A COMMENTARY ON A CONCEPT OF A NEW PUNITIVE MECHANISM 'OUTSIDE EUROPEAN UNION LAW' ESTABLISHED TO BETTER DISCIPLINE COUNTRIES ACCUSED OF VIOLATING THE RULE OF LAW*

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ABSTRACT

Attempts to resolve the crisis of values that the European Union (EU) has faced for years have involved developing the Union's institutional structure and creating new bodies. The principle of the rule of law, which is a pillar of modern democracy, is one of the values most readily cited by both EU representatives and authors when criticising state legislation in areas such as freedom of the press, the administration of justice or principles of the electoral system. To prevent shortfalls in this principle both in the Member States and in the EU itself, it has been proposed that a new body be established to oversee Member States' ongoing efforts to fully implement the rule of law.

The purpose of this article is to critically analyse the proposal to establish a new body, called for simplicity the Rule of Law Commission. The path that led to the idea of creating such a Commission is also briefly outlined.

KEYWORDS

Court of Justice of the European Union
democratic control
Rule of Law Commission
rule of law supervisory authority
EU values

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1. Introduction

As a rule, international law does not interfere with a nation's choice of political, social, economic and cultural systems, leaving it free to develop the principles underlying the state's political system. However, the development of internationalisation and integration processes has led many regional integration organisations to develop a catalogue of principles and values embodied in the course of integration processes. The most distinctive, and the most advanced in this respect, is the European Union (EU). The existing treaties underpinning the EU provide, in Article 4(2) of the Treaty on European Union (TEU), an obligation to respect the national identities of the Member States. inherent in their basic political and constitutional structures. On the other hand, EU law has formulated a catalogue of values that both the EU and its Member States are supposed to develop. Article 2 of the TEU lists among these values the principle of the rule of law and emphasises that it is – together with other values – the foundation of the EU. The rule of law, both in the treaties and in the jurisprudence of the EU courts, is regarded as a value common to all Member States, derived from the common constitutional traditions of the EU Member States.[2]

A natural consequence of the codification in EU law of values is the establishment of mechanisms to protect common values against their violation by EU Member States. The EU's mechanism for the protection of common values, although unique in the world and an expression of the consensus of its 27 Member States, is criticised both by the EU institutions (e.g. the European Parliament),[3] and in the doctrine of European law.[4] In particular, critics call for the creation of a new 'rule of law overseer' that would be able to compel states to incorporate a common or communitarian understanding of the principle, oversee strict compliance with the rule of law so understood, and impose severe sanctions on states failing to comply with this imposed understanding of the rule of law. These ideas materialised into the concept of a Rule of Law Commission. Interestingly, the latest ideas emerging in the doctrine for the creation of a 'Rule of Law Supervisory Authority' suggest detaching the functioning of this body from the EU structures and opening it up to other European or so-called 'Western World' states as well.

The objective of this article is to critically examine proposals for establishing such a body, through the prism of international law, and, above all, EU law. First, however, I will briefly characterise the concept of the rule of law, which is still in the stage of conceptualisation, and the existing mechanisms its protection operating within EU law.

2 | Ziller, 2023.
3 | 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)), OJ C 75, 26.2.2016, pp. 52–78.
4 | Magen and Pech, 2018; Martins, 2024.

2. The concept of the rule of law

The idea of the rule of law remains largely undefined, belonging to a group of legal terms that are highly controversial.[5] The controversy encompasses both the entrenchment of this principle into various constitutional systems worldwide, and the differing interpretations of its meaning and scope. The rule of law is not universally accepted as a systemic principle of modern states,[6] but mainly characterises European states or, more broadly, states belonging to the so-called West. However, even in the state legal orders that have adopted it as the foundation of their political and social systems, there is no uniform understanding of the rule of law, let alone a legal definition of this principle (for example German concept of *Rechtsstaat*[7] or the French *État de Droit*[8]). Nor has legal doctrine developed a uniform understanding of the rule of law. While the absence of a legal definition of the rule of law is not surprising, given its nature as one of the so-called general clauses, not even uniform criteria for determining its scope have been developed.[9] The only consensus in the understanding that this principle recognises that the rule of law means that all activities of the state and its organs must be grounded in law.[10] The principle therefore regulates the way in which public authority is exercised and its relationship to the individual, but that is where clarity on the subject ends. Nevertheless, the rule of law has proved very attractive to many legal orders, which first adopted it as the basis of their political and social systems and then began to fill it with content. Hence, the principle is understood differently in different, national legal orders.

