euobserver.com/justice/123507.

[27] K.L. Scheppele, 'The Rule of Law and the *Frankenstate*: Why Governance Checklists Do Not Work', 26 *Governance* 4, 559–562 (2013).

indicators. A key incentive supporting EU Member States' implementation of the proposed reforms is through various sources of EU funding,[28] including European structural and social funds and economic adjustment programmes.[29]

1.2.2.2 The EU Anti-Corruption Report

The European Commission adopted in 2011 the Decision C(20011) 3673 Establishing an EU Anti-corruption reporting mechanism for periodic assessment ('EU Anti-corruption Report').[30] The EU Anti-Corruption Report is a 'reporting mechanism' for the periodic assessment of anti-corruption efforts in the Union in order to facilitate and support the implementation of a comprehensive anti-corruption policy in the Union. According to Article 2 of this Decision the Report has the following objectives: "*(a) to periodically assess the situation in the Union regarding the fight against corruption; (b) to identify trends and best practices; (c) to make general recommendations for adjusting EU policy on preventing and fighting corruption; (d) to make tailor-made recommendations; (e) to help Member States, civil society or other stakeholders identify shortcomings, raise awareness and provide training on anti-corruption*".

The first issue of the EU Anti-Corruption Report was published in 2014,[31] and new editions are scheduled to appear every two years. According to the Report, it focuses on

> …selected key issues of particular relevance to each Member State. It describes good practices as well as weaknesses, and identifies steps which will allow Member States to address corruption more effectively. The Commission recognises that some of these issues are solely national competence. It is, however, in the Union's common interest to ensure that all Member States have efficient anti-corruption policies and that the EU supports the Member States in pursuing this work. The report therefore seeks to promote high anticorruption standards across the EU. By highlighting problems – as well as good practices – found inside the EU, the report also lends credibility to the EU's efforts to promote anticorruption standards elsewhere.[32]

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[28] According to the 2015 EU Justice Scoreboard, "*The European Structural and Investment Funds (ESI Funds)9 provide support to Member States' efforts to improve the functioning of their justice systems. At the start of the new programming period 2014-2020, the Commission engaged in an intensive dialogue with Member States on establishing the strategic funding priorities of the ESI Funds in order to encourage a close link between policy and funding. Based on the draft partnership agreements, the total budget allocated to investments in institutional capacity of public administration amounts to almost 5 billion euros for the next programming period. Out of the twelve Member States that received a country-specific-recommendation in the area of justice in 2014, eleven identified justice as a priority area of support for the ESI Funds. Justice is also a priority in the Economic Adjustment Programmes for Greece and Cyprus which will use ESI Funds in this area. The country-specific-recommendations, the country specific assessment and the data provided in the Scoreboard are key elements for Member States when setting out their funding priorities. Member States which identified justice systems as a priority area intend to use ESI Funds mostly for improving the efficiency of the judiciary. Although concrete activities will depend on the particular needs of each Member State concerned, some types of activities are emerging as being common to more Member States, such as the introduction of case management systems, the use of ICT in courts, the monitoring and evaluation tools, and training schemes for judges. The extent of this support varies between the Member States: while some Member States intend to support a broad section of their justice systems, others will concentrate on only a few courts which are facing particular challenges or are selected for pilot purposes. The Commission emphasised the importance of robust indicators for monitoring effectiveness of the support and issued guidance documents on monitoring indicators in line with those used in the Scoreboard. They will ensure the regular reporting of the Member States to the Commission on achieved results. These data will help the evaluation of EU support in rendering Member States' justice systems more effective*", page 4.

[29] For a detailed overview of the corrective and preventive arm of the European semester refer to 2013 CEPS study.

[30] European Commission Decision establishing an EU Anti-corruption reporting mechanism for periodic assessment ('EU Anti-corruption Report'), 6 June 2011, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/com_decision_2011_3673_final_en.pdf.

[31] European Commission Report From the Commission to the Council and the European Parliament, EU Anti-Corruption Report, COM(2014) 38 final, 3 February 2014, http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

[32] Page 2 of the Report.

The assessment has been based on a wide range of sources. These include existing evaluation mechanisms in other supranational *fora*, notably the Council of Europe's Group of States against Corruption (GRECO) and the OECD. This constitutes a commonality with the above-mentioned EU Justice Scoreboard, which relies heavily on non-EU specific monitoring bodies and tools. It also benefited from a group of experts on corruption and a network of research correspondents. The Report is not based on detailed questionnaires or expert country visits.[33] The assessment methodology also makes use of 'indicators', and is based on 'qualitative' rather than 'quantitative' assessment.[34]

The Report was originally intended to give special emphasis to indicators including "*perceptions, along with facts, trends, challenges and developments relevant to corruption and anti-corruption measures*." That notwithstanding, the actual assessment qualifies more as a proper country-by-country report/evaluation, still using indicators as reference points while acknowledging their profound methodological limitations. Indeed, the Annex on Methodology states

> During preparation of the list (of indicators), the Commission became aware that there might be a fundamental difficulty in relying primarily on indicators and statistical data for getting to the core of corruption problems, and most importantly for building actionable, tailor-made policy recommendations. Still, already established indicators directly relevant to the anti-corruption efforts supported by robust data were collected in order to examine the situation in Member States and identify areas for closer analysis in the country-specific research.[35]

The EU Anti-Corruption Report covers all EU Member States and is structured as follows: introduction (presenting the policy setting and background, the results of Eurobarometer surveys on perceptions and experience on corruption, a chapter describing corruption-related trends across the EU; a thematic chapter focusing on a cross-cutting issue of particular relevance at EU level, which in the 2014 edition focused on 'public procurement'; an Annex on Methodology and Country Chapters, which focuses on a 'list of key issues'.[36] The country reports end with a 'future steps' section which highlights points where further attention/action is required by the national government.[37]

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[33] Moreover, "*Studies and surveys were specifically commissioned for the purpose of further extending the knowledge base in areas relevant to the report. An extensive study on corruption in public procurement involving EU funds, launched at the initiative of the European Parliament, was commissioned by OLAF*", page 37 of the Report.

[34] According to the Report, "*Quantitative approaches play a lesser role, mostly because it is difficult to put a figure on how much of a problem corruption is, and even more difficult to rank the countries by results. The obstacle to using a quantitative approach is related to the fact that well-known surveys tend to compose their indexes using others' data. This creates a cascade effect: composite indexes building on this approach may reflect data gathered one or two years before their publication. Surveys tend to use for instance the Eurobarometer results; however, by the time the composite index is published, another more recent Eurobarometer survey may be available.*" *Id.* at 39.

[35] Page 40 of the Report. It continues by saying, "*These data (1) were used for scene setting (i.e. an introduction to the country chapters), and (2) serve as a starting/complementary point for further research on particular matters/sectors at country or EU level pointing to identification of problem and assessment of response; (3) ultimately, they also helped identify flows or lack of coherence in the different sources*".

[36] According to the Report, "*While the emphasis is on vulnerabilities and areas for improvement, the analysis is forward-looking and points to plans and measures going in the right direction, and identifies issues that require further attention. Good practices which might be an inspiration for others are highlighted. Some country chapters do, however, include a specific analysis of public procurement; this is the case for countries where substantial problems with public procurement have been identified*". *Id.* at 4.

[37] See for instance http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_austria_chapter_en.pdf

1.2.3 Monitoring

Sine 2014, the EU has counts on an EU Framework to strengthen the rule of law,[38] which was adopted in the form of a Commission Communication COM(2014)158.[39] The EU Framework can be seen as a 'monitoring' instrument focused on the Commission's assessment of specific national developments posing 'systematic threats to the rule of law'. The Framework is founded on the Commission's role in Article 7 TEU but does not provide for legally-binding outcomes, as it cannot alter the procedures described in that provision. The softness of the Framework, as well as its potentially disruptive legal effects (as the Framework had come to be perceived as a stage in the Article 7 TEU procedures, consequently making speedy deployment of that provision difficult) was criticised.[40] It constitutes an even 'softer' instrument than those falling under scope of 'evaluation/benchmarking', and the monitoring of a specific threat to the rule of law is framed and followed by a predominantly political or dialogue-driven nature between the Commission and the Member State concerned.

In the Annexes accompanying the Communication, the Commission underlined a number of important definitional or conceptual clarifications when it comes to the notion of rule of law in the EU legal system. Here, the Commission made express reference to the jurisprudence of the Court of Justice of the European Union, which over the various decades of European integration has developed a body of legal principles comprising the flesh and bones of the EU legal system and its foundations.[41]

The Communication underlines that "*the Court indicates that the rule of law is the source of fully justiciable principles applicable within the EU legal system*", and by doing so ascribes to this notion an 'EU-specific meaning'. The Commission highlighted the following legal principles as being particularly important in this context:

- the principle of legality;
- legal certainty;
- prohibition of arbitrariness of the executive powers;
- independent and effective judicial review, including respect for fundamental rights;
- an operational separation of powers implying an independent and effective judicial review;
- equality before the law.

Moreover, the Commission underlined, "*Mutual trust among EU Member States and their respective legal systems is the foundation of the Union. The way the rule of law is implemented at national level plays a key role in this respect*".[42] The Communication also recalls the competence of the European Commission as 'guardian of the Treaties' to ensure the respect of the values on which the EU is founded and of protecting the general interest of the Union. The EU Framework to strengthen the rule of law aims at guaranteeing "*an effective and coherent protection of the rule of law in all Member States*".[43] It is a crisis-driven framework of operation, "*to address and resolve a situation where there is a systemic threat to the rule of law*".[44]

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[38] http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm.

[39] European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11.3.2014.

[40] For an overview of key arguments, see D. Kochenov, L. Pech and S. Platon, 'Ni panacée, ni gadget: Le 'nouveau cadre de l'Union européenne pour renforcer l'Etat de droit', *Revue trimestrielle de droit européen* (2015), forthcoming.

[41] L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* No. 04/09 (2009); M.L. Fernández Esteban, *The Rule of Law in the European Constitution*, The Hague: Kluwer, 1999.

[42] See page 2 of the Communication.

[43] *Id.* at 3.

[44] *Id.*

The objective is to prevent situations in EU Member States from reaching the level or scope of application envisaged in the previously mentioned Article 7 TEU. It is seen to complement and precede this Treaty provision. The Communication reminds the reader,

> Its scope (Article 7 TEU) is not confined to areas covered by EU law, but empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously. As explained in the Commission's Communication on Article 7 TEU, this is justified by the fact that if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundation of the EU and the trust between its members, whatever the field in which the breach occurs.[45]

When justifying the need for an EU Framework safeguarding the rule of law, the Commission Communication states that recent developments in EU Member States show that existing instruments are not "*always appropriate to quickly respond to threats to the rule of law in a Member State. There are therefore situations where threats relating to the rule of law cannot be effectively addressed by existing instruments*".[46]

How does the EU Framework work in practice?[47] The Framework would be activated in those cases where EU Member States are about to adopt laws/policies or tolerate practices which can be expected to systematically and adversely affect or constitute a threat to the integrity, stability and proper functioning of their institutions in securing the rule of law. This would cover challenges to constitutional structures and the principle of the separation of powers; or cover questions related to the independence of the judiciary, including judicial review of government actions. The Framework therefore does not constitute a comparative and regular/periodic country to country assessment on the state of rule of law in the Union.[48]

Figure 1 below provides a visual representation of the various phases comprising the Commission's framework. It is composed of three main phases:

1. The first step is the Commission assessment leading to a 'rule of law opinion' where the concerns are developed, and granting the concerned Member State the possibility to answer.
2. If the controversy is not resolved, the Commission would issue a 'rule of law recommendation' providing a time limit for providing an answer to the concerns and ways to address them.
3. The final step would be a follow-up or monitoring of the rule of law recommendation, which if not complied with could activate Article 7 TEU.

On which basis does the Commission assess the rule of law threat? The Communication vaguely states that it will seek 'external expertise' and

> …will collect and examine all the relevant information and assess whether there are clear indications of a systemic threat to the rule of law as described above. This assessment can be based on the indications received from available sources and recognized institutions, including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights.[49]

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[45] Reference is here made to the above mentioned Commission Communication COM(2003) 606 final.

[46] *Id.* at 6.

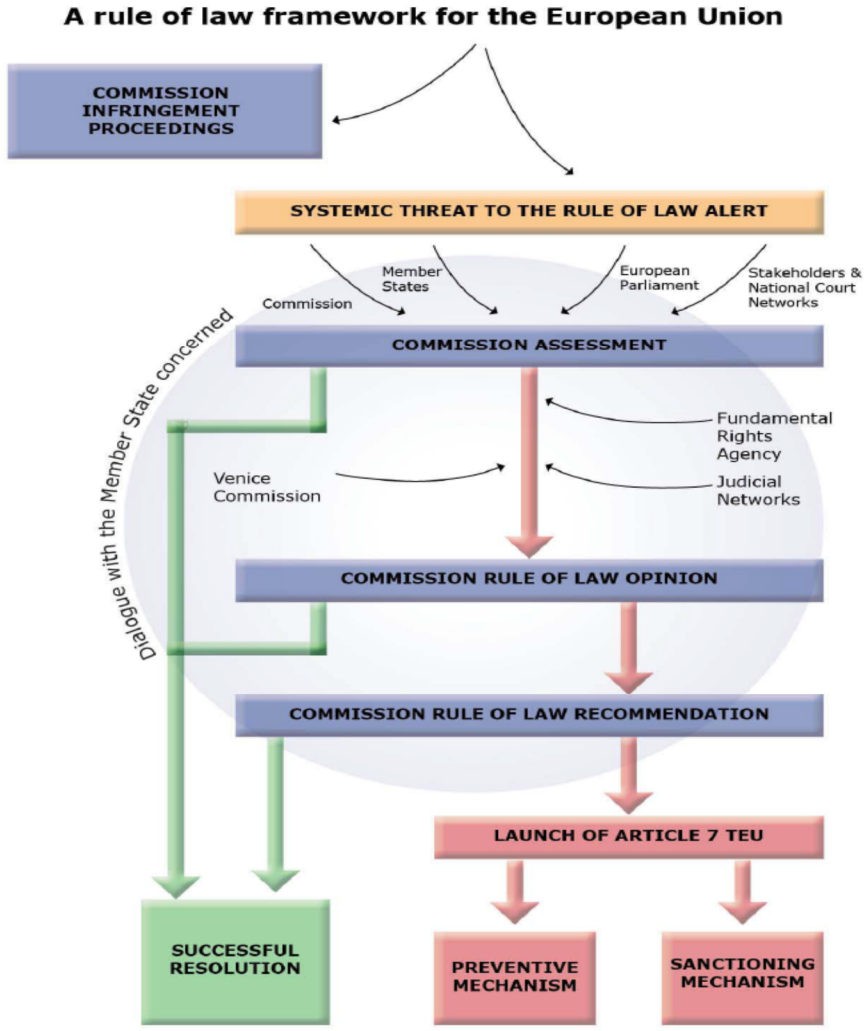
[47] For a detailed criticism, see, D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *European Constitutional Law Review,* 512–540 (2015).

[48] For an analysis see S. Carrera and E. Guild, Implementing the Lisbon Treaty: Improving the Functioning of the EU on Justice and Home Affairs, Study done for the European Parliament AFCO Committee, 2015, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519225/IPOL_STU(2015)519225_EN.pdf.

[49] Page 7. Page 9 reads, "*Depending on the situation, the Commission may decide to seek advice and assistance from members of the judicial networks in the EU, such as the networks of the Presidents of Supreme Courts of the EU23, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU24 or the Judicial Councils25. The Commission will*

Concerning inter-institutional relations and roles, the EU Framework only envisages that the Commission will keep the European Parliament and the Council "*regularly and closely informed of progress made in each of the stages.*"[50]

Figure 1. The EU Rule of Law Framework in practice



Source: Annex 2, Commission Communication, A new EU Framework to strengthen the Rule of Law COM(2014) 158 final, 11.3.2014, at 4.

The first case in which the EU Framework was used in practice was against Poland.[51] During his intervention before the European Parliament's Plenary Session in Strasbourg on 19 January 2016, Vice-

examine, together with these networks, how such assistance could be provided swiftly where appropriate, and whether particular arrangements are necessary to that end. 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".

[50] See page 8 of the Communication.

[51] Rule of law in Poland: Commission starts dialogue, 13 January 2016, http://ec.europa.eu/news/2016/01/20160113_en.htm, which states, "*The College agreed to come back to the matter by mid-March, in close cooperation with the Venice Commission of the Council of Europe. Echoing what President Juncker said last week, First Vice-President Timmermans underlined after the College meeting that this is not about accusations and polemics, but about finding solutions in a spirit of dialogue. He underlined his readiness to go to Warsaw in this con*text." See also European Commission – Fact Sheet, College Orientation Debate on recent developments in Poland and the

President of the European Commission Frans Timmermans laid down the reasons why the Commission had decided to assess the recent developments in Poland from a rule of law perspective:

> I would like to stress firstly that we are at the beginning of the process under the framework. The framework has a preventive nature, and the start of a detailed, factual and legal assessment in no way implies any automatic move to decisions at later stages. That will depend purely on the facts – and answering us so quickly will help to stimulate that dialogue and to have a constructive dialogue with the Polish government. We will engage in the dialogue in an impartial, evidence-based and cooperative way. It goes without saying that the Commission fully respects the sovereignty of the Republic of Poland, and carries out its duties in an objective and non-partisan manner, as for any other Member State in line with the duties imposed on the Commission by treaties that were signed and ratified by sovereign states – the members of the European Union. Finally, we will conduct our assessment in close cooperation with the Venice Commission of the Council of Europe.[52]

It is most regrettable that the Commission did not conduct serious analysis of the likely effects of the deployment of the Framework in the context of the subsequent invocability of Article 7 TEU. Invoking the Framework against one of the two Member States obviously allows the second to sabotage the deployment of Article 7 TEU sanctions, which indirectly require unanimity in the Council, since Article 7(2) TEU procedure is a necessary prerequisite for their activation. In such a context, leaving one of the problematic Member States outside the ambit of the Rule of Law Framework effectively switches off Article 7 TEU, leaving the EU absolutely powerless, as far as enforcement goes, in the face of the challenges to the rule of law and other values.[53]

1.2.4 Discussion/Dialogue

The General Affairs Council of 16 December 2014 formally adopted Conclusions on ensuring respect for the rule of law and established a Rule of Law Dialogue between EU Member States. The idea was to set up "*a political dialogue among Member States to promote and safeguard the rule of law within the EU*." Paragraph 5 of the Conclusions stated,

> [K]ey challenges that require particular and urgent attention include, in particular, judicial reform, the fight against organised crime and corruption, the freedom of expression and the media, the rights of persons belonging to minorities, the non-discriminatory treatment of national minorities, as well as tackling discrimination of vulnerable groups such as the Roma, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. Further work is also required to promote gender equality and the rights of women. The Council looks forward to the completion of preparations aimed at candidate countries' participation as observers in the work of the EU's Fundamental Rights Agency. The rule of law is also crucial for economic development and creating a favourable business environment and investment climate.

It is important to underline that the Conclusions were jointly adopted by the Council and the Member States meeting in the Council. They call for the Dialogue to be driven by "*the principles of objectivity, non discrimination and equal treatment of all Member States…(and to be) conducted on a non partisan and evidence-based approach*".[54] The Dialogue is organised by each of the relevant Presidencies once a year in the

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Rule of Law Framework: Questions & Answers, Brussels, 13 January 2016 http://europa.eu/rapid/press-release_MEMO-16-62_en.htm.

[52] Statement by First Vice-President Frans Timmermans and Commissioner Günther Oettinger – EP Plenary Session – Situation in Poland, Strasbourg, 19 January 2016, http://europa.eu/rapid/press-release_SPEECH-16-114_en.htm.

[53] D. Kochenov, 'The Commission vs. Poland: The Sovereign State is Winning 1-0', 25 January 2016, http://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/.

[54] Refer to paragraphs 2 and 3 of the Conclusions.

context of the General Affairs configurations, not those under Justice and Home Affairs. The Presidency prepares a concept note.[55] The Dialogue is then organised by the Committee of Permanent Representatives (COREPER) and it is of a purely intergovernmental nature. There is no formal role envisaged for the European Commission or the European Parliament in the session. The Commission is invited. The discussion takes place on 'thematic subject matters' and is closed-doors.

The first Dialogue took place under the Luxembourg Presidency in the second half of 2015.[56] The Discussion Papers which provided the background for the Dialogue of 17 November 2015 at the General Affairs Council focused on a presentation by the European Commission of the outcomes of its annual colloquium on fundamental rights "Tolerance and respect: preventing and combating anti-Semitic and anti-Muslim hatred in Europe" on 1-2 October 2015. Member States were then asked to "*to share one example of a best practice and one example of a challenge encountered at national level in relation to the respect for the rule of law, as well as the approach to respond to that challenge.*" Moreover, the Luxembourg Presidency distributed a discussion paper on "the rule of law in the age of digitalization" which aimed at combining "*the two themes in an attempt to identify areas in the digital environment where the rule of law could be strengthened in a useful and sustainable way.*" The following specific themes were examined: freedom of expression, internet governance, data protection and cybersecurity. One can only add that the choice of the topics for the 'Dialogue', made in the context of overwhelmingly serious backsliding and constitutional capture in at least two Member States, already provides a serious indication of the likely workability of this instrument for the promotion of the Rule of Law and other Article 2 TEU values.

The Dutch Presidency is currently preparing the ground for the second Dialogue. A preparatory seminar was organised on 2 February 2016 in Strasbourg on migration and rule of law which aimed at fueling the next Dialogue.[57]

1.3 An overview of UN and Council of Europe instruments

This Section provides a synthesised overview of the detailed mapping contained in **Annexes 1** and **3** of this Research Paper. The overview of relevant rule of law institutional structures, actors and mechanisms focuses on the following questions: Who? (Section 1.3.1.) What? (Section 1.3.2.) and How? (Section 1.3.3.)

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[55] Council of the European Union, Ensuring respect for the rule of law in the European Union, Brussels, 15206/14 FREMP 198 JAI 846 COHOM 152 POLGEN 156, 14 November 2014 http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015206%202014%20INIT. See the first substantive Presidency Discussion Papers which provided the basis for the first Dialogue: 13744/15 KR/tt 1 DGD 2C EN, Council of the European Union, Ensuring the respect for the rule of law – Dialogue and exchange of views, 9 November 2015 13744/15 JAI 821 FREMP 243, http://data.consilium.europa.eu/doc/document/ST-13744-2015-INIT/en/pdf.

[56] General Affairs Council, Meeting n°3427, 17-18 November 2015, http://www.consilium.europa.eu/en/meetings/gac/2015/11/17/, which states, "*Ministers held their first annual rule of law dialogue which was established in December 2014. They exchanged views on their experiences of challenges in this area and of how best to respond. Ministers also specifically addressed the issue of the rule of law in the digital era. "The launch of the political dialogue on the rule of law was one of the priorities of the Luxembourg presidency", said Jean Asselborn, adding: "I'm glad that the incoming Netherlands presidency is committed to follow up these efforts and to build on the exchange of views held today.*"

[57] The Dutch Presidency Priorities state, "*The Netherlands Presidency will work to ensure an open dialogue on the rule of law that helps foster a new culture which allows improvements to be made in this area in the member states. The second dialogue on the rule of law will take place in the Council during the Netherlands Presidency, following a seminar in Strasbourg in February on the rule of law and current political issues. An essential element of ensuring respect for the rule of law is the protection of fundamental rights as laid down in the EU Charter of Fundamental Rights. The Netherlands will devote specific attention to this during its Presidency by holding a seminar on the Charter's application in member states' legislative and policy processes*", 13.

1.3.1 Who?

The composition of the non-judicial monitoring UN and CoE bodies can be summarised as follows:

First, national experts ensure impartiality and independence from the State party or government, and have specific expertise on the issue/theme being monitored, usually in a Member State party to the relevant system.

In the context of the CoE, the Venice Commission is an independent consultative body composed of independent experts, serving in their individual capacity, and having achieved 'eminence' through their experience in democratic institutions or scholarship. Venice Commission experts "shall serve in their individual capacity and not receive or accept any instructions". The members of the European Commission against Racism and Intolerance (ECRI) are required to have high moral authority and recognised expertise in dealing with issues related to racism, discrimination, etc. Similar qualities of impartiality and independence are required of ECRI members.

Similar features apply to members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Its members come from different backgrounds, a number equal to that of the parties, and shall be chosen on the basis of their high moral character, competence in human rights and professional experience in prison and police matters covered by the Convention. The composition of the European Commission for the Efficiency of Justice relies on experts who can best contribute to its aims and functions and have in-depth knowledge of the administration, functioning and efficiency of justice. Each member of the CoE shall appoint an expert to the CEPEJ.

Similar qualities are required of members of the UN Treaty Bodies (see **Annex 3** for a detailed overview), which by and large need to ensure their independence, acknowledged impartiality and specific expertise in the subjects covered by the relevant UN Convention or Covenant, and more generally human rights. As Table 3 below shows, UN Treaty bodies' composition varies from 10 to 20 members.

Table 3. Composition of UN Treaty Bodies

Committee	Membership	Current number of State parties
CERD	18	**175**
Human Rights Committee	18	167
CESCR	18	**160**
CEDAW	23	**187**
CAT	10	**153**
CRC	18	**193**
CMW	14	**46**
SPT	25	67
CRPD	18	**129**
CED	**10**	37

Source: UN, International Human Rights Instruments, Overview of the human rights treaty body system and working methods related to the review of State parties, 12 April 2013.

Second, some monitoring actors are directly elected by the institutions composing the supranational actor. In the CoE context, the Commissioner for Human Rights is elected by the Parliamentary Assembly of the CoE, on the basis of candidates submitted by State parties. Similarly to the qualifications and qualities of national experts participating in other supranational monitoring bodies, the Commissioners are "eminent personalities of high moral character having recognized expertise in the field of human rights, a public record of attachment to the values of CoE and personal authority".

The members of the CPT are elected by the Committee of Ministers, from a list of names drawn up by the Consultative Assembly of the CoE. Each national delegation of State parties puts forward three names.

Third, nomination by State parties. There are other instances where the members are nominated directly by State governments. The members of the European Committee for Social Cohesion, Human Dignity and Equality (CDDECS) are representatives of CoE States. The governments designate one representative "of the highest possible rank and expertise in the relevant fields". In the UN context, members of the UN Treaty Bodies are usually nominated by State parties, yet they serve in their personal capacities.

Fourth, Member States' representatives are appointed to monitoring bodies following mutual evaluation or peer review assessments. This is the case of the CoE Group of States against Corruption. Each State party nominates a delegation of two representatives who will participate in evaluation teams.

Fifth, individual or working group model. Both in the context of the UN and the CoE, the model can be based on an individual or a team of experts or working group. Instances of individual models include the above-mentioned Commissioner for Human Rights. In the framework of the UN there are further examples, such as the Special Rapporteur or 'Individual Expert' model in the so-called Human Rights Council (Special Procedures). Special Rapporteurs are appointed by the Human Rights Council, in their personal capacities and have shown a special competence and expertise on specific themes that they cover. They have thematic or country-based mandates.[58]

1.3.2 What?

Both in the UN and CoE contexts, the monitoring systems focus generally on ensuring that State parties comply with their statuses, conventions/covenants and treaties and legal standards. When it comes to the 'what' question, human rights constitutes a central common dimension in the work that both supranational organisations carry out.

This is the case for instance when it comes to the CoE Parliamentary Assembly Monitoring Committee. Similarly, the UN Universal Period Review, and the Special Procedures, focuses on the extent to which States respect their human rights obligations provided by the UN Charter, the Universal Declaration of Human Rights and human rights instruments to which the State is party. The monitoring results, conclusions and recommendations resulting from UN Special Procedures and Treaty bodies feed into the work of the Universal Period Review (UPR).

Sometimes, there are Committees dedicated to monitoring aspects of work that cover specific fields of action, such as the CoE Committee for Social Cohesion, Human Dignity and Equality (CDDECS), which focuses on CoE work in these domains. This sectoral approach becomes more important in the scope of the Treaty bodies system in the UN, which plays a key role in the wider UN institutional setting outlined in Table 4 below. (**Annex 3** shows in detail UN human rights treaty bodies that focus on monitoring the application of specific conventions and covenants.)

[58] http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM (Thematic Mandates); http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx (Country Mandates).

Table 4. UN institutional landscape

Charter Bodies	Treaty Bodies
Human Rights Council	Human Rights Committee
Universal Periodic Review	Committee on Economic, Social and Cultural Rights
Human Rights Council (HRC)	Committee on the Elimination of Racial Discrimination (CERD)
Special Procedures of the HRC	Committee on the Elimination of Discrimination against Women
HRC Complaint Procedure	Committee against Torture
	Subcommittee on Prevention of Torture
	Committee on the Rights of the Child
	Committee on Migrant Workers
	Committee on the Rights of Persons with Disabilities
	Committee on Enforced Disappearances

Source: Authors' elaboration.

Table 5. UN Treaty Bodies and Relevant Convention/Covenant Monitored

Treaty Bodies	Conventions/Covenants
Human Rights Committee	International Covenant on Civil and Political Rights
Committee on Economic, Social and Cultural Rights (CESCR)	International Covenant on Economic, Social and Cultural Rights
Committee on the Elimination of Racial Discrimination (CERD)	International Convention on the Elimination of all Forms of Racial Discrimination
Committee on the Elimination of Discrimination against Women (CEDAW)	Convention on the Elimination of All Forms of Discrimination against Women
Committee against Torture (CAT)	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Subcommittee on Prevention of Torture (SPT)	Optional Protocol to the Convention against Torture (OPCAT)
Committee on the Rights of the Child (CRC)	Convention on the Rights of the Child and Optional Protocols
Committee on Migrant Workers (CMW)	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)
Committee on the Rights of Persons with Disabilities (CRPD)	Convention on the Rights of Persons with Disabilities
Committee on Enforced Disappearances (CED)	International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)

Source: Authors' elaboration.

In the context of the CoE, the angle of 'democratic rule of law' comes into the picture as a way to ensure human rights protection, i.e. effective implementation and delivery of human rights.

The Venice Commission focuses on "the guarantees offered by the law in the service of democracy" and the promotion of 'rule of law' and 'democracy' (see Table 6 below). The Venice Commission pays particular attention to the health check of the constitutional, legislative and administrative principles and practices. *Efficiency* of democratic and judicial institutions constitute a core dimension of work. The Venice Commission also pays attention to citizens' fundamental rights and freedoms when it comes to their participation in public life. 'Democracy' is here a key additional angle that falls under the material scope of its mandate, which includes actions in the electoral field.

Some monitoring actors focus on specific themes, which have direct and indirect ramifications for rule of law related aspects. CEPEJ focuses on the *efficiency*, *fairness* and practical implementation/functioning of the judicial system of Member States, for the purpose of ensuring that

every person can enforce their legal rights effectively. It also covers facilitating a better implementation of CoE legal instruments and standards. This aims at fostering citizens' trust in the justice systems.

Also in the CoE, bodies like GRECO primarily focus on a specific field, i.e. corruption. Yet, they have the mandate to tackle the subject from a rule of law perspective. This is the case in its fourth evaluation round which deals with "the prevention of corruption in respect of members of parliament, judges and prosecutors". (See Annex 1 for a detailed overview of GRECO.) GRECO aims at improving State parties' capacity to fight corruption. It pays special attention to the implementation of the Guiding Principles for the Fight against Corruption adopted by the Council of Ministers in November 1997, and the implementation of international legal instruments.

Table 6. CoE actors

Institutions (including relevant Committees)	Partial Agreements (not including all Member States)	Theme Specific Body
European Court of Human Rights (ECtHR)	European Commission for Democracy through Law (Venice Commission)	**European Commission against Racism and Xenophobia (ECRI)**
Parliamentary Assembly (Monitoring Committee)	Group of States against Corruption (GRECO)	
Commissioner for Human Rights	The European Commission for the Efficiency of Justice (CEPEJ)	
European Committee for Social Cohesion, Human Dignity and Equality (CDDECS)		
European Committee for the Prevention of Torture (CPT)		

Source: Authors' elaboration.

1.3.3 How?

Each of the actors or bodies involved in monitoring systems and instruments in the context of the UN and CoE present their own specificities as regards the procedures and methods deployed when conducting the States parties' assessment and evaluation. The following procedures can be broadly distinguished:

1.3.3.1 State parties reporting

A specific featuring component of the UN Treaty body system is that it is based on the reporting by the member countries to the relevant Committees. State parties are under the obligation to submit regular reports to the Committees on which rights under the relevant legal instrument are being implemented (with the exception of SPT, which does not require this task). This procedure and method of assessment shifts the burden of proof to the States and not the monitoring body.

The reporting systems by States are usually organised around a list of issues (LOI) which are key themes of principal concern prepared by the respective Treaty bodies' structures. The LOI is intended to give the government a preliminary indication of the issues that the Committee considers to be priorities for discussion. The LOI may take an article by article approach (CED and CEDAW), or be shaped around specific thematic priorities (Human Rights Committee). The LOI is not self-exclusionary as regards the material scope of the country assessment, as it does not generally restrict the dialogue with the State concerned as regards the issues to be tackled or monitored.

The kind of replies which are required from State parties vary from body to body. Some oblige them to reply in written form to the specific LOI (e.g. CEDAW, CESCR, CMW, CRC, CRPD and the Human Rights Committee), while others do not emphasise or envisage that duty (e.g. CAT, CED and CERD). In order to facilitate the reporting process, a majority of Treaty bodies have delivered reporting guidelines (common core document) which States are invited to use when submitting reports.

The usual procedure foresees the presence of representatives or a delegation of State parties. The procedures in UN Treaty bodies are in general open to the public and ensure a high degree of public accountability (open to media as well). The country reports are discussed and examined in public hearings. The number and kind of sessions vary from body to body.[59] The following procedures are shared by all the Treaty bodies in the framework of the so-called 'constructive dialogue' with State parties:

(a) The State party is invited to send a delegation to attend the meetings at which the committee will consider the State party's report;
(b) The head of the delegation is invited to introduce the report and provide information on developments since its submission in a brief opening statement. Some committees, such as the Human Rights Committee, request the delegation to provide an oral summary of the State party's written replies to the lists of issues;
(c) Members of the committee, usually led by the country rapporteur(s) or country report task force members, raise questions on specific aspects of the report that are of particular concern and/or in relation to the oral summary of the written replies to the list of issues.[60]

Sometimes this is preceded by a pre-sessional working group or system, which convenes some time before the formal meeting of the relevant Committee, and which identifies in advance the relevant questions and draft list of 'key issues' which will constitute the principal focus of the dialogue. The pre-sessional working group usually leads to the adoption and enactment of the LOI (e.g. CRC, Human Rights Committee, CESCR). The UN Treaty body committees usually appoint a country rapporteur who is responsible for steering the implementation of the various phases of the monitoring procedure.

During the phases preceding the preparation of reports by State parties, the Committees often consult with national human rights associations (NHRAs) and civil society organisations (CSOs), which provide additional information in the work of the Committee (e.g. CAT).

The majority of Treaty bodies have the mandate to assess the reports submitted initially and periodically by State parties. The specific 'periodicity' in the reporting procedures varies from Treaty body and instrument, as outlined in Table 7 below. Usually, there is an initial reporting shortly after accession and this is followed by periodical reporting procedures. Three of the UN treaty bodies have adopted

[59] According to UN, International Human Rights Instruments, Overview of the human rights treaty body system and working methods related to the review of State parties, 12 April 2013, "The number of sessions that each committee holds annually varies. Moreover, some committees have been given additional sessions or meeting time to address the backlog of reports and individual communications awaiting consideration. For example, CESCR will have one four-week session in 2013-2014, following the endorsements and approvals in General Assembly resolution 67/246. The General Assembly has also authorized CAT to hold two four-week sessions per year in 2011-2012 (resolution 65/204); CERD to convene two four-week sessions from August 2009 until 2011 (resolution 63/243); CEDAW to hold three three-week annual sessions and a one-week pre-sessional working group meeting for each session, for an interim period effective from January 2010, pending the entry into force of the amendment to article 20, paragraph 1, of the Convention (resolution 62/218); CRPD to hold two sessions per year, consisting of one one-week session and one two-week session (resolution 66/229). Since November 2012, CED convenes two two-week sessions per year."

[60] Quoted from UN, International Human Rights Instruments, Overview of the human rights treaty body system and working methods related to the review of States parties, 12 April 2013.

so-called 'simplified reporting procedures':[61] "*All committees, except CMW, have adopted the practice of proceeding with the examination of the situation regarding the implementation of the relevant treaty by a State party even when no report has been received*".[62]

Table 7. Reporting periodicity under the treaties

Treaty Body	Initial reports (years)	Periodicity of reports
ICERD	1	2
ICCPR	1	3, 4, 5 or 6
ICESCR	2	5
CEDAW	1	4
CAT	1	4
CRC	2	5
CRC-OPAC	2	Integrated into next CRC report, every five years; every five years for States not party to the CRC
CRC-OPSC	2	Integrated into next CRC report, every five years; every five years for States not party to the CRC
ICRMW	1	5
CRPD	2	4
CED	2	--

Source: UN, International Human Rights Instruments, Overview of the human rights treaty body system and working methods related to the review of State parties, 12 April 2013.

The dialogue with State delegations broadly takes place in the scope of thematic debates or days of general discussion. As regards the considerations of State parties' reports, the UN publication states,

> All the treaty bodies have adopted broadly the same approach towards the consideration of States parties' reports, the main features of which are the constructive dialogue, in which the respective committee engages with a delegation from the State party whose report is under consideration, and the adoption of concluding observations, which acknowledge progress made and indicate to the State party where further action is required. However, there is still considerable variation in how the treaty bodies consider their States parties' reports.

The phase of 'constructive dialogue' with State parties leads to the drafting by the relevant Committee of so-called 'concluding observations', i.e. "*all treaty bodies have adopted the practice established by CESCR in 1990 of formulating concluding observations or comments following the consideration of a State party's report.*"[63] These include "*introduction; positive aspects; principal subjects of concern; suggestions and recommendations.*" State parties may submit comments on the concluding observations.

Moreover, all Treaty bodies lay down their views on the actual content of the obligations taken by State parties in the shape of so-called 'general comments', which are based on Treaties concerned and their rules of procedure, which often relate to a specific article, provision or theme.[64] The concluding observations usually follow and are presented in a similar thematic structure. They include positive

[61] "In May 2007, CAT adopted a new, simplified and optional reporting procedure which consists in the preparation of a List of issues prior to reporting (LOIPR) to be transmitted to States parties prior to the submission of their respective periodic report (see A/62/44, paras 23-24). In October 2009 and in April 2011 respectively, the Human Rights Committee and the Committee on Migrant Workers also adopted this optional procedure", 6, paragraph 17.

[62] *Id.* at 15.

[63] *Id.* at 14.

[64] See for instance CESCR outline for drafting general comments (E/2000/22, annex IX).

aspects (areas where progress has been achieved), factors and difficulties/challenges impeding the implementation, main issues of concern and suggestions and recommendations.

1.3.3.2 Expert groups

The CoE Venice Commission uses a monitoring method which is based on an expert group/commission model. The experts carry out legal analysis or research on the compliance of State parties' draft pieces of legislation or laws already in force which are brought to its consideration. The group is assisted by a secretariat in the preparation of draft opinions and studies, which are then discussed and adopted at the Committee's plenary sessions. Several actors can request an Opinion to the Venice Commission: Member States, Council of Europe (Secretary General, Committee of Ministers, Parliamentary Assembly and Congress of Local and Regional Authorities), international organisations, which include the EU and OSCE.

The result of the assessment will result in an Opinion. **Annex 3** outlines the specific phases comprising the procedure for the elaboration and adoption of an Opinion by the Venice Commission. The Opinion issued by the Venice Commission is usually structured around the following sections: preliminary remarks, analysis (general and specific remarks) and conclusions, which include outstanding issues, concerns and recommendations to the State party. Interestingly, in light of the current rule of law controversy with Poland, the Venice Commission has recently received a request by Poland on the constitutional issues addressed in the amendments to the Act on the Constitutional Court of 25 June 2015.[65]

1.3.3.3 Evaluation: indicators and benchmarking

CEPEJ provides an example of a monitoring system based on benchmarking methodology. The assessment of State parties' judicial systems is based on a set of 'common principles', and comprises common statistical criteria and 'other means of evaluation'. CEPEJ has developed a biennial evaluation using a "Scheme for evaluating judicial systems". The evaluation scheme, which aims at identifying 'areas of possible improvement' and 'problems', is supplied with data by CEPEJ's members/national correspondents (which by and large correspond with national Ministries of Justice). Their responses are analysed and processed by the CEPEJ Secretariat.

The scheme is composed by six general indicators: demographic and economic data (number of inhabitants, GDP, budget allocated to courts, etc.); legal aid (access to justice, including number of legal aid cases), organisation of the court system and the public prosecution (including number of judges and prosecutors, level of computer facilities); the performance and workload of courts and the public prosecution (including number of cases related to Article 6 ECHR, number of civil and administrative law cases, number of cases received and treated by the public prosecutor, number of criminal cases); execution of court decisions and legal and judicial reform. On the basis of this method CEPEJ analyses quantitative and qualitative data and produces reports, statistics, 'best practices', guidelines, action plans, opinions and general comments.

CEPEJ data feeds into the so-called 'EU Justice Scoreboard', which among its various data sources uses information provided by EU Member States using the CEPEJ methodology.[66] The 2015 edition of the EU Justice Scoreboard states,

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[65] European Commission for Democracy through Law, (Venice Commission), Draft Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Opinion No. 833/2015, Cdl(2016)003, 26 February 2016

[66] The 2015 EU Justice Scoreboard, retrievable from http://ec.europa.eu/justice/effective-justice/files/justice_Scoreboard_2015_en.pdf.

> Most of the quantitative data are currently provided by the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) with which the Commission has concluded a contract in order to carry out a specific annual study. These data are from 2013 and have been provided by Member States according to the CEPEJ methodology. This year the data have been collected by CEPEJ specifically for EU Member States. The study also provides country fiches which give more context and should be read together with the figures.[67]

1.3.3.4 Mutual evaluation and peer-review

One of the instruments assessed in the context of the CoE uses a mutual evaluation or peer-review method of monitoring and evaluation, i.e. GRECO. The Group of States against Corruption implements a 'horizontal evaluation procedure' where all State parties are evaluated in the same round and which consists of a system of 'mutual evaluation'. So far GRECO has launched four evaluation rounds. Each member identifies a maximum of five experts who will be able to perform the evaluation tasks in the scope of 'evaluation teams'. A questionnaire is elaborated for each evaluation round, which provides the framework for the evaluation procedure. The evaluation teams will examine the answers to the questionnaire and can request additional information from the member State parties. This is accompanied by 'country visits' following the instruction of GRECO for the purpose of gathering extra information related to law or practical elements (with two months' prior notice). The results of the procedure are 'evaluation reports', which are confidential in nature.

The European Commission has used GRECO data in its 2014 Anti-Corruption Report,[68] which states,

> The Commission was determined to avoid duplicating existing reporting mechanisms and adding to the administrative burden on Member States which are subject to various resource intensive peer review evaluations (GRECO, OECD, UNCAC, FATF, Moneyval). The report is therefore not based on detailed questionnaires or expert country visits. It is based on the abundance of information available from existing monitoring mechanisms, together with data from other sources including national public authorities, research carried out by academic institutions, independent experts, think-tanks, civil society organisations etc.[69]

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[67] *Id.* at 5. For the information used by the Commission in conducting the Scoreboard it is stated that "[w]hen preparing the EU Justice Scoreboard for 2015, the European Commission asked the Council of Europe's Commission for the Evaluation of the Efficiency of Justice (CEPEJ) to produce a *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013*. The Commission also made use of field studies that were commissioned to external contractors for this purpose: *Case study on the functioning of enforcement proceedings relating to judicial decisions in Member States* and *study on the economic efficiency and legal effectiveness of review and remedies procedures for public contracts*", quoted from The EU Justice Scoreboard: Towards more effective justice systems in the EU, 9 March 2015, http://ec.europa.eu/justice/newsroom/effective-justice/news/150309_en.htm. Refer to European Commission for the Efficiency of Justice (CEPEJ) (2015), Study on the functioning of judicial systems in the EU Member States Facts and figures from the CEPEJ questionnaires 2010-2012-2013, CEPEJ(2014)17final (v2.0 – 16 feb.2015), 16 February 2015. See Annex 3 of the CEPEJ study which provides an 'Extract of the CEPEJ Scheme for evaluating Judicial Systems', 867 and ss.

[68] European Commission, EU Anti-Corruption Report, COM(2014) 38 final, 3 February 2014. For more information refer to http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm.

[69] It also emphasises, "*The report does not replicate the detailed, technical analysis included in GRECO or the OECD reports, though it builds upon their recommendations whenever they are still not implemented and relevant to key issues in focus as identified for a particular country chapter. By bringing to the fore selected recommendations that have been previously identified within other mechanisms, the report aims at promoting their implementation. The synergy with GRECO is particular important given that it covers all EU Member States as well as other European countries of relevance for future enlargement and the Eastern Partnership. The Commission is currently taking measures which will allow full accession of the EU in the future, allowing also for closer cooperation in view of subsequent editions of the EU Anti-Corruption Report*", at 41.

1.3.3.5 Country visits

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) uses a country visit model in its monitoring competences. The CPT organises visits to places of detention to examine treatment of individuals who are deprived of their liberty. CPT members are to be given unlimited access to any national detention facilities and can carry out interviews and communications with any domestic actor or person of relevance for their assessment of the situation in the context at issue.

The visit leads to the elaboration of a country general report which will lay down the facts (findings), taking account of the observations provided by the State party, and recommendations to address the situation, along with comments and requests for further information, if necessary. The general reports are developed following a set of thematic standards which deal with law enforcement agencies, prisons, psychiatric institutions, immigration detention, juveniles deprived of their liberty under criminal investigation, women deprived of their liberty, documenting and reporting medical evidence of ill-treatment, combating impunity and electrical discharge weapons.

1.3.4 Follow-up

1.3.4.1 UN

The UN Treaty system provides a toolbox of follow-up special procedures and institutional arrangements intended to ensure the implementation by State parties of the suggestions and recommendations resulting from the several monitoring venues and procedures (**Annex 3** provides a detailed overview). The status of the 'follow-up' procedures are provided in a chart which is maintained on the websites of the Committees.

Some UN Committees use a special 'follow-up' procedure on the implementation of the conclusions and recommendations submitted to State parties.[70] That is the case, for instance, of CAT, CERD, CED, CEDAW and the Human Rights Committee. These generally require State parties to provide data on how their recommendations have been followed up or implemented.[71] Some Treaty bodies issue recommendations on how State parties can better ensure the implementation of a specific Convention or Covenant. Some recommendations may require 'immediate action' by the State concerned and require reporting back in a period of one year (e.g. the Human Rights Committee). Some Committees (e.g. CERD) may request additional information or even a new written report on the implementation of their recommendations.

The Human Rights Committee elaborates a follow-up progress report for every session, which in addition to information on follow-up actions includes additional data provided by civil society organisations (see **Annex 2** for more information).[72] It appoints a special rapporteur to report back to the Committee on the information received by the State party on implementation of the recommendations issued. In cases of non-cooperation by the government, the special rapporteur may call for a meeting with a representative of the State party. The Human Rights Committee has developed

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[70] For a full overview by Committee refer to http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx.

[71] "In addition to indicating the time frame for follow-up to specific recommendations, CERD also draws the attention of the State party concerned to a few recommendations of particular importance and requests detailed information their implementation in the next periodic report. CAT invites States parties concerned to accept to report under the optional reporting procedure within a one-year time frame, in order to prepare the list of issues prior to reporting in a timely manner", at 14.

[72] *Id.* at 3.

a table containing all the relevant information concerning follow-up procedures with State parties since July 2006.

In all its concluding observations the CESCR asks the State to report back on implementation issues in the next periodic reporting exercise. It may also request that the State provide more detailed information or statistics on specific follow-up issues before the next reporting period. CESCR can ask a State party to implement a technical assistance mission (composed by Committee members). If the State is not willing to collaborate in the procedure, the CESCR can refer the issue to the Economic and Social Council.

The Committee on the Elimination of Discrimination against Women (CEDAW) has had a follow-up procedure since 2008, which calls on States to provide follow-up information on how they have taken steps to address its recommendations within a period of one or two years. Similar to the Human Rights Committee, it also appoints a rapporteur on follow-up and a deputy rapporteur who monitors and examines the follow-up information. A similar special procedure is practised by the Committee against Torture (CAT), which appoints a rapporteur to follow up on the State party's compliance with requests and sends reminders to the governments concerned. Other UN Treaty bodies also appoint a rapporteur to follow up and report back to the Committee about activities (e.g. The Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances).

Despite the development of 'special follow-up procedures' by UN Treaty bodies, there is evidence that some State parties do not comply with their reporting obligations. A clear example is the CAT Annual Report (2014-15: Chapter II), which states,

> The Committee deplores the fact that that some States parties do not comply with their reporting obligations under article 19 of the Convention. At the time of reporting, there were 28 States parties with overdue initial reports and 37 States parties with overdue periodic reports.

The same Annual Report makes reference to the oral report to the Committee by the Rapporteur in November 2014, which reads,

> …[I]n the light of the treaty body strengthening process and the Convention against Torture Initiative to ensure universal ratification within 10 years, it was incumbent upon the Committee to enhance the follow-up procedure. [The Rapporteur] also said that two overriding questions were how to strengthen compliance with the Convention and how to measure the extent of that compliance. In May 2015, he suggested that the follow-up procedure could be strengthened in several ways, such as by making the recommendations clearer and more implementable, inviting State parties to meet with the Committee on follow-up, using an assessment grading system to evaluate compliance, and using quantitative indicators to assist with the assessment of implementation. He also highlighted the role of civil society organizations in the follow-up procedure.[73]

Some UN Treaty bodies do not have special follow-up procedures. For instance, the only follow-up tools available to the Subcommittee on the Prevention of Torture (SPT) in cases where a State party refuses to cooperate and take steps to address its recommendations is to request CAT to make a public statement on the matter and publish the SPT country report. The Committee on the Rights of the Child (CRC) does not have a general obligation or special procedure either. Still, the State is 'expected' to send the Committee written information on how it has addressed its recommendations. CRC can send 'any relevant information' and reports to the Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations Children's Fund (UNICEF), International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health

[73] Page 17 of the annual report.

Organisation (WHO) and the Office of the United Nations High Commissioner for Refugees (UNHCR), containing requests or calling for the need to ensure technical assistance/advice to the country concerned. CRC has informed State parties that in cases where they do not submit the necessary information the Committee will in any case consider the situation of child rights in the State. UNICEF contributes to the follow-up of concluding observations by CRC.

As stated above, the monitoring results, conclusions and recommendations resulting from UN Special Procedures and Treaty bodies feed into the work of the Universal Period Review (UPR). The State under review is expected to provide information on its actions to address the recommendations made by the UPR first review. In cases of persistent non-cooperation by State parties, the Human Rights Council may decide on the appropriate measures to take.

1.3.4.2 Council of Europe

The Monitoring Committee of the Parliamentary Assembly has at its disposal the possibility to penalise 'persistent failures' by Member States to comply with their obligations and lacking cooperation in monitoring processes. It may adopt a Resolution and/or Recommendation "by the non-ratification of the credentials of a national parliamentary delegation or by the annulment of ratified credentials". In case of persistence, the Assembly may submit a recommendation to the Committee of Ministers for taking appropriate actions (see **Annex 3** for more details on specific actions).

Some CoE monitoring bodies have no formal procedures for ensuring the implementation of their conclusions and recommendations by State parties. This is the case, for instance, of the Venice Commission and CEPEJ, which do not have any specific follow-up procedure. The Venice Commission only offers facultative assistance to State parties to implement its opinions and recommendations.

GRECO does provide a more elaborate procedure for following, via a graduated approach, the implementation of its recommendations by governments. GRECO has the competence to re-examine outstanding recommendations and issue compliance reports, which may include an overall conclusion on the implementation of all the recommendations. GRECO can also issue public statements when a member remains passive or has taken insufficient action to address its recommendations. Similarly, the CPT may deliver a public statement in cases where a party fails to cooperate or refuses to improve the situation in light of its recommendations.

1.4 Scholarly approaches to overcoming challenges

The Union's vulnerabilities when it comes to safeguarding its values are fundamental in nature and pose a very serious threat to the success of the whole integration project. Given the perceived novel nature of the threat – as the adherence to the values of Article 2 TEU had been taken for granted before the backsliding of several Member States in recent years[74] – simply falling back on the old time-tested approaches is not an option: academic literature had until recently focused exclusively on the Union's

[74] The term has been coined by Jan-Werner Müller, see J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' *Working Paper* No. 3, Washington DC: Transatlantic Academy (2013).

own adherence to the rule of law[75] and the candidate countries' records in this area,[76] assuming that any – indeed, *all* – serious rule of law deficiencies within each EU Member State would be dealt with by the relevant national authorities.

