The Role of EU Institutions in the Prevention of Rule of Law Backsliding in the European Union

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Abstract

The rule of law in the European Union is in crisis. This bachelor thesis serves as an inquiry into the institutions of the EU and their role in the prevention of rule of law backsliding currently taking place in Poland and Hungary. The goal of the thesis is finding possible solutions to rule of law backsliding in EU Member States, as the main assumptions are that, the EU has failed to properly address rule of law backsliding within her Member States and that the EU is ill-equipped to effectively hold Member States accountable when they are in breach of their Membership obligations. The paper discusses the legal framework and the constitutional pluralist legal order of the European Union. Following, arguments for and against an EU intervention are weighted to provide an acceptable answer to the question of what ought to be done about increasingly illiberal Member States inside the Union. Finally, this thesis attempts to identify the EU institution's past mistakes regarding rule of law backsliding and dealing with increasingly authoritarian regimes. Reflecting on these mistakes shall help identify a suitable mechanism to stop rule of law backsliding, maintain the European Legal Order, and the Union of democracies.

List of Abbreviations

BVerfG = Bundesverfassungsgericht (The German Federal Constitutional Court)

CJEU = Court of Justice of the European Union

CP = Constitutional Pluralism

CT = Constitutional Tribunal

DC = Disciplinary Chamber

EC = European Commission

ECJ = European Court of Justice

ENCJ = European Network of Councils for the Judiciary

EP = European Parliament

EU = European Union

ESI = European Stability Initiative

MEP = Member of the European Parliament

NCJ = National Council of the Judiciary

PiS = Prawo i Sprawiedliwość (Law and Justice party)

TEU = Treaty on European Union

TFEU = Treaty on the Functioning of the European Union

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1. Introduction

1.1. Introduction

In the past ten years, we have seen the state of the rule of law deteriorate in two Member States of the European Union: Hungary and Poland. Poland has been described as to be testing a Soviet-style justice system, "where the control of courts, prosecutors and judges lies with the executive and a single party." (ESI, 2019, p.2) In February 2019, the European Commission (EC) found that in Poland "the executive and legislative powers now can interfere throughout the entire structure and output of the justice system." (EC, 2019)

This unprecedented situation has led to two infringement rulings by the Court of Justice of the European Union (CJEU) against Poland concerning the Polish governments' laws on the Supreme Court and the Ordinary Courts. Poland's Constitutional Court, the Constitutional Tribunal (CT), is effectively run by the ruling Law and Justice party (PiS) and enforcing EU law through the facade of a legitimate court. (Pech and Wachowiec, 2020a) As the Council of Europe's Parliamentary Assembly points out, Polish judges are subject to a disciplinary system with chilling effects on the entire judiciary (Parliamentary Assembly, 2020), while a bill introduced in December 2019 seeks to make it a disciplinary offense for judges to assess government laws with the Polish Constitution or European law (Jałoszewski, 2019). The bill has been described as a "Polexit bill" (Pech & Wachowiec, 2020a), alluding to a potential breaking point between the EU and Poland. Pech and Wachowiec (2020b) similarly argue that EU institutions and EU Member States will soon have to decide between sacrificing either good relations with Polish national authorities or the entire EU legal order. They offer a stern warning that Poland's rule of law default could trigger a chain reaction leading to the disintegration of the EU legal order.

This is not just a Polish problem but a problem for the whole European Union. The Polish government is still partaking in EU decision-making, while the Hungarian government is determined to block an Article 7 TEU-vote against Poland in the European Council. That rule of law backsliding is a problem for the whole EU bloc is also underlined by the extensive list of NGOs and European Law professors who have urged the EU, to step up her[1] game in her response to the rule of law crisis in at least two Member States, here more specifically the "erosion" of the justice system in Poland (European Liberties Platform, 2019).

Subsequently, the EU is faced with the question of what she ought to do with not only one but two Member States in breach of the EU's fundamental values and not fulfilling their EU membership

[1] For this research, I have decided to use the pronouns she and her, when referring to the European Union. Donald Tusk once correctly pointed out: "After all, Europe is a woman" (Reuters, 2019).

obligations. An effective European answer is essential. This research tries to contribute to this issue by addressing the following research question: *How can the EU institutions prevent further rule of law backsliding in a constitutional pluralist setting?*

The hypotheses to be examined in this thesis are, one, that the European Union has failed to properly address rule of law backsliding within Member States and two, that the EU is ill-equipped to effectively hold Member States accountable when they are in breach of their Membership obligations.

1.2. Research Design and Scientific Approach

To answer the main research question this study is divided into five chapters. Since the goal of this study was to find ways in which the EU's institutions may prevent rule of law backsliding, there are limits to any solution due to the legal bases the institutions can rely upon. These are discussed in Chapter 2, after more concretely defining the concept of 'the rule of law' by identifying its key characteristics and relations to democracy and fundamental rights. The last section of Chapter 2 discusses the obligations, principles, and red lines of the European Legal Order. Chapter 3 deals with the novel phenomenon of rule of law backsliding. After a definition of the concept, a closer look at Hungary and Poland describes how backsliding has taken place. Then, arguments for and against European intervention in such Member States are discussed to understand the ramifications of no intervention and the necessity of a European response to this problem. After a discussion of the EU's past mistakes and shortcomings, Chapter 4 tries to build the case for an effective monitoring and enforcement agent that would avoid the same errors. Chapter 5 summarizes the answer to the research question and presents some final remarks.

2. The Fundamentals of Protecting the Rule of Law

2.1. Introduction

This Chapter is dedicated to establishing the fundamentals of defending Article 2 TEU values, specifically the rule of law. As the goal of this study is to find a way to promote and enforce the rule of law, and in return prevent rule of law backsliding across Member States, one needs to assess what kind of system EU institutions and Member States are currently operating in. This provides an answer to what is in the remit of the European Union and her institutions by discussing relevant treaty provisions, their most effective combinations, and the way the European legal order operates. First, however, it is necessary to conceptualize the rule of law, as a common conception is vital to enforce and protect the rule of law, and it will aid in understanding the ramifications of the reforms in currently backsliding Member States. Following the question of what the EU can do - legally speaking - when faced with rogue Member States, is the question of what the EU should do, addressed in Chapter 3.

2.2. The Rule of Law

The rule of law is a universal legal principle and fundamental to any legal system. It requires all state bodies as well as the government to uphold the law, differentiating the rule *of* law from rule *by* law, where the government is not subject to the law. Nobody, whether it is a state body or an ordinary body (e.g. citizens) is above the law and all are equal before it, in that it is required to follow the law but everyone may also enjoy protection under it. In the following, the core principles of the rule of law are discussed. This provides insight into what makes the rule of law a vital part of any democracy.

2.2.1. Legality

The first characteristic of the rule of law is the principle of legality. Legality can be understood in three distinct ways. First, legality may mean *compliance with the law*. Simply: law rules or else there is no rule of law. It embodies the importance of having the law, equally applying it and it being taken seriously. The latter reveals that legality is not merely a legal instrument but also an attitude defining any legal culture. Second, legality is the *duty of the State*. It restrains political power and makes its use foreseeable. Hence, it presupposes a constitution or an international instrument that acts as a functional substitute for a constitution. Third, in a democracy, legality shall be understood as the *dominance of parliamentary law*. It means that the judicial and executive powers are strictly bound to act only in the limits of parliamentary law. (Merli, 2019) Here, we can see how the rule of law and democracy are deeply intertwined. Nobody can act without explicit or implicit consent of parliament, where issues are discussed publicly, under the scrutiny of the opposition, and decided by the officials elected by the people. These three meanings of legality respectively secure the effectiveness of the law, the control of political power, and democratically legitimizing the use of political power. Additionally, by expecting compliance with the law, legality acknowledges people as self-determined individuals with their own will and dignity. Legality also makes the use of power less arbitrary and gives equality and security, acting as a foundation for public trust. (Merli, 2019)

2.2.2. Access to Justice and Judicial Independence

To determine the independence of a court or a judicial body, the European Court of Human Rights (ECtHR) has established three basic criteria: (1) how the members of the court are appointed and their term duration, (2) existing guarantees against pressure from the outside, and (3) the court's appearance of independence (Badó & Bóka, 2019). Badó and Bóka (2019) argue that to safeguard judicial independence and every individual’s access to justice certain measures can be taken. For one, the judicial and legal institutions shall benefit from autonomy as well as install safeguards for the judges’ careers and personal life. Further, enjoying genuine independence of courts and judges can only be achieved in a democratic political environment in which they are administered by an organ that is made up of a majority of judges. The judges shall be accountable to the appointing organ while being protected from

public perception and political or organizational favoritism. Impartiality shall also be protected by automating case assignments to judges.

