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Master Thesis

Challenging the Rule of Law in Europe: how the Rule of Law Crises Occur?

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LIST OF ABBREVIATIONS

Art.	Article
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECtHR	European Court of Human Rights
EU	European Union
GDP	Gross domestic product
PiS	Law and Justice *(Prawo i Sprawiedliwość)* political party in Poland
TEU	The Treaty on European Union
VC	The Commission of the Council of Europe for Democracy through Law

INTRODUCTION

The relevance of the topic. Just a few years ago democracy was considered to be one stream process. No one was questioning on the larger scale why the rule of law is such a quintessential part of its legal systems. It was a dominant organizational paradigm of contemporary constitutional law.[1] However, today political and legal systems are at crisis all over Europe. Hungary and Poland are moving towards becoming 'illiberal democracies.'[2] Populist, nationalistic movements in multiple countries are winning elections and encouraging a culture of hate. Besides, the European Union is suffering from the rule of law deficiencies in the Member States and struggling to ensure the future of the Union. Current studies show that this is a global phenomenon. One-third of people in the world now are living in backsliding democracies.[3] The political sphere is facing the emergence of nationalist views, populist rhetoric, the apparent rejection of progressive values, and the development of what is termed 'post-truth' politics. Rising levels of public disenchantment with political institutions all go back to the principle of the rule of law. This principle is hard to define and difficult to discuss not just because of its ambiguous nature[4], but due to that, it is more than just a legal term or concept. It is a political concept as well, or to be precise the link between politics and law.[5]

No one saw these types of developments in modern politics coming. There is no clear answer what the appropriate response to them is. It has become one of the most discussed topics in social science and public discourse. For many legal scholars, the national safeguard mechanisms had to ensure the safety of the rule of law. Norms in legal orders that should guard political order and prevent abuse from all branches of government are the most relevant and problematic. These problems are challenging to address because they fall somewhere in between the political and legal system. For example, the response from the EU to democratic backsliding in Hungary since 2010 has been half-hearted and ineffectual,

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[1] KARAKAMISEVA-JOVANOVSKA, T. The model of the Rule of Law in the European Union – reality or.... *Journal of Constitutional Law in Eastern and Central Europe*, 2017, Vol. 24, No. 1, p. 99.

[2] *Prime Minister Viktor Orbán's speech at the 29th Bálványos Summer Open University and Student Camp*. Tusnádfürdő, 2018. [interactive, viewed on 8 April 2019]. Online access: <http://www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-29th-balvanyos-summer-open-university-and-student-camp/>.

[3] V-DEM INSTITUTE. *Democracy for All? V-Dem Annual Democracy Report 2018:* report. Sweden: Department of Political Science, University of Gothenburg, 2018. [interactive, viewed on 8 April 2019]. Online access: <https://www.v-dem.net/media/filer_public/3f/19/3f19efc9-e25f-4356-b159-b5c0ec894115/v-dem_democracy_report_2018.pdf>.

[4] FLINDERS, M. What Kind of Democracy Is This? Politics in a Changing World. *Political Insight*, 2017, Vol. 8, No. 2, p. 34–37. [interactive, viewed on 16 February 2019]. Online access: <doi:10.1177/2041905817726905>.

[5] BALTRIMAS, J.; LANKAUSKAS, M. *Argumentavimas remiantis teisės principais: atkuriamasis ir plėtojamas būdai*. Vilnius: Lietuvos teisės institutas, 2014, p. 6-7.

underlining both the lack of adequate legal instruments and the lack of political will to intervene.

Some could argue that the situation was entirely different when the European Commission quickly responded to the Polish government's actions towards the Constitutional Tribunal. It marked the opening of a new chapter in EU efforts to defend fundamental values. Sadly, the outcome of these efforts remains uncertain. Further developments to this situation are still happening with no signs of stopping. For example, the European Court of Justice on 2018 December 17 in the case C-619/18 European Commission v Republic of Poland the Court granted the Commission's request for interim measures to stop Poland's government's actions against the judiciary and the judicial system.[6] That raises questions. Is there a way to change legal norms in a way that it would prevent from the rule of law crisis elsewhere? Are there signs that might alert that a country is on a path to abandon or systematically break the rule of law?

Aim. The thesis aims to determine what short-comings in the legal system allow the rule of law crisis happen in established constitutional democracies and what could be the safeguards to prevent that from happening.

Tasks and objectives. In order to reach the coherent results of the research three objectives are indicated: (1) an explanation of what is the rule of law and what should be considered its crisis will be provided; (2) comparative analysis of how legal systems deal with the rule of law in Poland and Lithuania linked to the Constitutional Courts; (3) revision of safeguards already in place and possibilities for improvement will be analysed both in national and international context, mostly EU legal system.

Subject. The thesis will focus on the legislation linked to the rule of law in regards to Constitutional Courts in Lithuania and Poland. To find these answers two countries - Poland and Lithuania - will be compared based on their legal order linked to the Constitutional Court. There are multiple reasons to do so:

1) History and its reflections in the legal system (the Polish–Lithuanian Commonwealth, a dual monarchy comprising the Crown of the Kingdom of Poland and the Grand Duchy of Lithuania and its Constitution of 3 May 1791 - the first Constitution to combine the clear division of the executive, legislative and judiciary powers with the monarchic republic legal order, influence of the Soviet times to their legal culture and systems, move to democracy and joining of the EU);

[6] The European Court of Justice order C-619/18 R, 2018 December 17. *ECLI:EU:C*:2018:102.

2) Similar political and legal systems (both are parliamentary republics, in both legal systems are grounded on the principles laid out in the Constitutions, the EU law is an integral part of their legal systems);
3) The importance of the strategic partnership between two countries (many economic links, the geopolitical situation in the region). Poland is one of the closest neighbors, critical to Lithuania in the areas of defense, security and economy. Mutual understanding, cooperation in NATO and the EU as well as at the bilateral level is one of the guarantees for prosperity and safety of the region.

The processes that are happening in Poland have a direct effect on Lithuanian politics and legal system. If something has happened in our neighbor, there is a good chance that the same could happen in Lithuania. By doing a detailed analysis both of basis of Poland's rule of law crisis and Lithuanian legal systems' weak points we can learn how to spot the warning signs before the rule of law crisis happen in the first place. Additionally, figure out how to at least make it harder to corrupt the system to the level of crisis. This examination allows a better understanding of what the rule of law means in national and international standards. Is there changes that could be made to improve the legal and political system to prevent situations similar to Poland's rule of law crisis elsewhere.

There are a few essential prerequisites for this analysis — first, the time frame limit. The analyses will focus on legislation and other factors until the point in which we can say that a crisis has happened. Not what happened after that or should occur in the future to solve the situation in Poland. The second *sine qua non* - the thesis will focus on the legal problems linked to the rule of law in the judicial systems context (more precisely the Constitutional Courts) to make it possible to analyse in the scope of a master thesis. That will additionally help to prevent it from becoming speculation. For a more comprehensive understanding of the problematic of this situation some notes on the political and social context will be given, but not analysed in detail. International provisions that should guard the rule of law will be examined as well. Other countries that are facing the rule of law deficiencies such as Hungary, Romania were excluded from the analysis because of the master thesis size limitations and quite different legal systems from Lithuania.

Methods. Comparative, systemic and teleological research methods were used when writing this thesis. The teleological method is used to interpret legislative provisions on the rule of law safeguards in the light of the purpose, values, and goals these provisions aim to achieve. The method allows to point out the purpose of the concept in different contexts (national law, different international documents). The Constitutional norms, legal acts, defence mechanisms in place in Lithuanian and Polish legal systems are compared, to draw

a cross-comparison and in-depth case analysis linked to the rule of law. Based on the methodological principle of functionality[7] four areas of law were identified as the basis for examination: (1) justices appointment and removal procedures; (2) court and justice independence guarantees; (3) norms that prescribe the constitutional reviews procedure; (4) the provisions that mandate how norms and acts linked to constitutional order can be amended. The systemic method is applied to evaluate relevant constitutional doctrine, possible improvements to the existing system. It allows understanding how the rule of law is protected in constitutional democracies on the national and international levels. The thesis also covers research of actual relationships between different categories (concepts) in a different context — for example, the relationship between the separation of power and the concept of checks and balances.

Originality. Even before the developments in Poland, the rule of law was a prominent subject in legal, political science. Now quite a few books are analysing the rule of law, its shortcomings. Multiple articles cover Poland's rule of law crisis, different aspects of it.[8] This thesis will attempt to provide answer what are generally weak spots in established democracies constitutional legal systems linked to the Constitutional Courts that can result in the rule of law crisis. Based on the similarity of the Lithuanian and Polish legal traditions and orders the comparison of them is a way to preventively analyse what are the weaknesses in the Lithuanian system. Suggest what could be done to improve the system to prevent a similar situation to Poland's.

In Lithuania, the most noteworthy scientific study in the past few years on this topic could be 'Crisis, the rule of law and human rights in Lithuania' edited by Egidijus Kūris (2015). It focuses on whether (and, if so, then how) the global economic crisis, which gripped Lithuania in 2008, has altered the standards of the rule of law and human rights

[7] ZWEIGERT, K.; KÖTZ, H. *Introduction to comparative law*. Oxford: Clarendon, 1992, p. 34-40; GORDLEY, J. The functional method from *Methods of Comparative Law*. Research Handbooks in Financial Law. Cheltenham ; Northampton [Mass.]: E. Elgar, 2012, p. 107-120.

[8] SADURSKI, W. How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding. *Sydney Law School Research Paper*, 2018, Vol. 18/01. [interactive, viewed on 16 February 2019]. Online access: <http://dx.doi.org/10.2139/ssrn.3103491>; SADURSKI, W. Polish Constitutional Tribunal Under PiS: From an Activist Court to a Paralysed Tribunal, to a Governmental Enabler. *Hague Journal on the Rule of law*, 2018, p.1-22. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-018-0078-1>; WYRZYKOWSKI, M. Bypassing the Constitution or Changing the Constitutional Order outside the Constitution, from *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989-2015: Liber Amicorum in Honorem Prof. Dr. Dres. H.c. Rainer Arnold*. Gdańsk: Gdańsk University Press, 2016; GRABER, M. A.; LEVINSON, S; TUSHNET, M. V. *Constitutional Democracy in Crisis?* New York, NY: Oxford University Press, 2018; BLOKKER, P. *New Democracies in Crisis?: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. London; New York, NY: Routledge, Taylor & Francis Group, 2015; CLOSA, C.; KOCHENOV, D. *Reinforcing rule of law oversight in the European Union*. Cambridge, United Kingdom: Cambridge University Press, 2018; and etc.

enshrined in Lithuanian law.[9] Then there is an article 'Europos Sąjungos vertybių laikymosi užtikrinimo problemos' ['Problems of ensuring the values of European Union'] by Agnė Limantė (2016)[10] that tries to provide insights on how the procedure of Art. 7 should happen. In Lithuania a few academic papers were written in connection to the rule of law as well: a master thesis 'Teisės viršenybės samprata Europos Sąjungos Sutarties 7 straipsnio kontekste' [The concept of rule of law in the light of Article 7 of the Treaty of the European Union] by Karina Naumkinaitė (2018)[11] and a bachelor thesis 'Lenkijos Teisinės Viršenybės Klausimas Europos Komisijoje - Neatrastas Interesų Laukas?' [The Polish Rule of Law Question in the European Commission – Undiscovered Field of Interest?] by Eglė Kalašnikovaitė (2018).[12] Also, the last few years seen a rise of conferences held in Lithuania devoted to the rule of law and its problematic aspects: The Implementation and Protection of the Principles of the Rule of Law in the Context of Regional Challenges in Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine (2018)[13]; The Implementation and Protection of the Principles of the Rule of Law in Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine (2016)[14]; The Rule of Law and Constitutional Justice in the Modern World (2017)[15].