Since its inception in the nineteenth century, the rule of law has governed the relationship between the individual and the state and defined the rules for the creation and application of laws within the state. The rule of law can therefore be understood in both formal and substantive terms.[11] A formal understanding pertains to the manner in which the law was promulgated, the clarity of the ensuing norms and the temporal dimension of the enacted norm.[12] In contrast, a substantive understanding focuses on the principles (rights) which are derived from the rule of law as a foundational and general concept.[13] These principles (rights) are helpful in establishing whether the laws are 'good' or 'bad'.

It was not until the 1990s that the rule of law began to be transposed into international law permeating integration processes and regulating the foundations of the international legal order.[14] In 1993, the UN General Assembly adopted its first resolution on the rule of law, entitled Strengthening the Rule of Law.[15] However, the principle of the rule of law has taken on particular importance in Europe. In 1990, the Council of Europe established the European Commission for Democracy through Law (known as the Venice Commission)

5 | Varga, 2021, p. 249.
6 | Zolo, 2007, p. 3.
7 | Gozzi, 2007.
8 | Laquièze, 2007.
9 | Lautenbach, 2014, p. 19.
10 | Mik, 2022, p. 50; Sellers, 2016, p. 5.
11 | Craig, 2005.
12 | Ibid.
13 | Ibid.
14 | Majchrzak, 2023.
15 | A/Res/48/132.

to promote the three objectives of the Council of Europe, including the rule of law.[16] Furthermore, the EU adopted the rule of law during its formation, as one of its founding principles.[17]

The internationalisation of the rule of law and the development of integration processes – particularly in Europe – have accelerated the process of defining its content. In 2012, the UN General Assembly adopted the 'Declaration of the High-Level Meeting on the Rule of Law at the National and International Level'.[18] The resolution emphasised that the rule of law applies equally to all states, and international organisations, including the United Nations and its principal organs. It further stated that respect for and the promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. The resolution is general in nature, but demonstrates the multi-faceted and broad way in which the General Assembly understands the rule of law. First, the General Assembly noted the close relationship between the rule of law, human rights and democracy. It also emphasised the link between the rule of law and inclusive, sustainable and equitable development, as well as economic growth and employment. The General Assembly stressed that there are common features of the rule of law, based on international norms and standards, which are reflected in the wide diversity of national experiences with the rule of law. These are:

a) The existence of an independent, impartial and fair judicial system, together with the right to equal access to justice for all;
b) Ensuring that women fully enjoy the benefits of the rule of law;
c) Protection of children's rights, including against discrimination, violence, abuse and exploitation;
d) Conflict prevention, peacekeeping, conflict resolution and peacebuilding;
e) Respect for international humanitarian law in all circumstances;
f) Preventing impunity for genocide, war crimes, crimes against humanity, violations of international humanitarian law and gross violations of human rights;
g) Strengthening international cooperation to combat drug problems and transnational organised crime;
h) Combating and preventing corruption;
i) Condemnation of terrorism.

Thus, the General Assembly linked the rule of law to essentially every aspect of UN activities. Perhaps this has to do with the fact that the declaration addressed the rule of

16 | Resolution (90)6 on a Partial Agreement Establishing the European Commission for Democracy through Law, adopted by the Committee of Ministers on 10 May 1990 at its 86th Session.
According to Article 1(1): The Commission shall give priority to work concerning:
a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law.
b. the public rights and freedoms, notably those that involve the participation of citizens in the life of the institutions.
c. the contribution of local and regional self-government to the development of democracy.

17 | Sulyok, 2021, pp. 208–209.

18 | Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, 24 September 2012, A/Res/67/1.

law at both the national level and international legal order levels, although the declaration itself does not rigidly distinguish between the two levels to which the rule of law refers.

The Venice Commission's interpretation of the rule of law is much narrower. In 2016, it adopted a document fundamental to the European understanding, entitled the Rule of Law Checklist.[19] The document reflects the Venice Commission's belief that the rule of law cannot be defined and that instead of seeking a theoretical definition, an operational approach, focused on identifying the core elements of the rule of law, should be adopted. The checklist identifies five fundamental elements of the rule of law: legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and access to justice.