The problems we are currently facing were thus largely unforeseen in 'a Community based on the rule of law',[77] all the instruments described above notwithstanding. Academics and policy-makers have however quickly caught up with the issue of rule of law backsliding and constitutional capture in the EU and formulated an array of proposals of how to deal with the outstanding problems.[78]

The majority of proposals focus on institutional action, either within the context of the Union, or with the involvement of outside actors and institutions. The first types of proposals include the actions by both existing institutions – the Council,[79] the European Commission,[80] the Fundamental Rights Agency of the EU[81] – and actions by institutions yet to be created, such as the proposed 'Copenhagen Commission'.[82] Reliance on the Member States' courts[83] and a potential fine-tuning of the EU's powers

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[75] L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* No. 04/09, (2009); M. L. Fernández Esteban, *The Rule of Law in the European Constitution*, The Hague: Kluwer, 1999. One has to note here that such accounts have always been self-congratulatory, marking an important weakness of scholarship on this, given that a much more critical account is also possible. Once the EU's own adherence to the rule of law and other values is not merely presumed but tested empirically, numerous questions arise: G. Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in the EU Two-Level System', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming; D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015; A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' 29 *Oxford Journal of Legal Studies* 549–577 (2009).

[76] E.g. D. Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law', 8 *European Integration online Papers* 10 (2004).

[77] Case 294/83 *Partie Ecologiste 'Les Verts' v. Parliament* [1986] ECR 1339, para. 23.

[78] For brief overviews, see C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014); EPRS briefing 'Member States and the rule of law Dealing with a breach of EU values' (2015) http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf. For more in-depth analyses, see the contributions in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming; A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2016, forthcoming.

[79] Council of the European Union, Press Release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, 20–21; E. Hirsch-Ballin, 'Mutual Trust: The Virtue of Reciprocity Strengthening the Acceptance of the Rule of Law through Peer Review', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[80] K.L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming (outlining how to empower the Commission to intervene in the cases related to the breach of Art. 2 TEU based on a so-called 'systemic infringement procedure', allowing for a more effective deployment of Art. 258 TFEU).

[81] G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[82] J.-W. Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' 21 *European Law Journal* 2, 141–160, (2015); J.-W. Müller, 'The EU as a Militant Democracy', *Revista de Estudios Políticos*,141–162, (2014).

[83] A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, 'Reverse Solange–Protecting the essence of fundamental rights against EU Member States' 49 *Common Market Law Review*, 2, 489–519 (2012). For analyses, see J. Croon-Gestefeld, 'Reverse *Solange* – Union Citizenship as a Detour on the Route to European Rights Protection against National Infringements', in: D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2016, forthcoming; D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', XXXIII *Polish Yearbook of International Law*, 145–170 (2014). See also an upgraded versions of this proposal: A. von Bogdandy, C. Antpöhler, J. Dickschen, S. Hentrei, M.

through a broad interpretation of the Charter of Fundamental Rights of the EU[84] by the Court of Justice of the European Union have also been advocated. The proposals of the second type look to the outside, arguing for the involvement of the Venice Commission.[85]

Not all of the proposals fall within these two categories. Two proposals on the table are Member State-focused and go beyond mere supranational/international involvement, focusing on what the Member States themselves can do. The first among the two expects the Member States to take the lead in bringing systemic infringement actions to the Court of Justice,[86] while the second investigates Member States' direct retaliation against backsliding peers, grafting the alien tissue of reciprocity on the body of the EU legal order.[87] A watered down version of direct Member State involvement is the encouragement of peer-review among them, which, however, is most likely to happen within the framework of the Council, bringing us back to the main bulk of the proposals: those focusing on the institutions.

Besides the legally-articulated ways, there is of course always a possibility of *ad hoc* actions, akin to the kind that marked the EU's involvement in Austrian politics 15 years ago in reaction to the building of a governing coalition in that State, which involved the Freiheitliche Partei Österreichs (FPÖ), an extreme right nationalist party, which was still unusual in the political context of the time, but now looks to some degree as a strange exaggeration.[88] We leave such possible *ad hoc* actions outside the scope of this Research Paper, noting only that their legality is of dubious nature, given the abundance of procedures in the Treaties designed specifically to deal with the situation at hand, including, but not limited to, the two procedures of Article 7 TEU.[89]

In this vast sea of academic proposals, eight stand out. They offer contrasting visions, and due to the complexity of the problems we are facing, none of them appears sufficient on its own to solve the problem at hand, but they nonetheless offer EU policy-makers plenty of food for thought. Most important, there is enormous potential to deploy different elements of these in combination with each other. While the majority of them attempt to offer short-term solutions and are thus deployable

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Kottmann and M. Smrkolj, 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-*Solange* Doctrine', in: A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford: Hart, 2015, 248–267; A. von Bogdandy, C. Antpöller and M. Ioannidis, 'Enforcing European Values', in: A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2016, forthcoming.

[84] A. Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[85] K. Tuori, 'From Copenhagen to Venice', in: C. Closa and D Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union,* Cambridge: Cambridge University Press, 2016, forthcoming; J. Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law', in: A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford: Hart, 2015, 291–310.

[86] D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', 7 *The Hague Journal of the Rule of Law* 2, 153–174 (2015).

[87] I. Canor, 'My Brother's Keeper? Horizontal *Solange*: "An Ever Closer *Distrust* among the Peoples of Europe"', 50 *Common Market Law Review* 2, 383–421 (2013).

[88] GG.N. Toggenburg 'La crisi austriaca: delicate equilibrismi sospesi tra molte dimensioni' 2 *Diritto pubblico comparato ed europeo*, 735–756 (2001); K. Lachmayer, 'Questioning the Basic Values – Austria and Jörg Haider', in: A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2016, forthcoming.

[89] See, for a meticulous analysis, C. Hillion, 'Overseeing the Rule of Law in the EU', in: C. Closa and D. Kochenov, *Reinforcing the Rule of Law Oversight in the European Union,* Cambridge: Cambridge University Press, 2016, forthcoming; L. F. M. Besselink, 'The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives', in: A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2016, forthcoming.

immediately (at least according to their creators), several unquestionably require a Treaty change, which is clearly an unfeasible option in the current legal-political climate. We still chose to include several such proposals in this overview in order to demonstrate the options available for long-term solutions to current problems. One should not doubt that the need to ensure the observation of Union values will not disappear in the years to come; it will rather become more acute.

The same concerns the emphasis on the actual *enforcement* of values, which is present in the proposals to a varying degree: not all of them come equipped with a fine-tuned sanctioning mechanism beyond a possibility to use the exiting instruments, such as the shaming of the problematic Member State, or the suspension of the participation of that State in the Union institutions via Article 7 TEU or, alternatively, shaping and financial penalties via Articles 258, 259 and 260 TFEU.

The key proposals we chose to discuss in brief include:

a. Systemic infringement procedure (Scheppele).
b. Biting intergovernmentalism (Kochenov).
c. Reverse *Solange* (von Bogdandy).
d. The Copenhagen Commission (Müller).
e. The 'exit card' (Closa).
f. Peer review and 'Horizontal *Solange*' (Hirsch Ballin/Canor).
g. Unrestricted fundamental rights jurisdiction for the EU (Reding).
h. Outsourcing monitoring and enforcement to non-EU institutions (Buquicchio).

1.4.1 Systemic infringement procedure

Kim Lane Scheppele's 'systemic infringement procedure' proposal deserves to be examined first.[90] In a nutshell, this proposal aims to ensure the most effective use of the already existing infringement procedures, which have been used relatively successfully by the Commission in the context of the enforcement of EU law since the founding of the Communities, as analysed above. The proposal makes a sound attempt to address the shortcomings of the already existing EU law enforcement machinery concerning its ability to deal with any potential as well as actual serious breaches of EU values. This is done in two fundamental steps, covering both the procedure for stating the breach of values and the enforcement of compliance.

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[90] K.L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016; her proposal has been analysed in the *Verfassungsblog* in great detail. For the details of the proposal, see K.L. Scheppele, 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions', 2013, http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf; for the proposal in brief, see K.L. Scheppele, 'EU Commission v. Hungary: The Case for the "Systemic Infringement Action"', *Verfassungsblog*, 22 November 2013, http://www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.Uw4mfPuzm5I. For the discussion, see, *Verfassungsblog*, 'Hungary – Taking Action, Episode 2: The Systemic Infringement Action', http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.Uw4m4Puzm5J. See also K.L. Scheppele, 'The EU Commission v. Hungary: The Case for the "Systemic Infringement Action,"' Assizes de la Justice, European Commission, November 2013, http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf and K.L. Scheppele, 'Making Infringement Procedures More Effective: A Comment on Commission v Hungary, Case C-288/12' *Eutopia*, 29 April 2014, http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/.

Firstly, Scheppele suggests enabling the bundling up of infringements so as to empower the Commission to present a whole infringement package to the CJEU, rather than pursuing single instances of non-compliance on a case-by-case basis. The crucial underlying assumption in this approach is that pursuing numerous infringements simultaneously amounts to more than just the sum of its parts, as it should enable the Commission to present a clear picture of systemic non-compliance as regards Article 2 TEU. In this way – especially if Article 2 TEU is coupled with the duty of loyalty laid down in Article 4(3) TEU[91] – the Court could for instance hold that the rule of law has been breached by a Member State on the basis of multiple single breaches of EU law bundled together and submitted by the Commission in one go. Multiple individual beaches might not even be required, as long as a complex pattern of developments described in the case testifies to a violation of EU values. While it is often assumed that Article 2 TEU lacks justiciability, combining it with Article 4 TEU could potentially solve this problem, with jurisdiction stemming from the overwhelming demonstration of the seriousness of the breach. Moreover, this 'bundling approach' would not in fact be new, although it has only been used so far with respect to a systemic breach of the EU *acquis*.[92] Scheppele's proposal should therefore be commended for offering a creative route to enforcing Article 2 TEU on the basis of an already existing and well-tried procedure through merely altering the mode and scope of its application, by taking a step from strictly dwelling in the field of the *acquis* of the Union into the area of values.

The second part of Scheppele's proposal is just as important and is designed to deal with the limited effectiveness of financial sanctions as a tool to ensure compliance. The proposal is simple: Rather than imposing financial sanctions, the EU should seek to subtract any EU funds that the relevant Member State is entitled to receive. Although some secondary legislation would likely be needed to make this part of the proposal a reality,[93] it is definitely an approach to be considered very seriously. While the effectiveness of this change may not work with respect to countries that do not depend on EU moneys, it may well be effective with respect to Member States particularly dependent on EU funds, such as Hungary. While both elements of the proposal are legally solid, the weakest spot is the second part of the proposal, not the first. Given that sanctions are usually particularly ineffective in bringing about a regime change, any country which is not merely becoming autocratic but *already* is will be most unlikely to change its ways under financial pressure.[94] This problem is generally applicable to virtually all the proposals to be considered below, however: not much can be done with money against an autocratic government which is particularly nasty and absolutely determined. Some other tools should be found. There is a second important weak spot: the Commission's approach to reading Article 258 TFEU and applying this instrument seems to be hostile to taking EU values into account when bringing a case. This resulted in a number of missed opportunities – the judicial retirement case with regard to Hungary, which was a glorified loss, in terms of the Rule of Law, rather than a win, being one example. Besides, this approach also sees the value of the Charter of Fundamental Rights of the Union potentially

[91] "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union…"

[92] E.g. Case C-494/01 *Commission v. Ireland (Irish Waste)* [2005] ECR I-3331.

[93] A certain change in the ECJ's approach to the calculation of penalties under Article 260 TFEU, in particular the criterion of the 'ability to pay', could also be in need of a certain rethinking but is unlikely to form an overwhelming obstacle to the implementation of the proposal: D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', XXXIII *Polish Yearbook of International Law*, 145–170 (2014).

[94] N. Tocci, *Can the EU Promote Democracy and Human Rights through the ENP? The Case for Refocusing on the Rule of Law*, in: M. Cremona and G. Meloni (eds.), *The European Neighbourhood Policy: A Framework for Modernisation?*, 2007/21 EUI Working Paper LAW, 2007, 23–35, 29. See also D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', XXXIII *Polish Yearbook of International Law*, 145–170 (2014), 168.

undermined, as no case has been brought under Article 258 TFEU based, at least in part, on the Charter.[95] The proposal, however legally sound, is bound to be unworkable, unless the Commission changes its counterproductive and artificially narrow approach to the scope of Article 258 TFEU.

All in all, Scheppele's proposal creatively attempts to solve two key problems which have prevented the effective use of the EU's infringement procedure against Member States guilty of violating Article 2 TEU values.[96]

1.4.2 Biting intergovernmentalism

'Biting intergovernmentalism'[97] builds on the idea of utilising the systemic infringement procedure explained above, but offers a potentially more sensitive way to deploy the procedure, while not expecting the Commission to change its ways. In this sense, biting intergovernmentalism is deployable immediately. The core idea consists in bringing systemic infringement cases based on Article 259 TFEU, rather than Article 258 TFEU. The former provision allows the Member States themselves to bring to court their peers violating the Treaties. The presumption behind the provision is that all the members of the Union are equally interested – just as the institutions – in ensuring sustained compliance with the Treaties by their peers. Importantly, no demonstration of direct concern is needed to meet the standing requirements: the mere fact of a breach of EU law is sufficient.[98]

Under Article 258 TFEU the Commission enjoys absolute discretion in bringing Article 258 TFEU cases.[99] Given that it might choose, at any moment, not to bring a case even where there is a clear breach, or, which would be even more counterproductive in the context of values enforcement, to bring a case based merely on the violation of the rules of the *acquis sensu stricto*, getting 27 additional potential litigators on board is hugely important. True, the Commission is the first point of contact for a Member State bringing a case under Article 259 TFEU – the provision even allows the Commission to take over. What is crucial in this context, however, is that the Member State is not bound by the Commission's exercise of discretion. This concerns both the Commission's decision *not* to take over the case and the Commission's selection of arguments on the basis of which to proceed once the case has been taken over. In both instances the Member State concerned with the failure to abide by the Treaties evident from the state of affairs in one (or more) of its peers is free to bring the latter to court, construing the case as it sees fit.[100]

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[95] A. Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings' 14 *ERA Forum*, 573–587 (2013).

[96] For a more detailed assessment and criticism of this proposal, see *Verfassungsblog*, 'Hungary – Taking Action, Episode 2: The Systemic Infringement Action', available online at http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.Uw4m4Puzm5J. C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014); D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', XXXIII *Polish Yearbook of International Law*, 145–170 (2014).

[97] D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', 7 *The Hague Journal of the Rule of Law* 2, 153–174 (2015).

[98] This is the case since Article 259 – just like 258 TFEU – is not intended to protect the claimants' rights. Rather, the provisions aim to ensure general compliance with EU law, e.g. Case C-431/92 *Commission* v. *Germany* [1995] ECR I-2189, para. 21. Compare L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings', 47 *Common Market Law Review* 1, 9–61 (2010), 13.

[99] E.g. Opinion of AG Tizzano in Joined cases C-466 and 476/98 *Commission* v. *UK et al.* [2002] ECR I-9741, para. 30. Compare L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings', 47 *Common Market Law Review* 1, 9–61 (2010), 14.

[100] See, e.g. Case 141/78 *France* v. *UK* [1979] ECR 2923. For an overview of relevant practice, see, e.g. L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings', 47 *Common Market Law Review* 1, 9–61 (2010), 27 (and the references cited therein).

This is the first great advantage of the biting intergovernmentalism proposal over a simple systemic infringement action brought by the Commission: the Commission's limited reading of the scope of infringement proceedings cannot deprive biting intergovernmentalism of its effectiveness, making the deployment of a systemic infringement proposal straightforward and available immediately.

There is a second advantage, however: the Union is constantly criticised for 'creeping competences' and 'power grabs', allowing the Member States failing to comply with the values of Article 2 TEU to (misre)present the Commission's systemic infringement action under Article 258 TFEU as a blunt attempt to violate Member States sovereignty by a power-hungry Union. The same argument is difficult to make when another Member State is bringing a systemic infringement action, which gives the biting intergovernmentalism proposal a political edge.

With regard to the actual enforcement of values once a non-compliant Member State has been found in breach under Article 259 TFEU, the standard financial sanctioning procedure will then need to be applied.

1.4.3 'Reverse Solange'

One of the most widely discussed proposals to consider is based on AG Poiares Maduro's Opinion in *Centro Europa* and was popularised by Armin von Bogdandy.[101] Similarly to the two proposals discussed above, the existing law and institutional structure of the Union are relied upon to address the rule of law crises in the EU, thus no Treaty change is required. The core idea focuses on grave violations of fundamental rights. Once the seriousness of rights violations in a given Member State is particularly grave, this allows the Union courts (including that very Member State's courts in their capacity as enforcers of EU law) to intervene. The graveness of violation would create jurisdiction.[102]

This proposal is known as the 'Reverse *Solange*' as it purports to espouse the logic of the *Budesverfassungsgericht* (*BVerfG*) in the so-called *Solange I* and *Solange II* cases.[103] In these two cases, the *BVerfG* reserved for itself the final say on matters of EU law in situations where EU law could threaten

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[101] Opinion of the Advocate General, Case C-380/05 *Centro Europa* [2007] ECR I-349, para. 14 *et seq*. See, for an academic articulation: A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, 'Reverse Solange–Protecting the essence of fundamental rights against EU Member States' 49 *Common Market Law Review*, 2, 489–519 (2012). For the criticism of von Bogdandy's proposal, see: *Verfassungsblog*, 'Recue Package for Fundamental Rights', available at http://www.verfassungsblog.de/rettungsschirm-fr-grundrechte-ein-onlinesymposium-auf-dem-verfassungsblog-2/#.Uw4rVPuzm5I. See also D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', XXXIII *Polish Yearbook of International Law*, 145–170 (2014), and the upgraded versions of the proposal: A. von Bogdandy, C. Antpöhler, J. Dickschen, S. Hentrei, M. Kottmann and M. Smrkolj, 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-*Solange* Doctrine', in: A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford: Hart, 2015, 248–267; A. von Bogdandy, C. Antpöller and M. Ioannidis, 'Enforcing European Values', in: A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2016.

[102] In this sense the proposal is in line with the case law of the Court of Justice, which finds jurisdiction based on the gravity of consequences caused by the deprivation of rights, e.g. D. Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' 18 *Columbia Journal of European Law* 56–109 (2011), 56.

[103] BVerfGE 37, 271 (1974); BVerfGE 73, 339 (1986); BVerfGE 89, 155 (1993). For analysis, see, e.g. J.H.H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', 1 *European Law Journal* 3, 219–258 (1995); M. Herdegen, 'Maastricht Decision and the German Constitutional Court: Constitutional Restraints from an "Ever Closer Union"', 31 *Common Market Law Review,* 235–249 (1994). See also BVerfGE 63, 2267 (2009). For analysis, see, e.g. D. Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court', 46 *Common Market Law Review* 6, 1795–1822 (2009); C. Wohlfahrt, 'The Lisbon Case: A Critical Summary', 10 *German Law Journal* 8, 1277;–1286 (2009); A. Steinbach, 'The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?', 11 *German Law Journal* 4, 367–390 (2010).

the core of human rights protection established by the German Basic Law. Although the *BVerfG* has never actually acted on its threat, its *Solange* jurisprudence led the Court of Justice to reconsider its earlier stance regarding human rights protection in the early 1960s and hold that respect for human rights is one of the key conditions governing the lawfulness of EU acts.[104]

The essence of von Bogdandy's proposal is to 'reverse' the *Solange* approach by allowing the Court of Justice to move within the domain of the national law with a view to protecting EU values. The authors of the proposal presume that such a jurisdictional move would only be possible in truly exceptional cases of systemic non-compliance.[105] It is suggested that in a situation where human rights would be systemically violated in a 'captured' Member State, national courts should be empowered to make a preliminary reference under Article 267 TFEU in order to invite the Court of Justice to consider the legality of national actions in the light of Article 2 TEU, which the Court is not currently entitled to do.

While normatively defensible, this proposal however suffers from several shortcomings, as it is most likely unworkable both in theory and in practice. Most important, it does not even address the key issues related to the lack of compliance with Article 2 TEU in some Member States. This is due, first of all, to the proposal's heavy reliance on national courts, whereas the judiciary is normally the first institution which illiberal forces would seek to capture, as the Hungarian example shows. Tellingly, Poland follows suit very closely, as obstructing the work of the Constitutional Tribunal was among the priorities of the new government. If national courts are packed and decapitated,[106] one can hardly expect them to play any effective role in promoting Article 2 TEU compliance in the captured State of which they are part.

More important, however, the requirement of systemic non-compliance makes the implementation of the proposal practically impossible: the threshold is simply too high.[107] Ultimately, the presumption that the logic of trying not to give up *existing* jurisdiction – the original driver behind *BVerfG*'s *Solange* – and the logic behind claiming *new* powers by the ECJ – which is the driver behind the Reverse *Solange* proposal – are comparable seems to significantly underplay the fundamental differences between the two.[108] As a consequence, the so-called 'Reverse *Solange*' seems to be misnamed.

The last thing to say about this proposal is that not all backsliding in terms of the rule of law implies grave and persistent human rights violations. Quite the contrary seems to be true: a well-executed dismantlement of the rule of law and the constitutional checks and balances can happen – or at least go through crucial initial stages – without blunt violations of human rights.[109] Once the main jurisdictional argument made in Reverse *Solange* is considered outside of its rights context, however, it is very similar in essence to the one employed in the context of the systemic infringements proposal: the graveness of violation as such combined with their demonstrable character allows for intervention. For the reasons

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[104] E.g. Case C-1/58 *Stork* [1958-59] ECR 17. For an analysis, see: B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in: P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, 177–213.

[105] A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, 'Reverse Solange–Protecting the essence of fundamental rights against EU Member States' 49 *Common Market Law Review*, 2, 489–519 (2012).

[106] E.g. *Baka v. Hungary*. Application no. 20261/12, 27 May 2014.

[107] The example used in the proposal itself is 'the refusal to abide by the decision of the European Court of Human Rights'. See A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, 'Reverse Solange–Protecting the essence of fundamental rights against EU Member States' 49 *Common Market Law Review*, 2, 489–519 (2012), 513.

[108] See D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', XXXIII *Polish Yearbook of International Law*, 145–170 (2014), for a very detailed analysis.

[109] C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014).

above, however, it is abundantly clear that systemic infringement procedures – via either Article 258 TFEU or Article 259 TFEU – are overwhelmingly preferable to Reverse *Solange*: they are not limited in their deployment to human rights; the thresholds are more manageable and formulated more clearly; they do not rely on the national institutions in the backsliding Member States.

The problem of enforcement *sensu stricto* is as acute with Reverse *Solange* as with other proposals discussed: it comes down to Article 260 TFEU again, the effectivene ss of which is not beyond doubt.

1.4.4 The Copenhagen Commission

None of the proposals mentioned above suggested the creation of a new EU body, unlike the proposal put forward by Jan-Werner Müller who proposed to create a 'Copenhagen Commission'. This new body would ensure regular monitoring and the enforcement of compliance of current EU Member States with Article 2 TEU. Thus this proposal does not, unlike the previous proposals, rely on existing law and structures.[110]

The creation of a special Copenhagen Commission is potentially very attractive, as it will be an important step in the direction of establishing a "swift and independent monitoring mechanism and an early-warning system", which the Tavares Report also wanted to see in place.[111] The new body would build on the Copenhagen criteria idea, going back to the 1993 European Council in Copenhagen, which established, *inter alia*, the political conditions for membership in the Union, including respect for democracy, the rule of law and the protection of fundamental rights, which had to be complied with by all the countries willing to join.[112]

Unlike the previously examined proposals, which are mostly related to mending the holes in the EU's Article 2 TEU enforcement by relying on the existing tools already in place, the creation of a special organ with a new mechanism would clearly amount to a systemic mid- to long-term solution, which is no doubt preferable, as it would potentially allow for turning the EU into a full-fledged militant democracy.[113] This being said, the institutional innovation in question should not be viewed as necessarily stemming from a Treaty change. Some authors argued that it was possible to establish a binding 'Copenhagen mechanism' within the current Treaty framework, by inter-institutional agreement with the contribution of independent academic experts in the process of monitoring Member States' compliance with article 2 TEU.[114] Yet another option to consider, in this regard, is to involve the

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[110] J.-W. Müller, 'For a Copenhagen Commission: The Case Restated', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming; Jan-Werner Müller, 'Why the EU Needs a Democracy and Rule of Law Watchdog', *Aspen Review* 2/2015, http://www.aspeninstitute.cz/en/article/2-2015-why-the-eu-needs-a-democracy-and-rule-of-law-watchdog/.

[111] Tavares Report, proposing a new mechanism to enforce Article 2 TEU effectively. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) commonly called after its Rapporteur 'the Tavares Report', http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0315&language=EN&ring=A7-2013-0229.

[112] C. Hillion, 'The Copenhagen Criteria and Their Progeny' in: C. Hillion (ed.), *EU Enlargement: A Legal Approach,* Oxford: Hart, 2004, 1–23; D. Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law', 8 *European Integration online Papers* 10 (2004).

[113] J.-W. Müller, 'The EU as a Militant Democracy', 165 *Revista de Estudios Políticos*, 141–162, (2014); P. Bárd, 'The Hungarian Fundamental law and related constitutional changes 2010-2013', 20 *Revue des Affaires Européennes: Law and European Affairs* 3, 457–472 (2013).

[114] 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*, CEPS 2013, available at http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf; the original study done for the Directorate General for Internal Policies of the European Parliament, PE 493.031, 2013, is available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-

Fundamental Rights Agency of the Union more in the matters of Article 2 TEU compliance, which will most likely require only the amendment of some secondary legislation.[115]

The proposal is, however, of little use in addressing immediate challenges, as the creation of any new EU body of this nature would no doubt require the approval, as well as full participation, of the Member State already experiencing problems with Article 2 TEU compliance. Moreover, questions remain as to the desirability of further complicating the institutional structure of the Union, as well as, fundamentally, the mechanics of the actual *enforcement* of the decisions of the Copenhagen Commission.

1.4.5 The 'Exit Card'

A more radical proposal still, which would definitely require a Treaty change, has been advanced by Carlos Closa.[116] It suggests the introduction of a provision akin to Article 8 of the Statute of the Council of Europe and a number of other international organisations,[117] on the basis of which the EU could force out a chronically non-compliant EU Member State. Such a new provision would complement Article 50 TEU, which currently permits voluntary withdrawal from the Union.[118] As outlined by Closa,[119] the idea is not to start throwing countries out of the Union, but to increase credibility in the sanctions, which the EU may adopt on the basis of either Article 7 TEU or Article 260 TFEU.

The option to force an EU country out would be even more radical than the so-called 'nuclear option' laid down in Article 7 TEU and which, as previously noted, has never been used. It may be that the sheer possibility of being 'kicked out' of the EU would be of greater persuasive value for the non-compliant Member State in question than the mere possibility of losing voting rights in the Council.[120]

The crucial problem with this proposal is that it can only be deployed in the long-term and unquestionably requires a Treaty change. Moreover, such a proposal will have truly far-reaching implications for the concept of EU citizenship.[121] Viewed from the citizens' standpoint, ejecting a Member State facing severe troubles in the field of the rule of law and human rights could potentially demonstrate the Union's inability to guarantee actual Article 2 TEU compliance and protect the citizens of the 'captured' State. Building upon the presumption that this option would enter the Treaties on the assumption that it is never to be used, like the Council of Europe's own Article 8 of the Statute, adding the possibility of ejecting a Member State is definitely helpful, as it will dispel the unfortunate sense that

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LIBE_ET(2013)493031_EN.pdf; S. Carrera, E. Guild and N. Hernanz, 'Rule of law or rule of thumb, A new Copenhagen mechanism for the EU', CEPS policy brief, 2013, available at http://www.ceps.eu/system/files/No%20303%20Copenhagen%20Mechanism%20for%20Fundamental%20Rights_0.pdf.

115 G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

116 C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014).

117 For a meticulous assessment, see: C. Closa, 'Protection of Democracy in Regional and International Organisations', in: A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2016, forthcoming.

118 For analyses, see: Ph. Nicolaides, 'Withdrawal from the European Union: A Typology of Effects', (2013) 20 *Maastricht Journal* 2, 209–219 (2013); Adam Łazowski, 'Withdrawal from the European Union and Alternatives to Membership', 37 *European Law Review* 5, 523–540 (2012).

119 C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014).

120 What Article 7 TEU provides for, in terms of sanctions.

121 D. Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon', (2013) 62 *International and Comparative Law Quarterly* 1, 97–136 (2013) (and the references, for an exhaustive list of relevant literature).

Article 7 TEU is the last resort measure and should thus not be used. Enriching EU law with a Member State ejection option is thus likely to be a positive development, notwithstanding the fact that, strictly speaking, it will not help solve the problems of the non-compliant Member State.

1.4.6 Peer review and Horizontal Solange

Peer review and 'Horizontal *Solange*' options are profoundly interconnected as, similarly to the biting intergovernmentalism proposal, they attempt to involve the Member States, not the Union institutions, as much as possible in solving the rule of law crises. Unlike biting intergovernmentalism, however, the deployment of these two options is either potentially non-consequential (peer review) or potentially too costly in terms of ensuring the proper functioning of the law of the Union (Horizontal *Solange*). One could be branded as a 'positive' version of the other.

The positive proposal has been made by Ernst Hirsch Ballin and a team of researchers in the Netherlands and focuses on mutual peer review of the Member States' compliance with the rule of law.[122] To a degree the Council has heeded this proposal.[123] Peer review would allow the EU to avoid a number of problems, which are at the core of all the other proposals under review. Namely, it would not require any clear definition of the scope of EU law and the *acquis*, since peer review is to happen based on the agreements between the Member States outside of the framework of EU law. Although there is an obvious problem with detaching Article 2 TEU compliance from the EU legal system, the peer review solution could be swiftly implemented. The obvious drawback of the proposal is the presumption that naming and shaming works, while we know from experience that it often does not, which explains, for instance, the inclusion of Article 260 TFEU in the Treaties: initially, the Court did not have a legal ability to fine non-compliant Member States. The Treaties were amended in the face of the reality that Member States failing to comply with EU law would ignore Court decisions calling on them to respect the law.[124] It is indeed difficult to expect fundamental change from an illiberal national government as a result of other governments stating that *tout n'est pas rose* there. The problem of enforcement persists.

The 'negative' proposal allows the Member States rather than the EU to enforce sanctions against the non-compliant government by *de facto* disapplying EU law in bilateral relations with the 'guilty' state. This approach, recently analysed by Iris Canor, has been branded 'Horizonal *Solange*'.[125] Although the idea is not new, such treatment of non-compliant Member States profoundly undermines the very foundations of EU law, which is *not* based on reciprocity.[126] It strikes therefore at the core of the *acquis* and is thus unattractive for both normative and pragmatic reasons. In essence, it has the potential to turn the EU's internal market chaotic by opening up the Pandora's box of mutual accusations and immediate retaliation by Member States – precisely what the EU has been so successful in outlawing over so many decades. This approach is thus of very limited attractiveness, merely offering countless possibilities for abuse.

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[122] See Advisory Council on International Affairs, 'The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation', *Report No. 87*, 2014, 35. See also E. Hirsch-Ballin, 'Mutual Trust: The Virtue of Reciprocity Strengthening the Acceptance of the Rule of Law through Peer Review', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union,* Cambridge: Cambridge University Press, 2016, forthcoming.

[123] Council of the EU, Press Release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, 20–21. For a critical analysis, see D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *European Constitutional Law Review,* 512–540 (2015).

[124] K. Lenaerts, I. Maselis, K. Gutman, J.T. Nowak, *EU Procedural Law*, Oxford: Oxford University Press, 2015.

[125] I. Canor, 'My Brother's Keeper? Horizontal *Solange*: "An Ever Closer *Distrust* among the Peoples of Europe"', 50 *Common Market Law Review* 2, 383–421 (2013).

[126] Joined cases 90 and 91/63 *Commission v. Belgium and Luxembourg* [1964] ECR 626.

1.4.7 Unrestricted fundamental rights jurisdiction for the EU

In her speech of 4 September 2013, the former Commission's Vice-President Reding indicated a preference for the abolition of Article 51 of our Charter of Fundamental Rights, which states that the provisions of the Charter are applicable to the Member States "only when they are implementing Union law, so as to make all fundamental rights directly applicable in the Member States, including the right to effective judicial review."[127] Such a move would certainly have a federalising effect, which would lead to a situation where the EU Charter becomes a 'federal standard' as, similarly to the Federal Bill of Rights in the US, it would eventually apply "irrespective of the subject-matter at issue, that is to say irrespective of whether it falls within federal or State competence."[128] In this scenario, however unlikely due to reluctance of several EU Member States to revise the EU Charter along these lines, the Court of Justice would be entrusted with "the task performed by the US Supreme Court, that of protecting any individual citizen, on the basis of a 'federal' standard of respect for fundamental rights, against any public authority of any kind and in any area of substantive law."[129] Article 51(1) of the Charter, however, currently clearly precludes such a 'federal' evolution as it unmistakably implies that the EU Courts still lack the power to review the compatibility with EU fundamental rights – including those of a procedural nature such as the right to an effective remedy and to a fair trial – of national rules which fall outside the scope of Union law.

Be that as it may, Reding's proposal did demonstrate a certain appetite within the Commission for a potential power-grab, however unrealistic, at least in the short- to medium-term, as a Treaty change would be required to change or abolish the provision in question. Not unsurprisingly, there is little consensus or even a sense of urgency on this issue amongst the Member States, which tend to prefer focusing on the EU's alleged democratic and possibly also justice deficit.[130] Because of the EU's own limitations when it comes to complying with its own values, it has been suggested that it would be unwise to grant the EU a wide competence to police rule of law issues and other values at national level, as he who lives in a glass house shouldn't throw stones.[131] However promising, Reding's proposal is in any event unrealistic, as is the suggestion that the Court of Justice should neutralise entirely the limitations Article 51(1) imposes on its human rights jurisdiction.[132] Such a judicial move would actually undermine the rule of law by negating the clear intent of the Union's constituent power, i.e. its Member States.

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[127] V. Reding, 'The EU and the Rule of Law: What Next?', speech delivered at CEPS, 4 September 2013. The Charter's potential is as far-reaching as it is unused: F. Hoffmeiser, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far Are Rome, Budapest and Bucharest from Brussels?', in: A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford: Hart, 2015, 195–234; A. Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings' 14 *ERA Forum*, 573–587 (2013). See also P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Questions' 39 *Common Market Law Review* 945–994 (2002).

[128] K. Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union', 6 *Columbia Journal of European Law* 1, 1–25 (2000); A. Knook, 'The Court, the Charter, and the vertical division of powers in the European Union' 42 *Common Market Law Review* 2, 367–398 (2005).

[129] K. Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union', 6 *Columbia Journal of European Law* 1, 1–25 (2000).

[130] For an analysis, see D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2015 (and the literature cited therein).

[131] J.H.H. Weiler in: C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014); D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015.

[132] A. Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

1.4.8 'Outsourcing' the monitoring/enforcement of EU values

The President of the Venice Commission, Gianni Buquicchio, put forward another noteworthy proposal.[133] He suggested that the EU should avail of the expertise of his institution. The Venice Commission, which is not an EU organ, belonging to the Council of Europe system instead, has built up a solid reputation on the issues of the rule of law both in the context of its protection and promotion in the EU countries, and elsewhere in Europe.[134] All the Member States are represented in it.

The Venice Commission proposal did not come as a surprise to those interested in the enforcement of EU values, as this body of legal experts has traditionally played an important role in ensuring compliance with the rule of law in current EU Member States.[135] Given the established tradition of fruitful cooperation between the EU and the Venice Commission, which is already a reality, deepening the relations between the two offered a promising path. Buquicchio's offer does however raise two fundamental problems for the EU: one of a practical nature, the other of a normative nature.

From a practical point of view, one must note that the Venice Commission, although it obviously possesses an impressive track-record and admirable expertise, cannot boast any enforcement machinery to ensure Article 2 TEU compliance where it is most needed. In other words, outsourcing rule of law questions to the Council of Europe would not solve the key issue: how to guarantee actual change in the non-compliant Member States?

From a normative point of view, it is important to stress that Article 2 TEU established the core values on which both the Union and the Member States are built. Outsourcing Article 2 TEU issues thus potentially amounts to sending a signal of the EU's inability to deliver on its core promise. For this reason alone taking up the kind offer from the Venice Commission would seem to be inappropriate, as it would most likely undermine further EU authority in this fundamental area. In the light of the Venice Commission's inability to enforce compliance with the rule of law standards it may formulate, taking up the offer, next to being inappropriate, would also be of little use.

1.5 Institutional approaches to overcoming problems

History and recent events proved the Copenhagen dilemma to be a very vivid one in the EU. It exists despite the fact that the EU is already a rule-of-law actor, relying on a set of policy and legal instruments, assessing (to varying degrees) Member States' compliance with democracy, the rule of law, and fundamental rights under the current treaty configurations.[136] It is so because these mechanisms constitute a scattered and patchy setting of Member States' EU surveillance systems as regards their obligations enshrined in Article 2 TEU and the Charter of Fundamental Rights.

The only 'hard law' having a Treaty-basis is Article 7 TEU as described in Chapter 1.2.1. Article 7 consists of a preventive arm in Section (1) (determining a clear risk of a breach) and a corrective arm in Sections (2)-(3) (determining a serious and persistent breach). These require different thresholds to

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[133] Speech at the Assises de la Justice. See also K. Tuori, 'From Copenhagen to Venice', in: C. Closa and D Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[134] See especially European Commission for Democracy through Law (The Venice Commission), *Report on the Rule of Law*, Strasbourg, CDL-AD (2011)003rev., 4 April 2011. J. Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law', in: A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford: Hart, 2015, 291–310.

[135] See, e.g. its important opinions on Hungary, available at http://www.venice.coe.int/WebForms/documents/by_opinion.aspx.

[136] *Id.*

become operational. Article 7(1) requires four-fifths of the Member States' votes in the Council to become operational, whereas Article 7(2) requires unanimity of all Member States except the one in breach of EU values. Determination of sanctions does not require unanimity, but only applies as a follow-up to Article 7(2). The scope of application is rightly broad, and has the clear advantage, as compared to other mechanisms, of being not only limited to Member States' actions when implementing EU law but also of covering breaches in areas where they act autonomously. It also provides for more or less clear sanctions: if there is a serious and persistent breach by a Member State of the values referred to in Article 2, this Member State might be sanctioned and suspended from voting at Council level. Article 7 has however never been activated in practice due to a number of political and legal obstacles.

Other EU-level instruments that evaluate and monitor (yet do not directly supervise) Article 2-related principles at Member State level (discussed supra under Subchapters 1.3. and 1.4.) present a number of methodological challenges. First, they constitute soft policy, i.e. are non-legally binding, or make use of benchmarking techniques and exchange 'good practices' and mutual learning processes between Member States. Second, they are affected by politicisation and as a consequence make use of non-neutral and subjective evaluation methodologies. Third, many of these are characterised by a lack of democratic accountability and judicial control gaps, with a limited or non-existent role for the European Parliament and the Court of Justice of the European Union.[137]

The new EU Framework to Strengthen the Rule of Law, described in Chapter 1.2.3, can be seen as a first attempt to construct a viable mechanism.[138] While the EU Framework to Strengthen the Rule of Law can be seen as a step in the right direction, it has a number of limitations:[139]

The formulation of a pre-Article 7 procedure is a milestone in a worrying trend of non-enforcement of European values spanning almost two decades.[140] The Amsterdam Treaty introduced the Article 7 sanction mechanism in 1999, and soon a situation arose triggering the potential applicability of the provision. Whereas Article 7 came into existence foremost out of fear of post-Communist countries' retrogression, it was ultimately Austria, one of the old Member States with a consolidated democracy, which was seen as taking a dangerous path towards rule of law backsliding by an extreme right-wing party entering into the governing coalition. The remaining then 14 Member States opted for political and diplomatic segregation of Austria; seven months later the Three Wise Men entrusted with assessing the Austrian situation came to the conclusion that European values – and in particular minority rights – were being respected.[141] The incident was "swept under the carpet as an event which was embarrassing for everyone involved".[142] More important for our purposes, the case also triggered the amendment of Article 7 by adding a preventive arm to it and breaking down the mechanism into Article

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137 J. Mortensen, 'Economic Policy Coordination in the Economic and Monetary Union: From Maastricht via the SGP to the Fiscal Pact', *CEPS Working Document* No. 381, Centre for European Policy Studies, Brussels, August, (2013).

138 European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11 March 2014.

139 D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *European Constitutional Law Review,* 512–540 (2015).

140 As Wojciech Sadurski showed, the birth of Article 7 can be traced to the Works of the Reflection Group between 1994-95, paving the way to the run-up to the 1996 Inter-Governmental Conference (IGC preparing Amsterdam Treaty). W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' 16 *Columbia Journal of European Law* 3, 385–426 (2010).

141 M. Ahtisaari, J. Frowein and M. Oreja, 'Report on the Austrian Government's Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ' (The Wise Men Report), 40 *International legal materials: current documents* 1, 102–123 (2001).

142 R. Wodak, M. Reisigl, R. de Cillia (eds.), *The Discursive Construction of National Identity*, 2009, Edinburgh: Edinburgh University Press, 236.

7(1) and Articles 7(2) and (3) (the previous Article 7). When Hungary – a new candidate for the mechanism – entered the scene, instead of making use of the already diluted procedure of Article 7(1), the Commission decided to water down the process by inserting a preventive-preventive process.

The application of this heavily problematic procedure raises even further questions. First, the monitoring dimension is rather weak in nature. It is a crisis-led monitoring instrument and does not offer a comparative and regular/periodic assessment by relevant thematic area (corresponding with the fundamental rights enshrined in the EU Charter) for each individual EU Member State, so as to have a country-by-country assessment on the state of the rule of law.[143] Second, the discretion held by the Commission to assess the situation in a Member State and activate the Framework remains great. The assessment and operability of the Framework are not subject to any sort of external scrutiny or judicial and democratic accountability method (i.e. specific roles for the Parliament and the CJEU). Third, the framework does not propose any specific model, internal strategy or policy cycle[144] for EU inter-institutional coordination between the findings resulting from the rule of law assessment and those from other EU monitoring or evaluation processes of Member State performances, such as the European semester cycle and soft economic governance.[145] Fourth, and most important, it potentially gravely undermines the effectiveness of the deployment of Article 7 TEU, in the context when more than one Member State is backsliding or in a state of constitutional capture and the Framework is only activated in relation to one, leaving the second one free to block the application of Article 7 TEU sanctions, should such a need arise.

The Communication was acknowledged by the General Affairs Council meeting of 18 March 2014.[146] Yet it has not been followed up by the Council since then. Instead, EU Member States' representatives raised several institutional and procedural questions regarding the Commission's initiative, which were examined by the Council Legal Service (CLS) in an Opinion issued in May 2014.[147] The CLS emphasised that "the respect of the rule of law by the Member States cannot be the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described in Article 7 TEU". Tongue in cheek, it concluded that Article 7 TEU cannot constitute the appropriate basis to amend this procedure and that the Commission's initiative was not compatible with the principle of conferral. It also stated that there is no legal basis in the Treaties that empowers the institutions to create a new supervision mechanism for the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, either to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abased its powers by deciding without a legal basis. The CLS suggested as an alternative the conclusion of an intergovernmental international agreement designed to supplement EU law and to ensure the respect of Article 2 TEU values. This agreement could envisage the participation of European institutions, and specific ways in which EU Member States would commit to subject themselves to a 'review system'.

The opinion of the CLS is, with all due respect, legally dubious, however. In response to their chief criticism of lacking legal basis, one may on the contrary assert that since the Commission is one of the

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143 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*, CEPS 2013, available at http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf.

144 As proposed by European Parliament (2012), Resolution on the situation of fundamental rights in the EU (2010-2011), P7_TA(2012)0500, 12 December 2012, Rapporteur: Monika Flašíková Beňová.

145 See also European Parliament (2015), Draft Report on the situation of fundamental rights in the European Union (2013-2014), (2014) 2254 (INI), 2015, Rapporteur: Laura Ferrara.

146 Press Release, Council meeting, General Affairs, 3306th, Brussels, 18 March 2014.

147 Council of the European Union, Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10296/14, Brussels, 27 May 2014.

institutions empowered, under Article 7 TEU, to trigger the procedure contained therein, it should in fact be commended for establishing clear guidelines on how such triggering is to function in practice. In other words, a strong and convincing argument can no doubt be made that Article 7(1) TEU already and necessarily *implicitly* empowers the Commission to investigate any potential risk of a serious breach of the EU's values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis.[148] Moreover, given the overwhelming level of interdependence between the EU Member States, and the blatant disregard for EU values in at least one EU country, the Commission fulfilled its duty as Guardian of the Treaties by putting forward a framework that would make Article 2 TEU operational in practice.[149]

The General Affairs Council of 16 December 2014 adopted Conclusions on ensuring respect for the rule of law as described in Chapter 1.2.4.[150] The Council committed itself to establishing a dialogue among all EU Member States to promote and safeguard the rule of law "in the framework of the Treaties". Such an inter-governmental framework of cooperation unquestionably cannot be conducive to effectively addressing current rule of law challenges across the Union.[151]

Upholding and promoting European values, or reversing the trends in the deterioration of some sub-elements of democracy, the rule of law and fundamental rights, may follow a "'sunshine policy', which engages and involves rather than paralyses and excludes", a "value-control which is owned equally by all actors"[152] – but only if the Member State in question is playing by the rules, i.e. accepts the validity of European norms, the power of European institutions to supervise these, and is benevolently following recommendations and good practices. Since the success of such a positive approach is very much dependent on the willingness of the recipients to adhere to the concept of cooperative constitutionalism, it will not work when a state systematically undermines democracy, deconstructs the rule of law and/or engages in massive human right violations. There is no reason to presume the good intentions of those in power to engage in a sunshine approach involving a dialogue and soft measures to make the entity return to the concept of limited government – a notion that those in power wished to abandon in the first place.

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148 Such a reading is fully in line with the Commission's practice regarding Article 49 TEU. In the context, the Commission regularly adopts a number of 'monitoring' documents in which EU candidate countries' progress and alignment with EU *acquis* are reviewed: D. Kochenov *EU Enlargement and the Failure of Conditionality,* Kluwer Law International, 2008, Chapter 2.

149 See, for further criticism, D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *European Constitutional Law Review,* 512–540 (2015).

150 General Affairs Council, Meeting n°3362, 16 December 2014, www.consilium.europa.eu/en/meetings/gac/2014/12/16.

151 D. Kochenov, L. Pech and S. Platon, 'Ni panacée, ni gadget: Le 'nouveau cadre de l'Union européenne pour renforcer l'Etat de droit' *Revue trimestrielle de droit européen*, (2015), forthcoming.

152 G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in: C. Closa and D. Kochenov (eds.) Reinforcing *Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

1.6 A pair of test cases for the European Union

Whereas there are several candidates that could well deserve the stigma of 'rule of law backsliders', the direct triggers for establishing an efficient supervisory mechanism for European values are the current contexts and events in Hungary[153] and Poland.[154]

The Hungarian Fundamental Law of 2011 and the constitutionally relevant cardinal laws are used as tools in deconstructing checks on the government, ruled in Hungary by the majoritarian unicameral Parliament.[155] The ruling party was famous for not tolerating any kind of internal dissent,[156] and after forming the second Fidesz government it eliminated – at least in the domestic setting – all potentialities of criticism by both the voters and the state institutions, which might have materialised in the form of effective checks and balances.

Should a discontent electorate wish to correct deficiencies, it will be difficult for it to do so due to the novel rules of the national ballot. Gerrymandering, extension of citizenship and the introduction of the one-round election procedure all fundamentally endanger the fairness of future elections. Leaks about secret lists of voters' party preferences, and the general sense of insecurity and arbitrariness[157] that can touch upon anyone, might have a significant chilling effect through self-censorship. Judicial oversight and the Constitutional Court's room for correcting the failures of a majoritarian government have been considerably impaired,[158] along with the powers of other *fora* designed to serve as checks on government powers. Distortions of the media and lack of public information[159] lead to the impossibility of a meaningful public debate and weaken the chances of restoring deliberative democracy.

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153 I. Vörös, 'Hungary's Constitutional Evolution During the Last 25 Years', 63 *Südosteuropa* 2, 173–200 (2015); I. Vörös, 'The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law' 55 *Acta Juridica Hungarica* 1–20; P. Bárd, 'The Hungarian Fundamental law and related constitutional changes 2010-2013', 20 *Revue des Affaires Européennes: Law and European Affairs* 3, 457–472 (2013); G.A. Tóth (ed.) *Constitution for a disunited nation*, Budapest: CEU Press, 2012.

154 Is Poland a failing democracy? POLITICO asked leading thinkers, politicians and policymakers to weigh in on the Polish question, 13 January 2016, http://www.politico.eu/article/poland-democracy-failing-pis-law-and-justice-media-rule-of-law/; E. Maurice, Polish government curtails constitutional tribunal's powers, 23 December 2015, https://euobserver.com/political/131662; T.T. Koncewicz, Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense, International Journal of Constitutional Law Blog, 6 December 2015, http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense; A. Śledzińska-Simon, Poland's Constitutional Tribunal under Siege, 4 December 2015; A. Śledzińska-Simon, Midnight Judges: Poland's Constitutional Tribunal Caught Between Political Fronts, 23 November 2015, http://verfassungsblog.de/midnight-judges-polands-constitutional-tribunal-caught-between-political-fronts/.

155 Some argue that this point was reached in the fall 2012. This view is shared by, among others, former HCC Judge Imre Vörös and representatives of the Eötvös Károly Institute. Others associate the deconstruction of the rule of law with the Fourth Amendment adopted in the spring 2013. The first HCC President and former President László Sólyom is among them. See Sz. Nagy, 'Eltemetett demokrácia – Vörös Imre volt alkotmánybíró szerint államcsíny történt', *Vasárnapi Hírek*, 25 November 2012; Eötvös Károly Institute (L. Majtényi, Z. Miklósi, B. Somody, M.D. Szabó and B. Vissy), *A jogállam helyreállításának elvei nyolc tételben. Ajánlat a demokrácia híveinek*, September 2012, http://www.ekint.org/ekint/ekint.news.page?nodeid=557; L. Sólyom, 'A hatalommegosztás vége', *Népszabadság*, 11 March 2013, http://www.nol.hu/archivum/20130311-a_hatalommegosztas_vege.

156 Former Fidesz MP István Hegedűs locates the beginning for eliminating dissent in January 1991 already. See Gy. Petőcz (ed.), *Csak a narancs volt*, Budapest: Irodalom, 2001, 146.

157 M. Komiljovics, 'Unions slam new Labour Code', 30 January 2012, http://www.eurofound.europa.eu/eiro/2011/11/articles/hu1111011i.htm; A. Tóth, 'The New Hungarian Labour Code – Background, Conflicts, Compromises', *Working Paper, Friedrich Ebert Foundation Budapest*, June 2012.

158 A. Vincze, 'Wrestling with Constitutionalism: the supermajority and the Hungarian Constitutional Court', 7 *ICL Journal* 86–97 (2013).

159 Cf. Curtailing freedom of information via Act CXII of 2011 and also ECtHR, *TASZ v Hungary*, Application no. 37374/05, 14 April 2009.

Along with negative measures to silence dissenting views, positive reinforcements have also been introduced. Support by the electorate is enhanced through emotionalism, revolutionary rhetoric, catch phrases such as 'law and order', 'family', 'tradition', 'nation', symbolic lawmaking, and identity politics in general. Emotionalism has a nationalistic connotation unifying an allegedly homogenous Hungarian nation along ethnic lines,[160] and at the same time – by way of a negative definition – excluding from its members 'others' including unpopular minorities (for example suspects, convicts, homosexuals, drug users, Roma, the poor) or anyone diverging from the 'ordinary' (for example members of small churches or advocates of home birth).

The friend/foe dichotomy is artificially created through 'punitive populism', scapegoating and removing protections, sanctioning, criminalising or aggravating criminal sanctions on the 'foe' categories, partially through building on pre-existing prejudices, partially by creating new enemies, such as multinational companies, or persons challenging Hungarian unorthodoxy on the international scene. Positive reinforcements are also applied *vis-à-vis* the institutions: important posts are filled with 'friends' whose long-term appointments guarantee their continuous support. The concept of the political becomes the existential basis for any other domain that reaches the level of politics trumping state policies' moral, aesthetic or economic dimensions, and it also becomes the basic element of identity.[161]

Very similar events took place in Poland in recent months, curbing the powers and balanced constellation of the Constitutional Tribunal, and jeopardising the independence of the management and supervisory boards of the Polish public television broadcaster and public radio broadcaster.

Two weeks before the general elections for the Sejm in October 2015, the outgoing legislature nominated five judges for the Polish Constitutional Tribunal, to be appointed by the President of the Republic. It was foreseen that three judges would take seats vacated during the mandate of the outgoing legislature, while two would take seats that became vacated after the elections. The newly elected legislature, in an accelerated procedure, amended the Act on the Constitutional Tribunal, so as to open the way for annulling the judicial nominations made before the elections by the previous legislature and to nominate five new judges. The five new judges were nominated in December 2015.