The most important sources. The most relevant primary sources used in this thesis are the Polish and Lithuanian Constitutions, the legal acts on the Constitutional Courts and their jurisprudence. Academic literature on the rule of law and the Polish crisis was most widely used. The most referenced articles in the thesis: 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance' by Closa, C. (2018)[16], 'Political

[9] ANDRUŠKEVIČIUS, A., *et al. Crisis, the Rule of Law and Human Rights in Lithuania*: Multi-authored Monograph. Šiauliai: Titnagas, 2015.
[10] LIMANTĖ, A. Europos Sąjungos vertybių laikymosi užtikrinimo problemos. *Teisė,* 2016, Vol. 98. [interactive, viewed on 16 February 2019]. Online access: <http://dx.doi.org/10.15388/Teise.2016.98.9968>.
[11] NAUMKINAITĖ, K. *Teisės Viršenybės Samprata ES Sutarties 7 Str. Kontekste*: Master thesis. Vilnius: Vilniaus Universitetas., 2018.
[12] KALAŠNIKOVAITĖ, E. *Lenkijos Teisinės Viršenybės Klausimas Europos Komisijoje - Neatrastas Interesų Laukas?*: Bachelor thesis. Vilnius: Vilniaus Universitetas. 2018.
[13] *The Implementation and Protection of the Principles of the Rule of Law in the Context of Regional Challenges in Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine*: compendium of reports. Vilnius, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://www.lrkt.lt/data/public/uploads/2018/10/vilnius-forum-2018_vidiniai.pdf>.
[14] *The Implementation and Protection of the Principles of the Rule of Law in Georgia, the Republic of Lithuania, the Republic of Moldova, and Ukraine*: compendium of reports. Vilnius, 2016. [interactive, viewed on 16 February 2019]. Online access: <https://www.lrkt.lt/data/public/uploads/2016/12/31449_konstitucinis_teisines-valstybes.pdf>.
[15] *4st Congress of the World Conference on Constitutional Justice: The Rule of Law and Constitutional Justice in the Modern World*. Vilnius, 2017. [interactive, viewed on 16 February 2019]. Online access: <http://www.wccj2017.lt/en/4th-congress/contributions/163>.
[16] CLOSA, C. The politics of guarding the Treaties: Commission scrutiny of rule of law compliance. *Journal of European Public Policy*, 2019, Vol. 26 (5), p. 1–21. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2018.1477822>.

safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure' by Sedelmeier, U. (2017)[17], 'Cracks in the Foundations: Understanding the Great rule of law Debate in the EU' by Magen, A. (2016)[18].

[17] SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 337–351. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229358>.

[18] MAGEN, A. Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU. *JCMS: Journal of Common Market Studies*, 2016, Vol. 54(5), p. 1050–1061. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1111/jcms.12400>.

1. WHAT IS THE RULE OF LAW, WHAT CAN BE CONSIDERED IT'S CRISIS?

1.1. What is the rule of law?

The first target at hand is the determination of what is meant when using the term the rule of law. However, that is a problematic task. The rule of law is not a new concept; it has been debated for centuries. For example, an early incarnation of the rule of law concept is Aristotle's idea of 'the rule of laws, not men' which leads to predictability in society.[19] Nowadays multiple aspects go into the concept of the rule of law. Before all else the phrase in itself can be interpreted as: (1) state authority bound by law, (2) equality before the law, (3) law, order and human security, (4) respect for property rights, (5) predictable, accessible and efficient justice, and (6) public power respectful of fundamental rights.

Moreover, this is just one of the possible classifications. There is no universal, all-encompassing definition of the rule of law. Quite a big group of legal professional's doubts that we need to define it at all, they contribute the rule of law to 'essentially contested concept' category.[20] That implies that the definition will not and cannot ever cover everything. Still, many entities attempt to do it. For example, there have been several different attempts by various international organisations (European Commission for Democracy through Law (Venice Commission),[21] World Justice Project,[22] World Bank, and so on) to list what the rule of law should entail.

That shows another aspect of this concept - it is widely used. The term is commonly used by politicians, diplomats, jurists, economists, soldiers, journalists, bureaucrats, and academics to imply different meanings. Sometimes the rule of law is even called out as an empty concept that everyone fills based on what is needed at the moment.[23] That is just the first problem. A lot of the misunderstanding with it is not just the result of usability in different disciplines and contexts, but the contrasting comprehension of what the principle

[19] CLARKE D. The many meanings of the rule of law from *Law, Capitalism and Power in Asia.* New York: Routledge, 1998, p. 28-29.
[20] TAMANAHA, B. Z. Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004, p. 1-6.
[21]EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION). *Rule of Law Checklist*. Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). [interactive, viewed on 16 February 2019]. Online access: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.
[22] WORLD JUSTICE PROJECT. *What is the Rule of Law?*. [interactive, viewed on 16 February 2019]. Online access: <https://worldjusticeproject.org/about-us/overview/what-rule-law> .
[23] KOCHENOV, D. The Missing EU Rule of Law? from *Reinforcing rule of law oversight in the European Union*. United Kingdom: Cambridge University Press, 2016, p. 290-312.

entails. There are two interrelated distinctions – thicker (substantive) and thinner (formal).[24] Formalist definitions of the rule of law focus more on the straightforward aspect that law should be followed. No evaluation of the justness of law itself or how the principle is followed is required. On the contrary thick, democratic understanding of the rule of law identifies eight main constitutive attributes of the concept: (1) there has to be a constitutional order – a legal hierarchy of sorts that shows how rules are themselves legally ruled, and all subjects in it are permanently subject to regulations that govern their conduct; (2) the constitutional order has to possess and exercise adequate institutional and administrative capacities; (3) no one can be above the law; (4) illegality and corruption should be discouraged, detected and sanctioned across all branches of the government and state administration; (5) fundamental political and civil rights should be guaranteed and upheld equally, they also must apply to disadvantaged groups, minorities; (6) all security forces should be subservient to civilian government, all misconduct should be dealt humanely and with respect to individual's legally protected rights; (7) the judiciary is independent from undue influence from executive, legislative and special interests; (8) access to justice in criminal, civil and public matters is fair and reasonably expeditious.[25] Again, this is all very debatable and does not provide a clear enough definition of the concept. In a way, it is easier to determine what not the rule of law is, then to say what it is.

One of the possible ways to find a more all-encompassing definition is to look for national interpretations of the concept. For example, the evolution of the rule of law in post-communist European regimes is the starting point for the rule of law in Poland and Lithuania. When establishing new legal orders after Lithuania restated independence from the Soviet Union and Poland moved to democracy they used the concept to deal with the past. That was a way to reduce positivist and a formalist rule of the written text that was dominant in their legal culture. New democratic regimes initially prioritized thick conceptions of the rule of law.

Interestingly, the Polish Constitution does not have the rule of law *expressis verbis* embedded therein. In the Art. 2 of the Constitution, we find the phrase 'democratic state ruled by law' is probably the closest thing in the Constitution text.[26] In Lithuania

[24] RIJPKEMA, P. The Rule of Law Beyond Thick and Thin. *Law and Philosophy*, 2013, Vol. 32, No. 6, p. 793-816. [interactive, viewed on 16 February 2019]. Online access: <https://www.jstor.org/stable/24572426>.
[25] MAGEN, A. Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU. *JCMS: Journal of Common Market Studies*, 2016, Vol. 54(5), p. 1053–1054. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1111/jcms.12400>.
[26] The Constitution of the Republic of Poland. *Dziennik Ustaw*, No. 78, I. 483.

Constitution, the rule of law is written down explicitly in the preamble. So some could argue that because of that, Poland does not have such a principle or that it has a different approach to it from the other European counties understanding. However, that is a wrong presumption.

According to the Polish Constitutional Court jurisprudence rule of law should still be understood as a collective expression of several rules and principles. Even if it's not been laid down *expressis verbis* in the text of the Constitution. It immanently stems from axiology and the essence of a real democratic state. When there is no specific constitutional norm or when it is necessary to harmonize norms, the clause on a democratic state based on the rule of law may be the point of reference for constitutional review.[27] Lithuanian Court noted that the constitutional principle of a state under the rule of law is universal. Upon this, the whole Lithuanian legal system, as well as the Constitution of the Republic of Lithuania itself, are based. The content of the principle of a state under the rule of law can be detected in various provisions of the Constitution.[28] That brings us to the overall constitutional regulation. It is designed to defend universal values,[29] upon which the Constitution as the supreme law, as a social contract and the state as the common good of the entire society, is based. For example, the substantive limitations on the alteration of the Constitution stem from the goal to protect the harmony of these values and the harmony of the provisions of the Constitution.[30]

The Constitution does not permit any amendments to the Constitution that would deny the international obligations of the Republic of Lithuania. The obligations arising from its membership in NATO and EU are preconditioned by the geopolitical orientation of the Republic of Lithuania. The constitutional principle of *pacta sunt servanda* would be broken. Amendments to the Constitution may not violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them. As long as the international obligations have not been renounced the norms in them should be in accordance with the norms of international law.[31]

[27] XVIIth CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURS. *Role of the Constitutional Court in upholding and applying constitutional principles.* Georgia: The Constitutional Court of Georgia, 2018, Vol. 2., p. 592.
[28] The Constitutional Court of the Repuclic of Lithuania ruling of 23 February 2000. *Valstybės žinios*. 2000, No. 17-419.
[29] JARAŠIŪNAS, E. The Constitutional Grounds for Membership of the Republic of Lithuania in the European Union from *Lithuanian Constitutionalism: The past and the Present*. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, p. 271-273.
[30] The Constitutional Court of the Repuclic of Lithuania ruling of 24 January 2014. *TAR*. 2014, No. 478.
[31] *Ibid*.

The developmental changes both countries agreed upon in the process of joining the European Union should not be disputed now. At that point, the international interpretation of the rule of law automatically became the national understanding of it as well. Poland and Lithuania joined the EU by meeting the critical criteria for accession. These were mainly defined at the European Council in Copenhagen in 1993, hence referred to as 'Copenhagen criteria.' Countries who wished to join needed to have: stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces in the EU; the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.[32] The conditions and timing of the candidate's adoption, implementation, and enforcement of all current EU rules (the "acquis"). These rules are divided into 35 different policy fields (chapters). The most relevant to the rule of law requirement is Chapter 23: Judiciary and fundamental rights; Chapter 24: Justice, freedom, and security; Chapter 34 – Institutions.[33] Chapter 23 provides that the establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. It requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Equally, the Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law.[34]

Even though the Copenhagen Criteria provided these countries with guidance on what is expected of them, not all of them may have understood what the rule of law as a value entailed. The vagueness of the criteria and lack of response to candidate countries failures to meet all requirements before accession just postponed problems that are happening now.[35] However, by joining the EU respect for the rule of law in all areas became undebatable. It should be conceptualized that regard to the concept in the national realm can be understood as an *erga omes partes* obligation. Its nature entails that each country

[32] EUROPEAN COMMISSION; DIRECTORATE-GENERAL FOR COMMUNICATION. EU enlargement. Luxembourg: Publications Office, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.2775/06560>.
[33] EUROPEAN COUNCIL. *Accession criteria (Copenhagen criteria)*. Copenhagen, 1993. [interactive, viewed on 16 February 2019]. Online access: <http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en>.
[34] *Ibid*.
[35] REZLER, P. The Copenhagen Criteria: Are They Helping or Hurting The European Union? *Touro International Law Review*, 2011, Vol. 14, No. 2, p. 400-405. [interactive, viewed on 16 February 2019]. Online access: <https://www.tourolaw.edu/ILR/uploads/articles/V14_2/5.pdf>.

owes it to the Union, to the other member states and to individuals to follow through.[36] However, because the rule of law is such a hard thing to determine the Member States still struggle to follow it as a fundamental principle with no clear guidance. Each country has a particular, unique understanding of the principle and what it entails in practice. There have been some attempts to unify it, but at least for now they have not been successful enough.

For example, according to the European Commission, those principles that comprise the rule of law include: legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; efficient judicial review including respect for fundamental rights; and equality before the law. Also, Commission created a Framework in which it made a six-part (legality; legal certainty; prohibition on arbitrariness of the executive powers; independent and effective judicial review, including respect for fundamental rights; the right to a fair trial and the separation of powers; equality before the law) conceptualization of the rule of law.[37] That was an attempt to make the concept more obligatory and address another issue linked to it. No provision of the treaties or EU legislation has ever defined what is meant by the 'rule of law' or how the term is related to the other foundational values listed in Art. 2 of the Treaty on European Union. That is one of the biggest problems that have been exposed after the situations in Hungary, Poland and very recently Romania.[38] Similarly, the rule of law is mentioned in the preambles, but never defined in the statute of the Council of Europe, the European Convention on Human Rights and the United Nations Universal Declaration of Human Rights. The Commission's Framework for the very first time provided a public, comprehensive conceptualization of the concept by an EU institution.[39] By doing so, the Commission moved the rule of law from imprecise concept of fundamental value to creation of legal enforceability of its political components. However, this document is widely debated.

Can the Commission create a document specifying a value listed in a treaty and expect it to have the same legal power as the treaty? The rule of law in Europe is both part of the international and national systems. It shows the complicated relationship between the supremacy of EU law and the domestic reservations aimed at securing as much

[36] BARATTA, R. Rule of Law 'Dialogues' Within the EU: A Legal Assessment. *Hague Journal on the Rule of Law*, 2016, Vol. 8(2), p. 361. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-016-0032-z>.
[37] MAGEN, A. Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU. *JCMS: Journal of Common Market Studies*, 2016, Vol. 54(5), p. 1054. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1111/jcms.12400>.
[38] *Ibid*., p.1051.
[39] *Ibid*.

sovereignty as possible. That protection is enshrined in the principle of subsidiarity.[40] In areas in which the European Union does not have exclusive competence, subsidiarity seeks to safeguard the ability of the Member States to make decisions, action and ensure that powers are exercised as close to the citizen as possible. That is a difficult principle to guarantee in relation to the rule of law. National governments now more often use ill-reasoned arguments such protection of human rights, ultra vires doctrine and national constitutional identity to override the fundamental foundations of the concepts they argue they are protecting. The supremacy of law, fundamental rights, democracy and the right to a fair trial, all form a unique set of values that the Member States are expected to protect at a national level. They are instrumental for ensuring the correct functioning of a supranational system without borders for citizens, goods, and judgments.[41] Yet for some time now the struggle to establish such a system not just because of discrepancies (economic situations, ruling political majorities, legal traditions, political systems) in between countries. An impactful factor is the divinations of positions on how much EU can have an impact on national legislation or how much a Member State can deviate from shared values and remain a member.