2.2.3. Transparency

In the context of the rule of law, transparency shall describe the right for individuals to access information kept by public authorities in two ways. Either the individual seeks the information, or an authority is obliged to provide the information. Transparency is a "means to achieve the other elements of the rule of law" (Österdahl, 2019, p. 65) instead of an end in itself. It aids in revealing violations of the rule of law and its respective parts, while also strengthening the individual's ability and capability to take part in the democratic process. Access to documents promotes the rule of law, democracy, and efficiency. (Österdahl, 2019)

2.2.4. Legal Certainty

The principle of legal certainty guarantees both the security *through* and *of* law. The two can be distinguished as substantive certainty and formal certainty, respectively. Formal certainty is defined by the recognizability and predictability of the law. The former requires clear publication rules and easy access to the legal norm. Predictability entails interpretive and textual clarity, securing that legal norms are understandable and can only be interpreted in so many ways, as well as temporal consistency. Temporal consistency should secure the predictability of law. However, in a democratic system, this is not guaranteed since laws are occasionally subject to change. Normally, ordinary laws can be changed more easily than constitutional laws, making the latter more temporarily consistent. Regarding the substantive element of legal certainty, it shall be mentioned that the principle is inherent in certain fundamental rights. It can be tied to the right to a fair trial (Article 6 ECHR) and protect individuals from retroactive changes to the law (Article 7 ECHR). (Gamper, 2019)

2.2.5. Proportionality

The principle of proportionality affects containing the activities of all public authorities – judicial, executive, and legislative – in the European legal space. It roots from *iustitia distributive*, the idea that any law shall serve a purpose and that law and purpose shall be linked. In Prussia, the principle was put into law in that any limitation of freedom shall avoid more damage than it poses harm to the individual. Today, it is a vital instrument for courts to assess parliamentary legislation in the light of fundamental rights and to balance the relevant advantages and disadvantages of a legal norm/measure. The principle is explicitly mentioned in Article 5(4) TEU and has become a universal principle in democratic societies.

To assess the proportionality of a legal norm, a test with four to five elements can be applied to the law in question. The law must have a legitimate objective (1) and choose suitable means to achieve that legitimate objective (2). The burden on individuals through imposing the measure shall be as small as possible (3) while being appropriate (4). Lastly, even though a measure may limit certain fundamental

rights, under no circumstances can it violate the core of any fundamental right. This requirement is also called the *Wesensgehaltsgarantie*. (Huber, 2019)

This section has contributed to a deeper understanding of the rule of law by identifying common key characteristics of the concept. The importance of the rule of law for democratic societies that guarantee fundamental rights has been highlighted as well.

2.3. The Treaties

In this section, the main provisions regarding the rule of law in the European Treaties are discussed. This section identifies the most relevant combinations of articles the European institutions can rely on to justify action against backsliding Member States.

2.3.1. Key Provisions

a) Article 2 & 3 TEU

The rule of law is one of the fundamental values of the European Union. The European values are laid out in Article 2 TEU. This provision implies that the European legal order (as a part of 'the Union') is based on these values and that it, therefore, relies on these values being upheld and adhered to. Art. 3(1) makes the promotion of Article 2 TEU values the EU's primary objective, manifesting the transformation of Europe from an economic community into a community of values. (Schroeder, 2019)

b) Article 4 TEU

Article 4 TEU sets out that all Member States and the EU institutions are legally bound to ensure the realization of the treaty goals, including the respect for and promotion of the European values. Further, the provision states that the Union must respect Member States' 'national identities, inherent in their fundamental structure, political and constitutional'. However, Member States must never act in a way jeopardizing the attainment of the EU's objectives. (Schroeder, 2019) Article 4 also demands that all Members are treated equally and that they shall act accordingly to the principles of mutual trust and sincere cooperation.

c) Article 7 TEU

To police Member States and their adherence to the European values, Article 7 TEU foresees three distinct procedures. If a Member of the Union is seen as at risk of a "serious breach" of Article 2 values by either the European Parliament, one-third of Member States, or the European Commission the respective party may invoke Article 7(1). If then a four-fifth majority of the European Council finds such a "clear risk" it may provide the Member State in question with recommendations to amend their shortcomings. Article 7(2) serves the purpose of stating the existence of a "serious and persistent breach" of values. The threshold is a lot higher than for Article 7(1) since the accusation has more weight than

the one of a risk of a breach. The Council needs to vote in unanimity with the exclusion of the recalcitrant Member State, while the initiation is only open to the Commission and one-third of Member States. In the event of such a statement, Article 7(3) allows the Council, acting with a qualified majority, to consequently impose sanctions on the Member State. These come in the form of suspending certain rights granted by the Treaties such as voting rights in the Council or freezing of funds. Importantly, a statement of a serious and persistent breach under Paragraph 2 does not require of the institutions the initiation of the procedure under Paragraph 3. They may believe that the identification of a serious and persistent breach is shame enough for the Member States and it will act accordingly to the Treaties again with the additional threat of sanctions looming (Pech & Scheppele, 2017a; Kochenov, 2017). When a Member State is sanctioned, their obligations as a member of the Union continue to be binding, even though it may no longer enjoy the benefits of membership.

One may ask what constitutes a "serious and persistent breach" of Article 2 values or risk thereof. It pertains to a breach of systemic nature in which national institutions, who would normally be in charge to correct undemocratic behavior of the government or other public authorities, are no longer able to deal with the issue. This differentiates such *systemic deficiencies* like the on-going crises in Hungary and Poland from singular rule of law problems like the deportation of Romani EU citizens in France under President Sarkozy. While both were/are not in line with European values, the latter could be handled by the national institutions designed to vet government policy, while the rule of law issues in Hungary and Poland cannot be mended in that way. (Kochenov, 2017) More specifically there are three distinct classifications of a systemic deficiency. First, there is *constitutional capture* or a *constitutional coup d'état*, then, the *general dismantlement of the liberal democratic state* and third, *systemic corruption*. These issues circumscribe problems of profound and fundamental nature penetrating state and society, which a Member States' "own legal and political systems are overwhelmingly unlikely" to be able to solve by themselves. (Closa & Kochenov, 2019, p. 176)

Article 7 and its suitability and effectiveness in preventing and punishing breaches of European values have been widely discussed. While EU officials and politicians have called it a 'nuclear option' only to be used as a last resort, the academic discourse has rejected this notion increasingly. Kochenov (2017) argues that deeming Article 7 as an instrument 'too strong to be used' is a political convenience, nihilistic and "intellectually dishonest" (p. 2), while also ignoring the spirit of the Treaties. He suggests that the events taking place in Hungary and Poland are specifically what Article 7 was designed to prevent, and the unwillingness of the institutions to deploy it speaks as a lack of decisive and unequivocal political support of the European values. Like Kochenov, Toggenburg and Grimheden (2019) argue Article 7 is a reactive and political instrument with high substantial and procedural hurdles (as discussed above as well), stating it is "a matter of politics rather than constitutional consideration and expert assessment" (Toggenburg & Grimheden, 2019, p. 222).'