Compared to the UN General Assembly resolution, this document significantly narrows the concept of the rule of law, although a full reading of it leads to the conclusion that the rule of law is a dynamic concept and its scope is constantly evolving. Indeed, the Venice Commission stressed that adherence to the rule of law is a complex process and that the rule of law is achieved through successive stages and never in full. It is also worth noting that, in the Venice Commission's view, both the rule of law itself and its content derive from common constitutional traditions of different national legal orders. This impacts understanding of the rule of law, which differs among the Member States of the Council of Europe.

The EU understands the rule of law in a similar way. In the EU (or earlier in the European Communities), the concept of the rule of law has been mainly shaped by the case law of the Court of Justice of the European Union (CJEU). The CJEU first made reference to the rule of law in the Les Verts judgement, in which it stated:

> the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty.[20]

Since then, the CJEU has built an extensive body of case law interpreting the rule of law. Although the CJEU has repeatedly emphasised that the precise content of the principles and norms implicit in the rule of law may vary at the national level depending on the constitutional system of each Member State, its case law has formulated an incomplete list of the principles constituting the rule of law. These principles include: legality,[21] legal certainty,[22] prohibition of arbitrariness in executive actions ,[23] independent and impartial courts,[24] effective judicial review, including respect for fundamental rights[25] and equal-

19 | Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)007-e.
20 | Case 294/83, *Le Verts v. European Parliament*, [1986] ECR 1139, para. 23.
21 | Case C-496/99, *Commission v CAS Succhi di Frutta* [2004] ECR I-03801, para. 63.
22 | Joined Cases 212 to 217/80, *Amministrazione delle Finanze v Salumi*, Rec. p. 2735, para. 10.
23 | Joined Cases 46/87 and 227/88, *Hoechst v Commission* [1989] ECR 02859, para. 19.
24 | Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 91; Case C-550/09 E and F [2010] ECR I-06213, para. 44; Case C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-06677, paras. 38–39.
25 | Joined Cases C-174/98 P and C-189/98 P, *Netherlands and van der Wal v Commission* [2000] ECR I-00001, para. 17.

ity before the law.[26] In defining the rule of law, the CJEU refers to other general clauses, which it has elaborated on in subsequent judgments. However, this framing of the rule of law creates significant uncertainty regarding the precise meaning and content of the principle. The rule of law is *de facto* a 'rhetorical balloon' that can be inflated ever further and made almost unlimited.[27]

The current criteria defining the scope of the rule of law as developed by the CJEU have been adopted by the European Commission,[28] and have subsequently permeated into secondary law. The 2020 Regulation on the General Regime of Conditionality for the Protection of the Union's budget[29] is the first legally binding EU act to introduce a legal definition of the rule of law. Article 2(a) of the regulation defines the rule of law using criteria derived from CJEU case law and includes:

a) The principle of legality, which requires a transparent, accountable, democratic and pluralistic law-making process;
b) The principle of legal certainty;
c) The prohibition of arbitrariness in executive actions;
d) The principle of effective judicial protection, including access to justice, provided by independent and impartial courts, particularly in relation to fundamental rights;
e) The principle of separation of powers;
f) Non-discrimination and equality before the law.

The regulation stipulates that the rule of law must be understood in a way that takes into account the other values and principles of the Union enshrined in Article 2 of the TEU. Although this definition was created for this piece of legislation only, it is likely to affect all other areas covered by European integration. Indeed, it establishes a mechanism to safeguard the entire EU budget and all financial interests of the Union.

3. Protection of the rule of law by EU law

The positivisation of the rule of law has led the EU to start creating mechanisms to protect this value from infringement by Member States. These mechanisms may have a treaty basis or stem from non-binding acts of the institutions.[30]

26 | Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR I-8301, para. 54.
27 | Varga, 2021, p. 250.
28 | European Commission, Communication from the Commission to the European Parliament and the Council. A New EU framework to Strengthen the Rule of Law, 1COM (2014) 158 final, 1 March 2014.
29 | Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality to protect the Union budget, OJ. 2020, L 433I, p. 1.
30 | Sulyok, 2021.

