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We'll Cross that Bridge When We Come to It: The rule of law as an essentially contested concept and the European Commission's understanding of it

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We'll Cross that Bridge When We Come to It

The rule of law as an essentially contested concept and the European
Commission's understanding of it

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1. Introduction

“The Rule of Law is a necessary condition for effective cooperation between Member States. This is not just about the situation in Poland, this is about the EU as a whole, about who we are. An issue with the rule of law in one Member State is of concern to all Member States.” (Timmermans 2017a). With this statement, Frans Timmermans, the Executive Vice-President of the European Commission (hereinafter Commission), announced additional measures the Commission was going to take as a result of alleged breaches of one of the core values of the European Union (EU) by Poland: the rule of law. These measures included a 4th Rule of Law Recommendation, an invocation on Article 7(1) by sending a reasoned proposal to the Council to determine that there is a clear risk of a serious breach of the EU values, and referring Poland to the Court of Justice of the European Union (CJEU), taking a further step in the infringement procedure against Poland regarding the Ordinary Courts Organisation (Ibid.; Pech 2021, 8). Poland was the first member state ever on which an invocation of Article 7(1) TEU had been initiated (Pech 2021).

Some of the actions that the Commission labelled as breaches of the rule of law were mostly based on the decreasing level of independence of the Polish judicial system. For example, the Ordinary Courts Organisation Law included that the Polish Minister of Justice was allowed to transfer judges to a higher criminal court and could terminate this transfer whenever he found that this was needed without judicial review of the decision (European Commission 2019). In another law, the Supreme Court Legislation allowed the Polish government to lower the retirement age of judges, which led to a large part of the Polish Supreme Court judges to be forced into retirement (Pech 2021, 8). The National Council of the Judiciary, in which politicians from the ruling party are seated, gives recommendations to the President of Poland about who to appoint as new judges for the Supreme Court (Case C-824/18 2021). This means that the Supreme Court is not independent but dominated by judges chosen by the ruling party. For the very reason that the rule of law is one of the core values of the EU, the Commission has made efforts to stop the Polish government from further deteriorating the independence of its judicial system.

However, the steps taken by the EU have not been effective enough to stop Poland from continuing to deteriorate the independence of its judicial system (Łacny 2021). The activation of the mechanisms enshrined in Article 7 to deprive member states that breach EU values from,

for example, voting rights in the Council of the member states' representative, is based on unanimity (TEU 2012, Art. 7). Article 7 does not take into account the possibility of multiple breaching member states that refrain from voting against one another in the Council (Closa 2021). This has been the case with Poland and Hungary (Ibid.). As Article 7 is insufficient in addressing the rule of law breaches by Poland, the Commission has set up the Rule of Law Framework, which provides for official dialogue between the Commission and the breaching member states with the aim to decrease the risk of serious breaches of the rule of law (European Commission n.d.a).

Despite of the activation of the Article 7 procedure, the Rule of Law Framework of the Commission, and also infringement procedures, the rule of law breaches are still an ongoing problem, by some scholars called the EU rule of law crisis (Pech 2021, 17; Jakab and Kirchmair 2020). Even the Commission itself is divided on the solution to this crisis, as can be seen with the approval of the disbursement of funds to Poland. On the first of June this year, Poland's national plan was accepted by the Commission which is crucial for Poland in receiving €35.4 billion coming from the Recovery and Resilience Fund (European Commission n.d.b). Even though Poland's recovery plan has been approved by the Commission and has been given positive feedback regarding the milestones set, there is some criticism whether these milestones will be sufficient enough to protect the EU budget. Not all European commissioners (hereinafter commissioners) voted in favour of the disbursement of the Recovery and Resilience Fund to Poland. Two Executive Vice-Presidents, Margrethe Vestager and Frans Timmermans, voted against the approval of Poland's Recovery Plan (Bayer 2022). Timmermans does not believe the milestones set are in line with the CJEU's rulings about the breaches committed by Poland (Rankin 2022). Vice-President Věra Jourová, leading the Commission's work on Values and Transparency, Commissioner for Justice Didier Reynders, and Ylva Johansson responsible for Home Affairs abstained from voting and sent letters of concern (Bayer 2022; Hanke Vela and Lynch 2022). There is thus dividedness within the Commission concerning the approval of the Polish national plan due to Poland's rule of law breaches.

The core values of the EU are enshrined in the Article 2 of the Treaty of the European Union (TEU 2012, Art. 2). However, some of the values, such as the rule of law, democracy, and freedom, fall under "essentially contested concepts." (Gallie 1956; Collier et al. 2006; Traisbach 2021; Maliszweska-Nienartowicz and Kleinowski 2021; Möller 2018). These are

“concepts the proper use of which inevitably involved endless disputes about their proper uses on the part of their users.” (Gallie 1956, 169). Essentially contested concepts thus do not carry a universal meaning, and their users view their proper use differently, depending on the user’s background, view, and context in which they are used (Gallie 1956). As the rule of law is one of these essentially contested concepts (Collier et al. 2006; Traisbach 2021; Maliszweska-Nienartowicz and Kleinowski 2021; Möller 2018), there does not exist a universal definition of the rule of law. Therefore, the definition of the rule of law has been researched a lot over the past decades (Dworkin 1985; Collier et al. 2006; Harbo 2020; Keating 1987; Möller 2018; Raz 1979; Tamanaha 2004). However, what misses is how the Commission creates meaning and to what extent the contestation inherent to defining the rule of law concept is reflected in the Commission’s response to rule of law breaches.

This research argues that the dividedness within the Commission concerning the approval of the Polish national plan and the insufficient actions of the EU in solving the rule of law crisis have to do with the contested nature of the rule of law. However, contestation can also give room to institutions to justify actions (Gallie 1956). The aim of this research is to better understand how meaning and knowledge fluctuates and is constructed in a supranational institution. Therefore, the following question will be answered in this research: How has the Commission attached meaning to the rule of law since its first activation of the Rule of Law Framework in 2016 as regards the Polish rule of law breaches?

This question will be answered by first establishing what has already been written about the contested nature of the rule of law, so to uncover the different ways of conceptualizing the rule of law in general and in a supranational structure. Then, the Commission’s contributions to debates in the European Parliament (EP) are analysed. This is done by conducting a thematic analysis through a constructivist lens. Five themes and one overarching theme were created to grasp the meaning of the rule of law by the Commission and how it justifies its actions based on this meaning.

2. Methodology

This research aims to examine the complex meaning of the rule of law within the Commission in the relation to the rule of law breaches by Poland. An interdisciplinary approach, combining politics, law, and philosophy is taken. This research relies on constructivism to grasp the evolution of the meaning of the rule of law as interpreted by the Commission. Following van der Walt, “constructivism is based on the assumption that reality and the human behaviour therein is characterised by continuous fluctuations, adjustments and transformations operating simultaneously at multiple sites and that they offer a subtle depiction of how facts emerged and “truths” are shaped.” (van der Walt 2020, 61). Thus, constructivism lends itself well to better understand how “truths” and knowledge are shaped, and in this research, the “truth” concerning the rule of law and the meaning attached to it by the Commission are analysed. This research thus relies on the assumption that knowledge and truths are constructed, and aims to examine in what ways the Commission constructs truths and attaches meaning to concept of the rule of law.