2.3.2. Available Legal Bases

Having gathered the most important single provisions of the Treaties, this section covers the available legal bases to the Union's institutions, meaning the most reliable combinations of treaty provisions, while keeping in mind the significant drawbacks of Article 7 TEU. The combinations outlined here rely on the presumption that the existence of Article 7 does not pre-empt the adoption of other mechanisms designed to enforce Article 2 TEU (our goal) but rather is an additional argument to take Article 2 values with all seriousness.

a) Articles 2 TEU and 4(3), 3(1) and 13 (1) TEU read together

The difficulty in enforcing Article 2 and the enshrined values is its "over-encompassing nature" (p. 183) and the general vagueness of the term 'values'. Deriving strictly legal effects is vital, however, if the Articles shall be seen as imposing an obligation on each and every Member State. Here is where Article 3(1) and 13(1) TEU are applicable. They make the promotion of the European values an obligation for the EU and the EU institutions, respectively. Depending on how one interprets 'promote', it can be argued that this suffices as a legal-constitutional basis to enforce and protect Article 2 values on the EU level. Lastly, Article 4(3) TEU outlines the 'duty of loyalty' also knows as the 'principle of sincere cooperation' for both Member States and the Union alike. Closa & Kochenov argue this demands of Member States and the EU to read Article 2 systemically and that a claim of the diminished value of Article 2 is to be rejected. Reading Article 2 in combination with Articles 4(3), 3(1), and 13(1) TEU produces an obligation on Member States which is objectively sufficient to "justify forcible EU measure to adhere to the values protected by Article 2 TEU." (Closa & Kochenov, 2016, p. 184)

b) Articles 2 TEU and 258 TFEU deployed together

Any infringement falling under Article 258 TFEU shall be "concrete and clearly demonstrable" (Closa & Kochenov, 2016, 185), which makes an application concerning Article 2 and its more general nature delicate. One way of dealing with this is reorienting the two provisions and producing a 'systemic infringement action', a proposition of Kim Lane Scheppele. She advocates for bundling together evidence of instances of Article 2 violations and continuing under 258 TFEU by submitting the bundle to the ECJ. By bundling complaints under Article 2 or 4(3) TEU, the Commission could then reasonably argue that the alleged infringements constitute a systemic breach of the European values (Closa & Kochenov, 2016). If the Court confirms the Commission's view, the respective Member State would be obliged to apply systemic fixes to stop the systemic violation. One of the benefits of Scheppele's proposal is that it does not require a reform of the Treaties. If the Commission deems it necessary to reinforce the CJEU's ruling, it could apply Article 260 TFEU. (Scheppele, 2013)

c) Adding Article 260 TFEU

The purpose of adding Article 260 TFEU is mainly levying fines or lump sum payments from the respective Member State. If the ECJ finds a Member to be in breach of its obligations under Article 258 TFEU, it will provide the State with necessary measures to correct the deficiency. If the Commission

then perceives the Member State to not be taking the required measures to comply with the ECJ's ruling, it can bring the case before the Court, while specifying 'the amount of the lump sum or penalty payment to be paid by the Member State concerned which it [the Commission] considers appropriate in the circumstances.' If the Court rules against the Member State it may impose the financial sanctions without exceeding the suggested amount. If the Member State in question refuses to pay the bill, it would be possible to withhold the money the Member would receive from the EU budget. However, the power of the EU to adopt financial sanctions in this manner can be questioned. To withhold funds, a change in the relevant provisions might be necessary. Further, as Closa & Kochenov (2016) point out, research has shown that sanctions are likely to be ineffective if compliance goes "to the core of the regime in question" (p. 186). It might prefer to pay rather than change its ways.
In any case, these four legal bases provide the EU with reasonable grounds to more actively enforce and safeguard Article 2 TEU (Closa & Kochenov, 2019).

2.4. The European Constitutional Pluralist Legal Order

Having established reliable legal bases for an EU intervention, the system, that this mechanism needs to function in, shall be discussed. Constitutional pluralism (CP) is described as the idea of accepting "the coexistence of multiple constitutional orders that are not hierarchically ordered but may interact in a heterarchical way." (Schütze, 2017, p. 78) This implies that having a constitutional pluralist order enables national constitutional systems and structures to differ without problems arising from this. A key assumption of CP is that both the EU and her Member States will have constitutional claims, which can occasionally result in conflict but can nevertheless coexist without a need to identify the locus of legal supremacy. (Schütze, 2017) While the threshold for every EU Member State is having a functional liberal democracy, the consequent requirements can be fulfilled in various ways. However, it is required that, amongst the constitutional differences, Member States confide within the normative boundaries set by the European Treaties. They must always maintain a functional democracy and a functional rule of law, the thresholds of which have been discussed in 2.2.

The Treaties act as the lowest common denominator by defining the boundaries of the pluralist constitutional club. Lawrence (2019) calls this the "grammar of legitimacy" (p. 39) of the constitutional pluralist order. She argues that for a legal order to be truly constitutional pluralist, there needs to be some sort of norm that is agreed upon by every legal actor. This creates the "legitimating discourse" (Lawrence, 2019, p. 39): Only systems that match the "procedural and substantive preferences" are deemed legitimate. From this one can conclude that constitutional pluralism has a normative core and is a political tool, creating "a question of vertical or horizontal identification, of inclusion and exclusion from the constitutional club." (Lawrence, 2019, p. 39)

Overstepping these boundaries begs the question of whether a Member State of the EU is perceived by the fellow Members to be in breach of the shared values in a way seriously threatening the consensus of

what defines the EU community. (Toggenburg & Grimheden, 2016) One can refer to Article 2 as the EU's 'constitutional bow' - derived from the German 'Verfassungsbogen' and the Italian 'arco costituzionale' – which "draws a dividing line between what a constitution accepts and what is beyond the constitutionally accepted." (p. 222) Given that Article 2 TEU looks to unite the EU and Member States under common values, while Article 4(2) TEU seeks to keep the community diverse, one is left with two arguably opposing forces that need to be balanced. The 'balancing question' is: "To what degree can national autonomy be invoked to justify a deviant non-mainstream reading of the assumedly shared values in Article 2?" (Toggenburg & Grimheden, 2016, p. 222)

To solve this, let us return to Articles 3 and 4 TEU. Article 4(3) TEU defines two important principles. First, the principle of sincere cooperation requires the EU and the Member States, 'in full mutual respect', to 'assist each other in carrying out tasks which flow from the treaties', Second, the provision defines the principle of loyalty which puts Member States under the obligation to facilitate the realization of the Union's objectives and desist from any actions that might jeopardize this attainment. The objectives laid down in Article 3 include the Union's promotion of 'peace, its values and the well-being of its people' as well as 'social justice and protection', and guaranteeing an 'area of freedom, security and justice without internal frontiers'. This sets up a system that ties Member States and the Union closely together and in which national courts need to rely on each other's verdicts. Now, one can argue that the principle of sincere cooperation and the Unions functionality rely on the assumption that all Member States stay inside the 'constitutional bow' drawn by Article 2 TEU. A Member State violating Article 2 values cannot justify this by referring to its national identity being threatened. In light of such an excuse, it should be argued, by being an integrated Member of the Union, one's national identity is co-defined by Union membership including membership obligations and the concept of 'national identity' is a term of EU law and, can thusly not be defined by one Member State alone. (Toggenburg & Grimheden, 2019)

In the same vein, many have suggested adopting an alternative understanding of 'constitutional identity' that shall no longer trump basic requirements of the rule of law or other European values. (Scheppele & Halmai, 2019; Kelemen & Pech, 2019; Ziółkowski & Grabowska-Moroz, 2019). These scholars argue that Viktor Orbán has abused the concept of national identity to justify non-compliance with Article 2 values (Scheppele & Halmai, 2019; Kelemen & Pech, 2018), while the Polish government has cited constitutional pluralist theory and alluded to its 'national identity' when justifying their unconstitutional reforms to the court system (Kelemen & Pech, 2019; Ziółkowski & Grabowska-Moroz, 2019). Such arguments have jeopardized effective counteraction to rule of law backsliding in both countries (Kustra-Rogatka, 2019). Instead of continuing to allow such abuses giving false respectability to unconstitutional reforms, the concept should rather be centralized in so far that any reference to Article 4(2) is only reasonable and legitimate if the Member State is not violating the European values and acts per the principle of sincere cooperation (Kelemen & Pech, 2019).