3.1. Treaty provisions safeguarding the rule of law

The mechanism to protect the rule of law is explained in Article 7 of the TEU. It can be triggered against a state that violates the rule of law (or other EU values listed in Article 2 of the TEU) at the reasoned request of 1/3 of Member States, the European Parliament or the European Commission. While the request can be made by supranational bodies, the procedure itself is strictly triggered and conducted by intergovernmental bodies such as the European Council or the Council. The Council may find that there is a clear risk of a serious breach of Union values by a Member State, or by the European Council with a recognition of a serious and persistent breach of such values. Both decisions are essentially political in nature, although the treaties attach certain legal effects to their adoption. First, the Council may direct a recommendation to the state 'guilty' of the breach. Second, the consequence of the decision of the European Council may be the suspension of the state guilty of an infringement of certain rights under the treaties, in particular the right to vote in the Council. The decision to suspend is taken by the Council.

Since the decisions outlined in Article 7 of the TEU can only be taken with the consent of a majority of Member States (4/5 or unanimity, excluding the state concerned), this gives Member States guarantees that the mechanism would only be triggered as a last resort and would cover the most serious violations of EU values. After all, the decision-making process was entrusted to intergovernmental bodies composed of representatives of states or governments. Above all, it would not be used by EU supranational bodies for political purposes – for example to interfere in the electoral processes of Member States.

A 4/5 majority is needed for the Council to determine that there is a clear risk of a serious breach of the rule of law by a Member State, meaning that currently 22 out of the 27 Member States must agree on such a decision. It is worth noting, that to date, neither the Council nor the European Council has exercised its powers enumerated in Article 7 of the TEU against any Member State.

It became apparent fairly quickly that the mechanism for the protection of the rule of law described in Article 7 of the TEU is not exclusive, and that the European Council is not the only body with the power to determine whether a Member State is in breach of the rule of law. However, the Union legislature cannot, without infringing the treaties, establish a parallel procedure to that provided for in Article 7 of the TEU, pursuing the same objectives and allowing for the adoption of identical measures, while involving different institutions or grounds other than those provided for in that provision. However, the Union legislature may, on the basis of the provisions of the treaties, adopt an act of secondary legislation establishing other procedures relating to the rule of law, provided that the procedures differ in both their aim and subject matter from the procedure provided for in Article 7 of the TEU. In December 2020, the Member States unanimously agreed to establish another Rule of Law mechanism, which was adopted on 16 December 2020 in the form of a regulation on a general system of conditionality to protect the Union budget.[31] The legality of this mechanism was confirmed by the CJEU in two rulings[32] and shortly thereafter the mechanism was triggered for the first time against Hungary.

31 | European Parliament and Council Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L433I/1.

32 | Case C-156/21, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union,* ECLI:EU:C:2022:98.

Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), complaints before the CJEU are also a treaty tool for the protection of the rule of law. This procedure can be initiated by the European Commission against any Member State believed to be in breach of an obligation under the treaties. The European Commission has initiated proceedings under this article on several occasions, against both Hungary and Poland.[33]

3.2. Extra-treaty mechanisms to safeguard the rule of law

Initially, it seemed that Article 7 of the TEU would be the only mechanism to discipline states found to be violating EU values. Following the entry into force of the 2007 Lisbon Treaty, supranational bodies decided to expand their field of activity and build their own mechanisms to protect EU values, including above all, the rule of law.

The European Commission was the first to develop and implement its own mechanism. From mid-2013 to early 2014, the European Commission held two thematic debates dedicated to the development of a new tool to prevent violations of the rule of law.[34] These debates served as the rationale for building a new mechanism to protect the rule of law, which was placed entirely in the hands of the Commission. In March 2014. The European Commission published A New EU Framework for Strengthening the Rule of Law,[35] in which it sets out its understanding of the rule of law and proposed a three-stage mechanism that was intended to prevent the occurrence or escalation of systemic threats to the rule of law and to seek solutions to such situations.[36] This mechanism does not, however, presuppose the participation of EU intergovernmental bodies and is conducted entirely within the European Commission itself. The European Commission became the only body with the power to initiate the procedure and determine how it should be applied. In the European Commission's view, the rationale for its exclusive competence to initiate a procedure and determine its course lay in its power to initiate a procedure under Article 7 of the TEU. The new mechanism is intended to complement Article 7 of the TEU and prevent the need to resort to its tools.

According to the EC, the mechanism will only apply if Member States adopt measures or tolerate situations that may have a negative systematic impact on the integrity, stability or proper functioning of institutions and protection mechanisms established at national level to ensure compliance with the rule of law. However, isolated breaches of fundamental rights or miscarriages of justice will not trigger the application of the new EU rule of law framework.