The rule of law, as will be seen in the literature review, is a contested concept, and does not have the same meaning in every context (Collier et al. 2006; Traisbach 2021; Maliszweska-Nienartowicz and Kleinowski 2021; Möller 2018). Concerning the conceptualization of the rule of law by the Commission and what consequences this has for the Commission’s handling of the rule of law breaches by Poland, constructivism is a helpful approach, as it is, according to Steinfeld, very capable of assessing such a contested concept “in all its socio-political and legal complexity.” (Steinfeld 2022, 37). Steinfeld describes the use of social constructivism in relation to EU citizenship due to the contested nature of EU citizenship. The same contested nature applies to defining the rule of law as a concept in the EU context, as will be seen in the literature review.

2.1 Methods

Poland is the first country that was faced with the activation of the Rule of Law Framework by the Commission. Poland was also the first country that was issued with the activation of article 7(1) TEU procedure (Pech et al. 2021). Poland thus makes for an interesting case study, as it shows how the Commission needs to define what it means when a member state as big as Poland has breached the rule of law after accession, and what it ought to do. Especially in the

view of the economic downturn as a result of the COVID19 pandemic in combination with the consequences of the Ukraine war at the external border of the EU. Poland has received more than 1.5 million Ukrainian refugees, which is more than every other member state (UNCHR 2022). As already stated, Poland is also a country on which the Commission was divided when deciding upon approval of its National Recovery Plan (Rankin 2022; Bayer 2022; Hanke Vela and Lynch 2022). Researching the Commission's views on the rule of law breaches tells a lot about how the Commission attaches meaning to an essentially contested concept in an ever-changing world context and how this contestation influences the Commission's responses.

The reason for choosing for statements of the Commission in EP debates as the dataset is that the representatives of the Commission can be called upon by Members of the European Parliament (MEPs) to answer questions or to clarify and justify their actions (European Parliament n.d.). In general, the Commission's representatives that join the debate first make a general contribution and then, after the MEPs have expressed their standpoints and asked questions, the commissioners try to answer these questions. Of course, the Commission does not have an answer for every question or might feel the need to avoid some questions. In addition, it is nearly impossible to prepare an answer for every question. Still, the contributions of the Commission in these debates are more spontaneous than in official speeches. When critical questions are answered, the Commission's answers reflect the shared meaning among the commissioners of the rule of law, which makes it a more interesting dataset than that of official speeches. Official speeches may illustrate the approach of the Commission better, however, this research does not aim to examine the approach of the Commission *per se*, it aims to understand the meaning the Commission attaches to the rule of law, which exposes the means the Commission uses to construct reality. This does not necessarily need to be intentionally, and official speeches and documents of the Commission are very thought through. Therefore, also to take into account the Commission's underlying assumptions and by which the Commission constructs reality, the statements in the EP debates are more useful. On top of this, there do not exist extensive reports on the plenary meetings and debates within the Commission which are open to the public, merely short summaries. For these reasons, the contributions of the Commission in the parliamentary debates are chosen as the primary data to analyse.

The written reports of the EP debates are open to the public and accessible through the official website of the EP: <https://www.europarl.europa.eu/plenary/en/debates-video.html>. The time period relevant for this research was selected in the search bar of the EP's website and falls into two parliamentary terms: 2014-2019 and 2019-2024. 2016 was the year in which the Commission activated the Rule of Law Framework against Poland for the first time (Ibid., 2). Even though concerns about breaches of the rule of law were present before, 2016 was the first time the Commission confronted Poland through this framework and subsequently triggered the mechanisms enshrined in Article 7(1) TEU (Pech 2021). Therefore, the dataset consists of debates concerning the rule of law in general and in relation to Poland from the first of January 2016 and the seventh of June 2022, which was the last relevant debate at the time of writing., the Commission speaks as one in the plenary sittings of the EP. This means that for this research, it is irrelevant which commissioner speaks, as the commissioner does not represent his/her own opinion, but the standpoint of the Commission as a whole (European Parliament n.d.).

The words searched for are "rule of law" in the title, and the relevant meetings were selected. These are debates (thus excluding votes) where the rule of law and/or the rule of law breaches by Poland are the main theme which the debates revolve around. This resulted in six relevant hits for the first parliamentary term, and sixteen relevant hits for the second. Thus, a total of 22 debates were analysed. The contributions of the representatives of the Commission were extracted with relevant background information and the contributions of the MEPs kept as well. This is to prevent that the context of the data extracts get lost. Some commissioners occasionally speak in French, Dutch, or German. These are mostly limited to a few sentences and are translated on basis on the researcher's knowledge of these languages, of which Dutch is the mother language, French a B2 and German a B1. Thus, in some cases, there is a small language barrier, which is why the translated extracts are also included in their original text in the analysis.

In order to analyse the data in an orderly fashion, the six steps of doing a reflexive thematic analysis based on Braun and Clarke were followed (Braun and Clarke 2006) (see table 1). Five final themes were created: the importance of the rule of law, the universality of the rule of law, a common identity, and the budget, with one overarching theme: a culture of the rule of law. These are based on the dataset, the reviewed literature, and prior knowledge and experiences of the writer of this research (Braun and Clarke 2021; Braun and Clark 2006; Braun and Clarke

2021a). Adopting the reflexive approach towards thematic analysis means that, although the literature review helps to comprehend the topic, the coding in this analysis is not based on a pre-set codebook (Ibid.). Instead, the codes are reflexively made during the analysis of the data. It also means that it is important to state upfront the theory and paradigm this research is based on, which is, as already noted above, constructivism. By applying a reflexive thematic analysis to analyse data also means to acknowledge how this paradigm influences the way in which the researcher interprets data, resulting in an analysis in which the researcher's own reflexive influence plays a big part, and in no way is the reflection of the reality, which is socially constructed and depends upon one's unique (historical) experiences, worldviews and social contexts (Braun and Clarke 2006; Braun and Clarke 2021; Byrne 2022). Reflexive thematic analysis lends itself well for this particular research, as it helps to grasp the subjectivity of concept of the rule of law because of it being a contested concept, and how meaning is fluent (Braun and Clarke 2006; Braun and Clarke 2021; Braun and Clarke 2021a). Constructivism as applied to institutions by scholars will be further elaborated on in the literature review section.

Table 1: Steps to a reflexive thematic analysis (Braun and Clarke 2006, 87)

Phase	Description of the process
1. Familiarizing yourself with your data:	Transcribing data (if necessary), reading and re-reading the data, noting down initial ideas.
2. Generating initial codes:	Coding interesting features of the data in a systematic fashion across the entire data set, collating data relevant to each code.
3. Searching for themes:	Collating codes into potential themes, gathering all data relevant to each potential theme.
4. Reviewing themes:	Checking if the themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2), generating a thematic 'map' of the analysis.
5. Defining and naming themes:	Ongoing analysis to refine the specifics of each theme, and the overall story the analysis tells, generating clear definitions and names for each theme.
6. Producing the report:	The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts, relating back of the analysis to the research question and literature, producing a scholarly report of the analysis.