2.5. Conclusion

This chapter has defined the Article 2 TEU value of the rule of law by identifying its relevant characteristics. Then, relevant provisions in the European Treaties like Article 2, 4, and 7 TEU were discussed to establish two reliable legal bases (plus Article 260 TFEU) for an intervention by the EU. The last section of this chapter has shown that by intervening in Member States actively undermining the rule of law and democracy, the European Union would ultimately draw red lines concerning its constitutional pluralist order and make a judgment to what is and is not acceptable within that order.

3. The Case for a European Intervention against Rule of Law Backsliding

3.1. Introduction

Before one can make a judgment as to whether the European Union should intervene in backsliding Member States, it should be established how democracy, the separation of powers and the rule of law have been undermined in both Hungary and Poland. To do so this chapter first defines rule of law backsliding (3.2.) and, secondly, it focuses its attention on the analysis of institutional reforms in both Poland (3.2.1.) and Hungary (3.2.2.) in the last 5 and 10 years, respectively. Then one may make an argument as to why a European intervention is warranted (3.3.). What the intervention could look like is discussed in Chapter 4.

3.2. Rule of Law Backsliding

Pech & Scheppele (2017a) conceptualize rule of law backsliding as a process by which elected public officials introduce and apply governmental blueprints in a deliberate manner to "systemically weaken, annihilate, or capture" (Pech & Scheppele, 2017a, p. 10) checks on and balance of the powers of the government. Consequently, liberal democracy is dismantled and the long-term rule of one dominating party is established, making the transition of power impossible. The authors lay out a "recipe" for the rule of law backsliding process or "constitutional capture". They argue the first step in most cases is the election of a populist leader, posing as representing the will of the people. An election of this nature is likely to result from issues causing major disappointment with a large portion of voters, such as rising inequality, mass unemployment, or systemic corruption. The first key events indicating rule of law backsliding itself are attacks on key offices that would normally resist autocratic tendencies of governments or their leaders. Security services, police, judicial authorities (e.g. public prosecutors), and the (state) media might be either shut down or put under the influence of the government. Next, there is the suppression and active targeting of groups and institutions with non-conforming views. Often the government abuses its capabilities and deploys the tax police on these institutions arbitrarily. To dominate the public discourse, the regime will also take control of the state media and work hard to

restrain media pluralism and, ultimately, any independent media outlet critical of government actions. By tweaking electoral and party financing laws in their favor the ruling party quells the political and party opposition and its influence. The voters might realize that there is no longer any constitutional avenue to pursue that would challenge the government/party/leader in a meaningful way. Ultimately, the ruling party will have implemented so many undemocratic changes to the system of governance and checks & balances that any actual checks on its power will have been removed. (Pech & Scheppele, 2017a)

Such a system is akin to a 'competitive autocracy', a term coined by Way and Levistky. A competitive autocracy is described as a system resembling a democracy in which the ruling party has created an 'uneven playing field' by impairing the competitiveness of the opposition. This may be done by blocking funding for other parties, abusing state media and media pluralism, and/or shaping the judiciary, electoral committees, and other supposedly independent institutions in favor of the ruling party. (Way & Levitsky, 2019)

3.2.1. Rule of Law Backsliding in Hungary

In Hungary backsliding began in 2010 when the Fidesz party took power and its head Viktor Orbán became prime minister of the country. Since then, Orbán has continuously consolidated power, restricted human rights and the country's media, and effectively established a one-party state.

Orbán and his government have prematurely dismissed the president of the Hungarian Supreme Court, lowered the retirement ages of judges, prosecutors, and notaries, introduced the 'Regulatory Authority in media law' resulting in penalties for editors and journalists and fostered nationalist attacks on minorities, specifically on the Roma community in the country. (Lichtenberger, 2019) These developments sparked the initial debate between groups of MEPs and in the press in 2013, whether to initiate Article 7(1) TEU against Hungary. The changes to the constitution in 2013 were widely perceived as opposing the democratic values of the European Union as well as the principle of judicial independence (Lichtenberger, 2019).

Electoral laws have been changed to benefit Orbán and his party. In the last two parliamentary elections (2014 & 2018) Fidesz won exactly the 133 seats (2/3 majority) needed to change the constitution. In both elections, Fidesz received less than half of the votes: 44.87 percent in 2014 and 49.27 percent in 2018. OSCE election observers strongly criticized both elections finding overlaps in state and Fidesz party resources, untransparent campaign financing, biased media coverage, and an environment filled with threatening and xenophobic rhetoric, handicapping voters' informed decisions. (Scheppele & Halmai, 2019) And the political opposition is close to non-existent in Hungary. Orbán has created an environment in which whenever a party seems to be able to challenge him, it is "ridiculed in the Fidesz-controlled media, investigated by the Fidesz-controlled State Audit Office (and often fined), and

harassed by the Fidesz-controlled Election Commission." (Scheppele & Halmai, 2019) Undermining parliaments integrity and changing the electoral laws to one's will is an affront to the principle of legality.

It took until September 2018 for the European Parliament to successfully vote to begin Article 7(1) TEU proceedings. The most important concerns were related to the functioning of the constitutional and electoral system, the independence of the judiciary, corruption, and conflict of interest, the rights of persons belonging to minorities, including Roma and Jews, as well as concerns about the freedoms of expression, religion, association, and academia. (European Parliament, 2018)

Since taking office in 2010 Viktor Orbán has successfully captured the Hungarian constitutional system, suppressed most of the civil and political opposition as well as the media and, effectively established a competitive autocracy. He is an authoritarian leader inside the EU. Hungary is no longer rated as "free" but "partly free" by Freedom House. Notably, this is the first time an EU member has ever been downgraded. (Freedom House, 2020) While the European Union has largely ignored or refused to take action against Orbán and his autocratic regime, his "success" has been noticed by one Member State.

3.2.2. Rule of Law Backsliding in Poland

Scholars have argued that Poland has been copying the Hungarian blueprint for constitutional capture and the dismantlement of the separation of powers (Pech & Scheppele, 2017c, Kelemen et al., 2019). And indeed, one can find several similarities.