Interestingly, the mechanism described by the European Commission in the 2014 communication has no grounding in the EU treaties and goes against the principle of conferral of EU competence. It can, however, lead to recommendations being made to a Member State and – in the event of non-implementation or implementation not in line with the European Commission's proposals – to sanctions being imposed on the state

33 | Bence, 2021, p. 23.
34 | Coman, 2022, p. 114.
35 | European Commission, Communication from the Commission to the European Parliament and the Council. A new EU framework to strengthen the rule of law, 11 March 2014, COM (2014) 158 final.
36 | Sulyok, 2021.

deemed to have breached the rule of law. In May 2014, the Council Legal Service concluded that the mechanism described in the 2014 communication was contrary to the principle of conferral expressed in Article 5 of the TEU, and that the only mechanism for the protection of EU values was that provided for in Article 7 of the TEU.[37]

According to the Legal Service of the Council of the EU, Article 2 of the TEU does not confer substantive competence on the EU, meaning that 'an infringement of the values of the Union, including the rule of law, may be invoked against a Member State only if it acts in an area in which the Union has competence under specific provisions of the treaty establishing competence'.[38] The Council Legal Service proposed that Member States agree on a system of review allowing for EC involvement. Such a review mechanism could be established in an intergovernmental agreement aimed at complementing EU law and ensuring respect for the values of the Union without conferring on the Union any competences not provided for in the treaties.[39]

In response to the Commission's actions, the Council developed its own mechanism to protect the rule of law.[40] This mechanism was developed based on a dialogue between all Member States in the Council and aims to promote and protect the rule of law. The dialogue is based on the principles of objectivity, non-discrimination and equal treatment of all Member States and is conducted impartially, based on evidence. According to the Council, this mechanism respects the principle of conferred powers and ensures regard for the national identities of Member States inherent in their basic political and constitutional structures and core state functions, including territorial integrity, and maintenance of law and order and guarantees of national security. The dialogue takes place once a year in as part of the General Affairs Council.

4. Concepts of a non-EU 'rule of law supervisor'

As can be seen from the brief review above, the EU has several different mechanisms at its disposal to protect the rule of law. These mechanisms have varying legal bases, nature and legal effects. Undoubtedly, the mechanisms that operate on the basis of 'soft' EU acts should be considered the least effective. Nevertheless, the implementation of the mechanism described in the 2014 communication shows that it pre-empts the European Commission's application to the CJEU with a complaint under Article 258 of the TFEU. A CJEU decision issued on this basis, particularly if a Member State fails to implement it, has very significant financial consequences for that state.

In 2020, the European Commission acquired a second very important leverage tool against Member States alleged to have committed a breach of the rule of law: the Regulation on a General Regime of Conditionality for the Protection of the Union Budget. Thus,

37 | Opinion of the Legal Service of the Council of the EU, Communication from the Commission on a new EU framework for strengthening the rule of law. Compliance with the Treaties, 27 May 2014 [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0158 (Accessed: 6 August 2024).

38 | Ibid, p. 5.

39 | Ibid, para. 27.

40 | Conclusions of the Council of the European Union and the Member States, meeting within the Council, on ensuring respect for the rule of law (17014/14).

under the current legal framework, the supranational EU institutions have acquired effective tools to compel Member States to implement the rule of law arising from the extensive jurisprudence of the CJEU. Despite this, the doctrine of European law continues to highlight alleged threats to the rule of law, which are often used to justify the creation of further mechanisms aimed at safeguarding the values enshrined in Article 2 of the TEU.[41] Criticism of the rule of law in the Member States has led to proposals for establishing a new body tasked with monitoring the state of implementation of rule of law by Member States.

One of the first proponents of establishing a rule of law supervisory body was the European Parliament. In 2013, it called for the regular assessment of Member States regarding their continued adherence to the Union's fundamental values, including the rule of law. The assessment would avoid any double standards and would be based on a commonly accepted understanding of European constitutional and legal standards.[42] The European Parliament also called on the EU and its Member States to create a new mechanism to ensure that all Member States respect the common values referred to in Article 2 of the TEU and uphold the 'Copenhagen criteria'. This mechanism could take the form of a 'Copenhagen commission' or high-level group, a 'group of wise men' or an evaluation under Article 70 of the TEU, and could take the form of a reform and strengthening of the mandate of the EU Agency for Fundamental Rights and a process of enhanced dialogue between the European Commission, the Council, the European Parliament and the Member States. This mechanism should operate within the EU's institutional structure. The European Parliament has identified the characteristics of such a body, stating that it should be:

a) Independent of political influence,
b) Fast and effective,
c) Cooperative with other international institutions,
d) Regularly monitoring respect for fundamental rights, democracy and the rule of law across all Member States, while respecting national constitutional traditions,
e) Conducting inspections uniformly across all Member States to avoid the risk of double standards.