3. Literature Review

3.1 The rule of law as an essentially contested concept

There is no government leader who wholly rejects the concept of the rule of law, the rule of law is almost universally endorsed (Tamanaha 2004). However, a clear universal definition of the rule of law is absent (Ibid.). There exists a lot of literature on how to define the rule of law, mainly incorporated in legal and political theories. Although coming different disciplines,

scholars generally agree that the rule of law as a concept is ‘‘essentially contested.’’ (Gallie 1956; Collier et al. 2006; Traisbach 2021; Maliszweska-Nienartowicz and Kleinowski 2021; Möller 2018). This means that different actors define the rule of law differently, based on their experiences, views, and backgrounds (Galli 1956).

Therefore, in the following sections, the reviewed literature sheds some light on how established scholars view the rule of law. Then, the literature written about how the European institutions define the rule of law is elaborated and what role the contested nature of the concept plays in this definition.

3.2 Including and excluding elements as part of the rule of law

Scholars that have written on the conceptualization of the rule of law generally rely, as a minimum, on Joseph Raz’s definition (Raz 1979; Möller 2018; Tamanaha 2004; Bedner 2018). Raz identifies the following eight guiding principles: all laws and law-making should be prospective, open and clear, laws should be relatively stable, there must be independence of the judiciary with open and fair hearing and absence of bias, courts should have review power, the courts should be easily accessible, and the police should not be allowed to pervert the law (Raz 1979). From here, different scholars add or remove elements to their definition. These definitions build upon Raz’s thin formal definition and go further than merely the role of the government, attaching political and/or constitutional concepts to the rule of law (Buyse et al 2021, 2; Tamanaha 2004, 91). For example, Tamanaha’s formal definition of the rule of law includes democracy (Tamanaha 2004), and already hints towards what some other scholars would call a thick or substantive definition (Raz 1979; Bedner 2018). This is in contrast with Raz, who argues that the rule of law has nothing to do with equality or justice and should not be linked to democracy. A non-democratic authoritarian state for example may ‘‘conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies’’ (Raz 1979, 211). Therefore, Raz argues that going beyond his thin and formal definition of the rule of law obstructs the function of the rule of law (Raz 1979).

Jörgen Möller agrees with Buyse et al. and Raz and reduces the rule of law definition to formal legality. Formal legality corresponds with the thin formal version of the rule of law described by Raz (Raz 1979) and is seen by Möller as part of ‘‘a set of defining properties necessary for the concept to make sense.’’ (Möller 2018, 27). He views Raz’s definition of the rule of law as formal legality relatively uncontested and therefore as most useful to be analysed by scholars

conducting research on the rule of law (Möller 2018). By deconstructing the contested concept one can identify a concept that is less contested as the core of analysis (Ibid., 26). He argues further that if one would include more substantive concepts as part of the rule of law, it is almost impossible to identify a causal relationship between the rule of law and these substantive concepts (Ibid., 24). This is also why Buyse et al. argue that Raz's definition of the rule of law is more helpful when the rule of law is applied to a framework of law (Buyse et al. 2021). Möller thus embraces the thin version of the rule of law and suggests researching the concept by drawing upon formal legality (Ibid.).

Bedner explains that even though a lot of legal theorists promote the thin version of the rule of law, they end up using a thicker version by incorporating individual rights and liberties (Bedner 2018, 44). Bedner provides its reader with more arguments in favour of using a thicker version than Raz's and Möller's version. He argues that there is no harm in the fact that the rule of law is contested, and that using a thick or thin version depends on the function it serves and what kind of aim the research has when using the concept of the rule of law. There is no universal concept of the rule of law, especially because the classical definition of the rule of law may not apply or do right for the ever-changing modern world and states in which we now live. Because promoters of using Raz's classic version mostly rely on individual rights and liberties instead of terms that are more contested such as democracy and social welfare, Bedner observes that even those who claim to use this version, end up using thicker versions (Bedner 2018). This is for the reason that individual rights do not belong to Raz's definition. Raz argues that attaching concepts to the rule of law that are based on individual rights have more to do with the ideology dominant in Western liberal states than with the rule of law itself (Raz 1979). Thus, individual rights are not to be attached to the rule of law according to Raz (Ibid.), however, are included by some researchers in more recent years without them realizing it (Bedner 2018).

Thus, what can be established is that the rule of law is contested in nature. Raz's version of the rule of law is used by researchers to build upon and expand the definition of the rule of law to suit research about the current world. There is no universal concept of the rule of law, especially because the classical definition of the rule of law by Raz may not apply or do right for today's modern and changing world. How do the EU institutions define the rule of law according to the reviewed literature in the face of the breaches by Poland? This question will be answered in the following section of the literature review.

3.3 The rule of law defined by the EU institutions

The rule of law as defined by the EU institutions is researched by multiple authors (Maliszweska-Nienartowicz and Kleinowski 2021; Kochenov 2016). By taking a multidimensional approach, Maliszweska-Nienartowicz and Kleinowski embrace the contested notion of the rule of law as an interplay between the legal and political realm and consider the EU as where interaction between these two fields of study is very visible (Maliszweska-Nienartowicz and Kleinowski 2021). They argue that although the meaning of the rule of law in the different institutions of the EU went through a different evolution, ultimately the institutions attach the same elements to the rule of law. These include legal certainty, access to justice before an independent and impartial court, and respect for human rights (Ibid.). Some institutions emphasize one aspect of the rule of law more than the other, such as the CJEU, which has put more significance in its legal discourse on effective judicial protection and judicial review (Ibid.). Maliszweska-Nienartowicz and Kleinowski believe that due to the breaches of the rule of law by Poland and Hungary, the Commission has put more emphasis on the separation of powers and judicial independence.

Additionally, Maliszweska-Nienartowicz and Kleinowski view the CJEU as the main interpreter of the rule of law, however, find that the CJEU could have been more extensive in defining the rule of law. Because of the lack of extensive definition of the CJEU, the Commission has based its reasoning towards what constitutes a breach of the rule of law on the standards conducted by the Council of Europe. The Council of Europe declared the importance of the trinity of democracy, rule of law, and fundamental rights, and views the rule of law in a way that reinforces the other two concepts. By legitimizing its actions on the standards of the Council of Europe, a European Rule of Law emerges, which, according to Maliszweska-Nienartowicz and Kleinowski, misconstrues concepts and values such as human rights and the notion of democracy as being the same. Although these concepts are interrelated, Maliszweska-Nienartowicz & Kleinowski do not see them as the same and argue that the EU institutions neither should (Ibid.)

3.4 The rule of law as a means to an end

Traisbach unfolds what relying on essentially contested concepts can lead to in a supranational or international structure (Traisbach 2021). He views the rule of law, judicial authority, and

legitimacy in a conceptual triangular, all three essentially contested. The contested nature leads to conflict and discussion because of the different understanding amongst actors of its definition. By drawing upon constructivism, he believes the discussion and conflict and the resulting arguments about the rule of law as a result of the contested nature are a function of the rule of law which can be used by actors to justify authority and power (Ibid.). The multiple layers that get added or get lost when defining what the rule of law entails by authorities or institutions can be used to consolidate and justify power of these institutions. He warns that one needs to caution against “discourses about the legitimacy of global (judicial) governance and the international rule of law that ultimately are more about legitimation than about legitimacy and more about new ways of ruling than the rule of law.” (Ibid., 87). Thus, Traisbach, taking a constructivist approach to institutions, argues that discussion and contestation about the rule of law, judicial authority, and legitimacy can provide for legitimatisation practices to consolidate power (Traisbach 2021).