The amendment at the same time considerably shortened the terms of office for the President and Vice-President of the Constitutional Tribunal from nine to three years, meaning that their term of office expired three months after the amendment's adoption.

The Constitutional Tribunal delivered two judgments on the appointment of judges in December 2015. In the first judgment the Court ruled that the previous legislature was entitled to nominate three judges for seats vacated during its mandate but should not have made nominations for the seats vacated during the term of the new legislature. In the second judgment the Court ruled that the new legislature was not entitled to annul the nominations for the three appointments under the previous legislature. The Tribunal also held the shortening of the terms of office of the Tribunal's President and Vice-President to be unconstitutional. As a result of these judgments the President of the Republic was obliged to

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[160] Zs. Körtvélyesi, 'From "We the People" to "We the Nation",' in: G.A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest: CEU Press, 2012, 111–140.

[161] That is difficult to grasp for someone outside the scope of this paradigm. See Neelie Kroes rushing out of the room after a Hungarian politician broke his promise made a few minutes before they jointly addressed the public. 'Kroes threatens nuclear option against Hungary', 9 February 2012, http://euobserver.com/justice/115209; Francis Fukuyama was equally puzzled when a Hungarian State Secretary turned to the editors of the journal publishing his piece concerning some factual mistakes that did not have any influence on the message he tried to convey. F. Fukuyama, 'What's Wrong with Hungary?' *The American Interest* 6 February 2012, http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/.

appoint the three judges nominated by the previous legislature. However, the President of the Republic already appointed all five judges nominated by the new legislature.

Once the Tribunal was thus filled with the new judges the new legislature preferred, the legislature took another step to weaken the possibility of government criticism by way of constitutionality checks. It rendered the conditions under which the Tribunal may review the constitutionality of newly passed laws more burdensome, by increasing the number of judges hearing cases and raising the majority needed in the Tribunal to hand down judgments from simple to two-thirds.

Another form of internal government criticism was weakened when the Polish Senate adopted a media law on the management and supervisory boards of the Polish public television broadcaster and public radio broadcaster, putting these formerly independent boards under the control of the Treasury Minister. The new law also paved the way for the immediate dismissal of the existing management and supervisory boards.

The value of European integration lies in upholding the foundational European values and legal principles that were fought for over centuries, sometimes at great cost, and in not permitting Member States to abandon them, even if all internal checks and balances fail.

The Hungarian case is long overdue for an Article 7 TEU procedure, and there are good reasons to believe that the Polish case is ripe, too. Political forces, alliances and scholars propagated the use of the so-called 'nuclear option', and a Citizens' Initiative to launch procedures against Hungary for alleged violations of the EU's fundamental values was started by the European Humanist Federation.[162] The initiative was successfully registered by the Commission.[163] Due to political considerations and the practical difficulties of launching a high-threshold Article 7 procedure, no steps were taken *vis-à-vis* Hungary.

The situation is different with regard to Poland. The first case where the new EU Framework to Strengthen the Rule of Law has been used in practice is against Poland.[164] The main reasons behind this move were the composition of the Constitutional Tribunal, and the changes in the Law on Public Service Broadcasters. During his intervention before the European Parliament's Plenary Session in Strasbourg on 19 January 2016, Vice-President of the European Commission Frans Timmermans made clear that in case "there is an issue of the rule of law, there is no hiding behind national sovereignty, because you (Member States) have agreed in the Treaty you have signed and ratified that these issues can be discussed at the European level."[165] Whereas these words cannot be contested, one wonders why he did not invoke the preventive arm of Article 7 instead of the EU rule of law framework. The answer may be found in Commissioner Timmermans' speech in 2015 at Tilburg University: in his view Article 7 "is a

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[162] http://humanistfederation.eu/our-work.php?page=wake-up-europe-act-4-democracy, http://act4democracy.eu/index.html.

[163] European Commission Press release, Commission registers European Citizens' Initiative on EU fundamental values in Hungary, Brussels, 30 November 2015, http://europa.eu/rapid/press-release_IP-15-6189_en.htm.

[164] See Rule of law in Poland: Commission starts dialogue, 13 January 2016, http://ec.europa.eu/news/2016/01/20160113_en.htm, which states, "*The College agreed to come back to the matter by mid-March, in close cooperation with the Venice Commission of the Council of Europe. Echoing what President Juncker said last week, First Vice-President Timmermans underlined after the College meeting that this is not about accusations and polemics, but about finding solutions in a spirit of dialogue. He underlined his readiness to go to Warsaw in this con*text." See also European Commission – Fact Sheet, College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers, Brussels, 13 January 2016, http://europa.eu/rapid/press-release_MEMO-16-62_en.htm.

[165] Statement by First Vice-President Frans Timmermans and Commissioner Günther Oettinger – EP Plenary Session – Situation in Poland, Strasbourg, 19 January 2016, http://europa.eu/rapid/press-release_SPEECH-16-114_en.htm.

measure of last resort – not to be excluded, but I would hope that we never let a situation escalate to the stage that it would require its use. I believe that the case of Austria, with Jörg Haider's party joining the government, has weakened the EU's capacity to react in such a case. It was a political response which completely backfired at the time, and since then Member States have been reluctant to take issue with other Member States on this basis…Precisely to be able to address emerging threats to the rule of law before they escalate, the Commission has adopted a Rule of Law Framework."

Beyond the fact that the formulation of the pre-Article 7 procedure is yet another step in a two-decade-long trend of watering down original Article 7, its application of this heavily problematic procedure raises even further questions. Triggering the Rule of Law Framework against one Member State but not another may call into question the objectivity and impartiality of the EU rule of law system, and the principle of equal treatment of all member countries.[166] The case for criticising EU institutions is particularly strong since the problems in Hungary and Poland are very similar and closely interrelated; in fact, it seems as if the latter was mimicking the former.
In light of years of inaction against a Hungarian government that has made many controversial decisions over years, starting the procedure against a Polish government that just started deconstructing the rule of law a couple of months ago creates an impresssion of treating Member States arbitrarily and in an unequal manner.[167] It seems as if the Hungarian governing party Fidesz, which belongs to the large party family of the European Peoples' Party, was given more leeway in departing from EU values than the Polish Law and Justice Party, which is affiliated with the less influential group of European Conservatives and Reformists.[168]

Selectively initiating the Rule of Law Framework poses an additional difficulty: a scenario with not just one but two States violating European values was not foreseen by the drafters of Article 7(2). If more than one State is sliding down the slope, they will protect each other and veto the use of Article 7(2), which they can always do, since the provision requires unanimity.[169] This is what happened when the Hungarian Prime Minister warned that the EU will never get Hungary's vote in favour of applying sanctions against Poland.[170] The only way to make Article 7 operational when more than one Member State violates the rule of law is to make use of Article 7(1). For an Article 7(1) procedure no unanimity is needed, so the EU could condemn all States in question, or all problematic States, except the one against which an Article 7(2) procedure is to be initiated. Then Member States could argue that no country undergoing *any* Article 7 procedure may vote on another Member State's Article 7 case.[171] (This

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[166] For immediate criticism see D. Kochenov, The Commission vs. Poland: The Sovereign State Is Winning 1-0, 25 January 2016, http://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/; G. Gotev, Tavares: Discussing rule of law in Poland separately from Hungary will lead 'nowhere', 13 January 2016, http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead.

[167] As Sophie In ´t Veld, ALDE Group first vice-president and European Parliament's rapporteur for the establishment of an EU mechanism on democracy, rule of law and fundamental rights put it: "by choosing to intervene in Poland, but not in Hungary, the Commission appears to apply arbitrary standards and political considerations." S. In ´t Veld, Poland dispute: EU needs annual Rule of Law "Health check", 12 January 2016, http://www.sophieintveld.eu/poland-dispute-eu-needs-annual-rule-of-law-health-check/.

[168] G. Gotev, Tavares: Discussing rule of law in Poland separately from Hungary will lead 'nowhere', 13 January 2016, http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead.

[169] *Id.*

[170] "The European Union should not think about applying any sort of sanctions against Poland, because that would require full unanimity and Hungary will never support any sort of sanctions against Poland". G. Szakacs and C. Fernandez, Hungary PM flags veto of any EU sanctions against Poland, 8 January 2016, http://www.reuters.com/article/us-poland-hungary-sanctions-idUSKBN0UM0L220160108.

[171] K.L. Scheppele, EU can still block Hungary's veto on Polish sanctions, 11 January 2016, http://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/.

method is only operational if less than one-fifth of the Member States still having voting rights are effected.) Stripping States of their voting rights will of course be challenged by the member countries under an Article 7 supervision, so ultimately the CJEU will need to decide whether such a reading excluding Member States that are undergoing Article 7 procedures from any other Article 7 procedure is correct. The Luxembourg Court could argue that finding otherwise would undermine the *effet utile* of the provision.

Now that Poland has a chance to enter into a dialogue within the Rule of Law Framework, which can only be understood as a pre-Article 7 procedure,[172] the Hungarian government will reasonably expect the same before an Article 7(1) procedure could be started against it. That will undoubtedly result in unnecessary prolongation of the process. Let us for a moment turn back to Commissioner Timmermans' above-quoted forewarning that the EU institutions could fall into the trap of the Haider affair. The parallel drawn between the Austrian and Hungarian situations is misleading for numerous reasons. The most obvious point is that the institutions could not have made use of a yet non-existing preventive arm of the Article 7 procedure at the time the FPÖ entered the government, and there was no reason to make use of the provision as it then stood. Given the lack of a legally pre-defined preventive procedure, a political action was taken in the Haider case that need not be taken *vis-à-vis* Hungary in light of Article 7. The political quarantine *vis-à-vis* Austria started right after the formation of the government, before those in power could have eroded European values, and once the situation was thoroughly investigated, the Three Wise Men commissioned with this task did not find a violation of EU values, and accordingly suggested lifting the political sanctions.[173] Whereas it is understandable that EU politicians and Eurocrats do not wish to end up in such an embarrassing situation a second time, the Hungarian situation cannot be compared to the former Austrian one, since the former is long since in the state of constitutional capture, i.e. in the third scenario – a fact well documented in the literature. Finally, it is difficult to assess whether the treatment of Austria backfired, since it is impossible to second-guess what would have happened without the political reactions. Despite these criticisms Commissioner Timmermans' words acknowledge the difficulty in drawing the line between a set of serious, but not necessarily interrelated, depreciations in European values, and their systemic erosion.[174] The EU Rule of Law Framework. according to this positive interpretation, could be understood to be inspired by the Hungarian case, which outgrew the framework by the time it was adopted, and when the pre-Article 7 procedure was adopted it long passed the stage where "emerging threats to the rule of law [could be halted] before they escalate". Instead, an Article 7 procedure should be invoked. In order to reaffirm this benevolent reading the Commission should of course depart from its insistence that the Hungarian case was not yet ripe for Article 7.[175]

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[172] "The adopted Rule of Law mechanism is in fact a 'pre-article 7 procedure' and a diluted version of parliament's proposal." G. Gotev, Tavares: Discussing rule of law in Poland separately from Hungary will lead 'nowhere', 13 January 2016, http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead.

[173] M. Ahtisaari, J. Frowein and M. Oreja, 'Report on the Austrian Government's Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ' (The Wise Men Report), 40 *International legal materials: current documents* 1, 102–123 (2001).

[174] Cf. Renáta Uitz, 'Can You Tell When and Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 *I-CON* 279–300.

[175] Most recently stated by Commissioner Věra Jourová during an EP debate on 2 December 2015, on the "Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015".

2. Distilling general methodological issues to be tackled when developing an EU Scoreboard

2.1 What is a Scoreboard?

As a previous 2013 European Parliament study on the subject showed,[176] there is already a multi-level and multi-actor European patchwork of mechanisms engaged to different degrees in the assessment of Member States' compliance with Article 2 TEU principles. A typology was proposed in that study, which categorised these mechanisms into four main types of methods (i.e. monitoring, evaluation/benchmarking and supervision) in order to facilitate a better understanding of their scope, common features and divergences. This categorisation pays particular attention to the kinds of methodological features and assessment procedures used.

As the analysis in Section 1.2 above of existing EU instruments assessing Member States' compliance with the legal principles enshrined in Article 2 TEU reveals,[177] there are a number of methodological challenges affecting the effectiveness in their usage and implementation.

These relate first to their nature as 'experimental governance techniques' and 'policy tools', which constitute soft policy steering and coordination frameworks making use of benchmarking, exchange of 'good/best practices' and mutual learning processes between Member States at EU level. European integration takes place and develops not only through the institutional and decision-making parameters designed in the EU Treaties, but also through a benchmarking logic consisting of the framing and diffusion of common challenges, indicators and standardisation, and best practices/solutions.

They affect the rule-of-law features in the design of the EU inter-institutional balance, which has been granted to the so-called 'Community method of cooperation', and modify the ways in which EU decision-shaping and -making are supposed to take place according to the EU Treaties. Particular issues of concern include matters of democratic accountability and judicial control gaps, or the unbalanced way in which they handle scrutiny, and a lack of coherency/consistency with other existing EU legislative frameworks and policy agendas. Similar concerns have been raised concerning ongoing EU surveillance and monitoring systems in the field of economic policy coordination, in particular the European Semester for Economic Policy Coordination.

The use of benchmarking and indicator-driven methodologies poses additional methodological challenges to the attempts to conduct a fully comprehensive qualitative assessment of Member States' systems and their evolving domestic (context-specific) particularities in a reliable, accurate and objective manner. The use of benchmarking should therefore be limited and approached with great caution.

At this point it might be beneficial to deconstruct the 'triangle' – democracy, the rule of law and fundamental rights – and differentiate between more fluid concepts and phenomena with more solid

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[176] 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*, CEPS 2013, available at http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf; G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[177] 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*, CEPS 2013, available at http://www.ceps.eu/system/files/Fundamental%20Rights%20DemocracyandRoL.pdf, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET%282013%29493031_EN.pdf.

definitions and legal foundations that are often constitutional entrenchments. The rule of law belongs to the former group, and there is no single ideal formula for achieving such a complex social phenomenon. It is very much context specific, and therefore, as Ginsburg noted in his authoritative paper on measuring the rule of law, "one-size-fits-all solutions and 'best practices' may simply be illusory…[I]ndividual components of the rule of law might *not* be absolute goods, but rather, goods for which we should think of in terms of optimal rather than absolute values" (emphasis in the original).[178] Fundamental rights, as described above, have a solid legal basis, its definitional elements have authoritative interpretations and therefore both measuring and benchmarking make more sense with regard to fundamental rights.

Since the focus of the EU Scoreboard is on the overall status of the intertwined values of democracy, the rule of law and fundamental rights, the benchmarking logic should preferably be abandoned. Instead, an EU Scoreboard shall be defined as a 'process' encompassing a multi-actor and multi-method cycle.

2.2 Benchmarking: political challenges, neutrality and impartiality

The foundational added value of a supranational approach to monitoring and enforcing democracy, the rule of law and fundamental rights would be in its contribution to the militant democracy concept taking root at the supranational level, and in granting additional protection to individuals and societies against abuses of state power, arbitrariness and violations of fundamental rights, when other channels of limited government become non-operational.[179] Those in power will inevitably argue against the validity of the criticism or challenge the legitimacy of the critic. Yet it has been persuasively argued that the Council of Europe and the EU would act precisely as a 'guarantor' of democracy and the rule of European organisations in the countries of central and eastern Europe.[180]

In order to ensure objectivity, techniques that are not neutral shall be disregarded. This is the main reason for being cautious with benchmarking techniques using indicators, as suggested above. What do 'indicators' indicate? As Sergio Carrera (2008) explained, "[B]enchmarking is not neutral. It needs to be understood as carrying implications for strong political action through the setting of norms for disciplining national politics, policies and eventually laws. European integration takes place not only through norms, but also on the basis of figures, graphs and matrices presented as unquestionable, whose nature may actually justify any sort of purported strategy or politics."[181] The challenge lies less in what indicators to select – and indeed there is a wide range to select from – than in which standards to be complied with. "The indicators are used as a measuring tool to pinpoint a specific issue related to a policy or law and to examine whether that policy or law is in compliance with the approach set by 'the ideal standard'", or the principle guiding the evaluation.[182]

The degree of criticism of course depends on conceptualisation and the theoretical framework used, which always underlies any set of standards. But one should not fall into the trap of accepting the argument of those who are criticised and thus frame the tensions along ideological lines, as happened in Hungary. Initially, deliberately mixing liberalism with the concept of liberal democracy, the

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[178] T. Ginsburg, 'Pitfalls of Measuring the Rule of Law', 3 *Hague Journal on the Rule of Law* 2, 269–280 (2011), 272.

[179] For an enlightening analysis, see: J.-W. Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' 21 *European Law Journal* 2, 141–160, (2015); J.-W. Müller, 'The EU as a Militant Democracy',165 *Revista de Estudios Políticos*, 141–162 (2014); P. Bárd, 'The Hungarian Fundamental law and related constitutional changes 2010-2013', 20 *Revue des Affaires Européennes: Law and European Affairs* 3, 457–472 (2013).

[180] W. Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford: Oxford University Press, 2012.

[181] S. Carrera, Benchmarking Integration in the EU. Analyzing the debate on integration indicators and moving it forward, https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/GP_Benchmarking_Integration_in_the_EU.pdf, Gütersloh: Bertelsmann Foundation, 2008, 49.

[182] *Id.* at 52.

Hungarian government claimed that criticism was influenced by party politics and the liberal school of thought,[183] and, going a step further, equated liberalism with "unfettered capitalism and full freedom of choice in personal lifestyles".[184]

Similar objections have been made by the current rulers of Poland in the face of the Commission's criticism.[185] This is certainly a misinterpretation of the situation, as the Hungarian and Polish cases do not fit *any* – let alone their own self-proclaimed majoritarian or conservative – ideological tradition: whereas they claim their authority from the majority, they do not respond to the will of the people but often engage in an elitist approach that either patronises the majority against its will or falsely claims a certain minority's opinion to be the majority's desire. Acknowledging the antagonistic nature of these tensions and the impossibility of associating the novel legal institutions and procedures with conservative ideology, or with majoritarianism, the government claimed to realise "unorthodox" policies.[186] Later, gaining strength and self-confidence, the government even questioned the validity of liberal democracies and claimed to build an illiberal democracy,[187] rejecting the idea of open society.[188] It is not the objective of the present Research Paper to second-guess the reasons behind the Hungarian unorthodoxy or the Polish changes. Whatever the objectives, on the path to achieving them, ingredients of the rule of law, basic democratic principles and respect for fundamental rights, i.e. foundational European values, were lost.

A related attempt to delegitimise the rule of law mechanism disguises the tensions as European diversity[189] or a clash of constitutional identities.[190] When a state departs from the rule of law, it is hardly ever a case of an alternative constitutional identity. Deconstruction of the rule of law is typically a project of the governing elite as opposed to mirroring the wish of the people. The dividing line is thus not between constitutional identities – as is often contended by illiberal forces – but is still – as in 1941 when Altiero Spinelli authored his Manifesto – between "those who conceive the essential purpose and goal of struggle as being the ancient one, the conquest of national political power, and who, albeit involuntarily, play into the hands of reactionary forces, letting the incandescent lava of popular passions set in the old moulds, and thus allowing old absurdities to arise once again, and those who see the main

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[183] Speech by the Hungarian Prime Minister given in Tusnádfürdő on 25 July 2014. The original speech is accessible in video format via https://www.youtube.com/watch?v=PXP-6n1G8ls.

[184] J.-W. Müller, The Problem With "Illiberal Democracy", 21 January 2016, https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01#6ouqJhI9PLfjVf1V.99.

[185] E. Zalán, Poland defends controversial measures in EU letter, 21 January 2016, https://euobserver.com/political/131935; A. Rettman, Poland rebukes 'left-wing' EU commission, 12 January 2016, https://euobserver.com/justice/131799.

[186] J. Stanford, *Is Hungary the New EU? A Wildcard in the Future of the European Union*, London: The Bruges Group, 2013, http://newbruges.wadesigns.london/enlargement/48-issues/enlargement/169-is-hungary-the-new-eu, 5–6.

[187] The term was coined long ago, but it gained practical relevance in the EU after the Hungarian Prime Minister praised such State structures in his speech given in Tusnádfürdő on 25 July 2014. The original speech is accessible in video format via https://www.youtube.com/watch?v=PXP-6n1G8ls. Cf. Frans Timmermans' speech: "[T]here is no such thing as an illiberal democracy". F. Timmermans, 'EU framework for democracy, rule of law and fundamental rights', Speech to the European Parliament, Strasbourg, Speech/15/4402, 12 February 2015.

[188] See the speech by the president of the Hungarian Parliament: Kövér: Nem akarjuk a Soros-félék nyitott társadalmát (Kövér: We don't want Soros-type open societies), 13 December 2015,

http://mandiner.hu/cikk/20151213_kover_nem_akarjuk_a_soros_felek_nyitott_tarsadalmat/fullsite.

[189] G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[190] V. Constantinesco, Le statut d'État européen: quelle place pour l'autonomie et l'identité constitutionnelle nationales?, 20 *Revue des Affaires Européennes: Law and European Affairs* 3, 447–456 (2013).

purpose as the creation of a solid international State, who will direct popular forces towards this goal, and who, even if they were to win national power, would use it first and foremost as an instrument for achieving international unity."[191] It is therefore indispensable to bear in mind that attempts to undermine the rule of law typically go against the social consensus of the national state in question.

Diversity and tolerance are two of the core strengths of Europe, but clear lines shall be drawn as to which differences can be celebrated, which differences must be tolerated, and what are the European core values in relation to which disagreement cannot be accepted without putting the European project in danger.[192] As First Vice-President Frans Timmermans stated in his address to the European Parliament, "There is no such thing as an illiberal democracy. Our Union is built on a break from the past; on the principle that societies should be free and open, sheltered from arbitrariness and force. This great leap – that is what Europe stands for."[193]

Should the illiberal state government not be able to call into question the validity of the criticism, it may question the legitimacy of the critic – in this case international organisations, or more particularly their institutions and bodies – by claiming it acted *ultra vires*, without a mandate, or in violation of the vertical separation of powers. Therefore, there should be a particularly strong emphasis on solid treaty bases, legitimacy and accountability. (For such challenges against the EU and EU institutions see Chapter 3.2.)

Finally, not only the neutrality and power of the institution concerned, but the individuals assessing respect for European values might become subject to criticism. The importance of ensuring the provision of independent academic knowledge is central to the legitimacy and trustworthiness of any evaluation and supervisory methods. Any new interdisciplinary platform of academics with proven expertise on rule of law aspects which would issue an annual scientific report on the situation of fundamental rights, democracy and rule of law in the EU would need to be independent from the political and EU inter-institutional arenas.

2.3 Links to other rule of law instruments: synergies and avoiding duplication

Section 1.2 above showed that several of the currently existing EU instruments assessing Union Member States' compliance with rule of law-related aspects post-accession make use of and often rely heavily on already existing data and evaluation instruments in the context of the Council of Europe and the UN.

This is the case, for example, of the EU Justice Scoreboard, which has been implemented through a methodology based on externalising the analysis to the non-EU actors, chiefly the CoE CEPEJ, and using its model of evaluation/benchmarking and its resulting findings covering EU Member States. Similarly, the EU Anti-Corruption Report makes use of already existing assessment (non-EU specific) sources of information and analysis, in particular the GRECO model and its findings in measuring EU Member States' performance on specific anti-corruption policies.

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[191] A. Spinelli, *For a Free and United Europe – A Draft Manifesto*, Ventotene (1941).

[192] Cf. the talk of MEP Frank Engel at the ALDE conference on the EU Democratic Governance Pact, 4 February 2015, http://www.sophieintveld.eu/alde-presents-eu-democratic-governance-pact/.

[193] Speech of First Vice-President Frans Timmermans to the European Parliament, Strasbourg, 12 February 2015, http://europa.eu/rapid/press-release_SPEECH-15-4402_en.htm. It does not take away from the validity of his argument that in the political science literature and historically there is and there used to be such as a thing as illiberal democracy. J.-W. Müller, The Problem With "Illiberal Democracy", 21 January 2016, https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01#6ouqJhI9PLfjVf1V.99.

A widespread concern when discussing furthering or deepening EU action in assessing Member States' compliance with Article 2 rule of law legal principles and developing a 'Scoreboard' is the wide array of information which already exists in other international and regional *fora*. There is a large consensus, often emphasised in EU official documents, about the need to avoid 'duplication' with these same sources and actors. A case in point has been the work of the CoE and its different bodies in monitoring compliance by State parties to the ECHR and other CoE legal instruments and standards.

These concerns have important merits. Synergies and cross-fertilisation with already existing monitoring and evaluation instruments and actors in the CoE and UN are a *sine qua non* when considering the value added and design of a future EU Scoreboard. That notwithstanding, relying on non-EU specific sources and actors may pose fundamental questions from the perspective of the autonomy and specificities characterising the EU legal system and its common Area of Freedom, Security and Justice "*in pursuing its own specific objectives*".

This challenge has been clearly highlighted by the much criticised CJEU Opinion 2/13 of December 2014[194] on EU accession to the ECHR. The CJEU held in its Opinion, "*The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU*",[195] thereby potentially denying the synergies outlined above and undermining the rule of law architecture of the EU.[196]

The lack of an EU-specific monitoring and evaluation system or 'Scoreboard' may cause difficulties when ensuring "consistency and uniformity", not so much as regards the data gathered by EU Member States but rather in the actual interpretation of EU Member States' compliance with EU legal founding principles and "the specific characteristics of EU law". This is particularly so when reading or considering the implications of threats or challenges to EU general principles and legal standards and rights envisaged in European secondary legislation.

This consistency challenge, coupled with an imperative obligation to respect the Council of Europe standards and the potential disagreement in the reading or interpretation of monitoring data covering EU Member States' compliance with rule of law, may become particularly pertinent in those domains of European law living upon the so-called 'principle of mutual recognition' and the principle of mutual trust which are indeed of fundamental importance in domains like EU asylum and criminal justice cooperation legislation. The development of an EU rule of law Scoreboard could provide further guarantees and strengthen the practical viability of the mutual trust principle in AFJS policies.

2.4 Theoretical framework

Drawing up a Scoreboard is a complex interdisciplinary task of lawyers engaged in legal theory and dogma, and statisticians aware of methodological issues of data selection and handling. Without entering into the details of designing indices on democracy, the rule of law and fundamental rights, critical foundational issues will be tackled in what follows. An agreement on these questions is the *sine qua non* of a functional Scoreboard. Vital issues include conceptualisation of the values to be measured; interpretation and comparison of data; and recognising the uses and acknowledging the limits of various forms of mechanisms to assess compliance with democracy, the rule of law and fundamental rights.

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194 Opinion 2/13 (*ECHR Accession II*) ECLI:EU:C:2014:2454.

195 Paragraph 170 of Opinion 2/13.

196 For critical accounts, see, e.g. P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' 38 *Fordham International Law Journal* 4, 955–992 (2015); D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015.

2.4.1 The need for the triangular approach

In the following the relationship among the three key interrelated principles – the protection of rule of law, democracy and fundamental rights – will be discussed, along with the challenges that arise in reflecting on ways to strengthen EU mechanisms to ensure the primacy of all three of these principles. The cross-cutting challenges affecting their uses, effective implementation and practical operability are a central point of analysis. The three criteria are inherently and indivisibly interconnected, and interdependent on each of the others, and they cannot be separated without inflicting profound damage on the whole and changing its essential shape and configuration.

2.4.2 Democracy

The EU's democratic deficit is proverbial,[197] but active steps are being taken to bridge the gap between the daily practice of democracy in the Union and the stated value of Article 2 TEU. The European Parliament is endowed with new powers at every Treaty revision, and scholarly investigations lead to the EU's reconceptualisation as a working democracy and even as a 'Republic'.[198] The EU rather functions as a *demoi*cracy, in Kalypso Nicolaïdis' useful characterisation.[199] Yes, the institutional structure is quite atypical, but the EU is definitely the most democratic among all the international organisations of its kind and, probably more important, commands more trust than the national governments in a handful of the Member States.[200]

One can state that the EU has taken this aspect of the triangular relationship of democracy, rule of law, and fundamental rights on board in first accepting that the Council, although comprised of democratically elected representatives of the Member States, does not secure democracy at the EU level. The distance between a national election and the EU legislator was too great to satisfy the demands of civil society in the EU for properly functioning democratic institutions in the EU which are subject to direct election. From the transformation of the Assembly into the European Parliament, as well as from the granting of direct EP elections in the 1970s, the struggle for democracy in the EU has taken a very specific 'governance' form.[201]

The accumulation of power to the European Parliament to which the Lisbon Treaty added yet another step is a telling example of the governance *demoi*cracy in action: it is a democracy of means, as the objectives to be reached are set in stone in the Treaties.[202] The struggle to find the appropriate balance of democratic representation at the supranational level is thus ongoing. The importance to the European Parliament of rule of law is self-evident – direct elections subject to rule of law requirements of the franchise is only the starting point. The struggles for transparency as essential to rule of law and democracy together are part of this relationship. The efforts of the European Parliament to reach out to

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[197] For a recent reminder on throwing stones in a glass house see J.H.H. Weiler, 'Living in a Glass House: Europe, Democracy and the Rule of Law', in: C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014), 25–29.

[198] A. von Bogdandy, 'The prospect of a European republic: What European citizens are voting on' 42 *Common Market Law Review* 4, 913–94 (2005).

[199] K. Nicolaïdis, 'Our European Demoï-cracy: Is this Constitution a Third Way for Europe?' in: K. Nikolaides, and S. Weatherill, *Whose Europe? National Models and the Constitution of the European Union*, Oxford: Oxford University Press, 2003, 137–152.

[200] See Standard Eurobarometers' sections on "Trust in national governments and parliaments, and in the European Union". E.g. most recently, European Commission, Standard Eurobarometer 83, Spring 2015, http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_first_en.pdf, 6.

[201] Ph. Allott, 'European Governance and the Re-Branding of Democracy', 27 *European Law Review*, 60–71 (2002).

[202] G. Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People', in: D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2015, 259–276.

national parliaments to ensure their voice is heard and respected in the governance of the EU have also been key in this regard.

However, rule of law without democracy can be a hollow and totalitarian principle. Rule by rules can be used equally by dictatorships and absolute rulers as well as by liberal democracies. Democracy may become substandard without the two other foundational values in the triangular relationship mentioned above. "Elections, open, free and fair, are the essence of democracy, the inescapable sine qua non. Governments produced by elections may be inefficient, corrupt, short-sighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities make such governments undesirable but they do not make them undemocratic. Democracy is one public virtue, not the only one, and the relation of democracy to other public virtues and vices can only be understood if democracy is clearly distinguished from other characteristics of political systems."[203] These tensions and the understanding of the rule of law making up for the efficiencies of the majority rule are apparent in the rule of law debate discussed *infra*.

2.4.3 Rule of law

All three Article 2 values, the rule of law, democracy and fundamental rights, are value-laden constructions, and therefore one cannot have a wide consensus on all or even the majority of definitional elements. A challenge facing any rule-of-law debate at EU level relates to its conceptual vagueness. The notion of rule of law is an elusive and controversial one. The thematic contributions composing the CEPS report on "The triangular relationship between Fundamental rights, Democracy and Rule of law in the EU – Towards an EU Copenhagen Mechanism" revealed that there is an 'embeddedness' of this term with specific national historical diversities of a political, institutional, legal and imaginary nature. Indeed, legal theory distinguishes between multiple concepts.

The proliferation of detailed definitions of the rule of law notwithstanding, it is necessary to realize that defining it in the best possible way cannot cancel the nature of the rule of law, which is an essentially contested concept.[204] It is thus necessary to keep in mind that even the most detailed definition, to be true to the idea of the rule of law, has to contain a share of vagueness in order to accommodate rule of law's very nature. This requirement of vagueness plays strongly against any Quichotean attempts to turn the rule of law into a shopping list of elements, even if some examples of relatively good lists are known. Eliminating vagueness entirely, on such a reading, profoundly undermines the usefulness of the concept itself.[205]

There are some uncontroversial common elements of the rule of law, though. Both the thin and thick concepts of the rule of law require more than rules created by the elected majority.[206] In other words,

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[203] S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman: University of Oklahoma Press, 1991, 9–10.

[204] D. Collier, F.D. Hidalgo and A.O. Maciuceanu, 'Essentially Contested Concepts: Debates and Applications', 11 *Journal of Political Ideologies*, 2006, 211–246.

[205] O. Burlyuk, 'Variation in EU External Policies as a Virtue: EU Rule of Law Promotion in the Neighbourhood', 53 *Journal of Common Market Studies* 3, 2015, 509–523.

[206] Adherents of a formal theory, while emphasising the distinction between rule of law and other values, go beyond legitimacy through majority rule and look into the authority of the lawmaker, procedure, form, clarity and stability of the norm, temporal dimension of the law, i.e. the prohibition of retroactivity; an independent judiciary; access to the courts; and the requirement that norms should be based on clear rules and the discretion left to law enforcement agencies shall not be allowed to undermine the purposes of the relevant rules. Even those who emphasise the legitimising power of the majority rule as the cornerstone of all political order maintain that dissatisfied citizens reserve a lasting right to revolution. See J. Raz, *The Authority of Law*, Oxford: Oxford University Press, 1979, 210; Second Treatise of Civil Government, 1690, Indianapolis: Hackett, 1980, § 240. See also N. Luhmann, *Legitimation durch Verfahren*, Frankfurt: Suhrkamp, 1983.

the rule of law necessarily presupposes a balance between *gubernaculum* – the day-to-day law-making and application of the law by the sovereign – and *jurisdictio* – the checks on the law, which lie beyond the sovereign's reach.[207] Even the thinnest understanding claiming that any law that a democratically elected Parliament passes can be the foundation of a rule of law presupposes a minimum element: that people retain the right of expressing their discontent at least at the next democratic, i.e. free and fair, elections.[208] Besides, the observance of fundamental rights standards as well as the norms of international law cannot be departed from, thus providing a 'natural' check on any sovereign authority.[209] Raz prescribes "(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it."[210] Fuller identifies a number of principles, such as generality, publicity, prospectivity, clarity, consistency, possibility of compliance, constancy and faithful administration of the law.[211] Before going on with further potential constituent elements, Krygier's warning shall be remembered: it is impossible to list the prerequisites of a rule of law in anatomical terms; instead it shall be seen as a teleological notion.[212]

Weber brings us closer to the desired objective: although they have good chances to survive, neither traditional nor charismatic authority will render a system legitimate without adhering to some minimum element of rationality,[213] which is often formulated as *salus populi suprema lex esto,*[214] the good of the people as the supreme law. A social contract can never be rewritten in a way that does not respect at least this minimum requirement.[215] Dworkin straightforwardly rejects the value of majoritarianism as a legitimising force,[216] and searches for the substantive value behind the majority rule, which he traces to political equality.[217] Along these lines he argues for an alternative concept of democracy, which he

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Proponents of substantive rule of law requirements focus on the content, i.e. substance of the laws, which in their views shall reflect certain values such as justice, equality or human rights. For a summary see B.Z. Tamanaha, 'A Concise Guide to the Rule of Law' in: G. Palombella and N. Walker (eds.), *Relocating the Rule of Law*, Oxford: Hart Publishing, 2009, 3–15, 4.

[207] G. Palombella, 'The Rule of Law as an Institutional Ideal', in: L. Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues*, Leiden: Brill, 2010, 3–37; G. Palombella, *È possibile la legalità globale?*, Bologna: Il Mulino, 2012; G. Palombella, 'The Rule of Law and its Core', in: G. Palombella and N. Walker (eds.), *Relocating the Rule of Law*, Oxford: Hart Publishing, 2009, 17–42.

[208] J.A. Schumpeter, *Capitalism, socialism, and democracy*, New York: HarperCollins, 1950.

[209] R. Dworkin, 'A New Philosophy of International Law', 41 *Philosophy and Public Affairs* 1, 2–30 (2013).

[210] J. Raz, *The Authority of Law*, Oxford: Oxford University Press, 1979, 212–213.

[211] L. Fuller, *The Morality of Law*, New Haven: Yale University Press, 1969, 43.

[212] According to Krygier the rule of law is "concerned with the morphology of particular legal structures and practices, whatever they turn out to do. For even if the structures are just as we want them and yet the law doesn't rule, we don't have the rule of law. And conversely, if the institutions are not those we expected, but they do what we want from the rule of law, then arguably we do have it. We seek the rule of law for purposes, enjoy it for reasons. Unless we seek first to clarify those purposes and reasons, and in their light explore what would be needed and assess what is offered to approach them, we are bound to be flying blind." Martin Krygier, "Four Puzzles about the Rule of Law: Why, what, where? And who cares?," Talk delivered as the 2010 Annual Lecture of the Centre for Law & Society, University of Edinburgh, 18 June 2010, *UNSW Law Research Paper* No. 2010-22, Available at SSRN: http://ssrn.com/abstract=1627465.

[213] M. Weber, *Politik als Beruf*, München und Leipzig: Duncker & Humblot, 1919.

[214] Originally mentioned by Marcus Tullius Cicero, de Legibus (book III, part III, sub. VIII), as *ollis salus populi suprema lex esto*, also referenced by Locke in the Second Treaties and Hobbes in his Leviathan, who believed that it is rationality that makes men abandon the natural state of mankind, i.e. the state of *bellum omnium contra omnes*. For a summary see P. Costa, *The Rule of Law. A historical introduction*, Dordrecht: Springer, 2009, 73–74.

[215] Cf. V. Orbán, 'Új társadalmi szerződés született' (A new social contract was born), *Demokrata*, 25 May 2010, http://www.demokrata.hu/cikk/orban_uj_tarsadalmi_szerzodes_szuletett/.

[216] R. Dworkin, 'What Is Democracy', in: G.A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest: CEU Press, 2012, 25–34, 31.

[217] *Id.* at 29.

calls the partnership conception,[218] meaning "government by the people as a whole acting as partners in a joint-venture of self-government." In the same vein, Sajó argues[219] that the majority – and even more so the supermajority – of MPs in so-called representative democracies might subvert a rule of law first by not representing the majority voters as opposed to their mandate[220] and second by becoming too responsive to popular wishes, denying the rule of law to the powerless, i.e. those who do not have a mandate. Crucially, however complex the legal-philosophical notion, it is the tention between *gubernaculum* and *jurisdictio* that lies at the core of the meaning of the rule of law emerging, as theorised by Gianluigi Palombella, as an institutional ideal.[221]

Lord Bingham's eight principles of the rule of law are highly authoritative in the quest for the elements of the concept. These include that the law must be accessible, intelligible, clear and predictable; questions of legal right and liability should as a main rule be resolved by application of the law and not the exercise of discretion; equality before the law, except and to the extent that objective differences justify differentiation; public officers shall exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, not ultra vires and not unreasonably; protection of fundamental human rights shall be guaranteed; means shall be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes; adjudicative procedures shall be fair; the state shall comply with its obligations in international law and domestic law.[222]

The notion of EU rule of law is a more elusive and controversial one than the rough characterisation above might indicate. This is particularly the case when rule of law is considered from a bottom-up approach. The CoE European Commission for Democracy through Law (the Venice Commission) has provided one of the few more widely accepted conceptual frameworks for rule of law in Europe, and it represents a helpful starting point. The 'embeddedness' of this term has multiple specific national historical diversities of a political, institutional and legal nature. Concepts such as, for instance, *Rechtsstaat* in Germany, *État de droit* in France, *rule of law* in the UK, *stato di diritto* in Italy, or *правова държава* in Bulgaria are far from being synonymous and present distinctive features, including their relationships to the other notions of democracy and fundamental rights.[223] The material scoping of rule of law in Member States' arenas, and its linkages with the other two criteria, also remain shifting and are difficult to capture from a normative viewpoint, which necessarily affects possible EU-level understandings, where the emerging ideal of the rule of law is, in the wise words of Laurent Pech, "hollystic",[224] which does not detract from its relative clarity.[225] Since the path-breaking work by Bebr

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[218] *Id.* at 26 and 31.

[219] A. Sajó, 'Courts as representatives, or representation without representatives', Speech delivered in Yerevan, Armenia at the conference on 'The European standards of rule of law and the scope of discretion of powers in the Member State of the Council of Europe', 3–5 July 2013.

[220] András Sajó is arguing about the need of the representatives to be responsive to popular demands. H.F. Pitkin, *The Concept of Representation*, Los Angeles: University of California Press, 1967.

[221] G. Palombella, *È possibile una legalità globale? Il Rule of law e la governance del mondo*, Bologna: il Mulino, 2012, Chapter 2.

[222] T. Bingham, *The Rule of Law*, London: Allen Lane, 2010.

[223] Cf. D. Kochenov 'The EU Rule of Law: Cutting Paths through Confusion', 2 *Erasmus Law Review* 1, 5–24 (2009).

[224] L. Pech, 'Promoting the Rule of Law Abroad', in: D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013, 108–129.

[225] L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union' *Jean Monnet Working Paper* No. 04/09 (2009), (and the literature cited therein). See also M.L. Fernandez Esteban, *The Rule of Law in the European Constitution*, The Hague: Kluwer Law International, 1999; U. Everling, 'The European Union as a Federal Association of States and Citizens', in: A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Oxford/Munich: Hart Publishing/CH Beck, 2010, 701–734; M. Zuleeg, 'The Advantages of the European Constitution', in: A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Oxford/Munich: Hart Publishing/CH Beck, 2010, 763–785, 772–779.

at least, the EU has been a rule of law community, all the difficulties of defining the term notwithstanding.[226]

In a rule of law emerging as an institutional ideal, *built-in correction mechanisms compensate for the deficiencies* of a majoritarian government: in the first scenario these mechanisms engender healthy consequences upon departing from identity politics, whereas in the second they compensate for the weaknesses of identity politics, either by granting participation to those groups who have been excluded from 'we, the people' or by representing their interests while being excluded. In this sense international correction mechanisms can be seen as *means of militant democracy*[227] operating along the lines of mature constitutionalism implying the existence of robust precautionary measures into democratic systems to protect them against a future potential government acquiring and retaining powers at all costs, i.e. by superseding constitutional government by autocratic government.[228]

Rule of law is officially recognised as the primary tool of EU governance in all its forms, even if doubts are emerging as to whether the rule of law – a Treaty value and principle – actually amounts to the institutional ideal of the European Union, the EU's self-congratulatory rhetoric notwithstanding.[229] EU activities are officially based on a profound respect for rule of law[230] – the law-making activities which engage most of the EU actors either as part of the EU legislator or in the adoption of secondary legislation. The Commission's role as guardian of the Treaties is based on the principle of rule of law, which is the foundation for its powers of enforcement and infringement proceedings. The primacy of the role of the Court of Justice of the European Union (CJEU) as the sole legitimate source of interpretation of EU law is perhaps the most striking of the rule of the law tools of EU governance. Its power to sanction the recalcitrant backsliding Member State, which got somewhat diversified with the Lisbon revision of the Treaties, reveals the extraordinary importance which the EU ascribes to rule of law.

In this sense it matters little how sceptical of the EU's rule of law and democratic credentials one can eventually be: by supplying an additional level of checks on Member State governments, the EU, along Dworkinian lines, can only play a positive role in terms of monitoring and addressing rule of law backsliding in the Member States, turning itself into a vital supranational element of militant democracy.[231]

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[226] G. Bebr, *Rule of Law within the European Communities*, Brussels: Institut d'Etudes Européennes de l'Université Libre de Bruxelles, 1965.

[227] For a full description see K. Loewenstein, 'Militant Democracy and Fundamental Rights,' 31 *American Political Science Review* 417–433 and 638–658 (1937). For a most recent authoritative account of such a function of international legal mechanisms, see R. Dworkin, 'A New Philosophy of International Law' (2013) 41 *Philosophy and Public Affairs* 1, 2–30 (2013).

[228] On international mechanisms correcting the failure of domestic law to protect minorities see for example A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, Tübingen: Mohr, 1923.

[229] G. Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in the EU Two-Level System', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming; D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015.

[230] For a critical analysis by the leading academics, see, L. F. M. Besselink, F. Pennings and S. Prechal (eds.), *The Eclipse of Legality in the European Union*, The Hague: Kluwer, 2010.

[231] J.-W. Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' 21 *European Law Journal* 2, 141–160, (2015); J.-W. Müller, 'The EU as a Militant Democracy',165 *Revista de Estudios Políticos*, 141–162, (2014).

2.4.4 Fundamental rights

The third principle – fundamental rights – has been something of a late comer in the EU's triangular relationship. As European history testifies, democracy is not infallible. Democratic States have and continued to adopt intolerant laws and failed to respect fundamental rights in their enforcement (respecting the principle of rule of law). This sad truth underlies the Council of Europe's European Convention on Human Rights of 1950. The fact that no State can be a member of the Council of Europe without ratifying the ECHR and accepting the principle of individual application and adjudication by the European Court of Human Rights is a reflection of this relationship of necessity.

For the EU, however, the long story of the EU Charter of Fundamental Rights has revealed just how reluctant some Member States are of further embedding in the EU fundamental rights even when they go no further than those by which the Member States had already been bound in other texts, preventing the growth of supranational human rights jurisdiction.[232] Unwittingly, the CJEU, previously pushed to constitutionalise fundamental rights in a (then even more) rights blind Community by the decisive actions of the Italian *Corte costituzionale* and the German *Bundesverfassungsgericht*, failed to take the Treaty obligation spelled out by the *Herren der Verträge* in the most unequivocal way to heart, securing a setback for the EU's track record and provoking scholarly criticism of a one-sided Opinion it delivered.[233]

The Lisbon Treaty's transformation of the Charter from a persuasive document into a legally binding one is critical in this development, even though the Charter became binding following yet another watering down of its scope.[234] The Charter, the rich CJEU case law on the matter, and the EU's upcoming accession to the ECHR[235] completes the triangle requiring all activities of the EU and its Member States acting within the scope of EU law to be consistent with the EU's goals and in line with the nascent fundamental rights policy.[236] Due to the fact that fundamental rights have a solid legal foundation and an attached European case law developed over decades, the definitional elements and the tools for measuring rights are easier to use than the elements and tools related to the triangle's other two concepts.

One might characterise current EU rule of law, democracy and fundamental rights (in the form of fundamental rights in the Charter and the obligation to respect fundamental rights as contained in the ECHR) as the profound architecture of the EU. It is for this reason that sound EU supervisory mechanisms to ensure that all three principles are fully respected is critical to the success of the European integration project as a whole.

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[232] A. Knook, 'The Court, the Charter, and the vertical division of powers in the European Union' 42 *Common Market Law Review* 2, 367–398 (2005).

[233] Opinion 2/13 (*ECHR Accession II*) ECLI:EU:C:2014:2454. For critical accounts see, e.g. D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' 16 *German Law Journal* 105–146 (2015); and P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' 38 *Fordham International Law Journal* 4, 955–992 (2015); D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015.

[234] H. Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States', in: P. Cardonnel, A. Rosas and N. Wahl (eds.), *Constitutionalising the EU Judicial System*, Oxford: Hart Publishing, 2012, 291, at 294–302.

[235] Even thought the prospects of accession are overshadowed by Opinion 2/13 (ECHR Accession II) ECLI:EU:C:2014:2454.

[236] Ph. Aston (ed.), *The EU and Human Rights*, Oxford: Oxford University Press 2000.

2.5 Contextual, qualitative assessment

It is critical that all assessments of the compliance of Member States and their actors with rule of law, democracy and fundamental rights are fully objective, academically sound and carried out in a manner consistent with the highest standards of scientific rigour. This will require investment of substantial resources in the analytical process to ensure that the interpretation of all the information which is included in the Scoreboard fulfils the above requirements. We will highlight the most relevant methodological pitfalls of a scientifically sound, objective and methodologically correct interpretation of indices.

Evaluating the rule of law, democracy and fundamental rights cannot be an automated exercise on either the input or the output side. On the input side, the identification of standards and accordingly the acquisition of data are a challenge. On the output side, indicators "are tools for obtaining a diagnosis, not the diagnosis per se."[237] A uniform approach of interpretation with rigid numerical indicators might well result in substandard outcomes.

The first issue is **'what' quantitative indicators and statistics can actually capture**. Most often, they mirror the laws, i.e. States' commitments to achieving certain goals and ideals, but benchmarking cannot cover and mirror 'sociologies of law'. This is also reflected in the attempts of the UN Office of the High Commissioner for Human Rights – and on that basis the Fundamental Rights Agency – to capture not only laws, institutions (structures) and policies (processes), but also, and most important, the situation on the ground (outcome).[238] A pilot study conducted by the Fundamental Rights Agency with the participation of three Member States, Finland, Ireland and the Netherlands, in three areas, namely hate crime, access to justice and discrimination and independence of non-judicial bodies, showed the difficulties in agreeing on standards and accordingly on indicators. Whereas member countries could come to an agreement on indicators on the laws, and to some extent also on processes, it was close to impossible to reach an agreement with regard to the outcomes.[239]

Once this fundamental problem is tackled, interrelations between data and the **causalities** behind them need to be interpreted, and they can be interpreted in multiple ways. Most important, data shall be contextualised, instead of only quantifying the problem.[240] Context-specific qualitative evaluations are difficult to automatise, and therefore there shall be a heavy reliance on expert knowledge.

Case study: hate crimes

The lack of data on a certain type of criminality may indicate the lack of that particular type of criminality, but it may also indicate high latency. Hate crime statistics are illustrative in this regard. As the Fundamental Rights Agency and national studies have proven, hate crime provisions often remain inoperational or become counterproductive. This has been shown through the yawning gap between victims' surveys and the number of court files in the Member States.

According to FRA victim surveys up to a third of Jewish people personally experienced verbal or physical anti-Semitic violence. Between 16% and 32% of Roma and between 19% and 32% of persons of African origin were victims of assault, threat or serious harassment with a perceived racist motive in the 12 months before

[237] J.C. Botero, R.L. Nelson and C. Pratt, 'Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview', 3 *Hague Journal on the Rule of Law* 2, 153–169 (2011), 157.

[238] Promoting the rule of law in the European Union. FRA Symposium Report, 4th Annual FRA Symposium, Vienna, 7 June 2013, http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf.

[239] Talk of G. Toggenburg, Senior Legal Advisor, European Union Agency for Fundamental Rights at the LIBE Committee on Civil Liberties, Justice and Home Affairs meeting on 10/12/2015.

[240] For a detailed assessment, see K.L. Scheppele, 'The Rule of Law and the *Frankenstate*: Why Governance Checklists Do Not Work', 26 *Governance* 4, 559–562 (2013).

the research. A quarter of the 93,000 LGBT people, and one-third of transgender people surveyed in the EU experienced violence in the five years preceding the survey.[241] Official statistical data show, however, that most of the crimes do not reach the investigation stage, and even those that do are halted, suspended, or poorly investigated, or, if they reach the judicial phase of criminal procedure, the bias motive often cannot be proven. The number of hate crime cases in the Member States annually varies between a dozen and some 200, which is a small fraction of the actual criminality. The European Union classified the official data collection mechanisms of the Member States pertaining to hate crimes and only four can be labelled as comprehensive data providers. Most of them (14) are providing limited or no data; some of them (9) are good data providers.[242] Moreover, all the relevant supranational law notwithstanding, the case law on the matter is virtually non-existent.[243]

Longitudinal research data are again subject to interpretation. Certain data are relatively constant, and may only have an impact in extreme cases, such as the effects of the judiciary's budget on its independence. Changes in trends also need context-specific interpretation. Rising figures in criminality may be explained by the growing tendency of criminality, the strengthening of criminal policy, or the lowering of the age of criminal culpability. Also, decreasing figures might be explained by decriminalisation of certain types of human behaviour or their classification as petty or non-recordable offences instead of crimes. The same can be said for the number of perpetrators registered: decreasing numbers may be explained by lesser crimes; or the willingness of parties to turn to restorative justice methods, victim-offender mediation, or other out-of-court dispute settlement that the domestic law allows; or an emphasis on the principle of opportunity instead of the principle of legality, i.e. prosecutors may get a wider leeway to press on with the charges or not; but even the defect or failure of investigation might be behind the decreasing numbers. And *vice versa*.

Oftentimes, it is impossible to say even whether a **trend is positive or negative**, without context-specific interpretation of figures and data. For example, an increase in lost cases against a given country before regional human rights tribunals may indicate the deterioration of the fundamental rights situation in that country but may also show that individuals are more aware of their rights or that legal professionals' training in the admissibility criteria has been successful.

Again due to the context-specific nature of any evaluation, **cross-country comparative analyses** on the basis of indices entail substantial dangers. Some even argue against any attempt to engage in cross-country comparisons. They contend that during the process of comparison, context is inevitably lost, and the over-generalisation renders the comparison meaningless, if not distorting, giving governments inclined to violate EU values pretexts to attempt to justify their corrupt institutional designs, which would not emerge as problematic in out-of-context comparisons.[244] Therefore, rule of law benchmarking and cross-country comparisons should be used sparingly, and in the latter case only similarly situation countries should be compared.[245]

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[241] http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-lgbt-survey-2012.

[242] European Union Fundamental Rights Agency: Making Hate crimes visible in the European Union: Acknowledging victims' rights, Luxembourg: Publications Office of the European Union, 2012, http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf, 38.