The main task of such a body would be to alert the EU at an early stage to any risk of a breach of the values referred to in Article 2 of the TEU. The new body would also have the power to make recommendations to EU institutions and Member States on how to respond to any undermining of the values referred to in Article 2 of the TEU and to take corrective action.

The idea of the European Parliament was quickly taken up in the doctrine of European law, in 2017, Jan-Werner Müller proposed the creation of a new institution to address the EU's democratic protection deficit, tentatively naming it the 'Copenhagen Commission'.[43] Müller's idea was to create a body within the EU structure tasked with overseeing

41 | Magen and Pech, 2018.
42 | 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)), OJ C 75, 26.2.2016, pp. 52–78.
43 | Müller, 2017.

democracy and the rule of law, modelled after the Venice Commission of the Council of Europe.

A distinctive feature of both concepts was that the new rule of law monitoring body would be part of the EU's institutional structure. However, in 2024, a new proposal emerged to create a Rule of Law Commission through a multilateral international treaty, which would be located outside the EU's institutional structure.[44] This proposal is therefore broader than the EU itself and could involve non-EU countries, including EU candidate countries and so-called 'politically willing governments' supportive of tougher rule of law sanctions.

The Rule of Law Commission would be composed of non-partisan, independent and ideologically diverse legal experts and diplomats who would develop policy proposals for the promotion of democratic values. It would act upon requests from national governments or other unspecified actors.[45]

The Rule of Law Commission would have the authority to identify persistent deviations from democratic values in specific countries and make diplomatic and economic recommendations. The implementation of these recommendations would be mandatory for European governments (i.e. members of the so-called penal coalition) that have signed an international treaty.[46]

The tasks of the new body would be as follows:

1) Identify and analyse the links between the objectives of the rule of law and EU values;
2) Identify and examine systemic, long-standing rule of law problems in a given country;
3) Develop economic and diplomatic responses (specifically, penalties and sanctions) for national governments of countries failing to comply with the multilateral treaty;
4) Publish the content of criminal reactions in the form.[47]

The Rule of Law Commission would be established outside the EU structures and its costs would be borne by the governments participating in the new mechanism.[48]

5. Critical assessment of the new non-EU 'legal state regulator'

Is a new mechanism implemented by a non-EU 'rule of law supervisory body' (called the Rule of Law Commission in the article for the sake of simplicity) necessary and feasible in a Europe that continues to expand the frontiers of integration? An assessment of the establishment of the Rule of Law Commission should start with the observation that states, possessing an essentially unlimited treaty-making capacity, can conclude a treaty

44 | Barett, 2024.
45 | Ibid.
46 | Ibid.
47 | Ibid.
48 | Ibid.

on any issue.[49] However, while it is easy to conclude a treaty and on its basis to establish a body to uphold an undefined idea such as the rule of law, it is more difficult to create a framework for the operation of this body in which states parties retain control of the international obligations arising from such a treaty and shaped through the Rule of Law Commission.

For a treaty to be enforceable in good faith, in accordance with the principle of *pacta sunt servanda*, it should contain obligations that are foreseeable to the states parties. This is particularly relevant for treaties that, like the treaty establishing a Rule of Law Commission, impose obligations primarily concerning domestic law. In such cases, a state party is required to align its domestic law with the treaty's obligations at the tie of ratification. If it fails to do so, it is in breach of such a treaty.[50]

However, states that binding themselves to a treaty establishing a Rule of Law Commission would, in effect be giving a 'blank cheque' to such a body – ceding unlimited power to decide both the substantive meaning of the rule of law and the consequences imposed on a state 'guilty' of violating it. This would thus deprive the state of the ability to decide on its obligations under the treaty and would cease to be its host. As a result, state-parties would be at risk of remaining in a state of permanent uncertainty as to whether they were implementing such a treaty in good faith.

The concept of the rule of law, while providing a guarantee against unrestricted and unwarranted action by state organs, remains undefined.[51] As discussed in Chapter 2, there is, in principle, only a general agreement on its meaning. Furthermore, the precise content of the principles and norms derived from the rule of law remain unclear.