In the end, because the rule of law is such a difficult thing to be defined as the only way to research it is to choose a definition subjectively. In this thesis, it will follow Copenhagen criteria[42] and the European Commission for Democracy through Law (Venice Commission) the Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).[43] Copenhagen criteria will be used as the primary reference because of their legal power to bound countries. The second was chosen because of the Venice Commission's interactions with the Polish government based on the Checklist and their precise nature. Another very import thing that needs to be defined before beginning the analysis of legal systems in Lithuania and Poland is – what is considered to

[40] Treaty on European Union (Consolidated version 2016). *Official Journal of the European Union*, OJ C 202, 7.6.2016, Article 5(3) and Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality. *Official Journal*, 2008, Vol. 115, p. 206–209 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV). [interactive, viewed on 16 February 2019]. Online access: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02>.

[41] BARATTA, R. Rule of Law 'Dialogues' Within the EU: A Legal Assessment. *Hague Journal on the Rule of Law*, 2016, Vol. 8(2), p. 362. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-016-0032-z>.

[42] EUROPEAN COUNCIL. *Accession criteria (Copenhagen criteria)*. Copenhagen, 1993. [interactive, viewed on 16 February 2019]. Online access: <http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en>.

[43] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION). Rule of Law Checklist. Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). [interactive, viewed on 16 February 2019]. Online access: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.

be a rule of law crisis? Is there a way to know when the principle is not sufficient enough and when it movies to crisis territory?

1.2. What should be considered a rule of law crisis?

If it is already challenging to clarify what is the rule of law even more challenging task is to say what should be classified as its crisis. However, here we have a slight twist - the definition of the concept has been debated for years, but the crisis part of it is quite a new discussion. For a long time, democratization and spreading of the rule of law were considered as a one stream process. However, events in Hungary, Poland challenge conventional wisdom regarding democracy. Research had for long held that democratic consolidation is a one-way street. Previously, empirical studies have suggested that wealthy democracies, once reaching a certain level of GDP per capita, are immune to democratic breakdown. That may no longer be the case as signs over the last decade show that even economically stable democracies are not safe from backsliding.[44]

The rule of law always was and always will be the concept that connects politics and law. It is especially evident when trying to define what its crisis is. Fundamental, crisis-level deficiency in the rule of law nearly always finds its starts in political action or decisions. It could be a creation of a new law or a political decision to ignore a court's ruling, or many other examples. They all are linked by the systemic violation that most often need political power. The tricky part of it is that those political actions result in a legal problem which resolution requires both the political will and legal solutions. We also cannot forget that there is a chance that the rule of law crisis can legitimately be considered better placed within the parameters of its sister notions, 'democracy' and 'human rights' crisis.

By opting to frame democratic backsliding as a rule of law crisis, EU institutions reflect an awareness of empirical reality. By defining the imbroglio as the rule of law crisis, rather than broader democratic backsliding, the Commission and Parliament, in particular, provide a diagnosis of the current malaise. It is at once more circumscribed, nuanced and focused on the non-procedural dimensions of democratic quality.[45] That is the reason why the situation in Poland is considered to be the rule of law crisis – it is much easier to agree on the rule of law crisis definition than on the fact that Poland is moving from democracy

[44] TAUSSIG T.; JONES B. *Democracy in the new geopolitics*. Brookings, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://www.brookings.edu/blog/order-from-chaos/2018/03/22/democracy-in-the-new-geopolitics/>.

[45] MAGEN, A. Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU. *JCMS: Journal of Common Market Studies*, 2016, Vol. 54(5), p. 1050–1061. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1111/jcms.12400>.

to another type of regime. Additionally, attribution to the rule of law allows international actions to intervene; were in other types of deficiencies (democracy, separation of power, etc.) it would be much harder if at all possible to act from the international perspective. Poland does not uphold the rule of law based on the EU treaty, the Venice Commissions resolutions and its the Rule of Law Framework. Yet, neither the European Commission nor the remaining institutions ever venture to distinguish the rule of law from the other foundational values listed in Article 2 TEU. No conceptual boundaries between it and its sister concepts of 'democracy' and 'human rights' are drawn. This lack of explanation of how the rule of law should ensure other values enable the proper functioning of all of them. However, other international organizations have already attempted to define and relate the notions of democracy, human rights and the rule of law.[46]

European Union is based on mutual understanding and respect between member states.[47] So considering that the other Member States have declared the situation as a rule of law crisis, Poland cannot opt to deny such a possibility. Of course, given the fragile democratic legitimacy of the EU itself, its interventions against democratic backsliding are particularly precarious. If a countries government assumed power as the result of equal, free and fair elections and makes decisions based on the legal order in the country, what grounds the EU has to intervene in relation to the proportionality principle? By taking action against local governments, it invites a counter-reaction. It can portray the EU as an undemocratic actor who illegitimately intervenes against a government that has the backing of a majority of voters.[48] This problem is discussed in detail in the second and 3.4 part of this thesis.

As mentioned before the rule of law concept found its start in Lithuania and Poland after their legal systems were re-imagined after the Soviet periods in both of them. Then it became a focus for many years as a requirement needed to be reached to join the EU. The understanding of what is considered to be a modern democratic regime has not changed from then. It combines the same three primary institutions: the state, the rule of law, and

[46] MAGEN, A. Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU. *JCMS: Journal of Common Market Studies*, 2016, Vol. 54(5), p. 1050–1061. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1111/jcms.12400>.
[47] Treaty on European Union (Consolidated version 2016). *Official Journal of the European Union*, OJ C 202, 7.6.2016.
[48] SCHLIPPHAK, B.; TREIB, O. Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 352–365. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229359>.

democratic accountability.[49] For either of these countries, the membership in the EU represented—in addition to a guarantee of democracy and human rights—a path to the actual realization of their national aspirations. Sadly, countries were eager to join more because of the significant socioeconomic advantages that the EU offered.[50] So the problematic reality in different member states not just relates to the inherent elasticity of the concept itself and lack of clear conceptual boundaries between it and other foundational values. It goes back to why and how the rule of law appears in their legal and political systems.

The part of the rule of law that can be separated from the fuzziness of it and can be subjection to measuring consequences is the judiciary. Independence of judiciary is a fundamental, an integral part of checks and balances system. Breaching of the independence one of the branches of government cannot be ignored. Thus, is it possible to say that when the independence of the judiciary is violated the rule of law crisis can be identified? Which legal documents allows us to classify it as a crisis, not as a *mild* violation? The inability to perform duties based on the rule of law principle (constitutional review, ability to protect human rights, separation of power, etc.) is the way to determine that it is no longer just a violation but a crisis. A great example is Poland and Hungary. The situation in Hungary started with just violations, not a crisis because the judiciary of this country still had the chance to function properly. In Poland the whole judicial system is at a stop – the constitutional review is not executed/implemented; other judicial branches such as general, administrative courts are assaulted as well. To declare a rule of law crisis we need two things – the quite clear nature of violations and severity of them.

So, in analysing the legislation and the situation that lead to the rule of law crisis in Poland the problems with the rule of law and its guardianship in established constitutional democracies can be discovered. This analysis can aid the legislators, re-evaluate the tools we have and need to construct. Systematic rethinking of the legal system linked to the rule of law violations in the European Union and its member's national legislation must be done.[51] This study can reveal patterns from which law affects state government behavior and how the law is affected by social change, whether of a political, economic, psychological, or demographic nature.[52] So what allowed the crisis in Poland to happen and

[49]FUKUYAMA, F. Why is democracy performing so poorly? *Journal of Democracy*, 2015, Vol. 26(1), p. 12. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1353/jod.2015.0017>.
[50] SOLANA, J. *The flip side of Euro-Atlantic integration*. Brookings, 2017. [interactive, viewed on 16 February 2019]. Online access: <https://www.brookings.edu/blog/order-from-chaos/2017/07/27/the-flip-side-of-euro-atlantic-integration/>.
[51] ZWEIGERT, K.; KÖTZ, H. *Introduction to comparative law*. Oxford: Clarendon, 1992, p.16.
[52] *Ibid*., p.10.

is there a possibility that systems within the EU and its Member States would let it happen elsewhere? Before the analysis of the national legislation in Poland and Lithuania, the international provisions and mechanisms must be examined. That will provide a mutual background for both countries national norms.

2. INTERNATIONAL CHECKS AND BALANCES OF THE RULE OF LAW

2.1. The rule of law as part of the EU legal order

The crisis in Poland exposed how legislation fails to protect the rule of law when the government has the intention to abandon it. However, nowadays most legal systems are influenced by the international legal order. That is especially true for the EU Member States. Countries by joining the Union also agrees to follow the regulation set down in the Treaty. The Treaty of the EU is the most important legal document in the European Union. Every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU member countries. It is a binding agreement, so all of the provisions are mandatory for each member.[53] The Art. 2 of the TEU stipulate that the Union is founded on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The Art. 2 expresses that the rule of law is a fundamental principle of the Union creates the basis of homogeneity of the EU order. It is a community of law.[54] That is why according to the Art. 49 TEU, candidate countries must respect these values and be 'committed to promoting them.'[55] That was also stipulated in the accession criteria (the Copenhagen criteria) - a certain level in regulation and practice had to be reached to be allowed to join. As noted in the first part of this thesis Poland and Lithuania are members of the European Union since 1 May 2004. So we should look to the rule of law protection not just as a national prerogative but an international one. In a way, EU has a flawed system of how to deal with the Member States in connection to the rule of law. They can use a few options: the system of the Art. 7 procedure, infringement procedures in the CJEU or try to engage other actors in the international area.

2.2. The procedure of the Art. 7

After the past few instances where the rule of law was systemically threatened in the Member States, the European Commission in March 2014 adopted the Rule of Law Framework to address such issues. This framework established a three-stage process through which the rule of law problems should be solved. First, the Commission assesses

[53] Treaty on European Union (Consolidated version 2016). *Official Journal of the European Union*, OJ C 202, 7.6.2016.
[54] BLANKE, H.-J.; MANGIAMELI, S. *The Treaty on European Union (TEU): a commentary*. Heidelberg; London: Springer, 2013, p. 110; 131-133; CLOSA, C. Reinforcing EU monitoring of the Rule of Law from *Reinforcing rule of law oversight in the European Union*. United Kingdom: Cambridge University Press, 2016, p. 17.
[55] OLIVER, P.; STEFANELLI, J. Strengthening the Rule of Law in the EU: The Council's Inaction. *JCMS: Journal of Common Market Studies*, 2016, 54(5), p. 1075-1084. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1111/jcms.12402>.

whether there is a 'systemic threat' to the rule of law. Second, the Commission issues a recommendation. Those recommendations must be concrete, achievable, addressing the precise problem, they must specify deadlines, for the actions that need to be done based on the recommendation. Lastly, monitoring of how the EU member state follows the Commission's recommendations is done.[56] If no solution is found within the Rule of Law Framework or the state does not comply with the recommendations the procedure of the Art. 7 of the EU Treaty is used. It is the last resort to resolve the crisis, to ensure that the EU states comply with the EU values. However, the primary goal of the Rule of Law Framework is to prevent emerging threats to the rule of law in a way that it would not escalate to the point of Art. 7 procedure.

The procedure prescribed in the Treaty of the European Union is the main instrument against domestic breaches of liberal democracy. It should help to prevent and solve the rule of law crisis in the EU. The Art. 7 norms constitute that the Council may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2 and impose a penalty. However, for this to happen it needs a majority vote of four-fifths of Council members and the consent of the European Parliament to do so. The procedure, in general, can only be started after a reasoned proposal by three subjects: one-third of the Member States, the European Parliament or the European Commission. The Council also hears from the Member State in question. The Council has to regularly verify that the grounds on which such a determination has been made continue to apply.[57] That process can lead to the harshest punishment in the EU. The European Council is allowed to suspend 'certain membership rights' of a Member State that commits a 'serious and persistent breach' of the liberal democratic values on which the EU is founded.[58] Also, the sanctions can be individualized based on the specific breach. The Council can suspend the voting rights, withhold funding from the EU budget or issue other types of sanctions. However the Art. 7 procedure is complicated to use as seen from the attempts to start it against Hungary and Poland.

[56] SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 337–351. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229358>.

[57] Treaty on European Union (Consolidated version 2016). *Official Journal of the European Union*, OJ C 202, 7.6.2016.

[58] SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 337–351. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229358>.