To get rid of Supreme Court and Ordinary Court judges, the PiS government lowered their retirement age and re-filled the courts with party loyalists. The respective law resulted in 40 percent of the judges of the Supreme Court, including then sitting president Malgorzata Gersdorf, being forced out of their positions. (Pech & Wachowiec, 2020a) With this, PiS violated the principles of the irremovability of judges and judicial independence. These laws have been the substance of two infringement rulings by the European Court of Justice against Poland. In its ruling, the ECJ raised serious doubts on the government's objectives, and argued the laws' aim was more likely to have been the "side-lining of a certain group of judges of that court [the Supreme Court]." (CJEU, 2019, paragraph 82) In a preliminary ruling, the ECJ has also deemed Poland's Disciplinary Chamber (DC) as well as the newly formed National Council of the Judiciary (NCJ) to lack the judicial independence required by EU law. (Pech & Wachowiec, 2020a) The Polish Supreme Court came to the same conclusion. In December 2019 it ruled that the NCJ "does not give a sufficient guarantee of independence of the legislative and executive authorities." (Supreme Court of Poland, 2019) Concerning the DC, the Supreme Court found it lacks the credentials of a court in the meaning of Article 47 of the Charter of Fundamental Rights, Article 6 of the European Convention on Human Rights and Polish national law, as well as not fulfilling the requirements of independence and impartiality. The Disciplinary Chamber was formed by the PiS-party and tasked with disciplining Polish judges. It was apparent from the beginning that people appointed to

the Chamber were associated strongly with PiS and only the new, party-loyalist judges were chosen by the NCJ. (Supreme Court of Poland, 2019)

The Constitutional Tribunal (CT), Poland's constitutional court, has been under attack as well. By adjudicating irregular judges, systemically adjusting its benches to the political importance of cases, and unconstitutionally appointing a government pick as the Tribunals president, who has engaged in abuses of power (Pech & Wachowiec, 2020b), the CT has been captured "to act as an extension of the will of Parliament" and is working "in tandem with the Ministry of Justice and zealous and pliant members of the Parliament," (Koncewicz, 2019). The CT is also trying to masquerade itself as a legitimate court by beginning to enforce EU law (Pech & Wachowiec, 2020b). The CT's inability to make independent legal judgments are underlined by the outgoing president of the Federal Constitutional Court of Germany (FCC), Andreas Voßkuhle, arguing the CT can no longer be taken seriously by other national constitutional courts as it is nothing but a 'dummy' (di Lorenzo & Wefing, 2020).

Further, judges have been prevented from implementing and enforcing ECJ rulings, faced attacks by the media (Schmitz, 2020), and have been fined for the content of their decisions. Under a new law, they are now also barred from political activity and questioning presidential appointments of judges (Associated Press, 2020). These attacks on judicial independence may cause irreparable damage to Poland's judiciary (Pech, Scheppele & Sadurksi, 2019; Pech & Wachowiec, 2020b), while executive and legislative powers can interfere with the judiciary's functioning and its output at will. (Pech & Wachowiec, 2020a)

In the Commission's proposal to begin Article 7(1) proceedings against Poland, it raised concerns inter alia over the lack of legitimate and independent constitutional review, as well as the laws on the Ordinary Courts, the Supreme Court, and the NCJ (EC, 2017). The Constitutional Tribunal, the National Council of the Judiciary, and recently, with the replacement of First President Gersdorf, the Supreme Court have been captured by PiS. All this allows one to conclude that the rule of law is not merely under threat but "being erased." (Pech & Wachowiec, 2020b) Igor Tuleya, a Polish judge, has argued that after capturing the independent courts, the last democratic institution will be under PiS control and subordinate the entire state to the 'Law and Justice' Party (Schmitz, 2020).

3.3. Implications of (Non-)Intervention

Faced with backsliding Member States, as they have been illustrated above, the choice for the European Union and her institutions is between compromising with or fighting against (emerging) competitive autocracies. To better understand what this choice entails we shall look at the implications of either option.

The wider academic consensus on this matter is that, if the EU and her institutions fail to properly address rule of law backsliding in Member States, she risks her very existence. (Pech & Wachowiec,

2020b, Kelemen et al., 2019, Scheppele & Halmai, 2019). The existence of rogue governments no longer sharing basic EU values undermines the EU's *raison d'être* in the first place and endangers the legal framework based on those values and the fact that Member States share those values amongst themselves. Were the community of values to fail, the European Union would remain only an economic shell. (Pech & Scheppele, 2017c) One also needs to consider the "time element" (Bard, 2019) of the rule of law crisis. This refers to the prognosis by some scholars that, the longer the EU chooses to stay inactive, the more time is given to the emerging autocracies in Europe to undermine checks and balances and dismantle the rule of law. (Bard, 2019; Pech & Scheppele, 2017b; Kelemen et al., 2019) The Union has to treat this problem while she still can.

Some voices in the legal community have however argued that its best to remain cautious when it comes to intervening. For *Verfassungsblog*, von Bogdandy (2019) has argued domestic democracy and national identity shall be respected in line with Article 4(2) TEU since the on-going developments in Hungary and Poland are internal democratic processes, and warns of the potential dangers in both events of success and failure of the intervention. A successful intervention inside a Member State would be a tremendous proof of the EU's power that could potentially threaten Member States' sovereignty, while failure on the ground would reveal the EU's "frailty" and possibly "inflict lasting damage" (von Bogdandy, 2019). Von Bogdandy suggests that by intervening in a recalcitrant Member State, European Constitutionalism would be moved to the forefront of the EU agenda and give the EU elements of a "militant democracy", also alluding to a Schmittian 'tyranny of values'. Von Bogdandy (2019) lays out the fundamentals of systemic deficiencies, the threshold to invoking Article 7 TEU. First, there is the subjective nature of stating a systemic deficiency, as an outside opinion giving space to tensions between Member States in a system that is based on mutual trust and close cooperation. Second, to denote a situation as a systemic deficiency is an exercise of public authority, creating pressure to rid the system of the deficiency and hurting the respective state's reputation. Third, there is a breach of the law, more specifically, a breach of Article 2 TEU values. Fourth, this breach of law is defined by a particularly problematic" situation, including unfair elections, a lack of democratic checks on power or "widespread corruption" (von Bogdandy, 2019) The inability of a Member State to hand out an individual to another Member State due to fundamental rights concerns, would constitute a systemic deficiency on a horizontal level. (von Bogdandy, 2019) This is a usual practice through the European Arrest Warrant (EAW) which requires member states to arrest and turn over sentenced individuals or those suspected of a crime to the Member that issued the warrant. Interestingly, exactly this has happened. In a surrender case, the *Oberlandesgericht* Karlsruhe suspended proceedings on surrender of an individual to Polish authorities. Flowing from the CJEU's confirmation of systemic violations of the rule of law in Poland, the court reasoned that in the case of surrender there would be a risk of the suspect not getting a fair trial and, therefore, the principle of mutual trust had to be suspended. This decision also followed from the alleged bribery of witnesses to perjure themselves by "two influential Polish nationals", who also

instructed individuals to assault the suspect (Bard & Morijn, 2020), who was consequently released by the *Oberlandesgericht*.

As for the 'normal' democratic processes von Bogdandy's reasoning relies on, it has been described above that Viktor Orban has successfully rigged the electoral system and its laws in a way that predetermines his victories and therefore makes the Hungarian political system undemocratic (Scheppele & Halmai, 2019). To refute the 'militant democracy' argument and provide additional reasoning for an intervention by the EU, three normative arguments may be made. The first is the 'all-affected principle', which concerns the interdependency and interconnectedness of the European legal order at two levels. Every European citizen has a vested interest in not having an illiberal or potentially even autocratic Member State making decisions on their behalf in the Councils (Closa & Kochenov, 2019; Müller, 2015). And the Member States themselves should not want to see the EU's nature undermined. By now the Union "obliges the Member States to presume that each of them is at least as good as any other" (Closa & Kochenov, 2019, p. 178) when it comes to democracy and rule of law standards. The principle of mutual trust depends on the Member States doing so. (Closa & Kochenov, 2019) The 'all-affected principle' assumes a coherent "legal-political entity" (p. 178), which is based on the principles of mutual trust and respect working for citizens as well as Member States. As a second argument, it can be argued that, in line with how EU law functions in certain domains, the EU is a supranational federation (Closa & Kochenov, 2019) or "a public authority *sui generis* endowed with a supranational constitution." (Schroeder, 2019, p.7) Hence, it has a stake in the functionality and effectiveness of the system and the rights granted by it and is a "responsible actor" as a "bearer of duties vis-à-vis the citizens and […] Member States." (Closa & Kochenov, 2019, p. 178) The rule of law in Member States is the glue that holds the system of the Union together from the inside. (Schroeder, 2019) The third and last argument covers the 'principle of congruence' and works both internally and externally. Since the EU promotes her values in her relationships with third parties and tries to shape international law in regards to the European values, establishing an intervention and/or monitoring mechanism would enhance her credibility in the fields of democracy, the rule of law and fundamental rights. Internally, the respect for democracy and the rule of law shall not only be requirements pre-accession but also to continue membership. (Closa & Kochenov, 2019) This section has shown that Hungary and Poland have fallen out of the European family of constitutional-democratic states, while European leaders have shied away from their responsibility (4.2.) to protect them from regressing and deteriorating towards an authoritarian state, which is something that should have been prevented by EU membership and was a specific reason for many Eastern European countries to join the Union in the first place and commit to membership (Pech & Scheppele, 2017d; Müller, 2015). Akin to Ulysses, Hungary and Poland tied themselves to the mast that is EU Membership to be protected from the siren songs of populism and authoritarianism. This provides another argument for the EU to protect liberal democracy in both countries: The Union would simply be reminding the Polish and Hungarians of how