To a large extent, these principles are derived through the jurisprudence of courts and various international bodies and are therefore unknown to states at the time a state binds itself to the treaty establishing the Rule of Law Commission. These principles may also vary depending on the constitutional system of each state. The idea of the rule of law applies to every area of law and, in principle, to every legally regulated aspect of social life. The Rule of Law Commission would be granted *de facto* super-competence, whereby it would have an unlimited influence over all areas of national law. Thus, the legislative competence of the state would be significantly reduced. By becoming a party to the treaty establishing the Rule of Law Commission, a state would cede to an international body one of its fundamental attributes, namely the competence to define the principles governing the foundations of its political, economic, social or cultural system. The constitutional orders of many European states, including Poland and Hungary, do not allow for the transfer to an international body of the competence to decide the constitutional identity of the state.[52]

Why would states cede such competence to an international body? The rule of law defines the rules for the creation and application of law within a given community, which is generally constituted by states or – in exceptional cases – by regional international organisations. In the case of states, the rule of law is closely linked to the democratic system and guarantee for individual rights. International organisations adopt the rule of law either as an objective of their activities (e.g. the Council of Europe) or, as in the case of

49 | Frankowska, 2007, p. 53.
50 | Kolb, 2023, p. 171.
51 | Lautenbach, 2014, p. 3.
52 | Wojtyczek, 2007, p. 284.

the EU, as a value that permeates all the legislation it produces, establishing a high level of trust between Member States.[53] This is accompanied (or at least should be accompanied) by a common definition of the scope of this principle and an interpretation of its content.

Would the Rule of Law Commission be building a community of states? If so, the states recognising the competence of the Rule of Law Commission would be limited to European states only. The development of the rule of law is primarily the domain of European states, however, the emerging understanding of this value in Europe does not go hand in hand with the universal understanding of its development. The Rule of Law Commission would therefore function within the institutional structures protecting 'European' values. It is doubtful whether states from other geographical regions would want to incorporate a European understanding of values into their legal frameworks, especially since the Rule of Law Commission would impose this understanding.

This discussion of the Rule of Law Commission ignores the nature and extent of the consequences imposed on a state deemed 'guilty' of a violation. If the Rule of Law Commission identified deviations from democratic values, it would result in the formulation of a recommendation to the guilty state, which would *de facto* take the form of a criminal sanction. The criminal nature of such a sanction would require, in accordance with the principle of *nullum crimen, nulla poena sine lege,* that the types of criminal sanctions, their nature, duration and the rules for their imposition be precisely defined. Is this requirement fulfilled by indicating that the sanctions would be economic and diplomatic in nature and would be imposed according to the capacities of the Member States'? If criminal sanctions imposed on individuals for the commission of a crime were to be defined in national law on this basis, this would be met with a justified, harsh reaction from all human rights groups. Yet it is being proposed that the Rule of Law Commission be granted undefined power to punish states for committing violations they could not have foreseen.

Two further doubts arise against this background. First, the nature of the Rule of Law Commission's ruling is unclear. As a rule, rulings of an international body bind only the state to which they are addressed and only to the specific case in question. However, such a ruling would indirectly bind all other states parties to the treaty establishing the Rule of Law Commission, as the Commission's view on a given case, once expressed, would be replicated in other cases. This, of course, is nothing new in modern international law, and the European Court of Human Rights issues its rulings on a similar basis.[54] Second, states participating in the treaty establishing the Rule of Law Commission would be obliged to apply sanctions on the 'guilty' state – for example by suspending or breaking diplomatic relations with such a state, or to restricting or terminating economic relations with it. In this context, it would be interesting to see financial penalties that would both compel the 'guilty' state to implement the recommendations of the Rule of Law Commission and deter it from similar violations in the future, and also deter other states from emulating the 'guilty' state. Since no state can know in advance exactly what recommendations the Rule of Law Commission will make and how it will assess its 'capabilities', the Commission would enjoy enormous discretionary power.