[243] U. Belavusau, 'A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on *Asociația ACCEPT*' 21 *Columbia Journal of European Law* 2 237–259 (2015).

[244] K.L. Scheppele, 'The Rule of Law and the *Frankenstate*: Why Governance Checklists Do Not Work', 26 *Governance* 4, 559–562 (2013). See also, R. Uitz, 'Can You Tell When and Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' 13 International Journal of Constitutional Law 1, 279–300. (2015).

[245] J.C. Botero, R.L. Nelson and C. Pratt, 'Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview', 3 *Hague Journal on the Rule of Law* 2, 153–169 (2011), 159 and 165.

Case study: conviction rates

A typical example is the indicator showing whether those charged with an offence are ultimately convicted. Such indicators are often invoked to measure the success of public prosecutors,[246] whereas high figures may not only indicate prosecutions' efficiency, but also a biased or overburdened judiciary or a young and inexperienced democracy, where judges take the easy way out and – without questioning and double-checking the correctness of prosecutors' assessment of the case – copy and paste charges and prosecutors' reasoning into the judgments.

Whereas conviction rates show the importance of context-specific interpretation of causalities, here the differences with cross-country comparisons will be highlighted. At the same time it may show the preparedness of the prosecutors. In a 2005 research paper Raghav, Ramseyer and Rasmusen studied the difference between the conviction rates in the US, where prosecutors win 87-88% of federal cases and 85% of state cases, and Japan, where 99.9% of those charged are sentenced.[247] If basic conceptual issues are tackled (such as whether the first instance decisions or final judgments are taken into account, or whether the person charged needs to be guilty on all accounts, or it suffices if he or she is liable on at least one of them) and data become comparable, one might draw conclusions with regard to the reasons behind the differences and the high percentage in Japan. Some contended that it must be the lack of independence of Japanese judges or an informal pressure to make parties settle cases out of court. Before jumping to unjustified conclusions, it is worth looking at the number of prosecutors. In Japan there are 1,200 prosecutors, whereas in the US, a country with double the population, there are 32,000 prosecutors – 25 times more prosecutors for only twice as many people. In the US there are 14 million arrests per year, meaning 438 cases per persecutor, whereas in Japan the number of arrests is one-tenth of that in the US, but due to the small number of prosecutors there are only 1,166 prosecutions per year. Of course, these data are also difficult to compare due to the fact that different behaviours qualify as crimes and as grounds for arrest, but the numbers are sufficient to understand that, most likely, Japanese prosecutors will not 'waste' their time on cases where they do not have absolutely solid evidence. Such indicators do not tell us anything about the quality of justice and adherence to procedural guarantees. Without contextualisation and detailed qualitative descriptions, it is impossible to derive any methodologically sound and valid conclusions from indices. This is even truer for cross-country analyses.

2.6 Quality versus speed

The efficiency of a Scoreboard depends on the quality of the information which informs it and that of the outcome's interpretation. The higher the quality of the data and its assessment, the more efficient the Scoreboard will be in achieving its objective of providing a clear and comprehensive view of the field. The poorer the quality of the data and the corresponding interpretation, the less efficient the Scoreboard for the purposes of EU compliance with rule of law, democracy and fundamental rights. However, excellence in data collection and interpretation also has a price in terms of speed.

A particularly burdensome collection system and lengthy data analysis method have three disadvantages. First, by the time the potentially negative assessment is published, the State scrutinised might have changed its laws or practices, triggering another measurement and interpretation of outcomes. The new laws adopted or practices introduced may be equally substandard, and continue to do harm until yet another assessment becomes public. Second, legal consequences attached to a negative assessment may lose their impact over time. Criminal lawyers and criminologists are well aware of the

[246] T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, 2005, http://arno.unimaas.nl/show.cgi?fid=3891, 213: "What percentage of those charged with an offence are ultimately convicted?"

[247] M. Raghav, J.M. Ramseyer and E. Rasmusen, 'Convictions versus Conviction Rates: The Prosecutor's Choice', 11 *American Law and Economic Review* 1, 47–78. (2009).

fact[248] that it is not the gravity of the criminal sanction but its inevitability and proximity to the crime committed that have deterrent effect. The same applies to States. Applying this wisdom to the situation at hand, it is regrettable that the EU has a relatively slow mechanism for responding to violations of its own foundational principles. Third, the often irreversible and severe harm done in the meantime shall also be taken into account with regard to the speed of the response, potentially allowing for interim evaluations and measures.

The greater the demand for speed, the more corners are likely to be cut on quality and the more subject to challenge any Scoreboard is likely to be. There will always be some compromises necessary in getting this relationship right.[249] The temptation to use 'tick box' approaches in order to speed up the completion of what must be a periodic and regular task should be avoided. Such approaches, which simplify comparability, provide profoundly distorted views of the actual state of affairs regarding the subject matter.

Comparability should never compromise the accuracy of the information or the scientific analysis of interpretation of data in the Scoreboard. This may mean that more expertise is needed to analyse and understand the data, but this is a reasonable cost in light of the importance of the project. If the objective is to ensure that the three principles are fully respected in the EU by all Member States and at all levels of governance, then the investment in accurate and up-to-date information and methodologically sound, context-specific interpretations of indices cannot be underestimated.

[248] At least since Cesare Beccaria wrote his famous work 250 years ago. For an English language version see C. Beccaria, *On crimes and punishments*, Indianapolis: Bobbs-Merrill, 1963.

[249] On this trade-off see the evaluation by András Jakab of a Hungarian initiative responding quickly to the policy changes in Hungary in and after 2010. See A. Jakab, 'A jogállamiság mérése indexek segítségével', 2015/12 *Pázmány Law Working Papers* (2015), http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2015/2015-12_Jakab.pdf. For the details of the Hungarian index developed by the Eötvös Károly Institute and HVG, a weekly economic magazine, see L. Majtényi and M.D. Szabó (eds.), *Az elveszejtett alkotmány*, L'Harmattan – EKINT, 2011, 13-62.

3. Addressing objections to the supranational tackling of the issue by the EU

3.1 The need for an EU approach

The EU received its core values at its inception: achieving peace and prosperity, the immediate goals of the Union still with us since the times of the Schuman declaration, had a strong implied liberty component. Dictatorships and any countries which were not 'free' were not welcome to join the Union.[250] Notwithstanding the fact that democracy and the rule of law were not part of the black letter law of the Communities for a long time, both have clearly been regarded as important unwritten principles, which became codified thanks to the pre-accession strategy in the context of the preparation of the 'big-bang' enlargement to the east of the continent.[251] It is this process, alongside the political initiatives of the institutions and the *obiter dicta* in the case law of the CJEU, that resulted in the distillation of the core elements of the principle of the rule of law in the context of EU constitutionalism.[252]

The development of the written law on principles has been uneven, if not sloppy. 'Principles' would be the established way of referring to the foundational, enforceable and legally meaningful assumptions informing every aspect of the functioning of a given legal system – which unquestionably places rule of law and democracy among the principles of EU law.[253] Yet, for the first time in EU history, the Lisbon Treaty expressly refers to some among the established legal principles as 'values', introducing a double confusion in what is now Article 2 TEU.[254] The first confusion is terminological, given that the rule of law is clearly a 'principle' in the Charter of Fundamental Rights, which has the power of primary law of the EU. Moreover, it has been a principle at least since the oft-cited ECJ decision in *Les Verts*.[255] The second confusion is theoretical: legal scholarship shows clear differences between values, which are desirable ideals, and principles with a more solid binding force. In the context of the Lisbon Treaty, however, "values" is a misnomer that results in an erroneous synonymisation of the two words.

It is clear, however, as Laurent Pech has persuasively argued, that the unfortunate wording of Article 2 TEU does not deprive the rule of law of a legal value of a core legal principle in the context of EU law.[256] Read in conjunction with the rule of law in the Charter and the case law of the Court as well as drawing

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[250] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, The Hague: Kluwer Law International, 2008, Chapters 1 and 2.

[251] For the whole story, see *Id.*

[252] 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', 6 *European Constitutional Law Review* 359–396 (2010). On the analysis of this distillation process and its outcomes, see D. Kochenov 'The EU Rule of Law: Cutting Paths through Confusion', 2 *Erasmus Law Review* 1, 5–24 (2009).

[253] See, for the core contributions, M.L. Fernandez Esteban, *The Rule of Law in the European Constitution*, The Hague: Kluwer Law International, 1999; also U. Everling, 'The European Union as a Federal Association of States and Citizens', in: A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Oxford/Munich: Hart Publishing/CH Beck, 2010, 701–734; M. Zuleeg, 'The Advantages of the European Constitution', in: A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Oxford/Munich: Hart Publishing/CH Beck, 2010, 763–785, 772–779. EU Institutions' own accounts of what is meant by the rule of law beyond the tautology of 'being bound by law' present a most diverse account, which found an expression in the EU's external action: L. Pech, 'Promoting the Rule of Law Abroad', in: D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013, 108–129.

[254] For an analysis, see 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', 6 *European Constitutional Law Review* 359–396 (2010).

[255] Case 294/83 *Partie Ecologiste 'Les Verts'* v. *Parliament* [1986] ECR 1339, 23. See also Opinion 1/91 *EEA Agreement* [1991] ECR 6097.

[256] *Id.*

on the rich history of the rule of law as a constitutional principle of the EU, Article 2 TEU thus means that the EU based on the rule of law is a *Wertegemeinschaft*,[257] a community based on common values. This should not undermine the legal significance of the rule of law in the edifice of EU law. The EU views the rule of law as one of its *raisons d'être*, inspiring its internal and external action, and recognises the rule of law as being one of the interrelated trinity of concepts already referred to above.[258]

Within the scope of the *acquis* these values were reinforced by the entry into force of the Charter of Fundamental Rights, while outside the scope of the *acquis* Article 7 TEU is the usual approach to enforcing the same values.[259] Most important, the fundamental nature of European values referred to in Article 2 TEU strongly resonates with the peoples of Europe. When asked about the most important values that characterise the European Union, they most often cite peace, human rights, democracy and the rule of law. For European individuals personally, peace, human rights and respect for human life are the values that matter most.[260]

All the above notwithstanding, the EU remains vulnerable as far as its values are concerned: problems exist at both the supranational and national levels. Firstly, the EU's own understanding of its values is atypical, when approached from the traditional constitutionalism standpoint,[261] allowing for a theoretical possibility of certain principles of its law, particularly the principle of autonomy of EU law, to trump the substance of values, which has been overwhelmingly criticised in the literature.[262] The concept of autonomy can be traced back to the seminal *Costa v ENEL* case,[263] where the ECJ completed a line of argument it started to develop a year earlier in *Van Gend and Loos*,[264] famously proclaiming that Community law may have direct effect. As the ECJ argued, direct effect may not be meaningul, should national courts be able to overwrite it, as argued earlier by the Italian constitutional court, and therefore European laws shall enjoy supremacy over domestic ones. At this point of the reasoning the principle of autonomy kicked in. In the ECJ's view, laws based on the Treaties constitute an autonomous legal order [une source autonome], which must not be overwritten by national rules, however these latter are formulated. Thus, "according to the ECJ, the EU forms a unified, self-referential legal order, with its own internal claim to validity, which, at a minimum, is no longer part of the mainstream of international law."[265] As presented by the Union, this is all about the exercise of its competences.[266] Approaching this

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[257] See for example Konrad Adenauer on 7 December 1951 in an address at the Foreign Press Association in London, *Bulletin des Presse- und Informationsamtes der Bundesregierung* Nr. 19/51, 314.

[258] G. de Búrca, 'Europe's *raison d'être*', in: D. Kochenov and F. Amtenbrink (eds.), *European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013, 21–37.

[259] 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 University Press, 2016, forthcoming; L. F. M. Besselink, 'The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives', in: A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2016, forthcoming.

[260] See Eurobarometer 82 for Autumn 2014.

[261] E.g. G. Palombella, *È possibile la legalità globale?*, Bologna: Il Mulino, 2012; L. Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues*, Leiden: Brill, 2010; G. Palombella and N. Walker (eds.), *Relocating the Rule of Law*, Oxford: Hart Publishing, 2009; M. Krygier, 'The Rule of Law. An Abuser's Guide', in: A. Sajó (ed.), The Dark Side of Fundamental Rights, Utrecht: Eleven, 2006, 129–161.

[262] P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', 38 *Fordham International Law Journal* 4, 955–992 (2015); G. Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in the EU Two-Level System', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[263] ECJ, Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

[264] ECJ, Case 26/62 *Van Gend and Loos v Nederlandse Administratie der Belastingen* ECR [1963] 3.

[265] J.V. van Rossem, *The Autonomy of EU Law: More is Less?, Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*, The Hague: Asser Press/Springer, 2013, 19.

[266] Opinion 2/13 (*ECHR Accession II*) ECLI:EU:C:2014:2454, para. 192.

critically, however, we are dealing with a recurrent claim by the Union that its power should be unchecked externally, based on the strength of an 'autonomy' argument.[267] Secondly, the EU is lacking an evaluation process and enforcement mechanism of these foundational values at the national level, as has been demonstrated in Part I of this Research Paper. In other words, the values of Article 2 TEU are overwhelmingly procedural at the supranational level, where they need the substance the most, and absolutely toothless in the context of ensuring compliance at the national level, where the majority of violations – at least at this stage, when the EU itself is behaving well – is most likely to occur.

This double vulnerability is behind the emergence of a particularly dangerous reality, where acting within the realm of the *acquis*, the Union can potentially diminish the national level of fundamental rights protection and the respect for the rule of law in the compliant States,[268] while at the same time being apparently powerless to deal with the States where the rule of law is undermined. That plenty of rule of law and human rights-sensitive issues lie within the realm of EU competence to enforce mutual recognition is particularly dangerous in this respect: the Union can oblige Member States to honour each other's decisions, even if this would lead to absurd results, while it is at the same time unable to affect the substantive build-up and the nature of the national legal systems that take the decisions the EU enforces.[269]

This set-up of strong enforcement of mutual recognition without an ability to affect in all cases *what* is recognised, is potentially explosive and demonstrates the urgent need to tackle the two core drawbacks plaguing the functioning of the rule of law in the EU as a legal principle as soon as possible.[270] In other words, it is impossible to solve the rule of law challenge merely by thinking in terms of enforcement of values at the national level in the Member States: an important part of the challenge lies firmly within the realm of supranational law and has to do with the EU's own framing of the substance of its law as well as the reach of its powers.

This being said, the challenges underlying enforcement lie in the familiar debate over the conferral of powers and national sovereignty, subsidiarity and proportionality, i.e. turning to enforcement *sunsu stricto* is to a large degree about the legal framing of the vertical separation of powers between the EU and its constitutive elements. With special regard to purely internal situations, the legitimacy of EU

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[267] Piet Eeckhout made a most persuasive argument that the allocation of powers *per se* cannot possibly play any role here, since, no matter which level of government is responsible, the fundamental values, as expressed in the ECHR, have to be respected, as rightly put by Eeckhout "for the CJEU […] to assume that responsibility and division of competences are one and the same, is not an example of proper judicial reasoning, to say the least". It is thus clear that the ECJ simply deploys 'autonomy' as a flimsy pretext to ensure that its own jurisdiction is unchecked: P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', 38 *Fordham International Law Journal* 4, 955–992 (2015).

Other scholars argues along similar lines. For some immediate comments after the Opinion from among the many valuable contributions, see S. Peers, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, 18 December 2014, http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html, International Commission of Jurists, EU Court Opinion a major setback for human rights in Europe, 18 December 2014, http://www.icj.org/eu-court-opinion-a-major-setback-for-human-rights-in-europe/, S. Douglas-Scott, Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice, 24 December 2014, http://www.verfassungsblog.de/en/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.VbUtp0sk9uY, J. Polakiewicz, L. Brieskova: It's about Human Rights, Stupid!, 12 March 2015, http://www.verfassungsblog.de/its-about-human-rights-stupid/#_ftnref.

[268] Cf. CJ, C-399/11 *Melloni* EU:C:2013:107

[269] The problem is not merely theoretical, as both Eeckhout and Mitsilegas have demonstrated: *Id.*; V. Mitsilegas, 'The symbolic relationship between mutual trust and fundamental rights in Europe's Area of Criminal Justice' 6 *New Journal of European Criminal Law* 4 (2015).

[270] Cf. D. Kochenov, 'The EU and the Rule of Law: Some Critical Observations', in: E. Hirsch Ballin, M. Adams, A. Meuwese (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge: Cambridge University Press, 2016, forthcoming.

interference is repeatedly questioned by Member States. But there would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.[271]

Beyond **harming nationals** of a Member State, all **Union citizens** in that State will also be detrimentally affected. Lack of limits to illiberal practices[272] may encourage other Member States' governments to follow, and subject other countries' citizens to abuse. In other words, rule of law violations – if no consequences occur – may become contagious.[273] Moreover, all EU citizens will to some extent suffer due to the given State's participation in the EU's decision-making mechanism, or to say the least, the legitimacy of Union decision-making will be jeopardised. Therefore, a state's departure from the rule of law standards and the European consensus will ultimately hamper the exercise of rights of individuals EU-wide.

As anticipated in Section 2.3 above, we shall also address an important specificity of EU law, namely the nature and future faith of instruments covering the Area of Freedom, Security and Justice.[274] As long as fundamental rights are not enforced in a uniform manner throughout the Union, and as long as a member country cannot take judicial independence in another State for granted, **mutual trust- and mutual recognition-based instruments** in the Area of Freedom, Security and Justice will be jeopardised.[275] As long as Member States are worried about their citizens' basic rights and respect for their procedural guarantees due to different fundamental rights standards, they leave short-cuts in their legislation so as not to enforce EU law and at the same time they interpret EU law in a restrictive way.[276]

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[271] European Commission, Communication on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003, 5; G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[272] The term was coined long ago, but it gained practical relevance in the EU after the Hungarian Prime Minister praised such State structures in his speech given in Tusnádfürdő on 25 July 2014. The original speech is accessible in video format via https://www.youtube.com/watch?v=PXP-6n1G8ls. Cf. Frans Timmermans' speech: "there is no such thing as an illiberal democracy". Frans Timmermans, "EU framework for democracy, rule of law and fundamental rights", Speech to the European Parliament, Strasbourg, Speech/15/4402, 12 February 2015.

[273] 'Viktor Orbán: The conservative subversive', *Politico 28*, 2015, 12–15, 15.

[274] It goes without saying that problems can easily arise in a handful of other contexts, in particular with relation to the four freedoms, which imply the existence of well-functioning loyalty between the Member States and the Union. The Area of Freedom, Security and Justice is most prone to providing an opening to the most atrocious violations of human rights which could be multiplied and amplified by the EU's mutual recognition requirements, as described above. Cf.: M.P. Maduro, 'So close yet so far: The paradoxes of mutual recognition' 14 *Journal of European Public Policy* 5, 814–825 (2007); K Nicolaïdis, 'Trusting the Poles? Constructing Europe through mutual recognition', 14 *Journal of European Public Policy* 5, 682–698 (2007).

[275] As the CJEU has recently stated, "…[T]he principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law." Opinion 2/13 (*ECHR Accession II*) ECLI:EU:C:2014:2454 on the compatibility of the draft agreement on the EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with the EU and TFEU Treaties of 13 December 2014, para. 191.

[276] V. Mitsilegas, 'The symbolic relationship between mutual trust and fundamental rights in Europe's Area of Criminal Justice' 6 *New Journal of European Criminal Law* 4 (2015); V. Mitsilegas, 'The limits of mutual trust in Europe's Area of Freedom, Security and Justice: From automatic inter-State cooperation to the slow emergence of the individual', 31 *Yearbook of European Law*, 1, 319–372 (2012); G. Vermeulen, W. De Bondt, Ch. Ryckman (eds), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Antwerpen, Apeldoorn, Portland: Maklu, 2012, 269–270.

As long as the Member States – with or without good reason – have no confidence in each other's human rights protection mechanisms, the administration of EU criminal justice will remain cumbersome and – what could potentially have fatal consequences for the EU legal system – the Member States may invoke the protection of basic human rights in order to permit exemptions from the principle of primacy of EU law.[277]

The CJEU has accepted that the presumption of EU Member States' compliance with fundamental rights may be rebuttable.[278] However, in the eyes of both the academic literature[279] and the European Court of Human Rights,[280] the Court has not gone far enough in articulating the law on this issue, as the threshold for rebutting the presumption established by the CJEU is clearly much higher than the one the ECtHR would demand, thus potentially violating the standards of the Convention.[281] If EU Member States cannot properly ensure an efficient, human rights-compliant and independent judiciary to carry out that test, how possibly could the principle of mutual recognition stand in EU JHA law?[282] This constitutes also a direct challenge to the legitimacy and effectiveness of the role and attributed scrutiny functions of European institutions like the European Commission and European Parliament. The establishment of a uniform EU fundamental rights regime might be the answer to this challenge.

The heads of States and governments reached the same conclusion in the 2010 Stockholm programme and were surprisingly honest regarding the principle of mutual recognition. The Stockholm programme expresses a straightforward criticism and intends to establish that mutual trust, which was the alleged cornerstone of several third pillar documents adopted after 11 September 2001, was in reality absent. In order to remedy the problem and create trust, the multi-annual programme proposes legal harmonisation. "The approximation, where necessary, of substantive and procedural law should facilitate mutual recognition."[283] By 2012 several important EU laws were passed to this effect, for instance laws on the right to interpretation and translation in criminal proceedings, the right to information in criminal proceedings and the establishment of minimum standards on the rights,

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[277] See the seminal Solange cases of the German Federal Constitutional Court: *Solange I*, BVerfGE 37, 271, 29 May 1974; *Solange II*, BVerfGE 73, 339, 22 October 1986.

[278] Court of Justice of the European Union, C-411/10 *N.S. v Secretary of State for Home Department* [2010] OJ C 274/21; and C-493/10, *M.E. v Refugee Applications Commissioner* [2011] OJ C 13/18, 21 December 2011, para. 80 reads, "[I]t must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR." And para. 104 reads, "In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable." And para. 106 reads, "Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."

[279] V. Mitsilegas, 'The symbolic relationship between mutual trust and fundamental rights in Europe's Area of Criminal Justice' 6 *New Journal of European Criminal Law* 4 (2015); P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', 38 *Fordham International Law Journal* 4, 955–992 (2015); D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015.

[280] ECtHR, *Tarakhel v Switzerland* Application No. 29217/12, 4 November 2014 (Reconfirming ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011).

[281] The insufficient standard of the CJEU has recently been reconfirmed in Case C-294/12 *Abdullahi v Bundesasylamt* [2010] ECR I–1493.

[282] S. Carrera and E. Guild, *Implementing the Lisbon Treaty Improving the Functioning of the EU on Justice and Home Affairs*, Manuscript.

[283] Stockholm Programme, Section 3.1.1. See http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:jl0034&from=EN.

support and protection of victims of crime – issues all covered in the Justice chapter of the Charter of Fundamental Rights.[284]

The development of judicial cooperation as illustrated above supports the neo-functionalist explanation of the evolution of European integration. At the early stage of integration, Member States declined each and every rudimentary formal criminal cooperation, even if cooperation based on mutual recognition has been the cornerstone of EU law for decades before the principle entered the domain of criminal law.[285] The free movement of persons in respect of the Area of Freedom, Security and Justice, in addition to the formation of subjects of legal protection at Community level, necessitated common criminal investigation and cooperation in European decision-making (first spillover effect).[286] The initially stalling criminal cooperation and Member States' fear of losing a considerable part of their national criminal sovereignty resulted in the formation of norms that are highly influenced by politics, difficult to enforce and represent lower levels of cooperation: instead of legal harmonisation the adopted provisions comply with the principle of mutual recognition.

However, in the absence of adequate, communautarised, enforceable minimum procedural guarantees and a fundamental rights mechanism, such provisions were not able to operate effectively. Currently, we are witnessing how due process guarantees complement existing provisions and how an EU criminal procedural law system evolves, as a second spillover effect, in order to maintain and promote an effective criminal cooperation. This is how minimum harmonisation of due process guarantees – or in other words, how making fundamental rights justiciable permits – the survival of mutual recognition-based laws.

Beyond the political costs of the democracy, rule of law and fundamental rights deficit exposed in the non-compliant Member States, the social and economic costs should also be mentioned.

When discussing **social costs**, the point of departure should be the deficiency of democracies, which results in the depreciation of the other two values. The elected legislative branch can by necessity not represent the whole of the population, and oftentimes it does not even represent the interests of those who voted it into the parliament. There are a number of ways by which elected representatives misrepresent the people. Some voters may remain without representation due to the simple fact that their preferred candidates don't make it into the parliament. Those candidates who are democratically elected might ignore the interests of the opposing candidate's voters, but elected representatives might also turn against those who elected them by not fulfilling the promises made during the electoral campaign.

Also – and most important for our purposes – certain groups of people are denied the chance of being represented right from the outset, by being excluded from exercising even a most foundational first generation human right, namely the right to vote. These are the groups that are traditionally called – depending on the jurisdiction in question – insular or vulnerable minorities, such as children, individuals living with mental disabilities, and certain groups of foreigners. Lacking political rights,

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[284] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council framework decision 2001/220/JHA.

[285] ECJ, Case 120/78 *Rewe-Zentral AG kontra Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649

[286] E.B. Haas, *Beyond the Nation-state*, Stanford: Stanford University Press, 1964; Ph.C. Schmitter, 'Three Neo-functional Hypotheses About International Integration', 23 *International Organization* 2, 161–166 (1969).

they are typically protected by the judiciary, first and foremost by apex courts.[287] Depreciation of the rule of law therefore hits these individuals much harder than it hits those capable of influencing to some extent electoral processes.

Finally, as proven in Annex 4 by Wim Marneffe, a state based on democracy, the rule of law and fundamental rights creates an institutional climate that is determinant for stable **economic performance**: "Rational law presents a necessary condition for economic transactions, and its application creates a sense of foreseeability and predictability on the part of economic agents. The latter is a necessary condition in order for rational economic actions to occur." One of the most interesting studies in this research domain is Haggard & Tiede[288] proving that control of private capture and corruption, institutional checks on government, protection of property rights and mitigation of violence are all in close correlation with economic performance. (For the details see Annex 4.) Especially in times of financial and economic crises solid State institutions based on commonly shared values play a key role in creating or restoring confidence and fostering growth.[289]

In sum, as a result, partly, of the deficiencies of the Union's own rule of law framing, Member States failing to comply with the values of Article 2 TEU undermine the very core of the Union, which can end up undermining the state of values in compliant Member States through a strict enforcement of mutual recognition in an atmosphere where it has no say concerning the substance of the rules enforced in a huge array of cases. In addition to intra-State concerns, rule of law backsliding and constitutional capture will thus harm nationals of the Member State in question, as well as EU citizens as a whole; erode mutual trust on which instruments in the Area of Freedom, Security and Justice are based; incur economic, social and political costs for the EU; and diminish credibility in external affairs, especially when promoting democracy, the rule of law, and fundamental rights in third countries. Current initiatives by EU institutions shall therefore be welcome, as what is at stake is the rule of law, the foundational European value, the *sine qua non* of European integration, without the safeguarding and enforcement of which the EU as we currently know it would cease to exist.

3.2 Sovereignty challenges of an EU approach

It is the very constitutional structure of the EU – a multi-layered system of governance following a quasi federal model[290] – which is based on the principle of conferral that makes the criticism of EU intervention possible. Indeed, unlike what would be the case with unitary states, for instance, the EU simply cannot intervene in the matters which are outside the scope of competences conferred to it by the *Herren der Verträge* – the Member States. The easiest way to describe it is to state that the Union, although a constitutional system, is an atypical one, as it does not possess *Kompetenz Kompetenz*. Playing

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[287] A. Sajó, "Courts as representatives, or representation without representatives", Speech delivered in Yerevan, Armenia at the conference on "The European standards of rule of law and the scope of discretion of powers in the Member State of the Council of Europe", 3-5 July 2013.

[288] Haggard, S. and Tiede, L. 'The Rule of Law and Economic Growth: Where are We?'. *World Development, 39*(5), 673-685 (2011).

[289] The impact of national justice systems on the economy is shown by the International Monetary Fund, the European Central Bank, the OECD, the World Economic Forum and the World Bank. The 2015 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2015) 116 final; Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. The 2014 EU Justice Scoreboard, COM/2014/0155 final; 'The Economic Impact of Civil Justice Reforms', European Commission, Economic Papers 530, September 2014.; OECD, What makes civil justice effective?, OECD Economics Department Policy Notes, No. 18 June 2013 and G. Palumbo, G. Giupponi, L. Nunziata and J.S. Mora-Sanguinetti, The Economics of Civil Justice: New Cross-Country Data and Empirics, OECD Economics Department Working Papers, No. 1060.

[290] O. Beaud, *Théorie de la federation*, Paris: Presses Universitaires de France, 2007; R. Schütze, *From Dual to Cooperative Federalism*, Oxford: Oxford University Press, 2009.

with this understanding, the governments of the Member States undermining the rule of law and other values of Article 2 TEU usually fall short of telling the full story of what conferral means and how it functions, focusing merely on the rule that powers not delegated to the EU rest with the Member States.

The picture is in fact somewhat more complicated. Not only can the EU intervene to protect its constitutional core, which is, through the values, shared with those of the Member States. It is also unequivocally obliged by the Treaties to act. This obligation has both an internal component, reflected in Article 7 TEU, and an external component, articulated in, e.g. Article 3(1). Part of the legal confusion seemingly playing in favour of the abusive governments is that the values of Article 2 TEU occupy a somewhat atypical place in the body of EU primary law, since they cannot serve as a basis for legislation, providing a solemn restatement of the EU's constitutional nature shared with the Member State. Not being part of ordinary *acquis* does not disqualify them as law, however. Moreover, their binding nature is crystal clear and unquestionably operates equally within and outside the scope of conferred EU competences, since conferral, as the very existence of a rule of law-abiding democratic system of supranational law protecting fundamental rights and also ensuring that the objectives of the Union are reached, would be profoundly undermined – indeed, made impossible – should any of the Member States of the Union fall seriously short of meeting the basic standards of the value-provisions in the Treaties.

This explains why Article 7 TEU, put in place specifically to police the adherence of the Member States to the requirements of Article 2 TEU, does not contain *any* competence limitations. Indeed, it would be utterly unproductive to demand EU intervention only in the case of a falsified EP election, for instance, while leaving a falsified national election in a backsliding Member State unaffected. Rule of law examples stemming from the requirement of the proper functioning of a national court system are even more telling. National courts of the Member States act both as national courts *sensu stricto* and as enforcers of EU law or 'European courts'. In this sense, they constantly enjoy a dual function within the Union. Should the interpretation of the narrow approach to the enforcement of values prevail – thus, wrongly, connecting them with the scope of competences where the EU can legislate – it would be necessary, in every individual case, to determine whether the judge raising an issue of EU law or sensing a preliminary question to the CJEU is sufficiently independent and properly appointed, while not looking at these issues if the judge sits in a purely national case.

To make matters worse, the difference between purely national and EU-related can be so blurred, that even the experts are at times puzzled, making such determinations difficult if not almost impossible.[291] Such is the nature of the overlap of the layers in the European legal system: the Member States are responsible only for one layer, but are thereby able to affect the other every single minute. This is where the duty of loyalty and sincere cooperation kicks in, prohibiting the national (and also the EU) authorities from the obstruction of the achievement of the goals of integration as well as requiring each authority in the Union – be it national or supranational – to assist in the attainment of the Union's objectives. In this context any departure by *any* national authority from the strict adherence to the values of Article 2 TEU generates an obligation for the EU to act, to ensure that the proper and uniform functioning of the Union legal system throughout the whole territory of all the Member States remains unobstructed. In other words, the scope of the *acquis* as such is necessarily much narrower than the scope of application of the values of Article 2 TEU. This discrepancy cannot convincingly be interpreted as potentially obstructing EU intervention with the aim of ensuring that the values of Article 2 TEU are complied with.

It thus becomes clear that although Article 2 values, including, most importantly, democracy and the rule of law, are not within the scope of ordinary *acquis* in the sense that the Union cannot legislate based

[291] A. Tryfonidou, *Reverse Discrimination in EC Law*, The Hague: Kluwer Law International, 2009.

on this provision, their inclusion within the broader ambit of EU law cannot be disputed, as underlined by scholars on numerous occasions.[292] A most obvious sign of the crude legal nature of this provision is the existence of Article 7 TEU, which contains a specific enforcement mechanism. Besides, Article 2 values are unquestionably part of the 'Treaty', which the Commission is empowered to protect with the help of the ordinary infringement procedures allowing it to bring recalcitrant Member States to court (Article 258 TFEU).[293]

To explain why the values of Article 2 TEU enjoy such an atypical place within the context of EU law and do not follow the simple rules of the *acquis*, a brief turn to the history of the values' articulation is useful. It demonstrates a gradual move from the *presumption of compliance* of the Member States with values toward the articulation of an *enforced presumption* via the introduction and constant amendments of Article 7 TEU.

The democratic and rule of law-abiding nature of the Member States of the Union has always been presumed: the initial Communities were given neither powers nor legal tools to intervene in this field. This being said, as we already mentioned, the essential role democracy, the rule of law and other values play in the very construct of the Union is undeniable: the purpose of unification was ensuring peace, prosperity and liberty for the peoples of Europe, which was characterised both by limiting the range of national political as well as democratic choices.[294]

That only democratic States with a strong rule of law and fundamental rights record could join the Union was not part of its black-letter law but has been assumed from the very beginning.[295] The presumptions about the democratic maturity of the Member States survived several rounds of enlargement, including those extending membership of the bloc to the newly-democratised countries with no strong historical the rule of law record. The belief of the time seems to have been that the transformative power and the gains of integration and the internal market made any backsliding impossible. The Member States assembled in the Council always had the upper hand in enforcing the presumption, overruling the cautious assessment of the European Commission with regard to Greek membership, for instance.[296]

By the time of the 'big-bang' enlargement to the east the problems related to this approach became apparent: not only did Greece cause problems within and outside of the scope of the *acquis*; there was no trust in the newly-democratised states emerging from behind the Iron Curtain. This is when democracy and the rule of law as requirements addressed to the Member States, as opposed to the Union itself,[297] made it into EU law, first through enforceable political proclamations, then through the profound amendments of the Treaties' provisions on the principles on which the Union and the Member

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[292] C. Hillion, 'Overseeing the Rule of Law in the EU', in: C. Closa and D. Kochenov, *Reinforcing the Rule of Law Oversight in the European Union,* Cambridge: Cambridge University Press, 2016, forthcoming; C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', 2014/25 *RSCAS Working Paper* (2014); J.-C. Piris, *The Lisbon Treaty*, Cambridge: Cambridge University Press, 2010.

[293] See, e.g. K.L. Scheppele, 'Enforcing the Rule of Law through Systemic Infringement Proceedings', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

[294] A.J. Menéndez (2015) 'Whose Justice? Which Europe?', in: D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2015, 137–152.

[295] P. Soldatos and G. Vandersanden, 'L'admission dans da CEE – Essai d' interprétation juridique', *Cahiers de droit européen*, 674–707 (1968).

[296] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, The Hague: Kluwer Law International, 2008.

[297] 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', 6 *European Constitutional Law Review* 359–396 (2010).

States were founded as well as changes in the EU enlargement procedure.[298] The role of the Commission in this context was absolutely crucial, as this institution was *de facto* the only one entrusted with the monitoring of the candidate countries' adherence to the ideals of democracy, the rule of law, and fundamental rights protection, through the implementation of the Copenhagen criteria of 1993.[299] While a huge bulk of documents able to shed light on the emerging European consensus with regard to the meaning of the rule of law and its place in the context of modern constitutionalism was produced in the process, the ultimate results turned out to be both inconsistent and unreliable in terms of triggering transformation,[300] and unstable in terms of guaranteeing lasting change, to which the backsliding in a number of the Member States testifies.[301] The Commission is one of the key actors responsible for the failure of conditionality in the area of democracy and the rule of law.

On the positive side, however, the pre-accession strategy, including the Commission's engagement, resulted in three important developments. Each of these, just like the negative side which is one of the roots of the current crisis of the rule of law, inform the legal-political nature of the Union today.

Firstly, the pre-accession engagement with the rule of law unquestionably contributed to the distillation of the meaning of this fundamental principle of law in the context of EU law, which, albeit broad and complex, is clear.[302]

Secondly, the pre-accession engagement led to the articulation of the need to include the key principles promoted through the Copenhagen criteria among the written principles of EU law – a step forward following their embrace through the case law of the Court of Justice. In this sense, the pre-accession strategy played a crucial role and resulted in the reshaping of European constitutionalism as such, as Sadurski has clearly demonstrated.[303]

As part of this process, thirdly, a special political provision – Article 7 TEU – was included in the Treaty of Amsterdam to enable the Union to act when the principles of the rule of law, democracy and fundamental rights protection are breached by one of the Member States.[304] Although not deployed in the case of the public overreaction against the Austrian FPÖ coalition,[305] this provision marked a definitive departure from dozens of years of constitutional practice and is of crucial importance. For the first time since the inception of the Communities, the Treaty of Amsterdam laid to rest the unworkable assumption that all the Member States will *naturally* adhere to democracy and the rule of law merely as a consequence of the membership of the Union as such.

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[298] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, The Hague: Kluwer Law International, 2008. Chapters 1 and 2.

[299] M. Maresceau 'Quelques réflexions sur l'application des principes fondamentaux dans la stratégie d'adhésion de l'UE', in: M. Maresceau, *Le droit de l'Union européenne en principes: Liber amicorum en l'honneur de Jean Raux*, Rennes: Apogée, 2006, 69–97.

[300] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, The Hague: Kluwer Law International, 2008.

[301] J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' *Working Paper* No. 3, Washington DC: Transatlantic Academy (2013).

[302] 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', 6 *European Constitutional Law Review* 359–396 (2010); D. Kochenov 'The EU Rule of Law: Cutting Paths through Confusion', 2 *Erasmus Law Review* 1, 5–24 (2009).

[303] W. Sadurski, *Constitutionalism and Enlargement of Europe*, Oxford: Oxford University Press, 2012.

[304] W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' 16 *Columbia Journal of European Law* 3, 385–426 (2010).

[305] *Id.*; G.N. Toggenburg 'La crisi austriaca: delicate equilibrismi sospesi tra molte dimensioni' 2 *Diritto pubblico comparato ed europeo*, 735–756 (2001).

The legal framing and articulation of the idea that the values of Article 2 TEU can and should be enforced created the current state of affairs, where EU legal tools are available for use only in this field. This enrichment of EU law made the legal system of the Union more complex, as the law now – and since the times of the pre-accession strategy at least – *de facto* and also *de jure* includes the *acquis sensu stricto* – the law created by the Union within its scope of competences – and the *acquis* on values, which does not have such competence limitations but, at the same time, lying in the realm of core constitutional importance for the EU and the Member States alike, makes formal legislation on its basis impossible. Enforcement is always a possibility, however.

Subsidiarity, respecting the power of the lowest possible authority to act, should seemingly guide any action in this sensitive field. In other words, the EU is absolutely barred from encroaching on the constitutional essence of the Member States in situations where the adherence to values has not deteriorated beyond the thresholds established by Article 7 TEU. How to establish this?

In order to ensure that the principle of subsidiarity and, by consequence, the sovereignty of the Member States is respected, it is indispensable for the Union to create reliable, permanent and periodic mechanisms of data collection, monitoring and exchange, to enable it to be always on top of the situation on the ground in all the Member States. Monitoring is of crucial importance to make sure that the limits of powers set in the Treaties are respected. The pre-Article 7 procedure of the Commission, initiated against Poland on January 13 this year, is a great example of a competence-sensitive and constructive approach to tackling the issue of vital knowledge. By designing a special procedure of information exchange with the Member State suspected of potentially falling short of Article 7 standards, the European Commission managed to establish a transparent and reliable procedure which is as constructive as it is forward-looking. Yet, and most unfortunately, it will most likely not be effective at all in reaching the goals it set for itself, as explained above.

The European Parliament is as empowered as the Commission to step up its activity in this domain, as, just like other institutions, the EP is expected to play a role in the Article 7 procedures, once activated. To make sure that a meaningful role is played and the principle of the division of competences is safeguarded, it is absolutely necessary for the Parliament to be in possession of all the necessary information concerning the state of democracy and the rule of law on the ground in the Member State suspected of a violation.

To sum up, it is necessary to state that although EU values do not make up part of the standard Union *acquis* by lying within the grey area in terms of competences, the departure from the presumption of compliance with the values of the EU by all the Member States brought about by the big-bang enlargement to the east and the introduction of the special procedures of the enforcement of values, changed the paradigm of EU engagement in this sensitive area, creating a new legal reality compared to, say, 30 years ago. Once the obligation to enforce and promote the values appeared in the Treaties, the Member States were barred from making any legally sound arguments tailored to preventing EU intervention in the area based on the lack of *Kompetenz Kompetenz* considerations. Quite on the contrary, in light of the obligation to uphold and promote the values of the Union as well as the duty of loyalty, one can expect each Member State to actively participate in the attempts of the Union to restore the adherence to the values in any part of the Union's territory.

4. Specific suggestions for the elements of an EU Scoreboard

European integration is based on core values: the EU's watchdog function over the rule of law, liberal democracy and fundamental rights; upholding the heritage of enlightenment; allowing rationality to penetrate politics and law-making; and granting protection for individuals against the State or supranational entities. In the following, and based on the previous parts of this Research Paper – mapping the state of the art and existing mechanisms in the EU, CoE and UN contexts to assess democracy, the rule of law and fundamental rights, and highlighting general and EU-specific methodological issues – the main points to be taken into consideration when establishing an EU Scoreboard will be summarised.

4.1 Annual cycle: an all-encompassing approach

In its Resolution of 10 June 2015 the European Parliament called for an annual monitoring of compliance with democracy, the rule of law and the situation of fundamental rights in all Member States through a Scoreboard, to be established on the basis of common and objective indicators. The first issue to be tackled is 'what' a Scoreboard is, what methodology and what model it shall follow. A Scoreboard could be a combination of 'discussion and dialogue', 'monitoring', 'measuring/evaluating and benchmarking' and 'supervision', with various actors and methods channelled into one EU-specific system. In this sense a Scoreboard could be described as a 'process' encompassing a multi-actor and multi-method regular cycle.

4.2 Conferral and subsidiarity

Member States often claim European institutions act *ultra vires* when intruding into their purely domestic affairs. As it was shown in Section 3.2 above, not only can the EU intervene to protect its constitutional core, but it is also unequivocally obliged by the Treaties to act. Member Sates are interdependent in multiple areas, and depreciation of EU values will have EU-wide effects in all possible ways. Beyond harming nationals of a Member State, Union citizens residing in that State will also be detrimentally affected. Illiberal practices encourage other Member States' governments to follow, and subject other countries' citizens to abuse. All EU citizens will to some extent suffer due to the given State's participation in the EU's decision-making mechanism. Furthermore, the mutual trust underlying many European laws will be fundamentally undermined, jeopardising the Union's legal system. To complicate matters further, the difference between national and EU-related can be blurred, so as to make reference to purely domestic matters meaningless.

At the same time subsidiarity should guide any EU action in the field. In other words, the EU is absolutely barred from encroaching on the constitutional essence of the Member States in the situations where the adherence to values has not deteriorated beyond the thresholds established by Article 7 TEU. In order to ensure that the principle of subsidiarity and, by consequence, the sovereignty of the Member States are respected, it is indispensable for the Union to create reliable instruments of data collection and exchange, to enable it to be always on top of the situation on the ground in all the Member States. A Scoreboard instrument in this sense is not in contravention of the subsidiarity principle but, quite to the contrary, would contribute to making it operational.

4.3 EU self-check and a Scoreboard mechanism for the Member States

In the supranational context, in order to strengthen the EU's position as a rule of law actor and to prevent hypocrisy, preferably both the supranational entity – in the case at hand, the EU – and its constitutive elements, i.e. the Member States, shall be scrutinised via a Scoreboard.

How likely is a scenario where the EU would violate European principles? Let us here refer to the highest European authority, the main European guardian of fundamental rights, the ECtHR, which

found that the protection of fundamental rights by EU law could be considered "equivalent" to that of the Convention system.[306] There might be pragmatic reasons behind the presumption – the ECtHR not wanting to engage in a direct conflict with the EU or with the Member States that might become inflexible and jeopardise enforcement if they found themselves between a rock and a hard place, i.e. either meet their obligations stemming from EU law or comply with the Convention.[307] Still, that does not take away from the importance of the Bosphorus presumption, i.e. that EU law provides a system of fundamental rights protection similar to the Convention system. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.[308]

The sheer fact that the presumption is rebuttable shows that the EU's adherence to European values cannot be taken for granted. Even more illustrative is the fact that in cases where the ECtHR refused to apply the Bosphorus test, pieces of EU laws – when scrutinised through the conventional test – were found to be in violation of the Convention.[309] Whereas in a handful of cases the CJEU found EU instruments to be in violation of EU values,[310] there are worrying instances when the Luxembourg Court did not draw the right balance between competing private and public interests – as we retrospectively know from ECtHR judgments.[311] The number of such cases is only likely to grow after Opinion 2/13, which gave preference to vague structural considerations of EU federalism over the substance of the fundamental rights of EU citizens in a situation where there was no apparent conflict between the two, as Piet Eeckhout, among others, has demonstrated.[312] That proves all too well the necessity to apply the Scoreboard *vis-à-vis* the EU including its laws and policies, and the actual realisation of goals to which the Union is committed, and not only its member countries. That will also enhance the EU's internal and external legitimacy.

At the same time European values not only influence European law-making on the supranational scene but also have an impact on national laws and policies, and *vice versa*; mutual trust among EU Member States and their respective legal systems is the foundation of the Union legal system. Therefore, it is of utmost importance to regularly check the way European values are implemented at the national level.

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306 "If such an equivalent protection is considered to be provided (…), the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization." ECtHR, *Bosphorus v Ireland*, Application No. 45036/98, 30 June 2005, para 165.

307 Indeed, the ECtHR stated, "[T]his presumption of equivalent protection is intended, in particular, to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which is not party to the Convention and to which it has transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership vis-à-vis the Convention." ECtHR, *Michaud v France*, Application No. 12323/11, 6 December 2012, para. 104

308 ECtHR, *Bosphorus v Ireland*, Application No. 45036/98, 30 June 2005, para. 156.

309 ECtHR, *Michaud v France*, Application No. 12323/11, 6 December 2012; *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011.

310 Case C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources*, EU:C:2014:238; Case C‑362/14 *Maximillian Schrems v Data Protection Commissioner*, joined party: *Digital Rights Ireland Ltd*, ECLI:EU:C:2015:650.

311 ECtHR, *Tarakhel v Switzerland* Application No. 29217/12, 4 November 2014; Case C-294/12 *Abdullahi v Bundesasylamt* [2010] ECR I–1493.

312 P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' 38 *Fordham International Law Journal* 4, 955–992 (2015); D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015.

4.4 Possibilities and limits of borrowing from existing mechanisms

There is a complex matrix of existing actors, methods and instruments monitoring, evaluating and to some extent supervising democracy, the rule of law and the protection of fundamental rights. There is a strong belief – also shared by interviewees – 'not to reinvent the wheel' but instead to rely on existing mechanisms, and if needed to complement existing systems and make them EU-specific. As has been shown in this Research Paper, this is already happening, with the EU Justice Scoreboard relying among others on the CoE CEPEJ model of evaluation/benchmarking, and the EU Anti-Corruption Report making use of the GRECO model. Borrowing may take place with regard to information, data, standards, structures and mechanisms.[313]

One option is to bring together all existing data and analyses from the international scene under one umbrella, in a 'one-stop shop', like the European Fundamental Rights Information System within the frame of the Fundamental Rights Agency. EFRIS would not aggregate data or indices; instead it would allow for a sophisticated search to check in a coherent format all data and reports on a given Member State, in a given time frame on a given topic. It would enable gaps to be identified and allow additional data to be acquired and conclusions to be drawn. In addition annual reports could be drafted on the basis of available materials.[314] This Study argues that already existing data and analyses on various 'rule of law-related dimensions' at the CoE and the UN should be taken in consideration during the EU Rule of Law Scoreboard.

At the same time, bringing together data and analysing synergies, or even making comparisons as suggested in the literature, is an exercise that is close to impossible and more akin to 'alchemy'. As shown in Chapters 1.2 and 1.3 of this Paper, standards, sources, data, data-handling methods and the interpretations of each of the various sets of tools are so different in nature and fundamentals, they necessitate a very tedious methodological exercise for making international mechanisms comparable and conclusions and findings meaningful.

While relying on external sources and mechanisms, the EU element or specificity of the process shall always be kept. In other words, a rule of law mechanism shall never be 'contracted out' entirely to third parties, since non-EU actors fail to take due account of their relevance or links with existing European law and policies as well as general principles of European law, such as that of mutual recognition of judicial/administrative decisions.

As the CJEU put it: "In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[315] No external non-EU mechanism would put such a heavy emphasis on the specificities of the EU legal system and the autonomy, primacy, unity and effectiveness of EU law. If the path taken by the

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[313] For details see Chapter 2 of the present Research Paper and in the human rights context specifically K. Starl, V. Apostolovski, I. Meier, M. Möstl, M. Vivona and A. Kulmer, in collaboration with H-O. Sano and E.A. Andersen, Baseline Study on Human Rights Indicators in the Context of the European Union, 31 December 2014, http://www.fp7-frame.eu/wp-content/materiale/reports/12-Deliverable-13.1.pdf.

[314] Promoting the rule of law in the European Union. FRA SYMPOSIUM REPORT, 4th Annual FRA Symposium, Vienna, 7 June 2013, http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf.

[315] Opinion 2/13, (*ECHR Accession II*) ECLI:EU:C:2014:2454, para. 194.

CJEU is to be followed, the EU shall not allow a third party to determine exclusively how European values shall be construed in the EU's multi-level constitutional system.[316]

The stance of the Court can of course be harshly criticised. Should the Court be „serious about its claim that the Union constitutes an entity with distinct constitutional features, it should be prepared to translate this into a policy of deference towards external norms. (...) Under a modern, liberal reading of the concept, more autonomy vis-à-vis international law in effect might mean less autonomy."[317] In the present context the sui generis constitutional character of EU law predestines it to the status of "domestic law" that could potentially be reviewed by the ECtHR.

But there is a strong argument for respecting EU law autonomy: the EU shall be allowed to set higher standards than other international mechanisms. Take the example of a Member State found in violation of the European Convention on Human Rights due to its widespread overcrowding of prisons.[318] Is the Member State free to refuse surrendering suspects or alternatively to make surrender conditional upon an assurance that minimum detention conditions are met in the issuing state?[319]

And on what basis? In the N.S.[320] case the Court of Justice – echoing the Strasbourg judgment in M.S.S.[321] – emphasised international reports. So does a requested State have to wait until a prisoner exhausts all domestic remedies and turns to the Strasbourg Court, which ultimately renders a decision? Or will it be accountable to make an assessment on a case-by-case basis, thereby overwriting the principle of mutual trust? Or somewhere in between, does it have to register a certain level of rights infringement in order to engage in an assessment of the merits of the case? Does it have to wait until it can rely on international documents, e.g. until the Council of Europe anti-torture Committee visits the issuing country and publishes a negative report? Instead of being at the mercy of external bodies, the EU could develop its own control mechanism and prevent mutual recognition work even before there was international condemnation for a human rights violation. As Didier Bigo, Sergio Carrera and Elspeth Guild suggested, "[A] permanent EU assessment board could be established in order to carry out a constant monitoring of the quality of Member States' criminal justice systems and verify whether they fulfil international and European standards on the rule of law."[322]

The EU Rule of Law Scoreboard could fit into the timetable of the European Semester and could be linked to the Cycle of Economic Governance. Beyond necessary overlaps in data collection however the EU Scoreboard shall be detached from other existing mechanism, with special regard to the latter's weaknesses with regard to enforcement.[323] In the former mechanism the low enforcement rate remains

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316 Even though it may undermine the EU rule of law. D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 2015.

317 J.V. van Rossem, *The Autonomy of EU Law: More is Less?, Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*, The Hague: Asser Press/Springer, 2013, 39–40.

318 The case is not entirely hypothetical, see ECtHR, *Varga and Others v Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015.

319 Questions soon to be answered by the CJEU in Case C-404/15 *Aranyosi*, request for a preliminary ruling lodged on 24 July 2015. See also Opinion of AG Bot in C‑404/15 *Aranyosi* and C‑659/15 PPU *Căldăraru*, ECLI:EU:C:2016:140.

320 Cases C-411/10 *N.S. v Secretary of State for Home Department* [2010] OJ C 274/21; and C-493/10, *M.E. v Refugee Applications Commissioner* [2011] OJ C 13/18.

321 ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011.

322 D. Bigo, S. Carrera and E. Guild, The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security, 2009, http://aei.pitt.edu/12224/1/1905.pdf, 12.

323 Darvas, Z. and Leandro, Á. 'The Limitations of Policy Coordination in the Euro Area Under the European Semester, Brussels: Bruegel Institute', Policy Contribution 2015/19, November 2015

without much echo, whereas the essence of the proposed EU Scoreboard is enforcement of foundational EU values beyond monitoring.