As already covered in the first part of this thesis the determination of what is a severe and persistent breach of Art. 2, or that situation reached the rule of law crisis level is problematic. The very establishment of a breach is in the hands of the Member States and states most often are reluctant to act against other countries. No one wants to act as the controller because of how connected economically and politically the countries are.[59] The concerns about national sovereignty, especially among the less integration-minded governments puts additional pressure. Today the EU has at least two, quite openly illiberal governments –in Hungary (lead by Fidesz) and in Poland (lead by PiS), which are potential targets of the Art. 7 procedure. The consequence of this is support between these countries to stop any sanctions against each other.[60] Sadly there are even more states that view the rule of law and its deficiencies as the internal affairs. The President of the European Commission Jean-Claude Juncker revealed his frustration about some state refusal to use Art. 7 because this *de facto* cancels the chance the use of the procedure *a priori*.[61]

Further, the problem with the Art. 7 procedure is the requirement of the extremely demanding majority to approve it. It even deters the idea of mere proposals to use the Art. 7 against countries that violate the fundamental principles. The reluctance to submit a formal proposal comes from the possibility if it would not get the needed votes. That would be interpreted as the overall absence of a breach, rather than merely a shortfall of the required political support.[62] The decisional imbalance between the initiator and the decision maker is especially significant. The need for absolute majority puts the Council in a weak position.[63] The states in question for the rule of law breach take action to prevent Art. 7 procedure not by fixing the problems but lobbying other countries to express objection to such procedure. For now, there is also, no evidence to indicate that the Art. 7 procedure will create more positive, then negative results.

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[59] CLOSA, C. The politics of guarding the Treaties: Commission scrutiny of rule of law compliance. *Journal of European Public Policy*, 2019, Vol. 26 (5), p. 1–21. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2018.1477822>.

[60] SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 337–351. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229358>.

[61] CLOSA, C. The politics of guarding the Treaties: Commission scrutiny of rule of law compliance. *Journal of European Public Policy*, 2019, Vol. 26 (5), p. 1–21. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2018.1477822>.

[62] SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 337–351. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229358>.

[63] CLOSA, C. The politics of guarding the Treaties: Commission scrutiny of rule of law compliance. *Journal of European Public Policy*, 2019, Vol. 26 (5), p. 1–21. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2018.1477822>.

2.3. The possible outcomes of the Art. 7 procedure

The decision to start the Art. 7 procedure can create unexpected results. At the outset, these procedures create the rally-round-the-flag effect. The accused governments can turn the EU's interventions into a matter of 'us' against 'them' by arguing that the EU illegitimately is meddling in domestic affairs.[64] The same could be said about the results the EU can achieve through material sanctions when they are trying to change illiberal governments.[65] The EU will always be in at the disadvantage point. A threat of sanctions arouses a nationalist response within the target government or population, undermining the effectiveness of the threat. That may even lead to a situation where sanctions trigger support for authoritarian, illiberal governments. It is difficult to communicate to the nation why should it endure punishment to ensure values that are quite obscure at best rather than just ignore the problem and hide under the national interest's idea?[66] Even though EU institutions hold the legal, financial, and diplomatic upper hand over its members[67], especially in the case of Lithuania and Poland, but in them, little credit is given to EU institutions, the role of the Unions is quite poorly understood by the general public.

That brings us to the situation what could happen with Lithuania if it would join Poland in the democracy backsliding. First, the Commission took much firmer action against the Polish government that it has done before in similar situations. The shows that a significant factor in the rule of law violation - the timing of them. Poland's crisis happened after the Hungarian crisis which intensified the EU reaction to the events in Poland. That shows that context in which they happen make differences on how the international community reacts. In January 2016 the Commission activated the Rule of Law Framework and escalated the various stages of it. The Polish government did not do appropriate changes required by the recommendation and adopted a confrontational stance. In July 2017 the Commission launched a first infringement procedure and issued a third recommendation within the Framework which explicitly threatened to activate the Art. 7

[64] SCHLIPPHAK, B.; TREIB, O. Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 352–365. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229359>.

[65] SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 337–351. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229358>.

[66] CLOSA, C. The politics of guarding the Treaties: Commission scrutiny of rule of law compliance. *Journal of European Public Policy*, 2019, Vol. 26 (5), p. 1–21. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2018.1477822>.

[67] SWEENEY, R. J. Constitutional conflicts in the European Union: Court packing in Poland versus the United States. *Economics And Business Review*, 2018, Vol. 4(4), p. 3–29. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.18559/ebr.2018.4.1>.

procedure. On 20 December 2017, this resulted in the Commission issuing the fourth recommendation and initiation of the first stage of the Art. 7 procedure.[68] The whole process showed the Commission's preference for engagement strategies and its reluctance to use enforcement mechanisms. More limits to the EU enforcement system were exposed as well: the Commission relies mainly on domestic cooperation and that can encourage governments to comply only symbolically or rhetorically. In the case of Poland even went as far as to question the legality of the Commission actions and deepening of the breach going beyond the Constitutional Court.[69]

So if Lithuania started to drift away from the rule of law, the reaction would be even stricter. The disrespect to the rule of law in another Member States would start an unstoppable snowball effect that other illiberal governments would be encouraged to join. The long-term risk of the European legal order disintegrating as more and more members, emboldened by PiS example, see fit to violate the basic democratic standards and legal framework that holds the union together would be too great.[70] For that reason, the whole situation in Poland is seen as a significant showdown to see is the Commission capable of sanctioning misbehaving member. Additionally, is their real support from other countries to put the Unions values higher than anything else? However, international mechanisms have many problems the main being their counteractive nature. The significant breach has to happen to create a reason for any entity to act. As for the rule of law problems, they are nearly unfixable after such development happen. So safeguards have to be enshrined in the national legal order, and then just backed by international entities in a more coherent system than now.

2.4. Infringement procedure

The Court of Justice of the European Union (CJEU) jurisprudence, lacked a comprehensive analysis of what the rule of law fundamentally means. In older judgments, CJEU constructed the rule of law as a 'meta-principles.' According to the court, it just should provide the foundation for the independent, effective judiciary and protection of the

[68] CLOSA, C. The politics of guarding the Treaties: Commission scrutiny of rule of law compliance. *Journal of European Public Policy*, 2019, Vol. 26 (5), p. 1–21. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2018.1477822>.
[69] *Ibid*.
[70] DAVIES C. *Hostile Takeover: How Law and Justice Captured Poland's Courts:* special report. Freedom House, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://freedomhouse.org/report/special-reports/hostile-takeover-how-law-and-justice-captured-poland-s-courts>.

unlawful exercise of public power.[71] From this, it would seem that the situation in Poland easily should be judged as just a violation, but that is not so easy. The court partly developed the principle of the rule of law in a way that it lacked any real legal effect because of its ambiguity. This approach changed in recent years going as far as using other countries cases to comment on the situation in Poland. The Court made it clear that when a body operates as a court or tribunal, Member States are obliged to protect its judicial independence, and they cannot remove disputes from the jurisdiction of their courts and tribunals.[72] The systemic infringement procedure provides a chance to the Commission to act alongside the CJEU that the Member States meet their obligations. However, that alone will not provide needed results or will take a significantly long time to protect the fundamental values.[73]

A very recent decision, which is directly linked to Poland, probably will expand the doctrine. On 17 December 2018, the CJEU in Case C-619/18 R Commission v Poland issued an order that granted the Commission's request for interim measures against Poland. The Republic of Poland is obliged to immediately suspend the application of the provisions governing the judicial system and any measures adopted in implementation thereof; to take all necessary measures to ensure that judges of the Supreme Court can continue to hold office and have the same status, rights and working conditions that were applicable to them until 3 of April 2018. Moreover, they were obligated not to take any measures to appoint judges to the Supreme Court in place of the same judges, as well as to appoint a new president or person to direct that court before things are resolved. The Republic of Poland is also required to regularly (every month) inform the European Commission of any measures taken to comply with this Order.[74] However, these measures are just a first step in a long process where the results are still unpredictable; no one can say how the jurisprudence will be changed after the case is finished.

[71] PECH, L. 'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law. *European Constitutional Law Review*, 2010, Vol. 6(3), p. 359-396. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1017/S1574019610300034>.
[72] BONELLI, M.; CLAES, M. Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses. *European Constitutional Law Review*, 2018, Vol. 14(3), p. 622-643. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1017/S1574019618000330>.
[73] SCHEPPELE, K., L. Enforcing the Basic Principles of EU Law through Systemic Infringement Actions from *Reinforcing rule of law oversight in the European Union*. United Kingdom: Cambridge University Press, 2016, p. 105-132.
[74] The European Court of Justice order C-619/18 R, 2018 December 17. *ECLI:EU:C*:2018:102.

2.5. Other means of supervision of national states

There is no centralized institution to guard the principle in different countries that have the legal and political power to prevent breaches.[75] However, now more institutions are working on the rule of law promotion and guardianship than ever. On the international level, for example, an important factor is the European Commission for Democracy through Law (the Venice Commission) that works with Constitutional Courts and the rule of law. Currently, the Venice Commission has 58 states as members, with the 47 states of the Council of Europe as a member. It provides non-binding opinions on laws, situations that are linked to democracy and the rule of law. Sadly, quite often their recommendations are disregarded. Though most states do react positively, they are unwilling to take action. Since it is an advisory body and has no real instruments or power to pressure states to follow their recommendations it need help from other entities. To some extent, the Commission could enhance the effect of its opinions by joining forces with other institutions especially the Council of Europe.[76] However, the legality or to be precise (un)binding nature of any actions taken by the Venice Commission or the Commission are disputed continuously by the states. For example, the PiS government consistently uses the argument their decision is national legal systems decisions the no foreign entity has the power to dispute them.

That brings us to the European Court of Human Rights (ECtHR) being one of the institutions to guard the rule of law. However it quite a few problems in trying to do so. First, the court requires the applicant to be driven from something more than just minor violation of principles of the rule of law, to have a connection to one of the European Convention on Human Rights articles. Second, the procedure in the court is lengthy. It takes a few years to reach decisions, and the breath can continue for that time. Also, the international court is reluctant to issue decisions based on the rule of law.

In regards to the rule of law deficiencies, the court in recent years has provided some noteworthy decisions. First by the timeline is the ECtHR Baka v. Hungary decision. Here the court had the chance to deliver judgment about the rule of law and countries responsibilities towards it. However, in the court instead of relying on the well-established case law and providing clear and nuanced arguments, has stretched the Convention, broadened the scope of judges' freedom of speech. It failed to acknowledge the difference

[75] NOLLKAEMPER, A. The Internationalized Rule of Law. *Hague Journal on the Rule of Law*, 2009, 1(1), p. 74–78. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1017/S1876404509000748>.

[76] HOFFMANN-RIEM, W. The Venice Commission of the Council of Europe – Standards and Impact. *European Journal Of International Law*, 2014, 25(2), p. 579–597. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1093/ejil/chu029>.

between the dismissal of a judge from the position of a court president and dismissal of a judge from the judicial office. Most devastatingly the court excessively relied on the non-binding soft law created primarily by judges. It missed the opportunity to clarify the concept of the rule of law in the Convention.[77] For now, the concept of the rule of law is non-justiciable and has not been treated as a self-standing value in the ECtHR. It merely guarantees the protection 'against arbitrary interferences by public authorities with the rights safeguarded by the Convention.' That raises legitimate concerns whether the rule of law, as articulated by the Grand Chamber in Baka, can meaningfully protect any checks and balances against democratically elected majorities and their interferences with judicial power.[78] It seems that international organizations have struggled to acknowledge these theoretical challenges and disagreements. Moreover, the crisis in Poland exposed the distinct structural differences between the international and the national legal orders in the possibility to act based on national governments actions.

[77] KOSAŘ, D.; ŠIPULOVÁ, K. The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law. *Hague Journal on the Rule of Law*, 2018, Vol. 10(1), p. 83-110. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-017-0065-y>.
[78] *Ibid*.

3. ANALYSIS OF THE RULE OF LAW REGULATION LINKED TO THE CONSTITUTIONAL REVIEW IN POLAND AND LITHUANIA

Before starting to analyse the national legislation in Poland and Lithuania the situation of what exactly happened in Poland to reach the crisis level has to be addressed. The crisis was set in motion when the new Act on the Constitutional Tribunal was adopted in Poland on 25 June 2015, and one provision – Article 137 allowed the Polish parliament (*Sejm*) to elect five new judges to the Constitutional Tribunal. Two new judges were elected to replace judges whose terms were due to expire a month later, i.e., under the next parliament. This action was later found to be unconstitutional and could have been fixed legally if not for newly elected Sejm actions.