Traisbach's argument is in line with Harbo's view on how political and social discourses can be perverted as legal ones. Harbo bases his arguments upon Raz's rejection of the substantive approach to the rule of law (Raz 1979; Harbo 2020). By approaching the rule of law as something that is determined by social values and interwoven in political and social structures, debates about the rule of law are always dependent upon social values, which would then lead to debates about social welfare and values instead of debates about legal considerations (Ibid.). This leads the rule of law to be the basis on which disputes about social welfare rely, and social welfare is part of ideological assumptions, not of the rule of law. Therefore, Harbo has named the rule of law that specifically applies to the EU's definition of the rule of law the “Rule of Political Liberalism” (Harbo 2020, 250). With this new notion of the rule of law in the EU, he draws attention towards the ideological bias of the political liberal left dominant in the EU and the majority of the EU member states, and how the EU's definition of the rule of law has not much to do with what he sees as the rule of law. He sees the liberal leftist bias of the EU as one of the most important reasons for the clash between the EU and Poland. He argues that the EU, by arguing the importance of mechanisms which it sees as inherent to the rule of law, such as judicial review, wants to curtail the practices of the democratically elected Polish government. This, according to Harbo, has negative consequences for democracy, as the EU condemns the Polish government, which was democratically elected, merely because it does not adhere to the EU's rule of political liberalism (Harbo 2020). Here, the conceptualization of the rule of law is crucial for the justification and legitimation of the EU's actions regarding the rule of law

breaches by Poland (Harbo 2020). Harbo thus argues that by using the conceptualization of the rule of law, based on its bias, the EU conceals its actions against Poland as legal instruments, while it is politics and based on ideological assumptions (Ibid.).

Opposed to Harbo's argument that the rule of law in the EU merely serves the liberal left, Niedmann Alvarez takes a philosophical perspective and shows us, with her interpretation of the timeline of the rule of law, that the notion of the rule of law in the liberal Western world after the Second World War served the political right as much as the political left (Niedmann Alvarez 2022, 1507). She argues that the traumas left by the Second World War have fuelled a global turn to an emphasis on judicial review. Niedmann Alvarez does agree with Harbo that the initial ideals on which the rule of law is based have transformed. She goes further in that she believes that the initial ideals of the rule of law have been diminished "to a point where the principles that inspired them have become unrecognisable." (Niedmann Alvarez 2022, 1514). Thus, the similarity between Niedmann Alvarez' argument and Harbo's view is that they see the rule of law used in discourse in the national and international arena as detached from what they believe the rule of law essentially is, through which discussion about the promotion of ideological beliefs are concealed as discussion about the rule of law.

Niedmann Alvarez calls the rule of law in modern liberal Western countries the Rule of Rights while Harbo calls it the Rule of Political Liberalism (Niedmann Alvarez 2022; Harbo 2020). Both view the contemporary idea of the rule of law as underpinned by ideology, and thus not to be seen as separate from political and social structures. Like Niedmann Alvarez, Harbo also focuses on judicial review as the most important part of the rule of law on which most modern liberal states are based. He argues that going beyond a formal notion of the rule of law means going beyond mere judicial independence and includes judicial review. He blames the EU for defining judicial review as a part of the rule of law which "legitimizes individual rights through judicial activism as a tool to promote this leftist political morality" (Harbo 2020, 295). Niedmann Alvarez agrees that the emphasis on judicial review that has emerged globally leads the judiciary to have too much power as it now "controls over legislative outcomes and control over the actions of the executive power." (Niedmann Alvarez 2022, 1504). Both Niedmann Alvarez and Harbo thus see the focus on judicial review as part of the definition of the rule of law as a problem for democracy, as it eschews the separation of powers.

Both Niedmann Alvarez and Harbo recognize the same problems emerging from the fact that the concept of the rule of law has become an arena for ideological contradictions in which the focus on judicial review has given too much power to the judicial over the democratically elected powers. However, the authors have a different idea about what ought to be done about these problems (Niedmann Alvarez 2022; Harbo 2020). Niedmann emphasizes the need for collectivism to replace the focus on individualism and she argues to “recognize each other as part of a community” and the importance of a communal existence, while Harbo argues for political pluralism and legal pragmatism in the EU (Niedmann Alvarez 2022, 1514; Harbo 2020). Harbo places the problem within the institutions and believes that the solution also lies with the EU institutions. By pointing towards legal pragmatism, he believes the EU should become aware of its ideological bias and “moderate their ideological informed conception of the law, rule of law, individual rights and judicial independence.” (Harbo 2020, 295). Thus, both authors recognize that the rule of law in international organisations is underpinned by ideology, however present different solutions to this problem.

As is seen by this part of the literature review, the practice of (not) adding elements in the context of measures taken by the EU towards its member states can be the result of ideological and political assumptions, going beyond mere legal considerations (Harbo 2020; Niedmann Alvarez 2022). The danger of these ideological assumption is that discussion about the rule of law turns into a discussion about social values disguised as exclusively legal, in order to pursue new ways of ruling instead of pursuing rule of law principles (Ibid.). However, discussion about the rule of law can also serve as a means to justify power. According to Traisbach, this is not something that is harmful whenever contestation around the concept remains to exist, actors need to reconsolidate and keep on justifying their power, through which discussion and the ruling powers keep on being challenged to justify their power (Traisbach 2021). Ultimately, I will rely on Traisbach’s theory that the contested nature of the rule of law has a function. It creates meaning to a contested concept on which legitimacy can be build. What is however missing in the reviewed literature is to what extent and how the Commission creates meaning of the rule of law in the relation to the rule of law breaches.

The aim of this research is to better understand how meaning and knowledge fluctuates and is constructed in a supranational institution. The meaning of a contested concept is dependent upon the layers of meaning that are removed and/or added and can change dependent on context and time (Traisbach 2021). In the following section, through a thematic analysis, themes are

created based upon the Commission's contribution in the EP debates concerning the rule of law and the rule of law breaches by Poland. By drawing upon knowledge attained from the literature review hereabove and analysing the dataset, themes are created in order to establish what shared meaning the rule of law is created by the Commission in relation to the rule of law breaches by Poland. The created themes will be discussed below. Although these are set out as separate themes, they are all interconnected.

4. Results and discussion

4.1 The importance of the rule of law

It seems that the Commission relies on Raz's definition of the rule of law (Raz 1979). Multiple elements are mentioned by the commissioners as being part or as tightly related to the rule of law, with judicial independence as a "basic pillar of the rule of law" (von der Leyen 2021). Additional elements such as legal certainty¹ (Hahn 2022) are mentioned in relation to the rule of law as well, and Timmermans states that Poland has violated the separation of powers which "threatens to deepen the rule of law crisis in Poland" (Timmermans 2016a). The importance of the rule of law lies, according to Timmermans, with the limitations it places upon the ruling government (Ibid.). He explains what it means to have a democracy, and how "free societies" rest on the principles of democracy, the respect for the rule of law and fundamental rights (Ibid.). He calls these three elements, which are interconnected and interdependent, the "tripod" (Ibid.). In most debates, the commissioners speak about the rule of law in relation to these other two values. Thus, the Commission's definition of the rule of law includes legal certainty, the separation of powers, and judicial independence, and sees it, together with democracy and fundamental rights, as essential for a free society.