they wanted to live when they joined the EU in 2004. Both countries freely voted to bind themselves to EU law and the ramifications in place if that law is breached, including but not limited to Article 7 TEU. (Müller, 2015)

3.4. Conclusion

By discussing rule of law backsliding as a theoretical concept (3.2.), visualizing the concept through describing the recent and most important events in Hungary (3.2.1.) and Poland (3.2.2.), and relating them to the core principles of the rule of law as they were discussed in Chapter 2, it was established that European hesitance in light of these developments in Hungary and Poland is at best ill-advised and at worst a substantial threat to the whole European project. (3.3.) With this knowledge, Chapter 4 discusses what an intervention by the EU in recalcitrant Member States could look like and what shall be avoided.

4. A new Mechanism

4.1. Introduction

This Chapter identifies and analyses the mistakes the European institutions have made when faced with the currently backsliding Member States, Poland and Hungary. This helps to understand what actions and behavior have not proven effective in combating rule of law backsliding. This serves as the basis for a discussion on the 'keys to success' for a European mechanism to protect the European values in general and the rule of law more specifically. The first salient occasion of concerns over the adherence to European values came in 2000/2001 with the 'Haider affair'. After the conservative Austrian People's Party (ÖVP) formed a coalition with the right-wing populist Freedom Party of Austria (FPÖ) whose head, Jörg Haider, was a highly controversial political leader, the EU Members adopted bilateral sanctions against Austria due to their concerns about an extremist party as part of a national government. A committee of 'Wise Men' tasked with assessing the Austrian governments' commitment to the European values argued the sanctions to have been counterproductive and recommended: "the development of a mechanism within the EU to monitor and evaluate the commitment and performance of individual Member States with respect to the common European values" (Wise Men Report, 2001, p. 120). Consequently, Article 7 TEU was extended to include a preventive and monitoring arm (Scheppele & Pech, 2018). Scheppele and Pech (2018) and Müller (2013) put forward that EU officials learned the wrong lessons since the problem was not that the Member States acted at all but that they did so prematurely. The situation in Austria was fundamentally different from the current situations in Hungary and Poland, where checks and balances, as well as the European values, have been undermined repeatedly. Additionally, as in the Austrian case, rather than using the available provisions in the Treaties against Hungary, the Commission decided to step out of the treaty framework to create the 'Rule of Law Framework' functioning as a pre-Article 7 TEU procedure.

4.2. Ink Spilled and Time Wasted: The Major Shortcomings of EU institutions

4.2.1. The Commission's 'Rule of Law Framework'

The 'rule of law framework' was established in 2014 and was designed to be an early warning tool preceding Article 7 TEU and enabling the European Commission to engage in a 'constructive dialogue' with the Member State concerned. Through the new framework, the Commission firstly defined the rule of law on an EU law level and emphasized that it shall be a constitutional principle with formal and substantive components. This mirrors the jurisprudence of the ECJ, which repeatedly has referred to the rule of law and fundamental rights as 'constitutional principles' in its case-law (Schroeder, 2019). The framework foresees three stages. First, the Commission assesses the indications of a systemic threat to the rule of law. If it finds there to be substantial issues, it may make recommend ways and measures to deal with those to the national authorities. If those recommendations are not implemented adequately, the Commission can follow-up with additional recommendations or decide to trigger Article 7(1) TEU. (EC 2014) The framework was initially seen as a sign of European willingness to address issues with the rule of law while opening the possibility to steadily build a case against a Member State complementing the infringement action powers of the Commission and avoiding a time-consuming treaty amendment process (Kochenov & Pech, 2015). Today, however, the framework has been proven to be ineffective. Kochenov and Pech (2015) point out that while the Commission would likely be able to diagnose rule of law problems, the framework's ineffectiveness to push the recalcitrant Member State back in line erases its positive aspects. The Commission's key misjudgment was and still is, assuming that a dialogue with the regimes, that are deliberately and purposefully applying undemocratic reforms, would result in positive outcomes. Triggering the framework against Poland has had no deterring effect as it has not implemented a single recommendation fully. Additionally, the Framework was designed as a soft law instrument following a discursive approach with no legal ramifications and should, therefore, be understood as not more than an instrument making the gathering of evidence against a rogue Member State pre-Article 7 more transparent. (Pech & Scheppele, 2017a)

4.2.2. EU institutions

a) The European Commission

The behavior and (in-)actions of the EC over the last 10 years can be criticized extensively, however, to keep things simple there will be a short overview of the Commission's mistakes. Pech and Scheppele (2017) fault the Commission for its failure to learn the lessons from the Hungarian case and relate them to the Polish case, as both countries have followed a similar path (see 3.2.2.), applying the same blueprints to systemically dismantle national checks and balances. Most importantly, relying and insisting on a dialogical approach when dealing with authoritarian leaders like Viktor Orbán or Jarosław Kaczyński is misguided. As the authors point out, a dialogue in itself is reliant on liberal values, being open to the opinions of others, something the two party-leaders are emphatically not. Orbán has

explicitly stated that he wants to establish an "illiberal democracy" in the likes of Russia, while Polish officials have been hostile towards EU institutions and acted in bad faith throughout the process of the Commission's efforts under the Rule of Law Framework. Jarosław Kaczyński has called inquiries into Poland's democracy by the EU an "absolute comedy" and argued, "there is nothing going on in Poland that contravenes the rule of law". (Reuters, 2016) Concluding the remarks on the ill-advised dialogical approach, consider this excerpt from Pech and Scheppele (2017): "When a government is bent on deliberately undermining constitutional checks on power, dialogue only gives that government time to consolidate gains"(p. 27). In the case of Poland, this has proven to be true. After the Polish government failed to implement the first set of recommendations, rather than invoking Article 7(1), the Commission provided another set of recommendations, effectively giving even more time to the government to capture the Constitutional Tribunal (constitutional capture), while waiting for it to implement the sets of old and new recommendations. To prevent constitutional capture the EU needs to act before the capture is complete. (Pech & Scheppele, 2017c) This brings another key issue to light: The Commission's inability to change or reverse reforms that have already been implemented. For example, it cannot reinstate judges that were dismissed unconstitutionally or dismiss judges that were appointed unconstitutionally, as was the case in Poland in 2017 and Hungary in 2011. The Commission also cannot restore NGOs that had to stop operating due to cuts in funding to re-fuel pluralist discourse. The Commission can only set the rules for the future. (Pech & Scheppele, 2017a) This shows swift and preventive action is necessary to tackle rule of law backsliding.