4.5 Contextual, qualitative assessment, little if no benchmarking

A case-by-case approach would be needed, where assessment through numerical indicators could be an element, but it should not constitute the core of the new Scoreboard. Instead, emphasis shall be placed on a contextual, qualitative assessment of data and a country-specific list of key issues, in order to grasp interrelations between data and the causalities behind them.

Limits of the Scoreboard should also be acknowledged: it would not be suitable to predict or prevent future trends; rank Member States according to who is performing 'better' or 'worse'; or conduct simplistic cross-country comparative analyses.

Fundamental rights to a lesser extent, but democracy and even more the rule of law are fluid concepts and phenomena, and there is no single ideal formula to achieve them. Rule of law is a contested concept, and even the most detailed definition, to be true to the idea of the rule of law, has to contain a share of vagueness in order to accommodate rule of law's very nature. This requirement of vagueness plays strongly against any Quichotean attempts to turn the rule of law into a shopping list of elements, even if some examples of relatively good lists are known. Eliminating vagueness entirely, on such a reading, profoundly undermines the usefulness of the concept itself. Therefore we argue against designing the standards along indicators – a rather dubious exercise that can easily be attacked as politically or ideologically biased. It is suggested to carefully consider whether needed and sparingly use benchmarking methods and indicators.

Lack of agreement on standards and a context-sensitive analysis is not only benefiting states, but at the same time it does not allow rule of law backsliders to hide their efforts by referencing other states and claiming that there was nothing unorthodox about their structures. Whereas it may be true that formally a state borrowed the existing legal solutions, institutions and practices from various other jurisdictions, it might well be a selection of 'worst practices' and taken as a whole, a "Frankenstate" may be in the making.[324]

The contextualization of a rule of law assessment shall be a nuanced exercise and particular care shall be taken not to rely on a standardised benchmarking system that could potentially veil or blur problems in the subparts of EU values – thereby doing more harm than good, or even more harm than not having an EU Scoreboard at all.

4.6 Three scenarios

On a positive note, the ongoing rule of law debate shifted its focus from an Article 7 TEU emergency-led context toward a discussion on shared European values and legal principles. Over time the scope of the discussion became broader, in at least two dimensions: emphasis shifted beyond supervision to the active promotion of EU values, and the material scope widened beyond the rule of law incorporating all aspects of the triangular relationship including also democracy and fundamental rights. This also means that very different scenarios are covered in the debate, and these shall be clearly distinguished, as they trigger different responses. We systemised possible stages of respect for European values and identified three scenarios.

[324] K. L. Scheppele, 'The Rule of Law and the *Frankenstate*: Why Governance Checklists Do Not Work', 26 *Governance* 2013, 559.

In the *first scenario*, the boundaries of democracy, the rule of law and fundamental rights are primarily set by national constitutional law and domestic bills of rights, whereas the enforcement of the values is first and foremost the task of the domestic courts. Acknowledging that decisions are made by fallible human beings, in-built guarantees emerged over history to remedy mistakes and biases, such as the requirement of an impartial and independent judiciary, the possibility of appeal, but broader concepts including separation of powers or checks and balances are also supposed to contribute to the enforcement of values. Therefore in a functioning democracy based on the rule of law respecting fundamental rights, an external mechanism is not vital. Still, it can have an added value, with special regard to the positive obligations of the EU to promote European values. (cf. Article 3 TEU) At the same time the only way to ensure co-ownership of the Scoreboard of Member States in general, is to have countries involved in the scoreboarding process and invite them to cooperate, irrespectively where they stand with the enforcement of European values.

In a *second scenario* a Member State still adhering to democracy, the rule of law and fundamental rights might be in violation of certain individual rights, due to individual mistakes or structural and recurrent problems. In such cases as a general rule, if domestic mechanisms (such as a constitutional court, civil society or media pressure) are incapable of solving the problem, the national law will be overwritten by international law and deficiencies in application of the law will be remedied to some extent by international apex courts. That applies both to individual rights infringements and structural problems. In this second scenario international law is invoked vis-à-vis a democratic nation state based on the rule of law and respecting fundamental rights, where there necessarily emerge some law-making mistakes or anomalies in the application of the law. In other cases with a chronic lack of capacity to solve systemic problems such as corruption, international norms and *fora* cannot remedy the problems, but can point to them and contribute to the domestic efforts tackling them. In this second scenario emphasis shall be placed on the various sub-elements of European values; Member States should be warned if these are at risk, in what concerns specific issues or themes; they shall receive an in-depth analysis of key problem areas; and particular care shall be taken not to rely on a standardised benchmarking system that could potentially veil or blurred problems in the subparts of democracy, and the rule of law or fundamental rights.

There is also a *third scenario*, which is qualitatively different from the situations described in the previous points. In this last scenario domestic checks, all channels of internal criticism failed; there is a systemic breach of separation of powers, constitutional adjudication; there is a failure of the ordinary judiciary and the ombudsman system; and neither civil society nor the media is capable of fulfilling their watchdog functions. In a state which is off the track of democracy, the rule of law and fundamental rights, only the control mechanism of international law including international courts protecting the rule of law is left.[325] Accordingly we regard international norms and enforcement mechanisms as external tools of militant democracy whereby the unrepresented are granted protection against their substandard representatives, against arbitrary use of power and mass violations of individual rights and freedoms when all domestic channels of criticism have been silenced and all domestic safeguards of democracy became inoperational – in other words, when the rule of law has been efficiently deconstructed in the national setting, i.e. when a Member State is in a state of constitutional capture,[326] sometimes also referred to as constitutional overhaul,[327] or if it is on its way towards such a state, also

[325] Cf. "[I]n contemporary Europe, some of the most important institutional checks on power are those exercised by the EU and the broader international community, rather than anything within Hungary itself." Francis Fukuyama, 'Do Institutions Really Matter?' *The American Interest*, 23 January 2012, http://blogs.the-american-interest.com/fukuyama/2012/01/23/do-institutions-really-matter/#sthash.DOa5ys3f.dpuf.

[326] J.-W. Müller, *Constitutional Patriotism*, Princeton: Princeton University Press, 2007.

[327] Renata Uitz, 'Can You Tell When and Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 I-CON 279–300, 282.

referred to as rule of law backsliding.[328] In such states no areas of social life remain intact and arbitrariness penetrates all state policies.

Whereas democracy, the rule of law and fundamental rights are singled out for the present analysis, the division of scenarios shall also be applicable to other European values, as well. The system developed could also include rule of law obstruction and weakening of the EU's international presence through well-articulated actions preventing EU foreign policy from achieving its desired results.[329]

Construction of an illiberal state cannot go unnoticed. It is quite apparent when a state departed from the concept of liberal democracies, especially when it openly propagates an alternative state structure. Even if it is not self-proclaimed, the steps taken clearly delineate the path towards an authoritarian regime. Still, an "I know it when I see it" approach is not viable,[330] and will immediately be subject to criticism claiming the political and ideological nature of the attack. It is not easy to pinpoint the date and time when the line between the second and third scenarios has been crossed, and determine when an illiberal state is in the making. Benchmarking, indexing and an accordingly conducted "comparative analysis may overlook the building of a constitutional regime in which constitutional constraints on the exercise of political power evaporate, signs which point to clear departures from the global fold."[331]

Measuring the severity of the violation will not help either: whereas the depth of the violation may be indicative, it is not necessarily decisive as to a systemic threat or breach: however grave the infringement, if there is a commitment to foundational values by the supranational entity or the state, it is meaningful to engage in a dialogue and remedy the situation. (Scenario 2)[332] Instead a methodologically sound, objective annual EU Scoreboard mechanism may be of help to draw the borderline between the second and the third scenarios, i.e. indicate when the breaches of European values become qualitatively different from a set of individual violations.

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328 J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' (2013) *Working Paper* No. 3 (Washington, DC: Transatlantic Academy).

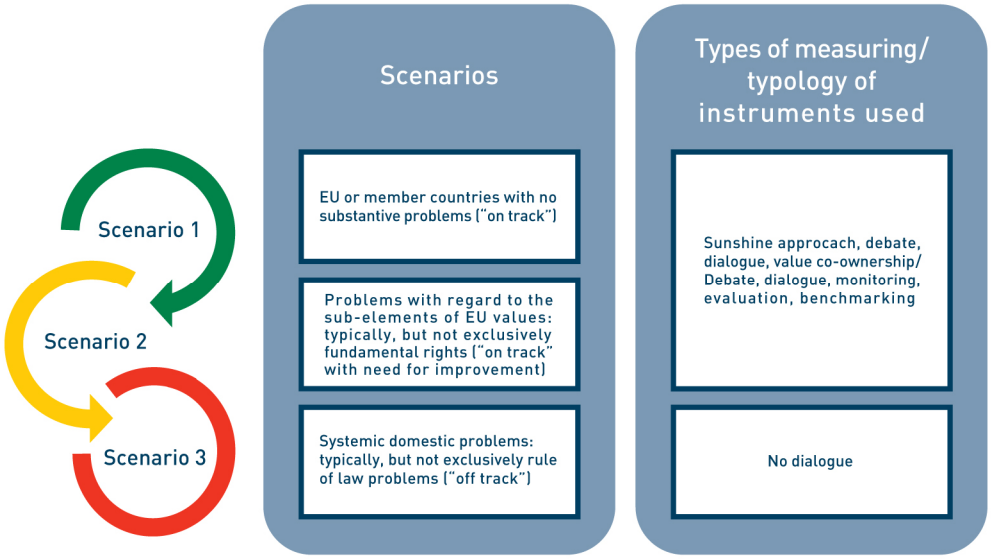
329 E. Basheska and D. Kochenov, 'Thanking the Greeks. The Crisis of the Rule of Law in EU Enlargement Regulation', April 2015, 39 *Southeastern Europe* 92–414 (2015).

330 Justice Steward first used this now colloquial expression in relation to hard-core pornography in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), at 197, explaining why the material at issue was not obscene and therefore protected by freedom of expression: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of 'hard-core pornography'], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

331 R. Uitz, 'Can You Tell When and Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' 13 *International Journal of Constitutional Law* 1, 279–300. (2015).

332 For an overview of the terms systemic threat, systemic violation and serious breach, see D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *European Constitutional Law Review,* 512–540 (2015).

Figure 2. The three rule of law scenarios



Source: Authors' elaboration.

4.7 Objectivity and equality

A key challenge of any Scoreboard is how to preserve its autonomy and legitimacy when governments and the various EU institutions will accuse it of being 'political' and 'non-neutral'.

In particular a country in a constitutional capture will question the validity of or simply disregard external criticism, and/or challenge the legitimacy of the critic, by claiming it acted *ultra vires*, without a mandate, or in violation of the vertical separation of powers. Therefore there should be a particularly strong emphasis on solid treaty bases, legitimacy and accountability.

The challenge is even greater, since supervisory mechanisms for states in a constitutional capture include the introduction of proportionate, dissuasive and effective sanctions – ultimately harsher measures than what Member States are used to in the arena of fluid European values, and therefore it is of utmost importance to be objective, not to apply double standards and establish institutions and procedures the legitimacy of which are beyond doubt.

Examples for infringing single elements of European values as opposed to systemic threats and violations

Display of insignia of totalitarian regimes

Should a certain domestic legal institution contravene European standards, the rights of those effected may seriously be hampered. However if the rule of law is not *systematically* deconstructed, there will be mechanisms to remedy the situation. Remedies may include domestic ones, or if they fail, the individual steps of enforcement of ECtHR judgments through an impartial judiciary, and the general steps of enforcement through a lawmaker adhering to the rule of law, modifying black letter law. *Vice versa*, in a state where the rule of law is systematically deconstructed and is lacking an impartial judiciary the situation will not be remedied, and ECtHR judgments will not be properly enforced. This is no hypothetical scenario.

Whereas there are tensions between several domestic jurisdictions and the Convention system,[333] the Hungarian state refused to enforce a Strasbourg decision in an unprecedented way. The basis of the dispute was the case of János Fratanoló, member of the "Workers' Party 2006", who was sentenced in a criminal proceeding for wearing a five pointed red star at the celebration organized on the occasion of Hungary's EU accession and Workers' Day.[334] Based on its previous decision *Vajnai v. Hungary* with virtually the same fact pattern the ECtHR held Hungary to be in violation of Article 10 ECHR guaranteeing freedom of expression, for criminalizing wearing the red star. Had Hungary enforced Vajnai, the Fratanoló case would never have reached the Strasbourg court. But instead of enforcing the second judgment with the same findings, a Parliamentary Resolution disapproved of the Strasbourg judgment *Fratanoló v. Hungary*.[335]

Resolution 58/2012 (VII.10) of the Hungarian Parliament pointed out that "the provision of the Criminal Code prohibiting the use of symbols of totalitarian regimes was adopted for the protection of the democratic social order, with a view to the country's historical past, in line with principles which guarantee respect for human dignity and in compliance with the constitutional order. Therefore, Parliament disagreed with the judgment application No. 29459/10 finding Hungary in violation of the Convention, the opinion of the ECtHR and with the amendment of the Criminal Code". The Resolution also stated that the amount of compensation Hungary will be obliged to pay in the future due to the application of the Criminal Code's relevant provision should be paid from the parties' budget. In a laconic reasoning[336] Parliament made reference to the Constitutional Court's decision passed a decade before the ECtHR judgments,[337] which found the relevant provision of the Criminal Code to be in compliance with the Constitution. Without elaborating on the Resolution[338] two comments need to be made here. First, the *Vajnai* and *Fratanoló* judgments do not suggest that the only way to guarantee compliance with the Convention is through the amendment of the Criminal Code. Instead the judgments give clear instructions on how the provision prohibiting the use of symbols of totalitarian regimes can be applied by the judiciary without infringing the Convention. Second, invoking the Constitutional Court's decision rendered in the year 2000 as a justification for not amending the relevant provision of the Criminal Code is clearly mistaken because at the time it had no chance to take the later *Vajnai* and *Fratanoló* judgments into account. Indeed the Constitutional Court in 2013 reviewed its position and found – in heavy reliance to the the Strasbourg cases – that the criminal offense of using symbols of totalitarian regimes as formulated by the Criminal Code at the time violated the constitutional principle of legal certainty and freedom of expression.[339] The invalidated provision was later replaced by introducing additional definitional elements: the use of symbols of totalitarian regimes in itself is insufficient to commit the crime, the display of symbols of totalitarian regimes is punishable only if done in a manner that is suitable for disturbing public peace, and in particular violates the dignity of victims or the memory of deceased victims of dictatorships.[340] Despite the ending, the long saga of the Hungarian red star cases illustrates how states might attempt to delegitimize European supervisory mechanisms.

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333 Ch. Grabenwarter, 'Grundrechtsvielfalt und Grundrechtskonflikte im europäischen Mehrebenensystem – Wirkungen von EGMR-Urteilen und der Beurteilungsspielraum der Mitgliedstaaten', 38 *Europäische Grundrechte Zeitschrift* 8, 229–232 (2011).

334 ECtHR, *Fratanoló v Hungary*, Application no. 29459/10, 3 November 2011.

335 10 July 2012 Parliamentary Resolution 58/2012 (VII.10.) stated that the Parliament "does not agree with the modification of the Criminal Code".

336 Proposal for a Parliamentary Resolution, H/6854.

337 Hungarian Constitutional Court, Decision No. 14/2000 (V. 12.)

338 For a detailed analysis of the legal, moral, and political implications of the nonenforcement of the Fratanoló judgment see P. Bárd, 'The Non-enforcement of Strasbourg Decisions and Its Consequences' ,in J. Busch and K. Lachmayer et al. (eds.), *International Constitutional Law in Legal Education. Proceedings of the Erasmus IP NICLAS 2007–2012*, International and Comparative Public Law Series (Schriften zum Internationalen und Vergleichenden Öffentlichen Recht) (Vienna: Nomos, 2013), 8, or in greater detail P. Bárd, 'Strasbourg v Hungary', in: Kriminológiai Közlemények, Budapest: Magyar Kriminológiai Társaság, 2012, 145–204.

339 Hungarian Constitutional Court, HCC Decision No. 4/2013 (II. 21.).

340 See Act XLVIII of 2013 introducing Article 335 into the Criminal Code, i.e. Act C of 2012.

Life imprisonment cases

Sometimes the questioning of the Convention's and the ECtHR's authority is more subtle. In a more recent case, the Hungarian system of life imprisonment without parole was challenged and held to be in violation of the Convention in *Magyar v Hungary*.[341] In a series of relevant judgments the Hungarian Constitutional Court[342] and the Supreme Court[343] proved that they were neither capable of enforcing European standards, nor of complying with European review mechanisms. The former erfused to decide on the constitutionality of the Hungarian life imprisonment regime in the merits, and the latter instructed ordinary courts not to directly consider the Convention, but apply domestic law instead,[344] even if in clear contradiction of Strasbourg tests.[345] The Supreme Court insisted that life imprisonment without the possibility of parole is allowed by international law, and that the ECtHR case law, the Hungarian Constitutional Court'sdecision or the above mentioned Magyar decision do not offer reasons to depart from domestic law. This statement is difficult to interpret, since the Constitutional Court did not pass a judgment in the merits, whereas the Strasbourg jurisprudence is in clear contradiction with the rules, even the ones that were adopted after the Magyar judgment was rendered by the ECtHR.

Principles of objectivity, non-discrimination and equal treatment of the entities scrutinised is the foundation of every Scoreboard. Acting to the contrary and using double standards will delegitimise the efforts of any new EU rule of law scoreaboard. As the current pre-Article 7 TEU procedure against Poland, and inaction vis-à-vis Hungary proved, additional procedural difficulties arise, if rule of law backsliders multiply and backing up for each other prevent an Article 7(2) mechanism requiring unanimity to be triggered. (For the details see Chapter 1.6.)

4.8 A EU Rule of Law Commission

The institutional framework behind the Scoreboard shall reflect this objectivity. The proposal to establish a 'EU Rule of Law Commission' as an independent body of scholars should be seriously considered. The EU Rule of Law Commission could be placed at the centre of the EU Rule of Law Scoreboard. The FRA should not play that role due to its high degree of dependence on EU Member States and the high degree of politicization, which is linked to the performance of its tasks and activities in a context of contested legal competences between EU and domestic arenas. The selection and organizational model could follow the one currently utilized in actors like the Venice Commission and the CEPEJ. Yet particular attention should be paid to the academic and independent nature of the members.

The EU Rule of Law Commission shall make a context-specific assessment in light of data available or call for the need to gather extra information on EU issue-specific questions. The possibility to conduct country visits (following the UN Special Rapporteurs model) could also be envisaged. As a FRA pilot study has shown, it is easier to agree on standards for laws, institutions (structures) and policies (processes), but it is close to impossible to agree on how to assess the situation on the ground

341 ECtHR, *Magyar v Hungary*, Application no. 73593/10, 20 May 2014.

342 Hungarian Constitutional Court, HCC Resolution 3013/2015. (I. 27.)

343 Resolution No. 3/2015 concerning the uniformity of criminal law.

344 See Article 109 of Act LXXII of 2014, which inserted a new subtitle on the mandatory pardon proceeding of persons sentenced to life imprisonment without the possibility of conditional release, Articles 46/A-46/H into Act CCXL of 2013.

345 For the saga see P. Bárd, The Hungarian life imprisonment regime in front of apex courts I. - The findings of the European Court of Human Rights and the Constitutional Court, 18 June 2015, http://jog.tk.mta.hu/blog/2015/06/the-hungarian-life-imprisonment-hu and P. Bárd, The Hungarian life imprisonment regime in front of apex courts II. - The findings of the Kúria (Supreme Court), 18 June 2015, http://jog.tk.mta.hu/blog/2015/06/the-hungarian-life-imp-hu.

(outcome).[346] The malevolent interpretation is that standards on structures and processes are easier to comply with, whereas states do not wish to subject themselves to a scrutiny on the truly decisive issue, which is the translation of promises into practice. A more benevolent approach may acknowledge however that assessment of outcomes is context-specific to an extreme extent and therefore need a nuanced analysis that prevents the use of generalised standards. For this reason, the UN model of well-established working relationships/close partnerships with national Human Rights Authorities and civil society organisations should be pursued.

An EU Rule of Law Commission could draw up Annual (Country Specific) Reports on the basis of available and additional materials.[347]

The Annual Report shall point to the strengths and weaknesses, and suggest specific ways to overcome them. This exercise would not 'track' or rank EU Member States, which is a typical method in benchmarking methodologies.[348] Whereas it may make sense with regard to macroeconomics (even though one should be aware of the methodological traps and limitations even in an area, which is more comfortably operating with figures), the contextualization and standardization of a rule of law assessment shall be a much more nuanced exercise and particular care shall be taken not to rely on a standardised benchmarking system that could potentially veil or blur problems in the subparts of EU values. Democracy, and to a greater and lesser extent respectively the rule of law and fundamental rights, are fluid concepts and phenomena, and there is no single ideal formula for achieving them. Therefore, we argue against designing the standards according to indicators – a rather dubious exercise that can easily be attacked as politically or ideologically biased.

4.9 Matching the tools to the needs: establishing a two-prong mechanism

The EU Rule of Law Commission shall monitor EU laws, policies, institutions and bodies, and institutions shall make use of existing procedures, the CJEU having a final say.

In the following we focus on Member States. Tools and institutional design shall be adjusted to the needs, and accordingly the Scoreboard shall establish a two-prong mechanism for Member States 'on track' and 'off the track' of the rule of law.

In both the first and second scenarios described above, i.e. when international mechanisms are used for upholding and promoting European values, remedying some breaches of single elements of European values or reversing the trends in the deterioration of some sub-elements of democracy, the rule of law and fundamental rights, the Scoreboard mechanism may follow a "'sunshine policy', which engages and involves rather than paralyses and excludes", and where value-control "is owned equally by all actors".[349]

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[346] Promoting the rule of law in the European Union. FRA SYMPOSIUM REPORT, 4th Annual FRA Symposium, Vienna, 7 June 2013, http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf; Presentation by Gabriel Toggenburg, Senior Legal Advisor, European Union Agency for Fundamental Rights at the LIBE Committee on Civil Liberties, Justice and Home Affairs meeting on 10/12/2015.

[347] Promoting the rule of law in the European Union. FRA SYMPOSIUM REPORT, 4th Annual FRA Symposium, Vienna, 7 June 2013, http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf.

[348] It would therefore be different from MEP Sophie in 't Veld's suggestion about a traffic light system 'scoreboarding' Member States in a way similar to the European semester for the Eurozone. The difference lies exactly in the way of assessment, as we argued against relying on indicators and benchmarking exclusively. Seminar of 4 February 2015, ALDE presenting the EU Democratic Governance Pact.

[349] G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

More specifically, the first two scenarios could be distinguished. The *first scenario* may result in inaction of the institutions, whereas in the *second scenario* the *FRA* and/or the *Commission* could be the facilitators of such a debate on systemic problems with regard to European values in the second scenario, with the *Council,* the *European Parliament* and preferably *national parliaments* being given a role as well. That would on the one hand enhance the democratic legitimacy of the procedure and on the other hand be justified by a very profound reason for an inter-institutional arrangement: it is simply more difficult to 'trick' more than one institution. In this second scenario, the Member States adhere to the rule of law, accept internal and external forms of criticism, and therefore respond well to concerns formulated by the EU. Not only at the end of the annual cycle, but also throughout the year, the EU Rule of Law Commission shall have the right to alert the Commission about a potential case for an infringement procedure. The current mechanism available seems to be sufficient if fully exploited (as suggested above in Chapter 1.4), and there is no need to insert another level in between or to create a novel process preceding the infringement proceeding. These are only needed – as a second best option – if there is no political will on the side of the Commission to exploit the potential in Articles 258 and 260 TFEU, and other Member States do not take over the role initially foreseen for the Commission.[350]

In this second scenario, it may be useful to disentangle the interrelated values of democracy, the rule of law and fundamental rights. Whereas there are attempts to capture all European values including democracy and the rule of law in the rights language,[351] there are skeptical voices with regard to an understanding of fundamental rights encompassing all values that could be associated with the good life.[352] Maintaining the distinction is particularly useful at this point, since infringement in this second scenario typically affects fundamental rights, whereas other mechanisms exist in Europe to tackle fundamental rights problems. Apart from obvious and external *fora*, such as the EctHR, for example, in the EU setting *national courts (ordinary and constitutional courts)* and the *Court of Justice of the EU* shall play a decisive role, both with regard to interim measures and overall remedies.

The *third scenario* – which is the trigger for the attempts to tackle the Copenhagen dilemma and also for the present Research Paper – is fundamentally different from the first two, and therefore the methodology of the Scoreboard shall introduce a second prong accordingly. When a State systematically undermines democracy, deconstructs the rule of law and engages in massive human right violations, there is no reason to presume the good intentions of those in power to engage in a sunshine approach involving a dialogue and soft measures in order to make the entity return to the concept of limited government – a notion that those in power wished to abandon in the first place.

The first challenge lies in identifying the point when a Member State enters or is on the path towards the third phase, and to remedy the situation. It is under this Scenario that the systemic infringement proceedings, the EU Rule of Law Mechanism or Article 7 TEU would come in. All these procedures have – and we assume all future mechanisms will have – a discussion phase, where the Member State in question can present its views on its laws, policies and their realisation in practice. The Scoreboard could guide the discussion and make the process foreseeable and transparent. The discussion could still be led by an *inter-institutional arrangement/agreement*, with the FRA and/or the Commission taking the lead.

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[350] D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', 7 *The Hague Journal of the Rule of Law* 2. 153–174 (2015), 153.

[351] G.N. Toggenburg and J. Grimheden, The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers, in C. Closa and D. Kochenov (eds.) Reinforcing Rule of Law Oversight in the European Union (Cambridge: CUP, 2016), forthcoming.

[352] Interviewees underlined this important point. See also C. Closa, D. Kochenov and J. H. H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union' (2014) *RSCAS Working Paper* No. 25/2014.

Once a case-by-case contextual assessment proves the need for a supervisory mechanism is established in the third scenario, a further challenge lies is the creation of mechanisms in addition to the only – and, as it presently stands, inefficient – one available: Article 7 TEU. Should there be no wilingness to make use of Article 7, the new mechanism should have both a preventive arm to prevent a State from taking the first step down a slippery slope and abandoning European values, and a sanctioning arm via proportionate, dissuasive and effective punishment of the ones which are already slipping to the bottom.[353]

Finally, the mechanism's speed of operation shall not be so great as to be a detriment to the quality of the assessment and monitoring; nevertheless, a timely response is necessary. As a main rule, the Scoreboard has an annual cycle, but steps may have to be taken at shorter intervals. Firm, immediate action is needed against rule of law backsliders, so as to prevent detrioration and also the phenomenon becoming contagious – and vice versa, tolerance towards or lack of consequences following the establishment of illiberal governments will encourage other Member States to follow. A speedy proceeding protects the individual against the State, so that the latter does not continue the violation, potentially resulting in greater or even irreversible harm. A speedy assessment proceeding also has pragmatic advantages: Member States will not have time to amend their problematic laws or change their practices and demand that the new situation shall trigger another mechanism, thereby gaining time to continue their practices in violation of EU values.

Prisoners' voting rights and the contagious nature of rule of law backsliding

In trying the *Hirst v the United Kingdom (No. 2)* case,[354] the ECtHR declared in its 2005 judgment that the indiscriminate stripping of voting rights for persons sentenced to prison violated Article 3 of Protocol No. 1 to the Convention. The ECtHR laid down a number of criteria to be met when depriving prioners of their voting right: the decision on disenfranchisement should be taken by a judge; the judge shall consider the specific circumstances of the case; and there shall be a link between the crime committed and issues relating to elections and democratic institutions.

Five years later, after Applicant complained of being denied he right to participate at the Europeany Parliamentary elections, in *Greens and MT v the United Kingdom*[355] in a pilot judgment the ECtHR called upon the respondent state to make legislative amendments to comply with the *Hirst* judgment.

Almost four years passed, until *Firth and Others v. the United Kingdom*[356] was decided. Applicants were ten prisoners who, again as an automatic consequence of their convictions and sentences of imprisonment, were unable to vote in the 2009 European Parliamentary elections. Whereas the Court recognised the United Kingdom's intention to comply with the Strasbourg court's expectations in the form of a draft bill and the report of the Parliamentary Joint Committee appointed to examine the bill, the UK was again found to be in violation of Article 3 of Protocol No. 1, given the fact that the case was identical to *Greens and M.T.* and the legislative environment did not change.

[353] For a division between measures sanctioning and promoting the rule of law, see C. Hillion, 'Overseeing the Rule of Law in the EU', in: C. Closa and D. Kochenov, *Reinforcing the Rule of Law Oversight in the European Union,* Cambridge: Cambridge University Press, 2016, forthcoming.

[354] ECtHR, *Hirst v the United Kingdom*, Application no. 74025/01, 6 October 2005

[355] ECtHR, *Greens and MT v the United Kingdom,* Applications nos. 60041/08 and 60054/08, 23 November 2010.

[356] ECtHR, *Firth and Others v. the United Kingdom*, Applications nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09, 12 August 2014.

A few month later 1015 prisoners' cases were decided in *McHugh and Others v. the United Kingdom*,[357] who, as an automatic consequence of their convictions and detention pursuant to sentences of imprisonment, were unable to vote in elections. The ECtHR found the UK again to be in violation of the Convention.

Most recently in December 2015 the Committee of Ministers adopted an Interim Resolution deciding to resume consideration of the United Kingdom's prisoners' voting rights cases in December 2016 the latest.[358] The contagious nature of human rights violations, especially if they remain without consequences is very apparent in the series of voting rights cases against other respondent states after the United Kingdom failed to enforce *Hirst*. Whereas "the [debated] principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention erga omnes",[359] non-enforcement works in the opposite direction, and instead of learning from each other' mistakes, state parties will follow each other's stance with regard to ECHR violations and non-enforcement of Strasbourg judgments. This may have disastrous consequences. As Council of Europe Human Rights Commissioner Nils Muižnieks in his Observations for the Joint Committee on the UK Draft Voting Eligibility (Prisoners) Bill: "continued non-compliance would have far-reaching deleterious consequences; it would send a strong signal to other member states, some of which would probably follow the UK's lead and also claim that compliance with certain judgments is not possible, necessary or expedient. That would probably be the beginning of the end of the ECHR system, which is at the core of the Council of Europe."[360] Acknowledging the fatal effects of non-compliance he went so far as to prefer withdrawal to non-execution: "I think that any member state should withdraw from the Council of Europe rather than defy the Court by not executing judgments."

Indeed, a series of cases show the disease spreading. In *Frodl v. Austria*,[361] the ECtHR acknowledged that unlike UK legislation, the Austrian National Assembly Election Act is not depriving prisoners indiscriminately and automatically of their voting rights, still, the national law did not meet all criteria laid down in Hirst, and therefore Austria was also found to be in violation of the Convention.

In *Söyler v. Turkey*[362] the Applicant, a person convicted for unpaid cheques was not allowed to exercise his right to vote, neither while being detained in prison, nor after his conditional release. The ECtHR held Turkey to be in violation of th Convention, due to the automatic and indiscriminate nature of the rights limitation, where the legislation did not allow to take in account the nature or gravity of the offence, the length of the prison sentence or the prisoner's individual conduct or circumstances.

In *Murat Vural v. Turkey*[363] the ECtHR repeated that the Turkish system did not comply with the requirements laid down in *Hirst*, furthermore it also observed that the Applicant's deprivation of his right to vote continued after his conditional release from prison.

Anchugov and Gladkov v. Russia[364] was different from the above cases in that deprivation of voting rights was constitutionally entrenched. The ECtHR again found a violation of the Convention, but due to the difficulty

[357] ECtHR, *McHugh and Others v. the United Kingdom*, Application no. 51987/08 and 1,014 others, 10 February 2015.

[358] Interim Resolution CM/ResDH(2015)251 Execution of the judgments of the European Court of Human Rights Hirst and three other cases against the United Kingdom, adopted by the Committee of Ministers on 9 December 2015 at the 1243rd meeting of the Ministers' Deputies.

[359] Parliamentary Assembly, Assembly debate on 28 September 2000 (30th Sitting) (see Doc. 8808, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Jurgens). Text adopted by the Assembly on 28 September 2000 (30thSitting).

[360] N. Muižnieks, Memorandum – Observations for the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Strasbourg, 10 October 2013

[361] ECtHR, *Frodl v. Austria*, Application no. 20201/04, 8 April 2010

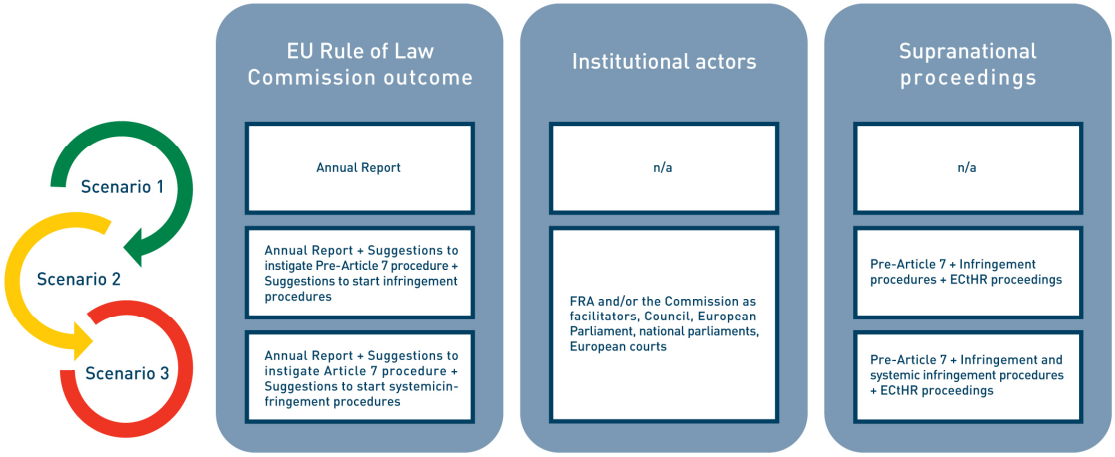
[362] ECtHR, *Söyler v. Turkey*, Application no. 29411/07, 17 September 2013

[363] ECtHR, *Murat Vural v. Turkey*, Application no. 9540/07, 21 October 2014

[364] ECtHR, *Anchugov and Gladkov v. Russia*, Application no. 11157/04, 4 July 2013

of amending the Constitution, the Court held that Russia could enforce the judgment by way of some form of political process or by interpreting the Constitution in line with the Convention and the attached case-law. But the Russian legislator went further than just referring to the UK stance in prisoners' voting rights cases,[365] and passed a law which allows the Russian Constitutional Court to declare rulings of international bodies – including the ECtHR or the UN Human Rights Committee – 'impossible to implement', in clear violation of Article 46 ECHR and rendering the Convention system meaningless.[366]

Figure 3. The three rule of law scenarios and the institutional actors



Source: Authors' elaboration.

[365] Ph. Leach and A. Donald, Russia Defies Strasbourg: Is Contagion Spreading?, *EJIL Analysis*, 19 December 19, 2015, http://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/.

[366] Id.; Putin signs law allowing Russia to overturn rulings of international rights courts, Reuters, 15 December 2015, http://www.reuters.com/article/us-russia-court-putin-idUSKBN0TY17H20151215.

Table 8. The three rule of law scenarios and responding mechanisms

Scenarios	Type of measure	Typology of instruments	EU Rule of Law Commission's output	EU institutional actors	Supranational procedures
FIRST SCENARIO EU or Member States with no substantive problems ('on track')	Sunshine approach, debate, dialogue, value co-ownership	Debate, dialogue, monitoring, evaluation, benchmarking	Annual Report	n/a	n/a
SECOND SCENARIO Problems with regard to the sub-elements of EU values: typically but not exclusively fundamental rights ('on track' with need for improvement)	Sunshine approach, debate, dialogue, value co-ownership	Debate, dialogue, monitoring, evaluation, benchmarking	Annual Report + Suggestions to instigate Pre-Article 7 procedure + Suggestions to start infringement procedures	*FRA* and/or the *Commission* as facilitators of such a debate on systemic problems, with the *Council*, the *European Parliament* and preferably *national parliaments* being given a role as well. With regard to rights infringements, *national and European courts* shall play a role	Pre-Article 7 + Infringement procedures + ECtHR proceedings
THIRD SCENARIO Systemic domestic problems: typically but not exclusively rule of law problems ('off track')	No dialogue	Supervision	Annual Report + Suggestions to instigate Article 7 procedure + Suggestions to start systemic infringement procedures	*FRA* and/or the *Commission* as facilitators of such a debate on systemic problems, with the *Council*, the *European Parliament* and preferably *national parliaments* being given a role as well. With regard to rights infringements, *national and European courts* shall play a role + Article 7 TEU	Article 7 + Systemic infringement procedures + ECtHR proceedings
Threat/risk ("rule of law backsliding", i.e. "on the way to constitutional capture")	(Effective threat of an) efficient sanction to prevent	Prevention, sanctioning			Article 7(1) procedure + Systemic infringement procedures + ECtHR proceedings
Breach ("constitutional capture")	Efficient sanction to stop	Sanctioning			Article 7(2)-(3) procedure + Systemic infringement procedures + ECtHR proceedings

Source: Authors' elaboration.

4.10 Acquisition of information and data, reversal of the burden of proof

While many pieces of information can be gathered via existing mechanisms, there might be additional information and data needed. One of the important ways to ensure that information and data which are provided by Member States regarding their compliance with rule of law, democracy and human rights is using appropriate mechanisms to test and challenge that information and data. One of the problems with all information assessment exercises is the difficulty of determining the accuracy of information provided by actors who have vested interests in certain outcomes. Often in good faith, State officials provide summaries of their compliance with international human rights commitments which miss important elements. This can happen as a result of a number of failings – oversight is of course one. There is also the need to be sufficiently succinct. Also, a State official might fail to understand or take seriously the gravity of the information which he or she is seeking for a report to a supervisory body. Another reason for incomplete data can be that other ministries have failed to respond or respond fully on a subject, or subsidiary levels of governance have failed to provide the necessary information. There is always the question of (in)action arising out of bad faith, but in such circumstances very strenuous mechanisms need to be in place to sanction such (in)action.

One of the ways in which supervisory bodies are able to test the accuracy of information which State authorities provide is by soliciting information from a wide range of sources in order to assess whether there is a wide divergence between what, for instance, specialist civil society actors have to say about compliance with democracy, the rule of law and human rights, and what the State authorities have to say. A case in point are the UN Treaty bodies studied in Section 1.2 above.

Among the methods available to supervisory bodies is checking information provided by the State against any related judicial proceedings. Often, State authorities' legal services provide very detailed information to their courts in challenges regarding the key principles, which may be divergent from the information provided to supranational authorities. The European Court of Human Rights is very aware of this issue and requires all information provided to the lower courts be made available to it as well. Secondly, State authorities are not always consistent in the information which they provide to different supervisory bodies at the national, supranational and international levels. Any EU body should ensure that it peruses carefully all the submissions of State authorities to national, supranational and international supervisory bodies in the context of the issue in question.

All EU Member States have official bodies responsible for fundamental rights protection. These include ombudspersons, mediators, fundamental rights protection supervisors, etc. All of these bodies should be consulted to ensure the accuracy of information and data provided by State authorities. A central role in this regard might be given to the FRA, which has a mandate in respect of fundamental rights. The EU Ombudsperson's Office, the European Data Protection Supervisor (EDPS) and the Article 29 Working Party should be closely associated with the project and have mandates to participate fully and make recommendations to the body.

There any many international and national human rights civil society bodies which produce detailed reports on the condition of democracy, the rule of law and fundamental rights in the Member States. Due regard should be paid to these sources of information, which often provide an invaluable tool in making assessments.

The existence of inconsistencies between information and data provided by State authorities and information and data gleaned from other sources must be subject to a rigorous evaluation standard. The EU is based on the principle of loyal cooperation between its Member States and its institutions and this duty of loyalty is central to the successful operation of the whole system. Thus identifying challenges and providing an instrument for Member States to respond to criticism and divergent information is

essential. The burden of proof in establishing the relevant facts in respect of any matter concerning democracy, the rule of law and fundamental rights must be spelt out. Due respect for the loyalty of the Member States must be the starting principle, but where contradictory information is revealed, the Member State must be fulfil its duty to provide an explanation and that explanation must be subject to anxious scrutiny.

The standard of proof to trigger a further investigation must also be set at the level of anxious scrutiny of the respect for democracy, the rule of law and fundamental rights – a level which is substantially higher than a balance of probabilities and certainly the opposite of the criminal law standard. As soon as there is a reasonable doubt that the requirements have been fulfilled and that the information provided accurately reveals the correct situation, the burden of proof should – following the UN model – shift to the Member State authorities to satisfy the body that their actions are consistent with the principles. Such a shifting of burden of proof is common in EU law.[367] Under this scenario the burden of proof would shift to the Member State(s) concerned.

4.11 Follow-up mechanism and efficient sanctions

There was a general agreement between interviewees that a follow-up mechanism was needed, such as the Committee of Ministers in the framework of the Council of Europe overseeing Strasbourg judgments. After problems – whether individual or systemic – have been identified, there shall be regular assessment and a special procedure on compliance and follow-up with recommendations. The supervisory prong of the Scoreboard would however need to go beyond that.

Promotion of the rule of law as foreseen in the Treaties with respect to current[368] and prospective Member States[369] is in close correlation with the possibility of effective sanctioning of rule of law violations – especially if systemic, persistent or serious.[370] As is apparent from the state of the art and the depreciation of rule of law values, enforcement is the weak side of the existing legal framework overseeing European values – including the Article 7 mechanism or general infringement procedures according to Articles 258-260 TFEU. Enforcement with effective sanctions is also the weak side of suggestions by EU institutions and academic proposals.[371]

The highly probable failure of both naming and shaming, and also of a more positive discursive approach, shall be acknowledged: an illiberal State is unlikely to be persuaded to return to EU values by way of diplomatic attacks, political criticism, discussions and dialogue. Proposals "adding bite to the

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[367] See for instance Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Article 10 (1) and Article 8(1) state that Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

[368] See especially Article 3 (1) TEU: "The Union's aim is to promote peace, its values and the well-being of its peoples"; and Article 13 (1) TEU: "The Union shall have an institutional framework which shall aim to promote its values".

[369] See Article 49(1) TEU.

[370] It shall be clarified whether or not the meanings of the different wordings in Article 7 TEU referring to a "serious and persistent breach", in the Commission's proposal addressing instances of "systemic threat to the rule of law", and in Barroso's reference to situations of "serious, systemic risks" to the rule of law are identical, and the extent to which they overlap. J.M.D. Barroso, State of the Union address 2013, European Parliament, 11 September 2013, Speech/13/684.

[371] D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *European Constitutional Law Review,* 512–540 (2015), 528.

bark"[372] therefore typically point to the power of the purse, i.e. operate with quasi-economic sanctions, such as the suspension, withholding or deduction of EU funds, or pecuniary sanctions.[373] Whereas pecuniary sanctions may be effective with regard to all Member States, for the time being the power of the purse could be particularly strong, as paradoxically the main rule of law backsliders are countries which are net beneficiaries of European integration. Freezing EU funds in their case would also put an end to the paradox of using EU money to build authoritarian regimes in denial of EU values.

4.12 Legal basis

Concerning the legal basis dilemma, we have several options under the current Treaty framework to set up an EU Rule of Law Commission as a consultative body.

First, the option of an inter-institutional agreement without any further legal basis shall be considered. There is evidence to suggest that reviewing Member States from a rule of law perspective did not require a firm legal basis in the past. It is worth noting that the 'Wise Men' evaluating Austria back in 2000 received their mandate on the basis of an addendum to the statement of the European Council in Feira dated 19-20 June 2000, on the basis of which then Council President and Portuguese Prime Minister António Guterres was given a mandate to request the President of the European Court of Human Rights, Luzius Wildhaber, to appoint three persons to carry out the task of drawing up a report on certain aspects of the situation in Austria.[374] The obvious difference is that the Austrian scrutiny was conducted on an ad hoc basis, whereas the EU Rule of Law Commission shall be a permanent consultative entity, therefore the legal basis shall preferably be more solid. An interinstitutional agreement is one option.

Second, Article 352 TFEU (former Article 308) constitutes the foundations for Regulation 168/2007 establishing the FRA.[375] There is therefore a precedent in its use. Article 352 TFEU can cover Union action "within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties", with the exception of the common foreign and security policy. The procedure would however require unanimity in the Council, on a proposal by the Commission and the consent by the EP.

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[372] W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' 16 *Columbia Journal of European Law* 3, 385–426 (2010).

[373] K.L. Scheppele, Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures, in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming; K.L. Scheppele, 'The EU Commission v. Hungary: The Case for the "Systemic Infringement Action,"' Assizes de la Justice, European Commission, November 2013, at http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf and K.L. Scheppele, 'Making Infringement Procedures More Effective: A Comment on Commission v Hungary, Case C-288/12' *Eutopia*, 29 April 2014, http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/. Building on the above suggestions, see also J.-W. Müller, Why the EU Needs a Democracy and Rule of Law Watchdog, *Aspen Review* 2/015, http://www.aspeninstitute.cz/en/article/2-2015-why-the-eu-needs-a-democracy-and-rule-of-law-watchdog/.

[374] The three persons appointed were (in alphabetical order) Martti Ahtisaari, former President of Finland, Professor Jochen Frowein, Director of the Max-Planck Institute at Heidelberg, former member and Vice-President of the European Commission of Human Rights, and Marcelino Oreja, former Spanish Minister of Foreign Affairs, former Secretary General of the Council of Europe, former member of the Commission of the European Communities. The three appointees reported directly to the State holding the Presidency of the European Union, in this case the French President Jacques Chirac.

See e.g. W. Hummer, The End of EU Sanctions against Austria – A Precedent for New Sanctions Procedures?, The European Legal Forum, Issue 2-2000/1, 77–152; F. Schorkopf, Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich, Berlin: Springer, 2002; E. Busek, M. Schauer (Hrsg.), Die "Sanktionen" der Vierzehn gegen Österreich im Jahr 2000. Analysen und Kommentare, Wien, Köln, Weimer: Böhlau, 2003, 537.

[375] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

It shall be noted that a Declaration was attached to the FRA mandate by the Council: "*The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights precludes the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met.*"[376] The mentioned 'independence' of the experts is the weak point of any FRA appointment. As argued in Chapter 4.7. for such a group to be truly independent these persons should be also *independent* from the FRA due to limitations in its current mandate and its dependency on EU Member States' governments.

The FRA also counts with a research network FRANET,[377] but they only provide 'data' or research under very specific terms of reference drafted by the FRA, and the results are later presented and assessed in line with the FRA's discretionary wishes, i.e. not in a foreseeable, independent and objective process.

The FRA's organisational structure also includes a Scientific Committee composed of eleven independent persons, highly qualified, whose terms of office is not renewable. Members are appointed after responding to a transparent call and a selection procedure conducted by the FRA Management Board after having consulted the competent committee of the European Parliament. Candidates cannot serve on both the Management Board and the Scientific Committee at the same time, furthermore the Committee has to have a balanced geographical representation. These are prerequisities and rules ensuring the objectivity of the Committee.378 The Scientific Committee thus is a candidate for fulfilling the role of the EU Rule of Law Commission. However, there are strong reasons against entrusting the FRA or the FRA Scientific Committee with such a mandate. First, as argued in Chapter 4.7. autonomy and legitimacy of the entity can only be preserved, if governments and the various EU institutions cannot accuse it of being 'political' and 'non-neutral', and therefore any such body shall be detached from EU institutions and bodies. Second, whereas democracy, the rule of law and fundamental rights are closely interrelated, they cannot be used as synonyms, and shown in Chapter 4.9. there are strong benefits in keeping these apart.

Third, alternatively, or in parallel, the implementation of Article 70 TFEU could also be used. This article would give a sound entry point in an area, which is specific to EU law, namely mutual recognition. As proven above in Chapter 3.1., the principle of mutual recognition will work deficiently or become inoperational, if its foundations in the EU legal system are not on based on solid grounds. For instance, the existence of independent national judicial authorities to carry out an assessment on the rebuttable presumption of 'mutual trust' set by the Luxembourg Court[379] is a sine qua non of the system, and the existence of such *fora* needs to be checked.

Article 70 TFEU would lead to a Council-driven evaluation procedure in collaboration with the Commission. As suggested by Mitsilegas, Carrera and Eisele the model to follow here could be the new evaluation system on Schengen adopted in October 2013, making use of Article 70 TFEU for the first time.[380]

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[376] Council of the European Union, Addendum to the draft minutes, 2781st meeting of the Council of the European Union (JUSTICE AND HOME AFFAIRS), held in Brussels on 15 February 2007, 27 February 2007.

[377] http://fra.europa.eu/en/research/franet

[378] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, Articles 12 and 14.

[379] Court of Justice of the European Union, C-411/10 *N.S. v Secretary of State for Home Department* [2010] OJ C 274/21; and C-493/10, *M.E. v Refugee Applications Commissioner* [2011] OJ C 13/18, 21 December 2011.

[380] "following the template provided by the new 2013 Schengen Evaluation Mechanism, in which the European Parliament has played a role in the decision-making and implementation. This template should be followed at times of implementing any future system for criminal justice cooperation."

V. Mitsilegas, S. Carrera and K. Eisele, The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?, *CEPS Paper in Liberty*

> *"The new Schengen evaluation mechanism foreseen in Regulation 1053/2013 provides a 'template' to be used in future implementation of Article 70 TFEU in the field of criminal justice cooperation, in particular when it comes to the increased involvement of the European Parliament in the decision-making process of EU law instruments focused on evaluation, as well as regards its role in the evaluation system itself and its access to information and documents in respect of the (annual and multiannual) evaluation results of Member States' practical implementation of EU law, including those cases where serious deficiencies have been identified. This includes the requirement by the European Commission to inform the European Parliament of follow-up and monitoring on regular basis as well as the adoption of any improvement measures. (…) Finally, the latter Regulation foresees an annual reporting by the Commission before the European Parliament."*[381] (footnotes ommitted)

In order to ensure *objectivity and impartiality* the EU Rule of Law Commission independent from the Council shall be set up feeding into the general evaluation mechanism via the EU Scoreboard. Moreover, following the wording of this provision, the EP and national parliaments would be informed of the content and results.

> *Any new system could give priority to thematic areas where concerns or more important challenges have been so far identified. (…) Special attention should indeed be paid to issues such as pre-trial detention, the basis for the implementation of the Framework Decision on the cross-border execution of judgments in the EU involving deprivation of liberty (transfer of prisoners system), or the uneven and differentiated practical implementation of the rights of suspects in police detention and criminal proceedings across the Union. Another priority area should be better ensuring the quality/independence of justice (principle of separation of powers), for instance, in what concerns the existence of sufficient impartial controls over the necessity and proportionality of the decisions on the issuing and execution of EAWs."*[382] *(*footnotes ommitted)

Fourth, the Court of Justice could get involved, in particularly at times of determining *what* is a systematic rule of law deficiencies. The EU Rule of Law Framework Communication by the Commission on page 7 states that "The main purpose of the Framework is to address threats to the rule of law (as defined in Section 2) which are of a systemic nature".[383] No definition of the notion systematic deficiencies is given. In footnote 18 in the same page it is confusingly stated that

> *"With regard to the notion of "systemic deficiencies" in complying with fundamental rights when acting within the scope of EU law, see, for example, Joined Cases C-411/10 and 493/10, N.S., not yet published, para 94 and 106; and Case C-4/11, Germany v Kaveh Puid, not yet published, para 36. With regard to the notion of "systemic" or "structural" in the context of the European Convention of Human Rights, see also the role of the European Court of Human rights in identifying underlying systemic problems, as defined in the Resolution Res(2004)3 of the Committee of Ministers of 12 May 2004, on Judgments Revealing an Underlying Systemic Problem, (https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=fr)."*

If the EU Rule of Law Commission determines that there are systematic deficiencies, one could consider to call the Court to intervene and have a substantial assessment even before the context of Article 7 TEU,

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and Security in Europe, No. 74 / December 2014, https://www.ceps.eu/publications/end-transitional-period-police-and-criminal-justice-measures-adopted-lisbon-treaty-who, 3 and 34.

Council of the European Union, Addendum to the draft minutes, 2781st meeting of the Council of the European Union (JUSTICE AND HOME AFFAIRS), held in Brussels on 15 February 2007, 27 February 2007.

[381] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

[382] *Id.*

[383] Council of the European Union, Commission's Communication on a new EU Framework to strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10296/14, Brussels, 27 May 2014, 7.

particularly when the deficiencies affect mutual recognition based EU policies and aspects where fundamental rights of people are at stake, for example in cases of detention.[384] An option is to make use of the urgent preliminary ruling procedure laid down in CJEU Rules of Procedure.[385]

Fifth, the EU Rule of Law Commission could follow a similar format than the Venice Commission.[386] An open question is *who* should appoint its members. In the Venice Commission it is the Member States. For the EU, prospective potential members should pass the test of the European Parliament before nomination, and they could be chosen from candidates proposed by Council and the Commission.