However, confusion about the definition of the rule of law still exists. The contestation in defining the rule of law principle is recognized. For example, Frans Timmermans in 2016 states the importance "to work towards a common understanding of our values." (Timmermans 2016b). He thus implies that confusion around the definition of concepts such as the rule of law exists because, if there already existed a common understanding, there would not be a need

¹ Translated. Original quote: "Denn zu Rechtsstaatlichkeit gehört es eben, dass es auch Rechtssicherheit gibt" https://www.europarl.europa.eu/doceo/document/CRE-9-2022-02-16-ITM-011_EN.html

to work towards one. This can also be seen through the assumption by some MEPs that the rule of law is not understood the same way by every member state, and Jourová in 2020 agrees: ‘‘We need a better definition of what we mean by the rule of law’’ (Jourová 2020a). The Commission thus acknowledges that the rule of law is not defined well enough so that all member states have a common understanding of the concept.

Conversely, in 2021, Hahn refers to regulation 2092 and states that there does exist a common understanding of the rule of law: ‘‘There is a uniform understanding of the rule of law, which is also used as a basis in the European Acts.’’ (Hahn 2021). He refers here to Regulation 2092, which was proposed by the Commission in 2018 and approved in 2020. The regulation does include some elements that are considered to be part of the rule of law which are not included in the Treaties: ‘‘a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.’’ (Regulation 2092/2020, Art. 3). Besides the reliance on European secondary law, the commissioners rely on the Treaties when arguing the uniform understanding of the rule of law. For example, Reynders argues the member states joined the EU and ratified the treaties voluntarily, in which the rule of law is enshrined as one of the European values. They therefore must comply with it (Reynders 2022).

However, the Treaties do not entail a clear definition of the rule of law (TEU 2012, Art. 2). This provides for a considerable amount of discretion for the Commission and the CJEU to decide what the rule of law entails. This is also the case with regulation 2092, in which elements are added to the rule of law which are not mentioned in the Treaties. The Commission’s argument that compliance with the rule of law rests on the fact that the member states signed the Treaties is not very convincing. Even though the member states have signed the treaties, the rule of law is not defined in them. For a member state to comply with the rule of law without it knowing what the rule of law entails seems an impossible task. The weakness of the treaties thus becomes apparent and makes the argument of pointing towards the treaties as to define the rule of law void.

The Commission relies on a thick definition of the rule of law in the Rule of Law Report. When speaking about the Rule of Law Report, an initiative of the Commission in 2019 as part of the

Rule of Law Mechanism to “identify and prevent early on rule-of-law-related issues” the definition of the rule of law takes on a thick version (Reynders 2020a). “The rule of law mechanism has a broad scope: “it is covering four areas: the national justice systems; the anti-corruption frameworks; media pluralism and media freedom; and other institutional issues related to checks and balances.” (Jourová 2020b). Thus, the elements on which the rule of law mechanism relies, and which are used to assess the rule of law situation in the member states, are not the elements that are mentioned earlier by the Commission as being part of the rule of law. Indeed, the elements the Commission mentions as part of the mechanism are not even mentioned in the most extensive definition of the rule of law by the reviewed literature in the previous chapter of this research. The reason given for the broad scope of the Rule of Law Mechanism by Jourová is that: “we believe that these are interconnected features and factors and we should be able to make an objective assessment.” (Jourová 2020a). Thus, the rule of law definition, or at least the elements on which the rule of law assessment of the member states is based, is expanded extensively in order to be able to make an assessment of the rule of law status in the member states.

Even though there exists confusion about the definition of the rule of law, the importance of adherence to the rule of law for the EU takes the upper hand and dwarfs the fact that the rule of law is not defined clearly enough. When one country does not respect the rule of law, concerns are in the Commission that this will not only affect the functioning of the EU because of the European laws that need to be implemented and followed correctly, but also that other member states will follow in not respecting the principle of the rule of law. “Only a common legal order provides equal rights, legal certainty, mutual trust, common policies.” (von der Leyen 2021). For EU legislation to be implemented and followed, the member states need a well-functioning judicial system. In addition to function well, the judicial systems also need to be consistent throughout the EU for the internal market to work well. This is of importance for an investment climate in which investors can rely on consistency in legislation. With mutual trust the Commission points to the importance of trust between member states, and provides an example of how some courts in the member states wanted to refrain from carrying out European Arrest Warrants to Poland due to concerns about the judicial independence in Poland (Jourová 2020). With this example, the Commission argues that the beaches of the rule of law in Poland threaten the trust of the judiciary between the other member states and Poland. The importance of the rule of law to be followed for the EU is emphasized by the Commission in almost every debate in the dataset and seems to be more important than defining the rule of law.

The first theme thus shows how, even though there are multiple elements attached to the rule of law, confusion around the concept remains, as there appears to be no common understanding of it amongst the member states. The need to define the rule of law decreases and underlining the importance of the rule of law and adhering to its principles becomes more important, while the Commission keeps on adding elements as part of the rule of law. The commissioners rely on the treaties heavily as the holy grail in which the values are enshrined, however, not defined. With Regulation 2092, it seems that some clarity is established, as it includes elements that are considered as part of the rule of law (Regulation 2020/2092). The elements that are part of the rule of law mentioned are also part of Raz's narrow definition (Raz 1979). However, the Rule of Law Framework includes elements to assess the member states' adherence to the rule of law which are beyond the elements mentioned in Regulation 2092. This shows how new frameworks and mechanisms rely on a thick version of the rule of law so to be able to adjust to the ever-changing context, in line with Bedner's argument (Bedner 2018). Still, the importance of adhering to the rule of law is emphasised more, foregoing the need to define what the rule of law exactly entails. The rule of law is to be adhered to, not to be defined.

4.2 The limited universality of the rule of law

The importance of the rule of law and the neglect in defining the concept is also seen in the supposed universality of the rule of law as argued by the commissioners. Timmermans states that the tripod values pre-date the EU, thus implying that they are not constructed by the EU (Timmermans 2016a). This means that there is no need to explain where these values are based upon, merely that they are important. Timmermans states that the consequences of not basing society on this tripod could lead to mistakes that have been made in the past when some societies were not free, referring to, for example, the Communist regime in some Central European states after the Second World War (Ibid.). Following Timmermans' reasoning, if the values are not constructed by the EU for the reason that they existed before the creation of the EU, then the values are not limited to the EU, and may apply to Europe as a continent, or even to the world. As stated by Jourová in a debate about the set-up of a European values instruments to support civil society organisations which promote democracy, rule of law and fundamental values within the EU: 'by supporting civil society we are not promoting any specific ideology. We are upholding the values enshrined in the treaty' (Jourová 2018). In another debate two years later, she claims that the rule of law, democracy, and fundamental rights are 'not left and

right” (Jourová 2020b), the three are “universal European values.” (Ibid.). Following this reasoning, she discards Harbo’s argument of the conceptualization of the rule of law by the EU as the “Rule of Political Liberalism” (Harbo 2020, 250). She wants to underline how the rule has nothing to do with politics, and therefore is to be applied in every state, regardless of political and ideological beliefs. With “universal European values”, she might refer to how the values are inherently European and applied in the rest of the world too. This would contradict Timmermans’ statement about the tripod predating the EU. Thus, the contested nature of the concept of the rule of law provides for the basis of contradictory arguments. The contested concept can function as limited and exclusive to the EU, or as universal and apolitical. Either way, as stated by Timmermans and Jourová, the Commission presents the rule of law as an apolitical concept which has the same meaning in every member state.