Ultimately, the Commission has repeatedly failed to fulfill its role as the 'Guardian of the Treaties'. For instance, the Commission triggered its Rule of Law Framework against Poland but never against Hungary, even though the cases are strikingly similar. Partisanship has been argued to have played a role in this, as Orbán's Fidesz is part of the European People's Party, the largest and most powerful group in the European Parliament. (Pech & Scheppele, 2017a)

More recently, the Commission raised the rule of law issue in the context of the 'Blueprint for Action', which is set on the promotion of a common rule of law culture, prevention through a 'Rule of Law Review Cycle' and response through enforcement on an EU level. While this sounds positive, old mistakes reappear. Again, the Commission fails to recognize that the rule of law backsliding in both Poland and Hungary has amounted to constitutional capture and that it is a deliberate strategy pursued by the governments. Regardless of the fact the EU has been engaged in an unproductive monologue for most of the time, the Commission continuously relies on productive dialogue to safeguard the rule of law. (Pech et al., 2019)

As for the new Commission, hopes for a more determined response to rule of law violations under President von der Leyen were quickly diminished. When asked on rule of law matters in an interview after her confirmation, von der Leyen said that while the "full rule of law is always the goal, nobody is

perfect," and cautioned against scrutinizing certain Member States too harshly, as it might evoke resentment from the citizens of those countries. (Broessler, 2019) Here, von der Leyen fails to recognize the active nature of rule of law backsliding as well as the EU's obligation to protect its citizens. The President should arguably be more concerned with being resented by the Hungarian and Polish people for not protecting them from autocratic rule than for 'being too into' democracy, the rule of law and fundamental rights. It is important to recall that per Article 3 TEU the EU is obliged to assure every EU citizen is protected from authoritarianism, fundamental rights violations and judicial arbitrariness, as they have put their trust in the Union to protect liberal democracy (Müller, 2015; Pech & Scheppele, 2017d; Bard, 2019).

The new President has also made significant changes to the rule of law department inside the Commission. (Bard, 2019) While previously there had been a Commissioner for the rule of law specifically, a position held by Frans Timmermans under President Juncker, the Article 2 value now falls under three Commissioner's portfolios. Vice-president and Commissioner for Values & Transparency, Vera Jourova, who, amongst upholding, strengthening, and defending the European values, is also tasked with transparency of the legislative process, European Citizenship and identity, as well as revising the 'Spitzenkandidatenprozess'. Jourova also oversees the Commissioner for Justice, Didier Reynders. Reynders is tasked with delivering cases to the CJEU in the form of infringement cases, strengthening the rule of law through international cooperation, and raise awareness of rule of law problems. (Bard, 2019) While these two Commissioners deal with internal rule of law issues, the Commissioner for Neighborhood and Enlargement is tasked with oversight and promotion externally. This resort oversees possible candidates for accession based on the 'Copenhagen Criteria', which include the respect for democracy, the rule of law, and fundamental rights (EC, 2016) The Commissioner shall also judge the respective country's fight against corruption, the role of independent media and the state of civil society. The person filling this role is the Hungarian diplomat Olivér Várhelyi. The notion that someone, who served under a government now subject to Article 7(1) proceedings regarding all Article 2 values, is overseeing the respect for those values is at least objectionable and does not reflect positively on the new Commission President. (Bard, 2019)

b) The European Council

When the European Council is not inactive, it has been described as counterproductive (Pech & Scheppele, 2017a). Instead of supporting the Commission's efforts to protect the rule of law, the Council rather denied the Commission's authority to put the framework in place and introduced its mechanism in response, the "Annual Rule of Law Dialogue", structured around self-assessment from the Member States. It was built without any independent checks involved producing a mechanism inviting "more self-congratulation than criticism". (Pech & Scheppele, 2017a, p. 29) Generally, the European Council has remained vastly silent on the rule of law issues in Hungary and Poland and should likely not be

counted on, when looking for support against illiberal Member States. Pech and Scheppele (2017a) argue the Commission should stop waiting for the national governments to support its efforts and do "what the law requires rather than what the politics will sustain" (p. 31), which is making difficult decisions independently and force the Member States to come face to face with their responsibility towards the European values as enshrined in the Treaties.

4.2.3. Summary

Summarizing the major shortcomings of the EU and her institutions regarding rule of law backsliding one should mention that the institutions have tended to procrastinate when faced with clear breaches of European values. Procrastination only makes matters worse as it gives more time to the backsliding states to continue undermining national checks and balances. The same goes for continuing dialogue with increasingly autocratic governments. Political and discursive approaches, the standard infringements, Article 7(1) proceedings, as well as invoking the 'Rule of Law Framework' against Poland have deterred neither government from consolidating power. Consequently, the question arises of what a successful defense of Article 2 values in the form of a monitoring and enforcement mechanism could look like.

4.3. Walking the Walk: A Successful Defense of European Values

After establishing the critical mistakes of the European institutions, it is time to inquire about possible routes to a successful defense of European values. First, the different categorizations of a mechanism will be discussed to understand the nuances of the different approaches as well as their advantages and drawbacks. By connecting the mistakes with the different categorizations, the most promising mechanism can be identified.

4.3.1. Different Categorizations

a) Existing v. new procedures

The first question that needs to be settled is the question of whether one should confide in the current Treaties or create a new institution/mechanism. Relying on the Treaties as they stand has the advantage of avoiding a complicated treaty amendment process as well as not giving the impression of a 'power grab' by the Commission. It is important to recall that the Commission sails political waters and is therefore inclined to practice "institutional modesty" in the "sensitive political context" that is compliance with Article 2 values. (Closa & Kochenov, 2019, p. 188)

b) *Ex ante* v. *Ex post* procedures

Due to the state of democracy and the rule of law in Hungary and Poland, the current discussion of a mechanism mostly revolves around how to reverse the situations (*ex post*) in Poland and Hungary and push them back into a constitutional-democratic system. However, to safeguard the rule of law and the

other European values in the long run, more focus should be given to *ex ante* procedures. Such procedures emphasize monitoring and oversight, would protect Member States from devolving into competitive autocracies, and address potential issues in time and not after e.g. the constitutional capture has already taken place. This would likely require a treaty change. (Closa & Kochenov, 2019)

c) Judicial v. Political Procedures

All options are essentially either of judicial or political nature (Closa & Kochenov, 2019). The challenge according to Müller (2015, p. 149) is finding an agent of impartial and "credible legal-political judgment as to whether a country is systemically departing from […] the EU's normative acquis". To guarantee compliance with Article 2 TEU, the judicial procedure relies on the European values to be binding law and involve the European court system on all levels to practice oversight. The strength of a judicial procedure is defined by which level – European or national – shall be tasked with enforcement of Article 2. Relying on national courts could prove to be precarious, since national courts of countries, in which the rule of law is a problem, may have been stripped of their independence and should not necessarily be trusted. The most potent judicial procedures include the previously discussed systemic infringement action and the involvement of the European Court of Justice's (ECJ) involvement through EU citizenship rights. (Closa & Kochenov, 2019) The latter involves local and national courts and would therefore only be suitable if those have not been captured. Additionally, it would require the ECJ to adopt a broader understanding of its ability to protect EU citizenship rights, a still-evolving field in the ECJ's jurisdiction. The systemic infringement action's strengths lie in using the existing treaty framework and securing legal effectiveness by not being dependent on the national courts of the suspected Member State, which also benefits the political acceptability of an ECJ ruling. Problematic aspects of systemic infringements are the contestable reinterpretation of Article 258 TFEU and the fact that, so far, the standard infringement rulings against Hungary and Poland have had limited effects. Using the systemic infringements in tandem with other possibly political mechanisms would therefore likely be more effective since both of these judicial procedures are likely unable to safeguard the rule of law in Member States entirely. (Closa & Kochenov, 2019)

Political procedures pursue wider monitoring and oversight capabilities (*ex ante*) and mechanisms to sanction recalcitrant Member States (*ex post*), while inviting all Member States as well as non-judicial institutions to partake to show openness to dialogue and as not to alienate the rogue Member State. The most tenable concepts according to Closa and Kochenov (2019) are 1) learning from the Council of Europe (CoE); 2) utilizing the existing EU bodies; and 3) creating a new monitoring and enforcement institution: the Copenhagen Commission.