[384] Questions soon to be answered by the CJEU in Case C-404/15 *Aranyosi*, request for a preliminary ruling lodged on 24 July 2015. See also Opinion of AG Bot in C‑404/15 *Aranyosi* and C‑659/15 PPU *Căldăraru*, ECLI:EU:C:2016:140.

[385] See Chapter 3 and in particular Article 107 of the Rules of Procedure of the Court of Justice.

[386] Venice Commission, Adopting the Revised Statute of the European Commission for Democracy through Law, CDL(2002)027-e Resolution RES (2002) 3, Article 2.

ANNEX 1
COUNCIL OF EUROPE[387]

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
European Commission for Democracy Through Law (Venice Commission)	The Venice Commission was established in 1990.[388] Article 1 of the Statute[389] states: "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	Article 2 of the Statute stipulates: 1. The Commission shall be composed of independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science. The members of the Commission shall serve in their individual capacity and shall not receive or accept any instructions.	Article 3.1 of the Statute emphasises: Without prejudice to the competence of the organs of the Council of Europe, the Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements. Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe. 2. The Commission may supply, within its mandate, opinions upon	Legal analysis of compliance with democracy, rule of law and fundamental rights standards and country visits are the main methods used when drafting the Opinion. It also includes studies and reports on topical issues. The Opinion is usually structured around the following sections: preliminary remarks (scope, background and specific legal process/context),	There is no specific follow-up procedure envisaged. The Venice Commission offers facultative assistance to State parties to implement its Opinions and recommendations. As it is stated on its website: "A dialogue-based working method: The Commission does not seek to impose the solutions set out in its opinions. It adopts a non-directive approach based on dialogue

[387] Compilation as requested by the Directorate General for Parliamentary Research Services.

[388] It is composed by the following 11 sub-commissions: fundamental rights, federal State and regional state, international law, protection of minorities, judiciary, democratic institutions, working methods, Latin America, Mediterranean basin, rule of law and gender equality. Each sub-commission has one chairperson.

[389] Refer to Resolution(2002)3, Revised Statute of the European Commission for Democracy through Law (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies, http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute and http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute_old.

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
	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	2. There shall be one member and one substitute in respect of each member State of the Enlarged Agreement. 3. Members shall hold office for a four-year term and may be reappointed. 6. The European Community shall be entitled to participate in the work of the Commission. It may become a member of the Commission according to modalities agreed with the Committee of Ministers. The JCCJ is composed of members of the Commission and representatives from co-operation courts and associations.	request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission. Where an opinion is requested by a state on a matter regarding another state, the Commission shall inform the state concerned and, unless the two states are in agreement, submit the issue to the Committee of Ministers. 3. Any State which is not a member of the Enlarged Agreement may benefit from the activities of the Commission by making a request to the Committee of Ministers.	followed by an analysis (general and specific remarks) and ending with conclusions (including outstanding issues, concerns and recommendations to the country concerned). An interesting example includes the recent request by the Polish government to the Venice Commission: 833/2015 - Constitutional issues addressed in amendments to the Act on the Constitutional Court of 25 June 2015 of Poland.	and shares Member States' experience and practices. A working group visits the country concerned to meet the various stakeholders and to assess the situation as objectively as possible. The authorities are also able to submit comments on the draft opinions to the Commission. The opinions prepared are generally heeded by the countries concerned. International institutions, civil society and the media regularly refer to the Commission's opinions."[403]

[403] Quoted from http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN.

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	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." "The Venice Commission's key tasks is to assist states in the constitutional and legislative field so as to ensure the democratic functioning of their institutions and respect for fundamental rights."[390] It has 60 State members,[391] one associate member, five		4. The Commission co-operates with constitutional courts and courts of equivalent jurisdiction bilaterally and through associations representing these courts. In order to promote this co-operation, the Commission may set up a Joint Council on Constitutional Justice composed of members of the Commission and representatives from co-operating courts and associations. 5. Furthermore, the Commission may establish links with documentation, study and research institutes and centres. Its core task is to provide State parties with legal opinions/studies on draft		

[390] http://www.venice.coe.int/WebForms/pages/?p=01_Const_Assistance.

[391] For a full overview of membership refer to http://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN.

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	observers and three with special status (including the EU).[392] The Venice Commission's areas of work are structured around three themes: First, democratic institutions and fundamental rights[393]; second, constitutional justice and ordinary justice[394]; and third, elections, referendums and political parties.[395] In respect of 'constitutional justice		pieces of legislation or laws already in force which are brought to its examination. "Groups of members assisted by the secretariat prepare the draft opinions and studies, which are then discussed and adopted at the Committee's plenary sessions."[401] The following actors can request an Opinion from the Venice Commission: Member States, Council of Europe (Secretary General, Committee of Ministers, Parliamentary		

[392] On the EU see http://www.venice.coe.int/WebForms/members/countries.aspx?id=69. Refer for instance to http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2003)022-e CDL-AD(2003)022-e, Opinion on the Implications of a Legally-binding EU Charter of fundamental rights on Human Rights Protection in Europe adopted by the Venice Commission, at its 57th Plenary Session (Venice, 12-13 December 2003).

[393] For an overview of the work of the Commission on fundamental rights refer to http://www.venice.coe.int/WebForms/pages/?p=02_Rights.

[394] See for instance on constitutional reform http://www.venice.coe.int/WebForms/pages/?p=02_Reforms&lang=EN and Report on Constitutional Amendment of 19 January 2010 http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e and COMPILATION OF VENICE COMMISSION OPINIONS CONCERNING CONSTITUTIONAL PROVISIONS FOR AMENDING THE CONSTITUTION of 22 December 2015, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)023-e and the COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING COURTS AND JUDGES, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e.

[395] On the Venice Commission activities refer to http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN.

[401] Id.

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	and ordinary justice', since 2002 the Venice Commission has counted on the so-called 'Joint Council on Constitutional Justice (JCCJ)'.[396] The JCCJ is a steering body for the cooperation of the Venice Commission with the Constitutional Courts.[397] The Venice Commission has been active in the electoral field, in particular, through the adoption of opinions on draft electoral legislation and referendums. It also includes seminars, trainings and assistance missions.[398] Here it cooperates closely with the Office for Democratic Institutions and Human		Assembly and Congress of Local and Regional Authorities); and international organisations, including the European Union, OSCE/ODIHR, etc. Any constitutional court or the European Court of Human Rights may request the Venice Commission to provide amicus curiae on comparative law issues. It can also deliver amicus ombud opinions. The Venice Commission develops and shares 'standards' and 'best practices'. The procedure for preparing an Opinion is		

[396] For more information see http://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice#Joint Council on Constitutional Justice.

[397] See also the World Conference on Constitutional Justice: http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ&lang=EN.

[398] Refer to http://www.venice.coe.int/WebForms/pages/?p=02_seminars&lang=EN.

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	Rights (OSCE/ODIHR).[399] There is also a Council on Democratic Elections within the Venice Commission.[400]		composed of the following steps: First, reference by national, international or regional body for assessing legislative initiative or existing legal instruments or constitutional provision. Second, a working group is set up comprising rapporteurs and experts who count on the assistance of the Commission's secretariat. Third, issuing of a draft opinion on the compliance with the law with legal standards and suggestions for improvements. Fourth, country visit: meeting with relevant		

[399] For more information see http://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums.

[400] See http://www.venice.coe.int/WebForms/pages/?p=02_CED&lang=EN.

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			official and civil society actors. Fifth, issuing of final draft opinion. Sixth, final draft opinion is submitted to all members of the Commission before going to the Plenary Session. Seventh, option to hold a discussion between the Commission and the relevant State. Eight, debate and adoption of the Opinion in Plenary Session.[402] Ninth, the Opinion is submitted to the requesting actor and it is published on the Venice Commission's website.		

[402] "The Commission 'endorses' a draft opinion prepared by the rapporteurs when two conditions are fulfilled: it wishes to express its agreement with the draft opinion prepared by the rapporteurs (as in the case of adoption); and but there are circumstances which make it appear unnecessary to go into detail, either because the text was already adopted or already abandoned." See http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN.

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Parliamentary Assembly (Monitoring Committee)	Since 1997 the Parliamentary Assembly has a Committee focused on monitoring the obligations and commitments by Member States of the Council of Europe (Monitoring Committee).[404] Paragraph 5 of Resolution 1115(1997) states: "The Monitoring Committee is responsible for verifying the fulfilment of obligations assumed by member States under the terms of the Statute of the Council of Europe, the European Convention on Human Rights and all other Council of Europe Conventions to which they are parties, as well	The Committee has 90 members.[405]	"Monitoring country reports are made in respect of each country separately. A report includes a draft resolution in which specific proposals are made for the improvement of the situation in the country under consideration, and possibly a draft recommendation for the attention of the Committee of Ministers. The Monitoring Committee is required to submit to the Assembly at least once every three years a report on each country being monitored (country report, see paragraph 14 of Resolution 1115). Parliamentary debates on monitoring are thus held	"Two co-rapporteurs are appointed for a maximum duration of five years in respect of each member State, ensuring a strict political and regional balance. The code of conduct for co-rapporteurs, approved by the Monitoring Committee in 2001 (see Doc. 9198, Appendix H), and Resolution 1799 (2011) on the code of conduct for rapporteurs of the Parliamentary Assembly are aimed at preventing conflicts of interest and set out the rules which apply to rapporteurs of the Assembly such as,	Paragraph 13 of Resolution 1115 states that the Assembly "may penalise persistent failure to honour obligations and commitments accepted, and lack of co-operation in its monitoring process, by adopting a resolution and/or a recommendation, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session or by the annulment of ratified credentials in the course of the same ordinary session in accordance

[404] Resolution 1115 (1997), adopted by the Assembly on 29 January 1997. See http://website-pace.net/en_GB/web/as-mon/main. See also Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), the monitoring procedure of the Parliamentary Assembly, AS/Mon/Inf(2015)14rev 5 October 2015.

[405] http://www.assembly.coe.int/nw/xml/AssemblyList/AL-XML2HTML-EN.asp?lang=en&XmlID=Committee-Mon

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	as the honouring of commitments entered into by the authorities of member States upon accession to the Council of Europe".		in public. However, the monitoring procedure at the committee stage remains confidential".[406] Within one year of the monitoring procedure's conclusion, there is the possibility to establish a 'post-monitoring dialogue' with a specific Member State. Moreover, the Committee reports to the Assembly on general progress of the monitoring procedures by submitting its progress report (Paragraph 14 of Resolution 1115). The Committee also performs periodic overviews of groups of countries, on a country-by-country basis, in accordance with its internal working methods.	inter alia, the principle of neutrality, impartiality and objectivity, the obligation of discretion, the undertaking of availability, etc."[407] Paragraph 3 of the Committee's mandate: "An application to initiate a monitoring procedure may originate from: i. the general committees of the Assembly by reasoned written application to the Bureau; ii. the Monitoring Committee by a written opinion prepared by two co-rapporteurs containing a draft	with Rule 6 (now Rules 6 to 9) of the Rules of Procedure. Should the Member State continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action in accordance with Articles 7 and 8 of the Statute of the Council of Europe": "Article 7: Any Member of the Council of Europe may withdraw by formally notifying the Secretary General of its intention to do so. Such withdrawal

[406] http://website-pace.net/documents/19887/259543/Role_E.pdf/980181e7-bdb1-4b0e-ab1c-799bd2a9c560.

[407] http://website-pace.net/documents/19887/259543/Role_E.pdf/980181e7-bdb1-4b0e-ab1c-799bd2a9c560.

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				decision to open a monitoring procedure; iii. not less than 20 members of the Assembly representing at least six national delegations and two political groups, through the tabling of a motion for a resolution or recommendation; iv. the Bureau of the Assembly."	shall take effect at the end of the financial year in which it is notified, if the notification is given during the first nine months of that financial year. If the notification is given in the last three months of the financial year, it shall take effect at the end of the next financial year. Article 8: Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not

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					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." The Rules of Procedure of the Assembly explicitly refer to the "persistent failure to honour obligations and commitments and [to the] lack of co-operation with the Assembly's monitoring procedure" as "substantial grounds" for which the unratified credentials of a national delegation may be challenged (Rule 8).

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European Commission against Racism and Intolerance (ECRI)	ECRI focuses on the examination of the situation concerning racism and intolerance in CoE Member States. The scope and tasks of ECRI are laid down in the statute adopted in Resolution 2002/8. According to Article 1 of the Statute, ECRI is "a body of the Council of Europe entrusted with the task of combating racism, racial discrimination, xenophobia, antisemitism and intolerance in greater Europe from the perspective of the protection of human rights, in the light of the European Convention on Human Rights, its additional protocols and related case-law. It shall	ECRI has 47 members.[409] Article 2(1) highlights: "One member of ECRI shall be appointed for each Member State of the Council of Europe; 2. The members of ECRI shall have high moral authority and recognised expertise in dealing with racism, racial discrimination, xenophobia, antisemitism and intolerance; 3. The members of ECRI shall serve in their individual capacity, shall be independent and impartial in fulfilling their mandate. They shall not receive any instructions from their government".	Article 11(1): "In the framework of its country-by-country approach, ECRI shall monitor phenomena of racism, racial discrimination, xenophobia, antisemitism and intolerance, by closely examining the situation in each of the Member States of the Council of Europe. ECRI shall draw up reports containing its factual analyses as well as suggestions and proposals as to how each country might deal with any problems identified. 2. In the framework of its country-by-country monitoring, ECRI shall conduct, in cooperation with the national authorities, contact visits in the countries concerned. It shall	ECRI drafts country reports, which during the fifth cycle focus on the following 'common topics': legislative issues, hate speech, violence and integration policies.[412] Each country report has five sections: a. a summary of ECRI's findings; b. a section dealing with the common topics; c. a section dealing with the country-specific topics; d. a section dealing with the fourth-cycle interim recommendations that were not – or not fully – implemented during the fourth monitoring cycle; and e. new interim recommendations.	Country reports include information on Interim recommendations not implemented or partially implemented during the fourth monitoring cycle that will be followed up.

[409] http://www.coe.int/t/dghl/monitoring/ecri/about/members_en.asp.

[412] Refer to Information document on the fifth monitoring cycle of the European Commission against Racism and Intolerance (ECRI) (adopted by ECRI's Bureau on 28 September 2012, further to the decisions taken by ECRI at its 58th plenary meeting from 19 to 22 June 2012).

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	pursue the following objectives: - to review Member States' legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance, and their effectiveness; - to propose further action at local, national and European level; - to formulate general policy recommendations to Member States; - to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate".[408]	Moreover, Article 3 of the statute states that they shall be appointed for a period of five years, which may be renewed twice.	subsequently engage in a confidential dialogue with the said authorities in the course of which the latter may comment on the findings of ECRI. 3. ECRI's country reports are published following their transmission to the national authorities, unless the latter expressly oppose such publication. These reports shall include appendices containing the viewpoints of the national authorities, where the latter deem it necessary". "The country monitoring deals with all member States on an equal footing and takes place in five-year cycles, covering nine/ten countries per year. ECRI's fifth monitoring cycle has	ECRI also issues General Recommendations on relevant themes.[413] Article 6 of the statute specifies the following: "ECRI may seek the assistance of rapporteurs or of consultants. 2. ECRI may organise consultations with interested parties. 3. ECRI may set up working parties on specific topics. 4. ECRI may be seized directly by non-governmental organisations on any questions covered by its terms of reference. 5. ECRI may seek the opinions and contributions of	

[408] Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance (Adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers' Deputies.

[413] http://www.coe.int/t/dghl/monitoring/ecri/activities/GeneralThemes_en.asp.

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			begun during the first semester of 2013."[410] ECRI performs country visits and organises a confidential dialogue with the national authorities. Member States' authorities are provided – for the purposes of the confidential dialogue – with a version of their country's report provisionally adopted by ECRI (draft report).[411] Article 12: "ECRI's work on general themes shall generally consist of the adoption of general policy recommendations addressed to governments of Member States and of the collection and dissemination of	Council of Europe bodies concerned with its work. 6. ECRI shall periodically inform the Committee of Ministers on the results of its work."	

[410] See http://www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry_en.asp

[411] http://www.coe.int/t/dghl/monitoring/ecri/activities/Information%20document%20fifth%20monitoring%20cycle_en.pdf

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			examples of "good practices" in combating racism, racial discrimination, xenophobia, antisemitism and intolerance."		
Commissioner for Human Rights	Article 3 of the mandate[414] states the Commissioner shall: "a. promote education in and awareness of human rights in the member States; b. contribute to the promotion of the effective observance and full enjoyment of human rights in the member States; c. provide advice and information on the protection of human rights and prevention of human rights violations. When dealing with the	The Commissioner[415] Article 9: "1. The Commissioner shall be elected by the Parliamentary Assembly by a majority of votes cast from a list of three candidates drawn up by the Committee of Ministers. 2. Member States may submit candidatures by letter addressed to the Secretary General. Candidates must be nationals of a member State of the Council of Europe."	The Commissioner issues recommendations, opinions and reports (Article 8 of mandate). The most relevant documents which are published are activity reports, country work, issue papers, opinions, third-party interventions and other publications and recommendations.[417] Their publication may be authorised by the Council of Ministers. A key dimension of the Commissioner's work is conducting country visits, which aim at ensuring "a	Article 5 of the mandate stipulates that the Commissioner "may act on any information relevant to the Commissioner's functions. This will notably include information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations".	

414 Resolution 99(50) on the Council of Europe Commissioner for Human Rights, 7 May 1999. Available at https://wcd.coe.int/ViewDoc.jsp?Ref=Res(99)50&Language=lanEnglish&Ver=original&Site=COE.

415 http://www.coe.int/en/web/commissioner/the-commissioner.

417 http://www.coe.int/en/web/commissioner/documents.

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	public, the Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member States. Where such structures do not exist, the Commissioner will encourage their establishment; d. facilitate the activities of national ombudsmen or similar institutions in the field of human rights; e. identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member	Article 10: "The candidates shall be eminent personalities of a high moral character having recognised expertise in the field of human rights, a public record of attachment to the values of the Council of Europe and the personal authority necessary to discharge the mission of the Commissioner effectively. During his or her term of office, the Commissioner shall not engage in any activity which is incompatible with the demands of a full-time office." Article 11: "The Commissioner shall be elected for a non-	direct dialogue with the authorities and looking into one or several specific issues".[418] There are a number of thematic areas where the Commissioner's work is more focused, which include: children's rights, terrorism, economic crisis, LGBTI, media freedom, migration, persons with disabilities, post-war justice, Roma and travellers, systematic human rights work.[419]	The mandate expressly states that the gathering of information relevant to the Commissioner will not entail any formal reporting procedure for Member States. Member States are required to facilitate the work of the Commissioner, in particular "the Commissioner's contacts, including travel, in the context of the mission of the Commissioner and provide in good time information requested by the Commissioner" (Article 6).	

[418] See http://www.coe.int/en/web/commissioner/country-monitoring

[419] For an overview of the thematic work refer to http://www.coe.int/en/web/commissioner/thematic-work.

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	States and assist them, with their agreement, in their efforts to remedy such shortcomings; f. address, whenever the Commissioner deems it appropriate, a report concerning a specific matter to the Committee of Ministers or to the Parliamentary Assembly and the Committee of Ministers; g. respond, in the manner the Commissioner deems appropriate, to requests made by the Committee of Ministers or the Parliamentary Assembly, in the context of their task of ensuring compliance with the human rights standards of the Council of Europe; h. submit an annual report to the Committee of Ministers and the	renewable term of office of six years." "The Commissioner is elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates drawn up by the Committee of Ministers, and serves a non-renewable term of office of six years".[416]			

[416] http://www.coe.int/en/web/commissioner/mandate.

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	Parliamentary Assembly; i. co-operate with other international institutions for the promotion and protection of human rights while avoiding unnecessary duplication of activities."				
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)	Article 1 of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment states: "There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter	It has 42 members.[421] The members come from a variety of backgrounds, including "a variety of backgrounds, including lawyers, medical doctors and specialists in prison or police matter".[422] Article 4: "1 The Committee shall consist of a number of	What does it do? "The CPT organises visits to places of detention to assess how persons deprived of their liberty are treated. These places include prisons, juvenile detention centres, police stations, holding centres for immigration detainees, psychiatric hospitals, social care homes, etc.[423]	Country visit and elaboration of country report, including recommendations. Article 10 of the Convention clarifies that "1 After each visit, the Committee shall draw up a report on the facts found during the visit, taking account of any observations which	Article 10.2 of the Convention states that "If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make

[421] Refer to http://www.cpt.coe.int/en/members.htm.

[422] Explanatory Report of the Convention states, "It is clear that they do not have to be lawyers. It would be desirable that the Committee should include members who have experience in matters such as prison administration and the various medical fields relevant to the treatment of persons deprived of their liberty. This will make the dialogue between the Committee and the States more effective and facilitate concrete suggestions from the Committee." See http://www.cpt.coe.int/en/documents/explanatory-report.htm.

[423] Article 8.2 of the Convention states, "*A Party shall provide the Committee with the following facilities to carry out its task: a access to its territory and the right to travel without restriction; b full information on the places where persons deprived of their liberty are being held; c unlimited access to any place where persons are deprived of their liberty, including the right to move inside*

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	referred to as "the Committee"). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."[420]	members equal to that of the Parties. 2 The members of the Committee shall be chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention. 3 No two members of the Committee may be nationals of the same State. 4 The members shall serve in their individual capacity, shall be independent	CPT delegations have unlimited access to places of detention, and the right to move inside such places without restriction. They interview persons deprived of their liberty in private, and communicate freely with anyone who can provide information. After each visit, the CPT sends a detailed report to the State concerned.[424] This report includes the CPT's findings, and its recommendations, comments and requests for information. The CPT also requests a detailed response to the issues raised in its report. These	may have been submitted by the Party concerned. It shall transmit to the latter its report containing any recommendations it considers necessary. The Committee may consult with the Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty." CPT has developed a set of thematic 'standards' which constitute the substantive sections of	known its views, by a majority of two-thirds of its members to make a public statement on the matter."[427]

such places without restriction; d other information available to the Party which is necessary for the Committee to carry out its task. In seeking such information, the Committee shall have regard to applicable rules of national law and professional ethics."

[420] See http://www.cpt.coe.int/en/documents/ecpt.htm.

[424] Country reports are available here http://www.cpt.coe.int/en/states.htm.

[427] The Explanatory Report further adds that ""*Given the importance of such a decision, it may only be taken by a qualified majority. Before using this remedy in the case of a State's refusal to improve the situation, the Committee should pay full regard to any difficulties in the way of doing so. 75. The Committee will have a wide discretion in deciding what information to make public, but will have to take due account of the need to secure that information passed over in confidence is not revealed. It should also take into consideration the desirability of not revealing information in connection with pending investigations.*"

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		and impartial, and shall be available to serve the Committee effectively." Article 5 (1): "1 The members of the Committee shall be elected by the Committee of Ministers of the Council of Europe by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly of the Council of Europe; each national delegation of the Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.	reports and responses form part of the ongoing dialogue with the States concerned."[425] Country visits, which are envisaged in Articles 7 to 9 of the Convention, are usually carried out once every four years. There is also the possibility to conduct further ad hoc visits. The state concerned needs to be informed in advance.	general reports.[426] These deal with: law enforcement agencies, prisons, psychiatric institutions, immigration detention, juveniles deprived of their liberty under criminal investigation, women deprived of their liberty, documenting and reporting medical evidence of ill-treatment, combating impunity and electrical discharge weapons.	

[425] Quoted from http://www.cpt.coe.int/en/about.htm.

[426] CPT Standards, Substantive Sections of the CPT's General Reports, CPT/Inf/E (2002) 1 - Rev. 2015, http://www.cpt.coe.int/en/documents/eng-standards.pdf

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		Where a member is to be elected to the Committee in respect of a non-member State of the Council of Europe, the Bureau of the Consultative Assembly shall invite the Parliament of that State to put forward three candidates, of whom two at least shall be its nationals. The election by the Committee of Ministers shall take place after consultation with the Party concerned. 2 The same procedure shall be followed in filling casual vacancies. 3 The members of the Committee shall be elected for a period of four years. They may be re-elected twice. However, among the members elected at			

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		the first election, the terms of three members shall expire at the end of two years. The members whose terms are to expire at the end of the initial period of two years shall be chosen by lot by the Secretary General of the Council of Europe immediately after the first election has been completed. 4 In order to ensure that, as far as possible, one half of the membership of the Committee shall be renewed every two years, the Committee of Ministers may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a			

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		period other than four years but not more than six and not less than two years."			
The European Commission for the Efficiency of Justice (CEPEJ)	CEPEJ exists since 2002.[428] Article 1 of the CEPEJ statute[429] states that its aim is "(a) to improve the efficiency and the functioning of the justice system of Member States, with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively, thereby generating increased confidence of the citizens in the justice system and (b) to enable a better implementation of the international legal instruments of the	Article 5 – Composition of the CEPEJ:[433] "1. The CEPEJ shall be composed of experts who are best able to contribute to its aims and functions, and who have in particular an in-depth knowledge of the administration, functioning and efficiency of civil, criminal and/or administrative justice.	The evaluation of the judicial systems of the CoE's members is coordinated by a Working Group on the evaluation of judicial systems (CEPEJ-GT-EVAL). Article 2 of the Statute stipulates the following functions: "a. to examine the results achieved by the different judicial systems in the light of the principles referred to in the preamble to this resolution by using, amongst other things, common statistical	The 'principles' against which the different judicial systems are examined are the following: I. Access to justice and proper and efficient functioning of courts; II. The status and role of the legal professionals; III. Administration of justice and management of courts; IV. Use of information and communication technologies. The methods used are common statistical	

[428] Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ), (Adopted by the Committee of Ministers on 18 September 2002, at the 808th meeting of the Ministers' Deputies). See information leaflet http://www.coe.int/t/dghl/cooperation/cepej/presentation/CEPEJ_depliant_en.pdf.

[429] See https://wcd.coe.int/ViewDoc.jsp?Ref=Res(2002)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[433] See http://www.coe.int/t/dghl/cooperation/cepej/presentation/contacts_en.asp.

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	Council of Europe concerning efficiency and fairness of justice." CEPEJ has different Working Groups: First, the Working Group on execution (CEPEJ-GT-EXE),[430] which enables a better implementation of relevant CoE standards concerning execution of court decisions in civil, commercial and administrative matters at national level.	2. Each member State of the Council of Europe shall appoint an expert to the CEPEJ." CEPEJ members are supported by networks of national experts enabling them to keep in touch with the situation in Europe's judicial systems.[434]	criteria and means of evaluation; b. to define problems and areas for possible improvements and to exchange views on the functioning of the judicial systems; c. to identify concrete ways to improve the measuring and functioning of the judicial systems of the member States, having regard to their specific needs; d. to provide assistance to one or more member States, at their request,	criteria[435] and other 'means of evaluation'. In particular, CEPEJ has developed an 'Evaluation Scheme'.[436] The Scheme is based on a system of six general indicators:[437] • Demographic and economic data (including data on inhabitants, GDP, budget allocated to courts, etc.).	

[430] The composition of the working group is outlined here http://www.coe.int/t/dghl/cooperation/cepej/Execution/GT-EXE-Composition.pdf.

[434] This includes "- a network of national correspondents responsible for co-ordinating the collection of relevant information for the evaluation of judicial systems; - a network of pilot courts allowing the CEPEJ to pursue its activities while taking account of the practical day-to-day operation of courts; - the Lisbon Network which is composed of representatives of national training institutions of the member States in charge of questions relating to training of judges and prosecutors, allowing the CEPEJ to develop European quality standards in the field of training", quoted from https://www.coe.int/t/dghl/cooperation/cepej/profiles/default_en.asp.

[435] Refer to CEPEJ Guidelines on Judicial Statistics (GOJUST), https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2008)11&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[436] European Commission for the Efficiency of Justice, Scheme for Evaluating Judicial Systems, 2014-2016 Cycle, CEPEJ(2015)1, Strasbourg 2 June 2015. Available at https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2015)1&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864. See also Explanatory Note https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2015)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[437] CEPEJ, Scheme for Evaluating Judicial Systems: Key Judicial Indicators, 6 December 2007, CEPEJ(2007)27. See https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2007)27&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
	Second, the Working Group on quality of justice (CEPEJ-GT-QUAL) which develops means of analysis and evaluation of the work done inside the courts. It aims at improving quality of the public service delivered by national justice systems, with special attention to the expectations of the justice practitioners.[431] Third, a centre for judicial time management (SATURN Centre – Study and Analysis of Judicial Time Use Research Network).[432]		including assistance in complying with the standards of the Council of Europe; e. to suggest, if appropriate, areas in which the relevant steering committees of the Council of Europe, in particular the European Committee on Legal Co-operation (CDCJ), may, if they consider it necessary, draft new international legal instruments or amendments to existing ones, for adoption by the Committee of Ministers." CEPEJ may carry out its functions outlined in paragraphs a, b, c and e above on its own initiative. Tasks foreseen in d at the request of one or more Member States.	• Legal aid (access to justice) (including number of legal aid cases). • Organisation of the court system and the public prosecution (including number of judges and prosecutors, level of computer facilities). • The performance and workload of courts and the public prosecution (including number of cases related to Article 6 ECHR, number of civil and administrative law cases, number of cases	

[431] For more information refer to http://www.coe.int/t/dghl/cooperation/cepej/quality/default_en.asp.

[432] See http://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp.

			Article 3 outlines the Working methods as follows: "a. identifying and developing indicators, collecting and analysing quantitative and qualitative data, and defining measures and means of evaluation; b. drawing up reports, statistics, best practice surveys, guidelines, action plans, opinions and general comments; c. establishing links with research institutes and documentation and study centres; d. inviting to participate in its work, on a case-by-case basis, any qualified person, specialist or non-governmental organisation active in its field of competence and capable of helping it in the fulfilment of its objectives, and holding hearings; e. creating networks of	received and treated by public prosecutor, number of criminal cases). • Execution of court decisions. • Legal and judicial reforms (optional question).	

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
			professionals involved in the justice area." States have the possibility to update some key data.		
Group of States against Corruption (GRECO)[438]	Article 1 of GRECO Statute[439] states that it aims "to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field." Article 2 foresees the functions of the GRECO as follows: "i. monitor the observance of the Guiding Principles for the Fight against Corruption as adopted by the Committee of Ministers of the Council of Europe on 6 November 1997; and ii. monitor the	Article 6 states the 'Composition of the GRECO', in particular "1. Each member shall appoint a delegation to the GRECO consisting of not more than two representatives. One representative shall be appointed as head of the delegation." The evaluation procedure and method relies on evaluation teams. Article 10.4 states: "Each member shall identify a maximum of 5 experts who would be able to undertake the tasks set out in Articles 12-14."	GRECO monitoring comprises: First, a "horizontal" evaluation procedure (all members are evaluated within an Evaluation Round), which constitutes a system of 'mutual evaluation'.[440] So far GRECO has launched four evaluation rounds. The evaluation procedure shall be based on the principle of mutual evaluation and peer pressure. The evaluation results in the issuing of recommendations aimed at furthering the necessary legislative,	Article 10 deals with Evaluation procedure and states: "1. The GRECO shall conduct evaluation procedures in respect of each of its members in pursuance of Article 2. 2. The evaluation shall be divided in rounds. An evaluation round is a period of time determined by the GRECO, during which an evaluation procedure shall be conducted to assess the compliance of members with selected provisions contained in the Guiding Principles and in other international legal	"The assessment of whether a recommendation has been implemented satisfactorily, partly or has not been implemented, is based on a situation report, accompanied by supporting documents submitted by the member under scrutiny 18 months after the adoption of the evaluation report. In cases where not all recommendations have been complied with, GRECO will re-examine outstanding recommendations within another 18

438 http://www.coe.int/t/dghl/monitoring/greco/default_en.asp.

439 Refer to Statute of the GRECO, Appendix to Resolution (99) 5, available at http://www.coe.int/t/dghl/monitoring/greco/documents/statute_en.asp.

440 See http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro_en.asp

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
	implementation of international legal instruments to be adopted in pursuance of the Programme of Action against Corruption, in conformity with the provisions contained in such instruments".		institutional and practical reforms. Second, a compliance procedure designed to assess the measures taken by its members to implement the recommendations."[441] GRECO is currently conducting the fourth evaluation round which deals with "Prevention of corruption in respect of members of parliament, judges and prosecutors". The evaluation starts with a questionnaire "for each evaluation round, which shall be addressed to all members concerned by the evaluation" (Article 11 of Statute). There is a model of questionnaire which is used for this purpose.[442] According to GRECO Rules of Procedure (Title	instruments adopted in pursuance of the Programme of Action against Corruption. 3. At the beginning of each round the GRECO shall select the specific provisions on which the evaluation procedure shall be based. 4. Each member shall identify a maximum of 5 experts who would be able to undertake the tasks set out in Articles 12-14. 5. Each member shall ensure that its authorities co-operate, to the fullest possible extent, in the evaluation procedure, within the limits of its national legislation." Article 11 deals with the Questionnaire, and stipulates: "1. The GRECO shall adopt a questionnaire for each evaluation round,	months. Compliance reports and the addenda thereto adopted by GRECO also contain an overall conclusion on the implementation of all the recommendations, the purpose of which is to decide whether to terminate the compliance procedure in respect of a particular member. Finally, the Rules of Procedure of GRECO foresee a special procedure, based on a graduated approach, for dealing with members whose response to GRECO's recommendations has been found to

[441] Quoted from http://www.coe.int/t/dghl/monitoring/greco/general/4.%20How%20does%20GRECO%20work_en.asp

[442] Available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Greco%20(2012)%2022E%20Questionnaire%20Eval%20IV%20REVISED_EN.pdf.

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
			II on Evaluation Procedure), Rule 24:[443] "1. The mutual evaluation questionnaire shall be sent to all members undergoing an evaluation. Unless otherwise decided by GRECO the replies to the questionnaire shall be returned to the Executive Secretary within the time limit set by GRECO. 2. The replies to the mutual evaluation questionnaire shall be detailed, answer all questions and contain all necessary appendices. Whenever a country visit is to be carried out, these documents shall be submitted to the Executive Secretary at least three months before the visit."	which shall be addressed to all members concerned by the evaluation. 2. The questionnaire shall provide the framework of the evaluation procedure. 3. Members shall address their replies to the Secretariat within the time limits fixed by the GRECO." Article 12 covers 'Evaluation teams', and states: "1. The GRECO shall appoint, from the experts referred to in paragraph 4 of Article 10, a team for the evaluation of each member (hereinafter referred to as "the team"). When the evaluation concerns the implementation of one of the international legal instruments adopted	be globally unsatisfactory."[444] Article 16 of the Statute deals with 'Public Statements', and states: "1. The Statutory Committee may issue a public statement when it believes that a member remains passive or takes insufficient action in respect of the recommendations addressed to it as regards the application of the Guiding Principles. 2. The Statutory Committee, in its composition restricted to the members who are parties to the instruments concerned, may issue a public statement

[443] GRECO Rules of Procedure, 5 December 2011, http://www.coe.int/t/dghl/monitoring/greco/documents/Greco(2011)20_RulesOfProcedure_EN.pdf.

[444] Quoted from http://www.coe.int/t/dghl/monitoring/greco/general/4.%20How%20does%20GRECO%20work_en.asp.

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
				in pursuance of the Programme of Action against Corruption, the GRECO shall appoint teams composed exclusively of experts proposed by members who are Parties to the instrument concerned. 2. The team shall examine the replies given to the questionnaire and may request, where appropriate, additional information from the member undergoing the evaluation, to be submitted either orally or in writing. Article 13 - Country visits foresees that "1. The GRECO may instruct the team to visit a member, for the purpose of seeking additional information concerning its law or practice, which is useful for the	when it believes that a member remains passive or takes insufficient action in respect of the recommendations addressed to it as regards the implementation of an instrument adopted in pursuance of the Programme of Action against Corruption. 3. The Statutory Committee shall inform the member concerned and provide an opportunity for the member to submit further comments before confirming its decision to issue a public statement referred to in paragraphs 1 and/or 2 above."

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
				evaluation. 2. The GRECO shall give a minimum of two months' notice to the member concerned of its intention to carry out the visit. 3. The visit shall be carried out in accordance with a programme arranged by the member concerned, taking into account the wishes expressed by the team. 4. The members of the team shall enjoy the privileges and immunities applicable under Article 2 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe. 5. The budget of the Enlarged Partial Agreement shall bear the travel and subsistence expenses necessary for the carrying out country visits."	

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
				Article 14 on Evaluation reports states: "1. On the basis of the information gathered, the team shall prepare a preliminary draft evaluation report on the state of the law and the practice in relation to the provisions selected for the evaluation round. 2. The preliminary draft report shall be transmitted to the member undergoing the evaluation for comments. These comments shall be taken into account by the team when finalising the draft report. 3. The draft report shall be submitted to the GRECO". Evaluation Reports are confidential (Article 15.5 of the Statute).	

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
European Committee on Crime Problems (CDPC)[445]	Terms of Reference[446]				
Council for Penological Cooperation (PC–CP)[447]	Terms of Reference[448]				
Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters (PC-OC)[449]	Terms of Reference[450]				
European Committee for Social Cohesion, Human Dignity and Equality[451]	The CDDECS was set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental	"The CDDECS Committee consists of representatives from CoE Member States. The governments of each member State designate one representative of the highest possible rank and expertise in the	Its work is divided into several Working Groups, and the results are discussed in Plenary Sessions.[454] It issues country reports on recent developments at national level.		

445 For general information on the Committee refer to http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/default_en.asp.

446 http://www.coe.int/t/dghl/standardsetting/cdpc/ToR%20CDPC%202014-2015.pdf.

447 http://www.coe.int/t/dghl/standardsetting/prisons/PCCP_en.asp.

448 http://www.coe.int/t/dghl/standardsetting/prisons/PCCP%20documents%202014/PC-CP%20Terms%20of%20Reference%202014-2015%20E.pdf.

449 http://www.coe.int/t/dghl/standardsetting/pc-oc/default_en.asp.

450 http://www.coe.int/t/DGHL/STANDARDSETTING/PC-OC/PCOC_documents/Documents%202015/PC-OC%20terms%20of%20reference%202016-2017.pdf.

451 http://www.coe.int/en/web/cddecs/.

454 http://www.coe.int/en/web/cddecs/plenary-sessions

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
	committees and subordinate bodies. It oversees and coordinates the intergovernmental work of the CoE in the fields of social cohesion, human dignity, equality and anti-discrimination. It advises the Committee of Ministers on all questions within its area of competence. According to the Terms of Reference,[452] its tasks include: First, oversee, promote and review the implementation of the Council of Europe Strategy and Action Plan for Social Cohesion (2010) and develop appropriate tools to promote social cohesion, combat discrimination, marginalisation, social exclusion and poverty. Second, support the implementation of the	relevant fields. The representatives have responsibility at the national level for the planning, development and implementation of policies relevant to the work of the Committee and are appointed by their governments to co-ordinate at national level all elements of government policy relevant to the work of the Committee. Each member of the committee has one vote. Where a government designates more than one member, only one of them is entitled to take part in the voting."[453] The Terms of Reference state that the members will have the responsibility for			

[452] http://www.coe.int/en/web/cddecs/terms-of-reference.

[453] Quoted from http://www.coe.int/en/web/cddecs/committee.

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
	Gender Equality transversal programme. Third, support the implementation of the transversal programme "Building a Europe for and with Children" and of the Council of Europe Strategy for the Rights of the Child 2012-15; support the preparation of the Strategy for 2016-19; and promote measures to prevent and eliminate all forms of violence against children and to protect and support child victims of violence. Fourth, oversee the promotion, implementation, follow-up and final review of the Council of Europe Disability Action Plan 2006-15, as well as the development of the Council of Europe post-2015 disability framework. Fifth, contribute, promote and support in its field of competence	"the planning, development and implementation of policies relevant to the work of the Committee and appointed by their governments to co-ordinate at national level all elements of government policy relevant to the work of the Committee. Each member of the committee shall have one vote. Where a government designates more than one member, only one of them is entitled to take part in the voting."			

	WHAT	WHO	HOW		
			Procedure	Method	Follow-up
	the implementation of standards, in particular through the promotion of the relevant Council of Europe conventions and the work carried out by ECRI, supporting States in the exchange of good practice to address the problems highlighted by monitoring mechanisms, taking into account the activities of other international organisations, in particular the European Union, the United Nations and the OSCE.				

ANNEX 2
Status of ratification of Human Rights Instruments by EU Member States[455]

(As of 13/02/2013)

	CERD	CERD: Art. 14	CCPR	OPT. PROT.	2nd OP	CESCR	OP-CESCR	CAT	CAT : Art. 22	OPCAT	CEDAW	CEDAW: OP	CRC	CRC:OPSC	CRC: OPAC	CRC: OPIC***	CMW	CRPD *	CRPD: OP *	CPPED **	CPPED ** Art. 31	CPPED ** Art. 32	
Austria	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	0	0	1	1	1	1	1	Austria
Belgium	1	1	1	1	1	1	0	1	1	0	1	1	1	1	1	**S**	0	1	1	1	1	1	Belgium
Bulgaria	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	0	0	1	0	0	0	0	Bulgaria
Croatia	1	0	1	1	1	1	0	1	1	1	1	1	1	1	1	0	0	1	1	0	0	0	Croatia
Cyprus	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	**S**	0	1	1	0	0	0	Cyprus
Czech Republic	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	0	0	1	0	0	0	0	Czech Republic
Denmark	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	0	0	1	0	0	0	0	Denmark
Estonia	1	0	1	1	1	1	0	1	0	1	1	0	1	1	0	0	0	1	1	0	0	0	Estonia
Finland	1	1	1	1	1	1	0	1	1	0	1	1	1	1	1	**S**	0	0	0	0	0	0	Finland
France	1	1	1	1	1	1	S	1	1	1	1	1	1	1	1	**S**	0	1	1	1	1	1	France
Germany	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	**S**	0	1	1	1	0	0	Germany
Greece	1	0	1	1	1	1	0	1	1	0	1	1	1	1	1	0	0	1	1	0	0	0	Greece
Hungary	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	0	0	1	1	0	0	0	Hungary
Ireland	1	1	1	1	1	1	S	1	1	0	1	1	1	0	1	0	0	0	0	0	0	0	Ireland
Italy	1	1	1	1	1	1	0	1	1	0	1	1	1	1	1	**S**	0	1	1	0	0	0	Italy
Latvia	1	0	1	1	0	1	0	1	0	0	1	0	1	1	1	0	0	1	1	0	0	0	Latvia
Lithuania	1	0	1	1	1	1	0	1	0	0	1	1	1	1	1	0	0	1	1	0	0	0	Lithuania

[455] Compilation as requested by the Directorate General for Parliamentary Research Services.

	CERD	CERD : Art. 14	CCPR	OPT. PROT.	2nd OP	CESCR	OP-CESCR	CAT	CAT : Art. 22	OPCAT	CEDAW	CEDAW: OP	CRC	CRC:OPSC	CRC: OPAC	CRC: OPIC	CMW	CRPD *	CRPD: OP *	CPPED **	CPPED ** Art. 31	CPPED ** Art. 32	
Luxembourg	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	**S**	0	1	1	0	0	0	Luxembourg
Malta	1	1	1	1	1	1	0	1	1	1	1	0	1	1	1	**S**	0	1	1	0	0	0	Malta
Netherlands	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	0	0	0	0	1	0	0	Netherlands
Poland	1	1	1	1	0	1	0	1	1	1	1	1	1	1	1	0	0	1	0	0	0	0	Poland
Portugal	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	**S**	0	1	1	0	0	0	Portugal
Romania	1	1	1	1	1	1	0	1	0	1	1	1	1	1	1	**S**	0	1	0	0	0	0	Romania
Slovakia	1	1	1	1	1	1	1	1	1	0	1	1	1	1	1	**S**	0	1	1	0	0	0	Slovakia
Slovenia	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	**S**	0	1	1	0	0	0	Slovenia
Spain	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	**S**	0	1	1	1	1	1	Spain
Sweden	1	1	1	1	1	1	0	1	1	1	1	1	1	1	1	0	0	1	1	0	0	0	Sweden
UK	1	0	1	0	1	1	0	1	0	1	1	1	1	1	1	0	0	1	1	0	0	0	UK
	28	**22**	**28**	**27**	**26**	**28**	**3**	**28**	**23**	**20**	**28**	**25**	**28**	**26**	**27**	**2**	**0**	**25**	**20**	**6**	**4**	**4**	**373**

Source: http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

ANNEX 3
UNITED NATIONS[456]

	WHAT	WHO	HOW	
			Procedure Method	Follow-up
Universal Periodic Review (UPR)[457]	Review of 'the human rights record' of UN members.[458] The UPR will assess the extent to which States respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the State is party (human rights treaties ratified by the State concerned); (4) voluntary pledges and commitments	The reviews are conducted by the UPR Working Group. The Group is composed of 47 members of the Council. Any UN Member State can take part in the discussion/dialogue with the reviewed States. Each State review is assisted by groups of three States, known as 'troikas', which serve as rapporteurs. The selection of the troikas	"Following the review by the Working Group, a report is prepared by the troika with the involvement of the State under review and assistance from the OHCHR. This report, referred to as the "outcome report", provides a summary of the actual discussion. It therefore consists of the questions, comments and recommendations made by States to the country under review, as well as the responses by the reviewed State." It is a 'state driven process'. The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a "national report"; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures (see below),	The State has the primary responsibility to implement the recommendations contained in the final outcome. The UPR ensures that all countries are accountable for progress or failure in implementing these recommendations. During the second review the State is expected to provide information on what they have been doing to implement the recommendations made during the first review as

[456] Compilation as requested by the Directorate General for Parliamentary Research Services.

[457] UN General Assembly on 15 March 2006 by resolution 60/251. See also the information of the Office of the High Commissioner for Human Rights, part of the UN Secretariat. mandated to support the work of all UN human rights mechanism. See http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx and http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx.

[458] Refer to UN, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Human rights bodies and mechanisms, 29 January 2015. Retrievable from http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx. See also http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM.

	made by the State (e.g. national human rights policies and/or programmes implemented); and, (5) applicable international humanitarian law.	for each State is done through a drawing of lots following elections for the Council membership in the General Assembly.	human rights treaty bodies, and other UN entities; 3) information from other stakeholders including national human rights institutions and non-governmental organisations. With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), special procedures include country visits to analyse the human rights situation at the national level; act on individual cases and concerns of a broader, structural nature by sending communications to States and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations; contribute to the development of international human rights standards; engage in advocacy, raise public awareness, and provide advice for technical cooperation. Special procedures are reported annually to the Human Rights Council; the majority of the mandates also reports to the General Assembly.[459] All State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every two years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".	well as on any developments in the field of human rights. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with the country concerned. If necessary, the Council will address cases where States are not cooperating. If the State does not cooperate, the Human Rights Council will decide on the measures it would need to take in case of persistent non-co-operation by a State with the UPR.

[459] http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx.

			"In order to facilitate the work of the Committee, States parties are once again requested to ensure that the reports correspond strictly to the provisions of the Convention and that they are drafted in accordance with the guidelines adopted by the Committee. States parties are invited to submit reports that are as succinct and concise as possible." The procedure is as follows:[460] reports of State parties, presence of the delegations of State parties, introductory presentation of State party's representative, action of country rapporteurs,[461] interventions by members of the Committee, reply of the State party's representative, Committee's concluding observations, written comments by State party. "In addition, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the early-warning procedure, the examination of inter-state complaints and the examination of individual complaints." The Committee will be provided by the secretariat, well in advance of the session, with country presentations concerning the State parties whose periodic reports are due to be considered	

[460] http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx#A.

[461] "The country rapporteurs, in presentations that should also not exceed 30 minutes, must highlight aspects relevant to the fulfilment of the obligations arising under the Convention, and also those where shortcomings or deficiencies are apparent. They will also put questions aimed at supplementing the information received and ensuring greater clarity or precision with respect to the information received. These questions may be conveyed to the State party beforehand", http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx#J.

			by the Committee, or the State parties scheduled for examination under the review procedure. These presentations, to be treated as confidential documents, should contain a summary of the information available on the country in connection with the periodic reports.462 The Committee can also carry out missions by members to States parties. "in order to assist where their presence would be useful in facilitating better implementation of the Convention. The Committee appoints one or more members to undertake such missions. When an invitation for a mission is received between meetings of the Committee, the Chairman will request one or more members to undertake the mission, after consulting the members of the Bureau. Members of the Committee participating in such a mission will report to the Committee at its next session." There is first a pre-sessional working group which convenes five days before each of the Committee's sessions. It is composed of five members of the Committee nominated by the Chairperson. The Group identifies the key issues or questions or list of issues (LOI) which will structure the dialogue with the State in question. As it is stated "24. It is generally accepted that the complex nature and diverse range of many of the	

462 On methods refer to http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx."Overview of the methods of work of the Committee", of the report of the Committee on the Elimination of Racial Discrimination on its forty-eighth and forty-ninth sessions. *Official Records of the General Assembly, Fifty-first Session, Supplement No. 18*(A/51/18), paras. 587-627.

			issues raised in connection with the implementation of the Covenant constitute a strong argument in favour of providing States parties with the possibility of preparing in advance to answer some of the principal questions arising out of their reports. Such an arrangement also enhances the likelihood that the State party will be able to provide precise and detailed information."[463] Depending on the expertise of the member concerned, issues are allocated within the Working Group. They function as 'country rapporteurs' and the final version of the list is adopted by the entire group. The Secretariat provides the Working Group with a country analysis and other relevant documents. The list of issues is then sent to State members,[464] requesting them to provide in written their replies. As part of the Dialogue, representatives of the State concerned should be present at the meetings of the Committee.[465]	

[463] Quoted from http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx.

[464] This includes a note stating the following: "The list is not intended to be exhaustive and it should not be interpreted as limiting or in any other way prejudging the type and range of questions which members of the Committee might wish to ask. However, the Committee believes that the constructive dialogue which it wishes to have with the representatives of the State party is greatly facilitated by making the list available in advance of the Committee's session. In order to improve the dialogue that the Committee seeks, it strongly urges each State party to provide in writing its replies to the list of issues and to do so sufficiently in advance of the session at which its report will be considered to enable the replies to be translated and made available to all members of the Committee."

[465] The following procedure is followed: "[T]he representative of the State party is invited to introduce the report by making brief introductory comments and providing any new information that may be relevant to the dialogue. The Committee then considers the report by clusters of articles (usually articles 1–5, 6–9, 10–12 and 13–15), taking particular account of the replies furnished in response to the list of issues. The Chairperson will normally invite questions or comments from Committee members in relation to each issue and then invite the State party representatives to reply immediately to questions that do not require further reflection or research. Any remaining questions are taken up at a subsequent meeting or, if necessary, may be the subject of additional information provided to the Committee in writing. Members of the Committee are free to pursue specific

			After the relevant procedure, the Committee drafts its 'concluding observations' with the following structure: introduction, positive aspects, principal subjects of concern and suggestions and recommendations. State parties can make comments to the concluding observations. Working Methods:[466] "Once the State party has ratified the Covenant it should submit, one year after the Covenant enters into force, its initial report to the Committee. For periodic reports, it is the Bureau of the Committee, at the end of the session at which the State party report is examined, which decides the number of years after which the State party should present their next report. The general rule (ever since this system was started two years ago) is that State parties should present their periodic report to the Committee every four years. However, the Bureau can add or subtract one year to this four-year period depending on the level of compliance with the Covenant's provisions by the State party."[467] The Committee may call for a report three, five or six years after the submission of a periodic report, depending on the State party's level of	

issues in the light of the replies thus provided, although the Committee has urged them not to (a) raise issues outside the scope of the Covenant; (b) repeat questions already posed or answered; (c) add unduly to an already long list on a particular issue; or (d) speak for more than five minutes in any one intervention." Quoted from http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx.

[466] Refer to http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx and the Guidelines are available at http://www.ecmi.de/fileadmin/doc/Implementing_Human_Rights/English/Reporting/UN%20Conventions/Guidelines/ICCPR.pdf.

[467] http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx.

			compliance with the provisions of the Covenant, including its reporting record. Refer to Rules 66 and 70, para. 1, of the rules of Procedure. 'Pre-Session Working Group' Country Report Tasks Forces (between four and six members) which identify in advance the questions which will constitute the principal focus of the dialogue with the representatives of the reporting State. One of these members is the country rapporteur who is overall responsible for the drafting of the list of issues. The working methods of the Country Report Task Force are as follows: First, the country rapporteur presents the draft list of issues for discussion to the Country Report Task Force. Once the members have made their observations, the list of issues is adopted by the Task Force as a whole. The Task Force then allocates to each of its members principal responsibility for a certain number of questions included in the list of issues, based in part on the areas of particular expertise or interest of the member concerned. Once the list of issues is adopted and edited, it is transmitted to the State party.[468] 'Constructive Dialogue' It is the practice of the Committee, in accordance with Rule 68 of its Rules of Procedure, to examine reports in the presence of representatives of the reporting States.	

[468] "In preparation for the Country Report Task Force, the secretariat places at the disposal of its members a country analysis as well as all pertinent documents containing information relevant to each of the reports to be examined. For this purpose, the Committee invites all concerned individuals, bodies and non-governmental organizations to submit relevant and appropriate documentation to the secretariat."