Conversely, when speaking of what the rule of law is not, the Commission relies on an ideological dichotomy by taking the example of Russia. In a debate about “the rule of law and the potential approval of the Polish national Recovery plan”, the Commission dichotomizes between the liberal political ideology as the leading ideology in the EU democracies and Russia (Dombrovskis 2022). “Russia’s war of aggression in Ukraine does but strengthen our conviction that our liberal democracies, based on the rule of law and fundamental rights and freedoms must prevail.” (Ibid.). Here, Dombrovskis implies a dichotomy between Russia and the EU, and on what these societies are based. He implies that the Russian state is, in contrast to the EU, not a liberal democracy and is thus not based upon the rule of law and fundamental rights. Even though another commissioner earlier on in the dataset has stated that values such as the rule of law have nothing to do with ideology (Jourová 2018; Jourová 2020a), Dombrovskis links liberal democracies as based upon, amongst others, the rule of law. Russia is not a liberal democracy and does not lean upon these values (Dombrovskis 2022). The universality of the rule of law here is limited to liberal democracies, meaning that the rule of law as the Commission views it inevitably relies upon ideology. In short, one of the ways in which the commission creates meaning to the concept of rule of law is by creating a dichotomy between good and bad ideologies.

4.3 The role of the Commission: the guardian of the treaties

Starting from 2020 and on, the role of the Commission as the guardian of the treaties is emphasized often, not only by the Commission in order to convince the Parliament that the

Commission takes its task seriously, but also by the MEPs. The MEPs accuse the Commission of not being active enough as the guardian of the treaties in preventing and taking measures against rule of law breaches by member states. In trying to convince their audience, the commissioners revert to personal anecdotes about, for example, their sitting time in the Commission, or their personal attachment to Poland and therefore their personal desire to protect the Polish people from their breaching government (Timmermans 2016a; Hahn 2021; Jourová 2021). Another strategy to convince the parliament is to name the measures the Commission has taken and is going to take and therefore their active stance in the rule of law crisis. The Commission thus presents itself as being committed to its role as the guardian of the treaties and as active in taking measures against the rule of law breaches.

The reason that the Commission emphasizes that it takes its role serious regarding the rule of law breaches is because the credibility and legitimacy of the EU have become uncertain. The rule of law crisis in Poland has the potential to influence the degree of credibility and legitimacy of the institutions of the EU due to the violation of one the core values on which the EU is based (Holesch and Kyriazi 2022). In particular that of the Commission as the executive arm of the EU and the guardian of the treaties. It is the most visible institution, as it represents the general interest of the EU as a whole (European Commission n.d.b). There is a fear within the Commission that it will lose its credibility in the eyes of the member states, which could lead to more Euroscepticism. This is expressed through the importance the Commission attaches to the success of cases for the Commission in infringement procedures. For example: ‘‘We cannot afford to lose the cases which relate to rule of law issues. It is too important, and we need also to work on the credibility of the European Union, and losing the cases would not be a good thing.’’ (Jourová 2020a). And in relation to Regulation 2092: ‘‘This is a very significant contribution to strengthening the confidence of the majority of the European population in the European institutions, in the European principles, in the European rules.’’ (Hahn 2022). The Commission emphasizes multiple times how the first cases brought under regulation 2092 need to be won, in order to retain credibility within the EU by the member states, the citizens, and the other EU institutions. Thus, when a member state does not adhere to one of the EU values such as the rule of law, the Commission fears losing credibility in the member states and therefore wants to present itself as the active and strong guardian of the treaties to avoid more Euroscepticism.

In addition to retaining credibility within the EU to avoid more Euroscepticism, the Commission recognizes that its credibility is also under threat in the eyes of the rest of the world. For example, Reynders expresses the importance of how the outside world views the EU and its handling of the rule of law breaches: “We must first of all think about doing the work at home. This is an important condition to be credible when we defend common values that are dear to us, including outside the European Union.”² (Reynders 2020b). The EU is in its external relations active to “promote sustainable and economic development and decent work beyond the EU’s borders in line with EU values, the European Pillar of Social Rights and the Sustainable Development Goals.” (European Commission n.d.c). When the EU fails to uphold its values in its member states, it loses the credibility to be able to promote values in third countries, leading to a possible decline of influence. Following this reasoning, the soft power on which the EU relies as part of its identity then diminishes and the EU becomes less important on the world stage (Kugiel 2017). Although the Commission would probably not admit that it loses influence, it does reflect on the rest of the world and the need for the EU to adjust: “Together, we can build a Europe that is strong and confident in a world where other big powers become more and more assertive.” (von der Leyen 2021). The Commission thus recognizes that it may lose credibility through the rule of law crisis in Poland and the importance in handling this well, within the EU and in the rest of the world.

Although it recognizes that it is the guardian of the treaties, the Commission is also of the conviction that the protection of the rule of law is a shared responsibility among the European institutions and the member states. Perhaps this is to divert the focus away of the Commission as the only one responsible. “Protecting the fundamental values of the union is a collective responsibility of all institutions.” (Timmermans 2016b). Besides pointing towards the other EU institutions as being partly responsible for a solution for the rule of law crisis, the Commission diverts attention to other organisations as well. When the Polish government did not acknowledge the allegations of the Commission concerning its violation of the rule of law, the Commission pointed towards organisations who have condemned the Polish government for its actions against judicial independence and violations of human rights: “It is not the European Commission only. It is not the European Parliament only. It is organisations of European judges, it is the Venice Commission, it is the United Nations. Are all these people

² Translated. Original text: nous devons d’abord aussi penser à faire le travail à la maison. (...) c’est une condition importante pour être crédibles quand nous défendons des valeurs communes qui nous sont chères, y compris à l’extérieur de l’Union européenne

wrong? Is the only one who is right the PiS government in this? They will say yes!’’ (Timmermans 2017). The commission thus justifies its opinion based on organisations that have authority in order to gain credibility.

However, some of these same organisations that the Commission in the beginning of the dataset in 2016 and 2017 used to argue against the Polish government, have also spoken out against the approval of the Polish national recovery plan by the Commission. For example, after von der Leyen publicly stated that the Polish plan got approved by the Council after the positive recommendations of the Commission, four associations of judges sued the Council for approving the Poland’s plan (Rechters voor Rechters 2022). In a joint letter, the associations argue that the milestones set by the Commission are not sufficient in addressing the rule of law issues in Poland. In addition, the associations consider the undermining of the judicial independence of Poland as an attack on the European judiciary as a whole, due to potentially lowering mutual trust between the member states (Ibid.). Even though the Commission also mentions that mutual trust is under threat because of the Polish undermining of judicial independence, the Commission still recommended to approve the Polish national plan and did not rely on the associations of the judges again in the parliamentary debates after they were publicly against the approval of the Polish national plan (MEDEL 2022). The same organisations that are credited with authority by the Commission, and thus are used by the Commission to support its argument against Poland, are not mentioned when they do not agree with the Commission. It seems the Commission is biased in choosing on what organisations it wants to rely on by only mentioning them when they are consistent with their opinion with the Commission.