3.1. What happened in Poland

On 25 November 2015, the new parliament adopted five resolutions invalidating the election of judges by the previous Sejm. This was done against the Constitutional Tribunals 30 November 2015 decision to take preventive measures by requesting that the Sejm abstain from electing new judges. The Sejm proceeded with the election of five new judges on 2 December 2015. It was immediately sworn into office by the President of the Republic, who also refused to swear in the newly elected Constitutional Tribunal judges by the previous Sejm even though he was obligated to swear them in based on the Constitution. By electing new judges, the new parliament did not respect the opinion of the Constitutional Tribunal.[79] Even when the Constitution only provides for 15 Constitutional Tribunal judges, there were 18 elected overall, and just 12 judges were able to adjudicate for over a year because of the Courts Presidents' and Polish Presidents' actions.[80] The second part of the problem is amendments to the Act adopted on 19 November 2015 and 22 December 2015. They introduced significant, unconstitutional changes - violations of the rule of law, as well as the principles of the separation of powers and the independence of the Constitutional Tribunal were made.[81] All actions towards legislation taken against the Constitutional Court of Poland can be grouped into three categories: (1) norms that effectively exempt the new laws just adopted by PiS from constitutional scrutiny by the Court; (2) those which would paralyse its decision-making, by making it more difficult,

[79] RYTEL-WARZOCHA, A. The Dispute Over The Constitutional Tribunal In Poland And Its Impact On The Protection Of Constitutional Rights And Freedoms. *International Comparative Jurisprudence*, 2018, Vol. 3(2), p. 153-160. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.13165/10.13165/j.icj.2017.12.003>.
[80] *Ibid*.
[81] *Ibid*.

and often impossible, to hand down any judgment; and (3) those which would increase control by the executive and legislature over the Court.[82]

Results of Poland's rule of law crisis are jaw-dropping. Just simple statistics about the constitutional review in Poland after 2015 show that. The number of cases filed with the Court, as well as those decided by the Court, decreased significantly. Before the constitutional crisis, the Court accepted about 500-600 cases annually. In 2016, this number dropped to 360 cases, and in 2017 it was down to 282 cases. The Court, once known for its efficiency (in 2014 alone, the Court rendered 119 judgments and in 2015 – 173), has become a slow-motion institution. In 2016 and 2017 the Court issued 99 and 89 judgments, respectively. In 2018 the number of judgments had dropped to an all-time low of 65 decisions (36 judgments and 29 orders).[83]

Moreover, the situation in Poland showed how quickly authoritarian governments or the ones that have authoritarian tendencies go about dismantling democratic checks and balances. It took the Polish government less than two months to paralyze the country's Constitutional Tribunal.[84] The disempowering should be seen not as a phenomenon in itself, but as a far more reaching violation. As former President of the European Commission José Manuel Barroso said, 'the fundamental rights are an empty shell without the rule of law.'[85] Disabling constitutional review of liberal rights such as freedom of assembly, freedom of speech, rights to free and fair elections or rights of non-governmental organizations will be the way to abandon fundamental pillars of democracy. As a leading Polish constitutional scholar Tomasz Tadeusz Koncewicz noted: "The Constitutional Court was targeted first because that would ensure that next phases would sail through without any scrutiny from its side. Who cares that the new legislation flies in the face of the constitution since there is no procedural and institutional avenue to enforce constitutional

[82]SADURSKI, W. Polish Constitutional Tribunal Under PiS: From an Activist Court to a Paralysed Tribunal, to a Governmental Enabler. *Hague Journal on the Rule of law*, 2018, p. 1-22. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-018-0078-1>.

[83] KONCEWICZ, T. T. *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court.* VerfBlog, 2019. [interactive, viewed on 8 April 2019]. Online access: <https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/> and DŁUGOSZ D. *Tak PiS sparaliżował Trybunał Konstytucyjny*. Polska Newsweek, 2019. [interactive, viewed on 8 April 2019]. Online access: <https://www.newsweek.pl/polska/tak-pis-sparalizowal-trybunal-konstytucyjny/xf4shpr>.

[84] MEYER-RESENDE, M. *How to fix Europe's 'rule of law' blindspot.* Politico, 2017. [interactive, viewed on 16 February 2019]. Online access: <https://www.politico.eu/article/how-to-fix-europe-rule-of-law-blindspot-poland-hungary-democratic-decline/>.

[85] KARAKAMISEVA-JOVANOVSKA, T. The model of the Rule of Law in the European Union – reality or.... *Journal of Constitutional Law in Eastern and Central Europe*, 2017, Vol. 24, No. 1, p. 99.

rules?[86] Not surprisingly, today Constitutional Courts all over the world are targeted because of that reason.

3.2. Lithuania and Poland compared

The crisis in Poland has been happening for five years now and is still not resolved; hopefully, in Lithuania, it is just hypothetical. At the point of writing this thesis, some minor rule of law deficiencies can be spotted in the political atmosphere. The only concerns come from the upcoming presidential elections in May of 2019, approaching the election of three new justices and appointment of a new President of the Constitutional Court in 2020 as well as political rhetoric and initiative to reform the judiciary.[87] The latter is exponentially prompted after the judicial corruption scandal shock Lithuania in the first quarter of 2019.[88] All of the listed things by themselves aren't violations of the rule of law, but they can lead to the situation similar to Poland's. It all depends on the political powers in the country. If they have a goal to undermine the checks and balances in the system, there is a good chance they can do so. Thus, for this master thesis not to be a speculation, the analysis has to be very precise. As already described in the introduction a particular time frame has been chosen. The analysis focus on what the system was before the crisis occurred in Poland and is now in Lithuania.

Polish and Lithuanian states have come a long constitutional way until they adopted modern constitutions: Lithuania after regaining its independence in 1992 October 25 passed the Constitution of the Republic of Lithuania in a referendum, the Republic of Poland a little later at on 1997 May 25.[89] Both of them are similar in there form and contents to other Central and Eastern European constitutions amended after 1990.[90] Each Constitution establishes three branches of government – legislative, executive and judicial and the essential principles of democracy. Separation of power, the sovereignty that belongs to the Nation, protection of human rights and other values that are a hallmark of European

[86] SADURSKI, W. Polish Constitutional Tribunal Under PiS: From an Activist Court to a Paralysed Tribunal, to a Governmental Enabler. *Hague Journal on the Rule of law*, 2018, p.1-22. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-018-0078-1>.
[87] JASTRAMSKIS M. Lithuania Country Profile from *Nations in Transit 2018*: *Confronting Illiberalism*: report. [interactive, viewed on 16 February 2019]. Online access: <https://freedomhouse.org/report/nations-transit/2018/lithuania>.
[88] MIŠKINIS, V. Korupcijos skandalas: sulaikyti 8 teisėjai ir 5 advokatai, sutartų kyšių suma siekė 400 tūkst. eurų. *15min*, 2019. [interactive, viewed on 16 February 2019]. Online access: <https://www.15min.lt/naujiena/aktualu/lietuva/prezidente-leido-patraukti-baudziamojon-atsakomyben-8-auksto-rango-teisejus-56-1105418>.
[89] KALINAUSKAS, G. Lenkijos Respublikos Konstitucinė sistema from *Europos Sąjungos Valstybių Narių Konstitucinės Sistemos*. Vilnius: Mykolo Romerio Universitetas, 2012, p. 495.
[90] *Ibid*., p. 497.

democracies or any rule of law-abiding states.[91] The Constitutions in these countries are considered to be the most important document in the legal system. The Constitutional Court or Tribunal are the institutions that can decide whether laws and other acts conflict with the Constitution, issue ruling to keep the system in balance. The Constitutional Court of Lithuania has addressed the principle of the separation of powers of the state in the ruling of 26 October 1995. It expressed that the principle means that the legislative, executive and judicial branches of power must be separated, sufficiently independent, but, at the same time, they must be balanced. In the system of state authority, every branch of state power occupies a particular place and accomplishes functions characteristic of it only. When general tasks and functions of the state are being accomplished, the activities of state institutions are based on their co-operation. Therefore, their interrelations should be defined as an inter-functional partnership.[92] However, any ideas have to be not just explained in the jurisprudence, but in systemic actions from other branches as well.

In any legal order, checks and balances should protect the system from uneven power balance between different government branches and unconstrained governmental power. Understanding that separation of powers is not the same as checks and balances is fundamental to this situation. Checks and balances mean that along with a separation of powers, one branch of government cannot act unilaterally without the agreement of another.[93] Different branches of government should be designed so that they have conflicting interests, but must reach an agreement to take collective action. That is the whole purpose of the independent judiciary and constitutional review - they work as a judicial check on the abuse of power by other branches of government.[94] Interestingly, but not surprisingly Constitutional Tribunal is considered to be one of the most critical and significant safeguards and should always bring balance to the system.

3.3. Analysis of national legislation on the Constitutional Courts

The most critical provisions linked to constitutional review are laid down in the Constitutions. The right to a fair trial and public hearing of case, without undue delay, before a competent, impartial and independent court (Art. 45 in the Polish Constitution and

[91] LETNAR ČERNIČ, J. The European Court of Human Rights, Rule of law and Socio-Economic Rights in Times of Crises. *Hague Journal on the Rule of Law*, 2016, 8(2), p. 227–247. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-016-0035-9>.

[92] The Constitutional Court of the Repuclic of Lithuania ruling of 10 January 1998. *Valstybės žinios*. 1998, No. 5-99.

[93] KALINAUSKAS, G. Lenkijos Respublikos konstitucijos pratermė. From *Pasaulio Valstybių Konstitucijos*. Vol. 2 Vilnius: Mykolo Romerio Universitetas, 2016, p. 563.

[94] HOLCOMBE, R. G. Checks and Balances: Enforcing Constitutional Constraints. *Economies*, 2018, Vol. 6(4): 57. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.3390/economies6040057>.

Art. 31 in the Lithuanian Constitution), the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution to everyone whose constitutional freedoms or rights have been infringed (Art. 79 in the Polish Constitution and the Art. 6 in the Lithuanian Constitution) are the first to come to mind. Separation and balance between the legislative, executive and judicial powers are addressed in the Art. 10 of the Polish Constitution, but remarkably the Lithuanian Constitution has no *expressis verbis* of this principle. The Art. 5 is the one that primarily focuses on this principle and the countries Constitutional Court has also provided official doctrine on this matter in one of its cases.[95] There cannot be a functioning justice system if some of these norms would be ignored or broken, and we can see this in Poland. So what are the protections that guard the Constitutional Court, and how they can be improved?

Answers can be found in three documents, that are important to the Constitutional Tribunals design and relevant to rule of law problematic linked to it in Poland and Lithuania: (1) the Constitution, (2) the Act of Constitutional Tribunal (in Lithuania named 'The Law on the Constitutional Court of the Republic of Lithuania') and (3) the Rules of the Constitutional Court (in Poland named 'Rules of Procedure of the Court'). The Constitutional Courts are regulated in Chapter VIII 'Courts and Tribunals' in the Polish Constitution and then in the Constitution of Lithuania the Chapter VIII 'The Constitutional Court,' regulates the same matter.[96] Interestingly, the Polish Constitution regulates the entire judicial branch in the same chapter wherein Lithuanian Constitution other judicial institutions are described in the Chapter IX 'Courts'.[97] For Poland the Constitutional Tribunal Act of 25 June 2015 was analysed because later amendments were made already in the state of the rule of law crisis. Also, the Constitutional Court's official jurisprudents on the rule of law, separation of power and constitutional review were examined. Interestingly, there are significant differences between how much doctrine courts have on issues such as separation of power, the rule of law, independence of the court and other relevant topics. This doctrine could be the main difference in how the rule of law can be protected in these countries.

[95] The Constitutional Court of the Repuclic of Lithuania ruling of 6 December 1995. *Valstybės žinios*. 1995, No. 101-2264.

[96] There was a constitutional dispute about the status of the Constitutional Court in Lithuania. In the country's Constitution the Constitutional Court is regulated in a separate chapter from the other courts, which lead to a question - is it a court at all, if it is not in the chapter about the courts? The Constitutional Court of Lithuania in 2006 June 6 ruling on the status of the Constitutional Court enriched the official doctrine on how the Court has to function and be preserved in Lithuania according to the Constitution. The Constitutional Court, according to the ruling, is part of the judicial system but has a special status in the system of judicial power.

[97] The Constitution of the Republic of Lithuania. *Valstybės žinios,* 1992, No. 33-1014; The Constitution of the Republic of Poland. *Dziennik Ustaw*, No. 78, I. 483.

In the analysis these arias were identified as the most vulnerable: (1) justices appointment and removal procedures; (2) court and justice independence guarantees; (3) norms that prescribe the constitutional reviews procedure; (4) the provisions that mandate how norms and acts linked to constitutional order can be amended. These aspects are essential when trying to come up with better safeguards for Lithuanian Constitutional Court protection, the essence of the rule of law crisis in Poland and will be examined in detail.

3.3.1. Justices appointment and removal procedures

Two things are fundamentally important for an effective constitutional review: a functional and reliable design of the institution that allows it to work appropriately and independent, uncorrupted, impartial judges. The second is much more critical. No matter how the constitutional review would be organized or regulated the justices, in the end, are responsible for the quality of the Constitutional Court work. How much justices follow the rule of law in their daily work. That brings us to the rules of the appointment procedure, which in both countries are set down in the Constitutions and detailed Law of the Constitutional Courts[98].