			Procedure: The representative of the State party is invited to introduce the report by making brief introductory comments, followed by the replies to the first group of questions included in the list of issues. It should be noted that State parties are encouraged to use the list of issues to better prepare for a constructive discussion, but are not expected to submit written answers. After this intervention, the Committee members will provide comments or further questions in relation to the replies provided. Although all Committee members participate in this dialogue, the members of the Country Task Force who are responsible for a pre-assigned number of questions, will have priority when asking questions to the representatives of the State party. The representative of the State party is then invited to reply to the remaining questions on the list of issues, to which will again follow the comments and questions of the Committee. 'Concluding Observations/Comments' The final phase of the Committee's examination of the State report is the drafting and adoption of its concluding observations. The country rapporteur prepares draft concluding observations for the consideration of the Committee.[469]	

[469] The agreed structure of the concluding observations is as follows: introduction; positive aspects; factors and difficulties impeding the implementation of the Covenant; principal subjects of concern and suggestions and recommendations.

			Reports by State parties to the Committee.[470] So it is a 'state driven process'. Documentation supplied by the Secretariat: The Committee will be provided with country files on the reporting State party. These files will include all material received by the secretariat, such as the official report, NGO and IGO information and other relevant documents. It also envisages cooperation with other specialised UN bodies and agencies, as well as NGOs and human rights organisations before the examination of a State report by the Committee.[471] State parties are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented. During its sessions the Committee considers each State party report and addresses its concerns and recommendations to the State party in the form of concluding observations. In accordance with the Optional Protocol to the Convention, the Committee is mandated to: (1) receive communications from individuals or groups of individuals submitting claims of	

[470] On the simplified reporting procedure refer to UN ICCPR, Focused reports based on replies to 'lists of issues prior to reporting' (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure), 29 September 2010, so instead of a period report there is a so-called "focused report based on replies to a list of issues". The LOPIR includes two sections: a first section on "General information on the national human rights situation, including new measures and developments relating to the implementation of the Covenant"; and a second section "where questions are organized according to clusters of provisions as in the standard list of issues, highlighting specific issues depending on the situation of the concerned State party and the information available to the Committee, in particular, the recommendations included in the last concluding observations addressed to the State party as well any follow-up information provided by the State."

[471] The Committee, in its Annual Report (2002), stated that it reserved the right to determine, at a later stage, whether other briefings by non-governmental organisations should also become part of the Committee's official record: (10) Paragraph 12, Annex III, Annual Report of the Human Rights Committee (2002), A/57/40 (Vol. I).

			violations of rights protected under the Convention to the Committee and (2) initiate inquiries into situations of grave or systematic violations of women's rights. These procedures are optional and are only available where the State concerned has accepted them. The Committee also formulates general recommendations and suggestions. General recommendations are directed to States and concern articles or themes in the Conventions. The procedure is also based on State reporting.[472] States are under the obligation to submit information regarding the ways in which they have or are implementing the Convention, as well as the 'recommendations' of the Committee. They will need to submit a report one year after the entry into force of the Convention, and then periodic reports every four years. It can also consider individual communications, adopting general comments and implement inquiries.[473] Similar to other treaty bodies, CATS has adopted guidelines for States' initial and periodic reports, which includes a common core document to be used when submitting the report to the Committee. Special focus is paid in the reporting to the practical implementation of the Convention as well as challenges characterising this implementation.	

[472] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

[473] CAT C/3/Rev 5, Rules of Procedure, 21 February 2011.

			During the phase preceding the preparation of the reports by the States, the Committee consults with national human rights organisations as well as NGOs, which may provide information substantiating the work of the Committee. The Committee drafts a list of issues (LOI), which is sent to the State concerned. The States are under the obligation to respond to the LOI in writing, before the dialogue with the State's delegation takes place. "The Committee holds two sessions annually, a four-week session in November and a four-week session in May, examining between 8 and 9 reports per session; a delegation from each country is invited to be present during the dialogue."[474] The assessment of the report occurs in the shape of a 'dialogue': "The aim of the dialogue is to enhance the Committee's understanding of the situation in the State party as it pertains to the Convention and to provide advice on how to improve the implementation of the Convention provisions in the State party. The dialogue also provides an opportunity for the State party to further explain its efforts to enhance prevention of torture and ill-treatment and to clarify the contents of its report to the members of the Committee. Exceptionally, the Committee may examine a report in the absence of representatives of the State party	

[474] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

			when, after being notified, they fail to appear without providing strong reasons." How the meeting takes place is interesting. According to the CAT website: "Two public meetings, a half-day meeting on the first day and another half-day on the following day, are generally devoted to the examination of a report. The first meeting begins with a short presentation by the State party's representatives, who usually update the information contained in the report and, if applicable, highlight the most relevant issues of the replies to the LOI previously sent in written to the Committee. Subsequently, the country rapporteurs and other Committee members make comments, ask questions and seek additional information related to issues that they consider require clarification. They can raise matters that had not been referred to in the LOI. On the following day, the second meeting will be devoted to the replies of the State party's representatives to the questions posed by the members during the first meeting as well as to any follow-up issues that might be raised by the Committee. Individual members do not participate in any aspect of the examination of the reports of the States parties of which they are nationals. Press releases in English and French are issued immediately by the United Nations Information Service (www.unog.ch) regarding the meetings at which a State report is examined. Summary	

			records are also issued after the closure of the session in English or French." So a key incentive for State parties to provide information is that the assessment will take in any case place if they don't provide the report "and such review would be carried out on the basis of information that is available to the Committee, including sources from outside the United Nations."[475] Following the examination the two rapporteurs draft 'concluding observations' are discussed and adopted in plenary of the Committee. The Conclusions follow a specific format, which after a brief introduction include a section on 'positive aspects' and another one on 'subjects of concern and recommendations'. The State parties may provide any follow-up or mention complementary issues in light of the concluding observations. They can also elaborate comments. It foresees the possibility of simplified reporting procedures.[476] The LIOs are prepared by "two country rapporteurs on the basis of the information contained in the report, previous concluding observations addressed by the Committee to the State and information originating from other treaty bodies, special procedures and from the United Nations system as well from others	

[475] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/172/18/PDF/G1517218.pdf?OpenElement.

[476] See http://www.un.org/ga/search/view_doc.asp?symbol=HRI/MC/2014/4.

			sources, including regional human rights mechanisms, NHRI and NGO and adopted by the Committee in plenary".[477] It is the only Treaty body which does not require State parties to submit reports. The ICPPED does not require State parties to submit periodic reports. This body also constitutes an exception when it comes to 'individual communications'. In comparison to the other bodies it is not possible for it to receive them. It has two main competences: First, visits to any place where a person may be deprived of liberty in State party territories.[478] There are four types of visits: SPT country visits, SPT country follow-up visits, NPM advisory visits and OPCAT advisory visits. Second, advice and assistance to State parties on the establishment of National Preventive Mechanisms (NPMs), independent national bodies for the prevention of torture.[479] The setting up of NPMs constitutes a requirement for State parties to the Optional Protocol. It publishes an Annual Report[480] which is presented before the CAT and the General Assembly.	

[477] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

[478] For a list of visits see http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/CountryVisits.aspx.

[479] The Subcommittee has provided guidelines on the setting up of NPMs, see http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx.

[480] For a full list refer to http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=12&DocTypeID=27.

			According to the SPT website,[481] "The SPT undertakes country visits during which a delegation of its members visits places where persons may be deprived of their liberty. During its visits, the SPT examines the conditions of their detention, their daily life, including the manner in which they are treated, the relevant legislative and institutional frameworks, and other questions that may be related to the prevention of torture and ill treatment. At the end of its visits, the SPT draws up a written report which contains recommendations and observations to the State, requesting a written response within six months of its receipt. This then triggers a further round of discussion regarding the implementation of the SPT's recommendations, and thus begins the process of continual dialogue. The SPT visit reports are confidential, though State parties are encouraged to make them public documents, as permitted by the OPCAT. When undertaking NPM advisory visits, the SPT focuses on issues concerning the establishment and/or operation of the NPM in the country concerned. OPCAT advisory visits focus on high-level discussions with the relevant authorities concerning a whole range of issues concerning OPCAT compliance.	

[481] http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx.

			The working methods can be summarised as follows.[482] State parties undertake to submit to the Committee reports on the implementation of the Convention within two years of the entry into force of the Convention for the State party concerned and thereafter every five years (Article 44.1 of the Convention on the Rights of the Child). The Committee has issued guidelines for structuring and facilitating the dialogue with State parties.[483] The agenda for the discussion takes place around the articles structuring the convention: (a) General measures of implementation (Arts. 4, 42 and 44.6); (b) Definition of the child (Art. 1); (c) General principles (Arts. 2, 3, 6 and 12); (d) Civil rights and freedoms (Arts. 7, 8, 13-17 and 37a); (e) Family environment and alternative care (Arts. 5, 18.1, 18.2, 9, 10, 27.4, 20, 21, 11, 19, 39 and 25); (f) Basic health and welfare (Arts. 6.2, 23, 24, 26, 18.3, 27.1, 27.2 and 27.3); (g) Education, leisure and cultural activities (Arts. 28, 29 and 31); (h) Special protection measures: (i) Children in situations of emergency (Arts. 22, 38 and 39); (ii) Children in conflict with the law (Arts. 40, 37 and 39); (iii) Children in situations of exploitation, including physical and psychological recovery and social reintegration (Arts. 32, 33, 34, 35, 36 and 39); (iv) Children	

[482] Refer to http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx.

[483] CRC/C/5 and CRC/C/58.

			belonging to a minority or an indigenous group (Art. 30). Before the session in Committee where the report is assessed, there is a pre-sessional working group. The group organises a private meeting with UN agencies and bodies, NGOs, and other competent bodies such as National Human Rights Institutions and youth organisations. This pre-sessional working group leads to the enactment of a list of issues, whose purpose according to the Committee's working methods follows: "The list of issues is intended to give the Government a preliminary indication of the issues which the Committee considers to be priorities for discussion. It also gives the Committee the opportunity to request additional or updated information in writing from the Government prior to the session. This approach gives Governments the opportunity better to prepare themselves for the discussion with the Committee, which usually takes place between 3 and 4 months after the working group. In order to facilitate the efficiency of the dialogue, the Committee requests the State party to provide the answers to its List of Issues in writing and in advance of the session, in time for them to be translated into the working languages of the Committee. It also provides an opportunity to	

			consider questions relating to technical assistance and international cooperation." The State party report is discussed in an open and public session of the Committee. The focus is on 'progress achieved' and 'factors and difficulties encountered' when implementing the Convention, but also a more strategic discussion with the delegation representing the State concerned, so as to discuss 'future goals and implementation priorities'. The discussions with the State are led by two country rapporteurs appointed between the members of the Committee. After the discussions the Committee will draft 'concluding observations' which also contain recommendations and specific suggestions. After an introduction, the concluding observations provide a similar format or structure dealing with positive aspects (including progress achieved); factors and difficulties impeding the implementation; principal subjects for concern; suggestions and recommendations addressed to the State party. The observations are made public and sent to the State involved, and they are submitted to the United Nations General Assembly, through the Economic and Social Council, for its consideration, every two years.	

			"The secretariat prepares country files for the pre-sessional working group, containing information relevant to each of the reports to be examined. These include country specific information submitted by United Nations bodies and specialized agencies, non governmental organizations and other competent bodies. The secretariat also prepares country briefs. Prior to the plenary session both file and country briefs are updated and made available to the Committee members during the sessions."[484] The monitoring system is based on States' reporting in light of Article 73 of the Convention.[485] Article 73 of the Convention states: "1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention: (a) Within one year after the entry into force of the Convention for the State Party concerned; (b) Thereafter every five years and whenever the Committee so requests."	

[484] Working Methods document retrievable from http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx. See also the Committee "Guidelines for the participation of partners (NGOs and individual experts) in the pre-sessional working group of the Committee on the Rights of the Child." (CRC/C/90, Annex VIII.)

[485] See Rules of Procedure of the Committee, HRI/GEN/3/Rev.1/Add.1 7 May 2004.

			The reports focus on 'factors and difficulties' affecting the implementation of the Convention. They will also include information on the characteristics of migration flows in the State concerned. Article 74.1 stipulates: "The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports."[486] The Committee then presents an Annual Report before the General Assembly on the implementation of the Convention, which contains its own considerations and recommendations "based, in particular, on the examination of the reports and any observations presented by States Parties." Article 76 provides signatories to recognise the competence of the Committee "to receive and consider communications to the effect that a State Party claims that another State Party is not	

[486] The same article states: "6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered."

			fulfilling its obligations under the present Convention." And Article 77 "to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party". Similar to other Treaty bodies, the Committee identifies a set or list of issues prior to reporting (LoIPR) which are sent to the States concerned and which are aimed at structuring the periodic reporting procedures. On the basis of the reports by State parties, the Committee elaborates Concluding Remarks or observations. There is also a simplified reporting procedure.[487] The reporting by States follows the common set of harmonised guidelines on reporting under the human rights treaties.[488] The Working Methods can be summarised as follows:[489] It is a State reporting based model. Article 35, paragraph 1, of the Convention stipulates that State parties are obliged to submit to the Committee within two years of the ratification of	

[487] http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=7&Lang=En.

[488] United Nations, International Human Rights Instruments, HRI/GEN/2/Rev.6, 3 June 2009.

[489] UN, Working Methods of the Committee on the Rights of Persons with Disabilities adopted at its fifth session (11-15 April 2011), CRPD/C/5/4, 2 September 2011.

			the Convention, and every four years thereafter, a report on the implementation of the Convention. It is also based on a framework of 'constructive dialogue' between the Committee and the State. The dialogue starts on the basis of a list of issues, which according to the working methods document "5. On the basis of information at its disposal, the Committee will formulate in advance a list of issues for which supplementary information to that contained in the common-core and treaty-specific documents is required. States parties will be requested to provide brief and precise replies in writing, not exceeding 30 pages. States parties may submit additional pages of statistical data, which will be made available to Committee members in their original format, as submitted." The Committee nominates one or two country rapporteurs on each of the reports received by each country, and "The country rapporteur(s) shall prepare a draft list of issues on the State Party report for which they are responsible prior to the dialogue, and draft concluding observations following the constructive dialogue."[490] The State reports are examined in a public hearing, where all the relevant stakeholders may attend. The States are represented by delegations who "comprise persons who possess the knowledge, competence and authority to explain	

[490] See http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5/4&Lang=en.

			all aspects of the human rights situation of persons with disabilities in the reporting State". Following the structured dialogue, the Committee will adopt the Concluding Observations which will be structured as follows: "Positive aspects • Factors and difficulties that impede the implementation of the Convention • Principal topics of concern • Suggestions and recommendations". "Concluding observations will be made public on the last day of the session at which they were adopted, and posted on the website of the Office of the High Commissioner for Human Rights (OHCHR)." There is also a simplified reporting procedure.[491] The Working Methods are outlined here.[492] They are founded on the Convention and the Committee's rules of procedures. The reporting is carried out following an article by article basis, and if necessary on complementary information. The focus is on the state of implementation and progress achieved and obstacle encountered. "The Committee encourages the involvement of families of victims' organizations, human rights defenders working on the issue of enforced disappearance, non-governmental organizations and National Human Rights Institutions (NHRIs) in the process of consultations leading to the	

[491] http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Simplifiedreportingprocedure.aspx and http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=4&Lang=En.

[492] Refer to http://www.ohchr.org/EN/HRBodies/CED/Pages/WorkingMethods.aspx.

			preparation of reports. The Committee also encourages civil society stakeholders and NHRIs to directly provide to it information on the implementation of the provisions of the Convention at the national level."[493] The Committee appoints two or more country rapporteurs by report, which carry out the review. They draft the list of issues and the concluding observations which are then validated by the Committee. After the report is received, "the Committee shall transmit a letter to the State party concerned notifying it of the dates, duration and venue of the session at which its report will be examined as well as a list of issues about which the Committee would like to receive additional information. The list of issues facilitates the preparation by the State party for the constructive dialogue; provide a focus for the constructive dialogue, without restricting it; and improve the efficiency of the reporting system." Also, "In reviewing States Parties reports, the Committee may take into consideration information originating from other treaty bodies, special procedures, in particular the Working Group on Enforced or Involuntary Disappearances, and from the United Nations system as well from others sources, including regional human rights mechanisms, civil society stakeholders and NHRIs."	

[493] Point 6 of working methods, http://www.ohchr.org/EN/HRBodies/CED/Pages/WorkingMethods.aspx.

			The report is examined in the context of a 'constructive dialogue' between the Committee and the delegation of the State party.	
			"Following the review by the Working Group, a report is prepared by the troika with the involvement of the State under review and assistance from the OHCHR. This report, referred to as the "outcome report", provides a summary of the actual discussion. It therefore consists of the questions, comments and recommendations made by States to the country under review, as well as the responses by the reviewed State." It is a 'state driven process'. The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a "national report"; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures (see below), human rights treaty bodies, and other UN entities; 3) information from other stakeholders including national human rights institutions and non-governmental organisations. With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), special procedures include country visits to analyse the human rights situation at the national level; act on individual cases and concerns of a broader, structural nature by	Special procedures regularly make recommendations to countries and other stakeholders in their reports to the Human Rights Council. All recommendations contained in country visit reports by special procedures since 2006, as well as direct access to the reports in which the recommendations are included, are accessible through the Universal Human Rights Index. The database provides easy access to country-specific human rights information emanating from international human rights mechanisms in the United Nations system: the Treaty Bodies, the Special Procedures and the Universal Periodic

			sending communications to States and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations; contribute to the development of international human rights standards; engage in advocacy, raise public awareness, and provide advice for technical cooperation. Special procedures are reported annually to the Human Rights Council; the majority of the mandates also reports to the General Assembly.[494] All State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every two years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". "In order to facilitate the work of the Committee, States parties are once again requested to ensure that the reports correspond strictly to the provisions of the Convention and that they are drafted in accordance with the guidelines adopted by the Committee. States parties are invited to submit reports that are as succinct and concise as possible."	Review (UPR). Refer to http://uhri.ohchr.org/. These recommendations can be searched by topic, right, mandate, region or country. Follow-up[529]

[494] http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx.

[529] For an overview on follow up by Treaty body refer to http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx

			The procedure is as follows:[495] reports of State parties, presence of the delegations of State parties, introductory presentation of State party's representative, action of country rapporteurs,[496] interventions by members of the Committee, reply of the State party's representative, Committee's concluding observations, written comments by State party. "In addition, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the early-warning procedure, the examination of inter-state complaints and the examination of individual complaints." The Committee will be provided by the secretariat, well in advance of the session, with country presentations concerning the State parties whose periodic reports are due to be considered by the Committee, or the State parties scheduled for examination under the review procedure. These presentations, to be treated as confidential documents, should contain a summary of the	

[495] http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx#A.

[496] "The country rapporteurs, in presentations that should also not exceed 30 minutes, must highlight aspects relevant to the fulfilment of the obligations arising under the Convention, and also those where shortcomings or deficiencies are apparent. They will also put questions aimed at supplementing the information received and ensuring greater clarity or precision with respect to the information received. These questions may be conveyed to the State party beforehand", http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx#J.

			information available on the country in connection with the periodic reports.497 The Committee can also carry out missions by members to States parties. "in order to assist where their presence would be useful in facilitating better implementation of the Convention. The Committee appoints one or more members to undertake such missions. When an invitation for a mission is received between meetings of the Committee, the Chairman will request one or more members to undertake the mission, after consulting the members of the Bureau. Members of the Committee participating in such a mission will report to the Committee at its next session." There is first a pre-sessional working group which convenes five days before each of the Committee's sessions. It is composed of five members of the Committee nominated by the Chairperson. The Group identifies the key issues or questions or list of issues (LOI) which will structure the dialogue with the State in question. As it is stated "24. It is generally accepted that the complex nature and diverse range of many of the issues raised in connection with the implementation of the Covenant constitute a strong argument in favour of providing States parties with the possibility of preparing in	

497 On methods refer to http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx."Overview of the methods of work of the Committee", of the report of the Committee on the Elimination of Racial Discrimination on its forty-eighth and forty-ninth sessions. *Official Records of the General Assembly, Fifty-first Session, Supplement No. 18*(A/51/18), paras. 587-627.

			advance to answer some of the principal questions arising out of their reports. Such an arrangement also enhances the likelihood that the State party will be able to provide precise and detailed information."498 Depending on the expertise of the member concerned, issues are allocated within the Working Group. They function as 'country rapporteurs' and the final version of the list is adopted by the entire group. The Secretariat provides the Working Group with a country analysis and other relevant documents. The list of issues is then sent to State members,[499] requesting them to provide in written their replies. As part of the Dialogue, representatives of the State concerned should be present at the meetings of the Committee.[500]	

498 Quoted from http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx.

499 This includes a note stating the following: "The list is not intended to be exhaustive and it should not be interpreted as limiting or in any other way prejudging the type and range of questions which members of the Committee might wish to ask. However, the Committee believes that the constructive dialogue which it wishes to have with the representatives of the State party is greatly facilitated by making the list available in advance of the Committee's session. In order to improve the dialogue that the Committee seeks, it strongly urges each State party to provide in writing its replies to the list of issues and to do so sufficiently in advance of the session at which its report will be considered to enable the replies to be translated and made available to all members of the Committee."

500 The following procedure is followed: "[T]he representative of the State party is invited to introduce the report by making brief introductory comments and providing any new information that may be relevant to the dialogue. The Committee then considers the report by clusters of articles (usually articles 1–5, 6–9, 10–12 and 13–15), taking particular account of the replies furnished in response to the list of issues. The Chairperson will normally invite questions or comments from Committee members in relation to each issue and then invite the State party representatives to reply immediately to questions that do not require further reflection or research. Any remaining questions are taken up at a subsequent meeting or, if necessary, may be the subject of additional information provided to the Committee in writing. Members of the Committee are free to pursue specific issues in the light of the replies thus provided, although the Committee has urged them not to (a) raise issues outside the scope of the Covenant; (b) repeat questions already posed or answered; (c) add unduly to an already long list on a particular issue; or (d) speak for more than five minutes in any one intervention." Quoted from http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx.

			After the relevant procedure, the Committee drafts its 'concluding observations' with the following structure: introduction, positive aspects, principal subjects of concern and suggestions and recommendations. State parties can make comments to the concluding observations. Working Methods:[501] "Once the State party has ratified the Covenant it should submit, one year after the Covenant enters into force, its initial report to the Committee. For periodic reports, it is the Bureau of the Committee, at the end of the session at which the State party report is examined, which decides the number of years after which the State party should present their next report. The general rule (ever since this system was started two years ago) is that State parties should present their periodic report to the Committee every four years. However, the Bureau can add or subtract one year to this four-year period depending on the level of compliance with the Covenant's provisions by the State party."[502] The Committee may call for a report three, five or six years after the submission of a periodic report, depending on the State party's level of compliance with the provisions of the Covenant, including its reporting record. Refer to Rules 66 and 70, para. 1, of the rules of Procedure.	

[501] Refer to http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx and the Guidelines are available at http://www.ecmi.de/fileadmin/doc/Implementing_Human_Rights/English/Reporting/UN%20Conventions/Guidelines/ICCPR.pdf.

[502] http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx.

			'Pre-Session Working Group' Country Report Tasks Forces (between four and six members) which identify in advance the questions which will constitute the principal focus of the dialogue with the representatives of the reporting State. One of these members is the country rapporteur who is overall responsible for the drafting of the list of issues. The working methods of the Country Report Task Force are as follows: First, the country rapporteur presents the draft list of issues for discussion to the Country Report Task Force. Once the members have made their observations, the list of issues is adopted by the Task Force as a whole. The Task Force then allocates to each of its members principal responsibility for a certain number of questions included in the list of issues, based in part on the areas of particular expertise or interest of the member concerned. Once the list of issues is adopted and edited, it is transmitted to the State party.[503] 'Constructive Dialogue' It is the practice of the Committee, in accordance with Rule 68 of its Rules of Procedure, to examine reports in the presence of representatives of the reporting States. Procedure: The representative of the State party is invited to introduce the report by making brief introductory comments, followed by the replies to	

[503] "In preparation for the Country Report Task Force, the secretariat places at the disposal of its members a country analysis as well as all pertinent documents containing information relevant to each of the reports to be examined. For this purpose, the Committee invites all concerned individuals, bodies and non-governmental organizations to submit relevant and appropriate documentation to the secretariat."

			the first group of questions included in the list of issues. It should be noted that State parties are encouraged to use the list of issues to better prepare for a constructive discussion, but are not expected to submit written answers. After this intervention, the Committee members will provide comments or further questions in relation to the replies provided. Although all Committee members participate in this dialogue, the members of the Country Task Force who are responsible for a pre-assigned number of questions, will have priority when asking questions to the representatives of the State party. The representative of the State party is then invited to reply to the remaining questions on the list of issues, to which will again follow the comments and questions of the Committee. 'Concluding Observations/Comments' The final phase of the Committee's examination of the State report is the drafting and adoption of its concluding observations. The country rapporteur prepares draft concluding observations for the consideration of the Committee.[504] Reports by State parties to the Committee.[505] So it is a 'state driven process'.	

[504] The agreed structure of the concluding observations is as follows: introduction; positive aspects; factors and difficulties impeding the implementation of the Covenant; principal subjects of concern and suggestions and recommendations.

[505] On the simplified reporting procedure refer to UN ICCPR, Focused reports based on replies to 'lists of issues prior to reporting' (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure), 29 September 2010, so instead of a period report there is a so-called "focused report based on replies to a list of issues". The LOPIR

			Documentation supplied by the Secretariat: The Committee will be provided with country files on the reporting State party. These files will include all material received by the secretariat, such as the official report, NGO and IGO information and other relevant documents. It also envisages cooperation with other specialised UN bodies and agencies, as well as NGOs and human rights organisations before the examination of a State report by the Committee.[506] State parties are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented. During its sessions the Committee considers each State party report and addresses its concerns and recommendations to the State party in the form of concluding observations. In accordance with the Optional Protocol to the Convention, the Committee is mandated to: (1) receive communications from individuals or groups of individuals submitting claims of violations of rights protected under the Convention to the Committee and (2) initiate inquiries into situations of grave or	

includes two sections: a first section on "General information on the national human rights situation, including new measures and developments relating to the implementation of the Covenant"; and a second section "where questions are organized according to clusters of provisions as in the standard list of issues, highlighting specific issues depending on the situation of the concerned State party and the information available to the Committee, in particular, the recommendations included in the last concluding observations addressed to the State party as well any follow-up information provided by the State."

[506] The Committee, in its Annual Report (2002), stated that it reserved the right to determine, at a later stage, whether other briefings by non-governmental organisations should also become part of the Committee's official record: (10) Paragraph 12, Annex III, Annual Report of the Human Rights Committee (2002), A/57/40 (Vol. I).

			systematic violations of women's rights. These procedures are optional and are only available where the State concerned has accepted them. The Committee also formulates general recommendations and suggestions. General recommendations are directed to States and concern articles or themes in the Conventions. The procedure is also based on State reporting.[507] States are under the obligation to submit information regarding the ways in which they have or are implementing the Convention, as well as the 'recommendations' of the Committee. They will need to submit a report one year after the entry into force of the Convention, and then periodic reports every four years. It can also consider individual communications, adopting general comments and implement inquiries.[508] Similar to other treaty bodies, CATS has adopted guidelines for States' initial and periodic reports, which includes a common core document to be used when submitting the report to the Committee. Special focus is paid in the reporting to the practical implementation of the Convention as well as challenges characterising this implementation. During the phase preceding the preparation of the reports by the States, the Committee consults with national human rights organisations as well as	

[507] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

[508] CAT C/3/Rev 5, Rules of Procedure, 21 February 2011.

			NGOs, which may provide information substantiating the work of the Committee. The Committee drafts a list of issues (LOI), which is sent to the State concerned. The States are under the obligation to respond to the LOI in writing, before the dialogue with the State's delegation takes place. "The Committee holds two sessions annually, a four-week session in November and a four-week session in May, examining between 8 and 9 reports per session; a delegation from each country is invited to be present during the dialogue."[509] The assessment of the report occurs in the shape of a 'dialogue': "The aim of the dialogue is to enhance the Committee's understanding of the situation in the State party as it pertains to the Convention and to provide advice on how to improve the implementation of the Convention provisions in the State party. The dialogue also provides an opportunity for the State party to further explain its efforts to enhance prevention of torture and ill-treatment and to clarify the contents of its report to the members of the Committee. Exceptionally, the Committee may examine a report in the absence of representatives of the State party when, after being notified, they fail to appear without providing strong reasons."	

[509] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

			How the meeting takes place is interesting. According to the CAT website: "Two public meetings, a half-day meeting on the first day and another half-day on the following day, are generally devoted to the examination of a report. The first meeting begins with a short presentation by the State party's representatives, who usually update the information contained in the report and, if applicable, highlight the most relevant issues of the replies to the LOI previously sent in written to the Committee. Subsequently, the country rapporteurs and other Committee members make comments, ask questions and seek additional information related to issues that they consider require clarification. They can raise matters that had not been referred to in the LOI. On the following day, the second meeting will be devoted to the replies of the State party's representatives to the questions posed by the members during the first meeting as well as to any follow-up issues that might be raised by the Committee. Individual members do not participate in any aspect of the examination of the reports of the States parties of which they are nationals. Press releases in English and French are issued immediately by the United Nations Information Service (www.unog.ch) regarding the meetings at which a State report is examined. Summary	

			records are also issued after the closure of the session in English or French." So a key incentive for State parties to provide information is that the assessment will take in any case place if they don't provide the report "and such review would be carried out on the basis of information that is available to the Committee, including sources from outside the United Nations."[510] Following the examination the two rapporteurs draft 'concluding observations' are discussed and adopted in plenary of the Committee. The Conclusions follow a specific format, which after a brief introduction include a section on 'positive aspects' and another one on 'subjects of concern and recommendations'. The State parties may provide any follow-up or mention complementary issues in light of the concluding observations. They can also elaborate comments. It foresees the possibility of simplified reporting procedures.[511] The LIOs are prepared by "two country rapporteurs on the basis of the information contained in the report, previous concluding observations addressed by the Committee to the State and information originating from other treaty bodies, special procedures and from the United Nations system as well from others	

[510] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/172/18/PDF/G1517218.pdf?OpenElement.

[511] See http://www.un.org/ga/search/view_doc.asp?symbol=HRI/MC/2014/4.

			sources, including regional human rights mechanisms, NHRI and NGO and adopted by the Committee in plenary".[512] It is the only Treaty body which does not require State parties to submit reports. The ICPPED does not require State parties to submit periodic reports. This body also constitutes an exception when it comes to 'individual communications'. In comparison to the other bodies it is not possible for it to receive them. It has two main competences: First, visits to any place where a person may be deprived of liberty in State party territories.[513] There are four types of visits: SPT country visits, SPT country follow-up visits, NPM advisory visits and OPCAT advisory visits. Second, advice and assistance to State parties on the establishment of National Preventive Mechanisms (NPMs), independent national bodies for the prevention of torture.[514] The setting up of NPMs constitutes a requirement for State parties to the Optional Protocol. It publishes an Annual Report[515] which is presented before the CAT and the General Assembly.	

[512] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

[513] For a list of visits see http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/CountryVisits.aspx.

[514] The Subcommittee has provided guidelines on the setting up of NPMs, see http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx.

[515] For a full list refer to http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=12&DocTypeID=27.

			According to the SPT website,[516] "The SPT undertakes country visits during which a delegation of its members visits places where persons may be deprived of their liberty. During its visits, the SPT examines the conditions of their detention, their daily life, including the manner in which they are treated, the relevant legislative and institutional frameworks, and other questions that may be related to the prevention of torture and ill treatment. At the end of its visits, the SPT draws up a written report which contains recommendations and observations to the State, requesting a written response within six months of its receipt. This then triggers a further round of discussion regarding the implementation of the SPT's recommendations, and thus begins the process of continual dialogue. The SPT visit reports are confidential, though State parties are encouraged to make them public documents, as permitted by the OPCAT. When undertaking NPM advisory visits, the SPT focuses on issues concerning the establishment and/or operation of the NPM in the country concerned. OPCAT advisory visits focus on high-level discussions with the relevant authorities concerning a whole range of issues concerning OPCAT compliance.	

[516] http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx.

			The working methods can be summarised as follows.[517] State parties undertake to submit to the Committee reports on the implementation of the Convention within two years of the entry into force of the Convention for the State party concerned and thereafter every five years (Article 44.1 of the Convention on the Rights of the Child). The Committee has issued guidelines for structuring and facilitating the dialogue with State parties.[518] The agenda for the discussion takes place around the articles structuring the convention: (a) General measures of implementation (Arts. 4, 42 and 44.6); (b) Definition of the child (Art. 1); (c) General principles (Arts. 2, 3, 6 and 12); (d) Civil rights and freedoms (Arts. 7, 8, 13-17 and 37a); (e) Family environment and alternative care (Arts. 5, 18.1, 18.2, 9, 10, 27.4, 20, 21, 11, 19, 39 and 25); (f) Basic health and welfare (Arts. 6.2, 23, 24, 26, 18.3, 27.1, 27.2 and 27.3); (g) Education, leisure and cultural activities (Arts. 28, 29 and 31); (h) Special protection measures: (i) Children in situations of emergency (Arts. 22, 38 and 39); (ii) Children in conflict with the law (Arts. 40, 37 and 39); (iii) Children in situations of exploitation, including physical and psychological recovery and social reintegration (Arts. 32, 33, 34, 35, 36 and 39); (iv) Children	

[517] Refer to http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx.

[518] CRC/C/5 and CRC/C/58.

			belonging to a minority or an indigenous group (Art. 30). Before the session in Committee where the report is assessed, there is a pre-sessional working group. The group organises a private meeting with UN agencies and bodies, NGOs, and other competent bodies such as National Human Rights Institutions and youth organisations. This pre-sessional working group leads to the enactment of a list of issues, whose purpose according to the Committee's working methods follows: "The list of issues is intended to give the Government a preliminary indication of the issues which the Committee considers to be priorities for discussion. It also gives the Committee the opportunity to request additional or updated information in writing from the Government prior to the session. This approach gives Governments the opportunity better to prepare themselves for the discussion with the Committee, which usually takes place between 3 and 4 months after the working group. In order to facilitate the efficiency of the dialogue, the Committee requests the State party to provide the answers to its List of Issues in writing and in advance of the session, in time for them to be translated into the working languages of the Committee. It also provides an opportunity to	

			consider questions relating to technical assistance and international cooperation." The State party report is discussed in an open and public session of the Committee. The focus is on 'progress achieved' and 'factors and difficulties encountered' when implementing the Convention, but also a more strategic discussion with the delegation representing the State concerned, so as to discuss 'future goals and implementation priorities'. The discussions with the State are led by two country rapporteurs appointed between the members of the Committee. After the discussions the Committee will draft 'concluding observations' which also contain recommendations and specific suggestions. After an introduction, the concluding observations provide a similar format or structure dealing with positive aspects (including progress achieved); factors and difficulties impeding the implementation; principal subjects for concern; suggestions and recommendations addressed to the State party. The observations are made public and sent to the State involved, and they are submitted to the United Nations General Assembly, through the Economic and Social Council, for its consideration, every two years.	

			"The secretariat prepares country files for the pre-sessional working group, containing information relevant to each of the reports to be examined. These include country specific information submitted by United Nations bodies and specialized agencies, non governmental organizations and other competent bodies. The secretariat also prepares country briefs. Prior to the plenary session both file and country briefs are updated and made available to the Committee members during the sessions."[519] The monitoring system is based on States' reporting in light of Article 73 of the Convention.[520] Article 73 of the Convention states: "1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention: (a) Within one year after the entry into force of the Convention for the State Party concerned; (b) Thereafter every five years and whenever the Committee so requests."	

[519] Working Methods document retrievable from http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx. See also the Committee "Guidelines for the participation of partners (NGOs and individual experts) in the pre-sessional working group of the Committee on the Rights of the Child." (CRC/C/90, Annex VIII.)

[520] See Rules of Procedure of the Committee, HRI/GEN/3/Rev.1/Add.1 7 May 2004.

			The reports focus on 'factors and difficulties' affecting the implementation of the Convention. They will also include information on the characteristics of migration flows in the State concerned. Article 74.1 stipulates: "The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports."[521] The Committee then presents an Annual Report before the General Assembly on the implementation of the Convention, which contains its own considerations and recommendations "based, in particular, on the examination of the reports and any observations presented by States Parties." Article 76 provides signatories to recognise the competence of the Committee "to receive and consider communications to the effect that a State Party claims that another State Party is not	

[521] The same article states: "6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered."

			fulfilling its obligations under the present Convention." And Article 77 "to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party". Similar to other Treaty bodies, the Committee identifies a set or list of issues prior to reporting (LoIPR) which are sent to the States concerned and which are aimed at structuring the periodic reporting procedures. On the basis of the reports by State parties, the Committee elaborates Concluding Remarks or observations. There is also a simplified reporting procedure.[522] The reporting by States follows the common set of harmonised guidelines on reporting under the human rights treaties.[523] The Working Methods can be summarised as follows:[524] It is a State reporting based model. Article 35, paragraph 1, of the Convention stipulates that State parties are obliged to submit to the Committee within two years of the ratification of the Convention, and every four years thereafter, a report on the implementation of the Convention.	

[522] http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=7&Lang=En.

[523] United Nations, International Human Rights Instruments, HRI/GEN/2/Rev.6, 3 June 2009.

[524] UN, Working Methods of the Committee on the Rights of Persons with Disabilities adopted at its fifth session (11-15 April 2011), CRPD/C/5/4, 2 September 2011.

			It is also based on a framework of 'constructive dialogue' between the Committee and the State. The dialogue starts on the basis of a list of issues, which according to the working methods document "5. On the basis of information at its disposal, the Committee will formulate in advance a list of issues for which supplementary information to that contained in the common-core and treaty-specific documents is required. States parties will be requested to provide brief and precise replies in writing, not exceeding 30 pages. States parties may submit additional pages of statistical data, which will be made available to Committee members in their original format, as submitted." The Committee nominates one or two country rapporteurs on each of the reports received by each country, and "The country rapporteur(s) shall prepare a draft list of issues on the State Party report for which they are responsible prior to the dialogue, and draft concluding observations following the constructive dialogue."[525] The State reports are examined in a public hearing, where all the relevant stakeholders may attend. The States are represented by delegations who "comprise persons who possess the knowledge, competence and authority to explain all aspects of the human rights situation of persons with disabilities in the reporting State".	

[525] See http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5/4&Lang=en.

			Following the structured dialogue, the Committee will adopt the Concluding Observations which will be structured as follows: "Positive aspects • Factors and difficulties that impede the implementation of the Convention • Principal topics of concern • Suggestions and recommendations". "Concluding observations will be made public on the last day of the session at which they were adopted, and posted on the website of the Office of the High Commissioner for Human Rights (OHCHR)." There is also a simplified reporting procedure.[526] The Working Methods are outlined here.[527] They are founded on the Convention and the Committee's rules of procedures. The reporting is carried out following an article by article basis, and if necessary on complementary information. The focus is on the state of implementation and progress achieved and obstacle encountered. "The Committee encourages the involvement of families of victims' organizations, human rights defenders working on the issue of enforced disappearance, non-governmental organizations and National Human Rights Institutions (NHRIs) in the process of consultations leading to the preparation of reports. The Committee also encourages civil society stakeholders and NHRIs	

[526] http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Simplifiedreportingprocedure.aspx and http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=4&Lang=En.

[527] Refer to http://www.ohchr.org/EN/HRBodies/CED/Pages/WorkingMethods.aspx.

			to directly provide to it information on the implementation of the provisions of the Convention at the national level."[528] The Committee appoints two or more country rapporteurs by report, which carry out the review. They draft the list of issues and the concluding observations which are then validated by the Committee. After the report is received, "the Committee shall transmit a letter to the State party concerned notifying it of the dates, duration and venue of the session at which its report will be examined as well as a list of issues about which the Committee would like to receive additional information. The list of issues facilitates the preparation by the State party for the constructive dialogue; provide a focus for the constructive dialogue, without restricting it; and improve the efficiency of the reporting system." Also, "In reviewing States Parties reports, the Committee may take into consideration information originating from other treaty bodies, special procedures, in particular the Working Group on Enforced or Involuntary Disappearances, and from the United Nations system as well from others sources, including regional human rights mechanisms, civil society stakeholders and NHRIs."	

[528] Point 6 of working methods, http://www.ohchr.org/EN/HRBodies/CED/Pages/WorkingMethods.aspx.

			The report is examined in the context of a 'constructive dialogue' between the Committee and the delegation of the State party.	
Human Rights Council (Special Procedures)	Idem	Independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.[567] As of 27 March 2015 there are 41 thematic and 14 country mandates. Special procedures are either an individual (called "Special Rapporteur" or "Independent Expert") or a working group composed of five members, one from each of the five United Nations regional groupings: Africa, Asia, Latin	"Following the review by the Working Group, a report is prepared by the troika with the involvement of the State under review and assistance from the OHCHR. This report, referred to as the "outcome report", provides a summary of the actual discussion. It therefore consists of the questions, comments and recommendations made by States to the country under review, as well as the responses by the reviewed State." It is a 'state driven process'. The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a "national report"; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures (see below), human rights treaty bodies, and other UN entities; 3) information from other stakeholders including national human rights institutions and non-governmental organisations. With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), special procedures include country visits to analyse the human rights situation at the	Special procedures regularly make recommendations to countries and other stakeholders in their reports to the Human Rights Council. All recommendations contained in country visit reports by special procedures since 2006, as well as direct access to the reports in which the recommendations are included, are accessible through the Universal Human Rights Index. The database provides easy access to country-specific human rights information emanating from international human rights mechanisms in the United Nations system: the Treaty Bodies, the Special Procedures and

[567] http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx See also 'Facts and Figures' at http://www.ohchr.org/Documents/HRBodies/SP/Facts_Figures2013.pdf

		America and the Caribbean, Eastern Europe and the Western group. The Special Rapporteurs, Independent Experts and members of the Working Groups are appointed by the Human Rights Council and serve in their personal capacities.	national level; act on individual cases and concerns of a broader, structural nature by sending communications to States and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations; contribute to the development of international human rights standards; engage in advocacy, raise public awareness, and provide advice for technical cooperation. Special procedures are reported annually to the Human Rights Council; the majority of the mandates also reports to the General Assembly.[530] All State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every two years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". "In order to facilitate the work of the Committee, States parties are once again requested to ensure that the reports correspond strictly to the provisions of the Convention and that they are drafted in accordance with the guidelines adopted by the Committee. States parties are	the Universal Periodic Review (UPR). Refer to http://uhri.ohchr.org/. These recommendations can be searched by topic, right, mandate, region or country. Follow-up[565] CERD has a special follow-up procedure for its recommendations and for considering the situation of State parties that have not submitted even an initial report, or whose reports are considerably overdue. The Committee, through its observations and recommendations with respect to State parties in such a situation, draws the attention of the State party concerned to the consequences of such non-compliance and reminds it of its reporting obligations

[530] http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx.

[565] For an overview on follow up by Treaty body refer to http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx

			invited to submit reports that are as succinct and concise as possible." The procedure is as follows:[531] reports of State parties, presence of the delegations of State parties, introductory presentation of State party's representative, action of country rapporteurs,[532] interventions by members of the Committee, reply of the State party's representative, Committee's concluding observations, written comments by State party. "In addition, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the early-warning procedure, the examination of inter-state complaints and the examination of individual complaints." The Committee will be provided by the secretariat, well in advance of the session, with country presentations concerning the State parties whose periodic reports are due to be considered by the Committee, or the State parties scheduled for examination under the review procedure. These presentations, to be treated as confidential documents, should contain a summary of the	under article 9 of the Convention. It furthermore makes recommendations to the State party with a view to ensuring the implementation of the Convention. The Committee includes a special chapter on such cases in its annual report to the General Assembly for the Assembly to take what action it deems appropriate.[566] CERD can request additional information and even a new report by the State concerned on the implementation of its recommendations. It appoints for a period of two years a coordinator of the follow-up procedure, and presents

[531] http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx#A.

[532] "The country rapporteurs, in presentations that should also not exceed 30 minutes, must highlight aspects relevant to the fulfilment of the obligations arising under the Convention, and also those where shortcomings or deficiencies are apparent. They will also put questions aimed at supplementing the information received and ensuring greater clarity or precision with respect to the information received. These questions may be conveyed to the State party beforehand", http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx#I.

[566] http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/FollowUp.aspx?Treaty=CERD&Lang=en

			information available on the country in connection with the periodic reports.533	the follow-up report before the Committee.
Human Rights Treaty Bodies[568]			The Committee can also carry out missions by members to States parties. "in order to assist where their presence would be useful in facilitating better implementation of the Convention. The Committee appoints one or more members to undertake such missions. When an invitation for a mission is received between meetings of the Committee, the Chairman will request one or more members to undertake the mission, after consulting the members of the Bureau. Members of the Committee participating in such a mission will report to the Committee at its next session." There is first a pre-sessional working group which convenes five days before each of the Committee's sessions. It is composed of five members of the Committee nominated by the Chairperson. The Group identifies the key issues or questions or list of issues (LOI) which will structure the dialogue with the State in question. As it is stated "24. It is generally accepted that the complex nature and diverse range of many of the issues raised in connection with the	CESCR may request the State to provide more detailed information or statistics concerning specific follow-up issues before the next periodic reporting period. It can also ask a State party to implement a technical assistance mission (one or two committee members) and if the State is unwilling to cooperate CESCR may submit the issue for consideration at the Economic and Social Council. The Committee decided at its 36 session to proceed as follows: "(a) In all concluding observations, the Committee would request the State party to inform the Committee, in

533 On methods refer to http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx."Overview of the methods of work of the Committee", of the report of the Committee on the Elimination of Racial Discrimination on its forty-eighth and forty-ninth sessions. *Official Records of the General Assembly, Fifty-first Session, Supplement No. 18*(A/51/18), paras. 587-627.

568 Refer to The United Nations Human Rights Treaty System, Factsheet No. 30/Rev. 1, 2012 http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf For an overview of the current working methods of the nine Human Rights Treaty Bodies refer to UN, International Human Rights Instruments, Overview of the human rights treaty body system and working methods related to the review of States parties, 12 April 2013.

			implementation of the Covenant constitute a strong argument in favour of providing States parties with the possibility of preparing in advance to answer some of the principal questions arising out of their reports. Such an arrangement also enhances the likelihood that the State party will be able to provide precise and detailed information."534 Depending on the expertise of the member concerned, issues are allocated within the Working Group. They function as 'country rapporteurs' and the final version of the list is adopted by the entire group. The Secretariat provides the Working Group with a country analysis and other relevant documents. The list of issues is then sent to State members,535 requesting them to provide in written their replies. As part of the Dialogue, representatives of the State concerned should be present at the meetings of the Committee.536	its next periodic report, about steps taken to implement the recommendations in the concluding observations; (b) Where appropriate, the Committee may, in its concluding observations, make a specific request to a State party to provide more information or statistical data at a time prior to the date that the next periodic report is due to be submitted; (c) Where appropriate, the Committee may, in its concluding observations, ask the State party to respond to any pressing

534 Quoted from http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx.

535 This includes a note stating the following: "The list is not intended to be exhaustive and it should not be interpreted as limiting or in any other way prejudging the type and range of questions which members of the Committee might wish to ask. However, the Committee believes that the constructive dialogue which it wishes to have with the representatives of the State party is greatly facilitated by making the list available in advance of the Committee's session. In order to improve the dialogue that the Committee seeks, it strongly urges each State party to provide in writing its replies to the list of issues and to do so sufficiently in advance of the session at which its report will be considered to enable the replies to be translated and made available to all members of the Committee."

536 The following procedure is followed: "[T]he representative of the State party is invited to introduce the report by making brief introductory comments and providing any new information that may be relevant to the dialogue. The Committee then considers the report by clusters of articles (usually articles 1–5, 6–9, 10–12 and 13–15), taking particular account of the replies furnished in response to the list of issues. The Chairperson will normally invite questions or comments from Committee members in relation to each issue and then invite the State party representatives to reply immediately to questions that do not require further reflection or research. Any remaining questions are taken up at a subsequent meeting or, if necessary, may be the subject of additional information provided to the Committee in writing. Members of the Committee are free to pursue specific issues in the light of the replies thus provided, although the Committee has urged them not to (a) raise issues outside the scope of the Covenant; (b) repeat questions already

			After the relevant procedure, the Committee drafts its 'concluding observations' with the following structure: introduction, positive aspects, principal subjects of concern and suggestions and recommendations. State parties can make comments to the concluding observations. Working Methods:[537] "Once the State party has ratified the Covenant it should submit, one year after the Covenant enters into force, its initial report to the Committee. For periodic reports, it is the Bureau of the Committee, at the end of the session at which the State party report is examined, which decides the number of years after which the State party should present their next report. The general rule (ever since this system was started two years ago) is that State parties should present their periodic report to the Committee every four years. However, the Bureau can add or subtract one year to this four-year period depending on the level of compliance with the Covenant's provisions by the State party."[538] The Committee may call for a report three, five or six years after the submission of a periodic report, depending on the State party's level of compliance with the provisions of the Covenant,	specific issue identified in the concluding observations prior to the date that the next report is due to be submitted; (d) Any information provided in accordance with (b) and (c) above would be considered by the next meeting of the Committee's pre-sessional working group; (e) In general, the working group could recommend that the Committee take one of the following measures: (i) That the Committee take note of such information; (ii) That the Committee adopt specific additional concluding observations in response to that information; (iii) That the matter be pursued through a

posed or answered; (c) add unduly to an already long list on a particular issue; or (d) speak for more than five minutes in any one intervention." Quoted from http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx.

[537] Refer to http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx and the Guidelines are available at http://www.ecmi.de/fileadmin/doc/Implementing_Human_Rights/English/Reporting/UN%20Conventions/Guidelines/ICCPR.pdf.

[538] http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx.

			including its reporting record. Refer to Rules 66 and 70, para. 1, of the rules of Procedure. 'Pre-Session Working Group' Country Report Tasks Forces (between four and six members) which identify in advance the questions which will constitute the principal focus of the dialogue with the representatives of the reporting State. One of these members is the country rapporteur who is overall responsible for the drafting of the list of issues. The working methods of the Country Report Task Force are as follows: First, the country rapporteur presents the draft list of issues for discussion to the Country Report Task Force. Once the members have made their observations, the list of issues is adopted by the Task Force as a whole. The Task Force then allocates to each of its members principal responsibility for a certain number of questions included in the list of issues, based in part on the areas of particular expertise or interest of the member concerned. Once the list of issues is adopted and edited, it is transmitted to the State party.[539] 'Constructive Dialogue' It is the practice of the Committee, in accordance with Rule 68 of its Rules of Procedure, to examine reports in the presence of representatives of the reporting States.	request for further information; or (iv) That the Chairperson of the Committee be authorized to inform the State party, in advance of the next session, that the Committee would take up the issue at its next session and that, for that purpose, the participation of a representative of the State party in the work of the Committee would be welcome; (f) If the information requested in accordance with (b) and (c) above is not provided by the specified date, or is patently unsatisfactory, the Chairperson, in consultation with the members of the Bureau, could be authorized to follow up the matter with the State party."

[539] "In preparation for the Country Report Task Force, the secretariat places at the disposal of its members a country analysis as well as all pertinent documents containing information relevant to each of the reports to be examined. For this purpose, the Committee invites all concerned individuals, bodies and non-governmental organizations to submit relevant and appropriate documentation to the secretariat."