Thus, what role in the debates about the rule of law crisis in the EU does the Commission assign itself to? First and foremost, the Commission is the guardian of the treaties, which therefore states to take its responsibility as the most important institution in addressing any rule of law breaches happening within the EU. It is therefore the institution that initiates infringement procedures and cases before the CJEU. However, the responsibility is shared with the other institutions and the member states. The Commission looks to consolidate trust from the European citizens in order to prevent more Euroscepticism, and in relation to third countries to retain its position as soft power. When the Commission alleges a member state of a breach, the Commission mentions other institutions such as the Venice Commission, European judges’ associations, and the United Nations as authoritative bodies to judge violations. When these

bodies' opinions are not in line with the Commission's opinion, the Commission will rely less on these bodies, or in any case does not mention them in the debates in the EP anymore. The way the Commission presents its role and that of external bodies in relation to the rule of law and the breaches by Poland is thus inherently political and has not much to do with legal considerations, or with protection of the Polish citizens. Worries about the rule of law are more about credibility than with concerns about the Polish citizens not having access to the same rights that the rule of law can provide to other EU citizens.

4.4 History, culture, identity

Creating a common European culture based on historical traditions that are shared by the different member states or connect them, is a theme on which the commissioners rely a lot throughout the entire dataset. Ursula von der Leyen begins her speeches with an historical anecdote more often than not, and the other commissioners also refer to historic events in their speeches numerous times. They do this to create a common history in an attempt to overcome differences between the member states and create a common identity (Lähdesmäki et al. 2019). Often used to foster a more positive attitude towards European integration and the EU as a whole (Ibid., 133), the construction of a European identity shared among the member states resembles the imagined community of the national identity in the modern nation state (Anderson 2016; Hülse 2006). Drawing upon historical events and by constructing them as shared and interconnected fosters a feeling of "Europeanness," creating a European community (Lähdesmäki et al. 2019). Following this reasoning, instead of nationalism, the commission draws upon supranationalism. When the EU is seen as the primary homeland instead of the nation state, solidarity may follow (Anderson 2016). The reference to historic events as a shared common European history facilitates a feeling of belonging to the EU and is used by the Commission when it speaks about the importance of the rule of law in the EU. Thus, the Commission wants to create a common European identity by referring to historic anecdotes in its statements about the rule of law.

Another type of reference made to historic events is in relation to other contested concepts. These are then connected by the commissioners to the rule of law, such as freedom and democracy, which together with the rule of law make the aforementioned tripod. This is often done with a reference to the fall of communism in Europe in the 1980s. For example: "Almost 40 years ago, in December 1981, the Communist regime in Poland imposed martial law. Many

members of Solidarność, the independent trade union, and other groups were put in jail, simply because they stood up for their rights. The people of Poland wanted democracy, like millions of other Europeans from Budapest to Tallinn to East Berlin. They wanted an end to corruption, and they wanted independent courts to protect their rights. The people of Central and Eastern Europe wanted to join the European family of free people, a strong community of values and democracy.’’ (von der Leyen 2021). Here, the Commission refers to concepts and values that carry political significance, such as democracy in relation to the fall of the Iron Curtain and the subsequent accession to the EU of former-communist states in the central part of Europe. This is not something new in the Commission’s discourse. As shown by Lähdesmaki et al., the Commission wants to overcome cultural differences between the old and new member states by referring to values as shared (Lähdesmaki et al. 2019). In von der Leyen’s contribution to the EP’s debate, she uses the fall of the Communist regime and the longing of the Polish people to become ‘‘free’’ and part of the EU as evidence that suggests the similarities in the needs and wants of the old and new member states. The only difference is that the Polish people had to overcome a hostile regime to become part of the ‘‘European family of free people’’ (von der Leyen 2021). The Commission thus wants to overcome differences between Poland and the other member states by referring to shared European values.

Next to the references to shared values, the commissioners stress how Poland has shaped an important part of European history. One of the many examples is the following anecdote by von der Leyen: ‘‘When Karol Wojtyla, as Pope John Paul II, went to his homeland, he changed European history forever. When Lech Walesa, with a scattered group of trade unionists, overcame a mighty army, we saw the beginning of the fall of the Iron Curtain. Polish people have played a fundamental role in making our union whole, in enabling their homeland to thrive as a vital part of our union, and they will always be.’’ (von der Leyen 2021). Here, von der Leyen refers to historic events in which Polish people, according to her, played an important role in shaping European history. This way, she emphasizes the importance of Poland and its contribution to the ‘‘common European history.’’ She mentions names of Polish people who she sees as brave as they needed to overcome communism. Identification with the Polish people is fostered which contributes to a feeling of solidarity and, even though some member states might feel distanced from Poland because of the rule of law violations, von der Leyen reminds the MEPs about the contribution of Poland to the EU, in order to retain unity in the EU.

Instead of referring to historic events in a positive way, the Commission also refers to history as something negative that should not be repeated, and should be learned from. For example, Timmermans speaks about the end of the Second World War and how the “free societies” due to the dictatorship of the Communist regime in Central Europe “realised that we need to avoid mistakes of the past and bring freedom to everyone – the tripod of democracy, the rule of law and fundamental rights” and “when democracy was used to impose tyranny and the rule of law was used to take away fundamental rights from individuals.” (Timmermans 2016b). Timmermans refers to Raz’s classic version of the rule of law as being misused by dictators in Europe in the past. The rule of law as defined by Raz was not part of the tripod (fundamental rights, democracy, and the rule of law), which resulted in oppression of the European people. He thus implies that the communist rulers did not have legitimacy, as they did not respect the tripod which a society should be based on. Timmermans argues that, if the tripod is not followed, states can become ruled by dictatorship, which could be as destructive as is seen after the Second World War. By juxtaposing the current followed regime, based on the rule of law, democracy and fundamental rights, with the Communist regime, he shows the legitimacy of the EU’s current regime by reminding the MEPs of what happens when an alternative to the tripod is followed. Thus, here, Timmermans is more concerned with ways of ruling than with the rule of law, democracy, or fundamental rights (Traibach 2021). Timmermans decides what is a good type of ruling and what is not, when the three concepts of the tripod are used against one another, the ruling is an evil one, when they are used to enhance each other, they are used in a good way.

To conclude this theme, the Commission uses historic references and anecdotes in different ways to create a European identity and foster a feeling of unity and solidarity. It does this in multiple ways. First, the Commission relates the rule of law to other contested concepts that carry political significance, such as freedom and democracy. Second, by looking back at shared historic atrocities that should not be repeated and suggesting that therefore these aforementioned contested concepts should be the basis of society. Third, by making Poland’s history part of a common European history. The Commission thus wants to prevent Poland from being isolated due to its rule of law breaches, and uses historic references to create a feeling of shared identity and solidarity, and to legitimize the EU’s ways of ruling over other regime’s.