In Lithuania, nine judges of the Constitutional Court are appointed for a single nine-year term of office every three years.[99] It is done to ensure that just one-third of the Constitutional Court are reconstituted and the work in the Court be less affected by the change. In Poland Tribunal is composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law.[100] Two issues linked to the appointment of the judges are the first concerns. Were other branches of government can corrupt the process: 1) the unclear candidate selection procedure and possible politicization of the procedure; 2) provisions connected to the oath of the already elected judge Neither Lithuanian nor Polish legal order has any safeguards to defend from such actions.

According to the law, the process of how the Court's justices are chosen is the only interaction were the other two, or one breach can influence the Court directly. That is not a bad thing in itself, but we, of course, can see some extremes. The United States of America is notorious for this in the few last decades. The Court there is perceived as politicized. That is not the same thing as understanding that the justices rely on their ideologies, values,

[98] The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120; The Constitutional Tribunal Act of 25 June 2015. *Dziennik Ustaw*, 2015, I.1064.
[99] The Constitution of the Republic of Lithuania. *Valstybės žinios,* 1992, No. 33-1014.
[100] The Constitution of the Republic of Poland. *Dziennik Ustaw*, No. 78, I. 483.

and opinions in deciding cases—a belief in legal realism.[101] For example when the Parliaments majority and the President are from the same political power (as it was in Poland at the start of the rule of law crisis) and they can appoint whatever they want. That does not mean that judge selected in such circumstances will be somehow subordinate to the political power. The independence guaranties should protect him, but it is much harder as seen from the situation in Poland. Court packing is one of the obstacles that can hardly be solved by legal means. The political and legal culture should be the things that prevent court-packing from happening. This problem is hardly fixable thought changing of the legal norms. Even though these procedures are detailed in the law, there are quite a few parts that allow someone that wants to politicize the process to an extreme level to do so, and a future detalization of the system will not help.

That is especially evident in relation to the selection process of the Constitutional Court President, who is essential to the functioning of the Court bought in Lithuania and Poland. For example, in Lithuania, the President of the Court directs the work of the Constitutional Court and the preparation of issues submitted to it for consideration, convenes and chairs sittings of the Court, can propose issues to be considered. He or she also distributes work to justices, manages the funds allocated to the Court and does other tasks.[102] The success or failure of the whole Constitutional Court relies on how well the President of the Court can perform his duties. The appointment procedure of him is not detailed and based more on the unwritten rules and subjectivity then clear criteria. In Lithuania, the Seimas appoints the President of the Constitutional Court from among its justices upon the submission by the President of the Republic.[103] There are no other criteria besides being a justice in the Constitutional Court. So, for example, the President of the country is free to suggest a candidate from newly appointed judges, by selecting a judge that is sympathetic to his political agenda. In Poland, the President of the Tribunal is appointed by the President of the Republic of Poland from among two candidates proposed by the General Assembly.[104] The regulation of this process in Poland was changed in the first amendments that lead to a crisis. That only shows how vital these norms are.

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[101] GIBSON, J. L.; NELSON, M. J. Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy? *Journal of Empirical Legal Studies*, 2017, Vol. 14(3), p. 592–617. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1111/jels.12157>.

[102] The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120. Art.13.

[103] The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120, Art. 4 and The Constitution of the Republic of Lithuania. *Valstybės žinios,* 1992, No. 33-1014, Art. 103.

[104] The Constitutional Tribunal Act of 25 June 2015. *Dziennik Ustaw*, 2015, I.1064, Art. 12 and The Constitution of the Republic of Poland. *Dziennik Ustaw*, No. 78, I. 483, Art. 194.

Having adequate safeguards in place to protect against appointments based on arbitrary criteria should be the foremost importance. However, even merit-based and competitive appointment systems are not immune. Putting self-governing bodies of the judiciary in charge of the recruitment process could make it truly independent.[105] If an independent judicial council could have a decisive influence on decisions on the appointment of judges that could be the most effective way to ensure that decisions concerning the selection of judges are independent of the powers of other government branches. It is essential that the judicial council would have a pluralistic composition with a substantial part, if not the majority, of members being judges.[106] In Poland, this was one of the areas that PiS change to their advantage.[107]

Notably, legal provisions in Lithuania and Poland detail different areas of the appointment in meticulous fashion. In Lithuania, much attention is put on the timing of the procedure. The law describes that the expiration of the justices' term of office shall be the 3rd Thursday of March of the corresponding year, candidatures must be presented not later than three months before the expiration of justices' ordinary term of office. Newly appointed justices of the Constitutional Court shall take an oath in the Seimas (Lithuanian Parliament) on the last working day before their term of office commences. Even the case in which a new justice was not appointed on the fixed time is described. In Polish regulation, these matters are less clarity regulated and were another problematic area that PiS used to disturb constitutional order.

Likewise, the Polish crisis reviled the problematic nature of the procedural requirement that approved candidates have to give the oath to become justices. In Lithuania, the oath has to take place in a sitting of the Seimas, was in Poland that has to be done in the presence of the President of the Republic of Poland.[108] It looks simple enough but what if the President or the Parliament breaks their constitutional duty to take the oath? Moreover, this is not a hypothetical question – this happened in Poland. Of course, an argument could be made that the President is one person institution and it could not happen with a

[105] THE SECRETARY GENERAL OF THE COUNCIL OF EUROPE. *State of Democracy, Human Rights and the Rule of Law - Role of institutions - Threats to institutions*: report. Elsinore, 2018, 5th report. [interactive, viewed on 16 February 2019]. Online access: <https://edoc.coe.int/en/an-overview/7584-state-of-democracy-human-rights-and-the-rule-of-law-5th-report-role-of-institutions-threats-to-institutions.html>.
[106] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION). *Rule of Law Checklist*. Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). [interactive, viewed on 16 February 2019]. Online access: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.
[107] SADURSKI, W. *Bad Response to a Tragic Choice: the Case of Polish Council of the Judiciary*. VerfBlog, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://verfassungsblog.de/bad-response-to-a-tragic-choice-the-case-of-polish-council-of-the-judiciary/>.
[108] The Constitutional Tribunal Act of 25 June 2015. *Dziennik Ustaw*, 2015, I.1064, Art. 21; The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120, Art. 7.

Parliament. However, there are other risks of manipulation. Especially, if in Parliament one political power has the absolute power. Of course, in Poland, the President broke his duty to ensure observance of the Constitution listed in the Art. 126 of the Polish Constitution. Although when the Constitutional Court is compromised, there is no institution in a democracy to evaluate his performance. The hypothesis that one of the simplest ways to disturb the constitutional court is to manipulate the justice appointment system came true in Poland. That is probably one of the easiest ways to compromise the system in other constitutional democracies as well.

A different set of problems is brought by the question of where and how the Constitutional Court judges can be relieved from their duties. We can find quite significant differences between different counties on how this is regulated, but Lithuania and Poland do it similarly. In them judge can be relieved of his powers before the end of his term when he dies, resigns from the office, is convicted by a legally effective court judgment, or a legally effective ruling on the recall of the judge of the Tribunal from office is made (impeachment).[109] Lithuania also has additional ground for this when justice is incapable of holding office due to the state of his health. If in one year the justice is ill for more than four months, or if he falls ill with a fatal or another lingering disease which precludes him from discharging the duties of justice.[110] Importantly, this list has to be as narrow as possible. Any effort to extend the list should be viewed as a possible violation of the independence of the Constitutional Court. Legislation on dismissal may not encourage disguised sanctions. In general, offenses leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal.[111] For now, legal provisions linked to this aspect in Lithuania does not seem problematic, but any initiative to change them should be reviewed extra carefully based on what happened in Poland.

[109] The Constitutional Tribunal Act of 25 June 2015. *Dziennik Ustaw*, 2015, I.1064, Art. 36 and The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120, Art. 11.
[110] The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120, Art. 11.
[111] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION). *Rule of Law Checklist*. Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). [interactive, viewed on 16 February 2019]. Online access: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.

3.3.2. Courts and justices independence guarantees

A fundamental constitutional principle and essence of the rule of law is the independence of the judiciary. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.[112] There are two parts to the independence of the judiciary: 1) the independence of each judge; and 2) the independence of the whole court (the institutional independence). These two levels differ in who they can be ensured. The entire judiciary can be protected more by institutional design and legislation; the second has not just external challenges but also relies on the judge's morality and inner convictions.[113] The independence can be threatened in three forms – operational, behavioural and decisional. We already covered one of the possible levers of influence, the non-transparent enough selection process, but there are many more: executive control over budget, threats of discipline other means.[114]

In both countries, justices of the Constitutional Court are described as independent and bound only to follow the Constitutions.[115] Interestingly, independence guarantees for the Constitutional Court and its justices are regulated slightly differently in Poland and Lithuania. In Poland, the guarantees are prescribed in the Constitution on the Art. 195 and focus much more on the justices' responsibility to ensure their own independence. The even bigger focus is put on the judges' role in the norms of the Constitutional Tribunal Act. Lithuanian legislation focuses more on the Constitutional Court's freedom and its independence from other institutions with a lesser focus on the judge's role. As expressed in the regulation independence must be ensured by the financial, material-technical as well as organizational guarantees secured by law. Much attention is put on the financial guarantees – how Court gets its budget, how property gets transferred to it, etc. The restriction of the legal, organizational, financial, informational, material-technical, and

[112] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION). *Rule of Law Checklist*. Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). [interactive, viewed on 16 February 2019]. Online access: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e>.

[113] MICHALAK, A. Seimo dalyvavimas Konstitucinio Teismo teisėjų rinkimuose. From *Lietuvos Ir Lenkijos Konstitucinės Teisės Aktualijos: Parlamentas: Straipsnių Rinkinys*. Vilnius: Vilniaus Universitetas, 2016, p. 113-115.

[114] TREBILCOCK, M. J.; DANIELS, R. J. *Rule of Law reform and development: charting the fragile path of progress.* Cheltenham: Edward Elgar, 2008, p. 104-106.

[115] The Constitution of the Republic of Lithuania. *Valstybės žinios,* 1992, No. 33-1014, Art. 104 and The Constitution of the Republic of Poland. *Dziennik Ustaw*, No. 78, I. 483, Art. 195.

other conditions for the activities of Constitutional Court as provided by this law are prohibited.[116]

Two countries are also different in how much detail they describe the possible interference with the activities of justice or the Constitutional Court. The act of the Constitutional Court of the Republic of Lithuania specifies that institutions of state power and administration, members of the Seimas and other officials, political parties, political and public organizations, or citizens are prohibited and incur liability provided for by law if they try to influence the Court.[117] It lists a duty of the President or a justice of the Constitutional Court to immediately inform the Seimas of attempts to influence the Constitutional Court or any of its justices and publicize this through public mass media. Also, there is a specific norm addressing the rallies, pickets, and other actions staged next to the Constitutional Court building or in the Court itself. That is considered to be one of the possibilities of how the Court can be influenced. There are no similar provisions in the Polish legal system. However, that probably creates less of a treat than other ways that court independence can be broken. In a way, Lithuanian legislation is much more extensive on the independence guarantees. Still, does that mean that the Court is more immune to interference? Not necessarily the protection of the independence of the institution and the individual is a never-ending and challenging process. It relies on the Court's design and external relationship with other entities which is nearly impossible to regulate and guard by legal means.

The established jurisprudence of Constitutional Courts and their interactions with other branches of government are a critical safeguard to independence guarantees and the substantive rule of law. If all branches of government respect the decisions of the Constitutional Court, there should not be any severe violations of the rule of law. The doctrine on the possibility to alternate the constitutional order, independence guaranties examinations provided after the financial crisis, right to a fair trial, constitutional court functions and judgments that address the international obligations is a vital part of legal systems in Lithuania and Poland.

3.3.3. Norms that prescribe the constitutional reviews procedure

The legal norms on how cases are chosen, deliberated by the Constitutional Court, and the procedure by which the publication of the judgments happen are all sensitive to manipulation. They are vital to a functioning and the rule of law obliging constitutional

[116] The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120, Art. 5(1).
[117] The Law on The Constitutional Court of The Republic of Lithuania. *Valstybės žinios*, 1993, No. 6-120.

review. All of these areas are linked together because they are regulated in the Act on the Constitutional Court, not on the constitutional level. That creates a much easier possibility to change the existing regulation and do it much quicker. Additionally, these provisions can indeed be susceptible to the interpretation of the court itself or other entities. The methods for the allocation of cases within a court are essential for internal judicial independence. They constitute a safeguard for the integrity of the judicial process and for securing public trust that justice is administered fairly and impartially. The allocation of cases should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It helps to protect against attempts by the parties or anyone otherwise interested in the outcome of the case to influence it.[118]

In Poland, the responsibility to of case appointment is placed on the President of the Court and is done by the procedural norms written in the Art. 45 and Art. 80 of the Tribunals Act. The court there can have his sittings in few different formations: as the full bench (at least nine judges), the bench of five judges, and the bench of three judges. In Lithuania, the President of the Court also appoints a justice to perform the preliminary investigation and is responsible for other allocation matters. However, here the Court exercises its judicial activities in a collective manner (*in corpore*): the Court collectively investigates cases and issues rulings, adopts decisions or conclusions provided that not less than 2/3 of all the justices of the Court are participating. For this reason, Lithuania legal order is much safer - there is no possibility to exclude a judge from a case.