Committee on the Elimination of Racial Discrimination (CERD)[569]	Application of the International Convention on the Elimination of All Forms of Racial Discrimination	The Committee on the Elimination of Racial Discrimination is composed of 18 independent experts who are persons of high moral standing and acknowledged impartiality. Consideration must also be given to equitable geographical distribution and to the representation of the different forms of civilisation as well as of the principal legal systems. Members are elected for a term of four years by State parties in accordance with article 8 of the Convention. Elections for nine of the eighteen members are held every two years, ensuring a balance between continuity	Procedure: The representative of the State party is invited to introduce the report by making brief introductory comments, followed by the replies to the first group of questions included in the list of issues. It should be noted that State parties are encouraged to use the list of issues to better prepare for a constructive discussion, but are not expected to submit written answers. After this intervention, the Committee members will provide comments or further questions in relation to the replies provided. Although all Committee members participate in this dialogue, the members of the Country Task Force who are responsible for a pre-assigned number of questions, will have priority when asking questions to the representatives of the State party. The representative of the State party is then invited to reply to the remaining questions on the list of issues, to which will again follow the comments and questions of the Committee. 'Concluding Observations/Comments' The final phase of the Committee's examination of the State report is the drafting and adoption of its concluding observations. The country rapporteur prepares draft concluding observations for the consideration of the Committee.[540]	The Committee has a special follow-up procedure. It shall appoint a special rapporteur to report back to the Committee concerning information received from the State party (within a specified deadline) as to the steps taken to meet the recommendations of the Committee provided in the Concluding Observations. This sessional follow-up progress report will prompt the Committee plenary to make a determination of the date/deadline for the submission of the next report. This special follow-up procedure does not apply in cases of examination of country situations (i.e. when the Committee examines the

[569] http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx

[540] The agreed structure of the concluding observations is as follows: introduction; positive aspects; factors and difficulties impeding the implementation of the Covenant; principal subjects of concern and suggestions and recommendations.

		and change in the composition of the Committee. Members serve in their personal capacity and may be re-elected if nominated.	Reports by State parties to the Committee.[541] So it is a 'state driven process'. Documentation supplied by the Secretariat: The Committee will be provided with country files on the reporting State party. These files will include all material received by the secretariat, such as the official report, NGO and IGO information and other relevant documents. It also envisages cooperation with other specialised UN bodies and agencies, as well as NGOs and human rights organisations before the examination of a State report by the Committee.[542] State parties are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented. During its sessions the Committee considers each State party report and addresses its concerns and recommendations to the State party in the form of concluding observations. In accordance with the Optional Protocol to the Convention, the Committee is mandated to: (1) receive communications from individuals or	measures taken by the State party in the implementation of the Covenant in the absence of a State report). "When the State party has not presented a report, the Committee may, at its discretion, notify the State party of the date on which the Committee proposes to examine the measures taken by the State party to implement the rights guaranteed under the Covenant. If the State party is represented by a delegation, the Committee will, in presence of the delegation and in public session, proceed with the examination on the date

[541] On the simplified reporting procedure refer to UN ICCPR, Focused reports based on replies to 'lists of issues prior to reporting' (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure), 29 September 2010, so instead of a period report there is a so-called "focused report based on replies to a list of issues". The LOPIR includes two sections: a first section on "General information on the national human rights situation, including new measures and developments relating to the implementation of the Covenant"; and a second section "where questions are organized according to clusters of provisions as in the standard list of issues, highlighting specific issues depending on the situation of the concerned State party and the information available to the Committee, in particular, the recommendations included in the last concluding observations addressed to the State party as well any follow-up information provided by the State."

[542] The Committee, in its Annual Report (2002), stated that it reserved the right to determine, at a later stage, whether other briefings by non-governmental organisations should also become part of the Committee's official record: (10) Paragraph 12, Annex III, Annual Report of the Human Rights Committee (2002), A/57/40 (Vol. I).

			groups of individuals submitting claims of violations of rights protected under the Convention to the Committee and (2) initiate inquiries into situations of grave or systematic violations of women's rights. These procedures are optional and are only available where the State concerned has accepted them. The Committee also formulates general recommendations and suggestions. General recommendations are directed to States and concern articles or themes in the Conventions. The procedure is also based on State reporting.[543] States are under the obligation to submit information regarding the ways in which they have or are implementing the Convention, as well as the 'recommendations' of the Committee. They will need to submit a report one year after the entry into force of the Convention, and then periodic reports every four years. It can also consider individual communications, adopting general comments and implement inquiries.[544] Similar to other treaty bodies, CATS has adopted guidelines for States' initial and periodic reports, which includes a common core document to be used when submitting the report to the Committee.	assigned. If the State party is not represented, the Committee may, at its discretion, either decide to proceed to consider the measures taken by the State party to implement the guarantees of the Covenant at the initial date or notify a new date to the State party. In both cases the Committee will prepare provisional concluding observations which will be transmitted to the State party. The Committee will mention, in its Annual Report, that these provisional concluding observations were prepared, but their text will not be published."[570] Moreover, in case of non-cooperation by a State party, the Special

[543] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

[544] CAT C/3/Rev 5, Rules of Procedure, 21 February 2011.

[570] http://www.nichibenren.or.jp/library/ja/kokusai/humanrights_library/treaty/data/HRC_GC_30e.pdf

			Special focus is paid in the reporting to the practical implementation of the Convention as well as challenges characterising this implementation. During the phase preceding the preparation of the reports by the States, the Committee consults with national human rights organisations as well as NGOs, which may provide information substantiating the work of the Committee. The Committee drafts a list of issues (LOI), which is sent to the State concerned. The States are under the obligation to respond to the LOI in writing, before the dialogue with the State's delegation takes place. "The Committee holds two sessions annually, a four-week session in November and a four-week session in May, examining between 8 and 9 reports per session; a delegation from each country is invited to be present during the dialogue."[545]	Rapporteur may call for a meeting with a representative of the State party. Also, "the Committee has produced and updated a follow-up table which includes all the information on States parties that have gone through the follow-up process since July 2006. The table is presented as an annex to the follow-up progress report. The Committee also publishes on its website CSO submissions on follow-up together with the follow-up replies from States parties."[571]
Committee on Economic, Social and Cultural Rights (CESCR)[572]	Monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. The Committee was established	The Committee on Economic, Social and Cultural Rights is composed of 18 independent experts who are persons of high moral character and recognised	The assessment of the report occurs in the shape of a 'dialogue': "The aim of the dialogue is to enhance the Committee's understanding of the situation in the State party as it pertains to the Convention and to provide advice on how to improve the implementation of the Convention provisions in the State party. The dialogue also provides an	CEDAW introduced a follow up procedure back in 2008. CEDAW calls states to give follow up information on the way in which they have implemented two recommendations in two

[545] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

[571] UN, International Human Rights Instruments, Other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process, HRI/MC/2013/3, 22 April 2013, page 3.

[572] http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx

	under ECOSOC Resolution 1985/17 of 28 May 1985 with the main task of monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC).	competence in the field of human rights. Members are elected for a term of four years by State parties in accordance with ECOSOC Resolution 1985/17 of 28 May 1985. Members serve in their personal capacity and may be re-elected if nominated.	opportunity for the State party to further explain its efforts to enhance prevention of torture and ill-treatment and to clarify the contents of its report to the members of the Committee. Exceptionally, the Committee may examine a report in the absence of representatives of the State party when, after being notified, they fail to appear without providing strong reasons." How the meeting takes place is interesting. According to the CAT website: "Two public meetings, a half-day meeting on the first day and another half-day on the following day, are generally devoted to the examination of a report. The first meeting begins with a short presentation by the State party's representatives, who usually update the information contained in the report and, if applicable, highlight the most relevant issues of the replies to the LOI previously sent in written to the Committee. Subsequently, the country rapporteurs and other Committee members make comments, ask questions and seek additional information related to issues that they consider require clarification. They can raise matters that had not been referred to in the LOI.	years' time. A rapporteur is also appointed to monitor the follow up. "It requests the State party to provide information within a period of one or two years on steps taken to implement specific recommendations. Such recommendations are selected because it is considered that their lack of implementation constitutes a major obstacle for the implementation of the Convention and implementation is seen as feasible within the suggested time frame. The Committee has a Rapporteur on follow-up and a Deputy Rapporteur who review and assess the follow-up information."[573]

[573] CEDAW/C/54/3, Methodology of the Follow up Procedure, 13 March 2013.

Human Rights Committee[574]	Review the application of the International Covenant on Civil and Political Rights.	The Human Rights Committee is composed of 18 independent experts who are persons of high moral character and recognised competence in the field of human rights. Members are elected for a term of four years by State parties in accordance with Articles 28 to 39 of the Covenant.[575] Members serve in their personal capacity and may be re-elected if nominated.	On the following day, the second meeting will be devoted to the replies of the State party's representatives to the questions posed by the members during the first meeting as well as to any follow-up issues that might be raised by the Committee. Individual members do not participate in any aspect of the examination of the reports of the States parties of which they are nationals. Press releases in English and French are issued immediately by the United Nations Information Service (www.unog.ch) regarding the meetings at which a State report is examined. Summary records are also issued after the closure of the session in English or French." So a key incentive for State parties to provide information is that the assessment will take in any case place if they don't provide the report "and such review would be carried out on the basis of information that is available to the Committee, including sources from outside the United Nations."[546]	CAT has a special follow-up procedure.[576] The concluding observations include[577] 'issues to be followed up' and which require the State party to report back on progress within the period of one year. "The Committee identifies some of its recommendations that are serious, protective and can be achieved within one year, which it would like to receive information from the State party. The State party, within one year, must provide information on measures taken towards their implementation. The Committee has appointed a rapporteur to follow-up on the State

574 http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx

575 United Nations, ICCPR, Human Rights Committee, Rules of Procedure of the Human Rights Committee, 11 January 2012.

546 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/172/18/PDF/G1517218.pdf?OpenElement.

576 Refer to Article 72 of the Committee's Rules of Procedure.

577 Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44 (A/58/44), para. 12.

			Following the examination the two rapporteurs draft 'concluding observations' are discussed and adopted in plenary of the Committee. The Conclusions follow a specific format, which after a brief introduction include a section on 'positive aspects' and another one on 'subjects of concern and recommendations'. The State parties may provide any follow-up or mention complementary issues in light of the concluding observations. They can also elaborate comments. It foresees the possibility of simplified reporting procedures.[547] The LIOs are prepared by "two country rapporteurs on the basis of the information contained in the report, previous concluding observations addressed by the Committee to the State and information originating from other treaty bodies, special procedures and from the United Nations system as well from others sources, including regional human rights mechanisms, NHRI and NGO and adopted by the Committee in plenary".[548] It is the only Treaty body which does not require State parties to submit reports. The ICPPED does	party's compliance with these requests."[578] The Rapporteur sends reminders to the States concerned. Its Annual Report (2014-15) states: "The Committee deplores the fact that that some States parties do not comply with their reporting obligations under article 19 of the Convention. At the time of reporting, there were 28 States parties with overdue initial reports and 37 States parties with overdue periodic reports". Refer to Chapter II of the Annual Report." As a strategy to encourage compliance, the Annual Report to the General Assembly includes a full list of

[547] See http://www.un.org/ga/search/view_doc.asp?symbol=HRI/MC/2014/4.

[548] http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx.

[578] Two documents of interest are the Overview of the Follow Up Procedure 2003-2015, available at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/1_Global/INT_CAT_FGD_7408_E.pdf; and Annual Report A/70/44, Chapter IV, paragraphs 46-74, Follow up to Concluding Observations on States' Parties reports, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/172/18/PDF/G1517218.pdf?OpenElement

			not require State parties to submit periodic reports. This body also constitutes an exception when it comes to 'individual communications'. In comparison to the other bodies it is not possible for it to receive them. It has two main competences: First, visits to any place where a person may be deprived of liberty in State party territories.[549] There are four types of visits: SPT country visits, SPT country follow-up visits, NPM advisory visits and OPCAT advisory visits. Second, advice and assistance to State parties on the establishment of National Preventive Mechanisms (NPMs), independent national bodies for the prevention of torture.[550] The setting up of NPMs constitutes a requirement for State parties to the Optional Protocol. It publishes an Annual Report[551] which is presented before the CAT and the General Assembly. According to the SPT website,[552] "The SPT undertakes country visits during which a delegation of its members visits places where persons may be deprived of their liberty. During	'overdue reports'. The Annual Report states that the Committee will "establish a working group on the follow-up to concluding observations to prepare a note on follow-up to concluding observations and discuss the use of indicators" and " (j) To request the rapporteurs on reprisals to prepare a document on concrete actions against reprisals." Page 17 of the annual report states: "In November 2014, in his oral report to the Committee, the Rapporteur said that, in the light of the treaty body strengthening process and the Convention against Torture Initiative to

[549] For a list of visits see http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/CountryVisits.aspx.

[550] The Subcommittee has provided guidelines on the setting up of NPMs, see http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx.

[551] For a full list refer to http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=12&DocTypeID=27.

[552] http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx.

			its visits, the SPT examines the conditions of their detention, their daily life, including the manner in which they are treated, the relevant legislative and institutional frameworks, and other questions that may be related to the prevention of torture and ill treatment. At the end of its visits, the SPT draws up a written report which contains recommendations and observations to the State, requesting a written response within six months of its receipt. This then triggers a further round of discussion regarding the implementation of the SPT's recommendations, and thus begins the process of continual dialogue. The SPT visit reports are confidential, though State parties are encouraged to make them public documents, as permitted by the OPCAT. When undertaking NPM advisory visits, the SPT focuses on issues concerning the establishment and/or operation of the NPM in the country concerned. OPCAT advisory visits focus on high-level discussions with the relevant authorities concerning a whole range of issues concerning OPCAT compliance. The working methods can be summarised as follows.[553] State parties undertake to submit to the Committee reports on the implementation of the Convention within two years of the entry into force of the Convention for the State party	ensure universal ratification within 10 years, it was incumbent upon the Committee to enhance the follow-up procedure. He also said that two overriding questions were how to strengthen compliance with the Convention and how to measure the extent of that compliance. In May 2015, he suggested that the follow-up procedure could be strengthened in several ways, such as by making the recommendations clearer and more implementable, inviting State parties to meet with the Committee on follow-up, using an assessment grading system to evaluate compliance, and using quantitative indicators to assist with the assessment of

[553] Refer to http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx.

			concerned and thereafter every five years (Article 44.1 of the Convention on the Rights of the Child). The Committee has issued guidelines for structuring and facilitating the dialogue with State parties.[554] The agenda for the discussion takes place around the articles structuring the convention: (a) General measures of implementation (Arts. 4, 42 and 44.6); (b) Definition of the child (Art. 1); (c) General principles (Arts. 2, 3, 6 and 12); (d) Civil rights and freedoms (Arts. 7, 8, 13-17 and 37a); (e) Family environment and alternative care (Arts. 5, 18.1, 18.2, 9, 10, 27.4, 20, 21, 11, 19, 39 and 25); (f) Basic health and welfare (Arts. 6.2, 23, 24, 26, 18.3, 27.1, 27.2 and 27.3); (g) Education, leisure and cultural activities (Arts. 28, 29 and 31); (h) Special protection measures: (i) Children in situations of emergency (Arts. 22, 38 and 39); (ii) Children in conflict with the law (Arts. 40, 37 and 39); (iii) Children in situations of exploitation, including physical and psychological recovery and social reintegration (Arts. 32, 33, 34, 35, 36 and 39); (iv) Children belonging to a minority or an indigenous group (Art. 30).	implementation. He also highlighted the role of civil society organizations in the follow-up procedure."
Committee on the Elimination of Discrimination Against Women (CEDAW)[579]	The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women.	CEDAW consists of 23 experts on women's rights from around the world. A total of 104 experts have served as members of the Committee since 1982. The officers of the Committee consist of a Chairperson, three Vice-Chairpersons and a Rapporteur. Office-bearers serve for two year terms and are eligible for re-election "provided that the principle of rotation is upheld".		"if the State party refuses to co-operate or fails to take steps to improve the situation in light of the SPT's recommendations, the SPT may request the Committee against Torture to make a public statement or to publish the SPT report if it has not yet been made public"
Committee Against Torture (CAT)[580]	It monitors implementation of	The Committee is composed of 10	Before the session in Committee where the report is assessed, there is a pre-sessional working	There is not a general obligation or special

[554] CRC/C/5 and CRC/C/58.

[579] http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx

[580] http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx

	the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.	independent experts who are persons of high moral character and recognised competence in the field of human rights. Members are elected for a term of four years by State parties in accordance with article 17 of the Convention against Torture. Members serve in their personal capacity and may be re-elected if nominated.	group. The group organises a private meeting with UN agencies and bodies, NGOs, and other competent bodies such as National Human Rights Institutions and youth organisations. This pre-sessional working group leads to the enactment of a list of issues, whose purpose according to the Committee's working methods follows: "The list of issues is intended to give the Government a preliminary indication of the issues which the Committee considers to be priorities for discussion. It also gives the Committee the opportunity to request additional or updated information in writing from the Government prior to the session. This approach gives Governments the opportunity better to prepare themselves for the discussion with the Committee, which usually takes place between 3 and 4 months after the working group. In order to facilitate the efficiency of the dialogue, the Committee requests the State party to provide the answers to its List of Issues in writing and in advance of the session, in time for them to be translated into the working languages of the Committee. It also provides an opportunity to consider questions relating to technical assistance and international cooperation."	procedure to reply in written to the concluding observations and recommendations issues by the Committee. The State concerned 'is expected to' send the Committee written information on the follow-up measures. The Committee may decide to send to any relevant agency (such as OHCHR, UNICEF, ILO, UNESCO, WHO and UNHCHR) "any reports from States parties containing a request or indicating a need for technical advice or assistance, along with the Committee's observations and suggestions."[581] The Committee has underlined the importance of timely reporting.

[581] http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx

			The State party report is discussed in an open and public session of the Committee. The focus is on 'progress achieved' and 'factors and difficulties encountered' when implementing the Convention, but also a more strategic discussion with the delegation representing the State concerned, so as to discuss 'future goals and implementation priorities'. The discussions with the State are led by two country rapporteurs appointed between the members of the Committee. After the discussions the Committee will draft 'concluding observations' which also contain recommendations and specific suggestions. After an introduction, the concluding observations provide a similar format or structure dealing with positive aspects (including progress achieved); factors and difficulties impeding the implementation; principal subjects for concern; suggestions and recommendations addressed to the State party. The observations are made public and sent to the State involved, and they are submitted to the United Nations General Assembly, through the Economic and Social Council, for its consideration, every two years. "The secretariat prepares country files for the pre-sessional working group, containing information	"At its twenty-ninth session (see CRC/C/114, paragraph 561), the Committee decided to send a letter to all States parties whose initial reports were due in 1992 and 1993, requesting them to submit that report within one year. In June 2003, similar letters were sent to three States parties whose initial reports were due in 1994 and never submitted. The Committee further decided to inform those States parties in the same letter that should they not report within one year, the Committee would consider the situation of child rights in the State in the absence of the initial report, as foreseen in the Committee's "Overview of the reporting procedures" (CRC/C/33, paras. 29-32) and in light of rule 67 of the Committee's provisional

			relevant to each of the reports to be examined. These include country specific information submitted by United Nations bodies and specialized agencies, non governmental organizations and other competent bodies. The secretariat also prepares country briefs. Prior to the plenary session both file and country briefs are updated and made available to the Committee members during the sessions."[555] The monitoring system is based on States' reporting in light of Article 73 of the Convention.[556] Article 73 of the Convention states: "1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention: (a) Within one year after the entry into force of the Convention for the State Party concerned; (b)	rules of procedure (CRC/C/4)."[582] The United Nations Children's Fund (UNICEF) is the body playing a specific function in following up the concluding observations of CRC, with the support of OHCHR and other partners.[583]
Subcommittee on the Prevention of Torture (SPT)[584]	It has a preventive mandate "focused on an innovative, sustained and proactive approach to the prevention of torture and ill treatment." It commenced its activities in 2007 on the basis of the Optional Protocol to the Convention	Its composition include 25 independent and impartial experts from different backgrounds and from various regions of the world. Members are elected by States Parties to the OPCAT for a four-year mandate and can be re-elected once.		

[555] Working Methods document retrievable from http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx. See also the Committee "Guidelines for the participation of partners (NGOs and individual experts) in the pre-sessional working group of the Committee on the Rights of the Child." (CRC/C/90, Annex VIII.)

[556] See Rules of Procedure of the Committee, HRI/GEN/3/Rev.1/Add.1 7 May 2004.

[582] Working Methods document retrievable from http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx

[583] UN, International Human Rights Instruments, Other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process, HRI/MC/2013/3, 22 April 2013, page 4.

[584] http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx.

	against Torture (OPCAT).		Thereafter every five years and whenever the Committee so requests." The reports focus on 'factors and difficulties' affecting the implementation of the Convention. They will also include information on the characteristics of migration flows in the State concerned. Article 74.1 stipulates: "The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports."[557] The Committee then presents an Annual Report before the General Assembly on the implementation of the Convention, which contains its own considerations and recommendations "based, in particular, on the examination of the reports and any observations presented by States Parties."	
Committee on the Rights of the Child (CRC)[585]	It monitors the implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two Optional Protocols to the Convention, on involvement of children in armed conflict (OPAC) and on sale of children child prostitution and child pornography (OPSC). On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure (OPIC), which allow individual children to submit complaints regarding specific	The Committee on the Rights of the Child is composed of 18 independent experts who are persons of high moral character and recognised competence in the field of human rights. Members are elected for a term of four years by State parties in accordance with Article 43 of the Convention on the Rights of the Child. Members serve in their personal capacity and may be re-elected if nominated.		"It identifies a number of specific recommendations of concern in its concluding observations and requests the State party to provide additional information, within a period of up to one year, on implementation of those." The Committee may request States to provide written information on the implementation of the suggestions and recommendations. "The Committee may appoint one of its members to serve as rapporteur to follow up, who will then submit a follow-up report to the Committee within two months of receiving the

[557] The same article states: "6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered."

[585] http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx.

	violations of their rights under the Convention and its first two optional protocols. The Protocol entered into force in April 2014.		Article 76 provides signatories to recognise the competence of the Committee "to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention." And Article 77 "to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party". Similar to other Treaty bodies, the Committee identifies a set or list of issues prior to reporting (LoIPR) which are sent to the States concerned and which are aimed at structuring the periodic reporting procedures. On the basis of the reports by State parties, the Committee elaborates Concluding Remarks or observations. There is also a simplified reporting procedure.[558] The reporting by States follows the common set of harmonised guidelines on reporting under the human rights treaties.[559]	information from the State party."[586] And the Working Methods state: "22. The follow-up rapporteur will establish a deadline, not exceeding 12 months from the date of notification, for States parties to submit the information requested. Once the requested information is received from the State party, the follow-up rapporteur will submit a follow-up report to the Committee within two months. If the follow-up rapporteur does not receive the requested information by the deadline, he or she will inform the Committee."

[558] http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=7&Lang=En.

[559] United Nations, International Human Rights Instruments, HRI/GEN/2/Rev.6, 3 June 2009.

[586] Quoted from http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx .

Committee on Migrant Workers (CMW)[587]	It monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[588]	"It is composed of 14 independent experts (persons of high moral character, impartiality and recognized competence in the field covered by the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families). Members are elected for a term of four years by States parties in accordance with article 72 of the Convention. Members serve in their personal capacity and may be re-elected if nominated. Members are elected at meetings of States	The Working Methods can be summarised as follows:[560] It is a State reporting based model. Article 35, paragraph 1, of the Convention stipulates that State parties are obliged to submit to the Committee within two years of the ratification of the Convention, and every four years thereafter, a report on the implementation of the Convention. It is also based on a framework of 'constructive dialogue' between the Committee and the State. The dialogue starts on the basis of a list of issues, which according to the working methods document "5. On the basis of information at its disposal, the Committee will formulate in advance a list of issues for which supplementary information to that contained in the common-core and treaty-specific documents is required. States parties will be requested to provide brief and precise replies in writing, not exceeding 30 pages. States parties may submit additional pages of statistical data, which will be made available to Committee members in their original format, as submitted." The Committee nominates one or two country rapporteurs on each of the reports received by each country, and "The country rapporteur(s) shall prepare a draft list of issues on the State	"It requests States parties to provide information within one year on the steps taken to implement specific recommendations of its concluding observations. Such recommendations are identified because they are particularly serious, urgent, protective, and/or can be achieved within short periods of time. The Committee has appointed a Follow-up Rapporteur, who shall assess, in consultation with the country rapporteurs, the information provided by the State party and report at every session to the Committee on her/his activities."[590]

[587] http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx

[588] Refer to Factsheet No. 24 (Rev 1)

[560] UN, Working Methods of the Committee on the Rights of Persons with Disabilities adopted at its fifth session (11-15 April 2011), CRPD/C/5/4, 2 September 2011.

[590] http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx.

		parties, in accordance with article 72 of the Convention."[589]	Party report for which they are responsible prior to the dialogue, and draft concluding observations following the constructive dialogue."[561]	
Committee on the Rights of Persons with Disabilities (CRPD)[591]	It monitors the Convention on the Rights of Persons with Disabilities (GA resolution A/RES/61/106).	"The Committee is a body of 18 independent experts which monitors implementation of the Convention on the Rights of Persons with Disabilities. The members of the Committee serve in their individual capacity, not as government representatives. They are elected from a list of persons nominated by the States at the Conference of the State Parties for a four year term with a possibility of being re-	The State reports are examined in a public hearing, where all the relevant stakeholders may attend. The States are represented by delegations who "comprise persons who possess the knowledge, competence and authority to explain all aspects of the human rights situation of persons with disabilities in the reporting State". Following the structured dialogue, the Committee will adopt the Concluding Observations which will be structured as follows: "Positive aspects • Factors and difficulties that impede the implementation of the Convention • Principal topics of concern • Suggestions and recommendations". "Concluding observations will be made public on the last day of the session at which they were adopted, and posted on the website of the Office of the High Commissioner for Human Rights (OHCHR)." There is also a simplified reporting procedure.[562]	

[589] Quoted from http://www.ohchr.org/EN/HRBodies/CMW/Pages/Membership.aspx

[561] See http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5/4&Lang=en.

[562] http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Simplifiedreportingprocedure.aspx and http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=4&Lang=En.

[591] http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

		elected once (cf. Article 34 of the Convention)."[592]	The Working Methods are outlined here.[563] They are founded on the Convention and the Committee's rules of procedures. The reporting is carried out following an article by article basis, and if necessary on complementary information. The focus is on the state of implementation and progress achieved and obstacle encountered. "The Committee encourages the involvement of families of victims' organizations, human rights defenders working on the issue of enforced disappearance, non-governmental organizations and National Human Rights Institutions (NHRIs) in the process of consultations leading to the preparation of reports. The Committee also encourages civil society stakeholders and NHRIs to directly provide to it information on the implementation of the provisions of the Convention at the national level."[564] The Committee appoints two or more country rapporteurs by report, which carry out the review. They draft the list of issues and the concluding observations which are then validated by the Committee. After the report is received, "the Committee shall transmit a letter to the State party concerned notifying it of the dates, duration	
Committee on Enforced Disappearances (CED)[593]	**It monitors the International Convention for the Protection of All Persons from Enforced Disappearance.**	It is composed of 10 independent experts.		

[592] Quoted from http://www.ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx

[563] Refer to http://www.ohchr.org/EN/HRBodies/CED/Pages/WorkingMethods.aspx.

[564] Point 6 of working methods, http://www.ohchr.org/EN/HRBodies/CED/Pages/WorkingMethods.aspx.

[593] http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx

			and venue of the session at which its report will be examined as well as a list of issues about which the Committee would like to receive additional information. The list of issues facilitates the preparation by the State party for the constructive dialogue; provide a focus for the constructive dialogue, without restricting it; and improve the efficiency of the reporting system." Also, "In reviewing States Parties reports, the Committee may take into consideration information originating from other treaty bodies, special procedures, in particular the Working Group on Enforced or Involuntary Disappearances, and from the United Nations system as well from others sources, including regional human rights mechanisms, civil society stakeholders and NHRIs." The report is examined in the context of a 'constructive dialogue' between the Committee and the delegation of the State party.	

ANNEX 4
Rule of law: economic impact and the costs of an EU scoreboard

by Prof. Dr Wim Marneffe – Hasselt University – Policy Management Research Group

1. The rule of law and economic performance

1.1 Introduction

One of the key research questions in economic literature is what causes some countries to grow more rapidly than others. Within this strand of literature, the relationship between institutions and economic growth has become a dynamic research domain of theoretical and empirical analysis by economic, political and legal scholars. Since the 1990s (neo-)institutional and growth research have crossed paths in the literature and scholars are increasingly examining institutional variables and their positive causal relationship with growth, investments, employment, etc.[594] For the remainder of the present chapter, we focus on the rule of law as the institutional variable of interest. The goal is not to provide an exhaustive overview of the institutional literature on the impact of the rule of law, but to highlight the most important scholars and findings on this topic. As discussed extensively in Chapter 2.4, numerous definitions of rule of law are being used, and the same appears to be the case in the institutional literature.

1.2 The concept of rule of law in economic literature

The institutional literature makes a distinction between a narrow and a broad definition of the concept of rule of law. Voigt clearly describes these different approaches used in the institutional literature.[595] The broad concept of rule of law has various dimensions: law and order, citizens' respect for formal legislation, democracy and human rights. This part of the Research Paper presents an overview of the variables/indicators being used in the institutional literature to measure the rule of law, such as the separation of powers,[596] judicial constitutional review,[597] judicial independence,[598] fair trial[599] and

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[594] See e.g. Acemonlu, D., Johnson, S. and Robinson, J.A. 'The colonial origins of comparative development: empirical investment'. *American Economic Review*, *91*, 1369-1386 (2001); Acemoglu, D., Johnson, S. and Robinson, J. A. 'Institutions as a fundamental cause of long-run growth', in Aghion, P. and Durlauf, S. (eds.), *Handbook of Economic Growth*, Vol. 1A, North Holland, Amsterdam, 385-472 (2005); Easterly, W. and Levine, R., 'Tropics, germs, and crops: How endowments influence economic development', 50 *Journal of Monetary Economics* 1, 3–39 (2003); Rodrik, D., Subramanian, A. and Trebbi, F. 'Institutions rule: the primacy of institutions over geography and integration in economic development', *Natl. Bur. Econ. Res. Work. Pap. 9305* (2002).

[595] Voigt, S. 'How to measure the rule of law'. *Kyklos*, *65*(2), 262-284 (2012).

[596] Beck, T., G. Clarke, A. Groff, P. Keefer and P. Walsh (2001), "New Tools and New Tests in Comparative Political Economy: The Database of Political Institutions" World Bank Economic Review, Vol. 15, No. 1, pp. 165-176.

[597] La Porta, R. 'Judicial Checks and Balances'. *J. Pol. Econ.*, *112*, 445-470 (2004).

[598] Feld, L.P. and Voigt, S. 'Economic growth and judicial independence: cross-country evidence using a new set of indicators'. *European Journal of Political Economy*, *19*(3), 497-527 (2003).

[599] Hathaway, O. (2002), "Do Human Rights Treaties Make a Difference?", Yale Law Journal, Vol. 111, No. 8, pp. 1935-2042.

fundamental rights.[600] The author also finds that the correlation between the various dimensions of the rule of law is also quite low, which shows that these dimensions are not perfect substitutes for each other and should be measured separately. Skąpska outlines a theoretical framework for the economic importance of the rule of law.[601] Rational law presents a necessary condition for economic transactions, and its application creates a sense of foreseeability and predictability on the part of economic agents. The latter is a necessary condition in order for rational economic actions to occur. Butkiewicz & Yanikkaya state that most developed economies are characterised by two dimensions: democracy and the rule of law.[602] While the empirical evidence clearly reflects the rule of law's impact on economic growth, democracy's impact is less straightforward.

1.3 Theoretical and empirical relationship between rule of law and economic performance

One of the most interesting studies in this research domain is Haggard & Tiede.[603] The authors identify four major theoretical routes from the rule of law to economic growth: through the mitigation of violence; through protection of property rights; through institutional checks on government; and through control of private capture and corruption. For each of these four theoretical routes, we highlight some of the major empirical studies:

- *Reducing violence*: The first studies on the rule of law focused almost entirely on the provision of security. The logic is that it makes little sense to discuss security of property or the contract integrity if economic agents themselves are not secure.[604] Numerous studies have demonstrated the impact of reducing violence on economic growth and job creation. For instance, the World Bank estimated that decreasing the homicide rate by 10% increased per capita GDP by 0.7–2.9% over the subsequent five years.[605]
- *Protection of property rights*: Among economists, the central theoretical mechanisms that connects the rule of law and economic prosperity are property rights and contract enforcement.[606]

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[600] Cingranelli, D.L. 'The Cingranelli-Richards (CIRI) human rights data project'. *Human Rights Quarterly*, *32*, 395-418 (2004).

[601] Skąpska, G. 'The rule of law, economic transformation and corruption after the fall of the Berlin wall'. *Hague Journal on the Rule of Law*, *1*(2), 284-306 (2009).

[602] Butkiewicz, J.L. and Yanikkaya, H. 'Institutional quality and economic growth: Maintenance of the rule of law or democratic institutions, or both?'. *Economic Modelling*, *23*(4), 648-661 (2006).

[603] Haggard, S. and Tiede, L. 'The Rule of Law and Economic Growth: Where are We?'. *World Development, 39*(5), 673-685 (2011).

[604] See e.g. Belton, R. 'Competing definitions of the rule of law: Implications for practitioners'. Carnegie. Rule of Law Ser. #55. Washington, D.C.: Carnegie Endow. Int. Peace (2005); Black, B., Kraakman, R. and Tarassova, A. 'Russian privatization and corporate governance: what went wrong?'. *Stanford Law Review*, 1731-1808 (2000); Narayan-Parker, D. and Patel, R. 'Voices of the poor: can anyone hear us?', *World Bank Publications,* Vol. 1 Oxford Univ. Press, New York (2000).

[605] World Bank. 'Crime, violence and economic development in Brazil: Elements for effective public policy'. Washington, D.C. Working Paper No. 36525 (2006).

[606] See e.g. Alchian, A.A. 'Some economics of property rights'. *Il politico*, 816-829 (1965); Alchian, A.A. and Demsetz, H. 'The property right paradigm'. *The Journal of Economic History*, *33*(01), 16-27 (1973); Coase, R.H. 'The problem of social cost'. *Journal of Law and Economics*, 3. 1-44 (1960); Demsetz, H. 'Toward a theory of property rights'. *American Economic Review*, 57, 347-359 (1967); Williamson, O.E. 'The vertical integration of production: market failure considerations'. *The American Economic Review*, *61*(2), 112-123 (1971); Williamson, O.E. '*The Economic Institutions of Capitalism Firms Markets Relational Contracting*'. The Free Press, New York (1985); Asoni, A. 'Protection of property rights and growth as political equilibria'. *Journal of Economic Surveys*, *22*(5), 953-987 (2008); Barzel, Y. '*Economic analysis of property rights*'. Cambridge University Press, New York (1997); Furubotn, E.G. and Pejovich, S. 'Property rights and economic theory: a survey of recent literature'. *Journal of Economic Literature*, *10*(4), 1137-1162 (1972); Dam, K.W. '*The law-growth nexus: The rule of law and economic development*.' Brookings Institution Press, Washington, D.C. (2007); Haber, S., Maurer, N. and Razo, A. '*The politics of property rights: political instability, credible commitments,*

- *Institutional checks on governments*: For most economists, institutional checks on executive discretion, including through independent judiciaries, are also part of the broad concept of the rule of law. Henisz has conducted the most comprehensive effort to construct a cross-national database of institutional checks on government.[607] The author finds a significant and positive relationship between such checks and economic growth, foreign direct investment, and investment in infrastructure.[608] In a seminal article, La Porta et al. proxy judicial independence through objective indicators such as judicial tenure and the lawmaking power of judicial decisions, and show that independence has positive effects on the security of property rights.[609] However, another study finds that judicial independence is not associated with long-term growth.[610] These divergent findings are explained by Feld & Voigt, who make a distinction between the 'de facto' (actual independence as enjoyed by judges) and the 'de jure' measures (independence from looking at the letter of the law) of the rule of law.[611] The authors find that whereas GDP growth (1980–98) is not affected by de jure independence measures, such as formal institutional arrangements, it is affected by de facto independence, such as the effective length of terms and trends in budgets.
- *Control of corruption*: Since the 1990s scholars have been increasingly examining the link between corruption and economic growth. Mauro indicated that greater corruption (measured by surveys of investors) leads to lower investment and growth.[612] Numerous

and economic growth in Mexico, 1876-1929'. Cambridge University Press, New York (2003); North, D.C. '*Institutions, institutional change and economic performance*'. Cambridge University Press, Cambridge (1990); North, D.C. '*Structure and change in economic history*'. W.W. Norton, New York (1981); North, D.C. and Thomas, R.P. '*The rise of the western world: A new economic history'*. Cambridge University Press, New York (1973). In economic literature almost all studies clearly find that more robust property rights protection leads to significantly improved long-term economic performance (Asoni, A. 'Protection of property rights and growth as political equilibria'. *Journal of Economic Surveys*, *22*(5), 953-987 (2008); Barro, R. J. '*Determinants of economic growth: A cross-country empirical study*.' National Bureau of Economic Research. The MIT Press, Cambridge (1997); Clague, C., Keefer, P., Knack, S. and Olson, M. (1996). 'Property and contract rights in autocracies and democracies'. *Journal of Economic Growth*, *1*(2), 243-276; Keefer, P. 'Beyond legal origin and checks and balances: Political credibility, citizen information, and financial sector development'. World Bank Policy Research, Working Paper No. 4154 (2007); Knack, S. and Keefer, P. 'Institutions and economic performance: cross-country tests using alternative institutional measures'. *Economics & Politics*, *7*(3), 207-227 (1995); Scully, G.W. 'The institutional framework and economic development'. *The Journal of Political Economy*, 652-662 (1988); Zak, P.J. and Knack, S. 'Trust and growth'. *The Economic Journal*, *111* (470), 295-321 (2001); Alston, L.J. and Libecap, G.D. 'The determinants and impact of property rights: Land titles on the Brazilian frontier'. *Journal of Law, Economics, and Organization*, *12*(1), 25-61 (1996); Anderson, T.L. and Hill, P.J. 'The evolution of property rights: a study of the American West'. *The Journal of Law & Economics*, *18*(1), 163-179 (1975); Bazzi, S. and Clemens, M. (2009). '*Blunt instruments: On establishing the causes of economic growth*'. Center for Global Development, Working Paper No. 171 (2009); Libecap, G.D. '*Contracting for property rights*'. Cambridge University Press, New York (1989); Kaufmann, D. *The worldwide governance indicators project: answering the critics* (Vol. 4149). World Bank Publications (2007); Malesky, E. and Taussig, M. 'Out of the gray: The impact of provincial institutions on business formalization in Vietnam'. *Journal of East Asian Studies*, *9*(2), 249-290 (2009).

[607] Henisz, W.J. 'The institutional environment for economic growth'. *Economics & Politics*, *12*(1), 1-31 (2000); Henisz, W.J. 'The institutional environment for multinational investment'. *Journal of Law, Economics, and Organization*, *16*(2), 334-364 (2000).

[608] See also Stasavage, D. 'Private investment and political institutions'. *Economics & Politics*, *14*(1), 41-63 (2002); Stasavage, D. '*Public debt and the Birth of the democratic state: France and Great Britain 1688–1789*'. Cambridge University Press, New York (2003).

[609] La Porta, R., Lopez-de-Silanes, F., Shleifer, A. and Vishny, R. 'The quality of government'. *Journal of Law, Economics, and organization*, *15*(1), 222-279 . (1999).

[610] Glaeser, E.L. and Shleifer, A. 'Legal origins'. *Quarterly Journal of Economics*, 1193-1229 (2002).

[611] Feld, L.P. and Voigt, S. 'Economic growth and judicial independence: cross-country evidence using a new set of indicators'. *European Journal of Political Economy*, *19*(3), 497-527 (2003).

[612] Mauro, P. 'Corruption and growth'. *The Quarterly Journal of Economics*, 681-712 (1995).

> other studies followed which showed that countries facing less corruption are associated with greater economic development.[613]

Haggart & Tiede perform an interesting cross-country study of 74 developing and transition economies in the 2003-07 period.[614] They grouped 11 indicators for the rule of law into the four dimensions as discussed above. Interestingly, the authors find that the correlations across various rule of law measures are mostly lower than expected, which reflects a previous finding that the impact of the rule of law on economic growth is dependent on the indicator used.[615] The authors do find that the dimension positively and significantly impacts long-term economic growth. The corruption dimension appears to be the strongest and has the most significant impact on economic performance.[616]

The economic literature has seen a remarkable increase in the number of studies examining the causal relationship between the rule of law and economic performance of countries. Part of this increased attention stems from the discussion on the 'right' measures or indicators for the rule of law. On the one hand some scholars make use of subjective indicators, which means they are based on expert evaluations or surveys among investors or citizens. On the other hand, scholars are implementing so-called 'objective' indicators that capture features of the institutional and legal environment. This difference between subjective and objective indicators has been an ongoing point of controversy. Glaeser et al. argue that scholars should limit their analysis to "objective" measurement due to the risk of bias in subjective measures.[617] Kurtz & Schrank also show that the significance of subjective governance variables disappears in cross-country growth regressions when controlling for economic performance.[618]

1.4 Summary

To sum up, we can see that authors of the economic literature are increasingly examining the relationship between the rule of law and economic performance of countries. In the beginning this literature was mostly theoretical and focused on the relevance of property rights and security. In recent decades authors have more frequently used a broad definition of the rule of law to examine the impact of corruption, judicial independence, etc. Furthermore, authors still debate the use of objective versus subjective indicators of the rule of law, which could lead to divergent results, but in general the broad consensus remains that a higher degree of rule of law is associated with increased economic

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613 E.g. Ades, A. and Di Tella, R. 'Rents, competition, and corruption'. *The American Economic Review*, *89*(4), 982-993 (1997); La Porta, R., Lopez-de-Silanes, F., Shleifer, A. and Vishny, R. 'The quality of government'. *Journal of Law, Economics, and Organization*, *15*(1), 222-279 (1999); Keefer, P. and Knack, S. 'Polarization, politics and property rights: Links between inequality and growth'. *Public Choice*, *111*(1-2), 127-154 (2002); Pellegrini, L. and Gerlagh, R. 'Corruption's effect on growth and its transmission channels'. *Kyklos*, *57*(3), 429-456 (2004); Wei, S.J. 'How taxing is corruption on international investors?'. *Review of Economics and Statistics*, *82*(1), 1-11 (2000); Treisman, D. 'The causes of corruption: a cross-national study'. *Journal of Public Economics*, *76*(3), 399-457 (2000); Treisman, D. 'What have we learned about the causes of corruption from ten years of cross-national empirical research?'. *Annu. Rev. Polit. Sci.*, *10*, 211-244 (2007).

614 Haggard, S. and Tiede, L. 'The Rule of Law and Economic Growth: Where are We?', 39 *World Development* 5, 673-685 (2011).

615 Arndt, C. and Oman, C. 'Uses and Abuses of Governance Indicators'. Paris: Organization for Economic Cooperation and Development. *Development Centre Series* (2006).

616 See also Kaufmann, D., Kraay, A. and Mastruzzi, M. '*Governance matters VII: Aggregate and individual governance indicators for 1996–2007*'. World Bank Policy Research Working Paper No. 4654. Washington, D.C. (2008); Skaaning, S.E. 'Corruption in the post-communist countries: A study of its particularity and diversity', in Backes, U., Jaskulowski, T. and Polese, A. (eds). *Totalitarismus und Transformation: Defizite der Demokratiekonsolidierung in Mittel- und Osteuropa*, Vandenhoeck & Ruprecht, Göttingen (2009).

617 Glaeser, E.L., La Porta, R., Lopez-de-Silanes, F. and Shleifer, A. Do institutions cause growth?. *Journal of Economic Growth*, *9*(3), 271-303 (2004).

618 Kurtz, M.J. and Schrank, A. 'Growth and governance: A defense'. *Journal of Politics*, *69*(2), 563-569 (2007).

performance of countries. Further research in the coming decades can, it is hoped, provide more insights into which dimensions of the rule of law have the most significant economic impact.

2. Costs of the EU Scoreboard on the rule of law

The European Union is likely to reap substantial societal benefits from a well-designed and -enforced Scoreboard. Yet the setup and maintenance of such a Scoreboard will also entail non-negligible costs. The assessment of these costs is made on the basis of a permanent multi-actor and multi-method annual insourced Scoreboard cycle to monitor and enforce the rule of law throughout the Union, administered by an independent EU Rule of Law Commission . The Scoreboard is not a standardised benchmarking system (which would significantly reduce its costs, but also its benefits) (see Chapter 4.5).
In assessing the costs of such a Scoreboard, a clear distinction has to be made between (1) the preparatory and implementation phase, (2) the Monitor and the Monitored States, and (3) the three scenarios of adherence to the rule of law.

2.1 Costs in the preparatory phase

2.1.1 Monitor

The preparatory phase starts with the set-up of the EU Rule of Law Commission . **Set-up costs** include the selection of independent scholars who will administer the Scoreboard process, guaranteeing the objectivity, impartiality and scientific soundness of the assessment methods used in the EU Scoreboard. The EU Rule of Law Commission (henceforth, 'the Monitor') will be responsible for the actual monitoring and evaluation of the rule of law.

Next, the Monitor has to develop the final Scoreboard and help to set up an organisational model. As a result, the Monitor will incur **information and planning costs**. They comprise the costs of building the Scoreboard (determining which variables shall be included and how information shall be gathered, e.g. country visits), identifying and making agreements with cooperating partners (e.g. CoE), setting up a timetable for the annual process, developing a sanctioning mechanism, and establishing the organisation that will manage the Scoreboard on a daily basis (i.e. quantifying the need for data collectors and (IT-)administrators, screening, hiring or reallocating as well as training of personnel, etc.).

Furthermore, the Monitor will incur some one-shot start-up **costs for infrastructure** (office equipment, ICT, etc.).

2.1.2 Monitored States

The Monitored States will also incur **information and planning costs** (getting acquainted with the Scoreboard (e.g. organising get-to-know work-shops), preparing and organising the national administration to meet the reporting demands, training of personnel, hiring or reallocating personnel, as well as infrastructural costs (office equipment, information and communications technology, etc.).

Furthermore, the Member States may engage in lobbying activities to influence the final design of the Scoreboard. While these so-called '**rent-seeking costs**' are difficult to measure, they cannot be ignored.

2.2 Costs in the implementation phase

2.2.1 Monitor

Once the Scoreboard methodology and timetable are elaborated, the Monitor will start the annual cycle of gathering, collecting, interpreting, discussing, monitoring and evaluating country-specific information on the rule of law. The implementation phase entails operational, administrative, monitoring and enforcement costs. In regulatory impact assessment, a clear and strict distinction is made between these cost categories. However, since the essence of the Scoreboard is to inform and monitor, the administrative and monitoring costs are part of the **operational costs**, which include: compensation of staff and/or external consultants gathering and collecting information, compensation of the Copenhagen experts interpreting and evaluating information, country visits, drawing up of annual (country-specific) reports, etc.

If the Monitored States do not comply with their reporting duties on the rule of law, the Monitor will have to take steps to obtain the necessary information, thus incurring **informational enforcement costs** (additional costs of data collection).

Since the Scoreboard system will be used for upholding European values, a mechanism will be implemented that will remedy any breach of those values and reverse negative trends. As the breaches of the rule of law are more severe, costs are likely to rise. Three scenarios have to be distinguished. In the scenarios 1 and 2, breaches are such that the Monitored State is willing to self-remedy them. The Scoreboard mechanism then follows a "sunshine policy", which will engage the Monitored States in self-remedying and/or self-reversing. The **enforcement costs** of the Monitor are thus relatively limited, especially since the burden of proof is shifted to the Monitored States (see Chapter 4.9).

Scenario 3 is fundamentally different from the first two and involves a Member State which undermines democracy and the rule of law. There is no indication that this State will return to the rule of law by its own initiative. It follows that the sunshine policy does not apply. In this third scenario, **enforcement costs** are incurred by starting an infringement procedure and drafting an inter-institutional agreement that – in case of breach of the rule of law – will impose sanctions.

2.2.2 Monitored States

The costs incurred by the Monitored States in the implementation phase are to a large extent the mirror image of the Monitor's. The States will also have to gather information and provide it to the Monitor. The interpretation of the raw data will require and be the subject of a discussion between the Monitor and the Monitored State. The annual Scoreboard cycle thus entails operational, administrative, monitoring and enforcement costs for the Monitored States. As mentioned, in regulatory impact assessment, the administrative burden and monitoring costs are typically distinguished from the operational costs. But in the case of the Scoreboard, both will fall under **operational costs** and include: additional or imputed compensation of staff and/or compensation of external consultants gathering and collecting information, presenting the information in the Copenhagen format, interpreting and evaluating information internally, organising country visits, discussing information with the Copenhagen group, etc. If the Monitored State does not fully comply with its reporting duties, it will have to allocate additional resources to provide the information required by the Monitor (**compliance costs**).

As mentioned, when a breach of rule of law is observed, three different scenarios may apply. Scenarios 1 and 2 assume that the Monitored State is willing to solve the problem. The Scoreboard mechanism

thus follows a "sunshine policy". In those scenarios, the costs of remedying and/or reversing the breach of the rule of law are primarily borne by the Monitored State. Since the enforcement costs of the Monitor in the first and second scenarios are relatively limited, the bulk of the costs are the State's **compliance costs** (changing laws or policies, etc.).

However, in the third scenario, where the Scoreboard process indicates that a Member State is undermining democracy and the rule of law and there is no indication that this Member State will return to the rule of law by its own initiative, the sunshine policy does not apply. The Monitored States thus faces substantial **enforcement costs** (procedural costs, financial sanctions, economic sanctions, etc.).

2.3 Economies of scale and efficiency gains

As previously pointed out, there is a common understanding "not to reinvent the wheel" and avoid duplications. Concretely, the costs of the Scoreboard on the rule of law can be substantially reduced if the European Union realises the **economies of scale** that are within reach, by cooperating with the Council of Europe and the United Nations and relying on their existing mechanisms while complementing them with EU-specific elements. This third-party approach will also strengthen the objective and perceived impartiality of the Scoreboard, which in turn will increase the political support by the Monitored States.

Bringing all existing information (from CoE and UN) as well as new EU-specific information on the rule of law under the umbrella of one Monitor (i.e. the EU Rule of Law Commission) also has several **cost advantages**. First of all, in building its own institutional capacity to assess the rule of law, the European Union avoids wasting time and money on discussing legal inconsistencies that might arise from the special characteristics of the EU legal system.

Second, the Monitor can and should uphold a timetable that is consistent with other EU-reporting activities (instead of relying on CoE or UN). In order to reduce the administrative burden on the Monitored States, the reporting duties of the Monitored States should indeed be bundled. One way to achieve efficiency gains might be to link the EU Scoreboard on the rule of law to the timetable of the European Semester and Cycle of Economic Governance. However, since a Scoreboard is incapable of catching the most atrocious violations and detecting internal linkages sufficiently, a comprehensive and qualitative assessment is recommended. Moreover, the purpose of the Scoreboard is not only to monitor but also to enforce. Unfortunately, the recommendations following the European Semester have so far not been enforced adequately.[619]

2.4. Summary

The costs of setting up and maintaining a Scoreboard on the rule of law are summarised in Table 1, which makes a clear distinction between the costs borne by the Monitor and the Monitored States in the two phases of preparation and implementation and in the three scenarios of (non-)compliance. The analysis is based on the concept of a permanent annual insourced Scoreboard cycle administered by an independent EU Rule of Law Commission .

[619] See e.g. Darvas, Z. and Leandro, Á. 'The Limitations of Policy Coordination in the Euro Area Under the European Semester', Brussels: Bruegel Institute, Policy Contribution 2015/19, November 2015; Deroose, S. and Griesse, J. 'Implementing Economic Reforms – are EU Member States Responding to European Semester recommendations?', Brussels: European Commission, ECF in Economic Brief 37, October 2014.

Table 1. Scoreboard costs

		Monitor	Monitored States
Preparatory phase (one-shot costs)	Expert group set-up costs	*	
	Information and planning costs	*	*
	Infrastructural costs	*	*
	Rent-seeking costs		*
Implementation phase (recurrent costs on annual basis)	Operational costs	*	*
	(Administrative costs)	*	*
	(Monitoring costs)	*	
	Compliance costs (information)		*
	Enforcement costs (information)	*	
	Compliance costs (scenarios 1, 2)		*
	Enforcement costs (scenario 3)	*	*

Although the precise format of the Scoreboard has not yet been determined (hence the cost categories cannot be monetised precisely), the operational costs of the Monitor in the implementation phase of a stand-alone Scoreboard (no economies of scale) can be estimated at €4 million per year, based on the experience of the Venice Commission. If the EU decides to cooperate with the CoE, some important economies of scale can be realised. However, the unknown cost factor today lies precisely in the degree of specificity of the EU Scoreboard on the rule of law (which data of CoE can and cannot be used, which additional data have to be collected) and the enforcement mechanism (how much manpower is needed to follow up serious breaches as described in scenario 3).

This final section discusses the benefits of a rule of law monitoring instrument. First of all, there are non-economic benefits relating to the improved quality of the rule of law, democracy and human rights. These non-economic benefits are captured by an improved (sense of) well-being of individuals and increased level of confidence in society (in general) and in other individuals and businesses (in particular). These benefits have already been discussed extensively and will not be detailed in this section. Secondly, we have the economic benefits of a rule of law monitoring system. These effects are discussed in the literature review above. Improving the rule of law leads to increased confidence of consumers and/or investors, leading to increased transactions and consequently investments (in employment, capital, etc.). The empirical literature has shown that the growth effects of improvements in the level of rule of law are significant. The potential of growth, however, differs between countries based on their previous level of rule of law and other growth factors. Currently, no detailed study examines the effects of an overall improvement in the rule of law in Europe on growth. Thus the consensus is that a rule of law improvement will lead to additional growth, though the degree of growth will differ from country to country.

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ICCPED International Convention for the Protection of All Persons from Enforced Disappearance.

ICCPR International Covenant on Civil and Political Rights.

ICERD International Convention on the Elimination of all Forms of Racial Discrimination.

ICESCR International Covenant on Economic, Social and Cultural Rights.

ICRMW Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

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