The new mechanism to combat deviations from democratic values would also operate outside any democratic control. It is intended to be a non-EU body of non-partisan,

53 | Magen and Pech, 2018, p. 245.
54 | Lautenbach, 2014, p. 13.

independent, ideologically diverse legal experts and diplomats'. However, these individuals would not be democratically elected, nor would their selection be influenced by the citizens of the states parties who would be directly affected by the sanctions imposed by the Rule of Law Commission. Thus, the Rule of Law Commission, which is supposed to uphold democracy, would itself lack democratic legitimacy derived from the peoples. Even if its members were nominated by the states parties to the treaty, they should represent values aligned with liberal democracy, given that the Commission is supposed to analyse violations of the rule of law within liberal democratic states. In practice, the requirement for independence and ideological diversity of the Commission's members may turn out to be an empty slogan, and the Commission could be the promoter of only one systemic model.

There is also no provision for any by any democratically elected body, such as national parliaments, to influence the way the Commission is set up, its functioning or the implementation of the criminal sanctions it recommends. Moreover, there are no procedural guarantees for a state subject to evaluation by the Rule of Law Commission, nor any procedure for subjecting recommendations made by the Commission to judicial review, which could be invoked by a state found 'guilty'.

The new rule of law protection mechanism also raises the question of its relation to EU law in both the substantive and institutional spheres. The scope of the Rule of Law Commission's powers may undermine the effectiveness of EU law,[55] by replacing the mechanisms for the protection of the rule of law provided for in EU law, and making them redundant. Since the Rule of Law Commission will be able to analyse legislative activities of states, including those arising from the implementation of EU laws and directly applicable EU norms (e.g. norms contained in regulations), it will therefore assess whether EU Member States, when applying EU law, comply with the treaty on which the Rule of Law Commission is based and with the recommendations issued by that body. Because the Rule of Law Commission is intended to be located outside the institutional structure of the EU, given the scope of the integration processes, its powers will undoubtedly overlap with those reserved for EU institutions, in particular the CJEU.

The CJEU is the only judicial body with the power to finally settle disputes concerning the interpretation and application of EU law, particularly through the preliminary reference procedure provided for in Article 267 of the TFEU.[56] There is no doubt in the jurisprudence of the Union courts that an international agreement providing for the establishment of a judicial body to interpret its provisions and whose decisions would be binding on the Union is in principle compatible with Union law.[57] Indeed, the Union's competence in the field of international relations and its capacity to conclude international agreements inherently include the power to be bound by judgements of a court created or designated by such agreements, in the interpretation and application of their provisions.[58] An international agreement concluded by the Union may affect the competences of the institutions of the Union provided that the basic conditions for preserving the essence of the said competences are fulfilled and that the autonomy of the legal order of the Union

55 | Groussot and Zemskova, 2021, p. 271.
56 | Opinion 1/17, 30 April 2019, ECLI:EU:C:2019:341.
57 | Opinion 2/13, 18 December 2014, EU:C:2014:2454, para. 182.
58 | Ibid.

is not thereby affected.[59] An agreement providing for the creation of a Rule of Law Commission can only be compatible with Union law on condition that the autonomy of the EU legal order is not infringed and that the mechanism of evaluation of the states parties aligns with the constitutional framework. This framework consists of: the values set out in Article 2 of the TEU, the general principles of Union law, the provisions of the EU and TFEU treaties, which include, inter alia, principles for the allocation and division of competences, rules for the functioning of the Union's institutions and judicial system, and the fundamental principles applicable in specific areas, structured to contribute to the integration process.[60] The process of the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms has shown the legal problems that can arise when subjecting EU law to the jurisprudence of other international bodies, even one as well-established in Europe as the European Court of Human Rights.

6. Completion

The creation of a new authority to uphold the rule of law should be preceded by a thorough and comprehensive analysis of both the legitimacy of creating a new authority, and the legality of its creation from the perspective of EU law. The mechanisms currently in place in the EU to protect the rule of law are sufficient to prevent systemic and serious violations of this value in Member States. In a situation where international bodies are unable to define clearly the content of the rule of law and even express the view that it is impossible to fully implement this principle, states should avoid being bound by an international agreement which they will know in advance they will be unable to implement. Instead of creating a new body, there should be a calm and substantive debate within the EU itself or in the Council of Europe on the content of the rule of law, mutual respect for constitutional traditions and how to implement this principle between European states. As the EU aims to deepen mutual trust in the judiciaries of the Member States, such a discussion is essential.

59 | Opinion 1/00, 18 April 2002, EU:C:2002:231, paras. 20, 21.
60 | Opinion 2/13, 18 December 2014, EU:C:2014:2454, para. 158.

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