Overall, the most severe violation can be made by ignoring the judicial decisions. The essence of every Constitutional Court is the binding and final nature of their judgments. By refusing to publish judgments of the Constitutional Tribunal PiS made the worse offense of all.[119] The judgments of the Tribunal had to be published according to Art. 190 (1) and (2) of the Constitution, but the Government announced that it would not publish this judgment because the Tribunal did not follow the procedure foreseen in the amendments. However, the Tribunal had to decide based on the Act without applying the very amendments because they were the subject of constitutional control.[120] In Lithuania, the

[118] THE SECRETARY GENERAL OF THE COUNCIL OF EUROPE. *State of Democracy, Human Rights and the Rule of Law - Role of institutions - Threats to institutions*: report. Elsinore, 2018, 5th report. [interactive, viewed on 16 February 2019]. Online access: <https://edoc.coe.int/en/an-overview/7584-state-of-democracy-human-rights-and-the-rule-of-law-5th-report-role-of-institutions-threats-to-institutions.html>.
[119] SADURSKI, W. Polish Constitutional Tribunal Under PiS: From an Activist Court to a Paralysed Tribunal, to a Governmental Enabler. *Hague Journal on the Rule of law*, 2018, p.1-22. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-018-0078-1>.
[120] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION). *Opinion On Amendments To The Act Of 25 June 2015 On The Constitutional Tribunal Of Poland*. Adopted by the Venice Commission at its 106th Plenary Session. [interactive, viewed on 16 February 2019]. Online access: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e>.

same situation is unlikely not just because of the regulation placed in the Art. 84 of the Law of the Constitutional Court, but the doctrine of the Constitutional Court where publication of decisions and legal acts is considered to be the part of the rule of law. Hopefully, the legal culture in the country is affected by these decisions. Constitutional Court judgments are final and binding (Lithuanian Constitution Art. 107 and Polish Constitution Art. 190), and this is an essential constitutional law principle. If a court has ruled that something is unconstitutional no other state institution, no other state official, and no other subject may change or revoke such a conclusion of the Constitutional Court. Under the Constitution, such a conclusion may not be changed or revoked by-election or any other way.[121]

3.3.4. The provisions that prescribe how norms and acts linked to constitutional order can be amended

As was shown by the previews weak points they are not problematic in the way they are prescribed now. However, norms can always become problematic if they are abused or political powers try to change the system, override the existing legal norms. In essence, they are not flowed by themselves. With the exception of the regulation on the publication of the judgments in the Polish legal system. However, there is a realistic and already explored the possibility that there can be initiatives to change the existing regulation away from the substantive rule of law standards.

That brings us to the most critical legal norms – those that regulate how legal order can be changed. In any given situation in a democracy, the legislative branch has the power and the duty to change laws. However, the legality of these changes and the procedure of how they are made is essential. In Poland and Lithuania, part of the regulation on the Constitutional Courts is on the Constitutional level which means that it is covered by more strict amendment regime. Additionally, the Lithuanian system of alterations of the Constitution is more secure compared to Poland.

In Lithuania amendments to the Constitution concerning the chapter of the Constitution about the Constitutional Court must be considered and voted at the Seimas twice. There must be a break of not less than three months between the votes. A draft law on the alteration of the Constitution can be deemed adopted by the Seimas if, during each of the votes, not less than 2/3 of all the Members of the Seimas vote in favour thereof.[122] That is maybe the best way how to protect the Constitutional Court and prevent the rule of law crisis from happening. The prolonged time in which amendments to the Constitutional

[121] The Constitutional Court of the Repuclic of Lithuania ruling of 25 May 2004. *Valstybės žinios*. 2004, No. 85-3094.
[122] The Constitution of the Republic of Lithuania. *Valstybės žinios,* 1992, No. 33-1014, Art. 148.

Court legislation can go into power creates a safety net for the Court, to rule on unconstitutional amendments, alert international actors or take any other appropriate measures.

Sadly this protection is enjoined merely by the norms regulated on the Constitutional level, but as the analysis showed a lot of essential parts are set down in the Acts of the Constitutional Court. The acts are just regular laws and as a result, enjoy weaker protection and can be changed much faster. That happened in Poland – the Act on the Constitutional Tribunal has changed multiple times already with a more severe shift from the rule of law each time. So placing the safeguards on the higher protection level or creating a system were amendments to them have a more extended period before going into power are essential.

3.4. The political dimension of the rule of law crisis

A lot of scholars, politicians and legal professionals have very different ideas on why the crisis in Poland happened. Nearly no one doubts that different social factors had a significant impact. It would be foolish to argue, that this whole situation is a problem spurring just from the legal system and its deficiencies. As already discussed the roots of the rule of law problems spur from politics and then have their expression in the legal norms. The legal norms were mishandled and amended bypassing the rule of law because of other processes in Polish society. Most influential being: 1) the weak public trust of the Constructional Court and the judicial branch in general; 2) accusations of corruption in judiciaries decisions; 3) focus on the power of judiciary as unelected elite; 4) distorted or manipulated assessment of the influence of history on modern processes; 5) failure of the traditional political parties; 6) distance for EU values in daily life; 7) rise of other populist ideas. They are just a few things that contributed to the convenient circumstances to break down the constitutional review in a significant way. Alarmingly few of these things, not on the same level at least for now but can be spotted in Lithuania.

Role of the Constitutional Court is most often hardly understood by the public – the justices of the court bare power to alter the legal and political system but are not elected. That brings us to the argument of ‘judicial dictatorship.' This argument first originated in the USA and suggested that the court not the people in the factor that changes American society. A similar argument that the legal state can be a path towards a judiciary state can be heard in Europe as well.[123] Connect that with the poor public trust of the Constructional

[123] BANASZAK B. The main principles of the reform of the Polish Constitutional Tribunal in December 2015: A comparative approach from *Transformation of Law Systems in Central, Eastern and Southeastern*

Court, and the judicial branch in general, scandals of corruption in the judiciary and Courts become the enemy of the public, not the guardian of people's fundamental rights. For example, when the government refused to publish the ruling, and then the General Assembly of the Supreme Court issued a resolution declaring that the Tribunal's rulings must be published, a PiS spokesperson described the Assembly as 'a group of buddies preserving the *status quo* of the old regime.'[124] That provides political powers with distorted support (a.k.a. a mandate) from the public to take action.[125]

Additionally, Constitutional Courts increasingly are used to solve conflicts in the political sphere.[126] Political parties use the constitutional review in controversial issues to place the difficult decisions and problems that need political will power or consensus. This phenomenon is especially growing in popularity in Lithuania. That can lead to an abnormal attitude towards the Constitutional Courts. It can become not an impartial arbitrary but a political player[127], or even an enemy in its own right. That is just reinforced by the critique that Constitutional Courts are becoming more prone to activism. They go beyond the scope of what was needed to be done to carry out their constitutional duties. Also, the absence of wider political and public debates on the foundations of the existing constitutions is adding increased pressure on the Constitutional Courts. In other words, constitutions have been mostly understood as foundational documents that merely need interpretation by judicial institutions, notably the Constitutional Courts, and much less so as vehicles of the continuing dialogue over foundational values and rights, and the overall nature of the political community.[128]

Europe in 1989-2015: Liber Amicorum in Honorem Prof. Dr. Dres. H.c. Rainer Arnold. Gdańsk: Gdańsk University Press, 2016, p. 43.

[124] DAVIES C. *Hostile Takeover: How Law and Justice Captured Poland's Courts:* special report. Freedom House, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://freedomhouse.org/report/special-reports/hostile-takeover-how-law-and-justice-captured-poland-s-courts>.

[125] CHMIELARZ-GROCHAL, A.; SUŁKOWSKI J. Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland. *Przeglądu Konstytucyjnego,* 2019, No. 2. [interactive, viewed on 16 February 2019]. Online access: <http://www.przeglad.konstytucyjny.law.uj.edu.pl/wp-content/uploads/2018/05/PKonst_2_2018_91-119.pdf>.

[126] BLOKKER, P. *New Democracies in Crisis?: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. London; New York, NY: Routledge, Taylor & Francis Group, 2015; *The first panel from the Oxford symposium on the Polish constitutional crisis.* Panel Chair: Nick Barber; panelists: Adam Czarnota, Marcin Matczak, held in Oxford on 9 May 2017 [interactive, viewed on 16 February 2019]. Online access: <https://www.youtube.com/watch?v=mm1ky1oepgA>.

[127] ŠILEIKIS, E. *Alternatyvi konstitucinė teisė*. Vilnius: Teisinės informacijos centras, 2005, p. 416-417.

[128] BAROŠ, J. Paul Blokker: New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Slovakia, and Romania. *Central European Political Studies Review*, 2014, Vol. 16(4), p. 345-353. [interactive, viewed on 16 February 2019]. Online access: <https://doaj.org/article/321a532715bb47bcb228c927dc5b7c4e>.

The biggest part of what happened had its roots in the state of politics. The strain between representative and participatory democracy created a challenge to the liberal, and representative democracy were just populists found a way to engage citizens.[129] For example in Poland PiS cleverly positioned itself as an anti-establishment party who is representing the Polish people against corrupt liberal elites. They argued that the elites want to control the state and its resources under the guise of empty phrases such as "the rule of law" and "separation of powers." The judges and lawyers protesting curbing of judicial independence was just part of that corrupt establishment, trying to preserve their influence.[130] Ultimately, Poland is facing worse thing then court packing it is just a part of a more critical process - democracy backsliding. The ruling party views the opposition as illegitimate, riddled with Communists, fatally tainted by ties to the communist dictatorship and the oligarchs that followed, unworthy of rotation in power.[131] Politics are not a matter of reason anymore. Manipulation of feelings and emotions are taking over.[132]

Despite the barrage of criticism from abroad, PiS is more popular today than it was two years ago. Recent opinion polls suggest that if elections were held today, PiS could count on a comfortable victory.[133] Poland's government often deploys a language that emphasizes the need for state protection and support of the elderly, the less well-off, and the family unit in general. Many Poles seem to find this more communitarian approach not only beneficial to their pocket-books but emotionally reassuring, as well, providing a sense of security and community.[134] The worst part of the opposition has not found a way to counteract these processes.

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[129] BLOKKER, P. *New Democracies in Crisis?: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. London; New York, NY: Routledge, Taylor & Francis Group, 2015, p. 1-8.

[130] ADEKOYA R. *Why Poland's Law and Justice Party Remains So Popular* [interactive]. Foreign Affairs, 2017. [interactive, viewed on 16 February 2019]. Online access: <https://www.foreignaffairs.com/articles/central-europe/2017-11-03/why-polands-law-and-justice-party-remains-so-popular>.

[131] SWEENEY, R. J. Constitutional conflicts in the European Union: Court packing in Poland versus the United States. *Economics And Business Review*, 2018, Vol. 4(4), p. 3–29. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.18559/ebr.2018.4.1>; KUSTRA, A. Poland's constitutional crisis. From court-packing agenda to denial of Constitutional Court's judgments. *Toruńskie Studia Polsko-Włoskie* Torun, 2016, Vol. XII, p. 343-366. [interactive, viewed on 16 February 2019]. Online access: <http://apcz.umk.pl/czasopisma/index.php/TSP-W/article/view/TSP-W.2016.022>.

[132] FLINDERS, M. What Kind of Democracy Is This? Politics in a Changing World. *Political Insight*, 2017, Vol. 8, No. 2, p. 34–37. [interactive, viewed on 16 February 2019]. Online access: <doi:10.1177/2041905817726905>.

[133] ADEKOYA R. *Why Poland's Law and Justice Party Remains So Popular*. Foreign Affairs, 2017. [interactive, viewed on 16 February 2019]. Online access: <https://www.foreignaffairs.com/articles/central-europe/2017-11-03/why-polands-law-and-justice-party-remains-so-popular>.

[134] *Ibid*.

History is a part of the culture and social context in any given moment in any country. The rule of law crisis is not immune to its influences. That is especially true about the post-communist countries are most susceptible to erosion of liberal democracy tendencies and state capture.[135] Looking at the issue of the rule of law from Central Eastern Europe perspectives we can formulate a thesis about two transformations.[136] There is no such thing as a complete and successful post-authoritarian transition. For example, transform a legal order from a totalitarian one into one based on the rule of law requires more than the changing of the law in the books. The way the law is applied by the courts and the way the legal reasoning is carried out is of at least equal importance. Because a superficial understanding of the rule of law as compliance with bright-line rules only, and a lack of understanding of the role principles play in the legal system, may both contribute to backsliding into authoritarianism.[137] Additionally, overwhelmingly traumatic historical experience has not helped to foster openness to other cultures, let alone a willingness to embrace multiculturalism as experienced in many countries in Western Europe.