1) Outsourcing

By drawing on the experience of the Council of Europe, and especially its Venice Commission, the Council's advisory body on constitutional matters, which has a long history of monitoring the rule of

law in the Council's Member States, the EU could merge its sanctioning power with the 'institutional memory' of the Venice Commission. (Closa & Kochenov, 2019) However, as compliance with European values is an internal normative concern, outsourcing responsibility to a third party, which is likely to have trouble assessing EU law, seems non-ideal. The system of the European Union is unquestionably deeper, denser, and more intricate than that of the Council of Europe (Müller, 2015). Further, tasking the Venice Commission with monitoring and possibly enforcing EU values would likely result in accusations of double standards. The Council of Europe includes various countries that would under no circumstances pass the lowest threshold of the Copenhagen criteria. How could the EU then justify interventions in Poland and Hungary? (Müller, 2015) Lastly, the Council of Europe's judicial body is the European Court of Human Rights (ECtHR). The ECtHR can only rule in cases concerning individual fundamental rights violations as they stand in the European Convention on Human Rights (ECHR). However, not every danger to the rule of law can be reduced to violations of fundamental rights (Müller, 2015). Protecting democracy and the rule of law to the extent required by the situation in Poland and Hungary must, therefore, be done in a more holistic approach. (Müller, 2015) For this, an EU institution (old or new), working with the European Court of Justice whenever necessary, would be better suited.

2) Using an Existent Body

Utilizing the Union's existing institutional resources is the most desirable option, as it would not necessitate treaty reform. However, there is no primary responsibility allocated to any institution by the Treaties. (Pech & Scheppele, 2017a; Müller, 2015) It is unclear who is supposed to push the red button in cases of emergency. The most prominent contestant for this spot is the European Commission, due to its already wide competences and experience in the rule of law field and its function as 'Guardian of the Treaties'. Unfortunately, as has been shown above, the Commission's track record in holding Member States accountable to European values leaves a lot to be desired. It would also run the risk to be accused of a 'power-grab' (Closa & Kochenov, 2019). This also reveals another problem with tasking the Commission with the mechanism. It operates in politically charged territory. In the past, partisanship protected the Hungarian government under Viktor Orbán from scrutiny for years. As the mechanism requires an impartial and credible judge of political and legal nature, the case for the Commission falls apart quickly. This is why Müller (2015) suggests, rather than giving the job to the 'Guardian of the Treaties', the Union shall establish a new institution acting as a 'Guardian of the European *acquis normatif*' filled by legal experts and state officials well-experienced in political judgment: the 'Copenhagen Commission'.

4.3.2. The Copenhagen Commission

Were one to outsource monitoring to, say, the Venice Commission, sanctioning the rogue Member State would still be the responsibility of the EU (Closa & Kochenov, 2019). A Copenhagen Commission (CC)

could unite monitoring and sanctioning capabilities within an EU mechanism (Müller, 2015) Additionally, it would be more likely to make independent and contextual judgments, vital for an effective mechanism as scholars like Bard (2019) have argued. The new procedure needs to emphasize enforcement, something previous efforts like the 'Rule of law Framework' lacked. To enhance enforcement, Müller (2015) envisions an EU body empowered to investigate the circumstances in a Member State, and then, on reasonable grounds, trigger a mechanism that would require from the EC to cut specific funding or impose substantial fines. A side effect of halting EU funds is the message that a Member State undermining European values is a concern to all of the Union, while also rendering a response which is a "genuinely European one." (Müller, 2015, p. 151) Moreover, all the existing instruments (Article 7, standard and systemic infringement procedures, protection of EU citizenship rights by the ECJ, and Member States policing one another) could remain in place.

A relevant question concerns the criteria the CC would be required to follow when making a judgment. Müller (2015) suggests three general criteria. First, the Member State in question should have a track record of violating liberal-democratic political principles. Second, the nature of conduct should be systemic. A successful systemic infringement action could reinforce the fulfillment of this threshold. Third, self-correction should be preferred as long as it is still possible. Only if it is apparent that national authorities are not able or unwilling to reverse course, a judgment by the CC shall be made.

There are reasonable objections to creating such an institution. One may argue that by passing judgments on liberal democracy and sanctioning offenders the EU could deepen its legitimacy crisis. As Müller (2015) admits Member State governments might prefer to delegate responsibility to the CoE. But since the EU ought to be serious about sanctioning deliberate backsliding and will have to be the one enforcing those sanctions, it would be appropriate to take on one's responsibility to form the judgments that are to be enforced. This responsibility results from the trust that has been put into the EU by its citizens to fiercely safeguard liberal democracy. (Müller, 2015; Pech & Scheppele, 2017d; Bard, 2019)

Then, there is the concern for European pluralism, including the constitutional pluralist legal order. By having a centralized defender of democracy and the rule of law, tolerance is overcome by homogenization and the constitutional pluralist order, as well as the heterarchy of norms and institutions, fall apart. Such worries resemble those of von Bogdandy (2019). Concerning that, Müller (2015) submits that European pluralism has always been reliant on common political parameters. The accession progress is designed to "ensure sameness in certain regards (democracy, the rule of law, state capacity, etc.)" (p. 158) and not to maximize difference. And in this very process the EU has repeatedly made definitive judgments on a candidate's liberal democracy, and, therefore, defined the limits of pluralism. To then argue that establishing a democracy and rule of law watchdog doing what the EU has already been doing but more visibly, would break the system is an inconsistent argument. Additionally, it is put forward that protection of democracy and the rule of law is not about narrowing constitutional pluralism,

as this would result in an insistence that there can only be one specific kind of constitutional court, for instance, or reducing and abolishing pluralism. It is about guarding pluralism's boundaries. (Müller, 2015)

4.4. Conclusion

This Chapter has contributed to a more precise understanding of the different approaches an EU mechanism to prevent rule of law backsliding can take as well as discussed the most promising mechanism: the Copenhagen Commission.

5. Conclusion

To conclude this Bachelor thesis and answer the main research question '*How can the EU institutions prevent further rule of law backsliding in a constitutional pluralist setting?*' one should say that to effectively tackle rule of law backsliding, the European Union and her institutions need to establish a mechanism which combines monitoring, oversight, and enforcement. It needs to be able to make legal-political judgments independently and contextually while also avoiding the same mistakes that have been made in the past decade in response to events in Hungary and Poland. Such mistakes include an emphasis on dialogical approaches and losing valuable time even though the deliberateness and corrosiveness of the regimes' reforms to their democratic systems were apparent early on. Justifications for establishing such a mechanism lie in the EU's responsibility towards every EU citizen to safeguard the European values and protect them from illiberalism, the systemic nature of this form of illiberalism paralyzing the national authorities of the backsliding state, and in the threat developments such as those in Poland and Hungary pose to the community of values that is the European Union. The mechanism best suited to accomplish a successful defense of Article 2 TEU values arguably is Müller's 'Copenhagen Commission'. A Copenhagen Commission promises to avoid the crucial mistakes of other institutions in the past while emphasizing the relevant requirements for a mechanism tasked with preventing rule of law backsliding. A negative side note is the fact that establishing such a Commission would require a change of the European Treaties. However, as most available instruments have failed so far and the last option, invoking Article 7 (2) TEU, is unlikely to happen due to its procedural hurdles, a mechanism in the vein of the Copenhagen Commission might be one of the last remaining options to safeguard the European Union and her values enshrined in Article 2 TEU.

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