4.5 The budget

In relation to the Ukraine War and the COVID19 pandemic, the Commission's focus after 2020 when it accompanies debates about the rule of law lies more with the protection of the budget against misuse than with other negative consequences resulting from breaches of the rule of law. While Timmermans in 2016 stated that the Commission would do anything to protect the rule of law (Timmermans 2016a), the protection of the budget became extra important for the Commission, as the enormous funds for the recovery of the member states' economies after the economic suffering caused by the pandemic had been included in the MFF 2021-2027. The prevention of misuse by member states of the big funds received from the EU for their recovery are set as the priority of the Commission, and regulation 2092 is said to be one of the most important to achieve this aim. The way in which the Commission tries not only to appeal to the MEPs, but also to the citizens is to emphasize the importance of protecting the taxpayer's money. Thus, the Commission's focus turns towards the budget and the need to "protect this funding in very interest of all taxpayers and all citizens of the Union." (Reynders 2020c). The commissioners portray the 2092 regulation as an "historic achievement" and the Multiannual Financial Framework 2021-2027 of which it is part as "history in the making." (Hahn 2021; von der Leyen 2020). Thus, while first the commission's focus lies with the protection of EU's values and thus proposed the 2092 regulation, due to the COVID pandemic, the focus of the Commission turned towards the protection of the budget in which the regulation from then on served as a tool to achieve this aim, instead of a measure against breaches of the rule of law only.

In 2022, in one of the last items of the dataset, Poland's solidarity with Ukraine during its war against Russia is recognized and seen as a burden on Poland. The importance of receiving the recovery funds for Poland is emphasized: "This is key to support the economic and social resilience of Poland, for Poland to emerge stronger from the crisis at a time where the Polish people have also shown their extraordinary generosity towards those fleeing Ukraine." (Dombrovskis 2022). The approval of Poland's recovery plan would unlock funds to Poland. However, the milestones that are set by the Commission for Poland's plan to be accepted need to be fulfilled before the funds are disbursed. These milestones concern the reversal of rule of law breaches by Poland. The Ukraine war and Poland's solidarity with the Ukrainian refugees create an extra dimension in the Commission's assessment of the potential approval of Poland's

national plan: “The positive assessment of Poland’s Recovery and Resilience Plan is a decisive moment to support the Polish recovery and economy, even more so in a difficult context created by the war at its borders.” (Ibid.). In theory, the war in Ukraine has nothing to do with the rule of law breaches.

However, the Ukraine war is mentioned multiple times in relation to the approval of the proposal, even though the debate in which Dombrovskis states the aforementioned quotes is called: “The rule of law and the potential approval of the Polish national Recovery Plan (RRF)” (Dombrovskis 2022). The debate thus does not revolve around the situation in Ukraine and Poland’s aid for Ukraine. There are other debates that concern this topic, and the EU has already disbursed considerable amounts of aid to Poland in order to assist with receiving refugees from Ukraine and protecting its border. For example, the Asylum, Migration and Integration Fund and the Instrument for Financial Support for Border Management and Visa Policy are mechanisms through which funds are disbursed to Poland as a compensation for hosting Ukrainian refugees (European Commission 2022). The money disbursed at the time of writing is 144.6 million euros (Ibid.). In conclusion, after having years of debates about the rule of law breaches in which the Commission emphasized the importance it attaches to protecting the EU values over and over again, the war on the border of Europe is eventually used by the Commission as something that should be considered in the potential approval of the Polish national plan, even though the EU already disburses funds to Poland to aid in its solidarity with Ukraine.

4.6 A culture of the rule of law

The overarching main theme is the aim of the Commission to install a culture of the rule of law in the EU. In 2021 and 2022, the commissioners referred to a “culture of the rule of law” in the EU, with the Rule of Law Report as the basis for discussion and debate throughout the EU. For example, for Reynders, the Rule of Law Report and the discussion held in the EP was with the aim of “becoming now a cycle with the real intention to install a culture of the rule of law in the entire EU” (Reynders 2021). Ongoing debate and discussion about the rule of law would create a culture of the rule of law. What the commissioners exactly mean with this phrase is not entirely explained, however, it is not new and has been used by other scholars as well. A culture of the rule of law relates to what Zimmerman calls a culture of legality/law. A society with a culture of legality exists of a general commitment by the citizens and government to the

principles that are defined by law (Zimmerman 2007, 24). Following this reasoning, a culture of legality relies upon the fact that “the law must be authoritative, that is, taken as binding by those whom it claims to bind.” (Krygier 2001, 13404). Thus, the law has authority and the principle of the rule of law is built upon this culture of legality.

Without a culture of legality, laws are not seen as authoritative. The result is that other ways to resolve conflict are looked for (Zimmerman 2007). Although there are laws which accredit the citizens with some fundamental rights, these laws do not have the same authority as in societies with a culture of the rule of law. Without a culture of law, one’s social status and socially defined rules instead of rules defined by the lawbook are more relevant in securing one’s positions or resolving conflicts (Ibid.). One of the means to obtain a high social status is oftentimes money, leading to corruption, which is also mentioned very often by the commissioners as related to rule of law breaches (von der Leyen 2021; Reynders 2021). This makes that lawbooks do not tell much about the rules that are followed in society (Ibid., 28-30). Thus, the Commission is seeking to avoid that the member states do not rely on laws as the primary ways to solve conflict, and, through regulation 2092 as well, to avoid corruption and misuse of European money (Ibid.). Arguably, the aim to install a culture of the rule of law can be seen as a culmination of all above-mentioned themes. The culture of the rule of law is a cluster of multiple elements desired by the Commission for the EU. It includes the EU’s historic tradition and how this has shaped the implementation and the importance of the rule of law, the need expressed by the Commission to keep working on the rule of law by having discussion and debate revolving around the rule of law, the need for a common understanding of the rule of law, and the role the commission plays in all this as the guardian of the treaties, thus having the responsibility of installing a culture of the rule of law within the EU.

5. Conclusion

Thus, how does the Commission attach meaning to the essentially contested concept of the rule of law? It does so in multiple ways. First, it seems that the Commission relies on a thin definition of the rule of law, including elements of formal legality to the concept. However, while the Commission refers to the rule of law as universal and apolitical, new mechanisms and frameworks that the Commission sets up in order to combat the EU’s rule of law crisis leads to more elements to become part of the rule of law, and discussions about the rule of law

do not necessarily revolve around formal legality. The meaning of the rule of law as constructed by the Commission is visible in the two functions the contestation of the rule of law serves.

First, the contestation that is inherent to the rule of law serves to retain credibility. Through the construction of a common history with shared EU values, the Commission wants to overcome the differences between the member states by drawing upon the rule of law as what binds and connects the member states. The Commission refers to installing a culture of the rule of law. A culture of the rule of law for the EU includes the EU's historic tradition and how this has shaped the implementation and the importance of the rule of law, the need expressed by the commission to protect the rule of law from threats by member states, and the role of the commission in this as the guardian of the treaties. By taking an active stance against the rule of law breaches by Poland, the Commission shows its commitment to the EU values while they are being violated. This is important to prevent increased Euroscepticism both within and outside the EU.

Second, contestation of the rule of law serves as a means to justify and legitimize the European Rule of Law. The Commission's statements in the EP debates reveal that most of the ways in which the rule of law is used by the Commission are underlined with ideological and political assumptions. Building upon constructivism, this is inevitable in the construction of meaning. However, the Commission presents an ideological dichotomy in which the European rule of law is the superior one, to show what the rule of law is and what it is not. Here, in line with Harbo and Traisbach contestation serves a function: that of legitimizing the EU's liberal democracy. However, the danger in this is that the concerns of the Commission about the rule of law are more about legitimacy and credibility than about the Polish citizens not having access to the same rights that the rule of law can provide to other EU citizens.

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