Economic factors did their part as well. The establishment of market economies in the region created clear winners and losers in countries such as Poland.[138] Central and Eastern Europe's predominant historical experience as victims, rather than beneficiaries, of colonialism, may help to explain the region's resistance. The peoples of the region were fighting for independence and even for the preservation of national identities during a succession of foreign occupations now feel attracted again by the liberal world.[139] Interestingly Polish Constitutional Court and PiS have a faceoff in the past as well – 10 years ago Court struck down a series of measures taken by the previous PiS-led government. That is probably one of the reasons why it was the first and most important target to ensure their power position.[140]

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[135] VACHUDOVA, M. A. Why Improve EU Oversight of Rule of Law? The Two-Headed Problems of Defending Liberal Democracy and Fighting Corruption from *Reinforcing rule of law oversight in the European Union*. United Kingdom: Cambridge University Press, 2016, p. 270-289.

[136] CZARNOTA, A. Rule of Law as an Outcome of Crisis: Central-Eastern European Experiences 27 Years after the Breakthrough. *Hague Journal on the Rule of Law*, 2016, 8(2), p. 311–321. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-016-0039-5>.

[137] MATCZAK, M. *Poland's Constitutional Crisis: Facts and interpretations*: policy breaf [intarective]. The Foundation for Law, Justice and Society, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://www.fljs.org/sites/www.fljs.org/files/publications/Poland%27s%20Constitutional%20Crisis%20-%20Facts%20and%20interpretations_0.pdf>.

[138] POGANY S. *Europe's illiberal states: why Hungary and Poland are turning away from constitutional democracy*. The Conversation, 2018. [interactive, viewed on 16 February 2019]. Online access: <https://theconversation.com/europes-illiberal-states-why-hungary-and-poland-are-turning-away-from-constitutional-democracy-89622>.

[139] *Ibid*.

[140] DAVIES C. *Hostile Takeover: How Law and Justice Captured Poland's Courts:* special report. Freedom House, 2018. [interactive, viewed on 16 February 2019]. Online access:

Emphasis on formal institutions of the rule of law left neglect of substantive, participatory, and legitimately dimensions.[141] These situations are dangerous if they are not addressed in resourceful and precise meaner and can lead or encourage unconstitutional changes in established democracies. Lithuania is not an exception to this. The responsibility to do something lies in many different actors starting with the Constitutional Court itself, political parties, NGO's, civil society and the legal community. Social pressure is not inevitably ineffective in countering democratic backsliding. Social pressure can lead the government to redress breaches of liberal democratic principles.[142]

The Venice Commission notes in its 2016 report that 'the rule of law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.'[143] That also relates to the citizen's relationship to the EU and the Constitutional Courts. Good relations with those entities would prevent counties national political power from amplifying Euroscepticism.[144] There is ample empirical evidence show that citizens trusting their government are more likely to show positive attitudes towards the European Union than citizens distrusting their domestic leaders[145] which also includes the Constitutional Courts relationship with the public. Most importantly we should shift our thinking towards preventive measures, institutions, and norms that would work before the breach happens.

3.5. The future of the rule of law protection

Today in many established constitutional democracies the Constitutional Courts provide a constitutional review which is vital to the rule of law. Threats to it should not be viewed

<https://freedomhouse.org/report/special-reports/hostile-takeover-how-law-and-justice-captured-poland-s-courts>.

[141] BLOKKER, P. *New Democracies in Crisis?: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. London; New York, NY: Routledge, Taylor & Francis Group, 2015.

[142] SEDELMEIER, U. Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 337–351. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229358>.

[143] LETNAR ČERNIČ, J. The European Court of Human Rights, Rule of law and Socio-Economic Rights in Times of Crises. *Hague Journal on the Rule of Law*, 2016, 8(2), p. 227–247. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1007/s40803-016-0035-9>.

[144]SOLANA J. *Europe is yearning for a past it can't return to*. Brookings, 2016. [interactive, viewed on 16 February 2019]. Online access: <https://www.brookings.edu/blog/order-from-chaos/2016/04/27/europe-is-yearning-for-a-past-it-cant-return-to/>.

[145] SCHLIPPHAK, B.; TREIB, O. Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding. *Journal of European Public Policy*, 2017, Vol. 24(3), p. 352–365. [interactive, viewed on 16 February 2019]. Online access: <https://doi.org/10.1080/13501763.2016.1229359>.

lightly. It is the dam that holds fundamental principles in practice and prevents the dismissal of fundamental constitutional values.[146] In the middle of this crisis in Poland famous polish scholars, legal and political professionals issued a public statement that 'there will be no democratic Poland without the rule of law <…> there will be no European Union without principles <…> there will be no freedom without law and order.[147] Two important conclusions may be made based on the analysis conducted in this thesis: 1) the rule of law is a political and legal concept, and any solutions or safeguards must address that dual nature of the concept; 2) international legal order is unable to stop any violation of the rule of law without the support of national norms and political will. The identified weak areas of the legislation: justices appointment and removal procedures, court and justice independence guarantees, norms that prescribe the constitutional reviews procedure and the provisions that mandate how norms, acts linked to constitutional order can be amended – all suffer from that and can only be secured by addressing both problems.

Nothing can guard against ill will or weakness in the political and legal sphere if there will be a wish to corrupt a system nothing is significant enough to protect it. However, there are a few additional safeguards that could help. First, appointment and removal procedures should be as transparent as possible; they should follow the Rule of Law Frameworks suggestions to involve the judiciary in the process. The norms should be protected with the more extended entry into force term as other legislation linked to the Constitutional Courts. The Court and justice independence guarantees should be reinforced by a healthy Courts interaction with other branches of government. Norms that prescribe the constitutional reviews procedure should not create instances where a judge can be excluded from a case. Also in this specific area, there is a place for new technologies to come in place. For example, if there is a need to create different compositions of the bench an algorithm can be used for that. The provisions that mandate how norms, acts linked to constitutional order can be amended should have not just a longer and more complicated process but could be preventively evaluated thought independent institutions. Additionally, changes should be made in the international area. The rule of law should move from a punitive, unilateral EU intervention to something that deals with all of the Union's values together. Also, all

[146] BREWER-CARÍAS, A. R. *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge [etc.]: Cambridge University Press, 2011, p. 13-32.
[147] *Europe, defend the rule of law in Poland!*. Wyborcza, 2018. [interactive, viewed on 16 February 2019]. Online access: <http://wyborcza.pl/7,75968,23531141,europe-defend-the-rule-of-law-in-poland.html?disableRedirects=true>.

member of the EU should be held to the same standards regularly outside the extreme situations, and not all actions should stem just from the EU institutions.[148]

Then on both levels (national and international) the supporting circumstances the political dimension of the rule of law crisis must be addressed. The real solution, real protection is the level of political and legal culture in the electorate and responsibility we all bare in a voting booth and how we view the rule of law on the daily basis not just when it is corrupted. Furthermore, education of the public should be a priority, and judges have to go through specific training addressing these new challenges. The change in values and attitudes of those in power must happen, and civil engagement is one of the ways to do it.[149] Constitutional reforms and processes should always be transparent, all-inclusive, and respectful to the fundamental values. Only systemic and all-encompassing safeguards that stem both from legal, political and social sphere can ensure that.

[148] TOGGENBURG, G. N.; GRIMHEDEN J. The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers from *Reinforcing rule of law oversight in the European Union.* United Kingdom: Cambridge University Press, 2016, p. 147-171.

[149] BLOKKER, P. EU Democratic Oversight and Domestic Deviation from the Rule of Law. Social Reflections. from *Reinforcing rule of law oversight in the European Union.* United Kingdom: Cambridge University Press, 2016, p. 249-269.

CONCLUSIONS

1. The rule of law cannot be defined precisely considering its rather extensive usage, the political-legal nature, and ambiguity of the concept. The definition of the rule of law differs between countries. Established European democracies aim to align with a substantive version of the rule of law principle. The rule of law crisis can be defined as a situation when the violation of the principle is so severe that the legal order is fundamentally affected, i. e. cannot function properly without the resolution of the breach.
2. The Constitutional Court of Lithuania and the Polish Constitutional Tribunal has similar safeguards. However, as seen from the rule of law crisis in Poland they can be easily broken. The weakest points remaining: 1) the unclear procedure of how the candidates for the justice position, the Constitutional Court President, are chosen; 2) the requirement to give an oath to a specific subject to obtain the position; 3) amendments on the Constitutional Court regulation going in to power in a short period of time; 4) lack of safeguards linked to the Constitutional Court regulated on the Constitutional level. Finally, there is no precise regulation what the Constitutional Court should do if the rule of law was broken. Especially, if the violation is directed to the Court itself. Lithuania and Poland differ by the extensive case-law of the Lithuanian Constitutional Court on the Constitutional norms (the status of the Court, publishing of its judgments and other actors influencing the Court). The institutional design in which the Lithuanian Constitutional Court exercises its judicial activities *in corpore* should be viewed as additional protection of its independence. However, this should not be identified as satisfactory safeguards: more safeguards should be placed in the national legal order as preventive measures, some of them should strengthen the international norms that protect the rule of law.
3. Presently international legal and political instruments are not sufficient to prevent or solve a rule of law crisis. The main obstacles are: 1) the content of the EU subsidiarity principle; 2) the requirement to reach a consensus to act in the name of the international organization; 3) the lack of effective sanctions linked to violations of the rule of law; 4) sanctions creating unpredictable and counteractive results. Improvement of this system should focus on all-encompassing safeguards that stem from the legal, political and social sphere. It should include soft mechanisms, i. e. the international organizations should maintain a relationship with governments and individuals. International and national safeguards must address the dual nature of

the rule of law concept. It is essential to create not only a separation of powers in the legal system but also the system of checks and balances. The system of checks and balances should require the cooperation of different branches of government while remaining in a constant clash to reach a consensus. The improvement of the legal and political culture should be addressed to prevent the rule of law crisis.

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SUMMARY

European Union is suffering from the rule of law deficiencies in the Member States. The master thesis attempts to determine what short-comings in the legal system allow the rule of law crisis happen in established constitutional democracies and what could be the safeguards to prevent that from happening. The thesis argues that the rule of law as a concept can only be identified rather than defined, because of the wide usage in different contexts and its ambiguous nature. The rule of law crisis is defined as a situation when the violation of the principle is so severe that the legal order is fundamentally affected – cannot function properly without the resolution of the breach. Poland and Lithuania are compared based on their legal order linked to the Constitutional Court. The two countries where chosen as subjects because of shared history, similar political-legal systems and the importance of the strategic partnership between the two countries. During the analysis four areas of law where identified as most vulnerable: (1) justices appointment and removal procedures; (2) court and justice independence guarantees; (3) norms that prescribe the constitutional reviews procedure; (4) the provisions that mandate how norms and acts linked to constitutional order can be amended. The rule of law is addressed as a political and legal concept. Any solutions or safeguards must focus on that dual nature of the concept. International safeguards were found to be not sufficient enough without the support of national norms and political will to protect it effectively. Preventive nature of the safeguards that should be placed in the national legal order are emphasised the most.

SANTRAUKA

Iššūkiai teisės viršenybei Europoje - kaip įvyksta teisės viršenybės krizės?

Europos Sąjungai kenčiant nuo teisinės viršenybės principo pažeidimų valstybėse narėse (Lenkijoje, Vengrijoje, Rumunijoje) siekiama nustatyti, kokie trūkumai teisinėje sistemoje sukuria pagrindą šio principo krizėms nusistovėjusiose konstitucinėse demokratijose. Aiškinamasi, kokios galėtų būti apsaugos priemonės, užkertančios kelią tokiems procesams. Lyginamos Lenkijos ir Lietuvos teisinės sistemos, siekiant nustatyti kokios nuostatos susijusios su Konstitucinių Teismų reguliavimų galėtų būti problemiškos. Teigiama, kad teisės viršenybės principą yra sudėtinga tiksliai apibrėžti dėl plataus naudojimo ir dvigubos teisinės-politinės prigimties. Šis principas yra tarsi šių dviejų disciplinų sandūros taškas. Teisės viršenybės krizę pasirenkama apibrėžti, kaip situaciją, kuomet pažeidimo lygis nebeleidžia teisinei sistemai iš esmės tinkamai veikti be pažeidimo panaikinimo. Darbe identifikuotos ir pasirinktos nagrinėti keturios labiausiai pažeidžiamos reguliavimo sritys: (1) teisėjų paskyrimo ir nušalinimo procedūra; 2) teismo ir teisėjų nepriklausomumo garantijos; (3) normos, nustatančios konstitucinės priežiūros procedūrą; 4) nuostatos, pagal kurias leidžiama keisti su konstitucine justicija susijusias normas ir aktus. Nustatyta, jog teisės viršenybė yra politinė ir teisinė koncepcija, todėl, bet kokios apsaugos priemonės turi į tai atsižvelgti. Tarptautinės apsaugos priemonės yra nepakankamos, jei jos neturi aiškaus pagrindo nacionalinėse teisės normose ir politinės valios palaikymo. Apsaugos priemonės turėtų būti įtrauktos į nacionalinę teisinę sistemą ir būti prevencinio pobūdžio.